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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 27, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CARVER SAND & GRAVEL, LLC	Docket No. YORK 2024-0049

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Chair Jordan and Commissioner Baker

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 19, 2024, the Commission received from Carver Sand & Gravel, LLC ("Carver Sand") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc*., 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995).

MSHA's records indicate that the subject proposed assessment was delivered to Carver Sand on March 9, 2024, and became a final order on April 8, 2024. Carver Sand has fully paid the civil penalty assessment. Sec'y Ex. D

In its motion, Carver Sand states that on April 10, 2024, it emailed MSHA a form to contest the assessment. On April 18, 2024, MSHA responded, rejecting Carver Sand's contest and stating that the deadline to contest was April 8th. CS Ex. 1. Carver Sand disputes the Secretary's calculation of the 30-day contest window. The operator states that it received the assessment on March 11, 2024, and, therefore, the 30-day contest window was open through April 10th.

The Secretary opposes reopening and reaffirms his position that Carver Sand received the assessment on March 9, 2024. The Secretary attached United States Postal Service ("USPS") Tracking Records (Sec'y Ex. B) and the USPS Signature Confirmation (Sec'y Ex. C) to his response, demonstrating that the assessment was signed for by a representative of Carver Sand on March 9, 2024.

Additionally, the Secretary attached evidence that prior to attempting to contest the assessment on April 10, 2024, Carver Sand paid the civil penalty assessment. Sec'y Ex. E at 1 (Carver Sand check dated April 5, 2024). Along with its check, Carver Sand submitted a remittance coupon affirming that payment was earmarked for the subject assessment. *Id*. at 3.

An operator "must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure." *Higgins Stone Co., Inc*., 32 FMSHRC 33, 34 (Jan. 2010). We conclude based upon the record before us that prior to attempting to contest the assessment on April 10th, Carver Sand submitted payment for the penalties at issue. Notably, in its motion to reopen, Carver Sand neither mentions that it paid the penalties, nor alleges that it submitted payment by mistake.[1]

[1] The omission of crucial facts brings a showing of good faith into question. *See H&D Mining, Inc*., 33 FMSHRC 2121, 2123 (Sept. 2011)

Instead, we conclude that the record demonstrates that the operator's attempt to contest the penalties on April 10, 2024, represented "a change of mind." It is well recognized that "[a] change of mind is not adequate grounds to reopen a final judgement pursuant to Rule 60(b)." *Cold Spring Granite Co*., 36 FMSHRC 1559, 1560 (June 2014) (citing *Brzeczek v. Centerior Energy*, 2000 WL 875744, No. 99-3900, slip op. at 1-2 (6th Cir. 2000)).

Accordingly, for the aforementioned reasons, Carver Sand has not demonstrated good cause to reopen the final order of the Commission and, therefore, its motion is **DENIED** with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, concurring,

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the operator received the final order. The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 24, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) obo JAMIE M. KOSLOP, Complainant, v. ATLANTIC CARBON GROUP, INC., Respondent	TEMPORARY REINSTATEMENT Docket No. PENN 2025-0067 MSHA No. PITT-CD-2025-01 Mine: Stockton Plant & Hazelton Shaft Mine Mine ID: 36-08766

DECISION AND ORDER OF TEMPORARY REINSTATEMENT OF JAMIE M. KOSLOP

Before: Judge Lewis

On January 28, 2025, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement ("Application") of miner Jamie M. Koslop ("Complainant" or "Koslop") to his former position as a laborer with Atlantic Carbon Group, Inc., ("Respondent"), at Hazelton Shaft Mine and Stockton Plant (collectively, "mine") pending final hearing and disposition of the case.

The Application followed the timely filing of a Discrimination Complaint by Koslop on October 28, 2024, alleging, in effect, that his termination from the mine was motivated by his protected activity. The Secretary represents in the Application that Koslop's Discrimination Complaint was "not frivolously brought" under Section 105(c)(2) of the Mine Act and requests an Order directing Respondent to temporarily reinstate Koslop to his former position as a laborer. On February 6, 2025, Respondent timely filed a Request for Hearing on the Application.

A virtual hearing was held via Zoom for Government on February 14, 2025. Counsel for the Secretary gave an opening statement and presented Koslop's testimony. 29 C.F.R. § 2700.45(d). Respondent's counsel then cross-examined Koslop. After the Secretary rested, Respondent's counsel gave an opening statement (which had been deferred at counsel's request), and then presented the testimony of Michael Basile, General Manager of Respondent. The Secretary's counsel opted not to cross-examine Respondent's witness. During the hearing, both sides offered documentary evidence, 29 C.F.R. § 2700.45(d), and three exhibits were admitted:

J1 (stipulations); CX-C (Koslop's Statement in support of his Discrimination Complaint),[1] and RX-D (Koslop's pay statement dated Sept. 27, 2024). Hearing Transcript ("Tr."), at 5:10-19; 112:23 – 113:5; 113:12 – 114:15. Both sides offered closing argument.

For the reasons set forth below, and consistent with Section 105(c)(2) of the Mine Act, I grant the Application and order temporary reinstatement of Koslop.

TESTIMONY & EVIDENCE

A. Discrimination Complaint and Application

On October 28, 2024, Koslop filed a Discrimination Complaint with MSHA alleging:

> I feel I was wrongfully terminated because of the safety violations I pointed out to management and MSHA. To be made whole, I would like my job back with backpay.

Application, Exh. B, at 2.

With the Application, the Secretary submitted the Declaration of Joseph M. Patula, a Special Investigator employed by MSHA, who attested under oath:

> 2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity I have investigated the discrimination claim filed by Jamie M. Koslop on October 28, 2024. My investigation to date has
>
> a. At all relevant times, Atlantic Carbon Group, Inc. ("Operator" or "ACG"), was a corporation and is a "person" as defined in § 3(f) of the Mine Act.
>
> b. The applicant, Jamie M. Koslop ("Mr. Koslop"), was employed by the Operator as a laborer at the Operator's Hazelton Shaft Mine and Stockton Plant (collectively, "mine") and therefore, was a "miner" within the meaning of § 3(g) of the Mine Act.
>
> c. Mr. Koslop was employed at the mine for approximately twenty months, from December 12, 2022, through September 24, 2024.

[1] The Secretary attached select pages of Koslop's Statement to the Application (*see* Exh. B), whereas CX-C, as admitted, contained his full 10-page Statement.

d. On October 28, 2024, Koslop filed a discrimination complaint after his employment was terminated for "dereliction of duty" according to mine management[.]

e. On October 31, 2024, I interviewed Mr. Koslop and he provided a statement.

f. In his interview and statement, Mr. Koslop reported that when he arrived to work on September 24, 2024, Chief Operating Officer for ACG, Mike Bowling, terminated his employment.

g. Mr. Koslop asserted that he was fired in retaliation because he:

i. provided an interview with MSHA during an investigation following a fatal mine accident that occurred on July 25, 2024;

ii. made safety complaints of unsafe conditions involving mine machinery and equipment to management and MSHA following the accident;

iii. undertook efforts to become an MSHA Miners' Representative during the months of August and September of 2024; and

iv. refused to perform a work assignment on September 23, 2024, that is, unjam the picking room table using a manlift, because he was not task trained.

Application, Exh. A at ¶ 2 (Jan. 27, 2025). The Secretary cited this Declaration as the basis for the formal request for temporary reinstatement. Application at ¶ 1.

B. Request for a Hearing

In its Request for a Hearing, Respondent contended the Discrimination Complaint failed to refer to "any specific instance of protected activity." Request for Hrg., ¶ 2. Respondent also denied there is reasonable cause to believe that any protected activity contributed to its decision to terminate Koslop, *id.* at ¶ 7, and contended his employment was terminated "for repeated instances of poor performance" and "substandard performance." *Id.* at ¶¶ 10, 11. In the alternative, Respondent contended: "[T]o the extent that it is found in this or any subsequent proceeding involving this complaint that adverse action was motivated in any part by protected activity, [Respondent] was also motivated by the unprotected activity and would have taken the same adverse action against the Complainant for the unprotected activity alone." *Id.* at ¶ 12.

C. Joint Stipulations

The parties submitted the following joint stipulations prior to the start of the hearing:

1. Atlantic Carbon Group, Inc., is and was at all relevant times, the operator of Hazelton Shaft and Stockton mines, located in Hazle Township, Pennsylvania.

2. Hazelton Shaft, Mine ID No. 3608766 is a "mine" as defined in Section 3(h) of the of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). 30 U.S.C. § 802(h).

3. Stockton, Mine ID 3608745, is a mine as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

4. At all times relevant to this proceeding, products of Atlantic Carbon Group's Hazelton Shaft and Stockton mines entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

5. Atlantic Carbon Group, Inc., is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and is person as defined Section 3(f) of the Mine Act, 30 U.S.C. § 802(f).

6. Jamie Koslop was employed as a laborer by Atlantic Carbon Group, Inc., from on or about December 12, 2022, until he was terminated on September 24, 2024.

7. Jamie Koslop is a "miner" within the meaning of § 3(g) of the Mine Act, 30 U.S.C. § 302(g).

8. Atlantic Carbon Group, Inc., is subject to the jurisdiction of the [F]ederal [M]ine [S]afety and [H]ealth [R]eview Commission. The presiding administrative law judge has the authority to hear this case and issue a decision regarding this case, pursuant to § 105 of the Act, 30 U.S.C. § 815, as amended.

Stips. for Temp. Reinstatement Hrg. (Feb. 14, 2025), admitted as J-1.

D. Summary of Testimony

1. Complainant's Testimony on Direct Examination

a. Background

Koslop was hired by Respondent as a laborer on December 12, 2022, and continuously served in that position until his employment was terminated on September 24, 2024. Tr. at 12:13-24, 63:1-3, 64:14. Koslop, 47 years old at the hearing, *id.* at 12:9-10, described his "many duties" as a laborer as "basically to clean up under . . . [and] around belts," "shoveling, cleaning up under belts, and keeping equipment running." *Id.* at 13:1-6. When he was hired (and up through the time of a fatal accident that occurred on July 25, 2024, *see infra* D.1.b), Koslop worked at Respondent's Hazelton Shaft Mine, a coal preparation plant.[2] *Id.* at 14:6-8. "Across the street" from Hazelton Shaft Mine was Respondent's Stockton Plant. *Id.* at 45:11-14; 46:8-12. Koslop was "task-trained on and . . . signed off on" each position he performed; he had also received basic MSHA mine safety training. *Id.* at 13:22 – 14:5. Koslop continuously worked the second shift (but for a short time described *infra* when his laborer crew was temporarily transferred to the first shift). *Id.* at 44:1-5. He worked "[t]en-hour shifts Monday through Friday and then every other Saturday," *id.* at 44:21-23, and his hourly schedule for the second shift was 4:00 p.m. to 2:00 a.m. *Id.* at 45:1-5.

When he began working at Hazelton Shaft Mine, Koslop was assigned to "the picking room in the headhouse." Tr. at 14:6-11. He described this as an area where basketball-sized pieces of coal "get[] dumped in from a loader into a hopper" and vibrated on a belt that goes into a crusher. *Id.* at 14:14-20. Koslop would pick pieces of log and sticks off the belt and throw those items "down to a different belt to separate the wood from the coal." *Id.* at 14:21-23. After six months of picking room duty, he was transferred "into the breaker" for approximately four or five months, and then to "retail" where he worked until the time of the fatal accident (*see infra* D.1.b). *Id.* at 14:24 – 15:3. Koslop's duties in retail included filling up the "coal truck as it would come in" with product held in separate hoppers as well as cleaning, i.e., sweeping up under belts, keeping "tail wheels and head wheels" clean "so they don't back up [and] jam the belt, cause any problems." *Id.* at 15:13 –16:6.

b. Fatal Accident

A fatal accident occurred at Hazelton Shaft Mine on July 25, 2024, while Koslop was working. Tr. at 17:2-12. At that time, the mine was "down"—meaning "the plant wasn't running" and the miners were "doing repairs [and] cleanup." *Id.* at 16:7 – 17:1.

The miner who died was Brian Brotzman ("Brian"). Tr. at 21:21, 27:1. Brian had been Koslop's neighbor for 15+ years; he was also a friend. *Id.* at 17:16-17; 20:15-16 (referring to Brian as "one of my best friends"); 33:22 ("my friend died"). Koslop had helped Brian get a job at Hazelton Shaft Mine and they would sometimes ride into work together. *Id*. at 17:16-25. The fatal accident occurred on a conveyor belt near a hopper; Koslop could not recall the "exact

[2] In the Application, the Secretary characterized Hazelton Shaft Mine as a "coal preparation plant." Application at ¶ 4. Koslop described it as "a coal breaker." Tr. at 13:15-17.

name" of the area but described it as "a hopper that the coal went down into . . . separated between two belts. One [belt] went to the plant. The other [belt] went to a stockpile. Brian passed away on the belt that was running . . . to the stockpile." *Id.* at 23:21 – 24:7.

On the night of the accident, and approximately 20 minutes beforehand, Koslop had been instructed by acting mine superintendent Dave Hampton ("Hampton") to fix a rail on the scale outside the plant building. Tr. at 26:7-12; 20:24 – 21:8.[3] Koslop, Brian, and another miner (Rick) put the rail back on and re-entered the plant where Koslop, Brian, and another miner (Mark) then engaged in some welding. *Id.* at 26:12-18. Brian was twice called over the radio to report to the belt by the hopper; after the second call, Brian left the area where Koslop was working to report to the belt. *Id.* at 26:19 – 27:3. Not five minutes later, Koslop heard "*Miner down*" over the radio and went to the hopper area. *Id.* at 27:3-6. Koslop, who described the scene as one of "panic," saw the supervisor (identified as "Hirko") trying to remove a guard. *Id.* at 27:6-12. Koslop ran up and asked, "Where is he?" and Hirko said, "In there." *Id.* at 27:8-10. Koslop "tore the guard off the machine" and "started pulling rocks out because [Brian] was down in between the belt and like, he was inside the hopper." *Id.* at 27:13-14, 20-22. He found Brian's hard hat as he removed rocks; he then found Brian's neck and tried to take a pulse. *Id.* at 28:10-13. He did not find a pulse, observed Brian's neck as "all black . . .[and] cold," and then he smelled feces. *Id.* at 28:25 – 29:2. Koslop realized Brian was dead and screamed, "Could everybody just calm down. Brian is gone. Now we need to get him out of here. We got to get his body out of here." *Id.* at 29:3-8. Asked to describe any material on the belt at the time of the accident, Koslop testified:

> There was a lot of material on the belt, a lot, because at the time when I started digging, I assumed when I got up there I tore the guard up. I was in a panic. I assumed the guard it was locked out. . . . The material – there had to be about 12 tons – 12 to 15 tons of material. I mean, the belt was 75 yards long with about 3-foot of material, I'd say, basketball size balls of rocks of coal and stuff on the belt. And it pushed him. [Brian] went through an 18-inch square, and he was stuck in there.

Id. at 28:4-24.[4] Koslop testified Brian "was standing on a belt when the accident occurred. *Id.* at 26:5-6.

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[3] Hampton had, at the time, recently been promoted from head electrician to acting mine superintendent.

[4] While recounting the accident, Koslop described how, when the paramedics arrived, the miners sought to find a set of belt clamps "to lock the belt out the proper way." Tr. at 24:19-20; 25:7-8. Miners at the scene could "not find a set of belt clamps on the property," and used a pair made and stored in a personal locker by a miner named Brendan. *Id.* at 25:8-17. Koslop later testified as to his concern, raised specifically with MSHA investigators after the accident (*see infra* D.1.c) about the lack of backstops on belts, placing his testimony about belt clamps into context. It is not clear if he reported lack of belt clamps specifically to MSHA investigators, although he did testify: "this was the night of the accident we used belt clamps that were . . . homemade. I don't even know because I was supposed to ask – actually ask the MSHA employee for the clamps back for my friend because he didn't get them back." *Id.* at 25:24 – 26:4. He also testified regarding lack of lighting at the accident scene. *Id.* at 24:19 – 25:6.

c. Interview with MSHA Investigators, Reporting of Safety Concerns & Miners' Representative

There was an investigation involving MSHA following the fatal accident, Tr. at 18:16-24, and Koslop was interviewed by two or three MSHA investigators and one Pennsylvania state official in a conference room at Hazelton Shaft Mine.[5] *Id.* at 19:13-24, 20:1-6. Hampton walked by the open conference room door at one point and Koslop told the MSHA investigator who got up to close the door, "'You don't have to close the door. I'm not hiding what I have to say to these people here'" and "'This buddy system that happens and everybody looks the other way can't happen. I said, Somebody died.'" *Id.* at 20:9-20.

