No. 19-23

In the
Supreme Court of the United States

ROCKWOOD CASUALTY INSURANCE COMPANY, insurer of HIDDEN SPLENDOR RESOURCES, INC.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and TONY KOURIANOS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO RESPONDENTS' OPPOSITION BRIEFS

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Petitioner's Reply to Respondents' Opposition Briefs

Petitioner files this Reply Brief to address legal arguments in Respondents' Briefs in Opposition to Petitioner's Petition for a Writ of *Certiorari* to this Court.

I. Petitioner's writ should be granted because Respondents fail to clarify whether the Department of Labor is governed by the Administrative Procedure Act.

Neither Respondent disputes that the Department of Labor is reassigning burdens of proof and affirmatively state the Agency has the authority to perform such acts. (Solicitor at 11-12; Claimant at 8-12). The lack of dispute is not surprising when the Secretary specifically stated, with regard to 20 C.F.R. §725.495, "In addition, the regulation explicitly assigns the burden of proof in the adjudication of the responsible operator issue" to the Employer. 65 Fed. Reg. 79920, 80008 (Dec. 20, 2000). With regard to the rebuttal standard at 20 C.F.R. §718.305(d), the Secretary admits that the "rigorous" rebuttal standard is greater than the standard a miner would be required to show to receive benefits without the presumption and sets the standard as requiring the Employer to show "by a preponderance of the evidence" that the presumption is rebutted. 78 Fed. Reg. 59102, 59106 (Sept. 25, 2013). Both statements reveal the Agency's shift in the burden of proof.

The Secretary's 1999 statement contends that Section 956 of the BLBA exempts the BLBA from Section 7(c) of the APA. 64 Fed. Reg. 54966, 54976 (Oct. 8, 1999). The statement further contends that the Secretary is authorized to "depart from the dictates of section 7(c) when she determines it is in the best interest of the black lung benefits program." *Id*. The Secretary's "best interest" belief is concerning as the Agency's interpretation of its powers allows the agency to shift the burden of proof in contravention of the APA as well as create regulations that are nearly identical to legislation Congress failed to pass. 64 Fed. Reg. at 54971. ("Congress' failure to act does not deprive the Department of the authority to promulgate regulations otherwise conferred by the Black Lung Benefits Act").

The power of an administrative agency to administer a congressionally created program requires the formulation of policy and making of rules to fill any gap left, implicitly or explicitly, by Congress. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). It is difficult to see how Congresses' failure to pass legislation creates a "gap" for the Agency to fill. While the Secretary has a "broad grant of rulemaking authority" (see, *Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 1390 (4th Cir. 1987)), the authority is not unlimited and is constrained by the APA which places the burden of proof on the Claimant for claims filed under the BLBA. See, 5 U.S.C. §556(d); *see also*, *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280 (1994). Further, this Court previously held that the Agency did not have the authority to usurp Section 556(d) of APA. *Greenwich Collieries*, 512 U.S. at 280.

Despite this Court's prior holding, the Secretary is issuing regulations that are contrary to the APA. There is no dispute that legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). While Respondents repeatedly state that the regulations have been upheld, the basis of the affirmation is grounded in *Chevron* deference and not a review of the Agency's authority or a review of the regulatory or statutory language. An agency's regulations that shift the burden of proof are contrary to the APA. 5 U.S.C. §556(d). The Secretary's statements regarding the amended regulations at issue in this Petition raise legitimate and grave concerns regarding the Agency's ability to ignore the limits of the APA and shift the burden of proof at will. For these reasons, certiorari is warranted to determine if the Secretary's regulations, and adjudications under the BLBA, are constrained by, or exempted from, the APA.

II. Petitioner's writ should be granted because the Agency's regulations violate the Administrative Procedure Act and the Tenth Circuit's published decision provides an erroneous time period for an RO to dispute its RO status.

Neither Respondent disputes that the Agency's regulations provide different and inequitable deadlines for the parties regarding the submission of R.O. evidence. (Claimant at 13-18; Solicitor at 12-17). Further, neither party disputes that the regulation

allowing an ALJ to address "new issues" on appeal encompasses a period substantially longer than a RO is allowed to dispute the RO issue before the District Director. *Id*. Finally, neither Respondent argues that Hidden Splendor meets the regulatory criteria to be the Responsible Operator for this claim. *Id*. The ALJ's decision acknowledged that Miner did not work the requisite year at Hidden Splendor Mine. (App at 95). As such, Hidden Splendor could not be the correctly designed RO for this claim as a matter of law. See, 20 C.F.R. §725.494(c).

