

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 17, 2018

SECRETARY OF LABOR, MSHA on
behalf of LOUIS SILVA JR.,
Complainant

v.

AGGREGATE INDUSTRIES WRC, INC.,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2017-0482-DM
RM-MD-17-05

Morrison Plant
Mine ID: 05-00864

DECISION

Appearances: Karen W. Bobela, Esq., Office of the Solicitor, U.S. Department of Labor,
Denver, CO for Complainant;
Matthew M. Linton, Esq., Ogletree, Deakins, Nash, Smoak & Stewart,
Denver, Colorado for Respondent.

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Louis Silva Jr. under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the “Mine Act”) and on a complaint seeking the assessment of a civil penalty filed by the Secretary against Aggregate Industries WRC, Inc. (“Aggregate”) pursuant to sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. A hearing in the case was held in Denver, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.¹

I. STATEMENT OF THE CASE

On February 6, 2017, Silva filed a complaint of discrimination under section 105(c) of the Mine Act. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) conducted an investigation and, following that investigation, the Secretary filed a complaint before the Commission on Silva’s behalf. This case was assigned to me on July 7, 2017, after Aggregate filed an answer to the complaint.

On February 28, 2017 the Secretary filed an application for temporary reinstatement on Silva’s behalf pursuant to section 105(c)(2) of the Mine Act. On March 20, 2017, I granted the parties’ joint motion to approve the settlement in that case and ordered Aggregate to provide temporary economic reinstatement in Docket No. WEST 2017-265-DM. As of this date, my order of temporary reinstatement is still in effect.

¹ Citations to “CX” indicate exhibits introduced by Complainant, while citations to “RX” indicate citations introduced by Respondent.

Silva alleges that Aggregate discriminated against him on January 19, 2017 when he was terminated from his employment at the Morrison Plant “for exercising his statutory rights under the Act.” Complaint of Discrimination at 1. While the complaint is short on specifics, Silva essentially argues that he was retaliated against for making safety complaints regarding traffic at the mine and ultimately for reporting an injury stemming from a collision between the pickup truck he was driving and a front-end loader. Aggregate asserts that the termination was “made for legitimate, nondiscriminatory reasons, and not because of any alleged protected activity.” Answer to Complaint of Discrimination at 2. Moreover, it denies that Silva engaged in protected activity and asserts that, even if he did, there is no causal nexus between that activity and his termination. *Id.* For the reasons below, I find that Aggregate did not discriminate against Silva when it terminated his employment. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of Facts

Aggregate operates the Morrison Plant (the “mine”), a surface crushed and broken granite mine in Jefferson County, Colorado. Loaders, haul trucks, other mine equipment, as well as customer trucks, travel throughout the mine. Tr. 35. In recent years the mine has significantly increased production, which in turn has resulted in an increase in traffic. Tr. 35, 202, 332.

Aggregate’s “Vehicle and Traffic Safety Standards” state that the mine’s traffic rules shall be documented in a traffic control plan. Tr. 226; CX-5. While the mine does not have a specific traffic control plan, it does have a traffic control book that inventories the size of the equipment on site, the traffic patterns, and whether traffic controls are in place. Tr. 226. In addition, the mine maintains a site specific map that provides, among other things, the direction of travel.² Tr. 226; CX-22.

According to Al Quist,³ the mine’s safety coordinator, the map, along with the training the operator provides, complies with Aggregate’s internal Vehicle and Traffic Safety Standards. Tr. 228-229. In addition, the mine also requires that light-duty vehicles, such as pickup trucks, yield the right of way to, and maintain a minimum distance from, all heavy equipment, including loaders.⁴ Tr. 33-34, 124, 328-329, 333, 338-339, 444. If a miner needs to encroach upon that

² The subject area of the mine is accessed via the pond road, which is a one-way road that loops around the area outside the stockpiles. Tr. 87, 254-255; CX-2

³ Quist has been in the mining industry for close to 48 years and been the safety coordinator at Aggregate since 1982. Tr. 222, 511. He is responsible for coordinating safety at three different Aggregate operations, including the Morrison Plant. Tr. 222, 511-512. He does not oversee the Quality Control employees, which is John Cheever’s duty, as discussed below. Tr. 222.

⁴ While Silva testified that he thought the minimum distance required to be maintained from heavy equipment was either 50 or 75 feet, all other testimony indicates that the minimum distance was 75 feet/25 yards. Tr. 33-34, 43, 333.

minimum distance, they must make positive contact with the equipment operator and get acknowledgement from that operator that they can then encroach within the minimum distance. Tr. 124, 328-329, 334-335, 337-339, 520-521.

The mine produces eight different rock products, all of which must be sampled and tested daily by a Quality Control Technician (“QC Tech”) to ensure that product specifications are met. Tr. 27-29. If oversize material is found, adjustments are made in order to get the material “back in spec.” Tr. 28-29. John Cheever,⁵ Aggregate’s quality control manager, supervised all of Aggregate’s QC Techs. Tr. 35, 298, 472. Louis Silva was the Morrison Plant’s sole QC Tech at the time in question and had been an employee of Aggregate since 2000.⁶ Tr. 26, 224, 299.

Silva explained that the normal sampling process required him to use his radio to call a loader operator, who would then respond and drive the loader to the stockpile from which the sample was needed, retrieve a bucket of material, set the material on the ground, and backdrag the material to create a pad. Tr. 29, 33, 62, 153-154. The QC Tech would observe the pad being made in order to ensure that the loader did not dig into the dirt and contaminate the sample while grabbing its bucket of material. Tr. 29-30. Once the pad was built, the QC Tech would drive his pickup closer to the pad and get a sample using a shovel and buckets. Tr. 29. After retrieving the sample, the QC Tech would take the material to the lab for testing. Tr. 30. Silva testified, and other witnesses confirmed, that at the time in question there were no formal traffic rules or procedures that specifically controlled the sampling process.⁷ Tr. 31-32, 301, 333.

Silva testified that on Friday, January 13, 2017, after being instructed to get a sample from the “3/4 washed rock” stockpile,⁸ he contacted Talmadge Milan,⁹ a loader operator, over

⁵ Cheever has overseen quality control at the Morrison Plant for over 20 years and had supervised Silva for approximately seven years prior to Silva’s termination. Tr. 299, 472.

⁶ Since his hiring, Silva routinely received high performance reviews, as well as performance based raises. Tr. 36-37. Silva testified that he got along well with John Cheever, his supervisor. Tr. 123. During his employment with Aggregate he has been disciplined twice. While the first incident is not relevant to this matter, the second involved Silva’s failure to wear a seatbelt while operating his pickup truck in December 2016, approximately one month before the accident at issue. Tr. 37-38, 123-124, 473-473. Although Silva was issued a warning, Cheever later told Silva he was going to tear up the paperwork because Silva was improving and he wanted to help him out. Tr. 38, 123, 473-474

⁷ Following the subject incident Cheever prepared a written safe operating procedure. Tr. 301-302; CX-13. He agreed that under the old procedure in place at the time of the accident it was part of the QC Tech’s job to watch while the pad was built. The new procedure did not allow the QC Tech to enter the area until the pad was built and the loader had left the area. Tr. 304-307.

