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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DENVER, CO 80202-2500
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November 15, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEST 2018-0339 A.C. No. 04-04075-461058
v.	
PERFORMANCE CONTRACTING INC., Respondent.	Mine: Permanente Cement Plant Quarry

DECISION

Appearances: Jessica M. Flores, Veronica Melendez, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner

Jason J. Curliano, Laura Van Note, Buty & Curliano LLP, Oakland, California, for Respondent

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801.[1] This case involves two section 104(a) citations issued to Performance Contracting Inc. (“PCI” or “Respondent”) over the course of a routine multi-week inspection at the Permanente Cement Plant Quarry (“Quarry”).

A hearing was held on September 6, 2018, in San Jose, California. MSHA Inspector Julie Hooker and Lehigh Southwest Mine Company Safety Manager Eric Powell testified for the Secretary. PCI General Superintendent of Scaffolding Lee McFarlane and forklift operator Stephen Meneses testified for Respondent. The parties agreed to the following stipulations of fact in their prehearing statements:

[1] In this decision, the parties’ Joint Stipulations, the transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip. #,” “Tr.,” “Ex. S–#,” and “Ex. R–#,” respectively.

1. The Federal Mine Safety and Health Review Commission ("Commission") has jurisdiction over this proceeding under Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Mine Act").

2. Lehigh Southwest Cement Co., Permanente Cement Plant & Quarry, located in Cupertino, California, is a "mine" as that term is defined in Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1)(a).

3. Performance Contracting Inc., ("Respondent") is an "independent contractor performing services" for Lehigh Southwest Cement Co., at the Permanente Cement Plant and Quarry and thus an "operator" as that term is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

4. Mine Safety & Health Inspector ("MSHI") Jerry D. Hulsey acted in his official capacity as an Authorized Representative of the Secretary of Labor when he issued Citation Number 8991596.

5. MSHI Julie Hooker acted in her official capacity as an Authorized Representative of the Secretary of Labor when she issued Citation Number 9377099.

6. The citations that are the subject of this proceeding were properly served upon Respondent, as required by the Mine Act and were properly contested by Respondent.

7. Without Respondent admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary, if affirmed, would not impair Respondent's ability to remain in business.

8. Respondent demonstrated good faith in abating the alleged violations.

9. At all times relevant to this proceeding, the Lehigh Southwest Cement Co., Permanente Cement Plant & Quarry mine produced products that entered into interstate commerce or had operations or products which affected interstate commerce within the meaning and scope of Section 4 of the Act.

See Jt. Stip. At hearing, the parties agreed to make closing arguments at the hearing in lieu of submitting post-hearing briefs. Based upon the parties' stipulations and my review of the witness testimony and of the entire record, I make the following findings.

II. LEGAL PRINCIPLES

A. Establishing a Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9

FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary's burden as:

> The 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."

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ).

B. Significant and Substantial

A violation is significant and substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id*. at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280–81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

C. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA's determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id*. Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically." *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

D. Penalty

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lehigh Southwest Mine Company owns and operates the Permanente Cement Plant Quarry ("Quarry") located in Cupertino, California. PCI is an independent contractor that provides year-round scaffolding construction and moving services throughout the Quarry. Tr. 51, 61. PCI provides a significant amount of additional scaffolding during the Quarry's "shutdown

period," wherein the Quarry closes for a couple of weeks each year to perform extensive maintenance. Tr. 50-51, 61. PCI stores the extra scaffolding in select areas across the mine to allow for easier transport. Tr. 61, 75. On January 23, 2018, during one such shutdown period, MSHA Inspectors Jerry Hulsey, Julie Hooker, and Jason Geno arrived at the Quarry to conduct a routine inspection. Tr. 16, 51. The inspectors thereafter separated to inspect different areas of the Quarry. Tr. 20.

A. Citation No. 8991596

On January 23, 2018, Inspector Jerry Hulsey began his inspection of the preheating tower accompanied by Quarry Safety Manager Eric Powell.[2] Tr. 52. Hulsey noticed a pile of refractory material that lay partially on top of stored scaffolding equipment on the sixth floor of the tower. Ex. S–2. The material measured approximately two feet high and three to four feet wide, and was taped off and tagged by Lone Star, another contractor performing services at the tower. Ex. R–A; S–2; Tr. 53, 64-65. Powell and Hulsey also observed footprints in the material, though neither reportedly observed any miners in the area. Tr. 54, 62. According to Powell, Hulsey concluded that the scaffolding stored in the area indicated that PCI was working there and was responsible for the buildup. Tr. 53-54, 62. Hulsey issued Citation No. 8991596, which alleged:

> There is a build-up of material in the passageway at the scaffolding staging area on the 6th floor of the pre-heat tower, creating a lost (*Sic.*) of footing hazard. The uneven sloped material build-up is about 5 feet long ranging from 2 inches high to 30 inches high. This condition is behind an area that has red colored danger tape around it with a sign warning of the tripping hazards. There are numerous foot prints noted going up and over the build-up material. Miners accessed this area to store scaffolding material.

Ex. S–1. Hulsey designated the citation S&S, reasonably likely to result in lost workdays or restricted duty, and the result of Respondent's low negligence. The Secretary assessed a penalty of $118.00.

PCI challenges the fact of violation and the Secretary's S&S and negligence designations. PCI argues that the Secretary is unable to meet his burden of proof because Inspector Hulsey did not testify as to his reasoning for issuing the citation to PCI. It contends that the evidence does not prove that PCI's employees created the alleged violation or were in the area at the time of the inspection. Tr. 109. PCI instead argues that the condition was created by Lone Star. Tr. 64-65, 109.

1. The Violation

30 C.F.R. § 56.20003(a) requires that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly" at all mining operations. The Secretary must

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[2] Eric Powell is the Safety Manager for the Lehigh Southwest Mine Company. Tr. 49. His responsibilities include ensuring all employees are properly trained on safety and accident and injury prevention, and to accompany MSHA and OSHA during inspections. *Id*.

establish that (1) the cited area is a "workplace," "passageway," "storeroom," or "service room," and (2) the area is not being kept clean and orderly. *See Tim M. Ball, employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1808 (July 2016) (ALJ); *Ames Construction*, 37 FMSHRC 536, 540 (Mar. 2015) (ALJ).

The photographs clearly show that the sixth floor area was a workplace and storage area that was not kept clean and orderly. Ex. S–2. The buildup of material was located where scaffolding is stored and where miners travel, measured approximately two feet high, and consisted of a plank that created a tripping hazard. Ex. S–2; Tr. 64-65. However, the photographic evidence and testimony do not prove that PCI's employees generated the pile or were even in the area at the time of the inspection. Inspector Hulsey was not present at the hearing and did not testify as to how he concluded that PCI was working in the area at the time, that the footprints belonged to a PCI employee, or why Lone Star was not responsible for creation or maintenance of the condition.

The Secretary contends that Hulsey rationally inferred PCI's culpability based on the scaffolding equipment stored on the sixth floor and the footprints through the buildup. Tr. 104-05. However, the Secretary does not provide sufficient evidence to place any PCI employees on the sixth floor of the preheating tower on the day of the alleged violation. Powell testified that he did not see any PCI employees during the inspection, and that Hulsey did not see or talk to any other employee while Powell was in his presence. Tr. 62. Lee McFarlane, PCI's general superintendent of scaffolding, testified that PCI stored scaffolding yards on the third floor and the sixth floor of the preheated towers to assure ease of access and movement of equipment. Ex. R–B; Tr. 74-76. He verified time and material reports that show PCI's employees only worked on the third floor of the preheating tower on January 23, and thus likely used the third floor storage cache instead of climbing multiple stairways to access the sixth floor cache. Ex. R–C; Tr. 83. The photographs support McFarlane's testimony, as they show that the refractory material is piled high on top of and against the scaffolding, indicating the housekeeping issue developed well after the scaffolding on the sixth floor was moved. Ex. S–2.

The evidence also strongly supports Respondent's claim that the refractory pile was generated and taped off by Lone Star on the day of the inspection. The Secretary did not produce any evidence suggesting that PCI's services generated refractory material, and Powell unequivocally stated PCI's work at the Quarry did not produce such material. Tr. 60. He stated that Lone Star likely generated the refractory material through its work in the tower. Tr. 60-61. Moreover, the tag on the tape surrounding the buildup read "Lone Star" and was dated January 23, thereby supporting the assertion that Lone Star taped off the area on the day of the inspection. Ex. R–A; Tr. 64-65. Since Lone Star generated the refractory material and was working near the sixth floor at the time, I find it reasonable to infer that Lone Star caused the condition and one of its employees created the footprints while taping off the area.

The Secretary points to this court's decision in NALC, LLC, 40 FMSHRC 779 (May 2018) (ALJ), to argue that photographs of footprints are sufficient to infer that an operator committed a housekeeping violation, even if the inspector did not personally observe a miner walking in the area. Tr. 105. In that case, the court deferred to the Inspector's credible testimony that footprints on a stairway covered in loose material belonged to a miner rather than a third

party trespasser. 40 FMSHRC at 785. The Inspector testified that miners frequently traveled in that area during operation hours and that the Foreman told him that he previously instructed miners to clean the area. *Id*. The court found that the Inspector's inference was reasonable even though he could not be absolutely certain who made the footprints, and rejected the operator's contention that a third party trespasser created the footprints because it presented no evidence to support that theory. *Id*.

Unlike in *NALC*, Inspector Hulsey did not testify as to why he concluded that PCI was responsible for the housekeeping violation in light of ample evidence suggesting that Lone Star worked in the area and taped off the pile of refractory material. The Secretary's other witnesses were unable to support Hulsey's reasoning. Tr. 46, 64-65. Inspector Hooker was not present during the inspection and had no firsthand knowledge of the condition beyond the photographs and what she heard in the post-inspection conference. Tr. 20, 46. Although Powell accompanied Hulsey during the inspection and personally observed the alleged violation, he could not speak to Hulsey's reasoning in light of the facts implicating Lone Star. Tr. 60. The photographs of the footprints here thus do not justify the same logical inference made in the *NALC* case, given the clear evidence of Lone Star's activity above and near the housekeeping violation. Absent Hulsey's testimony, the court cannot rationally infer that PCI violated the standard.

Accordingly, I vacate the citation and do not address the Secretary's gravity, negligence, or penalty designations.

B. Citation No. 9377099

On January 31, 2018, Inspector Julie Hooker[3] conducted an inspection at the finish mill area of the mine, accompanied by Eric Powell. Tr. 22. The finish mill area was busy with activity, and Hooker observed foot traffic in the area during her inspection, as well as foot and vehicle traffic in the area the week prior. Tr. 24-25, 27. While in the nearby pump house building, Hooker noticed a Genie telehandler ("forklift") reverse without the activation of an audible backup alarm. Tr. 23. The forklift measured about 6 feet 4 inches in height, weighed approximately 10 tons, and was transferring scaffolding material a distance of approximately 20 feet onto a truck. Tr. 23, 25, 27, 93. Hooker approached the forklift, identified herself to the driver, and tested the backup alarm twice manually. Tr. 24. The alarm failed to activate during either test. *Id*. Stephen Meneses, the forklift operator, informed Hooker that he was aware that the backup alarm was not working for a couple of days, but that he had not reported it to his supervisor. Tr. 27-28. She issued Citation No. 9377099, which alleged:

> The automatic reverse-activated signal alarm on the Genie GH-5519 forklift located on the mine was not maintained in functional condition. The alarm to indicate the forklift was in reserve (Sic.), failed to activate when tested. Foot and

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[3] Inspector Hooker has served as an MSHA Inspector since November 2012. Tr. 15. She spent 25 years in the military performing health and safety inspections on mobile equipment and buildings. *Id*. She conducted safety meetings and ensured compliance with federal safety regulations. *Id*. She also performed similar work for the United States Agricultural Research Service and Forest Service prior to starting with MSHA. *Id*.

vehicle traffic was observed in the area. This condition exposes miners working or traveling around this condition to a crushing standard.

Ex. S–4. Inspector Hooker designated the citation S&S, reasonably likely to result in a fatality, and the result of Respondent's moderate negligence. *Id*. PCI quickly called the company from which it rented the vehicle to repair the backup alarm and terminate the citation. Tr. 40-41, 85. The Secretary assessed a penalty of $638.00.

PCI challenges the Secretary's S&S and negligence designations. PCI contends that the violation is not S&S because no miners were working near the forklift. Tr. 111. It argues that the forklift operator did not see any other individual in the vicinity of the forklift and contends that Inspector Hooker was unable to give an exact measurement as to the nearest miners in order to justify the S&S designation. *Id*. PCI disputes the moderate negligence designation because the operator only drove the forklift for ten to fifteen minutes, covered a short distance, and honked the horn prior to backing up. Tr. 110-111.

1. The Violation

30 C.F.R. § 56.14132(a) provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Commission has defined "maintain" in the context of this standard to require that horns or audible warning devices must function at all times unless the equipment has been taken out of service for repair. *Beverly Materials, LLC*, 37 FMSHRC 1857, 1858 (Sept. 2015) citing *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014). The standard therefore "imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair." *Wake Stone Corp.*, 36 FMSHRC at 827.

The parties do not dispute that the forklift was in operation and that its back-up alarm did not work at the time of the inspection. Tr. 110. Inspector Hooker observed the forklift reverse without any alarm function activating. Tr. 24. Powell did not hear an alarm, and Meneses acknowledged that the alarm was inoperable. Tr. 23, 98. The alarm also failed to work twice when Inspector Hooker manually tested the system. Tr. 24. Since the forklift was in service and the backup alarm failed to function, I affirm the fact of violation. *See Wake Stone Corp.*, 36 FMSHRC at 827.

2. Significant and Substantial

Inspector Hooker designated the citation as S&S and reasonably likely to be fatal. I have already found that PCI violated § 56.14132(a), thereby satisfying the first element of the *Mathies* test.

In regards to the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that § 56.14132(a) is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC at 2037. Section 56.14132(a) imposes a continuing responsibility upon operators to ensure that audible safety alarms work at all times to prevent individuals or other vehicles from being struck by reversing equipment without warning. *Rock Products, Inc.*, 40 FMSHRC 808, 820 (May 2018) (ALJ). I find that that the non-functional backup alarm was

reasonably likely to contribute to the forklift's accidental contact with a miner or other equipment. The forklift was performing work that required reversing the vehicle in a busy area of the mine. Tr. 25, 27. Inspector Hooker observed miners approximately 50 to 75 feet away walking toward the forklift while it was in operation. Tr. 34. The alarm was inoperable for at least two days. Tr. 27-28. PCI's failure to maintain the forklift's backup alarm therefore contributed to the reasonable likelihood that miners traveling through the finish mill area on foot or in a vehicle would be struck by the reversing forklift without any warning.

I reject PCI's contention that the violation was not likely to contribute to the collision hazard because the inspector could not provide the exact distance of the nearest miners to the forklift. An exact measurement of the distance from the forklift to the nearest miner on foot is not necessary to demonstrate that the broken backup alarm contributed to the reasonable likelihood of a miner being accidently struck by the vehicle. I credit Inspector Hooker's testimony that the miners were walking nearby and that she also observed miners traversing the finish mill area the week prior to her inspection. Tr. 27-28. The Secretary has met his burden of proof for the second *Mathies* element.

To satisfy the third *Mathies* element, the Secretary must show that the hazard was reasonably likely to result in an injury. *Newtown*, 38 FMSHRC at 2038. The Secretary argues that hazard of inadvertent contact with individuals or vehicles was reasonably likely to occur given the size of forklift and how busy the finish mill area was in the context of continued mining operations. Tr. 25, 27-28. The forklift weighed close to a ton and was operating in an area where miners frequently worked and traveled. Assuming the hazard has been realized, a collision between the forklift and any miner on foot or driving a similarly sized vehicle was likely to result in injuries. Tr. 27. The Secretary has therefore met the minimum threshold for proving the third element of the *Mathies* test.

Regarding the fourth *Mathies* element, the Secretary must show that the injury resulting from the hazard is reasonably likely to be serious. *Newtown*, 38 FMSHRC at 2038. Here, Hooker credibly testified that the size and weight of the forklift would likely lead to fatal blunt force crushing, breaking or trauma injuries were a miner to be struck by the reversing vehicle. Tr. 27. I credit Hooker's testimony and find that any injury resulting from the hazard could reasonably likely lead to fatal injuries.

For the reasons above, I affirm the Secretary's S&S and gravity determinations.

3. Negligence

I find that the violation was the result of PCI's moderate negligence. The forklift was in operation and the backup alarm was not functional. Tr. 23. Meneses admitted at the inspection and again at hearing that he was aware that the alarm was not functional for at least two days but that he did not report the defect to a supervisor until he received the citation. Tr. 27-28, 99. Although Respondent claims that Meneses was only operating the vehicle for a short period on the day of the violation, his decision not to notify management and to continue operating the forklift without a functional backup alarm indicates that at least one PCI employee knew of the condition but failed to address it.

Although Meneses testified that he could clearly see out of the rear of the forklift and that he honked the horn twice prior to reversing in compliance with PCI's operation policy, I do not find that this is a mitigating factor meriting a reduction from moderate negligence. Meneses and Hooker offer conflicting testimony as to the forklift's rear visibility. Hooker testified that at the very least, a blind spot exists on the right rear side of the forklift when the boom is up. Tr. 25, 26. Even assuming that the blind spot was minimal or nonexistent and that the operator diligently honked prior to reversing, these measures would not adequately warn other miners or vehicles driving by while the forklift was actively reversing to use caution in the area. I affirm the moderate negligence designation.

4. Penalty

The Secretary proposed a penalty of $638.00. PCI's history of previous violations is low, and the parties stipulated that the Secretary's proposed penalty amount is consistent with the violation and would not affect PCI's ability to remain in business. *See* Jt. Stip. 7. I found that the violation was S&S and reasonably likely to result in a fatal injury and the result of PCI's moderate negligence. Respondent took immediate steps to terminate the citation by contacting a third party from which it rented the forklift to fix the faulty wire. Tr. 40-41, 85. Accordingly, I affirm the penalty of $638.00.

IV. ORDER

The Respondent, Performance Contracting Inc., is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$638.00** within 30 days of this order.[4]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[4] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

Distribution: (U.S. First Class Mail)

Jessica M. Flores, Veronica Melendez, Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, California 94103

Jason J. Curliano, Laura Van Note, Buty & Curliano LLP, 516 16th Street, Oakland, California 94612

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 29, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. MARTIN MARIETTA MATERIALS SOUTHWEST, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2018-0179 A.C. No. 41-01335-457187 Mine: Beckmann Quarry

DECISION

Appearances: Christopher D. Lopez-Loftis, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801.[1] This case involves five Section 104(a) citations issued to Martin Marietta Materials Southwest, Inc. ("Martin Marietta" or "Respondent"), in December 2017.

A hearing was held on September 12, 2018, in San Antonio, Texas. MSHA Inspector David Tijerina testified for the Secretary. Two managers from the mine, Howard Evans and Richard Jackson, testified for Martin Marietta. At hearing, the Secretary requested that Citation No. 9356108 be vacated, and the request was granted. Regarding the remaining four citations, the Secretary argued that they should be upheld as written. Martin Marietta contested all four violations, along with the gravity and negligence designations for each. The parties submitted post-hearing briefs. Based upon the parties' stipulations and my review of the witnesses' testimony and of the entire record, I make the following findings.

[1] In this decision, the transcript, the joint stipulations, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Jt. Stips.," "Sec'y Ex. #," and "Resp. Ex. #," respectively.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations of fact included in their prehearing statements:

1. Martin Marietta Materials Southwest, Inc. (hereinafter, "Respondent") was at all times relevant to this proceeding engaged in mining activities at the Beckmann Quarry Mine.

2. Respondent's mining operations affect interstate commerce.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (The "Mine Act" or "Act").

4. Respondent is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Beckmann Quarry Mine (Federal Mine I.D. No., Mine ID 41-01335) where the contested citations in this proceeding was [sic] issued.

5. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

6. On or about December 12, 2017, through December 13, 2017, Mine Safety and Health Administration ("MSHA") Inspector David Tijerina was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from docket CENT 2018-0179, at issue in this proceeding.

7. The citations at issue in this proceeding was [sic] properly served upon Respondent as required by the Act and was [sic] properly contested by Respondent.

8. The citations at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing their issuance. Materials published on MSHA's website or otherwise published by MSHA may also be admitted into evidence by stipulation for the purpose of establishing their issuance and availability. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.

9. Respondent demonstrated good faith in abating the violations.

10. The penalties proposed by the Secretary in this case will not affect the ability of Respondent to continue in business.

See Tr. 5; Jt. Stips.

III. LEGAL PRINCIPLES

A. Establishing a Violation

The Commission has long held that, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyo. Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary's burden as follows: "The 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.'" *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984).

B. Significant and Substantial

A violation is significant and substantial (S&S) "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id*. at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *W. Ridge Res., Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280–81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

C. Negligence

Under the Mine Act, operators are held to a high standard of care. *Am. Coal Co*., 38 FMSHRC 2062, 2083 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). However, negligence is not defined in the Act and has been differently defined by the Secretary and the Commission. The Secretary evaluates negligence on the basis of mitigating circumstances: low negligence involves actual or constructive knowledge of the violative condition with considerable mitigating circumstances; moderate negligence involves actual or constructive knowledge of the violative condition with mitigating circumstances; high negligence involves actual or constructive knowledge of the violative condition with no mitigating circumstances; and reckless disregard involves conduct that exhibits the absence of the slightest degree of care. 30 C.F.R. § 100.3: Table X.

The Commission and its judges are not bound to apply the Part 100 regulations in their consideration of negligence. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016) (citing *Brody*, 37 FMSHRC at 1701–03). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances. *Id*. Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically. *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

D. Penalty

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Martin Marietta operates the Beckmann Quarry, a surface limestone operation located in Bexar County, Texas. On December 12, 2017, MSHA Inspector David Tijerina visited the

quarry to perform a regular inspection.[2] He was accompanied by Ron Hager, the plant manager. Tr. 17. Four 104(a) citations issued during that inspection are at issue in this case.

A. Citation No. 9356102

Inspector Tijerina began the inspection at the primary crusher. The Beckmann Quarry is large with several pit areas, and the primary crusher is a large crusher with conveyor belts that feed the plants. Tr. 18. The crusher and its supports sit on a cement platform. Tr. 18. Tijerina examined the platform and observed that it was covered in mud. Tr. 18. He did not measure the mud, but believed it to be about two to four inches deep. Tr. 18, 22. The mud appeared slick to him, although he did not walk on it. Tr. 18-19. He observed footprints in the mud and believed that some of them indicated that the person walking had slipped. Tr. 18-20. The Secretary introduced a photograph of the footprints taken by Tijerina. Sec'y Ex. 2-1. Tijerina believed slip marks were apparent in the third footprint from the right in the photograph. Tr. 56. He determined that the mud had accumulated because the material in the crusher was wet and sticky due to recent rains. Tr. 21. Miners would typically have used a water pump and hose to spray down the area, but the pump was not working. Tr. 21. Tijerina believed that the mud presented a slip-and-fall hazard for miners working in the area. Tr. 20. He explained that if a person fell, he could strike the floor or one of the pillars and get a laceration, contusion, or broken bones. Tr. 24. The company terminated the citation by using a water truck to spray down the area. Tr. 26.

Howard Evans, the superintendent for the primary crusher area, was present during this portion of the inspection and testified at the hearing. He explained that typically employees only access the platform area to do cleanup. Tr. 61-61. They occasionally also enter the area to access the 96 belt if there is a problem with it. Tr. 61-62. He stated that the area is typically cleaned approximately every other day, and it had been cleaned the night before the inspection. Tr. 64. The platform is also occasionally used to access the 96 conveyor for repairs. Tr. 64. Evans stated that before directing anyone to work in the area, management would have inspected the area and ordered it to be cleaned. Tr. at 65. Evans believed there was less mud on the platform than the inspector described, only an inch or two of material instead of four. Tr. 66. He described the buildup as "minimal" and attributed it to dust from crushing that had gotten wet. Tr. 66. Evans did not believe the mud presented a slip-and-fall hazard. Tr. 67. He explained that employees wear steel-toed boots with slip-resistant soles that would prevent them from slipping if they walked in the mud. Tr. 67. No one was assigned to the crusher platform area on the morning of the inspection, and there were no problems with the 96 belt to cause anyone to enter the area that day or the previous day. Tr. 63, 102. Evans did not know who had made the footprints shown in the inspector's photographs. Tr. 70. He did not observe any slip marks on the day of the inspection. Tr. 102.

[2] Inspector Tijerina has worked as an MSHA inspector for approximately seven and one half years. Tr. 13. He previously worked for 20 years in the mining industry, including as a safety manager and consultant. Tr. 14.

1. The Violation

Based on the conditions at the crusher platform, Inspector Tijerina issued Citation No. 9356102 for a violation of 30 C.F.R. § 56.20003(a). Sec'y Ex. 1-1. That standard requires that "At all mining operations[,] Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.20003(a).

The term "workplace" is not defined in the Secretary's regulations, but Commission ALJs have generally found that an area is a workplace if work is done in the area. *See, e.g.*, *Oil Dri Prod. Co.*, 38 FMSHRC 990, 997-98 (May 2016) (ALJ); *Moltz Constr., Inc.*, 36 FMSHRC 1861, 1863 (July 2014) (ALJ); *Taft Prod. Co.*, 36 FMSHRC 522, 526 (Feb. 2014) (ALJ). Commission ALJs have interpreted "passageway" to include areas where miners walk in order to access other areas. *See, e.g., Ball, employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1809 (July 2016) (ALJ); *Taft*, 36 FMSHRC at 526-27. Here, while no one was assigned to the area at the time, the crusher platform provided access to the 96 belt and miners entered the area regularly to clean. The footprints in the mud indicate that someone had been in the area recently to work or to pass through. [3] I find that the area was a "workplace" or "passageway."

I also find that the area was not "kept clean and orderly." In applying broad standards such as this one, the Commission asks whether "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990). Inspector Tijerina testified that the area was covered in a thick layer of mud and appeared slippery. Tr. 18-19. Based on his observations of the footprints, he believed someone had already slipped in the mud. Tr. 18-20. I credit his testimony and find that the mud presented a slip-and-fall hazard. While Evans stated that the area had been cleaned the night before, even if this was true, I find that a reasonably prudent miner would have recognized the hazard and taken steps to address it. Accordingly, the Secretary has proven a violation.

2. Significant and Substantial

The Secretary argues that the violation was S&S and was reasonably likely to result in an injury causing lost workdays or restricted duty. The Secretary has proven a violation of a mandatory safety standard, satisfying the first element of the *Mathies* test for an S&S violation.

To prove the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that § 56.20003(a) is designed to prevent. *Newtown Energy,* 38 FMSHRC at 2037. Section 56.20003(a) requires that all workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. 30 C.F.R. § 56.20003(a). The purpose of § 56.20003(a) is to address the hazard of a miner slipping, falling, or tripping on loose materials in a work area. Martin Marietta argues that the hazard was unlikely to occur because the crusher pedestal was only accessed for cleaning, which occurred every other day, and

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[3] Evans implied at hearing that the footprints could have belonged to the inspector. Tr. 68. However, Tijerina testified that he did not walk on the cement. Tr. 19. I credit the inspector's testimony and find that the prints most likely belonged to a miner.

occasionally for repairs of the 96 conveyor. Resp. Br. 3, 6; Tr. 64. The company contends that the area would have been cleaned before anyone performed work there. Resp. Br. 6. However, the footprints observed by the inspector indicate that someone entered the area while it was still muddy. Assuming continued normal mining operations, it is reasonable to expect that someone would have entered the area again without cleaning it first. The operator argues that steel-toed boots would prevent anyone from slipping in the mud and that there are no slip marks apparent in the inspector's photograph. Resp. Br. 5-6. I disagree and find that the photograph does indicate slippage. *See* Sec'y Ex. 2-1. I find that the slip-and-fall hazard was reasonably likely to occur.

The third *Mathies* element requires proof that the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2038. Tijerina noted that there were hard surfaces in the area, including a concrete floor and pillars, which a person could strike if he fell. Tr. 24. I find that a fall in the area would be reasonably likely to lead to injury.

Finally, to establish the fourth *Mathies* element, the Secretary must show a reasonable likelihood that the injury resulting from the hazard would be of a reasonably serious nature. *Newtown*, 38 FMSHRC at 2038. Tijerina testified that a slip and fall could result in lacerations, stitches, contusions, or broken bones. Tr. 24. I credit his assessment and conclude that there was a reasonable likelihood that a reasonably serious injury could occur.

I affirm the Secretary's S&S designation for this violation, and for the same reasons I affirm the gravity designation of reasonably likely to result in lost work days or restricted duty.

3. Negligence

The Secretary alleges that the violation involved moderate negligence on the part of the operator. The Secretary contends that the condition was in plain view and miners should have seen the mud and known to clean it up. Sec'y Br. 13. Instead, a miner walked through the mud without cleaning it up. The Secretary considered the broken pump to be a mitigating circumstance, because it made cleaning the area more difficult. Tr. 24. The Secretary believed that management was unaware of the condition. Tr. 24. Martin Marietta argues that it was not negligent because the area had been cleaned the night before the inspection, miners had not been assigned to work in the area, and company policy required that miners wear non-skid boots. Tr. 64; Resp. Br. 7.

I agree with the Secretary that the condition was obvious. While the area was not heavily used, the footprints indicate that someone had passed through the area in that condition. Sec'y Ex. 2-1. I credit Evans's testimony that the area had been cleaned the night before. Tr. 64. The broken pump also made cleanup more difficult. Tr. 21. Nevertheless, it was possible to clean the area another way, and miners should have done so before using the area as a passageway. I affirm the Secretary's moderate negligence designation.

4. Penalty

The Secretary proposed a penalty of $2,919.00. Martin Marietta had been cited under the same standard seven times in the fifteen-month period prior to the inspection. Sec'y Ex. 11. The parties stipulated that the company demonstrated good faith in abating the violation. Jt. Stips. ¶ 9. I assess the proposed penalty of $2,919.00.

B. Citation No. 9356103

Inspector Tijerina continued his inspection in the F section of the plant. The F section included a conveyor known as a pant leg conveyor because it has a belt that splits into two separate sections. Tr. 28, 97. A set of steps led up to the conveyor and catwalk, and Tijerina observed that the steps and lower portion of the catwalk were covered with material. Tr. 28. There was approximately four inches of material on the steps, and closer to a foot of material on the catwalk. Tr. 28. The steps had a chain and sign across them that said "do not enter while running." Tr. 72. The steps had also been taped off with danger tape and a tag dated to the day before the inspection. Tr. 29. Based on interviews with miners, Tijerina determined that the condition had been identified the previous day, during either the day or the night shift. Tr. 29. The Secretary's Exhibit 4-1 is a photograph of the steps showing material on the steps and danger tape blocking entry to the steps. Tijerina observed that the pant leg chute was in bad condition, and that rock was spilling out of holes in the chute. Tr. 30. He believed this was causing the accumulation of material. Miners informed him that even if they cleaned up the material, it would accumulate again within an hour because of the condition of the chute. Tr. 30. Management told Tijerina that the chute had been there for a long time and they had plans to replace it in the next year. Tr. 30. To terminate the citation, miners installed a plate over a portion of the chute to keep the material from falling out. Tr. 31. The plate kept the material from spilling out when it was tested. Tr. 32.

