May 2024

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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May 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
	Docket No. LAKE 2019-0317-M
WESTFALL AGGREGATE & MATERIALS, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act") and comes to the Commission on remand from the United States Court of Appeals for the D.C. Circuit. *Sec'y of Labor v. Westfall Aggregate & Materials, Inc.,* 69 F.4th 902 (D.C. Cir. 2023). The Court directed the Commission to review our conclusion that a motion filed by Westfall Aggregate & Materials, Inc. ("Westfall") to reopen a final order assessing a penalty was moot. The Court ruled that the Commission must determine whether Westfall had demonstrated its entitlement to extraordinary relief. *Id.* at 915. Consistent with the Court's decision and our analysis of the facts, we deny the motion to reopen on remand.

I.

Factual and Procedural Background

This case concerns two enforcement actions by the Mine Safety and Health Administration ("MSHA") – Citation No. 6559330 and Order No. 6559329 – both issued on February 28, 2011. The $16,400 proposed special assessment for the Citation was received by the operator on July 20, 2011. 69 F.4th at 908, 909; Att. A to Sec's Opp. The operator failed to notify the Secretary of its intent to contest the assessment within 30 days of July 20, 2011. Therefore, according to the Secretary, the assessment became a final order on August 19, 2011. Westfall received a delinquency notice regarding this penalty on October 6, 2011.

On July 12, 2019, almost eight years later, the operator filed a motion to reopen the final Commission order. The Secretary opposed the request to reopen. The Commission found that the proposed assessment never effectively became a final Commission order, and therefore concluded that the operator's motion to reopen was moot. 44 FMSHRC 369 (May 2022). The Secretary appealed the Commission's order to the D.C. Circuit. The Court concluded that the penalty assessment became a final order on August 19, 2011. 69 F.4th at 908, 909, 914.

Therefore, the D.C. Circuit found that the matter was not moot, and reversed and remanded the matter to the Commission. *Id.* at 915. In remanding the matter, the D.C. Circuit found that "the Commission failed to assess whether Westfall could 'carry the burden of establishing its entitlement to extraordinary relief.'" *Id*.

II.

Disposition

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). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure. *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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993).

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. Further, Rule 60(c) provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons enumerated in Rule 60(b)(1)), *i.e. "*mistake, inadvertence, or excusable neglect," not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

The federal district courts have strictly observed this one-year time limit. In *Wright v. Poole,* the court held that because "[the] Motion is really a Rule 60(b)(1) motion . . . the Motion must be brought within the 'absolute' outer limit of one year." 81 F.Supp.3d 280 (S.D.NY 2014) *(citing Martha Graham Sch. & Dance Found.,* 466 F.3d 97, 100 (2d Cir. 2006) ("[t]he one-year limitation period for Rule 60(b) motions is absolute")). And in *Goff v. Walters,* 2024 WL 1722251 (E.D. Cal. 2024), the court recently held that "Rule 60(b)(1) authorizes courts to relieve parties from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect [and t]he decision on a Rule 60(b)(1) motion lies with the sound discretion of the court." The court concluded that the "motion is untimely under Rule 60(b)(1) as it is brought more than a year after the entry of the order of dismissal." *Id.*

Similarly, we have consistently enforced the one-year time limit for motions to reopen where the operator seeks reopening based on mistake, inadvertence, surprise, or excusable neglect. Specifically, we have held that "motions to reopen alleging mistake, inadvertence or excusable neglect must be made no more than a year after entry of the final order." *Leesville Land*, 2024 WL 893571 (Feb. 2024) *citing JS Sand & Gravel, Inc.* 26 FMSHRC 795, 796 (Oct. 2004); *Stony Creek Quarry Corp.,* 44 FMSHRC 366 (May 2022); *Apogee Coal Co.,* 38 FMSHRC 32 (Jan. 2016); *Four Corners Materials,* 37 FMSHRC 1150 (June 2015).

As recognized by the D.C. Circuit, Westfall claimed that "excusable neglect, mistake, inadvertence, and other good causes" justified reopening this matter. 69 F.4th at 912. In its

motion to reopen, the operator contended that its confusion regarding Citation No. 6559330 and Order 6559329 "resulted in an inadvertent and mistaken interpretation and treatment" of Citation 6559330 "by Petitioner [operator] and its staff." MTR at 5 (emphasis added). The operator also claimed that "such inadvertence and mistakes constitute excusable neglect on the part of Petitioner." *Id.* (emphasis added).

Accordingly, under our precedents, the operator's reopening request is subject to the one-year rule. In addition, it is undisputed that the operator filed its request to reopen in July 2019, almost eight years after the final order of August 19, 2011. MTR at 1; 69 F.4th at 909, 914. Consequently, the motion for relief was untimely filed more than a year after entry of the final order.

Westfall's motion to reopen is hereby **DENIED.**

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

/s/ Moshe Z. Marvit
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

May 30, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. LAKE 2017-0248 LAKE 2017-0224 LAKE 2018-0146 LAKE 2018-0141
NORTHSHORE MINING COMPANY, ROGER PETERSON, employed by NORTHSHORE MIINING COMPANY, and MATTHEW ZIMMER, employed by NORTHSHORE MINING COMPANY	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") from Cross Petitions for Discretionary Review filed by the parties. On January 21, 2021, the Commission affirmed the Administrative Law Judge's findings of reckless disregard and unwarrantable failure designations, affirmed the Judge's deletion of a flagrant designation, and reversed the Judge's findings of individual liability under section 110(c) of the Act. 30 U.S.C. § 820(c).

On August 22, 2022, the U.S. Court of Appeals for the Eighth Circuit issued a decision reversing the Commission's decision on the issues of the flagrant designation and individual liability. The court remanded the case "for consideration of whether the penalty amount for [the flagrant violation of 30 C.F.R. 56.11002 set forth in Order No. 8897220] should be reassessed." The Court subsequently issued its mandate on October 13, 2022.

In accordance with the court's decision, the Commission hereby remands this matter to the Office of the Chief Administrative Law Judge for consideration of whether the penalty amount for the flagrant violation of 30 C.F.R. 56.11002 set forth in Order No. 8897220 should be reassessed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

/s/ Moshe Z. Marvit
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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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May 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2023-0248 A.C. No. 16-00970-569815
MORTON SALT, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 8, 2023, the Commission received from Morton Salt, Inc. ("Morton"), 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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 27, 2023. On February 27, 2023, the assessment became a final order of the Commission. On April 13, 2023, MSHA sent the operator a delinquency notice, and on June 15, 2023, the operator's delinquency was referred to the Department of Treasury.

Morton states that it seeks to reopen Order Nos. 9648951, 9674876, 9674877, 9674883, and 9674887, and that it had filed timely notices of contest with respect to the latter four of these five orders. The four notices of contest filed by Morton Salt were docketed in Nos. CENT 2023-0072 through CENT 2023-0075. On July 31, 2023, the parties were asked to provide a status update on the contest dockets. On August 3, 2023, the Secretary responded that MSHA had not received a contest of the penalties associated with the orders, and the operator responded that the penalties had not been contested in error.[1]

Morton Salt submits that the EHS Manager, who was new in his role, failed to timely send the contest of the penalties to MSHA due to an oversight and as the result of an inadvertent mistake. It submits that it will make the required changes to its process so that the error does not happen again.

The Secretary opposes the operator's motion to reopen. She submits that the operator has failed to justify reopening because the reasons for its failure to timely file were too vague, and Morton Salt failed to state how it corrected its internal processes so that the error would not be repeated. The Secretary further notes that Morton Salt has filed another request to reopen in which it states that it had corrected its internal processes, and that the deficiency in those processes appears not to have been corrected. She notes that the operator has reason to pay particularly careful attention to its citations, orders, and penalties because it has received a pattern of violations notice, and four of the subject orders had been issued pursuant to section 104(e)(1) of the Mine Act.[2] In addition, the Secretary submits that the operator has not explained its delay in filing its motion to reopen. Finally, the Secretary states that it appears that Morton Salt acted on its delinquent penalties, not because it discovered them through its own diligence, but because a Commission Judge asked for a status update in the related contest proceedings.

The Commission has previously reopened penalty assessments issued to Morton that became final due to the operator's inadvertence or mistake in processing its proposed assessments. *Morton Salt, Inc.*, 44 FMSHRC 533 (Aug. 2022); *Morton Salt, Inc.*, 45 FMSHRC 286 (May 2023). More recently, however, recognizing that repeated motions to reopen may indicate an inadequate or unreliable internal processing system, the Commission denied a motion to reopen filed by Morton Salt. *Morton Salt, Inc.*, 46 FMSHRC 15 (Jan. 2024). Although Morton has stated that it will take action to prevent untimely filing in the future, it has not identified the steps it will take, and it appears that any steps taken have been ineffective. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res.*,

[1] On August 31, 2023, a Commission Administrative Law Judge dismissed those contests. The Judge's dismissal is currently pending for review before the Commission.

[2] Section 104(e)(1) of the Mine Act provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as could significantly and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern exists. If, within 90 days following issuance of the POV notice, an inspector cites the operator for a significant and substantial violation, then MSHA may issue a withdrawal order under section 104(e) of the Act. 30 U.S.C. § 814(e)(1).

LLC, 33 FMSHRC 103. 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

In addition, Morton Salt failed to file the motion to reopen within a reasonable time. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). The operator's August 8 motion to reopen was filed almost four months after MSHA sent the operator a delinquency notice, and two months after the penalties were referred to the Department of Treasury.

We find that Morton has not asserted good cause for its failure to timely contest the proposed penalties. *See Marfork Coal Co.*, 45 FMSHRC 463 (June 2023) (denying a motion to reopen when the operator neglected to fix problems with its internal procedures). The motion is DENIED WITH PREJUDICE.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HAMILTON COUNTY COAL, LLC	Docket No. LAKE 2023-0037 A.C. No. 11-03203-565749

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 26, 2023, the Commission received from Hamilton County Coal, LLC a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 27, 2023, the Chief Administrative Law Judge issued an Order to Show Cause in response to Hamilton's perceived failure to answer the Secretary of Labor's December 27, 2022, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 30, 2023, when it appeared that the operator had not filed an answer within 30 days.

Hamilton County Coal requests reopening based on excusable neglect. The operator timely returned a contest of the civil penalty associated with Citation No. 9195453 listed on Proposed Assessment No. 0005655749. When the operator's safety director was reviewing a separate proposed penalty assessment, he noticed that the form listed Docket No. LAKE 2023-0037 as a final decision and that payment was pending for the penalty associated with Citation No. 919453. The Safety Director had no record of the docket number but discovered upon investigation the docket had been transferred to a Conference and Litigation Representative ("CLR"). The CLR provided the safety director with a copy of the subject petition, and March 29 order. The Safety Director noted that his email address had been listed incorrectly in the order's distribution list, and was informed that MSHA did not have a return receipt showing delivery of the petition. The safety director states that as a miner's representative, he should have received a copy of the petition at his home, but that he did not.

The Secretary does not oppose the motion to reopen. She submits that the petition was delivered to the operator's address of record, but that she does not know why the operator did not receive it. The Secretary further states that she does not know, and Hamilton has not explained, why the operator did not follow up on its contest. The Secretary encourages the operator to be

more vigilant with receiving and processing petitions and to comply with the Commission's procedural rules.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Hamilton's request and the Secretary's response, we find that the operator's failure to properly file a response was the result of excusable neglect. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

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

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May 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2024-0022 A.C. No. 38-00007-580575
v.	Docket No. SE 2024-0111 A.C. No. 38-00007-589084
GIANT CEMENT COMPANY	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 19, 2023 and February 21, 2024, the Commission received from Giant Cement Company ("Giant") two motions seeking to reopen penalty assessments that had become a final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers SE 2024-0022 and SE 2024-0111 involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in SE 2024-0022 was delivered on July 10, 2023, and became a final order of the Commission on August 9, 2023. Giant asserts that it timely filed the contest in this case but received a delinquency notice dated September 25, 2023 claiming that the operator was delinquent on one of the three proposed penalties at issue. The Secretary agrees that the operator timely contested the penalties but explains that the operator did so by filing two separate contest notices which confused MSHA's system. As a result, the delinquency notice was sent to Giant in error. The Secretary notes that all three citations are currently docketed at SE 2023-0224 and asks that the Commission dismiss the motion to reopen as moot to allow the proceedings before the Judge to continue.

MSHA records indicate that the proposed assessment in SE 2024-0111 was delivered on November 17, 2023, and became a final order of the Commission on December 18, 2023. Giant asserts that it timely filed its contest of the proposed assessments. However, mailing receipts filed in support of Giant's motion to reopen show that the contest was mailed to MSHA's collection office in St. Louis, Missouri, instead of MSHA's headquarters in Arlington, Virginia. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed to the correct mailing address.

Having reviewed Giant's requests and the Secretary's responses, we conclude that the proposed penalty assessment in SE 2024-0022 did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, Giant notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and SE 2024-0022 is dismissed.

Moreover, we find that operator's failure to timely contest the proposed assessment in SE 2024-0111 was the result of Giant's mistaken mailing of the contest to the wrong MSHA address. In the interest of justice, we hereby reopen SE 2024-0111 and remand it to the Chief

Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
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/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 17, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. CENT 2024-0206 A.C. No. 41-02916-569870
v.	Docket No. CENT 2023-0020 A.C. No. 41-02916-569870
ALLEYTON RESOURCE COMPANY, LLC	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On March 21, 2023, the Commission received from Alleyton Resource Company, LLC ("Alleyton") 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).[1]

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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

[1] We hereby consolidate docket numbers CENT 2023-0020 (contest proceeding), and CENT 2024-0206 (civil penalty proceeding) because they both involve contests relating to Citation No. 9513801. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to Alleyton on January 23, 2023, and became a final order of the Commission on February 22, 2023. In its motion to reopen, the operator states that it timely filed a notice of contest of Citation No. 9513801, by counsel. The proposed penalty assessment related to the citation was not served on Alleyton's counsel. The operator states that the proposed assessment form was sent for payment by the operator's administrative staff who did not realize that the citation had been contested. Alleyton's counsel discovered the mistaken payment while reviewing MSHA's Mine Data Retrieval System ("MDRS").[2] On May 23, 2023, the Secretary filed a response indicating that she does not oppose the operator's request to reopen.[3]

Subsequently, the Secretary filed a motion to dismiss the contest proceeding as moot. In the motion to dismiss, the Secretary argued that, although the operator filed a notice of contest of Citation No. 9513801, it failed to contest the penalty associated with the citation. The motion makes no reference to the Secretary's previously filed non-opposition to Alleyton's motion to reopen.

[2] Commissioner Baker has previously stated that it is his position that the accidental payment of a civil penalty does not constitute excusable neglect. *See, e.g., Omya, Inc.*, 45 FMSHRC 131 (Mar. 2023). However, in light of the fact that the operator filed a timely contest to the underlying citation, Commissioner Baker would determine that in the instant case payment was not the result of an inadequate or unreliable internal processing system. *See Greenbrief Mineral, LLC*, 45 FMSHRC 822, 823 n.1 (Sep. 2023).

[3] The Secretary also noted that the motion to reopen was erroneously filed under the docket number assigned to the notice of contest rather than being assigned a separate civil penalty proceeding docket number. We have corrected this docketing error, and the correct docket numbers appear in the caption of this order.

Having reviewed Alleyton's request and the Secretary's response, we find that the operator has demonstrated that its failure to timely file a contest of the proposed penalty was the result of a mistake. The operator demonstrated that the mistake was made in good faith by pro-actively reviewing MSHA's MDRS and promptly moving to reopen upon discovery of the error.[4] The operator was also timely in its filing of a notice of contest of Citation No. 9513801. Accordingly, we hereby deny the Secretary's motion to dismiss. In the interest of justice, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

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

[4] The Commission has held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest of a proposed civil penalty will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the proposed penalty assessment became a final order of the Commission on February 22, 2023, and the operator filed its motion to reopen on March 21, 2023.

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May 20, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONTINENTAL CEMENT COMPANY, LLC	Docket No. CENT 2022-0064 A.C. No. 23-02434-546589

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 10, 2022, the Commission received from Continental Cement Company, LLC ("Continental") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 12, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Continental's perceived failure to answer the Secretary of Labor's February 10, 2022 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a default May 14, 2022, when it appeared that the operator had not filed an answer within 30 days.

Continental Cement states that it failed to timely file an answer to the Secretary's petition due to inadvertence. The operator explains that it filed a timely contest of penalties associated with twelve citations listed on a proposed penalty assessment (assessment control number 000546589). On February 10, 2022, the Department of Labor's Mine Safety and Health Administration ("MSHA") forwarded a petition for one of the citations and a second petition for the remaining eleven of the twelve citations. The operator's counsel attempted to forward the emails to an assistant to prepare answers. Although one email reached the assistant and one answer was timely filed, counsel inadvertently forwarded the second email only to himself, and the answer with respect to the eleven penalties was not filed. On April 12, 2022, Counsel received the April 12 order. However, Counsel inadvertently overlooked it because he was engaged in trial litigation at the time of receipt. The issue was further compounded by the fact that counsel's tracking of the assessment control number indicated an active docket. Counsel learned of the mistake upon receiving a July 28, 2022 delinquency letter from MSHA, and immediately prepared the subject motion to reopen. The Secretary does not oppose the request to reopen, but notes that she may oppose future requests to reopen penalty assessments that are not answered in a timely manner.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Continental's request and the Secretary's response, we find that the operator's failure to properly file a response was the result of mistake.[1] We also note the operator's prompt filing of its motion to reopen upon learning of the issue. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

[1] We caution the operator that future motions to reopen will not be granted where untimely filings are due to mistake or neglect that rise to the level of inadequate internal process or are otherwise not excusable.

Commissioner Baker and Commissioner Marvit, dissenting:

We would find that that Continental Cement Company, LLC ("Continental") failed to establish good cause to reopen in this case.

A party seeking the reopening of an assessment bears the burden of establishing that that the default was the result of more than mere carelessness. *Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017). The Commission has consistently held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening an assessment. *See e.g. Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

Where a defaulting party was aware of or should have been aware of its responsibilities to the opposing party and to the court and has failed to live up to those responsibilities through unexcused carelessness or negligence, relief from default should not be granted. *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1206 (7th Cir. 1984); *see also Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990) (stating carelessness or negligence is not sufficient to warrant relief under Rule 60(b)(1)). Although a default judgment is a harsh sanction and the law favors trials on the merits, these considerations must be balanced against the need to promote efficient litigation and to protect the interests of all litigants. *C.K.S. Engineers*, 726 F.2d at 1206. Default judgment is only an effective deterrent against irresponsible conduct in litigation if relief from a default judgment under rule 60(b) is perceived as an exceptional remedy. *Id*.

In the instant case, Continental does not assert a mistake caused its failure to timely respond to the Secretary's assessment. Instead, it alleges an entire series of errors. Specifically, on February 10, 2022, Continental's counsel received two petitions from MSHA, but only successfully forwarded one of those petitions to an assistant for processing. On April 12, 2022, Continental received a Show Cause Order from the Commission, regarding its failure to timely respond to the February 10, 2022, assessment. That is, Continental was given a second chance to respond to the assessment before default. However, counsel for Continental was engaged in a trial and forgot he had received the Show Cause Order. Finally, counsel for Continental maintained an internal tracking system for assessments, but that system contained inaccurate information, showing that the docket was active.

Despite receiving two opportunities to respond to the Secretary's assessment, Continental failed to timely file an answer. This was the result of several breakdowns in its internal processing system. We do not believe that Continental has established that it is entitled to a third bite at the apple or the "extraordinary" relief of reopening. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342 (Nov. 2013) (characterizing reopening as extraordinary relief).

In light of these circumstances we, respectfully, dissent.

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

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

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May 28, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2023-0336 A.C. No. 46-09495-566741
RAMACO RESOURCES, LLC	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 18, 2023, the Commission received from Ramaco Resources, LLC ("Ramaco") 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), 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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on December 1, 2022. The assessment became a final order of the Commission on January 2, 2023.

Ramaco states that when proposed assessments are received, they are immediately scanned and directed to the Ramaco's Vice President of Safety for a contest determination. Due to a malfunction in the company's email system, the Vice President did not receive the scanned assessment after it was routed to him via email.

According to the Secretary, on February 15, 2023, MSHA sent Ramaco a delinquency notice. On March 7, 2023, MSHA hand delivered to Ramaco a scofflaw letter regarding its unpaid civil penalties totaling $51,714.57 for 61 citations issued at the mine in question. The letter warned that additional enforcement action would be taken if the operator did not remit payment within 30 days of receipt. Ramaco began paying some of its delinquent debt, which arrested the need for MSHA to take additional action. Ramaco then filed this motion to reopen and ceased making payments on its debt. Consequently, MSHA then resumed its enforcement actions and went on to issue a citation on June 7, 2023, for Ramaco's failure to pay its civil penalties. According to the citation, Ramaco paid $18,505.44 leaving a balance of $33,663.65 that they have not paid or made arrangements to pay. The request to reopen only pertains to eleven citations, amounting to $29,076.59.

The Secretary opposes Ramaco's motion. She argues that the operator is responsible for maintaining and monitoring its internal scanning and email systems like any other internal system, and it has not explained how this electronic mail error does not reflect carelessness or unreliable office procedures. The Secretary notes that Ramaco has also neglected to explain how it failed to notice the absence of an assessment for a month's worth of penalties associated with 30 citations, issued on 10 different days. Ramaco should have anticipated an assessment for at least one of the citations and it should have been particularly careful given the large penalty amount involved. The Secretary also contends that Ramaco has not identified any steps it intends to take to prevent this error from occurring again. She argues that Ramaco has demonstrated a lack of good faith because it filed the motion to reopen only after MSHA attempted to collect the debt when it issued the scofflaw letter. The Secretary further notes that Ramaco waited three months after learning of the delinquency to file its motion to reopen and has not explained the delay. Finally, two of the underlying citations involved serious safety conditions that could have resulted in death by electrocution. The Secretary argues that Ramaco's motion to reopen should be denied with prejudice because the operator failed to establish good cause.

The Commission has held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See, e.g.*, *United Taconite, LLC*, 46 FMSHRC __, slip op. at 3, No., LAKE 2023-0205 (Jan. 9, 2024); *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012). Here, the error identified by Ramaco could suggest an unreliable system.