The issue was just as obvious to the ALJ and Claimant at the hearing. Following Rockwood's motion to withdraw the stipulation, Claimant "seconded" the motion. (Pet. Reply App. 3). He also advised that when this all started Westridge was the RO and because "they" figured out all the time he had received a check from Hidden Splendor "they" kept saying, "Yeah, they're the last mine you worked at."[1] (Pet. Reply App. 4). Claimant also stated that he told them, "I didn't work there a year." *Id*. The ALJ noted that Claimant's testimony "raised" the issue and that the briefs should establish the extraordinary cause for why [Rockwood] should be allowed to withdraw it withdrawal of controversion regarding the RO issue. (Pet. Reply App. 4, 5). The ALJ did not know what the legal standard was for extraordinary cause, but stated

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[1] At no time did Mr. Kourianos clarify who "they" was. Did he contact the DOL and tell them that he did not work for Hidden Splendor for a year? Was the DOL the party that advised him that Hidden Splendor had to be the RO because that was the last mine that he worked for?

"that the testimony is at least, sufficient to allow you to proceed, and to make the argument." (Pet. Reply App. 5). Thereafter, the Solicitor was allowed to recall Claimant and take additional testimony regarding his Hidden Splendor employment. (Pet. Reply App. 7-14).

At no time do the Respondents argue that Hidden Splendor meets the criteria of a Responsible Operator based on the agency's regulations. It was only by the inequitable time periods for evidentiary submissions and impermissible burden shifting found in the Agency's regulations that made it possible for Hidden Splendor to remain the Responsible Operator for this claim. The Agency has repeatedly stated that, if it was determined that the wrong RO was named, that benefits would be paid by the Black Lung Disability Trust Fund. See, 65 Fed. Reg. 79919, 79990 (Dec. 20, 2000). However, at no time, despite the evidence revealing that Hidden Splendor could not be the RO for this claim, has the Agency transferred the claim to the Black Lung Disability Trust Fund.

While the ALJ, the BRB, the Tenth Circuit and the Claimant have all provided statements as to what Hidden Splendor should have done after the facsimile regarding Claimant's employment was sent to the District Director, none have ever acknowledged that by the time the fax was sent to the DOL, the agency's regulations precluded Hidden Splendor from submitting any evidence on the issue. Therefore, Hidden Splendor was powerless after the 90-day period expired from developing or submitting any evidence on the issue because the Agency switched the burden of proof to the Employer and then limited the time for the

Employer to develop and submit the evidence. If the APA applies to Federal black lung claims there is also an issue of whether the limitation of time as well as the prohibition of addressing "new issues" on appeal seen in Section 725.463 of the Act also runs afoul of the APA. Section 556(d) states that, "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

In the case at bar, Claimant's testimony contained "a full and true disclosure of the facts" that revealed he did not work at Hidden Splendor as a miner for a full year which is required to classify a coal mine as the RO. However, Hidden Splendor was prohibited from using this unrebutted testimony to withdraw its stipulation as the RO in this claim. There is no dispute that "[a] stipulation is an admission which 'cannot be disregarded or set aside at will'." *Lyles v. American Hoist & Derrick Co.*, 614 F.2d 691, 694 (10th Cir. 1980); *Vallejos v. C.E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978); *Stubblefield v. Johnson-Fagg, Inc.*, 379 F.2d 270, 272 (10th Cir. 1967). However, stipulations are not absolute and may be withdrawn whenever necessary to prevent manifest injustice. *United States v. Montgomery*, 620 F.2d 753, 757 (10th Cir. 1980). Courts are vested with broad discretion in determining whether to hold a party to a stipulation or whether the interests of justice require that the stipulation be set aside. *Morrison v. Genuine Parts Co.*, 828 F.2d 708, 709 (11th Cir. 1987), cert. denied, 484 U.S. 1065, 108 S. Ct. 1025, 98 L. Ed. 2d 990 (1988).