⁸ Silva testified that, generally, when he took samples from the “3/4 washed rock” stockpile, after he made his initial call to the loader operator, he would head south along the pond road towards the stockpile so that he could see the face of the pile as he approached in order to ensure there

the radio and asked for a pad to be built. Tr. 66-67, 208. This was the last radio contact made between Silva and Milan. Tr. 455. Silva then drove his pickup truck south down the pond road toward the face of the stockpile to see if there was oversized rock. Tr. 66-65. Milan followed behind Silva in the loader. Tr. 66-67, 210, 449. After checking for oversize rock Silva turned off to the right and gradually back to the north at which point, according to him, he made eye contact with Milan while they were roughly parallel to each other, then turned to the east and went behind the loader and drove back toward the south where he was roughly parallel to the loader on its left side.¹⁰ Tr. 66-68, 150-151.

Milan testified that the last time he saw Silva before he started making the pad was when Silva went off to the right, which he believes is where Silva should have stayed while Milan was building the pad. Tr. 210-212, 214, 450, 452. Milan was not sure if Silva looked him in the eyes at that point. Tr. 206, 210-211. After dumping his bucket and backdragging the pad a first time,

was no oversize material. Tr. 62-63. Once he checked the face of the stockpile for oversize material, Silva testified he would turn off to the right (i.e., west) and circle back around to the north, then east before eventually turning south again at which point he would park his pickup truck next to the pond road so that that he was not in the way of equipment traveling the road. Tr. 63-65; CX-2. He would, in other words, drive from the right side of the loader to its left side by driving behind the loader.

While Silva initially stated that he normally “parked” the vehicle, he later indicated that he didn’t “really park[.]” and instead would just wait for the loader to get out of the way after building the pad. Tr. 64, 84. Usually the loader would follow behind Silva as he approached the stockpile in his pickup and the loader would continue into the pile to grab his bucket before building the pad. Tr. 64. Silva testified that, given the configuration of the plant, it was impossible for him not to breach the 75 foot minimum distance from the loader while observing the pad being built. Tr. 33-34. As a result, he stated that he has to “just pick the safest distance[.]” which was usually near the road because he believed the loader should not back up into the road where there will be traffic. Tr. 34. Once the pad was built Silva could then back his truck up to it and take his samples. Tr. 64. According to Silva the stockpile size fluctuated and he may not have parked his truck in the exact same spot each time. Tr. 34-35, 64, 153-154.

⁹ Milan has worked for Aggregate as a loader operator for approximately two and a half years, and has been in the mining industry since 1995. Tr. 191-192, 434-435. Milan agreed that, as a loader operator, he builds pads for the quality control department to collect material samples from. Tr. 192. Milan had worked with Silva multiple times in the past to pull samples. Tr. 196-197, 339-340. Milan testified that he has in the past corrected others, including customers and QC Techs, who have driven behind him. Tr. 204, 444. While operating the loader he is constantly trying to make eye contact with persons in vehicles around him in order to let them know that they need to pay attention to him. Tr. 443

¹⁰ Silva marked an “X” on CX-2 where he claims he made eye contact with Milan. Tr. 68. The exhibit, a photograph, shows Silva’s route of travel in yellow highlighter.

Milan noticed that the pad was too tall and went in to backdrag it a second time to make it easier for Silva to take his sample. Tr. 206, 450.

While Silva looped back around to the south in his truck by driving behind the loader, Milan articulated the loader toward the pond road and, according to Silva, backed up at a high rate of speed toward the east and away from the pad, at which point the loader struck the front of Silva's pickup. Tr. 70, 76-77, 82. Milan agreed that he articulated his loader toward the left and backed up until he saw Silva as the vehicles collided, at which point he stopped. Tr. 207, 451. Silva acknowledged at hearing that his truck was not stationary at the time of the collision and that he did not have time to react when the loader backed up because it happened in such a short period of time. Tr. 83, 171. Milan, at hearing, explained that the reason he backed out to the left was because when he went into the pile to grab a bucket there was no one to the left and he had seen Silva go off to the right. Tr. 454-455. Milan testified that after the accident he saw Silva standing outside of his truck, which was minimally damaged, and Silva did not appear to be injured. Tr. 459-460.

When Todd Prather,¹¹ the quarry supervisor at the time, learned of the accident he contacted Quist, who was offsite. Tr. 230, 331, 465, 512. Prather, who was charged with leading the investigation before Quist arrived, traveled to the accident scene and took photos so that the scene could be restaged later. Tr. 340, 465. He testified that when he arrived at the scene Silva was frustrated, but did not appear to be hurt or injured, denied being injured when asked, and showed no signs of any issues with balance or speech. Tr. 467. At some point following the accident Silva drove his pickup truck from the accident site to the mine office. Prather testified that nothing about the truck or Silva concerned him at the time and that Silva raised no issues about driving the truck. Tr. 467-468.

At the mine office Silva gave a statement to Cheever regarding the incident in which he said he did not know if he was stopped at the time of the collision, but that he could have been stopped for "a second, a minute." Tr. 96-97. Cheever testified that, based on that statement he thought that Silva and Milan had made positive contact like they were supposed to and Silva had been properly stopped and was waiting for Milan to complete the pad at the time of the collision. Tr. 475.

When Quist arrived he met Silva, Cheever and Prather at the mine office and took over control of the investigation. Tr. 229, 513, 515-516. While at the office Silva described the accident, drew a diagram of the accident on a whiteboard, and told Quist that he was okay.¹² Tr. 97, 231, 260, 513. Quist testified that at that point he had not made up his mind about anything

¹¹ Prather supervised the equipment operators including Milan. Tr. 94, 331, 466.

¹² Quist at some point drew a rendition of Silva's whiteboard drawing, CX-6, in which he depicted a puddle where Milan told Quist he believed Silva stopped after turning off to the right. Tr. 231-233. Quist could not recall whether Silva had told him he stopped at the puddle. Tr. 234.

with regard to the accident. Tr. 515-516, 279. The four of them then traveled back to the scene of the accident. Tr. 514-515, 234.

Quist had a discussion with Silva about what happened, during which he noted that nothing about Silva's appearance or behavior seemed to be abnormal. Tr. 260, 516. As a result, while Quist testified that he did look Silva over, no formal medical or physical examination was conducted at that time. Tr. 260-262.

The group then reconstructed the accident by staging a different truck and loader where Silva's truck and Milan's loader had been at the time of the accident. Tr. 97, 516-517. Quist, after getting in the cab of the loader and examining the visibility that Milan would have had, determined that, as staged, the loader operator could definitely see where the truck was stopped. Tr. 235-236, 516-517. The reconstruction revealed that, at the time of the collision Silva was approximately 40 feet from the pad that Milan had built.¹³ Tr. 313, 243; CX-7 Bates 145.

