

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGE
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November 6, 2019

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of ANTHONY VEGA
Complainant,

v.

SYAR INDUSTRIES, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0223 - DM
MSHA Case No. WE MD 18-02

Mine: Napa Quarry
Mine ID: 04-00023

AMENDED DECISION AND ORDER

Appearances: Abigail G. Daquiz, Esq., Verónica Meléndez, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, CA, for Complainant

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford, and Johnson, LLP, Sacramento, CA, for Respondent

Michael D. Corrigan, Esq., Syar Industries, Inc., Napa, CA, for Respondent

Before: Judge L. Zane Gill

The decision that I issued November 5, 2019, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. 2700.69(c) to read, as set forth below.

I. STATEMENT OF THE CASE

This proceeding arises from section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(2). The Secretary of Labor (MSHA) on behalf of Anthony Vega alleges here that Syar Industries terminated Vega’s employment as a heavy equipment mechanic at Syar Industries’ Napa, California quarry and shop because he engaged in protected activity. Respondent argues that the Secretary has failed to meet his burden to establish a prima facie case because no adverse employment action was taken against Vega and, even if Vega’s termination were deemed adverse employment action, there is no causal nexus between the adverse action and the protected activity.

For the reasons that follow, I find that Vega engaged in section 105(c) protected activities and that his termination was an adverse action. However, I find that there is insufficient evidence to infer a causal nexus between Vega's protected activities and his termination. For this reason, I find that the Secretary has failed to state a prima facie case for a section 105(c)(2) discrimination claim. Even if the Secretary were to have met his prima facie burden, ultimately, I also find that Respondent has provided evidence sufficient to rebut the prima facie case and affirmatively defend its claim that Vega's termination was motivated by unprotected activity.

II. STIPULATIONS

The parties' joint prehearing statement dated October 18, 2018, included the following stipulations:¹

1. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, found at 30 U.S.C. § 801, et seq.
2. Jurisdiction exists because Respondent is, and was at all times relevant to this proceeding, an operator of a mine, as defined in Section 3(b) of the Mine Act, found at 30 C.F.R. Section 803(b), and the products of the subject mine entered into the stream of commerce or the operations thereof affected commerce within the meaning and scope of Section 4 of the Act, found at 30 U.S.C. § 803.
3. The Federal Mine Safety and Health Review Commission and this administrative law judge have jurisdiction over this proceeding, pursuant to Section 105 of the Mine Act.
4. Respondent is and was, at all times relevant to this proceeding, engaged in mining activities at the Napa quarry, including the Napa shop, located in or near Napa, California, Mine ID Number 04-00023.
5. This proceeding was initiated by a timely complaint submitted by Anthony J. Vega under section 105(c) of the Mine Act, known as "the Vega complaint," which complaint may be admitted into evidence for the purpose of establishing its issuance.
6. The penalties proposed by the Secretary in this proceeding will not affect Respondent's ability to continue in business.
7. Mr. Vega began working for Respondent Syar in 1995.
8. Mr. Vega served as the miners' representative for Respondent Syar at the Napa shop from at least January 1, 2017, through the day his employment was terminated.
9. Mr. Vega served as the union steward for Operating Engineers Local from at least January 1, 2017, through the day his employment was terminated

¹ A fourteenth stipulation noting Vega's hourly rate, fringe benefits, and missed workdays has been excluded for relevance.

10. In July, August, and September of 2017, Mr. Vega wrote on the outside of some envelopes containing pay stubs and paychecks located on the reception counter of the Napa quarry offices where employees from both the Napa quarry and Napa shop sign in and out on a daily basis. Mr. Vega wrote the following messages on envelopes of his coworkers: “Thanks for all your good work - RT”; “I know I don’t say this often enough, I am glad you are on board with us. Keep up the good work. - RT”; “There is nothing more pleasing than hearing the sound of your voice over the radio in the morning - RT”; “I see greatness in your future here at Syar - RT”; “Doing a great job Jose - RT”; “if it wasn’t for you and Tyler, I don’t know how I would run this show! - RT.”
11. Respondent Syar terminated Mr. Vega’s employment with the company on September 11, 2017. Respondent Syar cites the following reasons for terminating Mr. Vega’s employment: Mr. Vega’s employment was terminated because it was Respondent’s determination that Mr. Vega falsely impersonated a company manager by writing messages on employee pay envelopes and signing those messages using the manager’s initials. In addition to falsely impersonating a manager, Vega’s employment was terminated because he repeatedly forged a manager’s initials, repeatedly tampered with other employees’ property, harassed at least one employee through inappropriate messages on the employee’s paycheck envelope, and made employment promises by signing a manager’s name to comments that provided feedback on employment performance, all in violation of the law and/or written company policy.
12. Respondent disputes the Vega complaint.
13. Pursuant to a decision by this administrative law judge, after a temporary reinstatement hearing on January 4, 2018, Anthony J. Vega was reinstated to his position as a heavy-duty mechanic at Respondent’s Napa shop on January 15th, 2018, and remains in that position as of the date of this stipulation.

III. FACTUAL AND PROCEDURAL BACKGROUND

Respondent, Syar Industries, operates quarries, sand and gravel operations, asphalt paving plants, redi-mix concrete plants, and recycling facilities in the North San Francisco Bay area of California. The quarry where these events transpired is located in Napa, California. (Ex. C-1, p.v)² At the time of his termination, Anthony Vega had worked for Syar Industries as a heavy equipment mechanic for twenty-two years. (Tr.12:10–13; 208:22–209:1; St. 7) In addition to his mechanic duties (Tr.145:16–19), Vega served as a union steward and miners’ representative. (Tr.44:3–5; 74:8–16; 210:17–211:1; St. 8; St. 9) As part of his union duties,

² For the sake of clarity, the following abbreviations will be used in referencing evidence in the record: “Ex. C” will refer to Complainant Vega’s exhibits; “Ex. R” will refer to Respondent Syar Industry’s exhibits; “Tr.” will refer to the hearing transcript; “St.” will refer to the stipulations included in the parties’ joint prehearing statement dated October 18, 2018; “AR” will refer to any document in the Administrative Record that is not part of Complainant’s exhibits, Respondent’s exhibits, or part of the hearing transcript.

Vega was expected to bring safety issues to management's attention. (Tr.21:14-20; 211:2-9) Vega reported to Ken Calvin, who in turn reported to James Irvine, the purchasing manager, Napa shop supervisor and equipment rolling stock manager. (Tr.170:7-10; 209:5-9)

Vega alleges that he was fired for raising two safety-related issues, the first involving a haul road in a quarry area, the second involving a hose cutting blade that generated smoke in the hose shop. Respondent maintains that the people involved in firing Vega knew nothing about his involvement in either safety issue and that their sole reason for terminating Vega was his repeated and admitted writing on other workers' pay envelopes, which the Respondent regarded as forgery, intentional impersonation of a manager, harassment of a fellow worker, and likely to create unjustified employee expectations.

