FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

January 6, 2020

MARSHALL JUSTICE,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEVA 2018-48-D
v.	:	PINE-CD-2016-07
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle Mine
Respondent.	:	Mine ID 46-06618

DECISION

Appearances: Samuel B. Petsonk, Esq., Petsonk PLLC, Beckley, WV; for Marshall Justice, Complainant.

Jonathan R. Ellis, Esq., and Joseph U. Leonoro, Esq., Steptoe & Johnson PLLC, Charleston, WV; for Rockwell Mining, LLC, Respondent.

Before: Judge Paez

This long-pending discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Complainant Marshall Justice ("Complainant" or "Justice") filed his discrimination complaint with the Commission against Respondent Rockwell Mining, LLC ("Respondent" or "Rockwell") after the Mine Safety and Health Administration ("MSHA") investigated Justice's claims and the Secretary of Labor ("Secretary") declined to take action under section 105(c)(2) of the Mine Act.

This case examines four discrete incidents at an underground coal mine that the Complainant alleges constitute a claim of discrimination and three claims of interference under section 105(c) of the Mine Act. To prevail, the Complainant must prove his discrimination and interference claims by a preponderance of the evidence. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). As the Commission observed, "[p]reponderance of the evidence" requires demonstrating that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

Having considered the testimony from Justice himself and Rockwell's five witnesses, as well as the pleadings, exhibits, post-hearing briefs, and reply briefs, I conclude that the Complainant has failed to prevail in his three interference claims. Additionally, although I determine the Complainant established a prima facie case in his discrimination claim, I conclude

that Rockwell provided sufficient evidence to affirmatively defend itself, and thus the Complainant's discrimination claim also fails.

I. STATEMENT OF THE CASE

On July 20, 2016, Marshall Justice filed a discrimination complaint with MSHA using the agency's Form 2000-123 and naming Rockwell as the violator. (Compl., Ex. A.)[1] On September 14, 2017, MSHA notified Justice that the agency had investigated Justice's discrimination complaint and determined Rockwell had violated section 105(c) of the Mine Act. (Compl., Ex. C.) Thereafter, on October 3, 2017, the Secretary in Docket No. WEVA 2018-10-D filed a complaint with the Commission under section 105(c)(2) regarding Rockwell's specific failure to provide mine ventilation maps to Justice due to his status as a miner's representative. However, the Secretary in his section 105(c)(2) complaint did not pursue Justice's claims regarding an allegedly unsafe diesel scoop nor any other claims by Justice. (*See id.* at 1–5.)

On October 30, 2017, Justice filed his own complaint of discrimination with the Commission under section 105(c)(3) of the Mine Act, regarding the claims rejected by the Secretary. Justice attached to his section 105(c)(3) complaint copies of his MSHA Form 2000-123, his supplemental statement to MSHA with his timeline dated August 10, 2016, and MSHA's September 14, 2017, determination letter. (Compl., Exs. A, B, C.)

On December 4, 2017, then-Chief Administrative Law Judge Robert J. Lesnick assigned me this matter. On December 6, 2017, Rockwell filed a Motion to Dismiss, which I granted, in part, on January 31, 2018, with regard to the claim about interference with Justice's right as a miners' representative to obtain copies of ventilation maps, which I found duplicative of the section 105(c)(2) claim contained, and later disposed of, in Docket No. WEVA 2018-10-D.[2] The other claims survived Rockwell's motion. Thereafter, Rockwell filed its answer on February 13, 2018, per my request. On February 9, 2018, the parties filed a joint motion requesting that I set a hearing date in September, which I granted, setting the hearing for September 11–13, 2018. Thereafter, on August 13, 2018, I granted the parties' joint motion to continue the September 11–13, 2018 hearing, and set the hearing for January 23–25, 2019. Yet again, on December 21, 2018, the parties filed a Joint Request to Continue Hearing Date, whereby I set the hearing for May 14–15, 2019, in Charleston, West Virginia.

Prior to the hearing, on April 19, 2019, Rockwell filed a Motion for Summary Decision against which Justice filed his Opposition on April 26, 2019. Rockwell filed a Motion for Leave to File Reply on May 3, 2019, which I granted. I denied Rockwell's Motion for Summary

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[1] In this decision the following abbreviations are used: Complaint ("Compl."); Transcript ("Tr. #"); Complainant Exhibit ("Ex. C–#"); Respondent Exhibit ("Ex. R–#"); Respondent's Motion for Summary Decision ("Resp't Mot. Summ. Dec."); Complainant's Post-Hearing Brief ("Compl't Br."); Respondent's Post-Hearing Brief ("Resp't Br."); Complainant's Reply Brief ("Compl't Reply"); and Respondent's Reply Brief ("Resp't Reply").

[2] The Secretary of Labor and Rockwell settled Docket No. WEVA 2018-10-D prior to hearing per my Decision Approving Settlement dated April 18, 2018.

Decision on May 8, 2019, because genuine issues of material fact remained. A full-day, extended hearing took place on May 14, 2019, in Charleston, West Virginia. Justice himself served as the only witness in the Complainant's case. For its case, Rockwell called mine superintendent Kermit "Rex" Osborne; evening shift foreman Harry Frank Javins; maintenance foreman William Luke Stepp; outby foreman and fireboss Rondal Gillispie; and regional human resource and labor relations manager Colin Milam. The parties filed their initial post-hearing briefs on July 10, 2019. On July 19, 2019, Rockwell filed a bankruptcy petition titled "Notice of Suggestion on Pendency of Bankruptcy for Blackhawk Mining LLC, et al. and Automatic Stay of Proceedings." On July 25, 2019, I issued my Order Staying Proceedings due to Respondent's Bankruptcy Filing.[3] On November 13, 2019, I lifted the Stay of Proceedings and ordered the parties to submit their pending reply briefs, which I received on December 2, 2019.

II. ISSUES

Complainant's pleadings were initially unclear regarding the scope of the claims Justice would pursue at hearing. On May 13, 2019, the eve of hearing, counsel for Rockwell e-mailed my law clerk, stating that the parties had agreed to limit the scope of the hearing to four issues. At hearing, counsel for Rockwell recited these issues and counsel for Justice agreed that these were the issues to be adjudicated. (Tr. 9:3–25.) Therefore, the four issues before the court are:

(1) Whether Rockwell interfered with Justice's right to make safety complaints about the use of a caged scoop for long-distance haulage by continuing to assign him to the caged scoop and discontinuing the use of the uncaged scoop Justice preferred;

(2) Whether Rockwell discriminated against Justice for making safety complaints by not selecting him to work during the "miners' vacation" of the first week of July 2016;

(3) Whether, on July 18, 2016, Rockwell interfered with Justice's attempt to make a complaint about a tire to an MSHA inspector; and

(4) Whether, on July 19, 2016, Rockwell interfered with Justice's right, as a miners' representative, to travel with an MSHA inspector on section 103(f) "walkarounds."

For the reasons set forth below, I dismiss Justice's complaint of discrimination and interference in its entirety.

III. FINDINGS OF FACT

Gateway Eagle Mine is a two-section coal mine located in Boone County, West Virginia. (Tr. 19:6–16, 220:15–17.) It is a union mine with a collective bargaining agreement ("CBA") between Rockwell and the United Mine Workers of America ("UMWA"). (Ex. R–2.) In 2012, Marshall Justice began a job as a coal miner at Farley Eagle Mine, operated by Patriot Coal

[3] Under section 362(a) of the Bankruptcy Code, the filing of the petition with the Bankruptcy Court gives rise to an automatic stay, applicable to all entities, of the commencement or continuation of any judicial, administrative, or other action or proceeding against the debtors. Justice, and not the Secretary, brought this case under section 105(c)(3) of the Mine Act. Accordingly, I stayed these proceedings, as the parties had not yet submitted their reply briefs before the filing of the bankruptcy petition.

Corporation's subsidiary Gateway Eagle Coal Company, LLC. (Resp't Mot. Summ. Decision, Ex. A.) He then worked for the same operator, Patriot Coal, at Gateway Eagle Mine from January 1, 2014, to October 25, 2015. (Resp't Mot. Summ. Decision, Ex. B.) He worked at the same mine for a subsidiary of Blackhawk Mining LLC while the mine was operated by Rockwell from October 26, 2015 through December 2015. (Resp't Mot. Summ. Decision, Ex. C.) Justice's last position at Gateway Eagle Mine was as a supply scoop operator from February 22, 2016, until his resignation on November 3, 2016. (Resp't Mot. Summ. Decision, Ex. RR.) During his employment at Gateway Eagle Mine, possibly in 2015 when Patriot owned the mine,[4] Justice filed internal complaints about one incident that took place on the road to work and about another incident that took place in the mine's changing room. (Tr. 113:8–114:7, 168:2–169:21, 250:22–251:8, 337:9–338:24.) Beginning on February 19, 2016, during training, Justice began to keep a journal where he would record events during his shifts at the Gateway Eagle Mine, as well as some personal thoughts interspersed with religious affirmations. (Exs. R–1, C–1.)

The main incidents surrounding the four claims in this proceeding took place during June and July of 2016.

A. Justice's Safety Complaint About the Caged Scoops

As a supply scoop operator or "supply man," Justice hauled supplies to the two coal-producing mine sections, sometimes using diesel scoops. (Tr. 20:2–8, 37:12–38:14.) Rockwell had three diesel scoops: #873, #874, and #882 (although #882 only came into service at the mine in July 2016 after #873 was taken out of service). (Tr. 87:20–88:4, 271:18–20, 276:6–24.) An approved safety cage enclosed scoop #874 and scoop #882 to protect its operators from a manufacturer-installed winch. (Tr. 26:6–7, 183:9–14.) Rockwell ordered miners, including Justice, to haul supplies between mine sections using the caged scoops. (Tr. 183:18–20.) Indeed, on Justice's first day on February 22, 2016, he operated the #874 caged scoop, and the next day hauled supplies to both section #1 and #2. (Ex. R–1.) Scoop #873 had no safety cage or winch, and Justice typically, though not exclusively, used scoop #873. (Tr. 25:1–10, 26:6–7, 276:6–21.) Justice preferred to use the #873 diesel scoop not only because of the visibility but because of the design of the equipment. As Justice explained, the #873 scoop was better designed for supply haulage due to an additional lever allowing the operator to raise the scoop like a forklift rather than the #874 scoop which required more maneuvering to raise the supplies to the appropriate height. (Tr. 68:6–70:2.)