During the interview, Koslop told the MSHA investigators about safety concerns and violations at Hazelton Shaft Mine. Specifically, he told them about an incident involving the same belt involved in the fatal accident and how it did not have a backstop, which he described as "a gear that is going to prevent the conveyor belt from rolling backwards." Tr. at 21:17 – 23:20. Koslop relayed how the same belt had "jammed up on [him] maybe two times" when he was working in the headhouse and that such was not normal. *Id.* at 21:17-24. When that belt backed up three months after Koslop started working, miners "locked the electric motor out" and Koslop opted to shove steel bars through the rollers on the head wheel and tail wheel. When another miner asked what he was doing, Koslop explained—in so many words—that he did not trust, while cleaning the belt, that locking out the electric motor was sufficient to hold the belt, in light of the "maybe 10 tons of material" on the belt. *Id.* at 22:4-23:2. Koslop had told his supervisor, Eddie Engle ("Engle"), about his concern and recalled Engle responding: "That belt has been like that for four years. There hasn't been a backstop in it." *Id.* at 23:7-11.

Koslop also told the MSHA investigators about an incident involving "the main feed plant belt,"[6] that occurred four or five weeks prior to the fatal accident—an incident he also brought to the attention of mine management. *Id.* at 29:14 – 30:22.[7] Koslop described what he told the investigators about that incident with the main feed plant belt:

> 'Five weeks ago,' I said [to the investigators], 'There was four of us working, shoveling that out because the same thing had happened. It was packed up like that. And we had shoveled it out. And I gave the radio call to Ricky, the plant operator, after we shoveled 15 feet of material off the back of the belt to get it so it would be

[5] Koslop could not recall if the interview was held the day after the accident or the following Monday. Tr. at 18:23-24; 19:9-12. I take judicial notice July 25, 2025, was a Thursday. Koslop identified the state official as "Ollie," testified that he knew this official, and referred to him by name at many points in his testimony. *E.g., id*. at 20:3-5; 29:15; 30:23.

[6] This was "another belt at the plant"—it "wasn't the belt that Brian died on." Tr. at 30:19-22.

[7] Koslop refers specifically to Ollie, the state official, while describing what he told officials about the incident with the main feed plant belt. He also refers to "them" and "they," presumably including the MSHA investigators. *See* Tr. at 29:10-24; 30:25 – 31:1.

> able to move, we radioed into Ricky to start the belt. The sound – . . . you'll hear a buzzer when he starts it, then you have 30 seconds, another buzzer and then the belts will engage. Well, we had the first buzzer. We waited for a second until it did, and there was a click and then all the material, a good 45 yards that we didn't shovel off came crashing back down into the thing and almost took us all out. Like – and it was – and I went to my acting supervisor at the time, Dan Makara, and told him, and I said, 'What the hell, Dan?' He . . . said he had mentioned that to Dave Hampton . . . I said, 'Well, what did he say?' Dan said, 'Dave [Hampton] put his hands in his pocket and looked at him and said, 'it ain't supposed to do that.'

Id. at 29:19 –30:18.[8]

Koslop told the MSHA investigators to check the belts as they did not have backstops, and testified that MSHA officials subsequently "red-tagged everything, *id.* at 30:24 – 31:2, and "shut the plant down." *Id.* at 34:7. More specifically, he recalled MSHA officials red-tagging equipment including "the main feed, the belt that I told them that . . . four weeks prior almost killed five of us." *Id.* at 34:13-19; *see also* 37:20-38:14, 39:7-8 (referring to the main feed belt being red-tagged and shut down); id. at 34:7-11(describing his understanding of "red-tagged").

Koslop testified that, in the days immediately after the accident, he was still working at Hazelton Shaft Mine and, during that time, reported additional safety concerns to MSHA inspectors. As he was shoveling near the belt involved in the fatal accident, he "noticed cracks in the welds in the crusher in the headhouse was only held on with one bolt" on one side and that he "brought that up to MSHA." *Id.* at 31:9-17. *See also id.* at 34:20 – 36:10 ("everywhere they were putting me, I was looking, like if there was something that was unsafe, . . . I would report it . . . I just reported it to MSHA . . . when they had us up at the headhouse shop, and then I said about the holes in the conduit, that the conduit was all rotted, the crusher and then the cracks underneath all the welds because – I mentioned that to them because I was up in the headhouse. . . . And then when I was digging it out, I crawled under it . . . and I looked. There was a lot of welds, and there was cracks going down the welds. I pointed that all out to MSHA inspectors. . . . This was after the interview. . . . I figured while I'm up here digging, I might as well look . . . and that's when I seen all the cracks, and I pointed them out. And the conduit was all rotted. And I . . . reported all of that"). Koslop testified that following his interview, MSHA performed an inspection "on the mine site" *id.* at 36:14-16, and "we [meaning Hazelton Shaft Mine] shut down because we had to repair a bunch of major plate beams." *Id.* at 37:4-13. *See also id.* at 39:1-8 (recalling other equipment was out of service after the inspection).

Sometime soon after the accident, Makara, Koslop's acting supervisor, held a meeting at Hazelton Shaft Mine. *Id.* at 30:12; 40:20-22.[9] Koslop recalled Makara saying at the start of the meeting, "this run, run, run mentality is done. We need to start being safe." *Id.* at 40:21 – 41:2. Koslop "stopped [Makara] right there," shook his hand and said "I went for miner's rep, Dan. . . . You'll probably hate me in three months." *Id.* at 41:2-7. Koslop also testified that subsequently:

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[8] Makara and Makora refer to the same person in the Transcript.

[9] This meeting was held when Koslop's laborer crew was "still on the shaft side," i.e., before they were transferred to Stockton Plant. Tr. at 40:21-22. *See also infra*.

> I went over to Mike [Bowling, the mine operator], I told Mike Bowling this. I said, 'Out of all the supervisors here,' I said, 'Dan [Makara], I have the most respect for' – I said, 'because he said to run, run, run.' And after that, Mike Bowling all of a sudden, he got all, 'What do you mean my supervisor is talking about me like that? I won't have that.' And then he's like writing stuff down in a book and then they got on his phone and then he did something, like he text messaged or something on his phone and then he got up. But I thought that was strange because I'm thinking, well, he's the mine operator and this guy [Makara]. . . I had respect for him because he said things were going to change. But he actually got in trouble for it. That's what – that was the assumption I got the way Mike Bowling acted when I told him what [Makara] had said.

Id. at 41:10 – 42:4.

Sometime after Koslop's interview with MSHA and after the Makara meeting, Makara told the laborer crew, including Koslop: "You guys need to go down and see Dave Hampton at noon." *Id.* at 31:18-20. At that meeting, Hampton told the miners they "had to go over to the other plant across the street" (i.e., Stockton Plant). *Id.* at 31:21-25. *See also id.* at 32:2-4 ("[Hampton] told us everybody from our shift was going across the street."); *id.* at 47:9-12 ("I feel I was transferred [from Hazelton Shaft Mine to Stockton Plant] just to get me out of the plant, so I wasn't making no observations to tell MSHA.")

The next day, unsure where to "clock in" and seeing two miners from his crew (Zach & Claudio) at Hazelton Shaft Mine, Koslop reported to Hazelton Shaft Mine where he normally clocked in and worked there, perceiving "[n]obody was on the other side of the street." Tr. at 32:4-12. Sometime later that day he was called to Hampton's office and, once there, told Hampton "I'm trying to be an MSHA rep." *Id.* at 32:13-16.[10] Koslop recalled Hampton responding, "I never heard of such a thing in a nonunion shop." *Id.* at 32:16-17. Koslop then asked why two miners from his laborer crew were still at Hazelton Shaft Mine and recalled Hampton's response as "some people handle their emotions better." *Id.* at 32:24 – 33:1. Koslop—who testified "And . . . I'm like, 'Dude, the kid was my best friend. I dug him out; and you're going [to] say that to me?'"—left Hampton's office and went across the street to Stockton Plant. *Id*. at 33:2-6.[11] Sometime soon thereafter, Koslop was called to Bowling's office.[12] *Id.* at 33:6-7. On his way to Bowling's office, Koslop spoke to John Evans, the first shift supervisor at Stockton Plant and told Evans he was going to be an MSHA rep. *Id.* at 33:13-16; 78:5-6. Evans told Koslop "the same thing"—"you can't. You can't be an MSHA rep." *Id.* at 33:16-18.

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[10] I assume Koslop understood the phrase "MSHA rep" to be synonymous with "miner's rep" or "miners' representative." *See* Tr. at 32:16, 33:16; 33:12 (using both phrases).

[11] It is unclear if Koslop's response to Hampton was said out loud or was simply internalized.

[12] Koslop was uncertain if the call to Bowling's office occurred the same or the day after Hampton's comment about his emotions. Tr. at 33:6-9.

When he got to Bowling's office, Bowling apologized to Koslop for Hampton's comment about emotions; Bowling also said that he "had no problems with [Koslop] being miners' rep." *Id.* at 33:7-12; 39:15-22. Bowling shook Koslop's hand, told Koslop "he was all for me going for the MSHA rep and this and that[,] but he wanted me to follow – he goes 'I just want you – he goes 'follow the proper procedure.'" *Id.* at 39:23 – 40:3. Koslop responded:

> I said, 'Yes. I will report it to my foreman,' and then . . . if [my] foreman didn't do nothing, I report it to the acting supervisor and then I go to – call him [Bowling]. He goes, 'Well, . . . I'd appreciate it if you would come to me before you would call MSHA.' . . . And I just thought that was strange . . . That didn't make sense to me."

Id. at 40:4-15.

Koslop testified he applied to be a miners' representative for the second shift at the same time a miner named John, who worked the first shift, applied to be a miners' representative for the first shift. *Id.* at 42:18; 43:12-15 ("me and John both put in for miners' rep, then, after the death.")[13] Koslop recalled the application required notification to mine management, and testified John had told him that John had "put everything on Dave Hampton's desk" because Hampton was the acting mine superintendent. *Id.* at 42:19 – 43:8. Koslop testified "they didn't want a miners' rep there. That was the vibe I got." *Id.* at 43:14-15.

Production was down at Hazelton Shaft Mine when Koslop's laborer crew was transferred "across the street" to Stockton Plant—which he described as "smaller plant with a "totally different setup." Tr. at 49:3-5, 10-16; *id.* at 49:17-18 ("There was a lot to learn when we went over to that other site"). At some point, in the days after the fatal accident, the laborer crew was temporarily assigned to work first shift hours "for a week," but eventually returned to the second shift at Stockton Plant. *Id.* at 44:10-12; 47:3-6:5-15.[14]

d. Assigned Duties at Stockton Plant and the Manlift Incident

Koslop testified that once transferred to Stockton Plant, he "found violations there, too" and mentioned "stuff" to supervisors. Tr. at 47:13-16.[15] Asked what his duties were at Stockton Plant, Koslop explained:

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[13] The exact timing of this application was not identified.

[14] Asked if the two miners from his laborer crew (Zach & Claudio) not initially assigned "across the street" were allowed to remain at Hazelton Shaft Mine, Koslop testified both transferred to Stockton Plant a few days later, but one subsequently quit. Tr. at 46:14 – 47:2.

[15] He recounted an incident at Stockton Plant when an acting foreman (Alex) told him he could not use a high-pressure hose to clean out under a belt. Koslop recalled the foreman saying "That's city water" and "You will have a cheaper water bill"—as the reason he had to use a shovel. *Id.* at 47:17 – 48:19; *see also id.* at 85:14-18.

> My duties [at Stockton Plant], they actually assigned duties to us. And then we were shown – because there was a problem there with something with the belts, like, not – there was some kind of argument over people not doing their jobs. So we were called into an office again, a group [of] us[16] into Mike Bowlings' office. And he had stated that, 'These are your jobs. This is what you have to do,' and this is and that. He goes, 'You's ain't doing your jobs. People are going to get fired.' And all of that. And that's what it – that was the meeting we had there.

Id. at 50:5-17.[17] Based on that meeting, Koslop's assigned duties consisted of "four belts" that he "had to keep clean." *Id.* at 51:10-11. Engle, his foreman, showed Koslop "what to do on these belts," which Koslop described:

> And then it was like – like, the one belt, it was every three and a half hours. Because our duties were to clean out the head and the tail wheels from them and it would take a while because it was – we were running coal about the size of – like, golf ball size coal, pe[a] size coal. And all the coal dust would build up under the belts. And belts, you got about maybe 23 24 to 27, 28 inches off the ground. But all that dust would build up and then back up on the tail wheel and jam the belts up. But it would take about three to three and a half hours on the one. So I would go up there every two hours, blast it all out, hose it all out and all of that. And they were my duties.

Id. at 51:13 – 52:5.

On September 23, 2024, while Koslop was working his typical 4:00 p.m. to 2:00 a.m. shift at Stockton Plant with Engle as foreman, Tr. at 49:19 – 50:2; 51:12, Koslop refused a work assignment. The incident (hereinafter "manlift incident") occurred "right at the beginning of the shift" because "the belt had jammed going through the crusher over at that plant." *Id.* at 52:9-13. Engle instructed Koslop to "get on the manlift and unjam the belt." *Id.* at 52:14-15. Koslop described this manlift as "like a PP&L boom truck that would work on [ ] power lines with a bucket." *Id.* at 54:10-11.[18] Asked to explain how this manlift could be used to unjam the belt, he explained:

> it gets you up to the top of the belt because there's nowhere to stand there. Like, you get in the man lift and then you'll able to come up – the man lift goes to the side of the belt and you'll be able to reach out of the man lift with a bar or whatever and unjam the rocks or whatever is there because sometimes it's pretty big

[16] Koslop testified five miners attended the meeting: "Me, Mark, Claudio, I think everybody that was a laborer on that side that got transferred from the shift was at that meeting." Tr. 50:22 – 51:5.

[17] Koslop testified about this meeting during cross-examination, *see infra*, and placed the date of the meeting as two weeks prior to September 24, 2024. *See infra* D.2.

[18] I understand PP&L to refer to the utility company "Pennsylvania Power & Light."

> rocks. . . . [The belt] was up about . . . 20 feet off the ground, 15 to 20 feet. Because there was no way to get a ladder up to it. . . . I would have had to put the ladder . . . in about two foot of mud. Silt mud. . . . And that silt mud you sink in, you get stuck.

Id. at 58:13 – 59:14. After Engle assigned the task, Koslop went to the manlift and "couldn't find a harness on it." *Id.* at 52:17-18. He was also worried he "wasn't signed off on [the manlift]," meaning he "wasn't task trained on that type of manlift across the street [i.e., at Stockton Plant]." *Id.* at 52:19 – 53:3. Koslop told Engle "I can't. . . . I'm not trained on that [manlift]," *id.* at 53:2-3, and Engle "started flipping out," which Koslop described as "[a]rms flying, yelling." *Id.* at 53:4, 7. At that point, Koslop told Engle "For one, I'm not signed off on the machine" and "[t]here isn't a harness in it." *Id.* at 53:8-10. Engle, who was wearing a harness at the time, "got on the machine," threw a "new style" harness at Koslop, *id.* at 53:11-13, and used the manlift himself to unjam the belt. *Id.* at 53:14-18.

A "couple hours later," Koslop spoke with Engle in Engle's office and Engle said, "we're going to get you task trained on that [man]lift." Tr. at 53:21-23. Koslop told Engle he was familiar with "the up, down, side-to-side" controls, but had never moved or driven this manlift which had wheels and levelers. *Id.* at 53:24 – 54:6. Koslop testified:

> he [Engle] told me he was going to sign me off on the machine. He was going to task train me, but it was raining out. He said, 'Well, after it's done raining, we'll go out and I'll show you how to drive it back and forth and this.' And he put the thing [i.e., a task training slip] in front of me. And I said, 'Well, all right. I'll sign that when I'm done.' It was, like, nonchalantly. Like, yeah. I said, 'I'll sign it after I'm trained on the machine.' And we never got trained.

