FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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LAWRENCE PENDLEY, Complainant v. HIGHLAND MINING CO. AND JAMES CREIGHTON, Respondent	DISCRIMINATION PROCEEDING Docket No. KENT 2013-606-D MSHA Case No.: MADI-CD 2010-07 & 11 Mine: Highland 9 Mine Mine ID: 15-02709

DECISION

Appearances: Tony Oppegard, Esq., Lexington, KY, Representing the Complainant

Wes Addington, Esq., Appalachian Citizens Law Center, Representing the Complainant

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True PLLC, Lexington, KY, Representing the Respondent

Before: Judge Andrews

This case is before me upon a complaint of discrimination brought by Lawrence Pendley ("Complainant"), a miner, against Highland Mining Co. and James Creighton, ("Respondents"), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3).

Pendley filed his original discrimination complaints with the Mine Safety and Health Administration (MSHA) on February 25, 2010 and March 25, 2010. RX-2; RX-3.[1] Pendley alleged that he was being interfered with in performing his duties as a miners' representative by Jack Creighton. CX-1; CX-2. After conducting an investigation, MSHA filed a §105(c)(2)

[1] Complainant's exhibits will hereinafter be designated CX followed by a number. The Respondent's exhibits will be designated as RX followed by a number. Dep-CX or Dep-RX followed by a number refers to the Complainant's or Respondent's exhibits that were attached to the deposition submitted into the record.

complaint on Pendley's behalf on December 2, 2010.[2] On February 3, 2011, the case was stayed pending the outcome of remand ordered by the Sixth Circuit Court of Appeals and the Commission in Docket No. KENT 2007-383. On December 27, 2012, Judge Barbour's Decision on Remand dismissed all claims of discrimination pending in Docket No. KENT 2007-383. Based on Judge Barbour's decision, the Secretary filed a Motion to Dismiss Docket No. KENT 2011-337-DM on February 21, 2013, stating that the "pattern of discrimination that served as a basis for the Complaint filed in this matter no longer exists." An Order dismissing KENT 2011-337-DM was issued on February 26, 2013.

Pendley, through counsel, filed the instant complaint of discrimination under §105(c)(3) of the Act on March 22, 2013. A hearing was held in Henderson, Kentucky, on April 17, 2014, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

STIPULATIONS

The Complainant stipulated to the following: At the time that Lawrence Pendley filed his complaint to MSHA in this matter, February 25, 2010 and March 25, 2010, he was designated as a miners' representative at Highland's No. 9 Mine. *Complainant Pre-Hearing Report*, 2.

The Respondent stipulated to the following:

1. Highland is subject to the Federal Mine Safety & Health Act of 1977.

2. Highland mines and produces coal at the Highland No. 9 Mine that enters into and has an effect upon interstate commerce within the meaning of the Federal Mine Safety & Health Act of 1977.

3. Highland is subject to the jurisdiction of the Federal Mine Safety & Health Review Commission and the Administrative Law Judge has the authority to hear this case and issue a decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See*

[2] This Complaint was docketed as KENT 2011-337-D, with MSHA Case No. MADI CD 2010-11.

Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Lawrence Pendley had been a coal miner for 31 years at the time of hearing. Tr. 14.[3] He worked at Highland No. 9 as a parts runner, until he was suspended and discharged in 2007 after an altercation with Jack Creighton. Tr. 14, 55-57; RX-7. Pendley filed several discrimination complaints associated with the discharge and predicate suspension, and Judge Barbour found that the suspension was discriminatory, but the discharge was not.[4] Tr. 15.

Pendley became a miners' representative in 2009 after several miners requested that he serve in that role. Tr. 15-16. He remained a miners' representative at the time of hearing. Tr. 52. As a miners' representative, Pendley was entitled to review examination books; however, on two occasions, people interfered with him doing so. Tr. 17. In the first instance, a Highland manager named Jack Willingham took the books from Pendley in the recording office because he did not think that Pendley had a right to view them. Tr. 17; Dep. 56. In the second instance, Scott Maynard, who worked in safety for Highland, took materials from Pendley as he was viewing them. Tr. 17-18, 28. Pendley complained to MSHA about these incidents in August 2009. Tr. 18. MSHA subsequently had a meeting with Highland and sent letters stating that if any more interference took place, action would be taken. Tr. 18. The August 18, 2009 letter from MSHA informed Highland that neither Highland nor any of its agents may interfere with Pendley's viewing of examination books. Dep. 56; CX-4. Larry Millburg, the superintendent of operations at Highland No. 9 mine, testified in deposition that he agreed that not allowing a miners' representative to view examination books would constitute interference.[5] Dep. 57.

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[3] Pages of the official hearing transcript are designated "Tr." followed by the appropriate page reference(s).

[4] 34 FMSHRC 3406 (December 27, 2012) (ALJ Barbour); 30 FMSHRC 459 (May 19, 2008) (ALJ Barbour).

