

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 6, 2019

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), on behalf  
of KEVIN R. SHAFFER,  
Complainant

v.

THE MARION COUNTY COAL  
COMPANY,  
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEVA 2018-423-D  
MSHA Case No. MORG-CD-2018-01

Mine: Marion County Mine  
Mine I.D. 46-01433

**DECISION AND ORDER**

Appearances: Jennifer Bluer, Esq., U.S. Department of Labor, Philadelphia,  
Pennsylvania for Complainant

Jennifer Betts, Esq., & Corey Ridenour, Esq., Ogletree, Deakins, Nash,  
Smoak & Stewart, P.C., Pittsburgh, Pennsylvania for Respondent

Before: Judge Bulluck

This case is before me upon a Discrimination Complaint brought by the Secretary of Labor (“Secretary”) on behalf of Kevin Shaffer (“Shaffer”) against the Marion County Coal Company (“Marion County”) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c). The Secretary alleges that Marion County unlawfully discharged Shaffer on or about October 23, 2017 after Shaffer engaged in protected activity under the Act. Marion County denies that it discriminated against Shaffer, and contends that he was discharged for threatening his supervisor.

Shaffer filed a 105(c)(2) complaint with MSHA on November 1, 2017. MSHA Special Investigator Clarence W. Moore conducted an investigation, and determined that there was “reasonable cause to believe” that Marion County unlawfully discharged Shaffer in violation of section 105(c). On December 4, 2017, the Secretary filed an Application for Temporary Reinstatement of behalf of Shaffer (WEVA 2018-117-D) alleging that Shaffer was terminated because he had made safety complaints to management about mobile equipment that he had been operating, and requested alternative work due to its unsafe condition. Marion County elected to waive its right to a hearing, and briefs were filed on January 9, 2018. The Secretary’s

Application was granted on January 16, 2018, temporarily reinstating Shaffer to duty, effective December 31, 2017. *Secretary of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 238 (Jan. 2018) (ALJ). Marion County appealed the Order Granting Temporary Reinstatement on January 22, 2018, and on February 8, 2018, the Commission affirmed the Order. *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39 (Feb. 2018).

The Secretary filed a Complaint of Discrimination on behalf of Shaffer on April 20, 2018. A hearing was held in Morgantown, West Virginia, and the parties filed Post-hearing Briefs. For the reasons set forth below, I conclude that the Secretary has established a *prima facie* case of discrimination, that Marion County has successfully rebutted the Secretary's *prima facie* case and that, ultimately, the Secretary has failed to prove that Shaffer was terminated, in any part, because of his protected activity.

### **I. Stipulations**

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this case under section 105(c) of the Mine Act.
2. For the purposes of this case, Marion County is an operator as defined in the Federal Mine Safety and Health Act, 30 U.S.C. § 802(d).
3. For the purposes of this case, Marion County Mine is a coal or other mine as defined by the Federal Mine Safety and Health Act, 30 U.S.C. § 802(h).
4. Marion County is a Delaware corporation with a principal place of business located in St. Clairsville, Ohio.
5. Marion County operates the Marion County Mine, an underground coal mine located in Marion County, West Virginia, and Monongalia County, West Virginia.
6. Marion County has products that enter commerce and its operations affect commerce.
7. Non-supervisory employees at Marion County Mine are represented by the United Mine Workers of America.
8. For the purposes of this case, Complainant, Kevin Shaffer, is a miner as defined by the Federal Mine Safety and Health Act, 30 U.S.C. § 802(g).
9. Complainant was employed from June 2010 to December 2013, at what is now known as Marion County Mine by CONSOL Energy, Inc., at what was then known as the Loveridge Mine.
10. Complainant Kevin Shaffer began working at what is known now as the Marion County Mine as a mobile equipment operator on June 21, 2010.

11. Marion County employs Complainant as a mobile equipment operator, and did so at all times relevant to the Complaint at issue in this matter.
12. On October 18, 2017, Foreman Bond and Complainant had a conversation about whether Complainant had driven his truck downhill without his headlights on.
13. On October 19, 2017, Foreman Bond emailed Marion County's human resources department concerning Complainant's conduct on October 18, 2017.
14. On October 23, 2017, Marion County suspended Complainant with intent to discharge him.
15. Complainant filed a Discrimination Complaint with the Mine Safety and Health Administration on November 1, 2017.
16. Complainant filed an Application for Temporary Reinstatement on December 4, 2017.
17. On January 16, 2018, Complainant's Application for Temporary Reinstatement was granted, effective December 31, 2017, and Complainant returned to work pending final adjudication of his Complaint.
18. Respondent produced 46,004,683 tons of coal in 2016, including 4,341,072 tons at the Marion County Mine.
19. During litigation regarding the merits of Kevin Shaffer's 105(c) Complaint, the parties have filed some pleadings and exchanged some written discovery using the docket number from the Temporary Reinstatement proceeding, WEVA 2018-117-D. The parties stipulate that all pleadings filed and documents exchanged by the parties during the litigation of the Shaffer 105(c) merits case are part of Docket No. WEVA 2018-423-D.
20. Neither Kevin Shaffer nor the UMWA received [documentation of] a verbal warning regarding the August 14, 2017 incident.
21. If called, C.W. Moore, MSHA special investigator, would testify that the data listed on the Exhibit B to the Amended Complaint, regarding Respondent's history of violations and history of 105(c) violations, is an accurate reflection of the information stored in the mine data retrieval system and MSHA's records.

Ex. J-1; see also Tr. 345-46.

