APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion in the United States Court of Appeals for the District of Columbia Circuit (January 7, 2020) . . . . . App. 1

Appendix B Opinion in the Federal Mine Safety and Health Review Commission (August 22, 2018) . . . . . App. 15

Appendix C Order Denying Petition for Discretionary Review by the Federal Mine Safety and Health Review Commission (October 1, 2018). . . . . App. 45

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1296

[Filed January 7, 2020]

WESTERN OILFIELDS SUPPLY COMPANY, DOING BUSINESS AS RAIN FOR RENT,	)
PETITIONER,	)
v.	)
SECRETARY OF LABOR AND FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,	)
RESPONDENTS.	)

On Petition for Review of a Decision of the Federal Mine Safety and Health Review Commission

Byron J. Walker argued the cause for petitioner. With him on the briefs was *Tim Boe*.

Daniel Colbert, Attorney, U.S. Department of Labor, argued the cause for respondents. With him on the brief was *Ali A. Beydoun*, Counsel, Appellate Litigation. *John T. Sullivan*, Attorney, Mine Safety and Health Review Commission, and *Andrew R. Tardiff*, Attorney, U.S. Department of Labor, entered appearances.

Before: GARLAND, *Chief Judge*, SRINIVASAN, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* GARLAND.

GARLAND, *Chief Judge*: Petitioner Western Oilfields Supply Co., doing business as Rain for Rent, mounts ambitious statutory and constitutional challenges to a $116 fine under the Federal Mine Safety and Health Act of 1977. We deny the petition for review, taking the opportunity to clear up some confusion about the rights the Act grants mine operators.

I

Under the Mine Act, the Secretary of Labor is responsible for setting health and safety standards to govern the nation's mines and mine operators. 30 U.S.C. §§ 803, 811. An "operator" is defined to include "any owner . . . or other person who operates . . . a . . . mine or any independent contractor performing services . . . at such mine." 30 U.S.C. § 802(d). The Act requires the Secretary to make frequent inspections each year, without advance notice, *id.* § 813(a), and authorizes the Secretary to do so without a warrant, *see Donovan v. Dewey*, 452 U.S. 594, 596 (1981). On the ground, the Secretary's responsibilities are carried out by the Mine Safety and Health Administration (MSHA). 29 U.S.C. § 557a. If an owner or operator violates a health or safety standard, a MSHA inspector may issue a citation. 30 U.S.C. § 814(a). The cited party may then challenge that citation before an administrative law judge (ALJ), *see id.* § 815(d); before the Federal Mine Safety and Health Review

Commission, in the Commission's discretion, *id.* § 823(d)(2); and ultimately before this court (or the court of appeals for the circuit in which the violation is alleged to have occurred), *id.* § 816(a)(1).

Our cited party, Rain for Rent, rents pumps for use in mines. Those pumps require maintenance, which it also provides. On February 8, 2017, Rain for Rent employee Jaime Tejeda drove a company truck to a quarry operated by Lhoist North America of Arizona, Inc., to perform maintenance on a pump that he had previously installed. After parking the truck, Tejeda went into the mine office to sign in for the day's work.

At that same moment, a MSHA inspector was waiting in the parking lot to meet mine representatives for the second day of an 11-day routine inspection. Seeing the truck rock back and forth, the inspector suspected that Tejeda had neglected to set the parking brake, a violation of a safety standard governing unattended vehicles. *See* 30 C.F.R. § 56.14207. The inspector walked over to the truck and tried to spot the state of the parking brake through the window. When that failed, he opened the door. As he suspected, the parking brake was not set. When Tejeda returned to his truck, he found the inspector photographing the brake and, after a brief exchange, was presented with a citation.

Rain for Rent unsuccessfully raised a storm of objections to the citation in a hearing before an ALJ. The Commission declined to exercise discretionary review, and the ALJ's decision therefore became the final decision of the Commission. *See* 30 U.S.C. § 823(d)(1); Commission Notice (J.A. 123). Thereafter, Rain for Rent petitioned for our review.

II

In this court, Rain for Rent has raised only three objections to the Commission's decision.[1] We consider them below, "review[ing] the Commission's legal conclusions *de novo*, and its findings of fact for substantial evidence." *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1099 (D.C. Cir. 1998) (citation omitted).

A

First, Rain for Rent maintains that its employee was not within the jurisdiction of the Mine Act at the moment the citation was issued.[2] The Act provides that "each operator of [a] mine . . . shall be subject to the provisions of" the Act, 30 U.S.C. § 803, and defines an "operator" to include "any independent contractor performing services or construction at such mine," *id.* § 802(d). Rain for Rent "does not contest that it was an independent contractor for purposes of this proceeding," Pet'r Br. 41, and stipulated before the ALJ

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[1] In particular, Rain for Rent no longer argues that the parking lot was not part of the "mine" within the meaning of the Mine Act, *see Sec'y of Labor v. Rain for Rent*, 40 FMSHRC 1267, 1270-72 (2018) (ALJ), that the truck was not "unattended" while Tejeda was signing in, *id.* at 1280, or that the violation was neither as negligent nor as grave as the inspector determined, *id.* at 1280-81.

[2] Or the moment the violation came into being, or the moment the inspection took place -- Rain for Rent is not consistent on this point. *Compare* Pet'r Br. 41 (measuring jurisdiction "at the time the MSHA inspector cited the alleged violation"), *with id.* at 42 (measuring jurisdiction "at the time an alleged violation occurs"), *and id.* at 12 (measuring jurisdiction "[a]t the time the MSHA inspector observed the subject of the Citation"). Those distinctions do not matter here.

that it had "provided services" to Lhoist, *see Rain for Rent*, 40 FMSHRC at 1268. But it insists that it was not "perform*ing* services" because Tejeda had not yet signed in with the mine office for the day.

We have not had occasion to address what the words "performing services" mean in isolation,[3] and the Secretary's regulations only define the term "independent contractor," not the phrase "independent contractor performing services." *See* 30 C.F.R. § 45.2(c). Rain for Rent maintains that, "[b]y its tense, 'perform*ing* services' . . . denotes present, ongoing work." Pet'r Br. 42. Assuming without deciding that Rain for Rent is correct about this, the undisputed record nonetheless shows that Rain for Rent was performing ongoing services for the mine operator, Lhoist. Under the Mine Act, the requirement is that the *contractor* -- not the particular employee on whom

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[3] We disagree with the Secretary's suggestion that our precedent resolves this case. The Secretary relies in part on a snippet from *DQ Fire &Explosion Consultants, Inc. v. Secretary of Labor*, in which we affirmed a citation despite the petitioner's contention "that it is not an operator under the Mine Act because, on the days in question, it was not performing the type of 'services' covered by the statute." 632 F. App'x 622, 624 (D.C. Cir. 2015). But that petitioner had not made -- and we were not purporting to respond to -- a temporal argument. Instead, the question was whether the services at issue were sufficiently related to mining. The Secretary also relies on *Otis Elevator Co. v. Secretary of Labor*, in which we rejected an argument that some independent contractors who perform services nevertheless are not operators because they do not perform the right *kind* of services. 921 F.2d 1285, 1289-91 (D.C. Cir. 1990). Again, we did not purport to address the independent meaning (if any) of "performing services," or else we would have had no reason to wonder whether we could grant deference to regulations that did not define the term. *Id.* at 1288 (citing 30 C.F.R. § 45.2(c)).

the citation is served -- be engaged in work at the mine. And Rain for Rent was.