[5] Millburg's deposition of April 8, 2014, was submitted as testimony at hearing. At the time of deposition, Millburg was employed as the General Manager by Cliff's Natural Resources in Hueytown, Alabama. Dep. 8-9. Millburg had a high school degree, a hoist engineer's certificate, a mine examiner's certificate, a mine manager's certificate, Kentucky mining papers, and Illinois and Kentucky mine manager and examiner certificates. Dep. 9. He had worked in the mines since 1973, as a utility man, maintenance foreman, assistant mine manager, shift manager, general manager, operations manager, superintendent, and vice president of operations. Dep. 9-11. When Millburg became vice president of operations in February 2011, he had jurisdiction over Highland 9, the surface mine, Freedom underground mine outside Henderson, and the underground mine at Dodge Hill. Millburg began at Highland in April, 2006. Dep. 44. Therefore, Millburg's jurisdiction included Highland 9 mine from 2006 through August 2012. Dep. 12-13. During the 2009-2010 timeframe, Millburg's duties included him being in charge of operations at Highland 9 mine, including production, safety, maintenance, and employee discipline. Dep. 13-14.

Furthermore, Pendley testified that Creighton interfered with his duties on several occasions, often by standing close to him and trying to intimidate him. Tr. 16-17. Pendley felt that mine management was permitting Creighton to behave in this way. Tr. 17. Millburg testified that neither he nor anyone else encouraged interference with Pendley's rights. Dep. 26-27.

The first incident with Creighton occurred in February, 2010, when Pendley and MSHA inspector Jeff Winter came out of the records book room and into the common area. Tr. 19. At the time, Creighton was working as a supply man, and part of his duties was to clean the common area.[6] Tr. 21. Creighton was in an area in the back of the room when he yelled out, "hey there," which Pendley believed was directed at him. Tr. 19, 36. Pendley believed Creighton's statement was a provocation, rather than a greeting. Tr. 19-20.

According to Creighton, he was sitting in the last table in the commons area when the phone rang. Tr. 76. Creighton answered the phone and someone told him that there were parts for him to pick up. Tr. 76. Creighton admitted that he may have yelled out "hey there," but testified that it would have been part of him yelling, "hey I got me a nibble," in reference to getting a call from the supply house. Tr. 79. He testified that the comment was not directed at anyone. Tr. 79.

After this incident, Pendley and Winter walked over to the edge of the room and stopped for a moment. Tr. 20. Creighton walked over and stood in close proximity to them for approximately 15-40 seconds before moving on.[7] Tr. 20, 25, 77. Creighton grew up with Winter and had been friends with him for a long time. Dep. 27-29. Creighton said to Winter, "How's it going Jeff? Where did you go today?" Winter told Creighton where he went and Creighton asked how it looked in that area. Tr. 77. Creighton testified that he was three to four feet from Winter when he stopped to talk to him. Tr. 86. He also said that he was facing Winter. Tr. 86. Creighton described the conversation he had with Winter as "chit chat." Tr. 116-118. Pendley testified that he did not believe that Creighton had a reason to stand where he was. Tr. 20.

Creighton testified that he did not say anything to Pendley when he spoke with Winter. Tr. 79. Pendley did not say anything to Creighton because he had been advised by mine management and Carolyn James at MSHA not to be around Creighton. Tr. 21. Creighton testified that he did nothing to harass Pendley or interfere with his activities as a miners'

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[6] Jack Creighton was employed at Highland No. 9 mine in February and March 2010. Tr. 72. Creighton began in the mining industry at Highland No. 9 mine since 1972, and retired on September 21, 2013. Tr. 72-74. He had worked as an underground supply man, a timber man, a ventilation man, a hoist man, a scoop man, and a bathhouse/supply/surface utility man. Tr. 73. Creighton's duties at the time of hearing included running the hoist, cleaning up the bathhouse, loading and unloading supplies, and working in utilities. Tr. 74. Most of his duties were on the mine surface. Tr. 74-75.

[7] Creighton testified that he ran into Winter and Pendley right outside the commons area. Tr. 77.

representative. Tr. 87. Creighton had been shown a letter from the District Manager that articulated Pendley's walk-around rights, and was told to avoid Pendley when possible. Tr. 120-124; CX-4.

Pendley brought this incident to Winter's attention, and Winter told Pendley to ignore Creighton. Tr. 22. Pendley proceeded to file a complaint with MSHA over this incident. Tr. 22. After hearing that Pendley filed a complaint against him, Creighton asked Inspector Winter what he did wrong. Tr. 88. According to Creighton, Winter replied, "Jack I didn't say you did anything wrong." Tr. 90.

