

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KEVIN WRISTON,
Grievant,**

v.

Docket No. 2023-0287-DOC

**MINERS' HEALTH, SAFETY AND TRAINING,
Respondent.**

DECISION

Kevin Wriston, Grievant, filed this grievance against his employer the West Virginia Office of Miners' Health, Safety and Training ("WVOMHST"), Respondent, protesting compensation received for activity performed as a mine rescue team member. The original grievance was filed on or about October 5, 2022. The grievance statement provides:

I Kevin Wriston responded to McDowell county West Virginia at Ramaco Resources Berwin No.1 mines. This Active underground coal mines had a mine ignition resulting in an explosion on 07/07/2022 this mines was (idle) for 4th July vacation week. On the explosion day 07/07 the mines had very hazardous mine gases that was sampled by myself and delivered to the MSHA mine lab in Beckley Wv which the readings were Methane 7.01% and Carbon Monoxide over 7,000 ppm along with other hazardous mine gases. The Company and MSHA reported that the mine explosion had some smoke venting out the mine portals and bore holes. On 9/14/22 through 9/16/22 the Wv mine rescue team and myself entered the mines for mine rescue operations mine recovery work and with a Dragger BG-4 apparatus, at which time level had reduced at the mine portals to 0.45% methane and 1 ppm carbon monoxide appeared to be at safe levels. Upon conducting mine rescue exploration inside the mine workings located up where the explosion occurred being (black soot) started at break 122 and break 123 to the start of an explosion field where shredded mine metals were discovered. The following breaks 126 is where two sets of scoop batteries and Mac12 mantrip batteries were located on the mine floor. This being an ignition source and break 128 at bottom of slop the methan readings were 10.0% at head level. At approximately 1500 hours the eventing time the barometric pressure dropped resulting atmosphere change the mine gases of 5.00% methane started migrate down (outby) to break 126. In addition a rubber tire 4-wheeler with batteries was parked (inby) the 5.00% methane of mine gas at break 127 just one break (outby) the inseam slope with readings of 10.00% methane. There's no doubt that an ignition occurred underground and the potential of another ignition that could have occurred.

(under laws, rules and regulations)

West Virginia the following laws were in effect. Chapter 22A article 1 section 35 (d). Title 36 series 44 section 2.2(a).

(The misapplied part and reason the grievance was filed on my behalf was)

Title 36 series 44 section 4.1(b) that was not followed and reads: When engaged in rescue work required by an explosion, fire or other emergency at a mine, all members of the agency's mine rescue teams assigned to rescue operations shall, during the period of their rescue work, be employees of the operator of the mine where the emergency exists, and shall be compensated by the operator at the rate established in the area for such work. In no case shall this rate be less than the prevailing wage rate in the industry for the most skilled class of inside mine labor and paid according to the following criteria:

Time and half - when on standby at hotel/home

Double time - when available on the surface

Triple time - when under apparatus underground

The Director will invoice the operator and ensure proper distribution to the individual agency mine rescue team members.

Relief Sought: Compensated as required by West Virginia State law for triple time wages for wearing apparatus and double time wages for being underground, surface, onsite, standby at motel/home and in a mine explosion with very hazardous readings ranges from 5.00% to 10.00% and greater up to 42.00% including Low Oxygen levels below 19.50%.

*Days from 09/14 through 09/16 and if called upon for any future events prescribed under Title 36 series 44 section 4.1(b) be compensated.

*I was only compensated for straight time and time and half for hours worked.

Additional Wv Mine Rescue state team members were present in these conditions.

A Conference was held at level one on October 14, 2022. The grievance was "granted in part and denied in part" at that level on October 25, 2022. Grievant appealed to level two on November 2, 2022, and a mediation session was held on December 15, 2022. Grievant appealed to level three on December 22, 2022. A level three hearing was held before the undersigned Administrative Law Judge on March 13, 2023, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by union representative Joshua King, United Mine Workers of America. Respondent appeared by and was represented by counsel, John Boothroyd, Assistant Attorney

General At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals, and this matter became mature for decision on April 17, 2023, on receipt of the last of these proposals.

