

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held September 15, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Dwayne Ackie, Miguel J. Chavarria, Jr.,
Maurice A. Goodwin and Wayne Rauceo

C-2019-3013933

v.

Philadelphia Gas Works

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Philadelphia Gas Works (PGW) on September 2, 2021, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Darlene D. Heep, served on August 13, 2021, in the above-captioned proceeding. Replies to Exceptions were filed on September 20, 2021, by Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin and Wayne Rauceo (collectively the Complainants). For the reasons stated below, we shall grant, in part, and deny, in part, PGW's Exceptions, and adopt the ALJ's Initial Decision, as modified and clarified by this Opinion and Order.

I. History of Proceeding

On October 31, 2019, the Complainants, who are PGW employees, filed a Formal Complaint (Complaint) against PGW with the Commission alleging safety infractions and other violations in the operation of PGW's Passyunk Liquified Natural Gas Plant (Passyunk Plant or Plant). Among the concerns alleged were manipulation of equipment temperature indicators, structural gas tank cracks that are not properly repaired, dangerously unmanned plant apparatus, employees handling equipment under the influence, abandonment of work areas, faulty override valves and uncontrolled, unsafe gas migration. The Complainants also alleged racial discrimination in the operation of the Plant.

On November 20, 2019, PGW filed an Answer, denying all material allegations, along with Preliminary Objections seeking to dismiss the Complaint. The Preliminary Objections were assigned for disposition to the ALJ on December 18, 2019.

On January 3, 2020, an Order Granting in Part and Denying in Part PGW's Preliminary Objections (*January 2020 Order*) was issued. It sustained PGW's Preliminary Objections regarding the claims of "persistent, insidious race, color and/or national origin discrimination" for lack of jurisdiction.

The *January 2020 Order* also dismissed the Complainants' allegations in: (1) Complaint Paragraph No. 14 - that in the summer of 2016, there was an auto accident at the Plant and actions to cover it up; and (2) Complaint Paragraph No. 16 - that on March 22, 2016, there was an unsafe release of gas. These claims were dismissed because the claims were not within the three-year statute of limitations set out in Section 3314(a) of the Public Utility Code (Code).

On February 6, 2020, a Prehearing Conference was held at which a litigation schedule and procedures, including service of written testimony, were discussed.

On February 11, 2020, a Prehearing Order was issued. Due to COVID-19 restrictions and various requests of the Parties, the procedures set forth in the Prehearing Order were modified for these proceedings.

On October 19, 2020, PGW filed a Motion in Limine (*Motion in Limine I*) contesting certain portions of the Complainants' pre-served Direct and Surrebuttal Testimony.

On October 21, 2020, the Complainants filed a Response in Opposition to the *Motion in Limine I*.

The evidentiary hearing convened on October 21, 2020. The Complainants were represented by Karin M. Gunter, Esquire, and PGW was represented by Graciela Christlieb, Esquire and Karen O. Moury, Esquire.

Prior to taking testimony, the ALJ ruled on PGW's *Motion in Limine I*; granting, in part, and excluded from evidence lines two through three on page four of Mr. Ackie's Surrebuttal Testimony.¹ The remainder of PGW's *Motion in Limine I* was denied. PGW was also directed to provide additional responses to the Complainants' discovery Sets III-IV no later than November 4, 2020.

¹ EE Statement No. 1-SR (Surrebuttal); Tr. at 6-7.

Attorney Gunter presented the testimony of the Complainants, and the following Complainants' Exhibits were admitted into the record:

- EE ST-1 (Ackie - Direct, with Exhibits 7 through 11)
- EE ST-1-SR (Ackie - Surrebuttal)
- EE ST-2 (Goodwin - Direct)
- EE ST-3 (Chavarria - Amended 12 Direct)
- EE ST-3-SR (Chavarria - Surrebuttal)
- EE ST-4 (Rauceo - Direct, with 15 Exhibits 1 through 3A)
- EE ST-4-SR (Rauceo - Surrebuttal)