Id. at 54:15-55:1. *See also id.* at 56:23 – 57:12 ("The paper that he put in front of me. He was going to task train me on the man lift over there. . . . I told him . . . I just wasn't familiar with the forward, the back and the leveling controls . . . And he said that he would go over that with me. And then he put – he didn't say to sign it, but he set the paper in front of me on the desk. Like, 'here's your slip to sign it.' And I said, 'Well' – I pushed it. I said, 'Well, all right. I'll sign it then after I do it.'"). Koslop never signed the slip, *id.* at 59:15-19, and testified he did not feel it was safe for him to use the manlift to perform the assigned task as it would have required him to use the manlift on unstable ground. *Id.* at 57:17-21 ("where you're at on that side, the ground is so unlevel and you have to use levelers and all that. You're in a bucket hanging over to unjam stuff. It's not – it wasn't something I felt safe doing."); 57:24 – 58:12 (further explaining the terrain and the difficulty).

After work on September 23, 2024, Koslop gave another miner (Ryan) a ride home, Tr. at 55:2-5, and Ryan told him Engle had been "snapping that [Koslop] wouldn't sign that paper." *Id.* at 55:5-6, 11-12; 60:1-4. Koslop called Engle when he got home, *id.* at 55:12-13, 60:11-12, and told Engle: "I'm worried they're going to get rid of me.' I said, 'That's the reason' – I said . . . 'I wasn't doing that to be a dick. I wasn't signed off on it. It wasn't safe.'" *Id.* at 55:13-17; *see also id.* at 60:11-17 ("I called Eddie . . . and I told him . . . because I didn't want him . . . thinking I was being an asshole . . . 'The reason I didn't get on that [manlift] is I wasn't trained on it." And I said, 'We're at a different mine site.'"). Engle responding "Oh, yeah" and "Okay. No problem."

Id. at 55:19, 23. Koslop did not know what Engle had done with the slip or with the fact that Koslop had not signed it; he perceived Engle was "fine with [him]." *Id.* at 59:20-25. He also believed Engle had "realized we had to get recertified when we went across the street to that separate site." *Id.* at 55:19-22. *See also id.* at 52:21-24; 80:7-11.

e. Meeting in Bowling's Office on September 24, 2024[19]

The next day, September 24, 2024, before he reported to work, Koslop took a call from Engle around 2:30 p.m. Tr. at 55:24 – 56:2; 71:24 – 72:1. Engle told Koslop he had to go with Engle to see Bowling about the "belt incident from yesterday." *Id.* at 55:24 –56:8 ("He goes, "Yeah, the manlift. You refusing to get on it."); 63:1-15 (recalling that when Engle said Koslop needed to see Bowling, Koslop said "'What for now?'" and Engle said "For the incident with the manlift last night."); 80:3-11. Koslop (and he believed Engle) were both "under the impression [that] when [he and Engle] went into Mike Bowling's office that that's what we were going there for [i.e., for the manlift incident]." *Id.* at 60:18-22; 63:16-17.

When he got to Stockton Plant, Koslop saw Evans, the first shift supervisor, who walked him to Bowling's office. Tr. at 63:22-24.[20] Engle and Bowling were already in Bowling's office when Koslop arrived, *id.* at 56:8-12, and Koslop recalled Engle giving him "this weird look" when Koslop came in. *Id.* at 56:9-10; 64:2-3 ("Eddie had this weird look on his face."). Bowling showed Koslop a picture on Bowling's phone and asked: "Is this your belt?" *Id.* at 64:5-6. Asked to describe what he saw on Bowling's phone, Koslop testified:

> A picture of the belt broken. It was the belt that . . . they're telling me that I left. . . . It was the belt with a bunch of coal all over the floor that – I would never leave something like that. . . . It was up in an elevated headhouse. I don't know the exact name of it because the plant that this was – I was only at the plant for a total maybe five weeks. I was unfamiliar with what they called everything. . . .

Id. at 64:24-25, 65:2-3, 66:4-6, 17-21. Koslop testified Bowling "held his phone up" and "let [Koslop] glance" at the picture."[21] *Id.* at 65:6-7. Koslop testified the belt in the picture "was the belt" he was assigned to, and that he quickly responded to Bowling: "I didn't leave it that way." *Id.* at 65:8, 11-12. *See also id.* at 64:7-10 ("And I was like, . . . 'Yeah, that's the belt that I'm

[19] The progression of the verbal exchange during this meeting is uncertain. As the Transcript reflects, counsel did not elicit testimony in chronology, and Koslop repeatedly testified that this meeting progressed quickly. Tr. at 78:13-17; 86:5-6.

[20] Koslop testified: "Well, I got to the mine site and John Evans was there. John Evans, like, I think it was John Evans, like walked me to the office that day." Tr. at 63:22-24. Koslop's testimony was unequivocal that Evans attended and spoke during the meeting in Bowling's meeting. *See infra*.

[21] Koslop also testified Bowling had handed him his phone. Tr. at 64:5. *But see id.* at 109:3-5 ("The picture . . . I never even got to really look at. It was like somebody showing you a photo, like just pointing the phone up to you and catching a glance at it.").

assigned to clean.' [Bowling said] 'Well, why did you leave it like that?' I said, 'I didn't leave it like that.'"); 78:17-23. Koslop further testified he did not leave the belt—

> the way the picture [Bowling] showed me because it was coal . . . it's, say, a 10-by-10-foot square building. And one belt – with the belt feeding material from the plant is falling onto another small belt. And the building is only – you've got 4 foot of space before the walls on each side. And like, if they said, like, they said that it had to take four hours,[22] if you ran that plant with that belt busted the way it was, the sides would blow off that building in a matter of ten minutes. There's no way possible.

Id. at 66:24 – 67:10. *See also* 67:20-22 ("in the picture [Bowling] showed me of the belt, . . . the room was full of coal.").[23] Koslop explained that because he was trained to know that the belt would fill up "every three and half hours," and because Stockton Plant "shut down at 1:00 [a.m.]" and miners left "at 2:00 [a.m.]," "sometime between 11:00 [p.m.] and 12:00 [midnight] [he] would go up there and hose that down for a final time so then it was – it was good for the night, and [he] wouldn't have to go back up there." *Id.* at 66:7-15. Koslop had been cleaning that belt for two weeks by September 23, 2024. *Id.* at 66:8-9.

At some point during the meeting in Bowling's office, Evans told Koslop the picture depicted the condition of the belt on the morning of September 24, 2024: "that's how it was when they got there. They couldn't run [coal] in the morning." Tr. at 70:2-5. *See also id.* at 60:23-25 ("belt busted"); 61:22-24 ("I was told that the belt broke"); 82:18-21 ("Q: So you were blamed for the backup on the belt resulting in a belt tear, which stopped production? A: Yes.") After Koslop told Bowling he had not left the belt in the condition shown in the picture, Bowling responded "Yes, you did," and Koslop again insisted "No, I didn't." *Id.* at 64:10-12; 78:21-25. At some point, Bowling said "we're going to have to agree to disagree," called Koslop's conduct "dereliction of duties," and informed Koslop "this conversation's over. You're fired." *Id.* at 64:13-15; 65:13-14, 18-19; 79:1-9. Koslop insisted that he *had* been up to clean the belt and repeatedly asked Bowling to "look at your cameras" to verify his presence. *Id.* at 61:2-4; 62:1-5 ("I said, 'Look at your cameras. I was up there."); 64:16-21 ("I tried arguing. I said . . . Check your cameras. I was trained to go up there every three hours. I went up there every two hours. I went up there at 12:30 [a.m.]. There's a camera right there."); 65:15-17; 70:6-12 ("I said 'I was up there at 12, 12:30' . . . 'Look at the camera. They'll tell you what time I was there.' But he would not look at any cameras."); 81:12-13; 87:14-17.

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[22] *See infra* capturing how Evans interjected "four hours" into the exchange.

[23] Koslop provided further testimony as to why the room containing the belt in question could not have looked the way it did in the picture on Bowling's phone. *See* Tr. at 67:16 – 69:4; 68:19 ("I had that place spotless"); 69:1-4 ("And that's why when he showed me a picture . . . I'm thinking, Dude, I made a hammer. I had it cleaned up there. It wasn't that way.") Koslop also questioned when the picture shown to him on Bowling's phone had been taken. *E.g.*, *id.* at 65:8-10 ("it was the belt, but I . . . I didn't even know if the picture was taken that day or it was an old picture."); 84:9-19 (questioning a fire extinguisher he saw in the picture).

At some point during the meeting in Bowling's office, Koslop asked Engle what time he (Koslop) had been in the "flock room" during the prior shift. Tr. at 70:21- 71:4. Koslop had been assigned an extra duty during the shift in question such that he was "doing the flock room and four belts" on the night he was responsible for the belt in the picture. *Id.* at 61:4-21.[24] Koslop testified,

> I looked at Eddie Engle. I said, 'Eddie, what time was I in the flock room with you?' And he said 12:00 [midnight]. And Eddie is like, 'Well, wait. Let me come up with a timeline.' But then Mike Bowling and John Evans both talked over Eddie, and John Evans gave Mike Bowling, 'Oh, it would take four hours for the belt to get that way.' And there's no way possible. The belt would be that way in a matter of five minutes with the plant running.

Id. at 62:5-16.[25] *See also id.* at 70:21-71:10 (reiterating his exchange with Engle); *id.* at 71:11-14 ("And then John Evans said, 'No. That belt . . . it would take four and half hours leaving the belt that way to get that bad.'"); *id.* at 81:16-18 (same); *id.* at 69:16-17 ("Eddie [Engle] was trying to speak up for me and say something, [but] they both talked over him.); *id.* at 86:1-18 ("John Evans talked over Eddie . . . Eddie didn't get a chance to say anything"); *id.* at 71:15-20 (Koslop explaining his belief it would take "a half hour for something [as bad as what was depicted] to happen"); *id.* at 69:21-23 ("Four hours, it would knock the headhouse down"). Koslop insisted it was not part of his duty to check the belt again before it was shut down at the end of the second shift. *Id.* at 87:10-14.

Sometime before leaving Bowling's office, Koslop protested he had not received a verbal or a written warning related to the condition of the belt before termination. Tr. at 79:13-22; 82:4-6 ("I said, 'What do you mean, I'm fired?' I said, . . . 'I didn't get a written warning, I didn't get anything.'").[26] The manlift incident was not mentioned during the meeting and Koslop did not know if Bowling knew of the incident.[27] As Koslop was leaving Bowling's office, Evans said

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[24] Engle had assigned Koslop to "mix[] the flock because we were short." Tr. 61:6-8. Asked to explain what he meant by "flock room," Koslop described "flock" as a sticky substance mixed with coal to allow the coal to float above water and "flock room" as a room containing "two big vats" in which the flock was mixed. *Id.* at 114:20 – 115:13. *See also id.* at 80:22-24 ("The flock I had to put down there every hour depending on how fast the plant was running . . . [Engle would] go in there with me.")

[25] The point of a timeline, Koslop explained, would be to trace Koslop's activity during the shift in question. Tr. at 80:19-21 ("because everything is, like, two- to three-hour increments"); *id.* at 80:16 – 81:15 (recounting his activity and testifying: "And Eddie agreed. He wanted to come up with a timeline to see that [activity].")

[26] Koslop described company policy as requiring a verbal warning, a written warning, and then, for a "third strike," termination at the company's discretion. Tr. at 79:13-22.

[27] On redirect examination, Koslop testified John Evans knew of the manlift incident. *See infra*.

"'I'll escort you off the property.'" *Id.* at 82:7-9. Koslop was terminated "a week before we were supposed to go back over to Hazelton Shaft [Mine]." *Id.* at 49:1-2.

f. Subsequent Call with Engle and The Run-graph

After Koslop left Bowling's office, he got in his truck, drove across the street to Hazelton Shaft Mine to retrieve his toolbox, and drove home. Tr. at 82:10-17. Soon after he left, Koslop spoke with Engle on the phone.[28] *Id.* at 69:5-6; 83:6-7, 22-25. Koslop testified Engle said "'That was bullshit,'" *id.* at 84:25, and "'Dude, they're trying to railroad you.'" *Id.* at 83:5-7. Engle also told Koslop that Bowling wanted Engle to fire him, but Engle had refused. *Id.* at 83:9-13.

At Koslop's request, Engle subsequently sent him a picture of a "run graph" showing that the belt depicted in the picture on Bowling's phone had run from 6:45 a.m. to 8:00 a.m. on the morning of September 24, 2024.[29] Tr. at 69:5-12; 71:21-23 ("when I got the run diagram, it said they ran an hour and 15 minutes on John Evans' shift, first shift"); 85:1-7. Koslop testified "There's no way they could have started that plant up in the morning and ran with that belt broken . . . That means that the belt had a break on first shift." *Id.* at 85:9-11, 13-14. *See also id.* at 86:23-87:2 ("it ran in the morning and there's no way possible if that belt was in the shape it was in.")

g. Prior Discipline

Koslop recalled being involved in two prior disciplinary incidents. One incident, involving a hard hat, occurred "back when [he] first started" and he signed a related "write-up." Tr. at 72:15-20. The second incident occurred during his time at Stockton Plant and he signed a write-up for that incident also. *Id.* at 72:21-24. The second incident involved a broken belt, which Koslop testified had been caused by Engle's failure to appreciate that shutting off a belt did not halt vibration. *Id.* at 73:12-22. Koslop was not part of the laborer crew shoveling under belts when the second incident occurred; rather, he was with Engle in the crusher room booth learning the booth. *Id.* at 72:25 – 73:11. After a problem in the plant, Engle had shut down the problematic belt, but the machine continued to vibrate, causing material to fall from the shutdown belt onto a different belt which then broke from the accumulation. *Id.* at 73:12 – 74:5. Koslop testified that after the belt broke, Engle "was flipping out on all the laborers . . . screaming and yelling" and that every laborer except Koslop refused to sign the write-ups Engle then issued to "all the laborers." *Id.* at 74:6-10; 75:13. Koslop, whose job title was laborer, signed the write-up: "I said, 'Give me it.' I signed the paper. I signed the write-up. I said 'I'll take the heat on that one, Eddie. This way you won't hear shit, I guess.'" *Id.* at 74:11-15. Koslop

[28] Koslop was uncertain if he called Engle or vice versa, *see* Tr. at 65:21-22; 69:6; 84:22-23, 86:19-21, and he recalled the conversation occurring sometime between 20 minutes to an hour after he was terminated. *Id.* at 84:18-23.

[29] In his Statement, Koslop indicated "an anonymous person" had sent him a picture of the run graph for the morning of September 24, 2024, at 7:16 p.m. on September 24, 2024. Statement at 4. At the hearing, he identified Engle as the source. Tr. at 69:10-12; 85:1-4.

received no further discipline on the basis of this write-up and had never been suspended. *Id.* at 74:25 – 75:3, 16-19.

h. Other

Koslop testified he was motivated to become a miners' representative out of concern for safety. Tr. at 33:21-23 ("I was really for safety . . . [M]y friend died. That's what I want to come of this.")

Koslop testified repeatedly to his perception that he was a "marked man" with mine management after reporting safety concerns to MSHA investigators/inspectors following the fatal accident and for vocalizing his interest in becoming a miners' representative. *See* Tr. at 31:2-5 ("and then that's when my life went to total shit because, like it was – I was ganged up on by – that's from that day forward, after I made those reports and they shut that down"); *id.* at 43:14-15 ("like I said, they didn't want a miner's rep there. That was the vibe I got"); *id*. at 45:23-23 ("And when they transferred me across the street, I started to begin to worry about my job."); *id.* at 46:3-4 ("I had this feeling that I was going to get fired"); 75:22 – 76:22 (explaining how after he pointed out "stuff" and "violations" to MSHA, he was moved "across the street" and "then we get called into [ ] Bowling's office"); *see also id.* at 52:19-20 (testifying, in conjunction with the manlift incident, "I was worried about my job at the time"); *id.* at 55:12-18 (testifying, in conjunction with his call to Engle after the manlift incident, "'Eddie, I'm worried they're going to get rid of me.'")