On June 21, 2016, Rockwell assigned a contractor to operate uncaged scoop #873 to clear the intake and lifeline entries of rock material. (Tr. 42:8–21, 45:4–7, 179:2–25; Ex. C–1 at 139.) Justice had to use caged scoop #874 and complained to Rockwell that the cage on his scoop

[4] Despite requests for clarification at hearing, the witnesses had only a vague recollection of when these incidents, which are not at issue in this decision, took place. (Tr. 250:22–251:8.) Regional human resource and labor relations manager Colin Milam investigated the changing room incident when Patriot Coal Corporation operated the mine. (Tr. 337:9–13.) This would place both the changing room and road incidents no later than October 2015 (Resp't Mot. Summ. Decision, Ex. B), at least seven to eight months, if not more, before the events at issue in this decision.

reduced his visibility and that, as a result, the cage posed a danger to the scoop operator and to others during long-distance haulage. (Tr. 44:8–45:15.) Justice made a "step-one" grievance with Gillispie, his direct supervisor, about the reassignment to the contractor of the scoop "that I run." (Tr. 42:12–21.) Justice complained that he should be allowed to use the #873 scoop because it allowed an unobstructed view, unlike the #874 scoop which had a manufacturer-installed safety cage that Justice said obstructed his view. (Ex. C–1 at 139–140; Tr. 42:12–45:1.) Gillispie disagreed, so Justice then spoke to superintendent Osborne, who explained that the contractor's use of the #873 scoop was temporary due to a specific job of clearing the intake and lifeline entries of material, which took the contractor about two or three shifts to complete; so Justice used #874. (Tr. 45:2–15, 189:24–191:5, 193:6–10.) Justice believed his assignment to the caged scoop would last a short time so that uncaged scoop #873 would be returned "right back to me." (Tr. 45:2–15.) Indeed, the next day, June 22, Justice operated the #873 uncaged scoop, as well as on June 23 and 24. (Ex. C–1 at 140–42; Tr. 48:9–49:12.) On Monday, June 27, Justice operated the #874 caged scoop but returned to using the #873 uncaged scoop the following day on June 28. (Ex. C–1 at 143–44; Tr. 49:13–51:6.) Then, on June 29, 2016, Rockwell assigned Justice to operate the #874 caged scoop, whereby Justice learned that the #873 uncaged scoop was taken "out of service." (Ex. C–1 at 144; Tr. 64:11–65:21.)

On June 29, 2016, the date Justice learned that Rockwell was taking his preferred uncaged scoop out of commission (Tr. 64:15–65:4; Ex. C–1 at 144), Osborne poked Justice in the ribs and observed Justice loading supplies. (Tr. 66:2–9, 66:25–67:5.) In his journal, Justice characterized the poke in the ribs as a "Friendly Gest" (meaning friendly gesture). (Ex. C–1 at 145.) However, Justice also interpreted this interaction as a message that management could do whatever they liked, and Justice could not stop them. (Tr. 67:6–12.) On the following day, June 30, 2016, Gillispie told Justice that he did not like him—a statement Justice believed to be in reference to his complaint about being assigned to operate the caged scoops. (Tr. 71:9–72:4; Ex. C–1 at 145.) Following an unrelated safety complaint about air reversal on July 1, Justice had a conversation with Javins during which Justice felt Javins was telling him not to make safety complaints. (Tr. 74:14–77:2, 264:7–265:12; Ex. C–1 at 146.) Justice then went on vacation and returned on July 11, 2016. (Ex. C–1 at 146.)

Rockwell obtained the "new" #882 caged diesel scoop when Justice returned to work on July 11, 2016, and put it into service the next day on July 12. (Ex. C–1 at 148; Tr. 87:20–88:7.) Rather than repairing uncaged scoop #873, Rockwell retired #873 on July 13 by moving it into a weed patch to cannibalize it for parts, citing financial considerations. (Ex. C–1 at 149, C–5 at 3, C–8 at 3; Tr. 193:12–194:15.) When Justice realized the uncaged #873 scoop was being swapped out for the #882 caged scoop whereby he would have to operate a caged scoop at all times, Justice told management he would agree to operate the caged scoops over long distances only "at a protest," meaning under protest, which Justice contended was "the same as a refusal." (Tr. 148:16–149:10; Ex. C–1 at 153.) On July 18 and into August, the #874 scoop began to have problems, so Rockwell paid for repairs to the caged scoops. (Tr. 85:19–86:7, 117:8–118:12, 228:25–231:19; Ex. C–1 at 155.) Sometime after August 8, Rockwell took the white #874 scoop off the property for repairs and returned it to service on August 17. (Ex. C–1 at 179–90.)

Justice sent a complaint to MSHA, which investigated and declined to issue a citation about the scoop's cage. (Tr. 148:16–149:20.) Neither MSHA nor the West Virginia Office of

Miners' Health, Safety, and Training ever cited the caged scoops for safety violations. (Tr. 287:24–288:8.) No miner other than Justice presented a safety complaint about the caged scoops. (Tr. 288:9–11.) Prior to June 21, 2016, Justice worked on more than a dozen occasions with the #874 caged scoop over long distances, and on none of these occasions did Justice actually refuse to operate the scoop. (Tr. 130:19–131:11, 133:3–142:25; Exs. C–1, R–1.)

B. Justice Not Selected to Work During the "Miners' Vacation"

During the first full week of July 2016, known as the "miners' vacation," all miners at Gateway Eagle Mine took paid leave, except certain miners who would work and take their vacation at another time. This was an annual occurrence. (Tr. 336:4–337:5.) Given the kind of work the mine needed that week (Tr. 199:10–20), General Manager Joe Evans decided how many miners to use. (Tr. 200:2–13.) The miners who wanted to work during that week wrote their names on a sign-up sheet. (Ex. C–3.) Under the CBA, Rockwell then ranked volunteers by seniority and specialty, e.g., electrician certification. (Tr. 52:1–12.) In 2016, more miners volunteered to work during vacation than the mine required. (Tr. 52:21–12.) Compared to other years, the mine needed a smaller crew to do maintenance as Rockwell did not intend to mine coal. (Ex. C–5 at 5; Tr. 199:2–20.)

Justice, who lacks an electrician's certification, volunteered, and Rockwell did not select him, filling all necessary non-salary slots either with miners more senior to Justice or with certified electricians. (Ex. C–5 at 4–5; Tr. 52:2–22.) Justice grieved his non-selection with the union, as he had canceled his vacation plans in anticipation of working during the "miners' vacation" week. (Ex. R–2; Ex. C–1 at 144; Tr. 109:18–25, 333:6–12.) The UMWA eventually withdrew Justice's grievance on August 5, 2016, after the union and management determined Rockwell had not violated the CBA in assigning vacation work. (Tr. 333:1–335:13; Ex. R–2.) Because Justice did not work during the "miners' vacation," he was on paid leave along with those miners not scheduled to work that week, resulting in him not having flexible vacation days to use at another time of his choosing later that year. (Tr. 153:17–155:9.)

C. Justice's Safety Complaint About a Damaged Tire

On July 18, 2016, Justice spoke with MSHA Inspector Shawn Tishanel and brought to his attention a damaged tire on a piece of mobile equipment. (Ex. C–1 at 153–54.) Justice explained that for several days a "big chunk" was loose on the tire and would sling mud and material into his face as it rotated, requiring him to wear safety glasses. (Tr. 86:12–22.) Inspector Tishanel examined the tire but did not issue a citation because the wear on the tire fell below the regulatory threshold. (Tr. 83:21–85:1; Ex. C–1 at 154.) After Justice told Tishanel about the tire damage, outby foreman and fireboss Gillispie approached Justice and told him to haul a load of supplies to the producing section. (Tr. 84:8–13, 346:12–13; Ex. C–1 at 154.) Gillispie, before ordering Justice to haul supplies, asked him whether he wished to travel with Tishanel on the rest of the "walkaround"; Justice declined. (Tr. 311:3–6.) Justice denies Gillispie invited him. (Tr. 347:16–22.)

D. Justice Not Traveling with the MSHA Inspector on July 19, 2016

Miners' representatives may travel with MSHA inspectors on their inspections or "walkarounds," but, as a matter of law, the operator needs to compensate only one miners' representative during the "walkaround." The CBA between Rockwell and the UMWA designates the union-appointed miners' representative to receive compensation while traveling with the MSHA inspector. (Tr. 165:16–166:20, 202:18–204:22.) Other miners' representatives who choose to travel with the inspector do so without pay. Although Justice sought to be elected as a miners' representative by the union, the UMWA membership did not elect him to the position. (Tr. 165:16–166:14.) Yet two or more miners appointed Justice as a non-union miners' representative, and he accordingly could choose to travel with the inspector.[5] (Tr. 165:16–166:20.)

On July 19, 2016, Justice entered his supervisor's office to report his completion of a work task but also intending to indicate his availability to travel with MSHA Inspector Tishanel, who Justice observed in the mine office. (Ex. C–1 at 156–58.) While Justice sat in the office, management asked the union-appointed miners' representative, Moses Meade, to come to the surface and travel with Tishanel. (Tr. 91:8–92:19; Ex. C–1 at 157–58.) Rockwell customarily summoned the union-appointed miners' representative to travel with compensation. (Tr. 273:1–16; Exs. C–5 at 2–3, C–6 at 2–3.) Justice did not voice his request to travel with Tishanel. (Tr. 92:11–14.) Instead, he looked at superintendent Osborne hoping to communicate his wish to travel. (Tr. 92:15–17; Ex. C–1 at 157–58.) Outby foreman and fireboss Gillispie was in the office and ordered Justice to haul oil, and Justice complied. (Tr. 92:11–14; Ex. C–1 at 157.)

E. Justice Files a Section 105(c) Complaint with MSHA

The day after Justice visited his supervisor's office hoping to travel, on July 20, 2016, Justice filed a discrimination complaint with MSHA against Rockwell. (Compl., Ex. A.) On or around August 18, 2016,[6] Justice attended a post-inspection conference with Inspector Tishanel and Eugene Cook, a third-shift foreman. (Tr. 315:14–21; Ex. C–1 at 193–96.) Cook told Justice he was not welcome in the meeting, but Gillispie took Cook aside and told him that Justice, as a duly appointed miners' representative, had a right to attend. (Tr. 315:25–316:5; Ex. C–1 at 194–95.) Justice sat through the rest of the meeting without incident. (Ex. C–1 at 195.)