Attorneys Christlieb and Moury presented the testimony of former PGW Senior Vice President of Gas Management Raymond M. Snyder and PGW employees Daniel J. Cassidy and Brian McGuire. They also presented the following PGW Exhibits that were admitted into the record:

- PGW ST-1 (Snyder)
- PGW ST-2 (Cassidy)
- PGW ST-3 (McGuire)
- PGW ST-3-SR (McGuire)

Also, during the evidentiary hearing on October 21, 2020, the Complainants raised new allegations regarding an incident which had occurred at the Plant on October 15, 2020. Presentation of evidence regarding the recent incident was allowed and PGW was informed that it would be given the opportunity to respond to allegations concerning this event. Accordingly, PGW provided supplemental responses by November 4, 2020.

On November 24, 2020, an order was issued setting deadlines for responses to the supplemental discovery responses, to file supplementary testimony and

for briefs. Main Briefs were due on February 12, 2021, and Reply Briefs were due on March 5, 2021. By order dated November 30, 2020, PGW and the Complainants were given deadlines to submit written testimony and rebuttal regarding the October 15, 2020 incident.

On January 8, 2021, regarding Mr. Rauceo's Supplemental Direct Testimony, PGW filed a second Motion in Limine (*Motion in Limine II*), contending that the Complainants were improperly using testimony to address a discovery dispute. PGW also sought to exclude two proffered exhibits as being beyond the permissible scope pursuant to the November 24, 2020 Order. On January 12, 2021, the Complainants filed a Response in Opposition to PGW's *Motion in Limine II*. By Order dated February 9, 2021, PGW's *Motion in Limine II* was granted regarding the testimony but denied as to the request to exclude the exhibits.

On January 19, 2021, PGW filed a third Motion in Limine (*Motion in Limine III*). The Complainants filed a Response in Opposition to this Motion on January 22, 2021. By Order dated February 9, 2021, *Motion in Limine III* was denied.

On February 12, 2021, PGW and the Complainants filed Main Briefs, and on March 5, 2021, they filed Reply Briefs.

On March 16, 2021, PGW filed a Motion to Strike Portions of the Complainants' Reply Brief. The Complainants filed an Opposition to the PGW Motion to Strike on April 7, 2021.

On May 24, 2021, the Parties filed a Joint Motion for Admission of Testimony and Exhibits into Record. On May 25, 2021, an Order was issued admitting post evidentiary hearing testimony and exhibits into the record. The May 25, 2021 Order also closed the record.

The record consists of a 169-page transcript and the following Testimony and Exhibits admitted into the record during the hearing or by the post-hearing order.

They are:

Complainants' Exhibits

- EE ST-1 (Ackie - Direct, with 8 Exhibits 7 through 11)
- EE ST-1-SR (Ackie - Surrebuttal)
- EE ST-2 (Goodwin - Direct)
- ST-3 (Chavarria - Amended 12 Direct)
- EE ST-3-SR (Chavarria - Surrebuttal)
- EE ST-4 (Rauceo - Direct, with Exhibits 1 through 3A)
- EE ST-4-SR (Rauceo - Surrebuttal)
- EE St. No. 4-SUP (Wayne Rauceo Proprietary and Non-Proprietary Versions with Exhibits IV, V and Confidential VI)
- EE St. No. 1-REPLY (Ackie)
- EE St. No. 3-REPLY (Chavarria)
- EE St. No. 4-SSR (Rauceo Proprietary and Non-Proprietary Versions)

PGW Exhibits

- PGW ST-1 (Snyder - Rebuttal)
- PGW ST-2 (Cassidy - Rebuttal)
- PGW ST-3 (McGuire - Rebuttal)
- PGW ST-3-SR (McGuire - Surrebuttal)
- PGW St. No. 3-SUR (McGuire)
- PGW St. No. 2-SR (Cassidy with Exhibit DCJ-1 with Confidential Exhibit A)

On August 13, 2021, ALJ Heep issued her Initial Decision, which granted, in part, and denied, in part, the Complaint filed by the Complainants, finding the claims that PGW violated 66 Pa. C.S. § 1501 when it bypassed a safety sensor and failed to repair a faulty valve to be true. The ALJ imposed a total civil penalty of eleven-thousand dollars (\$11,000.00) as provided for in Section 3301 of the Code, 66 Pa. C.S. § 3301. Further, the ALJ dismissed the employment discrimination claims brought by the Complainants for lack of jurisdiction and denied all other claims brought in the Complaint.