2. Complainant's Testimony on Cross-Examination

On cross-examination, Koslop acknowledged that portions of Hazelton Shaft Mine (i.e., "certain equipment") were still red-tagged when he was moved to Stockton Plant, that Stockton Plant (which had a separate MSHA mine ID from Hazelton Shaft Mine) was operational at that time, and that the laborer crew (i.e., "we") had been told that the move would allow Stockton Plant operation to continue. Tr. at 89:22-25; 90:5-17.

Koslop acknowledged he attended meetings with other members of his laborer crew ("four or five guys") at Stockton Plant. Tr. at 90:24 – 91:6; 92:25 –93:13. He identified one such meeting as the meeting during which the crew had been given specific assignments, which meeting had occurred after "the first belt" Koslop had identified as having been broken by Engle's behavior,[30] and acknowledged that, during that particular meeting, Bowling said management was not happy with how the crew was performing, *id.* at 93:14-20, had assigned the laborers specific areas of responsibility, *id.* at 94:2-5, and told the laborers that if there were any further "problem[s], people could get terminated." *Id.* at 94:6-9. Koslop acknowledged this meeting occurred two weeks before his termination. *Id.* at 94:10-12; *but see id.* at 90:20-24.

On cross-examination, Koslop confirmed the area in the picture shown to him on Bowling's phone on September 24, 2024, was the area he was responsible for. Tr. at 94:13-17.

[30] Koslop testified about this meeting and about the broken belt attributable to Engle's behavior during direct examination. Tr. at 50:4 – 8; 72:21 – 75:15; *see also supra* D.1.d & D.1.g.

He also testified that other hourly miners ("everyone involved" in the accident) interviewed with MSHA investigators after the fatal accident (although he did not know how many miners were interviewed or when their interviews occurred). *Id.* at 95:10 – 96:1. He confirmed no member of mine management attended his interview. *Id.* at 96:2-7.[31]

Koslop also confirmed (in conjunction with RX-D) that his hourly rate at the time he was terminated was $24.71/hour, Tr. at 96:25 – 97:21, that his work week (consisting of 10-hour days Monday through Friday, and 10 hours every other Saturday) averaged to 40 hours of regular time and 15 hours of overtime every week, *id.* at 97:24 – 99:6, and that he was not currently employed. *Id.* at 99:7-9.

On cross-examination, Koslop testified he did not know the date he applied to be a miners' representative, Tr. at 99: 12-17, and that the application was submitted on John's phone at the same time as John's application. *Id.* at 99:19-22, 100:7-19 ("We applied together"). Koslop also acknowledged that the manlift incident was not involved in the meeting at which he was terminated, nor did Bowling or Evans raise it during that meeting. *Id.* at 102:2 – 103:16. Rather, Koslop "brought it up," having said during that meeting that the manlift incident was "what I thought I was there for." *Id.* at 103:9-13.

Asked if the last time he cleaned the belt depicted in the picture on Bowling's phone was at midnight on September 23, 2024, Koslop testified he was "trying to come up" with the timeline of events, and that "it was after midnight because [he] always made it sometime after midnight because it took a three-and-a-half-hour time period before it was up where it had to be hosed[.]" *Id.* at 103:21 – 104:17. Koslop acknowledged he did not know the condition of the belt in the picture on Bowling's phone at the end of his shift on September 23, 2024, adding "I wasn't trained to go back up there to check that." *Id.* at 104:23 – 105:2.

3. Redirect Examination

On redirect examination, Koslop testified he had "no idea" how Bowling knew about the manlift incident; that it had been Engle who told Koslop that he needed to "go into Mike Bowling's office about the . . . incident with the manlift." Tr. at 105:19 – 106:7. Koslop also testified that Evans had been present in Engle's office on September 23, 2024, when Koslop told Engle he was not "certified" on the manlift at Stockton Plant. *Id.* at 106:15-18.[32] Koslop recalled that Evans "mumbled something and he was real mad" and how, as Koslop was leaving Engle's office, he heard Evans say something like "This is bullshit, they're all doing this" and perceived Evans was "aggravated." *Id.* at 106:18-25.

[31] The question posed by Respondent's counsel was broadly phrased to ask about interviews conducted with other miners—"when hourly miners were being interviewed, such as yourself and the others"—and Koslop responded with a reference to "us," but seemed to be referring only to his own interview; indeed, counsel's follow-up question appears to acknowledge that Koslop was referring only to his own interview. *See* Tr. at 96:2-15.

[32] Koslop did not specify at what point during the manlift incident Evans was present in Engle's office—specifically, whether that was before or after Engle unjammed the belt.

Koslop also reviewed the phone call with Engle after he was fired and how Engle had sent him a "screenshot" of the run graph, Tr. at 107:13-25, reiterated it was not part of his duties to check the belt in the picture on Bowling's phone after he had cleaned it and before Stockton Plant shut down for the night, *id.* at 108:1-5, reiterated he had been cleaning that belt for two weeks and doing the "the same thing every night," *id.* at 108:7-14, reiterated that four hours of operation "would back that belt up to the top," *id.* at 108:22-25, and reviewed his reasons for questioning when the picture of the belt he had been shown on Bowling's phone had been taken. *Id.* at 109:1-13 (referring to the red fire extinguisher). Koslop was never able to confirm if the belt had actually been in the condition depicted in the picture on Bowling's phone on the morning of September 23, 2024. *Id.* at 109:14-17.[33]

Finally, Koslop confirmed he had made a complaint to MSHA after his termination, Tr. at 111:5-8, and authenticated CX-C as the Statement he provided to MSHA in conjunction with his Discrimination Complaint. *Id.* at 111:13 – 112:20.

4. Direct Testimony of Respondent's Witness

Michael Basile, Respondent's General Manager for both Hazelton Shaft Mine and Stockton Plant, testified for Respondent. Tr. at 118:18-119:2. Specifically, Basile testified he knew Koslop, *id.* at 119:3-5, and that Koslop's rate of pay at the time he was terminated was $24.71/hour, whereas at the time of the hearing and due to a 2% increase, the laborer rate was currently $25.20. *Id.* at 119:6-12.[34] Basile also testified Koslop's work schedule had consisted of five 10-hour days per week, plus every other Saturday, with the first 40 hours per week paid at the regular rate, and the additional hours paid at a rate of time and a half. *Id*. at 119:17-120:4. However, since Koslop's termination, the work schedule for a laborer had changed and now consisted of five 10-hour days per week with only one Saturday scheduled per month; in other words, the "plus every other Saturday" that Koslop had worked is no longer part of the laborer work schedule at Hazelton Shaft Mine/Stockton Plant and no Saturdays have been scheduled beyond one scheduled in March 2025. *Id.* at 120:5-18.

GOVERNING STANDARDS FOR TEMPORARY REINSTATEMENT

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against a miner for exercising any right protected by the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. The Mine Act also provides that "if the Secretary finds that such complaint was *not frivolously brought*, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. §815(c)(2) (emphasis added). "The purpose of this protection is to encourage miners 'to play an active part in the enforcement of the

[33] Koslop testified he learned the belt had done the "exact same thing" 5-10 days after he was terminated due to "electrical problems." Tr. at 109:17-25. He did not say how he learned this.

[34] Respondent's counsel asked me to take judicial notice that a 2% increase of $24.71 is $25.20. Tr. at 119:13-15. It is so noticed.

Act," in recognition of the fact that "if miners are to be encouraged to be active in matters of safety and health[,] they must be protected against . . . discrimination which they might suffer as a result of their participation.'" *Sec'y of Labor on behalf of Collins v. Crimson Oak Grove Res., LLC*, 45 FMSHRC 866, 869 (Oct. 2023) (quoting S. Rep. No. 95-181, 95th Cong. 1st Sess. 35 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 623 (1978)), *pet. for rev. filed*, No. 23-13665 (11th Cir., Nov. 3, 2023). Congress created temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Crimson Oak Grove*, 45 FMSHRC at 869 (quoting *Legislative History*, at 624-25).

The Commission has held that the scope of a temporary reinstatement proceeding is "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990)). *See also Crimson Oak Grove*, 45 FMSHRC at 869. This narrow standard reflects Congress' intent that "employers bear a proportionately greater burden of risk of an erroneous decision in a temporary reinstatement proceeding." *Crimson Oak Grove*, 45 FMSHRC at 869 (citing *Jim Walter Res*., 920 F.2d at 748, n.11).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." *Legislative History,* at 624-25. In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" with "reasonable cause to believe" and "not insubstantial."" *Jim Walter Res*., 920 F.2d at 747, n.9. "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial" burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV*, *LLC*, 34 FMSHRC 1875, 1878 (Aug. 2012) (citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001)).

In applying this narrow standard, it is my role to "determine 'whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.'" *Crimson Oak Grove*, 45 FMSHRC at 869 (citing *Jim Walter Res*., 920 F.2d at 744). *See also Sec'y on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009) (hearing judge's only task is to determine whether the complaint "appear[s] to have merit"). A temporary reinstatement hearing is considered to be a preliminary proceeding and, as such, "'[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve . . . conflict[s] in testimony at this preliminary stage of the proceedings." *Crimson Oak Grove*, 45 FMSHRC at 869 (quoting *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999)) (brackets original). *See also Cam Mining*, 31 FMSHRC at 1088 (in assessing evidence at temporary reinstatement hearing, Judge must not resolve credibility issues, address conflicts in testimony, or weigh the operator's evidence against that of the Secretary).

The Commission has further stated that "'[w]hile an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the

elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test." *Crimson Oak Grove*, 45 FMSHRC at 869 (quoting *Cam Mining,* 31 FMSHRC at 1088). Those elements are: (1) that the miner engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. *Id.* (citing *Cam Mining*, 31 FMSHRC at 1088). Discriminatory motive may be shown by indirect evidence establishing a motivational nexus, and the Commission has held that "discriminatory motive can be established by circumstantial evidence of: "(1) knowledge of the protected activity, (2) hostility or animus towards the miner regarding the protected activity, (3) temporal proximity, i.e. coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant." *Sec'y of Labor on behalf of Hoover v. Moseneca Mfr. LLC d/b/a American Tripoli*, 46 FMSHRC 1, 3-4 (Jan. 2024) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom*., *Sec'y on behalf of Donovan v. Phelps Dodge Corp*., 709 F.2d 86 (D.C. Cir. 1983)). In applying this narrow standard, I note that a temporary reinstatement proceeding is so preliminary there has usually been little to no discovery or exchange of information or evidence.

DISPOSITION

I conclude the Secretary has provided sufficient evidence to show that Koslop's Complaint was "not frivolously brought" within the meaning of Section 105(c)(2). The facts provided by the Secretary, if true, would establish that Koslop engaged in protected activity and suffered an adverse action (i.e., termination) close in time to the protected activity under circumstances providing reasonable cause to believe there was a causal nexus between the protected activity and the subsequent adverse action.

A. Protected Activity

The Secretary has sufficiently demonstrated that Koslop engaged in protected activity, such that his Discrimination Complaint is not frivolously brought. Under the Mine Act, protected activity includes speaking with an MSHA inspector during a fatality investigation, *e.g.*, *Bewak v. Alaska Mechanical, Inc*., 2010 WL 8607470, at *5 (Aug. 31, 2010) (ALJ); *UMWA on behalf of Roybal v. Wyoming Fuel Co*., 12 FMSHRC 2443, 2456 (Nov. 16, 1990) (ALJ) (operator conceding such); making complaints about unsafe equipment and other safety concerns to mine management and/or MSHA investigators and inspectors, *e.g., Sec'y on behalf of Davis v. Smasal Aggregates & Asphalt*, *LLC*, 28 FMSHRC 172, 175 (March 21, 2006) (ALJ) (complaints made of danger or safety violations are specifically described as protected activity in section 105(c)(1)); expressing interest in and/or taking steps toward becoming a miners' representative, *e.g.*, *Sec'y on behalf of Ramsey v. Vulcan Constr. Materials*, 39 FMSHRC 1033 (May 5, 2017) (ALJ), and refusing a work assignment due to reasonable safety concerns. *E.g.*, *Sec'y on behalf of Barnes, v. Warrior Met Coal Mining, LLC*, 2025 WL 243153, at *29 (Jan. 10, 2025) (ALJ) (citing, *inter alia*, *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989)).

The Secretary's Application identifies four instances of protected activity that Koslop engaged in between July 2024 and his termination on September 24, 2024, and Koslop testified as to all four instances—each one qualifies as protected activity under the Mine Act.[35]

First, the Secretary alleged that "during the month of July of 2024, Complainant engaged in protected activity when he reported safety violations" to mine management: including that "backstops on the belts were missing and/or not working" and "safety concerns with the elevated crusher in the head house." Application, at ¶ 10. Koslop testified that he made such reports. *See* Tr. at 21:17-23:11 (testifying to lack of backstops on the belt involved in the fatal accident, and stating "I had spoken with other supervisors . . . and it was specifically I spoke with Ed Engle about it"); *id.* at 29:14-30:22 (testifying about an incident with the main feed plant belt four to five weeks before the fatal accident which he reported to Makara, who "mentioned" it to Hampton; "like it was all reported").

Second, the Secretary alleged in the Application that "following the fatal accident at the mine on July 25, 2024, Complainant provided an interview and . . . identified various safety violations." Application, at ¶ 10. Koslop testified he gave such an interview and reported numerous safety violations and concerns to MSHA investigators/inspectors, including his concerns about lack of backstops on the belt involved in the accident and the main feed plant belt. Tr. at 21:17-23:11; 29:14-30:22. He also reported numerous other violations and safety concerns to MSHA investigators/inspectors after the accident. *E.g., i*d. at 31:5 – 17 (testifying to cracked beams, cracks in the welds on the headhouse in the crusher; "I brought that up to MSHA"); *id.* at 34:20 – 36:10 (testifying about holes in the conduit, the crusher, cracks underneath all the welds; "I mentioned that to them . . . I pointed all that out to MSHA inspectors . . . This was after the interview.")

Third, the Secretary alleged in the Application that "between July 25, 2024[,] and the date of his termination [on September 24, 2024], Complainant vocalized to mine management his desire to become an MSHA Miners' Representative to make 'the [mine] safe.'" Application, at ¶ 10. Koslop testified he took steps during this timeframe to become a miners' representative, Tr. at 42:17 – 43:25; *id.* at 99:12-17, and had vocalized his desire to become a miners' representative directly to members of mine management, including to his acting supervisor Makara, *id.* at 40:19 – 41:8, acting mine superintendent Hampton, *id.* at 32:12-23, Stockton Plant first shift supervisor Evans, *id.* at 33:13-18, and mine operator Bowling, *id.* at 39:21 – 40:15. Koslop's testimony can be read to suggest Bowling may have already known of Koslop's interest in becoming a miners' representative before Koslop spoke with him about it. *See id.* at 39:22-25 ("because at that same meeting [when Bowling apologized for Hampton's reference to Koslop's emotions] . . . [Bowling] shook my hand and he told me that he was glad[,] he was all for me going for the MSHA rep and this and that . . .). *See also id.* at 42:19 – 43:8 (explaining John from the first shift put materials pertaining to their miners' representative applications on the desk of acting mine superintendent Hampton).

[35] Respondent contended in its Request for Hearing that Koslop's Complaint "does not refer to any specific instance of protected activity," Request for Hrg. at ¶ 2, and "is nonspecific as to any alleged protected activity," *id.* at ¶ 6. After reviewing the Application and Koslop's testimony, I reject this characterization.