The ALJ found as follows:

> Prior to the inspection at issue, Lhoist contracted with Rain for Rent . . . to pump an accumulation of rainwater out of the quarry pit. Rain for Rent employee Jaime Tejeda . . . visited the mine site several times to install the pump, perform maintenance and repairs, and replace the original pump with a larger model.

Rain for Rent, 40 FMSHRC at 1268 (citation omitted). Indeed, Tejeda had previously "[driven] the cited truck onto mine property on multiple occasions" to perform the "same services" he was there to perform on the day of the citation. *Id.* at 1273. And Rain for Rent's rented pump (although still in need of repair) was on-site providing the contractor's continuing service when the events at issue here unfolded. There is therefore no question that, as the ALJ found, "Rain for Rent was performing pumping services for Lhoist" at the time of the inspection. *Id.* at 1274.

Even if we were to narrow our focus to the individual employee, we would come to the same conclusion. Rain for Rent hangs everything on the fact that Tejeda had not yet signed in: It no longer denies, as it did before the ALJ, that Tejeda was already within the boundaries of a "mine" when he parked the truck. *See id.* at 1270-72. Nor does it go so far as to argue that Mine Act jurisdiction did not attach until Tejeda actually touched the pump. *See* Recording of Oral Arg. at 19:40-19:45. Yet, it offers nothing that would distinguish between the walk from truck to office

and the walk from office to pump. During each trip, Tejeda was on-site to execute his responsibilities under a contract for services. As the ALJ put it, "Tejeda's work on behalf of Rain for Rent *entailed* entering the Plant office to sign in and make his presence known on the site." 40 FMSHRC at 1274 (emphasis added).

B

We turn next to Rain for Rent's argument that the inspection violated section 103(f) of the Mine Act. That section provides that "a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . 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). Because Tejeda missed the first few minutes of the inspection of his truck, Rain for Rent argues, this "walkaround" right was violated. And while Rain for Rent maintains that the violation, standing alone, merits automatic vacatur of the citation, it also argues that the violation prejudiced its defense to the citation and warrants vacatur (or at least suppression of the evidence) on that ground as well. In particular, Petitioner says, it missed out on its right to refuse the inspection and mount its jurisdictional defense -- its claim about the meaning of "performing services" -- before the search began.

1. Like the ALJ, we do not see a violation. As section 103(f) states, the walkaround right is extended "for the purpose of aiding [the] inspection." *Id.* In other words, the provision gives an operator a chance to provide information that might be mitigating or material -- to argue, for instance, that the brake was in

fact set, or that the inspector had misunderstood how it worked. *See Big Ridge, Inc. v. Sec'y of Labor*, 36 FMSHRC 1677, 1735 (2014) (ALJ) (explaining that the representative's role is to "point out hazards, offer justifications, proffer mitigating circumstances, and collect evidence that may support a perspective contrary to the inspector's view at hearing"). But Rain for Rent was not denied that chance because Tejeda returned while the condition of the brake was still plain to see and had an opportunity to say whatever he wanted to the inspector. Rain for Rent points to nothing that it would have done differently if its employee had been present before the door was opened -- other than refuse the inspection entirely.

The problem for Rain for Rent is that the statute does not create such a "right to refuse." Certainly no such right appears on the face of the Act. To the contrary, section 103(a) of the Act grants the Secretary a "right of entry to, upon, or through any coal or other mine." 30 U.S.C. § 813(a). Accordingly, as we said in *Donovan v. Carolina Stalite Co.*, "[r]efusal to admit an authorized representative into a facility for purposes of conducting an inspection pursuant to § 103(a) is a violation of the Act." 734 F.2d 1547, 1549 n.2 (D.C. Cir. 1984). Moreover, the Act provides that "no advance notice of an inspection shall be provided to any person" (with exceptions not relevant here). 30 U.S.C. § 813(a). It is hard to understand what good that provision would do if any operator could delay a surprise inspection by blocking it without penalty.

In maintaining that a right to refuse nonetheless exists, Rain for Rent points to section 108 of the Act, which provides: "The Secretary may institute a civil

action for relief . . . whenever [a mine] operator or his agent . . . refuses to admit [the Secretary's] representatives to the . . . mine." *Id.* § 818(a)(1). Rain for Rent also highlights language from our decision in *Carolina Stalite*. There, we noted that section 108 proceedings provide a mine operator with "an adequate forum . . . to show that a specific search [was] outside the federal regulatory authority or to seek . . . an order accommodating any unusual privacy interests that [it] might have."*Carolina Stalite*, 734 F.2d at 1556-57 (quoting *Dewey*, 452 U.S. at 604-05). We described this as a "right to force MSHA to go to court to gain entry to [a] plant." *Id.* at 1557. But in pressing these quotations, Rain for Rent misunderstands both *Carolina Stalite* and the Act.

What we said in *Carolina Stalite* was what the Supreme Court had earlier explained in *Donovan v. Dewey*: section 108 limits the Secretary's *remedies* when a mine operator refuses entry in contravention of the Act. "The Act prohibits *forcible entries*, and instead requires the Secretary, *when refused entry* onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals." *Dewey*, 452 U.S. at 604 (emphasis added). In other words, if an operator refuses to permit an inspection, the operator has a "right" to require MSHA to go to court to gain entry because Congress did not empower the agency to force its way into the property. *See Rain for Rent*, 40 FMSHRC at 1276 (rejecting the argument that the Act's "prohibition of forcible entry is . . . necessarily the same as [a] granted right to deny inspection"). But section 108 has no application in a case like this one, where there never was such a refusal.

2. Even if there had been a violation of Rain for Rent's walkaround rights, we would reject the petitioner's contention that the violation warrants vacatur or suppression. The statute does not expressly state the consequences of violating section 103(f)'s walkaround right, except to say, somewhat cryptically, that "[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter." 30 U.S.C. § 813(f). Neither party has offered a persuasive account of what this language means.[4]

Even in the absence of such a proviso, however, we have interpreted a substantially identical walkaround right in the Occupational Safety and Health Act to require that an employer show "prejudice it suffered as a result of not being represented during the inspection, a requirement imposed by every circuit that has considered the issue." *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004) (internal quotation marks omitted). Whatever the "not a jurisdictional prerequisite to enforcement" language means, it must at least mean that a harmless violation does not preclude enforcement. Otherwise, compliance with section 103(f) would effectively be an absolute prerequisite, whether denominated as "jurisdictional" or something else.