Upon receiving Justice's discrimination complaint, MSHA thereafter conducted an investigation with interviews of Rockwell employees, including maintenance foreman William Luke Stepp, superintendent Rex Osborne, and evening shift foreman Frank Javins. (Exs. C–5, C–6, C–7, C–8.) MSHA later determined it would prosecute Justice's complaint of not receiving ventilation maps from Rockwell as required, given his designation as a miner's representative.

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[5] Almost a year earlier on August 20, 2015, MSHA cited Rockwell for failing to list Justice as a miners' representative on its bulletin board (Ex. C–2; Tr. 205:15–21), even though Rockwell had listed him on previous occasions. (Tr. 205:22–206:14.) Following the citation, Rockwell reposted Justice's information on the mine bulletin board. (Ex. C–2.)

[6] Gillispie testified about this incident based on an entry from Justice's journal dated August 18, 2016. (Tr. 315:9–13.)

However, MSHA declined to take up Justice's other discrimination and interference claims involving operation of the caged scoop, his non-selection for work during the "miner's vacation" week, his damaged tire complaint to an MSHA inspector, or the events surrounding the MSHA inspection on July 19, 2016. MSHA completed its investigation and finally issued its determination letter on September 14, 2017.

IV. PRINCIPLES OF LAW

A. Initiating Section 105(c) Complaints

The Mine Act provides that, upon receipt of a complaint for discrimination or interference, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . ." 30 U.S.C. § 815(c)(2). Under section 105(c)(2), "[t]he complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing . . . ." *Id.*

Section 105(c)(3) of the Mine Act provides that if the Secretary determines no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). The written discrimination complaint filed with MSHA must contain specific allegations that MSHA has investigated and that the Secretary's has considered in a determination. *See Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991). The scope of the Secretary's *investigation*, rather than the initiating complaint, governs the permissible ambit of the complaint filed later with the Commission. *See Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

B. Establishing a Prima Facie Discrimination Case

Under section 105(c), mine operators cannot discriminate against miners for engaging in activity protected by the Mine Act. 30 U.S.C. § 815(c)(1). Under Commission precedent, complainants must establish a prima facie case for discrimination by demonstrating that the miner was: "(1) engaging in protected activity, and (2) subject to an adverse employment action that was at least partially motivated by his protected activity." *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 318 (6th Cir. 2013) (citing *Pendley v. FMSHRC*, 601 F.3d 417, 423 (6th Cir. 2010)).

Section 105(c)(1) of the Mine Act states, in relevant part, that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [the Mine Act]." 30 U.S.C. § 815(c)(1).

Under the traditional *Pasula-Robinette* framework, a complainant establishes a prima facie case of section 105(c) discrimination if the preponderance of the evidence proves that (1)

the complainant engaged in a protected activity, (2) there was adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799. The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that protected activity motived the adverse action in no part. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n. 20 (Apr. 1981). If the mine operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that the miner's unprotected activities also motivated the operator and it would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2799–800.

Under a discrimination claim, a miner has the right under section 105(c) of the Mine Act to refuse work if the miner has a good faith, reasonable belief in a hazardous condition. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 177 (Feb. 2000). Furthermore, under a discrimination claim, the adverse action may be a constructive discharge, in which the operator has no conscious retaliatory motive but instead fails to reasonably remedy intolerable conditions, leading to the resignation of the miner who reported the conditions. *See id.* at 176 (citing *Simpson v. FMSHRC*, 842 F.2d 453, 461–63 (D.C. Cir. 1988)).

C. Establishing a Prima Facie Interference Case: *Franks* Test and *Pepin* Test

The Commission has not settled on the legal test for assessing claims of interference but has articulated two tests commonly referred to as the *Franks* test and *Pepin* test. *See Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680–81 (June 2018). Several Commission Judges have applied the Secretary's two-prong (*Franks*) test, which establishes an interference claim when:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. at 686 (Comm'rs Cohen & Jordan, separate op.) (quoting *UMWA on behalf of Franks and Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Chairman Jordan & Comm'r Nakamura, separate op.)). Commissioners Althen and Young would additionally require proof (*Pepin* test) that the person's action was motivated at least in part by the miner's protected activity. *Id.* at 711 (Acting Chairman Althen & Comm'r Young, separate op.) Some Commission Judges have come to refer to these tests as *Franks* (the Secretary's two-part test) and *Pepin* (requiring proof of operator motivation also). *See Sec'y of Labor on behalf of Pepin v. Empire Iron Mining P'ship*, 38 FMSHRC 1435, 1453–54 (June 2016) (ALJ) (articulating a test in which the Complainant has the burden to establish that the Respondent's actions were motivated by animus to the exercise of protected rights).

The Commission's line of section 105(c) interference cases demonstrates that successful claims concern tangible actions and clear communications by the operator and not vague implications requiring subtle inferences. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982) (determining that the operator's coercive interrogation of a miner over the exercise of protected rights was interference because it could chill the exercise of rights); *Sec'y of Labor on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 10–12 (Jan. 2005) (determining that threats to a miner are more likely to be interference if they are coercive, isolating, and pertaining to a criminal investigation).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

I now turn to the Complainant's individual claims. First, I will analyze the discrimination claim about Justice not working during the "miners' vacation" week. Second, I will examine the three interference claims. Of these, I will first analyze the interference claim about the caged scoop, then the interference claim about the damaged tire, and finally the interference claim about Justice not traveling with the inspector.

A. Whether Rockwell Engaged in Discrimination Under Section 105(c)

1. Protected Activity

Justice alleges that he engaged in protected activity through his safety complaints to MSHA inspectors as well as his "operation under protest" of caged scoops for long-distance haulage. (Compl't Br. 9.) Justice reported the alleged hazard of the cage on the scoop to MSHA, which investigated the use of the caged scoop for long-distance haulage and declined to issue a citation: the MSHA Inspector "didn't see no problem with it," Justice said. (Tr. 170:24–171:23.) Justice continued to inform Rockwell that he felt the caged scoop was dangerous because it obstructed his view, and that he operated the scoop only under protest. (Tr. 148:16–149:20.) Despite these actions by Justice, Rockwell counters that Justice did not engage in protected activity because Justice lacked a good-faith belief that the caged scoop was hazardous; Rockwell argues that Justice alleged a hazard as reprisal for Rockwell taking him off of uncaged diesel scoop #873, the scoop he preferred. (Resp't Br. 13–18.)

Under the Mine Act, a complaint about mine safety, made by the miner to the operator, is protected activity. 30 U.S.C. § 815(c)(1) ("[A] complaint under or related to this [Mine Act]," filed by a miner, his representative, or a job applicant is expressly protected under Section 105(c)); *see also, e.g., Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997) (holding that complainant's conversation with the mine landowner's representative, who was investigating conditions at the mine, was "protected, as it included complaints about unsafe equipment at the mine").

Justice unquestionably made safety complaints about the caged scoops. Indeed, both Rondal Gillispie and Rex Osborne listened to Justice's complaints about lack of visibility in the caged scoops and offered the advice of turning off his headlamp, which would reduce the glare, demonstrating Rockwell was aware of Justice's safety complaint at the time. (Tr. 217:13–19.)

Justice also expressed concerns that stacked supplies on the caged scoop impaired his vision, so Gillispie "had the supplies reloaded in such a manner as to not obstruct Justice's visibility." (Resp't Br. 19–20.) Though Justice told management that he considered the caged scoops unsafe, Justice never actually refused to operate those scoops. (Tr. 148:16–149:20.) The lack of refusal is, however, immaterial to this element. Justice raised safety issues with his employer and with MSHA. Consequently, I conclude that Justice has shown he engaged in protected activity. I turn now to the adverse action element.

2. Adverse Action

Justice argues that Rockwell took an adverse action against him by "prohibiting him from working through vacation and thus from earning additional bonus wages that he would have received for working during that period." (Compl't Br. 9.) Justice was frustrated that Rockwell "allowed others to work through vacation who had [fewer] qualifications than [him]." (*Id.*) Further, Justice pointed to the fact that miners who had never even signed the sheet were invited to work during vacation. (Tr. 58:4–7.) Finally, Justice considered it unfair that Rockwell waited until the "very last minute" to announce who would work during vacation. (Tr. 52:18–22.) Rockwell, however, noted that "[a]lthough nobody had ever guaranteed him or anyone else that signing the sheet would result in being selected to work over vacation, Justice . . . canceled his vacation plans." (Resp't Br. 22.)

Common forms of adverse action include discharge, suspension, and demotion. *See Pendley*, 34 FMSHRC at 1930. But the Mine Act protects miners against a broad range of adverse actions. *See id.* (noting that "section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against 'not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . . '") (quoting *Moses*, 4 FMSHRC at 1478 (quoting S. Rep. 95-19 at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978))). Furthermore, an adverse action may be an omission on the part of the operator. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984) (determining that an adverse action is any "act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.")

To determine whether adverse action occurred, the Commission has adopted the test articulated by the United States Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). *See Pendley*, 34 FMSHRC at 1931–32. In that Title VII retaliation case, the United States Supreme Court held that the term "discriminate against" included employer actions against an employee that would be "materially adverse to a reasonable employee." *Burlington*, 548 U.S. at 57. "[T]he employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* Furthermore, the Court stated that analysis should look at actions from the perspective of a reasonable employee and that analysis should look at the particular circumstances of the case. *Id.* at 68–69. "[A]n act that would be immaterial in some situations is material in others." *Id.* at 69 (citations omitted). In adopting this test, the Commission recognized that "retaliatory action does not only affect the targeted miner, but other miners on whom it could have a chilling effect

regarding the reporting of safety hazards." *Pendley*, 34 FMSHRC at 1932. Nevertheless, an adverse action under *Burlington* cannot be simply "those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington*, 548 U.S. at 68.

The standard for determining adverse action is objective but also depends on the particular circumstances of the case. Another miner, in a different situation, might have taken his non-selection on the chin and not have been reasonably dissuaded from filing a charge of discrimination. Yet it remains that the effect of Justice's non-selection was that he had to take his vacation during the "miners' vacation" week and could not use those vacation days at a time of his choosing later in the year. Indeed, Justice had canceled his vacation plans with his daughter, so he could work that week in July and plan a vacation with her later in the year. (Tr. 109:18–25, 153:24–154:4.) Because senior miners were granted priority during the decision-making process (Tr. 200:2–21), I determine that miners considered their selection for work during vacation to be desirable. When I consider a reasonable miner who made safety complaints to the operator shortly before learning of his non-selection for a desirable assignment (e.g., that would have allowed him more flexible vacation-day options later in the year), I determine that this miner could reasonably be dissuaded from raising safety complaints in the future. The non-selection of Justice for work during the "miners' vacation" week was therefore materially adverse and could chill a reasonable miner from making safety complaints, even though this non-selection is much less severe than discipline, lost wages, or termination. Weighing the evidence and circumstances, I conclude that Justice's non-selection for work during the "miners' vacation" week was an adverse action.