On September 2, 2021, PGW filed Exceptions. On September 20, 2021, the Complainants filed Reply Exceptions.²

II. Discussion

A. Legal Standards

We note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also generally, Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Section 332(a) of the Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa. C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990). “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). The offense must be a violation of the Code, the Commission’s Regulations, or an outstanding Order of the Commission. 66 Pa. C.S. § 701.

In the present case, the Complainants have the burden of proof as the party seeking relief associated with PGW’s operations.

² On September 3, 2021, the Complainants sought an extension of time in which to file Reply Exceptions, which was granted by Secretarial Letter issued on September 9, 2021.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (Milkie); *see also, Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982).

On appeal, the decision of the Commission must be supported by substantial evidence. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); and *Pa. Dep't of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

In the present case, the overarching statutory and regulatory provisions applicable to the conduct of the utility include Section 1501 of the Code. The Complainants essentially allege that PGW violated 66 Pa. C.S. § 1501 in the operation of the Passyunk Plant, particularly with respect to safety. This section provides:

§ 1501. Character of service and facilities.

Every public utility shall furnish and maintain adequate, efficient, *safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.* Such service also shall be reasonably continuous and without unreasonable interruptions

or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.

66 Pa. C.S. § 1501 (emphasis added).

Also, at issue is whether, once a violation of Section 1501 is properly found, the ALJ properly calculated penalties for such violations, consistent with Section 3301 of the Code, which provides for civil penalties, as follows:

(a) General rule.--If any public utility... subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited... such public utility... for such violation... shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000... .

(b) Continuing offenses.--Each and every day's continuance in the violation of any regulation or final direction, requirement, determination, or order of the commission... shall be a separate and distinct offense... .

66 Pa. C.S. § 3301.

When evaluating the imposition of a penalty under Section 3301, the Commission applies the ten factors and standards set forth in the Commission Policy Statement at 52 Pa. Code § 69.1201 and as discussed in *Rosi v. Bell Atl. Pa., Inc.*,

Docket No. C-00992409 (Order entered March 16, 2000), 2000 WL 1407936
(Pa. P.U.C.) (*Rosi, Rosi factors*).

Finally, the Code provides for a three-year statute of limitations on actions for violations under the Code, pursuant to Section 3314, which provides in pertinent part:

No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose.

66 Pa. C.S. § 3314.

B. The ALJ's Initial Decision

The ALJ reached twenty-five (25) Findings of Fact and drew thirteen (13) Conclusions of Law. I.D. at 6-9; 29-31. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ's Initial Decision found two PGW practices: (1) the bypass of a safety sensor and alarm at the Passyunk Plant; and (2) the inadequate repair and failure to replace a known faulty valve involving odorless gas, created unreasonably unsafe conditions in violation of Section 1501. The ALJ applied the *Rosi* factors in determining the appropriate penalty and awarded a civil penalty in the amount of \$11,000 for the violations found under Section 1501 of the Code.

The ALJ dismissed the remaining allegations of the Complaint, concluding that they were either not within the Commission's jurisdiction or there was insufficient

evidence presented to support a finding that other operations-related claims and certain personnel and hiring decisions rose to the level of violations of the Public Utility Code, Regulations or a Commission Order.³

C. Exceptions and Replies

On Exceptions, PGW disputes the ALJ's factual findings as to both PGW's bypass of safety features and the existence of a faulty valve. PGW asserts that the ALJ relied upon flawed factual premises which are not supported in the record to sustain the Complaint, thereby reaching the incorrect legal conclusions that PGW is engaged in unsafe practices, during the Liquefied Natural Gas (LNG) vaporization process and by continuing to use a PCV-1027 valve at the Plant, in violation of Section 1501 of the Code. Therefore, PGW asserts that the ALJ's Initial Decision must be rejected. Exc. at 3-19; Exc. Nos. 1 and 2.