In finding Hidden Splendor could not withdraw its stipulation, the Tenth Circuit found that the Employer's reliance on *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 512 P.2d 438 (1973) was "misguided because Mr. Kourianos's claim involved the application of the BLBA regulations rather than state common law." (Pet. App. 42-43). *Morrison,* which allowed for the withdrawal of the stipulation stated:

> A trial court may, on a proper application, relieve a party from the effects of a stipulation which admits as a fact that which is not true and is of such a material character as to change the rights of the parties, but parties will not be relieved from a stipulation as to certain facts in the absence of a clear showing that the matter stipulated is untrue.

Morrison v. Hurst Drilling, 212 Kan. 706, 709 citing 83 C. J. S., Stipulations, § 35, p. 90 and 50 Am. Jur., Stipulations, §14, pp. 613-14.

No party ever disputed the veracity of Mr. Kourianos's testimony which revealed that Hidden Splendor's stipulation was untrue. Justice should be applicable to both state common law and agency proceedings.

Regulations that shift the burden of proof and further require an adjudicator to ignore and issue a decision contrary to the "full and true disclosure of the facts" are contrary to the APA. Regulations that provide inequitable time frames for the submission of evidence are equally untenable. For these reasons, Rockwood renews its request that this Court grant certiorari.

III. Petitioner's Writ Should Be Granted Because The ALJ Failed to provide a rationale regarding his finding of total disability as required by the APA.

The Solicitor's response provides the Tenth Circuit's interpretation of the evidence, claims that Employer is requesting this Court re-weigh the evidence and further claims that the decision is not in conflict with any other circuit and therefore not suitable for review. (Solicitor at 17-19). Solicitor further contends that it is not necessary for the ALJ to provide a rationale for the conclusions under the APA; instead all that is required is that there be substantial evidence supporting the ALJ's decision. (Solicitor at 17). Solicitor concludes that Petitioner's criticisms are "insubstantial." (Solicitor at 18-19).

Claimant's response contends that the his ABG values were not normal citing to Dr. Gagon's August 24, 2014 supplemental report and ignoring Dr. Gagon's testimony on the issue (just like the ALJ). (Claimant at 20). Claimant also contends that the ALJ was not required to consider all the evidence regarding total disability in his decision. (Claimant at 20-23).

Petitioner has not requested this Court, or any other, re-weigh the evidence. Despite repeatedly advising the Court's that it is the ALJ's function to weigh the evidence and that it is the reviewing Court's duty to review the ALJ's decision to see if it comports with the APA, both the Benefits Review Board and the Tenth Circuit have provided their own analyses of the evidence. (Pet. App. 45-51; 65-75).

Respondent's claims that Mr. Kourianos' arterial blood gas testing values were not "normal" (Solicitor at 18, Claimant at 20-21) is incredible. Based on Respondent's arguments, the fact that Mr. Kourianos' arterial blood gas testing values were in the range of normal at the hospital where the testing was performed (Pet. App. 144) is irrelevant, as is the testimony from all three board certified pulmonologists who classified the values as "normal." (Pet. App. 67-68). All that matters is the DOL disability table, despite the regulatory language that only gives deference to the disability table "in the absence of contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Contrary to Respondent's contentions, the standard "supported by substantial evidence' (Solicitor at 17; Claimant at 19-20) does not absolve an ALJ from reviewing all the evidence and providing a rationale for the findings as required by the APA. 5 U.S.C. §557(c)(3)(A). An ALJ's findings must be rational, supported by substantial evidence and not contrary to law to be affirmed. *Consolidation Coal Co. v. Williams and Director, OWCP,* 453 F.3d 609, 614-615 (4th Cir, 2006). However, if the decision does not abide by the APA or the BLBA, it is contrary to law. The BLBA's purpose is to provide benefits to miners who are totally disabled due to pneumoconiosis. 30 U.S.C. §901. In the case at bar, the ALJ's decision awards benefits despite all of the objective medical testing having values within the range of normal. Certiorari should be granted to re-establish the requirements for adjudications under the BLBA.

IV. Petitioner's Writ Should Be Granted Because the Agency's Regulations are inconsistent with APA Requirements and Allow the Agency to Shift the Burden of Proof to the Employer.