While Quist took photographs and collected interview statements of witnesses, he withheld judgement as to fault because he didn't know if Silva's truck was stationary at the time and wanted to review the Dashcam video. Tr. 236-237, 517-518. Silva returned to work after assisting with the reconstruction. Tr. 94, 98.

Silva testified that there was nothing different about how he performed his work at the stockpile that day, but that Milan, who normally goes "back and out to the west[,]'" had instead articulated the loader and backed out to the east toward the road. Tr. 67, 78. According to Silva loader operators never pull out on to the road. Tr. 79. Silva later testified that that when Milan finished building the pad in this instance he anticipated that Milan would back straight up to the north and go out toward the haul road, which was to the east. Tr. 81-82. He further testified that the location of his truck at the time of impact was the only place where he could have parked and observed the pad being built to ensure that the loader did not dig too deep. Tr. 77, 79. However, Milan contradicted Silva and said it was not uncommon for him to back out toward and onto the road and, had Silva not been there that day, he probably would have kept going out onto the road. Tr. 456. He explained that it is situational as to which direction he will back out and there is no standard pattern he follows. Tr. 463. While Milan acknowledged that he had a responsibility to not run over Silva, he opined that Silva should not have encroached upon the loader's working space. Tr. 457-458.

On cross-examination Silva agreed that he had been trained to keep a safe distance from working loaders, to make positive eye contact with the loader operator before approaching the loader, and that he had attended multiple traffic safety trainings provided by the mine. Tr. 124-135.

¹³ Cheever testified that, while he agreed that there are places in the mine where it is not possible to maintain the 75 foot distance, here Silva should have been parked further away or been stationary and not within 40 feet of the pad that was being built by the loader. Tr. 309-313.

Silva testified that at some point later in the day he experienced dizziness and vomited while working in the lab. Tr. 95, 98. He agreed that he had been trained to report all incidents and notify Aggregate, via its health service, as soon as he suffered an injury. Tr. 136-137. Silva acknowledged that he never told management that he was injured or had vomited that day, nor did he ask for medical attention. Tr. 90, 95, 143-144. However, he testified that while in the lab he told Cheever that he wasn't feeling well and his neck and back hurt.¹⁴ Tr. 90, 139-140, 143. Cheever, at hearing, expressed skepticism as to whether Silva vomited since Cheever was also in the lab and smelled nothing and denied that Silva told him that he had vomited. Tr. 323-324. While in the lab, Cheever told Silva that Milan was likely more at fault and Silva would only get a small part of the fault because he did not have a high visibility flag on his vehicle. Tr. 98-99, 308-309. Silva then asked Cheever if he could go home because he wasn't feeling well. Tr. 99. Cheever said Silva could leave as soon as he took a drug test, which he did before leaving for the day. Tr. 99-100.¹⁵ Cheever testified that Silva did not complain of any injuries the day of the accident, nor did he display unusual behavior or speech. Tr. 480-481

Silva went to the mine the morning of Saturday, January 14 to run a test on some material. Tr. 100-101, 179. Silva testified that he felt "terrible." Tr. 101. After attempting, but failing, to get in contact with multiple members of management, Silva contacted Cheever to say he was not feeling well and was going to go home, which he did. Tr. 101-102, 144-145.

Cheever came into possession of the "Dashcam" video (the "video") later that Saturday.¹⁶ Tr. 477. Cheever testified that, after reviewing the video, in which Silva's truck was clearly in

¹⁴ Silva claims that he did not ask for medical attention due to fear of losing his job. Tr. 90. 143. He testified that when he worked at a different Aggregate facility earlier in his career a miner was fired after he was injured. Tr. 91-92. I afford very little weight to Silva's testimony on this issue for a number of reasons. First, the alleged retaliation occurred at a different facility. Second, it's unclear when this occurred and what management personnel may have been involved. Third, very little context was provided and Silva's reasoning for why that miner may have been terminated was pure speculation. Fourth, no evidence which could possibly corroborate Silva's account was introduced. Finally, Silva testified that he told Cheever his symptoms. If Silva truly intended to conceal an injury due to fear of retaliation, I find it unlikely he would have discussed his symptoms with Cheever.

¹⁵ Silva's wife Veronica testified that when Silva picked her up from work the night of the accident she noticed that the truck was damaged, her husband appeared to be confused, and he told her that he had been vomiting. Tr. 174-177. According to her, he complained of a headache that evening and said he did not want to seek medical care. Tr. 178. Veronica, after failing to convince Silva to see a doctor, enlisted the help of their daughter, Valerie, who ultimately was able to convince her father to see a physician, as discussed below. Tr. 179-180, 185. Valerie testified that when she went to see her father the following Tuesday he was sitting in a dark room and seemed dazed. Tr. 185. According to her, he was resisting medical treatment because he said Aggregate would fire him since he was old and had a preexisting liver condition. Tr. 186.

¹⁶ At hearing both parties relied heavily on the "Dashcam" video. RX-49. The video, a split screen, shows two different views from inside Silva's pickup truck. The left side of the screen

motion at the time of collision, he began to change his mind with regard to fault. Tr. 476-477. According to Cheever, miners are trained to be nowhere near the loader when it is in operation. Tr. 477. He was surprised that Silva was not stationary so as to give the loader operator a fixed position to know where the truck was. Tr. 478. At some point after viewing the video Cheever called Silva and told him to come in on Monday to review the video. Tr. 102, 479-480. According to Silva, Cheever said there was nothing to worry about. Tr. 102. Cheever also called Quist and relayed his impressions of the video and told Quist that Silva was moving in the video. Tr. 479. According to Cheever, Silva made no mention of any injuries on Saturday, January 14. Tr. 480

Silva testified that on Sunday, January 15 he spent most of the day sleeping and that his headache, neck and back pain, as well as his balance were worse. Tr. 103.

On Monday, January 16, Silva went into Cheever's office and reviewed the video. Tr. 103, 180, 316, 481. Silva testified that he said to Cheever that he thought he had a concussion, to which Cheever responded that he could not have a concussion since the video showed that Silva did not hit his head. Tr. 103. Cheever, on the other hand, testified that they discussed the possibility of getting a concussion without hitting one's head, but stated that Silva said he did not have a concussion when Cheever asked him if he did. Tr. 483. Following their review of the video the two of them took Silva's damaged truck to a body shop and then came back to the mine where Cheever gave Silva a different truck to drive. Tr. 103, 316, 481-482. The mine was not running that day due to weather and Cheever told Silva he would contact him and let Silva know where to go on Tuesday. Tr. 104, 316. Cheever noticed nothing unusual about Silva's behavior that day besides Silva generally being shaken up as a result of the accident. Tr. 483-484. Had Cheever noticed signs of a concussion like confusion, dizziness or anything out of the ordinary he would not have let Silva drive a vehicle. Tr. 327, 484. Cheever testified that, following his meeting with Silva, mine management made the decision to form a Safety Recognition, Reward and Consequences Policy ("SRRCP") Committee for the incident.¹⁷ Tr. 317.

shows a rear facing view of the inside of the cab with Silva seated in the driver's seat, while the right side shows a forward facing view out the truck's windshield. Tr. 72. The video camera system is activated by impact, hard braking or turning, fast acceleration, and even bumps. Tr. 281-282. Once the system is triggered it saves the eight seconds recorded just prior to the triggering, as well the four seconds immediately afterwards. Tr. 281-282. In the video, which is quite clear and self-evident, Silva can be seen driving his vehicle at 5 mph on a road while turning to the right and decelerating before colliding with the loader. Tr. 282-283. The video also shows the front end of Milan's loader leaving the frame traveling in reverse with its bucket down, before the back end of the loader comes back into the frame as Silva turns his truck to the right and collides with the rear of the loader. During the collision Silva's hardhat can be seen falling off of his head.

