

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**OCT 21 2016**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), on behalf of  
SHAYNE BUNGARD,

Complainant,

v.

GMS MINE REPAIR & MAINTENANCE,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2015-793-D  
MSHA Case No.: MORG-CD-2015-13

Mine: McElroy Mine  
Mine ID: 46-01437/ MVK

**DECISION**

Appearances: Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Representing the Secretary of Labor

Sunshine R. Fellows, Esq., The Levicoff Law Firm, P.C., Pittsburgh, PA, Representing the Respondent

Before: Judge Andrews

This case is before me upon a complaint of discrimination brought by Shayne Bungard (“Complainant”), a miner, against GMS Mine Repair & Maintenance, (“Respondent”), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c).

The Secretary of Labor, on behalf of Bungard, alleges that Bungard was discriminated against and his statutory rights were interfered with after asking for safety equipment. A hearing was held in Pittsburgh, PA, on January 4, 2016, 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 parties submitted the stipulations in their respective pre-hearing reports. The following stipulations represent those where there is agreement:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this action pursuant to Section 113 of the Mine Act, 30 U.S.C. § 823.

2. At all relevant times, GMS was a “person” within the meaning of Sections 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(f) and 815(c).
3. GMS employed Complainant Shayne Bungard.
4. At all relevant times, Complainant Bungard was a “miner” within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

*See* GMS Pre-hearing Report at 4, *and* Sec’y Pre-hearing Report at 8, *and* GMS Post-hearing Brief at 3-4.

## **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 or her 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 Craig v. Apfel*, 212 F.3d 433, 436 (8<sup>th</sup> 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).

Shayne Bungard worked as a miner at McElroy Mine for GMS Mine Repair from October 31, 2014, until he was suspended and fired on January 16, 2015. Tr. 34, 35. At the time of the hearing, Shayne Bungard had two years of undergraduate prerequisites to become a Registered Nurse (RN). Tr. 30-31. He had left college and decided to work at the coal mines because it was the best paying job in the area. Tr. 31. In high school, Bungard worked various jobs to support his mother, including work assisting a contractor, work for a lawn care company, work as a lifeguard, and work at a truck stop. Tr. 31-32.

In order to earn an underground coal mine card for West Virginia, Pennsylvania, and Ohio, Bungard attended an 80-hour class in Glen Dale, WV. Tr. 32. At the conclusion of the class, Bungard passed the Red Hat/Apprenticeship Miner test, making him eligible to become a miner. Tr. 32. In this class, Bungard learned that rock dust contains silica, which can clot one’s lungs, and can be more harmful than breathing coal dust. Tr. 33. He also learned that miners had to be presented a respirator whenever they needed one. Tr. 34. It was during this class that a recruiter made Bungard aware of available work with GMS Mine Repair. Tr. 32.

Bungard began working as a general laborer on the steel set crew on belt lines at the Blakes Ridge portal of McElroy Mine on October 31, 2014. Tr. 34-35. He typically worked 48 hours per week, at \$15 per hour for the first 40 hours and eight hours at overtime pay. Tr. 34-35. On Bungard’s first day, he was provided a radio, battery, cap light, and a reflective vest. Tr. 36. He was not provided with a respirator, and he was not told how to procure one. Tr. 38. Bungard was never given direction that if he wanted a dust mask during his shift he was responsible for having it on his person before he went into the mine. Tr. 90. He had heard from word of mouth

that if he wanted a dust mask he had to ask the shift foreman.<sup>1</sup> Tr. 90-91. He was told during the refresher training that he could have a dust mask whenever he wanted one. Tr. 91.

Bungard testified that in his experience, it was a frequent occurrence to get “dusted out” while working underground. Tr. 44. In previous instances of being dusted out, the crew would sit out the event, and the crew leader, Jamie McKelvey, would check dust levels every five to ten minutes. Tr. 44, 105. Bungard’s fellow miner, Joseph Gonchoff, testified that one’s vision becomes limited when it becomes dusty. Tr. 104. Bungard’s crew leader, Jamie McKelvey, testified that in a “dust out” the dust becomes so bad that one cannot see 20 feet in any direction.<sup>2</sup> Tr. 135. Dust was a daily occurrence. Tr. 105.

Gonchoff testified that he experienced a stark difference between how dust is treated in the context of training and how it was treated in the context of work: “Ever since we started getting training for mine, everyone preaches black lung, rock dust is worse than coal dust, and from day one you are preached never work in dust, and then you start working at the mine and it seems like it is not that important, that you need to get the job done.”<sup>3</sup> Tr. 106. Gonchoff had

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<sup>1</sup> Mine Site Coordinator Michael Blackburn testified that the protocol for getting safety equipment was that a miner would have to ask for any safety equipment from their shift foreman 15 minutes prior to their shift. Tr. 160. He said that he always recommended to all new miners to always ask for a paper mask before the shift because one can never know when it will become dusty. Tr. 160.

Corporate Safety Director for GMS, Susan Bealko, testified that dust masks were “readily available.” Tr. 282. Bealko’s department would deliver the dust masks to the coordinators, who put them in their lock boxes, and they give them to their crew leaders to give to employees as needed. Tr. 282-283. If the environment is dusty, and a miner does not wear a dust mask, he would get reprimanded. Tr. 282.

Bealko testified that “there is a remote chance that it is going to get dusty, and you have to know what job you are doing. If you are going to be in a dusty environment, you take your dust mask with you. You should have dust masks with you, and the crew leader should.” Tr. 285.

<sup>2</sup> Jamie McKelvey worked for GMS from October 2010 through April 2015. Tr. 130-131. He worked as a laborer for two years and then a crew leader for two years. Tr. 131. He worked primarily at the McElroy Mine, but occasionally worked at other Murray mines. Tr. 131. He described his responsibilities as crew leader “to make sure the work got done and it was done safely.” Tr. 131. He has certificates for underground mining. Tr. 132. McKelvey’s job with GMS was his first underground mining job. Tr. 132. After being laid off from GMS, McKelvey went on unemployment for one month and then returned to construction work building bridges and maintaining roads. Tr. 132.