Specifically, PGW avers, *inter alia*, that contrary to the ALJ's findings: (1) it has not been bypassing low temperature sensors during the vaporization process at the Plant for twenty (20) years; (2) the PCV-1027 valve at the Plant is not faulty; (3) it has not been faulty for 10 years; and (4) the valve did not malfunction on October 15, 2020. Further PGW alleges that the PCV-1027 valve had nothing to do with

³ Among the allegations dismissed by the ALJ for lack of evidence were manipulation of equipment temperature indicators, structural gas tank cracks that are not properly repaired, dangerously unmanned plant apparatus, employees handling equipment under the influence, abandonment of work areas, faulty override valves and uncontrolled, unsafe gas migration. The alleged racial discrimination in the operation of the plant was dismissed for lack of jurisdiction. Notably, the ALJ's *January 2020 Order* also dismissed the Complainants' allegations in: (1) Complaint Paragraph No. 14 - that in the summer of 2016, there was an auto accident at the Plant and actions to cover it up; and (2) Complaint Paragraph No. 16 - that on March 22, 2016, there was unsafe release of gas, where the ALJ found that these claims were not within the three-year statute of limitations set out in Section 3314(a) of the Code.

the emission of gas into the atmosphere, which was not unsafe, and which was caused by harmless human error. *Id.*

In addition, PGW avers that the ALJ erred in applying the legal standard for safety violations under Section 1501 of the Code. PGW avers that “the proper focus of an inquiry regarding the safety of a utility facility or service is whether the preponderance of the evidence demonstrates that a utility facility or service *caused or will cause harm to the public.*” PGW further avers that the Commission’s enforcement authority under Section 1501 includes prevention of harm. In exercising this prevention of harm enforcement authority, PGW argues the Commission is required to find “*proven exposure to harm*” as a basis for deeming a facility or service unsafe, which PGW avers the Commission cannot find in the given circumstances. Exc. at 4-7; Exc. Nos. 1 and 2.

Finally, in its Exception No. 3, PGW avers that it was error for the ALJ to calculate the penalties based upon a finding that violations extend beyond the three-year statute of limitations under Section 3314. PGW argues that:

As the Complaint in this proceeding was filed on October 19, 2019, Section 3314 divests the Commission of jurisdiction to address practices that occurred prior to October 19, 2016. **It logically follows that since the Commission does not have jurisdiction to hear claims that occurred prior to October 19, 2016, it likewise may not impose civil penalties on a public utility for practices that may have been in effect prior to that date. The ID errs in calculating these civil penalties based on periods that exceed the three-year statute of limitations in this case.**

Exc. at 23-24; Exc. No. 3 (emphasis added), citing, *Perry v. Public Power, LLC*, Docket No. C-2018-3003086 (Initial Decision served January 30, 2019 and Final Order entered March 29, 2019).

In the Replies, the Complainants assert that, to the extent PGW's Exception Nos. 1 and 2 pertain to the ALJ's weighing of the evidence and acceptance of the Complainants' witnesses' testimony, PGW's arguments constitute an attack upon the ALJ's credibility determinations, rather than an assertion of any factual or legal error. R. Exc. at 3-11 (Replying to Exc. Nos. 1 and 2).