## **II. Factual Background**

The Marion County Coal Company operates the Marion County Mine ("mine"), an underground bituminous coal mine in Marion and Monongalia Counties, West Virginia.<sup>1</sup> The mine runs three shifts, six days a week: a day shift from 8:00 a.m. to 4:00 p.m.; an afternoon shift

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<sup>1</sup> Prior to December 2013, Marion County Mine was known as Loveridge Mine, and was owned and operated by CONSOL Energy, Incorporated. Stip. 9.

from 4:00 p.m. to 12:00 a.m.; and a night shift from 12:00 a.m. to 8:00 a.m. Tr. 37-38. Marion County has four haulage trucks in its fleet, each with an approximate 40-ton capacity, and one 30-ton capacity rented from Forquer for additional support. Tr. 34, 46, 92, 502, 514; Ex. C-9 at 5. Maintenance of the haulage trucks is contracted out to Wheeling Diesel and, given the constant wear and tear on the equipment, mechanics are regularly on-site making repairs. Tr. 38-42, 222, 298, 502, 515. During each shift, the mine generally operates two trucks, hauling refuse slate from the processing plant up a quarter-mile road to the Harvey Run Impoundment (“impoundment”). Tr. 34, 512. Because the road is too narrow and steep for haulage trucks to easily pass each other, after mobile equipment operators (“MEO”) dump refuse at the impoundment, they wait at the top of the hill to exchange places, and it is customary for waiting MEOs to turn off their headlights so as not to blind their partners. Tr. 35-37, 60-63, 267.

Kevin Shaffer, also known at the mine as “Cowboy,” began employment as an MEO at the mine in June 2010, and has held that position at all times relevant to this proceeding. Stips. 10, 11; Tr. 141. On October 18, 2017, Shaffer was assigned to haul refuse slate during the afternoon shift. Tr. 38-40. Shaffer operated the No. 4 truck and Geoff Phillips, his partner during that shift, operated the No. 1 truck. Tr. 513.

During Shaffer’s pre-operation examination of the No. 4 truck, he noted several issues, including non-functional interior lights and oil leaks. Ex. C-4. While operating the truck, when Shaffer set the parking brake, the transmission would intermittently jump out of neutral into reverse. Ex. C-4; Tr. 49. Shaffer reported the transmission problem to plant foreman Adam Bond over the plant-wide CB radio system. Tr. 52, 365, 514; Ex. C-9 at 5. After hearing Shaffer’s complaints, Bond went to the mine office and talked to plant maintenance foreman Doug Sanders about the maintenance issues and availability of other trucks. Tr. 365-73, 514-15. Sanders, who, among others, had heard Shaffer’s complaints over the radio, called Wheeling Diesel mechanic Paul Dixon to come to the mine that evening to service the No. 4 truck. Tr. 298-300, 514-15, 520; Ex. C-9 at 5. While it is uncertain what exactly Shaffer and Bond said to each other over the radio or how much was actually heard, it is undisputed that during the next hour or so, Shaffer made numerous vulgarity-laced complaints about his truck, as well as lack of air conditioning and a non-functioning radio in Phillips’ truck. Tr. 52-53, 374, 514. Shortly thereafter, Bond went up to the impoundment in his pick-up truck to deliver a replacement radio to Phillips, and to talk to Shaffer about the maintenance issues with his truck. Tr. 374-77.

An animated conversation ensued between Bond and Shaffer in which Shaffer aggressively repeated his complaints regarding the equipment and management’s failure to timely address safety issues. Tr. 55-56, 384-88, 391. There is disagreement as to whether Bond had told Shaffer to park the No. 4 truck and drive Forquer’s truck during the earlier radio communications; Shaffer denies having heard this. Tr. 55-56, 171, 365-73. In any case, the face-to-face exchange was emotionally charged, and involved posturing and profanity. Tr. 178-80, 385-87, 391, 396-99. Bond repeatedly directed Shaffer to park the No. 4 truck and, throughout the verbal confrontation, Shaffer “invoked . . . [his] safety rights,” and threatened to call in the “Feds . . . to shut every piece of equipment down on this job.” Tr. 180, 387-88, 390, 392. To defuse the situation, Bond suggested that he drive Shaffer down to the plant for his meal break and, en route, the two had routine conversation and an uneventful ride. Tr. 56, 183, 390, 396-99.

After his meal break, Shaffer switched to Forquer's truck, and returned to his hauling duties. Tr. 59-60. Between 8:00 and 8:30 p.m., mechanic Paul Dixon arrived at the mine to repair the No. 4 truck. Tr. 302-03. Shortly before 9:45 p.m., Bond made a second trip up to the impoundment to check on Dixon's progress with the repairs. Tr. 403-04. Upon Bond's arrival, Dixon reported to him that Shaffer had been driving down from the impoundment without his headlights on and had almost run the mechanics' truck off the road, and asked Bond to "make sure [that Shaffer] has his lights on." Tr. 303, 406.

Bond tried to contact Shaffer twice on the CB radio to ask him to turn on his lights, but received no response. Tr. 409-11. Bond then observed Shaffer, driving Forquer's truck, pull off to the side of the road at the top of the hill to wait for Phillips' truck to pass; Bond claims that Shaffer did not have his headlights on as he was pulling off-road. Tr. 185, 410-11, 414-15. Bond hollered up to Shaffer in his truck about driving without his headlights and Dixon's allegation. Tr. 60-63. Shaffer stepped down from the cab, fervently denying driving without his headlights, and advanced toward Bond at ground level. Tr. 64-66, 189-90, 191-95, 419-23; Ex. C-9 at 8. By both accounts, the ensuing conversation was extremely volatile. Tr. 191-95, 420-24. Throughout the exchange, Bond repeatedly instructed Shaffer to turn on his headlights and resume work. Tr. 420, 422, 423. Shaffer continued aggressive denial of driving without his headlights, and made multiple threats to report Bond to human resources and call in the "Feds." Tr. 64-66, 422-23. Shaffer alleges that Bond became angry and put his finger in Shaffer's face, shouting, "I'm tired of this fucking shit on this fucking equipment." Tr. 64-65. Bond denies making that statement, and contends that Shaffer got in his face and threatened to "take [him] to the gate and whip [his] ass." Tr. 422-23, 426-28; Ex. C-9 at 8.