Evans, the supervisor for this section, was also present when this citation was issued. He testified that the spillage had been discovered the day before the inspection, and he had instructed employees to begin cleaning the area at that time. Tr. 72, 81, 84. He explained that workers had started at the top of the head section of the 104 conveyor and had been working their way down cleaning the catwalk. Tr. 80. The employees would pull out any larger rocks that were stuck in the catwalk and then wash the remaining material down to the bottom of the conveyor with a hose. Tr. 80, 81. Respondent's Exhibit H-6 is a photograph of the side-view of the conveyor, and Evans testified that it is an accurate representation of the conditions at the time of the inspection. Tr. 74. Evans noted that while there are accumulations visible on the steps and the lower third of the conveyor, there are none on the upper section. Tr. 83; Resp. Ex. H-6, H-7. Martin Marietta argues that this is consistent with Evans's testimony that the miners had begun cleaning prior to the inspection, moving from the top to the bottom of the conveyor. Resp. Br. 8; Tr. 83. Evans believed the spillage had been discovered during clean-up on the previous day shift, and cleaning had begun at that point. Tr. 84. He thought workers had also cleaned during the night shift, but had also run the plant, which would have created more spillage. Tr. 84. Evans explained that the miners typically clean for approximately one hour at the beginning and end of each shift and do as much as they can. Tr. 106. He understood the inspector's position to be that cleaning should have been completed before the plant started running. Tr. 106.

Evans emphasized that there was red caution tape across the entrance to the catwalk as well as a sign and a tag, and thus no one would have entered the area. Tr. 71-73. The miners working on cleaning had entered from a different ladder, and they would not be allowed to enter the belt area while the belt was running. Tr. 81, 84, 107. Regarding the source of the spillage, Evans explained that the belt is equipped with metal and rubber skirting to keep material from spilling out. Tr. 96. Over time the skirting wears away and has to be readjusted. Tr. 96. In this location, the metal skirting was replaced and the rubber skirting was readjusted to stop the spillage. Tr. 96. Evans also explained that the conveyor has a liner that sometimes wears out and has to be patched. Tr. 97. However, he did not recall having to patch any holes in the liner to terminate this violation. Tr. 98.

The Secretary questions Evans's assertion that the catwalk was being cleaned at the time of the inspection. Evans testified that he instructed workers to clean the area as soon as the spillage was detected, which was during clean-up on the previous day shift. Tr. 84. However, the Secretary introduced the inspector's notes from the inspection, which state, "Management had not seen it according to superintendent." Sec'y Ex. 3-4. Evans denied telling the inspector that he had not seen the spillage, and instead testified that he told the inspector at the time that the area was being cleaned and no one was allowed to enter. Tr. 99. Tijerina made no mention of the mine's cleaning efforts in his testimony or his notes. Tr. 33; Sec'y Ex. 3-4. Instead, the notes reflect that there was nothing in the workplace examination reports reflecting the condition. Sec'y Ex. 3-4. Faced with inconsistent testimony, I credit the inspector on this issue because of the contemporaneous notes matching his account. It seems most likely that someone at the mine had noticed the condition and tagged the area, but the condition had not been noted in the examination log and clean-up had not yet begun. The miners' comments to the inspector that even if they cleaned the area, the accumulations would be back in an hour, suggest that cleaning the area was not a priority. Tr. 30. Martin Marietta argues that the photos showing less accumulated material on the top section of the conveyor indicate that the top section had already been cleaned. Resp. Br. 12; Resp. Exs. H-6, H-7. However, it is equally possible that the hole in the chute causing the accumulations was simply located near the bottom of the chute. The photos do not show that anyone was cleaning at the time of the inspection.

1. The Violation

The Secretary alleges a violation of 30 C.F.R. § 56.18002(a), which provides:

> (a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place, for conditions that may adversely affect safety or health.
>
> > (1) The operator shall promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions.

In order to prove a violation under a prompt-correction rationale, the Secretary must establish (1) the existence of a condition that may adversely affect safety or health and (2) that the operator

failed to initiate either (a) prompt or (b) appropriate action to correct the condition. 30 C.F.R. § 56.18002(a).

The inspector testified that the accumulated material on the steps and catwalk could have caused a miner who tried to walk there to trip and fall. I credit this testimony and find that the cited condition adversely affected the safety of miners.

The Secretary alleges that the operator failed to promptly correct the condition in violation of the standard. While the "promptness" requirement is not elaborated in the standard, the Commission has interpreted an analogous standard requiring "timely" correction of a defect on equipment after inspection. *See Lopke Quarries, Inc*., 23 FMSHRC 705, 715 (July 2001). The Commission found that "Whether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id.* This interpretation is consistent with the Commission's application of the "reasonably prudent person" standard to broadly worded regulations. *See Ideal Cement Co.*, 12 FMSHRC at 2415-16.

Here, the accumulation of material on the steps and catwalk was extensive. Someone at the mine had recognized that the accumulations presented a hazard and had put up danger tape and a tag. Tr. 29. While Evans testified that miners had begun cleaning the accumulations, this was not corroborated by the inspector's notes or the mine's records, and thus I do not credit his statement. Tr. 84; Sec'y Ex. 3-4. The condition had been discovered the previous day, but action had not yet been taken to correct the hazard. Instead, several cycles of cleaning and running the plant had occurred without anyone addressing the condition. Tr. 29. I find that a reasonably prudent person would have taken steps to clean the area or to address the cause of the spillage in the time that had elapsed since it was discovered.[4] The Secretary has proven a violation.

2. Gravity

The Secretary alleges that the violation was unlikely to cause injury and that if injury did occur it would likely lead to lost workdays or restricted duty. The inspector credibly explained that if someone were to walk in the area, he could trip and fall on the extensive accumulated material. Tr. 32-33. He did not think this was likely, however, because the area had been taped off and tagged out. Tr. 32. Evans also testified that no one would enter the area while the plant was running. Tr. 107. Based on these facts, I affirm the Secretary's gravity assessment.

3. Negligence

The Secretary alleges that the violation involved moderate negligence on the part of the operator. The inspector noted that the area had been taped and tagged off to warn miners of the danger. Tr. 29. Mine management also had plans to replace the chute, which would address the

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[4] Because I find that miners had not yet begun cleaning the cited area, it is unnecessary to address Martin Marietta's arguments that the standard requires operators to "initiate" but not to complete corrective action to address a safety hazard and that it lacked adequate notice of the requirements of the standard. Resp. Br. 9-14.

cause of the spillage. Tr. 30. Martin Marietta argues that it was not negligent because it had already begun removing the accumulations, but I do not find this to be true. Resp. Br. 14. Based on the other mitigating factors, however, I modify the negligence designation to low.

4. Penalty

The Secretary's proposed a penalty of $151.00. Based on the reduction in negligence, I assess a penalty of $100.00.

C. Citation No. 9356106

The next violation at issue involved a catwalk between the mine's Crusher 2 and Crusher 3 in the secondary area of the plant. Tijerina observed that the catwalk was dented in the middle and had a three-inch drop. Tr. 34. The welds at the corner of the walkway had come off. Tr. 34. The Secretary's Exhibit 6 is a photograph showing the missing welds. Respondent's Exhibit L-9 is another photograph of the same area showing that the grating is bent. Respondent's Exhibit L-6 is an aerial photograph of the catwalk showing that it is bent in the middle. A miner told Tijerina that the catwalk had been in this condition for at least three and a half weeks. Tr. 35. Tijerina thought it had probably been longer based on the substantial amount of rust. Tr. 35. He believed that the uneven surface of the catwalk created a trip hazard. Tr. 35. He also believed that the grating on the catwalk would eventually fail, which could lead a person to fall 20 feet to the ground below. Tr. 35. Tijerina did not conduct any tests to evaluate the strength of the catwalk. Tr. 55. After the inspection, the company determined that it would be difficult to repair the catwalk and instead closed off access to it. Tr. 37, 140.

Richard Jackson, the supervisor of the secondary area at the mine, was present for this portion of the inspection. Tr. 128. He stated that some of the welds on the catwalk had curled up to the left and there was a separation where part of the catwalk had bowed up. Tr. 129. The portion that had bowed up was at the very edge of the catwalk on the toe board. Tr. 129; Resp. Ex. L-1. The bent grating was about halfway across the catwalk. Tr. 139. He disagreed with the inspector's opinion that the catwalk was not stable enough to support workers because while the grating was curled up in the corner, it was otherwise in good shape. Tr. 131. He did not believe that anyone would fall off of the catwalk because there were guardrails on both sides that were stable and in good shape. Tr. 131; Resp. Ex. L-8. He also did not believe that the catwalk would collapse. Tr. 145. He explained that the catwalk is used to travel between Crusher 2 and Crusher 3 so that miners can avoid descending to the ground and walking up another set of stairs. Tr. 132. Miners would not be in the area while the plant was running, but would use the catwalk when doing lubing or greasing in the area or when doing inspections. Tr. 131-32.

1. The Violation

Inspector Tijerina cited the mine for a violation of 30 C.F.R. § 56.11002. That standard provides that "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." 30 C.F.R. § 56.11002.

I find that the Secretary has proven a violation. The catwalk was an "elevated walkway" used to travel between two crushers at the mine. The walkway was not maintained in good condition. The welds at one corner of the catwalk had come off, and the grating was bent in several places. Sec'y Ex. 6; Resp. Ex. J, L-6, L-9. The bent grating created a tripping hazard for miners and should have been corrected.

2. Significant and Substantial

The Secretary argues that the violation was S&S and was reasonably likely to result in a fatal injury. The Secretary has proven a violation of a mandatory safety standard, satisfying the first element of the *Mathies* test for an S&S violation.

With regard to the second *Mathies* element, the inspector discussed two hazards addressed by the standard. The first was that the catwalk could fail or collapse. Tijerina believed that the grating was in such bad condition that it would eventually fail. Tr. 35. However, he did not conduct tests to evaluate the strength of the catwalk or provide details as to why he thought it would fail. Tr. 55. It is difficult to assess the strength of the walkway from photographs alone. In the absence of more detailed evidence regarding the conditions of the catwalk, I do not find that the Secretary has established that this hazard was likely to occur. The inspector also discussed the hazard of a miner tripping and falling on the catwalk. Tr. 35. A portion of the grating at the end of the catwalk was bent upward where the weld had come off. However, Jackson testified that the curled up portion was on the very edge of the catwalk, and this testimony is supported by the photographs introduced by Martin Marietta. Tr. 129; Resp. Ex. J. Jackson believed it was unlikely that anyone would step in that specific place and thus that it was unlikely that anyone would trip. Tr. 133-34. The Secretary did not provide any details regarding how the trip hazard would occur. I agree with the assessment of Jackson that the damaged grating was not in a location where it would be likely to cause a trip and fall accident.[5] The likelihood of injury is modified from reasonably likely to unlikely. The Secretary has failed to establish that the trip and fall hazard was likely to occur, and therefore, the S&S designation is vacated.

With respect to the injury designation, as noted above, the Secretary's evidence fails to establish a reasonable likelihood of a fatality, either from a fall or from the collapse of the catwalk. In the event that a miner did trip on the uneven catwalk, however, the resulting injury could be expected to lead to lost workdays or restricted duty. Thus, the injury designation is modified from fatal to lost workdays/restricted duty.

3. Negligence

The Secretary alleges that the violation involved moderate negligence on the part of the operator. Management claimed that they were unaware of the violation and the walkway was not

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[5] Martin Marietta argues that a trip and fall hazard was unlikely to occur because there were handrails present on the walkway. Resp. Br. 17-18. The Commission has held that redundant safety measures are irrelevant to the S&S analysis. *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1312-13 (June 2016). Thus, my finding that a hazard was unlikely to occur is not based on that rationale.

used frequently. Tr. 44, 46, 132. However, Tijerina determined based on a discussion with a miner that the condition had been present for at least three and a half weeks, and I credit his finding. Tr. 35. Additionally, miners told the inspector they had reported the condition on workplace exams. Tr. 44. Tijerina did not see a record of the condition in the workplace exam record, but I do not find this to be a mitigating circumstance. Tr. 44. Although the walkway was not severely compromised, the defects were obvious. The bent portion of the walkway was visible from a distance. Resp. Ex. L-6. The defects had been present for some time and should have been addressed. I increase the negligence designation from moderate to high.

4. Penalty

The Secretary proposed a penalty of $2,487.00. Martin Marietta had not been cited under this standard in the fifteen months prior to the inspection, and the parties stipulated that the company demonstrated good faith in abating the violation. Sec'y Ex. 11; Jt. Stips. ¶ 9. Based on the changes in gravity and negligence, I assess a penalty of $1,250.00.

D. Citation No. 9356109

The final citation at issue occurred in the rail load out area where trucks and rail cars are loaded with material. Tr. 46, 48. The inspection party approached the three screen shaker, and Tijerina observed that the catwalk in front of the shaker was covered in material. Tr. 46. He observed that the chute on the shaker had a hole and was spilling material out onto the catwalk. Tr. 46. The shaker was running at the time. Tr. 47. A photograph of the area shows that the material reached the top of the toe board in one place, a height of four inches. Tr. 46, 48; Sec'y Ex. 10-1. The material was wet at that point in the operation, and Tijerina believed it would be relatively stable to stand on. Tr. 50. At one point during the inspection, a miner was about to enter the area, but the supervisor for that area, Eddie de la Garza, stopped him from doing so. Tr. 49. To terminate the citation, miners repaired the damaged chute, which stopped the material from spilling out. Tr. 49, 142.

Jackson, the secondary supervisor, testified about the general housekeeping practices at the mine. He explained that because of the nature of the work, there are many possibilities for spillage. Tr. 115. Miners do workplace examinations at the beginning of each shift and also walk around the site monitoring conditions throughout the shift. Tr. 116. The company attempts to address spillage as it occurs. Tr. 115. The miners typically clean spills by spraying water or shoveling, and occasionally they also use a skid steer or loader. Tr. 115, 121. If a miner finds an accumulation and is unable to address it himself, management will shut down the plant and send someone to help. Tr. 118.

Jackson observed the three screen shaker area with the inspector, although he left before the citation was issued. Tr. 118. He agreed that there were four inches of material on the left side of the walkway, but thought there was an inch or less on the rest of the walkway. Tr. 126, 141. He stated that the cited accumulation had been noted on the workplace examination the day before, but the spillage was minor at that time. Tr. 120. The spillage was caused by a hole in the chute, and the company had plans to fix it the day of the inspection. Tr. 120. Additionally, a miner had just arrived to clean the area. Tr. 120. Jackson explained that the cited area is a

walkway used to reach the screens and catwalks. Tr. 123. Miners enter the area to do pre-shift checks and to check the screens, but would not be in the area when the rail loader was running, as it was that day. Tr. 123, 144.

1. The Violation

Tijerina again cited the mine for a violation of 30 C.F.R. § 56.20003(a), requiring that "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

Martin Marietta argues that the standard requires a showing that a miner accessed the cited area before cleaning it. Resp. Br. 18-20 (citing *Nelson Quarries, Inc.*, 30 FMSHRC 254, 266-67 (Apr. 2008) (ALJ)). That interpretation has been adopted by one ALJ cited in Respondent's brief, but not by the Commission.[6] I decline to adopt it here. The standard at issue applies to "workplaces," which I interpret to mean places where work is done, and to "passageways," which I interpret to mean places that miners use to travel between areas of the mine. *See Oil Dri Prod. Co.*, 38 FMSHRC 990, 997-98 (May 2016) (ALJ) (applying similar definitions of these terms).

Here, the cited area was used to access the screens and catwalks and was open to access by miners at the time of the inspection. Tr. 49, 123. Tijerina observed a miner attempt to enter the area before he was stopped by a supervisor. Tr. 49. I therefore find that the area was a "workplace" or "passageway" under the standard. The area was covered in a layer of material up to four inches in depth. Tr. 48. The condition had been noted in a workplace exam, which supports the inspector's opinion that it constituted a hazard. Tr. 120. I find that the area was not "clean and orderly."

Martin Marietta argues that in operations like its quarry, accumulation of materials is inevitable, and requiring the operator to constantly clean up accumulations would be unreasonable. Resp. Br. 20. However, the record suggests that the accumulations cited here were not the ordinary accumulations that occur in the course of operating the quarry. The inspector found that the spillage was caused by a hole in the chute, and it had been noted in a workplace exam the day before but had not yet been corrected. Tr. 46, 120.

I find that the Secretary has proven a violation.

2. Gravity

The Secretary alleges that the violation was unlikely to cause injury and that if injury occurred it would likely result in lost workdays or restricted duty. Based on the testimony of Jackson, it seems that the area was not frequently used. Tr. 123, 144. Tijerina believed the

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[6] The *Southwest Rock Products* case cited by Respondent involved a mine that was not in operation at the time of the inspection, and the ALJ noted that that fact was essential to his decision to vacate a housekeeping citation. *Southwest Rock Products, LLC*, 38 FMSHRC 2750, 2758 (Nov. 2016) (ALJ). Respondent also cites a case decided by me, *A & G Coal Corp.*, 37 FMSHRC 1046 (May 2015) (ALJ), which does not stand for the proposition it claims.

accumulated material was fairly stable to stand on. Tr. 50. Tijerina testified that if a miner were to trip and fall on the material, he could strike the floor or railing, causing broken bones or lacerations. Tr. 50. I credit the inspector's testimony and affirm the Secretary's gravity designation.

3. Negligence

The Secretary alleges that the violation involved moderate negligence on the part of the operator. The inspector believed the condition had not been present for very long and that the supervisor was unaware of it. Tr. 51. Jackson testified that the miner assigned to the area was on his way to do a workplace exam at the time of the inspection, and management had made plans to fix the hole in the chute. Tr. 142-43. It seems that if management was aware of the hole in the chute, it should have been obvious that spillage was going to occur. However, I accept the inspector's findings that the condition did not present significant danger, and thus it was not highly negligent for the operator to delay maintenance on the chute for a brief period of time. Therefore, I affirm the Secretary's moderate negligence designation.

4. Penalty

The Secretary proposed a penalty of $429.00. Martin Marietta had been cited under the same standard seven times in the fifteen-month period prior to the inspection. Sec'y Ex. 11. The parties stipulated that the company demonstrated good faith in abating the violation. Jt. Stips. ¶ 9. I assess the proposed penalty of $429.00.

V. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$4,698.00** within 30 days of this order.[7]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[7] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

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December 7, 2018

SIMS CRANE, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. SE 2017-0097 Mine I.D. 08-00981 Mine: Wingate Creek Mine

DECISION AND ORDER

Appearances: W. Ben Hart, W. Ben Hart & Associates, Tallahassee, Florida for Contestant

Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Respondent

Before: Judge McCarthy

This case is before me after the Commission reopened and remanded a Notice of Contest of Withdrawal Order under Section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act or the Act) for further proceedings pursuant to the Act and the Commission's Procedural Rules. *See* 29 C.F.R. §§ 2700, 2700.22; *Sims Crane*, 39 FMSHRC ___, No. SE 2017-97-RM (July 7, 2017).[1]

I. STATEMENT OF THE CASE

The alleged violation at issue in this proceeding is imminent danger Order No. 8823572. Order No. 8823572 was issued on September 23, 2015 by MSHA Inspector Robert Peters in conjunction with 104(a) Citation No. 8823573 after Peters witnessed truck driver William Nasrallah exit a mobile crane's cab area and walk forward across the left front fender without using handholds or fall protection. *Sims Crane*, 39 FMSHRC 116, 120-121 (Jan. 2017) (ALJ). Order No. 8823572 alleged that walking across the fender without fall protection presented an imminent danger. Citation No. 8823573 alleged a significant and substantial violation of 30 C.F.R. § 56.15005 for the same conduct. The Secretary filed a Petition for the Assessment of Civil Penalty for Citation No. 8823573 under section 105(d) of the Act, which Sims Crane (Contestant) properly contested. *Id.* at 116. The proceeding was assigned to Docket No. SE 2016-0081.

[1] I have construed the Contestant's August 1, 2017 "Application for Vacation, Modification, or Termination," as a Notice of Contest.

The Secretary does not assess a civil penalty for a 107(a) order, and such orders are not included in the Secretary's Petition for the Assessment of a Civil Penalty. The Contestant averred that it contested Order No. 8823572 in conjunction with its contest of the Secretary's proposed penalty for 104(a) Citation No. 8823573 because Order No. 8823572 was referenced by number in the text of the Citation. *Id.* at 119 n.4. During pre-hearing proceedings in Docket No. SE 2016-0081, it became apparent that Contestant had failed to file a Notice of Contest to contest Order No. 8823573 as required by the Commission's procedural rules. 29 C.F.R. § 2700.22; *see also* 30 U.S.C. § 817(e)(1); *Sims Crane*, 39 FMSHRC 116, 119 n.4 (Jan. 2017) (ALJ).

A hearing was held in St. Petersburg, Florida, on November 14, 2016. During the hearing, the parties offered testimony and documentary evidence regarding both Citation No. 8823573 and Order No. 8823572, and the record was left open to allow the Contestant to submit evidence supporting its argument that it properly contested Order No. 8823572 as required by the Commission's procedural rules. *See, e.g.*, Tr. 11, 24, 54-56; *see also* 29 C.F.R. § 2700.22. Pursuant to the Commission's procedural rules governing simplified proceedings, the parties presented closing arguments in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e).[2]

On December 19, 2016, Contestant filed with the Commission a motion seeking to reopen imminent danger Order No. 8823572, which had become a final order of the Commission pursuant to section 107(e)(1) of the Mine Act, 30 U.S.C. § 817(e)(1).

On January 13, 2017, this tribunal issued its Decision and Order in Docket No. SE 2016-0081.[3] As relates to Order No. 8823573, this tribunal found the following:

> Order No. 8823572 was issued by MSHA inspector Robert Peters under section 107(a) of the Act, in conjunction with Citation No. 8823573, the single citation at

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[2] In this decision, "Tr. #" refers to the hearing transcript, "Jt. Ex. #" refers to joint exhibits, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the Contestant's exhibits. Jt. Ex. 1, P. Exs. 1-10, and R. Exs. 1-14 were received into evidence at the hearing.

[3] Regarding the alleged violation in Citation No. 8823573, the Secretary argued that Nasrallah's travel across the fender wheel well, approximately seven feet above the paved road, without maintaining three points of contact, constituted a violation of 30 C.F.R. § 56.15005. *Sims Crane*, 39 FMSHRC 116, 120 (Jan. 2017) (ALJ). The Secretary also alleged that the violation was S&S, highly likely to cause permanent disabling injury to one person, and the result of Respondent's moderate negligence. *Id.* at 116-117. This tribunal found that the Secretary failed to "establish by a preponderance of the evidence that there was a reasonable likelihood that Nasrallah would fall from the crane as he briefly took three steps" while walking on the three-foot wide fender with a slip-resistant surface. *Id.* at 126. This tribunal also found that the violation was not the result of Sims Crane's negligence because the Secretary failed to establish that Sims Crane knew or should have known of Nasrallah's violation, Sims Crane trained its employees to maintain at least three points of contact during access or egress of mobile equipment, and MSHA's Policy Information Bulletin No. 10-04 references standards that allow the use of two points of contact for support on walkways. *Id.* at 126-27.

> issue in this proceeding. Although the parties' stipulations reference this Court's jurisdiction over Order No. 8823572, the Commission's records contain no indication that Respondent timely filed its Notice of Contest within 30 days of the receipt of Order No. 8823572, as required under the Commission's procedural rules. *See* Commission Procedural Rule 22, *Notice of contest of imminent danger withdrawal orders under section 107 of the Act*, 29 C.F.R. § 2700.22. The record was left open after hearing to permit Respondent to submit such evidence. Tr. 57, 154-55. In an e-mail to my attorney advisor on November 28, 2016, Respondent argued that it had contested Order No. 8823572 at the same time it contested the proposed penalty assessment for Citation No. 8823573 because the Order was referenced by number in the text of the Citation. However, the Commission's procedural rules provide that Notices of Contest regarding imminent danger orders must be filed with the Commission within 30 days of the termination of the order. *Id.* Even assuming that contesting the Petition for the Assessment of Civil Penalty for Citation No. 8823573 was sufficient to also contest Order No. 8823572, MSHA did not receive Respondent's Notice of Contest regarding the proposed penalties for Citation No. 8823573 until December 23, 2015. *See* Ex. A, *Sec'y of Labor's Petition for the Assessment of Civil Penalty*, Docket No. SE 2016-0081. Since Order No. 8823572 was terminated on September 23, 2015, Respondent should have filed its Notice of Contest by October 23, 2015. P. Ex. 6. Despite the parties' stipulations to the contrary, I find that Respondent never timely filed its Notice of Contest regarding Order No. 8823572, and I consequently lack jurisdiction over that Order. I therefore decline to address Order No. 8823572 in this Decision and Order.

Sims Crane, 39 FMSHRC 116, 119 n.4 (Jan. 2017) (ALJ).

Contestant filed a Petition for Discretionary Review of that Decision and Order on February 13, 2017. The Commission granted Contestant's Petition on February 22, 2017. Docket No. SE 2016-0081 is still pending before the Commission.

On July 7, 2017, the Commission issued an order reopening and remanding Order No. 8823572 for further proceedings. *Sims Crane*, 39 FMSHRC ___, slip op. at 7, No. SE 2017-97-RM (July 7, 2017). The proceeding was assigned to Docket No. SE 2017-0097-RM. The Commission held that reopening the final order was appropriate under Federal Rule of Civil Procedure 60(b)(1) because the Contestant clearly expressed its understanding that it had properly contested the imminent danger order, the Secretary of Labor's affirmative endorsement of the Contestant's misunderstanding fostered this mistaken belief, and the confluence of circumstances constituted an extraordinary mistake. *Sims Crane*, 39 FMSHRC ___, slip op. at 4-7, No. SE 2017-97-RM (July 7, 2017).

This reopened proceeding was assigned to me on July 10, 2017. I stayed the proceedings in Docket No. SE 2017-0097 pending the Commission's decision in Docket No. SE 2016-0081. As it has been more than a year since this proceeding was stayed, I now issue the following Decision and Order.

II. PRINCIPLES OF LAW

Under section 107(a) of the Act, if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). An imminent danger exists whenever "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 30 U.S.C. § 802(j); *see also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992)*; Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *E. Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted)). For an imminent danger order to issue under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* Although the Commission has cautioned against narrowly construing imminent danger to include only immediate threats, there must be some degree of imminence to support an imminent danger order. That is, a hazard must be impending so as to require the withdrawal of miners. *Island Creek Coal Co.*, 15 FMSHRC at 345.

An inspector's issuance of a 107(a) order is reviewed under an abuse of discretion standard, meaning that a judge "must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority." *Wyoming Fuel*, 14 FMSHRC at 1291 (*quoting Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)); *see also Knife River Construction*, 38 FMSHRC 1289, 1291 (June 2016). The Secretary must prove, by a preponderance of the evidence, "that the inspector reasonably concluded, based on information that was known or reasonably available to him at the time the order was issued, that an imminent danger existed." *Knife River Construction*, 38 FMSHRC at 1291 (internal citation omitted). The Commission has recognized that "a judge is not required to accept an inspector's subjective perception that an imminent danger existed, but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed." *Id*.

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Sims Crane is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to § 105 of the Act.

3. The citation and imminent danger order at issue in this proceeding were properly served upon Sims Crane as required by the Mine Act.

4. The citation and imminent danger order at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.

5. Sims demonstrated good faith in abating the violation.

6. The penalties proposed by the Secretary in this case will not affect the ability of Sims to continue in business.

7. Sims was at all time relevant to this proceeding engaged in mining activities at the Wingate Creek Mine located in or near Myakka City, Manatee County, Florida.

8. Sims' mining operations affect interstate commerce.

9. Sims is an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Wingate Creek Mine (Federal Mine I.D. No. 08-00981) where the contested citation and imminent danger order in this proceeding were issued.

10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation and imminent danger order.

Jt. Ex. 1.

B. Order No. 8823572

Order No. 8823572 was issued on September 23, 2015 by MSHA inspector Robert Peters, who observed the allegedly dangerous practice as he was driving to the mine site to conduct an inspection. Tr. 33. Peters arrived at the Wingate Creek Mine around 8:20 a.m. Tr. 33. As he drove toward the mine's administrative offices, he observed truck driver William Nasrallah loading a Tadano crane onto a lowboy trailer in preparation for removing the crane from the mine site. Tr. 33, 122. Specifically, Peters first saw Nasrallah near the cab of the crane, as if Nasrallah had just exited the cab. Tr. 34-35; P. Ex. 5 at 2. Peters then saw Nasrallah walk from the cab area forward across the left front fender of the crane. Tr. 33, 35; P. Ex. 5 at 4.

Peters pulled his vehicle over to the side of the road, parked, exited his vehicle, and approached Nasrallah at the crane. Tr. 38. As Peters was parking, Nasrallah descended from the front of the crane to the ground using the stepped ladder at the front left side of the crane. Tr. 114; R. Ex. 8.

After observing Nasrallah walking from the cab area of the crane over the front fender to the front of the crane, Peters issued Imminent Danger Order No. 8823572 based on the following practice:

> Truck driver, William Nasrallah, was observed on top of the fender of the crane number RT 481. The crane had been loaded on a low-boy trailer for transport. The driver was observed leaving the cab of the crane, walking across the top of the

> wheel fender to exit the crane to ground level. The drive was not using any handholds or alternate means of fall protection[.] There was a danger of falling 7 feet to the road pavement. There was an exit/access ladder at the cab area which could have been used to exit the crane to the ground level. This confirms an oral imminent danger order issued to William Nasrallah, truck driver, at 0820 hours on this date.[4]

P. Ex. 6. Peters first issued the order orally to Nasrallah after Nasrallah descended from the crane. The order was likewise terminated at the same time at 8:21 a.m., when Nasrallah descended to the ground. P. Ex. 6; Tr. 58-69.

C. Peters' Conclusion that an Imminent Danger Existed was Not Objectively Reasonable.

The Secretary argues that Nasrallah's travel across the crane's wheel fender presented an immediate danger of falling that would result in a permanently disabling injury, and Order No. 8823572 should therefore be upheld. Tr. 39, 43, 52. Respondent argues that Nasrallah's ingress and egress procedure was in compliance with MSHA requirements and the manufacturer's recommendations, and therefore did not present an imminent danger. Tr. 27-29.

Peters first observed Nasrallah from about 15 yards away as he was driving onto the mine site. Tr. 33, 47. Specifically, Peters first saw Nasrallah near the cab of the crane, as if Nasrallah had just exited the cab. Tr. 34-35; P. Ex. 5 at 2. Peters then observed Nasrallah walk from the cab of the crane across the left front wheel well fender towards the crane's valve bank, a distance of between six and seven feet. Tr. 36, 39, 51, 78-79; P. Ex. 5 at 1, 4. Although Peters did not observe Nasrallah descend the stepped ladder at the front of the crane to reach the ground, Nasrallah testified that his normal procedure for exiting the crane involved crossing over the left front fender and descending via the stepped ladder at the front of the crane, rather than using the rung ladder immediately below the cab. Tr. 38, 114; *see also* P. Ex. 5 at 3, 4; R. Ex. 11. The top of the fender wheel well where Nasrallah crossed was seven feet above the ground, which included the height of the lowboy trailer. Tr. 43; *see also* R. Ex. 3 (MSHA Program Policy Letter indicating that compliance with OSHA's standard requiring fall protection for work surfaces 6 feet or more above a lower level may also satisfy the requirements of section 56.15005). Nasrallah's undisputed testimony indicates that he was not using fall protection. Tr. 120.

When Peters first saw Nasrallah on top of the wheel fender without fall protection, he was concerned that Nasrallah would "misstep or trip and stumble" and consequently fall off the wheel well while crossing from the cab to the front of the crane. Tr. 36, 39, 42, 43, 51, 71, 72; P. Ex. 5 at 1, 4. Peters specifically identified the act of walking across the fender without fall protection as the imminent danger. Tr. 71. Peters testified that "anytime you're walking in an area . . . you're subject to . . . stumbling or making a small misstep," especially because Nasrallah was presumably focused on his job and "he had everything on his mind except where

[4] Nasrallah's undisputed testimony indicates that the crane was manufactured by Tadano. Tr. 122. Although the text of Order No. 8823572 indicates that the crane was an "RT 481," that particular model number does not correspond with any of the current production models nor the discontinued production models listed on Tadano's website. *See* https://tadanoamerica.com/ (last accessed December 7, 2018).

he was." Tr. 44.[5] Peters further testified that Nasrallah's position on top of the wheel fender was "a dangerous position to be in" because the fender was "just real narrow" and was not designed for use as a walkway. Tr. 42, 43, 52, 72. Peters estimated that the fender was about 20 inches wide, but he did not take a measurement. Tr. 43-44.