The Complainants assert that the witness testimony is substantial, properly found to be credible, and is a matter within the ALJ's discretion. Specifically, regarding PGW's practice of temperature sensor bypass measures, the Complainants argue that the ALJ properly concluded that PGW's practice the "jerry rigging a steam lance" created an unreasonably unsafe condition:

thereby causing "the internal electrical element [to be] obstructed preventing accurate readings, warning/alarms and fail safe systems" which "ultimately sabotaging engineered and designed components of the Plant's vaporization system." Complainants further credibly testified this same process resulted in the 2000 explosion at the Passyunk Plant. PGW never argued in its main brief, reply brief or the herein Exceptions that the 2000 exposure did not occur. It coyly states "what may or may not have been happening in 2000. . ." Furthermore, Complainants also credibly testified regarding the flammable and dangerous nature of LNG, an odorless gas; their individual job duties as Senior Process Operators, Working Foreman and Operations Supervisor at PGW's Passyunk Plant; the "critical and extremely safety sensitive nature of Plant operations" requiring 24 hours, 7 days a week operations; and the Plant's close proximity to neighboring residential community, *inter alia*.

R. Exc. at 4-6, citing Complainants Reply Brief at 17; Complainants Main Brief at 16; PGW Main Brief at 18 (citing testimony of Brian McGuire).

Specifically, in the Replies to PGW's Exception No 2, the Complainants assert that the ALJ properly sustained averments related to the faulty PCV-1027 valve

based on substantial evidence. The Complainants assert that the extensive oral testimony of both Mr. Ackie and Mr. Chavarria, offered in support of the averments, was subject to cross examination and was credible evidence of the incident that occurred on October 15, 2020, involving the release of odorous LNG gas into the atmosphere due to a defective PCV-1027 valve, and in establishing it had been defective for years. The Complainants aver that the ALJ weighed the Complainants' testamentary evidence against that offered by PGW's lay witness Brian McGuire in rebuttal and concluded that the Complainants' evidence outweighed that offered by PGW. The Complainants aver that PGW's Exception No. 2, like Exception No. 1, is an attack on the weighing and credibility determination of the evidence of record, and not an attack on any violation of the Commission's legal standard under Section 1501. R. Exc. at 9-11.

The Complainants further assert that PGW's argument in Exception Nos. 1 and 2, that the ALJ improperly applied the Commission's legal standards in finding PGW's practice of employing temperature sensors bypass measures during its LNG Vaporization Process violates Section 1501, is without merit. The Complainants assert that the Commission should reject PGW's implicit assertion, that Section 3314 prevents: (a) the use of the 2000 explosion as a proven harm and/or proven exposure to harm; and (b) the consideration of PGW's *continued bypass practices* before October 19, 2016. The Complainants note that PGW does not challenge the credible testimony of the Complainants regarding their job titles and duties, the inherent nature of LNG odorless gas or the 24 hours, and the 7 days a week operation of the Passyunk Plant. The Complainants argue that the Commission should reject PGW's assertion that "a complainant would be able to prevail by presenting a preponderance of evidence that a hazard exists, without considering whether the utility has taken steps to reduce exposure to the hazard." R. Exc. at 5-6, citing, PGW Exceptions at 21-22 and PGW Main Brief at 11-12, 14.

In reply to PGW's Exception No. 3, challenging the calculation of penalties, the Complainants assert that under Section 3314 (b), the Commission is permitted to assess penalties on a cumulative basis, including calculating the penalties based upon the years during which the violations are found to have occurred, including years prior to the statute of limitations for filing a claim under Section 3301. The Complainants note that the limitations of actions under Section 3301 does not reference any limitation upon assessment of penalties. R. Exc. at 8-9.

The Complainants aver that, for the reasons set forth above, the Commission should deny PGW's Exceptions and impose the civil penalties based on PGW's violations of Section 1501 of the Code and the creation of unsafe facility/services at the Passyunk Plant.

D. Disposition

Upon consideration of the Exceptions and Replies thereto, and the record in this proceeding, we conclude that the ALJ properly applied the legal standard under Section 1501 of the Code and found that PGW had violated its duty to the public to provide reasonable and safe service at the Passyunk Plant regarding PGW's practice of temperature sensor bypass measures and faulty PCV-1027 valve. We further conclude that the ALJ's findings are based on substantial evidence of record and shall be adopted.