Creighton also talked about the complaint with Larry Millburg, Highland's superintendent of operations at the mine at the time. Tr. 90. Millburg had been aware of the conflict between Creighton and Pendley. Dep. 44. Millburg testified that he received the May 5, 2009 letter from MSHA making him aware that Pendley was a miners' representative. Dep. 16-17; RX-1. At that time, a notice that Pendley was a miners' representative was posted on a bulletin board in the hallway. Dep. 24. Millburg had previously talked to Creighton about Pendley being a miners' representative. Dep. 25. Millburg testified that prior to receiving the August 18, 2009 letter from MSHA, he was not aware that anyone from Highland was interfering with Pendley's rights as a miners' representative. Dep. 26; RX-4.

After talking with Creighton, Millburg did not believe that Creighton had interfered with Pendley's rights as a miners' representative. Dep. 29. Millburg discussed the events with Creighton and Winter to see if Creighton's account was accurate. Dep. 27. Millburg did not believe that the letters to Pendley and Creighton prohibited contact. Dep. 36-37; RX-6, 7. Millburg never told Creighton or Pendley that they could not be in the same room or have any contact. Dep. 37. Millburg testified that he told Creighton that if it was at all possible he should stay away from Pendley while Pendley was on the mine property. Dep. 37-38.

Creighton asked Millburg if he could retrieve the security camera footage from the time of the incident on February 22, 2010. Tr. 90-91; RX-8. There had been cameras set up in the hallways, so Millburg had Ronnie Weiss find the video.[8] Dep. 30-31. After viewing the video, Millburg determined that it corroborated Creighton's account. Dep. 32. He stated that Creighton was beside Pendley, standing approximately three feet away. Dep. 32-33. Creighton testified that after reviewing the video, Millburg told him that "I saw nothing going on. I saw no harassment, no cause for a case to be filed." Tr. 96.

Millburg testified that he could not have prevented Creighton from speaking to Winter because it was Creighton's right as a miner to speak to an MSHA inspector. Dep. 33-34. Millburg did not see any problem with Creighton's conduct. Dep. 34.

In Creighton's deposition, which took place 21 days before hearing, he stated that after the February complaint, no one from Highland management talked to him about the incident. Tr.

[8] Weiss did all the mine maps and computer work at the mine at the time. Dep. 31. He passed away prior to the hearing. Dep. 31-32.

110, 113. At hearing, Creighton stated that the reason he said this, despite the fact that he testified that he spoke with Millburg after the February incident, is because *he went to talk with* Millburg, rather than Millburg coming and talking with him. Tr. 110-111. Creighton then stated that during the deposition, he could not recall talking with Millburg or watching the video with him. Tr. 113.

The second incident with Creighton occurred in March, 2010, in approximately the same location as the February 2010 incident. Tr. 22, 102. It occurred when Pendley was traveling with MSHA Inspector Archie Coburn during a quarterly closeout.[9] Tr. 22. When Pendley and Coburn entered the common room, Creighton yelled across the room to Pendley, "I'm going to file a harassment case against you." Tr. 23. At hearing, Creighton testified that he was approximately 20-25 feet from Pendley when he yelled to Fenwick. Tr. 129. However, in the deposition, Creighton stated that he was approximately 5-10 feet from Pendley. Tr. 131.

Then, a little later, Creighton walked over to within a foot of Pendley and stood there for approximately 30 seconds to one minute. Tr. 23-25. Pendley testified that there was no reason for Creighton to walk up to him, and that he understood the move to be a form of intimidation and harassment. Tr. 24-25. Pendley mentioned his concern to Coburn and Coburn told him not to pay any attention to it. Tr. 25. Pendley subsequently filed a discrimination complaint with MSHA over the incident. Tr. 26.

Creighton testified that he arrived at the mine at 6:30 or 7:00 am on the day of the second incident, and soon after a miner named Chad Fenwick became upset with him because Creighton had not yet made any sweet tea. Tr. 102. Creighton told Fenwick "to get the hell out of there before I filed a case on him."[10] Tr. 102. Then Creighton proceeded to make Fenwick the sweet tea, and Fenwick left. Tr. 102-103. Creighton never filed a harassment charge against Fenwick. Tr. 127-128, 133. Creighton denied that he said anything to Pendley, stared at Pendley, touched Pendley, or made any gestures at Pendley on March 25. Tr. 106-107.

On April 14, 2010, Creighton filed a harassment charge against Pendley. Tr. 26, 127-128, 133. In his statement to MSHA, Creighton said he felt that he was being harassed, threatened, and discriminated against. Tr. 136. Creighton accused Pendley of positioning himself so that he would have contact with Creighton, and said that he felt threatened and feared for his safety while Pendley was on mine property. Tr. 137-139. Further, he demanded that Pendley be removed as a miners' representative. Tr. 136.

After Creighton received Pendley's March complaint, he discussed it with superintendent Millburg. Tr. 107-108. Millburg did not witness the events that Pendley described in his March 2014 complaint, but Millburg did not believe that Creighton's conduct constituted harassment or

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[9] In quarterly closeouts, there is a review of the mine violations during the quarter, and miners' representatives have an opportunity to be present. Tr. 22-23.