Vega was terminated on September 11, 2017. A grievance hearing held on November 1, 2017, deadlocked on the issue of reinstatement, triggering a subsequent arbitration hearing on January 15, 2018, at which Vega was reinstated to his prior position.³ (Tr.110:14-17; 193:8-9; 240:19-241:1) Vega and the Secretary filed this discrimination action on November 6, five days after the November 1 grievance hearing. (Tr.193:17-194:2) Vega and the Secretary initiated a temporary reinstatement action (WEST 2018-0135) with this agency after the union grievance process was completed. I conducted a temporary reinstatement hearing on January 4, 2018, and issued a decision on January 11, 2018, preserving Mr. Vega's employment and related status quo issues.⁴ (St. 13) Vega returned to work on January 15, 2018. (Tr.229:23-24)

This merits action was filed on February 12, 2018.⁵ In it, Mr. Vega seeks restoration of lost wages, and the Secretary asks for statutory remedies, items either not awarded or unavailable through the union grievance process. I have determined that neither the restoration of lost wages nor the requested statutory remedies will be awarded. The penalties requested by the Secretary will not be ordered.

³ Vega was reinstated to his position prior to the issuance of this decision. Vega's reinstatement was the result of a union grievance process conducted independently of the hearings for this case and my decision has no effect on Vega's reinstatement as an employee of Syar Industries.

⁴ The Board of Adjustment hearing was postponed four times. (Tr.244:4-7)

⁵ The Secretary filed an Amended Complaint on July 16, 2018.

IV. SUMMARY OF THE FACTS⁶

The court made a record of the parties' testamentary and documentary evidence at a hearing held in Vacaville, California on October 25–26, 2018. The parties filed post-hearing briefs.

A. Protected Activity

Vega claims the Respondent fired him because of two safety-related issues he raised in his capacity as a miners' representative and union steward. (Ex. R–2) The safety issues involved smoke from a chop saw in the hose room and concerns about the quarry haul road. Vega raised these issues about the same time he began writing on the envelopes. (Tr.236:16–24) He claims that the actions he took to bring attention to these safety issues constituted protected activity, and that Respondent retaliated against him by firing him under the pretext of his writing notes on the pay envelopes.⁷ (Ex. R–2)

1. **Smoke In The Hose Room**

The first safety issue Vega claims to have raised with management involved smoke from a chop saw located in a special hose room at the Napa shop where Vega and his co-workers fabricated and repaired hydraulic hoses. (Tr.49:20–22; 50:7–19) The chop saw used to cut these hoses would frequently generate smoke that concerned Vega and Robert Hayes, a fellow heavy equipment mechanic. (Tr.50:21–51:13; 53:4–54:12; 132:14–18; 216:6–217:2; 220:19–25) Vega and Hayes believed that the company should replace the chop saw blade to eliminate this excess smoke, which they worried was dangerous to breathe.⁸ Vega spoke to safety and environmental technician James Kerr about the smoke in the hose shop in January, 2017.⁹ (Tr.126:3–5; 233:6–9) Vega told Kerr he was worried that the hose smoke might be toxic. (Tr.216:6–17; 221:1–7)

⁶ The findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, all consistencies or inconsistencies in their testimony, and their demeanor. Any failure to analyze each witness's testimony is not a failure to have fully considered it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence, and failure to cite specific evidence does not mean it was not considered).

⁷ "I believe [Respondent] [. . .] used this excuse to terminate me rather than fix the safety concerns that I thought I had protections under section 105(c) of the Federal Mine and Safety Act." (Ex. R–2)

⁸ Although there had been a hose saw smoke issue for ten years (Tr.220:19-2), January 2017 was the first time Vega saw hose particles released when cutting. (Tr.221:1-7)

⁹ Kerr was formerly a parts runner until 2012. (Tr.126:6-11) Kerr did safety inspections and miner training. He also conducted weekly safety meetings. (Tr.126:13-20)

Kerr researched the issue on the internet to see if he could determine whether the smoke was toxic and found no answer.¹⁰ (Tr.216:18–22) Vega did not speak to management about the smoke issue for several months. (Tr.233:16–19) In the interim, however, he personally conducted research and found a new blade that he thought the company should buy.

Out of concern that management would intentionally ignore his recommendation, Vega requested that Hayes ask for the new blade.¹¹ (Tr.217:11–22) Although Hayes testified that he considered the purchase of better blades an efficiency issue rather than a safety issue (Tr.61:18–63:2; 66:14–68:10), he agreed that management might ignore or delay responding to a parts request for the blade if it came from Vega. (Tr.51:22–53:3; 64:10–65:9) According to his testimony, Irvine was unaware of Vega’s involvement with this safety complaint. (Tr.198:19–199:4) Hayes submitted the blade request in July 2017. Vega followed up with parts runner Randy Novak about a week later to ask if and when a new blade would be installed. (Tr.217:23–218:7) According to Vega’s testimony, Novak told him that Irvine directed him to research what blades other companies were using to cut their hoses. While Irvine and Novak began to research the issue (Tr. 132:24–133:8; 197:12–198:18), Irvine promptly dealt with the smoke issue by posting a warning sign directing workers to wear a respirator when cutting hoses. (Tr. 65:11–19; 199:5–9)

Vega followed up with Novak again in another week. According to Vega’s testimony, Novak informed him that Irvine put the blade issue on indefinite hold. (Tr.218:24–219:7) Vega assumed that the reported delay in buying the new blade was because of Irvine’s dislike of Vega. (Tr.221:18–24) Vega responded by telling Novak that if Irvine blocked the blade request, he would approach MSHA with a safety complaint. (Tr.219:8–13) Vega surmised that Irvine could have overheard this statement since his conversation with Novak occurred just a few feet outside Irvine’s office door. (Tr.219:14–25)

Vega broached the subject of the new blade once more on August 23, 2017, when he recommended to Kerr that the company should invest in a diamond hose saw blade or improve the ventilation system in the hose room. Kerr then spoke to Irvine about the blade and ventilation information. (Tr.130:15–20; 133:9–134:10) Irvine ultimately purchased the blade Hayes had requested (Tr.62:10–63:2), but the issue had a broader ultimate resolution. Within six months, the entire ventilation system was revamped and replaced. (Tr.55:24–56:4)

¹⁰ Vega testified that he believed his conversation with Kerr would remain anonymous. (Tr.237:3-17) However, Vega did not specifically ask Kerr to keep the conversation private. (Tr.237:18-20)

¹¹ Kerr stated that Vega had requested saw blades in his own name before, and Irvine had never objected to nor expressed any disfavor of Vega’s requests. (Tr.239:5-20) Kerr never sensed that management would be displeased to learn that the request for a new blade came from Vega. (Tr.137:14-138:4)

2. The Haul Road

In July 2017, a miner approached Vega about a near miss incident on the haul road at the Napa quarry. (Tr.211:10–14) In his capacity as a miners’ representative, Vega spoke to Kerr about the incident. (Tr.126:3–5; 128:23–129:10; 136:13–25; 211:10–212:2) Vega asked Kerr about the applicable regulations for road width and proper signage. (Tr.129:5–10; 211:15–212:6) Kerr checked on his computer, but was unable to find answers for Vega. (Tr.129:11–13; 212:3–6) Kerr then spoke to Irvine about the issue. (Tr.129:2–18; 196:16–20) Irvine testified that he did not know Vega had anything to do with the issue at the time. (Tr.196:16–20) Irvine instructed Kerr to inform Rick Tranchina and Jamal Grayson, the Napa Quarry Safety Director, about the haul road issue. (Tr.129:14–130:4; 196:24–197:2) Kerr immediately contacted Grayson to notify him. (Tr.129:19–23; 145:20–146:4)