Synopsis

The issue addressed in the present matter is whether the work performed by Grievant on September 14th through 16th, 2022, is covered by *West Virginia Code* § 22A-1-35(j) and entitled to enhanced pay as specified by West Virginia Code of State Rules § 36-44-4.2. The work must be “rescue work”, and the work must be “required by an explosion, fire, or other emergency at a mine”. See West Virginia Code § 22A-1-35(j). It is not the role of the undersigned Administrative Law Judge to advise nor is the Public Employees Grievance Board authorized to direct the actions of a non-state agency.

Grievant wants the compensation he perceives is provided by applicable statute and regulations. Respondent’s argument deflects responsibility for payment, spoken and unspoken reasons. However, it is disingenuous to recognize the need for specialists, to call upon and use their skills, but then neglect to pay the recognized rate for the services because it wasn’t conveniently reimbursed by a third party. Mine rescue activities encompass more than just the rescue of an endangered miner. It is established by a preponderance of the evidence that Grievant is entitled to compensation pursuant to West Virginia Code § 22A-1-35(j). Nevertheless, this ALJ has no authority to compel a coal operator, which is not a state agency, to compensate, reimburse or not reimburse Respondent for the issuance of Grievant’s compensation.

Accordingly, this **Grievance is GRANTED** in that Grievant engaged in activity which meets the criteria of West Virginia Code § 22A-1-35(j) and he is entitled and should be compensated as provided by applicable statute, rule, and regulation.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. West Virginia Office of Miners' Health, Safety and Training ("WVOMHST"), Respondent is responsible for the protection of miners and enforcement of rules, regulations and procedures as it relates to WV mining laws and rules. W. Va. Code § 22A-1-1 et seq.

2. Grievant has worked as an underground mine inspector for Respondent since approximately 2012.

3. The West Virginia Division of Personnel's description of the nature of work for an underground mine inspector is "[u]nder general supervision, inspects all areas and equipment in and around underground mines within an assigned district to determine compliance with safety and health laws and regulations." (R Ex 6).

4. Pursuant West Virginia Code § 22A-1-34, Respondent maintains mine rescue crews or teams. These mine rescue teams consist of employees of the Respondent.

5. Grievant is a member of the mine rescue team for Respondent. Grievant has been a member of the mine rescue team since approximately 2012. Prior to 2012,

Grievant had been on a mine rescue team for a private company. Pursuant to West Virginia Code State Rules § 36-44-4.1, Grievant is paid an additional \$5,000.00 per year by Respondent for being a member of the agency's mine rescue team.

6. The federal Mine Safety and Health Administration's ("MSHA") Initial Mine Rescue Team Training manual initially defines mine rescue as "the practiced response to a mine emergency situation that endangers life, property, and the continued operation of the mine." (G Ex 1). The manual further sets forth that the "three objectives of mine rescue in the order of their importance are: 1) Team safety; 2) Locating trapped miners and returning them to safety; 3) Protecting the mine property and recovering the mine."

7. The definitions are consistent with the basic purposes and training of mine rescue teams maintained by Respondent (WVOMHST), which is the state of West Virginia's counterpart to the federal MSHA. Both MSHA (federal) and WVOMHST (state) provide mine rescue teams and services.

8. Mine rescue activities may require a mine rescue team member to work and explore/search under dangerous conditions in the mine, including work in the presence of poisonous gases, explosive gases, smoke and fire, low oxygen, and work in passageways that are constricted, blocked or unstable.

9. Mine rescue training includes training in the use of a specialized breathing apparatus; monitoring gases; inspecting and assessing mine ventilation; exploring the mine; fighting fires; sealing off sections of the mine; locating survivors or victims, triaging survivors; transporting survivors or victims out of the mine; re-establishing/repairing ventilation in the mine; and clearing and rehabilitating the affected areas of the mine.

See G Ex 1 and R Ex 10 (excerpts from MSHA's advanced training manual).

10. As part of the mine rescue team, Grievant must undergo initial and yearly specialized training. See West Virginia Code State Rules § 48-4-1 et seq. To continue being on the mine rescue team, Grievant is required to undergo monthly training totaling at least 96 hours per year. W. Va. Code State R. §§ 48-4-4.1.1 and 48-4-4.4. Additionally, Grievant is required to participate in scheduled mine rescue competitions, which test mine rescue teams under simulated mine rescue scenarios. W. Va. Code State R. §§ 48-4-4.1.1 and 48-4-15.1.

11. Actual mine rescue emergencies are not regular occurrences. A mine rescue emergency does not necessarily arise every year. Events calling for mine rescue may take many forms.¹ Mine rescue activities encompass more than just the rescue of an endangered miner.