As the Commission has concluded, the Secretary must prove, by a preponderance of the evidence, "that the inspector reasonably concluded, *based on information that was known or reasonably available to him at the time the order was issued*, that an imminent danger existed." *Knife River Construction*, 38 FMSHRC at 1291 (emphasis added). Peters first observed Nasrallah on the crane from about 15 feet away, walking across the fender without fall protection. Tr. 38-39, 47. Peters concluded that such circumstances presented a fall hazard, and he was concerned that Nasrallah might continue to work on the crane without fall protection. Tr. 39, 72. Accordingly, Peters immediately pulled over, parked his vehicle, approached the crane, and issued Order No. 8823572. Tr. 38, 69-71. Based on Peters' observations from 15 yards away, I am inclined to conclude that Peters' initial belief that an imminent danger existed was a reasonable one.

As noted, however, "a judge is not required to accept an inspector's *subjective perception* that an imminent danger existed, but, rather, must evaluate whether it was *objectively reasonable* for the inspector to conclude that an imminent danger existed." *Knife River Construction*, 38 FMSHRC at 1291 (emphasis added). At the time that Peters issued Order No. 8823572, his subjective perception was that Nasrallah had, without fall protection, walked across a narrow, 20-inch-wide fender that was not designed for use as a walkway. Tr. 42, 43, 52, 72, 78-79. I find that this subjective conclusion was not objectively reasonable because it failed to take into account information that was reasonably available to Peters at the time that he issued the order.

Peters' conclusion that Nasrallah's walk across the fender presented an imminent danger was based, in part, on his belief that the fender was "narrow" and only 20 inches wide. Tr. 42, 75. Robert Berry, Sims Crane's safety director, testified that the fender was actually at least 36 inches wide, close to twice what Peters believed the width to be at the time he issued the order.[6] Tr. 99. Moreover, the actual width of the fender constituted information that was reasonably available to Peters at the time he issued Order No. 8823572. He could have measured the width of the fender. Peters did, in fact, measure the fender's height from the ground, but declined to take a measurement of the fender's width. Tr. 43-44.

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[5] Peters did not know what type of work Nasrallah was performing on the crane when he first observed Nasrallah as he was driving up to the mine site. When he first saw Nasrallah on top of the fender, he did not realize that Nasrallah was in the process of exiting the crane. Tr. 35, 39.

[6] Although Peters estimated that the fender was 20 inches wide, he admitted he did not take a measurement. Tr. 75. Both Berry and Nasrallah testified that the fender was approximately three to three-and-a-half feet wide. Tr. 99, 125. I credit the mutually corroborative testimony of Berry and Nasrallah, particularly because they are more familiar with the surface and because Peters gave an estimate and did not take a measurement.

Peters also mistakenly assumed that the fender was not designed for use as a walkway, and that assumption figured prominently in his conclusion that Nasrallah's walk across the fender presented an imminent danger. Tr. 42, 43, 52, 72, 78-79. Both Berry and Nasrallah, however, credibly testified that the entire top surface of the crane, including the three-foot-wide fender, was coated with non-skid materials and was designed to be used as a walkway. Tr. 99, 124; *see also* R. Ex. 10; R. Ex. 12. As found in my Decision and Order in Docket No. SE 2016-0081, the presence of anti-slip material suggests that the manufacturer intended the surface for use as a walkway. *Sims Crane*, 39 FMSHRC 116, 123 (Jan. 2017) (ALJ). The fact that Peters took photographs of the truck after issuing Order No. 8823572 indicates that he had ample opportunity to examine the design and surface texture of the fender to determine whether it had, in fact, been designed for use as a walkway.[7]

In sum, I find that Peters' conclusion that Nasrallah's travel across the fender presented an imminent danger of falling was based on mistaken assumptions regarding the width of the fender and the intended design of the fender. Peters mistakenly assumed that the fender was only 20 inches wide and had not been designed for use as a walkway. Factually contrary information regarding the width of the fender and its design for use as a walkway was reasonably available to Peters at the time he issued the order. Had he chosen to do so, Peters could have measured the fender and examined the anti-slip surfacing before he issued the imminent danger order. I therefore find that the Secretary has not shown, by a preponderance of the evidence, that Peters' subjective conclusion regarding the imminent danger was objectively reasonable, because Peters did not take into account information that was reasonably available to him at the time the order was issued. *See Knife River Construction*, 38 FMSHRC at 1291 ("[A] Judge is not required to accept an inspector's subjective perception that an imminent danger existed, but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed."). Rather, I find that Nasrallah's conduct of walking forward across the left front fender of the three to three-and-a-half-foot-wide, anti-skid coated surface without using handholds or fall protection could not reasonably be expected to cause death or serious physical harm within a short period of time. Accordingly, I conclude that Peters abused his discretion in

[7] On cross examination, Peters testified that the fact that the fender was covered in an anti-skid material "would have had no bearing on anything." Tr. 73. This directly conflicts with his testimony that Nasrallah was in danger of falling because he was walking "in a place where it wasn't designed as a walkway," and I therefore find no merit in his testimony that the anti-slip material would have had no bearing on his conclusion regarding whether or not Nasrallah's walk across the fender presented an imminent danger. Tr. 72.

issuing Order No. 8823572 because no imminent danger existed under an objective analysis that considers the totality of the circumstances.

IV. ORDER

For the reasons stated above, Order No. 8823572 is **VACATED.**

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

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/ccc

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December 10, 2018

ROBERT THOMAS, Complainant, v. CALPORTLAND COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2018-0402 DM Mine: Sanderling Dredge Mine ID: 45-03687

DECISION AND ORDER

Appearances: Colin F. McHugh, Navigate Law Group, Vancouver, WA, for Complainant;

Brian P. Lundgren & Erik M. Laiho, Davis Grimm Payne & Marra, Seattle, WA, for Respondent.

Before: Judge Miller

This case is before me on a complaint of discrimination brought by Robert Thomas against CalPortland Company ("CalPortland"), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). Thomas alleges that he was discharged from his employment at the mine because of his participation in an MSHA investigation and because of safety and task training complaints he made to his immediate supervisor. CalPortland denies the allegations, and states that Thomas abandoned his employment and voluntarily resigned after failing to cooperate with management during an investigation. The parties presented testimony and documentary evidence at a hearing commencing on September 4, 2018, in Portland, Oregon. Based on the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the post-hearing briefs of the parties, I find that Thomas was discharged in violation of the Act and is entitled to back pay and other relief.

I. FINDINGS OF FACT

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony should not be deemed a failure 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).

The Sanderling Dredge mine is a surface sand mine located in Vancouver, Washington. CalPortland is the owner and operator of the dredge and is a mine operator subject to the jurisdiction of the Act. Robert Thomas was an employee of CalPortland from March 7, 2002, through the beginning of 2018, and he worked as a dredge operator for the company in Oregon and Washington. Jt. Stips. ¶ 1.1 and 2.1. His discharge from employment at the mine is the subject of this case.

Thomas worked at CalPortland, without any safety or other incident, for sixteen years. He first worked as a deck hand and then became a dredge operator in 2015. As a dredge operator, he worked on the Sanderling dredge. The Sanderling dredge is 220 feet long by 40 feet wide and is moved by an attached towboat called the Johnny Peterson. The dredge is typically operated by two persons on the barge, a dredge operator and a deck hand. The towboat is operated by a captain and sometimes a deck hand, who are both employed by a contractor. The captain and deck hands connect the towboat to the dredge each day to transport the dredge up and down the Columbia River. The dredge operates by pulling sand through a suction system from the bottom of the river, loading the sand evenly onto the barge, and then transporting it to a location on shore to be unloaded. Tr. at 115-16. For the most part, the Sanderling dredge is docked in Vancouver, Washington. A usual run for the dredge includes a four-hour journey in one direction on the river, and then several hours retrieving sand from the river bottom and unloading the sand before returning to port. Repairs and maintenance are done on the dredge often while it is traveling on the river.

The miners who work on the Sanderling dredge typically arrive in the early morning around 5 a.m. to do maintenance work to prepare for the day. The captain of the towboat arrives shortly thereafter to connect the towboat to the dredge and begin the day's trip on the river. Typically, the Sanderling does one load during the day and returns to the dock around 5 p.m. Occasionally, when the dredge travels farther on the river, it returns around 8 p.m. It is not unusual for the miners to work 12 hours per day and sometimes as much as 80 hours per week. During January 2018, Thomas was the dredge operator, and he worked on the Sanderling with Joel McMillan, an experienced deck hand. Roger Ison captained the towboat, the Johnny Peterson.

In the months leading up to the events at issue here, Thomas, McMillan, and other CalPortland employees were required to work long hours, working 16-hour days and sometimes around 80 hours per week. These long hours began in January 2017, when the mine changed from two shifts working on the dredge to a single day shift. Over the course of the year, Thomas and other employees grew concerned about their safety and health. They complained to their supervisor and marine manager, Dean Demers, and asked for additional help to avoid the long days and subsequent unsafe conditions. Both Thomas and McMillan agreed that working so many hours caused them to be tired during the day, making it difficult to pay attention and work safely. Thomas was particularly concerned that his lack of sleep was impacting his ability to remain responsive and alert at work.

To address their concerns, Demers attempted to bring in personnel from the rock barges to take over on some of the shifts. However, the practice resulted in an exchange of one problem for another. The rock barge workers, who worked under OSHA regulations, did not have experience with the tasks and work required on the dredge. Each barge employee, therefore, required task-training and introduction to MSHA regulations before being able to fully perform their duties. Instead of assigning a trainee to shadow Thomas or McMillan, Demers frequently assigned a rock barge worker to the Sanderling and expected the one experienced worker to both task train the new person and to perform their normal job duties. When it came time to certify that a trainee had been task-trained, Demers asked Thomas to sign off in his capacity as a designated training person. However, Thomas believed the new workers were not adequately trained and refused to sign the task-training forms. McMillan signed one task training document, but was not a designated training person. For the most part, Demers signed off on the task training, but was not present and did not conduct the training himself.

Demers started his career in the Coast Guard and after retiring, began working at CalPortland in July 2014 as a barge worker. He became the marine manager in July 2017 and was assigned to manage four barges and the Sanderling dredge. The barges under Demers' management are subject to OSHA jurisdiction and the Sanderling dredge is subject to MSHA jurisdiction. While Demers had years of experience on various water craft, this was his first experience on a project subject to MSHA jurisdiction.

Thomas and McMillan agreed at hearing that in the year leading up to Thomas' termination, the Sanderling dredge was understaffed. Demers stepped in to help out occasionally when they were short of help or when one of them was out on leave. While no testimony was presented as to how Demers felt about stepping in to help, he did have a disagreement with Thomas about sick time in November 2017. Thomas had requested a sick day and received push-back from Demers. McMillan testified at hearing that immediately following that disagreement, Demers indicated to him that "Rob Thomas was done, he was fucking done at CalPortland." Tr. at 48.

On January 24, 2018, Thomas and McMillan were returning to the dock in Vancouver at the end of a shift when they observed an MSHA inspector on the dock. As they headed downriver, earlier in the day, they realized they needed to change out a valve on the barge. They used air wrenches to remove the bolts, and extracted the valve from in between the pipes to lower the valve onto the deck. *See* Comp. Ex. 14 (showing the bow of the Sanderling dredge, where the valve was changed out). Thomas stood on the ladder to help lower the valve down from its position. Thomas and McMillan testified that they were both wearing their personal flotation devices ("PFDs") during the change out. On their approach to the Vancouver railroad bridge, McMillan climbed up on the ladder in order to weld the studs and return the valve. McMillan testified that as he was welding, he saw Thomas remove his PFD and hang it on the hooks outside of the lever room. McMillan watched Thomas walk from the lever room to the table in the middle of the barge,[1] use a cutting torch to cut a piece of steel, and put the PFD back on once he was finished with the torch.

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[1] *See* Comp. Ex. 14.

Near the end of the day, as the dredge neared the port, Thomas saw MSHA Inspector Mathew Johnson on the dock. From the dock, Inspector Johnson called out and asked if it was company policy to *not* wear a PFD. Thomas responded that CalPortland's policy requires miners to wear PFDs. Once in port, Thomas admitted to Inspector Johnson that he had not worn his PFD for up to ten minutes while operating the cutting torch at the welding table in the middle of the deck. Thomas also indicated that he and McMillan had been on the ladder while working that day, and that they had been on the ladder up to the third rung. Following their conversation, Inspector Johnson asked to speak to a supervisor, so Thomas called Demers, who was working at a different location. After some discussion with Demers, Thomas handed the phone to the inspector. Demers was aware that Thomas had provided information to the inspector prior to handing over the phone. After hanging up, Inspector Johnson completed his inspection of the barge with Thomas. The inspector then issued a Section 104(d) citation to CalPortland for a miner failing to wear a safety device or be tied off while working on the open portion of a dredge.

Thomas returned to work around 6 a.m. the next morning, and began to repair the transmission on the dredge. Demers arrived shortly after 7:30 a.m. He then accompanied Thomas and McMillan to the dredge's engine room and conducted a refresher PFD training in order to terminate the citation. Following the training, Thomas explained to Demers that he was not on the ladder without his PFD and that no one on board had witnessed him on the ladder without his PFD. McMillan agreed with Thomas'statement, and said additionally that he was the one who had used the ladder to return the valve. At around 8:30 a.m., Inspector Johnson returned to the dock area and met with Demers to discuss the previous day's violation. Thomas joined the meeting so that he could respond to further questioning by Inspector Johnson. Once the inspector left the dock, Thomas returned to work.

Demers and Dave McAuley, CalPortland's regional operations manager, then met and the two decided to suspend Thomas, without pay, pending further investigation. Following the decision, Demers called McMillan to tell him he was coming down to the dredge to "get rid of" Thomas. Tr. at 67. At about 10:30 a.m., Demers pulled up to the dock and suspended Thomas. Thomas gathered his things and punched out for the day. The next morning, January 26, 2018, Demers contacted Thomas and asked him to provide a written statement about the incident that lead to the citation. Thomas prepared and emailed his statement to Demers on January 28. Comp. 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 on Monday morning, he met with Demers and Jeff Woods, the safety manager. Demers proceeded to read the narrative portion of the MSHA citation aloud to Thomas. After hearing what the inspector had written, Thomas asserted that the inspector's statement was not correct. Thomas tried to explain further but at some point felt it was not productive to respond to Woods' follow-up questions. Woods left the meeting and Demers asked Thomas to fill out an employee incident report. Thomas complied and also submitted an additional, lengthier statement later that day. Comp. Ex. 22. At some time that same day, McMillan was also asked to complete an employee incident report. Comp. Ex. 5.

Following their meeting with Thomas, Demers and McAuley met with Candy Strickland, who is a human resources manager for CalPortland. They sought Strickland's advice on next steps. In their view, Thomas had become uncooperative with the investigation when he failed to respond to the last questions Woods had asked. McAuley noted at hearing that it was unusual to involve Strickland at this point, but insisted that no disciplinary decisions had been made at that time. However, shortly after the meeting ended, Demers sent McAuley and Strickland a corrective action form. The form contained Demers' recommendation that Thomas be fired from his employment for violating the PFD rule and for his lack of cooperation with the company investigation.

On January 30, Thomas was asked again to return to the office for a meeting the next day. Following that request, Strickland, Demers, and McAuley participated in a meeting with management to brief them on the situation with Thomas. After that meeting, Demers sent an email to numerous people, including contractors and employees of CalPortland, and attached a corrective action form that included his recommendation to fire Thomas. Demers testified that he sent the email by accident, he attempted to recall the email immediately, and he sent another email asking recipients to disregard his previous email. Tr. at 389-93; Resp. Ex. N. He also contacted Strickland and McAuley to let them know what had happened.

As Thomas was preparing to go to the scheduled meeting on January 31, he received a phone call from Ison, the captain of the towboat, at around 6:30 a.m. Ison, who had received the email from Demers, suggested to Thomas that he check his email. When Thomas opened his email, he saw the email from Demers that was sent to his co-workers and contractors with the attached corrective action form recommending Thomas' termination. Comp. Exs. 1 and 2; Resp. Ex. N at 4-6. After reading the email, Thomas believed that he had been terminated and sent a text message to Demers to let him know that he would not attend their scheduled meeting. That afternoon, Thomas hired an attorney. The next morning, February 1, Thomas received a call on his personal phone from McAuley. Thomas did not recognize the number, but asked his step-daughter to return the call on his behalf in order to determine who had called. She hung up when McAuley identified himself on speaker phone. With his step-daughter in the room, Thomas called McAuley back and said, "[y]ou have no business calling me on my personal phone, I don't know how you got it, you need to contact my attorney." Tr. at 157. McAuley denied at hearing that Thomas mentioned an attorney during the February 1st phone call, but Thomas and his step-daughter remember it being a part of the conversation. Immediately following the phone call with Thomas, McAuley contacted Strickland to discuss the matter. Together they determined that this issue was now one for human resources to address.

Later that same day, Thomas directed his attorney to send a letter to Demers and CalPortland about his intent to file a discrimination claim against them.[2] On February 2, Strickland spoke with a human resources supervisor at company headquarters about the situation with Thomas. She was advised to begin the process of voluntary resignation based on a violation of the company's attendance policy. At this point, Thomas remained on suspension and believed he had been terminated based upon the email he received from Demers. He had not been asked to return to work. That Monday, February 5, Strickland drafted a letter notifying Thomas that he

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[2] The letter was dated February 2, 2018. At hearing, Demers testified that he did not receive the letter from Thomas' attorney until February 13, 2018.

was in violation of CalPortland's attendance policy. Resp. Ex. R. The letter stated that if Thomas did not contact human resources by Thursday, February 8, "he will be considered to have voluntarily resigned." *Id.* at 2. Thomas was sent two copies of the letter and refused to accept delivery on both. Additionally, Demers testified that on February 5 and 6, 2018, he spoke with MSHA Special Investigator Diane Watson over the phone. She indicated that MSHA would not be opening a separate investigation against Thomas, that she understood he had been fired, and that he may be filing a discrimination complaint. Following the phone calls with Ms. Watson, Demers told McAuley that Thomas thought he had been terminated based on Demers' January 30 email and that Thomas had retained counsel.

When Strickland did not hear back from Thomas, she sent him a second letter, dated February 9, to notify him of his voluntary resignation. CalPortland asserts that Thomas abandoned his employment and voluntarily resigned effective February 8, 2018. Thomas filed his written discrimination complaint with MSHA on February 13, 2018.

II. ANALYSIS

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator … of an alleged danger or safety or health violation" or "because of the exercise by such miner … of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). In order to establish a prima facie case of discrimination under section 105(c)(1), a complaining miner must prove by a preponderance of the evidence: (1) that he engaged in protected activity; and (2) that the adverse action he complains of was motivated at least partially by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y 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). The operator may rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. The operator may also defend affirmatively by proving that, "it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

a. Protected Activity

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. While Section 105(c)(1) does not include the term "protected activity", Commission cases have nevertheless found that the section defines certain protected activities. An individual covered by Section 105(c)(1) engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation[;]", (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]", (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to

testify in any such proceeding[;]", or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

The legislative history of the Mine Act states that that Congress intended "the scope of the protected activities be *broadly interpreted* by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and, the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act." S. Rep. No. 95-181 at 35 (1977) (emphasis added). Moreover, the history notes that "the listing of protected rights contained in . . [what eventually became section 105(c)(1)] is intended to be illustrative and not exclusive," and that the section should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id*. at 36.

I find that Thomas engaged in a number of activities protected by the Act. First, he complained to his immediate supervisor, Dean Demers, that he was tired from working so many hours, that it was unsafe because he could not concentrate, and that the dredge needed more workers. The complaint was one of safety about his working conditions and is protected under the Act. Second, Thomas expressed his concern about the lack of task training for the rock barge employees who were moved over to work on the dredge. Several times, he refused to sign the task training certificates because he believed the substitute workers were not trained adequately. Third, Thomas spoke with MSHA Inspector Johnson when he boarded the dredge on January 24, 2018, and provided information that the inspector relied upon in issuing a citation. Finally, 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. While there is some dispute about the timing of the last activity, the mine was told to speak to Thomas' attorney as of a February 1st phone call and they became aware of the discrimination complaint no later than February 6, 2018, following a call from an MSHA supervisor. Both of these notifications occurred prior to the second notice of termination given to Thomas.

CalPortland argues in its post-hearing brief that Thomas' complaint should be dismissed because he did not include all of these protected activities in his original complaint to MSHA. The mine points to *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991) and contends that Thomas' private Section 105(c)(3) complaint is limited to the specific activities he identified in his original MSHA complaint. However, recent Commission case law does not support the mine's narrow reading of *Hatfield.* In *Sec'y v. Hopkins County Coal*, 38 FMSHRC 1317 (June 2016), the Commission addressed a similar argument. The majority concluded that it is not the terms of the initial complaint that control the scope of the Section 105(c)(3) action; it is whether or not the Secretary investigated the miner's broader claim of discrimination. *Id.* at 1323 n.9. MSHA did investigate the discrimination complaint that alleged Thomas was terminated for cooperating in an MSHA inspection. After the investigation, MSHA notified Thomas that they would not take his case further, and subsequently he filed a complaint here that included each protected activity raised at hearing. In addition, the acts that Thomas alleges as protected acts were all the subject of various types of discovery in this case. The mine therefore was aware of the allegations and had ample time to explore them and present a defense at hearing.

The mine also contends that Thomas did not engage in any protected activity. It relies on evidence at hearing wherein the attorney for the mine operator read a list of protected activities which included making a complaint to MSHA to each of the mine's witnesses, and asked each witness if they were aware that Thomas had engaged in that particular activity. In response to the attorney's leading questions, each witness for the mine replied "no." I am not persuaded and instead find that there is ample evidence in the record to demonstrate that Thomas engaged in a number of activities commencing both prior to the MSHA citation issued in January and after.

b. Adverse Action

Pursuant to the provisions of the Mine Act, the Commission has defined "adverse action" to mean "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). Thomas was suspended without pay from CalPortland on January 25, 2018, pending an investigation into the events that resulted in the January 24, 2018, MSHA citation. Demers, CalPortland's Marine Manager, sent Thomas a draft termination memo on January 30, 2018. After reading that email on January 31, 2018, Thomas reasonably believed he had been fired from his employment. On February 9, 2018, CalPortland's Human Resources Manager sent Thomas a letter explaining that, in their view, Thomas had decided to voluntarily resign his position by failing to contact CalPortland by February 8, as had been requested in a February 5, 2018 letter to Thomas. Thomas was first suspended and then terminated from his employment by email on January 30, 2018, with a follow up written termination effective February 9, 2018 and therefore has shown several adverse actions that were taken against him.

c. Discriminatory Motive

Thomas must next demonstrate that his protected activity is connected to the adverse action. A complainant is not required to provide direct evidence of discriminatory motive; "circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner*, 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). Factors that may tend to prove a discriminatory motive for the adverse action include the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, the timing of the adverse action in relation to the protected activity, and disparate treatment as compared to other employees. *Turner*, 33 FMSHRC at 1066; *Sec'y on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In this case, two factors are most persuasive: knowledge and timing. An operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon*, 3 FMSHRC at 2510. Demers, the manager at the mine and the person who ultimately recommended termination, knew of Thomas' protected activity. Thomas testified that he had complained to Demers repeatedly about the long work hours and the impact those hours had on his safety and health. McMillian made similar complaints to Demers. In addition, Thomas complained about the use of workers who were not adequately trained and he refused to sign the task training certificates. In some instances, Demers signed them without having worked

alongside those being trained. Demers denied that he had conversations about long hours or training, but instead remembered a conversation about Thomas wanting a day off. McMillian explained that shortly after the many conversations about safety and training, Demers showed up to take Thomas' place while he was out sick and told McMillan at that time that Thomas was done working at CalPortland. Demers was upset about Thomas' actions, not only wanting a day off, but the related issues of safety, long hours, and training. Based on my observations of the demeanor of the witnesses at hearing, I credit Thomas' and McMillan's testimony on this matter, over Demers'testimony, which appeared rehearsed.

Next, Demers was aware of Thomas'discussions with the MSHA inspector on January 24 and 25. Thomas handed the phone to Inspector Johnson so he could speak with Demers on January 24, and Thomas spoke to the inspector in front of Demers on January 25, shortly before his suspension became effective. Additionally, Demers had a number of follow up discussions with the inspector wherein the information provided by Thomas was discussed. Demers indicates that he did not tell McAuley or Strickland about the actions taken by Thomas, but it was Demers who pushed for termination and made the initial recommendation to fire Thomas. Under Commission case law, Demers' knowledge of Thomas' protected activity is therefore imputed to McAuley and Strickland. *See Con Ag., Inc. v. Sec'y*, 897 F.3d 693, 702 (6th Cir. 2018) (finding that the ALJ reasonably imputed a mine manager's knowledge of a miner's protected activity to upper management in making a termination decision).

Timing is another factor that weighs in favor of Thomas. The Commission has noted that it "applies no hard and fast criteria in determining coincidence in time . . . [s]urrounding factors and circumstances may influence the effect to be given." *Hicks v. Cobra Mining Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). According to testimony at hearing, both Thomas and McMillan made repeated safety and health complaints to Demers in the months leading up to Thomas' suspension and termination. During that same time frame, they consistently complained about the lack of task training that the temporary dredge barge workers were receiving. In mid-November 2017, Thomas requested a sick day but Demers was reluctant to approve the request because he did not have enough workers for the dredge and became angry with Thomas. McMillan testified that immediately following the sick day disagreement, Demers wanted Thomas gone from CalPortland. Thomas testified that he thought their disagreement had been settled.

Finally, Thomas testified that Demers continued to brush off his safety complaints, suggesting hostility toward the protected activity. Just weeks after his complaints, Thomas was observed without his life jacket on the barge and discussed the matter with the inspector, resulting in a citation. Demers was justifiably upset that Thomas violated the Mine Act by failing to wear his PFD while working on the dredge and later failed to respond to all of the questions asked by Wood regarding the citation. However, the mine insists that Thomas was not terminated for either of those actions, but was instead terminated because he violated the mine's attendance policy in part by failing to show up for a requested meeting. Yet, Thomas advised his supervisor that he would not attend the meeting and no further effort was made by the mine to reschedule the meeting, or gather more information from Thomas.

There is no evidence in the record to support an argument by CalPortland that Thomas was treated like other employees who violated a safety rule. In fact, no evidence in the record suggests that violating a safety rule is the type of offense that leads to automatic termination. Nor is there any evidence to demonstrate that the failure of a long term employee to answer the several questions asked by a member of the safety department is an offense that leads to firing at Calportland. At hearing, the mine presented some evidence regarding employee discipline but nothing to indicate how the mine operator normally handled incidents where an employee's activity resulted in a citation. Thomas worked for the mine for 16 years without any safety related incident, and yet, he was summarily terminated for this violation in Demers' email.

CalPortland continues to deny that Thomas was terminated for violating a safety rule, and instead argues that he was terminated in part for failing to comply with an investigation into the incident, thereby leading to the ultimate allegation that he violated the attendance policy. The pattern and reasoning the mine posits is not persuasive. Thomas failed to answer some questions of Jeff Woods and immediately Demers and McAuley determined he was not cooperative. Still Thomas continued to submit further written information as requested. Thomas cancelled a meeting at the mine only after receiving an email letting him know he was being fired. No further phone calls, texts, or emails (the method of communication throughout the incident), were sent to Thomas to discuss the matter or attempt to reschedule or gather further information. Instead for the first time, a letter was mailed from the human resources department.

I find that there is sufficient circumstantial evidence to demonstrate a connection between Thomas' discharge and his protected activity. Demers said he would get rid of Thomas shortly after the first discussions of safety regarding long hours and task training. Additionally, Demers decided to terminate Thomas immediately following the discussion with MSHA without considering his past history or long-term employment with the mine. Finally, Demers asserts that Thomas did not cooperate with the investigation, but the only person who could testify about that lack of cooperation, Jeff Woods, was noticeably absent from the hearing.

d. Operator's Rebuttal

CalPortland denies that Thomas was terminated in violation of the Mine Act, and argues instead that no protected activity occurred and that any adverse action was not motivated in any part by protected activity. As discussed in more detail above, I have found that Thomas engaged in protected activity by making safety complaints, voicing concerns about task training, speaking with the MSHA inspector, and notifying the mine that he was filing a discrimination complaint against the mine. The mine argues that Thomas was terminated, not for any reason related to that protected activity but, for a violation of the company attendance policy. Based on the evidence available to me, I find that CalPortland has failed to demonstrate that the termination of Thomas' employment was in no part related to his protected activity and therefore, Calportland has failed to rebut Thomas' prima facie case.

CalPortland presented witness testimony in an effort to justify firing Thomas based on his violation of the PFD safety rule, along with his alleged unwillingness to cooperate in the safety investigation. Company representatives testified at great length about the safety and training programs at the mine. All of the witnesses agreed that the mine's safety plan includes a rule

mandating that employees wear a PFD while on the dredge and, for the most part, life jackets are worn in accordance with that rule. Demers, Thomas' immediate supervisor, spent a majority of his testimony explaining how serious it was not to wear a PFD, and what could happen if someone fell into the river without wearing a PFD. Both Demers and Chad Blanchard,[3] the corporate safety director, testified that they had never seen anyone on deck without a PFD. However, McMillan said that he observed another supervisor enter onto the barge several days after the January 24 incident without a life jacket. It is unrefuted that it is important to wear a flotation device on the barge and failure to wear it could result in a serious injury were the miner to fall into the very cold waters of the Columbia River.

CalPortland points out that it relied on the information provided by Inspector Johnson, regarding Thomas' actions and that the mine took the inspector at his word as set forth in the citation, even though the citation conflicts with the information provided by Thomas and McMillan. The citation states that Inspector Johnson saw Thomas walking around the deck and performing work on the ladder that was within 8 feet of the edge of the dredge barge deck in an elevated position approximately 3 feet (or 3 ladder rungs) above deck level. Resp. Ex. I. While the mine is correct to have concerns about the ramifications of not wearing a PFD and receiving a citation, it asserts that it did not terminate Thomas for those reasons. Instead, CalPortland argues that there is no evidence that Thomas would have been terminated based on Demers' recommendation and argues Thomas was actually terminated in part for his failure to cooperate in an internal investigation regarding the citation. Demers' memo recommending firing includes failure to cooperate, prior to Thomas making a decision not to attend another meeting with the mine. Therefore, the uncooperativeness alleged by Calportland in Demers email includes the single incident with Woods. After that memo, Thomas informed Demers that he would not attend the next scheduled meeting, which resulted in a finding that Thomas had violated the attendance policy. The alleged violation of the attendance policy, then, is based upon Thomas' decision not to attend the meeting of January 31. However, Thomas did provide notice of his intent not to attend the meeting to his supervisor and the meeting was not rescheduled nor were any other directions given to Thomas.

CalPortland's witnesses agreed that the company typically conducts an investigation following a workplace safety incident. While company witnesses testified that conducting an investigation was a standard practice, there was little discussion as to the process those investigations routinely follow. In this instance, according to McAuley, it was Demers' job, as the manager of the Sanderling dredge, to lead the investigation into the safety incident with assistance from someone in the safety department, which in this case was Woods. McAuley denied having any input into the investigatory process or the disciplinary recommendation, stating that it was up to Demers to draft an initial opinion as to discipline, which would then be vetted through human resources and brought to McAuley for final approval.