Vega followed up with Kerr about a week later. (Tr.212:7–11) Kerr told Vega he had spoken to Irvine. Vega claimed that Kerr told him, “James Irvine wanted to know why it was any of [Vega’s] business performing mining duties in the quarry when [he is] the Napa shop’s miners’ rep.” *Id.* Vega testified that he asked Kerr “why he narked [him] out to [Irvine], because he knows [Irvine] doesn’t like [Vega].”¹² (Tr.212:25–213:6) According to Vega, Kerr said nothing more and walked away. (Tr.213:3–6) Kerr testified that he does not recall following up with Vega about the road. (Tr.130:5–15) Tranchina testified that he was alerted to the haul road safety issue on August 10, 2017, from Grayson. (Tr.145:20–22; 159:10–23; 165:12–166:7) Tranchina told Grayson to look into it the same day. (Tr.165:12–22) Grayson learned that operations had ceased in the area of the quarry served by the haul road before this issue was raised and the haul road had already been shut down, except for police traffic. The road was also in compliance with applicable MSHA regulations. (Tr.165:23–166:7)

B. Writing Notes on Pay Envelopes

Pay envelopes were routinely laid out in the Napa quarry shop office for distribution. In the summer of 2017, Vega noticed that some of the pay envelopes lying on the counter waiting to be picked up by other miners had smiley faces and positive notes written on them. (Tr.146:12–147:1; 223:8–18; 236:12–15) These writings inspired him to write his own notes on some of the envelopes as a prank. (Tr. 26:12–22; 223:19–21; 224:1–12)

Tranchina supervised the Napa shop employees whose pay envelopes were involved in Vega’s prank. (Tr.144:13–18; 172:3–10; 223:22–25)¹³ At first, Vega’s messages did not

¹² Vega testified that he believed his conversation with Kerr about the haul road issue would remain anonymous. (Tr.138:5-8; 237:3-17) However, Vega did not specifically ask Kerr to keep the conversation private. (Tr.237:18-20) Kerr stated that Vega had requested saw blades in his own name before, and Irvine had never objected to nor expressed any disfavor of Vega’s requests. (Tr.239:5-20) Kerr never sensed that management would be displeased to learn that the request for a new blade came from Vega. (Tr.137:14-138:4)

¹³ Tranchina did not have authority to supervise or discipline Vega. (Tr.164:20165:4)

indicate who they were from, but eventually he started adding Tranchina's initials, "RT", to the envelopes. (Tr.223:22-25) At least one employee initially believed the notes were from Tranchina. (Tr.45:17-46:1; 57:19-58:17) Some employees thought the notes were funny and out of character for Tranchina. (Tr.46:13-20) Some workers asked Tranchina if the notes were really from him. (Tr.153:18-24) Vega told some of his co-workers that it was he, not Tranchina, who had left notes on the envelopes. One co-worker, going along with the joke, asked Vega why he had not received a note from Tranchina. Vega put a note on his envelope the next day. (Tr.224:13-25)

Tranchina was upset when he became aware of the notes on the pay envelopes. (Tr.160:14-161:1) Particularly, he was concerned that the as yet unidentified japer had attributed the comments to him by using his initials. (Tr.161:2-22) Tranchina hoped that the notes might stop without his intervention (Tr.169:2-4), but this was not the case. When the prank continued, he called a meeting to tell the employees that the notes were inappropriate and had to stop. (Tr.151:10-153:3; 162:1-6; 164:11-19) One of the employees told Tranchina it was Vega who was writing the notes. (Tr.46:21-47:8) According to Tranchina, the miners he spoke with felt that the prank was out of the ordinary. (Tr.153:25-154:5) Although Vega's stunt caused no real problems for the Respondent (Tr.162:7-13), in management's estimation it created a risk of confusion and dissent among the miners. (Tr.163:15-164:5) Tranchina testified that at least one miner whom he supervised was not deserving of the prank praise he was receiving. (Tr.162:14-163:4)

Tranchina met with Ann Pearson, the personnel manager, on August 4, 2017, to discuss the writing on the pay envelopes. (Tr.82:18-25; 89:7-13; 118:1-14; 154:12-20; 160:7-13; 169:5-8) Tranchina testified that he neither liked nor disliked Vega. (Tr.167:15-18) He had never had an unpleasant interaction with Vega prior to the firing and (Tr.167:19-21) he did not speak with Vega or Tom Vella, a witness to the prank, about the envelope writing. (Tr.154:21-155:2) Pearson decided to install a surveillance camera in the office to catch the culprit in the act. (Tr.167:3-7) She authorized Tranchina to buy and install the camera and alerted Irvine of her decision. (Tr.147:9-15; 150:6-15; 176:7-13) Pearson testified, and Irvine confirmed, that she did not tell him what had prompted the installation of the camera. (Tr.176:14-17) Nor did Pearson alert Vega of the installation, hoping to develop proof of his prank to make sure she had correctly identified the culprit. (Tr. 97:6-18; 103:22-104:13) Tranchina spoke to Irvine about the writing incident when the camera was installed, but there is no evidence that he communicated to Irvine that Vega had raised a safety complaint. (Tr.155:11-13; 166:24-167:2)

The camera was functional within two weeks, and more altered envelopes were discovered.¹⁴ (Tr.94:16-19; 150:19-151:2) Vega did not stop writing on the envelopes until early September, 2017, when he heard about the installation of the surveillance camera from a co-worker. (Tr.225:16-226:8; 234:13-235:14) Vega testified that when he realized that management regarded his prank as a serious offense, he regretted that he had not stopped before getting caught. (Tr.226:9-14) Vega also testified that he felt he was treated unfairly by management because he had not received a warning not to write on the envelopes prior to his

¹⁴ For example, Tranchina discovered two more envelopes on September 5, 2017, and exchanged them with unmarked replacements. (Tr.151:6-9; 161:23-25)

dismissal. (Tr.226:15–19) He reinforced this sense of unfairness at the hearing when he testified that he brought this discrimination action to send Syar Industries a message to be more circumspect in its dealings with miners’ representatives in the future. (Tr.243:1–4)

C. The Decision to Fire Vega

Pearson determined it was appropriate to fire Vega as early as August 4, 2017, the day she and Tranchina discussed the note writing for the first time. (Tr.89:7–13; 98:2–5) She considered the note writing a matter of dishonesty. As she saw it, Vega had impersonated a manager. (Tr.110:7–13) Tranchina and Pearson did not discuss any option for Vega other than firing because the violation was so severe in their estimation. (Tr.148:21–149:9) Pearson spoke to Respondent’s CEO, James Syar, to secure his consent. (Tr.75:5–15)¹⁵ CEO Syar testified that he considered what Vega had done an act of forgery.¹⁶ (Tr.77:3–12) To him, it was of significant importance that Vega was handling other people’s paychecks. (Tr.78:25–79:3) He believed it had the potential to mislead the processing banks. (Tr.77:8–12) CEO Syar also spoke with Irvine about terminating Vega. (Tr.76:2–11)