12. On or about July 10, 2022, an explosion or explosion like event occurred at the Berwind mine located in McDowell County, West Virginia. At the time of this explosion event, no one was working or located in the mine.

13. On or about July 10, 2022, Grievant and other members of the Respondent's mine rescue team were called to the Berwind mine, located in McDowell County, West Virginia. No mine rescue teams or persons entered the mine on that date. At the mine, Grievant took gas readings and samples at the mine portals, which were sent

¹ Examples of cases generally recognized, not of dispute, include cases where working miners may be trapped inside a mine due to an explosion or collapse, or non-miner persons trespassing in the mine may be located and brought out of the mine. In other cases, a mine may have suffered an explosion without any threat to life or limb, but with significant damage to mine equipment which renders the mine unsafe for mining activity.

to MSHA for analysis.

14. There was no one trapped in the mine. It was determined that mine rescue teams would return to the Berwind mine once gas levels became safe enough for mine rescue teams to enter the mine and conduct exploration. Grievant and Respondent's mine rescue team members left the mine site.

15. On or about September 13, 2022, a command center was established on mine property. Preparations were made for Respondent's mine rescue team, along with mine rescue teams from MSHA and from a private company, to re-enter the Berwind mine. The identified purpose was to explore the mine, re-establish ventilation in the mine and investigate the cause of the explosion event.

16. Re-establishing ventilation involves putting up curtains or stoppings to restrict and or direct air flow, so that there is sufficient fresh air in the mine for people to operate underground without using a breathing apparatus for oxygen.

17. On September 14, 2022, Grievant, Stephen Evans (from WVOMHST) and mine rescue team members from MSHA and a private company re-entered the underground Berwind mine. One combined group explored, assessed, and re-established ventilation along the intake ventilation. The second combined group explored, assessed, and re-established ventilation along the neutral ventilation. Both groups worked their way out to approximately the 90th break or crosscut from the mine entrance/portal, before turning back and exiting the mine for the day.

18. While in the mine, Grievant took measurements of gases and gas levels all along the way. Measuring gas levels is important because certain gases can become

explosive or toxic if at a high enough level. Grievant brought with him his BG4 oxygen apparatus, which would give him approximately four hours of oxygen air if he found himself in toxic gases or low/no oxygen. Grievant did not put on the breathing mask of the BG4 oxygen apparatus to breathe on September 14, 2022.

19. On September 15, 2022, Grievant was a backup to Respondent's underground mine rescue team members, Jeremy Ball and Travis Farthing. At some point in the day, supplies were needed and Grievant was assigned to bring supplies to the mine rescue teams underground. Grievant traveled to approximately the 127th break or crosscut. At this section of the mine, the mine rescue teams would have been within the likely area of the July 10, 2022, explosion event.

20. At some point thereafter, it was determined by the mine rescue teams that the gas levels were too high or explosive and the high levels were spreading through the mine, putting mine rescue team members at risk. The underground mine rescue teams turned back and exited the mine. The mine rescue teams did not make it all the way to the working face (area of coal extraction) of the mine.

21. Grievant did not have to use or put on the breathing mask of the BG4 oxygen apparatus to breathe on September 15, 2022, but there were a few mine rescue team members who did put on their oxygen breathing masks that day. According to witnesses from Respondent's mine rescue team, being "under apparatus" is considered to be when the mine rescue team member is wearing the oxygen mask of the BG4 apparatus and using its supplied oxygen.

22. On September 16, 2022, no mine rescue teams were sent back

underground, and the decision was made to leave the mine site. On September 16, 2023, it was determined that the mine was too dangerous.

23. Mine rescue teams returned to the Berwind mine to complete exploration and re-establish ventilation from November 7th to 10th, 2022. Grievant went underground on November 10, 2023. At this time, ventilation for the mine was re-established and, thereafter, people could go underground without needing a BG4 oxygen type apparatus. This step was necessary before the Respondent would allow mining operations to resume at the Berwind mine.

24. West Virginia Code § 22A-1-35(d) sets forth that “[i]n the event of a fire, explosion, or recovery operations in or about any mine, the director is hereby authorized to assign any mine rescue team to said mine to protect and preserve life and property.”