¹⁷ SRRCP Committees are formed to, among other things, determine appropriate consequences following violations of the SRRCP. Tr. 503. The Committee generally consists of both corporate members and members from the local operation where the violation occurred. Tr. 503.

Quist testified that he first viewed the Dashcam video the morning of Monday, January 16. Tr. 278, 518. While he had started to form an opinion as to fault after talking to Cheever on Saturday, it was not until Quist actually saw the video on January 16 that he determined Silva was 100% at fault since he pulled within 75 feet of a working loader and was actually turning toward the loader without having any idea what direction the loader was going to turn. Tr. 279-283, 518.

On Tuesday, January 17, the SRRCP Committee (the "Committee") met to determine whether Silva should be disciplined as a result of the accident. Tr. 267- 268. Quist, as lead investigator, was a member of the committee, along with Cheever, David Patrick Lane,¹⁸ the mine's HR manager, and one other corporate Committee member. Tr. 267, 277. The Committee met, via teleconference, for approximately one hour between noon and 1:00 PM. Tr. 267-268, 276-277, 286, 351, 490.¹⁹ Based on their discussion during the call, the entire Committee decided to terminate Silva after it determined that Silva was entirely at fault and had been grossly negligent by not paying attention and failing to make radio or eye contact with Milan before driving his truck within 75 feet of the operating loader, which could have resulted in a fatality.²⁰ Tr. 269, 309, 317, 352, 356, 365-366, 376, 485. Cheever opined that although the Committee discussed that Silva had been with Aggregate for a long time, there was no way to get around the fact that he had been involved in a potentially fatal accident. Tr. 485-486. Two members of the Committee were unable to view the Dashcam video at the time of the call and asked to see the video before they gave their final confirmation. Tr. 320, 352, 357. Lane testified that he eventually reviewed the video and then called the local HR person that evening or the next morning to confirm the decision. Tr. 356-358.

Quist and Cheever testified that at the time of the meeting they were unaware that Silva had been injured. Tr. 272-273, 327, 486, 526.²¹ Quist testified that he only became aware of the

¹⁸ Lane is the Human Resources Director for LaFarge Holcim's aggregates division, which includes Aggregate and the Morrison Plant. Tr. 348-350. He is one of the corporate members of the SRRCP Committee. Tr. 351. He was first contacted about the incident on the day it occurred so as to put him on notice that it would fall under the SRRCP. Tr. 350-351. Lane testified regarding other Committee decisions involving mobile equipment accidents in which miners were terminated. Tr. 503-504. In his experience, miners who are terminated for mobile equipment violations have previous offenses, but not always.

¹⁹ Although the Committee discussed that Silva's truck was not equipped with a required high visibility flag at the time of the collision, that omission did not form a basis for the termination. Tr. 269, 351-352, 365.

²⁰ Quist agreed that Silva's actions qualified as a Category 1 offense under the mine's SRRCP because driving towards the loader was a grossly negligent, willful action. Tr. 272; CX-10 Bates 82. Lane explained that the reckless operation of mobile equipment, while listed under Category 2, can become a Category 1 offense depending on the circumstances. Tr. 366-367.

²¹ The Secretary questioned Quist, Cheever, and Lane about a possible second SRRCP meeting on January 18. Tr. 276, 320, 352. However, each of those witnesses denied that a second

injury later that day after the meeting. Tr. 276, 286, 526. Lane testified that he could not recall whether it had been communicated during the meeting whether Silva had sought medical treatment. Tr. 365. However, he stated that had he known about any injury it may have impacted the timing of the termination, but it would not have affected the decision to terminate. Tr. 509

Cheever agreed that at the conclusion of the Committee meeting, he spoke with HR personnel to get the paperwork ready for a meeting he planned to schedule with Silva for Wednesday morning at 8:00 AM, during which he intended to terminate Silva. Tr. 318-319, 489.

Silva testified that on Tuesday, January 17, his condition was even worse. Tr. 105. The weather was still bad on Tuesday and Cheever had not called, so Silva assumed the plant was not running. Tr. 105. During the afternoon, Silva's daughter Valerie talked Silva into going to the emergency room. Tr. 105-106, 180, 187. Cheever called Silva while he was at the emergency room and told Silva to call back after he had been examined. Tr. 106, 188, 318. According to Cheever, this was the first he had learned that Silva was injured and seeking medical attention. Tr. 327, 486. On cross-examination Silva conceded that this was the first time anyone at Aggregate knew he was seeking medical care. Tr. 145. Cheever was "shocked" and immediately called the mine's HR and safety personnel. Tr. 490. Shortly thereafter Cheever called again and told Silva that Quist wanted Silva to go to Concentra, the company's medical provider, so that the injury would be addressed through workers compensation and Silva would not be stuck with the bill. Tr. 106, 187, 487-488. Silva's daughter drove him to Concentra, whose medical personnel in turn told Silva to go to a hospital, which he did. Tr. 106-107. Silva testified that he received an MRI at the hospital and the doctor confirmed that he had a concussion. Tr. 107, 120.

On Wednesday, January 18, Silva, at the direction of the hospital doctor, went to see his primary care physician to have his liver checked given that he had had a transplant in 2011. Tr. 88, 108. His primary care physician noticed no issues with the liver but confirmed that Silva had a concussion. Tr. 108, 112. While Silva did not talk to anyone from the mine that day, his wife Veronica did talk to Cheever. Tr. 108.

On Thursday, January 19, Silva, at the direction of his wife, went to see a workers compensation attorney. Tr. 108, 181. While Silva was at the attorney's office he received a call from Cheever informing him that the SRRCP Committee had decided Silva was at fault and that he was terminated. Tr. 26, 109, 320. Silva testified that he was surprised given that Cheever had

meeting ever occurred. Tr. 276, 320, 352, 355, 356, 489. The Secretary took issue with what he viewed as Lane's inconsistent testimony on this issue as compared to his deposition testimony and questioned him at length regarding an errata sheet that he submitted after his deposition. The errata sheet, along with his trial testimony indicate that the inconsistency was due to confusion on Lane's part over a date he mentioned during his deposition, which he then sought to correct after reviewing his calendar. Tr. 352-355, 359-364. I note that Lane's deposition occurred almost a year after the events at issue in this matter and he sought to correct the record as soon as he referred to his calendar after the deposition.

never led Silva to think he would be fired. Tr. 110. Milan was not disciplined as a result of the accident. Tr. 219.