Here, the investigation into Thomas' conduct began shortly after the incident on January 24. Demers and McAuley held or scheduled numerous meetings with Thomas both before and following his suspension from work. Thomas argues that he cooperated with the investigation by speaking with Inspector Johnson and communicating with management both on site and at the

[3] Blanchard was not involved in the Thomas investigation, but testified that Woods told him about the citation.

Scappoose location regarding the incident on January 24, 2018. Thomas also testified that he participated in the January 29 meeting, which was the only one attended by Woods, but stopped answering questions once it became clear to him that Demers and Woods had little interest in his description of the incident. The investigation involved four statements: three written by Thomas and one written by McMillan. McMillan's written statement did not state conclusively whether or not he observed Thomas without a PFD while on the ladder, but he made additional statements and testified at hearing, suggesting that he agreed with Thomas' characterization of the incident. The observations of the inspector as written in the citation were also part of the investigation. However, Ison, the towboat captain, was not questioned by CalPortland, and Woods, the safety manager in charge of the investigation, gave no recorded statement or opinion as to the nature or outcome of the investigation. Woods notably did not testify and the only mention of Woods in the testimony at hearing came from Demers, who claimed that Woods was not happy with Thomas' responses to questioning and left the room. Following that January 29, 2018 meeting, Demers decided that Thomas had been uncooperative with the investigatory process, relayed his opinion to McAuley, and together they contacted Strickland in human resources. Given the statements provided by Thomas, as well as his attendance at various meetings, I find that the arguments regarding Thomas' refusal to cooperate in the investigation are pretext.

Immediately after contacting Strickland, Demers recommended in writing that Thomas be fired due to the seriousness of the PFD rule violation and for his failure to cooperate in the company's investigation process. Demers gave no further justification for his recommendation to fire a 16-year employee with no other safety violations on his record but, instead, sent his recommendation by email to at least 50 contractors and co-workers of Thomas, albeit inadvertently. Demers did not base his recommendation on any apparent company discipline policy. The evidence shows, however, that Thomas did participate in the investigation and only became uncooperative after repeated questioning about issues he had already addressed.[4] In the five days following the incident, as described above, Thomas prepared and submitted three statements while suspended from work and participated in at least three meetings. While Thomas did refuse to answer a few questions at the last meeting with Woods, he continued with the investigation by providing a lengthier written statement regarding the incident. Therefore, I find that Demers explanation regarding his recommendation to fire Thomas does not have a basis in fact. Instead, based on his description of the incident and ensuing investigation, Demers seemed unconcerned with objectively assessing the situation. Nor did he seem concerned about actually completing the investigation and considering the recommendations of the safety department.

Next, I find that Demers and McAuley were overly rehearsed in their testimony, using or agreeing to terminology that was coined to spin the facts in CalPortland's favor. Most of the questioning was in the form of leading, and often by virtue of having documents, including emails, in front of the witnesses to bolster their testimony. For example, Demers testified that he believed what the inspector told him about Thomas' "PFD misconduct," and that same term was used by each witness for CalPortland. Demers and McAuley were careful to note that they

[4] In the context of a retaliation case under a different statute, it has been recognized that a company's justification for interrogating an employee was pretextual when the company already knew the answers to the questions it was asking that employee. *United Serv. Auto. Ass'n v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004).

decided to suspend Thomas "pending an investigation" into the facts surrounding the citation, rather than as discipline for the alleged conduct. While some of this testimony is accurate, use of the same coined term by each witness causes the evidence to lose its element of truthfulness. Therefore, I do not find either Demers or McAuley to be credible witnesses.

Furthermore, Woods' absence at hearing leads me to the conclusion that he may have had some unfavorable information about CalPortland's investigation into the incident. "It is well established that an adverse inference may be drawn against a party if the party fails to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party." *Sec'y of Labor v. Virginia Slate Co.*, 23 FMSHRC 482, 485 (May 2001). Woods was a main participant in CalPortland's investigation and led the January 29, 2018 meeting. While the mine acknowledged that Woods is now a former employee, there was no indication that the mine made any attempt to contact him.

e. Affirmative Defense

Having found that Thomas has established a prima facie case of discrimination, I must now consider whether CalPortland discharged him in part for unprotected activity and "would have taken the adverse action for the unprotected activity alone." *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley*, 4 FMSHRC at 993. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has stated that, "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

An affirmative defense requires more than showing that the operator's business justification is plausible. As the Commission has noted, evidence of practices and policies consistent with the adverse action taken may be persuasive support of an operator's defense of justifiable cause. *Bradley*, 4 FMSHRC at 993. CalPortland's attendance policy was introduced into evidence, along with examples of individuals who were designated as having "voluntarily resigned" for violating the policy. Resp. Ex. FF. However, I find that the practices and policies described by Calportland are not consistent with the evidence in the record. The justification is weak and implausible. I find instead that the mine has failed to demonstrate that it would have taken the adverse action based on the mine's attendance policy alone.

First, the mine did not meet its burden to show that Thomas' violation of a safety regulation is behavior that results in immediate termination, or is an activity that alone would have justified termination. Instead, the mine demonstrated it is a serious violation and it could

result in serious injury. There is no indication that Thomas had a history of violating safety regulations or that he had received any kind of written reprimand, or even that there was a policy of progressive discipline. There was some evidence that Thomas had a disagreement with Demers in November, and that one time in the past he had received a warning about some behavior but, the mine witnesses testified that neither of those actions had anything to do with his termination. The evidence shows that Thomas worked for CalPortland and on the Sanderling dredge for 16 years without any safety incident, and the record contains no evidence to demonstrate that an employee with such a record would summarily be terminated for violating a safety standard. Second, CalPortland argues that it would have taken action against Thomas because his failure to report to work or respond to management after February 1, 2018, constituted an abandonment of his position. According to the mine, when Thomas did not return calls or respond to the February 5, 2018 letter notifying him he was in violation of the attendance policy, it had no choice but to terminate him based on a voluntary resignation. I am not convinced by CalPortland's asserted justification for terminating Thomas' employment.

The mine argues that Thomas violated the company's attendance policy while he was on suspension, and after he reasonably believed that he had been fired by the mine. No call, text message, or email was made to Thomas lifting the suspension or explaining that the email sent by Demers was not, in fact, a termination of his employment. Thomas had been suspended pending an investigation on January 25, and he continued to participate in the investigation until he received the email from Demers. Based upon the understanding that his employment had been terminated, Thomas cancelled his next meeting, and then spoke with McAuley on February 1. Thomas informed McAuley that he had hired an attorney to file a discrimination complaint. There is no evidence to support how Thomas would have been expected to attend meetings, be part of an internal investigation, or to return to work following those events.

Finally, the timing of the "voluntary resignation" letter fits with the information learned from the mine regarding Thomas' plan to file a complaint of discrimination. Even if McAuley did not hear Thomas' statement regarding the attorney on February 1, 2018, there is no dispute that on or around February 5, 2018, Demers was notified by MSHA that they were not going to pursue a case against Thomas regarding the citation issued to the mine, and that Thomas was intending to file a discrimination case against the mine.[5] During that same timeframe, Strickland sent Thomas the initial attendance policy violation letter. These actions, when viewed in the context of the incident as a whole, suggest that CalPortland used its attendance policy as pretext for terminating Thomas' employment. Based on the evidence, I do not believe that Thomas abandoned his position with CalPortland; instead, he was first fired as a result of the email sent by Demers and then fired a second time by a formal letter based on an attendance policy violation that he could not cure.

[5] CalPortland addresses this phone call in its post-hearing brief, and argues that counsel for Thomas tried to suggest at hearing that the MSHA investigator violated her duty of confidentiality by warning Demers that Thomas' discrimination complaint was imminent. I have considered the mine's argument and, based on my review of the testimony, I find that it is wholly without merit.

III. PENALTY

Thomas has brought this case individually without the assistance of the Secretary and thus no penalty has been proposed by the Secretary. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision is being sent to the Secretary for the assessment of a civil penalty against CalPortland Company within 45 days.

IV. DAMAGES AND RELIEF

The Mine Act gives the Commission the authority in proceedings under Section 105(c)(3) to assess against an operator "a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner." 30 U.S.C. § 815(c)(3). The Commission has explained that back pay "is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package." *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993). An award of attorney's fees is "a matter that lies within the sound discretion of the trial judge." *Sec'y on behalf of Ribel v. E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2017 (Dec. 1985).

Prior to hearing, the parties were given the opportunity to submit calculations of back pay and other damages potentially owed to Thomas. Counsel for Thomas submitted proposed relief on August 1, 2018. CalPortland did not submit back pay calculations. However, both parties stipulated that Thomas earned $26.90 as an hourly employee and worked 53.9 hours on average per week while employed by CalPortland. Jt. Stips. ¶¶ 3-4.[6] Both parties also stipulated to monthly totals for certain benefits, including medical insurance, life insurance, short-term disability insurance, and voluntary accident, death, and dismemberment insurance. Am. Jt. Stips ¶¶ B.1, 3-5. Those amounts are:

- Lost benefits:
  - $2,105.01 per month for medical insurance;
  - $12.77 per month for basic life insurance;
  - $2.60 per month for short-term disability insurance;
  - $2.02 per month for voluntary accident, death, and dismemberment insurance;
  - 12% per year of base pay towards company pension benefits.

The requests for back pay, lost benefits, and attorney's fees are appropriate. I find that Thomas is entitled to total back pay of $49,281.09. The total back pay amount reflects a weekly rate of approximately $1,637.00 that Thomas would have earned at CalPortland from January 26 through November 30, minus a weekly rate of approximately $852.00 that he has earned at A-1 Redi Mix from May 27 through November 30, 2018. The back pay amount will increase until Thomas is reinstated to his former position and full payment is made with interest. I further find that Thomas is entitled to the monetary value of his lost insurance benefits, in the amount of $21,223.30, calculated monthly from February through November 2018. Additionally, Thomas is

[6] Based on payroll reports submitted into evidence as Respondent's Exhibit EE, Thomas was paid at an overtime rate of $40.35 beginning in August 2017.

entitled to lost company pension benefits, which amounts to $5,681.28 and is calculated from the total base pay he would have earned from January 26 through November 30, 2018, at CalPortland. In sum, Thomas is due a total payment of $76,185.67, calculated through November 30.

Thomas is also entitled to reasonable attorneys' fees. 30 U.S.C. § 815(c)(3). To evaluate reasonableness, courts typically consider an attorney's reasonable hourly rate and whether the number of hours expended on the case was reasonable. *See Perdue v. Kenny A. ex rel. Winn*, 599 U.S. 542, 551-52 (2010). While counsel for Thomas submitted a proposed award amount of at least $16,000, counsel did not provide the information necessary to evaluate the reasonableness of those attorneys' fees. Therefore, subject to the submission of itemized invoices, this Court will consider the reasonableness of counsel's fees and set an appropriate award. Counsel for Thomas has 10 days from the date of this order to submit the requested invoices to opposing counsel and this Court. Counsel for CalPortland will then have 10 days following receipt of the invoices to agree to or object to the reasonableness of Thomas' attorneys' fees. The Court will issue an award for reasonable attorneys' fees prior to the date on which this decision becomes final.

Under Commission case law, Thomas is entitled to interest until the damages' amount is paid at the short-term Federal underpayment rate established by the IRS. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988).

V. ORDER

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

Respondent is further **ORDERED** to pay back pay and lost benefits to Thomas in the amount of $76,185.67 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. All back pay and benefits' awards, including attorneys' fees, shall be recalculated and brought up to date with interest as of the date paid, and shall continue until Thomas is reinstated. *See Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2053 n.1 (Dec. 1983). Such payments shall be made within 30 days of the date of this decision. This case is referred to MSHA for assessment of a civil penalty that must be filed within 45 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. MARTIN MARIETTA MATERIALS SOUTHWEST, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2018-0228 A.C. No. 41-01335-459015 Mine: Beckmann Quarry

DECISION

Appearances: Christopher D. Lopez-Loftis, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801.[1] This case involves Citation No. 9356617 issued to Martin Marietta Materials Southwest, Inc. ("Martin Marietta" or "Respondent"), in August 2017. The Secretary proposed a penalty of $1,806.00. The citation was designated as significant and substantial (S&S), reasonably likely to result in an injury causing lost workdays or restricted duty, and involving high negligence on the part of the operator.

A hearing was held on September 12, 2018, in San Antonio, Texas. MSHA Inspector Emilio Perales testified for the Secretary. Howard Evans, the primary superintendent at the Beckmann Quarry, testified for Martin Marietta. After fully considering the testimony and evidence presented at hearing, I find that the Secretary met his burden of proof in establishing the violation as issued. I assess the proposed penalty of $1,806.00.

[1] In this decision, the transcript, the joint stipulations, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Jt. Stips.," "Sec'y Ex. #," and "Resp. Ex. #," respectively.

II. STIPULATIONS OF FACT

The parties entered the following stipulations of fact into the record at hearing:

1. Martin Marietta Materials Southwest, Inc. (hereinafter, "Respondent") was at all times relevant to this proceeding engaged in mining activities at the Beckmann Quarry Mine.

2. Respondent's mining operations affect interstate commerce.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (The "Mine Act" or "Act").

4. Respondent is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Beckmann Quarry Mine (Federal Mine I.D. No., Mine ID 41-01335) where the contested citation in this proceeding was issued.

5. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.

6. On or about August 29, 2017, Mine Safety and Health Administration ("MSHA") Inspector Emilio Perales was acting as a duly authorized representatives [sic] of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation from docket CENT 2018-0228, at issue in this proceeding.

7. The citation at issue in this proceeding was properly served upon Respondent as required by the Act and was properly contested by Respondent.

8. The citation at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing their [sic] issuance. Materials published on MSHA's website or otherwise published by MSHA may also be admitted into evidence by stipulation for the purpose of establishing their issuance and availability. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.

9. Respondent demonstrated good faith in abating the violations.

10. The penalties proposed by the Secretary in this case will not affect the ability of Respondent to continue in business.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

On August 29, 2017, MSHA Inspector Emilio Perales[2] visited the Beckmann Quarry to conduct an inspection. Tr. 11. He met with Robert Deware, the acting plant manager, and Howard Evans, the supervisor for the primary section of the mine. Tr. 11. Perales explained the general operation at the mine: workers drill holes in a pattern at the top of the wall, then fill them with explosives; they initiate a blast, which causes material to come down from the wall; and loaders pick up the material to be hauled away and processed. Tr. 17, 27. Before workers are allowed near the wall, the operator must check the area for stability and address any loose materials. Tr. 16, 27. In a process known as scaling, miners use a rock breaker to knock down any loose material. Tr. 14, 30. Perales explained that scaling is practiced industry-wide and must be done after every shot. Tr. 26, 27. The scaling process is the subject of this citation.

Perales and the inspection party began the inspection at the highwall. Perales observed loose, unconsolidated material in several places on the highwall. A portion of the highwall had already been mucked out, and Perales observed loose unconsolidated rock on the corner that had not been scaled. Tr. 12. There was also a "back break" to one side of the corner. Tr. 12. Perales explained that "back breakage" refers to a crack in the rock indicating that energy has gone back into the highwall, causing material to loosen. Tr. 16. He observed a significant amount of loose material in the breakage. Tr. 16. Adjacent to the highwall was an inactive section, and Perales observed loose rock there, as well. Tr. 12.

The Secretary's Exhibits 2-1 and 2-2 are photographs taken from the southwest[3] corner of the lower pit bench. There are loose boulders apparent in both photos. Sec'y Exs. 2-1, 2-2. Exhibit 2-1 shows the surface of the bench and overlooks the inactive south wall. Tr. 13-14. Exhibit 2-2 overlooks the west wall, the active area.[4] Tr. 15. The back breakage is located along

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[2] Emilio Perales has worked as a mine inspector for MSHA for 20 years. Tr. 8. Prior to that he was employed in the mining industry for 16 years in shipping, production, and as a safety manager. Tr. 9. His work experience was at the Beckmann quarry, the mine that is the subject of this proceeding. Tr. 8-9. As a safety manager, Perales managed the safety aspects of drilling, loading, and blasting on highwalls, and he has inspected many mines with highwalls. Tr. 10. Perales has also completed the course of regular training required of inspectors. Tr. 8.

[3] Perales referred to this corner as the southeast corner, while Evans called it the southwest corner. Tr. 13, 37. I will refer to it as the southwest corner for consistency.

[4] There was some confusion in the witnesses' testimony as to the meaning of the terms "active" and "inactive" and which areas of the mine were active. The inspector referred to the area with the partial berm shown in Exhibits 2-1, D-7, and D-8 as "inactive." Tr. 13-14, 21, 32. He referred to the other area, where there was a loader, tire tracks, and back breakage, as "active." Tr. 23, 32. Evans at first referred to the area with the partial berm as "done," "inactive," and "mined out." Tr. 36, 38, 48. He then stated that that area was "part of the active mine," and later that it was the same area as the area with the loader, but seen from a different angle. Tr. 52-

(continued…)

the active side. Sec'y Ex. 2-2. Perales observed that material had been removed from the active area after blasting, which would have required a loader to make repeated trips to the face. Tr. 15. A loader is visible in Exhibit 2-2, and Perales observed someone operating it at the time of the inspection. Sec'y Ex. 2-2; Tr. 19. Respondent's Exhibit D-5 shows a closer view of the area in Exhibit 2-2. There are tire tracks from a loader close to the highwall. Resp. Ex. D-5; Tr. 21, 30, 45. Perales observed the loader going back and forth to load material, which exposed the operator to the highwall repeatedly. Tr. 23. There were no photographs introduced to show the highwall above where the loader was working. Tr. 28. Respondent's Exhibits D-7 and D-8 are photographs of the inactive wall shown in Exhibit 2-1. Tr. 21, 31, 32. There is a berm at the end of the wall, but most of the length of the wall is not bermed. Resp. Exs. D-7, D-8. At the inspection, Perales discussed the condition with Evans, who told him the plant manager had directed the crew to clean up the area. Tr. 24. Perales interpreted this to mean that Evans had directed miners to remove the berms. Tr. 21, 24, 30. Perales explained that berms are used to keep people away from an inactive highwall. Tr. 21. They are placed some distance away from the highwall so that if any rock falls, it will fall behind the berm. Tr. 21, 22. A loader operator working to remove the berms would be exposed to rock falls from the inactive highwall. Tr. 15.

Perales explained that a loader operator working near the highwall would be exposed to hazardous conditions. Tr. 15, 23. He was concerned that material could fall from the highwall and hit the cab of the loader. Tr. 24. A rock could potentially come through the windshield, and depending on the size of the rock, it could cause serious injury. Tr. 24, 25. He noted that some large loose rocks were visible in the photos. Tr. 25.

To terminate the violation, the operator installed berms along the inactive part of the pit and used a rock breaker to scale the active area. Tr. 19. The Secretary's Exhibit 2-3 shows the highwall after it was scaled. Tr. 19.

Howard Evans, the superintendent for the primary section of the mine, was present during the inspection and testified at hearing. He had been in that position for eight months at the time, but it was his first inspection as a superintendent. Tr. 35. He believed there had been a misunderstanding with the inspector regarding the berms in the inactive area. Tr. 35. Evans recalled telling the inspector that his boss, Chance Allen, had instructed him to clean the area. Tr. 35. But the area Allen was referring to was the catch bench between the upper level and the floor. Tr. 36; *see* Resp. Ex. D-8. The purpose of the catch bench is to catch material that may fall from the upper bench to keep it from falling to the floor. Tr. 36. Allen wanted the catch bench cleaned because that part of the mine had been mined out and was designated for reclamation. Tr. 36. Evans testified that no berms were removed in the area. Tr. 37. He stated that miners had

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[4] (…continued)
53. In response to further questions, he referred to the area with the loader as both active and inactive. Tr. 54-56. Evans then claimed he had been confused about the definition of "active," and had only meant that miners were not presently digging and mucking in some areas. Tr. 56. In terms of whether mining would continue on the wall, he stated that only the south wall was completely inactive. Tr. 56. The inspector's testimony was more consistent, and I credit his account. I find that the south wall was "inactive" in the sense that mining would not continue in that direction, while the west wall was actively being mined.

begun construction on a berm in the inactive area prior to the inspection, but that it takes several days to build a berm. Tr. 37. He did not see anyone working in the inactive area other than the miners building the berm. Tr. 45. He admitted that there was loose material in the area and it looked like the wall had not been scaled. Tr. 51-52. Regarding the active wall, Evans believed that the back breakage observed by the inspector did not pose a hazard. Tr. 39. He said that back breakage is common, and only poses a problem if it is deep, which this was not. Tr. 39, 47, 49. He stated that the wall had been scaled to a 45-degree angle using a rock breaker, and he believed this would prevent any material from falling. Tr. 40. However, he later admitted that there were loose rocks in the Secretary's Exhibit 2-1 showing the southwest corner and said that that area had probably not been scaled. Tr. 51-52. He stated that as far as he could recall, the wall further down where the loader was working was "in pretty good shape" with no loose material, and he did not believe it posed any danger to the loader operator shown in Exhibit 2-2. Tr. 40, 41. No other work was being done along the west wall at the time. Tr. 42. Evans also testified that miners are trained to watch the highwall as they are loading and to stay at a 45-degree angle to the wall. Tr. 41. He noted that the loaders are 60 feet long with 26 feet from the tip of the bucket to the front of the cab. Tr. 42. The large loaders are used in that area in order to keep the loader operators farther from the wall. Tr. 42.

IV. ANALYSIS

A. The Violation

Perales cited the mine for a violation of 30 C.F.R. § 56.3131. That standard requires that

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

30 C.F.R. § 56.3131.

The inspector testified that he observed loose material and back breakage along the lower bench in the corner of the pit. The photographs from the day of the inspection clearly show large loose boulders on the west wall. Sec'y Ex. 2-1, 2-2; Resp. Ex. D-1, D-4, D-5, D-9, D-10. The photographs also show obvious cracks or back breakage along the west wall. I credit the inspector's testimony that the back breakage created a fall-of-material hazard. Tr. 16. While Evans at one point testified that the west wall had been scaled to a 45-degree angle, he later acknowledged that there were loose rocks indicating that the area had not been scaled. *See* Tr. 40, 51-52; Resp. Br. 6. The angle of repose is not readily apparent from the photographs. Even if the area was indeed scaled, the scaling was not adequate. There was still loose material present that created a hazard to miners working below.

Martin Marietta argues that there was no one working in the area because it had already been mucked out. Resp. Br. 5. However, the witnesses' descriptions of the mining cycle indicate

that the loose rocks would most likely arise during blasting. Tr. 16-17, 39. Thus, they were most likely present when the loader approached the corner to remove material, leaving the tire tracks observed by the inspector. Moreover, there was nothing to prevent the loader observed on the day of the inspection from approaching the corner. The area where that loader was working was part of the same active wall. The fall-of-material hazard was present in an area where a miner was working.

The inspector based his violation in part on information indicating that miners had been working to remove berms near the south wall. The testimony of Evans indicated that in fact the mine was in the process of constructing berms in that area. Resp. Br. 5. Thus, I base my findings on the activity of the loader and the loose rocks and back breakage on the west wall. Those conditions created a hazard to the loader operator working below, and I find that a violation occurred.

B. Significant and Substantial

The Secretary alleges that the violation was reasonably likely to cause injury resulting in lost workdays or restricted duty and was S&S.

A violation is significant and substantial (S&S) "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984). The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id*. at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280–81 (Oct. 2010); *see also W. Ridge Res., Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

Here, the Secretary has proven a violation of a mandatory safety standard, 30 C.F.R. § 56.3131. The hazard addressed by the standard is that of loose material falling from the wall when a miner is working below. Perales testified that a vibration could cause material to come down. He observed the loader working in the area, and there were tire tracks from a loader close to the cited area. I find that it was reasonably likely that material would fall while the loader was working below, satisfying the second *Mathies* element.

The third *Mathies* element requires proof that the hazard created was reasonably likely to result in injury. *Musser Eng'g, Inc.,* 32 FMSHRC at 1280–81. Respondent argues that injury was unlikely because no one was assigned to work directly below the loose rocks. Resp. Br. 8. Respondent further argues that even if a miner did enter the area, loader operators are required to move at a 45-degree angle, allowing them to see any falling material, and the length of the loader would keep the operator at least 26 feet from the wall. Resp. Br. 8-9. Even accepting that a miner was unlikely to enter the area before the next blasting cycle, the tire tracks indicate that a loader operator did approach the wall while the hazard was present. The inspector and Evans gave differing opinions on whether a loader operator would be exposed to injury from a falling rock. I found the inspector to be a credible witness and accept his testimony on this point. Based on the proximity of the tire tracks to the wall, I find that it was reasonably likely that a rock would strike the loader if it fell. The inspector noted that a rock could come through the window of the loader and strike the operator. The rocks were of varying sizes, but he testified that even a small rock could contribute to a fatal injury. I credit his explanation and find that the violation was reasonably likely to result in a reasonably serious injury. I find that the violation was S&S and affirm the gravity as issued.

C. Negligence

The Secretary alleges that the violation involved high negligence on the part of the operator.

In evaluating negligence, the Commission employs a traditional negligence analysis based on whether an operator failed to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Operators are held to a high standard of care under the Mine Act. *Am. Coal Co*., 38 FMSHRC 2062, 2083 (Aug. 2016); *Brody*, 37 FMSHRC at 1702. The Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances. *Brody*, 37 FMSHRC at 1702. High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

The inspector testified that it is an industry-wide practice to inspect the highwall and scale after every shot before work can proceed. The loose rocks and breakage here were obvious and should have been noticed and addressed before the loader was allowed to work in the area. I affirm the high negligence designation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the

> operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Secretary proposed a penalty of $1,806.00. The mine has not been cited under this standard in the past 15 months. Sec'y Ex. 3. The parties stipulated that the violation was abated in good faith and the proposed penalty will not affect Respondent's ability to remain in business. Jt. Stips. ¶¶ 9, 10. As discussed above, the violation was reasonably likely to cause an injury resulting in lost workdays or restricted duty and involved high negligence on the part of the operator. I find that the proposed penalty of $1,806.00 is appropriate to the violation.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$1,806.00** within 30 days of this order.[5]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[5] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution: (U.S. First Class Mail)

Christopher D. Lopez-Loftis, U.S. Department of Labor, Office of the Solicitor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Karen L. Johnston, Benjamin J. Ross, Jackson Kelly PLLC, 1099 Eighteenth Street, Suite 2150, Denver, CO 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH ST. SUITE 443
DENVER, CO 80202-2500
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December 12, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. CENT 2018-0243 A.C. No. 41-00009-460832
v.	
CACTUS CANYON QUARRIES, INC., Respondent.	Mine: Fairland Plant & Qys

DECISION

Appearances: Christopher D. Lopez-Loftis, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Andy Carson, Marble Falls, Texas, for Respondent.

Before: Judge Simonton

I. INTRODUCTION

This case is before me upon the Secretary's petition for assessment of civil penalty filed in accordance with the provisions of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801 *et. seq*.[1] The case involves two section 104(a) citations issued to Cactus Canyon Quarries, Inc. ("CCQ" or "Respondent") for a total penalty of $236.00.

A hearing was held on September 13, 2018, in San Antonio, Texas. MSHA Inspector William Bonneau testified for the Secretary. Quarry owner Andy Carson and CCQ miner Jesus Garcia testified for the Respondent. The parties agreed to the following stipulations of fact:

1. The Cactus Canyon Quarries, Inc. Fairland Plant & Qys is a mine as defined under Section 3(h) of the Mine Act.

2. The Southern Aggregates Plant 9 is subject to the Federal Mine Safety and Health Act of 1977.

[1] In this decision, the parties' Joint Stipulations, the transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip. #," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

3. The Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding administrative law judge has the authority to hear the case and decision.

4. At all times relevant to these proceedings, the products of the subject mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

5. Copies of the citation in contest are authentic and a copy was served on the Respondent by an Authorized Representative of the Secretary employed by the Mine Safety and Health Administration.

6. The individual whose signature appears in Block 22 of the contested citation at issue in this proceeding is an Authorized Representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citation at issue in this proceeding.

7. The Respondent timely contested the violation.

8. The Respondent abated the citation timely and in good faith.

See Jt. Stip; Ex. S–7. In addition, the parties stipulated at hearing that CCQ had not been cited for broken brake lights or headlights in the past. Tr. 139-40. Based upon the parties' stipulations and my review of the witness testimony, the entire record, and the parties' post-hearing briefs, I make the following findings.

II. LEGAL PRINCIPLES

A. Establishing a Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary's burden as:

> The 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."

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ).

B. 30 C.F.R. § 56.14100(b)

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

C. Fair Notice

The Secretary must provide fair notice of the requirements of broadly written safety standards. *See Sunbelt Rentals Inc.*, 38 FMSHRC 1619, 1626 (July 2016); *see also Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1992); *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981). The Commission has consistently applied the objective reasonably prudent person standard to resolve issues of notice. *Id*. at 2125. That test examines whether a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co*., 12 FMSHRC 2409, 2416 (Nov. 1990). The Commission looks to a wide array of factors in making that inquiry, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history and purpose, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulatory community of its interpretation, and whether the operator would have been aware of the requirement of the standard because of past case precedent. *See Sunbelt Rentals*, 38 FMSHRC at 1627.

D. Gravity

The gravity penalty criterion under § 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147) (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). An analysis of gravity focuses on the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected, and must be considered assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

E. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA's determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015)). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id*. Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically." *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

F. Penalty

It is well established that Commission Administrative Law Judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Fairland Plant & Qys ("Quarry") is an aggregate mine located in Marble Falls, Texas, owned and operated by Cactus Canyon Quarries. On January 30, 2018, MSHA Inspector

William Bonneau inspected the Quarry and issued the two citations challenged here.[2] Both citations allege violations of 30 C.F.R. § 56.14100(b) for non-functioning brake lights on a service truck and for broken or missing headlights and brake lights on four haul trucks, respectively.[3]

CCQ argues that both citations should be vacated. CCQ contends that the language of § 56.14100(b) does not explicitly require vehicles to have functional headlights and brake lights at all times. Respondent's Post-Hearing Brief ("Resp. Br.") at 1-2. Rather, liability under § 56.14100(b) depends on the conditions at the mine in reasonably determining what constitutes a defect affecting safety. *Id*. CCQ argues that the Quarry's low traffic flow and restriction of operations to daytime and optimal weather ensure that the broken and missing lights on the various trucks do not affect safety. Resp. Br. at 2-3; Tr. 20-21, 119, 121. Finally, CCQ argues that it was not given fair notice by MSHA that broken headlights or brake lights on equipment violated § 56.14100(b). Respondent's Reply Brief ("Resp. Rep.") at 5.

A. The Violations

<u>*Citation No. 9359738*</u>

On January 30, 2018, Inspector Bonneau arrived at the Quarry to conduct a routine inspection. Tr. 25. In accordance with company policy, CCQ's sales manager shut down all Quarry operations upon Bonneau's arrival so that the miners could accompany the inspection. Tr. 25, 28, 54. Bonneau began his inspection with a white F-150 service pickup truck located near the shop. Tr. 30-31, 35. He asked the accompanying miners to test the truck and discovered that the brake lights failed to function. Tr. 30-31, 35. The miners told Bonneau that the lights worked previously but that they were uncertain how long they had not worked. Tr. 31-32. Bonneau issued Citation No. 9359738, which alleged:

> A defect affecting safety was present and had not been corrected in a timely manner. The brake lights on the white shop/service truck did not function when tested. The truck is used throughout the mine site as needed to service the plants and mobile equipment. This condition exposes the driver to serious injuries in the event a rear-end collision occurs while operating the truck throughout the mine site. The lights are a safety feature which should be maintained in functional condition.

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[2] William Bonneau has worked as an MSHA inspector for three years. Tr. 22. He completed all required inspector training at the Mine Academy in Beckley, West Virginia, and conducts an average of 75 inspections annually. Tr. 23. Prior to MSHA, Bonneau served as safety engineer at Sherwin Alumina in Gregory, Texas for eight years. Tr. 23.