25. West Virginia Code § 22A-1-35(j) sets forth that “[w]hen engaged in rescue work required by an explosion, fire, or other emergency at a mine, all members of mine rescue teams assigned to rescue operations shall, during the period of their rescue work, be employees of the operator of the mine where the emergency exists, and shall be compensated by the operator at the rate established in the area for such work. In no case shall this be less than the prevailing wage rate in the industry for the most skilled class of inside mine labor. During the period of their emergency employment, members of the mine rescue teams shall be protected by the workers’ compensation subscription of the mine operator.”

26. West Virginia Code State Rules § 36-44-4.2 restates the language of West Virginia Code § 22A-1-35(j) and adds that mine rescue team members shall be paid

according to the following criteria.

- 4.2.1 Time and a half - when on standby at hotel/home
- 4.2.2 Double time - when available on the surface
- 4.2.3. Triple time - when under apparatus underground

27. Grievant asserts that his work performed on September 14th through 16th, 2023, meets the criteria of West Virginia Code § 22A-1-35(j) and he should be paid consistent with West Virginia Code State Rules § 36-44-4.2.

28. Respondent's level one decision for this matter "granted in part and denied in part" the grievance. The October 25, 2022 level one decision stated in part:

The Grievance is granted in as much as the West Virginia Office of Miners' Health, Safety and Training will submit an invoice to the operator, Ramaco Resources, LCC, If the invoice is deemed payable under relevant law by Ramaco Resources, LCC, the West Virginia Office of Miners' Health, Safety and Training will ensure proper distribution to the individual agency mine rescue team members.

The Grievance is denied in as much as the West Virginia Office of Miners Health, Safety and Training does not take the position that the Grievant is legally correct that he and others performed "rescue work" as contemplated by W. VA. CODE § 22A-1-35(j) and W. VA. STATE RULES § 36-44-4.2 and is, thus, entitled to the compensation sought in the grievance. In the event that Ramaco Resources, LCC determines that the invoice is not payable under relevant law, the West Virginia Office of Miners' Health, Safety and Training will not reimburse or compensate the Grievant as has been sought for in this grievance.

29. Respondent concluded that Grievant's work did not meet the criteria of West Virginia Code § 22A-1-35(j) and West Virginia Code State Rules § 36-44-4.2 Nevertheless, Respondent forwarded an invoice to the Berwind mine operator, Ramaco Resources, LLC (Ramaco) on or about October 31, 2022. As of the date of the instant level three hearing Ramaco Resources had not paid the invoice.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving his grievance by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant asserts that his work performed on September 14th through 16th, 2023, meets the criteria of West Virginia Code § 22A-1-35(j) and he should be paid consistent with West Virginia Code State Rules § 36-44-4.2. The issue presented in the present matter is whether the work performed by Grievant is entitled to enhanced pay as requested. The complication arises in that applicable language tends to identify the payor of the contested wages as a third party, a non-state agency. It is not the role of this ALJ to advise and/or direct a non-state organization. This Grievance *Board's authority is limited* and the undersigned ALJ is not empowered to provide a compulsory ruling to a non-state agency, regarding its obligation to compensate Grievant or reimburse Respondent for the issuance of Grievant's compensation.

A primary legal issue in this case is whether the work performed by Grievant at the Mine as part of his duties as a member of the Agency's Mine Rescue Team falls within

the meaning of Section 22A-1-35(j) of the West Virginia Code.² That provision reads as follows:

When engaged in rescue work required by an explosion, fire, or other emergency at a mine, all members of mine rescue teams assigned to rescue operations shall, during the period of their rescue work, be employees of the operator of the mine where the emergency exists, and shall be compensated by the operator at the rate established in the area for such work. In no case shall this rate be less than the prevailing wage rate in the industry for the most skilled class of inside mine labor. During the period of their emergency employment, members of mine rescue teams shall be protected by the workers' compensation subscription of the mine operator.

West Virginia Code § 22A-1-35(j) sets forth that “[w]hen engaged in rescue work required by an explosion, fire, or other emergency at a mine, all members of mine rescue teams assigned to rescue operations shall, during the period of their rescue work, be employees of the operator of the mine where the emergency exists, and **shall be compensated by the operator at the rate established in the area for such work.** In no case shall this be less than the prevailing wage rate in the industry for the most skilled class of inside mine labor. During the period of their emergency employment, members of the mine rescue teams shall be protected by the workers’ compensation subscription of the mine operator.”