And as we have noted, Rain for Rent suggests nothing that it would have done differently if its employee had been present the moment the inspector

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[4] The Commission's last encounter with the question did not produce a majority opinion. *See Sec'y of Labor v. SCP Invs.*, *LLC*, 31 FMSHRC 821, 821-22 (2009).

opened the truck's door -- nothing, that is, other than refuse entry based on a claim that the inspector exceeded his jurisdiction under the Mine Act. *See* Pet'r Br. 39. Not only is that defense without merit, *see supra* Part II.A, but witnessing the full inspection would not have improved it. Nor was Rain for Rent's ability to present it to the ALJ or this court impeded in any way.

C

Finally, Rain for Rent maintains that the warrantless inspection of its truck violated the Fourth Amendment because the petitioner was not afforded an opportunity for precompliance review. In support, it cites the Supreme Court's opinion in *Dewey*, which upheld the Mine Act against a Fourth Amendment challenge. But the Court did not hold there, nor has it ever held, that precompliance review is necessary for the constitutionality of warrantless administrative searches in a closely regulated industry like mining.[5]

Dewey states the test for the constitutionality of a warrantless inspection program in such an industry: there must be a "substantial federal interest" that

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[5] A "closely regulated" industry is one with "such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2455 (2015) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)). The Court has "identified" mining as one of the few such industries. *Id.* (citing *Dewey*, 452 U.S. 594); *see also Dewey*, 452 U.S. at 603 (finding that "the regulation of mines [that the Act] imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he will be subject to effective inspection") (internal quotation marks omitted).

informs the regulatory scheme; Congress must have reasonably determined "that a system of warrantless inspections was necessary if the law is to be properly enforced and inspection made effective"; and the inspection program, "in terms of the certainty and regularity of its application," must "provide[ ] a constitutionally adequate substitute for a warrant." *Dewey*, 452 U.S. at 602-03; *accord City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2456 (2015); *New York v. Burger*, 482 U.S. 691, 702-03 (1987). *Dewey* held that the Mine Act satisfied all of the elements of that test. There is no requirement of precompliance review in this framework,[6] nor is there one in the Mine Act itself.

Rain for Rent nevertheless maintains that *Dewey*'s requirement of "certainty and regularity" implies a requirement of precompliance review. But *Dewey* explained that the Mine Act meets the "certainty and regularity" requirement because: (1) it "requires inspection of all mines and specifically defines the frequency of inspection," and (2) "the [health and safety] standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations." 452 U.S. at 603-04 (emphasis omitted). Again, the Court did not mention a precompliance review requirement.

Rain for Rent's argument to the contrary focuses on the paragraph that follows *Dewey*'s discussion of the

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[6] *Accord Zadeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019) ("No opportunity for precompliance review is needed for administrative searches of [closely regulated] industries."); *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 280-81 (6th Cir. 2018) (same).

"certainty and regularity" requirement. There, the Court noted:

> [T]he [Mine] Act provides a specific mechanism for accommodating any special privacy concerns that a specific operator might have. The Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action . . . to obtain an injunction against future refusals.

Dewey, 452 U.S. at 604 (citing 30 U.S.C. § 818(a)). *Dewey* is, frankly, ambiguous as to whether this discussion of section 108 is part of its Fourth Amendment analysis, or simply a description of an additional -- but not constitutionally required -- protection afforded by the Mine Act. Subsequent Supreme Court cases do not include anything like it in their descriptions of what is necessary to provide a constitutionally adequate substitute for a warrant in a closely regulated industry.[7]

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[7] In *Patel*, the Court indicated that "an opportunity for precompliance review" is required for the constitutionality of searches under "general administrative search doctrine," but not for searches under the "more relaxed" test applicable to "closely regulated industries" like mining. 135 S. Ct. at 2454. In *Burger*, the Court explained that the "certainty and regularity" requirement means that a statutory scheme "must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." 482 U.S. at 703. *Burger* held that a warrantless search of an automobile junkyard under a New York regulatory scheme satisfied those requirements. *Id.* at 711-12. It did so without mentioning either a precompliance review requirement or a provision like section 108 of the Mine Act. Indeed, the New York statute did not contain any such

But the relevance of section 108 to *Dewey*'s constitutional analysis is not something we need divine in order to resolve the challenge presently before us. As we explained in Part II.B, section 108 does not create a freestanding right of refusal; it creates only a prohibition against forcible entry when entry is refused. Section 108 has no application here because the Secretary's inspector was not refused entry. And because no feature of the statute that *Dewey* upheld against constitutional attack was violated, Rain for Rent's challenge must fail.[8]

III

For the foregoing reasons, we conclude that Rain for Rent's statutory and constitutional challenges lack merit. Accordingly, its petition for review is

Denied.

[*Certificate of Service Omitted in Printing of this Appendix*]

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requirement or provision. *See Burger*, 482 U.S. at 708-11 (describing the statute's relevant features in detail).

[8] Rain for Rent also suggests that *Dewey*'s approval of the Mine Act's warrantless inspections was predicated, in part, on the protections provided by the Act's walkaround provision, 30 U.S.C. § 813(f), which we discussed in Part II.B. But that provision is not mentioned anywhere in *Dewey* or any of the subsequent Supreme Court opinions discussed above.

APPENDIX B

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Docket No. WEST 2017-0377
A.C. No. 04-00156-434274 VVG

[Filed August 22, 2018]

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)
Petitioner,	)
v.	)
RAIN FOR RENT,	)
Respondent.	)

DECISION

Appearances:

Isabella M. Finneman, Esq., Joshua Love, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for Petitioner;

Byron Walker, Esq., Jack Easterly, Esq., Tim Boe, Esq., Rose Law Firm, Little Rock, Arkansas, for Respondent.

Before: Judge Simonton

I. INTRODUCTION

This simplified proceeding is before me upon the Secretary of Labor's petition for assessment for a civil penalty pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act").[1] The docket involves a single citation issued pursuant to Section 104(a) of the Act with a proposed penalty of $116.00. The parties presented testimony and evidence regarding the citation at a hearing held in San Francisco, California, on May 15, 2018. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

II. STIPULATIONS OF FACT

The parties jointly filed the following stipulations of fact:

1. Respondent Rain for Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment to different industries, including mine operators in the United States, Canada, and United Kingdom.

2. Respondent provided services to Lhoist North America of Arizona, Inc., which operates the Natividad Plant, MSHA I.D. No. 04-00156, in Monterey County, California.

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

3. This matter is subject to the jurisdiction of the Commission and the assigned judge.

4. The subject citation was properly served by a duly authorized representative on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance but not for the truthfulness or relevance of any statements asserted therein.

5. Respondent demonstrated good faith in abating the conditions noted in the subject citation.

6. The Rain for Rent company truck referenced in Citation No. 8785566 was parked on flat, level ground in the parking area of the mine office.

7. The MSHA inspector observed the alleged violation referenced in Citation No. 8785566 upon opening the truck door.

8. The MSHA inspector did not communicate with Rain for Rent or its representative before opening the door referenced in Citation No. 8785566.

9. The truck referenced in Citation No. 8785566 is marked with the Rain for Rent logo and related information on its exterior.

