FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 10, 2016

MARK BAILEY, Complainant,	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 2016-241-D
	:	PINE CD-2016-03
v.	:	
REX OSBORNE, COLIN MILAM, ROCKWELL MINING, LLC, and GATEWAY EAGLE COAL CO., LLC, Respondents.	:	Mine: Gateway Eagle Mine
	:	Mine ID: 46-06618

DECISION AND ORDER

Appearances: Samuel B. Petsonk & Sarah K. Brown, Mountain State Justice, Inc., Charleston, West Virginia, for Complainant;

Jonathan R. Ellis & Thomas S. Kleeh, Steptoe & Johnson, PLLC, Charleston, West Virginia, for Respondents Rockwell Mining, LLC, Rex Osborne, and Colin Milam.

Before: Judge Miller

This matter is before me on a complaint of discrimination and interference brought by Mark Bailey against Gateway Eagle Coal Company, LLC, Rockwell Mining, LLC, Rex Osborne, and Colin Milam pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3). The parties presented testimony and documentary evidence at a hearing commencing on August 24, 2016, in South Charleston, West Virginia.

I. FINDINGS OF FACT

Mark Bailey was employed at Gateway Eagle Mine beginning February 5, 2014. The mine was operated at that time by Gateway Eagle Coal Company. Bailey alleges that he began making safety complaints in the fall of 2014 regarding conditions at the mine, and refused to operate his roof bolting machine in return air because of concerns about excessive dust. He alleges acts of interference with his refusal to work culminating in his suspension with intent to discharge on September 10, 2015. He seeks reinstatement to his former position, back pay, attorneys' fees, and other injunctive relief. Bailey has named as respondents Gateway Eagle Coal Company, LLC, and two of its employees, Rex Osborne and Colin Milam. He has also named Rockwell Mining, LLC, alleging that Rockwell is a successor-in-interest to Gateway Eagle.

Bailey's Safety Complaints

Mark Bailey started work as a roof bolter at the Gateway Eagle mine in February 2014. At the time, the mine was owned and operated by Gateway Eagle Coal Company. Bailey worked primarily at the No. 1 section on the left side and worked with a number of different bolting partners and supervisors. In the summer of 2014, the mine began a project of tunneling through the rock to create the No. 5 and No. 6 belt entries. According to Bailey, the height of the entry was around eight feet, but it increased to 10 or 12 feet as the crew worked into the No. 5 tunnel. He asserts that at that height, it became impossible to reach the roof with the bolter he normally used. He was instead forced to leave the protective canopy of the roof bolter and climb onto the machine or onto a ladder to install the bolts. Allen Holstein, Bailey's bolting partner at the time, agreed that they did sometimes bolt by standing on top of the machine.

Bailey testified that he brought the issues of the roof height to the attention of the union and management at weekly safety meetings. The mine superintendent, Rex Osborne, and the mine foreman, Steve Gibson, would have been present at those meetings. Holstein agreed that Bailey brought up the issue at the meetings, and said that management told Bailey to "put it to bed," which he took to mean forget about the issue. Osborne disagreed with Holstein's account, and instead explained that he was not aware that miners were standing on the machine to bolt. He stated that the maximum height of the roof in the No. 5 development area was 9 feet 5 inches, which the bolter should have been able to reach with extensions, ladders, or grease guns. While it was possible that miners had been taking a short cut, if he had known about it he would have told them to stop. He would not have allowed bolting without the use of the bolter's temporary roof support.

In the fall of 2014, Bailey brought his problem with the roof height to the attention of Marshall Justice, who was a union representative at the time. Justice filed a complaint with MSHA that resulted in an inspection but no citations were issued.

Sometime in the fall of 2015, Bailey asserts that he stood on top of the roof bolter in order to hang a ventilation curtain and fell off of the machine. He incurred a neck injury and reported the incident to the section boss, who filled out an accident report. Bailey claims that when Osborne learned of the incident, he encouraged Bailey to work light duty rather than taking time off so the company would not have to report a lost-time accident. A claim denied by Osborne. Bailey worked for several days on light duty, but then became unable to work and sought treatment. Osborne agrees that he called Bailey at home while he was off work. Bailey claims that Osborne asked him to tell the hospital he was sick rather than injured, and threatened that he would become a "target" if he made a compensation claim for the accident. Osborne denied Bailey's allegation and explained that he called to check on Bailey when Bailey did not show up for work, as he did with all miners. Bailey's absence from work for the injury was excused and I find Osborne's recount of the call to be the more reliable.

In addition to the roof height, Bailey had concerns about excessive dust while bolting. The mine's ventilation plan allows for roof bolting in return air once per shift, but in the fall or winter of 2014, Bailey and others expressed concern about the amount of dust when the continuous miner was operating. Bailey complained to management and the union at safety meetings about having to bolt in the return air, and also told Osborne that the dust was causing

health problems for him. A union representative, Gary Scott, conducted a safety run in the area in November or December 2014. He observed the dust and instructed the bolters and others in the area not to work in the dusty area. Scott spoke to the section foreman, Chris Blankenship, who called the shift foreman, Frank Javins. After some discussion, Javins agreed that miners would not be required to bolt in return air.