Cheever testified that the delay between the decision to terminate on January 17 and the actual termination on January 19 was simply a matter of finding time, trying to allow Silva a chance to meet with doctors, and HR personnel's desire to not terminate Silver over the phone due to the all of the paperwork and personal belongings that would need to be returned to Silva. Tr. 488-489, 492-494. However, after a number of days passed, Cheever eventually decided to do it over the phone so it would not drag on. Tr. 492-494.

At hearing Silva testified that he believes he was terminated for reporting the injury and due to safety complaints that he had previously raised regarding traffic at the mine. Tr. 112. Silva testified that he previously made multiple safety complaints regarding traffic at the mine. In particular, he testified that he raised the issue of traffic safety with both Cheever and Quist during the mine's annual safety meetings in 2015 and 2016 and again with Cheever at the mine's Christmas meeting in December 2016, roughly a month before the accident. Tr. 47-48. Silva also testified regarding a series of meetings in 2012 and 2013 with Cheever and the loader operators where they talked about eye contact and verbal communication. Tr. 40-41, 44. According to Silva, during those meetings they discussed how the QC Techs and the loader operators could work together to ensure that Silva could obtain his samples more safely given that it was impossible for Silva to perform his job without encroaching within the minimum distance vehicles were supposed to maintain from equipment. Tr. 42-43. They also discussed the need for a new sampling procedure that, according to Silva, Cheever was supposed to develop. Tr. 43-44. At some point the meetings ceased to occur. Tr. 44-45. Silva testified that one of the objectives on his 2013 performance standards was to hold a quarterly meeting with the loader operators to discuss issues, but these meetings never occurred due to time constraints. Tr. 45-47; CX-1. Silva agreed that his performance rating was not impacted by the inability to hold the meetings. Tr. 47. Cheever, Prather, and Quist each testified that Silva had never raised safety complaints with them. Tr. 327, 468-469, 484, 524.

Steve Sands, a QC Tech for Aggregate at a different operation, occasionally performed these functions at the Morrison Plant. He testified that he attended multiple safety meetings and has never felt like he could not raise safety concerns or report an injury, and in fact did raise an issue regarding traffic at the Morrison Plant during an August 2016 meeting and a December 2016 meeting. Tr. 427-430. RX-8, RX-13. According to Sands, no one else raised safety concerns during those meetings and he recalled Silva saying that traffic was not that bad at the Morrison Plant. Tr. 430-431.

At hearing, Quist described Silva as a good employee and testified that, prior to the accident, he never had a reason to question Silva's credibility. Tr. 224. Cheever, likewise, described Silva as a very good, dependable worker with whom he had a good relationship, and someone he would not expect to fabricate injuries. Tr. 300, 322, 472. While Cheever did not believe Silva lied during the investigation, he was adamant that Silva never said he was hurt or described symptoms that would have indicated to Cheever that Silva needed medical attention. Tr. 322, 326-327.

B. Analysis of the Issues

i. *Prima Facie Case*

Section 105(c) of the Mine Act prohibits discrimination against a miner for exercising a right established under the Mine Act. Pursuant to Commission case law, a prima facie case for a violation of section 105(c) is established if the complainant proves by a preponderance of the evidence that (1) he was engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Once a prima facie case is established, the mine operator is given an opportunity to rebut by showing that either there was no protected activity or the adverse action was not motivated in any way by the protected activity. *Robinette* at 818 n. 20. I address these issues below.

a. *Did Silva Engage in Protected Activity?*

Complainant argues that Silva engaged in two types of protected activity; making safety complaints and reporting an injury. I address these activities separately.

The Secretary first argues that Silva engaged in protected activity when he made safety complaints about traffic at the mine. Specifically, Silva, who “found that dangerous traffic conditions made it difficult for him to get around the plant to collect samples and do his job[,]” engaged in protected activity when he routinely complained to Cheever and Quist about the issue. Sec’y Br. 3, 12. Although Cheever denied that Silva ever made safety complaints, Respondent did not rebut Silva’s testimony that Silva and Cheever set up meetings with the loader operators to address safety issues, which was a direct response to Silva’s complaints. Sec’y Br. 3. Silva also raised safety concerns about the increased traffic at the mine approximately a month before he was terminated and asked for additional training on how to get around the mine safely. Sec’y Br. 4.

Respondent disputes that Silva made safety complaints, either formally or informally, and asserts that Silva presented no credible evidence to suggest that any safety concerns he may have raised amounted to protected activity. Aggregate Br. 4-5. Cheever and Quist both testified that that Silva never raised any safety concerns. Their testimonies were supported by Sand’s testimony that Silva never raised concerns during the two safety meetings that Silva claims to have raised concerns. Rather, it was Sands who raised those concerns about traffic safety, to which Silva said “it wasn’t that bad[.]” Aggregate Br. 5. Respondent argues that while traffic levels had increased at the mine, the issue was constantly discussed and Aggregate had worked to ensure the safety of vehicle traffic as evidenced by safety meetings during which miners were given every opportunity to raise safety concerns, written procedures, as well as rules regarding deference to heavy duty vehicles and minimum distances that needed to be maintained, and the presence of stop signs and speed limits. Aggregate Br. 5-6.

Whether Silva engaged in protected activity by making “safety complaints” is questionable. I accept Silva’s testimony that he raised questions about traffic safety, but this was a constant topic at the mine that many people discussed. Silva testified that he routinely raised questions regarding his ability to safely perform his job given the increasing traffic at the mine. I credit his testimony that he brought up this topic during safety meetings at the mine in 2015 and 2016. I note that a few years before the accident, Cheever asked Silva to meet with loader operators to discuss issues regarding the best way for QC Techs and loader operators to work safety together. At one point, Cheever charged Silva with running such meetings and included this objective as one of his performance standards. A few meetings were held, but they did not continue beyond 2013 due to time constraints. Silva continued to raise traffic issues in 2015 and 2016. I would not characterize the concerns raised by Silva as “complaints” and Aggregate clearly did not see them as specific complaints but rather as the types of issues that are typically discussed in a mining environment.²² Nevertheless, for purposes of this decision, I will assume that Silva engaged in protected activity when he discussed traffic safety with management.

The Secretary also argues that Silva engaged in protected activity when he reported his injury, specifically a concussion, to management. I agree that reporting an injury can be a protected activity. See *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). An important issue in this case is whether Aggregate management was aware of the concussion at the time the decision was made to terminate him. The Secretary contends that management was aware of Silva’s injury, but Aggregate maintains that it did not learn of his injury until after the decision to terminate was made.²³ This disputed issue of fact is discussed below. Thus, although I agree that Silva’s act of reporting his injury is protected, the key issue is whether there is a nexus between the reporting of his concussion and the decision to terminate.

b. Was Silva’s Termination Motivated in any Part by the Protected Activity?

The Commission has recognized that although direct evidence of discriminatory intent or motivation is rarely available, a nexus between the protected activity and adverse action may be inferred where indicia of discriminatory intent exists, including (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the Applicant. See *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); see also *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I analyze each of these factors in turn.