10. Respondent and its representatives cooperated with the Secretary during the inspection that resulted in the issuance of the subject citation.

11. Respondent demonstrated good faith in addressing the conditions noted in the subject citation.

12. The alleged violation in Citation No. 8785566 was terminated immediately after its issuance.

III. FINDINGS OF FACT

The Natividad Plant is a limestone quarry and mill located in Monterey County, California, and operated by Lhoist North America of Arizona, Inc. ("Lhoist"). Prior to the inspection at issue, Lhoist contracted with Rain for Rent ("Respondent") to pump an accumulation of rainwater out of the quarry pit. Jt. Stip. #2; Ex. S-6; Tr. 42. Rain for Rent employee Jaime Tejeda ("Tejeda") visited the mine site several times to install the pump, perform maintenance and repairs, and replace the original pump with a larger model. Ex. S-7; Tr. 42-43. Tejeda signed in at the mine office on behalf of Rain for Rent upon each visit. *Id.*

On February 8, 2018, MSHA Inspector Nicholas Basich arrived at the Natividad Plant to begin the second day of a routine 11-day inspection.[2] Tr. 23. He entered the mine site by turning off of Old Stage Road into the mine driveway and proceeded approximately 400 feet to the mine office. Ex. S-2, S-3; Tr. 25. Basich checked in at the office and arranged to meet a Lhoist representative in the office parking lot to begin the inspection. Tr. 29-30. While waiting, Basich observed Tejeda drive a flatbed truck into the parking lot, park, and enter the mine office. Tr. 30-31. The truck had a

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[2] Inspector Basich has worked as an MSHA Inspector for five years. Tr. 22. He worked in the heavy construction industry for 42 years prior to joining MSHA. *Id.* He has completed 21 weeks of MSHA training at Beckley Academy and has completed on the job training, special investigation training, and mobile equipment training. Tr. 23.

"Rain for Rent" insignia on its door and a Department of Transportation Number, and Basich concluded that Tejeda intended to sign in and enter the quarry site. Jt. Stip. #9; Ex. S-5; Tr. 33-35. Basich noticed the truck rock back and forth once parked. which led him to believe that Tejeda did not set the parking brake. *Id.* Basich approached the truck and, unable to see the brake through the truck's windows, opened the driver side door for a better look. Tr. 32-33. He confirmed that the parking brake was not set and began to take photographs of the condition when Tejeda exited the office and returned to the vehicle. Tr. 32-33, 35. Basich identified himself to Tejeda as a MSHA inspector, stated that he was conducting an inspection of the truck based upon his belief that the parking brake was not set, and stated that the parking brake was in fact not set. Tr. 35-36. He issued Citation No. 8785566 alleging a violation of 30 C.F.R. § 56.14207:

> The Ford F-55O Flatbed truck (Rain for Rent company truck), in a parked an unattended attended [*sic*] condition adjacent to the mine office at the mine, does not have the parking brake set. The truck is parked on flat, level ground with the transmission in park. The practice of not setting the parking brake when leaving a truck or mobile equipment unattended on a mine site exposes miners to the unplanned and unwarned movement of the vehicle/mobile equipment. No lost time injuries would be expected from the truck parked in this locate and in this condition. If the truck were parked on a slope or grade, serious potentially fatal crushing type injuries would be expected.

Ex. S-4. Inspector Basich designated the citation non-S&S, unlikely to result in lost workdays, and the result of Rain for Rent's moderate negligence. *Id.* The Secretary assessed a penalty of $116.00. Rain for Rent quickly terminated the citation. Jt. Stip. #5, 11; Tr. 35, 95.

IV. DISPOSITION

Rain for Rent denies the validity of the citation on multiple grounds.[3] Respondent contends that MSHA lacked jurisdiction over the parking lot and its truck. It argues that the parking lot is not a "mine" as defined by the Act. Respondent's Post-Hearing Brief ("Resp. Br.") at 8. It further argues that Tejeda was not "performing services" at the mine at the time the citation was issued and was therefore not an "operator" as defined by the Act. *Id.* at 5. Rain for Rent also contends that Inspector Basich violated its Fourth Amendment rights when he entered the truck while Tejeda was away from the vehicle in contravention of the regular and certain inspection procedures required

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[3] As a preliminary matter the court denies Respondent's request for a new hearing based on the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*, 135 S.Ct. 2044 (2018). *See* Respondent's Post-Hearing Brief, at 21, n. 17. The full Commission unanimously ratified the appointment of its ALJs on April 3, 2018, more than a month prior to this bearing. Federal Mine Safety and Health Review Commission, *Commission Ratification Notice,* http://www.fmshrc.gov/about/news/commission-ratification-notice (Apr. 3, 2018). Thus, this court was constitutionally appointed as required by *Lucia* and Respondent is not entitled to a new hearing. *See Lucia,* 135 S. Ct. at 2050; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010); *see also Jones Bros. Inc. v. FMSHRC*, No. 17-3483, slid op. at 11 (6th Cir. July 31, 2018).

by the Mine Act. Resp. Br. at 14; Respondent's Reply to Secretary's Post-Hearing Brief ("Resp. Rep.") at 3. Rain for Rent also argues Basich's denial of its walkaround rights pursuant to § 103(f) of the Mine Act resulted in actual prejudice and justifies vacatur of the citation in and of itself. Resp. Br. at 17. Finally, Respondent contests the fact of violation as well as the negligence and gravity designations in the citation. Resp. Br. at 12; Resp. Rep. at 2.

The Secretary contends that MSHA properly asserted jurisdiction over the lot and the truck. Secretary's Post-Hearing Brief ("Sec'y Br.") at 6. The Secretary further contends that the search of the truck was reasonable because § 103(a) grants MSHA Inspectors the right to enter and inspect the truck without providing advance notice. *Id.* at 4. The Secretary also argues that Rain for Rent was not denied its walkaround rights because Tejeda returned to the truck and spoke with Inspector Basich while he was still conducting the inspection. *Id.*

For the reasons set forth below, I affirm the citation as written.

A. Jurisdiction

The Office and Parking Lot

The Mine Act provides that "[e]ach coal or other mine . . . and each operator of such mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Thus, in order to prove that MSHA had jurisdiction to issue the subject citation in this case, the Secretary must prove that the violation occurred at a "mine" and that the citation was issued to an "operator."

The Act defines a "coal or other mine" as

> (A) an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals . . .

30 U.S.C. § 802(h)(1). The Secretary has interpreted subsection (A) of this definition to refer to "extraction areas and everything within their boundaries." *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 513 F.3d 788, 793 (D.C. Cir. July 2009). He interprets subsection (B) to include roads but not the vehicles on them, while (C) reaches equipment including vehicles, tools, and other property used in mining but not located within an extraction area. *Id.* at 795. This interpretation has been accepted by the D.C. Circuit. *Id.* (holding that the Secretary's interpretation of subsection B is reasonable as part of the Mine Act's overall enforcement scheme). The Commission has applied subsection (C) to find that jurisdiction existed over a warehouse located one mile from the closest extraction site because it was a "facilit[y] . . . used in mining." *Jim Walter Ru., Inc.*, 22 FMSHRC 21 (Jan. 2000). The Commission has also

affirmed MSHA's jurisdiction over various "equipment . . . used in mining," including trucks and conveyors used in the screening process but located on a public road, *State of Alaska, Dep*'t *of Transp.,* 36 FMSHRC 2642, 2647 (Oct. 2014); a dragline being assembled at a site one mile from where coal was being mined, *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 2000 WL 1682492 (Nov. 2000); and a garage adjacent to an asphalt plant and used for mining work, *W.J. Bokus Industries, Inc.*, 16 FMSHRC 704 (Apr. 1994). The recent Sixth Circuit case *Maxxim Rebuild* suggests that application of subsection (C) may be limited to locations in or adjacent to a working mine. *Maxxim Rebuild v. FMSHRC*, 848 F.3d 737, 740 (6th Cir. 2017).

The legislative history of the Act indicates that the intention of Congress was that "what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977). Accordingly, the Commission has construed Section 3(h) (1) broadly in favor of Mine Act coverage. *See, e.g., State of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2647 (Oct. 2014); *Calmat Co. of Ariz.*, 27 FMSHRC 617, 622, 624 (Sept. 2005).

I find that the Plant office and the parking lot were "facilit[ies] used in the work of" mining in accordance with subsection (C). The Natividad Plant is a working mine. The office and parking lot are located on mine property and adjacent to the Plant's active extraction sites. Ex. S-1, S-2; Tr. 26. Lhoist directed mining

operations out of the office and kept paperwork and examination records there. Tr. 30. The parking lot serviced the office and was adjacent to the Plant's primary plant crusher. Tr. 30, 64-65, 79. Miners, contractors, and vendors parked their professional vehicles in the lot to sign in and receive authorization to enter the mine site to perform work. Tr. 30, 79. The office and parking lot are thus geographically and functionally related to the mining process at Natividad Plant and are subject to MSHA jurisdiction under the Act.

Respondent contends that the Secretary's assertion of jurisdiction over the office and parking lot is inconsistent with the structure and purpose of subsections (B) and (C) because the Secretary has taken conflicting stances on his inspection policy. Resp. Br. at 8. It contends that Inspector Basich put forth two novel interpretations of MSHA's jurisdiction over parking lots at hearing to improperly include the lot at issue. *See* Resp. Br. at 9. Respondent contends that these interpretations, which it nicknamed the "doing business test" and "lease test," would lead to absurd results that would permit MSHA to assert jurisdiction over miners' vehicles in parking lots located away from the mine or in lots adjacent to but not affiliated with the mine. *Id.* at 9-10. Rain for Rent similarly claims that the Secretary's interpretation necessarily and inappropriately extends his jurisdiction over any

private vehicles located in the parking lot.[4] Resp. Br. at 12.

Respondent's hypothetical scenarios contain material facts that are not present in the instant case and are therefore of minimal relevance to its disposition. *See Nat'l Cement Co.*, 513 F.3d 788, 796 (D.C. Cir. July 2009) ("The theoretical possibility that an agency might someday abuse its authority is of limited relevance in determining whether the agency's interpretation of a congressional delegation is reasonable"). Here the Secretary reasonably applied the plain language of subsection (C) to assert jurisdiction over the parking lot in question. The parking lot is on Natividad Plant property, adjacent to active extraction sites, and used for mine-related purposes. Likewise, the Secretary did not assert jurisdiction over any private vehicles in this case, and Inspector Basich took reasonable steps to demonstrate that it was not his intent to do so. He testified that the truck was clearly labeled as a Rain for Rent vehicle, and Tejeda drove it on behalf of Rain for Rent to the parking lot with the intent to perform professional

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[4] Respondent notes that its inability to conduct discovery in this matter prevented it from determining where Inspector Basich discerned MSHA policy prohibiting the inspection of personal vehicles. Resp. Br. at 11, n. 6. The court acknowledges that simplified proceedings limited discovery as required by 29 C.F.R. § 2700.100(b)(5). This does not amount to a deprivation of due process rights that Respondent alleges. The legal questions presented in this case and my findings are in no way dependent on Respondent's inability to depose Inspector Basich. Respondent had the opportunity to ask the Inspector about MSHA policy at hearing, and indeed did so. Tr. 91.

services at the mine. Jt. Stip. #9; Ex. S-5, S-7; Tr. 33-35.

The parking lot is a facility used in the mining process and is subject to the jurisdiction of the Act.

Rain for Rent's Operator Status

Rain for Rent also argues that it was not an "operator" subject to the Act because Tejeda was not "performing services" at the mine when the citation issued. Resp. Br. at 5. Section 3(d) defines an "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). The Commission has held that the independent contractor language of Section 3(d) "covers any independent contractor performing more than *de minimis* services at a mine."[5] *Musser Eng'g, Inc.*, 32 FMSHRC 1257,

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[5] Previous Commission cases applied a two-prong test addressing the independent contractor's "proximity to the extraction process and the extent of its presence at the mine." *Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989); *see also Old Dominion Power Co. v. Donovan*, 772 P.2d 92 (4th Cir.1985). However, the D.C. Circuit explicitly rejected this approach in its review of the *Otis Elevator* decision, and no Circuit Court has applied the test since. *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990) ("Section 3(d) does not extend only to certain "independent contractor[s] performing services . . . at [a] mine"; by its terms, it extends to "any independent contractor performing services . . . at [a] mine."); *see also N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002); *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996). Commissioner Cohen in *Musser* stated that a test based on the text of the statute is more appropriate and that the Commission's older precedent "merits reexamination." *Musser*, 32 FMSHRC at 1267 n.10.

1267-1270, 1276-79 (Oct 2010) (Company that prepared permit application and maps contained therein for a mine was an independent contractor "performing services" at the mine).

The Commission has interpreted the language of § 3(d) to include a wide array of services that need not be performed on mine property as long as the services are related to the mine site and its operations. *Joy Techs., Inc.*, 11 FMSHRC 303, 307-08 (Mar. 1995) (Contractor that sold a continuous miner machine to a mine and performed maintenance services at the mine site on four occasions was an operator because its work was more than *de minimis* and essential to extraction at the mine); *Thompson Electric, Inc.*, 39 FMSHRC 1228 (June 8, 2017) (ALJ) (Contractor that provided electric services but was never present at the mine site for more than 5 consecutive days was an operator because the contractor was performing maintenance of mine equipment on mine property); *Agapito Assocs., Inc.*, 34 FMSHRC 3465 (Dec. 2012) (ALJ) (Consulting company that performed services remotely and spent only 27 days on mine site over a 12-year period and provided analysis of potential for retreat mining was an operator because its work influenced the mine's roof control plan).