To fall within the meaning of § 22A-1-35(j), the work must be “rescue work”, and the work must be “required by an explosion, fire, or other emergency at a mine”. See W.

² The ancillary concern indirectly presented in this matter is the implementation/enforcement of the enhanced pay as specified by West Virginia Code of State Rules § 36-44-4.2. This Grievance *Board’s authority is limited* and the undersigned ALJ has no authority to compel a coal operator, which is not a state agency, to reimburse or not reimburse the issuance of Grievant’s compensation.

Va. Code § 22A-1-35(j) The phrase “rescue work” is not defined in the West Virginia Code or in the West Virginia Code of State Rules.³ Rescue work is many things, while it may be generically considered to be rescuing trapped miners, it is much more than that one action. Rescue work includes monitoring gases; inspecting and assessing mine ventilation; exploring the mine; fighting fires; sealing off sections of the mine; locating survivors or victims, triaging survivors; transporting survivors or victims out of the mine; re-establishing/repairing ventilation in the mine; and clearing and rehabilitating the affected areas of the mine. See G Ex 1 and R Ex 10 (excerpts from MSHA’s advanced training manual). Rescue work encompasses more than just rescuing trapped individuals. Mine rescue teams are trained and undergo specified training to perform in response to situations.⁴

Grievant’s work during the period in question does fall within the meaning of West Virginia Code § 22A-1-35(j), so it should be compensable under West Virginia Code of

³ Accordingly, it should be presumed that the Legislature intended to use those terms with their ordinary meaning or with the meanings ascribed to those terms in the relevant industry or field, in this case the field of mine rescue. See *Riddle v. D.H.H.R./Bureau for Children and Families*, Docket No. 2018-2029-DHHR (Oct. 24, 2018); Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by* *Lee—Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). (“In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.”) The undersigned is persuaded that the work performed by Respondent’s mine rescue team from September 14th to September 16th, 2022, falls within the meaning of the phrase “mine rescue” as that phrase is understood in the field of mine rescue.

⁴ As part of the mine rescue team, Grievant has to undergo initial and yearly specialized training. See West Virginia Code State Rules § 48-4-1 et seq. To continue being on the mine rescue team, Grievant is required to undergo monthly training totaling at least 96 hours per year. West Virginia Code State Rules §§ 48-4-4.1.1 and 48-4-4.4. Additionally, Grievant is required to participate in scheduled mine rescue competitions, which test mine rescue teams under simulated mine rescue scenarios. W. Va. Code State R. §§ 48-4-4.1.1 and 48-4-15.1

State Rules § 36-44-4.2, and OMHST has a duty to invoice the operator and ensure proper distribution of those funds. As set out in the Findings of Fact, an explosion occurred on or prior to July 10, 2022. No mining work could be performed at least until the ventilation system was brought back to working order. One of the primary objective(s) in the operation from September 14th to September 16th, 2022, was the re-establishment of the ventilation system.

Among other arguments, Respondent promulgates that Grievant was carrying out “recovery” work at the Berwind mine and there were no persons trapped in the mine needing rescue. It is not established that one or more individuals must be trapped in order to recognize a mine rescue team’s activity as rescue activities. Mine rescue activities encompass much more than just the rescue of an endangered miner.

It is recognized that there are non-emergency situations which might require the skills and training of mine rescue teams, but which Respondent cannot invoice the mine operator under West Virginia Code § 22A-1-35(j). However, the fact pattern of this Grievance is not such an occasion. In the circumstances of this case, it is disingenuous to recognize the need for specialists, to call upon and use their skills, but then neglect to pay the recognized rate for the services because it was not conveniently reimbursed by a third party. There were no individuals trapped in the mine needing liberated, however the work performed by Grievant and others from September 14 to September 16, 2022, falls within the meaning of the phrase “mine rescue” as that phrase is understood in the field of mine rescue.

Mine rescue training materials produced by MSHA, the federal mine safety and mine rescue agency, define mine safety as “the practiced response to a mine emergency situation that endangers life, *property*, and *the continued operation of the mine*.” See G Ext 1 (emphasis added). Under this articulation of the phrase, “mine rescue” encompasses more than the saving of lives (“miner rescue”), but also the recovery of property and the reestablishment of safe and ordinary working conditions in the mine, such that the business of mining may continue. To be clear, a training manual produced by a federal agency cannot define a phrase in a state statute. However, the way in which the nation’s mine safety and mine rescue agency uses a phrase goes a long way in showing how the phrase is used and recognized in the mining industry.