As Bailey describes it, he began refusing to bolt in the return air after Scott's inspection. Because of this, his section boss, Chris Blankenship, began to refuse to allow Bailey and his partner to take lunch breaks. Blankenship also kept records of how fast Bailey and his partner bolted and would watch them working and tell them to go faster. Bailey believes this was meant to intimidate him. He claims that he encouraged the bolters on the other section to refuse to work in return air as well, but they would not because of pressure from their section boss.

The mine's witnesses denied that miners were pressured to bolt in return air, though they admitted that the practice slowed production. Osborne testified that the issue was handled on the sections. When Scott told him that it was unsafe for miners to bolt in return air, management did not push back. Scott testified that while Osborne knew Bailey had complained about the dust, it was Scott who encouraged the miners to refuse to bolt, and management was aware of that. He stated that none of the miners had reported being pressured to bolt in return air. The foreman on Bailey's section, Conley Tadd Bailey, credibly testified that management did not pressure the sections to bolt in return air. He admitted that he discussed Bailey's bolting speed with him, but said that this was not related to Bailey refusing to bolt in return air. Osborne also met with complainant Bailey, along with a union representative, to discuss the rate at which Bailey was bolting. Osborne said that the low numbers were due to factors other than not bolting in return air, since Bailey was bolting more slowly than other miners who did not bolt in the return. Bailey was not disciplined for any problems involving his work. Finally, Scott, the union representative, explained that on the evening shift, miners are not given a full lunch break. Thus, if Bailey's supervisor told him to take a short lunch, it was probably not retaliation. After Bailey left the company, the crew continued not to bolt in return air. None of the other roof bolters, including those who worked with Bailey, have been discharged.

Bailey raised two other safety issues in early 2015. First, Bailey noticed an oil leak on the roof bolter which he believed it to be a hazard because the oil was leaking onto a portion of the machine where he climbed to reach the high roof. Bailey claims he told his shift boss of the problem three times and nothing was done. Bailey then spoke to a co-worker, Marshall Justice, who in turn made a complaint to MSHA. MSHA issued a citation and the bolter was repaired. There is nothing in the file to indicate that the mine knew, or tried to discover, who made the complaint to MSHA.

Finally, Bailey complained of a problem with the water supply to the underground machinery. The water came from a pond near the bath house, and around March 2015 it began to have a foul smell. Bailey raised the issue in safety meetings, as did other miners who believed they were getting ill from the water. Bailey had a respiratory infection around that time, which he believes may have been caused by the water. When Osborne learned of the foul-smelling water, he called the company responsible for treating the water and the matter was resolved by adding more chlorine to the water.

Bailey's Attendance Issues and Discipline

Throughout his employment at the mine, Bailey was subject to increasingly serious discipline based on his attendance. The mine has an attendance policy as a part of the contract with the UMWA. Attendance is monitored by the human resources department, which is off the mine site and handles attendance for several mines. The mine's witnesses testified that the plan is enforced uniformly. Miners at the mine are given a certain number of floating vacation and contractual personal or sick days. Those days are paid but must be scheduled 24 hours in advance. If a miner misses a day without providing advance notice, he will not be paid, but he may present a doctor's note to have the absence excused. An unscheduled absence for which a doctor's note is not provided is unexcused. Miners typically provide their excuses to a manager, and the managers send them to the payroll office. If there is a question about an excuse, it is handled by Colin Milam who works in the off-site human resources department.

In order to address chronic and excessive absenteeism at the mine, Gateway implemented a "standard attendance control program" consistent with the UMWA contract. *See* Ex. R-9. The program authorizes increasingly serious discipline for missing work. It is administered by Milam, using information he receives from the mines. Under the attendance plan, a miner would be subject to counseling if he had two unexcused absences in 30 days, three in 180 days, or four in 365 days. If after counseling the miner again accumulated two unexcused absences in 30 days, three in 180 days, or four in 365 days, and the miner is suspended with notice of intent to discharge.