However, we agree with PGW that the ALJ's calculation of the appropriate penalty creates ambiguity as to whether the ALJ intended to assert jurisdiction predating the three-year statute of limitations and we, therefore, shall modify the ALJ's Initial Decision to clarify that the penalty imposed in the present case is for violations which occurred every day within the applicable period within the statute of limitations, which, however, was calculated based upon relevant factors, including the period of years in which the unsafe conditions were found to have occurred. We emphasize that nothing in

the ALJ's Initial Decision should be construed to conclude a finding of accountability for violations which occurred prior to the three-year statute of limitations. Therefore, we shall adopt the ALJ's Initial Decision, as modified and clarified by this Opinion and Order.

To the extent PGW's Exceptions challenge the ALJ's factual findings, we shall deny the Exceptions. We agree with the Complainants that PGW's challenge of the ALJ's findings and the sustaining of the averments as to PGW's failure to provide reasonable and safe facilities/service at the Passyunk Plant, regarding PGW's practice of temperature sensor bypass measures and faulty PCV-1027 valve, amount to challenges to the ALJ's credibility determination on the factual issues in dispute and weighing the evidence to be in favor of Complainants.

Further, we agree with the Complainants that the record evidence provides substantial credible evidence upon which the ALJ properly found PGW in violation under Section 1501 of the Code for PGW's failure to provide reasonable and safe facilities service at the Passyunk Plant regarding PGW's practice of temperature sensor bypass measures and faulty PCV-1027 valve. Despite PGW's assertions to the contrary, the evidence offered by the Complainants which was found to be credible, was substantial evidence upon which the ALJ could properly conclude outweighed the evidence offered by PGW.

For example, PGW argues that:

in accepting the Complainants' testimony, the ID capriciously disregards the extensive testimony of PGW on this issue – without any explanation. PGW witness Brian McGuire provided substantial evidence refuting the allegations of Mr. Ackie and Mr. Chavarria, which is supported by the lack

of evidence, to show that the valve has been malfunctioning for a significant period of time.

Exc. at 17. Here, the ALJ's findings regarding the valve were supported by the record and within the ALJ's discretion to weigh the credibility of the Complainants' testimony versus that of the witnesses for PGW.

To the extent PGW's Exceptions challenge the ALJ's application of the appropriate legal standard under Section 1501, we shall deny the Exceptions. The ALJ's conclusions of law included:

The Complainants prevail on an issue where a preponderance of the evidence demonstrates that a utility facility or service caused or will cause harm to the public. *Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Opinion and Order entered March 28, 2019) at 29, *rev'd in part on other grounds*, 241 A.3d (Pa. Cmwlth. 2020), *app. granted*, 619 MAL 2020 (Pa. May 12, 2021).

I.D. at 29; Conclusions of Law No. 4, citing *Povacz v. PECO*.

In analyzing whether the averments of the Complaint satisfied *Povacz v. PECO*, the ALJ stated regarding PGW's disrepair of a valve:

Plants involve moving parts operated by humans. They cannot and are not expected to operate perfectly all the time. However, there should be correction of known problems that may cause a dangerous situation. The continued disrepair of the valve led to and can lead to a dangerous situation and creates an unsafe condition in violation of Section 1501. The Complainants prevail on this claim.

I.D. at 25.

With respect to PGW's bypass of safety features, the ALJ stated:

As the Commission stated in *Povacz v. PECO Energy Company*, “[P]ublic utility operations are not, as a general matter, hazard-free. As part of ensuring the safe operation of facilities and the safe provision of service, public utilities are, on a near continual basis, tasked with properly identifying, handling and reducing physical and health hazards to avoid danger to its employees, its customers and the general public.” Here, the PGW Passyunk Plant bypass and disrepair of a valve have been found unsafe in violation of 66 Pa.C.S. § 1501. The bypass and the malfunctioning valve employed by PGW are contrary to the directive to *reduce* hazards or *avoid* dangers.

I.D. at 26 (citations omitted).

We agree with the ALJ's rationale for finding PGW in violation of its duty under Section 1501 in the circumstances and therefore, reject PGW's argument to the contrary.