Claimant's argument concedes that the presumption is "difficult to rebut," but claims this is appropriate based on Sen. Byrd's post-PPACA enactment statement. (Claimant at 23-24) Claimant also contends that the higher burden is proper providing citations to case law that have approved its use. (Claimant at 25-27). The remainder of Claimant's response reiterates the errors found in the ALJ's decision and asks this Court to defer to both the ALJ's errors as well as his failure to follow the APA requirements. (Claimant at 28-33).

The Solicitor's argument relies on the Tenth Circuit's analysis of the evidence (Solicitor at 19-21) instead of the ALJ's errors and concludes that its "rule out" standard was necessary because a "rigorous rebuttal standard" was "warranted." (Solicitor at 21). Solicitor concludes by stating that every court of appeals has upheld the standard. *Id*.

Petitioner does not dispute that all the appellate courts have applied the heightened rebuttal standard. However, all of the cases cited by Respondents provide *Chevron* deference to the Secretary in addressing the rebuttal standard. While deference to the Secretary's position must be given considerable weight a court's "deference to the Secretary, however, has important limits: A regulation cannot stand if it is 'arbitrary, capricious, or manifestly contrary to the statute.'"

United States v. O'Hagan, 521 U.S. 642, 673, 117 S. Ct. 2199 (1997).

The basis of the Secretary's heightened rebuttal standard was the post-enactment statement by Sen. Byrd. See, 156 Cong. Rec. S2083-84 (Mar. 25, 2010). However, "post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) citing *Jones v. United States*, 526 U.S. 227, 238 (1999) and *United States v. Mine Workers*, 330 U.S. 258, 281–282 (1947). Revival of the 15-year presumption was established by Section 1556 of the PPACA. Pub. L. No. 111-148, §1556 (Mar. 23, 2010). Nothing in the PPACA provided for a heightened rebuttal standard. *Id*.

The statute contains a rebuttal standard, albeit the standard is limited solely to the Secretary, which states, "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). The Agency's regulations contain the following definition, "For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Considering the statute and regulation together, there is no basis for a heightened rebuttal standard that requires the Secretary, or any other party, to "rule out" that any

portion of a Miner's pulmonary impairment was caused by pneumoconiosis. The Secretary's rebuttal standard is contrary to underlying statute and therefore, is contrary to law. To the extent the regulation requires the Employer to establish rebuttal by a "preponderance of the evidence," (78 Fed. Reg. 29102, 59106, Sept. 25, 2013), the Agency has shifted the burden of proof which is contrary to the APA. For these reasons, certiorari should be granted.

Conclusion

For the reasons set forth above, Rockwood Casualty Insurance Company respectfully requests this Court grant its writ of certiorari to determine if the Administrative Procedure Act governs adjudications under the Black Lung Benefits Act, and, if it does, determine whether the agency's regulations violate the Administrative Procedure Act or conflict with the statutory language.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX 1

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 2014-BLA-05171

[Dated August 12, 2014]

In the Matter of:	)
TONY N. KOURIANOS,	)
Claimant,	)
	)
vs.	)
	)
HIDDEN SPLENDOR RESOURCES, INC.,	)
Employer,	)
	)
ROCKWOOD CASUALTY INSURANCE CO.,	)
Carrier,	)
	)
and	)
	)
DIRECTOR, OFFICE OF WORKERS'	)
COMPENSATION PROGRAMS,	)
Party-in-Interest.	)
	)

PAGES: 1 through 73

LOCATION: Price, Utah

DATE: August 12, 2014

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* * *

[p.60]

A Huh?

Q Do you also hunt?

A No. I gave that up in 1980.

MR. MITCHELL: Your Honor, I think that's all the questions that I have, especially in light of the questions you asked. You asked many of the ones I would have asked.

THE WITNESS: I've got to ask just one. Are you the same insurance company that has Westridge? Do you know?

MR. MITCHELL: And, I wanted to bring up that point. We have a potential issue with Responsible Operator.

THE WITNESS: Yeah.

MR. MITCHELL: So, I'll let Mr. Ellis respond.

JUDGE ALMANZA: Well, let me thank you for your testimony.

THE WITNESS: Sure.

JUDGE ALMANZA: You may resume your seat.

(Witness excused.)