More importantly, however, Ramaco failed to file the motion to reopen within a reasonable time and did not explain its delay. The Commission has held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009); *United Taconite*, 46 FMSHRC __, slip op. at 3. We have further held that motions to reopen filed more than 30 days after receipt of such information should include an explanation

for why the operator waited so long to file for reopening and the "lack of [] an explanation is grounds for the Commission to deny the motion." *Highland*, 31 FMSHRC at 1317. The operator's May 18, 2023 motion to reopen was inexplicably filed three months after MSHA sent the February 15 delinquency letter and more than two months after MSHA hand-delivered to Ramaco a scofflaw letter on March 7, 2023.

We find that Ramaco has not asserted good cause for its failure to timely contest the proposed penalties. *See Moose Lake Aggregates, LLC*, 34 FMSHRC 1, 2-3 (Jan. 2012) (denying a motion to reopen when the operator had deficient internal procedures and failed to file motion within a reasonable time). The motion is denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

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

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May 28, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. POCAHONTAS COAL COMPANY, LLC	Docket No. WEVA 2023-0351 A.C. No. 46-08878-568995

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On June 2, 2023, the Commission received from Pocahontas Coal Company ("Pocahontas") 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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 11, 2023, and became a final order of the Commission on February 10, 2023. Pocahontas asserts that the proposed penalty was not timely contested because an "administrative error" delayed outside counsel's receipt of the assessment. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on March 28, 2023.

A party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748 (Aug. 30, 2023); *B & W Res., Inc*., 32 FMSHRC 1627, 1628 (Nov. 2010). At a minimum, the applicant 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. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, Pocahontas merely states that counsel did not timely receive the proposed assessment due to "administrative error," without further detail. We find this explanation insufficient to meet the operator's burden of showing that it is entitled to relief.

Pocahontas has also failed to explain the apparent delay in filing its motion to reopen. The Commission has held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Conversely, however, motions to reopen filed more than 30 days after such notice "should include an explanation for why the operator waited so long to file for reopening," and "[t]he lack of such an explanation is grounds for the Commission to deny the motion." *Id.* Here, Pocahontas filed its motion more than three months

after the assessment became final, and more than two months after the Secretary's delinquency notice. Pocahontas offers no explanation for the delay.[1]

Having reviewed Pocahontas's request and the Secretary's response, we find that the operator has not provided sufficient explanation to justify reopening the captioned proceeding. Accordingly, we deny Pocahontas's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

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

[1] Pocahontas's motion notes that counsel was retained for purposes of filing a motion to reopen once the Safety Manager became aware the assessment had not been timely contested. However, the motion does not state *when* he became aware of the failure to timely contest. Whether Pocahontas learned of the issue upon receiving the delinquency notice but did not immediately file a motion to reopen or did not learn of the issue until well after receipt of the delinquency notice, an explanation is warranted. Without such detail, the Commission is unable to determine whether the motion was filed within a presumptively reasonable amount of time or whether any delay was reasonable.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May, 28, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2023-0064 A.C. No. 37-00243-567271
J.R. VINAGRO CORPORATION	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On March 28, 2023, the Commission received from J.R. Vinagro Corporation ("Vinagro") 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), 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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on December 2, 2022. The assessment became a final order of the Commission on January 6, 2023.

Vinagro states that the underlying citation was one of nine citations issued during a fatality investigation at the mine. When the related assessment arrived, Vinagro's staff opened it

and placed it with other papers and notes from the accident investigation. Vinagro's new Safety Director, who is responsible for determining which violations will be contested, was not informed that the assessment had been received. The safety director learned of the delinquent assessment in late February 2023 when he received an email from Vinagro's Payroll Administrator informing him that three assessment forms for three different sites were delinquent. To prevent reoccurrence of this mistake, Vinagro has mandated that all assessments be logged upon receipt, tracked, and immediately emailed to its Safety Director for determinations. Vinagro has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

Having reviewed J.R. Vinagro's request and the Secretary's response, we find that due to an administrative error, the penalty assessment was not timely contested. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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

/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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May 14, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KENNETH M. ADKINS, Complainant v. GREENBRIER MINERALS, LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2024-0248 MSHA Case No. PINE-CD-2024-04 Mine: Middle Fork Surface Mine Mine ID: 46-09645

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Sullivan

This matter is before me upon an Application for Temporary Reinstatement filed by the Acting Secretary of Labor on April 16, 2024, pursuant to Section 105(c) 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.

In her application, the Secretary seeks, on behalf of miner Kenneth M. Adkins ("Complainant" or "Adkins"), the temporary reinstatement of Complainant to his former, or similar, position as a mechanical or mobile equipment operator with Greenbrier Minerals, LLC ("Respondent" or "Greenbrier"), at its various mines at which Complainant worked between late 2022 and March 2024. On April 24, 2024, pursuant to 29 C.F.R. § 2700.45(c), Respondent requested a hearing on this matter.

The parties subsequently presented testimony and documentary evidence at a virtual hearing, via ZOOM for Government, on May 7, 2024. Mr. Kenneth Adkins testified for the Complainant, while Mr. Wayne Cooper, Respondent's Human Resources Manager, testified for the Respondent.

For the reasons below, I grant the application for temporary reinstatement and retain jurisdiction over this matter until a final disposition of a complaint on the merits.

I. Joint Stipulations

At hearing, the parties provided the following joint stipulations:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission pursuant to sections 105 and 113 of the Mine Act. Judge John Sullivan has authority to issue a decision following the temporary reinstatement proceeding.

2. Greenbrier is a limited liability company and qualifies as a "person" within the meaning of section 105(c) and within the definition of section 103(f). 30 U.S.C. § 802(f).
3. Greenbrier is the operator of the Middle Fork Surface Mine.
4. At all relevant times, the products of the subject mine 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. Middle Fork Surface is a "mine" as that term is defined in section 3(h) of the Mine Act. 30 U.S.C. § 802(h).
6. Greenbrier was an "operator" with respect to the mine identified above, as that term is defined in section 3(d) of the Mine Act. 30 U.S.C. § 802(d).
7. Kenneth Adkins was previously employed by Greenbrier as a mechanical equipment operator and is therefore a "miner" within the meaning of the Act. 30 U.S.C. § 802(g).
8. Kenneth Adkins started his position with Greenbrier on December 12, 2022.
9. Greenbrier terminated Kenneth Adkins' employment on March 7, 2024.

Tr. 6-8.

II. Factual Findings

Background

Greenbrier, located in Lyburn, West Virginia, operates four mines under what is alternatively referred to as its Buffalo Creek Mining Complex or Logan Division: the Middle Fork, North Fork, Tony Fork, and Elk Lick Surface Mines. Tr. 14, 74, 76. Before his termination, Adkins worked for Greenbrier, operating machinery during the day shift at any of these surface mines, depending on his work assignment. Tr. 14-15.

Summary of Testimony

At the May 7, 2024, hearing, each party offered a single witness. A summary of the testimony of each witness follows.

Kenneth Adkins

Adkins began working as a mobile equipment operator for Greenbrier on December 12, 2022. Tr. 8. As part of his position, he could and would regularly operate loaders, dozers, and graders. Tr. 96.

When he started, Adkins informed his supervisor, Rick Hunter, that he preferred not to drive haul trucks, which were also referred to throughout the hearing alternatively as rock, articulating, and lizard trucks. Tr. 20-21, 38. Consistent with this request, Adkins was primarily assigned to dozers and only drove a rock truck occasionally—once or twice a month—when his assigned Dozer 229 was inoperable. Tr. 21.

On his first day of work, Adkins completed onboarding training for experienced miners, which included instruction on recognizing hazards and helping to prevent or correct violations of

applicable health and safety standards. Tr. 17-18; Ex. C-1, at 1. Eight months later, Adkins completed experienced miner training that involved additional guidance on spotting, preventing, and correcting hazards and violations. Tr. 18-19; Ex. C-1, at 2-3.

In early September 2023, Adkins began noticing problems with his dozer, and so, he began logging safety complaints on his pre-shift safety checklist form. Tr. 21-23. Admitted at hearing was a record of those periodic daily complaints, which were logged through November 10, 2023. Ex. C-2. Adkins' most frequent notations were regarding a worn out hardbar, a hydraulic leak, and improperly working lights and fire suppression. Tr. 24-28. At hearing, Adkins explained the concerns he had regarding the deficiencies he had noted in the condition of the dozer. Tr. 28-29. Even though Adkins' foreman, Chris Bellomy, reviewed the reports, Adkins saw no indication Greenbrier acted on the concerns he had raised. Tr. 30-31.

At one point while this was occurring, Adkins also observed a text message exchange between foreman Bellomy and either mine superintendent Rick Hunter or maintenance foreman Brian May. Tr. 32. In the exchange, Bellomy's text disclosing that the dozer's hardbar required inspection was met with the response that Greenbrier would "get to it when we can." Tr. 32.

Greenbrier's weeks-long failure to address the dozer safety issues led Adkins to discuss the issues with his wife, who then called a complaint into the Department of Labor's Mine Safety and Health Administration ("MSHA") on November 9, 2023, regarding the issues Adkins had been documenting. Tr. 32-33. MSHA Inspector Paul Milum visited the mine the next day and issued citations which took the dozer out of service for four days. Tr. 33-35, 36; Ex. R-6, at Ex. C. The inspector also concluded that Greenbrier had failed to remedy the conditions properly reported by Adkins on his pre-shift safety checklist. Tr. 36-38.

Following this inspection, Brandon Vance, a Greenbrier safety supervisor, met with day shift miners and discouraged them from calling MSHA with safety concerns without first notifying management. Tr. 40, 92-93. At the meeting, Adkins identified himself as the source of the complaint to MSHA and stated that he had done so only after Greenbrier had failed to address his dozer-related complaints for two months. Tr. 41.

With the dozer undergoing repairs, Hunter instructed Adkins to operate a rock haul truck. Tr. 38-39. Even after the dozer was fixed five days later, Adkins continued to be assigned rock truck duty without receiving additional training on its proper operation. Tr. 39, 41-42, 43. Adkins also feared driving the rock truck because of the scratches on the camera making it difficult to navigate, though he chose not to report these hazardous conditions out of fear of reprisal. Tr. 20.

On Friday, March 1, 2024, Adkins was supposed to operate a grader but was instead assigned to drive a rock truck. Tr. 42-43, 46. That day, Adkins expressed his frustration over the company radio, stating that he felt that his assignment to primarily driving a rock truck was in retaliation for his complaint to MSHA. Tr. 42-43, 49. Adkins felt that "ever since [he] called the inspector in November, [he has] been in a lizard truck or a wiggle truck, unless it was down." Tr. 43. According to Adkins, everyone at the mines used and listened to that channel on the radio. Tr. 43.

Adkins' next working shift was Monday, March 4. After the regularly scheduled weekly safety meeting at the start of the shift, superintendent Hunter and the mine manager Ben Collins pulled Adkins aside to privately discuss Adkins' use of the radio on Friday. Tr. 44-45. Hunter told Adkins that he was not being retaliated against for contacting MSHA and instructed him not to use the radio to make such statements. Tr. 45.

Following this meeting, superintendent Hunter directed Adkins to confirm his daily assignment with foreman Gordon Tomblin, who assigned him to operate a grader at the North Fork and Middle Fork mines. Tr. 46; Ex R-6, at Ex. A, ¶ T. Adkins told Tomblin that he would switch with someone and instead drive a rock truck because he expected to be back on a rock truck sooner or later regardless. Tr. 46; Ex R-6, at Ex. A, ¶ U. Adkins subsequently boarded a bus for the Middle Fork Surface Mine. Tr. 47.

Shortly after, superintendent Hunter pulled Adkins off the bus and arranged for him to report to Wayne Cooper, the Human Resources Manager for Greenbrier. Tr. 47-48. Upon arriving at Mr. Cooper's office, Adkins explained that he felt retaliated against by Respondent ever since making the MSHA call. Tr. 49. At this point, Mr. Cooper suspended Adkins for three days and assured him that he would be in touch. However, Adkins received no written explanation or paperwork regarding this suspension, and Mr. Cooper never reached out. Tr. 49-50. After not hearing from Mr. Cooper, Adkins returned to work three days later, where mine manager Ben Collins instructed him to return to Mr. Cooper's office. Tr. 50. While he was in the waiting room, Adkins received a call from Mr. Cooper informing him of his termination. Tr. 51. Again, the Respondent failed to provide any paperwork or written explanation regarding the reasons for Adkins' termination. Tr. 51-52.

Wayne Cooper

Human Resources Manager Cooper testified that he received a phone call from superintendent Hunter and manager Collins stating that Adkins had refused to operate a grader, whereupon Cooper instructed them to send Adkins to see him to talk and informed them that Greenbrier would be suspending Adkins with intent to terminate on the grounds of insubordination. Tr. 78-79. At Cooper's office, Adkins confirmed he had refused to operate the grader and had gotten on a different bus intentionally. Tr. 79. While Adkins also told Cooper of his complaint to MHSA, this was the first time Cooper had heard of the incident. Tr. 79. Cooper himself made the decision on Adkins' discipline and informed him of his three-day suspension for refusing to perform a work assignment. Tr. 79-80.

At hearing, Cooper clarified that the initial three-day suspension was for investigation purposes, and he planned to discuss the matter further with Adkins. Tr. 81, 87. During cross-examination, Mr. Cooper could not point to any other documented instances that contributed to Adkin's termination. Tr. 85-86. He was also unaware whether the company had ever suspended or terminated an employee for insubordinate actions or for switching job assignments. Tr. 86-87. Lastly, Mr. Cooper could not cite any job policy mandating suspension or termination based on such insubordination. Tr. 87.

MSHA Complaint

Three days after his termination, on March 11, 2024, Adkins filed a discrimination complaint with MSHA. He alleged that he was unlawfully discharged from employment after complaining to his employer and MSHA that his work dozer, Co. No. 229, Caterpillar D10-R Dozer, was unsafe to operate. Ex. R-6, at Ex. B. As a result, the Secretary filed the application requesting that Adkins be temporarily reinstated to his former position or a comparable one, pending a final decision on the merits of his complaint. Ex. R-6.

III. Legal Standard

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising a protected right under the Act. 30 U.S.C. § 815(c). The prohibition's purpose is to encourage miners "to play an active part in the [Act's] enforcement." 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*, at 623 (1978) ("*Legis. Hist.*").

Under section 105(c)(2), a miner that lodges a discrimination complaint is entitled to "immediate reinstatement . . . pending final order on the complaint" if the Secretary finds that the complaint was "not frivolously brought." 30 U.S.C. 815(c)(2). Upon the Secretary's application to the Commission for an order reinstating the miner, an operator may request a hearing on the Secretary's application. 29 C.F.R. § 2700.45(c). Under the Commission Procedural Rules, "the Secretary may limit his [hearing] presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought." 29 C.F.R. § 2700.45(d).

Nonetheless, the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y on behalf of Collins v. Crimson Oak Grove Res., LLC,* 45 FMSHRC 866, 869 (Oct. 2023), *pet. for rev. filed,* No. 23-13665 (11th Cir. Nov. 3, 2023) (quoting *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990); *Sec'y on behalf of Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2522 (Nov. 2015)). This narrow standard reflects Congress' intent that "employers bear a proportionately greater burden of risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res.*, 920 F.2d at 748, n.11.

At the hearing, the Judge's sole task is to evaluate the evidence of the Secretary's case to determine whether the complaint "appears to have merit." *Sec'y on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). When evaluating that evidence, the Judge must not resolve credibility issues, address conflicts in testimony, or weigh the operator's evidence against that of the Secretary. *Id.* at 1089, 1091; *see* 30 U.S.C. § 815(c)(2); *Sec'y on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012); *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (recognizing that "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this

preliminary stage of the proceedings"). Thus, under this standard, the Secretary must only prove a non-frivolous claim that the miner engaged in a protected activity that has an arguable connection to an adverse employment action and need not set forth its prima facie case of discrimination. *CAM Mining,* 31 FMSHRC at 1088; *Jim Walter Res.*, 920 F.2d at 744 (explaining that a temporary reinstatement case is "conceptually different" than the underlying case of discrimination").

Even though the Secretary need not prove a prima facie case, the Commission has found that "it is useful [for a Judge] to review the elements of a discrimination claim in order to assess whether the evidence at this stage . . . meets the non-frivolous test. In order to establish a prima facie case . . . a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity." *Crimson Oak Grove*, 45 FMSHRC at 869 (quoting *CAM Mining*, 31 FMSHRC at 1088 (citations omitted)). The Commission has further held that evidence of discriminatory motive, or a causal nexus, may be shown by circumstantial evidence. *Sec'y on behalf of Hoover v. Moseneca Mfr. LLC d/b/a American Tripoli*, 46 FMSHRC 1, 3-4 (Jan. 2024); *Sec'y 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). Recognized circumstantial evidence includes: (1) knowledge of the protected activity; (2) hostility or animus towards the miner regarding the protected activity; (3) temporal proximity; and (4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510-12.

If the Secretary meets her burden of proof, the Judge will issue an order temporarily reinstating the miner. If, however, the Secretary fails to meet this burden, the Judge will dismiss the case. *See, e.g., Sec'y on behalf of Fletcher v. Frontier-Kemper Constructors, Inc.*, 34 FMSHRC 2189 (Aug. 2012) (ALJ).

IV. Disposition

The Secretary has more than sufficiently demonstrated that Adkins' discrimination complaint to MSHA was not frivolously brought. The documentary evidence and testimony presented by the Secretary establish that there is reasonable cause to believe there may be a causal nexus between the protected activity in which Adkins engaged and his subsequent termination.

a. Protected Activity

First, there is sufficient evidence at this stage to establish Adkins engaged in a protected activity. Protected activity can include making a complaint to an operator or its agent about unsafe equipment, *see, e.g., Sec'y on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1995), or an alleged danger or safety or health violation. *See, e.g., Sec'y on behalf of Davis v. Smasal Aggregates & Asphalt, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ).

In this case, Adkins made a complaint to both the operator and eventually MSHA. As background, the training Adkins completed where he learned to spot, prevent, and correct hazards or violations of safety standards, is indirect evidence that Greenbrier expected its miners

to assist in ensuring a safe workplace with properly functioning machinery. Tr. 17-18. Such expectation is amplified by Greenbrier's use of pre-shift safety checklists. *See, e.g.,* Ex. C-1. Adkins used these checklists as intended when he raised his safety concerns regarding the worn out hardbar, hydraulic leak, and non-functioning lights and fire suppression. Ex. C-1.

The evidence suggests that the mine foreman Chris Bellomy reviewed and signed off on most of these pre-shift reports but Greenbrier did not take any further action. Ex. C-1. After Greenbrier failed to address the two-month long concerns lodged in the pre-shift reports, Adkins spoke with his wife who then contacted MSHA with his complaints, which prompted an MSHA inspection resulting in citations alleging violation with respect to the dozer's condition. Tr. 32-34. Either action by Complainant—bringing his concerns to the attention of mine management or filing an MSHA safety complaint—constitutes a protected activity.

Adkins' use of the company radio to express his frustration and complain about his perception that he had been retaliated against by the company for his safety complaints to the operator and MSHA can also qualify as protected activity. Tr. 42-43. In enacting the Mine Act, Congress indicated that the concept of protected activity "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36, *Legis. Hist*. at 624. Given his history of safety complaints to the operator and MSHA, Adkins' radio broadcast regarding perceived retaliation can be considered to fall within the expansive scope of rights protected under the Mine Act, particularly in light of section 105(c)(1)'s prohibition against such retaliation.

b. Adverse Employment Action

Next, I find that the Secretary provided sufficient evidence that Adkins suffered an adverse employment action when he was terminated. Under the plain language of the Act and well-settled Commission precedent, suffering a discharge or termination is an adverse employment action. 30 U.S.C. § 815(c)(1); *see e.g., Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982). It is undisputed that Adkins was terminated on March 7, 2024. Tr 8.

c. Causal Nexus

Given the evidence presented by the Secretary, I further find that a connection can reasonably be drawn between Adkins' safety complaints and his subsequent discharge. To reach this conclusion, I will discuss each *Chacon* factor in turn.

i. Knowledge

Although Respondent argues that Mr. Cooper had no knowledge of the protected activity when he made the decision to terminate Adkins (Tr. 101-103), the Secretary need not prove that the operator had actual knowledge of the activity, only that there is a non-frivolous issue as to knowledge. *Chicopee Coal Co.*, 21 FMSHRC at 718. At this stage, I need not make a credibility determination as to Mr. Cooper's testimony. Regardless, the evidence shows that Adkins had expressed his frustration over the company radio regarding the retaliation following his safety complaints a few days before his meeting with Mr. Cooper. Tr. 42-43. Mr. Cooper's testimony

also indicates that he consulted superintendent Hunter and manager Collins prior to deciding to suspend or terminate Adkins. Tr. 78-79. The timing of the radio broadcast and the conversations with Hunter and Collins suggest that Mr. Cooper could have reasonably known of the protected activity, especially given the evidence of the widespread use of the radio channel at the mines. Tr. 43.

In any event, the finding that Greenbrier essentially requests here—that Cooper decided to terminate Adkins solely based on his limited knowledge of the events of the morning of March 1—would require an extensive inquiry into the communications between Cooper and several other Greenbrier management personnel. Such an inquiry is beyond the limited scope of this proceeding, and much more appropriate for the merits stage of a discrimination case. *See, e.g., Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1067-68 (May 2011).

ii. Temporal Proximity

The Commission has found that "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive." *Chacon*, 3 FMSHRC at 2511. There is no hard and fast rule for this element; "surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Sec'y on behalf of Hyles v. All. Am. Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (citations omitted). Improper motive has been found in instances in which there were varying periods of time between the protected activity and the adverse action, including up to a few months. *See e.g., Pero v. Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (holding that an adverse employment action four months after a protected activity constituted close temporal proximity where the operator had knowledge of the protected activity).

Considering the evidence presented by the Secretary, I find reasonable cause to believe there is sufficient coincidence in time between the safety complaints and Adkins' termination. The Complainant's primary protected activities occurred a little less than four months before the termination. Tr. 33-34, 40-41, 42-43, 51. After learning of Adkins' call to MSHA, Respondent immediately transferred him to rock haul truck service, a piece of machinery that Adkins had no additional training to operate. Tr. 38-39. Even after his dozer was fixed, Respondent did not switch Adkins back to that machinery. Tr. 39, 41-42, 43.