<sup>3</sup> Joseph Gonchoff testified at hearing. He worked at the McElroy Mine for GMS from June 2014-January 2015, as an underground miner digging and cleaning the belt lines. Tr. 100-101. At the time of hearing he worked at United Dairy driving a truck. Tr. 100. In January of 2015, Gonchoff was working the afternoon shift on Jamie McKelvey’s crew. Tr. 101. Gonchoff left GMS to work for Murray Energy on January 16, 2016. Tr. 113. Gonchoff continued to work at

talked to McKelvey about the dust problems, but did not say anything to the shift foreman, Anthony Brown, because he was afraid of being fired from the job.<sup>4</sup> Tr. 106-107. McKelvey testified that he didn't say anything to Brown, because he feared that Brown would not have listened to him and may have fired him. Tr. 137-138, 142. Gonchoff described the situation as there being a "feeling that if you don't do what you are told, they will find a way to fire you." Tr. 106-107. Gonchoff described GMS as "all about getting your footage all day every day." Tr. 125. Gonchoff listed an employee who was fired for not making his daily footage. Tr. 126. The daily footage was eight feet per day on both sides of the belt for a total of 16 feet. Tr. 127-128. If one worked hard all day, that footage could be completed, but if breaks were required because of dust, it was not possible. Tr. 128.

On January 16, 2015, Bungard worked the afternoon shift, which began at 4:00 pm. Tr. 40. He was working in between crosscut 1404 and the drive, cleaning ribs alongside a Black Hat on the tight side of the belt line.<sup>5</sup> Tr. 39. Their task was to shovel the ribs with handheld tools, such as shovels, pics, matics, jackhammers, and other tools to clean the area. Tr. 41, 104. With him were three other Red Hats (Mitch Tilak, John Glenn Denning, and Joseph Gonchoff), a Black Hat (Jeff Hamstead), his crew leader (Jamie McKelvey), and the coverage foreman (Chuck Hess). Tr. 40, 102-103.

At approximately 8:00 or 8:30 pm, it began getting dusty. Tr. 42, 103, 113. Bungard described the conditions as appearing like "light snow, you can see it coming, you can feel it, basically, in the air." Tr. 42. He described it being difficult to breathe. Tr. 42. Hamstead motioned the crew with his cap light to gather underneath the belt and start heading toward crosscut 1404 because the crew was "going to get dusted out." Tr. 42-43. Everyone from the crew, other than coverage foreman Hess, went into the crosscut. Tr. 43. The coverage foreman stayed on the belt line. Tr. 43-44.

The crew sat in the crosscut until McKelvey determined that the dust had cleared. Tr. 134. They returned to work for approximately half an hour, and then it became dusty again, so the crew returned to the crosscut. Tr. 134. They sat in the crosscut for a little while, until foreman Anthony "Scott" Brown came and asked what they were doing. Tr. 45, 135. McKelvey responded that it was dusty and they were in the crosscut for fresh air. Tr. 135-136. Brown went to the belt, came back, and told the crew to get back to work because it was "not that bad." Tr. 135-136.

Brown told Bungard and the others that it was not dusty and they were required to return to work. Tr. 45, 105. As the crew walked back to work, Bungard and Gonchoff noticed that it

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the same mine, but a different portal. Tr. 113. Gonchoff began working for Murray Energy on or about January 20, 2015, after working for GMS. Tr. 102. At Murray, Gonchoff worked as a general inside laborer. Tr. 102. Gonchoff, along with approximately 120 other workers, was laid off at the end of May, 2015. Tr. 102, 113.

<sup>4</sup> Gonchoff testified that the turnover rate at GMS was high, with "people getting fired and brought in every day." Tr. 112.

<sup>5</sup> A Red Hat refers to a new miner. A Black Hat refers to an experienced miner.

was still dusty.<sup>6</sup> McKelvey described the conditions when they returned as not “as bad, but it was still dusty.” Tr. 136. McKelvey testified he would not have made the same decision as Brown because “it was still dusty and you don’t want to breathe it.” Tr. 136.

Gonchoff testified that many people in the crew were angry about the dust and did not want to return to work in such dusty conditions. Tr. 105. Bungard requested a dust mask because he felt that he needed a dust mask in order to breathe in the conditions they were in. Tr. 46, 47. Bungard also recalls hearing another Red Hat ask Brown for a dust mask, but said that he did not think that Brown heard him. Tr. 46. McKelvey testified that it was reasonable to ask for a dust mask to work in the dusty conditions they encountered. Tr. 138-39. Brown responded to Bungard by making Bungard repeat the request. Tr. 46. When Bungard repeated it, Brown replied that it would require them to walk out to the surface, to which Bungard assented. Tr. 46.

Bungard knew from a former crewmember named Eddie Smith that if he wanted a dust mask he would have to ask for one. Tr. 62. The dust masks were kept in a cabinet in the shower house, and Bungard was never told that he was required to request them at a specific time. Tr. 62-63. The filters for the dust masks would get clogged, and GMS was supposed to provide replacement filters, but Bungard testified that they were often unavailable.<sup>7</sup> Tr. 62-63.

Gonchoff testified that when Bungard asked Brown for a dust mask, Brown told Bungard that it was his responsibility to have a dust mask. Tr. 107. Bungard responded by saying that by asking for one he was fulfilling that responsibility. Tr. 107. Bungard and Brown began arguing, with Bungard on the defensive side, and Gonchoff first assumed they were joking around. Tr. 107, 118. However, as it escalated and Brown told Bungard that he would take him out of the mine, Gonchoff realized that they were not joking. Tr. 107. Brown was pointing, yelling, and appeared visibly angry. Tr. 123.

Brown asked if anyone else wanted a respirator, and one crew member replied that Brown should bring everyone respirators. Tr. 107. Before leaving, Brown told McKelvey to take the crew back to the crosscut and out of the dust, and that if any workers even take off their glasses to clean them they would be written up. Tr. 108. Gonchoff understood that statement to be borne out of frustration and Bungard being correct, as well as an affirmation of Gonchoff’s belief that they could always find a way to fire them if they wanted to. Tr. 108-09.

The crew stayed in the crosscut for approximately 15-20 minutes until the dust cleared out, and then went back to work. Tr. 109. Gonchoff described the dust being at approximately five or six out of a ten-point scale when the crew returned to work. Tr. 109.

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<sup>6</sup> When asked at hearing to rate the dust levels on a scale of 1-10, Bungard rated the dust levels at five. Tr. 45. Gonchoff rated the dust levels as a seven or eight on a ten-point scale. Tr. 109.