[10] Creighton alternately described his comment as, "I'm going to file a harassment case against you." Tr. 126-127.

interference. Dep. 38-39. Millburg talked to Creighton after the March incident. Dep. 40. Creighton told Millburg that he was doing his job and then walking past Pendley. Dep. 40-41. Millburg told Creighton to stay away from Pendley if possible. Dep. 40-41.

In addition to the encounters with Creighton, Pendley also alleged discrimination by Highland management concerning a belief that he was making complaints to MSHA and in regards to sharing information with him. On September 9, 2009, Safety Manager James Allen sent an email to a group of Highland management stating that Pendley was making §103(g) complaints. Dep. 62. The recipients to the email included Frank Foster (corporate safety), Scott Maynard (superintendent of Highland 9), Randy Duncan (Safety Supervisor at Highland 9), Travis Little (Safety Supervisor), Jack Willingham (Safety Supervisor), and J.R. Wolfe (Training Supervisor). Dep. 59-61.

In another email, David West asked James Allen how changes in the Emergency Response Plan (ERP) were being communicated to the miners' representatives at Highland. Dep. 64. At deposition, Millburg agreed that changes to the ERP must be communicated to the miners' representatives. Dep. 65. Allen responded that they would not post a complete ERP plan for Pendley to review, and followed up the statement with three exclamation points. Dep. 66; Dep-CX-6.

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Respondent argued that no Commission case has addressed the issue of co-worker harassment, rather than harassment by management, and that the Commission should use other federal anti-discrimination laws as guides. Accordingly, Respondent suggested that this Court follow a five-step analysis to determine if such discrimination is actionable: (1) that the individual engaged in protected activity; (2) that he was subject to harassment; (3) that the harassment was based on the protected activity; (4) that the harassment unreasonably interfered with his performance as a miners' representative and objectively created a hostile environment; and (5) that the operator knew or should have known of the alleged harassment and failed to implement prompt and appropriate corrective action. Respondent argued that Complainant should prevail only if he can meet each of these elements. *Resp. Post-Hearing Br.* 4.

The Respondent conceded that Pendley engaged in protected activity in the past, but argued that Pendley's claim fails on all other elements of the *prima facie* test that it suggested the Commission adopt. *Resp. Post-Hearing Br.* 5. The Respondent argued that Pendley failed to establish that the harassment rose to a level that was both subjectively and objectively hostile and abusive. Respondent next argued that Pendley failed to prove that Creighton's harassment was based on activity protected under the Act, specifically Pendley's rights as a miners' representative. *Resp. Post-Hearing Br.* 7. Respondent contended that it was more likely that Creighton's actions towards Pendley were based on their history of mutual animosity rather than on Pendley's protected activity. *Resp. Post-Hearing Br.* 8-9.

Respondent further argued that even if Creighton harassed Pendley, there was no actionable discrimination because Highland responded appropriately and reasonably to Pendley's complaints. *Resp. Post-Hearing Br.* 9-11. Millburg told Creighton not to interfere with Pendley's duties as a miners' representative and to avoid him when possible. Millburg determined that Creighton had not violated company rules in his interactions with Pendley, so it was proper not to discipline Creighton. Furthermore, the Respondent argued that Highland was not permitted to limit Creighton's abilities to speak to an MSHA inspector, so it could not instruct him against approaching the inspector while Pendley was around. *Resp. Post-Hearing Br.* 13-14.

Furthermore, the Respondent argued that §103(f) provides that a miners' representative has the right to accompany an inspector only during the physical inspection of the mine or participate in a pre- or post-inspection conference. To the extent that Pendley was not accompanying the inspector at the time of the alleged harassment, the Respondent argued that he was not engaged in protected activity. *Resp. Post-Hearing* Br. 3.

In its Post-Hearing Brief, the Complainant argued that the Commission has established a different framework from the standard *Pasula-Robinette* analysis for determining whether conduct constitutes interference under §105(c). *Sec'y of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005). Rather than having to find protected activity, adverse action, and a nexus between the two using various indicia, the interference analysis is based on §8(a)(1) of the National Labor Relations Act. The Complainant argued that under this analysis, the judge must only find that the Complainant engaged in protected activity and that the operator engaged in conduct that would tend to interfere with such protected rights. *Comp. Post-Hearing Br.* 14-16.