Moreover, if Adkins' expression of his concern regarding retaliation over the radio is viewed as an additional protected act, the gap between his protected activity and his suspension and eventual termination is reduced to a few days, which easily satisfies the coincidence in time factor. Tr. 42-43, 51; *see e.g., Sec'y on behalf of Houston v. Highland Mining Co.*, 35 FMSHRC 1081, 1093 (Apr. 2013) (ALJ) (holding that a five-day gap between the adverse action and protected activity constituted circumstantial evidence of nexus); *Chacon*, 3 FMSHRC at 2511. Either timeframe establishes a non-frivolous claim that a casual nexus exists.

iii. Hostility

The Commission has held that the more animus or retaliatory hostility "specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon.*, 3 FMSHRC at 2511. Here there is a non-frivolous issue to this element. Potential circumstantial evidence may include when safety supervisor Brandon Vance discouraged miners from calling MSHA prior to addressing any safety issues with management. Tr. 45-46, 104-05. Such an attitude by Greenbrier management may indicate hostility to a miner's right to raise safety complaints to MSHA under section 103(g) of the Mine Act, 30 U.S.C. § 813(g). *See, e.g., Sec'y on behalf of McGary v. Marshall County Coal Co.*, 38 FMSHRC 2006, 2013-15 (Aug. 2016).

Further evidence of hostility towards Adkins' protected activity is that following the MSHA inspection, Respondent assigned Adkins to the rock truck service despite knowing for over a year of his preference to not operate such machinery. Tr. 20-21, 38. For almost four months, Respondent rarely if ever switched Adkins back to operating other machinery like the dozer. Tr. 39, 41-42, 43. Either of these acts show sufficient evidence to establish a non-frivolous claim that management may have harbored hostility or animus about Adkins' alleged protected activities.

iv. Disparate Treatment

The Secretary does not supply evidence of disparate treatment. However, Mr. Cooper's cross-examination reveals that he was unaware of whether Respondent has ever suspended or terminated a miner for insubordinate actions, including for refusing or switching a job assignment. Tr. 85-87. Additionally, Mr. Cooper testified he had no knowledge of an employment policy suggesting or mandating a suspension or termination based on a miner's refusal to complete an assigned work task. Tr. 87. Because Adkins was terminated for such refusal, there is reasonable cause to find disparate treatment as a non-frivolous issue in this case.

d. Conclusion

For the reasons above, I conclude that the Secretary has established a non-frivolous claim that: (1) Adkins engaged in one or more protected activity; (2) Adkins suffered an adverse employment action upon his termination; and (3) there was a causal nexus between Adkins' protected activities and the adverse employment action. Given that the complaint "appears to have merit" and there is a non-frivolous issue, Adkins is entitled to temporary reinstatement under section 105(c) of the Mine Act.

V. Order

Accordingly, it is **ORDERED** that Respondent Greenbrier Minerals, LLC, immediately reinstate Complainant Kenneth M. Adkins to his former position, or a comparable position, at the Buffalo Creek Mining Complex at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

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 under 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a status report on the underlying discrimination complaint no later than **June 9, 2024**.[1] The Secretary's counsel **SHALL** also **immediately** notify my office of any settlement or of any determination that the Respondent did not violation section 105(c) of the Act.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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[1] Section 105(c)(3) of the Act directs the Secretary to notify a complainant whether a section 105(c) violation occurred within 90 days of the filing of a complaint. 30 U.S.C. § 815(c)(3).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
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May 23, 2024

SECRETARY OF LABOR, MSHA obo ROBERT BAUMANN, Complainant v. MOSENECAMANUFACTURER LIMITED LIABILITY COMPANY d/b/a AMERICAN TRIPOLI, Respondent	DISCRIMINATION PROCEEDING Docket No. CENT 2023-0251-DM MSHA No. MADI-CD-2023-03 Mine: MOSenecaMfr LLC dba American Tr Mine ID: 23-00504

DECISION AND ORDER

Appearances:

For the Complainant: Laura O'Reilly, Esq., Elaine M. Smith, Esq., Quinlan B. Moll, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri.

For the Respondent, Russell Tidaback, pro se.

Before: Judge William B. Moran

This case is before the Court on a complaint of discrimination pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("Mine Act" or "Act"), brought by the Secretary of Labor on behalf of Robert Baumann, against MoSenecaManufacturer Limited Liability Company, d/b/a American Tripoli. ("Tripoli," "AT," "Respondent"). The mine involved is MOSenecaMfr LLC dba American Tr, which mine has the ID: 23-00504.

Bringing two Counts against the Respondent, the Secretary alleges, in Count I, that Robert Baumann was discharged from his employment at the mine because he engaged in protected activity while so employed. Complaint at 2. In Count II, the Secretary alleges that the Respondent interfered in Mr. Baumann's rights and that of at least one other miner, essentially by telling miners not to communicate with MSHA during inspections. *Id.* at 3-4.

Respondent asserts that it terminated Baumann's employment for matters unrelated to any protected activity, contending that Baumann did not satisfactorily perform his job duties. Answer at 1.

A hearing was held in Joplin, Missouri from February 27 through February 29, 2024.

Based on the testimony and exhibits presented at the hearing, the Court's credibility determinations, and the post-hearing briefs of the parties, the Court finds that by the preponderance of the evidence the Secretary clearly established both Counts and that the Respondent failed to establish any credible evidence that Mr. Baumann was terminated for non-protected activity.

The Court further determines that for Count I, the Discrimination Count, the civil penalty proposed by the Secretary, in the amount of $15,000.00, is fully warranted and that, for Count II, the Interference Count, the amount proposed by the Secretary in the amount of $17,500.00 is also fully warranted. Accordingly, both fines are imposed by the Court. As described below, the Court also awards damages to Mr. Baumann and orders other corrective action to be taken by the Respondent.

APPLICABLE LAW

The Source for Both Counts in this Matter Arises from 30 U.S.C. §815(c), which provides:

> **No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against *or otherwise interfere* with the exercise of the statutory rights of any miner, representative of miners** or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. §815(c) (emphasis added).

Commission case law has addressed both causes of action: the discrimination count and the interference count.

The Basics Regarding Discrimination Under the Mine Act.

Discrimination Claims

> A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a

> conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980)*, rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981)*; Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Secretary of Labor on behalf of Hyles, 21 FMSHRC 34, 42 (Jan. 1999).

A Change Occurs in one Circuit Court[1]

In 2021, the United States Court of Appeals for the Ninth Circuit ruled that a "but for" analysis applies in discrimination claims under the Mine Act. *Thomas v. CalPortland Co*., 993 F.3d 1204, 1211 (9th Cir. 2021). The decision looked to the language in Section 105(c) of that Act, determining that section's text, prohibiting discrimination by a mine operator "because" the miner engaged in protected activity, means that, to prevail, the miner complainant must show that the discrimination would not have occurred "but for" the protected activity. *Id.* In holding that "because" means "but for," the decision held that "the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise."[2] *Id.*

Then, Another Circuit Follows that Change, with the Secretary of Labor's Apparent Blessing

Subsequently, the Eighth Circuit, in a separate Mine Act discrimination proceeding, noted that the Secretary of Labor took the position that the Mine Review Commission's traditional approach indeed requires but-for causation, and she proceeds to argue the case with that understanding. So we will, too." *Cont'l Cement v. Sec'y of Labor*, 94 F4th 729,733 (8th Cir. Feb. 28, 2024). The Eighth Circuit includes Missouri.

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[1] There are thirteen circuits for the United States Courts of Appeals. *About the U.S. Court of Appeals*, USCOURTS (May 9, 2024), https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals.

[2] This Court believes that a "but for" essentially existed under the Commission's *Pasula-Robinette* standard in that a mine operator could rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. The difference, it would seem, is that under the "but for" approach, that burden is placed on the complainant. Even so, where a complainant, as in this case, presents a plethora of credible information in support of its position and a respondent's slate is empty, the burden is met.

The Commission Issues its Decision Upon Remand in *Calportland* on March 1, 2024.

Speaking to "But-for Causation," the Commission noted that:

> [a]ccording to the Ninth Circuit, the Supreme Court has instructed "that the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise." (citation omitted) … The Supreme Court has explained that the ordinary meaning of "because of" is that the protected activity or class was the "reason" the employer decided to act. (citation omitted) Under the but-for standard the plaintiff retains the burden of persuasion and must prove by a preponderance of the evidence (which may be direct or circumstantial), that the protected activity was the "but for" cause of the challenged employer decision.

Calportland 2024 WL 1012573 at * 3 (Mar. 2024).

Interference Claims

It is arguable that the proper test for analyzing section 105(c)(1) interference claims is the two-step framework adopted by two Commissioners in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP,* 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm'r Nakamura) ("*Franks*"). 38 FMSHRC at 946-48. *Secretary of Labor on behalf of Greathouse*, 40 FMSHRC 679, 683 (June 2018) ("*Greathouse*").[3] The first step of the *Franks* test, asks whether a reasonable miner would view the operator's actions as tending to interfere with miners' protected rights. *Id.* The second step of this test requires identifying and weighing any legitimate and substantial business justification proffered by the operator for actions it takes that interfere with protected rights. *Id.*

[3] In *Greathouse,* Administrative Law Judge Margaret Miller noted that "a majority of the Commission has recognized that 'the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the Pasula-Robinette framework.' … [and that] in interference cases the Commission has focused not on the employer's motive, but rather on whether the conduct would "chill the exercise of protected rights," either by the directly affected miner or by others at the mine. [citing] *Gray, 27 FMSHRC at 8; Moses, 4 FMSHRC at 1478-79.* Greathouse, 38 FMSHRC 941, at *947* (May 2016) (ALJ).

Greathouse was mentioned again in *McNary v. Alcoa*, 42 FMSHRC 9 (Jan. 2020) ("*McNary*") wherein it noted "[i]n Secretary of Labor on behalf of *Greathouse v. Monongalia Coal Co*., 40 FMSHRC 679 (June 2018), a four-member Commission divided evenly regarding the proper analytical framework for interference claims. Two Commissioners stated that they would apply a test developed by two Commissioners in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), in which protected activity need not cause the operator action giving rise to an interference claim. The other two Commissioners concluded they would apply *Secretary of Labor ex rel. Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 14, 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981), and its progeny to claims of interference. Id. at 681, 708-16. *McNary* at n.8

In *Secretary on behalf of McGary,* 38 FMSHRC 2006 (Aug. 2016), under the heading "The Appropriate Test for Interference," the Commission remarked:

> In evaluating whether the miners here had established interference with their statutory rights, the Judge applied the two-step test articulated by Chairman Jordan and Commissioner Nakamura in their opinion in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2104-19 (Aug. 2014) (hereinafter *"Franks* interference opinion"). *See* 37 FMSHRC at 2603-08. The test, suggested by the Secretary in his amicus brief in that case and drawn from National Labor Relations Board precedent, provides that interference is established when (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. at 2011.

The decision by the United States Court of Appeals for the District of Columbia Circuit in *Marshall Cnty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n,* 923 F.3d 192 (D.C. Cir. 2019) ("*Marshall Cnty*"), is also useful when considering interference claims. There, the D.C. Circuit upheld the Commission's determination that the operator interfered with miners' statutory rights to raise anonymous health and safety complaints with MSHA. That case involved miners invoking their statutory rights under section 103(g)(1),[4] but the interference complaints can be based on any other statutory rights of miners.

The D.C. Circuit noted that "Congress recognized that its national mine safety and health program would be most effective **if miners and their representatives** contributed to the enforcement of the Mine Act." *Marshall Cnty.* at 195(emphasis added). This includes "**the right to point out hazards**." *Id*. at 196 (emphasis added). Accordingly, the Mine Act "specifically protects miners and their representatives against retaliation and **interference.** *Id.* (emphasis added). As noted above, the Mine Act specifically provides for this protection. 30 U.S.C. §815(c).

The D.C. Circuit referred to the application of the *Franks* test, which was applied by the administrative law judge and later by two members of the Commission. In that regard, it noted that under *Frank:*

> an interference violation occurs if (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the

[4] 30 U.S.C. §813(g)(1) affords the statutory right for a representative of miners or a miner, who has reasonable grounds to believe that a violation of a health or safety standard exists, or an imminent danger exists, to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. The notice is reduced to writing but the name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification.

> circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights[.] *Franks,* 36 FMSHRC at 2108 (opinion of Jordan, Chairman, and Nakamura, Comm'r). **Unlike the test for discrimination claims under Section 105(c)(1), the *Franks* test for interference does not require a finding that the employer was motivated by miners' exercise of their protected rights**.

Marshall Cnty at 199 (emphasis added).[5]

In the case before this Court, *Sec. obo Baumann*, it is not necessary to determine if the alleged interference *was motivated* by Baumann's exercise of his protected rights, because, as described below, the Court finds several instances of substantial evidence supporting its conclusion that American Tripoli interfered with Baumann's statutory rights. Nevertheless, the Court does find that Tripoli *was* so motivated.

Substantial Evidence

> Apart from the new "But for" approach, it is important to note that:
>
> [u]nder the Mine Act, an administrative law judge's findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc*., 14 FMSHRC 1549, 1555 (Sept. 1992). In addition, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Resources, Inc*., 6 FMSHRC 1132, 1138 (May 1984). The "possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them." *NLRB v. Nevada Consolidated Copper Corp*., 316 U.S. 105, 106 (1942). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent*, 6 FMSHRC at 1138.

Secretary of Labor on behalf of Hyles, 21 FMSHRC 34, 43 (Jan. 1999).

The Court finds that applying the "but for" test, Complainant Baumann, through the Acting Secretary, overwhelming established his discrimination. Further, the Respondent demonstrated

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[5] Although the D.C Circuit declined to decide whether the *Franks* Test is the proper for interference claims in that case, any reasonable reading of that decision would conclude that it supported the test. It remarked "[i]t is beyond dispute that the Commission's finding of interference in this case was supported by substantial evidence **under *any* applicable test construing Section 105(c)(1)**." *Marshall Cnty* at 204 (emphasis added). It found that there was substantial evidence to show that the mine operator's actions were motivated by the miners' exercise of a statutory right, namely Section 103(g) in that instance. *Id.* As set forth below, this Court, as the undersigned in this Baumann decision, finds a wealth of substantial evidence to establish such motivation by American Tripoli.

nothing to show otherwise. To put it plainly, all as described below in the Findings of Fact, there was only one credible conclusion from the evidence in this matter: American Tripoli acted as it did because Mr. Robert Baumann exercised his statutorily protected rights against discrimination under the Mine Act. Equally clear, the Respondent interfered with Mr. Baumann's rights and that of at least one other miner, essentially by telling those miners not to communicate with MSHA during inspections, and otherwise intimidating its miners from free exchange with MSHA's inspectors.

Findings of Fact and Related Conclusions of Law.

Complainant, Robert Baumann, was called by the Secretary. Baumann's complaint alleges that he was terminated for participating in MSHA inspections and trying to stand up for the miners' rights. Complaint at 2-3. He asserts that Russell Tidaback, Jordan Tidaback[6], and John Spears were the individuals who discriminated against him. Vol. 1 Tr. 46. Baumann stated that Russell Tidaback is the owner of American Tripoli. *Id.* at 47. This is not disputed. Mr. Spears was identified as the mine's operations manager. *Id*. Baumann's employment was from June 16, 2022 to April 17, 2023. *Id.* (Ten months' employment)

Baumann was hired as production supervisor and was informed that the mine's computer system reflected that as his job designation. *Id.* at 53, 99. That remained his job title during his employment at the mine. *Id.* He worked in the mill at the mine.[7] The mine produces "tripoli" and this explains the apt name for the company, American Tripoli. Baumann described the product as ground up rock, that ends up as powder. *Id.* at 57. Later in the hearing, during his testimony upon being sworn-in, Russell Tidaback elaborated that "Tripoli is a natural product. …[its] chemical makeup [ ] is … anywhere between 90 and 98 percent silicon dioxide, and the other particles could be numerous. …That's Tripoli in a whole. We don't add any chemicals. We don't change anything about the product. We just pulverize it." *Id.* at 175-176.

As noted, on April 17th, Baumann was terminated from American Tripoli. *Id.* at 47. On that day he received a text message to be at the mine office and, upon arriving, was given his termination letter. *Id.* at 47-48. Ex. P-38. According to Baumann, Spears told him at that time

[6] Jordan Tidaback is the daughter of Russell Tidaback. Tr. 164.

[7] The mill is located in Seneca, Missouri. *Id.* at 65. Baumann described the operation generally, stating "[t]hey mine the rock out at the pit. They bring it into Seneca to the processing plant. They dump it in a pit. It goes through a crusher. Goes up into big holding tanks, and then when we were producing or trying to produce, it would come out of the tanks into a fluid bed dryer to dry the product and then into a tube mill, which actually crushed it up into a fine like powder. And then it went through a -- basically an air system type thing that classified what grain or whatever, you know, how fine the powder was, whether we were running once ground or double ground, and then it went through classifiers, shakers, up through a big system into the finished goods hopper to go into a bag." Vol. 1 Tr. 53-54. In response to an inquiry by the Court about the size of the operation, Baumann estimated that it had about 20 employees. *Id.* at 55. Though not testifying at that point in the hearing, Mr. Tidaback asserted that the number of employees was less than 12. *Id.* Either way, the Tripoli Mill is a small mine.

"Sorry. Russell [Tidaback] told me to let you go." *Id.* at 48. Baumann also spoke that day with the mine's safety director at that time, Jesse Molesi, who also informed that the mine had fired him. *Id.* Baumann added that he informed Molesi that he could still contact him, if needed, reminding that he was still the miners' representative. *Id*. at 48-49. Baumann stated that the letter asserted his termination was due to "poor performance, lack of leadership skills and for failure to follow procedures and guidance given to your supervisor -- by your supervisor." Vol. 1 Tr. 50-51.

Mr. Baumann denied that he was having any performance issues at the time he was terminated. *Id.* at 51. Importantly, Baumann affirmed that he had not been disciplined or told that his job performance was lacking prior to his termination. *Id*.

In the weeks before he was fired, Baumann informed that there had been an MSHA inspection at the mine. *Id.* Explaining the circumstances for MSHA's presence, Baumann stated that there had been air tests at the mine, and after receiving those results MSHA issued some citations based on those test results. *Id.* at 51-52. The mine was told to get PAPR[8] systems and to work on the clean air system in the building. *Id.* The MSHA inspector returned after that and learned that no PAPRs had been purchased and that no attempts to address the air cleaning systems had been achieved. *Id.* at 52. This resulted in the inspector issuing a 104(b) order. *Id.*

Baumann agreed that he participated in an MSHA inspection around April 12, 2023. *Id.* at 57-58. He also participated in an earlier MSHA inspection involving air sampling. *Id.* at 58. The dust issue involved silica dust. *Id.* Baumann stated that he had raised safety concerns to mine management about that dust. *Id.* He also stated that, following MSHA's issuance of a 104(b) order for the dust hazard, he raised concerns about the dust issue with management "[e]very day." *Id.* at 60. He raised these concerns with John Spears and Jesse Molesi. *Id.* The concerns were not addressed before his termination. *Id.* at 61.

Regarding the 104(b) withdrawal order and Baumann voicing his concern that miners were due to be paid as a consequence of the order, he spoke with both Spears and Molesi about this subject. *Id.* at 61-62. An MSHA inspector confirmed to Baumann that miners would be entitled to pay. *Id.* at 62. However, neither Spears nor Molesi responded to him on this matter. *Id.* at 62-64.

Baumann's last day working at the mine was April 12th, the day MSHA shut down the mine. *Id.* at 64. He returned to the mine on April 17th and was terminated that day. *Id.*

Baumann was hired at Tripoli by Christine Schreiber, who was then the operations manager. *Id.* at 66. Then, not long after he was hired, Schreiber left and John Spears became his supervisor at Tripoli. *Id.* at 67. According to Baumann, Spears was in charge of day-to-day operations at the mine. *Id.* at 69. Mr. Spears role at Tripoli is not contested.

[8] The witness was unsure of the words for the acronym, but explained that it refers to respirators with filters. Tr. 247. PAPRs are identified as "Powered Air Purifying Respirator, … "PAPRs provide a constant flow of filtered air, which offers respiratory protection and comfort in hot working environments." *Petition Docket No. M-2022-040-C,* MSHA (Jul. 31, 2023), https://www.msha.gov/petition-docket-no-m-2022-040-c

Baumann communicated with Mr. Tidaback in person and through a messaging application, "Microsoft Teams." *Id.* at 67-68. (Hereinafter, Microsoft Teams Chats, or Teams Chats or Chats) Baumann also knew that Spears was communicating with Tidaback. *Id.* at 70. When Baumann raised safety or health issues, Spears told him that he, (i.e. Spears himself) would need to contact Tidaback. *Id.* at 69-70.

During his employment at Tripoli, Baumann was initially hired to work the second shift. *Id.* at 70-71. In that role, he was tasked with loading the 2,000 lb. bags of the tripoli product, while the day shift prepared 100 or 50 lb. bags. *Id.* at 71. This was part of production and his hours were from 4 p.m. to 11 p.m. *Id.* When he began the night shift there were three employees, but then a maintenance employee was fired, leaving two miners working. *Id.* at 72.

Thereafter, Baumann then moved to the day shift. *Id.* He asserted that the night shift work ended, as many of the bulk orders had been completed and because the machinery was breaking down from high use. *Id.* at 72-73. According to Baumann, Mr. Tidaback, Mr. Spears, and Ms. Christine Schreiber all gave him 'attaboys' for his night shift work. *Id.* at 73. Once moved to the day shift, his hours were then from 8 am to 4 pm. *Id.* Though he worked more than 8 hours with both the night and day shifts, he was never paid for the extra hours. *Id.* at 73-74. Mr. Spears informed that Mr. Tidaback would need to approve such overtime work. *Id.* at 74. Baumann was told there would be no overtime pay.[9] *Id.* He was an hourly, not salaried, employee, and was paid at $20.00 per hour. *Id.* at 75.