The surveillance camera captured two video clips that identified Vega and Vella in the Napa quarry shop office at the time when Vega wrote on the pay envelopes. (Tr. 95:21–96:11; 100:23–25; 102:9–11; 104:20–105:1; 109:14–18) To bolster the video evidence, Pearson asked Irvine to gather handwriting samples from Vega and Vella. Later, in response to a request by Pearson, Irvine identified a sample of Vega’s writing based on his personal knowledge, having seen Vega’s writing on many occasions over the 10–15 past years. (Tr. 91:2–17; 177:3–19) Pearson conferred with company attorneys and CEO Syar and got approval to hire a handwriting expert to develop evidence to support whatever disciplinary action might be taken. (Tr.78:12–79:3; 92:13–15; 93:21–23; 96:4–11; 104:14–19) The expert was hired in early September, 2017 (Tr.96:7–11), and confirmed Vega’s writing from two anonymous writing samples. (Tr.97:20–98:1; 105:2–9) When Pearson confronted Vega with copies of the pay envelopes, Vega admitted to writing on them. (Tr.227:12–17) Pearson told Vega about the camera and the handwriting expert. (Tr.227:18–25)

Vega was terminated on September 11, 2017, (St. 11) and Vella was disciplined with one day off without pay and a written warning for witnessing and failing to report Vega’s prank. (Tr. 87:14–18; 102:6–15; 108:20–109:1–13) According to the parties’ joint stipulations, Respondent terminated Vega because: (1) it determined that he falsely impersonated a company manager by writing messages on employee pay envelopes and signing the messages using the manager’s initials; and, (2) because Vega repeatedly forged a manager’s initials, repeatedly tampered with other employees’ property, harassed at least one employee through inappropriate messages on the employee’s paycheck envelope, and made employment promises by signing a manager’s name to comments that provided feedback on employment performance, all in violation of

¹⁵ Neither Tranchina nor Irvine advised Pearson or CEO Syar to fire Vega. (Tr.165:5-11; 199:13-23)

¹⁶ The termination notice did not mention forgery. (Tr.99:11-25)

written company policy. (St. 11) The stated reason for Vega’s termination was for “falsely impersonating a company manager by writing messages.”¹⁷ (Tr.100:1–5; 114:22–115:13)

D. The Grievance Process

The labor agreement between Respondent and the Operating Engineers’ Local Union, No. 3 (of which Vega was a member) provided a grievance and arbitration framework to resolve disputes between the Respondent and its union employees. (Ex. C–3, p.33) The Union invoked the labor agreement to challenge Vega’s termination. (Tr.41:22–42:2) The first step in the grievance resolution process was a Board of Adjustment (BoA) hearing, which was held on November 1, 2017. (Tr.34:8–12; 240:19–241:6) At the hearing, Vega stated he thought the termination was ridiculously harsh for such a minor offense. (Tr.228:1–7) The BoA deadlocked on the issue of whether Vega had been terminated in violation of the labor agreement. (Tr. 35:1–5; 111:4–7; 179:14–20; 180:2–19) No mention of safety issues or protected activity was made in the November 1, 2017 BoA hearing. (Tr.193:10–16)

The labor agreement stipulated that Vega’s case proceed to arbitration to resolve the deadlock. (Tr.180:23–181:1) The arbitration was conducted on January 15, 2018, (Tr.229:19–230:2), after the temporary reinstatement hearing of January 4, 2018. It resulted in Vega’s reinstatement to his former position (Tr.229:25–230:2), but it did not restore his lost wages and benefits. (Tr.42:9–13; 229:25–230:2; 250:19–25; St. 13) Vega filed this discrimination complaint five days after the BoA hearing failed to reinstate him. (Tr.111:4–7) This was the first time Vega formally raised the issue of his protected activity. (Tr.241:12–17)

V. ANALYSIS OF THE ISSUES

Although the basic factual backgrounds of both protected events are outlined above to establish a storyline, the following includes contested factual details along with analysis and findings. It is fundamental that the ALJ, as trier-of-fact, assess the credibility of all witnesses and determine the weight their testimony deserves. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (“[A] Judge’s credibility resolutions cannot be overturned lightly.”).

A. Prima Facie Case

Under section 105(c)(1) of the Mine Act, a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he “has filed or made a complaint under or related to this Chapter, including a complaint notifying the operator [...] of an alleged danger or safety or health violation.” 30 U.S.C. § 815(c). To establish a prima facie case of discrimination under section 105(c)(1), Vega is required to show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of was motivated, at least in part, by that activity.¹⁷ *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of*

¹⁷ The legitimacy of the *Pasula-Robinette* framework was challenged in *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). In *Riordan*, the respondent mine operator argued that the *Pasula-Robinette* test was no longer appropriate

Labor on behalf of Robinette v. United Castle Coal, Co., 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981).

B. Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Vega must show that he engaged in protected activity.¹⁸ *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Protected activity under the Act has been found to include making a complaint to an operator or its agent of “an alleged danger or safety or health violation,” *see Sec'y of Labor on behalf of Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ), and reporting potential safety or health hazards to MSHA or an MSHA inspector, *see Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206 (Feb. 2010) (ALJ). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

I find that Vega engaged in two instances of protected activity in relative temporal proximity to his termination on September 11, 2017. Respondent does not dispute that Vega's actions regarding the quarry road and the hose room issues can be seen as protected activity under Section 105(c) of the Mine Act. Even if Respondent did dispute this, the fact that Vega was involved in the hose room and haul road issues either in his capacity as a miner's representative or shop steward – or merely as an employee – is sufficient to bring the issues

because the Supreme Court invalidated the burden shifting framework in the ADEA and Title VII contexts. *Id.* at 1919. The Commission, citing the legislative history and intent of the Mine Act, found that the burden shifting framework of the *Pasula-Robinette* test is still applicable and appropriate. “Congress envisioned such a burden shifting framework when drafting the discrimination protections of section 105(c)(1) [...] Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission's reasoning in *Pasula* was sound, and we decline to overturn it.” *Id.* at 1921.

¹⁸ When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1323 (June 2016) (citing *Pasula*, 2 FMSHRC at 2789). In determining whether an activity is to be considered protected activity, the legislative history makes clear that Congress intended for courts to liberally construe the Act. Congress stated that “[t]he Committee intends that the scope of the protected activities be broadly interpreted by the Secretary” and that “[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive.” S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). It further stated that section 105(c) was to be construed “expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* at 36.

under the umbra of protected activity covered by section 105(c)(2). The evidence supports the conclusion that the hose room and quarry road issues are properly considered safety concerns and that Vega played a role in both events. As such, the requirement for the protected activity portion of the prima facie analysis is satisfied.

C. Motivation of Adverse Action

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Respondent took adverse action against Vega that was motivated, at least in part, by Vega's protected activity. *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be alternatively framed as two sub-questions: (1) was there was an adverse employment action; and, if so, (2) was there was a motivational nexus, at least in part, between the adverse action and the Complainant's protected activity? See *United Mine Workers of America (UMWA), on behalf of Mark A Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2096 (Aug. 2014) (Cohen and Young) (decisions where Commission first held that a miner engaged in protected activity, then determined that the complained of action, a termination, was an adverse employment action, before addressing the nexus).

1. Adverse Employment Action

The Complainant must first establish that an adverse employment action occurred before the issue of nexus is reached. Complainant has satisfied this requirement. Termination is the ultimate adverse employment action. This is consistent with the legislative history of the Mine Act. In keeping with the Congressional intent, the term "adverse action" has been broadly defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010).