Fourth, the Secretary alleged in the Application that "on September 23, 2024, Complainant refused a work assignment from his immediate supervisor when he was tasked to operate a manlift, a piece of equipment with which he was not trained to unjam the Picking Room table." Application, at ¶ 10. Koslop testified extensively about the manlift incident, Tr. at 52:6-55:23; 56:14-60:17, as well as the safety concerns that drove his refusal to perform the assigned task. *See e.g., id.* at 52:24 – 53:1 ("I wasn't task-trained on that type of manlift across the street"); 53:10 (testifying he told Engle "There isn't a harness in it"); 55:16-17 (testifying he told Engle "'I wasn't signed off in it. It wasn't safe"); 57:17-21 ("And over where you're at on that side, the ground is so unlevel and you have to use levelers and all that. You're in a bucket hanging over to unjam stuff. It's not – it wasn't something I felt safe doing"); *id.* at 58:15-22 ("you'll be able to reach out and unjam the rocks of whatever is there because sometimes it's pretty big rocks"); *id.* at 59:3-4 ("you're up about 20 feet of the ground, 15 to 20 feet"). He also testified about his refusal to sign a task training slip for the manlift because he had not actually received any training. *Id.* at 54:18 –55:1; 56:14 –57:12; 59:15-16.

In closing argument, Respondent's counsel characterized the fourth instance of protected activity—i.e., the refusal to perform a work assignment for safety reasons—as a "red herring" because (1) Engle, Koslop's immediate supervisor, "ended up not having a problem" with the refusal and expressed "no animus with it at the end of the day," *id.* at 129: 5-9, and (2) Koslop did not establish that Bowling, who conducted the termination, knew of alleged work refusal, and Bowling, moreover, "didn't use it as a basis" for the termination." *Id.* at 129:10-12, 15-16. These contentions pertain to causal nexus and are addressed below; they do not undermine the Secretary's non-frivolous showing that Koslop engaged in protected activity when he refused a work assignment for reasonable safety concerns.

B. Adverse Employment Action

The Secretary has sufficiently demonstrated that Koslop suffered an adverse employment action when Respondent terminated his employment on September 24, 2024, such that his Discrimination Complaint is not frivolously brought.

Under the plain language of the Mine Act and well-settled precedent of the Commission, suffering a discharge or termination is an adverse employment action. 30 U.S.C. § 815(c)(1); *Moses v. Whitley Dev. Corp*., 4 FMSHRC 1475, 1478 (Aug. 1982). *See also Moseneca Mfr.,* 46 FMSHRC at 4 (finding substantial evidence for ALJ's determination that terminated miner suffered adverse employment action). Koslop testified repeatedly that his employment was terminated on September 24, 2024, Tr. at 62:25 – 63:2; 64:14; 79:7-8, and Respondent acknowledged such in its Request for Hearing ¶ 5.

C. Causal Nexus

Third, the Secretary has sufficiently demonstrated the existence of a causal nexus between Koslop's protected activity and his subsequent termination, such that his Discrimination Complaint is not frivolously brought. To reach this conclusion, I address all four of the circumstantial indicia of discriminatory intent used by the Commission, and conclude that the Secretary has created a non-frivolous issue as to each one.

i. Knowledge of the Protected Activity

The Secretary provided circumstantial evidence of knowledge sufficient to create a non-frivolous issue as to Respondent's knowledge of Koslop's protected activity in relation to his termination. The Secretary need not prove that an operator had actual knowledge of the miner's protected activity, only that there is a non-frivolous issue as to such. C*hicopee Coal Co*., 21 FMSHRC at 718.

Koslop's testimony suggests mine management was fully aware he had engaged in the protected activity of providing an interview with MSHA investigators after the fatal accident. Tr. at 18:17 – 19:16. He sat for the interview in a conference room at Hazelton Shaft Mine, *id.* at 19:20-24, and testified that acting mine superintendent Hampton walked by the open door of the conference room. *Id.* at 20:9-12. The implication is that Hampton may have heard at least Koslop's statement to "the MHSA guy" who got up to close the door that he (Koslop) was "not hiding" what he had to say. *Id.* at 20:11-20. Moreover, other miners gave interviews as well, *id.* at 95:10 – 96:7, thus increasing the likelihood mine management knew of the interviews and who provided them. Mine management was obviously aware that equipment was "red-tagged" at Hazelton Shaft Mine after Koslop's interview and the subsequent inspection. *Id.* at 30:23-31:17; 33:24 – 34:19; 36:14-16. Koslop testified he had informed mine management, including Makara and Hampton, of unsafe conditions at the mine. Tr. at 29:14 – 30:18; 47:13-16. Additionally, Koslop was a friend and neighbor of the miner who died in the accident as well as a first responder on the scene. *Id.* at 16:25; 21:21-22, 27:4 –29:9. It appears both Hampton and Bowling were aware of Koslop's close tie to the deceased miner given the three-way exchange over Koslop's ability to handle his emotions after the accident. *Id.* at 32:12 – 33:12.

Koslop told members of mine management directly about his interest in becoming a miners' representative. Tr. at 40:19 – 41:8 (Makara); *id.* at 32:12-23 (Hampton), *id.* at 33:13-18 (Evans). He spoke also with mine operator Bowling about this interest, *id.* at 39:21 – 40:15, and his testimony suggests that Bowling raised the issue of miners' representative with him, not vice-versa. Additionally, Koslop testified materials pertinent to his application to become a miners' representative were left on Hampton's desk. *Id*. at 42:21 – 43:8. *See also* 30 C.F.R. §§ 40.2(a) (requiring copy of filing to be provided to operator), 40.3(6) (requiring a statement that copy was provided to operator), 40.4 (requiring posting to mine bulletin board).

Koslop's testimony can be read to suggest mine management above his immediate supervisor (Engle) knew or may have known about the manlift incident. Koslop testified that Evans was present at some stage of the manlift incident, Tr. at 106:15-25, and later participated in and verbally supported Bowling during the September 24, 2024, meeting in Bowling's office at which Koslop was terminated. *Id.* at 69:18-23; 81:16-20. It is not implausible that Evans informed Bowling of that incident. Nor is it implausible that Engle (who told Koslop the meeting would pertain to the manlift incident and then, afterwards, told Koslop that Bowling had asked him (Engle) to fire Koslop and he refused)—informed Bowling of the manlift incident. *Id.* at 63:10-17; 83:8-13.

ii. Temporal Proximity

The Secretary provided circumstantial evidence of coincidence in time sufficient to create a non-frivolous issue as to the timing of Koslop's protected activity in relation to the adverse employment action.

As the Commission recognized in *Chacon*, "adverse action under circumstances of suspicious timing" tends to "cast doubt on the legality of the employer's motive." 3 FMSHRC at 2511. There are "no hard and fast criteria [for] determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time."' *Sec'y of Labor on behalf of Hargis v. Vulcan Construction Materials, LLC*, 46 FMSHRC 523, 532 (Aug. 2024). Improper motive has been found in cases with varying periods of time between the protected activity and the adverse action, "ranging from a few hours to a few months." *Id.* (quoting *Sec'y of Labor on behalf of Vega v. Syar Indus., Inc*., 40 FMSHRC 55, 64 (Jan. 11, 2018) (ALJ) (listing cases with parentheticals capturing range from two hours to 15 months)).

All four instances of protected activity identified in the Application, about which Koslop testified, occurred inside a temporal window a little over 2 ½ months long, i.e., between July 2024 (mainly in the aftermath of the fatal accident on July 25, 2024) and September 24, 2024. The surrounding circumstances—which include the accident, Koslop's tie to the deceased miner, and Koslop's increased interest in protecting miner safety following the accident and in becoming a miners' representative—reinforce the suspiciousness of the timing. Koslop's testimony suggests that most of his protected activity, especially his interview with MSHA investigators/inspectors, Tr. at 19:15-20:12, and his repeated vocalization of interest in becoming a miners' representative, *id.* at 32: 15-17; 33:13-39:21– 40:14; 41:6, was visible and known to management, including to Bowling, the mine operator, who delivered the actual termination.

Koslop also testified that Evans, the Stockton Plant first shift supervisor, knew about the work refusal/manlift incident that occurred on September 23 (i.e., the day before Koslop's termination), Tr. at 106:13-17, displayed anger towards that conduct, *id.* at 18-25, and verbally supported Bowling during the meeting held the very next day in Bowling's office at which Koslop was confronted with the picture of the broken belt and terminated. *Id.* at 69:18-23; 81:16-20. Additionally, Koslop testified that Engle, who was "talked over" by both Evans and Bowling during the meeting in Bowling's office, later told Koslop mine management was trying to "railroad" him, *id.* at 83:7, 107:15, a word that suggests he may have been falsely accused of having done one thing (breaking a belt) as a means of achieving a different goal (perhaps removing a miner who had become a source of unwanted safety complaints). It is at least plausible that the adverse employment action stemmed from Koslop's protected activity inside this temporal window.

iii. Hostility or animus towards the protected activity

The Secretary provided circumstantial evidence of hostility or animus toward the protected activity engaged in by Koslop sufficient to create a non-frivolous issue as to animus.

The Commission has held that "[h]ostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon*, 3 FMSHRC at 2511 (citations omitted). *See also Hargis*, 4 FMSHRC at 532 (hostility directed toward a miner may indicate animus, but the proper inquiry focuses on animus towards the protected activity because an operator can be outwardly pleasant toward a miner but still ignore that miner's complaint thereby exhibiting animus toward the protected activity itself).

Koslop identified several instances of seeming animus toward his protected activity. He testified that, prior to the accident, his safety complaint about the main feed plant belt was met with disinterest by Hampton. Tr. at 30:11-18. Two members of mine management, Hampton and Evans, responded to Koslop's vocalization of interest in becoming a miners' representative with discouragement, *id.* at 32:12-17; 33:13-18, and Bowling—despite assuring Koslop that he (Bowling) had "no problems" with, and was "all for," Koslop being a miners' representative, *id.* at 33:11-12, 39:24:25—discouraged him from contacting MSHA prior to addressing safety issues directly with Bowling. *Id.* at 39:21 – 40:15. *See Sec'y of Labor on behalf of Adkins v. Greenbrier Minerals, LLC*, 46 FMSHRC 329, 337 (May 14, 2024) (ALJ) (citing *Sec'y of Labor on behalf of McGary v. Marshall Co. Coal*, 38 FMSHRC 2006, 2013-15 (Aug. 2016) and finding possible animus in temporary reinstatement where safety supervisor discouraged miners from calling MSHA prior to addressing safety concerns with management). *See also* Tr. 40:19 – 42:4 (describing Bowling's reaction to Koslop's recount of Makara's speech involving the "run, run, run mentality" and Koslop's expression of support for Makara's interest in safety after the fatal accident); 43:12-22.

Koslop testified Evans was present and displayed aggravation upon witnessing Koslop's refusal to operate the manlift as requested by Engle at Stockton Plant on September 23, 2024. Tr. at 106:15-25 (Evans "mumbled something and he was real mad. And then I heard 'This is bullshit, they're all doing this,' when I walked out the door . . . I could tell he was aggravated"). This is potentially significant as Evans participated in and verbally supported Bowling during the meeting at which Koslop was terminated. *E.g.*, *id.* at 69:13-70:5; 71:21-23; 81:16-20; 82:8-9; 83:5-7; 86:14-16. *See Vulcan Constr.,* 46 FMSHRC at 532 ("animus of a supervisor who participates in the termination decision in any way can be imputed to the operator")

During his opening and closing statements, Respondent's counsel suggested that Respondent's conduct, as identified through Koslop's own testimony, undermined any showing of hostility or animus towards the protected activity he had alleged. Specifically, Respondent's counsel pointed out that: (1) Respondent did not impede Koslop's (or any other miner's) ability to interview with MSHA investigators/inspectors following the fatal accident and to share safety concerns with them; in fact, Respondent provided the conference room in which the interviews were conducted and no member of management attended; Tr. at 117:4, 95:10 – 96:15; 19:15-21:15; (2) there was a miners' representative (John) for the Stockton Plant first shift employed by Respondent (at least through Koslop's termination, if not beyond), *id.* at 117:5-11; 99:19-20; 100:2 – 101:178; (3) Koslop's immediate supervisor Engle did not "have a problem" with Koslop's work refusal during the manlift incident, *id.* at 129:5-9, 14-15; 55:23; and (4) Koslop

was transferred and given work at Stockton Plant following his MSHA interview and reporting of safety concerns. *Id.* at 117:21-4; 47:3-12.

The conduct identified by Respondent's counsel could, ultimately, undermine Koslop's ability to show animus and, by extension, causal nexus, but it does not, at this early stage of the proceeding, negate the Secretary's showing of a non-frivolous issue as to animus. Again, there has been little to no discovery or exchange of information and evidence at this early stage, and as such, there is no way to know if the present evidence can truly bear the import placed on it by Respondent's counsel. Evidence may exist to undermine the import of Respondent's conduct vis-à-vis animus,[36] and Koslop has certainly placed in dispute Respondent's contention that he was terminated for conduct related to dereliction of duties on his final shift. Given the standard for temporary reinstatement, I will not weigh the Respondent's counsel's present characterization of the Secretary's evidence against the Secretary.

iv. Disparate Treatment

In *Chacon*, the Commission explained that "[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the [Complainant] escape the disciplinary fate which befalls the latter." 3 FMSHRC at 2512. Evidence of disparate treatment is not necessary, however, when other indicia of discriminatory intent are present. *Id*. at 2510-2513.

Koslop testified he did not receive a verbal or a written warning vis-à-vis the condition of the belt shown to him on Bowling's phone on September 24, 2024, for which he was terminated, and understood such to be required by "the company's policy." Tr. at 79:13-22. He also testified repeatedly to his perception that he was a "marked man" with mine management and believed his job was in jeopardy after and seemingly because he identified reported safety concerns to MSHA and expressed his interest in becoming a miners' representative. *E.g., id.* at 31:2-5; 43:14-15; 45:23-24; 46:3-4; 52:18-20; 55:11-18. There is also Engle's statement, recounted by Koslop as, "Dude, they're trying to railroad you," *id.* at 83:7; 107:15, which could suggest Koslop had been treated differently than other miners. At this stage, while there has been no identification of specific employees who escaped the disciplinary fate that befell Koslop (i.e., termination), the evidence provided at this stage is sufficient to create a non-frivolous issue as to disparate treatment as well.

CONCLUSION

I find there is reasonable cause to believe that Koslop engaged in four instances of protected activity between July 2024 and September 23, 2024; that, following such, he suffered an adverse employment action; and that the has been a non-frivolous showing that Respondent was aware of Koslop's protected activity, there was a close connection in time between the protected activity and Koslop's termination, members of mine management exhibited animus

[36] Perhaps, for example, John on the first shift has encountered animus towards his protectd activity as a miner's representative that Koslop is, at present, unaware of. Or perhaps Engle, even if he did not have a "problem" with Koslop's work refusal, knows someone who did.

toward Koslop's protected activity, and Koslop may have been subject to disparate treatment. Therefore, given the arguable nexus shown between Koslop's protected activity and his termination, I conclude the Secretary has carried her burden to prove Koslop's Complaint was "not frivolously brought" under Section 105(c)(2) of the Mine Act.[37]

ORDER

For the reasons set forth above, it is **ORDERED** that the Secretary's Application for Temporary Reinstatement be GRANTED, and that **Jamie M. Koslop** be **immediately TEMPORARILY REINSTATED** to the position he held on the date of his discharge from Atlantic Carbon Group, Inc., or a comparable position within the same commuting area, at the rate of pay currently applicable to that position, with all of the benefits he was receiving at the time of his termination. To the extent the amount of overtime Koslop was typically able to work prior to his termination is no longer available, he shall be given the same opportunity to work overtime as is currently available to his position.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this Court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying Discrimination Complaint as soon as possible.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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[37] At the close of the hearing, Respondent's counsel stated Respondent's position that, per Koslop's own testimony, "he was terminated as a result of conditions that were shown to him that had nothing to do with any of the asserted protected activity." Tr. at 116:19-24. I will not address the merits of Respondent's defense in this temporary reinstatement proceeding. *See Moseneca Mfr.,* 46 FMSHRC at 4. Moreover, Koslop's testimony placed those "conditions" in dispute.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 2025

SECRETARY OF LABOR, on behalf of SHAUN CHAPMAN, Complainant, v. BUCHANAN MINERALS LLC, Respondent.	TEMPORARY REINSTATEMENT Docket No. VA 2025-0026 MSHA No. NORT CD 2025-02 Mine: Buchanan Mine Mine ID: 44-04856

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT OF SHAUN CHAPMAN

Before: Judge Simonton

I. INTRODUCTION

This case is before me on application for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Buchanan Minerals LLC, pursuant to section 105(c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) ("Act" or "Mine Act"). On February 9, 2025, pursuant to 29 C.F.R. § 2700.45(c), Respondent requested a hearing on these matters. A virtual hearing was conducted on February 19, 2025, via the Zoom platform.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. The operations of Respondent are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. Complainant Shaun Chapman is a "miner" within the meaning of the Federal Mine Safety and Health Act.