Asked about miner training, Baumann informed that Tripoli did provide some training, stating, "[a]bout two weeks after we started we had about a 30, 45 minutes, like, went through safety stuff." *Id.* at 81. Ex. P-40 is Baumann's record of his New Mining Training Certificate, dated July 5, 2022, which he signed while working at American Tripoli. *Id.* at 82. However, though he signed the certificate on July 5th, Baumann stated that in fact he had not received all the training listed on the certificate.[10] *Id.* at 85.

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[9] This was essentially true. Ex. P-4, a payroll record for the Complainant, reflects that Baumann was paid for only three hours of overtime during the period from July 1, 2022 through April 21, 2023, essentially ten months. Thus, that exhibit reflects that his overtime was miniscule. *Id.* and Tr. 76-77.

[10] Mr. Tidaback objected, as Baumann's testimony conflicted with the certificate. The Court ruled that Respondent could raise this issue during cross-examination. Tr. 85-86. Baumann did check 'new miner training' on the certificate box, but he stated that at that time he did not know what new miner training entailed. *Id.* at 86-87. He stated that he did not know that the training encompassed all the topics checked off on this training list. *Id.* at 87. Baumann contended that he never received 24 hours of new miner training while working for Tripoli. *Id.* at 87-88. The point is that Baumann, at least by his testimony, which the Court found to be credible, did not receive all of the required training. Further, he stated that he never received any other additional training after July 5, 2022. *Id.* at 88. Elaborating, Baumann responded to the following inquiries from the Secretary's Counsel, affirming that he was never supervised closely prior to July 5, 2022, the date when he received his new miner training. *Id.* at 89. After that training, he never received close supervision by anyone while he was working at American

(continued…)

According to Baumann, he didn't know initially about MSHA inspections that occurred during November 2022 at the mine. Vol. 1 Tr. at 91. He only became aware of these around February 2023 when MSHA told him that the mine had not corrected the cited conditions. *Id.*

There was certainly ample means to communicate with one another at the mine. As Baumann informed, there were groups of American Tripoli employees communicating with each other on Teams. *Id.* at 92. There were multiple communication groups different categories such as a maintenance group, a general group, a mill management and a production group. *Id.* People could also communicate individually. *Id.* at 92-93. Baumann was able to communicate with John Spears this way too. *Id.* at 93. In contrast, he described his communication with Mr. Tidaback as occurring only "on occasion." *Id.* However, Baumann informed that Tidaback would be able to view messages sent through Teams. *Id.* Baumann used Teams and he stated that he was never told that he failed at using Microsoft Teams effectively while working at American Tripoli. *Id.* at 94.

For background, the Court inquired of Baumann to describe his work at Tripoli.[11] He was hired to do production and was the lead over production from his first day to the day he was terminated. *Id.* at 96. Later, workplace exams became part of his job. Though expected to write down issues he found during an exam, initially the form did not provide sufficient space to describe problems found. *Id.* at 101. Baumann stated that workplace issues he identified could not be addressed right away because either there was no maintenance person at that time or because the

[10] (…continued)
Tripoli, and never received any task training on the jobs he would be performing while working at American Tripoli. *Id.* Nor did he ever observe task training being carried out, while he worked at American Tripoli. *Id.* He only became aware of these training requirements when so informed by MSHA inspectors during their inspections from December 2022 to February 2023. *Id*. Based on the credible testimony of other Tripoli employees, the Court concludes that Tripoli came up short in meeting its obligations for training its miners.

[11]In response, Mr. Baumann described his duties, generally. He informed that when on the second shift he would overlap the day shift by 30 minutes. Tr. 96. He would then find out if the day shift was having any problems, and anything like that for which he could provide assistance. *Id.* at 96-97. He would also get the bulk bags and other items, such as pallets, ready for his shift. *Id.* at 97. His duties were to feed the rock (i.e. the Tripoli) out of the tanks into the dryer, through the fluid bed dryer system and then into the bags. *Id.* He would then label the bags to identify the customers where they would be sent. *Id.* This was part of the process to get the orders ready. *Id.* The process would end with shutting down phase. *Id.* In sum, there was a start-up phase, running the material to fill orders and, last, a shut-down phase. Those were the phases on a good day, when things went smoothly. *Id.* On a bad day, if something broke, that would have to be addressed. *Id.* There were other factors impacting production. For example, the temperature, moisture and humidity could interfere with running the product. *Id.* Baumann would walk around about once an hour to make sure all the scrolls and all the pieces were moving in order to prevent backups or excessive dusting outside of the stacks and other issues like that.' *Id.* at 97-98. His duties encompassed the entire mill; they were not confined to a certain area of the mill. *Id.* at 98. He agreed that he interacted with all the employees at the mill. *Id.* at 98-99. Around December of 2022 or January 2023, he started doing workplace exams. *Id.* at 100. However, he never received any training how to do those exams. *Id.* at 101.

fix would interfere with production. *Id.* at 102. He contended that only problems hindering production would be addressed immediately. *Id.* at 103. Baumann asserted that the maintenance issues impacted safety. *Id.* He also stated that he never received task training for maintenance or electrical work at Tripoli. *Id*. As for maintenance work, he asserted that during his employment at Tripoli, the mine had six or eight different people in that position and that there were times when there was no maintenance person. *Id.* at 104. These periods with no maintenance person occurred at least three times and one such gap lasted three or four weeks. *Id.* In those instances, mill employees fixed problems or Spears would work on the problem. *Id.* at 105. The inadequacy of maintenance people made it difficult to attend to safety issues. *Id.*

It is accurate to note that during the relatively short time of Baumann's employment there was a great deal of employee turnover for maintenance. This is instructive in understanding this operation.

Baumann asserted that no one at Tripoli ever told him he had to meet a certain production quota. *Id.* Specifically, Baumann denied that Mr. Tidaback ever told him he had to meet a 40,000 pound daily production quota. *Id.* at 106. Baumann maintained that he never spoke with Mr. Tidaback or Mr. Spears about meeting production quotas or goals and further that he was never counseled for not meeting production demands. *Id*. To the contrary, he was given positive feedback regarding the production he was able to achieve from John Spears. *Id.* at 106-107. Baumann stated that the praise came about a month before he was fired. *Id.* at 107. Baumann also stated that the 40,000 lbs. per day goal was not realistic due to equipment and weather issues, among other reasons. *Id.* at 108.

Baumann informed that John Spears was the operations manager. *Id.* at 109. As such, Baumann asserted that Spears had the ultimate authority as to the amount of production at the mine. *Id*. Baumann also stated that to properly run the operation five employees were needed but there were many times when they had only three or four miners working. *Id.* at 112.

It is noteworthy that shutdowns occurred not simply due to operations problems. Baumann informed that the local Chief of Police for Seneca came to the mill due to mill dust reaching the city. *Id.* at 112-113. He claimed such shutdowns occurred on three or four occasions. *Id.* at 113. On one occasion, according to Baumann, the sheriff threatened to arrest everyone if the dust problem was not corrected. *Id*. Then too, MSHA shut down the mill multiple times, Baumann informed. *Id.* at 114.

On the issue of actual production at the mill, as opposed to goals, shown Ex. P-27, Baumann identified it as a production spreadsheet, covering from November of 2022 through March of 2023. *Id.* at 117. It shows production of 40,000 lbs. per day was never achieved during those dates. Ex. P-28 also reflects the same shortcoming for production. *Id.* at 121. The Mine only met the asserted production goal of 40,000 pounds 20-30 times during Spears' 18-month employment with AT, regardless of who was the production supervisor. Sec's Br. at 24.

The Secretary then inquired about Baumann's role, if any, regarding safety. *Id.* at 134. Baumann informed that he was never in charge of safety while at Tripoli, nor was he given any training on that subject by Tripoli. *Id.* Further, he was never tasked with ensuring that the mill was

complying with MSHA standards. *Id.* at 135. Baumann informed that out of the 10 months of his employment for at least 3 or 4 of those months there was no one employed with the role of safety at Tripoli. Vol. 1 Tr. at 136. During those time when no one was employed for that, John Spears would be in charge of safety. *Id.*

Essentially, Baumann asserted that employees were inattentive to safety issues until MSHA started with its inspections and began issuing citations. He stated that when safety issues were raised, the Mill often did not have the material to repair items or were prevented from taking such action when production would be impacted. *Id.* at 137. When safety issues were raised to Spears, Baumann informed that, unless the issue would shut down operations, they were to keep running. *Id.* at 138-139. Baumann also contended that he was unaware of any written safety procedures and never provided with such. *Id.* at 139.

Baumann's duties did include keeping track of the hours that miners worked. *Id.* at 140. He was never told that he was failing at that task. *Id.* at 140-141. Handling shipping and receiving paperwork were also part of his job duties, and for this responsibility too, he was never told of issues with his performance for this duty. *Id.* at 141. In contrast, mill product and production supply inventory were not part of his duties. *Id.* Though on occasion Baumann sent employees home early, it was always after receiving approval from Christine Schreiber or John Spears. *Id.* at 143.

Questions then turned to MSHA inspections at Tripoli. *Id.* at 148. Ex. P-21 references the mine's ID: 2300504, and it lists several MSHA inspections at the mine. *Id.* Part of that exhibit refers to "verbal hazard complaints." *Id.* at 149. Baumann informed that during February through April 2023 MSHA inspections, he walked around with MSHA on multiple days. *Id.* at 150. Baumann confirmed that Spears was with him during some of those MSHA inspections and that Spears also observed him with MSHA inspectors. *Id.*

Ex. P-8 is a Microsoft Teams message sent from Spears to Gage Wheeler. Baumann took a screen shot of the message using his phone. *Id.* at 151. The exhibit, which is dated February 14, 2023, reflects that Spears and Mr. Tidaback were part of the message and that Gage Wheeler is also referenced in it. *Id.* at 152. The message states: **"Gage Wheeler, do not answer any questions about the -- that the MSHA inspector may have. Do not go into the mill. I'll be the person who talks to me [sic] inspector."** *Id.* at 154 (emphasis added). Baumann identified Wheeler as the maintenance person at that time. *Id.* Baumann, quite reasonably in the Court's view, understood the message to convey that the employees were not to speak with MSHA. *Id.* Baumann's recollection was that he and Wheeler walked around with the MSHA inspector on the February 14th inspection. *Id.* at 155. Ex. P-9 is a Teams Chat from the same time. Participants in that Chat would have been Baumann, Gage Wheeler,[12] Russell Tidaback, Jordan Tidaback, and John Spears. *Id.* at 156-157. The Secretary received the Teams messages from the Respondent during discovery. *Id.* at 161.

[12] The message lists one participant as "UU." Baumann explained that stood for 'unknown user,' which he identified as Wheeler in that instance. Vol. 1 Tr. 156-157. Mr. Tidaback stated that Exhibits P -8 and P-9 contain the same information. *Id.* at 161.

The Court finds that those messages were plainly to warn the employees, improperly, that they were not to speak to MSHA. Even a follow-up Teams message from Jordan Tidaback was improper, when she expressed "Hi, Gage. We spoke with John about that. You are absolutely allowed to answer questions the MSHA inspector has (obviously). I think John [Spears] may have meant don't just go up to him and point out everything under the sun. We've had people doing that, knowing very well it's an issue being worked on." *Id.* at 167; Ex. P-10.

Ex. P-13, consisting of 467 pages, reflects Team Chats. It was produced by the Respondent through MSHA's discovery. *Id.* at 170. Baumann was a participant in the February 14, 2023, MSHA inspection. *Id.* at 173. As part of messaging for that day, he wrote: "IDK. This guy is out for blood. We are removing product from the floor now." Ex. P-13 at page 54. Baumann explained his message, stating that the MSHA inspector was:

> very unhappy that nothing had been done that we were supposed to be doing. [Baumann] asked him, … what do we need to be doing to make this right … [and Baumann learned that the inspector … was talking about some product that was on the floor in front of an electrical box and then an oil dam that was underneath the tube mill.

Id. at 173-174.

For context, Baumann explained that the inspector was referring to prior citations that had not been abated. *Id.* at 174. However, Baumann told the inspector he was unaware of the prior citations. *Id.* at 174-176. The upshot was that the MSHA inspector shut the mill down. *Id.* at 177. However, on page 30 of that exhibit, Baumann was told it was unnecessary to shut down the whole building. *Id.* at 195. Instead caution tape was used around the affected area. Tr. 195. Baumann stated that the hazard was not remedied until about two weeks later. *Id.* This example epitomized Baumann's view that he was often told to do something in response to a safety concern that did not actually fix the issue at hand. *Id.* at 196. Baumann cited other examples of inadequate responses to his safety concerns.[13]

Baumann confirmed that his Chat message reflected there would have gone to all in the Mill group Chat. *Id.* at 191. Mr. Tidaback was part of that group. *Id.* The issue there was described as "[s]weeping up by palletizer and we have live wires coming through the floor. Sparked through the broom, shutting this area off." *Id.* at 192. Baumann wanted the power cut to the whole building for this issue because "none of the breakers were labeled, so we didn't know what was energizing that wire. You couldn't tell where it was going into what." *Id.* at 193; Ex. P-13, at page 31.

[13] One involved the bagger for the tripoli product. "So the bagger, it bags. It shoots product into a hundred pound bags. They had had multiple problems. It started giving them problems, and Mr. Tidaback and Mr. Spears were telling … the mill associates to run it. The electrical box was open with a jump wire across it, and they were telling them to run it like that, running a little toggle manual switch. And I brought that up multiple times to both of them." Vol. 1 Tr. 198-199.

There were other, safety-related issues,[14] raised by Baumann. One such instance involved a safety-related concern involving stacking 100 lb. bags of product too high. Vol. 1 Tr. 187. Next was Ex. P-13 reflecting a message from Baumann which he sent to the Mill Group. *Id.* at 208. That Group included Mr. Tidaback and Mr. Spears. *Id.* Baumann's message stated: "Okay. So MSHA seen [sic] the ten stacking and said absolutely no. So we will move to next order continuing five high. Unless Russell Tidaback had a better option. They started without a platform -- they [then] stated without a platform nothing over waist high." Ex. P-13, at page 27; Vol. 1 Tr. 208.

In the same exhibit, P 13, at page 314, that page reflects a message from Tidaback, stating: "Did all the mill associates[15] get their 40 hours this week. If not, John Spears, maybe they will want to come in and work some hours over the weekend to get these repaired. **We don't want to use production schedule time to do maintenance.**" Vol. 1 Tr. 210 (emphasis added). Baumann's interpretation of the message, a very sound interpretation in the Court's estimation, was that Mr. Tidaback did not want maintenance issues to interfere with production. *Id.*

Ex. P-12 pertains to an MSHA inspection which began on March 28, 2023, and continued through April 10th, and for which Baumann participated. *Id.* at 211. Ex. P-12 is discovery American Tripoli produced.[16] At page 18 of this exhibit, a message dated March 31st from Mr. Tidaback states: "*I will stress with you -- any MSHA inspector is not your friend. Anything you say to or in their presence can," in all caps, "and will be used against you in court of law. Hopefully this will never be needed, but just be well aware*." *Id.* at 216-217, (emphasis added). In that Group message were Russell Tidaback, Jordan Tidaback, John Spears, Baumann and Jesse Molesi. *Id.* at 217. Baumann agreed that the message was sent during the time of an MSHA inspection. *Id.* at 217-218. Baumann took the message as a warning not to speak to MSHA. *Id.* at 218. The Court finds that this is the only plausible interpretation. Management stated, specifically, Mr. Tidaback, according to Baumann, that MSHA would give citations *to miners* while they worked at American Tripoli. *Id.* at 218-219.

[14] Another instance Baumann cited involved a dam underneath the tube mill that was created by the tripoli. Vol 1. Tr. 189. The material, which had oil in it too, damned [sic] up underneath the tube mill. *Id.* MSHA wrote a citation for this condition, asserting that it was a fire hazard. *Id.* Though Baumann asserted that he tried to clean it up, he was told the mine was not doing that. *Id.* There was also an instance involving product on the floor in front of an electrical thing. *Id.* at 190. Though Baumann started sweeping it up, he was told not to do that as the product was going to be reused. *Id.* This was in spite of the MSHA inspector advising that it needed to be removed as it was covering an entranceway to an electrical box. *Id.*

[15] Tripoli refers to its employees as "associates." *See*, *for e.g.*, Vol. 1 Tr. 177- 178.

[16] Specifically, this pertained to Respondent's Third Interrogatories Answers and Responses for Production of Documents. Vol. 1 Tr. 213.

Continuing with page 19 of Ex. P-12, Baumann again identified the page as from Mr. Tidaback in a message dated March 28th to Jim Huber,[17] who was a mill associate. *Id.* at 220-221. Therein, Tidaback stated "Jim Huber, I get along with them great. *Remember... MSHA inspectors are not your friends*. They can and will us anything and everything against you in a court of law." *Id.* at 221, (emphasis added). Baumann stated that messages like this made him concerned that he would be subject to retaliation if he spoke with MSHA. *Id.* at 222.

Regarding an MSHA inspection that began on April 11th, six days before Baumann was fired, Baumann affirmed that he participated in that inspection. *Id.* at 223; Ex. P-21. A 104(b) order was issued that day. *Id.* Spears was aware that Baumann had participated in that inspection. *Id.* at 224. Ex. P-31, a screen shot, dated April 12th, mentions Baumann, and it is a screen shot sent to John Spears. *Id.* at 224-226. This communication refers to Baumann stating to Spears that employees would have to be paid because of the shutdown. *Id.* at 225. Respondent produced this information in response to a discovery request. *Id.* at 226. Baumann, sent home as a consequence of the withdrawal order, did not return to the mine until April 17th on which date he was terminated. *Id.* at 227.

For context, Baumann sent this message on April 12th, stating "Good morning crew. We will finish SO 325 this morning. Everyone did very well yesterday with pallets and color bearing and staging product. Thank you." *Id.* at 227. John Spears was included in the message. *Id.* The 11th of April was the last day Baumann worked at the mine before the MSHA shutdown. *Id.* at 228.

Ex. P-7 is a message Baumann sent to Spears, referring to the MSHA Handbook. *Id.* It was sent following the issuance of the 104(b) Order. *Id.* at 229. The portion sent from the Handbook referred to miners' pay when there is a shutdown. *Id.* at 230. Baumann never received a response to this. *Id.* at 231. Baumann sent the message following the April 12, 2023, withdrawal order. *Id.* at 232.

At any rate, the Secretary then returned to Ex. P-32, and April 14th within that exhibit, which was in the same time frame as the remark about miners being paid for work lost due to the (b) order, Mr. Tidaback states "Rob's termination *will*[18] be based on production performance. Not following guidance given by management. Not ensuring the safety of the mill associated by utilizing the proper controls, etcetera. He doesn't have to sign it. *We just need to have a document of why he was let go*." *Id.* at 245, (emphasis added).

The Court finds this remark clearly displays that Tidaback was aware that he needed to create a basis to justify Baumann's firing, a basis he did not then have.

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[17] It is noted that the Secretary, in her post-hearing brief, repeatedly incorrectly referred to Mr. Huber as Mr. Hoover. The pages cited by the Secretary refer to Mr. Huber, a mill employee; there is no mention of anyone named Hoover in the transcript. The mysterious reference to Hoover was solved by the Court. *See* footnote infra.

[18] The Court notes the use of the future tense.

In light of that, Baumann was asked if he "[h]ad [ ] ever been told [he] w[as] having issues with production performance before [he was] terminated," to which he answered "No." *Id.* at 246. He also denied that he had ever been told he was "having issues with not following guidance given by management before [he was] terminated," and denied that he had ever been told that he was "not ensuring the safety of the mill associates before [he was] terminated." *Id.* at 246. In fact, Baumann affirmed that, regarding the safety issue, he had been trying to ensure the proper PPE would get purchased specifically for the dust issues going on at this time. *Id.* Baumann asserted that he "checked with the safety director, Jesse Molesi, every day to see if the systems had been ordered or if they were on their way, if they were there yet." *Id.* at 247-248.

In a sense, the following exchange by the Secretary with Mr. Baumann amounts to a summary, as Baumann affirmed that Tidaback was sending e-mails with different options on what kind of face filters the mine could get ordered, and that Molesi informed Baumann about those emails and all of this occurred on the Friday before Baumann was fired, April 14th, with his termination occurring on April 17th. *Id.* at 246-250. Further, it cannot be ignored that his firing occurred three weeks after he became the miners' rep, and within days of his raising the issue of miners' pay, following the MSHA withdrawal order. *Id.* at 250-251. It was only five days after he participated in an MSHA inspection which resulted in the mine being issued a 104(b) order regarding dangerous silica dust hazards. *Id.* at 250. Baumann concurred that the 104(b) order was issued for not controlling dangerous silica dust, a safety issue which he had repeatedly raised to management. *Id.* at 251. Also, Baumann agreed that his termination happened just two weekend days after he had been messaging with the safety person, Jesse Molesi, about his concerns with the dust. *Id.* Baumann asserted that every time MSHA inspectors were on the site he was with them. *Id.* at 254.

Ex. P-34 consists of additional discovery from the Respondent, involving some 56 pages. At page 15 of the exhibit are Teams Messages with Jim Huber from April 17-May 7, 2023. In the message for April 17th, Mr. Tidaback stated, "[u]nfortunately, we had to let Rob [Baumann] go today." Vol. 1 Tr. 259. On April 19th Tidaback's message states: "*MSHA just compounds the problem 10 X but not working with us and being fucking dicks*." *Id.* at 260, (emphasis added). Baumann agreed that Tidaback made similar statements about MSHA. *Id*.

On the same date, Tidaback stated *"[t]his [MSHA Inspector] Keith [Markeson][19] jackass... he gets his jolly off handing out citations... this fucker is a snake. When he is -- when he's around you better watch what you say and do... he is out to fuck you or anyone else he can*." *Id.* at 261. And, in the same exhibit, Tidaback states: "*Everyone needs to stop calling MSHA*." *Id.* at 265, (emphasis added).

Baumann affirmed that such remarks from Mr. Tidaback made him fearful about talking to MSHA. *Id.* at 265. However, in contrast, Baumann made clear that he was not scared of MSHA inspectors, nor did any inspector ever threaten him. *Id.* at 266.