<sup>7</sup> Gonchoff brought his own respirator into the mines until he lost it. Tr. 114-15. He repeatedly asked for one but explained that GMS rarely had enough for all employees. Tr. 115. He would usually request the dust mask before or after the shift, whenever he saw Blackburn. Tr. 115. Gonchoff complained orally to Blackburn about the company not having a sufficient number of dust masks. Tr. 116. Blackburn responded that he was trying to get them. Tr. 116.

Bungard testified that after walking approximately 10 steps with Brown towards the bottom of the belt line, Brown said, “no...never mind, get in the crosscut.” Tr. 47. Brown ordered everyone to get into the crosscut. Tr. 47. The crew proceeded into the crosscut, and Bungard heard Brown say something that he could not understand over the noise. Tr. 47. Bungard told Brown that he would do his work, but that he wanted a dust mask, and that he was willing to talk to Mine Site Coordinator Michael Blackburn to get one. Tr. 47. Brown responded by saying that if Bungard wanted to talk to Blackburn, they would go and talk to him right then. Tr. 48. Bungard grabbed his bag and the two of them started to walk. Tr. 48. Bungard testified that Brown’s body language and tone of voice indicated that he was upset about having to walk out of the mine for a dust mask. Tr. 48.

Bungard followed Brown approximately 10-15 feet behind him as they walked out of the mine. Tr. 49. Twice during the walk, Brown pointed out dusty belt drives and asked Bungard, “do you see any dusters, he was screaming, do you see any dusters.” Tr. 49-50. Bungard responded by shrugging and indicating that he did not see any dusters. Tr. 49. Bungard did not otherwise engage Brown in conversation during the walk. Tr. 49. In the 20 minutes that it took to walk out of the mine, Bungard did not see or speak to any other miners. Tr. 50.

Bungard and Brown exited the mine at approximately 8:30 or 8:45 p.m., which was in the middle of the shift. Tr. 51. The lamp man was in his office when they walked by, but no one else was around. Tr. 51. They proceeded to the GMS office, and Bungard sat down as Brown attempted to call Blackburn. Tr. 51. The first few calls were unsuccessful, but eventually Brown was able to reach Blackburn. Tr. 51.

Brown placed Blackburn on speakerphone so that Bungard could hear the conversation. Tr. 51. Brown told Blackburn that Bungard refused to work and there was dust on the belt line. Tr. 51. Blackburn responded by saying “get him the F out of there.”<sup>8</sup> Tr. 52. Bungard tried to interject, but Brown talked over him. Tr. 52. Brown hung up the phone and said, “well, that is that.” Tr. 52. Bungard asked what Brown meant, and Brown responded that Bungard was fired. Tr. 52. Bungard asked if he was being fired for asking for a dust mask, and Brown responded that “no, you brought it on yourself, wanting to walk out here.” Tr. 52. Bungard told Brown several times that “I am just asking for a dust mask, I will go straight back to work, I don’t want to lose my job.” Tr. 53. Brown told Bungard that he was the foreman and he determined that there was no dust present. Tr. 53. During this conversation, Bungard was sitting and Brown was standing over him pointing in his face so that Brown’s finger was within two inches of Bungard’s face. Tr. 53-54.

Following this exchange, Bungard said that he would go sit in his car because he had driven a fellow coworker to work that day. Tr. 54-55. He handed his cap light and SCSR back to Brown and said “see you later.” Tr. 55. Bungard testified that he was approximately 10 feet away from Brown and did not say this in a threatening way. Tr. 94, 96. Brown responded, “oh, you will see me later,” and Bungard said that Brown then became belligerent. Tr. 55. Brown threw his hardhat down, took off his belt, and said, “you will see me right the F now.” Tr. 55. Bungard asked Brown what he meant. Brown responded, “if you want to fight me, you will fight me right

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<sup>8</sup> It is unclear from the testimony whether witness used “F” in lieu of “fuck” out of a desire to not swear during a hearing, or if “F” was used at the mine.

now.” Tr. 55. Brown’s face was red, and he was yelling. Tr. 56. Bungard responded, “okay, well, you can hit me right here on my property if you want to, go ahead.” Tr. 55. Bungard testified that he said this because he thought a camera might catch the incident. Tr. 55-56. Brown responded that he would not hit Bungard where they were standing, and said they could fight at Brown’s truck. Tr. 56.

Brown walked outside and began taunting Bungard saying, “come on, come outside.” Tr. 57. Bungard replied that he would not go out and he started to walk towards the break room. Tr. 57. Bungard went to the lamp room to find a phone, and he asked the lamp man if he could use the phone. Tr. 57-58. The lamp man told Bungard to call the supervisor, Michael Blackburn. Tr. 58. Bungard called two to three times and left a message. Tr. 58. He never received a call back. Tr. 58. Bungard proceeded to get his belongings from his locker and went to wait in his car. Tr. 58-59.

After the shift, when the crew was walking out of the mine, one of the union guys by the bus garage told them that they needed to call MSHA’s 800 number because Brown had fired Bungard and tried to fight him in the parking lot. Tr. 110. Gonchoff felt that it was odd for a member of the union to offer advice to contractors, because typically union members do not like contractors, and took it as evidence of the truth of what was being said. Tr. 110-11. Gonchoff relayed the message to Bungard. Tr. 126.

Gonchoff and the other crew-members were then told by the crew waiting to go underground that Brown wanted to meet with him in the bathhouse. Tr. 111. Brown told them that he “is not a bad guy,” and that he was just going to suspend Bungard. Tr. 111. However because Bungard tried to fight him, Brown had to fire Bungard. Tr. 111. John Glenn Denning spoke up and said that it was wrong for Brown to fire Bungard for asking for a respirator. Tr. 111-12. Gonchoff testified that he and the rest of the crew were in agreement with Glenn Denning. Tr. 112. Gonchoff stated that this incident with Bungard made him feel that no one cared about his safety. Tr. 112.

After Bungard waited for approximately one to two hours for his coworker in the car, he went to the shower house and talked to his crew. Tr. 59. Several crew members told him that Brown told them in the shower house that Bungard refused to work, and there was no dust present. Tr. 59-60.

When Bungard left the mine, he understood that he had been fired. Tr. 62. Some time later, Bungard was contacted for an exit interview by a woman from GMS. Tr. 63. She told Bungard that he was being discharged for insubordination and trying to start a fight with a foreman, which he denied. Tr. 63.