Around 11:30 or 11:45 p.m., Dixon radioed Shaffer to test drive the No. 4 truck. Tr. 67, 313. As he was getting into the cab, Shaffer asked Dixon why he had reported him to Bond for driving without his headlights, and Dixon replied that Shaffer had almost run his truck off the road when he was driving up the hill. Tr. 67, 313-14; C-9 at 6. The exchange grew heated, and Dixon told Shaffer that if he came closer, he would "bust [Shaffer] in [his] fucking mouth." Tr. 67-69, 199-200, 313-15; Ex. C-9 at 6. At this point, the hostility deescalated, and they proceeded to discuss the repairs on the No. 4 truck, after which Shaffer test drove the truck and found it to be operating properly. Tr. 67-69, 199-200, 314-15. Thereafter, Shaffer finished his shift running the No. 4 truck. Tr. 68-69.

On October 19, Bond sent an email to human resources manager Pam Layton and plant manager Rocky Cianfrocca recounting the previous night's events. Tr. 431; Ex. C-9 at 7. Thereafter, without further explanation, Layton advised Shaffer not to report to work because management was investigating an incident that had occurred on October 18. Tr. 71-72. The next day, on October 20, general manager Scott Neitzelt held a meeting with Cianfrocca, Layton, and human resources representative Dave Wilkinson to discuss the incident and review Shaffer's disciplinary record. Tr. 473-74, 488. Neitzelt also launched an internal investigation, which included statements from Doug Sanders, Paul Dixon and hourly employee Marty Miller. Tr. 475-76; see generally Ex. C-9. In accordance with company policy, Shaffer was not interviewed. Tr. 78-79, 286, 495-96, 556.

Shaffer was called in to the Mine on October 23 for a meeting with Neitzelt, Layton, Wilkinson, and local union president Jason Todd. Tr. 72. During the meeting, Shaffer was informed that he was being suspended with intent to discharge because he had violated Marion County's employee conduct rules when he threatened Bond. Tr. 75-76. Todd requested additional details about the investigation, which management declined, and a grievance meeting ("24/48 meeting") on Shaffer's behalf. Tr. 262.

By agreement, Shaffer's 24/48 meeting took place on October 27, with Shaffer, Neitzelt, Layton, human resources representatives Wilkinson and Tim Baum, Todd, and several other union representatives. Tr. 80, 264, 270. Two prior incidents, in which Shaffer was formally disciplined, were discussed. The first incident had occurred in 2011, when Shaffer was suspended for six days for sleeping on the job. Tr. 282; Ex. R-32. The other had occurred in 2014, when Shaffer was suspended-without-pay and removed from the Mine Rescue Team for vandalizing a hotel room and verbally assaulting the hotel manager with hostile language laced with racial slurs. Tr. 197, 282, 544; Ex. R-34. A third incident, occurring in August 2017, was also discussed, where Shaffer threatened to lay down on the job in response to Bond assigning him to work mandatory overtime, resulting in a verbal warning from Bond, but no formal discipline. Tr. 268, 353-56; Ex. C-9 at 9-10; see Stip. 20. The union argued that mitigating factors should be considered, including Shaffer's long-term employment with the company and his lack of issues with foremen other than Bond. Tr. 283. At the conclusion of the meeting, Neitzelt reiterated his decision to terminate Shaffer. Tr. 550. Consequently, the union elected to take the matter to arbitration. Tr. 271.

The arbitration hearing was held on November 17, 2017, and the Arbitration Report was issued on December 11, 2017, finding that Marion County had just cause to terminate Shaffer because he had threatened Bond.<sup>2</sup> Marion County Coal Co. and UMWA, Dist. 31, Local Union 9909, Arb. No. 16-31-17-037, at 18-19 (2017) (Colflesh, Arb.). Thereafter, Shaffer filed his Discrimination Complaint with MSHA.

### III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complainant must prove by a preponderance of the evidence "(1) that he engaged in a protected activity, and (2) that the adverse action [complained of] was motivated in any part by the protected activity."<sup>3</sup> *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC

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<sup>2</sup> Administrative notice is taken of the Arbitration Transcript ("Arb. Tr."), filed in support of the Secretary's Application for Temporary Reinstatement, in conjunction with the hearing record, for the purpose of establishing facts and assessing witness credibility.

<sup>3</sup> 30 U.S.C. § 815(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate . . . against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or

2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2510.

Once the complainant has established a *prima facie* case, "[t]he operator may attempt to rebut [the] *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend its actions by proving, by a preponderance of the evidence, that it was motivated by both the miner's protected and unprotected activities, and would have taken the adverse action for the unprotected activity alone. *Id.* at 818. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). Indicia of legitimate non-discriminatory reasons for an employer's adverse action include evidence of the miner's unsatisfactory work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Id.*

At this stage, the complainant has the opportunity to demonstrate that the operator's non-discriminatory reason for its actions is a mere pretext for discrimination. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Id.* However, the Commission has also stated that "[its] judges should not substitute for the operator's business judgement [their] views on 'good' business practice." *Chacon*, 3 FMSHRC at 2516. Finally, the Commission has noted that the ultimate burden of proving discrimination always remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

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because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