[19] Baumann informed that there was no one named Keith working as an employee at the mine, but there was an MSHA inspector at the mine; Keith Markeson. Tr. 264. Markeson was the inspector who issued the 104(b) citation. *Id.*

In another message, this one on April 28th, from Tidaback to [Mill employee Jim] Huber, Tidaback stated: "We need you to make that place rock and roll. *I need the justification since Rob's complaint to MSHA about being let go... Just need you to put the cherry on the cake.* That's all." *Id.* at 267, (emphasis added).

Baumann affirmed that he started to raise more safety complaints in February 2023, which coincided with his walking around with MSHA during inspections. *Id.* at 268. Baumann stated that he raised such safety issues to Spears, the operations manager for the mill. *Id.* at 109, 269.

Ex. P-12, at page 23, pertains to a message, in July of 2022, from Tidaback to the group Teams Chat, wherein he states: "and if you are asked a question by the [MSHA] inspector, keep your answer short and simple. Don't be that guy Cameron LOL that thinks he knows it all and starts pointing out all the faults, etcetera. …I only named John Cameron since he doesn't work with us any longer." *Id.* at 272- 273 (quote edited by the Court to remove extraneous parts).

Ex. P-11 also involves Teams messages. Baumann affirmed that Spears made comments about not speaking to MSHA and not trusting their inspectors. *Id.* at 276. A message from Spears dated April 14th evidences this, with Spears remarking, "*I'm telling you guys... Keith [Markeson] is a snake... be cautious on what you say to and around him**. Any MSHA inspector really***." *Id.* at 276, (emphasis added).

Respondent's cross-examination of Mr. Baumann was conducted by Mr. Tidaback. Baumann agreed that the administrative building, providing offices for John Spears and a safety person, is a separate building from the mill but it's very close, separated just by probably 20 feet. *Id.* at 295. The mill itself consists of a four floors. *Id.*

Directed to Ex. R-I, titled, 'Production lead duties,' Baumann could not identify it as a document he had seen before. *Id.* at 300-301. With some differences as to the proper title for his position, Baumann stated he was hired a "production supervisor" when asked by Tidaback if he was the "production lead." *Id.* at 302. Baumann considered the terms to be roughly synonymous. *Id.* at 303. However, as to Ex. R-I, Baumann recognized some items within that exhibit as part of his duties, but not others. *Id.* He added that he never received training for those duties. *Id.* Referred to Ex. R-J, Baumann informed he had never seen that exhibit either.[20] *Id.* at 304.

Baumann denied reading the employee handbook, adding that he never got one. *Id.* at 315-316. He also denied any instructions or feedback about his work from his boss at Tripoli, Christine Schreiber. *Id.* at 320-323. Baumann did agree that there were instances where he had disagreements with Schreiber and Spears which led to raised voices by him, but this was an expression of frustration, "yelling about a situation with [his] boss." *Id.* at 323-324. He denied that

[20] The Court took a moment to explain to Mr. Tidaback that whether the correct name for Mr. Baumann's job title was 'production supervisor' or 'production lead,' does not really count for much as the focus is upon whether the complaining employee engaged in protected activity and had an adverse action associated with that, regardless of his job title. Vol. 1 Tr. 305-307.

anyone ever claimed he was creating a hostile work environment by, *in Mr. Tidabacks' words*, "screaming, getting mad or walking off."[21] *Id.* at 325.

When asked about receiving new miner training, Baumann stated "No. Not the full -- I didn't realize that it was supposed to be 24 hours or whatever, until months into my employment, until the lady came and did the refresher course." *Id.* at 333. The Respondent tried to make much of the fact that Baumann signed his training certificate, contending that he should not have signed it, given his testimony that he did not receive all the new miner training. *Id*.; Proposed Exhibit R-L; Ex. P-40.[22] Baumann did agree that he received annual refresher training. *Id.* at 335.

More importantly, Tidaback stated that the whole business about the training form certificate was *not* a basis for firing Baumann.[23] *Id.* at 340-341.

At that point in the hearing the Court spoke to what it identified as the central problem for the Respondent, namely that it seemed to the Court "that at the time that you decide[d] to discharge Mr. Baumann you would have, of necessity, had some sort of record established prior to discharging him as to the grounds for his discharge." *Id.* at 343. Mr. Tidaback concurred, stating "Correct." *Id*. The Court then noted that it didn't "know of any exhibit thus far that identifies [Baumann's] deficiencies such as that would warrant your [Mr. Tidaback] firing him, regardless of protected activity." *Id.*

One of Respondent's contentions, which was not testimony, but only Mr. Tidaback's assertion *before* he testified, was that Tripoli hired several people to replace Baumann. *Id.* at 345. The Respondent's theory was that Baumann "would have been fired in any event for his lack of adequate job performance, [but the Court noted] that would have had to have been detailed chapter and verse before [the Respondent made] the decision." *Id.*

The Court then commented that it seemed to it that there was, at that point in the hearing, no record that the Respondent had demonstrated, such inadequate performance by Baumann, adding that if the Respondent was trying to demonstrate that shortcoming by people it hired after Baumann was fired, that did not get Respondent there. *Id.* at 344-345.

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[21] The Court commented that this question was plainly aimed as an attempt by Mr. Tidaback to establish an affirmative defense, that he would have fired Baumann anyway because of such *alleged* intemperate behavior. Vol. 1 Tr. 325. Mr. Tidaback agreed with the Court that was his intention behind those questions. *Id.* at 326. The problem, however, is that Respondent never established any credible testimony, or other evidence, to show this improper behavior occurred.

[22] Exhibits R-L and P -40 involve the same training certificate, but they are not identical, as Exhibit R-L is undated. Vol. 1 Tr. 338. Consequently, the Respondent was satisfied to have only P-40 admitted. *Id.* at 335.

[23] Mr. Tidaback informed that his questions were intended to contradict Baumann's assertion that he did not receive all of his new miner training. Tidaback's position, which was an assertion and not made as testimony, was that the training was available online and accessible for Baumann. Vol. 1 Tr. 342-343.

Summing up its observation, the Court informed that the Respondent would need testimony or other evidence that Baumann would have been fired in any event for his lack of adequate job performance, and that would have had to be detailed, chapter and verse, *before* Respondent made the decision. *Id.* Mr. Tidaback agreed that Respondent's goal was to establish that, apart from any protected activity, it would have fired Baumann anyway. *Id.* at 346.

On the subject of daily safety inspections, Baumann stated that he didn't hear anything about doing those "until the MSHA inspector started asking for them. I never got trained. I never heard one -- not one word was ever said to me [about that] until it became an issue with MSHA." *Id.* at 365.

Respondent next brought up Exhibit R-P, about which the Court noted that exhibit has a "citation to MSHA['s] guide to equipment guarding tips. This is dated 2-14-23. So that's near the end of Mr. Baumann's employment." *Id.* at 366. Mr. Tidaback agreed with that description. *Id.* Attempting to testify, but not yet sworn in, Mr. Tidaback asserted the exhibit refers to refresher training. *Id.* at 367. However, the Court noted that there was nothing in that proposed exhibit indicating that there was prior guarding training. *Id.* at 368. The Court emphasized that there was nothing in that proposed exhibit to indicate that prior to 2-14-23 there were instructions from Tidaback to people about guarding.[24] *Id.* at 371-372.

Next was Respondent's Ex. R-C. Baumann agreed that he did daily workplace exams, and that part of his workplace exam responsibilities was to look for hazards before his shift started. *Id.* at 376-377. That proposed exhibit reflects dates from March 3, 2023, through April 7, 2023. *Id.* at 378. Baumann stated that he did not recognize the exhibit. *Id*. Baumann, it will be recalled was fired on April 17, 2023. *Id.* at 379.

Mr. Tidaback then referred to Exhibit R-D, which reflects a violation issued to Respondent during the time Baumann was an employee. *Id.* at 392. It pertains to guarding, housekeeping, and workplace exams. *Id.* Essentially, Tidaback was asserting that these were Baumann's responsibility and that, as MSHA issued citations on these subjects, it showed that Baumann wasn't doing his job. *Id.* at 392-394. However, it was then disclosed *that Respondent created the exhibit*, not MSHA. *Id.* at 395. As the Respondent had no witness at that time to identify Exhibit R-D, it was not admitted. *Id.* at 396. The Respondent never moved to have the exhibit admitted later in the proceeding.

Another problematic assertion from the Respondent is its claim that it hired *four* people so that Baumann could then be terminated. *Id.* at 400-401. The Court voiced its concerns about this claim stating:

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[24] The Court explained its point about the deficiency with proposed Exhibit R-P further, stating "[f]or example, let's say that the three times in 2022 you said, hey, Mr. Baumann, I want you to pay attention to guarding, and then you give me dates through your Microsoft chat or whatever, Teams. You don't have that. The first time you have mention about this is in the wake of getting some citations from MSHA, so I find it difficult for you, if you're attempting to put the blame on Mr. Baumann on the issue of guarding, that the first time on this record that this shows up is after you got the citations from MSHA. And apparently, you're suggesting that would be on him, not doing his job properly because you had guarding citations." Vol. 1 Tr. 372.

> This doesn't -- to me this doesn't make sense that you're saying that you decide to terminate Mr. Baumann months before, and you hire four people to effectively do the job that he wasn't doing sufficiently, and yet there's no record of -- written record or Microsoft Teams even between just you and Mr. Spears or your daughter saying we got a real problem here. You haven't laid a foundation for what causes you to hire these other people, and of course, we haven't heard from those people, but this is not adding up. It sounds -- I know you blanch when I use the expression, but backfilling. It sounds like you're trying to look back and create reasons, from what I have heard so far, to discharge him as opposed to we had this problem and this problem and this problem, and then [you] hired four people but [you] had to keep Mr. Baumann on. Bad a job as he was doing, because someone had to teach him how to do it. Are you really suggesting that?

Id. at 401-402.

Amazingly, Mr. Tidaback agreed that he was keeping Mr. Baumann on for the purpose of having the replacement employees learn the job from him. *Id.* at 402. Tidaback agreed, stating, "[s]o we can terminate Mr. Baumann. Correct." *Id.* Thus, Respondent was claiming he wanted Baumann, who he is claiming was doing a poor job to stay on, while needing him to remain on the job so that he could train the replacement people. *Id*.

The Respondent's cross-examination of Mr. Baumann continued on the second day of the hearing. Baumann was directed to Ex. R-A, referring to the bottom of page 10, and Jim Huber, at 5-7- 2023 at 2:01 p.m. Vol. 2 Tr. 14, 16. Baumann noted that the message was made *after* he had been fired. *Id.* at 15.

According to Mr. Tidaback, Ex. R-A represents a communication between him and Mr. Huber. *Id.* at 16. The Secretary objected to its introduction, stating that it is a redacted version of Ex. P-34, at page 15. *Id.* at 17-18. Nevertheless, the Court admitted Ex. R-A. *Id.* Still, this exhibit was of no real moment, as Baumann agreed that Huber stated there was yelling and screaming going on among Huber, Spears and Baumann. *Id.* at 19. Baumann agreed that things got loud, arising out of issues such as the need for parts, but that he was never confrontational. *Id.* at 19. Baumann agreed that his manager was to make decisions about needs at the mill, but he added that no one ever spoke to him about raising his voice and, if that had occurred, he would never have raised his voice again. *Id.* at 22.

Mr. Tidaback tried, without success in the Court's view, to show indirectly that Baumann was not doing his job. Most of his questions pertained to matters not relevant to this discrimination matter.

The Court then addressed the evidentiary problem, explaining:

> what's missing is if [Mr. Baumann] were deficient, as you allege here, there would be a record of that. Not just through Team chats, but the normal course of business is when an employer is unhappy with their employees, those employees get notified of it. … [the employer has] to advise that [the employee has] to make certain corrections or something more serious will come down.

Id. at 51-52.

Mr. Tidaback conceded that nothing along that line had been presented up to that point in the hearing. *Id.* at 52.

After sustaining an objection to a question from Tidaback in which he asserted that Baumann never communicated safety concerns, the Court rephrased the question for him, inquiring of Baumann if he ever raised safety issues to Mr. Tidaback or to Mr. Spears. *Id.* at 79. Baumann identified safety concerns he raised to management. *Id.* at 79-80; Ex. P-14. It is noted that Baumann had mentioned these issues in earlier testimony.

Baumann asserted that he was being treated differently after raising safety concerns, stating:

> Just like I testified yesterday, I felt like I was being left out of Team chats, and any concerns that I brought up were, in my opinion, being blown off or ignored … [in that his] my name was not being tagged in any of the Team messages. If I brought a concern across, taking a picture of something, I never got answered, in my last two months … prior to being terminated [though he agreed that he was still in the group chat].

Vo1. 2 Tr. 86.

The Court then inquired of Mr. Baumann, if he ever received a warning, oral or written, from Mr. Spears, that his job performance was inadequate, whether he ever received an oral or written warning from Mr. Tidaback or any other person in management that he was not performing his job adequately and whether he was ever given a warning that he was on some sort of probation. *Id.* at 100-101. The Court added that it wasn't using those terms "in a legal sense, but rather if he was advised that if his job performance did not improve he would be terminated." *Id.* at 100. Mr. Baumann answered "No" to each of those questions. *Id.* at 100-101. Further, when asked if management had ever called to his attention deficiencies in the performance of his job, he also answered "No." *Id.*

Mr. Gage Wheeler was then called by the Secretary. *Id.* at 126. Wheeler was employed by American Tripoli, beginning around December 26, 2022. *Id.* at 128. He left that employment around February 2023. *Id*. He was employed as a maintenance person, working in the mill. *Id.* at 128-129. Spears was his supervisor. *Id.* at 130. His duties were to keep and maintain everything in working order, to the best of his ability. *Id.* Wheeler stated that, not long after he began working for Tripoli, he was "pulled" from his job by an MSHA inspector because he lacked new miners training. *Id.* at 137. Wheeler stated that once his employment began, he was put right to work without any new miner training. *Id.* During this time he was not closely supervised by anyone, nor did he receive any task training from Tripoli. *Id.* at 137-138. Asked a series of questions about task training for welding, lockout/tagout, and use of a forklift, Wheeler stated he never received such training. *Id.* at 138-139. On the issue of lockouts, Wheeler stated that Tripoli did not provide locks, and consequentially, he used his own locks. *Id.* at 139. He used Teams Chat to communicate with

Tripoli management and other employees there. Wheeler quit when the mill was shut down by MSHA. *Id.* at 145.

Asked about his relationship with John Spears, Wheeler answered "[t]urbulent I guess is the best word I can use in the company present." Vol. 2 Tr. 145. He explained further, "I'm sure he's a great feller, but I don't think he's competent and overall just kind of ignorant in some aspect. I think that's a fair word. Ignorant is a fair word." *Id*. He agreed that 'contentious' was an apt word to apply by his using the term ignorant. *Id.* at 145-146. In contrast, he described his interactions with Baumann as "pleasurable interactions" and in his view, Baumann was a "pretty decent" employee. *Id.* at 152. In his estimation, Wheeler believed that Baumann did his job adequately. *Id.* at 153.

Wheeler also expressed that, in his view, Baumann cared about safety and he expressed safety concerns to him. *Id.* at 154. As an example, he offered:

> One was the dryer downstairs. It was leaking gas real bad. Real bad. I mean, to the point, you know, you were a smoker, you know, the whole place might go up. It was really bad. There was, on the other couple of floors, there was some rotten spots in the floor that got brought up to me. Just kind of overall, you know, rust, sharp things, you know, about. Just kind of in general. I mean, you know, kind of a walking tetanus shot in there.

Id. at 154.

Wheeler also noted that fixing things was his responsibility, not Baumann's. *Id*.

Indicative of the problems at the Mill, Wheeler stated that it was often shut down, explaining "you know, most of the time we were shut down from whatever agency, you know, whether it be MSHA, the National Department of Natural Resources or the cops, for that matter." *Id.* at 157.

The Secretary then referred Wheeler to Ex. P-43, the deposition transcript of Russell Tidaback taken on January 22, 2024. *Id.* at 158. This was relevant because Mr. Tidaback asserted in his deposition that Wheeler said he did not like Baumann and that Baumann was lazy. *Id.* at 162. Mr. Wheeler denied he ever said such things. *Id*. Further, Wheeler denied that he told Tidaback that Baumann never helped him with maintenance. *Id*.

It is clear that Mr. Wheeler's overall description of the Mill's operation was not a positive one. Asked about his earlier remark about jagged edges, he stated "everything that's in there is just jagged, you know. The handrails, you got to be careful with them handrails, you slice your hand open on those. Short bits and bobs around every corner. Just in general." *Id.* at 163. Plainly, Wheeler was concerned about safety at the Mill in general. *Id.* at 164.

Wheeler confirmed that there were instances of conflict between Baumann and Spears, with dust being the number one contention. *Id.* at 167. He stated that, at times, the Mill ran in spite of the dust issue while at other times it did not run. *Id.* He informed that Spears told him to "steer

clear" during an MSHA inspection. *Id.* at 170. Asked how he received that message, Wheeler stated "Don't talk to them. Don't interact with them. Don't engage with them in any way, shape or form." *Id.* at 171. And this message was delivered to Wheeler more than once. *Id*.

It is noted that Ex. P-9, a Teams Chat, dated February 14, 2023, involved a message from Spears to Wheeler advising that he not speak with MSHA. *Id.* at 175. In one Teams Chat message to Wheeler, on February 14, 2023, he was advised to not volunteer information to MSHA. Tr. 178-179. Wheeler also spoke of an instance when the Seneca Police came to the Mill and told them not to run the Mill, advising them that if the Mill continued to run the police would "tak[e]every one of you son's of bitches to jail." *Id.* at 185. To be clear, Wheeler quit, he was not fired. *Id.* at 196. Wheeler worked at Tripoli for three months. *Id.* at 194.

When Mr. Tidaback suggested that Wheeler's time at the Mill was too short for him to speak knowledgeably about it, Wheeler responded "I got eyes." *Id.* at 196.

Carson Allman was then called by the Secretary. *Id.* at 214. He worked at Tripoli, from September 13, 2022, through November of 2022, as a maintenance employee, primarily working in the Mill. *Id.* at 218. John Spears was his supervisor. *Id.* During some periods of that time, he was the only maintenance worker at the Mill. *Id.* at 219. He received new miner training about a month after his employment began. *Id.* at 220. When he received his new miner training, Mr. Tidaback told him "*[m]ostly just not to tell any stories about the mill itself to the inspectors.*" *Id.* at 221-225, (emphasis added). He never received any task training while at Tripoli. *Id.* at 222- 223.

The Court notes that Allman's testimony was consistent with the prior witnesses – that Spears had to get approval from Tidaback before things were repaired, such as parts needed for repairs. *Id.* at 225. Sometimes requested parts were not received. *Id.* at 230-231. Allman stated that Spears told him "it was just too expensive. Something they couldn't do right now." *Id.* at 231. Allman informed about a request he made for new filters for the bag house. *Id.* Regarding that, he explained the nature of the bag house:

> The "[b]ag house [is] kind of like a ventilation system. The dust goes in and [its] supposed to separate the dust from the clean air, but the clean air, instead of pushing out a whole bunch of dust. When them filters go bad, instead of separating the air and dust, it just pushes out the dust with the air straight out of the stack.

Id.

Allman recommended new filters because "[t]he ones they would were plumb full of tripoli and old and brittle. A lot of them had rips in [them]. I think we counted 36 [bags with rips]. *Id.* at 231-232. New bags were not ordered. *Id.* at 232. Instead, Spears had them use those from a "stockpile of old filters that they had pulled out and replaced beforehand. He had us sort through them to put back in the place of the ripped ones, but they were just as rough as condition because they had been sitting in the garage for who knows how long." *Id*.

According to Allman, the *day* shift was shut down most of the time he worked there. *Id.* at 233. He elaborated about the reasons for the shutdown, stating "[t]here was multiple reasons. On

day shift they didn't want to run for -- one, the local police weren't happy with the dust. And then there was also an MSHA inspector that wanted to watch the plant run so we were running night shift instead." *Id.*

The Court takes note of that revealing remark, as Allman stated that the mill would run at night. Vol. 2 Tr. 233-234.

Allman's view of Baumann was, like Wheeler's, positive, informing that he was "one of the most helpful people I worked with while I was there." *Id.* at 234. Further, Allman expressed that Baumann was concerned about the workers' safety. *Id.* at 235. Distinct from safety, Allman spoke to the Mill's production demands, informing that "Russell [Tidaback] had mentioned several times that the plant was capable of running a hundred thousand pound of product, but I think when I was working there it was lucky to push out about 15,000, if that." *Id*.

In explaining why production fell short, Allman did not paint a pretty picture about the operation, stating:

> There were a lot of reasons why. Such as holes in the augers, holes in the bearings. A lot of their product was going on the floor. Like in the very lower floor there's several spots where the tripoli would just pile up at the machine [while it was] running. By [the] end of shift you'd have probably a couple hundred pounds worth of tripoli sitting on the floor. And half the equipment, when I started there, wasn't even working. A lot of it was just locked out, not running since I started.

Id. at 236-237.

Allman described the safety culture at American Tripoli thus: "[k]ind of nonexistent, for the most part. Kind of just look out for yourself." *Id.* at 238. As just one example, illustrating Allman's concern about his safety, he stated that his concern was:

> [q]uite a bit. Especially like working on that bag house, we were doing some air diaphragms on that, and we would [ ] do it from the roof of the building because it's on the back side of the bag house, so you have to stand on the roof and all the safety harnesses they had there were expired.

Id. at 242.

Also consistent with the previous witnesses, Allman stated that Spears' instruction to him was that he didn't want employees speaking with the MSHA inspector Van Horn, telling them "he [Spears] could handle it all." *Id.* at 246. Allman denied that Inspector Van Horn ever yelled or threatened him. *Id.* at 249. Allman also stated that he and employee [Terry] Newburn were terminated not long after they participated in an MSHA inspection. *Id.* at 250. Allman denied that he was ever verbally abusive and disrespectful to Spears and Baumann. *Id.* at 252.