3. Buchanan Mine is a mine within the meaning of the Federal Mine Safety and Health Act.

4. Complainant Shaun Chapman was terminated from employment at Buchanan Mine on or about December 2, 2024.

5. Complainant Shaun Chapman filed a complaint with MSHA on or about December 4, 2024.

Tr. 6.

III. ANALYSIS AND FINDINGS

Shaun Chapman was terminated from his position as a roof bolter at Buchanan Minerals on December 2, 2024. Tr. 9. He has worked as a roof bolter, also known as a pinnerman, for 23 of his 25-year long mining career. Tr. 9-10, 32. As a roof bolter, he was responsible for ensuring that the ribs and top of the mine are secure and that the area is safe to progress forward with coal mining. Tr. 10, 32. His job duties involved examining areas for loose rock and installing metal rods into holes using glue in order to connect rocks together to keep them from falling. Tr. 10, 13. If a roof bolter is rushed during the installation process, rock falls can occur from improperly set glue. Tr. 11. Roof bolters work on shift with one partner. Tr. 11.

Chapman began his employment with Buchanan Minerals on August 10, 2021. Tr. 11. Beginning in January 2024, TJ Dotson became his supervisor. Tr. 12. Chapman testified that Dotson's management style was very "rushy" and that he wanted employees to finish bolting quickly in order to move onto cutting coal. Tr. 12. This interfered with Chapman's work because bolting takes time to do properly and rushing through the bolting process can create an unsafe environment. Tr. 13. Under Dotson, Chapman felt pressured to prioritize working quickly at the expense of safety. Tr. 18.

In August 2024, Chapman witnessed a tense conversation between Dotson and Chapman's roof bolting partner, Gary Ramey. Tr. 16. While Chapman and Ramey were bolting a rib that was over nine feet high and that they believed could be a citable violation, Dotson approached them to tell them that the rib did not need to be bolted. Tr. 16-17, 18. Chapman testified that Dotson told them to "stop cutting into [his] coal run time." Tr. 17. Chapman responded by asking Dotson what was more important, coal run time or safety, and that the rib needed to be bolted. Tr. 17. After this argument, Chapman felt that he and Ramey had targets on their backs because Dotson was angry with them. Tr. 17-18. This caused Chapman to fear for his job security. Tr. 18.

Shortly after this incident, Dotson and Ramey had another argument that led to the termination of Ramey's job. Tr. 19. Chapman testified that Dotson had instructed them to run a different bolter, but Ramey refused because he believed he could not run it. Tr. 19-20. Ramey and Dotson then had an argument, and Ramey left the mine in order to meet with HR. Tr. 20. Chapman participated in HR's investigation into this incident, informing them that he felt that Dotson had been smothering them, that this argument had been built-up, and that Ramey did not deserve to get fired. Tr. 21-22. He also informed HR that he felt like he had a bullseye on his back due to his poor relationship with Dotson. Tr. 23. Ramey was terminated as a result of the investigation for not following orders. Tr. 22. Chapman testified that he was concerned for his own job following Ramey's termination. Tr. 22

In November 2024, a dispute occurred between Dotson and Chapman. Tr. 23. Dotson told a group of miners, including Chapman, to take ventilation tubing through the return to prepare for a cut-through. Tr. 23. One miner was still cutting, which caused dust to go down the intake. Tr. 23. When Dotson saw the dust, he told the group that "it's got to be done." Tr. 24. Chapman further testified that when they cut through the breakthrough, a right-handed break, the ventilation would come over the top of the miner man and the buggy man, causing all the dust to come over the top of them. Tr. 24. When the dust came, Chapman stated that he told Dotson that he didn't know how Dotson slept at night after putting his men into that kind of dust, to which Dotson responded that he was the boss, and he would run it how he wanted. Tr. 24. In spite of the dust, which was too much for the area, Chapman still entered the return to get the ventilation dust because failing to do so would be considered not following an order and could result in his termination. Tr. 24-25.

Chapman was ultimately called into a meeting on November 26, 2024, with Michael Adams, Brian Richardson, Jordan Smith, and Josh Honaker, members of mine management, concerning Chapman's alleged misuse of a personal dust monitor ("PDM"). Tr. 25-27. The PDM measures dust while work is being conducted. Tr. 13. It was not required every shift and would be shared between the two roof bolters, depending on where the ventilation was routed. Tr. 13-14, 41. Chapman testified that instructions on how to use the PDM differed by shift, and that sometimes it was to be located on his person and other times it would be left on the bolter. Tr. 14-15, 43. Chapman did not know how these decisions were made, but depending on the day's specific instructions, he would always try to follow them. Tr. 15, 44.

During the meeting, it was alleged that Chapman had placed the PDM in his work bag to keep it from accessing dust. Tr. 27. Chapman was surprised by the allegation, and he contended that he had placed it in his work bag near the end of his shift so that he would not forget it when leaving at the end of his shift. Tr. 27-28. He is the one who brings it in ninety percent of the time at the end of a shift. Tr. 28. Chapman testified he told Dotson he had the PDM. Tr. 28. The date this incident allegedly occurred was not provided to Chapman. Tr. 27. At the conclusion of the meeting, Chapman was suspended for misuse of the PDM. Tr. 29.

Chapman was terminated via phone call on December 2, 2024. Tr. 29. He had no prior disciplinary infractions or written warnings prior to his termination. Tr. 30. Chapman believed that Dotson was a factor in the decision to terminate his position, because Dotson and Jordan Smith, who was present at the November 26, 2024, meeting, are good friends. Tr. 30. Chapman filed a complaint with MSHA shortly after his termination to try and get his job back. Tr. 31. He filed an amended complaint, which was signed electronically, on December 9, 2024. Tr. 35-36. MSHA composed the narrative in both the complaint and the amended complaint based on information provided by Chapman. Tr. 39-40.

Michael Adams, the human resource manager at the mine, testified for the Respondent. Tr. 49. As HR manager, he is responsible for hiring employees, disciplinary actions, and the termination of employees. Tr. 49-50. Adams was familiar with the circumstances surrounding Chapman's termination but refreshed his recollection of the incident prior to giving testimony by reviewing Chapman's personnel file. Tr. 51, 59-60. On November 20, 2024, Chapman had been assigned to wear a PDM while operating the roof bolter. Tr. 51. The machine he had been

assigned required maintenance, so Dotson initially instructed Chapman to place the PDM on a toolbox to prevent it from being damaged. Tr. 52. While preparing to crop dust in the area, Dotson then instructed Chapman to get the PDM and wear it. Tr. 53. Later on, Dotson noticed that Chapman did not have the PDM and asked him where it was. Chapman responded that it was in his dust bag down at the end of the track. Dotson then asked what it was doing in the backpack and Chapman responded, "Well, it's dusty what did you want me to do with it?" Tr.53.

As part of the investigation, Adams gathered facts, conducted interviews with individuals that had been involved, and submitted recommendations to the vice presidents of HR and operations to make the final decision. Tr. 69. In an environment where crop dusting was ongoing, Adams would expect the readings to be very high, which was not reflected in the report from Chapman's monitor. Tr. 61. He did not personally examine the dust monitor and did not know who in the three-person department examined it. Tr. 60. Adams testified he believed that because Chapman knew the rules surrounding PDM usage, he left the PDM in his bag deliberately despite orders from Dotson. Tr. 64.

Adams further testified that mine management learned about this incident from Dotson. Tr. 62. During the investigation of the incident, Dotson informed Adams that Chapman had confessed that he had put the PDM in his bag. Tr. 54. Dotson then witnessed Chapman removing the PDM from his bag. Tr. 54. This was corroborated by another miner who overheard Chapman tell Dotson the PDM was in his bag and observed Chapman remove it from the bag. Tr. 54. Adams testified that Dotson was not involved in the decision to terminate Chapman and did not offer any input, suggestions, or recommendations. Tr. 54-55. He also testified that during the investigation into Ramey, Chapman did not express any concern about Dotson and that Chapman just confirmed that Dotson asked Chapman and Ramey to switch sides and Ramey refused to do so. Tr. 55-56. In fact, Chapman had never raised any concerns about Dotson's attitude prior to his own termination. Tr. 56.

Adams maintains that Chapman was suspended on November 26, 2024, and terminated on December 2, 2024, solely for his misuse of the dust monitor. Tr. 56-57. Adams was not aware of any alleged incidents of protected activity or any incidents between Chapman and Dotson. Tr. 57. There were no prior disciplinary actions or warnings in Chapman's personnel file. Tr. 63. This incident is the first time Adams was aware of a miner being terminated for misusing a dust pump. Tr. 67. While unusual, a miner may be terminated without prior warning, particularly for a safety issue. Tr. 63.

IV. DISPOSITION

Section 105(c)(1) of the Mine Act provides that no person shall discharge or otherwise discriminate against a miner for exercising rights under the Act. It states, in pertinent part, "[n]o person shall discharge or in any manner discriminate against … or otherwise interfere with the exercise of the statutory rights of any miner … because such miner … has filed or made a complaint under or related to this Act, 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." 30 U.S.C. § 815(c)(1)(Emphasis provided by the *Commission in Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982)).

Pursuant to 105(c)(1), if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint. 30 U.S.C. § 815(c)(1). The Commission has noted that the parameters of a temporary reinstatement hearing are narrow, being limited to a determination with respect to whether a miner's discrimination complaint has been frivolously brought. *See Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd.*, 920 F. 2d 738 (11th Cir. 1990). Accordingly, it is only necessary to determine whether the Applicants' complaints *appear* to have merit. (Emphasis added). *See* S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978). In *Jim Walter Resources, Inc. v. FMSHRC*, the Eleventh Circuit found the "not frivolously brought" standard comparable to a "reasonable cause to believe" standard. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Eleventh Circuit concluded that the low burden imposed by the "not frivolously brought" standard reflects clear Congressional intent to make temporary reinstatement relatively easy to obtain. *Id*. at 748.

The Commission has consistently and historically found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) *citing Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited *in any way* in exercising any rights afforded by the legislation."')(quoting S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978) (emphasis added)).

Although the Secretary is not required to present a prima facie case in a temporary reinstatement proceeding the Commission has determined it useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). In order to establish a prima facie case under Section 105(c), a miner must show: (1) that he engaged in a protected activity; and (2) that his termination was motivated, at least in part, by the protected activity. *See Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980).

The Commission has held that evidence of motivation may be shown by circumstantial evidence. *See, e.g., Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom., *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) (holding that illegal motive may be established if the facts support a reasonable inference of discriminatory intent); *Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (Jan. 1984). Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include: (1) knowledge by the operator of the protected activity, (2) hostility toward the miner because of his protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complaining miner. *Jungers v. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).

The Secretary has sufficiently demonstrated that the Application for Temporary Reinstatement was not frivolously brought. As stated above, a miner must raise a nonfrivolous claim that he engaged in a protected activity that has an arguable connection to an adverse employment action. The facts presented by the Secretary in this matter are sufficient to establish that there was reasonable cause to believe that there was such a causal nexus.

I find that the Secretary has sufficiently demonstrated that the Complainant engaged in a protected activity. It is clear from Chapman's testimony that before his suspension and subsequent termination, he raised safety concerns regarding dust levels with his supervisor, TJ Dotson. Even despite continuing to work through dangerous conditions, raising safety concerns constitutes a protected activity.

I also find that the Secretary has sufficiently demonstrated that the Complainant suffered an adverse employment action when he was terminated. It is well established precedent that termination is an adverse employment action. Chapman's termination came approximately two weeks after the protected activity occurred. As such, the Complainant has suffered an adverse employment action.

Although Respondent claims that the decisionmaker who chose to terminate Chapman had no knowledge of any alleged protected activity when the decision to terminate was made, the Secretary does not need to prove that the operator has actual knowledge of a complainant's protected activity in a temporary reinstatement proceeding, only that there is a nonfrivolous issue as to knowledge. *Sec'y of Labor obo Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 718 (July 1999). There is conflicting testimony about whether HR was aware of Chapman's poor relationship with Dotson. Additionally, while Adams testified that the decision to terminate Chapman was based solely on the misuse of the PDM and that Dotson did not play a role in the termination, some members of management are friends with Dotson and they learned about the incident from him. At this preliminary stage, it is not my duty to resolve conflicts in the testimony and I find that there is a nonfrivolous issue with regards to knowledge.

The temporal proximity between the protected activity and the adverse employment action supports the causal nexus. It is undisputed that the Complainant engaged in the protected activity approximately a week prior to his suspension on November 26, 2024, and was then terminated on December 2, 2024. This is a short period of time, which meets the threshold to establish that the timing is sufficient to support the nexus.

"Hostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted). In his testimony, Chapman described how Dotson prioritized coal cutting over safety and described several disputes between Dotson and either himself or other employees concerning safety concerns. Further, prior to his own termination, Chapman observed the termination of his partner Gary Ramey after an argument with Dotson. The two terminations follow very similar timelines, beginning first with an argument with

Dotson over safety, shortly followed by an HR investigation, and finally culminating in a termination. These facts are sufficient to establish potential animus.

A temporary reinstatement hearing must be a full evidentiary process that permits all relevant evidence relating to the adverse employment action. *Sec'y of Labor o/b/o Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 165-66 (Apr. 2021). The Respondent claims that Chapman was terminated for reasons solely related to misuse of the PDM. Accordingly, the Respondent was permitted to present evidence and testimony throughout the hearing in support of this position. "[R]esolving conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's prima facie case" are simply not appropriate during a temporary reinstatement proceeding. *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009) (citing *Chicopee Coal Co.* at 719). While the Respondent's evidence may be relevant or dispositive in a later discrimination proceeding, the only purpose it serves in this proceeding is as an alternative theory as to why the Respondent discharged the Complainant. *See Sec'y of Labor o/b/o Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). There is no obligation to adopt this theory and it does not demonstrate that the Complainant brought forth a frivolous complaint.

III. DECISION AND ORDER

For all of the reasons articulated above I find that the Complainant presented sufficient evidence at hearing to render his discrimination complaints non-frivolous. Accordingly, **IT IS ORDERED** that Respondent Buchanan Minerals LLC immediately reinstate Complainant Shaun Chapman no later than **February 27, 2025**, to the position he held immediately prior to the December 2, 2024 termination or to a similar position at the same rate of pay and benefits and with the same or equivalent duties assigned.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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February 27, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GENTRY MOUNTAIN MINING LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2024-0064 A.C. No. 42-02263-588942 Mine: Gentry Mine #3

DECISION AND ORDER

Appearances: Bryan Kaufman, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 515, Denver CO 80204-3516

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Paul Cannon, Attorney, 53 West Angelo Ave., Salt Lake City, UT 84115

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Gentry Mountain Mining Company ("Gentry Mountain" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] This docket originally contained six 104(a) citations. Citation No. 9159960 was settled prior to hearing. The five remaining citations are associated with a proposed penalty of $3,333.00 against Gentry Mountain.

The parties presented testimony and documentary evidence regarding the citations at issue at a hearing held on October 28, 2024, in Salt Lake City, Utah. MSHA Inspectors David Turner, Sydel Yeager and Jose Hernandez testified for the Secretary. Gentry Mountain safety director Randy Defa testified for the Respondent. After fully considering the testimony and

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, Respondent's exhibits, Secretary's brief, and Respondent's brief are abbreviated as "Jt. Stip.," "Tr.," "Ex. GX–," "Ex. R–," "S. Br.," and "R. Br.," respectively.

evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9730062 and 9730066 as issued and **AFFIRM** Citation Nos. 9730069, 9730072, and 9730073 as modified herein.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Gentry Mountain Mining Company, LLC, was, at all relevant times, the "operator" of Gentry Mine No. 3. ID: 42-02263, as defined in §3(d) of the Mine Act, 30 U.S.C. § 803(d).