## **A. Summary of Testimony**

### **1. Kevin Shaffer**

Mobile equipment operator Shaffer testified extensively about the sequence of events on October 18, 2017. He believed that Bond had trouble hearing his safety complaints over the radio, and he did not remember Bond telling him to drive Forquer's truck, but thought that Bond might have mentioned that he needed to check with Sanders about truck availability. Tr. 51-52, 170-72. Shaffer stated that Sanders was the first manager to respond to his safety complaints by broadcasting to the mine that mechanics had been called in. Tr. 54-55. According to Shaffer, he continued operating the No. 4 truck until Bond arrived at the impoundment and asked him why he was still running it, where upon Shaffer "invoked . . . [his] safety rights," and detailed his concerns about the condition of the equipment and management's failure to timely address safety issues. Tr. 55-58, 136. Shaffer stated that Bond did not respond to his complaints, but offered to drive him "off the hill" for his lunch. Tr. 56. He also stated that in the past management had gotten upset with him for downing a vehicle without approval, but that he had not been formally disciplined for doing so, and he noted that management would often respond to complaints with, "Walmart is hiring." Tr. 55, 106, 137-38, 160-61.

By Shaffer's account, he drove Forquer's truck after his lunch break, and Phillips went back to driving the No. 1 Truck, which had cooled off sufficiently. Tr. 59-60. While he was waiting at the top of the impoundment for Phillips to pass, without his lights, Bond approached by foot, and accused him of nearly hitting Dixon while he was driving without his lights. Tr. 60, 63-64. Shaffer alleged that Bond became angry, put his finger in Shaffer's face, and told him, "I'm tired of this fucking shit on this fucking equipment." Tr. 64-66. Shaffer stated that he told Bond that he could not talk to him in that manner on mine property and that he could report it to management or human resources, and that Bond walked away without responding. Tr. 65-66. Shaffer contended that both were upset during this exchange, and he admitted that he was "talking heatedly," but denied losing his temper. Tr. 103, 195. He also denied pointing at the gate or threatening to fight Bond, and stated that he has never threatened Bond or anyone else while at work. Tr. 70, 196-98. Shaffer also testified that later, Dixon radioed him to test drive the No. 4 truck and, as he was climbing into the truck, he and Dixon discussed Shaffer's headlights, things became heated, and Dixon threatened to "fucking bust [Shaffer]." Tr. 67-69. According to Shaffer, he perceived this comment as a threat, and he thought that he could defuse the tension by laughing at Dixon; ultimately, he did not report the incident. Tr. 68, 200-01.

### **2. Adam Bond**

While the finer details vary substantially, plant foreman Bond's testimony largely confirms Shaffer's account of events. After hearing Shaffer's complaints over the radio, Bond contended, he went to the mine office immediately and discussed maintenance issues and availability of trucks with Sanders, then radioed Shaffer to park the No. 4 truck and drive Forquer's truck, explaining to him that the brakes were working on Forquer's truck. Tr. 365-73. Bond stated that later in the shift, he drove up to the impoundment and spoke to Shaffer about his truck. Tr. 374-75. According to Bond, he told Shaffer to park the No. 4 truck again, and Shaffer became angry, "invok[ing] his safety rights," and threatening to call the "Feds." Tr. 385-88, 390, 392. Bond testified that he believed that the situation was getting out of control and, in an effort

to cool it down, suggested that he drive Shaffer down to the plant for his meal break, during which time Shaffer calmed down. Tr. 390, 396-99.

By Bond's account, shortly after hearing from Dixon about Shaffer driving without his headlights, he observed Shaffer, in Forquer's truck, pull off to the side of the road at the top of the hill with his headlights off. Tr. 410-11, 414-15. Bond testified that when he approached the truck and asked Shaffer about his headlights, Shaffer stepped down from the cab and denied the allegation, before advancing toward him. Tr. 417-19. Bond contended that he instructed Shaffer to turn on his headlights and resume work, and that Shaffer continued to deny driving without his headlights and threatened to report Bond to human resources and the "Feds." Tr. 420, 422-23. As the exchange escalated, Shaffer became hostile and approached within a foot of Bond shouting, "Fuck this shit. I put up with this shit every fucking day." Tr. 420-23. Bond testified that at this point, he thought that Shaffer was going to strike him, so he put his finger in Shaffer's face to create some space between them. Tr. 421, 425-26. According to Bond, Shaffer then got in his face and threatened to "take [him] to the gate and whip [his] ass," all the while pointing toward the mine gate. Tr. 422-23, 426.

Bond also testified about an incident with Shaffer in August 2017. Tr. 353-56. According to Bond, after he had assigned mandatory overtime work to Shaffer and Moran, Shaffer began shouting "fuck you," and stated that he would "fuck [Bond's] eyeballs out." Tr. 353-56. Bond stated that he understood Shaffer's outburst to be a work refusal rather than a threat of physical harm, and that he took Shaffer to Rocky Cianfrocca's office in order to issue a written warning. Tr. 356, 436.<sup>4</sup> Bond recounted that upon reaching Cianfrocca's office and finding him occupied, he reconsidered his options and decided that he would only give Shaffer a verbal warning. Tr. 355-56. He testified that Shaffer then asked, "[w]hy don't you just fire me," to which Bond responded, "I don't want to do that . . . I want to start from square one." Tr. 355-56.