[3] Section 56.14100(b) states "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b).

Ex. S–1. Bonneau designated the citation non-S&S, unlikely to result in lost workdays or restricted duty, and the result of Respondent's moderate negligence. *Id*. Respondent terminated the violation by replacing a fuse. Ex. S–1; Tr. 37. The Secretary assessed a penalty of $118.00.

I affirm the violation. There is no dispute that the brake lights on the service truck did not activate when Bonneau and the miners tested them. Ex. S–2; Tr. 31, 125. The defective brake lights also affected safety at the Quarry. Inspector Bonneau testified that brake lights function as a signaling device from the miner driving the truck to other nearby vehicles or miners.[4] Tr. 33-34. The broken brake lights clearly affect the safety of the truck because vehicles travelling behind the truck will be unable to discern when it is slowing down or coming to a stop and bears the risk of a rear-end collision.

CCQ was aware that the brake light did not work for an extensive period of time and did not replace it. Although miners on site were unsure how long the lights were inoperable, Garcia testified that he was aware the brake lights had been out for quite some time, possibly years. Tr. 128-29. When asked why they did not repair the brake lights, both Carson and Garcia testified that CCQ did not pay attention to the matter because they believed functional brake lights to be unnecessary during operating hours. Tr. 128-29. I find that CCQ operated the truck without working brake lights and therefore created a hazard to other persons on the mine site.

CCQ contends that the Secretary cannot prove the defective brake lights created a safety hazard because Inspector Bonneau did not see the truck in operation in conditions where brake lights would be necessary. Resp. Br. at 2-3. It argues that the Quarry is small, does not have a high volume of traffic, and does not operate at night or in bad weather. Resp. Br. at 2. CCQ therefore maintains that the Secretary cannot prove that the inoperable brake lights affected safety at the mine site.

As an initial matter, CCQ's arguments as to the conditions in which the mine operates relate to the gravity determination of likelihood rather than to the fact of violation. *See Walker Stone Co.*, 20 FMSHRC 1218, 1225-26 (Oct. 1998) (ALJ). Defective brake lights affect safety at any time in which vehicles are moving about the mine site. Even attentive drivers operating in clear conditions with little traffic may encounter another vehicle and fail to discern whether it plans to slow down or stop without working brake lights.

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[4] CCQ contends that Inspector Bonneau was not an expert witness and therefore did not have the qualifications necessary to testify as to what constituted a defect and what created a hazard to persons under the standard. Resp. Br. at 2-3. Respondent has made this argument before to no avail. *See Cactus Canyon Quarries of Texas*, 23 FMSHRC 280, 286 (Mar. 2001) (ALJ). In denying CCQ's motion to exclude parts of an inspector's testimony as improper expert testimony, the ALJ in that case held that the conclusions of MSHA Inspectors based on personal observations of what they believe to be violations of mandatory safety standards are not opinions based on scientific, technical, or other specialized knowledge that require an expert. *Id*. The same is true here. Bonneau testified to his personal observation of the truck's broken brake lights, his conversations with miners at the site regarding its operations, and why he believed that the inoperable brake lights violated the standard.

It follows that Inspector Bonneau need not have personally observed the truck in operation to conclude that the defective brake lights created a safety hazard.[5] Inspectors may make inferences regarding violations so long as a rational connection exists between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984). Bonneau determined that the mine was in operation when he arrived to conduct his inspection and gathered through his discussions with miners at the site that multiple vehicles, including the service truck, operated on the site at once. Tr. 60-61. He was not informed that the truck was tagged out or never used, and thus logically concluded that it operated without functional brake lights. The court credits his inference from these facts that the truck's inoperable brake lights affected safety.

The Secretary has proven the violation.

Citation No. 9359739

Inspector Bonneau continued his inspection the following day, this time accompanied by Quarry owner Andy Carson. Tr. 40-41. Bonneau discovered that the headlights and brake lights on four haul trucks were either out or missing. Ex. S–4, S–6; Tr. 40. The miners again claimed that the lights had worked on previous occasions but could not determine how long ago. Tr. 41. Carson believed that the lights may have broken soon after he purchased the trucks. Tr. 143. Bonneau issued one citation for the missing and broken lights on all four trucks. Tr. 45-46. The citation alleged:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons. The front headlights and brake lights on the dump trucks (#3; 303; 24 and 4) did not function when tested. The trucks are used throughout the mine site to haul material from the stock pile to the crushing plants and to transport material from the railroad haulage cars. This condition exposes the driver to serious injuries in the event a collision occurs while operating the truck throughout the mine site. The headlights and brake lights are a safety feature which should be maintained in functional condition.

Ex. S–3. Bonneau designated the citation non-S&S, unlikely to result in lost workdays or restricted duty, and the result of Respondent's moderate negligence. *Id*. CCQ terminated the citation by replacing the fuses and bulbs on each of the trucks. Tr. 48-49. The Secretary assessed a penalty of $118.00.

I affirm the fact of violation for the same reasons discussed above. The parties do not dispute that headlights and brake lights on the haul trucks were either not functional or missing completely. Ex. S–6; Tr. 40, 115, 125-27, 143-45. The Secretary has offered a number of pictures of each truck that support the citation. Ex. S–4; S–6; Tr. 44. Exhibits S–4 and S–6

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[5] The court again notes that Bonneau was unable to observe the Quarry at work because Respondent shut down all operations upon Inspector Bonneau's arrival for the inspection. Tr. 25, 28, 54.

clearly show haul trucks missing brake lights. Inspector Bonneau also identified three trucks in Exhibit S–6 that had inoperable headlights. Tr. 44-45. Three or four haul trucks travel through Plant 1 and about five proceed through Plant 2 each day. Tr. 107. The two plants run simultaneously for approximately one third of the Quarry's operating time. Tr. 117.

As discussed *supra*, broken and missing brake lights are a defect that affects safety at mine sites because any vehicle traveling behind a haul truck would not realize that it needed to stop or slow down. I find that defective headlights pose a similar safety hazard because oncoming vehicles may not be able to see trucks approaching or rounding a corner without operable headlights. Inspector Bonneau testified that the presence of fog on the second day of the inspection increased the safety hazard because miners would be unable to see vehicles coming around corners and up narrow roads between warehouses. Tr. 46-47, 147. Although CCQ disputes that it operates in inclement weather, weather can change quickly and impede operators' visibility of oncoming traffic. *See Walker Stone Co.*, 20 FMSHRC at 1226. In those situations, defective headlights affect safety because other miners may have trouble seeing a haul truck approach.

Again, CCQ was aware of the condition for an extended period of time and did not address the defects. Garcia and Carson both testified that CCQ was aware that its haul trucks did not have working headlights and brake lights, and that some of the trucks never had lights. Tr. 126-27; 143-45.

The Secretary has proven a violation.

B. Fair Notice

Respondent contends that it did not receive fair notice that broken brake lights or headlights constituted defects affecting safety in violation of the standard because previous MSHA inspectors have never cited the condition at the Quarry and because it knows of no written interpretation that § 56.14100(b) requires vehicles to repair defective headlights and brake lights. Resp. Rep. at 5; Tr. 139-140.

That CCQ has not been cited in the past does not excuse it from understanding that defective headlights and brake lights affect safety and must be repaired in a timely manner. "MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator." *Oil-Dri Production Co.*, 40 FMSHRC 876, 941 (June 2018) (ALJ) (citations omitted) (rejecting Respondent's argument that it lacked fair notice because at least 14 inspections over seven years failed to express concerns regarding the violative condition).

CCQ relies upon the U.S. District Court's memorandum opinion in *Bevins v. Apogee Coal Co.*, No. 2:13-cv-24264, 2014 WL 7236415 (S.D.W.Va. Dec. 18, 2014), *aff'd*, 635 Fed.Appx. 117 (Mem) (4th Cir. 2016), to support its contention that §56.14100(b) is not a strict liability standard and lacks the specificity to give fair notice of the alleged prohibited conduct. Resp. Rep. at 5. Its reliance on that case is misplaced. In *Bevins*, the Court held that §§ 56.14100(b), (c), and (d) lacked the specificity to qualify for additional damages under the employer immunity exception of § 23-4-2(d)(2) of West Virginia's workers' compensation

provision. *Bevins*, 2014 WL at *4-5. Whether the standard is sufficiently specific to qualify for damages under West Virginia law is irrelevant to whether an operator received fair notice under the strict liability framework of the Mine Act.

Actual notice is not required. Under Commission precedent, the due process requirements for fair notice are satisfied so long as the regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions that the regulation is meant to address and the objective the regulation is meant to achieve would have fair warning of what the regulation requires. *Oil-Dri Production Co.*, 40 FMSHRC at 941; *see also Sunbelt Rentals Inc.*, 38 FMSHRC 1619, 1626 (July 2016); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1992); *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *Palmer Coking Coal Co.*, 22 FMSHRC 887, 891-92 (July 2000) (ALJ).

I find that § 56.14100 is sufficiently specific that a reasonably prudent person familiar with the conditions the standard intends to address would have recognized that broken headlights and brake lights on vehicles in use are a violation of the standard. Headlights and brake lights are a near universal safety feature on vehicles and serve to prevent the obvious safety hazard created by front and rear-end collisions. Bonneau testified that CCQ's miners agreed with his contention that lights are a safety feature that would reduce the risk of an accident on the mine site. Tr. 91. A reasonably prudent person familiar with the standard would assume that these lights should work to ensure safe vehicle travel around the mine and that inoperable lights are defects that affect such travel. Inoperable head and brake lights thus must be repaired in a timely matter to prevent accidents.

Furthermore, the Secretary's interpretation of the standard is not novel or unreasonable. Inspectors have often cited operators for failing to timely repair non-functional brake lights under § 56.14100(b) and Commission Judges have consistently affirmed the Secretary's interpretation that broken brake lights are a defect affecting safety that must be timely repaired to prevent a hazard. *See e.g.*, *Boart Longyear Co.*, 34 FMSHRC 2715, 2718-19 (Oct. 2012) (ALJ); *Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 355 (Feb. 2011) (ALJ); *Palmer Coking Coal Co.*, 22 FMSHRC 887, 892 (July 2000) (ALJ); *Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2007-08 (Sept. 1993) (ALJ). The Commission has also consistently affirmed the Secretary's interpretation that broken headlights are a defect affecting safety and must be timely repaired under the standard. *Apex Quarry, LLC*, 36 FMSHRC 211, 220-21 (Jan. 2014) (ALJ); *Florida Rock Industries, Inc.*, 34 FMSHRC 745, 761-62 (Mar. 2012) (ALJ); *Freeman Rock, Inc.*, 28 FMSHRC 354 (May 2006) (ALJ); *Walker Stone Co.*, 20 FMSHRC 1225, 1226 (Oct. 1998) (ALJ); *Bob Bak Construction*, 19 FMSHRC 582, 604-05 (Mar. 1997) (ALJ).

I find that adequate notice was provided to CCQ as to the requirements of the standard.

C. Gravity

Inspector Bonneau designated both citations as non-S&S and unlikely to result in lost workdays or restricted duty. The Quarry is small and has minimal traffic, only operates during the daytime and in clear weather, and enforces traffic guidelines, speed limits, and stop signs. Tr. 34, 118-19. I find that the violation was unlikely to result in a collision on the Quarry site. In the

event of a collision between vehicles, Bonneau believed that either driver could sustain whiplash, broken bones, strains, or sprains. Tr. 70-71. I affirm the Secretary's designation on both citations.

D. Negligence

The Secretary designated both violations to be the result of CCQ's moderate negligence because the operator was aware that the lights on all of the vehicles were defective. Tr. 128-29. However, CCQ has never been cited for the condition in the past despite the conditions existing for quite some time, and the conditions of the mine rendered any actual accident quite unlikely. Tr. 139-40. Less than 20 people worked at the Quarry at any given time and no traffic-related injuries occurred on the site in at least 15 years. Tr. 119. Speed limits at the Quarry topped at 10 miles per hour and the trucks only traveled short distances at very slow paces. Tr. 119. The Quarry does not generally operate at night or in adverse conditions, lessening the impact of missing or broken headlights or brake lights during operations. Tr. 119. While a reasonably prudent miner would have repaired the brake lights, under the circumstances the brake lights did not pose a serious safety concern to this particular mine site. I reduce CCQ's negligence to low for both citations.

E. Penalty

The Secretary proposed a penalty of $118.00 for each citation. CCQ's history of previous violations is low and it had not been cited for this violation prior to Bonneau's inspection. Tr. 139-40. The violations were unlikely to result in lost workdays or restricted duty, and were the result of CCQ's low negligence given the operating conditions at the Quarry. Respondent acted quickly and in good faith to abate the citations. Jt. Stip. 8. Accordingly, I assess a penalty of $100.00 for each citation.

IV. ORDER

The Respondent, Cactus Canyon Quarries, Inc., is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$200.00** within 30 days of this order.[6]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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[6] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

Distribution: (U.S. First Class Mail)

Christopher D. Lopez-Loftis, Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Room 501, Dallas, Texas 75202

Andy Carson, 7231 CR 120, Marble Falls, Texas 78654

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 12, 2018

INDUSTRIAL PROCESS EQUIPMENT CONSTRUCTORS, Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. WEST 2018-0557-RM Order No. 9346744; 07/09/2019 Portland Plant and Quarry Mine ID 05-00037 E938

ORDER GRANTING THE SECRETARY'S MOTION TO DISMISS
ORDER OF DISMISSAL

Before: Judge Manning

This case is before me upon a notice of contest filed by Industrial Process Equipment Constructors ("IPEC") pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). For reasons that follow, I find that I do not have jurisdiction over this case. Consequently, this case is **DISMISSED**.

On July 9, 2018, MSHA issued Imminent Danger Order No. 9346744 to IPEC for an alleged violation of section 107(a) of the Act. On September 21, 2018, IPEC filed its notice of contest. The Secretary filed a Motion to Dismiss this case arguing that IPEC failed to timely contest the 107(a) withdrawal order. IPEC filed an opposition to the motion arguing that dismissal was inappropriate due to the confusing nature of the contest procedure for 107(a) orders and its lack of counsel during the relevant contest period. I was assigned the case on October 31, 2018. Following a review of the Secretary's motion and the Contestant's response, I ordered the parties to brief whether I have jurisdiction over the imminent danger order. On December 6 the parties filed their respective briefs.

The Secretary argues that the court does not have jurisdiction over the imminent danger order because IPEC failed to timely contest the order. Sec. Br. 1-2. Congress granted the Commission and its judges jurisdiction to hear contests of enforcement actions brought by the Mine Safety and Health Administration ("MSHA") only when properly presented. *Id*. 3. The clear language of the Act mandates that 107(a) orders be contested within 30 days. *Id*. 2. The Commission, relying on the language of the Act, has stated that operators who wish to contest 107(a) orders must notify the Secretary within 30 days. *Id*. 3 (citing *ACI Tygart Valley*, 38 FMSHRC 939 (May 2016)). *Id*. 3. The Secretary asserts that, because IPEC did not file its contest within 30 days, this court is without jurisdiction to consider the merits of the order. *Id*. The Secretary maintains that under IPEC's interpretation, imminent danger orders would never

become final and the 30 day contest period would be rendered irrelevant "because the order always could be challenged." Sec'y Br. 3 n. 3.

IPEC argues that the Act grants Commission administrative law judges jurisdiction to hear contests of citations and orders brought before the Commission. IPEC Br. 2-3. Section 105(a) of the Act specifically removes jurisdiction over, and makes final, citations and orders issued pursuant to section 104 when those citations and orders are not timely contested in a civil penalty case. IPEC Br. 3. However, section 107 includes no such language. *Id*. 4. As a result, IPEC argues that because no language exists to revoke jurisdiction over orders issued pursuant to section 107, this court has authority to hear this case. *Id.*

I find that I do not have jurisdiction over this matter because the imminent danger order became a final order of the Commission before the notice of contest was filed. Section 107(e)(1) of the Act states that an operator who is notified of the issuance of a 107(a) order "may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order." 30 U.S.C. § 817(e)(1). Section 105(d) of the Act provides that an operator may contest a citation or order issued under section 104 of the Act within 30 days of receipt thereof. Only section 105(a) provides that if an operator fails to contest a citation or a proposed penalty within 30 days, the "citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. 815(a). Nevertheless, the Commission has stated that "treating all penalties and orders as 'final' is the better practice and is more consistent with the structure and language of the Act." *Sims Crane, Inc.,* 39 FMSHRC 1367, 1371 n. 2 (July 2017).[1] In *Sims Crane*, upon motion of the operator, the Commission reopened a section 107(a) order, which it described as "final" throughout its decision, after the operator failed to contest the order within the 30 day period prescribed in section 107. Consequently, I find that upon expiration of the 30 day contest period, an imminent

[1] The entire footnote in *Sims Crane* states:

> We have elected to proceed pursuant to Rule 60(b) in this case because the Commission has, in previous cases, considered imminent danger orders as though they are "final." *See, e.g., ACI Tygart Valley*, 38 FMSHRC 939 (May 2016). However, it is not certain that the order in this case was "final" in the fatal, legal sense applied to penalties issued pursuant to section [105(a)]. Unlike that section, section 107 does not contain a clause explicitly rendering an uncontested order a "final order." We believe that treating all penalties and orders as "final" is the better practice and is more consistent with the structure and language of the Act. But the fact that even the Secretary acted as through the imminent danger order remained a viable issue in the case, up until the latter stages of pretrial preparation, certainly renders this case "extraordinary."

danger order becomes a final order of the Commission. *See also, ACI Tygart Valley*, 38 FMSHRC 939.[2]

Order No. 9346744 was issued by MSHA on July 9, 2018, was not contested within 30 days and became final on or about August 8, 2018, before IPEC filed its Notice of Contest on September 21, 2018. As a consequence, I find that I do not have jurisdiction over the case because the subject imminent danger order became a final order of the Commission before the notice of contest was filed.[3]

It is important to emphasize that IPEC is not without a potential remedy. The Commission has held that, in appropriate circumstances, it has jurisdiction to reopen a contest of an imminent danger order that has become a final order of the Commission. *ACI Tygart Valley,* 38 FMSHRC 939. In that case, the Commission held that it will be guided by Rule 60(b) of the Federal Rules of Civil Procedure when faced with a motion to reopen the contest of an imminent danger order. A party may be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect, for example.

The Secretary's Motion to Dismiss is **GRANTED** and this case is **DISMISSED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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[2] When an operator is issued a citation or order under section 104 of the Act, it need not contest the citation or order by filing a notice of contest under section 105(d) but can wait to contest the matter when a civil penalty is proposed by the Secretary. If an operator files a notice of contest of a citation or order issued under section 104(a) out of time and the case is dismissed on that basis, it does not lose its right to contest the citation or order in the civil penalty case. Because penalties are not assessed for imminent danger orders, such orders can only be challenged by filing a notice of contest under section 107(e).

[3] Several Commission judges have taken a different approach to late filed notices of contest by resolving the issue on the merits without considering the jurisdictional issue. For example, in *Kinder Morgan Operating L.P.*, 24 FMSHRC 1055 (Dec. 2002), a Commission judge dismissed ten contest proceedings involving citations issued under section 104 of the Act because they were filed more than 30 days after the citations were issued, citing a long line of cases holding that "the late filing of notices of contest of citations is not permissible under the Mine Act[.]" 24 FMSHRC at 1056. In another case, a Commission judge excused the late-filing of 21 notices of contest of section 104(a) citations without objection by the Secretary. *Rockhouse Energy Mining Co.,* 30 FMSHRC 988, 989-90 (Oct. 2008).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 14, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-0211 A.C. No. 15-17741-305075
v.	
KENAMERICAN RESOURCES, INC., Respondent.	Mine: Paradise #9

DECISION AND ORDER

Appearances: LaTasha T. Thomas, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for the Petitioner;

Jason W. Hardin, Esq., Fabian VanCott, Salt Lake City, UT, for the Respondent.

Before: Judge L. Zane Gill

This case resulted from a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against KenAmerican Resources, Inc. ("KRI"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (the "Act" or "Mine Act"). The court made a record of the parties' testamentary and documentary evidence at a hearing held in Henderson, Kentucky. The parties filed post-hearing briefs.[1]

The Secretary alleges that a prohibited advance notice of inspection occurred when someone from inside the mine asked over the mine phone/PA system whether there was "company outside," and the mine dispatcher answered by saying either "Yeah, I think there is," (the Inspector's version) or "I don't know" (the dispatcher's version). The Secretary alleges that the dispatcher's answer violated section 103(a) of the Mine Act and proposes a penalty of $18,742.00.

[1] The Court had granted Respondent's Motion for Summary Decision. 37 FMSHRC 1809 (Aug. 2015) (ALJ). That decision was appealed to the Commission, which remanded it with instructions to hold a hearing to develop a record to reveal the context of the statements the Secretary claims violated the prohibition of giving advance notice of an MSHA inspection, 30 U.S.C. § 813(a). 38 FMSHRC 1943, 1953 (Aug. 2016).

For the reasons developed below, I vacate Citation No. 8502992. The Secretary failed to prove by a preponderance of the evidence that the contested communication constituted an actionable "advance notice of an inspection."

I. PRINCIPLES OF LAW

A. Burden of Proof and Credibility

In order to establish a violation of a safety standard or provision of the Act, the Secretary must prove "by a preponderance of the credible evidence" that a violation occurred. *Keystone Coal Mining Corp*., 17 FMSHRC 1819, 1838 (Nov. 1995), *citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). 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 at 2152-53, *citing Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *see also Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001).

The weight of evidence is a measure of the believability or persuasiveness of evidence. To satisfy the burden of proof—preponderance of the evidence—the Secretary must convince me that the evidence in support of his case outweighs the evidence offered by the Respondent.

To determine whether the Secretary met this burden, I am required to make credibility determinations, one of the most important and difficult responsibilities an ALJ must complete. *See N. Idaho Drilling, Inc*., 35 FMSHRC 2472, 2473-74 (Aug. 2013) (ALJ) (explaining that credibility determinations are part of the process of determining whether the Secretary has met his burden of establishing a violation by a preponderance of the evidence, and the primary issue is determining whether witness testimony is worthy of trust and belief in the context of the record). Credibility can be defined as "the quality that makes something (as a witness or some evidence) worthy of belief." *Credibility*, Black's Law Dictionary 448 (10th ed. 2014). According to *Secretary of Labor v. Rag Cumberland Resources Corporation*, 22 FMSHRC 1066, 1071 (Sept. 2000), consistent with the "preponderance of the evidence" standard, the Secretary must "persuade the judge that it [is] more likely than not" that the key factual predicate needed to support a violation occurred.

In this case, the key elements are: (1) what the dispatcher understood and said; (2) what the words heard and spoken meant in the context in which they were communicated; and, (3) whether the words conveyed advance notice of an MSHA inspection. I am convinced by the weight of the evidence that the Secretary failed to prove an essential element of the prima facie case, i.e., whether the words spoken by the dispatcher conveyed advance notice of an MSHA inspection.

II. SUMMARY OF EVIDENCE AND FINDINGS OF FACT

Inspector Doyle Sparks issued Citation No. 8502992 to KRI on April 20, 2012, alleging that miners had violated section 103(a) of the Mine Act. The citation alleges, "[d]uring a Hazard

Complaint inspection [. . .] mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property." (Ex. S–1) (emphasis added)

The day before, April 19, 2012, someone lodged a section 103(g) hazard complaint about KRI's Paradise #9 mine. (Tr.20:25-21:7; 41:7-42:11; 52:25-53:13) In response, Inspector Sparks and five[2] other MSHA inspectors traveled to the mine on April 20, 2012, to investigate. (Tr.20:25-21:7; 64:9-65:1; 65:20-25; Ex. S–2) They arrived at 5:10 p.m., approximately two hours after the evening shift had begun.[3] (Tr.50:7-14; 65:2-13; 76:18-23; 86:7-18; Ex. S–2) They first met with Charles Kapp, mine foreman, to inform him of the hazard complaint and the resulting inspection. (Tr.66:1-67:9; 106:9-23; 111:5-15) Then, four of the six inspectors, including Sparks and Inspector Tim Gardner, went to the mine's new portal; the other two went to the dispatch shack at the old portal. (Tr.22:6-10; 160:5-14)

Inspector Sparks considered the Paradise #9 mine to be large in scale. (Tr.96:7) There were four to five miles of belt lines in the mine. (Tr.95:1-9; 145:14-24) According to Sparks, this hazard complaint inspection could have involved many possible inspection areas. (Tr.95:25-96:9)

The size of the mine also accounted for the fact that MSHA or state mine inspectors were present at the mine site nearly every day. (Tr.98:8-23; 142:24-144:9) Using VPID data, there were 735 inspection days during the 15-month period from January 21, 2011, through April 20, 2012, meaning that there were one or more MSHA inspectors at the mine frequently enough to total 735 inspection days during that 15-month (455-day) period. (Tr.99:13-101:14) There was an E01 inspection going on nearly every work day, usually involving multiple MSHA inspectors. (Tr.102:1-24; 142:24-143:8)

Mine personnel were aware that inspectors were on the property essentially all the time because the inspectors would typically show up before shift changes and be seen on the site and heard on the phones. (Tr.143:9-144:9)

Witnesses discussed various scenarios where MSHA could be on site for reasons other than to conduct a covered inspection. Giving notice of MSHA's presence under such circumstances would not violate the regulation. (Tr.63:3-64:8) For example, MSHA could be on site to interview people as part of an investigation (Tr.63:9-11), to take photos and gather information as part of an investigation (Tr.63:12-16), to review exam records (Tr.63:17-22), or to merely meet with the safety department of mine management. (Tr.63:24-64:1) In addition, any

[2] It is unclear whether there were five, six, or seven MSHA personnel on the mine site to respond to the hazard complaint. At various places in the record witnesses testified that all three numbers of inspectors responded to the hazard complaint on April 20, 2012. (Tr.21:1-7; 53:10-13; 64:9-15; 65:20-25; 76:18-23; 82:25-83:16; 84:5-14; 120:22-121:4; Ex. S–2) The exact number is unimportant for this decision. For clarity and consistency I speak of six inspectors.

[3] KRI had three shifts on April 20, 2012 (Tr.72:25-73:9): the "first" or day shift (Tr.73:16-22), the "second" or evening shift (Tr.73:23-74:1), and the "third" or midnight shift, which was non-production and used for maintenance. (Tr.74:2-11)

imminent danger situation constitutes an exception to the advance notice prohibition. (Tr.43:21-44:1; 112:3-11)

Whenever an inspection occurred, MSHA inspectors needed escorts and rides into the mine.[4] (Tr.69:17-70:7) Safety directors were designated to escort MSHA inspectors. (Tr.138:24-139:5) As a courtesy, inspectors tried to coordinate with the safety directors to minimize logistical issues. (Tr.74:24-75:11) Still, it was easier to find rides and escorts for the inspectors if they showed up at or before the shift change because the miners were already at the rendezvous points and did not need to return from inside the mine to pick up an inspector. (Tr.85:24-86:6) But, when the inspectors arrived at the mine after the normal shift change time (as happened here), the logistics could become awkward. If the escort personnel were already underground when MSHA arrived for an inspection, someone (typically the dispatcher) had to communicate (typically with the mine phone/PA system) with the underground miners to summon them back to rendezvous with and transport the MSHA inspectors. (Tr.74:24-76:23)

The mine dispatcher operated the mine's interconnected page phone system. (Tr.22:21-23:7; 157:20-24) When the dispatcher wanted to call a particular location, his summoning call could be heard through the whole mine. (Tr.158:6-12) There was no way to limit the call to just one place in the mine. (Tr.37:9-38:1) If the dispatcher wanted to speak only with a person on unit four, for example, he called out for unit four on the page phone. (Tr.158:20-159:3) When a person on unit four picked up a phone and responded, the conversation became private. (Tr.38:9-39:4; 159:4-14) If someone else picked up a phone at the same time, he would be able to hear what the others were saying since it was a party line. (Tr.39:5-10; 159:16-19) Similarly, if someone underground wanted to call the dispatcher, the page to the dispatcher would be heard throughout the mine until the dispatcher pushed a button making the call private. (Tr.89:6-90:3)

Lance Holz, the dispatcher on duty in the dispatch shack at the old portal on April 20, 2012, was the person who made the statement that Inspector Sparks interpreted to be a prohibited advance notice.[5] (Tr.155:4-15; 157:17-19) Among other duties, Holz coordinated rides into the mine for MSHA inspectors, when needed. (Tr.154:16-23; 161:16-162:6) In this instance, Holz was working the phone system from the dispatch shed at the old portal to get rides for the six MSHA inspectors who responded to the hazard complaint (Tr.69:17-22; 161:12-22), while two of the inspectors looked through record books kept in the dispatch shack. (Tr.161:4-11) As was customary in such cases, one of the MSHA inspectors—in this instance, Gardner, initially—monitored the mine's phone system. (Tr.21:8-20; 40:5-11; 160:7-14) Significantly, Holz testified that the inspectors reminded him not to give any advance notice of inspection, which was consistent with the training he had received from KRI. (Tr.160:7-161:2)

The dispatch shed at the old portal was about six miles away from the new portal where Inspector Sparks was. (Tr.34:12-22; 36:14-20; 167:23-168:6; Ex. R–12) From his location at the

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[4] MSHA inspectors were routinely escorted and transported into the underground parts of the mine by miners (consistent with the Section 103(f) "walk-around rights"). (Tr.85:13-23); *see Consolidation Coal Co.*, 2 FMSHRC 1403 (June 1980) (ALJ); 30 U.S.C. § 813(f).

[5] Holz worked as a dispatcher at KRI from 2010 to 2015. (Tr.153:6-25) During that time he was an hourly employee and reported to the mine foreman. (Tr.155:23-156:14)

new portal, Sparks was also able to monitor phone traffic over the mine's phone system. (Tr.37:1-8) At one point, he took over monitoring the mine's phone system from Gardner. (Tr.23:10-14; 113:16-25) While monitoring the phones, Sparks testified that he heard someone from the #4 unit ask, "Do we have any company outside?" (Tr.23:15-25; 55:11-24) This is undisputed. Sparks' testimony suggested that he considered the inquiry whether there was "company outside" to be advance notice, regardless of any response by Holz. (*See* Tr.24:21-25:10; 61:3-8) Sparks claimed that Holz answered, "Yeah, I think we do"[6] (Tr.23:15-24:1; 55:11-25), which Sparks also considered prohibited advance notice.[7] (Tr.24:2-14; 28:17-25) However, Sparks never said that he knew or factored in the requirement that the advance notice had to convey advance warning of an inspection to be a violation.

What dispatcher Holz said in response is disputed. While Sparks testified that he heard Holz say, "Yeah, I think we do," Holz testified repeatedly to the contrary that he said "I don't [know]." (Tr.163:9-16) Holz further denied giving or intending to give advance notice. (Tr.166:23-167:5) He agreed that someone underground asked if there was company outside, but he assumed that the voice was asking whether MSHA was present (in the context of arranging rides and escorts). (Tr.172:13-16) At the hearing, each time Holz was asked what he responded, he said that his response was, "I don't know." (Tr.163:9-16; 174:21-22) On further questioning, he allowed that he might have said something else (Tr.163:17-19), but his routine and training was to answer indefinitely. (Tr.162:22-163:8) The indefinite response was the norm in situations such as this—if anyone asked why they needed to come to the surface, the standard response was "I don't know" or "I can't say." (Tr.164:2-10; 172:17-19) Sparks confirmed that mine personnel were in the habit of using such vague language whenever they called into the mine to have miners come out when MSHA was on site in order to avoid violating the advance notice prohibition. (Tr.81:22-82:24)

Consistent with Sparks' statement, it appears that miners often suspected or were aware of the presence of MSHA inspectors and had developed a practice of intentional vagueness when asking and answering why they were being summoned to the surface. Given the fact that MSHA inspectors were at the mine almost daily for inspections, the necessity of summoning escorts and rides for the inspectors from underground, and the reality that the only way to summon rides was to use the mine phone system (Tr.158:16-159:1), the dispatcher and other miners involved adopted a communication technique that feigned ignorance about what was happening whenever MSHA inspectors were on site for an inspection. (Tr.81:22-82:24) Since miners were trained that they were prohibited from giving any advance notice of an MSHA inspection (Tr.140:7-19; 160:15-161:2), under the typical scenario, a dispatcher would page into a unit in the mine and say generically that he needed someone to come to the surface. (Tr.161:23-162:6) If a miner from underground had a question about why he was being summoned to the surface, the dispatcher adopted the ruse of not knowing—or at least telling the underground miner he did not know—why the miner was needed at the surface. (Tr.161:23-164:10) Holz' had been trained and

[6] Sparks later testified that Holz said, "Yeah, I think there is." (Tr.55:25; 62:16; 79:6; 81:6; 103:15) This minor semantic inconsistency does not change my analysis, and I will refer to both ("Yeah, I think we do" or "Yeah, I think there is") interchangeably throughout this decision.