GMS Mine Site Coordinator Michael Blackburn testified at the hearing.<sup>9</sup> His understanding of what transpired on January 16, 2015, came exclusively from Brown. Tr. 152-

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<sup>9</sup> Michael Blackburn was a truck driver for Super Service at the time of hearing. Tr. 148. He worked for GMS from January 2012, through July 2015, as a mine site coordinator. Tr. 148-49. Blackburn was in charge of the 270 people that GMS employed at the mine, and was responsible for making sure they were present at work and performed their jobs. Tr. 149. Blackburn also had

53. Brown left a note for Blackburn that explained that he came across McKelvey's crew in a crosscut and told them to get back to work because the dust had cleared.<sup>10</sup> Tr. 153. The note explained that Bungard told Brown that it was still too dusty and he needed a dust mask. Tr. 153. Brown wrote that he took Bungard outside, and Bungard tried to provoke a fight with him. Tr. 153-54. Brown wrote that he told Bungard to "go ahead and hit me, I know there is cameras here, I know you want to hit me, go ahead and hit me." Tr. 153-54. Brown then collected Bungard's equipment and told Bungard to go home. Tr. 154.

At approximately 8:30 am the next morning, after Blackburn read Brown's note, Brown called Blackburn on the phone. Tr. 154, 172. This was the first time that Blackburn recalled Brown contacting him about the matter. Tr. 172. Brown also told Blackburn that one of the shift foremen said Blackburn wanted a union representative. Tr. 155. Blackburn did not speak to any of the shift foremen or anyone from Bungard's crew about the incident. Tr. 172-73. He spoke with McKelvey and Jeff Hamstead the following day. Tr. 173. McKelvey told Blackburn that the crew had to take a break because of the dust, until Brown told them that the dust had cleared and they had to return to work. Tr. 191. Blackburn testified that McKelvey told him that the dust levels were "good enough for us to go back to work." Tr. 191.

Blackburn testified that neither he nor Brown had the authority to fire Bungard. Tr. 157. Human Resources Director Terry Jackson or General Counsel Mike Thomas had the final say on whether to fire someone. Tr. 157, 202. Blackburn filled out the paperwork for a suspension pending HR review and a payroll change form, and submitted the forms to Derek Jackson in the HR department. Tr. 156, 170. Blackburn testified that he decided to suspend Bungard because provoking a fight with a superior constituted insubordination. Tr. 157-158.

Blackburn testified that he and Brown probably told Jackson about Bungard's provocations and about Bungard requesting a union representative, but not about any issues regarding Brown being upset about being asked for a dust mask.<sup>11</sup> Tr. 158-159. Blackburn said that Bungard jeopardized up to 270 people's jobs by asking to speak to a union representative. Tr. 159.

Derek Jackson testified at hearing that he made the final decision to terminate Bungard.<sup>12</sup> He had never received training concerning discrimination under the Mine Act and was unaware

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to submit three to four reports per week to the mine customer that detailed every GMS employee's position at the mine, as well as lists of individuals that were terminated. Tr. 149-50.

Blackburn was laid off from GMS for lack of work. Tr. 149.

<sup>10</sup> Blackburn testified that he did not know what became of the note. Tr. 154, 167-68. Blackburn did not provide the note to MSHA inspectors or to company officials. Tr. 169.

<sup>11</sup> Derek Jackson testified that getting the union involved in a matter would not be a violation of GMS policy because the union was not a customer. Tr. 255-56.

<sup>12</sup> At the time of hearing, Derek Jackson was the Human Resources Director for GMS. Tr. 201. He had held this position for approximately two and a half years, and was responsible for



of Section 105(c) of the Act. Tr. 231-233. Tr. 211. GMS did not have a policy in place for how to investigate discrimination or harassment. Tr. 245. Jackson reviewed the information that Blackburn presented to him. Tr. 211-212. Jackson testified that Bungard had requested a dust mask and was brought out by Brown in order to get him a dust mask. Tr. 212. Then, Bungard became combative and tried to start an altercation with Brown, and refused to return to work. Tr. 212. Jackson testified that he tried to reach out to Bungard, but was unable to get a hold of him. Tr. 212. Jackson did not speak to anyone on Bungard's crew or Brown before deciding to terminate him. Tr. 244-245.

Jackson testified that he did not interview any of the people present when Bungard asked for the dust mask because he did not believe it was not relevant to the termination. Tr. 246. Jackson did not know if Brown provided the dust mask to Bungard or if he tried to send him back underground without a dust mask. Tr. 246-247.

Jackson spoke with Bungard after he made the decision to fire Bungard. Tr. 212. Bungard told Jackson that it was Brown who became aggressive towards him, and that all Bungard wanted was a dust mask. Tr. 212.

Jackson testified that he was faced with a choice as to whether to believe Blackburn or Bungard. Tr. 212-13. Blackburn had been with the company for several years, and Jackson had "faith in the information he was providing me." Tr. 213. Jackson testified that because Bungard did not have proof of the veracity of his claims, he chose not to believe him. Tr. 213. Jackson asked Bungard, without offering, if Bungard would be interested in a potential transfer, and Bungard declined. Tr. 213. Jackson explained that he asked Bungard about transfer simply to satisfy his own curiosity. Tr. 213-14. Jackson described the conversation as "very brief." Tr. 213. He told Bungard that a letter was sent to him, which Bungard had already received, for an exit interview. Tr. 213. Jackson sent a letter on January 20, 2015 to the HR Administrator Emily Hale, explaining that he had called Bungard and told him that he was moving forward with the termination. Tr. 215-216; RX-4.

Jackson did not speak to anyone besides Blackburn before making a decision concerning Bungard's termination. Tr. 219. He testified that the information he received from Blackburn was "clear-cut," and he didn't have any contradictory information. Tr. 220. Jackson testified that in other instances he has decided not to follow a front-line manager's recommendation of termination. Tr. 221. At the time Jackson made the decision to terminate Bungard, he had not yet spoken to Bungard, so all the information that resulted in the termination came from Blackburn. Tr. 221. Jackson testified that if he had had the opportunity to talk with Bungard and discuss the matter further with Blackburn, such conversations may have made a difference in the ultimate decision. Tr. 221-22.