2. Motivation

The Secretary and Vega must next prove that the adverse action was motivated, at least in part, by the protected activity. *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir.1981). The Commission has noted that "direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id.* The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2511.

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the 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. The ALJ may not impose his own business judgment as to an operator's actions. *Chacon*, 3 FMSHRC at 2516–17. Additionally, the ALJ may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sept. 2001).

In *Bradley v. Belva Coal Company*, with regard to the issue of motivation, the Commission found that “circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510–12). Furthermore, the Commission has held that “inferences drawn by judges are ‘permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

a. Coincidence in Time

The Commission has stated that “[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer’s motive [...]” *Chacon*, 3 FMSHRC at 2511. Also, “[W]e ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Vega’s protected activity occurred at roughly the same time as his writing notes on the pay envelopes in the Napa quarry shop office. (Tr.223:10–21; 225:16–17; 232:19–22; and 236:12–20) Vega’s involvement in the quarry haul road issue occurred in July 2017, and although he first became involved in the hose room ventilation issue in early 2017, he did not return to the topic until August 2017. (Tr.211:10–21; 216:6–217:6; 236:6–11, 236:21–24) Vega learned that Respondent had installed a surveillance camera in August or September 2017 and believed that management suspected he had been writing on the pay envelopes. (Tr.225:16–226:2) Syar management, specifically Tranchina and Pearson, discovered Vega was the individual who was writing on pay envelopes in August 2017 (Tr.89:7–13; 118:1–14), and terminated his employment on September 11, 2017. (Tr.226:24–227:3)

I find that Vega’s claim of nexus between his protected activity and termination is implausible. Instead of buttressing the notion that Respondent’s decision to fire Vega was retaliatory, the close proximity in time between Vega’s discovery that management suspected he was carrying out the prank, his involvement with the two incidents of protected activity, and his termination suggest that the claim of nexus between the protected activity and the termination was a calculated response intended to defend Vega from Respondent’s decision to fire him for writing on the envelopes. At a minimum, the temporal proximity of these events does not bolster the claim that Vega’s termination was retaliatory or motivated by his protected activity.

b. Management Had No Knowledge of the Protected Activity

The Commission has held that “an operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case.” *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be “proved by circumstantial evidence and reasonable inferences.” *Id.* The commission has also held that “discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).” *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that “a supervisor’s knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner’s employment.” *Sec’y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner’s direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that “[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.”).

The issue of whether Respondent’s management had knowledge of Vega’s protected activity at the time of his termination can be resolved by evaluating the weight of the evidence and considering the compelling force of each side’s arguments. When the evidence in the record is considered and weighed, it is apparent that the evidence supporting the Respondent’s claim that its management knew nothing about Vega’s involvement in protected activity when the decision was made to terminate him is significantly better supported, more cohesive, and has more convincing force than the evidence the Secretary and Vega brought to the record. I am not convinced that Respondent’s management knew of Vega’s involvement with the protected activity at the time of his termination.

Vega testified that he was not on good terms with his supervisors in general and Irvine in particular because: (1) he had once notified management in his capacity as a union representative that untrained laborers had operated skip loaders without being qualified; and, (2) he had initiated a grievance after a shoulder injury. (Tr.52:8–19; 64:10–25; 213:7–215:22; 173:8–174:8; 213:17–215:22, 237:3–14; 244:1–23)¹⁹ The Secretary and Vega ask me to find that management had to know about Vega’s involvement in the hose room and quarry haul road issues because: (1) Tranchina and Irvine met regularly to discuss work issues (primarily purchase issues) (Tr.83:15–21; 84:1–7; 144:19–24; 154:3–6; 172:3–10); (2) CEO Syar met periodically with supervisors, including Tranchina and Irvine (Tr.72:25–73:15; 181:20–182:2); and, (3) Pearson had met with Irvine from time-to-time to discuss common work issues.^{20 21} (Tr.83:15–21) In broader context, Irvine testified that he did not meet

¹⁹ Vega had a shoulder injury. He was on part time work for a while. He had made plans for three days off, but they released him to full duty in the middle of the week. He asked if he could go ahead with his three-day plans. He went ahead, but the company treated it as AWOL. He grieved the decision to give him two days off. (Tr.213:22-214:19)

²⁰ In regard to the haul road issue, there is conflicting evidence regarding whether Vega wanted his involvement kept confidential. Vega claimed that he told Kerr that he

regularly with CEO Syar (Tr.181:20–182:2) and he only met with Tranchina when Tranchina “really need[ed]” to purchase an item. (Tr.172:3–10) He described his interactions with other managers as limited to the request and question at hand, i.e., purchasing a camera or providing his mechanics’ requisitions (Tr.176:3–178:2) — nothing else was discussed. *Id.* To underscore this, Irvine testified that he was not even consulted when human resources considered terminating one of his three skilled mechanics. (Tr.71:10–16; 112:23–113:2; 202:14–16)²²

The evidence that might show management’s knowledge of the protected activity relies solely on Vega’s testimony, lacks non-hearsay corroboration, is unreliable, and is not entitled to convincing probative weight. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998) (hearsay evidence is admissible but should be evaluated by the judge to determine whether it is reliable and entitled to any probative weight). Vega testified that he dealt with Kerr and Novak regarding the hose room smoke issue and with Kerr only regarding the haul road issue. Novak was not called as a witness, and although hearsay is admissible if material and relevant, nothing attributed to him can be corroborated. *Cf. Hayes v. Dept. of the Navy*, 727 F.2d 1535, 1538 (Fed.Cir.1984) (footnote omitted) (hearsay testimony may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence).

On balance, the evidence does not support the argument that Respondent’s management knew Vega was involved in the protected activity prior to his termination. Vega testified that he raised the safety concern regarding the hose room with Kerr, but he did not offer anything to

wanted his role in the issue kept quiet (Tr.138:5-8), but, he also testified that he did not tell Kerr to keep his name confidential. (Tr.223:3-7) Vega testified further that he assumed and believed that his comments to Kerr would be anonymous since during a safety meeting, management instructed miners to go to Vega or Kerr if they wanted to keep their complaint anonymous. (Tr.237:3-17) Kerr could have substantiated parts of Vega’s story, but his testimony left Vega’s version of the story uncorroborated.

²¹ The Secretary also argues that Irvine must have known about Vega’s involvement in the hose room smoke issue in August 2017 because a complaint could have only come from one of three mechanics making hoses (Tr.197:12-198:24) and/or that given Irvine’s open door policy for safety and stated care for safety, it was plausible that Novak told Irvine about Vega’s MSHA comments (Tr.192:3-5; 195:23-196:15), because Novak did talk to Irvine about the request for the diamond blade. (Tr.197:12-198:9; 218:14-16) This plausibility does not convince me that Respondent’s management in general, and Irvine in particular could have or did know about Vega’s protected activity prior to his termination.