[7] Sparks later clarified that only the response could constitute a violation, not the question whether there was "company" outside. (Tr.103:2-19)

knew that he could not say that there were inspectors at the surface needing a ride to conduct an inspection. (Tr.160:5-161:2; 163:2-16)

III. ANALYSIS

A. Credibility Assessment

A full analysis of this controversy requires that I consider both the question about "company," which is undisputed,[8] and Holz' response to determine which scenario is better supported by the record. Holz recalled saying, "I don't know." Inspector Sparks, on the other hand, testified that Holz replied, "Yeah, I think there is." The Commission is reluctant to set aside a judge's credibility finding based on the judge's evaluation of conflicting oral testimony. *Austin Powder Co.*, 21 FMSHRC 18, 22 (Jan. 1999). This rule appropriately recognizes the importance of the judge's observation of witness demeanor. *Id.* at 24. For the reasons explained below, I find dispatcher Holz' testimony that he said "I don't know" more credible than Inspector Sparks' recollection of what he heard while monitoring the mine phones.

1. Sparks' Credibility

Three items cast a shadow over Sparks' credibility and bolster my conclusion that Holz answered, "I don't know" instead of "Yeah, I think there is."

First, it is apparent to me that this citation was written under the mistaken assumption that the question about "company" alone was all that was needed to make out a violation of this section of the Mine Act. When Sparks decided to cite KRI for the violation, he believed and concluded that the question alone gave prohibited advance notice of an MSHA inspection. The citation and the transcript of Sparks' testimony bear this out. (*See* Tr.24:21-25:10; 60:10-61:8) When pressed on the issue, he agreed that it was the response that would complete the inchoate advance notice. (Tr.103:2-19) (emphasis added) Only the putative statement "Yeah, I think we do [have company]" would violate the statute. (Tr.23:15-24:1; 55:11-25) I am convinced by a preponderance of the evidence that Sparks paid closer attention to the undisputed question whether there was "company" on site than he did to the response.

Second, in general, Sparks came across as overly convinced of his position and unwilling to admit to any alternate interpretation of the facts.[9] He was assertive and forceful in defending

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[8] While it is undisputed that somebody from Unit #4 asked about "company," Respondent argues that "company" could have meant KRI safety department personnel or Murray Energy corporate personnel. (Resp't Br. 16) In fact, Joe Myers, Corporate Safety Director, was on site that day. (Tr.116:1-11) At hearing, Holz testified that "company" could have meant one of a few things, but he assumed that the person calling probably was asking about MSHA, especially given that it was a Friday evening after a shift change. (Tr.164:23-165:11) I credit Holz' statement and find that "company" was in reference to MSHA.

[9] At one point in his testimony, Sparks equivocated and said, "However, I think what he said —. He said, do we have any company outside? And he said yeah, I think we do; I think there is." (Tr.55:23-25) (emphasis added)

his belief that what he claimed to have heard was advance notice of an inspection. (*See, e.g.*, Tr.62:3-6) Sparks' demeanor in delivering his testimony created the impression that the level of credibility accorded his testimony should increase due to the fervor of its delivery, despite obvious shortcomings with some points of fact. For instance, Sparks categorically denied that it was possible that he misheard the statements. (Tr.81:1-6)

Importantly, Sparks claimed that in "every place" where he had been associated with miners, the miners used surreptitious and coded language on a regular basis to convey prohibited advance notice of MSHA inspections. (Tr.26:1-3) He claimed that what he heard on April 20, 2012, was an example of this. (Tr.24:21-25:10) He gave two examples of how miners used code words to give advance notice that MSHA was on site: (1) a miner asks another, "Is it raining?" and the other says, "Yes" (Tr.25:13-20); and (2) a miner asks about a belt that does not exist. (Tr.25:21-25) These examples were apparently taken from Sparks' experience as an inspector but had no discernable connection to the facts of this event.[10]

It is clear that Sparks' state of mind when he issued this citation was that coded language was commonly used to convey advance notice, and that the question he heard over the mine PA system was consistent with such coded language. Sparks' claim of widespread advance notice given through coded language suffers from the logical fallacy of *a dicto simpliciter ad dictum secundum quid*, i.e., a general rule is taken to be universal. Here, despite a dozen previous inspections at the Paradise #9 mine, Sparks never had any issues with miners giving advance notice at this mine until he issued Citation No. 8502992. (Tr.26:4-22) Additionally, Sparks was not aware of any prior section 103(a) violations at the Paradise #9 mine. (Tr.117:14-21) In fact, despite the alleged advance notice pervasive in the industry, Sparks had issued only one advance notice citation before this one (Tr.32:14-18)—it was at another mine and the miners in that instance admitted that they were giving advance notice. (Tr.30:17-31:3; 32:14-24) The evidence simply did not support his sweeping and categorical statement that such cryptic language was commonly used at "every" mining facility he had had experience with, and, specifically, at this mine.

Third and finally, Sparks' testimony was out of step with common sense and the contemporaneous records made at the time he issued the citation regarding several important points. Sparks never interviewed Holz, nor presumably his fellow inspectors, to confirm his

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[10] During the hearing, counsel for the Secretary mentioned in her argument opposing Respondent's oral Motion for Directed Verdict that there was "a pattern throughout the mine industry of documented coded [sic] to alert to [sic] inspectors [. . .] that MSHA inspectors are going around." (Tr.126:7-12) Counsel also referred to language in the Commission's remand decision about "advance notice [. . .] be[ing] conveyed through ambiguous language." (Tr.126:18-20); *see* 38 FMSHRC at 1949 n.7. However counsel's argument is not evidence that I can consider. *See Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co., Inc.*, 21 FMSHRC 1207, 1213 (Nov. 1999) (noting that statements of counsel are not evidence). Nor is the Commission's dicta footnote a holding that might become law of the case. There is no testimony, Commission authority, nor any exhibits providing me with a factual basis or binding precedent against which to evaluate the otherwise unsupported and sweeping statement from Sparks that the practice of giving advance notice was a given in every mine he had ever dealt with. (Tr.24:21-26:3)

conclusion that Holz had given a prohibited advance notice of an MSHA inspection. (Tr.34:12-35:3; 87:13-18; 168:24-169:19) Sparks instead relied solely on his perception and recall of what he heard to conclude that advance notice had been given. (Tr.54:16-20) I am aware that it was several miles from where Sparks was to the dispatch shack where Holz and the other inspectors were (Tr.34:12-19), but it seems obvious and prudent that such an interview would be helpful and not prohibitively onerous. More diligence in this regard might have had a positive impact on my assessment of Inspector Sparks' credibility.

Interestingly, despite not interviewing Holz to confirm what he thought he heard, Sparks did talk to other workers at the mine. He testified that he immediately went outside the dispatch shack and told Joe Myers, the assistant corporate safety director, what had happened and that he was going to issue a citation. (Tr.24:2-14) Sparks also testified that he interviewed rank-and-file miners on the #4 unit as well as the section foreman on April 20, 2012. (Tr.33:4-34:11) He testified that nobody knew who called or admitted to asking about "company." (Tr.33:10-34:11) However, Sparks' field notes, written on the day of the inspection, contained no mention of these potentially corroborating conversations. (Tr.33:11-23; Ex. R–2) Also, in his sworn declaration filed in opposition to the Respondent's Motion for Summary Decision (Ex. R–7), he failed to mention any conversation with miners on the day of the citation. The declaration was prepared on July 20, 2015, nearly three years after the events in question but still nearly two years before the hearing. (Tr.58:3-15; Ex. R–7)

Sparks also testified that Holz hesitated before responding to the person on the phone system (Tr.79:8-15), but he omitted this detail from the notes he made about this incident at the time he issued the citation. (Tr.79:16-18; 81:7-9) Sparks testified that after a couple of seconds' delay he asked the other person on the phone, "Who is this?" to which there was no answer. (Tr.24:7-14) Again, he failed to document this alleged interchange at the time it happened. (Tr.81:10-15) When contrasted with the granular detail of his hearing testimony on these points, this inconsistency created the impression that Spark's recollection of specific events—notably undocumented and unconfirmed events—nearly five years before the trial date, became more detailed and precisely tailored to the elements of the Secretary's case as the time for trial approached. The effect of this is to undermine his credibility.

Sparks' belief that coded language was common and lay at the root of what happened here is simply unsubstantiated. (Tr.24:21-26:8) His emphasis on this point early on in his testimony created the impression that he was already "leaning" toward concluding that what he heard that day was a violation. Sparks' failure to verify by interview, his failure to document some of the key points he raised in his testimony, and his vehemence that his memory was unassailable created an abiding impression of tainted perception and enhanced recall.

2. Holz' Credibility

On the whole, Holz' testimony was more credible than Sparks' and his version of the events more believable for three reasons.

First, Holz testified that he had been trained not to say anything that could be taken as an advance warning of an MSHA inspection while at KRI. (Tr.160:15-161:2) Shannon Baker,

KRI's safety director at the time of this citation, testified that his miners did not use coded language to circumvent the advance notice rule. (Tr.140:12-19) In his eight years at the mine, Baker never witnessed anyone giving advance notice of an inspection. (Tr.141:8-13) He testified that, to his knowledge, no coded language was ever used (Tr.141:17-22), and he was not aware of any prior advance notice citations at the Paradise #9 mine. (Tr.141:23-142:23) Indeed, as mentioned above, prior to Citation No. 8502992, Sparks had never had an issue with anyone giving advance notice with or without the use of coded language at the Paradise #9 mine. (Tr.26:4-23) Nothing in the record undermines Baker's testimony. I find Baker's testimony to be credible, and it tends to support Holz' claims.

Second, nearly five years passed between the contested events and the hearing. By then, it had been two years since Holz had left his dispatcher job at KRI. (*See* Tr.153:23-25) His leaving KRI had nothing to do with these events. (Tr.153:14-18) There was no evidence to suggest that Holz had any reason to skew his testimony in favor of this former employer. His statement that he believed that it was more likely that he said, "I don't know" (Tr.163:15-19; 164:2-4), did not sound self-serving.[11] The record contains nothing to suggest that Holz had a reason to bolster or misstate his recollection of these events. *See, e.g.*, *Sunny Ridge Mining Co.*, 16 FMSHRC 1797, 1818 (Aug. 1994) (ALJ) (where the ALJ was persuaded by the credible testimony of respondent's former employees).

Third and most notably, Holz was in the presence of two MSHA inspectors at the time the contested statements were heard, and the inspectors explicitly cautioned him against giving prohibited notice. (Tr.160:7-14) This fact alone very convincingly undercuts Sparks' recollection. It is difficult to believe that Holz would not only go against his training and give prohibited advance notice but would risk doing so in a confined space (*see* Ex. R–12) in the presence of two MSHA inspectors who had just warned him not to.

I find that a preponderance of the evidence makes it more believable and consistent that Holz' answer to the question about "company" was "I don't know" and not "Yeah, I think there is." Accordingly, I find no advance notice was given and, therefore, there was no violation.

B. Only Advance Notice of an Inspection is Prohibited

I have already found Holz to be a more credible witness than Sparks and, thus, have found that Holz said, "I don't know" in response to the question of whether there was company outside. This is dispositive and ends the inquiry. Nevertheless, even assuming Sparks' version of Holz' answer—"Yeah, I think there is"—was what was actually uttered, the Secretary has failed to prove that Holz provided advanced notice of an inspection in violation of section 103(a).

Section 103(a) plainly prohibits advance notice of an inspection: "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person [. . .] ." 30 U.S.C. § 813(a) (emphasis added). The Commission's decision in the prior appeal did not change this requirement: "Inherent in our analysis is an understanding that

[11] This was the only time Holz was ever cited for anything at KRI. (Tr.160:1-3) He claimed to remember it well. (Tr.159:21-160:4)

ambiguous language can violate section 103(a), if context establishes that it conveyed advance notice of an inspection." 38 FMSHRC at 1949 (emphasis added).[12]

The statute's limited scope recognizes the reality that certain mines, like the Paradise #9 mine, have a constant MSHA presence on site and harmonizes this with the need to prevent the sort of advance notice that would defeat the specific purposes of section 103(a), i.e., "determining whether an imminent danger exists, and [. . .] determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." 30 U.S.C. § 813(a). It is consistent with this limited scope that communicating that MSHA was on site was only prohibited if it gave or effected notice of an inspection. Giving notice of MSHA's presence under other non-inspection circumstances is not prohibited. Thus, saying, "Yeah, I think there is," is not necessarily a prohibited communication even though it happens in connection with an MSHA inspection.

Here, the citation does not allege nor does any other evidence prove that the overheard language actually did or even intended to give advance notice of an MSHA inspection. (Ex. S–1) In the citation, Inspector Sparks documented what he believed to be the *sine qua non* of the alleged violation: "[E]vidence was provided to MSHA that mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property."[13] (*Id.*) (emphasis added) When pressed to confirm whether he believed the mere act of giving notice of the presence of MSHA personnel was a violation, he reiterated that such was his understanding and frame of mind when he wrote the citation. (Tr.60:10-61:16) This, of course, is wrong. Only advance notice of an inspection is prohibited.

MSHA was present at the Paradise #9 mine nearly every day. (Tr.102:7-24; 142:24-143:8) It was a fact of life at this mine that miners were constantly aware of MSHA's presence.

[12] Respondent makes a novel, creative argument that the plain language of section 103(a) indicates it applies only to the Secretary of Labor and the Secretary of Health, Education, and Welfare, but not to mine operators. (Resp't Br. 6) Instead, Respondent argues, section 110(e) is the clear mechanism for preventing and enforcing advance notice violations. (*Id.* at 8) I am not convinced. The applicable statutory language ("In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person [. . .] .") is an imperative sentence with no clear subject. While the subject could be the Secretary of Labor or the Secretary of Health, Education, and Welfare, as Respondent argues, I note that the "no advance notice of an inspection" clause is found in the only sentence in section 103(a) that utilizes an implied subject. Although Respondent would have me believe the language is plain and unambiguous given that the language of the surrounding sentences explicitly apply to the Secretary of Labor and/or the Secretary of Health, Education, and Welfare, I conclude this particular clause and sentence is ambiguous because it is unclear who the implied subject is. Therefore, I defer to the Secretary's reasonable interpretation of section 103(a) that nobody—whether MSHA or mine employees—is permitted to give advanced notice of an inspection. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1334-36 (June 2016) (deferring to Secretary's reasonable interpretation of section 104(b)), *aff'd*, 875 F.3d 279 (6th Cir. 2017).

[13] The Petition does not allege that advance notice of an inspection was given. It only incorporates the language in the citation. (Ex. S–1) The citation is attached to the Petition.

(Tr.144:3-9) There were multiple reasons why MSHA inspectors could be on the mine site that had nothing to do with conducting inspections. *See* discussion *infra* Part II. In all of these scenarios, it is common and appropriate (not prohibited) to communicate that MSHA inspectors are present. Even in the instances where MSHA inspectors were on the site to do inspections, it was necessary to arrange escorts and rides for them from the surface into the mine. So, assuming that Holz said, "Yeah, I think there is," instead of "I don't know," or something of similar import, there is only a small subset of facts where such a statement would be prohibited, e.g., if Holz intended to convey the message that MSHA inspectors were on the premises to conduct an inspection and he intended his statement to be an advance warning instead of one of the many other possible and innocuous scenarios. It is the Secretary's burden to prove this intent by a preponderance of the evidence.

Even assuming Holz intended to convey advance notice of an inspection, it would have been very difficult to effectively do so. Neither Holz nor the other person on the phone said anything about where Sparks would be traveling. (Tr.72:15-20) In fact, Sparks testified that he did not think it was even possible for the miners to know where MSHA inspectors were going. (Tr.72:21-23; 96:24-25) There were several miles of belts in this mine. (Tr.95:1-9) With such a large mine and the fact that this was a hazard complaint inspection (Tr.95:25-96:5), the men underground would not know where MSHA would be going, even if they had advance notice that MSHA was on site to conduct an inspection. (Tr.96:10-25) Furthermore, because all of the MSHA inspectors had to be escorted into the mine and needed rides (Tr.69:17-22), they were trained not to tell escorts where they were going until they were underground. (Tr.70:22-71:8) Consistent with this practice, Sparks would not tell his escort where he intended to go until they got underground. (Tr.69:23-70:21) Even though MSHA notified mine management that they were at the mine in response to a hazard complaint (Tr.66:1-67:9), until the MSHA inspectors were underground, no one at the mine knew where they were going. (Tr.71:22-72:3)

To bolster his argument, the Secretary cites extensively to *Topper Coal Company*, 20 FMSHRC 344 (Apr. 1998), in which the Commission affirmed the Judge in finding that the operator violated section 103(a). In that case, three MSHA inspectors arrived at Topper Coal Company and told Gary Fields, the company's president, that they were there to conduct a spot inspection and explicitly instructed him not to telephone underground to alert miners. *Id.* at 345. Fifteen to 20 minutes after this instruction, and while two of three inspectors crawled into the mine to conduct the inspection, Fields telephoned the working section and told a miner that "there are two federal inspectors in there. Tell the men to watch out and be careful." *Topper Coal Co.*, 17 FMSHRC 945, 946 (June 1995) (ALJ).

The facts in *Topper Coal* are clearly distinguishable from those here. First, the mine in *Topper Coal*, the No. 9 mine, was significantly smaller than the Paradise #9 mine.[14] Unlike the Paradise #9 mine, the No. 9 mine in *Topper Coal* presumably did not have MSHA inspectors

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[14] At the time of the violation, Topper Coal Company produced 135,401 production tons per year, and its No. 9 mine produced 29,716 production tons per year. *Topper Coal Co.*, 17 FMSHRC at 955. By way of comparison, at the time of this alleged violation, KRI produced 27,688,481 production tons per year, and the Paradise #9 mine produced 1,758,880 production tons per year. (Ex. R–4) In other words, the Paradise #9 mine at issue in this case produced 59 times as much coal as the No. 9 mine in *Topper Coal*.

present on an almost-daily basis. Thus, any notification of MSHA's presence, even if for a non-inspection purpose, would likely have triggered higher levels of unease and suspicion for the miners at the No. 9 mine. Additionally, and importantly, given the smaller size of the mine in *Topper*, with one working section and only nine miners underground, Fields knew where the inspectors were heading. *Topper Coal*, 20 FMSHRC at 345 n.3, 346. By contrast, the Secretary has not established here that anybody other than the inspectors knew with any degree of specificity where the inspectors were ultimately going.

Second, in *Topper Coal* there was no good reason for Fields to contact any of the miners working underground. Unlike this case, where there was a legitimate need to arrange rides and escorts, the inspectors in *Topper* did not require rides or miners to escort them. *Id.* at 345. Nevertheless, Fields proactively and intentionally called the working section despite the MSHA inspectors' explicit warning not to.

Finally, the advance notice of an inspection that Fields gave the underground miner over the telephone was explicit and its contents uncontested. Although Fields argued at hearing that he made the call because of his concern for the safety of the inspectors who might otherwise be run over by shuttle cars, the Judge discredited this explanation, reasoning that Fields had not previously expressed concern for the inspectors' safety before calling and there was no reason Fields needed to specifically identify the people entering the mines as "federal inspectors." *Topper Coal*, 17 FMSHRC at 950-51. Here, by contrast, Holz contested ever saying the purported violating language—"Yeah, I think so"—in response to the question whether there was "company" outside. Furthermore, Holz' alleged statement is ambiguous and its intent and effect are unclear, particularly in light of the circumstances surrounding the need for escorts and rides.

Ultimately, there is nothing but Sparks' pre-formed and unsupported opinion—that covert and coded language was used on a regular basis to circumvent this prohibition—to support the essential component of the prima facie case that the notice given pertained to an MSHA inspection. The fact that MSHA's presence was quotidian, that no evidence shows that anyone but Sparks, his fellow inspectors, or Mine Foreman Kapp knew why these specific MSHA inspectors were on site, and that there were several permissible reasons to tell miners underground that MSHA personnel were on site significantly dilutes the convincing power of Sparks' testimony and the Secretary's argument. The most a fair assessment of the evidence yields is that the language Sparks claimed he heard might have given notice that MSHA personnel were present.

Asking whether "company" was present may well have become part of a prohibited advance notice if the answer completed the communication in a way that could be understood to give advance notice of an MSHA inspection. If, however, the question about "company" was asked in the context of whether people underground needed to stop what they were doing and report to a rendezvous point to provide rides and escorts for people at the surface, even if they were MSHA inspectors, neither the question nor the response communicated prohibited advance notice of an MSHA inspection. In the context of Holz' trying to arrange rides for the MSHA inspectors (Tr.161:12-22), it is more consistent with his training, his memory, and the facts on the ground and in the record, that the question about whether "company" was present was an

innocuous inquiry relating to the need for rides and escorts rather than a precursor to prohibited advance notice of an MSHA inspection, the details of which were yet to be revealed to anyone by the MSHA inspectors. Thus, even though Holz' alleged statement could appear to be a violation, seen in the larger context, I find it is more believable that it was made with the intent to facilitate finding escorts and rides for the MSHA inspectors. *See, e.g.*, *Portable, Inc.*, 36 FMSHRC 3249, 3257-58 (Dec. 2014) (ALJ) (where the Judge found that notifying a crusher operator of an inspection for the purpose of securing an escort did not constitute advanced notice of an inspection in violation of section 103(a)).

Considering the entirety of the record, the preponderance of the evidence stops short of proving that Holz gave or even intended to give advance notice of an inspection.[15]

IV. SUMMARY AND ORDER

I find that dispatcher Holz' testimony about what he said in response to the query, which Inspector Sparks thought constituted an advance notice of MSHA presence on the mine site, was more credible than Sparks' recollection. Sparks appeared to be focused on the question based on a mistaken belief that it alone could violate the prohibition against giving advance notice of an MSHA inspection per section 103(a) of the Mine Act. As a result, Sparks' recollection of what he thought he heard in response is less convincing than Holz' testimony that his response was "I don't know." I find that the communication Sparks alleged was advance notice of MSHA presence at the mine site was not intended to be, nor was it by its very content, advance notice of an MSHA inspection. As a result, the Secretary has failed to prove by a preponderance of the evidence an essential element of the prima facie case, and the citation issued on April 20, 2012, must be vacated.

Accordingly, it is **ORDERED** that Citation No. 8502992 is hereby **VACATED**.

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

[15] Respondent makes another novel, interesting argument that section 103(a), as applied to KRI here, violates the first amendment because the violative communication was non-specific and occurred while KRI was attempting to exercise its section 103(f) rights. (Resp't Br. 22-24) As KRI has already prevailed, I see no need to address this argument.

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December 28, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. POLAND SAND & GRAVEL, LLC, Respondent	CIVIL PENALTY PROCEEDING: Docket No. YORK 2017-0096 A.C. No. 30-03460-434978 Mine: Poland Sand & Gravel

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Poland Sand & Gravel pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $116.00 for an alleged violation of his mandatory safety standard regarding berm requirements on banks of roadways under certain conditions.

The Secretary filed a Motion for Summary Decision ("Sec'y Mot."), a Memorandum of Law in Support of the Secretary's Motion for Summary Judgment ("Sec'y Mem."), and Parties' Stipulations for Summary Judgment ("Jt. Stips.") with attached exhibits ("Exs. A through C-3"), including photographs of the bench and water clarifier in question, and diagrams of the bench and the path and location of traveling vehicles. Poland Sand & Gravel, represented by managing member, Roger Rommel, filed a Motion for Summary Judgment ("Resp't Mot.") and a Memorandum of Support for the Respondent's Motion for Summary Judgment ("Resp't Mem.").[1] The Secretary then filed the Secretary's Memorandum of Law in Response to Respondent's Motion for Summary Judgment ("Sec'y Reply"). Poland Sand & Gravel, in turn, filed Support for the Respondent's Motion in Response to the Petitioner's Request for Summary Judgment ("Resp't Reply"). Subsequently, the parties jointly filed Supplemental Stipulations ("Jt. Stips.") with attached exhibits ("Exs. D and E").

Poland Sand & Gravel is not contesting the gravity or negligence ascribed to the violation but the fact of violation, which turns solely on whether the cited bench was a roadway. Indeed, the parties agree that if the bench constituted a roadway, there was a violation. The following are issues for resolution: (1) whether Poland Sand & Gravel violated 30 C.F.R. § 56.9300(a); and, if so, (2) the appropriate penalty for the violation.

[1] This Memorandum was mistitled "Support for the *Petitioner's* Motion for Summary Judgment."

Pursuant to Commission Procedural Rule 67(b), "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only "upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that "the Supreme Court has stated that 'we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Id.* at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Moreover, Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

Based on the agreement of the parties to file cross motions for summary decision and the facts, as represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the citation, as issued, and assess a penalty of $116.00 against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:[2]

1. Poland Sand & Gravel, LLC ("Respondent") operates the Poland Sand & Gravel Mine (the "Mine").
2. The Mine produces sand and gravel. It is located in Herkimer County, New York.
3. In 2016, Respondent worked a total of 15,066 hours.
4. Respondent is an "operator" as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Act"), 30 U.S.C. § 803(d).
5. Respondent and the Mine are subject to the jurisdiction of the Mine Act.

[2] The parties' Joint Stipulations were misnumbered in the original document, and have been corrected for ease of reference in this Decision. The parties' Supplemental Stipulations have been sequentially numbered 51 through 63.

6. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Act.
7. True copies of the citation at issue in this proceeding were served on Respondent as required by the Act.
8. The proposed civil penalty will not affect Respondent's ability to remain in business.
9. Citation No. 9310591 was issued on January 9, 2017 by MSHA Inspector Vincent F. D'Angelo. Mr. D' Angelo is an authorized representative of the Mine Safety and Health Administration.
10. The parties stipulate that, should a violation be affirmed, the violation is not "significant and substantial."
11. The parties stipulate that, should a violation be affirmed, the Respondent was moderately negligent.
12. The parties stipulate that if injury were to occur as a result of the alleged violation, such injury would result in injuries that were permanently disabling.
13. Citation No. 9310591 was issued with respect to a berm not being provided along an approximately 42 feet opening at the edge of a bench adjacent to a Clearwater 2000 water clarifier (the "water clarifier").
14. The water clarifier is mounted on a chassis with wheels at the rear.
15. The bench was approximately 12 to 15 feet wide, as measured from the left side of the water clarifier to the edge of the drop-off.
16. The drop-off measured 6 to 8 feet from the bench surface to the ground below.
17. There was a pond approximately 16 feet away from the edge of the bench at the ground surface.
18. Attached hereto, as Exhibit A, is a true and accurate photograph, with extraneous markings, of the water clarifier where Respondent installed it, across from the approximately 42 foot unbermed area of the bench, with extraneous markings.
19. The area marked "1" on Exhibit A depicts the drop-off from the surface of the bench to the ground below.
20. The drop-off from the bench, marked "1" on Exhibit A, is 6 to 8 feet.
21. Attached hereto, as Exhibit B, is a true and correct photograph, with extraneous markings, of the water clarifier and the bench taken from the rear of the water clarifier.
22. The distance between the left side of the water clarifier and the edge of the bench drop-off is between 12 to 15 feet.
23. There was a block retaining wall erected to the right of the water clarifier, marked as such on Exhibit B.
24. The distance between the right side of the water clarifier and the block retaining wall on the bench is approximately 12 feet.

25. Attached hereto, as Exhibit C, is a true and correct bird's eye diagram of the bench, the water clarifier and the retaining wall, with extraneous markings.
26. The area marked "X" on Exhibit C is the space between the water clarifier and the edge of the bench immediately adjacent to the 6- to 8-foot drop-off.
27. The area marked "1" on Exhibit C is the drop-off adjacent to the bench, which is approximately 6 to 8 feet lower than the bench.
28. The area marked "X" on Exhibit C is approximately 12 to 15 feet wide, as measured from the left side of the water clarifier to the 6- to 8-foot drop-off, marked "1".
29. The area marked "Y" on Exhibit C is approximately 12 feet wide, as measured from the right side of the water clarifier to the retaining wall.
30. The area marked "Pond" on Exhibit C depicts the pond adjacent to the drop-off.
31. The Pond, as shown on Exhibit C, is approximately 16 feet from the edge of the drop-off, marked "1."
32. Between December 2, 2016 and December 4, 2016, Respondent constructed the bench using a Doosan DX340 excavator.
33. The DX340 excavator, likewise, filled the footing of the retaining wall adjacent to the bench during this same period.
34. Attached hereto, as Exhibit C-1, is a copy of Exhibit C modified to show the path of the DX340 excavator during the construction of the bench and the backfilling of the retaining wall footing.
35. The blue arrow on Exhibit C-1 depicts the approximate path and direction of the DX340 excavator as it constructed the bench and backfilled the retaining wall footing.
36. The area marked "X" on Exhibit C-1 is approximately 12 to 15 feet from the right of the DX340 excavator to the 6- to 8-foot drop-off marked as "1."
37. The area marked "Y" on Exhibit C-1 is approximately 12 feet from the left of the DX340 excavator to the retaining wall.
38. On or about December 4, 2016, Respondent placed the water clarifier on a tandem tow dolly and used the DX340 excavator and a Yanmar B5 mini excavator (the "B5 excavator") to transport the water clarifier from a nearby parking area to the bench.
39. The B5 excavator weighs approximately 5 tons.
40. The DX340 excavator weighs approximately 34 tons.
41. The B5 excavator pulled the dolly-mounted water clarifier from the front end up the bench, while the DX340 excavator pushed the water clarifier from the rear.
42. Attached hereto, as Exhibit C-2, is a modified diagram of Exhibit C that illustrates the transport and placement of the water clarifier.
43. The area marked "2" on Exhibit C-2 depicts the approximate location of the B5 excavator.