### **3. Paul Dixon**

Wheeling Diesel mechanic Dixon testified that when Sanders called him about coming in to repair the No. 4 truck, between 6:30 and 7:00 p.m., he was in a hospital emergency room receiving medication for an illness that he did not disclose. Tr. 301-03. He stated that on his way up to the impoundment, Shaffer, coming down the road without his headlights on, nearly ran the mechanic's truck off the road, and that he asked Bond to "make sure [Shaffer] has his lights on." Tr. 303-04, 331-32. He testified that later that evening, situated 20 to 30 feet from Shaffer and Bond, he heard Shaffer shout repeatedly, "I had my fucking lights on," and "no one puts a fucking finger in my face;" he also heard Shaffer say the word "gate," while pointing in the direction of the mine gate. Tr. 305-7, 309, 312. Dixon noted that Shaffer was louder than Bond throughout the confrontation. Tr. 307, 333. He also testified that as Shaffer was climbing into the No. 4 truck, he paused, turned, and said to him, "[Bond] said you said I didn't have my lights on," and that he told Shaffer that he had made the statement. Tr. 314. Dixon contended that Shaffer came closer to him and aggressively told him, "I had my fucking lights on," to which, in

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<sup>4</sup> See Ex. C-9 at 10 (Marty Miller's account of the lunchroom incident, including hearing Shaffer shouting "fuck you," and "I'm going to fuck your eyeballs out" at Bond).

an effort to meet Shaffer at his level, Dixon responded, “back off, or I’m gonna bust you in the mouth - - your fucking mouth.” Tr. 314-15. Dixon also testified that he had received a verbal warning, but was not suspended, for threatening to hit Shaffer. Tr. 328-29.

#### **4. Doug Sanders**

Plant maintenance foreman Sanders testified that employees are required to make pre-operation reports before running any equipment, that items are prioritized for repair based on the severity of issues identified, and that when issues are nonessential, equipment may be kept in service until it can be addressed. Tr. 504-06. He testified that mine management would never force an employee to continue operating unsafe equipment because “no one [at the mine] would accept the liability,” and he added that operating unsafe equipment is a violation of Marion County’s employee conduct rules. Tr. 506. He stated that after he had heard Shaffer’s complaints about the No. 4 truck over the radio, he immediately called Dixon to come in, then broadcast over the radio that mechanics were coming in to work on the trucks, and spoke to Bond about the brakes and availability of Forquer’s truck. Tr. 514-17. In Sanders’ opinion, Shaffer had “lost his temper” and was “worked up;” he was “screaming, [and] cussing” over the radio at Bond and any other member of mine management who could hear him all evening, and he viewed Shaffer’s behavior as upsetting and unprofessional. Tr. 522-25. Sanders testified that he was impressed by Bond’s composure in dealing with Shaffer, noting that he had never seen Bond swear at any employee. Tr. 521-22, 525.

#### **5. Rocky Cianfrocca**

Plant manager Cianfrocca testified that he only became aware of Shaffer allegedly threatening Bond after he had received an email from Bond about the previous night’s events. Tr. 471-72. Additionally, he testified that when employees find maintenance issues during pre-operation examinations, there is no discipline for reporting them and downing equipment. Tr. 459. He noted that there had been no complaints about Bond cursing at employees, that employees liked working on Bond’s shift, and that Bond is “pretty quiet,” easy to get along with, and well-liked. Tr. 493-94.

#### **6. Jonathan Moran**

Mobile equipment operator Moran testified that he heard Shaffer’s initial safety complaints and Sanders’ response over the radio, but that he did not hear Bond’s response to Shaffer. Tr. 229-31, 241. He also testified that vehicles are downed if issues are identified during pre-operation examinations, and that there is no discipline for reporting issues. Tr. 235, 240. Finally, Moran said that he had heard management comment that “Walmart is hiring” and, although he could not recall a specific instance when that had been said to him, he characterized the statement as a general response to complaints at the mine. Tr. 245. He also noted that he had a good relationship with Bond, and that Bond had never threatened him. Tr. 248.

## **7. Scott Neitzelt**

General manager Neitzelt explained how the mine's disciplinary process works, and stated that while the mine usually employs progressive discipline, severe conduct can result in immediate termination. Tr. 537, 545-51, 561-63. He testified that his decision to discharge Shaffer was based on the October threat and in no part Shaffer's safety complaints, and that he would have discharged any employee who had threatened another employee, irrespective of whether the employees involved were hourly or management. Tr. 552, 558. He also testified that Shaffer's prior disciplinary infractions "showed somewhat of a pattern," establishing Shaffer as "a hothead," and contributed to his decision to terminate Shaffer. Tr. 543-44, 552-54. Neitzelt explained that he elected to notify Dixon's supervisor that he had threatened Shaffer, rather than ban him from the mine, because Dixon worked for a contractor. Tr. 540-41, 565. Finally, Neitzelt noted that Bond had told him that since the incident, he has been afraid of Shaffer. Tr. 554.

## **8. Jason Todd**

Todd, prep plant electrician and president of the local UMWA chapter, accompanied Shaffer to the disciplinary proceedings associated with Shaffer allegedly threatening Bond. Tr. 256, 260. He identified Adam Fry as Shaffer's union representative at the 24/48 meeting. Tr. 263. Todd testified that Shaffer admitted to him that Bond had responded to his initial safety complaints by instructing him to drive a different truck. Tr. 290-91. In response to a question about whether Bond had ever been confrontational with him, he recounted an incident where he was speaking with union miners in the lunchroom and Bond approached him, commenting on Todd's work schedule and union activities. According to Todd, both of them became angry, and there were a "few back and forth words" before Bond left the lunchroom. Tr. 274-77.

### **B. Shaffer's *Prima Facie* Case**

It is undisputed that Shaffer's complaints regarding the No. 4 and No. 1 trucks on October 18, 2017, constitute protected activity under the Act, and it is clear that Shaffer's termination is an adverse action. Sec'y Br. at 17-19. As is often the case, the circumstantial evidence involved in Shaffer's discharge must be examined in order to determine whether Marion County was motivated, in any part, by Shaffer's protected activity.

The Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). In this case, the temporal nexus is even stronger, since Marion County initiated Shaffer's discharge approximately five days after Shaffer's safety complaints.

Marion County management had knowledge of Shaffer's protected activity. Clearly, Bond and Sanders had heard the complaints about the trucks over the plant-wide radio. Sec'y Br. at 19; Tr. 173, 365-73, 514-17. Layton and Cianfrocca were made aware of Shaffer's safety complaints the next day by Bond's email describing the prior evening's kerfuffle and, if not sooner, Neitzelt was put on notice of Shaffer's safety complaints by the information gleaned

from the ensuing internal investigation. Accordingly, I find that the Secretary has established a *prima facie* case of discrimination based on the temporal nexus between Shaffer's safety complaints and termination, in conjunction with management's knowledge of Shaffer's protected activity.

### C. Marion County's Rebuttal

Marion County contends that it terminated Shaffer because he threatened his supervisor, Bond, in violation of its employee conduct rules, and in no part because of his protected activity. Resp't Br. at 17-24. In relevant part, Marion County's employee conduct rules state as follows:

In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including . . .

4. Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or *threatening language or conduct toward subordinates, fellow employees, or officials of the company.*

Ex. C-8 (emphasis added). Marion County alleges that Shaffer threatened to "take [Bond] to the gate and whip [his] ass." Resp't Br. at 11. Marion County asserts that it does not tolerate threats, and that Shaffer's unprotected conduct was its sole motivation for his termination. Resp't Br. at 17, 24; Tr. 552-53.

The alleged threat occurred during Bond's second trip up to the impoundment. It is clear from the record that Shaffer's agitation had escalated as the shift progressed, and Dixon's accusation about his headlights took Shaffer's disgruntlement up a notch when Bond approached him about the matter. By both accounts, their exchange quickly became confrontational. Shaffer got in Bond's personal space, Bond pointed his finger at Shaffer, and it is at this point that Bond alleges that Shaffer threatened to fight him at the gate. Bond's rendition is largely corroborated by Dixon, who, standing 30 feet away at most, observed Shaffer pointing in the direction of the gate as he was referencing it verbally.

The next day, based on Bond's email to Layton and Cianfrocca, management began an internal investigation, and Shaffer was advised not to report to work. As a part of the investigation, Neitzelt reviewed employee statements and Shaffer's personnel file, and found Shaffer's behavior toward Bond in August 2017 and the incident at the hotel in 2014 particularly troubling. Shaffer was called to the mine on October 23 for a meeting, and was informed that he was being suspended with intent to discharge because of threatening Bond.

Shaffer's 24/48 meeting was held on October 27, and the union's arguments, that Shaffer was a long-term employee of the company and had no issues with foremen other than Bond, did not persuade Neitzelt to reverse his decision to terminate Shaffer. Tr. 549-52. In fact, Neitzelt testified credibly that even with a clean disciplinary record, he would have discharged any employee, hourly or management, for threatening another employee. Tr. 558, 563. I find that Neitzelt offered credible testimony, that his account of his motives was supported by the record

and, therefore, that Marion County has established that Shaffer was discharged for legitimate, non-discriminatory reasons, entirely unrelated to his safety complaints.

#### **D. Pretext**

The Secretary argues that Marion County's articulated justification for terminating Shaffer is merely a pretext for unlawful discrimination. In support of this argument, the Secretary maintains that Shaffer never threatened Bond, that management displayed animus toward Shaffer's protected activity, and that Shaffer was disparately treated with respect to discipline. Sec'y Br. at 10-11, 20-25. For the following reasons, I conclude that the Secretary's arguments are not supported by the record.

##### **1. The Threat**

The Secretary contends that it was Bond who became agitated that evening, that he put his finger in Shaffer's face and said that he was tired of this "fucking shit" on the "fucking equipment," and that Bond fabricated the threat by Shaffer in order to insulate himself from being held accountable for his hostility toward Shaffer. Sec'y Br. at 10-11, 21. Additionally, the Secretary maintains that Dixon's testimony lacks credibility. Sec'y Br. at 10-11, 28 n.9.

According to the Secretary, Bond's failures to call the police, report the incident to human resources immediately, and send Shaffer home lend credence to his contention that Bond fabricated the threat. Sec'y Br. at 11, 21. I find this reasoning unpersuasive. Primarily, the record establishes Bond as someone who believes that actions have consequences, and gives careful consideration to exercises of his supervisory authority. See e.g., Tr. 355-56, 365, 430-33, 453-54.<sup>5</sup> Additionally, Bond is well-liked by the employees under his supervision, including Shaffer.<sup>6</sup> See, e.g., Tr. 248, 493-94, 525. Consequently, I find the Secretary's claim to be inconsistent with Bond's character and reputation, as borne out by the record.

The Secretary's assertion that Dixon was an unreliable witness, insofar as his testimony corroborates Bond's account of events, is based on his contention that Dixon had reason to be "annoyed" with Shaffer due to the inconvenience of being called in from the emergency room, and possibly because Dixon took the complaints about the equipment personally. Sec'y Br. at 28 n.9. The Secretary presented no evidence to support this contention. Furthermore, Dixon's assertion that he was working within earshot of Bond's and Shaffer's confrontation was not

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<sup>5</sup> While the Secretary points to the lunchroom incident between Bond and Todd as evidence of Bond's antagonistic temperament, I do not find this argument availing for two reasons. See Sec'y Br. at 21. First, Todd's recounting of the incident does not provide enough context to evaluate the reasonableness of Bond's alleged actions. Second, if I were to take Todd's testimony at face value, I do not believe that an isolated display of anger outweighs what the record clearly establishes - - that Bond enjoys a good relationship with his subordinates, and is respected as a manager.