²² The Secretary argues that I should infer Pearson and Irvine had knowledge of Vega’s protected activity and acted against Vega based on that knowledge because skilled mechanics were scarce and the Respondent would not act against its own interest and fire a person with Vega’s skills unless it had a retaliatory motive. (AR: Secretary’s Brief, p.16) However, it is equally if not more plausible that Respondent acted as it did (using the Secretary’s logic) because it felt keeping him on staff despite his forgery stunt was of even greater importance.

support the idea that Kerr told Irvine about his involvement. (Tr.238:25–239:4) Irvine testified that he heard from Novak about the blade purchase request in August 2017, and that he heard about the smoke issue from Kerr at the same time. (Tr.197:12–198:24) But, Kerr testified that he did not disclose Vega’s involvement in either protected activity to Irvine or any other member of management prior to Vega’s termination and stated that when people made safety complaints to him, he assumed they wanted to remain anonymous. (Tr.127:24–128:2; 142:8–12; 198:19–24) Consistent with this, Vega asked Kerr to keep his concerns about the hose room and the haul road confidential. (Tr. 129:14–18, 138:5–8; 142:8–17) Novak did not appear as a witness to confirm or deny any of the evidence attributed to him.

Irvine testified that prior to Vega’s termination, he was not aware that Vega was involved in discussions about replacing the hose shop blade. (Tr.198:19–24) There is no evidence in the record showing that Hayes ever informed Irvine about Vega’s involvement with the hose room issue. When Hayes submitted the saw blade request, it did not have Vega’s name associated with it. (Tr.238:6–11) Pearson testified that she did not discuss Vega raising either safety concern with Mr. Irvine. (Tr.105:10–22, 110:1–6) Napa Quarry Manager Rick Tranchina testified that neither Grayson nor Irvine ever communicated to him that Vega had raised either the quarry haul road or hose room safety concern. (Tr.166:20–25, 167:1–2) Irvine also testified that at the time he obtained the writing samples, he did not know why they were requested and Pearson and Irvine did not discuss any safety issues when Irvine identified Vega’s writing. (Tr.105:10–22; 178:14–20)

Vega, in his capacity as the Napa shop safety coordinator, first heard of the haul road issue from another miner and passed the information along to Kerr. (Ex. R–2) Vega asked Kerr to investigate and pass his findings on to Jamal Grayson. *Id.* Grayson never mentioned Vega’s name in connection with the haul road complaint. (Tr.166:20–23) Kerr told Vega that he was unsuccessful in his search for haul road regulations and had spoken with Irvine about the issue. (Ex. R–2; Tr.129:2–18; 196:16–20) When Kerr reported the issue about the haul road to Irvine, he said it came from a miner and did not name Vega (Tr.129:14–18), again consistent with Vega’s request for anonymity. Irvine credibly denied knowledge of Vega’s involvement. (Tr.196:16–20) Although there is conflicting evidence about whether Vega wanted to remain anonymous during this process, Irvine’s denial that he knew about Vega’s role in this event is consistent with the preponderant evidence that Vega wanted to remain anonymous. Irvine testified that he had no conversation with anyone at Syar regarding the quarry haul road issue after it was initially raised in July 2017, and until November 6 or 7, 2017, when he received Vega’s MSHA Discrimination Report. (Tr.197:3–8)

The evidence convincingly shows that Irvine had no role or responsibility in making the decision to terminate Vega in September 2017, nor did Irvine recommend that CEO Syar or Pearson take such action. (Tr.199:13–25, 105:10–22) Further, Respondent’s agents who made the decision to terminate Vega also denied having knowledge that Vega had made complaints about safety issues that could be considered protected activity. Both CEO Syar and Pearson denied any knowledge of the two safety concerns listed in Vega’s MSHA discrimination report when they made the decision to fire him. (Tr.80:6–13; 110:1–13) Pearson had only been at the job about nine months. (Tr.123:22–124:6) She testified that she was not aware of any animosity between Vega and management and (Tr.123:13–124:6) had no substantial contact with Vega

prior to learning about the envelope writing incident. (Tr.105:23–25) The first time she heard Vega’s name was in the context of this controversy when she saw Vega’s MSHA complaint (Ex. R–2) on November 6, 2017, a week after the union grievance hearing, and almost two months after Vega’s termination. (Tr.111:8–12; 122:20–123:2) This is consistent with Vega’s testimony that the first time he formally raised a claim of protected activity was in his MSHA discrimination complaint. (Tr.241:12–17) CEO Syar spoke with Irvine about terminating Vega after learning about the note writing situation and denied knowledge of either safety issue prior to Vega’s termination. (Tr.76:2–11)

The Secretary essentially argues that Pearson, Irvine, and Tranchina (and presumably CEO Syar) lied under oath that they had no knowledge of Vega’s protected activity until after his September 11, 2017 termination, indeed after the November 6, 2017 grievance hearing. To support this argument, the Secretary asks the court to find that Kerr lied when he testified that he never revealed Vega’s involvement in the hose room and quarry haul road issues. (Tr.127:24–128:5; 142:8–17) I am urged to credit Vega’s otherwise uncorroborated testimony over Kerr’s because Kerr lived in a house belonging to Syar Industries (Tr.127:24–128:5; 135:2–23; 142:8–17;), which perforce would cause him to lie to contradict Vega’s belief that management must have known about his involvement with the hose room and quarry haul road issues. Furthermore, Vega’s testimony about management having knowledge of his protected activity is heavily dependent on corroboration from Novak, a person who was not called as a witness. Although I can admit and consider hearsay evidence for its reliability and probative value, nothing in this scenario prompts me to credit those portions of Vega’s testimony that rely for corroboration on statements or conclusions attributed to Novak or rule on a finding that Kerr lied under oath. *See Sec’y v. REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998).

The Secretary’s entire case on the issue of Respondent’s knowledge of the protected activity is based on Vega’s testimony. As a matter of simple credibility assessment, Vega’s claims are less convincing than Pearson’s, CEO Syar’s, and Irvine’s. I find that Respondent’s managers and executive had no knowledge of Vega’s protected activity until after he was terminated, two grievance hearings had taken place, and Vega had submitted his MSHA discrimination claim. Vega’s speculation that Syar management knew he had engaged in the two cited instances of protected activity and fired him for that protected activity (which is different than Syar management allegedly suspecting that Vega was responsible for tampering with pay envelopes) does not amount to substantial evidence. The testimony of CEO Syar and Pearson, as well as that of each member of Syar management in this case, is credible and consistent. *See, e.g., Robinette, supra*, 3 FMSHRC at 813. As set out above, Syar management had no knowledge of Vega’s protected activity when it terminated Vega for his repeated misconduct.

c. Hostility or Animus Toward the Protected Activity

Examples of operator animus or hostility related to protected activity run the gamut from the relatively minor (less desirable work schedules) to the flagrant and criminal (severe verbal harassment, 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 (finding that the operator’s “angry remarks to Chacon about the MSHA complaints . . . display a specific hostility towards Chacon’s protected activity”).