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employee relations, benefits, recruitment, and terminations. Tr. 201. Jackson had a total of over 15 years of Human Resources experience, but his job with GMS was his first job in a mine. Tr. 208, 231. He had an undergraduate degree in business management and marketing, and a Master's degree in industrialization of Human Resources. Tr. 208-09. Additionally he had two professional Human Resources certifications. Tr. 209.

GMS has a policy regarding probationary employees that evaluations are performed at 30 days, 45 days, 90 days, six months, and one year.<sup>13</sup> Tr. 152. The probationary period is 90 days.<sup>14</sup> Tr. 152. Bungard was still in the probationary period. Tr. 152.

Prior to this incident, Bungard had never been subjected to any discipline at the mine.<sup>15</sup> Tr. 60. Bungard did not have any issues with Brown or Blackburn prior to the January 16, 2015, incident. Tr. 90. He has never been in trouble in any job for fighting, and has never been in a verbal altercation with a superior prior to that incident. Tr. 97. Bungard was often chosen by his crew leader to accompany him for special tasks. Tr. 61. Bungard felt that the job had been going well up until the dust mask incident, and had already interviewed with Murray Energy for a job with the mine. Tr. 60-61. He was told that due to the contract between Murray and GMS, they were unable to hire him at the time, but that he should continue working with GMS for another three months and try again when he was eligible for employment with Murray. Tr. 68. Bungard's career plan prior to his termination was to remain a coal miner at GMS until he could get hired at Murray. Tr. 73.

Bungard had never previously been fired from a job, and he testified that it created a great deal of stress for him. Tr. 72-73. After being terminated Bungard performed odd jobs for family to make money. Tr. 66. He purchased a lawnmower, blower, and leaf eater for approximately \$500 for these jobs. Tr. 66. Bungard earned approximately \$125 per week mowing lawns during this period. Tr. 66-67. Bungard testified that he did not apply for jobs in the mining industry because he thought he might be blacklisted, and unable to get a job after his termination.<sup>16</sup> Tr. 67. Between January and some time in the late summer of 2015, Bungard did not make efforts to seek employment beyond the casual employment he was engaged in. Tr. 86.

Bungard applied for approximately six to eight jobs, mostly as a general laborer, before he got his current job. Tr. 69. His first job after being terminated from GMS was at Mineral Lab Company, where he worked full time for \$10.50 per hour. Tr. 69-70. Bungard worked there for

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<sup>13</sup> Bungard's personnel folder did not include evaluations for 30 or 45 days, and Blackburn testified that it was likely they were not performed on time. Tr. 166-167. Blackburn could not recall if these evaluations were performed for Bungard. Tr. 167.

<sup>14</sup> The GMS Employee Policy Manual holds that all new employees are under a 90-day probationary period. Tr. 203. If, during this period, it is determined that the employee is not fit for the position, the company can fire them. Tr. 203. The Manual further lists 20 actions that can result in disciplinary action up to and including termination. Tr. 204. Some result in progressive discipline, and some like insubordination or violation of safety rules can result in immediate termination. Tr. 204-205. Under the policy, management can take into account all facts of a situation to determine what level of discipline is appropriate. Tr. 206-207. Any action that requires more than a verbal warning requires the involvement of Human Resources. Tr. 207.

<sup>15</sup> Bungard testified about one incident wherein he complained about having to carry the bag of water for the crew for four days in a row. Tr. 61.

<sup>16</sup> Bungard took his coal mine test again so that he could return to working in the coal mines. Tr. 71.

approximately one month before he began working at his current job on November 16, 2015, in water transfer, where he makes \$13 per hour. Tr. 70-71, 85. He worked approximately 40 hours per week in the slow period, and expected to work as many as 100 hours per week in the normal rotations. Tr. 71. Bungard's work hours were determined by the rise and fall of gas costs. Tr. 71.

Bungard was living in a house with two roommates when he was working for GMS. Tr. 72. After he was fired, he could not pay rent and had to move in with his mother. Tr. 72. At the time of hearing, he was living with his father, and helping to take care of him following a stroke. Tr. 72.

Between March and April of 2015, GMS laid off approximately 230-240 people. Tr. 161. This was a mixture of black hats and red hats. Tr. 161-62. Blackburn had a meeting with Jackson and John Mattingly to decide who was being transferred and who was being laid off. Tr. 180. Blackburn created a spreadsheet for each miner. Tr. 183. He did not use any criteria provided by Human Resources, but rather his own experiences and information provided by subordinates about each employee. Tr. 182. No one that Blackburn recommended for lay off or transfer was overruled by Mattingly or Jackson. Tr. 180.

Some employees were offered transfers to other locations. Tr. 162. These were all Consol mines in Pennsylvania, such as Bailey Mine, Enlow Mine, Emerald Mine, Cumberland Mine, and BMX. Tr. 162. Blackburn made all decisions concerning who would be offered transfers in lieu of layoffs. Tr. 161. First he chose 26 crew leaders for 26 crews. Tr. 162-163. Then he made offers to all the Black Hats that wanted the transfer. Tr. 163. Some Black Hats declined the transfer because of the pay cut and increased travel. Tr. 163. Then he made offers to some Red Hats. Tr. 163. He testified that he based these decisions on attendance, work ethic, and performance. Tr. 161. A few dozen miners were also recalled at Marshall County locations. Tr. 163.

McKelvey and three other afternoon shift employees were laid off and never returned to work. Tr. 181-82; GX-2. Twenty-one afternoon shift employees were transferred or later returned to work. Tr. 182; GX-2.

Jackson's involvement with the April 2015 layoffs was to meet with the staff and help receive their equipment, explain unemployment benefits, and discuss transfers. Tr. 222-23. He did not have any responsibility for deciding who would be offered a transfer or job recall. Tr. 223. Those decisions were made by the CONSOL operations with input from Blackburn or Mattingly. Tr. 223.

There was no policy in place at GMS or written criteria to determine who would be transferred instead of laid off. Tr. 242-43. Jackson believed that the field managers like Blackburn and Mattingly based their decisions on criteria such as attendance, job performance, and ability to lead. Tr. 257. He believed this because he described it as "common sense" and the factors that the field managers talked about often. Tr. 257.

GMS continued to hire after Bungard's termination, and at the time of hearing had numerous job listings for experienced and inexperienced miners. Tr. 254-55. GMS has also held numerous job fairs and open interview sessions since Bungard was terminated. Tr. 254.