<sup>6</sup> In the arbitration hearing, Shaffer testified that he had never had a problem with Bond, and went so far as to say, "I've had two good bosses in my life, and [Bond's] the second best and the first was my dad." Arb. Tr. 262.

refuted. According to Dixon, he could not hear Bond well during the conversation, but he could hear Shaffer yelling at Bond. Dixon recounted Shaffer repeatedly shouting in Bond's face that he had his "fucking lights on," and "fuck you," and that he heard Shaffer tell Bond that nobody puts his "fucking finger" in his face, and say "gate," while pointing toward the mine gate. Ex. C-9 at 6; Tr. 305, 307-09, 312.

While it is uncontroverted that Dixon came to the mine from the emergency room to service the No. 4 truck, there is no evidence that this generated hostility on his part. In fact, Dixon and Shaffer never had any issues before the incident in question, and Dixon specifically testified that he was not bothered by having to go to the mine that evening. Tr. 301-02, 313, 320-21; Ex. C-9 at 2. Moreover, if Dixon had harbored any hostility toward Shaffer, he most likely would have misrepresented what he had heard that evening to construct a more damaging story. As it stands, one would have to consider why he merely stated that he heard Shaffer say "gate," when he could have testified that he heard Shaffer make the entire alleged threat. Additionally, Dixon provided balanced testimony that could be construed against Bond, i.e., Shaffer telling Bond that nobody puts their "fucking finger" in his face, which does not serve the retaliatory motive that the Secretary attempts to construct. Therefore, based on the record, and after observing him testify, I find Dixon wholly credible, and conclude that he harbored no animosity toward Shaffer.

Shaffer's abusive and disrespectful conduct toward Bond was wholly inappropriate, and Bond, although obviously frustrated, was more patient with him than could reasonably be expected under the circumstances. Moreover, I find that Shaffer's overall testimony was extremely self-serving. While he admitted that his conversations with Bond and Dixon were heated, he left out negative information corroborated by multiple witnesses, he denied past inappropriate behavior that had been observed by others, he could not recall many events that were readily established by other witnesses, and his testimony was riddled with inconsistencies. See, e.g., Tr. 90-91, 170-71, 194-97, 203, 290-91. Shaffer painted himself as an easy-going, cooperative employee, but his demeanor was unconvincing, and the record tells a much different story. In fact, the record is replete with examples of Shaffer's hostile and disruptive attitude. See, e.g., Tr. 282, 353-54, 461, 544; Ex. R-34; Ex. C-9 at 5-6, 10.

While I find that Bond also became agitated during the verbal confrontations with Shaffer, given the circumstances, I do not find Bond's conduct antithetical to his reputation as a fair, even-tempered supervisor. Indeed, patience is not without limits. Moreover, I find that Bond's frustration was reasonable, when viewed in reaction to Shaffer's aggressive display of anger. To characterize Bond as intimidating and hostile, as the Secretary urges, ignores Bond's need, as Shaffer's supervisor, to maintain control and respect. Therefore, based on my credibility determinations and the evidence in its entirety, I find that Shaffer did, in fact, threaten Bond.

## **2. Marion County's Animus**

The Secretary contends that both Bond and Sanders displayed animus toward Shaffer's protected activity, and that their conduct was consistent with management's pattern of hostility toward safety complaints. Sec'y Br. at 20-21.

The Secretary argues that Bond displayed hostility toward Shaffer's protected activity when he confronted Shaffer about his headlights. Sec'y Br. at 20. After making the accusation, Shaffer alleges that Bond became angry, put his finger in his face, and told him that he was sick of the "fucking shit" on the equipment. Shaffer interpreted this comment to be in reference to the safety complaints about his truck that he had made earlier that day. Tr. 101-102. While I have found that Shaffer's testimony, as a whole, casts a deep shadow upon his credibility, I find it plausible that Bond said something of this nature to Shaffer during their argument. However, as has been briefly touched upon earlier, it is critical to evaluate any such statement in the context of the events that precipitated it. Bond's alleged comment was made in the midst of an animated exchange in which Bond was taking Shaffer to task for engaging in extremely hazardous conduct. As a reminder, leading up to this confrontation, Bond had actually observed Shaffer park the truck without using headlights. Additionally, I note that this was the second instance of Shaffer engaging in unsafe conduct that shift. On his first trip up to the impoundment, Bond discovered that Shaffer had been driving the No. 4 truck for over two hours, despite having been instructed by Bond to drive Forquer's truck instead. Given Bond's legitimate concerns about Shaffer's attitude and conduct in the mine that evening, and putting Bond's comment in the context of the accusation that actually sparked the confrontation, I conclude that Bond's alleged comment would have been in reference to Shaffer's repeated safety infraction, i.e., not using his headlights, rather than his safety complaints.

Moreover, the alleged comment must be viewed in light of Bond's reaction to Shaffer's safety complaints throughout the evening. By the time that the alleged statement was made by Bond, Shaffer's complaints were already being addressed. Shaffer was driving Forquer's truck and Dixon was repairing the No. 4 truck; Phillips had been given a replacement radio and the No. 1 truck had cooled down sufficiently. It is clear that Bond took immediate action to address the safety issues that Shaffer had brought to his attention. Importantly, Bond did not raise any objections to Shaffer's safety complaints the first time they spoke, but instead questioned why Shaffer was still driving the malfunctioning truck. This immediate response to Shaffer's safety complaints supports the conclusion that Bond's statement was, in fact, about the headlights issue. Therefore, I find that the record does not support the Secretary's claim that Bond displayed any animus toward Shaffer's protected activity.