3. Motivation/Causal Connection

I now turn to the most crucial element in a prima facie discrimination case, the motivational nexus between the protected activity and adverse action. The Commission looks to four factors to determine whether a causal connection links the protected activity to the adverse action: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors one by one.

a. Knowledge of Protected Activity

In its post-hearing briefs, Rockwell does not specifically deny knowledge of Justice's complaints about the safety of using a caged scoop for long-distance haulage. On June 21, 2016, the date Rockwell assigned uncaged diesel scoop #873 to the contractor, Justice initiated a step-one grievance under the CBA: "I step oned [Gillispie] over this," Justice wrote in his journal. (Ex. C–1 at 139; Tr. 42:8–43:18.) Gillispie was aware of Justice's complaint about using the caged scoop because Gillispie responded to Justice's concerns about the safety of the scoop by advising him to extinguish his cap light to reduce glare. (Tr. 44:16–45:1, 309:22–310:7.) Moreover, Justice then complained to Osborne about the #874 caged diesel scoop, and Osborne also gave Justice the same guidance as Gillispie regarding the cap light. (Tr. 188:22–189:17,

189:24–190:7, 190:21–191:8, 198:9–21; Ex. C–5 at 3–4.) Justice did not testify specifically that Rockwell was aware of the complaint he made to MSHA about the cage, but the inspector investigated the situation at the mine and declined to issue a citation. (Tr. 170:24–171:23.)

I therefore determine that Rockwell had knowledge of Justice's protected activities, given Gillispie and Osborne's discussions with Justice regarding his safety complaints about obstructed visibility in operating the #874 caged diesel scoop.

b. Animus Toward the Protected Activity

Operator animus ranges from minor actions, such as less desirable work schedules, all the way to the severe or criminal (physical assault). "The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon, supra*, 3 FMSHRC at 2511. For this element, I will examine several incidents and remarks related by Justice at hearing.

The court heard much testimony at hearing about incidents outside of the June and July 2016 events at issue in this case. Among them were incidents that, depending on whom I credit, were either workplace bullying of Justice or just goofing off, part of workplace camaraderie. As observed at the hearing and stated in testimony, Javins is animated and known for clowning around with his colleagues. According to Javins, "[i]t's the camaraderie between the men and the playing and the things that you do. You build a bond and stuff with people." (Tr. 248:16–21.) In contrast, Justice was comparatively reserved and known for carrying around a diary where he would record incidents at the mine, interspersed with religious reflections. (Exs. C–1, R–1.) I observed Justice at hearing to be quiet, deliberate, and soft-spoken.

The first alleged incident happened to Justice once in his car. (Tr. 168:17.) According to Justice, Javins tailgated him and then drew alongside his vehicle and then he would let off and get back behind. (Tr. 114:1–7.) Javins drove up behind to "stomp gas" making it look like he would ram Justice's car and then lunge sideways. (Tr. 168:2–24.) From his car, Justice observed Javins "laughing and just acting crazy." (Tr. 168:20–21.) According to Javins, the general manager and HR manager interviewed him about "a shopping list of things" including an allegation he had attempted to "run [Justice] over . . ." (Tr. 249: 11–19.) At hearing, Javins acknowledged the incident, pointing out he drove a small Cutlass while Justice drove a "good size" Cadillac. (Tr. 249:20–25.) But Javins denied the allegation he tried to run over Justice: "I certainly got enough sense about me [that] I'm not going to try to run over somebody on a highway." (Tr. 249:25–250:2.)

On another occasion, Javins came through the changing room back door where he encountered a group of miners, including Justice. Javins admitted that he hit Justice with two fingers in the Adam's apple: "[N]othing ill at all was intended by that, you know," Javins testified, "It certainly wasn't anything that would have been hurtful." (Tr. 248:19–21.) Justice observed the scene as the miners being lined up on both sides; Javins walked through "like a big bull and looked everybody over." (Tr. 169:6–10.) According to Justice, Javins mock-lunged at him "like he's wanting to scare me plum out of my skin," but "that day I didn't jump because I was used to him doing that." (Tr. 169:11–14.) And then Javins made contact with Justice's

throat with his two fingers. (Tr. 168:25–169:21.) Following this "karate chop" incident, Justice filed an internal complaint with the company. (Tr. 169:19–21.) Regional human resource and labor relations manager Milam investigated the incident for then-operator Patriot Coal and concluded that the encounter had not been malicious and that Javins was "just playing" with Justice. (Tr. 337:9–338:24.) After a superior informed Justice that Javins could lose his job, Justice rescinded his complaint, "[pleading] mercy for him." (Tr. 169:22–170:15.) Rockwell counseled Javins that placing one's hands on another employee was "under no circumstances appropriate," and Javins agreed it would not happen again. (Tr. 338:17–24.)

The automobile and karate-chop incidents took place months before the events underlying these claims when Patriot operated the mine, which was from January 2014 through October 2015. (Tr. 249:8–10, 250:22–251:8; Resp't Mot. Summ. Decision, Ex. B.) Importantly, these incidents are not contemporaneous with the June and July 2016 events at issue in this case. Still more importantly, none of these incidents, even if I were to credit fully Justice's version of them, are probative to the claim that Rockwell's decision not to select Justice was motivated by animus toward Justice's complaints about the diesel caged scoops. Justice did not even assert that his exercise of protected rights prompted these two incidents. Based on the evidence and my observations at hearing, I find it more plausible that these incidents were akin to a personality conflict. Accordingly, they do not help establish that Rockwell's actions, at issue in this case, were motivated by animus toward protected activity.

To contextualize the incidents above, I also note a significant entry in Justice's journal. On August 5, 2016, Justice recorded that, when management offered complimentary cake and coffee shortly before testing him for drugs, Justice believed that the company might have laced the food with drugs so he would fail his drug test. (Ex. C–1 at 177; Tr. 155:12–158:9.) Milam was present at the meeting where coffee and cake had been provided, and he denied at hearing that Rockwell attempted to drug Justice. (Tr. 335:9–336:3.) This indicates to me that Justice was highly suspicious of any action taken by Rockwell, and accordingly I find Justice's uncorroborated testimony about Rockwell's actions less credible than I otherwise would.

I will also consider several contemporaneous events described at hearing. On June 29, 2016, the date that Justice learned that his preferred #873 uncaged scoop would be taken out of commission (Tr. 64:15–65:5), Osborne poked Justice in the ribs in a friendly way while he observed Justice loading supplies onto #874 scoop. Justice interpreted this interaction as a message that management could do whatever it liked, and Justice could not stop them. (Tr. 66:10–18, 66:25–67:18.) Next, Justice recorded in his journal that on June 30, 2016, Gillispie told Justice at the start of the shift that "he did not like [him.]" (Tr. 71:9–72:4.) I have only Justice's word that Gillispie made this remark. More importantly for this analysis, Justice presents no reliable evidence, only his personal interpretation, that this remark meant that Gillispie did not like him because of his protected activity. The other conflicts detailed above suggest that "I don't like you" could have referred to several other issues. Justice simply did not introduce sufficient evidence to convince me that this exchange referred to the exercise of protected rights.

On July 1, 2016, Justice used a walkie-talkie that could be heard throughout the mine to report that the flow of air in the section he was working had reversed; when he received no

response, Justice listed several things aloud that could be wrong on the section that might cause the air to temporarily reverse. (Ex. C–1 at 146; Tr. 74:14–76:17.) Due to his observance of the Sabbath on Friday at sundown, Justice had to leave early. (Tr. 74:14–23.) As he left the mine, Justice informed Frank Javins of the air reversal issue. (Tr. 76:18–23.) According to Justice, Javins told him, "[I]f you'll just leave us alone, we'll leave you alone." (Justice's words). (Tr. 76:21–23.) Justice took this to mean that he should not make safety complaints. (Tr. 76:21–77:2.) Javins, however, remembers neither receiving this complaint nor giving this response. (Tr. 264:7–265:12.) Given the particular circumstances, "leave us alone" is another ambiguous phrase. Justice was leaving for a religious observance and shortly before had broadcast to the entire mine his theories about the air reversal. It remains unclear whether Javins's annoyance flowed from Justice's safety complaints, or perhaps from his early departure from the mine, or perhaps from how Justice used his walkie-talkie. I determine that Justice has not introduced sufficient evidence about this incident to establish that Javins was telling Justice not to make safety complaints.

Next, Justice recorded in his journal that on July 11, 2016, management held a meeting with the crew, at which Osborne and MSHA Inspector Mark Muncy spoke. (Ex. C–1 at 146–47; Tr. 77:3–78:16, 79:8–18.) Muncy warned the miners about safety hazards related to air flow and dust accumulation. (Tr. 78:8–12.) Justice relates that Osborne said unless miners remained cognizant of safety hazards, they could become unemployed. (Tr. 78:18–79:7.) I do not find this incident probative to questions of animus, given that, according to Justice's own account, both Osborne and MSHA Inspector Muncy were exhorting the miners to pay *more* attention to safety. Justice nevertheless testified that the safety talk was "directed to me." (Tr. 77:13–19.)

Next, in the July 29, 2019, entry in his journal, Justice says that Javins "blew up" at him about the issue of using the scoop for hauling supplies and accused Justice of "just trying to cause trouble . . . ." (Ex. C–1 at 168–69; Tr. 271:13–272:8.) But Javins testified that he did not remember the incident and "I certainly don't remember blowing up on anyone." (Tr. 272:10–18.) Once again, I have only Justice's word, this time contradicted by the person who is supposed to have made this remark. The quotation imputed to Javins is, like the one above imputed to Gillispie, too brief and lacking in context to serve as evidence that Justice's supervisors were motivated by animus specifically toward his safety complaints about the diesel scoop's cage. These incidents as related do not help Justice meet his burden.