During his cross-examination, Mr. Tidaback asked if Allman ever received a letter of reprimand from Tripoli. *Id.* at 255-256. Allman denied that. *Id.*

Ms. Kensley Brewer then testified for the Secretary**.** *Id.* at 266. She was identified as a miner witness. *Id.* at 264. Her employment at Tripoli was brief, as she worked there just over a month, from December 19, 2022 through January 24, 2023. *Id.* at 289; Ex. P-39, at page 15. Though she had applied for a safety position, she "ended up being like a secretary and I did, like I did the production part. Did inventory and shipping and receiving a lot of the times, or helped with that." Vol. 2 Tr. 270.

She informed that she worked with Mr. Baumann on a daily basis. *Id.* at 272. Her impression of him was "[he] was always really dedicated to his job and wanted everything to go right and be safe [and that he did the work he was asked to do], stating "yes, he did." *Id.* at 273. She added,

> [b]ut sometimes things would be unsafe, and he [Baumann] would come and report to John [Spears] in the administration building that I was in, and you know, he would tell John [Spears], you know, more than one time, and then finally, you know, he would have to stand up for what was right as far as safety went. And he was just always trying to make sure that everything was as safe as possible, even though a lot of the times [he] was being told to do otherwise.

Id. at 273.

In sum, Brewer described Baumann as one who was always at work early, had a good attitude, and cared about safety. *Id.* at 275-276. Brewer asserted that Baumann complained about safety concerns to Spears "[c]onstantly." *Id.* at 278. Brewer described the MSHA inspectors as "always friendly." *Id.* at 282- 283. As with other witnesses, Brewer asserted that Spears stated that "Russell said we [i.e. employees, such as Brewer] [were not] supposed to talk to the MSHA inspectors." *Id.* at 283. No MSHA inspectors ever yelled or threatened Brewer. *Id.* at 287.

On cross-examination, Brewer stated that she worked with Baumann every day. *Id.* at 294. She clarified that her testimony was not about Baumann's job performance; she did not watch him perform his job. *Id.* at 295. She acknowledged that there were instances when Spears and Baumann raised their voices, but that this was when safety was in issue. *Id.* at 301. She expressed that Spears would not listen to Baumann, informing that he [Spears] had been told by Tidaback how things were to be done. *Id.*

Following Mr. Brewer, Michael Dillingham then testified for the Secretary. *Id.* at 306. Dillingham is a special investigator for MSHA. *Id.* at 307. He has more than 49 years of experience working in mines, with 17 of those years working for MSHA. *Id.* at 308. He conducted the section 105(c) investigation for Baumann's discrimination complaint. *Id.*; Ex. P-1. The complaint was delivered to the mine operator on April 27, 2023. *Id.* at 311. Mr. Baumann's complaint of discrimination was based upon his claim of raising safety concerns and also by being selected as the miners' representative. *Id.* at 316. Dillingham requested Baumann's personnel file from the Respondent three times, but it was never given to him. *Id.* at 324. Later, Dillingham stated he received, "bits and pieces" of the personnel file. *Id.* at 326.

Investigator Dillingham did receive a copy of American Tripoli's employee handbook, which includes its disciplinary policy. *Id.* at 325. He described that policy, stating "it says right in

there that it's a three step process. No. 1, if they have got an issue, they converse with you about it. They talk to you about it. No. 2, you get some kind of written form, and then after that, the next thing would be -- would be potential termination or disciplinary action, you know, whatever they could warranted to do." *Id.* at 325; Ex. P-16 at page 43. The penalty MSHA is seeking for the alleged violations are reflected in Exhibit P-42.

After Investigator Dillingham's testimony, MSHA Inspector Keith Markeson testified. Vol. 2 Tr. 356. It is noted that Tripoli asserted that it filed a complaint against Markeson regarding his behavior during his inspections. *Id.* at 352. However, the Secretary advised that there is no active complaint regarding the Inspector. *Id.* at 354.

Inspector Markeson has been an MSHA inspector for sixteen plus years. *Id.* at 356. He has inspected Tripoli many times.[25] *Id.* at 357. These inspections included times in the past when the mine was under different ownership. *Id.* at 375. He has interacted with Baumann on every inspection he performed at the Seneca Mill. *Id.* at 358. He described the management members of Tripoli as follows: "John Spears was the operations manager. Rob Baumann was the production supervisor, and then Jordan and Russell Tidaback were in the ownership roles." *Id.* at 359.

He first met Russell Tidaback on February 27, 2023. *Id*. On that date he was conducting a complaint investigation. *Id.* at 359-360. Mr. Baumann and Mr. Tidaback were present during his investigation. *Id.* at 360. Markeson stated that during the first day of that inspection Baumann "brought some concerns to my attention when we were on the top floor of the mill building that needed to be addressed." *Id.* at 361. For context, the inspector stated that "[a] miner had gotten hurt at the mine. He had fallen through some floor grating and gotten hurt, and he didn't want anybody else to get hurt. And during some of the repairs that were conducted at the mine, he was directed to leave guards out of place to get back into production faster, and he thought that was a concern that needed to be addressed." *Id.* at 362.

Markeson informed that during inspections he would discuss miners' rights, including their right to elect a representative. *Id.* at 363. He did so at Tripoli and shortly thereafter provided Mr. Baumann with the paperwork to become a miners' representative. *Id.* at 363-364. Thereafter, on March 21, 2023, Baumann was elected as the miners' representative. *Id.* at 364. At that point, Markeson went to the mine's office, informing them of the miners' representative and the rights that person had in that capacity. *Id.* at 365.

During his inspections at Tripoli, Markeson spoke to all the miners employed there. *Id.* at 366. There were five miners, but one of them didn't talk much. *Id.* The big concern raised by those miners was the dust at the mill, and that they were exposed to it without proper protection. *Id.* at 366-367. The miners also spoke of other safety issues. *Id.* at 367. He described these as "[g]uards being left off, which left moving machine parts exposed. Some electrical issues and general condition of walkways and work areas, whether it be sturdiness of the area or housekeeping of the areas." *Id.*

[25] The Inspector briefly described the mine's operation: "They quarry their material over in Oklahoma. That material is then trucked over to drying sheds on the Missouri side. Dries for a period of time there, and then it is trucked again to the plant in Seneca, Missouri, where it is crushed and ground and sized and then packaged for sale." Vol. 2 Tr. 357-358.

Inspector Markeson denied ever threatening miners at Tripoli, nor for that matter, did he threaten anyone at Tripoli. *Id*. Instead, he asserted that he explained the MSHA enforcement process. *Id.* at 368. But this was never done in a threatening or harsh manner. *Id*.

Regarding Markeson's inspections at the Mill, although there were one or two times when he and Baumann were alone, most of the time either Spears or Tidaback were present with them. *Id.* at 369. It is noteworthy that Inspector Markeson always had another MSHA inspector with him when he was at American Tripoli. *Id.* at 372. Markeson stated that no one from MSHA ever threatened anyone at Tripoli during those inspections. *Id.* Shortly after his inspection in February 2023, three miners told him they were told not to speak with MSHA and they showed him text messages supporting that claim. *Id.* at 373-374.

In comparison to his inspections when Tripoli was under previous ownership, Markeson's impression in February and onward in 2023, was that the mine was "lacking in upkeep." *Id.* at 375. Among the inspector's concerns, he stated that:

> [t]he biggest thing that comes to mind is there was a dust citation issued on, what was it, March 30th, 2023 for overexposure to dust. I had sampled all the miners that worked -- that were working that day at the plant, and they were all overexposed. Four of them were overexposures that was citable. One was an overexposure that was not citable. I set the termination due date for April 7th, which was a week later, which is standard because none of the miners had been enrolled in a respiratory protection program, and normally when we cite dust that doesn't have a respiratory program, we give them a week to get that program in place, get the miners wearing respirators, fit tested, that type of thing.
>
> And then I returned to the mine on April 12th, so the termination due you was on the 7th. I came back the following Wednesday on April 12th and no action had been taken. Respirators hadn't been ordered. The respiratory protection program hadn't been put into place. Miners hadn't been fit tested or medically evaluated. Nothing had been done yet.

Id. at 377-378; Ex. P-21.

The Court makes note that this testimony from Inspector Markeson is considered in a limited fashion because this proceeding is not for the purpose of adjudicating any citations or orders at Tripoli. Rather, it is mentioned for context only, in support of the finding that Mr. Baumann's safety concerns were not invented or fabrications.

On the third day of the hearing Inspector Markeson's testimony resumed, with Mr. Tidaback starting his cross-examination. Vol. 3 Tr. 8. Markeson stated that he had more than ten inspection visits at Tripoli. *Id.* at 9-10.[26] The inspector denied that he has ever been disciplined for his performance as an inspector. *Id.* at 17.

[26] The Court made note that this discrimination case is not about trying the citations issued by any MSHA inspector to American Tripoli. Vol. 3 Tr. 11.

The Court also takes note that much of Mr. Tidaback's questions to Inspector Markeson were irrelevant to this matter, as they related to that inspector's actions during an inspection. *See*, *Id.* at 21-22, for example, relating to the speed of an inspection. That said, employing its discretion, the Court did admit Ex. R-H. Vol. 3 Tr. 24. It is a chain email, introduced by the Respondent to show, allegedly, that Inspector Markeson was disrespectful or showed some other negative attribute with his behavior. *Id.* at 24. The email is a message from Tidaback to MSHA District Manager Simms. *Id.* at 28. The Court had issues, to put it mildly, with the Respondent's use of this email, noting "[t]he extent of the camaraderie or disagreements between MSHA's inspection team does not advance at all in my perspective the determinations that I have to make in this case." *Id.* at 27. Tidaback stated that the Respondent's purpose for this exhibit was "to establish the basis that Mr. Markeson influenced and coerced Mr. Baumann in filing a complaint," but that is something which is also completely irrelevant to this case. *Id.* at 32. Markeson did say to Baumann, upon learning of the circumstances of Baumann's firing, that he might have a discrimination action. *Id.* at 34.

The Court would remark that there is nothing improper about so advising a miner of such a right. Inspector Markeson denied having tried to influence Baumann; he only provided the information for the procedure to file such a complaint, if he chose to do so. *Id.* at 35.

As Mr. Tidaback frequently tried to establish that Mr. Baumann was deficient in his job, in one instance by attempting to have the inspector comment on machine guarding, the Court informed that:

> that's not how you're going to establish that Mr. Baumann was deficient. The way that the American Tripoli can potentially do that is to have someone like Mr. Spears or some other witness testify that Mr. Baumann's duties included making sure that guards were in place and that on one or more occasions this was noted by such individual and that there was -- to demonstrate the veracity of that, that there was a record made on the part of American Tripoli which would have noted this deficiency, alleged deficiency, on the part of Mr. Baumann. So this would all be part of American Tripoli's affirmative defense to the extent that they can show that.

Id. at 40-41.

The Secretary then called MSHA Inspector, Bryan Licklider. *Id.* at 67. He has conducted an inspection at Tripoli. *Id.* at 69. Ex. P-26 at page 9, represents Licklider's field notes. The inspector alleged that the mine had a fire extinguisher that did not have an annual inspection on it. *Id.* at 73. Instead, the last inspection sticker was dated 2021 and his inspection was carried out on February 14, 2023. *Id.* On that date Licklider was present because of a hazard complaint. *Id.* at 74. An inspection ensued and the inspector asserted that multiple violations were found. *Id.* Licklider's opinion was that Tripoli had "a total disregard for safety." *Id.* at 80. He denied ever telling personnel at Tripoli that he would call the U.S. Marshalls on them. *Id.* He also denied that he threatened anyone, and similarly denied that he told anyone he would take them to jail. *Id.* at 80-81.

Subject to any rebuttal witnesses, the Secretary then rested. *Id.* at Tr. 86.

The Respondent's defense then began. Mr. Tidaback called John Robert Spears as his first witness. *Id.* at 88. Spears confirmed he is employed at American Tripoli at its Seneca, Missouri location, where he is the operations manager for the mill. *Id.* at 91. His employment began in August 2022. *Id.* at 92. His duties are broad, as he informed that he "oversee[s] the activities of the processing mill as well as the drying shed area and the quarry itself. *Id.* at 92. Spears agreed that the operation experienced high turnover in several jobs including maintenance, the shift lead, the safety and environmental job, and the administrative assistant positions. *Id.* at 96-97.

Essentially, all of Spears prior work was with US Postal Service. *Id.* at 98-99. For some of those years with the post office, he helped conduct training. *Id.* at 99. It must be said that much of Mr. Spears testimony was not helpful to the Respondent's defense. For example, Mr. Tidaback asked if Mr. Baumann had expressed to Spears multiple times that more Tripoli should not be fed into the system. *Id.* at 100. Spears agreed, but only in part, as he expressed recalling "[o]nly one particular instance, you know, with the weather being hot and having to hand stack our -- our product." *Id.*

Tidaback continued, asking whether Spears "ever provide[d] reasoning why [the mine] should provide more feed to the mill?" *Id*. Spears response was "to meet our production goals." *Id.* at 100-101.

Spears denied ever instructing Baumann not to speak with MSHA. *Id.* at 102. He acknowledged that Baumann did inform him that he was a miners' representative. *Id.* at 104. He denied ever cutting off a lock that wasn't his own. *Id.* at 105. He denied creating an atmosphere where miners would be fearful of speaking with MSHA. *Id*. Though it is irrelevant to the issues in this matter, Spears did agree that a miner expressed concern about his job in connection with MSHA inspectors, and fear of MSHA inspectors, identifying Inspector Markeson in particular. *Id.* at 107-108.

As for Spears relationship with Baumann, Spears believed they "got along pretty well." *Id.* at 109. On the issue of whether Baumann ever raised his voice, cursed at him, or was basically disrespectful to him as his subordinate, Spears answered, "[n]ot to me personally, no." *Id.* As to whether Baumann "ever showed anger, haste, stomp his feet, g[o]t mad at anything you directed him that we needed to do," Spears responded "[y]es, sir." *Id.* at 109-110.

In describing the mill operations with Baumann as the shift lead, Spears stated he, "felt that [Baumann] was conscientious about trying to -- you know, trying to get our product produced." *Id.* at 110. Asked if Baumann ever had issues or complaints that he brought to Spears, he answered "[w]ell you know, there was always issues with -- with the equipment, you know, needing to be repaired, looked after, you know." *Id.*

Thus, Spears agreed that Baumann brought those issues to his attention. *Id.* at 109-110.

Spears asserted that he addressed any maintenance-related or safety-related issues that were brought to his attention. *Id.* at 111. He acknowledged that there were instances when guards were removed for lubrication and then the guards were not reinstalled. *Id.* at 112. Responsibility for reinstalling the guards, he said, was the person doing the workplace exam. *Id.* at 112-113. This person would be the shift lead, i.e. the production supervisor. *Id.*

When Spears was asked about hazards and keeping employees safe, he expressed a view that put the burden on employees, not on the mine's compliance, stating: "I would like to think that people's personal initiative, that they would want to -- to not be in a position to be in danger of any -- of any type of equipment that we have." *Id.* at 115.

Spears affirmed that there were issues with Baumann's performance when he was the shift lead and that he discussed those performance issues with him. *Id.* at 118-119. Spears stated that he knew of and was familiar with, the mine's employee handbook, including the progressive discipline aspect of it. *Id.* at 119-120.

At that point, Mr. Tidaback posed a revealing question, asking if Spears knew that Missouri is an "at-will work state." *Id.* at 120. Spears affirmed he knew that. *Id*. Spears then described its application, expressing "[i]t just means that at any point, the employer may terminate an employee's employment with the company. And, therefore, the employee can also terminate at any time, you know, for no -- you know, without giving any reason." *Id.*

The Court would note that such an unfettered ability to fire an employee may be true in a right to work state, but if the Respondent is suggesting that overrides the protections of the Mine Act, that is incorrect.

Spears did state that it was not his intention to interfere with an MSHA inspection, asserting that there was a swirl of activity ongoing at that time. *Id.* at 131. Instead, he asserted that, as Gage Wheeler was a new employee, his motivation was he didn't want "any kind of wrong information" given by him. *Id.* This was offered, Tidaback asserted, to show that Tripoli had no intention to interfere with an MSHA inspection. *Id.* at 132; Ex. R-DD. February 14th group chat material. The Court concludes that this explanation is not credible. The Court asked Spears if he had seen the document, to which he responded "[n]ot that I can remember." Vol. 3 Tr. 127. That same day, February 14th, Spears agreed that he was also dealing with the Seneca Police who were arresting a Tripoli employee. *Id.* at 128.

In cross-examination by the Secretary, Spears agreed that he is the operations manager at Tripoli and that he has the authority to discipline employees. *Id.* at 144-145. He then agreed that he *never disciplined Baumann* while he was an employee at Tripoli. *Id.* at 145. Spears added "I don't remember ever doing any kind of a counseling notice or a write-up or anything like that." *Id.*

In notable contrast, Spears informed that he has given written discipline to other miners at American Tripoli. *Id*.

Further, Spears stated that Baumann was fired for production issues. *Id.* at 146. The record shows that the claim that Baumann was fired for production issues is unsupported. Spears also agreed that Baumann told him that meeting production quotas was too hard on the mill associates. *Id*. However, Spears stated that he did not know if this was related to safety concerns on Baumann's part. *Id.*

On the issue of production, Spears agreed that the demand of 40,000 lbs. per day has only been met 20 to 30 times during the entire time he has been employed at Tripoli. *Id.* at 147. Thus,

Tripoli rarely met its production issues and the record show that this claim was aspirational, and infrequently met.

Spears also admitted that he walked around with the MSHA inspectors and that he observed Baumann speaking with the inspectors. *Id.* at 148. Further, he agreed that Baumann informed him that he was a miners' rep before he was terminated. *Id*. In addition, Spears acknowledged that he never hired anyone to replace Baumann before he was fired. *Id.*

On re-direct, Spears repeated that Baumann was fired for performance issues. *Id.* at 150. However, Spears blurred that meaning of that term, calling it "performance/production." *Id.* at 151. He considered production to be the key element, stating "[i]f your production's not showing what it's supposed to be, then it would be your performance toward that goal." *Id*.

The Court inquired further. Spears stated that meeting production goals would be part of his 'performance,' elaborating that "it was his, Mr. Baumann's, reluctance to -- to try to meet that production goal due to whatever circumstances in the mill that he thought was relevant at the time." *Id.* at 152.

When asked if conversations between Tidaback and Spears discussing firing Baumann occurred months before Baumann was fired, Spears answered "No." *Id*.

On recross examination, Spears was directed to Ex. P-44, from his January 30, 2024, deposition at p. 29. There, in response to the question that "it sounds like overall, you [Spears] didn't have a lot of complaints about Rob [Baumann]. Would you say your only complaint about him had to deal with meeting production quotas?" *Id.* at 156. Spears answer was "Yes." *Id.*

On redirect, Mr. Tidaback referred Spears to Ex. P-44 at page 10, when Spears was asked why Baumann was fired, Spears responded "for his lack of production and just an overall him just not being a productive employee." *Id.* at 158-159.

Mr. Tidaback then testified. *Id.* at 164. Questions to Russell Tidaback were posed to him by his daughter Jordan Tidaback.[27] When asked how he coordinates between himself, Spears and Jordan Tidaback "to provide support and ensure that the company's operations run smoothly," Tidaback stated that "everything in American Tripoli [is] run through [Microsoft] Teams. *Id.* at 175.

Tidaback stated that Baumann's correct job title was production lead or shift lead. *Id.* at 203. He described the roles and responsibilities of the shift lead as follows:

> The shift lead is responsible for the mill operations. That position is -- monitors the production schedule which the sales team builds for them. They -- They are the ones that control the inventory flow through the mill. They are the ones that also control the quality control of it leaving. They create the product. They ensure that it goes out properly. That's -- That's really it for that role. They manage the

[27] Jordan Tidaback, Russell Tidaback's daughter, did not testify. All references to testimony from Tidaback refer to Mr. Tidaback, not his daughter.

> workload of the mill associates. They're in there. That's their role. That's their primary role, to make sure that things get done in the mill.
>
> On top of that, they're also responsible for the safety and -- of the mill associates. They're in that senior leadership position because it would be the senior person because the progression -- and this may help, your Honor, the progression of every mill associate is they start as a mill associate. Then they move to the shift lead. And then after the shift lead is when you come into a manager role where you can either become safety, the operations manager, the quarry manager, that stuff. So there is progression moving up and that's one of the things that we had for Mr. Baumann, and that's -- that's -- that's why this is bothering me, so --

Vol. 3 Tr. 177-179.

Tidaback agreed that he had to remind Baumann to add mill Teams hours and shifts, so that too many days didn't go by. *Id.* at 179. He maintained that he shouldn't have had to remind Baumann about that task but he had to do that numerous times. *Id.* at 180. He asserted that, by Baumann's failure to do that task, it impaired the production scheduled for the next day. *Id.* at 181. Tidaback also asserted that he had to remind Baumann to do the shift lead close-out at the end of each day. *Id*.

In speaking to Tripoli's disciplinary process, Tidaback emphasized, as did Spears, that Missouri is a "right-to-work state, [one] can be fired at any time without any notification." *Id.* at 182. Then, he described Tripoli's disciplinary process, stating "First is a verbal, okay. Second is a written. Third, if there is one, is immediate termination. No explanation is needed or anything like that. By that time, you know that you're going to be terminated." *Id*.

He then added that, per its policy, the process "can go in any order. We don't have to follow that [disciplinary process] order." *Id.* at 183. Thus, he asserted Tripoli can terminate anyone at any time just for any reason. *Id*.

Tidaback asserted that he hired people to replace Mr. Baumann. *Id.* at 186. The Court tried to clear up testimony about this claim. *Id.* at 186-187. Tidaback contended that, if he remembered correctly, that four people were hired for that purpose. *Id.* at 187. None of them are still employed by Tripoli. *Id.* at 188. None worked for Tripoli for more than one month. *Id.* at 189. Respondent referred to Ex. R-X regarding this issue. *Id.* at 190. That exhibit refers to a hiring document for one such employee, Will Shellenberger. *Id.* at 192. It is dated August 24, 2022. *Id.* at 193. Exhibits R-X, R-Y, and R-Z were admitted previously. *Id.* at 194. Among those exhibits, Richard McCullen was another employee hired by Tripoli. *Id.* at 195. According to Tidaback, that hiring was for production shift lead. *Id.* at 196. A third such hiring was for Alex Nigrass, who started work for Tripoli on March 20, 2023. *Id.* at 195. Tidaback asserted that all three of these hirings were for the purpose of replacing Baumann. *Id.* at 196.