I find that Rain for Rent is an "operator" under the Act. Rain for Rent was performing ongoing services at the Natividad Plant that were related to the mine and its extraction process. *See Musser Eng'g*, 32 FMSHRC at 1269; *Joy Techs.*, 17 FMSHRC at 307-08; *Agapito Assocs., Inc.*, 34 FMSHRC at 3465. Respondent has an MSHA Mine Contractor Identification Number and contracted with Lhoist to pump floodwater out of the

Natividad Plant's quarry pit. Jt. Stip. #2; Tr. 42-43. Lhoist was unable to extract lime from the quarry while water accumulated in the pit and Rain for Rent's services therefore facilitated the extraction process.

Rain for Rent's presence at the mine was also more than *de minimis*. Prior to the inspection at issue Tejeda drove the cited truck onto mine property on multiple occasions to install, repair, and replace a water pump on the mine site. Ex. S-7; Tr. 42-43. On the day of the citation, Tejeda parked the truck in the office parking lot with the intent to enter the mine site to perform those same services. *Id.* Lhoist's sign in sheets show that Tejeda remained at the mine site for nearly two hours after signing in. Ex. S-7. Rain for Rent therefore contracted to perform more than *de minimis* services directly related to mine operations at the Natividad Plant at the time of the inspection.

Rain for Rent's contention that Tejeda was not "performing services" because he had not yet signed in and entered the mine site at the time of the citation unduly narrows the scope of § 3(d). *See Agapito Assocs., Inc.*, 34 FMSHRC at 3470 ("'[T]he totality of the work' performed upon the pertinent project, not just the work relating to the underlying citations, 'must be considered on the jurisdiction issue") citing *Musser Eng'g Inc.*, 32 FMSHRC at 1269. Rain for Rent was performing pumping services for Lhoist and Tejeda was an employee of Rain for Rent tasked with performing those services. Tejeda's work on behalf of Rain for Rent entailed entering the Plant office to sign in and make his presence known on the site. The mere fact that Tejeda had not yet signed in does not alter the professional nature of his visit or otherwise diminish

Rain for Rent's status as an operator. *See Musser Eng'g*, 32 FMSHRC at 1269 (holding that even services performed away from mine property are considered to be performed at a mine if those services "relate to the mine"). The court declines to limit the jurisdictional reach of § 3(d) based upon down-to-the-minute actions of contractor employees on mine property when the purpose of their presence is to perform services directly related to the extraction process.

Rain for Rent's claim that the Secretary's interpretation would improperly subject contractor vehicles on mine property for purely personal reasons to liability under the Act is unfounded and irrelevant to the facts surrounding the alleged violation. Resp. Br. at 7. Tejeda's truck was a business vehicle and Basich took clear and reasonable investigatory steps to reasonably conclude that the truck was at the mine on behalf of Rain for Rent and that he was therefore authorized to inspect it. Tr. 31-35, 73, 92. He credibly testified that the truck had a "Rain for Rent" decal and a Department of Transportation Number. Tr. 31-35. Basich observed Tejeda exit the truck and enter the mine office, and concluded that Tejeda intended to enter the extraction site. *Id.*

Accordingly, I find that MSHA has jurisdiction over Rain for Rent's employee and truck.

B. Fourth Amendment Considerations

Inspector Basich's search of Respondent's truck in Tejeda's absence complied with the Act's regular and certain inspection procedures provided by § 103(a) and approved by the Supreme Court.

The Supreme Court has held that the general inspection program of warantless inspections authorized by § 103(a) of the Mine Act does not violate the Fourth Amendment. *Donovan v. Dewey*, 452 U.S. 594, 605 (1981). The dangerous nature of mining and ease with which health or safety hazards can be concealed upon advance notice of an inspection indicate that a warrant requirement would significantly frustrate the purposes of the Act. *Id.* at 603. The Court found that in light of these factors, the Mine Act's warrantless inspection program was a constitutionally adequate substitute for the Fourth Amendment's warrant requirement because it notified operators of regular and frequent searches, outlined what health and safety standards must be met to comply with the Act, curtailed the extent of government searches, and prohibited forcible entry by requiring the Secretary to file a civil action when denied entry onto a mining facility. *Id.* at 605. All mine owners and operators should thus be aware and even expect continuous and frequent inspections without a warrant or probable cause. *Id.*

The Commission thus held that a deprivation of § 103(f) walkaround rights during an inspection does not violate the regular and certain inspection procedure provided for by the Mine Act in violation of the Fourth Amendment because no advance notice is required to conduct an inspection. *SCP Investments, LLC* ("*SCP I*"), 31 FMSHRC 821, 837 (Aug. 2009) (holding that the failure of an MSHA inspector to permit a representative of the operator to accompany him on an inspection "does not curtail the inspector's right to enter and inspect the mine"); *see also Big Ridge, Inc.,* 36 FMSHRC 1677, 1725-26 (June 2014) (ALJ); *DJB*

Welding Corp., 32 FMSHRC 728, 731, 32 (June 2010) (ALJ). Section 103(a) provides MSHA Inspectors with a right of entry to, through, or upon any coal or other mine for the purpose of conducting an inspection without giving advance notice, and includes the "the right to use any investigatory technique reasonably related to the discovery of violations, so long as it is employed with reasonable limits and in a reasonable manner." *DJB Welding Corp.*, 32 FMSHRC at 731-32.

In *DJB Welding*, the court held that an MSHA Inspector's entry into a contractor's welding truck without notice or permission was reasonable because the truck was a work vehicle that could present hazardous conditions on the mine site. *Id*. The search was thus an acceptable investigatory technique that was reasonably related to enforcement of the Act. *Id*.

Much like the welding truck in *DJB Welding*, Inspector Basich's search of the truck was part of a routine inspection conducted at Natividad plant. The truck was a work vehicle located on mine property and owned by a contractor performing work on the mine site, and could have presented hazardous conditions on the site. Section 103(a) thus granted Inspector Basich the right to enter the truck to inspect for potential violations without providing advanced notice to the driver or waiting for him to return to the vehicle. Rain for Rent is an MSHA-registered contractor and has been subject to MSHA inspections in the past; it should have a reasonable expectation that regular inspections of its equipment could occur. *Dewey*, 452 U.S. at 603; *cf. Big Ridge, Inc.*, 36 FMSHRC 1677, 1726 (June 2014) (ALJ).

Furthermore, Basich's decision to open the door was reasonably related to determining whether Rain for Rent violated § 56.14207 of the Act. Basich testified that he noticed the Rain for Rent truck rock back and forth in a manner that suggested the parking brake was not set. Tr. 33-35. He opened the door in furtherance of this investigation because he could not observe the parking brake through the window or in any other manner. Tr. 32-33. This investigatory technique was reasonable and necessary to determine whether the truck presented a hazardous condition. There was nothing irregular or uncertain about Inspector Basich's inspection of the truck that would run afoul of the Supreme Court's decision in *Dewey*, require a warrant, or otherwise violate Rain for Rent's Fourth Amendment rights.