More apposite to this element is MSHA's investigation on August 30, 2016, during which an MSHA employee interviewed William Luke Stepp about possible interference with Justice's right to travel as a miners' representative. (Tr. 295:5–19.) This MSHA employee drafted a memorandum, written in Stepp's own voice, and included a passage stating that neither Rockwell nor the union liked Justice to travel with an inspector because he habitually drew the inspector's attention to violations that Justice had not previously reported to Rockwell, which hurt Rockwell's reputation. (*Id.*; Ex. C–8.) Before signing, however, Stepp crossed out these sentences and initialed next to them to indicate that he wished them stricken from his statement. (Tr. 295:19–21.) On the one hand, an investigator reducing an interview to a written statement could easily misconstrue words or make an error, and this statement was quickly disavowed by Stepp. On the other hand, Stepp's revised statement notes his belief that when "Justice travels with inspectors, he points out potential hazards that he has previously observed

but which he did not inform anyone of," and that the union is "frustrated" with Justice observing potential hazards and not reporting them because it gives the appearance of not doing their job." (Ex. C–8 at 3.) At hearing, Stepp tried to distance himself from the statement (Tr. 297:16–298:13), but agreed that the company and union did not like it if unreported hazards were cited by MSHA. (Tr. 299:14–300:2.)

Bearing in mind especially Justice's belief that management intended to poison him with coffee and cake, I find generally that Justice's interpretations of his interactions with management skew toward the negative, and I therefore accord his uncorroborated testimony less weight than I otherwise would. But Stepp's statement is specific and in my opinion unlikely to be groundless and, accordingly, serves to corroborate the impression that Justice attempts to make in detailing his interactions with Rockwell. I believe that Rockwell had a negative attitude about Justice's various safety-related efforts near the time when they did not select him to work during vacation. Considering all the evidence produced at hearing as a whole, I determine that Rockwell's management exhibited some level of hostility or animus toward Justice due to his protected activities.

c. Timing

The Commission does not apply "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." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Nevertheless, coincidence in time between the protected activity and the adverse action may alone be sufficient to establish discriminatory intent. *See Pendley*, 601 F.3d at 427 (citing *Garcia v, Inc.*, 24 FMSHRC at 354. Here, Rockwell assigned the contractor to uncaged scoop #873, the one Justice preferred, on June 21, 2016. (Tr. 42:8–21, 44:8–45:15.) Justice initiated with Gillispie his step-one grievance under the CBA on that same date, and also discussed it with Osborne. (Ex. C–1 at 139; Tr. 45:2–15, 189:24–191:5.) On June 28, 2016, Justice recorded in his journal that he "step oned [Osborne] on not allowing me to work vacation." (Ex. C–1 at 144.) I infer, then, that Justice learned of his non-selection no later than June 28, 2016. The "miners' vacation" at issue took place during the first week of July 2016. (Tr. 336:4–337:5.) The safety complaints and grievance were contemporary with Rockwell not selecting Justice to work during vacation. Consequently, I determine that a coincidence in time existed between Justice's protected activity and the adverse action taken against him.

d. Disparate Treatment of the Miner

For the disparate treatment factor, "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same or more serious offenses escaped the disciplinary fate suffered by the complainant." *Driessen*, 20 FMSHRC at 331 n.14 (citing *Chacon*, 3 FMSHRC at 2512). Justice admitted that those miners who worked during vacation were either senior to him or had an electrician's certification, which Justice lacked. (Tr. 58:8–15.) From Justice's perspective, however, Rockwell's alteration of its customary "miners' vacation" work-selection procedure amounted to disparate treatment. (Tr. 51:14–53:12.) Specifically, Justice testified that Rockwell "customarily posted a specific number of employees who could sign up through vacation." (Compl't Br. 9.) Deviations from the norm such as these

led Justice to suspect that Rockwell was retaliating against him: ". . . I know in my heart that they stopped me from working all because of my protest over this scoop situation . . ." (Tr. 53:8–10.) Yet Justice had never before worked during a "miners' vacation" week. (Tr. 52:13–14.)

Justice argues that "just a few days following [his] complaints to management about the caged scoop, management decided not to post a specific number of positions and rather elected to cut off vacation workslots at the point on the sign-up list that would cause [him] to be excluded. . . . " (Compl't Br. 9–10.) Rockwell, however, explains that it declined to post the number of miners needed during the miners' vacation because they felt that this would have the "effect of discouraging enough people from signing up if they thought that they might not get picked." (Resp't Br. 22.) Rockwell further notes the mine was not "running coal over the 2016 miner's vacation, so it needed fewer people." (*Id.*)

Rockwell treated Justice differently than other miners who signed up to work over the miners' vacation. But Justice fails to meet his burden by introducing evidence that another miner similarly situated—who had made safety complaints, lacked seniority, or lacked an electrician's certification—was granted permission to work during the miners' vacation. Therefore, I determine that the evidence presented does not establish that Justice suffered disparate treatment.

e. Weighing the Motivation Factors

Considering the above four factors on causal connection, I determine that Justice has proved by a preponderance of the evidence that Rockwell's adverse action against him was motivated in part by his protected activity. Rockwell knew about his safety complaints regarding the caged scoop when they began on June 21, 2016 (Tr. 128:23–129:20, 309:22–310:7), and did not select Justice to work during the vacation, which was the first week of July 2016. (Tr. 336:4–337:5.) When I examine this close sequence of events alongside Stepp's signed statement and testimony (Ex. C–8; Tr. 295:5–19), I determine that Justice has met the timing, animus, and knowledge factors, and I thereby conclude that Justice has established a causal connection between his safety complaints and Rockwell's non-selection of him to work during vacation.

4. Evaluating the Prima Facie Case

Justice alleges that management's decision not to post the specific number of positions was motivated by his safety complaints about the caged diesel scoop and was intended to allow management to "cut off the vacation workslots at the point on the sign-up list that would cause [him] to be excluded." (Compl't Br. 10.) Further, Justice alleges "[t]he discriminatory motive is apparent from [] Osborne's open animus toward [] Justice's good-faith concerns regarding the caged scoop, and by the proximity in time of the protected activity . . ." (*Id.*)

In contrast, Rockwell argues that it chose those miners to work during the miners' vacation week because of business necessity and CBA requirements. Specifically, "pursuant to the CBA, selection of who was to work was a matter of simply sorting the volunteers by specialty . . . and seniority." (Compl't Br. 23.) Simply put, Justice lacked an electrician's license, a specialty needed that week, plus he lacked the level of seniority that would have required his selection over other miners willing to work during the miners' vacation.

Justice engaged in protected activity by making safety complaints to MSHA and management about the obstructed view of the #874 caged scoop. He also suffered an adverse action in his non-selection for work during the "miners' vacation" week. Finally, Rockwell's knowledge of Justice's safety complaints, the very close timing, and the animus, especially when corroborated by Stepp's statement and testimony, allow Justice to establish the motivational nexus element and, therefore, to establish a prima facie case for discrimination. Thus, I determine that Justice's protected activity motivated Rockwell, in part, to take an adverse action against him. However, before turning to Rockwell's affirmative defense, I address the special difficulties presented by the issue of damages in this case.

5. Recoverable Damages

Justice requests, as relief under the discrimination claim, that Rockwell "pay [him] five days of pay to compensate him for the extra wages that he was unable to earn when Respondent declined to allow [Justice] to work through vacation."[7] (Compl't Br. 10.) If Justice establishes discrimination under section 105(c), the Commission may "[grant] such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3).

The Commission has recognized that discrimination encompasses intangible as well as tangible employment actions. *See McNary v. Alcoa World Alumina, LLC*, 39 FMSHRC 433, 439 (Mar. 2017). Furthermore, Commission Judges can fashion discrimination remedies suitable to the facts of each case. *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257 (July 1997) ("The Commission enjoys broad remedial power in fashioning relief for victims of discrimination."); *see also Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1306–07 (Dec. 1998) (determining that Commission Judges may remedy section 105(c) violations by ordering the posting of notices and expunging references to discipline from employee records). Nevertheless, in fashioning a remedy, the aim of the Commission Judge centers on "[restoring] discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Sec'y of Labor on behalf of Dunmire* v. *Northern Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982).

At Gateway Eagle Mine, miners who did not work during the miners' vacation would have to take paid vacation during that week. In not selecting Justice to work that week, Rockwell prevented him from taking his vacation days at another time of his choosing. (Tr. 154:5–155:7.) Given that Justice no longer works for Rockwell and does not seek reinstatement, making Justice whole in this respect would be difficult and the proposed five days of pay might be a reasonable fashioning of a remedy. (*See* Ex. C–4.) But given Rockwell's successful affirmative defense (*see* discussion *infra* Section V.A.6), the issue of appropriate relief is moot.

[7] Justice submitted pay stubs dated July 8, 2016 and July 22, 2016, which I have considered. (Ex. C–4.)

6. Affirmative Defense

A mine operator "can establish an affirmative defense under the *Pasula-Robinette* framework by showing that 'while it took adverse action against the miner because of the miner's protected activity, it would have taken the action even if the miner had not engaged in protected activity.'" *Cumberland River Coal Co.*, 712 F.3d at 319 (quoting *Pendley*, 601 F.3d at 423–24). "[T]he inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity." *Pendley*, 601 F.3d at 425 (citing *Chacon*, 3 FMSHRC at 2516). Nevertheless, the Commission Judge should not accept a defense that rests on mere pretext: a justification may be "so weak, so implausible, and so out of line with normal practice" that it should be found to be "mere pretext." *Chacon*, 3 FMSRHC at 2516. The inquiry is not whether the Commission Judge believes that the justification supported the adverse action but is based on what the evidence shows that "the operator actually believed at the time." *Pendley*, 601 F.3d at 426. The Commission Judge should not "impose [his or her] own business judgement as to an operator's actions." *See id.* at 425.

At hearing, Rockwell laid out its defense by describing the procedure by which it decided which miners would work during vacation, not including Justice. Given the kind of work the mine needed that week, Osborne proposed the number of miners needed and General Manager Joe Evans decided how many miners to take, trying "to be as lean as he possibly could." (Tr. 199:2–200:13.) Under the CBA, Rockwell then ranked volunteers by seniority and specialty, e.g., electrician certification. (Tr. 52:4–53:8.) Justice, who lacks an electrician's certification, volunteered to work that week, and Rockwell did not select him, filling all necessary slots either with miners more senior to Justice or with certified electricians, who were needed to conduct MSHA-mandated weekly permissibility checks on equipment. (Ex. C–5 at 4–5; Tr. 211:15–214:17.)