2. The Gentry Mine No. 3 is a "mine," as defined in the Mine Act.

3. Gentry Mountain Mining Company, LLC. has been the "operator" of King 6 Mine. ID: 42-01599, as defined in §3(d) of the Mine Act, 30 U.S.C. § 803(d) from July 7, 2024, until present. This mine has been in idle status since before July 7, 2024.

4. The King 6 Mine is a "mine," as defined in the Mine Act.

5. Mine No. 3 is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

6. Gentry Mine No.3 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1970, 30 U.S.C. §§ 801-965.

7. The citations at issue in this proceeding were properly served upon Gentry Mountain Mining Company, LLC, as required by the Mine Act.

8. The citations at issue in this proceeding may be admitted into evidence for the purpose of establishing the issuance but no stipulation is made regarding their truthfulness or relevancy of any statements asserted therein.

9. Gentry Mountain Mining, LLC, demonstrated good faith in abating the alleged violations.

Tr. 9.

III. FINDINGS OF FACT AND CONCLUSIONS

The citations at issue at hearing were issued by MSHA Inspector David Turner during inspections conducted on May 31, 2023, June 1, 2023, June 7, 2023, and June 8, 2023, at Gentry Mine #3.

A. Citation No. 9730062

i. Background

When traveling through the main haulage way during his May 31, 2023, inspection, Inspector Turner encountered loose ribs located at the outby and inby corners of a crosscut. Tr. 43, 45, 47; Ex. GX-1. The outby rib was estimated to be two and a half feet wide, seven feet tall, and up to eight inches thick. Tr. 46. A second loose rib was located at the inby corner of the same crosscut, estimated to be seven feet high, four foot thick, and six feet wide. Tr. 47, 60. As the main haulage way is also the escapeway and primary travel way into the mine, miners would frequently walk beside the ribs. Tr. 47-48. A broken-down roof bolter was parked in the crosscut, between the two loose ribs, requiring employees to walk within two feet of either of the loose ribs to get around the machine. Tr. 48-49, 62. At the time of the inspection, the inspector did not observe anyone working on the bolter. Tr. 63.

When a rib falls, it will either tumble down or crush out. Tr. 64. When the outby rib was removed, it crumbled and fell approximately three feet into the haulage way. Tr. 51-52. The inspector did not witness the removal of the inby rib because it required the use of equipment. Tr. 52. The inspector testified that when he interviewed miners after the inby rib was removed, they informed him that the rib came right down after it had been hit with a scoop and fell into the entry. Tr. 58, 60. Based on this information, the fallen rib would have taken up seven to eight feet of the entry, leaving the remaining eight to ten feet to walk. Tr. 58-59. In addition, sloughage was located near the bad rib; while miners can walk in the sloughage, it does present a tripping hazard. Tr. 59.

Injuries associated with being struck by a falling rib include crushing-type injuries that could potentially be fatal. Tr. 53. The inspector assigned the severity of injury as "permanently disabling," which he testified was generous and that he gave the operator the benefit of the doubt with this designation. Tr. 53. The inspector also determined that this violation was significant and substantial. Tr. 54. One person, any miner on foot in the working section at any given time, would be affected by a falling rib. Tr. 54. Negligence was assessed as moderate, because it was outby, two breaks of the last open crosscut, and because the lifeline was on the other side of the entry at the time of inspection. Tr. 55. Further, the section boss should be doing pre-shift evaluations in the area to ensure safety. Tr. 55-56. Where miners walk cannot be regulated on a daily basis and they could be walking anywhere in the entry. Tr. 65.

Randy Defa, the safety director at Gentry Mountain, testified for the Respondent. He did not believe the outby rib was as dangerous as the inspector described, because it was leaning inwards and tapered from the bottom up. Tr. 233-235. When it was removed, it slid down the wall. Tr. 235. He also testified that the ribs were located in the air course of the escapeway, and not the escapeway itself, which is only six feet wide. Tr. 235-236. When the rib was brought down, it fell on top of the sloughage lining the edges of the entry. Tr. 237. The Respondent trains its miners to avoid walking on the sloughage because it is a tripping hazard and they were unlikely to be in the area where the rib ultimately fell. Tr. 239, 242-243. He also testified that the bolter was further in than what the inspector described and that it was not within two feet of the bad rib. Tr. 253.

ii. Fact of Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law and the standard applicable here, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

On May 31, 2023, Turner issued 104(a) Citation No. 9730062, which alleged:

> The ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the ribs and coal. At the time of inspection in the intersection of X-cut 14 in the #4 entry of the 5th West Development Section (MMU 001), it was observed to have multiple locations were loose ribs w. On the outby corner, one loose rib was pried down measuring at least 2.5 feet wide, 7 feet tall, and 8 inches thick. The loose rib corners were in the primary escapeway, which is also the main haulage way for 5th West Section. It was also observed that on the inby corner the rib was severely cracked and reviling a potential large piece of the inby corner that was not secured or supported. These areas around the ribs and bad corners are at least 10' high and the intersection is higher. This area is regularly traveled by any miner working in the 5 West section throughout the day. If these ribs were to fall, they would cause crushing type injuries to a miner passing by the area.
>
> Standard 75.202(a) was cited 13 times in two years to mine 4202263 (13 times to the operator, 0 times to)

Ex. GX-1; Tr. 45.[2]

Turner designated the citation as a significant and substantial violation of 30 C.F.R. § 75.202(a) that was reasonably likely to cause an injury that could reasonably be expected to be "permanently disabling," would affect one miner, and was caused by Respondent's moderate negligence.

30 C.F.R. § 75.202(a) states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The parties do not contest the fact of the violation. Accordingly, I affirm that there was a violation of 30 C.F.R. § 75.202(a).

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2. All errors contained in this narrative of the cited condition or practice are reflective of the language used by the inspector in the issued citation.

iii. Gravity and S&S

The inspector assessed the hazard as reasonably likely to cause an injury or illness, because of the frequent use of the haulage way and because it was a primary escapeway. He designated that the injury would reasonably be expected to be permanently disabling, because falling rib could cause crushing type injuries. The Respondent contends that the likelihood of injury should be reduced to unlikely and the severity of the injury should be reduced to lost workdays or restricted duty because the loose rib was not actually located in the escapeway, but rather adjacent to it, and this location posed no risk to miners who were often protected by the man trip. After reviewing the relevant testimony and evidence, I credit the inspector's testimony and his assessment of the conditions at the time of the violation and affirm these designations. *Buck Creek Coal* 52 F.3d 133, 135-36 (7th Cir. 1995).

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

I have already determined that a violation of a mandatory safety standard occurred, satisfying the first step of the S&S analysis. As Inspector Turner testified, the hazard associated with the violation is crushing injuries from loose rib falling onto a miner. The location of the violation is the main escapeway where miners travel frequently. The inspector described the loose ribs as large and there was uncertainty regarding how they would fall and where they would land. The parked roof bolter also required miners working on the machine or passing through the escapeway to maneuver around the bolter and be in close proximity to the loose ribs. I defer again to the inspector and find that based on these facts, the violation was reasonably likely to cause the occurrence of a discrete safety hazard. It is also reasonably likely given the size of the loose ribs that the injury in question would be of a reasonably serious nature. The S&S designation is affirmed.

iv. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Turner assessed negligence as moderate but acknowledged at hearing that a finding of high negligence could be supported. Management should have recognized the loose rib condition and removed it, but the loose rib condition was located across from the lifeline and there would be no exposure to the ribs when using the lifeline. I reluctantly affirm the negligence level as moderate.

B. Citation No. 9730066

i. Background

On June 1, 2023, Inspector Turner issued a citation for a come-along missing a safety latch. Tr. 67, 69; Ex. GX-4. A come-along is a piece of machinery described as a miniature manual hoist with a handle, chain, two hooks, and a ratcheting mechanism that is used to lift and maneuver heavy objects. Tr. 37. Inspector Turner testified that it was important for equipment like the come-along to have safety latches to secure the load, otherwise the load may detach from the equipment's hooks. Tr. 38, 72, 74. He has never seen a come-along come from the manufacturer without safety latches and believed safety latches are the only safe way to operate a come-along. Tr. 73, 81, 82.

The come-along at issue was found on top of a large tire, estimated to weigh a few hundred pounds, that had been removed from a nearby shuttle car. Tr. 69-70. The come-along would be used to ratchet the tire into a vertical position and move it closer to the car so that it could be reattached. Tr. 71. The shuttle car was parked in the crosscut, leaving minimal room to manipulate the tire. Tr. 75-76. Even though the come-along was designed to swivel, the inspector did not think that this had any bearing on whether the load could detach while the come-along was in operation. Tr. 83. The inspector believed that at the time of the citation the operator either had been working on the shuttle car or had intentions to work on the shuttle car. Tr. 69. He later learned that someone on an earlier shift had worked on the shuttle car. Tr. 69, 78.

He marked the violation as unlikely to cause an injury because the come-along was not in use at the time he observed the condition. Tr. 77. One person, the miner operating the come-along, would be injured. Tr. 78. The injuries associated with this hazard include crushing type injuries such as sprains and strains or otherwise disabling injuries. Tr. 75, 77-78. A miner could be pinned by the tire in the limited space available to work on the shuttle car. Tr. 80. As management was responsible for ensuring that equipment is in safe working order, the violation was cited as moderate negligence. Tr. 78.

Randy Defa again testified for the Respondent regarding this citation but was not present at the time it was issued. Tr. 258. Based on the language of the cited standard, which only references "equipment," he did not believe that the standard applied to the violation because the come-along is a tool and not equipment. Tr. 258, 263. As evidence supporting this interpretation, Defa referenced the analogous standard for metal/nonmetal mines, which explicitly references tools. Tr. 262-263. The analogous OSHA standard also does not explicitly state that the use of safety latches is required, only that slings shall be securely attached to their loads. Tr. 265-266, 277-278. Regarding the come-along at issue, the hooks were deep, which prevented them from slipping off the load while the come-along is in use. Tr. 260. In his own experience, he has never witnessed a hook slip off a load regardless of whether safety latches were in use or not. Tr. 260,

269. As a safety latch is only one way to securely attach a load, they were in compliance with safety practices. Tr. 278. Defa admitted that the operator is not bound by the OSHA guidelines, and they are merely used as a reference. Tr. 278.

Defa also provided testimony about MSHA policy and guidelines for enforcing the cited standard, which he had never seen cited previously. Tr. 262-263, 271. Referencing a 2008 email that was distributed to MSHA staff about enforcing the analogous metal/non-metal standard, he testified that it was his understanding that in order to find a violation of the cited standard, all five requirements listed in the email must be met: (1) a sling or a come-along has a broken or bent safety latch, (2) safety latch is missing from a sling or come-along hook that was originally equipped with one, (3) the sling and/or come-along hook is in use, (4) the safety latch was damaged or came off during use, and (5) use of the come-along or sling hook without a safety latch affects the safety and that the load could come off the hook creating a hazard to miners. Tr. 263-264; Ex. R-E. Under this analysis, Defa did not think element one had been met because the come-along had no hooks at all and element five had not been met because the load could not come off the hooks of the come-along. Tr. 264-265. No one from MSHA had ever informed Defa that this was official policy, however. Tr. 276. Defa testified that the cited standard was not applicable to the come along, because under MSHA policy the standard should only apply if the load could detach without the use of a safety latch, which was not the case here. Tr. 264.

ii. Fact of Violation

On June 1, 2023, Turner issued 104(a) Citation No. 9730066, which alleged:

> Any piece of mobile and/or stationary machinery and/or equipment shall be maintained in a safe operating condition and all unsafe machinery or equipment shall be removed from service immediately. At Xcut 13 in the 5th West section, it was observed that a ¾ ton com-along had missing safety latches on both ends. These safety latches are to assure that the hooks will remain hooked up to whatever is necessary at the time of use. It was evident that the com-along had been recently used on a shuttle car that was also being worked on at Xcut 13. The com-along was found sitting on a shuttle car tire that was lying on the mine floor and was found to be in a ready to use state.
>
> Standard 75.1725(a) was cited 11 times in two years to mine 4202263 (11 times to the operator, 0 times to a contractor)

Ex. GX-4; Tr. 67.

Turner designated the citation as a non-significant and substantial violation of 30 C.F.R. § 75.1725(a) that was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-4.

30 C.F.R. § 75.1725(a) states that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in an unsafe condition shall be removed from service immediately."

It is uncontested that the come-along did not have safety latches at the time of the violation. The Respondent argues that there was no violation of the cited standard because the standard only references equipment, and the come-along is a tool. The standard for metal/non-metal mines specifically mentions tools, indicating that the references to tools were omitted from the same standard for coal mines and that the coal mine standard does not apply to tools. As noted by the Secretary in her post-hearing brief, equipment has previously been defined as "[t]he implements (as machinery or tools) used in an operation or activity." *Knife River*, 33 FMSHRC 1456, 1469 (June 16, 2011). I adopt this definition of the word "equipment," and I find that the cited standard is applicable to the come-along.

The Respondent also argues that the relevant OSHA standard does not explicitly require the use of safety latches to secure a load. I do not give this argument any weight, because the Respondent admitted during the hearing the OSHA standard was only used as a reference and that it is not binding on a mine operator. Additionally, there is no evidence that demonstrates that the Respondent took any action to secure the load.

Finally, the Respondent contends that the MSHA policy email about enforcement of the analogous metal/non-metal standard, presented as Exhibit R-E, requires that all five elements listed be met in order to find a violation. R. Br. at 7; Ex. R-E. Under their interpretation, there cannot be a violation because only one of the elements, a missing safety latch, is satisfied. After reviewing the email, I find this guidance to be confusing at best. From the language of the first two elements, a piece of equipment would need to have both a missing safety latch *and* a broken or bent safety latch in order to find a violation under the Respondent's interpretation. As the practical outcomes of this interpretation would result in never finding a violation, I decline to adopt the Respondent's interpretation of this guidance.

I have already determined that the cited standard applies to the come-along, therefore, I find that there was a violation of 30 C.F.R. § 75.1725(a).

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury that would result in lost workdays or restricted duty. The violation was determined to be unlikely because the inspector did not observe anyone operating the come-along at the time of the citation and the injuries likely to result from this violation would be strains and sprains. The testimony from Defa regarding his personal experience and his personal observations regarding the security of loads without the use of safety latches also supports a designation of unlikely. I affirm the citation's designations as unlikely and lost workdays or restricted duty.

iv. Negligence

The negligence level was assessed as moderate. Inspector Turner testified that it is management's responsibility to maintain equipment in safe working order. Also, he was told by Respondent that someone was working on the shuttle car from another shift but he had no idea who that person was. From this testimony I conclude that the mitigating circumstance was that he did not personally observe the come-along in use in the violative condition. I credit the inspector's testimony and rationale and affirm his assessment of moderate negligence.

C. Citation No. 9730072

i. Background

Inspector Turner issued Citation No. 9730072 on June 7, 2023, for a Jeep truck parked in the haulage way, which also serves as the primary escapeway for the mine. Tr. 86-87. The mine's safety representative who was traveling with the inspector at the time, informed the inspector that the vehicle was down. Tr. 86-87. The truck had not been tagged out, but it still had the ability to run. Tr. 87. The safety representative then moved the truck out of the haulage way. Tr. 87.

The truck was parked directly beneath the lifeline, the guide attached to the roof for miners to use to escape in low-visibility emergency scenarios. Tr. 87-88. A designated escapeway of six feet would lead miners directly into the back of the truck. Tr. 89, 98. The inspector testified that miners in an emergency situation will likely panic and be confused upon encountering the truck, which could cause them to drop the lifeline or otherwise unnecessarily delay while escaping. Tr. 90.

Because the truck was left parked in the escapeway, the inspector determined that the escapeway was not properly maintained. Tr. 92. The citation was marked as unlikely and non-S&S because there were no hazards present underground at the time of the citation and the lifeline could be pulled around the truck. Tr. 92, 99-100. Further, if miners had the right mindset in an emergency situation, the entry was large enough to move around the parked truck and still escape. Tr. 92, 96, 97. While more severe injuries could result from this violation, the inspector marked it as lost workdays due to unnecessary delays from maneuvering around the truck. Tr. 92-93. One person would be affected by this hazard, most likely the lead miner who would be the first person to encounter the truck. Tr. 93. The inspector said that this was generous because it was a shift change at the time of citation with two working sections underground. Tr. 94. Delayed escape could also expose the miners to other hazards for a longer period of time. Tr. 95.