²² For example, Sands testified that he raised safety issues regarding QC Tech sampling procedures and traffic at the Morrison Plant in August and December 2016.

²³ Aggregate does not dispute that Silva reported his injury to Cheever over the phone the afternoon of Tuesday, January 17 when Silva was in the emergency room. Aggregate maintains that the decision to terminate had already been made earlier that day.

Knowledge of Protected Activity

The Secretary argues that Aggregate had knowledge of Silva's safety complaints to Cheever and Quist, and avers that Silva's work with Cheever to address safety concerns directly with loader operators was a direct response to those complaints. Sec'y Br. 13. Further, the mine had knowledge of Silva's injury because he complained of symptoms to management immediately after the accident on Friday, told Cheever on Monday that he thought he had a concussion, and notified Cheever that he was seeking emergency care. Sec'y Br. 13.

Respondent argues that the SRRCP Committee members, which included Cheever, Quist, and Lane among others, had no knowledge of any protected activity when they unanimously decided to terminate Silva during their midday SRRCP meeting on Tuesday, January 17. Aggregate Br. 8. The Committee discussed only Silva's violative actions related to the January 13 accident and did not consider Silva's alleged past safety complaints because none existed. Aggregate Br. 9. Moreover, there was no discussion of Silva's injuries because there was no knowledge of injuries at that point. Aggregate Br. 9. Even if Cheever or Quist had knowledge of safety complaints or injuries, there is no evidence that either of those issues were discussed with the rest of the Committee or influenced the termination decision. Aggregate Br. 9.

The Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (quoting *Chacon*, 3 FMSHRC at 2510).

I find that Aggregate had at least constructive knowledge of the safety concerns raised by Silva. Silva testified that he regularly made complaints about traffic safety as it relates to the duties of QC Techs to Cheever and occasionally to Quist. Cheever and Quist could not recall any specific complaints made by Silva and, more importantly, they considered any discussions about traffic safety that did occur to be ongoing conversations about safety improvements rather than specific complaints. Nevertheless, I give Silva the benefit of the doubt and find that Aggregate was aware of the traffic safety concerns raised by Silva.

Whether Aggregate had knowledge of Silva's injury is a more complicated issue. The Secretary, in his brief, does not pinpoint a particular time when Silva reported his injury. Rather, he lists a number of events, including that Silva informed Cheever that his neck, back and head hurt the day of the accident, that on Saturday Silva told Cheever he felt terrible, that on Monday Silva told Cheever he thought he had a concussion, and that on Tuesday afternoon Silva told Cheever he was at the emergency room seeking medical attention. Conversely, Respondent again argues that the Committee had no knowledge of any protected activity when it decided to terminate him mid-day on Tuesday, January 17.

There is no dispute that Silva reported his concussion to Cheever over the phone while he was at the emergency room Tuesday afternoon and told Cheever he was seeking medical attention. The issue that must be resolved is whether Silva's earlier actions on Friday, Saturday and Monday amounted to reporting an injury. I find that they did not.

This case presents a somewhat unusual issue in that the injury for which Silva ultimately sought medical treatment, a concussion, does not necessarily manifest in an easily recognizable manner, at least as compared to other injuries that may be sustained in a vehicle collision, i.e., cuts, scrapes, contusions, broken bones, etc. Here, there is no dispute that Silva did not immediately report an injury following the accident. Silva, in the immediate aftermath, was interviewed, provided a statement, participated in the accident reconstruction, and voluntarily drove his pickup truck. I credit the testimonies of Respondent's witnesses that Silva, by all accounts, did not appear to be injured immediately after the accident.²⁴

Later the same day, Friday, Silva allegedly vomited and informed Cheever that his head, neck and back hurt before heading home. Silva acknowledged that he did not tell Cheever that he vomited and Cheever testified that he never smelled vomit in the lab when he was with Silva. While Silva may have informed Cheever that his head, neck and back hurt, I find his statement was at most a recitation of short term symptoms that are quite common for those involved in a vehicle accident as a result of the impact and jostling that the body endures, and did not amount to reporting an injury. The same can be said for Silva's interaction with Cheever on Saturday where he simply told Cheever he was not feeling well.

While both parties agree that there was some discussion regarding concussions at the meeting between Silva and Cheever on Monday, a dispute exists regarding what exactly was said. Silva claims that he told Cheever he had a concussion and Cheever responded by saying that that Silva could not have a concussion because he did not hit his head, as could be seen in the video. Tr. 103. Conversely, Cheever claims that on Monday he asked Silva, just as he had on Friday and Saturday, whether Silva was hurt, to which Silva responded that he was not. Tr. 326-327. I find it unlikely that Silva stated to Cheever on Monday that he had a concussion. Silva testified that he drove his pickup to the meeting, and then drove again to the body shop. According to Silva, he was familiar with the signs of concussions as a result of his boxing background and would probably know if he had a concussion. Tr. 159-160. Cheever testified that he also was familiar with the signs of concussions and had received concussion training as a result of his involvement in soccer. Tr. 483. If Silva believed he had a concussion at that point and stated such to Cheever I find it unlikely he would have elected to drive to the mine or body shop, and even less likely that Cheever would have allowed him to continue to drive a company vehicle. As a result, I find that Silva did not report his concussion on Monday, January 16. Accordingly, I find that the first time Aggregate had knowledge of Silva's protected activity of reporting his injury was when Cheever spoke with him over the phone on Tuesday afternoon while Silva was at the emergency room. Silva agrees that this was the first time Aggregate would have known that he was seeking medical treatment.

²⁴ While the Secretary takes issue with the fact that no physical examination was conducted at that point, I find that there was no reason to do so. Silva was understandably frustrated and shaken as a result of the events which had just unfolded. However, no injuries were visible and Silva did not state that he was hurt. The Dashcam video subsequently reviewed by management would not lead one to believe Silva had been injured.

Given that the first time Aggregate became aware of Silva's injury was Tuesday afternoon, the question that now must be answered is whether that knowledge played a role in the decision to terminate. I find that it did not.

Quist, Cheever, and Lane all testified that the decision to terminate Silva was made during the Tuesday meeting of the SRRCP Committee that convened at noon and lasted for approximately an hour. While the Secretary takes issue with their testimonies and asserts that a decision was not made during that meeting, I disagree. I credit Aggregate's witnesses on this point. The Secretary spent much of his examinations of Quist, Cheever and Lane attempting to point out discrepancies between their deposition and hearing testimonies. Having observed each of these witnesses at hearing, evaluated their demeanor, and reviewed their testimonies, I find that each of them credibly testified as to having rendered the decision to terminate Silva during Tuesday meeting of the Committee. While I acknowledge that an inconsistency exists between Lane's deposition and trial testimonies, I accept his explanation. Because Cheever's conversation with Silva on Tuesday occurred after the Committee had rendered its decision, I find that knowledge of the report of the injury played no role in the decision to terminate. Up until that point Aggregate, at most, had knowledge that Silva was experiencing normal aches and pains that accompany a vehicle accident.