44. The area marked “3” on Exhibit C-2 depicts the approximate location of the DX340 excavator.
45. The blue arrows depicted on C-2 depict the direction of travel of the DX 340 excavator, the B5 excavator, and the dolly-mounted water clarifier.
46. Once the water clarifier was in place, the B5 excavator traveled on the bench between the clarifier and the retaining wall, through the area marked “Y” on Exhibit C-2.
47. Once the water clarifier was in place, as depicted in Exhibit C, Respondent brought an Earthforce EF500 compact tractor backhoe (the “backhoe”) on the bench to the left side of the water clarifier in order to power the water clarifier’s hydraulics.
48. Attached hereto, as Exhibit C-3, is a copy of Exhibit C modified to show the path and location of the backhoe on the bench.
49. The blue arrow on Exhibit C-3 depicts the approximate path and location of travel of the backhoe on the bench.
50. The area marked “Z” on Exhibit C-3 depicts the approximate location where the backhoe came to a rest and was used to power the hydraulics of the clarifier.
51. A portion of the bench was intended to be permanent, and a portion of the bench was intended to be temporary.
52. The condition and dimensions of the bench as it existed on the date of the citation are reflected in Exhibits A through C, previously submitted.
53. Attached hereto, as Exhibits D and E, are photographs of the bench taken and annotated by Respondent on October 24, 2018.
54. Subsequent to the citation, Respondent removed a portion of the bench and intends to remove additional portions of the bench, circled in the photographs attached as Exhibits D and E, at some point in the future.
55. The water clarifier was permanently installed on the bench.
56. The water clarifier is permanently mounted on a chassis with wheels at the rear, as shown in Exhibit A and in Exhibit D.
57. Additionally, the front end of the water clarifier had been mounted on a tandem tow dolly on December 4, 2016, to allow Respondent to support the front of the water clarifier and steer the water clarifier on to the bench.
58. Once the water clarifier was positioned on the bench on December 4, 2016, the tandem tow dolly was removed, leaving the water clarifier on the chassis with the wheels in the back and supports in the front, as depicted in Exhibit A and Exhibit D.
59. Water clarifiers are not regularly moved at the Mine.
60. The B5 excavator, depicted as “2” in Exhibit C-2, traveled approximately 84 feet on the bench during placement of the water clarifier; specifically, the B5 excavator traveled approximately 42 feet onto the bench from the roadway, and then an additional 42 feet back down the bench toward the roadway.

61. The backhoe, depicted as “Z” in Exhibit C-3, traveled approximately 42 feet on the bench after placement of the water clarifier in order to power the water clarifier’s hydraulics for purposes of positioning the water clarifier’s supporting legs; specifically, the backhoe traveled approximately 21 feet up the bench from the roadway, and then an additional 21 feet back down the bench toward the roadway.
62. The tank, depicted in Exhibit B, is permanent.
63. The photographs in Exhibits A and B were not the photographs referenced in Inspector D’Angelo’s citation, but rather were provided to MSHA by Respondent after issuance of the citation.

II. Factual Background

Poland Sand & Gravel operates the Poland Sand & Gravel Mine, a surface sand and gravel operation, in Herkimer County, New York. Jt. Stips. 1, 2. Between December 2 and 4, 2016, Poland Sand & Gravel constructed a bench solely for permanent placement of a water clarifier to be used in the process of washing mined aggregate. Jt. Stips. 32, 55; Resp’t Mem. at 1. The bench was 42 feet long and 24 to 27 feet wide, and was built 6 to 8 feet above ground. Jt. Stips. 16, 18, 28, 29; see Exs. A, C. At the back of the bench was a block retaining wall that held loose material. Jt. Stip. 24; see Ex. B. No berms had been built along the front edge of the bench, exposed to a 6- to 8-foot drop-off with a pond approximately 16 feet away at ground level. Jt. Stips. 17, 18, 20, 30, 31; see Exs. A, C.

Poland Sand & Gravel permanently installed its water clarifier in the middle of the bench, leaving approximately 12 to 15 feet between the clarifier and the front edge, and about 12 feet between it and the back retaining wall. Jt. Stips. 29, 37, 42, 55; see Exs. C, C-1. The water clarifier is a large piece of equipment permanently mounted on a chassis with wheels in the rear and supports in the front. Jt. Stips. 56, 58. To move the water clarifier into position on the bench, on December 4, Poland Sand & Gravel pulled the clarifier, mounted on a tandem tow dolly for support of the front and steering, from the roadway with a five-ton mini excavator, while pushing it with a larger 34-ton excavator. Jt. Stips. 38, 39, 40, 57. The front mini excavator was driven from the roadway approximately 42 feet along the bench to install the water clarifier, then traveling around the it, the excavator was driven another 42 feet back down the bench to the roadway. Jt. Stip. 60; see Ex. C-2. The back excavator did not travel onto the bench. Jt. Stip. 60. Once the water clarifier was positioned, the tandem tow dolly was removed, and the operator drove a backhoe onto the bench to power the water clarifier’s hydraulic system, which leveled its supporting legs. Jt. Stips. 47, 48, 50, 58, 61; see Ex. C, C-3. The operator drove the backhoe between the water clarifier and the exposed edge of the bench for approximately 21 feet, and then another 21 feet back down to the roadway. Jt. Stips. 49, 61; see Ex. C-3; Resp’t Reply at 2.

Subsequent to issuance of the citation, Poland Sand & Gravel cut back the width of the bench between the edge and the water clarifier, and according to its installation plan, it had intended to remove additional portions. Resp’t Mem. at 1; Jt. Stips. 51, 54; see Exs. D, E. In any case, however, the operator had intended to maintain the 12-foot area between the water

clarifier and the back retaining wall in order for the equipment to be accessed for service.[3] Resp't Mem. at 1.

On January 9, 2017, Inspector Vincent D'Angelo conducted a regular inspection of the mine. After examining the bench, water clarifier, and drop-off, he determined that the bench had been used as a travelway and issued a citation.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

Inspector D'Angelo issued 104(a) Citation No. 931059, alleging a violation of section 56.9300(a) that was "unlikely" to cause an injury, and was due to Poland Sand & Gravel's "moderate negligence."[4] The "Condition or Practice" is described as follows:

> A 15 foot section (as measured with a tape measure) of travel way located on a bench beside a trailer of water classifiers [clarifier] past the scale house was not provided with a berm on the bank where an estimated 10 foot drop off exist to cause a vehicle to overturn or endanger persons in equipment. The travel way was used to locate the trailer and there was no tracks observed beside the berm. A miner would be exposed to back, neck, head, and other permanently disabling injuries from over travel of a berm.

Pen. Pet. at 5.[5] The citation was terminated on January 10, 2017, after Poland Sand & Gravel restricted entry to the bench by placement of a perpendicular berm. Pen. Pet. at 5.

To establish a violation of section 56.9300(a), the Secretary must show: (1) that there was a roadway, (2) that a sufficient drop-off existed to cause a vehicle to overturn or endanger persons in equipment, and (3) that no berms or guardrails were in place for protection at the edge. *Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011).

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[3] Respondent did not clarify how the water clarifier would be serviced in the future.

[4] 30 C.F.R. § 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

[5] Although the description of the violation may be confusing, the parties stipulated that the exposed edge of the bench did not have berms. Jt. Stip. 18.

In the instant case, the parties agree that there were no berms along the edge of the bench during installation of the water clarifier, and Poland Sand & Gravel does not challenge the Secretary's contention that the drop-off is of sufficient height for a vehicle to overturn.[6] Jt. Stip. 16. Consequently, the only remaining question is whether, during the permanent installation of the water clarifier, the nature and usage of the bench constituted a roadway for purposes of section 56.9300(a).

While the term "roadway" is not defined in the Secretary's regulations, the Commission has looked to the "common usage" and "a common-sense application of the standard to the facts" to determine whether a roadway exists. *See Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982) (interpreting former section 56.9-22, which is identical to current section 77.1605(k)).[7] Further, the Commission has stated that, "[an] '[e]levated roadway' is a general descriptive term that encompasses a variety of more specific applications." *Id.* (upholding the ALJ's determination that an elevated ramp used by a front-end loader for dumping was an "elevated roadway"). More recently, in considering the issue under section 77.1605(k), the surface coal mine standard analogous to the surface metal/nonmetal standard at issue herein, the Commission stated that, "an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735 (Aug. 2012) (citing its previous holdings regarding elevated roadways in *Capitol Aggregates*, 4 FMSHRC at 847; *Burgess Mining & Constr. Corp*., 3 FMSHRC 296 (Feb. 1981); and *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 36 (Jan. 1981)). Even temporary and infrequently used roadways may be covered under this standard. *Id.* at 1738-42 (a temporary roadway constructed solely for moving a drill rig within a few days was covered by the standard).

The Secretary contends that he is entitled to summary decision because the bench was used for vehicular travel, rendering it a roadway for purposes of section 56.9300(a). Sec'y Mem. at 6. To support this contention, the Secretary cites several cases, Commission and ALJ, in which benches were found to be elevated roadways. Sec'y Mem. at 6-7 (citing *Black Beauty*, 34 FMSHRC at 1735; *El Paso Rock Quarries, Inc.*, 3 FMSHRC at 36; *Foundation Coal W., Inc.*, 34 FMSHRC 2911, 2929 (Nov. 2012) (ALJ); *Arch of Wyo., LLC*, 32 FMSHRC 568, 575-76, (May 2010) (ALJ); *S. & M. Constr., Inc.*, 19 FMSHRC 566, 576-77 (Mar. 1997) (ALJ); *Peabody Coal Co.*, 12 FMSHRC 109, 114-16 (Jan. 1990) (ALJ)). The Secretary takes the position that the Commission's roadway analysis does not rest on frequency of travel, and that infrequency does

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[6] Commission ALJs have consistently found drop-offs of 6 feet and less sufficient to cause vehicular overturning or endangering persons in equipment. *See, e.g., Morris Sand & Gravel*, 39 FMSHRC 1609, 1616-17 (Aug. 2017) (ALJ) (a 3- to 4-foot drop-off); *Meyer Aggregate LLC*, 38 FMSHRC 2596, 2607 (Oct. 2016) (ALJ) (a 6-foot drop-off); *Palmer Coking Coal Co.*, 34 FMSHRC 620, 634-35 (Marc. 2012) (ALJ) (between 3- and 8-foot drop-off); *Pappy's Sand & Gravel*, 20 FMSHRC 647, 648, 651 (Jun. 1998) (ALJ) (a 6-foot drop-off).

[7] 30 C.F.R. § 77.1605(k) provides that "[b]erms or guards shall be provided on the outer bank of elevated roadways."

not negate the risk of vehicles overturning.[8] Sec'y Mem. at 7-8 (citing *Black Beauty*, 34 FMSHRC at 1744; *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 417-18 (Mar. 1996) (ALJ); *Arch of Wyo.*, 32 FMSHRC at 576 (ALJ); *Manalapan Mining Co*., 16 FMSHRC 1727, 1733 (Aug. 1994) (ALJ)). The Secretary urges application of the Commission's "common usage" of an area and "common-sense application of the standard to the facts" to decide whether an elevated area is a roadway. Sec'y Mem. at 7 (citing *Capital Aggregates*, 4 FMSCHRC at 846-47). As such, the Secretary asserts that because the bench was an elevated roadway, berms were required. Sec'y Mem. at 6, 10.

Poland Sand & Gravel asserts, on the other hand, that it is entitled to summary decision because the bench was not used regularly for travel, and usage of the bench did not rise to the level required for a roadway. Resp't Mem. at 1-2; Resp't Reply at 2-3. First, the operator contends that the principal purpose of the bench was for placement of the water clarifier, rather than vehicular travel. Resp't Mem. at 2; Resp't Reply at 2 (citing *Knife River Corp.*, 34 FMSHRC 1109, 1128 (May 2012) (ALJ). Second, it emphasizes that the bench is a dead-end that could not be used for travel to another area of the mine. *Id.* Finally, the operator contends that vehicular travel on the bench was infrequent, and that frequency of travel was essential to the Commission's roadway analysis. Resp't Reply at 1-3 (citing Commissioner Duffy's dissent in *Black Beauty*, 34 FMSHRC at 1754).

It is noted that the parties argue about whether berms were required during the initial construction of the bench. Sec'y Mem. at 3, 7; Resp't Mem. at 1-2; see Jt. Stips. 33-35 (the 34-ton excavator was used to fill the footing of the back retaining wall in addition to constructing the bench). This argument is off-point, however, because it expands the narrow question before me of whether the bench was a roadway during *installation* of the water clarifier.

Although the Secretary cites a number of cases in which the Commission has found benches to constitute roadways, his assertion that frequency of travel is not a determinative factor in the analysis is not consistent with Commission rulings. Sec'y Mem. at 6-7; *see*, *e.g., Black Beauty*, 34 FMSHRC at 1735 ("an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining *routine*.") (emphasis added); *Capitol Aggregates*, 4 FMSHRC at 846-47 (an elevated ramp, which was *regularly* used by a front-end loader for dumping, was found to be an elevated roadway) (emphasis added); *Burgess Mining & Constr. Corp*., 3 FMSHRC at 296 (a bridge, used during the normal mining *routine*, was found to be an elevated roadway) (emphasis added); *El Paso Rock Quarries, Inc*., 3 FMSHRC at 35-36 (a *routinely* used haulage road was found to be an elevated roadway) (emphasis added). In these cases, not only did the Commission consider frequency of travel, but also the common usage of the areas, and it took a common sense approach to applying the standard to the facts in deciding whether roadways existed. As the Secretary contends, however, travel infrequency does not negate the presence of the hazard. *Black Beauty*, 34 FMSHRC at 1741-42.

[8] By the Secretary's reasoning, frequency of travel is appropriately considered when assessing the penalty.

Poland Sand & Gravel's reliance on the dissent in *Black Beauty* and the ALJ's ruling in *Knife River* is misplaced. In *Black Beauty*, the majority explained that "the *presence* of a rubber-tired vehicle on the bench, by itself, did not mean that the bench was a 'roadway,'" but left open the possibility that its presence may be an indicium of whether a roadway existed. *Black Beauty*, 34 FMSHRC at 1735. The dissent pointed out that the *traveling* of a rubber-tired vehicle did not transform the bench into a roadway. *Id.* at 1754. Here, *multiple* mobile vehicles - - the water clarifier, itself, on a wheeled chassis and a wheeled tow dolly, an excavator, and a backhoe - - traveled on the bench to install the clarifier. Clearly, in this case, the analysis involves consideration of several vehicles, operating together over the course of three days, to accomplish a single one-time task. Ultimately, as the majority in *Black Beauty* has instructed, frequency is but one factor to consider, and how the area was used looms large. *Id.* at 1735.

Similarly, *Knife River*, finding that portable truck scales did not constitute a roadway, was decided on its own set of facts that are not similar to the facts at hand. *Knife River*, 34 FMSHRC at 1128, 1134.[9] Furthermore, *Knife River* predates the Commission's decision in *Black Beauty* by a few months, and does not employ the Commission's standard.

To recap, in *Black Beauty*, the Commission reiterated its definition of a roadway, set forth in earlier decisions, that "an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine." *Black Beauty*, 34 FMSHRC at 1735. In that case, the operator received a citation during a dragline move.[10] Dragline moves occurred every seven to ten days at that mine, and it was routine for a rubber-tired backhoe to accompany the dragline. *Id.* at 1736. For that specific move, the operator closed a haulage road so that the dragline could be moved on that road to another area of the mine. *Id.* To prepare for the move, the operator removed the berms along the haulage road and closed the area to traffic. *Id.* at 1734, 36. During the move, however, the dragline had an electrical malfunction and a service truck was driven along the bench in order to service it. *Id.* at 1734. Finding that it was common for service trucks to attend to draglines when issues arose during moves, the Commission concluded that "the service truck's use of the bench in this instance illustrates that the character of the bench was unchanged. Therefore, the evidence demonstrates that the bench remained a 'roadway' during the dragline move." *Id.* at 1736. The Seventh Circuit affirmed the Commission's determination that the bench was a roadway, and that usage is at the heart of the

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[9] Judge McCarthy identified the unique facts and circumstances present in the case, such as the purpose for using the scales, the controlled environment when trucks drove onto the scales, the limited access to the area, and the speed at which the trucks traveled on the portable truck scales.

[10] A dragline is "[a] type of excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket towards itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile." American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 167 (2d ed. 1997).

roadway analysis. *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 615 (7th Cir. 2014).[11]

The parties stipulated that water clarifiers are not regularly moved at this mine. Jt. Stip. 59. Although this case does not involve travel regularity as in *Black Beauty*, these fairly unique facts sufficiently indicate that the elevated bench was used as a roadway for the three days required to install the water clarifier. Two substantial vehicles, the mini excavator and the mobile water clarifier, traveled onto the bench to situate the water clarifier and, once it was in position, a backhoe was driven onto the bench to finalize its instillation. This vehicular travel, on the 6-8 foot elevated span without berms, exposed miners to a drop-off sufficient to result in overturning and serious to fatal injuries.

Moreover, a broad reading of section 56.9300(a) is consistent with the protective goals of the Mine Act and Commission precedent. To find that this elevated bench was not a roadway during installation of the water clarifier would render the miners performing the excavator/tow dolly/backhoe installation totally unprotected, since no other standard adequately addresses the safety hazard. As such, a common-sense application of the standard to the facts leads to a finding that this elevated bench was used as a roadway for the purpose of installing the water clarifier.

Having found that the bench was a roadway during installation, I also find that there was a sufficient drop-off for a vehicle to overturn, and that there were no protective berms along the edge of the bench when the installation took place to protect the miners from death or serious injury. Accordingly, I find that Poland Sand & Gravel violated section 56.9300(a), and that the Secretary is entitled to summary decision as a matter of law.

B. Penalty

While the Secretary has proposed a civil penalty of $116.00 by application of his Part 100 penalty regulations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). These criteria are: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

Applying the *Sellersburg* criteria, and based upon a review of MSHA's online records, I find that Poland Sand & Gravel is a small operator, with no prior violations of section 56.9300(a), and an overall violation history that is not an aggravating factor in assessing an appropriate penalty. Jt. Stip. 3. As stipulated, the proposed civil penalty will not affect Poland Sand & Gravel's ability to continue in business. Jt. Stip. 8. I also find that Poland Sand &

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[11] Black Beauty Coal Company changed its name to Peabody Midwest Mining, LLC, before the 7th Circuit considered the appeal of the Commission's *Black Beauty* decision.

Gravel demonstrated good faith in achieving rapid compliance after notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Poland Sand & Gravel's negligence in committing it. This is a serious violation, although limited in duration, given the lack of overturn protection for the heavy mobile equipment used to install the water clarifier, and I find, based on the obviousness of needed protection from the drop-off and exposure to the nearby pond at ground level, that Poland Sand & Gravel was moderately negligent in committing it. Therefore, I find that a penalty of $116.00, as proposed by the Secretary, is appropriate.

ORDER

ACCORDINGLY, the Secretary's Cross-Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED,** and it is **ORDERED** that Poland Sand & Gravel, LLC, **PAY** a civil penalty of $116.00 within 30 days of the date of this Decision.[12]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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/adh

[12] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket number and AC number.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 8, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON WYLIE, Complainant, v. ALLEGHENY MINERAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. PENN 2018-0158-DM MSHA No. NE MD 2018-01 Mine: Bison Mine Mine ID: 36-10107
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ALLEGHENY MINERAL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-0275 Mine: Bison Mine Mine ID: 36-10107

ORDER DENYING SECRETARY'S MOTION FOR RECONSIDERATION

Before: Judge Feldman

These discrimination and civil penalty matters concern a discrimination complaint filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) (the "Mine Act" or "Act"), by the Secretary of Labor (the "Secretary") on behalf of Jason Wylie against the Allegheny Mineral Corporation ("Allegheny"). Before me is the Secretary's October 26, 2018, Motion to Reconsider the October 23, 2018, Severance Order. The Severance Order established and severed newly created Docket No. PENN 2018-0275 concerning the Secretary's civil penalty proceeding from Docket No. PENN 2018-0158-DM that is limited to issues concerning the merits of Wylie's discrimination complaint and his claim for relief. *Severance Order*, 40 FMSHRC ___ at 4, No. PENN 2018-0158-DM (Oct. 23, 2018). On November 5, 2018, Allegheny filed an opposition to the Secretary's request for reconsideration.

I. Discussion and Evaluation

The Severance Order is predicated on the Secretary's representation that the parties, including Wylie[1], had verbally agreed on settlement terms regarding both the relief to be awarded to Wylie and the amount of the civil penalty to be paid in this matter. However, the Secretary has, to date, prevented Wylie's receipt of his agreed upon monetary settlement relief by opposing Wylie's settlement terms solely on the basis of the Secretary's insistence that the amount of Wylie's relief must not be kept confidential.[2]

Wylie's desire to settle is well documented. In this regard, in an email dated September 28, 2018, Wylie advised the Commission:

> This settlement proceedings [*sic*] is getting way out of control now. I agreed to a[n] amount and now feel like it has stalled out to nothing. I have tried to move on but [it is getting] ridiculous. When I agreed to settle I was and am ready to move on but have yet to get anywhere as far as finalizing or receiving my settlement. I don't want to go to court and I just want to move on. It has been long enough and for the [*sic*] MSHA to fight the court and without my settlement is absurd. Thank you for reading my email I just want my thoughts on the matter known.

Resp. to Sec'y's Mot. to Reconsider, Ex. C at p. 1, (Nov. 5, 2018). Wylie's email was sent to Nicholas Desai, the law clerk of Judge Paez, who previously had been assigned to this case.

The Severance Order is consistent with the Commission's decisions in *Sec'y of Labor o/b/o Clemmie Callahan v. Hubb Corp.*, 20 FMSHRC 832 (Aug. 1998) ("Callahan"), and *Sec'y of Labor o/b/o Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) ("Hale"). In *Callahan* the Commission distinguished a discrimination complainant's interest in settling his complaint in a 105(c)(2) proceeding from the Secretary's interest in establishing a violation of section 105(c) in a pertinent civil penalty proceeding. *Callahan*, 20 FMSHRC at 837-39. In other words, Wylie's settlement with Allegheny would not preclude the Secretary from prosecuting its civil penalty case.

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[1] Commission Rule 4(a) states, in pertinent part, "[i]n a proceeding instituted by the Secretary under section 105(c)(2) of the Act . . . the complainant *on whose behalf the Secretary has filed the complaint* is a party and may present additional information on his own behalf." 29 C.F.R. § 2700.4(a) (*emphasis added*).

[2] In the interest of clarifying this matter, Allegheny and Wylie's settlement terms only concern confidentiality with respect to the specific monetary amounts of Wylie's relief. This can be accomplished through a settlement motion that references an addendum containing the specific monetary terms of Wylie's relief, which will be placed under seal regardless of whether the Motion to Approve Settlement is ultimately granted or denied. The confidentiality of Wylie's monetary relief would not preclude posting that is commonly required by the Commission. Finally, while the amount of Wylie's relief may remain confidential, a decision approving settlement provides public notice of the disposition of Wylie's discrimination complaint.

Obviously, a miner should not be made worse off than he otherwise would have been because he is pursuing his rights in a 105(c)(2) proceeding brought by the Secretary rather than in a 105(c)(3) proceeding brought by the miner on his own behalf. *See Sec'y of Labor o/b/o Rieke v. Akzo Nobel Salt Inc*., 19 FMSHRC 1254, 1259 (July 1997). In *Hale*, the Commission, in essence, noted that it eschews prejudicing a complainant as a consequence of actions taken by the Secretary in a 105(c)(2) proceeding. *See Hale,* 8 FMSHRC at 908. *Hale* concerned the Secretary's *inadvertent* late initiation of a 105(c)(2) discrimination proceeding on Hale's behalf. *Id*. In contrast, this matter concerns the detrimental delay in Wylie's receipt of the remedial relief that would presumably make Wylie whole that has been brought about by the Secretary's *conscious* litigation posture.

Finally, Commission Rule 1(b) provides, "on any procedural question not regulated by the Act . . . the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . . ." 29 C.F.R. § 2700.1(b). Rule 42 of the Federal Rules of Civil Procedure authorizes a judge to issue orders avoiding unnecessary delay or prejudice, or such orders that expedite and/or economize proceedings. Fed. R. Civ. P. 42(a)(3), 42(b). As the Severance Order is consistent with both the Federal Rules of Civil Procedure and relevant Commission case law, **IT IS ORDERED** that the Secretary's Motion for Reconsideration of the Severance Order **IS DENIED**.

II. Procedural Framework

a. Discrimination Proceeding in PENN 2018-0158-DM

I construe Allegheny's opposition as reflecting a continuing interest in settlement. Consequently, Allegheny may wish to formally submit, in writing, a motion for approval of settlement that disposes of the issue of Wylie's relief. Any such motion must include the total amount of Wylie's monetary relief as well as an explanation of the calculation upon which the monetary relief is based.

Any settlement motion filed by Allegheny must be filed within 14 days of the date of this Order.[3] Alternatively, if Allegheny is no longer interested in pursuing settlement of Wylie's relief, it should so advise within 14 days of the date of this Order. In such event, the discrimination and civil penalty matters will be scheduled for hearing.

Any opposition to Allegheny's settlement motion must be filed by the Secretary within 10 days thereafter. The opposition should specify why the remedial relief in the settlement motion is objectionable. The opposition should further specify the alternative relief sought. The Secretary should support any objection to the remedial relief contained in Allegheny's motion to approve settlement with a sworn affidavit by Wylie specifically stating the basis for his objection.

[3] This Order supersedes the filing deadlines contained in the October 23, 2018, Severance Order.

Finally, Section 105(c)(2) of the Act authorizes the Commission to order such relief in a discrimination proceeding that "the Commission deems appropriate." 30 U.S.C. § 815(c)(2). Consequently, any opposition filed by the Secretary should address whether the question of confidentiality is a judiciable issue rather than a matter committed to a Judge's reasonable exercise of discretion.

b. Civil Penalty Proceeding in PENN 2018-0275

The Secretary has proposed a civil penalty of $30,000.00 for Allegheny's alleged violation of section 105(c)(1) of the act.[4] 30 U.S.C. § 815(c)(1). Allegheny and the Secretary apparently previously had reached an informal settlement agreement with respect to the civil penalty to be imposed. If the parties continue to agree on this matter, a motion for approval of settlement must be submitted within 14 days of the date of this Order.

If Allegheny and Wylie agree to settlement terms with respect to relief, but Allegheny and the Secretary cannot agree on the issue of civil penalty, the civil penalty matter will be scheduled for adjudication. Any agreement between Allegheny and Wylie, in essence, constitutes Allegheny's withdrawal of its contest of the fact of the violation of section 105(c)(1) that can be considered solely for the purposes of any relevant proceedings subsequently brought under the Mine Act. Consequently, any adjudication under such circumstances would be strictly limited to the issue of the appropriate civil penalty.[5]

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[4] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner … in any … mine subject to this Act because such miner … has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the … mine of an alleged danger or safety or health violation in a … mine, … or because of the exercise by such miner … of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1)

[5] In *Callahan*, the 105(c)(2) complainant sought dismissal after admitting on the record that "there has been no violation of section [105(c)(1)] of the [A]ct[.]" 20 FMSHRC at 844. Callahan's admission of no violation did not preclude the Secretary from litigating the fact of the violation is a separate civil penalty proceeding. Unlike *Callahan*, any settlement with respect to Wylie's relief would remove the fact of the violation as an outstanding issue.

The Commission long ago noted that it is not bound by the method of computation utilized by the Secretary to arrive at his proposed civil penalty. *Sec'y of Labor v. Co-Op Mining Co*., 2 FMSHRC 784, 785 (April 1980). Thus, the authority of the Commission to assess civil penalties *de novo* for 105(c)(1) violations of the Act is well established. *Sec'y of Labor v. Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). An issue in the civil penalty adjudication is whether the Secretary has abused his discretion by unreasonably delaying Wylie's receipt of relief in contravention of the remedial goals of the antidiscrimination provisions of section 105(c) of the Act. If so, the dispositive question is whether such delay should be considered as an aggravating factor that warrants a reduction in the Secretary's proposed civil penalty.

Finally, the record amply reflects the issues in this case. Enough is enough. Consequently, the Secretary's November 6, 2018, reply to Allegheny's response to the Secretary's motion for reconsideration, and any response by Allegheny thereto, have not been authorized and will be given no consideration.

Any procedural questions concerning the matters discussed herein should be directed to my Law Clerk, Noah Meyer, at nmeyer@fmshrc.gov or (202) 233-4010.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of JUSTIN HICKMAN, Complainant,	DISCRIMINATION PROCEEDING Docket No. LAKE 2018-0387-DM MSHA Case No. NC-MD-18-06
v.	
HUBER CARBONATES, LLC, Respondent.	Mine: Quincy Plant Mine ID: 11-02627

ORDER GRANTING RESPONDENT'S MOTION FOR DECLARATORY JUDGMENT

Before: Judge Priscilla M. Rae

INTRODUCTION

This proceeding is before me upon a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) ("Mine Act"). A hearing is scheduled for February 19-20, 2019 in a location to be determined.

Huber Carbonates, LLC ("Huber" or "Respondent") has filed a motion for Declaratory Judgment seeking the return of an attorney-client privileged email communication (and all copies thereof) obtained by the Secretary and a bar on the use of this email by the Secretary in this or any other proceeding under the Mine Act. The Secretary has filed a response in opposition to this motion.

The issue of whether the document is privileged was decided, in the affirmative, through an *in camera* review by Judge David Simonton on November 16, 2018. At issue presently is whether Respondent waived that privilege.

STATEMENT OF THE FACTS

On August 8, 2018, outside counsel for Huber sent an email to Respondent's in-house counsel and members of management. The email contained legal advice concerning the instant case, as well as other legal matters. The words "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION" were included in the subject line of the original email and a footer within the email further declared the contents as privileged and instructed unauthorized receivers on the means to return the email. Later that day, a member of Huber management included an EH&S Coordinator on the email chain. The EH&S Coordinator had information about the original email

and was needed to analyze the legal issues being discussed. Respondent's Motion for Declaratory J. ("Resp. Mot.") at 2-3.

Respondent later learned that, on August 16, 2018, the EH&S Coordinator had forwarded this email chain, via blind carbon copy ("bcc"), to a Plant Engineer being discussed in the chain. On August 16, 2018, the Plant Engineer deleted the "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION" notation in the subject line and forwarded the email to an MSHA inspector. Resp. Mot. at 3.

On September 6, 2018, counsel for Respondent contacted counsel for MSHA, via phone, to discuss the August 8, 2018 email communication and the subsequent events. In a written response, counsel for MSHA stated that the documents were protected by attorney-client privilege. Resp. Mot. at 4.

On October 3, 2018, counsel for Huber sent a written request to counsel for MSHA, in which it demanded that the August 8, 2018 email correspondence be returned to Huber and stated the information contained therein could not be used by MSHA in the Plant Engineer's 105(c) discrimination claim filed on September 27, 2018. Counsel for MSHA refused this demand in his October 12, 2018 response. Resp. Mot. at 5.

On October 18, 2018, counsel for Respondent filed a motion requesting the court to issue Declaratory Judgment that (1) the email correspondence was privileged, (2) all copies of the email correspondence be returned to Huber or destroyed, and (3) MSHA be barred from using the email correspondence in this and any other future proceeding against Huber instituted by MSHA or the Secretary. Resp. Mot. at 1, 12.

On November 5, 2018, the Secretary filed an opposition to Respondent's motion for Declaratory Judgment and requested a hearing in order to determine whether the document was protected by the attorney-client privilege and, if so, whether Respondent waived that privilege.[1] On November 13, 2018, Judge Rae referred the motion and opposition to Judge Simonton and requested that he conduct an *in camera* review of the email chain in order to determine whether attorney-client privilege applied. Secretary's Opposition to Resp. Mot. ("Sec'y Opp.) at 1-2.

On November 16, 2018, Judge Simonton held that the contents of the email chain were indeed protected by the attorney-client privilege. He returned the case to Judge Rae for further deliberations on whether Huber waived this privilege. In Camera Review Holding that Subsequent Email Chain is Protected by Attorney-Client Privilege ("In Camera Rev.") at 1, 4.

DISPOSITION

As noted above, at issue is whether Huber waived the attorney-client privilege which protected the contents of the email chain which originated on August 8, 2018. Each party focuses on two different events in which Respondent could have waived the privilege. The Secretary

[1] I have determined the facts were sufficiently pleaded in the parties' motions and, as such, are not at issue. For this reason, the questions of attorney-client privilege and waiver are solely matters of interpretation of law. Thus, no hearing is required.

argues the privilege was waived on August 8, 2018 when a member of Huber management included the EH&S Coordinator on the email chain. Respondent argues it did not waive the privilege when the EH&S Coordinator forwarded the email on August 16, 2018 to the Plant Engineer, by bcc, because the Coordinator did not have the power to waive attorney-client privilege.