The Complainant argued that the following actions performed by Pendley constituted protected activities under §105(c): Pendley performing his duties as a miners' representative from June 2009 through April 2010; Pendley's complaints to MSHA regarding Creighton's and the Highland's alleged harassment that led to the August 18, 2009 letter; Pendley's review of mine examination books; and Pendley's §105(c) complaints in February and March 2010, which led to the instant proceeding. Furthermore, Highland's belief that Pendley was making §103(g) complaints to MSHA after reviewing the mine examination books was protected activity that was imputed to Pendley, regardless of whether he actually made the complaints. The Complainant further argued that Creighton's harassment of Pendley, and the company's tacit approval of Creighton's conduct, tended to interfere with Pendley's rights as a representative of miners. *Comp. Post-Hearing Br.* 16-19.

In response to this position, the Respondent contended that the cases cited by Complainant involved a supervisor's conduct, rather than a coworker's, and that there was nothing in the instant case to impute Creighton's actions to management. *Resp. Response Brief* at 5-7. Furthermore, as opposed to the cases cited by Complainant, Pendley was neither fired nor threatened with economic repercussions. *Id.* The Respondent also argued that the Commission's concerns over chilling speech are inapplicable here because Pendley did not receive any remuneration for his position as a miners' representative. *Id.* at 8. Finally, the Respondent

argued that insofar as Creighton's conduct was based on personal animosity or on any other response to non-protected activity, Pendley's interference claim must fail.

The Complainant responded that Pendley's argument is not as atypical or unique as Respondent asserted. Numerous cases have considered complaints by non-employee miners' representatives, which are specifically protected under 105(c), and numerous cases have been directed toward an individual respondent. *Pendley Reply Brief*, 4-6. Furthermore, Complainant argues that the Respondent's argument that Pendley and the investigator were not engaged in an inspection or in a pre- or post-inspection conference at the precise moment of the alleged conduct is an absurd and unsupported reading of the Mine Act. *Id.* At 6-7.

ANALYSIS

This case is before me on allegations that the Respondent interfered with Pendley's rights as a miners' representative in violation of §105(c). The provision states:

> 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 Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, 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 101 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 Act 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 Act.

30 U.S.C. 815(c)(1).

The Act prohibits both discrimination because of protected activity and interference with the exercise of statutory rights. Most cases before the Commission are of the former, and follow the *Pasula-Robinette* framework, wherein the Claimant presents a *prima facie* case by showing that he or she engaged in protected activity, that there was an adverse action, and that the adverse action was motivated in any part by that activity. *See Turner v. Nat 7 Cement Co. of California,* 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The five-step analysis proposed by Respondent is unnecessary, as the Commission has already developed various tests to determine whether unlawful discrimination or interference has taken place, noting that "in addition to the broad protections offered against adverse actions, the scope of miner rights protected by the Act is equally broad." *Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7 (Jan. 2005). The Act's legislative history makes clear that it protects miners against "not only the common forms of discrimination, such as discharge, suspension, demotion..., but also against the more subtle forms of interference, such as promises of benefits or threats of reprisals." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978). In *Moses v. Whitley Development Corp.*, the Commission found that "more subtle forms of interference" includes "coercive interrogation and harassment over the exercise of protected rights." 4 FMSHRC 1475, 1478 (Aug. 1982). The Commission explained,

> A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.

Id. at 1479.

The Commission developed the test for interference by looking to Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), "which makes it unlawful for an employer to 'interfere with, restrain, or coerce' an employee's protected rights. *Gray*, 27 FMSHRC at 9. The Commission quoted approvingly from NLRB caselaw, which holds that the issue "does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA]." *Id.*, quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959). The Commission made clear that the judge should take into consideration the totality of the circumstances in determining whether there was unlawful interference. *Id.* at 10-12. In Gray, the Commission considered such factors as "the persistence with which the subject of the miner's protected activity was raised and "the accusatory manner in which it was done." *Id.* at 11 (quoting trial court judge). Furthermore, it stated that other factors must be taken into account, such as "where the statements were made," "the nature of [the] relationship," and the manner in which statements were made. *Id.*

Building upon its prior precedent in *Gray* and *Moses*, the Commission recently provided a helpful clarification of the elements of an interference violation. According to this test, 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 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.

United Mine Workers of America obo Mark A. Franks and Ronald M. Hoy v. Emerald Coal Resources, LP, 36 FMSHRC 2088, 2108 (Aug. 2014). The Commission stated in no uncertain terms that "for the miners to prevail on their interference claim, proof of the operator's intent to interfere with the miner's statutory rights is not required." *Id.* at 2112-2113. Viewing the totality of the circumstances in the instant case, I find that Pendley's rights as a miners' representative were interfered with in violation of Section 105(c).

Section 103(f) of the Mine Act provides miners' representatives the "opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."[11] 30 U.S.C.A. § 813(f). In addition to these walk-around rights and pre- and post-inspection conference rights, miners' representatives are also provided notice rights and the right to make safety complaints. The legislative history of the Mine Act viewed the miners' representative as serving an important function in ensuring the safety and accountability at mines.[12]

In the instant case, Pendley faced interference with his walk-around rights, his right to examine books, and his right to make safety complaints. Each of these will be examined separately. However, taken together, these actions constituted interference of Pendley's rights as a miners' representative in violation of the Mine Act.