Animus or Hostility Toward the Protected Activity

The Secretary argues that Aggregate demonstrated hostility and animus towards Silva's report of an injury. Sec'y Br. 13. Aggregate management did not believe that Silva was actually hurt during the accident and Quist testified that he believed Silva was attempting to defraud the worker's compensation system. Sec'y Br. 13. As evidence of this animus towards Silva's report of an injury the Secretary points to an email sent by Quist to Aggregate personnel and statements made by Quist to the SRRCP Committee prior to the decision to terminate. Sec'y Br. 14.

Respondent argues that the Committee exhibited no animus or hostility toward Silva's alleged protected activity. Aggregate Br. 9. The frustration expressed in Quist's email was a reaction, not to protected activity, but rather toward the accusation of discrimination based upon what Quist believed were baseless claims. Aggregate Br. 10. Further, any suggestion that Aggregate retaliated against Silva for reporting an injury or "perpetrating a fraud" is undercut by the fact that the Committee had met and decided to terminate Silva before he notified a supervisor that he was injured, which he was required to do under company policy. Aggregate Br. 10.

I find that the Secretary's argument with regard to the email is without merit.²⁵ The email was sent by Quist to other Aggregate personnel in March, roughly two months after the accident and termination. CX-9. The message is quite clearly a frustrated response to Silva's discrimination claim and application for temporary reinstatement. While Quist's statement in the email that Silva "lie[d] about the event and is trying to defraud the workers compensation

²⁵ The Secretary's arguments on this point are directed only at alleged hostility or animus towards Silva's reporting of his injury and not his alleged safety complaints.

system[.]” may facially appear to demonstrate animus or hostility towards Silva’s protected activity or reporting the injury, I agree with Respondent that the timing and circumstances surrounding the sending of the email are not evidence of hostility or animus that Quist, or others, harbored towards Silva’s protected activities when they occurred or when the decision to terminate was made.

With regard to the Secretary’s argument that Quist made statements to the SRRCP Committee regarding skepticism of the timing of Silva’s reporting of the injury, I note that the testimony cited by the Secretary in her brief was actually Quist’s deposition testimony that counsel for the Secretary read into the record and asked Quist to confirm. At hearing, Quist testified that he may have been confused at the deposition because the Committee could not have considered the injury since none of them were aware of the injury at the time of the meeting. Tr. 272-277. While a conflict between Quist’s deposition testimony and his trial testimony is apparent, I credit his trial testimony, during which he was adamant that he had no knowledge of the injury until after the SRRCP Committee met and decided to terminate Silva. In reaching this conclusion I am mindful that Cheever and Lane also testified that they were not aware of the injury at the time of the meeting.

Finally, I note that at no time when Silva brought up traffic safety with Cheever or Quist did he receive any pushback or disagreement. Although Aggregate did not quickly put into place more formal procedures for the taking of samples by QC Techs, it did not demonstrate any animus towards employees who raised the subject. Indeed, Sands, another QC Tech, credibly testified that he brought the subject up several times in 2016 and he never suffered any adverse consequences.

Coincidence in Time

The Secretary argues that a coincidence in time exists because Silva complained about unsafe traffic conditions less than one month before he was terminated and reported his injury just days before he was terminated. Sec’y Br. 13. Respondent argues that there is a “rational, independent, and non-discriminatory reason for Silva’s termination that arose closer in time to the termination than any alleged protected activity regarding raising safety concerns.”²⁶ Aggregate Br. 11. For purposes of this decision, I agree with the Secretary that a coincidence in time exists between Silva’s protected activity and his termination.

Disparate Treatment

The Secretary argues that Silva was subject to disparate treatment and points to a similar accident at a Lafarge Holcim facility in Michigan in which both parties to the accident were given only three day suspensions. Sec’y Br. 14; CX-17. In contrast, Silva was terminated while Milan was not disciplined. Sec’y Br. 14. Respondent argues that Silva’s situation differed from that described by the Secretary, where the matter was not reviewed by an SRRCP Committee and

²⁶ Respondent’s argument is more fully addressed below in the discussion of its affirmative defense.

was not subject to the same policies as the Morrison plant. Moreover, Aggregate has terminated several other similarly situated employees. Aggregate Br. 13.

I find that Silva was not subject to disparate treatment. I accept Lane's testimony that the other Lafarge Holcim facility was subject to a different disciplinary policy, which did not include an SRRCP Committee. Tr. 370. Lane explained that the Lafarge Holcim merger presented challenges as the two companies attempted to integrate their policies. Tr. 350. The fact the disciplinary policies differed between the two facilities for a period of time after the merger is unsurprising. It is impossible to tell what discipline would have been handed down to those individuals at the other facility had a SRRCP Committee been formed. In addition, while the accident at the other facility also involved a loader colliding with a pickup truck, the factual circumstances surrounding the two collisions differ significantly. Whereas Silva's truck was moving at the time of the collision, the pickup truck involved in the other collision was stationary and the driver was not even in the vehicle. CX-17 p. 2. Accordingly, I find that the Secretary has not shown that Silva was subject to disparate treatment.

c. Did Silva establish a Prima Facie Case?

I find that Complainant did not establish a prima facie case of discrimination. The Secretary was unable to establish a nexus between Silva's alleged protected activity and his termination. Although Aggregate had knowledge of Silva's reporting of his injury prior to his ultimate termination on Thursday January 19, the decision to terminate Silva was actually made on Tuesday, January 17 during the SRRCP Committee meeting, which occurred before Silva notified Cheever of his injury. As a result, I find that the decision to terminate was not motivated by Silva's report of injury. It bears noting that the two key members of the Committee, Cheever and Quist, came to the conclusion that Silva was at fault by Monday morning after studying the Dashcam video. Moreover, I credit Respondent's witnesses that that the issue of any safety complaints Silva may have made in the months and years leading up to the time in question were not discussed and had no bearing on the Committee's decision. Finally, the Secretary did not establish that Silva suffered disparate treatment or that Aggregate demonstrated hostility or animus toward his protected activity. Accordingly I find that Silva's protected activity in no way motivated his termination and, as a result, Complainant did not establish a prima facie case of discrimination.

ii. Affirmative Defense

The Commission has explained that an operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and it would have taken the action based solely on the unprotected activity. *Pasula* at 2799-2800. The 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 the defense, the judge should determine whether the justification is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Complainant may demonstrate that the alleged non-discriminatory reason is mere pretext for the adverse action by showing that the "asserted justification is weak, implausible, or out of line with

the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Respondent argues that Silva was terminated for "grave safety violations." Aggregate Br. 13. Namely, it asserts that Silva failed to keep a minimum distance from operating heavy equipment and failed to make positive contact with the equipment operator when he breached that distance after he moved his pickup. Aggregate Br. 13. Silva's unsafe and unprotected activity, which could have had a tragic result, was the sole cause of his termination, which was administered in compliance with the mine's safety policy. Aggregate Br. 13. This justification was "highly credible and plausible[.]" and consistent with Aggregate's disciplinary policy and past treatment of similarly situated employees. Aggregate Br. 14.