Vega testified that Irvine had such a negative opinion of him that anything he might say or that was attributed to him would be rejected out-of-hand. (Tr.221:22–24) Vega’s perception of hostility between himself and Irvine falls into two time periods, before the protected activity and after the termination. For his part, Irvine testified that he felt no hostility towards Vega during the eight years they worked together (Tr.230:3–10) excepting the event arising from the grievance process after the termination. The record does not support the allegation that management acted with hostility toward Vega during the period of the protected activity. During Vega’s termination meeting on September 11, 2017, Vega said nothing about a link between his protected activity and the firing. (Tr.226:24–227:25) There was no mention of protected activity at either the initial grievance hearing (BoA) on November 1, 2017, or the follow-up arbitration hearing. (Tr.33:10–34:25; 41:4–7; 110:14–111:3; 193:10–16; 224:7–11) The first time the alleged protected activity was mentioned was in the MSHA discrimination complaint. (Ex. R–2; Tr.241:12–17)

Any hostility between Vega and Irvine that Vega repeatedly mentioned seems more likely to relate to the prior grievance over Vega’s shoulder injury, the related dispute about being able to take time off after being released back to unrestricted work, the dispute about whether other workers not covered by Vega’s union’s rules being allowed to do jobs that Vega thought he should be allowed to do, and the resulting grievance process. (Tr.52:8–53:3; 64:16–25; 138:9–139:20; 213:22–214:16; 215:9–22) However, Kerr testified that Vega had spoken about Irvine’s animosity toward him, but that Kerr was not personally aware of any animosity between Vega and any member of management over issues relating to Vega’s shoulder injury. (Tr.123:18–21) Hayes testified that although Vega talked about ill will between himself and Irvine, Hayes believed the animosity originated from a territory dispute with a rival union, not the shoulder injury episode or a disagreement over safety concerns. (Tr.64:16–65:9) If either of these testimonies is true, the ill will does not arise from or relate to the protected activity in this case. Moreover, this purported animosity seems to be a construct in Vega’s mind. There is no evidence showing that it was shared by Irvine or other members of Respondent’s management. (Tr.213:17–21; 214:17–215:2; 221:18–24) From Irvine’s perspective, he testified that he had worked with Vega for eight years and had never been aggressive or threatening toward him. (Tr.230:3–10) Furthermore, Irvine had no input in the firing decision and denied knowing anything about Vega’s alleged safety complaints.²³

As discussed above, there is no evidence showing that Irvine or any other member of Syar management displayed or expressed animus or hostility toward Vega for the protected activity he alleges in his MSHA Discrimination Report. (Tr.239:12–20) Vega asserted that because of their historical animosity, Irvine delayed dealing with the hose room issue. (Tr.218:24–219:7; 221:18–24) The evidence does not support this belief. Vega had requested saw blades in his own name before. Irvine never objected or expressed any disfavor. (Tr.239:5–20) Not only did Respondent purchase the requested new blade, (Tr.62:10–63:2) but Irvine directed Kerr to immediately post a warning sign in the hose room (Tr.65:11–19; 132:24–133:8; 204:3–11) when he learned about the smoke issue from Kerr and Novak. (Tr.54:13–55:2;

²³ Irvine played a part in developing the evidence that supported the termination (Tr. 91:2-17; 177:3-178:20), and appears to have become the focus of Vega’s belief that management was aware of his protected activity.

197:12–198:18) The process of learning about, researching solutions (Tr.197:12–198:5; 200:7–19), identifying the course of action, and remedying the hose room issue resulted in the installation of a new ventilation system as well as a better chop saw blade within six months. (Tr.54:13–56:4; 205:14–206:22) The timing of this series of events belies the claim that Irvine put an “indefinite hold” on anything related to it. Further, Irvine testified that it was not unusual for a parts request to take some time while research into options was done (Tr.200:7–19) and stated that a \$400 saw blade was insignificant compared to the hundreds of thousands of dollars Respondent spent for parts each month. (Tr.201:6–17)

As for the quarry haul road, Tranchina, Irvine, and Pearson all testified that they did not know Vega had raised a concern about the quarry road. In support of this, Kerr testified that he did not disclose Vega’s identity when he passed the haul road information on to Grayson. (Tr.123:3–17; 142:1–7; 166:20–167:2; 196:16–23) The evidence of Irvine’s purported hostile comment questioning what business it was of Vega’s to be raising questions about the quarry haul road comes only from Vega and is otherwise uncorroborated. (Tr.212:25–213:6) It also appears that Vega’s belief that there was ill will with Irvine stemming from the earlier grievance dispute prompted him to vacillate between wanting his involvement in the hose room and haul road issues kept confidential and at the same time claiming that he did not expect anonymity. (Tr.223:3–7; 233:24–234:10; 236:21–237:17) Vega also testified that he experienced no change in work schedule, reduction in wages or benefits, or denial of any training or advancement opportunity after raising the quarry haul road issue in July or August 2017, or the hose room issue in January 2017 or August 2017. (Tr.240:11–18)

The Secretary provided evidence of hostility from Irvine toward Vega after Vega’s termination. Irvine testified that he became upset about the hostile and confrontational tone of the grievance hearings. (Tr.12:19–183:14; 192:6–9) He felt that he had been maligned by Vega in the process. (Tr.184:16–186:12; 192:3–5; 194:21–195:3) Then, when Vega filed his MSHA complaint in this matter, he accused Irvine of singling him out because of his involvement in the quarry haul road and the hose shop issues. (Tr. 191:4–192:2) In reaction to this, Irvine asked Pearson and the company attorney, Mike Corrigan, about getting a restraining order against Vega. Pearson and Corrigan advised Irvine against taking any action, and he did nothing further. (Tr.186:13–187:20)

I understand that the focus of both the grievance hearing and the follow-up arbitration hearing was whether the terms of the labor agreement had been violated by Vega’s termination, and the precise issue of whether protected activity occurred was not essential to the outcome. However, the failure to even mention Vega’s actions as being potentially protected under the Mine Act dovetails with Respondent’s claim that its management decision makers had no knowledge of Vega’s involvement in either the hose room or the quarry road incidents prior to his termination.

d. Disparate Treatment

When attempting to show disparate treatment as an indicator of the operator’s discriminatory motive, “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 324 (citing *Chacon*, *supra*, 3 FMSHRC at 2512). Evidence of four other recent disciplinary actions was produced.

The evidence that Syar employee Birrell received a written warning for failing to correctly install a gas cylinder gauge cap (Tr.87:23–88:3) and the evidence that an employee (Byron) received a written warning for disclosing confidential security vehicle information is not sufficiently similar to Vega’s case to be persuasive of disparate treatment. (Ex. C–11, p.7; page 7; Tr.88:4–11) I also do not find evidence of Vella’s actions and resulting punishment persuasive. Respondent disciplined Vella with one day off without pay and a written warning for witnessing Vega write on the envelopes and not reporting it. (Tr. 87:14–18; 102:6–15; 108:20–109:1–23) Prior to the paycheck envelope incident, Vella had been disciplined in January 2016 for damaging equipment. (Tr.87:2–6) While related to Vega’s case, Vella’s case is not sufficiently comparable. As Vella was punished for merely witnessing Vega’s actions and failing to report them, it is consistent that he would receive a lesser punishment.