JUDGE ALMANZA: And, as you're walking to the table, the issue that Mr. Mitchell is alluding to is there may be an issue as to the correct designation of the Responsible Operator. Correct?

MR. MITCHELL: That's correct, Your Honor.

MR. KOURIANOS: I second that motion.

MR. MITCHELL: Yes, Mr. Kourianos does, too. There is nowhere in the record reflecting that his last job was as

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a security guard at Hidden Splendor.

And, I know that at one point, we accepted responsibility as Responsible Operator. And, I know there are requirements for extraordinary cause. I'd have to look back at the regulations.

MR. KOURIANOS: They paid me for it. That time was allotted to the coal mine, as it should have been.

JUDGE ALMANZA: You may be seated.

MR. MITCHELL: Based on his testimony, I think we do have extraordinary cause, that his last job, even by his own testimony, was nothing to do with coal mining. It was as a security guard, outside of working hours.

JUDGE ALMANZA: Understood. In terms of -- well. First, Mr. Ellis, do you want to be heard?

MR. ELLIS: Yes, Your Honor. Because the RO issue wasn't controverted in this case, I'm not prepared to argue it at this point.

JUDGE ALMANZA: But, I think you would agree -- and I have no reason to doubt Mr. Mitchell's representation, and there wasn't anything in the record that I saw that raised this. But, the testimony has raised it.

And, I do believe there's good cause -- well, I don't want to prejudge anything. I'll just say that arguably there might be good cause. I'll just leave it at that.

So, with respect to moving forward, it probably

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makes sense to not abate, but stay, to the extent that the first thing we need to do is, after the transcript of this hearing is prepared, to give you time to respond to the Responsible Operator issue.

And then, based on that, we can continue with the normal sequence of events of closing the record.

MR. KOURIANOS: Your Honor?

JUDGE ALMANZA: Yes.

MR. KOURIANOS: When this all first started, Westridge was the official -- or, was the responsible party. And, because they figured out all the time that I had received a check from Hidden Splendor, they kept saying, "Yeah, they're the last mine you worked at." And I'm going, "I didn't work there a year."

JUDGE ALMANZA: Well, this is something that, based on your testimony, sir, this is an issue that I want to make sure we put to bed properly before we move forward.

MR. KOURIANOS: Sure.

JUDGE ALMANZA: So, what I'm going to rule is that within 30 days of receiving the hearing transcript, Mr. Mitchell, if you would brief the Responsible Operator issue.

And in briefing that, part of your briefing has to be establishing the extraordinary cause for why you should be allowed to withdraw your withdrawal of controversion, and state your controversion of the RO issue.

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MR. MITCHELL: I'll follow that through, Your Honor. And, I don't know what the legal standard is on extraordinary cause.

JUDGE ALMANZA: Nor do I at this time, sitting here. But, that is something that I do, having heard the testimony here today, I do agree that the testimony is at least, sufficient to allow you to proceed, and to make the argument.

MR. MITCHELL: Let me make sure I'm clear on your ruling, Your Honor. We have 30 days from receipt of the transcript to brief that specific issue.

We have the separate issue of the supplemental report. But, I am guessing that we would rather have

a brief on just this issue, as opposed to briefing the entire matter.

JUDGE ALMANZA: I think that's more efficient.

MR. ELLIS: With respect to his testimony regarding his occupation, or his employment as a security guard, Wackenhut doesn't preclude security guards from being considered miners.

But, I'm not sure we had enough testimony to flesh out specifically his duties there. In Wackenhut, he was more involved than just as a security guard. It was the specific duties.

MR. KOURIANOS: That's all I did for that month and a half, or two months.

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JUDGE ALMANZA: Well, would you like to recall him, so you can ask him more questions?

MR. ELLIS: Sure, Your Honor. Thank you.

JUDGE ALMANZA: Mr. Kourianos, would you please return to the witness stand?

MR. KOURIANOS: Sure. I just want this cleared up.

JUDGE ALMANZA: Oh, absolutely.

MR. KOURIANOS: I feel really guilty, because Hidden Splendor was really decent to me. I don't want to see anything piled on them that they didn't deserve.

JUDGE ALMANZA: Okay. Now, Mr. Kourianos, I will remind you you're still under oath.