Tidaback contended that Tripoli never stopped any employee from speaking with MSHA. *Id.* at 199. Tidaback then veered into irrelevant material, asserting that inspector Markeson in taking notes during an inspection, asserted that operator's statements can be used against them. *Id.*

at 201-202. Tidaback took that to mean that Markeson was effectively giving him Miranda rights. *Id.* The Court reminded Tidaback about the subject of this hearing – Mr. Baumann's discrimination claim. *Id.* at 203.

On the issue of whether Tidaback ever received any safety concerns from Baumann in any fashion, whether it be a phone call or a chat, Tidaback responded, "[t]hat I recall, no." *Id.* at 204. When the Court inquired further about this, he reiterated that "[i]n the numerous communications that we had, I do not recall any specific safety-relatable concerns from Mr. Baumann, no." *Id.* at 205. Further, on the issue of safety concerns, Tidaback stated that such concerns should be voiced through the hierarchy and that Baumann did not follow that procedure. *Id*.

Given the small management group- three people – the Court did not find Mr. Tidaback's lack of recollections to be credible.

On the subject of appropriate procedure for terminating an employee, Tidaback informed that no written counseling statements are required by Missouri law and that verbal statements are sufficient and beyond that no counseling statements of any sort are required. *Id.* at 207. Though in the Court's view it is inconsequential, Tidaback denied that he ever knew that Baumann was a miners' representative until he was fired. *Id.* at 214-216. Nor, he contended, did Spears inform him of Baumann's miners' rep status. *Id.* at 216.

The Court did not find the denial to be credible.

The Respondent then turned to Ex. P-38, Baumann's termination letter. *Id.* at 222. Tidaback stated that on numerous occasions he gave Baumann counseling sessions about reading training files as he was "starting to have issues in his role." *Id.* at 223. This led to questions for Tidaback about Ex. R-B. *Id.* at 224. He identified it as notes regarding Baumann from June 26, 2022, through April 17, 2023. *Id.* at 224. The Court attempted to clarify the nature of Ex. R-B. *Id.* at 224-227. It is, Tidaback agreed, a three-page exhibit, *dated April 27, 2023,* and it reflects Teams notes. *Id.* at 226. Tidaback also agreed that the exhibit reflects his personal notes about Baumann. *Id.* at 227. There are three entries within the exhibit: The first entry, on page 1, is dated July 26, 2022, and the last is April 17, 2023. *Id.*

The Secretary had significant objections to the admission of the exhibit, noting "the document was not provided to the Secretary, adding that:

> A version of this document was provided to MSHA during their inspection. However, the document *has been modified since then* that they're offering here as an exhibit. Also, Mr. Tidaback puts in his cover page to his exhibit binder that this document is … an ongoing journal. And so it's not clear when this document was last updated or even the date here at the top here. It was [created] after Mr. Baumann's termination, and so we object to the reliability and authenticity of this document and that it does vary from what was provided to the MSHA inspector during the investigation.

Id. at 228, (emphasis added).

Despite these legitimate concerns, the Court admitted the exhibit, Ex. R-B. *Id.* at 229. However, the Court stated that the Secretary would be able to cross-examine about the exhibit and in doing so to have the original document, which was sent to the Secretary from Tripoli, entered in the record. *Id.*

On cross-examination, the Secretary first referred to Exhibit R-JJ. *Id.* at 235. Tidaback agreed that the last page of that exhibit, which involves an email, is dated November 13, 2023. *Id.* at 235-236. The Secretary then presented Ex. P-45, which Tidaback acknowledged that "[i]t appears to be an e-mail from myself to Mr. Dillingham, cc'ing John Spears, Jordan Tidaback and myself …" *Id.* at 236-237. Tidaback then corrected himself stating that "it does appear to be the correspondence between myself and Mr. Dillingham." *Id.* at 237.

Michael Dillingham, it will be recalled, was the special investigator for the Baumann Complaint. Tidaback, was asked to identify page 2 of Exhibit P-45 and whether it was in response to documents that Mr. Dillingham had requested during his investigation of Mr. Baumann's complaint. *Id.* at 238-239. At that location of the exhibit, Tidaback's email states "I have attached a copy of the employee notes journal paren Rob Baumann space hyphen space notes dot PDF closed paren that I maintain on each employee." Vol. 3 Tr. 240. Stated more succinctly, the email states "I have attached a copy of the employee notes journal [for] Rob Baumann … that I maintain on each employee." *Id.*

Turning to page 7, 8, and 9 from that exhibit, Tidaback expressed uncertainty when asked "[i]s there anything about the document attached on pages 7, 8 and 9 that you do not recognize as the notes regarding Rob Baumann that you provided to Mr. Dillingham during his investigation of this matter." *Id.* at 242. Tidaback didn't deny such recognition, but insisted that he would need to verify the attachments to agree with certainty to the question. *Id.* at 242. The Secretary then moved to admit Exhibit P-45 and it was admitted. *Id.* at 243.

The Court then inquired of Tidaback about Exhibit R-B, asking if he agreed that it is not identical to those pages within Exhibit P-45. *Id.* at 246. Tidaback agreed they were not identical. *Id.* The Secretary then asked if Exhibit R-B, contains an entry for February 14, 2023, and Tidaback agreed that was true. *Id.* at 246-247. Further, Tidaback agreed that P 45 at pages 7 through 9, *does not have an entry for February 14, 2023*. *Id.* at 247. Further, Tidaback agreed that his Exhibit R-B includes an image of some Teams chat messages. *Id.* He also agreed that those notes are generated based on his [i.e. Tidaback's] writing in a wipeable notebook and then that text being uploaded into one note and that the Teams chat messages are not something that he wrote in a wipeable notebook. *Id.* at 247-248. Regarding the November 5, 2022, entry within Exhibit R B, Tidaback stated that entry "would be the date that [he] added the entry, *not the actual specific date*." *Id.* at 248-249 (emphasis added).

Tidaback was then referred to the April 27, 2023, entry in Exhibit R-B and to Exhibit P-12, with the latter involving answers to interrogatories from the Secretary. *Id.* at 249-250. Interrogatory No. 5 asks for Tidaback to "set forth the reasons Mr. Baumann was terminated, who participated in the decision and when that date of that decision was made." *Id.* at 250. To that very basic question, Tidaback answered "[t]hat's what it states, yes, ma'am." *Id.* He was then asked,

referring to page 4 of the interrogatories, whether his response identified three individuals who participated in the decision to terminate Mr. Baumann. *Id.* at 250-251. Those individuals were Russell Tidaback, Jordan Tidaback and John Spears. *Id.* Tidaback admitted the three are "in the decision-making process." *Id.* at 251. On re-direct, Tidaback stated that he makes the final decision on terminations. *Id.* at 252.

The testimony concluded at that point.

Analysis:[28] For the Discrimination Count

Complainant, Secretary of Labor, MSHA obo Robert Baumann has alleged that he engaged in protected activity while employed by Respondent by his making safety complaints and raising safety concerns to Respondent; by walking around with MSHA inspectors during MSHA inspections at Respondent's mine and discussing safety concerns and hazards with those inspectors during those inspections and by his participation in those inspections as the elected representative of miners and, following an MSHA withdrawal order, by inquiring of MSHA inspectors about the rights of miners to compensation in connection with withdrawal orders. Complaint at 2-3. As noted in the Findings of Fact, Inspector Markeson informed that on March 21, 2023, Baumann was elected as the miners' representative and thereafter Markeson went to the mine's office, informing them of the miners' representative and the rights that person had in that capacity. Spears admitted that Baumann told him he was the miners' representative.

Robert Baumann was hired as the production supervisor at the mine. He was employed to do production and he was the lead over production from his first day on the job to the day he was terminated. Later, workplace exams became part of his job. Though expected to write down issues he found during an exam, initially the form did not provide sufficient space to describe problems found. Baumann stated that the workplace issues he identified could not be addressed right away because either there was no maintenance person at that time or because the fix would interfere with production. He contended that only problems hindering production would be addressed immediately.

His employment was for a period of ten months, from June 16, 2022, to April 17, 2023. He was fired on April 17, 2023. Baumann stated that, per his termination letter, he was fired, allegedly, due to **poor performance, lack of leadership skills and for failure to follow procedures and guidance given to him by his supervisor.** As noted, Baumann denied that he was having any performance issues at the time he was terminated, and he affirmed that he had not been disciplined or told that his job performance was lacking prior to his termination. The Court takes note of its determination that *none* of the trio of reasons for Baumann's firing were established with any credibility. This is because virtually all of the evidence Respondent offered to support those claims were developed *after* the firing. The Court noted this deficiency during the hearing, characterizing the claimed reasons as backfilling. Vol. 1 Tr. 401.

Baumann participated in an MSHA inspection around April 12, 2023, and in an earlier MSHA inspection involving air sampling. There was an issue involving silica dust at the mine.

[28] The analyses' portions in this Decision are derived from the Court's determinations of those findings of fact, which were found to have been credible.

Baumann stated that he had raised safety concerns to mine management about that dust. Further, following MSHA's issuance of a 104(b) withdrawal order for a dust hazard, Baumann stated that he raised concerns about the dust issue with management every day with operations manager John Spears and the mine's safety director, Jesse Molesi. The concerns were not fixed prior to his termination. Baumann raised the issue of miners' entitlement to pay following the withdrawal order with Spears and Molesi, but neither responded to him about the issue. The withdrawal order was issued on April 12, 2023. That order shut down the mill and it would be the last day Baumann worked at the mill. When he returned to the mill on April 17, 2023, he was fired.

The subject of miners' training was brought up during the hearing. Based on the testimony of Baumann, Gage Wheeler and Carson Allman, all of whom the Court found to be credible witnesses, the Court finds that, based on their credible testimony during the hearing, the Respondent came up short in terms of meeting the required MSHA training. Baumann agreed that he received annual refresher training, but he never received task training for maintenance or electrical work at Tripoli. There is no evidence of record to contradict Baumann's claim on the issue of task training. While the Court does not find that the Respondent violated MSHA training requirements, that is because such citations which may have been issued were not part of the Secretary's case, which is limited to discrimination and interference claims. However, the Respondent did not refute those claims of insufficient training and the Court finds that, based on the credible testimony, such shortcomings were emblematic of the overall poor operations at the mine.[29]

Another instructive evidentiary finding by the Court is the unrefuted remark by Baumann that during his employment there was a great deal of employee turnover for mill maintenance. This is instructive in understanding this operation.

On the subject of communication, the mine employed Microsoft Teams, as the messaging system at the mine. It was referred interchangeably at the hearing as "Microsoft Teams Chats," or as "Teams Chats," or "Teams." At bottom, it was simply an email messaging system for the mine's employees.[30]

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[29] Instead of showing that all training was conducted, the Respondent tried to make an issue that Baumann had signed the initial new miner training certificate as having been completed. Baumann credibly responded that, when he signed the form, he did not know what that training actually required. See the Court's earlier footnote 10 on this issue in the Findings of Fact.

[30] As noted in the findings of fact, there were certainly ample means to communicate with one another at the mine. As Baumann informed, there were groups of American Tripoli employees communicating with each other on Teams. There were multiple, different, categories such as a maintenance group, a general group, a mill management and a production group. People could also communicate individually. Baumann was able to communicate with John Spears in this way too. In contrast, Baumann described his communication with Mr. Tidaback as only "on occasion." However, Baumann informed that Tidaback would be able to view messages sent through Teams. Significantly, Baumann stated he was never told that he failed at using Microsoft Teams effectively while working at American Tripoli. The Court notes there is no record evidence contradicting Baumann' statement about his effective use of Teams Chat.

The Respondent's claim that Baumann had poor performance. Baumann stated that no one at Tripoli ever told him he had to meet a certain production quota and he denied that Mr. Tidaback ever told him he had to meet a 40,000 lbs. daily production quota. He added that the 40,000 lbs. per day goal was not realistic due to equipment problems and weather issues, among other reasons. Baumann maintained that he never spoke with Mr. Tidaback or Mr. Spears about meeting production quotas or goals and further that he was never counseled for not meeting production demands. To the contrary, he was given positive feedback regarding the production he was able to achieve from John Spears with such praise coming about a month before he was fired. The mine's own production records make it clear that output of 40,000 lbs. per day was aspirational, a fiction, not a fact.[31]

The claim of Baumann's alleged poor performance was never documented, such as through Teams or through some disciplinary remark.

Baumann maintained that operations problems were a source of diminished production. Equipment problems and an insufficient number of employees were contributors to this. Not to be overlooked, on one occasion, dust emanating from the mill was so serious an issue, as it was reaching the city, that it prompted the local police to come to the site. MSHA too impacted production by its shutting down the mill operation.

As Spears admitted, debunking Tripoli's claim that Baumann was deficient in performing his job, he never disciplined Baumann while he was an employee at Tripoli. Spears added "I don't remember ever doing any kind of a counseling notice or a write-up or anything like that." Vol. 3 Tr. 145. Spears asserted that Baumann was fired for 'production issues' but the record shows that production at the mill was irregular, rarely meeting the aspirations. Beyond that, there was simply no record evidence to support the claim that Baumann was failing in meeting those illusory goals. Spears himself admitted that the goal of producing 40,000 lbs. per day of product has only been met 20 to 30 times during the entire time he has been employed at Tripoli. That's a span beginning in August 2022 to the date of the hearing. The record, overall, shows that goals were not met because there were multiple equipment problems, and inadequate repair to address those problems and hazards, such as dust, making the Mill unsafe to operate.

Spears also blurred the distinction between performance and production. As he said, "[i]f your production's not showing what it's supposed to be, then it would be your performance toward that goal." *Id.* at 151.

Critically, and strong evidence refuting Tripoli's claims that it had issues with the quality of Baumann work before firing him, when Spears was asked if he had conversations with Tidaback discussing terminating Baumann months before he was fired, Spears' answer was plain and direct: "No." *Id.* at 152. Though Spears answer left no doubt, when asked if it was correct to state that, overall, he did not have a lot of complaints about Baumann and that his only complaint had to deal with meeting production quotas, again Spears answered succinctly, responding "Yes." *Id.* at 156.

[31] If the mine was running well, the mine would run about 15,000 pounds in product and during Spears 18 months of employment the 40,000 lbs. of product goal was only met 20-30 times. Ironically, during the last six weeks of Baumann's employment, Tripoli approached the 40,000 lbs. goal more than once. Sec. Br. at 24.

Very clearly, Mr. Spears honest testimony augmented the Secretary's case.

Baumann's Role in Safety

Baumann contended that he was never in charge of safety while at Tripoli, nor was he given any training on that subject at Tripoli. Further, he was never tasked with ensuring that the mill was complying with MSHA standards. He asserted that during the 10 months of his employment for at least 3 or 4 of those months there was no one employed with the role of safety at Tripoli. When no one was employed for safety, John Spears would be in charge of safety. When safety issues were raised to Spears, Baumann informed that, unless the issue would shut down operations, they were to keep running. No testimony from the Respondent contradicted Baumann's assertions on this issue.

In contrast, Baumann's duties did include keeping track of the hours that miners worked. As with every other task he acknowledged to be within his duties, he was never told that he was failing at that task. Handling shipping and receiving paperwork were also part of his job duties, and for this responsibility too, he was never told of issues with his performance for that duty. Every contention of Baumann's alleged failures arose after he was fired. The Court concludes that, as it stated at the hearing, this was an attempt to backfill the claim of Baumann's shortcomings, and as such the Court can only conclude that the reasons were contrived.

Baumann's Presence During MSHA Inspections

Baumann's testimony is uncontested that, during MSHA inspections in the time frame of February through April 2023, he walked around with MSHA inspectors on multiple days and that Spears was with Baumann during some of those times and observed Baumann with the MSHA inspectors. In fact, a Teams message to Tripoli employee Wheeler from Spears on February 14, 2023, informed "Gage Wheeler, do not answer any questions about the -- that the MSHA inspector may have. Do not go into the mill. I'll be the person who talks to me [sic] inspector." Vol. 1 Tr. 154. The participants in that Teams chat included Baumann, Wheeler, Spears, Russell Tidaback, and Jordan Tidaback.

This is an indisputable example of Tripoli management's animus towards its employees involvement with MSHA inspections and, as discussed below, it also constitutes interference with its employees exercising their protected rights. As noted above, the Court finds that those messages were plainly and expressly warning the employees, improperly, that they were not to speak to MSHA. The Court views Jordan Tidaback's follow-up message as simply an attempt to repair the plain import of that message, a failed attempt to put an innocuous gloss on the warning. There were serious results from that February 14, 2023, inspection, as MSHA then shut down an area of the Mill.

The record shows that maintenance was a step-child to production at the Mill. For example, Tidaback, referring to employees working less than 40 hours that week may want to do weekend work to attain those hours. What is more instructive about the remark is Tidaback's remark that "[w]e don't want to use production schedule time to do maintenance." *Id.* at 210.

Tripoli's Animus Towards MSHA

The record is replete with examples showing Tripoli's animus, misguided as it was, towards MSHA. A March 31, 2023, Teams message from Tidaback says it all: "I will stress with you -- any MSHA inspector is not your friend. Anything you say to or in their presence can," in all caps, "and will be used against you in court of law. Hopefully this will never be needed, but just be well aware." *Id.* at 216-217. This remark alone sinks Tripoli both with regard to the discrimination and interference counts. The Findings of Fact identify other such inappropriate remarks. A few examples make this abundantly clear:

On April 19th Tidaback's messaged: "MSHA just compounds the problem 10 X but not working with us and being *fucking dicks*." *Id.* at 260, (emphasis added).

On the same date, Tidaback stated:

> This [MSHA Inspector] Keith [Markeson] jackass... he gets his jolly off handing out citations... *this fucker is a snake*.[32] When he is -- when he's around you better watch what you say and do... *he is out to fuck you* or anyone else he can.

See Findings of Fact, *supra*. (emphasis added).

The testimony of Gage Wheeler is in line with this observation. Wheeler was hired as a maintenance person. Overall, as noted in the Findings of Fact, his testimony did not paint a safety conscious picture of the operation. Spears telling him to "steer clear" during an MSHA inspection evidences this animus towards MSHA. Wheeler understood the messages, quite reasonably in the Court's view, that he was not to talk with MSHA. As noted below regarding the interference count, Spears "steer clear" message amounts to interference as well.

It is noted that Ex. P-9, a Teams Chat, dated February 14, 2023, involved a message from Spears to Wheeler advising that he not speak with MSHA. Vol. 2 Tr. 175. In one Teams Chat message to Wheeler, on February 11, [2023] he was advised to not volunteer information to MSHA.

The testimony of Carson Allman reinforced the testimony of other witnesses. As noted, when he received his new miner training, Tidaback told him mostly just not to tell any stories about the mill itself to the MSHA inspectors. His testimony too is tantamount to interference, effectively an attempt to silence employees from exercising their rights when MSHA inspectors were on the site. Ms. Kensley Brewer, another former Tripoli employee, told the same story, reporting that Spears told her that Tidaback said they were not supposed to talk to the MSHA inspectors.

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[32] Spears displayed the same animus to MSHA earlier when, on April 14th, on the Teams message he made this virulent remark, "I'm telling you guys... [MSHA inspector] Keith [Markeson] is a snake... be cautious on what you say to and around him. *Any MSHA inspector really*." Vol 1. Tr. 276, (emphasis added).

Baumann Raises More Safety Complaints in February 2023

Baumann started raises more safety complaints in February 2023. He raised these safety issues with Spears. These coincided with his walking around with MSHA inspections at the mill.

Tripoli's Attempt to Show it Fired Baumann Because MSHA Issued Citations to the Mill Fails

Tidaback tried to show that by virtue of MSHA's issuance of citations, this meant Baumann was not doing his job. Even if, for the sake of argument, the citations could be placed at Baumann's doorstep, there is no record that Tripoli ever stated anything to Baumann about this claim prior to firing him. Thus, Tidaback was left with nothing more than his claim, at the hearing, that Baumann's alleged shortcomings were responsible for those citations being issued. Such mere assertions are insufficient.

The Testimony of Russell Tidaback

As mentioned earlier, when testifying about Tripoli's disciplinary process, Mr. Tidaback placed emphasis that Missouri is a right-to-work state and as such that he can fire anyone without any notification. And, while he acknowledged that the process had an order to it – verbal, written and then immediate termination, he stated that order could be ignored, or be applied in any order. Thus, he affirmed, Tripoli does not need to follow the order of its process.

Also, as mentioned earlier, he asserted that he hired people to replace Baumann, contending that four were hired for that purpose. None of them worked out, with none working for more than one month. But a greater oddity was that Tidaback needed Baumann, the allegedly deficient employee, to stay on to train the replacements.

On the issue of whether Tidaback ever received ever received any safety concerns from Baumann in any fashion, whether through a phone call or a Teams chat, as the Court noted, supra, Tidaback responded, "[t]hat I recall, no." Vol. 3 Tr. 204. When the Court inquired further about this, he reiterated that "[i]n the numerous communications that we had, I do not recall any specific safety-relatable concerns from Mr. Baumann, no." *Id.* at 205. Regrettably, the Court, observing Mr. Tidaback closely during those answers, concluded that he was not credible.

Mr. Tidaback also denied that he ever knew that Baumann was a miners' representative until he was fired. Nor, he contended, did Spears inform him of Baumann's miners' rep status. Given the extremely small management group at Tripoli, essentially Tidaback, his daughter, Jordan, and Spears, the Court finds that it is highly unlikely that this assertion was true.

In terms of Baumann's termination letter, it is noted that Tidaback asserted, on numerous occasions, that he gave Baumann counseling sessions about reading training files. To say the least, there were problems with Tidaback's effort to substantiate that claim, as the exhibit offered, Ex R-B, was dated April 27, 2023, a date *after* Baumann was fired. There were several other problems

with that Exhibit, as set forth in the Findings of Fact. While the Court admitted the exhibit, the weight given to it is nil, for the reasons set in forth in the Findings of Fact.[33]

An Important Event Just Before Baumann is Fired; a Nexus Writ Large

As noted in the Findings of Fact, an MSHA inspection that began on April 11th, was just six days before Baumann was fired. Baumann participated in that inspection and Spears knew that. A 104(b)-withdrawal order was issued that day. Baumann told Spears that, as a consequence of the shutdown resulting from the (b) order, Mill employees would have to be paid. Baumann, like the other employees, was sent home. He returned to the mine on April 17th on which date he was terminated.