Perhaps most relevant to the case at hand is the example given of Javier Lopez, a long-time Syar employee with a history of receiving other discipline. (Tr.114:12–21) Lopez was fired in 2017 for dishonest acts, i.e., taking excessive work breaks and purposely taking too long to complete assignments in order to claim the extra time on his timecards. (Exhibit 8; Tr.106:25–107:176) As in this case, Pearson conducted an extensive investigation of Lopez prior to his termination, including GPS tracking. Also, Pearson did not talk to Lopez during her investigation. Her purpose was to gather information in order to catch him in the act and terminate his employment. (Tr.107:18–108:3)

To Pearson, the false statements Vega left on the envelopes had the potential of causing the company grief if they tried to fire someone. She speculated that the union might use the false positive statements on the envelopes as evidence of praise. (Tr.118:23–119:16) Pearson testified that she would have still recommended Vega’s firing had she known about his safety concerns. (Tr.110:1–13) CEO Syar was aware that Vega was a union steward and a miners’ representative. (Tr.73:16–20; 74:8–16) Nonetheless, he also stated that he would have authorized the firing even had he known about the safety complaints. (Tr.80:14–22)

Given the previous examples and testimony, the record of Respondent’s prior disciplinary actions does not support the claim that Vega was singled out or treated with disproportionate severity. There is no circumstantial nexus between Vega’s protected activity and the discipline he received in response to the note writing stunt. My task is not to second guess Respondent’s business judgement. Other decision makers faced with the same circumstances may well have chosen to impose less severe discipline. What is relevant here is whether the chosen course was disproportionate when compared to other disciplinary actions taken by this employer. Respondent’s disciplinary response to Vega’s writing on the pay envelopes is reasonably proportional to prior disciplinary instances.

e. Vega's Belief That His Termination Was Motivated by Ill Will Toward His Protected Activity Is Not Credible

Vega's characterization of the nature of the hose room and haul road issues as safety concerns and his theory about Respondent's reaction to those issues is not convincing. Additionally, Vega's testimony is subject to question because it reveals little more than his belief that management was hostile to him. (Tr.221:18–24) Respondent's agents did nothing prior to the termination that supports Vega's belief that the ill will he perceived had anything to do with his protected activity. Indeed, a preponderance of evidence shows that Syar's management reacted to the two event allegations promptly and appropriately, given their understanding of the circumstances.

Vega attributed to Kerr and Novak much of the evidence about his involvement in the protected activity and management's supposed knowledge of it. But, Kerr did not confirm Vega's claims sufficiently to render them convincing in the context suggested by Vega (Tr.123:18–21), and because Novak was not made available as a witness, statements attributed to him by Vega (Tr.219:8–25) carry little weight. What is left is Vega's belief that management harbored ill will toward him. However, even this suggestion is attenuated by the fact that it appears to refer to events arising from a grievance involving an injury to his shoulder years before and not the two incidents of protected activity in this case. (Tr.52:8–19; 64:19–25; 213:7–215:22; 173:8–174:8; 213:22–215:8) Given the lapse of years between Vega's shoulder injury and this controversy, it is at most unconvincing and borders on irrelevant. If there were evidence showing ill will, and the source of the ill will was something other than unrelated historical events, the ill will mentioned by Hayes, Vega, and Kerr might carry more weight. Without such a reshuffling of the factual deck, Vega's belief that ill will motivated his termination is simply not credible enough to have convincing weight.

To summarize, the Secretary has introduced no evidence showing (1) that Respondent or its management had knowledge of Vega's protected activity; (2) that management demonstrated hostility or animus towards Vega as a result of his protected activity; (3) that any reasonable inference of discriminatory motive can be drawn from the coincidence in time between Vega's protected activity and his terminated for misconduct; or (4) that management engaged in disparate treatment of Vega when it terminated him for his misconduct. The Secretary has thus failed to prove the prima facie case of discrimination by a preponderance of the evidence. *Pasula, supra*, 2 FMSHRC at 2799; *Turner v. National Cement Company of California*, 33 FMSHRC 1059, 1065–1066 (May 2011).

D. Respondent's Affirmative Defense and Pretext

A thorough review of the evidence as applied to relevant legal precepts leads me to conclude that Vega's claims fail. Vega engaged in section 105(c) protected activities, and his termination was an adverse action. However, there was insufficient evidence to infer or find a causal nexus between Vega's protected activities and his termination. I conclude that Vega and the Secretary have failed to prove a prima facie case of section 105(c)(2) discrimination. Even if Vega had met the prima facie burden, ultimately, I find that Respondent has provided sufficient

evidence to rebut the prima facie case, or, alternatively, to prove the affirmative defense that Vega's termination was motivated by unprotected activity.

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799–800. If an operator cannot rebut the prima facie case in these ways, it may still affirmatively defend its position by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. See *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800; see also *E. Assoc. Coal Corp.*, 813 F.2d at 642–43 (applying *Pasula*-*Robinette* test). It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18; See also *E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission has explained that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An asserted reason may be found to be pretextual "where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). In the context of other federal discrimination statutes, "[a] Plaintiff may establish that an employer's explanation is not credible by demonstrating either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Turner*, 33 FMSHRC at 1073 (emphasis in original) (citations omitted). While the intermediate steps of the *Pasula*-*Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

Here, the Secretary and Vega attack the credibility of the proffered explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the employer. In other words, the plaintiff argues that the weight of the circumstantial evidence of discrimination proves that the employer's explanation is a pretext. I find that Respondent's reason for terminating Vega was plausible and not pretextual. First, Respondent's witnesses' testimony that no one in management knew anything about Vega's protected activity until after his termination for writing the notes on the pay envelopes is coherent, plausibly supported by the evidence showing that Vega did not want his involvement in the hose room or haul road incidents disclosed, and is more convincing than the evidence to the contrary. Pearson, Irvine, and CEO Syar all testified believably that their first knowledge of Vega's claim to have been involved in the two incidents of protected activity came in the form of his MSHA complaint, weeks after the termination and the subsequent (and multiple) union grievance hearings. The only evidence to the contrary is either from Vega himself, and lacking in convincing corroboration, or more plausibly related to the earlier shoulder injury incident and resulting grievance that Vega himself saw as the reason to keep his involvement unmentioned.

The credibility of Vega's claim of retaliatory discharge is also undercut by the fact that, other than the initial mention of smoke in the hose room to a coworker months earlier, the substance of Vega's alleged protected activity did not manifest itself until in and after July 2017, the same timeframe when Vega was writing on the pay envelopes. It is troublingly plausible that Vega decided to use the two protected activity incidents as a second line of defense against being fired in the event the union grievance process failed to bring the results he wanted.

I find that Respondent's proffered reason for firing Vega had a basis in fact and was sufficient to motivate the termination. I also find that the proffered reason actually motivated the discharge. It is reasonable that an employer would terminate an employee who admitted to impersonating a supervisor. There is substantial evidence to support the plausibility of Respondent's stated reason for discharging Vega. Accordingly, I find that Respondent's reason for terminating Vega is plausible and not pretextual.

VI. CONCLUSIONS OF LAW

The Secretary and Vega failed to establish a prima facie case of discrimination under section 105(c)(2) of the Mine Act. Respondent's stated reason for terminating Vega was plausible and not pretextual. Respondent affirmatively defended the termination. Based on a thorough review of the record, I conclude that the Secretary and Vega failed to prove, by a preponderance of the evidence, that Respondent discriminatorily terminated him in violation of section 105(c) of the Act.

Since there was no violation of the Act, Vega's claim for an award of lost wages during the time between his termination and his reinstatement through the union grievance process is denied.

VII. ORDER

Anthony Vega's complaint and this proceeding are **DISMISSED**.



L. Zane Gill
U. S. Administrative Law Judge

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