In 2016, more miners volunteered to work during vacation than the mine required. (Tr. 211:15–214:17.) Compared to other years, the mine needed a smaller crew because it was not running coal. (Tr. 199:13–20.) Indeed, from December 2015 to February 2016, the mine had been idle because of a slow coal market. (Tr. 147:18–21, 195:15–19.) According to Superintendent Osborne, during the June and July 2016 period at issue in this case, "money was hard to come by" and the mine was "pinching pennies just to survive . . . . [i]t was tough in that day." (Tr. 195:10–14.) Moreover, Osborne characterized the proposed cost of repairing the uncaged scoop—$50,000—as "devastating to us" and that carrying out the repair would have required significant cost-cutting in another part of the mine. (Tr. 195:24–196:6.) At hearing, Justice did not rebut this testimony demonstrating that the mine was in tight financial straits. I therefore determine that trimming costs was a significant motive for Rockwell, not only with respect to the "miners' vacation," but in every area of the mining operation at that time.

Justice grieved his non-selection with the union, having already canceled his vacation plans in anticipation of working during the "miners' vacation" week. (Ex. R–2; Tr. 109:18–25, 333:6–12.) But the UMWA eventually withdrew Justice's grievance on August 5, 2016, after the union and management determined Rockwell had not violated the CBA in assigning vacation work. (Ex. R–2; Tr. 333:1–335:13.) At hearing, Justice spoke of possible arbitration but did not

rebut this testimony establishing that Rockwell properly followed the CBA in selecting miners to work during vacation. (Tr. 152:8–22, 344:6–349:16.) Based on this unrebutted testimony as well as the evidence as a whole, I determine that Rockwell properly followed the procedures under the CBA when choosing miners to work during the vacation.

From these determinations, I conclude that Rockwell's procedures could not have been mere pretext. To deprive itself of an additional miner, like Justice, whom Rockwell needed that week, would have been shooting itself in the foot. Neither seniority nor electrician certification are subjective categories of the kind that allow plausibly deniable retaliation. At hearing, Justice did not rebut his lack of seniority or lack of an electrician's credential. He did not disprove or cast doubt on whether Osborne or General Manager Evans properly determined that the tasks that week required a certain number of miners to work during vacation. He did not rebut the assertion that Gateway Eagle Mine had to cut costs due to a poor coal market. He did not rebut Rockwell's testimony that the CBA procedures were properly applied, especially in light of the UMWA's withdrawal of the step-three grievance. Upon weighing this evidence together, I determine that Rockwell's procedure for selecting which miners would work justified its non-selection of Justice for work during the "miners' vacation" week.

I therefore conclude that Rockwell has established by a preponderance of the evidence that it would not have selected Justice to work during the "miners' vacation" week for an unprotected activity alone. Consequently, I dismiss Complainant's discrimination claim.

B. Whether Rockwell Interfered with Protected Rights Under Section 105(c)

1. Assigning Justice to Use the Caged Scoop for Long-Distance Haulage

Justice's interference claim alleges that the caged scoop was unsafe yet Rockwell continued to task him with using it to haul supplies over long distances, despite his complaints. (Compl't Br. 7.) Justice argues that Osborne "continued to express derision for the concern at hearing" about the allegedly hazardous cage and that this attitude helps establish interference. (Compl't Reply 2.) At hearing, although not in the post-hearing briefs, Justice emphasized that Rockwell's decision to retire and not repair his preferred, uncaged #873 scoop amounted to a message that he should not make safety complaints. (Tr. 72:22–73:24.) Justice also emphasized that he operated the caged scoop only "under protest," because he feared retaliation should he disobey his supervisors. (Compl't Reply 1–2.)

Rockwell argues that Justice made his safety complaint in bad faith because he had operated the caged scoop many times over several months. (Resp't Br. 13–15.) Rockwell then makes several additional points. No governmental agency, including MSHA, had cited the factory-installed cage for safety violations, and neither any miner besides Justice nor the union had complained about the cage. (*Id.* at 16–18.) Furthermore, Justice never refused to operate the caged scoop. (*Id.* at 16.) He was not "chilled" because he continued to make safety complaints. (*Id.* at 21.) Justice has no right to say which scoop Rockwell assigns him to use. (*Id.* at 20.) Finally, the decision to retire the uncaged scoop was a purely financial one. (Resp't Reply 4.)

a. Tendency to Interfere with Protected Rights

An interference claim first requires the Complainant to establish that the operator's action tended to interfere with the exercise of protected rights. (*See* discussion *supra* Section IV.C.) Considering the evidence presented, I find it difficult to discern which right Rockwell allegedly chilled. First, Justice complained to management on June 21, 2016, about being assigned the caged scoop for long-distance haulage because he thought it unsafe due to the obstructed view. (Tr. 128:23–129:20.) But at hearing Justice acknowledged that, according to his own journal, he had used the caged scoop to haul items to mine sections several times before June 21, 2016, without incident or complaint. (Tr. 130:19–131:11, 133:3–142:25; Ex. R–1.) Rockwell listened to Justice's complaint and acknowledged the caged scoop's limited visibility but disagreed with Justice's assessment of the safety cage's dangers, as Justice did not work in close proximity to other miners. (Ex. C–5, at 4.) Rockwell continued to assign him to use it for long-distance haulage. (Tr. 309:22–310:7.) Second, Justice reported the alleged hazard of limited visibility to MSHA, which investigated the use of the caged scoop for long-distance haulage and declined to issue a citation—the MSHA Inspector "didn't see no problem with it," Justice said. (Tr. 170:24–171:23.) Yet on July 18, 2019, Justice continued to inform Rockwell that he felt the scoop was dangerous and that he operated the scoop only under protest. (Tr. 148:16–149:20; Ex. C–1 at 153.)

If Justice's argument is that Rockwell chilled his right to say which scoop Rockwell should assign to him, then the argument fails because there is no such right. Rather, a miner has a protected right to make safety complaints to the mine operator or to MSHA. Here, Rockwell did not chill Justice from making safety complaints about the caged scoop because he continued to make them by notifying management that he was operating the caged scoop "under protest." (Tr. 148:16–149:10.) But neither would Rockwell have chilled a reasonable miner by assigning him to the caged scoop or disagreeing with his complaints. Threats, coercion, and isolated interrogation are hallmarks of section 105(c) interference, but none are present here. *See, e.g.*, *Gray*, 27 FMSHRC at 10–12 (determining that threats to a miner are more likely to be interference if they are coercive, isolating, and pertaining to a criminal investigation). Rockwell was simply assigning Justice work tasks and disagreeing with some of his safety complaints, regarding the caged scoop. Rockwell did not disagree with all of his complaints. Justice was concerned an obstructed view would force him to back up the caged scoop exposing him to diesel dust and the higher rates of cancer for those exposed to it. (Tr. 159:1–22.) Justice acknowledged that Gillispie had heard his complaint and taken measures to fix the conditions. (Tr. 160:2–11; Ex. C–1 at 189.) For example, Justice described the August 16, 2016, incident in which supplies were stacked so high on the scoop that his vision was impaired. Gillispie corrected it, which convinces me that Rockwell was not averse to addressing safety complaints as such. (Tr. 158:10–160:11.) Likewise, Javins's statement to MSHA recalls that Justice had a conversation with Gillispie about ventilation problems, whereby Javins instructed Gillispie to check into it and he found an open mandoor that he closed, which fixed the problem. (Ex. C–5, at 4.)

Justice seeks to convince me that Rockwell, by disagreeing with his safety complaints about the caged scoop, would chill safety complaints. But because Rockwell addressed other safety complaints unrelated to the cage, I conclude that Rockwell's continued and reasonable

disagreement with Justice on one issue could not have chilled the right to make safety complaints in general. My determinations that MSHA investigated and found no hazard with the cage (Tr. 170:24–171:23), and the fact that Justice continued to make safety complaints, including some where Rockwell agreed with him, are also significant to my conclusion.

Next, a miner has a right to refuse work if he expresses a good faith, reasonable concern about safety that is not adequately quelled by the operator.[8] But Justice admits that he never refused to operate the caged scoop. He continued to inform his supervisors that he considered the caged scoop unsafe. It appears Justice would like me to believe that Rockwell continuing to assign him to the caged scoop would be chilling a reasonable miner from refusing to operate the caged scoop. I determine that it is more plausible that Rockwell needed Justice to operate the scoop as part of its mining operation. At any mine, operators repeatedly assign the same miner to the same task; it is entirely implausible that a mining operator thereby "chills" all work refusal rights with respect to that task. No reasonable miner would infer such a conclusion. I am not convinced that assigning a task to a miner chills that miner from refusing to perform that task if or when he reasonably deems it dangerous. I conclude that repeated assignments to the caged scoop did not tend to interfere with the right to refuse dangerous tasks.

Justice, in his post-hearing briefs, does not center this interference claim on the fact that Rockwell assigned his preferred scoop to a contractor and then later retired it, cannibalizing it for parts. But I infer from Justice's testimony at hearing that he considers these incidents important to his claim about the scoop, and so I examine the incidents briefly. Justice stated that he understood that Osborne had promised him that he would get "my scoop back" after the contractor had finished using it temporarily. (Tr. 179:8–10, 179:24–25.) Yet Justice acknowledges that Rockwell assigned the uncaged scoop to the contractor to assuage safety concerns in the area where the contractor was working. (Tr. 179:8–24.) Justice then testified that Rockwell removed the #873 uncaged scoop from service but that Gillispie had not given him a reason for its removal, as though one was required. (Tr. 72:15–21.) Justice considered it insulting when Rockwell decided to have him be the miner who would put his favorite scoop into the weed patch, retiring it. (Tr. 72:22–73:24.) While Rockwell repaired the caged scoop #874, it did not expend the money and effort to repair the uncaged scoop that Justice preferred and which he deemed safe. (Tr. 117:8–118:12.) Justice is thus asking me to be convinced that Rockwell would deprive itself of a useful machine for the sole reason of discouraging Justice from complaining about the caged scoop. Rockwell has provided evidence that it would have cost roughly $50,000 to repair the uncaged scoop. (Tr. 194:2–7.) In the earlier statement, Osborne estimated $40,000. (Tr. 219:15–220:7.) Either figure is considerable. I find it implausible that Rockwell would engage in a subtle and potentially very expensive conspiracy to punish a single

[8] Throughout this case, Justice has discussed "work refusal" as part of an interference claim. However, as articulated in *Dolan v. F&E Erection Co.*, the Commission analyzes a work refusal claim under a discrimination theory and requires a showing that the miner expressed a good faith, reasonable concern about safety, and that the operator did not quell these reasonable fears before the miner refused to perform the assigned task. 22 FMSHRC at 177. If the operator takes an adverse action against a miner who reasonably refuses work, a court can grant appropriate relief. Here, it is undisputed that Justice never refused to operate the caged scoop. Thus, Complainant and his counsel failed to articulate a "work refusal" claim under *Dolan*.

miner for his disagreements with his supervisors. Osborne testified that during June and July 2016, the mine was "pinching pennies," and he characterized the potential spending of $50,000 dollars as "devastating." (Tr. 195:10–14, 195:24–196:6.) Justice did not rebut these financial arguments at hearing.