Tripoli's First Attempt in Point of Time to Justify Baumann's Firing

On April 14, 2023, Tidaback stated "Rob [Baumann] 's termination will be based on production performance. Not following guidance given by management. Not ensuring the safety of the mill associated by utilizing the proper controls, etcetera. He doesn't have to sign it. We just need to have a document of why he was let go." Vol. 1 Tr. 245.

Tidaback's remark shows the reason for firing Baumann was pretextual and invented. Baumann denied each of these alleged deficiencies and Tripoli presented no earlier evidence demonstrating them. Though the remark above is more than sufficient, Tidaback's message to Huber on April 28, 2023, a date after Baumann's firing, states "I need the justification since Rob's complaint to MSHA about being let go... *Just need you to put the cherry on the cake*. That's all." *Id.* at 267 (emphasis added).

As the Secretary notes, protected activity may take several different forms. These include making safety complaints to MSHA or the mine operator, and acting as the miners' representative, which includes walking around with MSHA inspectors during an inspection. Sec. Br. at 35. As reflected in the Findings of Fact, Baumann made multiple safety complaints directly to Spears, and Tidaback and through Teams Chat. The events very close in time to Baumann's firing, all as

[33] As the Secretary notes and the Court so finds, regarding Respondent's Exhibit: R-B, Tidaback's personal notes, that exhibit is quite suspect and is disregarded by the Court as a failed attempt to justify Baumann's termination. As the Secretary correctly remarks, those "notes were not produced in the form seen in R-B during MSHA's investigation. Rather, Respondent provided *a different version* of those notes than in P-45. In Ex. R-B, an entirely new entry, dated February 14, 2023, that was not provided to MSHA, was the date Baumann started walking around with MSHA pointing out certain safety concerns he had to MSHA and AT. [ ] There is no reason why, if this entry was made contemporaneously with the event, it would not appear in the version of the document provided to MSHA. Another indication that these notes are not reliable is the date of the document. R-B is dated not only after Baumann was terminated, but on the same day Tidaback was served with Baumann's discrimination complaint. [ ]. These inconsistencies solidify that these "notes" are not a reliable or credible source of information and are nothing more than AT backfilling a reason to terminate Baumann, after he was terminated. Not only are there issues on the face of R-B, but the substance of the document was not supported by the testimony at trial. Sec's Br. at 48.

set forth in the Findings of Fact, demonstrate the attempt by Tidaback to contrive reasons to justify that action. One does not speak idly of putting the "cherry on the cake," as Tidaback expressed, for terminating an employee.

With no choice but to express it bluntly, the Court concludes that Tripoli presented no credible defense. If anything, Spears' testimony supported Baumann's claim. Further, as the Court noted during the hearing, Mr. Tidaback's claims, almost all of which arose after Baumann was fired, amounted to backfilling and, as such, were not credible.

Additional Observations.

Mr. Baumann's Discrimination Complaint

Mr. Robert Baumann engaged in multiple instances of protected activity. The adverse action is undisputed: Baumann was fired on April 17, 2023. The termination was motivated by Baumann's protected activity, clearly meeting the "but for" test, as described above. Per the discussion above, Baumann made several safety-related complaints to management at the mine and made safety complaints to MSHA. He also served as the miners' representative, walked around with MSHA during inspections, and discussed safety issues with MSHA, all of which are protected rights afforded by the Act. He would not have been fired but for his safety complaints. No other legitimate basis for Baumann's termination was presented by Respondent Tripoli.

As the Secretary accurately summarized,

> During his time at American Tripoli, Baumann made multiple and repeated safety complaints to Spears and Tidaback in person and via Teams, including increasingly more safety complaints in the last two months of his employment. … The safety issues Baumann raised, … included complaints about the dangerous silica dust that was not being properly controlled, concerns about a guard that nearly fell on Baumann, multiple electrical issues including a live wire Baumann found while sweeping that sparked a miners' broom, rags being stuffed into bearings, and concerns about manually stacking 100-pound bags over six feet high. … Baumann walked around with MSHA during inspections and made safety complaints to MSHA, including a complaint to MSHA that triggered a new inspection on March 28, 2023, and [he] participated in MSHA inspections by walking around with MSHA inspectors and pointing out and discussing safety issues with MSHA inspectors during those inspections. … Baumann also became a miners' representative on March 21, 2023, and in that role exercised his right under the Act to walk around with MSHA during their inspections, raised his safety concerns to MSHA, and brought the safety concerns of other miners to MSHA. … Baumann also exercised his and other miners' statutory right to be paid during the 104(b) Orders.

Sec's Post-Trial Brief at 35.

Tripoli's Initial Brief, consisting of five pages, began with the assertion that Baumann "was terminated on legitimate, non-discriminatory grounds related solely to documented performance issues, which were persistent and detrimental to operational efficiency. … there is no credible evidence linking his termination to his safety complaints or MSHA interactions—activities that the Respondent acknowledges and supports as part of its commitment to safety." Tripoli Brief at 1.

Succinctly stated, the Court finds otherwise with each of those assertions, findings amply supported in the record.

Tripoli maintained that Baumann was fired "strictly due to job performance and operational requirements." *Id*. at 2. It then immediately turned to its right "exercise discretion in its disciplinary measures." *Id*. It is revealing that Tripoli emphasizes its unfettered discretion regarding discipline. That discretion, Tripoli advises, means that it "is not required to adhere to a fixed sequence of progressive discipline steps and may terminate employment without prior written warnings if operational exigencies or substantial performance failures warrant such immediate action." *Id*.

Tripoli, through Tidaback, justifies its right to sidestep its own disciplinary procedures to provide "the necessary flexibility to manage its workforce effectively and ensure operational integrity without being constrained by a rigid disciplinary procedure." *Id*.

That disciplinary procedure, it must be said, is Tripoli's creation. That is to say, it was not foisted upon it by some outside force.

Tripoli then turns to its assertion that its Exhibit R-JJ establishes "the absence of any MSHA record recognizing Mr. Baumann as an official miners' representative." *Id* at 2. Tripoli combines this claimed absence with its "application of flexible disciplinary policies that comply with the company's handbook." *Id*.

There are problems with this contention. To begin, it is not necessary to be a miners' representative to have the Mine Act's protections against discrimination. Further, the Court finds that Tripoli did in fact know of Baumann's status as a miners' rep. As noted above, and during the hearing itself, the Court identified problems with Tripoli's claim that its termination procedure is within its complete discretion, a view which it somehow ties to Missouri being a right-to-work state.

As for the Interference claim, Tripoli acknowledges that its "internal communications, such as the message from Mr. Spears to Mr. Wheeler on February 14th, might imply interference," but that, in context, those communications were simply to ensure that the most knowledgeable person, i.e. Mr. Spears, speak with MSHA. *Id.* Thus, Tripoli maintains that the messages were simply "operational in nature and aimed at ensuring effective communication during MSHA inspections." *Id*. at 4.

The Court finds that the words in the Teams messages, and the credible hearing testimony, clearly refute this assertion.

Tripoli's Reply Brief

Tripoli continued the theme of its Initial Brief, to wit, there was no discrimination or interference, contending that its actions were simply "well-intentioned operational decisions." Reply at 1. Tripoli essentially repeats the claim in its Initial Brief that Baumann was fired due to "persistent performance issues that directly impacted operational efficiency." *Id.* at 2. Thus, it reiterates its position that those "policies allow the company to terminate employment without prior written warnings if substantial performance failures warrant such immediate action, ensuring that operational integrity is not compromised by inadequate job performance." *Id*.

Similarly, Tripoli repeats the contentions it made in its Initial Brief that there was no interference, as its concern "was operational, aimed at ensuring that accurate and relevant information was communicated to inspectors." *Id*. It then touts its training programs and policies, referring to Exhibits P-14 and P-16. *Id.*

Regrettably, the Court finds that the credible hearing testimony tells a very different story.

Last, Tripoli contends that "[g]eneralized scenarios from other cases do not satisfy the legal burden of proof, which demands clear and convincing evidence specific to the circumstances at hand." *Id.* at 4. It also asserts that the Secretary has used "reliance on speculative linkages from other cases [and that this is] insufficient for establishing a causal connection in this case [and such cases] do not replace the need for specific evidence in proving individual claims of discrimination or interference. *Id*.

The Court, based on the testimony from those witnesses it found to be credible and the Secretary's documentary evidence admitted at the hearing, concludes that the Secretary's case clearly established each of the claims.

As the Court noted during the hearing, a central problem for the Respondent was that at the time he decided to discharge Mr. Baumann, of necessity Tripoli would have had to have some sort of record established prior to discharging him as to the grounds for his discharge. The Court added that it didn't know of any exhibit thus at that point in the hearing that identified Baumann's deficiencies such as that would warrant Mr. Tidaback basis for firing him, regardless of protected activity. In fact, it was not just the lack of identified deficiencies warranting firing Baumann; Tripoli never identified any deficiencies at all prior to terminating Baumann.

In fact, as the Court also stated during the hearing, Tidaback's efforts to create grounds for Baumann's firing were in the nature of backfilling, that is, to invent grounds after firing him. In short, Tripoli's grounds were contrived, not genuine.

The Secretary's Count Alleging Interference with Miners' Rights

On the issue of interference, an equally clear case was presented. Tripoli interfered with the Mine Act's rights of miners on multiple occasions. As described above, Tidaback's own words show direct motivation to fire Baumann. Beyond the ample direct evidence, circumstantially the evidence is overwhelming that Tripoli knew of Baumann's protected activity, and, to say the least, did not take it well. Tripoli did not want interaction with MSHA Inspectors. Tidaback expressly stating that "everyone needs to stop calling MSHA" is plainly interference. Derogatory remarks,

replete with expletives, were made about the MSHA inspectors and employees were advised to steer clear of them.

Baumann's Damages

Finding that Mr. Baumann was unemployed for 62 days after his termination, the Court awards **$9,920.00** in back wages to him.[34] The Court also awards interest on back pay in the amount of **$632.00** through February 27, 2024 **plus the additional interest accrued from that date to the *actual date of payment*, (which is presently unknown),** applying the same *Arkansas-Carbona Co.* 5 FMSHRC 2042 (1983) formula ("*Arkansas-Carbona*") for the additional interest.

The Court finds that the other expenses Baumann incurred in searching for a job: inability to keep up with his bills, needing to sell possessions to meet such bills, gasoline costs incurred from driving to unemployment offices and to the days of the hearing, were all insufficiently supported as they were without receipts to establish those expenses and so must be denied.

[34] In awarding this backpay, the Court subscribes to the Secretary's remarks in its Post-Hearing ("Post-Trial) Brief, wherein it noted: "During Baumann's unemployment, he collected unemployment benefits from the State of Kansas. (See Vol. 1 Tr. 285:11-14; 290:9-21). However, none of these amounts should be subtracted from an award of back wages to Baumann. The Commission has recognized that unemployment should not be deducted from the backpay awards of miners discharged in violation of Section 105(c). *See Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc*., 18 FMSHRC 1315, 1325 (August 1996) (citing the Fourth Circuit's decision in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc*., 80 F.3d 110 (4th Cir. 1996) and reversing the judge's deduction of unemployment compensation from the Complainant's backpay award). In addition, the State of Kansas requires Baumann to pay back the unemployment he received if he receives any back wages award. *See* K.S.A. § 44-706(s)(1) ("For any such weeks that an individual receives remuneration in the form of a back pay award or settlement, an overpayment will be established in the amount of unemployment benefits paid and shall be collected from the claimant."). As such, subtracting unemployment benefits from the award would charge Baumann double for the unemployment benefits as he would still be required to pay back the State of Kansas." Sec's Br. at 50, n. 24.

The Court's Imposition of Civil Penalties for Tripoli's Interference and Discrimination Acts.

Tripoli's Interference

Interference is a separate and distinct violation of the Mine Act.[35] The Court agrees with the Secretary's remarks that:

> The evidence at trial established it was part of the cultural fabric at AT to interfere with miners' rights. Management at AT, including Tidaback, Ms. Tidaback, and Spears, repeatedly and regularly told miners not to talk to MSHA, not to participate in MSHA inspections, and even made veiled threats that if a miner did speak to MSHA they would be terminated. The evidence at trial introduced numerous Teams chats from management consistently reminding miners to not speak to MSHA, many of which were sent during or after MSHA inspections, including inspections which were initiated based on miner complaints. The messages sent, which were also reinforced during repeated verbal conversations to multiple miners, could not be more clear: "do not talk to MSHA," "MSHA inspectors are NOT your friend," anything you say to MSHA "can AND WILL be used against you in a court of law" and "EVERYONE needs to stop calling MSHA." Further, miners testified at the trial that it was a pattern and practice at AT to avoid any contact with the inspectors, and miners were told by Spears and Tidaback that their participation and speaking to MSHA could cause them to personally be issued citations. These statements, when viewed from a miner's perspective, would tend to interfere with miners' rights to raise safety issues to MSHA. Indeed, the miners at AT interpreted these messages from Spears and Tidaback as interfering with their rights, as they were fearful of speaking to MSHA because of these statements. Inspector Licklider testified that the miners at AT appeared nervous when MSHA was there, and their behavior was out of the ordinary from the miners at other mines. (¶ 93). In addition, Baumann was fearful to speak to MSHA, other miners told him they were fearful to speak to MSHA, and Wheeler testified he was concerned he would be terminated if he volunteered information to MSHA after being told not to by Spears. Any

[35] In this respect, the Court also agrees with the Secretary's remarks on the issue of interference, to wit: "under section 105(c) of the Act interference is a separate and distinct violation from discrimination. *McNary v. Alcoa World Alumina, LLC*, 39 FMSHRC 433, 449 (2017) ("Section 105(c)(3) permits an individual to file a complaint charging 'discrimination or interference' in violation of section 105(c)(1)."). The Acting Secretary interprets the Act as prohibiting acts that reasonably tend to interfere with protected rights, the motive for those acts notwithstanding. *See, e.g. Marshall Cnty. Coal Co. v. FMSHRC*, 923 F.3d 192, 198-99 (D.C. Cir. 2019); *Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (2014). The Court should find a violation of the interference provision of Section 105(c) of the Act if: "(1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *Franks*, 36 FMSHRC at 2108." Sec's Br. at 52-53.

> reasonable miner would have taken these multiple, ongoing statements about not speaking to MSHA and not volunteering information to MSHA from AT management as preventing them from exercising the right to speak to MSHA about safety concerns at the mine. This is particularly true when AT management's comments directly referenced prior miners who spoke to MSHA and then were swiftly terminated.

Sec.'s Br. at 53-54. (Sec's references to cited paragraphs from its brief were omitted).

There was utterly nothing presented by Tripoli to excuse its interference.

Analysis: For the Interference Count

The Secretary, upon investigation, alleges that Respondent interfered with Mr. Baumann's rights and that of at least one other miner in violation of Section 105(c)(1) of the Mine Act in that, on February 14, 2023, MSHA was conducting an inspection of the Respondent's Mine and on that date Complainant Baumann and another miner received a message via Microsoft Teams from John Spears, Respondent's operations manager, telling the miner not to answer questions from the MSHA inspector, to not go in the mill, and Spears as the operations manager continued to state that he would be the person who would talk to the MSHA inspector. Further, at other times during Complainant Baumann's employment, Respondent told miners not to speak to MSHA during MSHA inspections. Complaint at 3-4.

In the Exhibit P-34, a Teams message, Tidaback states: "Everyone needs to stop calling MSHA." Vol. 1 Tr. 265. This is interference plain and simple. Further, MSHA Inspector Markeson testified, credibly in the Court's view, that shortly after his inspection in February 2023, *three miners* told him they were told not to speak with MSHA and they showed him text messages supporting that claim.

The Secretary contends that those statements to miners, as described above, illegally interfered with the exercise of the miners' statutory rights in violation of Section 105(c)(1) of the Mine Act by intimidating miners against engaging in activities protected by the Mine Act, including miners' protected right to report safety issues to MSHA. Complaint at 4. The Court agrees.

Imposition of Civil Penalty for Each of the Two Counts.

The Court has given due consideration to each of the two counts brought by the Secretary of Labor. As noted by the Secretary and about which the Court agrees:

> The Commission considers six statutory factors in its penalty assessment: (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 operator charged in attempting to achieve rapid compliance after notification of a violation. 30

> U.S.C. § 820(i). The Court should award a separate penalty for the discrimination violation and the interference violation, as the Act requires a civil penalty for "each such violation" of the Act. 30 U.S.C. § 820(a).

Sec. Br. at 55.

The Court agrees that separate penalties are fully warranted in this case.

Continuing with its penalty recommendations, and about which statutory considerations the Court also wholeheartedly agrees, the Secretary notes:

> The Acting Secretary assessed a penalty of $15,000 for the discrimination violation and $17,500 for the interference violation based on information gathered during MSHA's investigation. AT's violations of the Act by interfering with miners' rights and discriminating against Baumann are serious offenses which exhibit a lack of good faith and a high degree of negligence. AT discouraged miners from speaking to MSHA about the multiple safety issues at the Mine, putting miners in serious danger, as evidenced by the hazardous conditions miners testified to, like cutting off a lock while maintenance work was being performed, not having ladders, dangerous silica dust exposure, and electrical sparks. AT discouraged miners from speaking to MSHA during ongoing MSHA inspections, including MSHA inspections triggered by miner complaints and during inspections where Baumann was raising safety complaints to MSHA and participating in MSHA inspections as a miners' representative. AT went out of their way to ignore miner safety complaints, disregarded MSHA standards and miner safety, failed to provide training, and ultimately terminated Baumann, who was the miners' representative and was trying repeatedly, against strong resistance and constant interference and intimidation, to improve miner safety at the Mine. *See Highland Mining Co.*, 37 FMSHRC 2436, 2438 (Oct. 2015) (ALJ) (finding mine operator's interference with a miners' representative's rights was serious considering the important function that miners' representatives serve in ensuring a safe and healthy environment for miners). AT has not exhibited any good faith in complying with the Act …"

Id. at 55-56

Although the Secretary conceded that AT had no previous discrimination violations at the time the penalties were assessed, it then asserted that AT has an extensive recent history of safety and health violations, and these past violations must be considered as part of the penalty assessment.

The Court does not agree with the Secretary. The Secretary's regulations addressing violation history interprets the language to include "[o]nly assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission." 30 C.F.R. § 100.3(c); *See, for e.g*., *GMS Mine Repair,* 72 F.4th 1314, 1318 (D.C. Cir. 2023) and *Brody Mining*, 36 FMSHRC 2027, 2038, (Aug. 2014). Tripoli's current ownership, headed by Mr. Tidaback, was acquired in

June 2021. Vol. 1 Tr. 40. Accordingly, the history, being so recent, and outside of consideration, does not count for and against Tripoli.

In the same vein, the Secretary's argument regarding AT's history of violations, while reacknowledging that it did not have a history of Section 105(c) violations, still remarks that "MSHA assessed a subsequent penalty against AT for terminating *another*[36] miner in violation of Section 105(c) in a case still pending with the Court." Sec. Br. at 33, (emphasis added).

The Court departs from and disagrees with the Secretary's remark that it should consider another discrimination claim, which claim is unresolved and involves another employee of Tripoli. That case is assigned to another administrative law judge. Being outside of the proper scope of Tripoli's violation history, that other case plays no role in the Court's penalty determination.

Speaking to the factors of size and ability to continue in business, the Secretary remarks: "the record establishes AT is a small employer, but AT did not present any evidence that any civil penalty assessed would cause the company to go out of business." *Id*. at 57. Those remarks are accurate:

In terms of the civil penalties sought by the Secretary for the discrimination and interference counts, the Respondent states only that both counts should be dismissed in their entirety. Thus, Tripoli made no contentions about any of the statutory penalty consideration such as its size, violation history, and good faith in achieving rapid compliance.

The mine's small size, was considered, as was the absence of any contention that the penalties sought by the Secretary would interfere with its ability to continue in business. Nevertheless, considering the Court's conclusions that the negligence, gravity and lack of good faith associated with Tripoli in this matter were of such a serious level that, at a minimum, the penalties sought were fully warranted. *See* the Court's extensive Findings of Fact, fully supporting its determinations regarding those three penalty factors.

ORDER

Based on the foregoing Findings of Fact and the Court's Analysis, the Court **ORDERS** a civil penalty in the amount of $15,000.00 for the discrimination violation and $17,500.00 for the interference violation.[37] Given the entire record in this case, including Tripoli's high degree of

[36] The improperly cited case, *Hoover v. AT*, does at least explain the Secretary's mistaken reference in its Brief to Hoover, when it meant Huber.

[37] Pending any appeal rights, the Respondent is to pay the full imposed penalty amounts within 30 days of the date of this decision. Penalties may be paid 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. It is vital to include Docket and A.C. Numbers when remitting payments.

negligence, the lack of good faith, and the Court's determination that Tripoli's assertions lacked credibility, the Court could well have imposed larger penalties for these Counts.

Regarding Complainant Robert Baumann, as set forth above, the Court awards damages in the amount of **$9,920.00 in back wages** to him. The Court also awards interest on backpay in the amount of **$632.00 through February 27, 2024, plus the additional interest accrued from that date to the actual date of payment, which date is presently unknown,** applying the *Arkansas-Carbona* formula for the additional interest. Tripoli is **ORDERED** to pay these amounts to Mr. Baumann.

The Court **ORDERS** that Tripoli shall remove from Robert Baumann's personnel file any mention of any employment action stemming from this incident and to expunge Baumann's termination from his personnel record and only provide a neutral reference for any inquiries regarding him.

Further, American Tripoli is ORDERED to post a notice at Tripoli's Mill, in a conspicuous location, and on hard stock board of at least 11 x 17 inches size, setting forth the rights of miners protected by 105(c) of the Mine Act. Given the mine's history of rapid employee turnover, the notice shall remain in place for 1 year. If weather or other factors cause the notice to become deteriorated, a new notice of equivalent composition shall be posted.

SO ORDERED

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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