The Secretary argues that discrepancies in Respondent's claimed basis for terminating Silva, as well as the timeline of the termination, establish pretext. Sec'y Br. 15. Specifically, the Secretary takes issue with what information the SRRCP Committee did, and did not, consider when deciding to terminate Silva, and argues that Cheever, Quist and Lane offered conflicting testimony as to the justification for the termination and the application of the SRRCP. Sec'y Br. 15. Further, the Secretary again raises issues, which have already been addressed above, regarding alleged inconsistencies in testimony about whether the Committee had knowledge that Silva was injured when deciding to terminate him, as well as the timing of the actual termination two days later. Sec'y Br. 19-21. Finally, the Secretary argues that other facts demonstrate pretext, including that Milan was not disciplined despite evidence establishing fault on his part, and the fact that Silva's job required him to be within proximity to the loader. Sec'y Br. 21.

Assuming *arguendo* that Complainant established a *prima facie* case of discrimination, I nevertheless find that Respondent has provided a valid affirmative defense. At the outset, I find that it is quite clear based on the testimony and evidence introduced that Silva's act of driving behind and then toward the loader while it was operating was unsafe.. Although the Secretary takes issue with whether or not the "75 foot rule" was actually a rule, see Sec'y Br. 16 n. 20, it is quite clear that Silva understood it to be a rule as indicated by his testimony that he was aware the a rule existed and had been trained on such.²⁷ Tr. 33, 42-43. Moreover, while the Secretary's brief, as well as Silva's testimony, constantly make mention that the rule was impossible to follow given the layout of the mine, I disagree. The rule, as explained at hearing, allowed smaller vehicle operators to breach the minimum distance by making positive contact with the larger equipment operator and receiving confirmation from the larger equipment operator that it was okay to breach the minimum distance. Silva agreed that he was aware of this exception to the rule, yet chose not to follow the policy when he approached within the minimum distance just prior to the collision.²⁸ Tr. 124.

²⁷ Silva testified that at one point the rule had been to maintain 50 feet from loaders, but that he thought it was 75 feet at the time in question. Even if the distance was 50 feet, the reconstruction revealed that at the time of the collision Silva was approximately 40 feet from the edge of pad that Milan constructed, which would have put him even closer than 40 feet from the loader.

²⁸ There is no dispute that the last verbal contact between Silva and Milan was over the radio when Silva asked Milan to make the pad, which was before the two of them drove to the

I find that Cheever's post-accident reaction prior to his viewing of the Dashcam video, and his subsequent change in opinion following his viewing of the video, lends credibility to Aggregate's justification for terminating Silva. There is no dispute that Cheever, prior to viewing the video, had a discussion with Silva in which he stated that Silva would be assigned little fault for the accident. Cheever explained that he made the statement based upon his understanding that Silva was too close to the loader and did not have a high visibility flag, but was stationary when the collision occurred. Tr. 308. Quist, likewise, while not assigning fault at the time, testified that based on the reconstruction Milan should have seen Silva in the loader's mirrors and backup camera. Tr. 516-517. However, like Cheever, he had not viewed the video at the time and his statement was made assuming that Silva was stationary. As stated above, I find that the video clearly shows that Silva was moving at the time of the collision and he was not paying close attention to his surroundings. Silva, by moving south and roughly parallel to the loader while the loader began to back up, would have been moving in roughly the same direction as the loader's rear field of view that the mirrors and backup camera provided as that field of view swung around from the north and towards the east.²⁹ While the Secretary takes issue with the fact that Milan received no discipline as a result of the accident, I find it entirely possible that, even using his back up camera and mirrors, Milan did not see Silva as he backed up because Silva's vehicle was just outside of the rear field of vision and only came into view at the last second. Cheever's explanation for why he changed his opinion with regard to fault and Quist's explanation for why he determined fault after viewing the video are very credible and provide a strong justification for disciplining Silva.

Although the Secretary takes issue with alleged inconsistencies in the testimonies of Cheever, Quist and Lane regarding the reason for the termination and the section of the SRRCP under which the action was taken, I find that their testimony quite clearly establishes that Silva was terminated for his unsafe act of staying in motion while driving too close to operating heavy equipment, which in turn resulted in a collision that very well could have been fatal. As the loader operator was working to create a pad, Silva drove his truck from a position to the right of the loader, where he would have been visible to the loader operator, to the left of the loader where the loader operator was unable to see him. Silva did not communicate his intentions to the loader operator and he was moving towards the left side of the loader when it backed up.

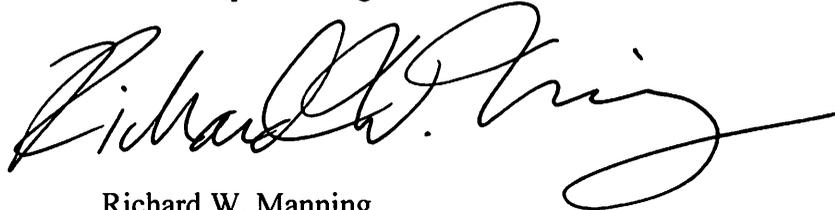
stockpile. Although Silva testified that he made eye contact with Milan as he drove his pickup truck off to the right, this was before he headed away from the loader back to the north and then turned to the east behind the loader and eventually south, which placed him on the opposite side of the loader from where he allegedly made that eye contact with Milan.

²⁹ I credit Milan's testimony that the direction he reverses the loader after making a pad is situational and that there is no set pattern as to how he backed up the loader. Tr. 463. Given that no formal written traffic procedures were in place at the time addressing the specific process of taking a sample, I find that Milan's explanation is far more believable than Silva's assertion that Milan had always backed up in a straight path. Milan reasonably assumed that Silva's truck was to the right of the loader on the day of the accident because that was where Silva was the last time Milan saw him and where Silva alleged he made eye contact with him.

I find that the business justification offered by Aggregate was not pretextual. Silva engaged in a dangerous act by improperly driving too close to an operating piece of heavy equipment. Given the significant size difference between the pickup and the loader, Silva is fortunate that Milan noticed him at the last second and stopped the loader as it collided with Silva's truck. Collisions between large pieces of mobile equipment and smaller vehicles often result in fatalities. Tr. 531. Aggregate's desire to prevent a fatality from occurring is certainly a reasonable one. While terminating Silva was arguably the most extreme disciplinary option and other options may have been available, the Commission has stated that its judges should not substitute their views of what is good business practice for that of the operator with regard to whether the adverse action was "just" or "wise." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981).

III. ORDER

For the reasons set forth above, the complaint of discrimination brought by the Secretary of Labor on behalf of Louis Silva is **DENIED** and this proceeding is **DISMISSED**.³⁰



Richard W. Manning
Administrative Law Judge

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³⁰ My order granting the parties' Joint Motion to Approve Terms of Economic Reinstatement in WEST 2017-265-DM must remain in place until further notice because my decision in the present case is potentially not the final decision of the Commission. See *Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999); *Sec'y on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 323 (Feb. 2013); 30 U.S.C. § 823(d)(1).