Despite Justice's belief that Rockwell conspired not to repair the #873 scoop, he acknowledged that equipment "in the mining industry . . . [had] breakdowns weekly in a drilling operation and you replace parts." (Tr. 118:9–11.) Thus, removing the #874 scoop for repairs in mid-August would not be an unusual occurrence. (Ex. C–1 at 179–90.) Justice did not introduce convincing evidence to rebut Rockwell's business decision to repair the #874 scoop and not the #873 scoop. Instead, he second-guesses Rockwell's decision nearly a month after the fact.

I determine that Rockwell made a business decision not to repair the #873 uncaged scoop, given the cost. Because I determine that retiring the #873 scoop was a business decision, I conclude that Justice has failed to establish that retiring the scoop would tend to interfere with the exercise of protected rights.

b. "Legitimate and Substantial" Reason Element Under *Franks*

On this element, Justice can prevail only if Rockwell fails to justify the action with a legitimate and substantial reason outweighing the harm to protected rights. (*See* discussion *supra* Section IV.C.) Rockwell offered sufficient evidence to establish a legitimate and substantial reason for retiring the uncaged scoop and retaining the caged one: namely, the cost to fix it and the fact that it had no reason to believe that the caged scoop presented a danger to its operator. Osborne testified that the uncaged scoop had trouble passing emissions tests and that the front and rear brakes had problems. (Tr. 193:12–194:1.) The cost, Osborne estimated, was roughly $40,000 or $50,000 dollars. (Tr. 194:2–7, 219:15–220:7.) The retiring of the uncaged scoop and the diversion of funds to repair the caged one was an action narrowly tailored to the business goals of Rockwell. On the other side of the scale, the harm to protected rights is very slight, for the reasons articulated above: Justice continued to make safety complaints and no reasonable miner would have been discouraged from doing so. I determine that Rockwell's business decision, made in hard economic times, outweighs the "chill" imposed on Justice's right to make safety complaints. Accordingly, I conclude that Rockwell has met its burden on the "legitimate and substantial" element by justifying its action based on a logical business decision.

c. Motivation Element Under *Pepin*

Commissioners Althen and Young would require the Complainant to establish as well that protected activity motivated the operator's action. (*See* discussion *supra* Section IV.C.) But Justice has not provided enough credible evidence to meet this burden. While the evidence below suggests mistrust and personal dislike between Justice and some supervisors, it does not establish that Rockwell made its decisions about the scoops because of animus toward a miner's protected right to make safety complaints.

In fact, as discussed above, Rockwell corrected complaints unrelated to the safety cage. (Tr. 159:1–22, 160:2–11, Tr. 158–59.) Only the most circumstantial evidence could indicate that

Rockwell meant to discourage Justice from making safety complaints by its decision to take the uncaged scoop out of service and assign Justice to caged scoops for long-distance haulage. The same evidence could reasonably be interpreted, as I do, that whatever animus Rockwell might have displayed was irritation at Justice for requesting that the company make various modifications to the caged scoop that MSHA and management deemed unnecessary. Given the evidence presented as a whole, I determine that the most plausible motive to impute to Rockwell for repeatedly assigning Justice to the caged scoop and retiring the #873 uncaged scoop is business necessity. (*See* discussion *supra* Section V.B.1.a.)

As detailed in the discussion of animus in the discrimination claim *supra*, there were several incidents not directly related to the scoop, which I will consider. Although they took place months before Justice's complaints about the caged scoop (Tr. 250:22–251:8), I examine operator motivation in light of the incident on the road (Tr. 113:8–114:7) and the "karate-chop" incident (Tr. 168:25–169:21). I consider as well contemporaneous incidents such as Osborne's poking Justice in the ribs in a "friendly way" on June 29, 2016 (Tr. 66:10–13, 66:25–67:18), and Gillispie telling Justice that he did not like him on June 30, 2016. (Tr. 71:9–72:4.) I also consider an incident that Justice related at hearing, involving Justice and Javins, of which Javins has no recollection: on July 1, 2016, Justice made a safety complaint (about air reversal, unrelated to either the scoop or the tire) to Javins, and Javins told Justice (in Justice's words at hearing) "if you'll just leave us alone, we'll leave you alone." (Tr. 74:14–77:2, 264:7–265:12.) On August 5, 2016, Justice recorded that, when management offered complimentary cake and coffee shortly before testing him for drugs, Justice believed that the company might have laced them with drugs so he would fail his drug test. (Tr. 155:12–158:3.) The fact that Justice believed Rockwell intended to poison him leads me to give less credit to his interpretations of these other events. Because Justice himself was the sole witness for the Complainant, I only have his word, and furthermore the contemporaneous incidents concern mostly attitudes and tone of voice rather than tangible, material actions. "I don't like you" and "leave us alone" may or may not have referred to safety complaints. These are short, ambiguous phrases lacking corroboration, and inferring that they refer to safety complaints requires me to credit Justice's interpretation of them. Given his suspicions of being poisoned, I cannot do this. Justice does not offer sufficient convincing evidence to establish that Rockwell's actions in this claim—decommissioning the uncaged scoop and assigning him to the caged scoop—were motivated by its hostility to the exercise of protected rights. In the discrimination analysis above, I found the Stepp statement (about Rockwell and the union not liking Justice to travel with the inspector (Tr. 295:5–21)) probative to the animus element in the prima facie case. In this interference claim, however, Rockwell has presented sufficient evidence that its decommissioning of the uncaged scoop and its assignment of Justice to the caged scoop were not motivated by animus toward his complaints about the scoop. I determine that neither Rockwell's declining to carry out an expensive repair to an uncaged scoop nor Rockwell's repeated assignment of Justice to operate a caged diesel scoop, deemed safe by MSHA and other miners, indicate a motivation to curb protected rights.

In post-hearing briefs, instead of emphasizing the remarks at Gateway Eagle Mine, Justice appears to hang his hat on an exchange during hearing in which Osborne compared the removal of a factory-installed safety cage from a scoop to the removal of an air conditioning system from a car. (Compl't Br. 6–8; Tr. 219:1–14.) From this, Justice asks me to infer hostility

to the protected right to make safety complaints. I find more plausible the idea that this exchange shows Rockwell considered Justice's proposed modification to be impractical and unsafe. My determination is buttressed by the fact MSHA approved the manufacturer's installation of the safety cage on the scoop and it had never been cited for a safety violation. Here, the operator's reasonable disagreement with a miner's safety complaint does not establish the motivation element under *Pepin*. I conclude that Justice does not establish the motivation element.

d. Conclusion

I conclude that, under both the *Franks* and *Pepin* tests, Justice did not establish a prima facie case in his claim of interference involving the caged diesel scoops.

2. Interrupting Justice While He Discussed an Allegedly Damaged Tire with an MSHA Inspector

Justice argues that Rockwell interfered with protected rights when Gillispie interrupted him as he attempted to make a safety complaint about a tire to MSHA Inspector Tishanel. (Compl't Br. 8.) In ordering him back to work, Justice argues, that Gillispie prevented him from making his complaint and also from exercising his "walkaround" rights as a miners' representative. (*Id.*)

Rockwell argues that Gillispie giving Justice a work order did not prevent Justice from making his complaint to Inspector Tishanel and such an action would not "chill" a reasonable miner and did not chill Justice, who successfully made the complaint. (Resp. Br. 4–5.) Furthermore, Gillispie's action was legitimate because assigning tasks to employees is a necessary part of any organization. (*Id.* at 5.) Finally, Rockwell states that Justice cannot show Gillispie was motivated by animus toward Justice's right to make safety complaints or to accompany the inspector if he so chose. (*Id.*)

a. Tendency to Interfere with Protected Rights

An interference claim first requires the Complainant to establish that the operator's action tended to interfere with the exercise of protected rights. (*See* discussion *supra* Section IV.C.) Justice testified that Gillispie interrupted Justice's conversation with Inspector Tishanel about the tire complaint by telling him to hurry up and haul a load to the section. (Tr. 83:21–84:11.) Justice testified that he told Gillispie that as a miner's representative he had a right to have Tishanel examine Justice's safety concern about the tire. (Tr. 84:14–18.) Gillispie, for his part, did not recall Justice invoking his rights as a miners' representative at that time. (Tr. 322:19–25.) Gillispie testified that he understood that the conversation with Tishanel was over when he tasked Justice with hauling a load and that he probably would not have issued this work order if, say, Tishanel had beckoned him over to discuss the issue. (Tr. 325:17–22.) In contrast, Justice recollects that Inspector Tishanel had to interrupt Gillispie when he gave Justice the order, and that Tishanel had told Gillispie that he needed to wait while he examined the tire. (Tr. 346:11–19.) But during the same line of questioning, Justice does not dispute he had already alerted Tishanel to the tire damage before Gillispie told Justice to go haul a load. (Tr. 346:12–13.)

Furthermore, Gillispie's testimony is that before giving his work order to Justice, he asked whether Justice wished to travel with Inspector Tishanel on his walkaround, and Justice declined. (Tr. 311:3–6.) Although Justice denies this (Tr. 347:16–22), I credit Gillispie's testimony and find that, after voicing his safety concern to Inspector Tishanel, Justice chose not to accompany him on the rest of the "walkaround" because it comports with Justice's other testimony that he would decline to travel with the inspector unless he received compensation. (Tr. 103:16–17.) *See* discussion *inra* Section V.B.3.a.