THE WITNESS: Absolutely.

6:00 o'clock p.m.

FURTHER CROSS-EXAMINATION

BY MR. ELLIS:

Q Good evening, Mr. Kourianos. My name is Beau Ellis. I represent the Director of the Office of Workers' Compensation Programs. So, I'm with the government. And, I just want to ask you just a few more questions about your employment, which came to light, as a security guard with Hidden Splendor --

A Sure.

Q -- near the end. You testified earlier that you worked there one to two months, possibly --

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A As a security guard.

Q -- as a security guard.

A The very last of my employment up there was that.

Q Or, for possibly longer, I think you might have said, depending on what the records showed?

A Yeah, it wasn't much more than that, because like I was saying, Hidden Splendor wanted this coal load-out facility that was down by the tracks, and it was owned by Murray.

Murray had shut it down. It had sat idle for oh, almost two years. And, you can't let something like that sit idle for very long. It just rusts up.

So anyway, Hidden Splendor bought the property. But, until the Court went through the thing, and worked it out that Hidden Splendor could buy it -- and, they did finally buy it -- they had to put somebody down there to take care of it, because parts started to disappear, things that were very valuable, motors, pumps, things of that nature. People were taking it.

I think Murray was taking it up to the mine, and people were coming up to sell it for scrap. So, I was up there to prevent that.

I didn't have nothing else to do, so I'd drive up there in the middle of the night and say, "Surprise, I'm here.

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Q When you say take care of it, did you perform any maintenance --

A No, uh-uh.

Q -- on any of the equipment?

A Other than I watched -- we finally got a 5-horsepower pump online. Because of the rain and such, it would go down slope, and then to the bottom of the -- you know, the silos that load up coal were right at the bottom near the belt.

So, right down there at the bottom, there would be a 5-horsepower pump, so I'd just go down and see how

deep the water was, flip a switch, and turn on the pump, walk back up, drive around the property.

We're talking about, I think about 38-acre facility. There's a train load-out, and there's a lot of electronics, and the offices, of course, and the bath house, the lab and the scales. And that's primarily where I just kind of hung out by the front gate. Anybody coming up that canyon, I would see them.

Q You just mentioned a lot of facilities and equipment just now when you were responding to my earlier question. Did you perform any sort of maintenance or inspection with respect to the function of that equipment or those facilities?

A Basically just that pump that I mentioned. That

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was it.

Q I guess what I'm getting at is did you do more than just keep people off the site?

A Yeah, I actually done a lot of stuff that I figured they're going to be needing to get this done. I used to work, when I got out of the Army, for the state road at the lab. And, I had my own scale down on I-70 down at Green River. We were working on I-70 from Green River to San Raphael. So, I had my own scale.

So, we had a scale there, at the load-out. So, I knew how to calibrate them. So, I calibrated the scale, which kind of shocked the shit out of -- I'm sorry -- of the owners, because they thought they were going to have

to call somebody in. I calibrated them, because it's something I knew how to do. That was just one thing.

The warehouse was a joke. They just put tore everything down and threw it on the floor. I categorized everything, cleaned out the shelves, put all the parts back in bins, swept out the shop, cleaned it up, so I could put my car in there, and wax it, also get that done before they got there.

I was there for like, as long as I wanted to be. I could be there, I could go a couple times a day, three times a day or, go up there, and stay there all night long.

Most of the time, I'd go up a couple of times

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during the day, once at night. When I went at night, I'd generally go at different times, so nobody could figure out my schedule, that they could figure, "Hey, he won't be there between here and here, we'll go up there and knock off a pump and take it away."

Q What else did you do that wouldn't be considered typical security guard work, but was still of benefit to the company?

A Primarily, even pulling weeds, general clean-up, just make the place presentable, that they wouldn't have to bring people that was going to buy their coal up there -- and I knew this. So, I would make the office presentable. I would make it look like it was a class act, instead of a fly-by- night.

Q And, production, or load-out was going on at the time you were a security guard?

A No, sir. No, sir, the only thing that was going on was the legalities some place else. Nothing was going on at that property. But, the mine was still -- it had gone off.