Finally, with respect to the ALJ's assessment of penalties for the violations, we agree with PGW to the extent we conclude the ALJ's assessment of penalties may be mischaracterized as penalties assigned to years prior to the three-year statute of limitations under Section 3314.

In the present case, the ALJ was within her discretion to consider that the unsafe condition caused by the utility was established to have occurred for a period of twenty (20) years (regarding the bypass violations) and ten (10) years (regarding the valve violations). Specifically, after analyzing the bypass violations under the *Rosi* factors the ALJ concluded:

The bypass has been intentionally employed by PGW for many years. Considering the danger that bypassing a safety

sensor that provides an alarm to warn of a dangerous situation and that allows the continued use of malfunctioning equipment poses to nearby residents and the employees of the Plant, **a penalty of \$500 per year for each of the 20 years PGW violated Section 1501, for a total civil penalty of \$10,000, is appropriate.**

I.D. at 28. (emphasis added). After analyzing the valve violations under the *Rosi* factors the ALJ concluded:

A lower penalty is appropriate here, given efforts by PGW, although unsuccessful, to repair the valve. Therefore, **a penalty of \$100 per year for each of the 10 years that the malfunctioning valve was not effectively repaired or replaced, for a total of \$1000, will be imposed.**

I.D. at 29; (emphasis added).

In each instance of assessing penalties the ALJ's discussion appears to state that the penalties are based upon a finding of violations stemming backward twenty (20) and ten (10) years, respectively. In this regard, the ALJ's Initial Decision may be read to imply a finding of the violation beyond the three-year statute of limitations. PGW's Exception is based upon this ambiguity created in the ALJ's discussion of the calculation of the penalty. PGW asserts that the ALJ effectively makes a finding of violation and imposition of penalty beyond the statute of limitations. Exc. at 23-25. *See Shedlosky v. Pa. Elec. Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977) (The Commission must act within and cannot exceed its authority).

To the extent the ALJ's discussion of the calculation of penalties may be read to assert Commission jurisdiction for violations which occurred prior to the applicable three-year statute of limitations, we shall modify the ALJ's Opinion and Order to clarify that nothing in this Opinion and Order should be construed as asserting

Commission jurisdiction for violations beyond the three-year statute of limitations under Section 3314. Rather, the ALJ's analysis is to be read strictly as an application of the *Rosi* factors to determine a reasonable penalty given the serious nature of the violations, and period of time during which the unsafe conditions were found to be existent.

The ALJ was within her discretion in applying the *Rosi* factors to determine a reasonable penalty in these circumstances. The ALJ reasoned that since the unsafe conditions, which established the violations of PGW's duty under Section 1501, were found to have existed dating back twenty (20) and ten (10) years, respectively, the penalties may be assessed based upon a calculation using the period of years the unsafe conditions were found to have existed. In these circumstances, we find the ALJ's use of those period of years was reasonable for purposes of the calculation of the amount of the penalties.

We note that under Section 3301, the Commission retains broad discretion to assess penalties for unreasonable and unsafe conditions found to be in violation of Section 1501 of the Code. Section 3301 authorizes up to \$1,000 penalty for each day the violation is found to have occurred. Accordingly, so long as the penalty does not exceed \$1,000 per day during the period in which there is a continuing violation, the Commission is within its discretion to impose a reasonable penalty. *See* 66 Pa. C.S. § 3301, *e.g.*, *Newcomer Trucking Inc. v. Pa. PUC*, 531 A.2d 85 (1987) (Commission not required to assess penalties on a per day per violation basis but may assess penalties as reasonable in circumstances).

In calculating penalties, the factors for the ALJ to consider in imposing a reasonable penalty include the length of time during which the unsafe condition existed. The relative length of the period during which the unsafe condition is found to have existed, whether short or long, may weigh in the decision to increase or decrease a penalty for violation of Section 1501.