The September 14th through 16th operation was treated as a “mine rescue” at the time. Grievant, in his capacity as a member of the Mine Rescue Team, was called to the site of a mine explosion. Mine rescue teams from MSHA, OMHST, and a private company set up a command center, which is normally done only during mine rescue operations. Grievant and other members of the Mine Rescue Team were provided breathing apparatuses, which are normally provided only during mine rescue operations. Grievant was exposed to hazardous conditions, such as high levels of methane, which “reportedly” caused the July 10th explosion. Working miners are not permitted to work under those conditions. If nothing else, the team was attempting to rescue the mine itself. Further, it is noted what an overly narrow reading of “mine rescue” would lead to. Private coal operators would enjoy the benefit of brave, dedicated, and highly trained mine “recovery” specialists bringing the operators’ mines back into working order while the West Virginia

taxpayer foots the bill. The payment scheme established in Section § 22A-1-35, in which the mine rescue personnel become temporary employees of the operator, is designed to precisely avoid this outcome. Accordingly, herein, the phrase “mine rescue” should and is afforded its recognizable and befitting scope.

Grievant has shown by a preponderance of the evidence that he is entitled to be paid for his mine rescue services September 14th through 16th, 2022. pursuant to West Virginia Code § 22A-1-35(j) and West Virginia Code of State Rules § 36-44-4.2. There is no practice, policy, regulation, or statute, which requires the Respondent to pay any additional money out of state funds to Grievant whenever he is asked to respond to an actual mine rescue. Respondent is required to invoice the operator of the Mine and **take appropriate measures to collect on the invoice** for mine rescue services September 14th through 16th, 2022.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving his grievance by a preponderance of the evidence. See West Virginia Code State Rules §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” *Riddle v. D.H.H.R./Bureau for Children and Families*, Docket No. 2018-2029-DHHR (Oct. 24, 2018).

3. West Virginia Code § 22A-1-35(j) sets forth that “[w]hen engaged in rescue work required by an explosion, fire, or other emergency at a mine, all members of mine rescue teams assigned to rescue operations shall, during the period of their rescue work, be employees of the operator of the mine where the emergency exists, and shall be compensated by the operator at the rate established in the area for such work. In no case shall this be less than the prevailing wage rate in the industry for the most skilled class of inside mine labor. During the period of their emergency employment, members of the mine rescue teams shall be protected by the workers’ compensation subscription of the mine operator.”

4. It is established that mine rescue services performed in accordance with the criteria of West Virginia Code § 22A-1-35(j) should be paid consistent with West Virginia Code State Rules § 36-44-4.2.

5. Grievant has established by a preponderance of the evidence that the work performed by Respondent’s mine rescue team on September 14th through 16th, 2022, at the Berwind Mine meets the criteria of West Virginia Code § 22A-1-35(j).

6. Grievant has established by a preponderance of the evidence that his services September 14th through 16th, 2022 meets the criteria of West Virginia Code §

22A-1-35(j) and he should be paid consistent with West Virginia Code State Rules § 36-44-4.2.

7. Grievant is entitled to be enhanced paid for his mine rescue services September 14th through 16th, 2022.

8. Grievant has shown by a preponderance of the evidence that the Respondent is required to invoice the operator of the Berwind Mine and take appropriate measures to collect on the invoice for Grievant's mine rescue services September 14 through 16, 2022. (Emphasis added)

Accordingly, this **Grievance is GRANTED** in that Grievant engaged in activity which meets the criteria of West Virginia Code § 22A-1-35(j) and he is entitled and should be compensated as provided by applicable statute, rule, and regulation. Respondent is **ORDERED** to take reasonable steps⁵ which will encourage and enhance that Grievant is lawfully compensated.

Any party may appeal this decision to the Intermediate Court of Appeals.⁶ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

⁵ Reasonable steps while not defined, herein, in the context of this matter it is envisioned to be more than just requesting via verbal and/or written format. Respondent has a duty to invoice the coal mine operator pursuant to West Virginia Code State Rules §§ 36-44-4.2 and 4.3. If the operator does not pay the invoice, Respondent would have a duty to take appropriate measures to have the invoice paid.

⁶ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

§ 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: May 25, 2023

Landon R. Brown
Administrative Law Judge