## **CONTENTIONS OF THE PARTIES**

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Secretary brings both discrimination and interference claims on behalf of Bungard, arguing that Bungard engaged in protected activity by requesting a dust mask, discussing the issue with Brown, and attempting to involve a representative of miners. The Secretary further argues that if Bungard's actions are treated as a work refusal, that too would constitute a protected activity. The employment actions of suspension and termination were motivated at least in part by these protected activities. As a result, it argues that Bungard suffered both discrimination and interference.

The Respondent argues that both the discrimination and the interference claims should be dismissed. With respect to interference, the Respondent argues that its procedures for obtaining a dust mask in no way interfered with Bungard's rights. With respect to discrimination, the Respondent concedes that Bungard engaged in protected activity when he requested a dust mask, and that he suffered an adverse employment action when he was discharged. Resp. Brief at 20. Respondent argues that there was no causal connection between the protected activity and the discharge, and focuses primarily on animus and disparate treatment. Further, Respondent argues that even if this court finds that its actions were in some manner motivated by Bungard's protected activity, it would have taken the same actions based on unprotected activity alone. *Id.* at 25.

Respondent argues that even if this Court finds that Bungard was discriminated against, he is not eligible for backpay because he did not properly mitigate. Further, he would have been laid off for economic reasons in the spring of 2015. The Respondent also encourages the Court to summarily reject the Secretary proposed penalties of \$25,000.00.

## **ANALYSIS**

The Secretary has alleged that the operator's conduct constitutes both standard discrimination and interference, and I will address each in turn.

### **1) Discrimination:**

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "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 of the exercise by such miner...of any statutory right afforded by this Act." 30 U.S.C. 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), the Secretary on behalf of a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially 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 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 the protected activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette*, 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen*, 20 FMSHRC at 328-29 (citing *Robinette*, 3 FMSHRC at 817; *Pasula*, 2 FMSHRC at 2799-2800). The operator bears the burden of proof for the affirmative defense. *Pasula*, 2 FMSHRC at 2800.

#### **A. Protected Activity:**

The Respondent concedes that Bungard engaged in protected activity by requesting a dust mask. Resp. Brief at 20. The Secretary argues that not only was Bungard's initial request for a dust mask protected, but each step he took in furtherance of obtaining a dust mask was also protected activity. Sec'y Brief at 13.

This Court agrees that Bungard's protected activity did not conclude after the initial request for a dust mask. His actions towards procuring a dust mask, from the initial request to the attempts to talk with his supervisor, Michael Blackburn, constitute a singular chain of events that are protected under the Mine Act. The walk out of the mine with Brown was taken because GMS kept the dust masks in a locked cabinet at the surface. Tr. 62-63. That the action took so long was the result of GMS's inefficient and cumbersome protocols for keeping and retrieving dust masks. I find GMS Corporate Safety Director Bealko's testimony concerning the availability of dust masks to be self-serving and non-credible. Her assurances that the GMS procedures for retrieving dust masks allowed miners to obtain them when necessary was contradicted by every miner that testified. Tr. 282-285. Further, her testimony concerning the company's policy of reprimanding miners for not wearing dust masks when the environment was dusty, illustrates that she had no sense of the facts on the ground. Tr. 285. The bulk of the credible testimony at hearing illustrated an environment where miners were dissuaded from requesting safety equipment, even when dust was prevalent and made it impossible to work without such equipment.

#### **B. Adverse Action:**

The Respondent concedes that Bungard suffered an adverse employment action when he was discharged by Jackson on January 20, 2015. Resp. Brief at 20. However, Bungard testified that Brown fired him on January 16, immediately following the conversation with Blackburn. Tr.

52. No contrary evidence was presented at hearing as to the exchange between Bungard and Brown, and this court credits Bungard's testimony of the events at issue. Bungard was sent home on January 16 by Brown, and he never returned to work. Brown told the other crew members that he had fired Bungard. Tr. 111-12. The Respondent presented evidence that only Jackson was authorized to officially terminate Bungard's employment. Tr. 157, 202. However, for purposes of finding an adverse employment action under the Act, whether Brown suspended Bungard or fired him is immaterial; both acts are examples of adverse employment actions. Therefore, I find that Bungard suffered an adverse employment action that began when Brown told him he was fired on January 16, 2015 to the point when Jackson officially terminated his employment on January 20.

### **C. Discriminatory Motive:**

The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). To establish the nexus, the Commission has identified the following indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec'y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 2012 WL 7659706, \*4 (ALJ)(Dec. 2012).

"Hostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981)(citations omitted). In the instant case, there is ample evidence of hostility or animus towards the protected activity. As soon as Bungard made a request for a dust mask from Brown, Brown became agitated with Bungard. Tr. 48, 107, 118, 123. Brown then misreported to Blackburn that Bungard refused to work, to which Blackburn responded, "get him the F out of here." Tr. 52. Brown told Bungard that he brought his termination onto himself by wanting to walk out of the mine to get a dust mask.<sup>17</sup> Tr. 52. Brown then taunted Bungard and attempted to engage him physically. Tr. 55-57. Brown then told the rest of the crew that he was

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<sup>17</sup> There were only two witnesses—Bungard and Brown—to most of the interactions between Bungard and Brown. Bungard appeared to be a credible and forthright witness at hearing, and as he was the only one of these two to testify at hearing, I fully credit his account of what transpired between them.

planning on suspending Bungard for asking for a dust mask, but he fired him for trying to fight him. Tr. 111-12.

Jackson's understanding of the events on January 16 came exclusively from Blackburn, and Blackburn's understanding came exclusively from Brown. Tr. 152-53, 211-12, 244-45. Blackburn and Jackson were aware that Bungard requested a dust mask prior to what transpired between Bungard and Brown. Tr. 152-53, 212. Blackburn chose to believe Brown without first speaking with Bungard, anyone else in the crew, or engaging in any reasonable investigation. Tr. 172-73. Similarly, Jackson chose to accept Blackburn's one-sided second-hand account of what transpired, and did not engage in any investigation.