We agree with PGW, to the extent we conclude that the ALJ's Initial Decision created ambiguity regarding the calculation of and imposition of the penalty, whether the ALJ was asserting jurisdiction for violations beyond the three-year statute of limitations. However, it is evident, when read in totality, the ALJ was clear that the calculation of the penalty is a separate issue from the finding of the violation, which may only be imposed for the period covered by the three-year statute of limitations for the finding of such violations. In fact, in the present case, the ALJ specifically dismissed several claims which were raised based upon the finding that the claims were outside the three-year statute of limitations. *See, infra.*, at fn. 3. It is clear the ALJ was cognizant of the statute of limitations on claims. It is also clear the ALJ was using the period of years in which the unsafe condition existed as a metric to establish a reasonable violation based on \$100 and \$500 a year for a period of years, respectively.

We conclude the ALJ was within her discretion to impose a reasonable penalty and did so based upon an appropriate application of the *Rosi* factors. To the extent the ALJ's discussion appears to assert jurisdiction to find violations which predate the three-year statute of limitations we modify the Initial Decision to expressly note that the ALJ's discussion regarding penalties is strictly to establish a metric by which to assess penalties, and that the penalties assessed pertain only to the continuing violations found to have occurred within the applicable three-year statute of limitations under Section 3314 of the Code.

For example, when viewed in context of the three-year statute of limitations, it is evident the ALJ's assessment of penalties is within the Commission's discretion to assess penalties under Section 3301 of up to \$1,000 a day for each day's continuing violation. A penalty of \$11,000 for continuing violations over a period of three years amounts to a penalty of approximately \$10 a day for three years (*i.e.*, \$11,000 total penalty, divided by 1,095 days (3 years = 365 days x 3)). Clearly, a penalty of effectively \$10 per day is within the Commission's discretion under Section 3301.

Therefore, so long as the calculation achieves a penalty figure which does not exceed \$1,000 a day during the period in which violations fall within the statute of limitations, it is irrelevant whether the ALJ relied upon a period of 10 or 20 years for the penalty calculation (which includes years outside the statute of limitations). The ALJ's use of the twenty- (20) and ten- (10) year periods was clearly only intended as an aid for purposes of determining an appropriate penalty, and not impose penalty beyond the three-year statute of limitations.

We conclude that the ALJ's Opinion and Order's calculation of the penalties in the present case was reasonable and within the Commission's discretion established under Section 3301, as modified and clarified by the discussion in this Opinion and Order.

Conclusion

Upon review, we shall grant the Exceptions of PGW, in part, and adopt the ALJ's Initial Decision, as modified and clarified, consistent with this Opinion and Order;

THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by Philadelphia Gas Works on September 2, 2021, are granted, in part and denied, in part.

2. That the Initial Decision of Administrative Law Judge Darleen D. Heep, served on August 13, 2021, is adopted, as modified and clarified by this Opinion and Order.

3. That the Philadelphia Gas Works' Motion to Strike Portions of the Complainants' Reply Brief is denied.

4. That the Complaint filed by Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin, and Wayne Rauceo against Philadelphia Gas Works at C-2019-3013933 is granted, in part, and denied, in part.

5. That the claims that Philadelphia Gas Works violated 66 Pa. C.S. § 1501 by use of the bypass of a safety sensor and failure to repair a faulty valve are granted.

6. That Philadelphia Gas Works shall pay a total civil penalty of eleven-thousand dollars (\$11,000.00) as provided for in Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within twenty (20) days from entry of the Final Commission Order to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

7. That a copy of this Opinion and Order be forwarded to the Commission's Bureau of Investigation and Enforcement, Gas Safety Division to review

and to assist any inspection it may conduct to determine whether the bypass and valve issues have been addressed by Philadelphia Gas Works.

8. That the employment discrimination claims of Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin, and Wayne Rauceo are denied and dismissed for lack of jurisdiction.

9. That all other claims of Dwayne Ackie, Miguel J. Chavarria, Jr., Maurice A. Goodwin, and Wayne Rauceo at Docket at C-2019-3013933 are denied and dismissed.

10. That after Philadelphia Gas Works remits the payment required by Ordering Paragraph No. 6 above, the Secretary's Bureau shall mark this proceeding closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: September 15, 2022

ORDER ENTERED: September 15, 2022