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[11] The regulations define "representative of miners" as:

> (1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and
> (2) Representatives authorized by the miners, miners or their representative, authorized miner representative, and other similar terms as they appear in the Act.

30 C.F.R. § 40.1.

[12] The Senate Report accompanying the Mine Act states, "Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness." S. Rep. 95-191.

The Respondent Creighton interfered with Pendley's walk-around rights when he repeatedly conducted himself in a manner that Pendley understood as intimidation. The Commission's test requires that the action be "reasonably viewed...under the totality of the circumstances." In this instance, Pendley and Creighton's multi-year feud, which resulted in numerous judicial decisions and Pendley's termination, is important to contextualizing the conduct.

In his December 27, 2012 Decision, Judge Barbour began by noting that "this discrimination proceeding has a long and tortured history."[13] *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 3406 (Dec. 27, 2012) (ALJ).[14] Allegations of discrimination and conflicts with Creighton go as far back as 2005. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 30 FMSHRC 459 (May 19, 2008) (ALJ).[15] In May 2005, Pendley complained to his supervisor after Creighton used "foul language" in response to Pendley's request for a delivery of food. *Id.* at 462. During that same month, Pendley accused Creighton of opening his bathhouse locker and pouring bleach on his clothing. *Id.* at 463. Creighton denied the charge, but according to Pendley, he told fellow miners that Pendley was "crying," and "I'll give you something to cry about." *Id.* Subsequently, dirt was swept intentionally in front of Pendley's locker, and Pendley similarly suspected Creighton of being the culprit. *Id.* 463-464.

Next, as Judge Barbour found, came the "gun" incident. Creighton testified he knew Pendley had gone to Creighton's supervisor and complained. "So" said Creighton, one day in the bathhouse "after I heard [about] him complaining, I walked halfway back [to Pendley's locker]

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[13] Judge Barbour recounted this history in his decision:

> It is before me on remand from the Commission (*Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC___, KENT 2007-383-D (August 30, 2012) (hereinafter *Pendley,* slip op.), which in turn received the case from the United States Court of Appeals for the Sixth Circuit. *Pendley v. FMSHRC,* 601 F. 3d 417 (6th Cir. 2010). The Sixth Circuit reversed the prior decision of the Commission (*Sec'y on behalf of Pendley v. Highland Mining Co., LLC,* 31 FMSHRC 61 (Jan. 2009)), a decision affirming my underlying decision on the merits. *Sec'y on behalf of Pendley v. Highland Mining Co, LLC*, 30 FMSHRC 459 (May 2008) (ALJ). Pursuant to its reading of the Sixth Circuit's opinion, the Commission returned the case to me to determine whether Highland Mining Co. ("Highland") discriminated against Lawrence Pendley ("Pendley") in violation of the Mine Act when it: (1) fired him in March 2007, and (2) changed his work assignments and conditions when he returned to work upon an order of reinstatement.[1] *Pendley*, slip op. at 15.

34 FMSHRC at 3406.

[14] This decision is also in the Record as RX-7.

[15] This decision is also in the Record as RX-6.

... thr[ew] a piece of paper towel on the floor and told him there is something to cry about ... [and] that's when he reached up in his locker in his hard hat and pulled out what I perceived to be a weapon." Creighton continued, "I told him ... I [will] shove it down ... [your] throat or make ... [you] eat it, something on that order." Creighton maintained Pendley "started mouthing" at him, but Creighton walked away. *Id.* at 464 (citations omitted). Throughout 2005, matters continued to deteriorate between Pendley and Creighton, with accusations that Creighton was inspiring harassment against him. In one instance, Pendley accused Creighton of suddenly stopping the cars while he was traveling into the mine, which resulted in Pendley going to the hospital. *Id.* at 468-471.

The final incident occurred in 2007, when a physical altercation occurred between Pendley and his "long-time nemesis, Jack Creighton." 34 FMSHRC at 3407. As a result of this altercation, as well as a loud argument that Pendley had concerning his overtime pay, Millburg made the decision to suspend and then terminate Pendley's employment. *Id.* Judge Barbour found that the suspension was discriminatory, but that Respondent had a legitimate nondiscriminatory reason for firing Pendley. *Id.*

Pendley became a non-employee representative of miners in 2009, and it was in this capacity that he experienced the instant discrimination. Tr. 15-16.