Jackson had a graduate degree and 15 years of Human Resources experience, with two and a half years as the Director of Human Resources at the mine, but he somehow knew nothing about the Mine Act's protections of protected activity and its prohibitions against discrimination. Tr. 201, 208-09, 231-33. Indeed, it appears that Jackson was not alone in his ignorance towards miners' rights. Neither Blackburn nor Brown—both of whom served in supervisory capacities—appeared to have any knowledge of the protections provided by Section 105(c). Had any supervisor at GMS had knowledge or training in miners' rights, then Bungard's request for safety equipment, followed closely by a suspension, would have immediately raised red flags, such that an investigation would have been conducted. But GMS, which provides services to numerous mines, did not even have a policy in place concerning the investigation of discrimination or harassment. Tr. 231-33, 245.

GMS cannot claim some sort of safe harbor based on Jackson's ignorance of the actual events when that ignorance was a result of Jackson choosing not to investigate the incident prior to firing Bungard. Jackson may not have evinced animus towards the protected activity, but by choosing to adopt whole cloth Blackburn's second-hand account of Brown's, the hostility that Brown displayed towards the protected activity can be ascribed to Jackson. Respondent has essentially requested a benefit for its personnel deciding to engage in purposeful ignorance of the law and the facts on the ground. Because each person up the chain of command made the conscious decision to blindly adopt the account of the person beneath them, without performing any investigation, then they also adopted the animus of the person beneath them. Therefore, I find that animus towards the protected activity was a motivating factor in the decision to fire Bungard.<sup>18</sup>

With respect to the second factor of knowledge of the protected activity, both Blackburn and Jackson testified that they were aware that Bungard requested a dust mask on January 16. Tr. 152-53, 212. Therefore, they both had knowledge of the protected activity.

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<sup>18</sup> Further, I find the Respondent's argument that Brown had no authority to fire Bungard problematic. Brown told Bungard and the rest of the crew that Bungard was fired. Bungard left work understanding that he had been fired. Blackburn and Jackson engaged in no independent investigation or review of the events, and their actions with respect to proceeding with the termination appeared merely ministerial. Therefore, in effect, Brown was the decision-maker with respect to Bungard's termination.

With respect to coincidence in time between the protected activity and the adverse action, the Commission has noted, “[a] three week span can be sufficiently close in time”, especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC*, 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners’ contact with MSHA and the operator’s failure to recall miners from a layoff; however, only one month separated MSHA’s issuance of a penalty resulting from the miners’ notification of a violation and that recall failure. *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated “We ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.” *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). In the instant case, Bungard was sent home within the same shift of his requesting a dust mask. He was officially terminated by Jackson four days later. This close time frame weighs in favor of finding a nexus between the protected activity and the adverse employment action.

In the instant case, no evidence was presented with respect to disparate treatment. However, weighing the other indicia, I find that the Respondent’s adverse employment actions were motivated in significant part by Bungard’s protected activity.

#### **D. Affirmative Defenses**

Respondent argues that it would have taken the same actions that it took with regards to Bungard’s termination based on unprotected activity alone. Resp. Brief at 25-27. The unprotected activity that it cites in this regard is insubordination towards Brown. *Id.* In raising this argument, the Respondent bears the burden of production and proof with regards to each element of the defense. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984).

The problem with Respondent’s defense is that they provided no credible evidence that Bungard was insubordinate towards Brown. I find that Bungard’s testimony concerning the events was credible. Jackson may well have based his decision to terminate Bungard based on Blackburn’s account, which was based solely on Brown’s account. As there was no investigation into the matter by Blackburn or Jackson, their testimony represents hearsay and hearsay upon hearsay. Their decisions to rubber-stamp Brown’s account of the situation in no way compels this court to affix a rubber-stamp upon their rubber-stamp. The judge’s role is not to “pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). However, in this instance, the Respondent had no policy for how to deal with issues involving protected activities or discrimination, and every decisionmaker chose to actively remain ignorant of whether Brown’s account was truthful or whether a miner was being discriminated against. The decision to fire Bungard was not a reasonable business decision because statutorily protected activities were implicated and no investigation was conducted as to whether they were the cause for the



termination. Respondent alleges that Bungard was insubordinate and that he tried to engage Brown in a fight, but the only credible evidence presented at hearing showed that Bungard asked for a dust mask and Brown tried to engage him in a fight. Therefore, I find that Respondent's "proffered reasons had no basis in fact." *Turner v. Nat. Cement Co. of California*, 33 FMSHRC 1059, 1073 (May 2011). Effectively, the Respondent's conduct makes it impossible to determine whether unprotected activities played *any* role in its decision, because there is no proof that any unprotected activities actually occurred.

## 2) **Interference:**

A miner may also bring a complaint "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." *UMWA on behalf of Franks and Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Young & Cohen, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07 (Jordan & Nakamura, Comm'rs).

To make out a claim of discrimination under the *Pasula-Robinette* framework, an employee must prove that he engaged in protected activity and suffered an adverse employment action motivated at least in part by the protected activity. *Turner v. Nat'l Cement Co. of Cal.*, 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 sub nom. Consol. Coal Co. v. Marshall*, 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). In contrast, in interference cases, the Commission has accepted claims where the complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than a classic adverse employment action. *See Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). In these 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. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

*Sec'y Of Labor on behalf of Greathouse v. Monongalia County Coal Co.*, 38 FMSHRC 941, 947 (May 2016)(ALJ).

In the *Franks* case, two Commissioners provided a framework for analyzing interference claims based upon its prior precedent in *Gray* and *Moses*, and recently, a majority in the Commission affirmed the use of this test.<sup>19</sup> According to this test, an interference violation occurs if:

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<sup>19</sup> Several ALJs have adopted this test. *See Sec'y Of Labor on behalf of Greathouse v. Monongalia County Coal Co.*, 38 FMSHRC 941 (May 2016)(ALJ); *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 37 FMSHRC 2597, 2603-04 (Nov. 2015) (ALJ); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015) (ALJ). The Commission has recently decided

- 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.

*UMWA on behalf of Franks and Hoy v. Emerald Coal Resources*, 36 FMSHRC at 2108. According to this analysis "proof of the operator's intent to interfere with the miner's statutory rights is not required." *Id.* at 2112-2113.