I reject Respondent's argument that Inspector Basich's search deprived Respondent of its claimed right to refuse an inspection based on jurisdictional grounds pursuant to § 108(a)(1)(D).[6] Section 108(a)(1)(D) does not expressly confer operators the right to refuse an inspection but prohibits forcible entry and requires that the Secretary file a civil action in

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[6] Section 108(a)(1)(D) states in relevant part:

> The Secretary may institute a civil action for relief (including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principle office, whenever such operator or his agent . . . refuses to permit the inspection of a coal or other mine. . . ."

30 U.S.C. § 818(f).

federal court when a mine owner refuses entry onto a mine site or to mine equipment. *See Dewey*, 452 U.S. at 604. The prohibition of forcible entry is not necessarily the same as the granted right to deny an inspection. That the Act authorizes the Secretary to issue a citation to any operator that refuses or interferes with an inspection indicates that MSHA 's right of entry under §103(a) is to be construed broadly and that an operator's refusal or interference with an MSHA inspection is forbidden and a "dereliction of [operators'] duty under the Act." *Topper Coal Co.*, 17 FMSHRC 945, 948 (June 1995) (ALJ) citing *Waukesha Lime & Stone Co.*, 3 FMSHRC 1708 (July 1981).

Nor does the language of § 103(f) suggest that walkaround rights entail an operator's right to deny entry. That provision requires that an Inspector give an operator the opportunity to accompany an inspection 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). Thus, walkaround rights by their very definition entail participation in an inspection, not refusal. *Cf. SCP I*, 31, FMSHRC at 832 ("There is nothing in either section 103(f) *or the remainder of the Mine Act* that indicates than an operator would have the extraordinary power to essentially nullify an inspection by refusing to participate in it") (emphasis added).

Respondent's interpretation would also curtail the Secretary's right of entry by requiring inspectors to provide notice to operators and contractors before each inspection in order to allow them the opportunity to refuse entry. *SCP I*, 31 FMSHRC at 837, 842 ("There is no language in section 103(a) that makes the

inspector's right to enter the mine, or to conduct an inspection and cite conditions that violate mandatory standards, contingent upon . . . compliance with . . . section 103(f)"). Such a requirement is contrary to the language in §103(a) prohibiting advance notice and would frustrate the objectives of the Act by affording operators the opportunity to address perceived safety violations before allowing entry. *See Dewey*, 452 U.S. at 603. To grant all operators subject to a Mine Act inspection the right to refuse entry would subjugate the § 103(a) inspection program to the operator's perceived right to deny inspections and require advance notice be provided to operators to the detriment of the Mine Act's enforcement goals.

As a result, Respondent's interpretation would essentially render any violation of § 103(f) walkaround rights a *per se* violation of the Fourth Amendment and nullify otherwise valid enforcement actions in contravention of Commission precedent and § 103(f) itself. 30 U.S.C. § 813(f) ("Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter"). As noted above, the Commission and its judges have consistently held that even the arbitrary denial of § 103(f) walkaround rights is not a violation of the Fourth Amendment's protections against warrantless searches. *See SCP I,* 31 FMSHRC at 841-842 (opn. of Comm'r Jordan); *Big Ridge, Inc.*, 36 FMSHRC at 1725-26; *DJB Welding*, 32 FMSHRC at 731-32. I decline to limit the Act's constitutionally approved general inspection program in such a drastic manner.

Accordingly, the inspection at issue did not violate Rain for Rent's Fourth Amendment Rights.

C. Section 103(f) Walkaround Rights

I next turn to whether Inspector Basich violated § 103(f) when he began his inspection of the truck in Tejeda's absence. Section 103(f) states in relevant part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his 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) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine . . . Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 813(f).

Section 103(f) is a qualified right and the Commission has recognized a crucial substantive difference between the absence of walkaround participation that is not intended to vitiate any citations and penalties, and the unauthorized denial of such walkaround rights. *SCP Invs., LLC* ("*SCP I*"), 31 FMSHRC 821, 831-32, (Aug. 2009) (Inspector arbitrarily denied operator's walkaround rights when he refused to allow the mine owner onto the mine site because he had not received new miner training); *Big Ridge, Inc.*, 36 FMSHRC 1677 (June 2014) (ALJ) (Inspector arbitrarily denied operator's walkaround rights because he did not permit mine representative to call for additional representatives to accompany

three different teams performing an impact inspection in different areas). The denial of walkaround rights in itself is not sufficient to merit vacatur. *SCP I*, 31 FMSHRC at 834. Commission judges must determine (1) whether the operator's walkaround rights were denied arbitrarily and (2) the effect of that denial on the operator's case to determine the proper remedy. *SCP I*, 31 FMSHRC at 821, 827, 829, 830-31; *see also DJB Welding*, 32 FMSHRC at 734.

In *SCP I*, the Commission found that the inspector arbitrarily denied the mine owner his walkaround rights but remanded the case to permit the Judge to determine the effect of a deprivation of walkaround rights on the operator's ability to present its defense. *SCP I*, 31 FMSHRC at 822. Two members of the Commission suggested that the second step of the analysis should entail an exclusionary hearing to determine what prejudice, if any, resulted from the violation of walkaround rights and exclude evidence accordingly. *Id.* at 822, 834. One Commissioner suggested that the Judge retained discretion at hearing to determine the proper civil penalty with the consideration that a violation of walkaround rights may have affected the mine's ability to present evidence relevant to its case. *Id.* at 839-40. The fourth and final Commissioner found that the exclusion of the operator from the inspection had no effect on the trial of the case. *Id.* at 842-43.

Consequently, subsequent ALJ decisions have diverged on whether the deprivation of an operator's walkaround rights may merit vacatur or necessarily precludes it in favor of applying the exclusionary rule. *See SCP Invs., LLC* ("*SCP II*"), 32 FMSHRC 119, 128-

29 (Jan. 2010) (ALJ) (holding that a violation of § 103(f) rights is *per se* prejudicial and vacating citations based upon improper denial of walkaround rights "on due process, abuse of discretion and/or prejudice grounds); *DJB Welding*, 32 FMSHRC at 734-36 (holding that an operator's abuse of discretion in denying walkaround rights provides a sufficient basis for vacating the citations); *contra Big Ridge Inc.*, 36 FMSHRC at 1735-36 (holding that the Commission requires a showing that denial of § 103(f) walkaround rights actually prejudiced the preparation or presentation of operator's defense and applying the exclusionary rule accordingly).

I find that Rain for Rent was not arbitrarily denied the opportunity to exercise its walkaround rights. Section § 103(f) requires that operators be given the opportunity to accompany an inspector during the inspection, and Tejeda was given that opportunity upon his return. 30 U.S.C. § 813(f). Mr. Tejeda returned to the truck a few minutes into the inspection while Basich was still taking photographs of the unset parking brake. Tr. 35-36. Basich identified himself to Tejeda as an MSHA inspector, explained his authority over the vehicle, and explained why he was inspecting the truck. *Id*. Tejeda was permitted and able to observe the violative condition and was present when the citation was issued and abated. Tr. 35, 95. Tejeda therefore had sufficient opportunity to view the alleged violation, open a dialogue with Inspector Basich regarding the inspection, and offer mitigating circumstances prior to and after the issuance of the citation in accordance with § 103(f). *Id*. I find this opportunity sufficient under § 103(f).