The test for this element requires analyzing the totality of the circumstances. Most importantly, Justice made his safety complaint to the inspector. Even if Gillispie interrupted the conversation, the character of the interruption is key to the analysis: it was abrupt, brief, and it did not prevent Justice from reporting the alleged hazard, which did not result in a violation. This is in contrast to a deliberate, explicit statement to stop talking to an inspector. My determination that Gillispie suggested Justice could travel with Tishanel also removes the impression from a reasonable miner that Rockwell discouraged the reporting of safety violations. I determine from the totality of the circumstances that no "chilling" of protected rights took place during this encounter. I therefore conclude that Justice failed to establish the first element.

b. Legitimate and Substantial Reason Element Under *Franks*

On this element, Justice can prevail only if Rockwell fails to justify the action with a legitimate and substantial reason outweighing the harm to protected rights. (*See* discussion *supra* Section IV.C.) That Gillispie interrupted Justice or that, alternatively, he told Justice to perform a task after ascertaining that he was finished speaking with the inspector, is an action that has a legitimate and substantial justification: namely, that supervisors must assign tasks to their subordinates. Even if this interruption tended to interfere with the right to speak to an MSHA inspector—and I conclude that it did not—the action in question, a single command to go perform a task, is narrowly tailored to a legitimate and substantial reason. On the other side of the scale, the harm to the right to communicate safety complaints to MSHA inspectors is negligible because Justice successfully conveyed his concern to Tishanel. Rockwell has met its burden in this element, and Justice's claim accordingly fails under *Franks*.

c. Motivation Element Under *Pepin*

Commissioners Althen and Young would require the Complainant to establish as well that protected activity motivated the operator's action. (*See* discussion *supra* Section IV.C.) Justice does not establish this element. Even if I credit Justice's testimony that Inspector Tishanel had to tell Gillispie to pause in his orders while Tishanel examined the tire (Tr. 346:11–19), this does not meet Justice's burden. Such behavior could suggest one of two things: hostility toward protected rights or else Gillispie's sense of the urgency of the task he was assigning. When I combine this ambiguity with the fact that Gillispie said nothing else to indicate his hostility to safety complaints and furthermore suggested to Justice that he could travel with Inspector Tishanel, I determine that the balance tips in favor of Rockwell, and I conclude that Justice does not establish this element. (Tr. 311:3–6.)

d. Conclusion

I conclude that, under both the *Franks* and *Pepin* tests, Justice did not establish a prima facie case in his claim of interference involving his complaint to an inspector about the tire.

3. Justice Not Traveling with MSHA Inspector Tishanel on July 19, 2016

Justice argues that, on July 19, 2019, Rockwell interfered with protected rights because management did not allow him to travel with MSHA Inspector Tishanel on the "walkaround." (Compl't Br. 8.) Although Justice was in the office with the inspector, management summoned another miner, Moses Meade, who was underground, and Justice did not accompany the inspector. (*Id.* at 8–9.)

Rockwell argues that no one ever told Justice he could not accompany Tishanel, and that Justice never asked to accompany Tishanel. (Resp't Br. 6–7.) Furthermore, Rockwell argues that Justice was not interested so much in traveling with the inspector as he was in being the miners' representative who received payment for traveling with Tishanel. (*Id.* at 7.) Rockwell argues, not only does the Mine Act not require the operator to compensate more than one miners' representative during the "walkaround," but the CBA requires that the union-designated representative (Meade) be the one to receive payment. (*Id.*)

a. Tendency to Interfere with Protected Rights

An interference claim first requires the Complainant to establish that the operator's action tended to interfere with the exercise of protected rights. (*See* discussion *supra* Section IV.C.) Justice stated at hearing that he was unable to voice his desire to travel with Inspector Tishanel on his walkaround on July 19, 2016, because Gillispie told him to go haul oil before he could ask whether he could accompany Tishanel. (Tr. 90:2–11.) Justice entered the office to inform his supervisor that he had removed trash from the trailer and it was ready to be loaded. (Tr. 90:2–6.) Justice also knew that Inspector Tishanel was on the premises, and he "was hoping to get to travel." (Tr. 90:6–7.) Management asked for the miners' representative appointed by the union, Moses Meade, to come to the surface to accompany Tishanel. (Tr. 91:8–13.) Justice states that supervisors had told him before that, if he traveled with the inspector, he would not be compensated for his time. (Tr. 91:17–20; Ex. C–6 at 2–3.) Justice stated that he felt he had a deal with management in which they would allow the paid representative to be the union-appointed miners' representative Moses Meade, and that Justice, the non-union miners' representative, would take turns with Meade when it came time for a miners' representative to travel with the inspector. Justice stated that Rockwell did not conform to this arrangement. (Tr. 91:25–92:5.) On July 19, 2019, Justice testified that the union representative Meade was "miles away on a working section, and I was right there front and center." (Tr. 92:5–9.) Justice intended to offer his services as the "walkaround" miners' representative, but, as soon as he walked into the office, "Rondal [Gillispie] was already in the frame of mind that he was going to . . . slap a bunch of orders on me before I could even hardly say a word." (Tr. 92:11–14.) Justice testified that he then "looked at Rex [Osborne] to kind of let him and the inspector know, you know, I'm kind of wanting to travel here." (Tr. 92:15–17.)

Javins testified that supervisors had always instructed him to send the miners' representative appointed by the union to travel with the MSHA inspector, and he was not aware of ever having told Justice that he could not travel with the inspectors. (Tr. 273:1–16.) Furthermore, he does not recall Justice asking him whether he could travel with Inspector Tishanel, although Javins testified that he would have no problem if he did. (Tr. 247:10–12, 19–21.) But Javins's understanding was that Justice did not want to travel unless he could be the miners' representative who was compensated. (Tr. 246:22–247:4.)

The union did not elect Justice as its miners' representative. But Justice continually requested that management "try to make it fair" by "rotating us out or whatever," meaning that Justice and the union representative would alternate "walkaround" duties. (Tr. 103:13–17.) The sticking point for Justice, however, was not the "walkaround" itself but the payment given to the miners' representative: "I was expressing to [Osborne] I'd like to be able to travel and travel with pay." (Tr. 103:16–17.)

Putting aside the fact that only one miners' representative has a right to be compensated for his time during "walkarounds," *see* 30 U.S.C. § 813(f) ("[O]nly one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection"), the more salient fact, by Justice's own admission, is that he did not actually ask anyone if he could accompany the inspector. The fact that none of Rockwell's agents invited him to travel after he cast a significant glance toward Osborne and Tishanel is not the kind of overt coercion, threat, isolated interrogation, or heated argument that can give rise to an interference claim. In short, with respect to the first element of the interference test, I conclude that Rockwell violated no right because Rockwell is not obliged to make Justice's request to travel for him. That Justice did not actually ask to accompany the inspector is clear. (Tr. 92:1–19.) Furthermore, the Mine Act does not guarantee "walkaround" payment to every miners' representative, only to one. Justice may have understood, rightly or wrongly, that he had an arrangement with Rockwell that would allow him to be paid sometimes during a "walkaround," but the evidence of record as a whole does not establish such an arrangement and does not serve as the basis for an interference claim.

b. Legitimate and Substantial Reason Element Under *Franks*

On this element, Justice can prevail only if Rockwell fails to justify the action with a legitimate and substantial reason outweighing the harm to protected rights. (*See* discussion *supra* Section IV.C.) Gillispie had a legitimate and substantial reason for ordering Justice to go haul oil: transporting supplies was Justice's job. On the other side of the scale, the harm to protected rights is negligible. Indeed, Justice did not even ask to travel with the MSHA inspector. I determine that, without Justice speaking up, Rockwell had no way of knowing that Justice wanted to accompany the MSHA inspector. I therefore conclude that Rockwell's not asking Justice to travel was justified by a legitimate and substantial reason.

c. Motivation Element Under *Pepin*

I have determined that Rockwell did not engage in activity tending to interfere with protected rights when it called the union-designated miners' representative to accompany the

inspector and did not ask Justice. Justice has therefore not established a prima facie case for interference. Nevertheless, I will examine the motivation element in the *Pepin* test. Commissioners Althen and Young would require the Complainant to establish additionally that protected activity motivated the operator's action. (*See* discussion *supra* Section IV.C.)

Luke Stepp had made statements to MSHA on August 30, 2016, and the initial draft by the MSHA employee, memorializing the conversation, included a passage to the effect that Rockwell and the union did not like Justice to accompany the inspector because Justice would point out violations to the inspector that had not been previously reported to the mine, hurting Rockwell's reputation. (Tr. 295:5–19.) However, Stepp then crossed out these sentences on his statement and initialed them to indicate he wanted them stricken. (Tr. 295:19–23.) Stepp stated that he had not written the initial statement and did not believe it accurately reflected his views. (Tr. 296:1–22.) Stepp testified at hearing that he did not think the statement was accurate and that it was a misunderstanding on the part of MSHA, which he corrected in writing. (Tr. 295:10–296:4, 297:12–298:13.)

In another incident, a third-shift foreman named Eugene Cook was in a post-inspection conference with Inspector Tishanel, and Justice attended the meeting as well. (Tr. 315:16–21.) Gillispie recalls that Cook told Justice that he did not want him in the meeting, but Gillispie took Cook aside and told him that Justice had a right to attend. (Tr. 315:1–316:5.)

Rockwell had been cited previously in 2015 for failing to list Justice as a miners' representative on the mine's bulletin board. (Tr. 205:15–21.) Osborne testified that he did not know why the name was not displayed and that it could have fallen or been pulled down, given that it had been displayed before. (Tr. 205:22–206:14.)

Taken together, these incidents convince me that Rockwell at least harbored reservations about Justice as a miners' representative. But this element of the *Pepin* test does not require proof of a general animus, but rather demonstration that Rockwell took the action in question *because* of protected activity. Here, Rockwell simply refrained from inviting Justice to travel (without pay) with the inspector. It was not obligated to invite him. (Ex. C–6 at 2–3.) Justice did not ask to travel on that date. Rockwell's sole positive action was when Gillispie told Justice to go haul oil. Given that Justice had entered the office to inform his supervisor that he had completed a task (Tr. 90:2–6), giving Justice another order does not seem to be an extraordinary action indicating a particular state of mind. If Justice had responded to Gillispie's order by asking to travel with the inspector instead, Gillispie's reaction could perhaps have shed light on Rockwell's motivations. But because Justice never made such a request or raised the issue, I determine the evidence is lacking that the motive underlying Gillispie's order was hostility to protected rights. I conclude that Justice did not establish this element by a preponderance of the evidence.

d. Conclusion

I conclude that, under both the *Franks* and *Pepin* tests, Justice did not establish a prima facie case in this claim for interference involving his walkaround rights as a miners' representative.

VI. ORDER

The evidence presented in this case does not establish that Rockwell Mining either discriminated against Complainant Marshall Justice or interfered with his rights under section 105(c) of the Mine Act. Accordingly, Justice's complaint is hereby **DISMISSED**.

Alan G. Paez
Administrative Law Judge

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