Applying this test to the instant case, I find that the Respondent interfered with Bungard's statutory rights. Bungard had a right under the Mine Act to request safety equipment, such as a dust mask. When Bungard exercised that right, Brown told Bungard in front of the crew that it was his responsibility to have a dust mask. Tr. 107. Brown began pointing and yelling at Bungard, and displayed visible anger. Tr. 123. Brown then tried to engage in a fight with Bungard, and subsequently fired him. Tr. 51-57, 110. Brown told the rest of the crew that he planned on suspending Bungard for requesting a dust mask, but fired him because he tried to fight with him. Tr. 111. Bungard, Gonchoff, Glenn Denning, and others in the crew believed that Bungard was fired for asking for a dust mask. Tr. 111-12. A reasonable person in Bungard's position would understand Respondent's conduct to mean that one risked losing his job if he requested safety equipment.

Under the second prong of the test, the Respondent argues that it had a legitimate reason for firing Bungard because Bungard was insubordinate and tried to fight with Brown. The problem with this argument, as described *supra*, is that there is no credible evidence that Bungard was insubordinate or tried to fight with Brown. All the evidence presented at hearing from those that were present for any part of the interaction described a chain of events where the reverse occurred. I discount Blackburn and Jackson's testimony to the contrary because they chose not to investigate the incident, and their entire understanding of the events stemmed solely from Brown.<sup>20</sup> Accordingly, I find that there was no legitimate and substantial reason for Respondent's actions that outweigh the harm caused to the exercise of protected rights.

### **3) Damages and Penalty**

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988) ("Local 2274"). However, the Commission has held that

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that a judge did not err when she applied the *Franks* test in an interference test. *Sec'y of Labor on behalf of McGary v. The Marshall County Coal Co.*, WEVA 2015-583-D (Aug. 26, 2016).

<sup>20</sup> The only other person present for the January 16 incident, Brown, did not testify at hearing.

A backpay award “may be reduced in appropriate circumstances where an employee incurs a ‘willful loss of earnings.’” 21 FMSHRC at 284 (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982)) (other citations omitted). Under the duty to mitigate damages from discrimination, “a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment*, fails diligently to search for alternative work, or voluntarily quits without good reason.” *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972) (citations omitted) (emphasis in original).

*Secretary of Labor, on behalf of Walter Jackson v. Mountain Top Trucking Company, Inc.*, 21 FMSHRC 1207, 1212 (Nov. 1999).

In the instant case, Bungard typically worked 48 hours per week for GMS at \$15 per hour for the first 40 hours and \$22.50 overtime. Tr. 34-35. Bungard was fired on January 16, 2015 and gained full time employment on October 19, 2015. However, Bungard did not make efforts to find employment (aside from casual employment he engaged in) until the late summer. Tr. 86. Bungard’s belief that he was blacklisted from mining, while sincere, was based on no objective evidence. Furthermore, his stress following the termination does not warrant him not searching for employment for months. I find that had Bungard been diligent in searching for employment, he would have found a comparable position to the one he held with GMS within 6 months of his termination.

Respondent argues that Bungard’s damages should be cut off when GMS engaged in a large reduction of force in April 2015. The Commission has recognized that a bona fide reduction in force can toll a miner’s right to back pay, and the burden in showing that work is no longer available for the complainant lies with the employer. *Sec’y of Labor, on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054-55 (Oct. 2009). The Respondent must make this showing by a preponderance of the evidence. *Sec’y of Labor, on behalf of C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, 1188 (2013). I find that the Respondent has not met this burden.

GMS argues that it laid off between 230-240 workers in April of 2015, and that Bungard, as a red hat, would not have been retained as an employee or offered a transfer. Tr. 161-63, 253, 270-271. However, GMS appeared to use no objective criteria in making the decision concerning which miners would be laid off, which retained, and which offered transfer. Tr. 242-43. Blackburn had a meeting with Jackson and regional manager John Mattingly before creating a spreadsheet. Tr. 183. He did not use any criteria provided by Human Resources, but testified that he used his own experiences and information provided by subordinates. Tr. 182. GMS employment records indicate that red hat miners remained at the mine or were recalled. GX-2, GX-3. Furthermore, GMS has continued to recruit and hire new employees, holding job fairs and interview sessions. Tr. 254-55. Indeed, their online advertisements state that they are “constantly expanding operations and constantly in need of good employees.” Tr. 254. Without anything more than an *ad hoc* system for determining layoffs and transfers, I cannot find that Bungard would have been laid off during the spring reduction in force, or that he would not have been offered a recall.

Accordingly, Bungard is entitled to 26 weeks of backpay at a rate of \$780.00 per week, plus pre-judgment interest calculated on the federal rate designated by the Internal Revenue Service for the underpayment of taxes. *See Local 2274*, 10 FMSHRC at 1505. Additionally, Respondent must expunge Bungard's employment records of all references to his unlawful termination, and must inform the Mine that Bungard was unlawfully terminated.

The Secretary proposed a penalty of \$25,000.00 for Respondent's violations. The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The court's assessment here is independent, and the Secretary's proposal "is not a baseline or starting point," that the court has used in its assessment. *Sec'y of Labor, MSHA v. The American Coal Co.*, LAKE 2011-701. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In the instant case, the only factor weighing in GMS's favor is that it does not have an extensive history of Section 105(c) violations. However, the other factors weigh strongly against the Respondent. GMS is a large contractor for penalty purposes. The gravity of the matter is exceptionally serious, as miners should not be demeaned, disciplined, or fired for reasonably requesting safety equipment. GMS's handling of the entire situation, from creating a difficult process to procure safety equipment, to not training any of its management in miners' rights, to failing to conduct any sort of investigation, exhibits not just a high level, but very high level, of negligence. GMS did not make any good faith effort to rectify, investigate, or even acknowledge Bungard's allegations. GMS has presented no evidence that the proposed penalty will impact its ability to continue in business. Considering all of the factors, I find that a \$35,000.00 penalty is appropriate.

### **CONCLUSION AND ORDER**

Based on the foregoing, I find that Respondent violated §105(c) of the Act by discriminating against Bungard for engaging in protected activity and interfering with his statutory rights.

Respondent is **ORDERED** to pay Bungard for 26 weeks of backpay, at \$780.00 per week, plus interest.<sup>21</sup> Further, Respondent shall expunge Bungard's employment records of all references to his unlawful termination, and must inform the Mine that Bungard was unlawfully terminated.

It is further **ORDERED** that Respondent pay a civil penalty of \$35,000.00 within 40 days of this decision to the Secretary of Labor.<sup>22</sup>



Kenneth R. Andrews  
Administrative Law Judge

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<sup>21</sup> The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method, which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), *as modified by Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

<sup>22</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390