I find Respondent did not waive the attorney-client privilege when including the EH&S Coordinator on the email chain, neither did it waive the privilege when the EH&S Coordinator forwarded the email, because the EH&S Coordinator did not have the power to waive the attorney-client privilege.

i. Respondent did not waive the attorney-client privilege when a member of management included the EH&S Coordinator in the email chain, because the latter needed to know the information.

In a corporation, the attorney-client privilege attaches to both the corporation and individuals within it. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). Traditionally, the privilege only existed in communications between top-level management and counsel. Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 323-24 (7th Cir. 1963) (the court applied the "control group" test, which only protected communications of top-level management, defined as the corporate client, and counsel). However, the Supreme Court rejected this test in Upjohn Co. v. United States and established a balancing test where the attorney-client privilege applies to communications between a company employee and an attorney if:

(1) the information communicated is necessary to provide legal advice to the corporation or was ordered to be communicated by superior officers;

(2) the information was not available to counsel from "control group" management already;

(3) the communications concerned matters within the scope of the employee's duties;

(4) the employee was aware that they were being questioned so the corporation could receive legal advice; and

(5) the communications were considered confidential when made and kept confidential.

Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981). When these factors are met, a lower-level employee is considered part of the corporate client and communications involved are privileged.

In applying these factors to the inclusion of the EH&S Coordinator on the email chain, it is clear that the EH&S Coordinator, though a lower-level employee, constituted part of the corporate client. Hence, his inclusion on the email chain did not disrupt or waive the attorney-client privilege.

As Respondent noted in their motion and as affirmed by Judge Simonton, the email was sent for the purpose of obtaining legal advice. The EH&S Coordinator was included in the chain by a superior officer because he "had information about the contents of the original email communication and his assistance was needed to analyze some of the legal issues that were being discussed." Resp. Mot. at 3. Lastly, the EH&S Coordinator would have known both this purpose and the confidential nature of the communications due to the contents of the email and the "ATTORNEY-CLIENT PRIVILEGED INFORMATION" notation in the subject line. Indeed, the fact that the EH&S Coordinator forwarded the email to the Plant Engineer via bcc, a means which would conceal the transfer of information, indicated his knowledge of the confidentiality of the communication.

The Secretary argues that the privilege did not extend to the EH&S Coordinator, because he did not "need to know" the information contained in the email chain. Scholtisek v. Eldre Corp., 441 F. Supp. 2d 459, 464 (W.D.N.Y. 2006) (holding that the disclosure of information that an employee did not "need to know" to perform his responsibilities removed that information from the attorney-client privilege). In Scholtisek, the court held that dissemination of privileged information to lower-level employees destroys the attorney-client privilege if the employee did not "need to know" the information in order to perform their job effectively or make decisions related to the subject matter of the communication. This "need to know" standard "must be analyzed from two perspectives: (1) the role in the corporation of the employee or agent who receives the communication; and (2) the nature of the communication, that is, whether it necessarily incorporates legal advice." Scholtisek, 441 F. Supp. 2d at 464.

The Respondent has adequately articulated that the EH&S Coordinator was included in the privileged email so that he could give relevant information which pertained to the communication. The EH&S Coordinator needed to know the information provided by counsel to then give context required for the corporate client to obtain legal advice. The inclusion of a specific lower-level employee for the purpose of receiving his particular knowledge about the contents of the original email stands in contrast to the case cited by the Secretary in which confidential communications were widely distributed to lower-level employees. Smithkline Beecham Corp. v. Apotex Corp., 194 F.R.D. 624 (N.D. Ill. 2000).

Thus, I find that Respondent did not waive the attorney-client privilege and the privileged communications retained the attorney-client privilege when a member of Huber management included the EH&S Coordinator on the email chain.

ii. The attorney-client privilege was not waived when the EH&S Coordinator forwarded the email to the Plant Engineer, because he did not have the power to waive the privilege.

The power to waive the attorney-client privilege held by a corporation rests with the corporation's management and is normally exercised by its officers and directors. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). A lower-level employee has no power to waive the privilege unless she is given the authority to do so by one who holds the privilege (i.e., corporate management). U.S. v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996); Alexander v. F.B.I., 198 F.R.D. 306 (D.D.C. 2000) (holding that privilege was not waived when a lower-level employee disclosed privileged information because the officers and directors of the

corporation had not authorized the lower-level employee to waive the privilege); Bus. Integration Servs. v. AT&T, 251 F.R.D. 121, 125-27 (S.D.N.Y. 2008), aff'd, No. 06 Civ. 1863(JGK), 2008 WL 5159781 (S.D.N.Y. Dec. 9, 2008) (a non-executive manager lacked authority to waive the attorney-client privilege). Furthermore, employees must generally keep their employer's confidences. Chen, 99 F. 3d at 1502.

There is no indication in the record that the EH&S Coordinator was given authority by the corporate management to waive the attorney-client privilege. To the contrary, the email communicated that it was protected by attorney-client privilege and "made clear [it] was not intended for transmission to or receipt by any unauthorized persons…." Resp. Mot. at 2. Without this authority, he lacked the power to waive the attorney-client privilege and the document remained privileged when he inappropriately forwarded it to the Plant Engineer.

The Secretary relies heavily on the holding in Jonathan Corp. v. Prime Computer in arguing that the EH&S Coordinator both held the privilege and the power to waive that privilege. In Jonathan, Prime Computer provided attorney-client privileged communication to an employee without indicating that the communication was confidential or privileged. The employee, who was the sole representative of Prime Computer to Jonathan Corp., disclosed the privileged communication in negotiating with Jonathan Corp. This disclosure occurred in the ordinary course of his business with Jonathan Corp. Subsequently, Prime Computer's corporate officers made no attempt to recover the privileged information until two years after the disclosure was made. Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 695 (E.D. Va. 1987). In determining whether this communication retained its privileged status, the court held that Prime Computer had waived the privilege when it failed to designate the communication as privileged, allowed the employee to disclose it in the ordinary course of business, and failed to recall the communication following its disclosure. Jonathan Corp., 114 F.R.D. at 699.

The facts in the instant case are easily distinguished from Jonathan. Huber clearly communicated to the EH&S Coordinator that the contents of the email chain were privileged in the subject line notation, as well as the footer of the email. There is no evidence that the EH&S Coordinator forwarded the email as a means of communicating in the ordinary course of business. Instead, his use of blind carbon copy via email seems to indicate he knew the forwarding of a privileged email was irregular. Lastly, there is ample evidence to indicate that Huber, unlike Prime Computer, swiftly attempted to retrieve the privileged communication after learning of its disclosure. As noted, counsel for Huber contacted counsel for MSHA and requested the return of the communication. When that request was rejected, Huber sought the court's review.

For these reasons, I find that the EH&S Coordinator had no power to waive the attorney-client privilege because he had not been granted the authority from Huber management to do so. Thus, the communications retained their privileged status when he forwarded them to the Plant Engineer.

Accordingly, Respondent's Motion for Declaratory Judgment is **GRANTED** in part. The Secretary is **ORDERED** to return the August 8, 2018 email (and subsequent versions) held by the Counsel for Trial Litigation and ensure all other copies, or emails containing a copy of the privileged email, are destroyed.[2]

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

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[2] In Respondent's Motion for Declaratory Judgment, Huber requested an order preventing the use of the contents of the August 8, 2018 email in any litigation, present or future, instituted by MSHA or the Secretary against Huber. In view of the ruling that the privileged communication be return and that copies be destroyed, it is unnecessary to address that portion of Respondent's motion.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 14, 2018

MARSHALL JUSTICE, Complainant, v. ROCKWELL MINING, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2018-697-D PINE CD 2018-05 Mine: Gateway Eagle Mine Mine ID 46-06618

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This 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). On September 21, 2018, the Federal Mine Safety and Health Review Commission ("Commission") received a complaint of interference filed by Marshall Justice ("Complainant") against Rockwell Mining, LLC ("Respondent"). In his complaint, Justice alleges that Rockwell Mining has interfered with his rights as a non-employee miners' representative to travel on section 103(f) "walkarounds" and to inspect the mine map.[1] After investigating these claims, MSHA chose not to bring a section 105(c)(2) claim against Rockwell Mining. Justice is proceeding pro se. Respondent filed its Motion to Dismiss on October 22, 2018. Thereafter, on October 29, 2018, Chief Administrative Law Judge Robert J. Lesnick assigned me this case. On November 1, 2018, the Commission received Justice's Memorandum of Support of Claims Marshall Justice Motion to Proceed with 105(c) (hereinafter "Opposition"), in which, among other things, Justice opposes Rockwell Mining's Motion to Dismiss in the course of 113 pages, including exhibits.

The Commission strongly discourages the disposal of pro se discrimination cases on the face of the complaint. *See Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1918, 1920 (Nov. 1996) ("In cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself of all available facts relevant to his decision, including the complainant's version of those facts") (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). I construe Rockwell Mining's Motion to

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[1] On July 6, 2018, Justice submitted the following complaint to MSHA: "Frank Javins refused to provide [the] mine map as requested by Complainant. Respondent has failed to notify Complainant, who is a miner's representative for Mine No. 4606618 under the Mine Act, with [the] mandatory opportunity to exercise his walkaround rights on MSHA inspections conducted during the day shift repeatedly during the past year, and including several times as indicated on the attached inspection records, during the 30 days prior to the filing of this Complaint[.] Complainant seeks cessation of these Mine Act violations, and award of costs & fees." (Compl. at 8.)

Dismiss as a Motion for Summary Decision.[2] Summary decision is proper only when the entire record demonstrates that "there is no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

This proceeding is not isolated, as Justice has filed a series of complaints against the operator of the Gateway Eagle Mine. In July 2016, Justice filed a complaint with the Mine Safety and Health Administration ("MSHA") alleging that Rockwell Mining interfered with his exercise of rights as a miners' representative and discriminated against Justice by forcing him to work in unsafe conditions. The Secretary pursued part of Justice's interference claim by filing a section 105(c)(2) case against Rockwell Mining in Docket No. WEVA 2018-10-D. At the same time, Justice filed a complaint under section 105(c)(3) to pursue the claims the Secretary did not take. Rockwell Mining withdrew its contest in the Secretary's case and paid a civil penalty of $3,700.00 on April 13, 2018. Justice's separate proceeding, Docket No. WEVA 2018-48-D, remains in dispute and is set for hearing in January 2019. In that matter, Justice has alleged that Rockwell Mining violated section 105(d) based on Justice's refusal to operate a piece of mining machinery because of safety concerns. Docket No. WEVA 2018-48-D stems from a complaint filed with MSHA on July 20, 2016. Furthermore, Justice has retained counsel for Docket No. WEVA 2018-48-D, whereas here he is proceeding pro se.

I. BACKGROUND AND FACTUAL ASSERTIONS

When Marshall Justice was previously employed at the Gateway Eagle Mine, which Rockwell Mining now operates, two or more of the miners there appointed him as their miners' representative. (Mot. at 1.) Although Justice is not currently employed at the mine, he remains a non-employee miners' representative. As such, Justice enjoys certain rights under the Mine Act, among them the right to inspect mine maps and the right to be given the opportunity to accompany MSHA inspectors during physical inspections at the mine. *See* 30 U.S.C. § 813(f). In response to an MSHA interference investigation, Rockwell Mining agreed on March 31, 2017, to telephone Justice whenever an MSHA inspector is on the premises during the evening shift. (Mot. Ex. B at 2.) Rockwell Mining's logs indicate that, from May 10, 2017, through August 13, 2018, Rockwell Mining telephoned Justice 22 times to alert him to the presence of an MSHA inspector, but Justice came to the mine only once, on July 12, 2017. (Mot. Ex. H at 1–3.)

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[2] The Commission's procedural rules do not expressly contemplate a motion to dismiss for failure to state a claim, but Commission Judges addressing such motions have looked to Federal Rules of Civil Procedure 12(b)(6) and treated such motions as motions for summary decision. *See, e.g.*, *Sec'y on behalf of Chaparro v. Comunidad Argricola Bianci, Inc.*, 32 FMSHRC 1517, 1518 (Oct. 2010) (ALJ); *see also* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure").

On April 10, 2018, Justice spoke by telephone to shift foreman Frank Javins and made two requests: (1) to be sent an up-to-date copy of the mine map and (2) to be alerted via telephone when MSHA inspectors would be present during the day shift. (Opp. at 5.) Rockwell Mining did not send Justice a copy of the mine map and has declined to telephone him about MSHA inspections during the day shift. (Mot. at 6–7, 10–11.)

Justice alleges that Rockwell Mining's policy—that Justice travel on section 103(f) "walkarounds" during the evening shift only—is in effect to force him to interact with individuals who have assaulted him or threatened assault. (Opp. at 11.) Furthermore, Justice has described a history of alleged violent intimidation that discouraged him from viewing the mine map. (*Id*. at 4–5.) Justice states that he described these incidents to the MSHA investigation team before they declined to bring a section 105(c)(2) case. (*Id*. at 6.)

Consequently, Justice filed an interference complaint with MSHA on July 6, 2018. By letter dated August 28, 2018, the Secretary declined to bring section 105(c)(2) charges against Rockwell Mining. On September 21, 2018, Justice filed his complaint with the Commission under section 105(c)(3).

II. ISSUES

In its motion, Rockwell Mining argues (1) Rockwell Mining did not interfere with Justice's right to inspect the mine map because miners' representatives do not have the right to obtain copies of mine maps; (2) Rockwell Mining did not interfere with Justice's right to accompany MSHA inspectors (on section 103(f) "walkarounds") because any given individual miners' representative does not have the right to accompany MSHA inspectors during *every* shift; and (3) the damages that Justice seeks are not recoverable.

The primary issue before me is whether Rockwell Mining is entitled to summary decision because there is no genuine issue of material fact about whether Rockwell Mining interfered with Justice's rights as a miners' representative.[3]

III. PRINCIPLES OF LAW—ANALYSIS—CONCLUSIONS OF LAW

A. Principles of Law—Summary Decision and Section 105(c) Interference

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.

[3] Some of the arguments in Justice's Opposition could be construed as a cross-motion for summary decision in his favor. However, the arguments in the Opposition essentially recapitulate those in the Complaint, and, for this reason, I decline to evaluate those arguments as though Justice were arguing his entitlement to a decision without a hearing as a matter of law.

Lakeview Rock Prods., Inc., 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *Id*. at 2988 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The Mine Act provides relief not only for discrimination but also "interference." Section 105(c) of the Act provides, in relevant part, that:

> [n]o person shall . . . interfere with the exercise of the statutory rights of any . . . representative of miners . . . because such . . . representative of miners . . . has filed or made a complaint under or related to this chapter . . . or because of the exercise by such . . . representative of miners . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1). The Commission has not settled on the legal test for assessing claims of interference. *See Monongalia County Coal Co.*, 40 FMSHRC 679, 680–81 (June 2017). Several Commission Judges have applied the Secretary's two-prong test, which asks, first, whether the alleged interfering actions reasonably can be viewed as "tending to interfere with the exercise of protected rights," and, second, whether the interfering person can "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *See, e.g.*, *Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ) (applying the Secretary's proposed test for interference). The Commission has split, however, over whether the Secretary must also demonstrate that the interfering actions were motivated by animus to the exercise of protected rights. *See Monongalia County Coal*, 40 FMSHRC at 708–29.[4]

B. Analysis

Rockwell Mining argues that, as a matter of law, Justice is not entitled (1) to a copy of the mine map, (2) to notification regarding a section 103(f) "walkaround" during day *and* evening shifts, and (3) to attorney's fees or damages for pain and suffering. First, I will analyze the material facts regarding a claim for interference with a miners' representative's mine map inspection rights and section 103(f) "walkaround" rights. I will then turn to the damages issue and Justice's other arguments in his Opposition.

1. Mine Map Inspections and Alleged Violent Threats

Justice complains that Rockwell Mining has not honored his request for a copy of the mine map. (Compl. at 8.) Rockwell Mining argues that no statute, regulation, or guidance

[4] In this order, I need not decide between the tests because the complaint survives the more stringent test.

document confers a right to miners' representatives to obtain a copy of the mine map and, accordingly, that no interference took place. (Mot. at 6–8.)

By statute, a miners' representative[5] may inspect the mine map. *See* 30 U.S.C. § 872(b). The Mine Act also explicitly permits only the Secretary of Labor and the Secretary of Housing and Urban Development to request copies of the map, but they must keep them confidential. *See id*. In his Opposition, Justice clarifies that the alleged acts of interference include hostile confrontations while he was present at the mine as a non-employee miners' representative. Justice asserts that employees of Rockwell Mining told him that he could not view any documents posted at the mine site (Opp. at 4), and that past assaults discouraged Justice from demanding to view the mine map. (*Id*. at 4–5.) In light of this, Rockwell Mining's argument appears to be too narrow. If Justice's assertions are true, such actions would "interfere with the exercise of the statutory rights of any . . . representative of miners . . . because of the exercise by such . . . representative of miners . . . on behalf of himself . . . of any statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1). Assertions of hostility could also support a conclusion that the operator's interfering actions were the result of animosity toward Justice's protected actions as a miners' representative. *See Monongalia County Coal*, 40 FMSHRC at 708–29. Whether or not a miners' representative is entitled to a copy of the mine map under such circumstances, the record, construed in favor of the non-moving party, contains a genuine dispute of material fact. Accordingly, I conclude that summary decision against Justice is inappropriate at this stage.

2. Section 103(f) "Walkaround" Rights and Alleged Violent Threats

Justice complains that, for a year before he filed his complaint, Rockwell Mining has failed to telephone him about section 103(f) "walkarounds" during the day shift. (Compl. at 8.) Rockwell Mining argues that non-employee miners' representatives are entitled to notification of MSHA inspections during one shift only—here, they say Justice can attend the evening shift because it was the last he worked before leaving employment. (Mot. at 8–9.) The Mine Act provides that:

> [s]ubject to regulations issued by the Secretary . . . a representative authorized by [the operator's] miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f). MSHA's Program Policy Manual (PPM) states that, when notice of enforcement or investigation activities is given, notice should also be given to the representative

[5] A miners' representative is "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act . . . ." 30 C.F.R. § 40.1(b)(1). *See also Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 455 (10th Cir. 1990) (confirming that any person or organization representing two or more miners is a miners' representative under 30 C.F.R. § 40.1(b)). Rockwell Mining does not dispute that two or more miners appointed Justice as their miners' representative. (Mot. at 1.)

of miners. *See* I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Section 103-5, at 10 (2010).

In his Opposition, Justice clarifies that the alleged acts of interference included hostile confrontations while he was present as a miners' representative at Gateway Eagle Mine. (*See* Opp. at 4, 11.) If true, these actions would constitute interference with a miners' representative's exercise of his 103(f) "walkaround" rights and would establish motivation by animus to Justice's exercise of protected rights. *See Monongalia County Coal*, 40 FMSHRC at 708–29 (articulating a test for interference that requires the operator's animus toward the exercise of protected rights). Furthermore, such hostile actions could provide context to the telephone logs created by Rockwell Mining, which show that Justice went to the mine only once for a section 103(f) "walkaround." In light of these alleged threats, the telephone logs could cut both ways: Justice's absence on section 103(f) "walkarounds" could establish that Rockwell Mining's agents are hostile rather than that Justice lacks initiative. Whether or not Justice is entitled to notification about evening *and* day shift inspections, Justice should have the opportunity to present additional evidence about these incidents. A genuine dispute of material fact precludes summary decision.

3. Recoverable Damages

Rockwell Mining argues that Justice is not entitled to the damages he seeks for "pain and suffering and inconvenience" and that he is not entitled to "all customary lawyer fees and gratuities." (Mot. at 15.) However, Commission Judges can fashion 105(c) remedies suitable to the facts of each case. *See 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."). Justice has requested all "concession(s) available to me as permitted by [the] Mine Act . . . ." (Compl. at 2.) Justice is not an attorney, is pro se, and, consequently, cannot avail himself to attorney's fees. However, at this stage, I cannot rule out the possibility of another appropriate remedy for section 105(c) interference.

4. Other Arguments by Justice

In his Opposition, Justice makes several other arguments, which I feel compelled to construe as opposing Rockwell Mining's motion. For example, he asks for the Court to "dispense" with or "void" certain exhibits or arguments in Rockwell's Motion. (Opp. at 1, 2, 4, 6.) However, Commission Judges may admit "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative . . . ." 29 C.F.R. § 2700.63(a). He asks the Court to order MSHA to produce documents (Opp. at 6), but MSHA is not a party to this proceeding.[6] Justice asks the Court to examine maps of Gateway Eagle Mine—which he believes may contain "violation[s] or imminent dangers"—for "security risks." (Opp. at 9). In his numerous arguments, it is sometimes difficult to tell what Justice is requesting, and some requests seem unrelated to Rockwell Mining's motion. Accordingly, I construe Justice's various arguments not to be motions but simply statements in opposition to Rockwell's motion to dismiss. Justice is

[6] A party may choose to submit a written Freedom of Information Act ("FOIA") request either to the National MSHA FOIA Officer or to an MSHA FOIA Coordinator.

reminded that “[w]ritten motions shall be set forth in a document separate from other pleadings.” 29 C.F.R. § 2700.10(b).

C. Conclusion

The standard for summary decision under Commission precedent is not whether the non-moving party is likely to prevail but whether the non-moving party can “prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC at 1947 (quoting *Campbell*, 21 F.3d at 55). The presence of a “genuine issue as to any material fact” means that Justice could prevail. *See* 29 C.F.R. § 2700.67(b). Justice makes several allegations which, when I draw all inferences in his favor, create a genuine dispute of material fact as to whether Rockwell Mining interfered with his Mine Act rights as a miners’ representative. Summary decision is therefore premature.

IV. ORDER

In light of the foregoing, it is hereby **ORDERED** that Respondent’s Motion to Dismiss is **DENIED**.

/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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December 26, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DELBERT LEIMBACH, Applicant	CIVIL PENALTY PROCEEDING Docket No. LAKE 2019-0106-DM No. NC-MD-19-01
v.	
HUBER CARBONATES, LLC Respondent	Mine: Quincy Plant Mine ID: 11-02627

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge William B. Moran

Before the Court is the Secretary of Labor's ("Secretary") application for temporary reinstatement regarding Delbert Leimbach. The Secretary's application for temporary reinstatement of Mr. Leimbach is pursuant to the Secretary's authority under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). Respondent, Huber Carbonates, LLC ("Respondent") contested the Secretary's Application. A hearing on the temporary reinstatement application was conducted on December 19, 2018. The parties agreed at the outset of the hearing that there were no jurisdictional issues and that the only issue before the Court is the determination as to whether the application was frivolously brought. Tr. 8.

For the reasons that follow, the Court, finding that the Application was not frivolously brought, **GRANTS** the Secretary's Application for temporary reinstatement of Delbert Leimbach, effective as of the date of this Order.

Testimony at the Temporary Reinstatement Hearing.

Complainant Delbert Leimbach was the sole witness at the hearing. Leimbach was an employee of Respondent, Huber Carbonates, LLC from early 2010 until his termination of employment in September 2018. Tr. 31. In 2015, Leimbach was hired as the Chief Engineer at Huber's Marble Hill, Georgia plant. Tr. 41-42. That plant has a limestone mine. Tr. 46. Leimbach was subject to annual performance reviews and in his eight years with Huber he never has had a negative review. Tr. 47.

Prior to filing his discrimination complaint, Complainant was involved in a 105(c) discrimination investigation. This occurred in 2018, around April. Tr. 48. It involved former Huber employee Justin Hickman, who was the ball mill coordinator at the plant. Tr. 48. At that time Liembach met with Robert Hogan, who was then the production manager. Complainant stated that Hogan was upset over Hickman's termination. Tr. 49. In essence, it was

Complainant's contention that the performance improvement plan ("PIP") for Hickman was misleading in that it asserted that Hickman failed to complete a project. Complainant asserted that a project plan was devised but unfunded and that was the reason the project was not completed. Tr. 51. Based on that unfairness, Leimbach contacted the MSHA special investigator for Hickman's 105(c) discrimination claim in April and May of 2018. *Id.*

In May 2018, Leimbach spoke with Huber management about Hickman's 105(c) case. At that time he spoke with Sharon Noble, the vice president of HR and Brian Williams, vice president of Environmental Health and Safety. These conversations occurred after Hickman had been fired and were part of Huber's internal investigation related to the Hickman matter. Tr. 56. At that meeting, Leimbach related that Huber asked him if he had "heard any Huber management saying that [Huber] should change work procedures to affect the dust samples. [Leimbach] responded in the affirmative. [Huber also] asked [Leimbach] if [he] had talked to MSHA. [Leimbach] responded in the affirmative." Tr. 57. Leimbach also told Noble and Williams about his conversations with MSHA, advising that he "told them [MSHA] the same information about Justin[] [Hickman's] PIP not being accurate." *Id.*

Leimbach also participated in a 105(c) investigation regarding a complaint of discrimination filed by Hickman. He spoke to investigators from the Mine Safety and Health Administration (MSHA) and he informed his [Huber] managers that he had discussed the investigation of that matter with MSHA, and repeated the information he had provided MSHA with regard to that 105(c) investigation. *Id.*

Leimbach testified that following that meeting with Huber things began to change in his employment. Prior to that meeting, Leimbach had been brought into meetings with MSHA involving dust issues, but after it, he was not brought into to any new MSHA items. Tr. 59. Further, he was called in for a subsequent Huber internal investigation – this one including Huber's legal counsel. That second meeting occurred about a month after the meeting with Noble and Williams. It covered the same topics as the initial meeting – inquiring if he had talked with MSHA, and if had he heard Huber management saying that they should change work procedures regarding dust. Tr. 59-60.

Subsequently, during the first week of August 2018, there was an MSHA inspection at Huber at which about five inspectors came to the mine. They arrived because a complaint had been called in to MSHA. On that day, Leimbach stated that several employees came to his office, asserting that he must have been the one who called MSHA. Tr. 60. Leimbach also heard that several members of management believed that he was the person who called MSHA. Tr. 60-61. Leimbach asserted that Mike Morris, the plant manager, Sean Eisenbeiss, the maintenance manager, and Kevin Garnett, the Environmental Health and Safety [EHS] coordinator, all told him that management believed he was the person who called MSHA. Tr. 60-61. Leimbach denied that he was the source to each person who made that claim about him. Tr. 61.

Thereafter, on August 22, 2018, Leimbach met with Huber management's Dave Daisy, the director of HR for ground calcium carbonate. Tr. 64-65. Their discussion included Leimbach's reasons for being unhappy with Huber and Leimbach's informing Daisy that Huber management wanted to modify work practices to make the dust sampling come out better.

Leimbach expressed that it was hard to work in that environment, where things were not "on the up and up." Tr. 65. By that expression, Leimbach was clear – he meant doctoring of samples as a serious matter. *Id*. Daisy's reaction to their conversation was to present Leimbach with three options – move to another Huber business unit, receive a generous payout, or stay at his present job, with the last choice described by Daisy as the least desirable option. Tr. 66.

Following that, on September 17, 2018, Leimbach met again with Daisy and with Richard Lewis, the director of safety for ground calcium carbonate. Tr. 66-67. The upshot of that meeting was Leimbach was suspended pending an investigation. Three days later, on September 20th, Leimbach was terminated. [1] Following his testimony of direct, Leimbach was cross-examined.[2]

Standard of Review

In order for a miner to receive an order granting temporary reinstatement, the Secretary must prove that the miner's complaint was not frivolously brought. In drafting Section 105(c) of the Mine Act, Congress indicated that a complaint is "not frivolously brought" when it "appears to have merit." S. Rep. No. 181, 95th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources , 95th Cong. 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978).

There are two elements to an act of discrimination: first, that the employee engaged in protected activity, and second, that the adverse action complained of was motivated in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sep. 1999); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

"Protected activity" includes filing or making complaints "under or related to" health and safety standards issued under the Mine Act, as well as initiating or participating in proceedings commenced under the Mine Act. 30 U.S.C. § 815(c). *See also Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom.*

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[1] The circumstances involving Leimbach's basis for Respondent's decision to terminate his employment are disputed by the Secretary and Respondent. The dispute involves two related issues: the grounds provided in Leimbach's complaint and the issue of whether an email from Huber's counsel to Huber can legitimately be considered in the discrimination claim. In view of this, at the outset of the hearing the Court announced that it would bifurcate the issues presented so as to compartmentalize mention of the disputed matter. It achieved this by directing the Secretary to first present its evidence supporting the application for temporary reinstatement apart from the disputed matter. Following that evidence, the Secretary elected to stand on that presentation and not to delve into the disputed matters. The Respondent did not raise the disputed matter either, except to maintain that the decision did not constitute a waiver of that issue in subsequent arguments. The Court reassured the Respondent that the issue was not waived.

[2] The cross-examination is referenced in the discussion section of this Order.

Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d. Cir. 1981); *Sec'y on behalf of Lester v. Know Crrek Coal Corp*., 35 FMSHRC 1916, 1928-1931 (June 2013) (ALJ).

As the Court stated at the hearing, the determination of whether an application is frivolously brought is not limited to the four corners of the discrimination complaint. The statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination. *Hatfield v. Colquest Energy*, 13 FMSHRC 544 (Apr. 1991). In *Sec. v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, June 2016, the Commission expounded upon its *Hatfield* decision, stating that "the miner's complaint establishes the contours for subsequent action." *Hopkins* at 1340. It noted in *Hopkins* that the complainant's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint." *Id.* at 1341 (citing *Hatfield* at 546). The Commission held that the initial complaint formed the basis of MSHA's investigation. *Id*. The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, but is also informed by MSHA's ensuing investigation:

> The Commission has previously held that 'the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary's investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.' *Sec'y o/b/o Callahan v. Hubb Corp*., 20 FMSHRC 832, 837 (Aug. 1998); see *Sec'y o/b/o Dixon v. Pontiki Coal Corp*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint. [*Hopkins*], at 1326, n. 15.

Mulford v. Robinson Nevada Mining, 39 FMSHRC 1957, 1959-1960, (Oct. 2017)

Discussion

The Court, upon hearing and evaluating the testimony of Mr. Leimbach, concludes that his testimony was credible and, for purposes of this temporary reinstatement application, that his testimony was not diminished by the cross-examination. Although the cross-examination raised questions concerning the extent to which the Complainant's participation in prior safety matters was diminished, post raising his safety concerns, those questions did not demonstrate that the application was frivolous. As noted above, the temporary reinstatement proceeding is not the time to weigh such matters against the complainant's testimony: "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Chicopee*, 21 FMSHRC 717, 719 (July 1999).

As set forth above, again in the context of a temporary reinstatement proceeding, Leimbach's testimony, when considered together with his interview by MSHA in connection

with his discrimination complaint,[3] established protected activity and a nexus to the adverse action, sufficient to demonstrate that the Application was not frivolously brought.

Employee's Protected Activity and Operator's Adverse Action

The Court concludes and finds that there is reasonable cause to believe that Complainant Delbert Leimbach engaged in protected activity and that there is reasonable cause to believe that the adverse action, his termination, was motivated in part by his engagement in the protected activity discussed above. A nexus has been established.[4]

ORDER

For the foregoing reasons, the Court finding that the Application was not frivolously brought, Respondent Huber Carbonates, LLC is hereby **ORDERED** to reinstate Delbert Leimbach to his former position at the same rate of pay and with all other benefits that he enjoyed prior to his discharge, as of the date of this decision.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[3] *See,* Declaration of MSHA Special Investigator David Schwab, Exhibit A, to Application for Temporary Reinstatement, Official File at 5-7.

[4] The Commission has established several indicia of discriminatory intent to establish a "nexus" between the employee's protected activity and the alleged adverse action. Those factors include (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary need not demonstrate each factor individually; rather, any combination of factors is sufficient so long as they support by substantial evidence a conclusion that there is reasonable cause to believe a complainant suffered adverse action for engagement in protected activity.

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