The Secretary also identifies statements made by Sanders during the internal investigation as evidence of Sanders' animus toward Shaffer's protected activity. Sec'y Br. at 20; Ex. C-9 at 5. Sanders stated that he was "afraid [Shaffer] would have both trucks down by the end of the shift," which "would only leave [the mine] with a rented 30-ton truck to haul refuse." Ex. C-9 at 5. Sanders also testified that production would be affected if either of the 40-ton refuse trucks were not running. Tr. 530. The Secretary contends that Sanders' statements suggest that management was concerned about production at the expense of safety. Sec'y Br. at 20.

To fully understand Sanders' comments, they must be viewed in light of Sanders' response to Shaffer's complaints about the No. 4 truck. Sanders took immediate action once he was made aware of Shaffer's complaints: he spoke to Bond about the safety issues and availability of trucks, called in the Wheeling Diesel mechanics, and contacted Forquer to work out the issue with the parking brake on the rented truck. Although Sanders stated that he was

worried about Shaffer downing trucks, he also testified credibly that mine management would never encourage an employee to continue operating an unsafe piece of equipment. Tr. 506; Ex. C-9 at 5. While not discounting that Sanders had a concern about production, the record does not show that he prioritized it over safety. It does show him to be disdainful of Shaffer's hostility toward Bond throughout the evening. Sanders regarded Shaffer's language and behavior as highly objectionable and disrespectful, and he was impressed that Bond was able to maintain his composure. I fully credit Sanders' testimony about the evening, as consistent with Shaffer's history of uncooperative conduct throughout his tenure at Marion County. The record illuminates Shaffer's disruptive behavior, his negative attitude toward work, and his refusal to follow instructions despite the latitude and assistance afforded him by Bond and Sanders. See, e.g., Tr. 282, 353-54, 461, 544; Ex. R-32; Ex. R-34; Ex. C-9 at 5, 6, 10. Consideration of Shaffer's pattern of bad behavior provides support for Sanders' negative view of him, and any hostility on Sanders' part is reasonably attributable to Shaffer's non-protected conduct. This highlights an important distinction. While the Act protects miners who have legitimately engaged in protected activity, that protection is not without parameters. Therefore, I find that any animus expressed by Sanders was directed toward Shaffer's prolonged demonstration of hostility throughout the evening - - behavior that is wholly unprotected.

Finally, the Secretary notes a few instances in which management, including Bond, responded to safety complaints by telling employees that "Walmart is hiring," and asserts that this created a general hostility toward protected activity at the mine. Sec'y Br. at 20-21. This contention also lacks support in the record. Shaffer claimed that he was told "Walmart is hiring" after he had made a safety complaint regarding parts on a truck, and also during the August 2017 incident. Tr. 55, 106, 138. Jonathon Moran characterized "Walmart is hiring" as a general response to complaints at the mine. While I credit that this retort has been made by management and, specifically, by Bond, it does not follow, without more, that the statement rises to the level of animus. Shaffer's allegation is self-serving and uncorroborated; the other instances identified by the Secretary are not tied to any specific safety complaints. I note that the Secretary has offered no evidence of management forcing miners who have raised legitimate safety complaints to continue operating unsafe equipment. See Tr. 235, 238-40, 396, 459, 506. Moreover, it is important to consider that heavy mobile equipment is running 24 hours, six days a week at this mine, and that equipment breaks down often and needs maintenance regularly. Complaints and concerns about equipment are raised multiple times on a daily basis, and the record is devoid of evidence that management does not adequately address safety issues.

Therefore, the Secretary has failed to establish any animus on the part of management toward the safety complaints Shaffer made on October 18.

### **3. Disparate Treatment**

Finally, the Secretary asserts that Shaffer was subject to disparate treatment respecting his termination. Sec'y Br. at 22-24. After threatening Bond, Shaffer was told not to report to work and stay off mine property. Five days later, he was suspended with intent to discharge. The Secretary points out that Dixon engaged in similar threatening conduct during the same shift, but was neither banned from mine property nor suspended from work. Sec'y Br. at 23.

Dixon readily admitted that he threatened to punch Shaffer in the face. However, Dixon contended that, having just observed Shaffer screaming in Bond's face, his own conduct was in response to Shaffer's temper and aggressiveness, in an effort to back Shaffer down. While Dixon's statement could be viewed as defensive, Marion County viewed it as a threat, and I find likewise. Dixon is not a valid comparison employee as the Secretary asserts, however, because Dixon and Shaffer are not similarly situated. Shaffer is an employee of Marion County, and Dixon works at the mine as a contractor employed by Wheeling Diesel. As such, the conditions of Dixon's employment are not under the dominion of Marion County. Neitzelt did not take any disciplinary action against Dixon, but reported his conduct to his supervisor at Wheeling Diesel, which lends credence to Marion County's stated zero-tolerance policy regarding threats. Consequently, I find that the Secretary has failed to establish that any similarly situated employee has been treated more favorably than Shaffer, under similar circumstances.

Having reviewed the evidence in its entirety, including the demeanor and credibility of the witnesses, the record shows that Shaffer threatened Bond, that management displayed no animus toward Shaffer's protected activity, and that Shaffer was not subject to disparate treatment. Therefore, I conclude that the Secretary has failed to show, by a preponderance of the evidence, that Marion County's stated justification for Shaffer's termination was a pretext for unlawful discrimination, or that Marion County's termination of Shaffer was, in any way, motivated by his protected activity.

#### IV. ORDER

**ACCORDINGLY**, it is **ORDERED** that the Complaint of Discrimination filed by the Secretary of Labor on behalf of Kevin Shaffer is, hereby, **DISMISSED**; and the Order Granting Temporary Reinstatement is, hereby, **DISSOLVED**, effective November 6, 2019.

  
Jacqueline R. Bulluck  
Administrative Law Judge

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