Even assuming arguendo that Inspector Basich arbitrarily denied Rain for Rent its walkaround rights, the facts do not merit vacatur or the exclusion of evidence derived from the search.

Inspector Basich did not abuse his discretion in beginning the inspection without Tejeda. The Commission has found an abuse of discretion "when there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *SCP II*, 32 FMSHRC at 128-29. As discussed above, Basich nspection and entry into the truck in Tejeda's absence to determine whether it presented safety hazards was a lawful exercise of his § 103(a) right of entry. The inspection was well within MSHA's authority because it was part of a routine inspection conducted to enforce the safety and health provisions of the Act. It was further based upon Inspector Basich's reasonable belief that the truck's back and forth motion while parked indicated that the brake was not set in violation of the Act. Basich's actions were therefore supported by evidence and based on a proper understanding of MSHA's right of entry granted pursuant to § 103(a) of the Act.

Respondent argues that Basich abused his discretion because he did not make every reasonable effort to wait for Tejeda's return before inspecting the truck. Resp. Br. at 19. I disagree. Basich took reasonable steps to discover the violation before exercising his right of entry when he looked into the windows. He had no obligation under the Act to wait for Tejeda's return to open the truck door. An inspector has broad discretion on how to approach an inspection, and an inspector's decision not to delay an inspection is

not a *per se* abuse of discretion. *DJB Welding*, 32 FMSHRC at 735. Even if Basich's decision to conduct an inspection initially deprived Rain for Rent of its walkaround rights, he nonetheless had the right to inspect the truck and gave Tejeda the opportunity to view the scope of the alleged violation only minutes later. *See SCP I*, 31 FMSHRC at 887, 842.

Nor did the hypothetical denial result in actual prejudice meriting the exclusion of any evidence derived from the inspection. *See Big Ridge*, 34 FMSHRC at 1736-37. Actual prejudice occurs when an operator can show that the denial of the walkaround rights resulted in its inability to observe the condition as cited in order to prepare or present its defense on the merits before the Commission. *Id.* (citations omitted). Tejeda returned to the truck while the inspection was ongoing and the violative condition still existed. Tr. 35-36, 95. He observed the violative condition unchanged ftom when Inspector Basich first opened the door and was present when the citation was abated. Respondent does not identify, and the court does not conceive of any procedural, jurisdictional, or substantive challenges that were lost or adversely affected because Tejeda was not present at the precise moment Basich opened the door to the truck. Tejeda's short absence therefore did not actually prejudice Rain for Rent's ability to argue its case before this court.

For the reasons explained above, I find that Rain for Rent was not arbitrarily denied an opportunity to accompany Inspector Basich on his search of the truck.

D. Citation No. 8785566

Rain for Rent also challenges the fact of violation, gravity, and negligence designations of the citation. Resp. Rep. at 2.

The Violation

Inspector Basich issued Citation No. 8785566 for a violation of 30 C.F.R. § 56.14207. That standard provides that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.P.R. § 56.14207.

The Secretary has proven that Rain for Rent violated the standard. The truck was "mobile equipment" as defined by the regulation. *Cortez Gold Mines*, 16 FMSHRC 148, 156 (Jan. 1994) (ALJ Morris) ("Mobile equipment" includes F-150 pickup truck). Mr. Tejeda parked the truck and did not set the parking brake before leaving the truck to enter the mine office. Tr. 38. Inspector Basich provided photographs clearly indicating that the parking brake was not set when the truck was parked and left unattended. Ex. S-5.

Respondent contends that the vehicle was not unattended because the driver was ten yards away and could see the vehicle through the Plant's office windows. Resp. Br. at 12. This argument fails. Commission precedent has found vehicles to be "unattended" for the purposes of section 56.14207 when a miner is not behind the wheel of the vehicle and cannot control the mobile equipment. *See Blanchard Machinery Co.*, 38 FMSHRC 1786, 1794 (July 2016)

(ALJ) (deferring to the Secretary's *reasonable interpretation*); *Knife River Constr.*, 36 FMSHRC 2176, 2181 (Aug. 2014) (ALJ). Here, there is no question that Mr. Tejeda could not control the truck while in the mine office.

Accordingly, I affirm the violation of section 56.14207.

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 CFR § 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*, 31

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).

I find Rain for Rent to be moderately negligent. Inspector Basich testified that Tejeda was unaware that he violated the standard. Tr. 40. Section 56.14207 is a Rule to Live By Standard. Tr. 35-37. Rain for Rent is a registered mine contractor and is required to train its employees on the importance of the Rules to Live By standards. *Id.* Although the truck was on level ground and the violative condition did not pose a serious threat of injury, Tejeda should have known that failure to set the parking brake upon parking and exiting the vehicle constituted a safety violation.

I affirm the moderate negligence designation.

Gravity

The Commission has stated that gravity is to be approached "holistically," focusing on factors including the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. *Consol. Penn. Coal Co.,* 39 FMSHRC 1893, 1902-03 (Oct. 2017); *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2049 (Aug. 2016).

Inspector Basich testified that the violation was unlikely to result in lost workdays because the truck

was parked on level ground with the engine off and the transmission in the parked position. Tr. 38-39. Even if the truck were to pop out of the park position, it was unlikely to roll a significant distance or gain sufficient speed to cause an injury. Tr. 39. Thus, the worst possible injury would be bruising or contact with a miner's foot. *Id.* I credit Inspector Basich's testimony and affirm the 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 Company*, 5 FMSHRC 287, 291 (Mar. 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).

Rain for Rent's violation history is minimal. Ex. S-8. The Secretary assessed the statutory minimum penalty and Rain for Rent does not contend that the penalty is disproportionate to its business or would affect its ability to continue in business. I discussed the negligence and gravity of the violation in more detail

above. I found the violation to be non-S&S and unlikely to result in lost workdays and the result of Rain for Rent's moderate negligence. Rain for Rent quickly abated the citation after being notified of its existence. Jt. Stip. #5, 11; Tr. 95. I assess a penalty of **$116.00**.

VI. ORDER

The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of **$116.00** within 30 days of the date of this decision.[7]

s/_____
David P. Simonton
Administrative Law Judge

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[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.

APPENDIX C

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Docket No. WEST 2017-0377

[Filed October 1, 2018]

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)
v.	)
RAIN FOR RENT	)

NOTICE

A petition for discretionary review was filed by Rain for Rent, on September 21, 2018. This petition was filed pursuant to section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2). That section provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A). However, after consideration by the Commissioners, no two Commissioners voted to grant the petition or to otherwise order review under 30 U.S.C. § 823(d)(2)(B). Consequently, the decision of Administrative Law Judge David P. Simonton dated August 22, 2018, is final as of 40 days after its issuance. 30 U.S.C. § 823(d)(1). The right to obtain

review of Commission decisions in a United States court of appeals is set forth in 30 U.S.C. § 816(a)(1).

s/_____
Colin Dobbins
Supervisory Attorney-Advisor

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