With regards to the February and March 2010 incidents where Creighton stood beside Pendley or yelled out threats to bring discrimination claims against him, I found much of Creighton's testimony to be incredible. Creighton's testimony was filled with ad hoc explanations that sounded more clever than true. A prime example of such incredible testimony was Creighton's attempt to reconcile his hearing testimony with his deposition testimony, which took place three weeks prior, concerning whether he talked with anyone in mine management about the February encounter with Pendley. Tr. 110-113. At deposition, Creighton answered in the negative when asked if anyone in mine management had talked to him about the incident, however at hearing he testified that he spoke with Millburg. *Id.* Creighton's explanation for this contradictory testimony was that in deposition he understood the question to be whether anyone from mine management talked to him about the incident, not whether he talked to anyone from mine management about the incident. *Id.* This tortured parsing of the parts of a conversation to explain contradictory testimony defies credibility, and constitutes but one instance of Creighton providing seemingly made up and self-serving excuses to explain away his actions.

Pendley and Creighton had been told to stay away from each other when possible. Tr. 120-124; CX-4. There may have been instances where run-ins between Pendley and Creighton were necessary or unavoidable, but what occurred in February and March 2010 were not such instances. According to Pendley's credible testimony, Pendley was exercising his walk-around rights by accompanying inspectors before, during, and after an inspection. Tr. 19-20, 22-25.

During the February inspection, Creighton yelled out "hey there" to Pendley as a provocation. Tr. 19-20, 36. Creighton's testimony that he was not yelling at Pendley, but was instead yelling "hey there I got me a nibble" to no one in particular in response to a phone call, defies belief and was not credible. Tr. 79. Following this outburst at Pendley, Creighton walked

over to the edge of the room where Pendley and the inspector were standing and stood in close proximity to them for a period of 15-40 seconds in order to "chit chat" with the inspector. Tr. 20, 25, 77, 116-118. Based on their long history of conflict, it was reasonable for Pendley to see these actions as a provocation and an attempt to interfere with his rights as a miners' representative. Pendley proceeded to complain to the inspector and filed a complaint with MSHA over the incident; however, mine management did nothing. Tr. 22.

Approximately one month later, a similar encounter occurred. Pendley was accompanying an inspector, and Creighton yelled at him from across the room, "I'm going to file a harassment case against you." Tr. 22-23. Creighton's testimony that he was not yelling at Pendley, but rather was yelling at another miner who was upset with Creighton for not making sweet tea was not credible, especially in light of the fact that Creighton filed a discrimination complaint against Pendley a few weeks after the incident. Tr. 102, 26, 127-128. Creighton then proceeded to walk over to within a foot of Pendley and stand there for approximately 30 seconds to one minute. Tr. 23-25. Pendley viewed Creighton's conduct to be a form of harassment meant to intimidate him. Tr. 24-25. Based on the history of conflict that existed between Creighton and Pendley, along with the fact that Pendley had just filed a complaint based on similar conduct, this view was indeed reasonable.

Creighton has a right under the Act to bring a discrimination complaint for actions that he believes constitute discrimination. However, his yelling across the room that he would be filing a complaint against Pendley appears more like a threat than an exercise of his rights. This is further bolstered by the fact that in his complaint Creighton demanded the removal of Pendley as a miners' representative, which is a remedy beyond MSHA's authority. Tr. 136. Despite the long history of actual conflicts between these miners, it is quite telling that at the time pertinent to this proceeding there is no credible evidence that Pendley acted in any aggressive manner. He was not alone, but in the company of an MSHA inspector while on mine property.

Despite Millburg, who was a member of mine management, knowing about the problematic history between Pendley and Creighton, he chose to do nothing. Tr. 110-111, Dep. 40-41. Millburg testified at deposition that after talking with Creighton, he did not believe that any interference had taken place. Dep. 29. Millburg only viewed the videotape footage of the incident because Creighton asked him to retrieve it. Tr. 90-91. Millburg testified that the footage corroborated Creighton's account, so there was no need for an investigation. Dep. 32-33. Upon viewing the video footage submitted, I find that the footage has little evidentiary value in proving or disproving interference on Creighton's part. The video, which has no sound and is shot from a high vantage point in the hallway, merely shows Creighton walking up to two obscured figures who are largely beyond view and talking at them for a period close to a minute. RX-8, at minute 11:33-11:34. One cannot hear what was said, or see how Pendley reacted. The video simply corroborates that the event happened—a fact not in dispute—but does not help in determining the nature of the event. *Id.* Millburg's lack of action based on a conversation with Creighton and a viewing of this video served as an allowance for Creighton to repeat his conduct.

Indeed, that the event occurred reveals mine management's failure to restrain Creighton's aggressive verbal and non-verbal behaviors. Creighton was only advised that he "should" stay

away from Pendley "if at all possible." Considering Millburg's knowledge of the history of conflicts, this advice was a woefully inadequate exercise of supervisory responsibility. Millburg did not tell Creighton and Pendley they *could not* have contact. Hence, Creighton's actions can be imputed to Highland.