Defa, who did not see the actual condition of the lifeline at the time the citation was issued, testified that the truck did not impact the twelve-foot-wide escapeway, because even with the truck parked there, there was still six feet of space to maneuver. Tr. 280-281, 286, 294. As long as there is a six-foot walkway, it is standard practice to park vehicles along the escapeway. Tr. 286. He also believed that the lifeline did not go over the truck, but just over the edge. Tr. 282, 292; Ex. R-H. Because the lifeline is flexible, it could have been easily pulled around the truck. Tr. 282-283, 291, 295. While escaping, miners would be able to get around the truck quickly and would not be slowed down by the truck, even if they were experiencing nervousness or panic from an emergency situation. Tr. 282, 293. Defa did admit that if a miner could not see the Jeep, he would not know to move the lifeline to the other side until he reached the truck. Tr. 292.

ii. Fact of Violation

On June 7, 2023, Turner issued 104(a) Citation No. 9730072, which alleged:

> Each escapeway shall be properly maintained in a safe condition to always assure passage of any miner, including a disabled miner. The #4 entry in Mine 3 is the main haulageway and primary escapeway for the mine. The primary escapeway is in 1st North at Xcut 4 was found not being properly maintained. At the time of inspection, Jeep truck #108 was found parked and left unattended, directly under the lifeline in the entry. This will create confusion and unnecessary delays to the miners who would be trying to get around the truck while using the lifeline in the primary escapeway in a post-accident scenario and smoke infested atmosphere.
>
> Standard 75.380(d)(1) was cited 6 times in two years to mine 4202263 (6 times to the operator, 0 times to a contractor)

Ex. GX-8; Tr. 86-87.

Turner designated the citation as a non-significant and substantial violation of 30 C.F.R. § 75.380(d)(1) that was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-8.

30 C.F.R. § 75.1725(a) states that each escape way shall be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

From the testimony, it is clear that the parked Jeep truck presented an obstacle to a miner using the lifeline in an emergency where visibility is limited. During such an emergency, nothing should impair a miner's ability to evacuate while using the lifeline. At least the first miner in the line of those escaping would need to pull the lifeline down and around the truck. I agree with the Secretary's argument that this can create confusion and delays. While the Respondent argues that there is no violation because the lifeline could easily be pulled down and maneuvered around the truck, this does not detract from the fact that the Jeep parked in the escapeway presents an obstacle for miners to avoid in the event of an emergency. I find that the Respondent violated the cited standard.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty because there were no hazards at the time of the citation that would have necessitated use of the lifeline. I defer to the inspector's determination that this violation would only cause minor delays during an emergency evacuation. I affirm that this violation is unlikely and that the severity of the injury would result in lost workdays or restricted duty.

iv. Negligence

Turner assessed the negligence as moderate, which he testified was generous and that the violation could have been assessed as high. When the inspector found the violation, it was during a shift change with two shifts of miners underground. Management passing through should have seen the parked Jeep and removed it rather than allowing the condition to persist. I find it

concerning that the Respondent seemingly does not take issue with parked vehicles, especially multiple vehicles, in the escapeway and under the lifeline. This indicates to me that there is little regard for maintaining the escapeway in a safe condition. The cited standard also states that the escapeway should assure the passage of disabled persons. The Respondent does not appear to consider the added complications of evacuating a disabled person when parking vehicles in the path of the lifeline. For these reasons, I increase the negligence from moderate to high.

D. Citation Nos. 9730069 and 0730073

i. Background

Both citations arise from similar circumstances involving non-functional methane monitors located on machinery operating in the working face. Methane is an odorless gas that is unpredictable and can appear suddenly. Tr. 114, 127. It presents a hazard during mining because it may ignite in the presence of sparks caused by dull bits on a cutter head or other permissibility issues on machines used in the mining process. Tr. 108, 171. The explosive range for methane is between 5 and 15%. Tr. 106. Levels below 5% are unlikely to cause an explosion, but if coal dust is present, it may lower the explosive range of methane. Tr. 130, 171-172, 192. Even if methane levels are below the explosive range, methane continually poses a hazard because an accumulation may build up anywhere, increasing the concentration in a specific area. Tr. 178-179, 180, 184-185.

The only way to detect methane is by placing a monitor onto operating machinery. Tr. 114, 126, 128, 160. The monitor's display is located at the back of the machine and the sniffer, which detects methane, is located towards the front of the machine. Tr. 105. In this configuration, the operator is at least 30 feet away from the sniffer. Tr. 107. If the monitor registers a methane reading of 1%, it gives the operator a warning comprised of a flashing warning light. Tr. 104, 120. At that reading, the operator should back the machine out of the area, ensure he has ventilation, and liberate the methane out of the working face. Tr. 106. At a 2% methane concentration, the machine automatically shuts down. Tr. 104, 120.

Sydel Yeager, an MSHA inspector and ventilation specialist, testified about the characteristics of Gentry Mine #3. Tr. 150, 152. Bottle samples collected at the mine clearly demonstrate that the mine liberates methane. Tr. 153; Ex. GX-17. He confirmed that methane liberations can be found anywhere in the mine, particularly at the working face, and can appear unexpectedly. Other mines and gas wells located on the same coal seam as Gentry #3 also liberate methane, and other mines have been placed on spot checks. Tr. 162, 164-165; Ex. GX-16. While not currently on a methane spot, the mine has previously been on a 103(i) methane spot in 2009 for elevated levels of methane, indicating more hazards and risks at that time. Tr. 158; Ex. GX-19. Tr. 153-155, 159, 175-176. In addition to methane, the mine also releases other harmful gases, such as ethane. Tr. 155-156, 186-187. The operator had been put on notice in January 2024 that the mine had been creating more methane than before. Tr. 166; Ex. GX-14, GX-15.

Less than four months prior to the two citations at issue, a possible ignition event of one-second duration occurred on February 28, 2023. Tr. 210-211, 220; Ex. GX-18. MSHA inspector

Jose Hernandez testified about the investigation into this event. Tr. 200. Citations were issued to the operator for dull work bits, failure to monitor dust levels, failure to perform 20-minute methane checks, and a lack of ventilation at the working face. Tr. 212-213; Ex. GX-18. Ultimately, the conclusion of the investigation found that an ignition had in fact occurred. Tr. 218. However, the Respondent's safety director, Randy Defa, disputes this conclusion and maintains that the citation issued for the ignition was erroneous. Tr. 302, 310. Because MSHA regulations state that a mine operator has 15 minutes to call in events like an ignition, the operator did not have time to conduct an investigation themselves. Tr. 308. Later, the operator discovered an inexperienced miner mistakenly believed there was one. Tr. 309. When the miner cut into sandstone, the miner mistook sparks for an ignition. Tr. 309.

The first citation at issue in this docket, No. 9730069, was issued by Inspector Turner on June 7, 2023, for a methane monitor that was not functioning properly. Tr. 100-102; Ex. GX-6. When the inspector attempted to simulate a 2.5% methane reading, the display on the back of the monitor did not move from zero. Tr. 102. The inspector testified that monitors that fail to work at all were very rare. Tr. 118. Without a functioning methane monitor, miners may be exposed to a possible methane ignition. Tr. 103. At the time of the citation, no methane was detected in the section. Tr. 110-111. In addition to the methane monitor, there were other violative conditions on the continuous miner that were addressed in other citations that could contribute to an ignition event. Tr. 109-110, 129.

The inspector marked the violation as reasonably likely and S&S because of the confluence of factors, including the two citations issued for other conditions found on the continuous miner. Tr. 115. While Inspector Turner has never detected methane personally using his handheld monitor at the mine, methane samples can vary and without monitoring, the amount of methane liberated in a specific location is unknown. Tr. 123, 144, 146-147. Prior to joining MSHA, Inspector Hernandez worked at the Gentry mine and detected methane in the mine during his employment with the Respondent. Tr. 203-204. Based on his experience, Hernandez believed that it was reasonably likely for an ignition to occur given the condition of the continuous miner. Tr. 219; Ex. GX-6. The only person that would be affected by this violation would be the machine operator; however, it is also common for the operator to have a helper during the mining practice at any given time. Tr. 116. The injuries associated with this violation include skin burns and eye injuries and would result in lost workdays or restricted duty. Tr. 117. Inspector Turner further noted that if there was an ignition of coal dust, the injuries would be more severe. Tr. 117. The citation was marked as moderate negligence because methane has been found occasionally in the mine and because the operator reported an ignition earlier in the year, however given the operator's history it would be possible to support a designation of high negligence. Tr. 116, 118-119.

The second citation, No. 9730073, was issued the next night on June 8, 2023, for a similar violation. Tr. 132; Ex. GX-10. A methane monitor on a different continuous miner was also found to be non-responsive, with a display that did not move from zero when a 2.5 % concentration of methane was introduced. Tr. 133, 135. There were other violative conditions associated with this miner, which were addressed in other citations, that could increase the severity of an ignition event. Tr. 135-137. Similar to Citation No. 9730069, the citation was assessed as reasonably likely, lost workdays or restricted duty, and S&S due to the repetitiveness

of the condition and the confluence of factors. Tr. 142, The negligence cited as moderate, but the inspector testified that it could have easily been cited as high. Tr. 143.

Citations for non-functioning methane monitors were issued frequently at the mine. Tr. 139. Inspector Turner testified about one related citation, No. 9734282, which had been issued for a monitor that had a blue latex glove taped over the sniffer, the part of the monitor that detects methane. Tr. 140-141; Ex. GX-21. In that condition, the sniffer would not be able to detect any methane, which Inspector Turner described as "alarming." Tr. 141. This indicated to the inspector that the operator was not maintaining the methane monitors or properly considering the hazards of methane. Tr. 140, 144.

Randy Defa testified that prior citations for non-functioning methane monitors had been designated as unlikely and non-S&S because of the mine's history of low methane liberation, conditions observed, and history of similar citations. Tr. 299, 300-301; Ex. R-L, R-K. Records maintained by the Respondent of weekly air readings, including methane readings, reflect methane levels of zero to low. Tr. 297-298; Ex. R-J. At these levels, which have never constituted a dangerous amount of methane, there would be no likelihood of an explosion. Tr. 312, 313-314, 320.

ii. Fact of Violation

On June 7, 2023, Turner issued 104(a) Citation No. 9730069, which alleged:

> All methane monitors shall be maintained in a permissible state and in a proper operating condition. The methane monitor on the continuous mining machine company #CM014 which is located in the 3rd Left pillar section, (MMU002) was found not being maintained in a functional state. When tested with a known air-methane mixture of 2.5%, the methane monitor on the miner did not react and the display on the readout stayed at zero. This condition will not make the operator aware if methane is present while operating the machine in the working faces and will expose the operator to a potential methane ignition.
>
> Standard 75.342(a)(4) was cited 9 times in two years at mine 4202263 (9 to the operator, 0 to a contractor)

Ex. GX-6; Tr. 100.

Turner designated the citation as a significant and substantial violation of 30 C.F.R. § 75.342(a)(4) that was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-6.

The second 104(a) citation, No. 9730073, was issued On June 8, 2023, and alleged:

> All methane monitors shall be maintained in a permissible state and in a proper operating condition. The methane monitor on the continuous mining machine company #CM017 which is located in the 5th West Develop section, (MMU001)

> was found not being maintained in a functional state. When tested with a known air-methane mixture of 2.5%, the methane monitor on the miner did not react and the display on the readout stayed at zero. This condition will not make the operator aware if methane is present while operating the machine in the working faces and will expose the operator to a potential methane ignition. The operator is hereby officially put on notice. This condition has been cited multiple times and appears to be an ongoing issue at this mine. The operator is advised to come up with a solution to this ongoing issue because if this condition continues to be found throughout the mine, then the condition will be cited and a higher enforcement and negligence will be considered justified.
>
> Standard 75.342(a)(4) was cited 9 times in two years at mine 4202263 (9 to the operator, 0 to a contractor)

Ex. GX-10; Tr. 132.

Turner designated the citation as a significant and substantial violation of 30 C.F.R. § 75.342(a)(4) that was reasonably likely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-10.

30 C.F.R. § 75.342(a)(4) states, in pertinent part, that "[m]ethane monitors shall be maintained in permissible and proper operating condition."

The parties do not dispute that the methane monitors on the two continuous miners were not functioning at the time the conditions were cited. The fact of violation is affirmed for both citations.

iii. Gravity and S&S

Inspector Turner designated each violation as significant and substantial and reasonably likely to cause an injury that would result in lost workdays or restricted duty. The Respondent argues that the violations should be reduced to unlikely, because there is no evidence that methane levels underground were in the explosive range. Assuming normal mining operations, I find that an ignition was unlikely to occur. The history of methane emissions reflects that methane levels were well below the explosive range and slightly above zero at most. Considering the prior enforcement history of these types of violations, I reduce the likelihood of each violation to unlikely.

I raise the severity of the injury, however, to fatal. The Secretary's witnesses testified at length about the dangers of methane ignition and the impossibility of a machine operator to know the concentration of methane at his location without a working methane monitor. Further, each of the continuous miners had other violative conditions that would increase the severity of an ignition event were one to occur. Should an ignitable concentration of methane be encountered, the resulting event would cause more severe injuries than burns.

Both violations were marked as significant and substantial. The fact of violation has already been established. But the Secretary has failed to show that the occurrence of an ignition is reasonably likely. The conditions at the mine do not show that either operator of the continuous miners were likely to encounter an ignitable concentration of methane, as the historical levels of methane liberation were either zero or slightly above zero. As the analysis fails at step 2, I reduce both citations to non-S&S.

iv. Negligence

The inspector testified that the negligence of each violation was assessed as moderate. However, given the Respondent's alarming history of similar violations for non-functioning methane monitors, it is obvious that the many dangerous hazards associated with methane are not taken seriously by the operator. This type of violation has been cited far too frequently and in light of the Respondent's indifference towards rectifying this repeated issue, which as discussed above can have severe consequences, I raise the negligence for both citations to high.

E. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9730062, the Secretary proposed a regularly assessed penalty of $1,246.00. Gentry Mountain has a significant history of thirteen prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is an S&S violation that is reasonably likely to result in permanently disabling injuries and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. In light of these considerations, particularly the number of previous violations, I raise the penalty to $4,984.00.

For Citation No. 9730066, the Secretary proposed a regularly assessed penalty of $252.00. Gentry Mountain has a history of twelve prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator's moderate

negligence. The operator acted in good faith in abating the violation. Noting the significant history of similar violations, I increase the penalty to $504.00.

For Citation No. 9730072, the Secretary proposed a regularly assessed penalty of $167.00. Gentry Mountain has a history of six prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator's high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I find an increased penalty of $334.00 is appropriate.

For Citation No. 9730069, the Secretary proposed a regularly assessed penalty of $834.00. Gentry Mountain has a history of eight prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in fatal injuries and was caused by the operator's high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I increase the penalty to $3,336.00.

For Citation No. 9730073, the Secretary proposed a regularly assessed penalty of $834.00. Gentry Mountain has a history of eight prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in fatal injuries and was caused by the operator's high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I increase the penalty to $3,336.00.

F. PARTIAL SETTLEMENT

The parties have filed a motion to approve partial settlement regarding the one settled citation. The originally assessed amount for this single action was $834.00 and the settlement amount is $834.00. The settlement includes:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9159960	$834.00	$834.00	Affirm as Issued
TOTAL	**$834.00**	**$834.00**	

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**, the citation is **AFFIRMED** as set forth above.

G. ORDER

It is hereby **ORDERED** that Citation Nos. 9730062 and 9730066 are **AFFIRMED** as issued, Citation Nos. 9730069 and 9730073 are modified to increase the severity of injury to fatal and the negligence to high, and that Citation No. 9730072 is modified to increase the negligence to high. Gentry Mountain Mining Company is **ORDERED** to pay the Secretary the total sum of $13,328.00 within 40 days of this order.[3]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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[3] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.