Then they started back up at the mine, because before that, I would have to leave the load-out facility, and drive four or five miles up the canyon, and go up there to the bath house, the offices up there, and make sure nothing was happening up there. And, there was nobody up there, either. But, if any car came up, I generally was right on

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their tail to know what their business was, because there's nothing else up that canyon.

MR. ELLIS: If I may get my limited notes?

JUDGE ALMANZA: Yes. Counsel, are either of you flying out tonight?

MR. MITCHELL: No, Your Honor.

JUDGE ALMANZA: Because we may, just to be fair to the security guard, we may need to reconvene in the morning, because I told her 5:30, then by six, and it's now 6:05.

MR. MITCHELL: My flight is at zero-six tomorrow.

JUDGE ALMANZA: Okay.

MR. MITCHELL: But, I don't have any more questions.

MR. ELLIS: I anticipate I have five more minutes, tops.

BY MR. ELLIS:

Q So, to be clear, it appears in the record, it shows that you worked for a period at Hidden Splendor from 2010 to 2011. And, I'll avoid testifying here.

Then there is a 3-month layoff, and then you resumed work at Hidden Splendor again.

A Correct.

Q So, the entire time, your last stint, for lack of a better term, was spent as a security guard?

A Yes.

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Q You were not performing any trainer or supervisor duties?

A No.

Q Those occurred prior to your -- the span where you didn't work for Hidden Splendor?

A Right.

Q Is there anything you would like to add about your duties that we haven't -- that I haven't brought up, or you haven't brought up while you were serving as a security guard?

A I worked -- at one time, there was plenty of guys at the mine. And in fact, it got to the point that I felt like I was more in the way than anything.

I went down to the shop, their main office here in Price, worked there, just basically doing odd jobs, cleaning up, cleaning up with a big front-end loader. That was only like, a couple months.

Q That was during the time that you were a security guard?

A That was before.

Q Okay.

A Can I mix this up any more?

Q I'm sufficiently confused, I think, so I don't think you're going to do any harm.

A It's like -- I got to tell you this: The guys that

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owned the mine and the mine management, I had a real good rapport with them. I don't know.

I think I filed out the employment paper six times, at least, because I'd work for a couple of months, then say, "Okay, you've got enough guys, everybody's trained here, call me when you need me."

Two months later, they'd call, or a month, or a week. And, I'd go back up, and fill out the paperwork again. I told the secretary, "You might as well copy it, so I don't have to fill this out each time."

MR. ELLIS: I have no further questions, Your Honor. Thank you, Mr. Kourianos.

THE WITNESS: Thank you.

JUDGE ALMANZA: Thank you, Mr. Kourianos, for your testimony.

THE WITNESS: Appreciate it.

(Witness excused.)

JUDGE ALMANZA: Okay. Now normally, I would be asking for a briefing schedule, or for a date for holding the record open until.

In this case, as I have already stated, The Employer has 30 days to file a brief on the issue of whether they should be allowed to withdraw their withdrawal of the controversion of the Responsible Operator issue. Part of that is to address extraordinary cause issue.

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MR. ELLIS: I'm sorry, Your Honor, is it 30 days from receipt of the transcript?

JUDGE ALMANZA: Correct.

MR. MITCHELL: So, that's 30 days from receipt of the transcript, we are to brief that issue, and get it to the Court, and also to Mr. Ellis. And, we will provide Mr. Kourianos a copy, as well.

JUDGE ALMANZA: Absolutely.

MR. MITCHELL: And, we will take up the additional scheduling, depending on what the ruling is on Responsible Operator.

JUDGE ALMANZA: Correct.

MR. MITCHELL: Thank you.

JUDGE ALMANZA: Is there anything further to address before we adjourn? Thank you. We are adjourned.

(Whereupon, the proceedings concluded at 6:10 o'clock p.m.)

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REPORTER'S CERTIFICATE

CASE TITLE: TONY KOURIANOS vs. HIDDEN SPLENDOR RESOURCES

CASE NUMBER: 2014-BLA-0517

DATE: AUGUST 12, 2014

LOCATION: PRICE, UTAH

This is to certify that the attached proceedings before the United States Department of Labor, were held according to the record and that this is the original, complete, true and accurate transcript which has been compared to the reporting or recording accomplished at the hearing.

Debra Shroyer — September 4, 2014
SIGNATURE OF REPORTER — DATE