Respondent cites *Thurman v. Queen Anne Coal Co.*, 9 FMSHRC 526 (March 9, 1987) (ALJ) for the proposition that the employer is not liable for acts of co-worker harassment. However, *Thurman* is inapposite to the instant case. *Thurman* was not an interference case, but rather a discrimination case. The judge employed the *Pasula-Robinette* framework for analyzing the case, and found that it failed on the adverse action prong. *Id.* at 529-531. Furthermore, the judge found that the instances of harassment by Thurman's coworker, were not in any way related to the miner's protected activity.

In the instant case, Creighton's conduct tended to interfere directly with Pendley's walk-around rights, which, as discussed *supra*, is a protected activity. Respondent's argument that the Act only protects miners' representatives during the actual inspection and during the exact moments of pre- or post-inspection conferences is an unnecessarily narrow reading of the Act, which the Commission has rejected previously. *See Secretary of Labor, on behalf of Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293, 1299 (Sept. 25, 1986) ("Consol's argument that the miners' section 103(f) rights, if any, arose when the inspector arrived on mine property is not well taken on this record."). Pendley was accompanying the inspector during the general period of an inspection, and as such was exercising his walk-around rights. If the Act permitted interference immediately before or after an inspection, then the purpose of §§103(f) and 105(c) would be nullified by providing legally sanctioned windows when interference was allowable.

I need not find that Creighton's conduct alone constituted interference in this case, because there were other acts or omissions by mine management, which combined with Creighton's conduct, constituted interference.

In addition to Creighton's conduct, mine management illustrated a pattern of attempting to hide information from Pendley that, as a miners' representative, he was permitted to access. Pendley complained to MSHA in August, 2009 about two incidents where materials he was viewing were taken from him. Tr. 18. In the first incident, a manager named Jack Willingham took examination books from Pendley while he was reading them in the recording office, an act which Millburg admitted constituted interference with Pendley's rights. Tr. 17; Dep. 57. In the second incident, an individual from safety named Scott Maynard took materials from Pendley as he was viewing them. Tr. 17-18, 28.

Furthermore, Highland was required to inform miners' representatives of any changes to the emergency response plan (ERP); however, safety manager James Allen refused to provide a copy of the ERP to Pendley. Dep. 83-84. Evidence submitted at hearing shows that Carl Boone emailed Allen informing him that Pendley was a miners' representative and should receive a copy of the ERP. Dep-CX-6. Following this email, Frank Foster of Magnum Coal emailed Allen that "there should be a copy [of the ERP] posted for Pendley to review if he wishes, correct?" Dep. 65-66; Dep-CX-6. Allen responded, "We will not post a complete ERP plan!!!" Such

refusal to share required materials with Pendley constituted interference with Pendley's rights as a miners' representative.

Additionally, there are indications beyond these events that Highland's actions were conducted with animus towards Pendley's rights. For instance, emails introduced into evidence indicate that Allen was trying to determine who was making confidential 103(g) complaints to MSHA. Dep. 62. "Section 103(g) of the Mine Act provides for an immediate inspection of a mine upon the complaint of a miner or representative of miners. 30 U.S.C. § 813(g). The section further provides that the name of the complaining miner should not be disclosed." *Highland Mining Co.*, 31 FMSHRC 61, n. 8 (Jan. 2009). On September 9, 2009, Allen sent an email to Foster detailing a few recent 103(g) inspections. Dep-CX-5. In response, Allen asked Foster, "Are we still getting a lot of 103 G's (sic) there?" *Id.* Foster responds to this email, by blind copying a group of Highland managers, and indicating that he believed Pendley was responsible for the 103(g) complaints to MSHA. *Id.*

> As you know, Lawrence Pendley (X-employee) is on the "Miner's Rep" listing for this group of miners. He shows up at different times to travel with the inspectors. When he is on the property, he will review our belt books, then at a later date call in a 103 G on specific belts that he seen "Corrections needed" entered in the belt books. MSHA comes out to the mine and inspects these areas. The no. 3 and 4 belts have been inspected during this regular as a result of 103 G call In's.

Id. (grammatical mistakes in original). This email sent among Highland management shows that they suspected him of making 103(g) complaints and labeled him as a troublemaker.

CONCLUSION ON LIABILITY

Based on the above, I find that Highland Mining Company and James Creighton violated Section 105(c) of the Act by interfering with Lawrence Pendley's rights as a Miner's Representative.

DAMAGES

When a discrimination complainant's claim is granted, Section 105 (c)(3) of the Act provides that the Administrative Law Judge may grant "such relief as it deems appropriate." The Complainant has requested no specific relief in these proceedings. The record, therefore, must be further developed for consideration of any affirmative relief, including but not limited to, for example, costs and expenses, posting notice and/or training.

Accordingly, the parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

The undersigned judge retains jurisdiction of this matter until the specific remedies to which Lawrence Pendley is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting any specific relief and awarding any monetary damages has been entered.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Highland 9 Mine is located so that the Secretary may take the actions required by the rule.

Kenneth R. Andrews
Administrative Law Judge

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