In addition to this program, the mine maintained a chronic and excessive absenteeism program that dealt with all absences, including excused absences. If management determined that a miner was "chronically and excessively absent," they would notify him in writing that his attendance needed to improve. *See* Ex. R-9. If after receiving that notification the miner did not improve his attendance to at least the mine average, he would receive a final warning. If his attendance did not improve dramatically, the next step was suspension with intent to discharge. *Id.* The miner would remain on the program until he worked six months with an attendance rate at or better than the mine average. *Id.*

Bailey received a counseling letter pursuant to the standard attendance control policy on June 15, 2014. Ex. R-1. The letter referred to three unexcused absences in the previous 180 days: February 13, 2014; April 14, 2014; and June 6, 2014. The letter advised that if Bailey incurred another two unexcused absences in 30 days, three in 180 days, or four in 365 days, he would be discharged. A meeting was held to discuss the letter, in which Bailey claimed that the June 6th absence should have been excused. Bailey testified at hearing that he was involved in a car accident on June 5, 2014, and was hospitalized overnight. He claims that he produced a doctor's excuse on June 7th when he returned to work, but that the mine lost it. He gave Osborne another copy of the excuse, a hospital discharge report, on June 16 after he received the attendance control letter. A copy of the discharge slip was introduced as Complainant's Exhibit 7. Bailey testified that Osborne told him he would be taken off of the attendance control list at that time. However, he did not provide corroborating evidence at hearing that the attendance letter had been rescinded.

Bailey received a second attendance warning letter, two months later, on August 6, 2014. Ex. R-3. This notice was pursuant to the mine's chronic and excessive absenteeism program, and alleged that Bailey's total absences from March 1, 2014, through July 31, 2014, were twice the mine average—6.61% days absent as opposed to the mine average of 3.09%. The June 6th absence would have counted against Bailey under this calculation whether or not the mine accepted his excuse. The letter stated that if Bailey did not improve his attendance to at least the mine average, he would be suspended with intent to discharge. At some point, Bailey was also disciplined for violating the mine's policy against tardiness and leaving early, but those actions were not noted in the attendance letter or action taken against Bailey.

Bailey received a third attendance warning letter on April 3, 2015, stating that he was being suspended with intent to discharge for a second violation of the standard attendance control program. Ex. R-2. It referred to three unexcused absences occurring in the preceding 180 days: December 5, 2014; January 27, 2015; and March 5, 2015. *Id.* A meeting, called a 24/48 hour meeting, was held shortly after with Bailey, a union representative, and management. Milam agreed at hearing that the mine received Bailey's excuse regarding the June 6th absence at this point. However, he stated that the hospital discharge report was not accepted as a valid excuse because, while it states that Bailey arrived at the hospital on June 5th at 11:19 p.m., it does not specify that he should be excused from work on June 6th. *See* Ex. C-7. Milam testified that Bailey could have been discharged after this 24/48 meeting, but was instead given a last chance agreement. *See* Ex. R-4.

When a miner reaches the suspension level of one of the attendance programs, the mine will frequently offer him a "last chance agreement" rather than discharging him immediately. The mine's union witnesses explained that in some instances, a last chance agreement can be extended even after it is violated. However, that is up to the mine's discretion and is based on the miner's attitude and work ethic or the presence of extenuating circumstances.

Bailey was put on a last chance agreement on April 13, 2015. Ex. R-4. The agreement was negotiated and signed with union representation present. It provided that Bailey would not incur another unexcused absence for 365 days and would maintain an absentee rate at or below the mine average. To have an absence excused for personal illness, he would need to present a doctor's note. His failure to meet the requirements of the agreement would subject him to discharge. Ex. R-4.

Bailey received his last attendance letter from the mine on September 10, 2015, stating that he was suspended with intent to discharge. The letter stated that Bailey incurred an unexcused absence on September 4, 2015, and failed to maintain an absentee rate at or below the mine average. *Id.* The months when he was over the average absentee rate were June and July, when he missed one day each because of illness. In response to the letter, Bailey produced a doctor's note relating to the September 4th absence. Ex. R-8. The note stated that Bailey was treated on September 5, 2015, but should have been excused from work for September 4, 2015. *Id.* Milam explained that the mine has an unwritten policy against accepting so-called "backdated doctor's excuses," where the employee was treated on one day but asks to be excused for an earlier day. The mine produced an example of an instance where it did not accept a similar backdated doctor's note from another miner. Ex. R-10. The union witnesses agreed that the company does not accept backdated doctors' excuses.

A 24/48 hour meeting was held to discuss Bailey's suspension with intent to discharge. Bailey presented his excuses for his absences to mine management and union representatives. One of the excuses was a doctor's note excusing him from work on June 6, 2014, but it was dated over a year later for September 10, 2015. *See* Ex. R-6. Milam believed the excuse should have been submitted when Bailey was first put on the last chance agreement. Bailey also submitted a number of backdated doctors' excuses that the company had accepted in the past. Milam insisted that those were only accepted because the company had not noticed that they were backdated. In the course of the 24/48 hour meeting, Bailey admitted that in July 2015 he had taken a day off to deal with damage from a flood at his house, but had then obtained a doctor's excuse for that day to cover himself. Milam explained that in some instances, miners are given a second last chance agreement, but Bailey's admission of submitting a false excuse removed him from consideration of that option. The mine's union witnesses agreed. Bailey asserts that he raised the issue of discrimination at the 24/48 hour meeting, but the union and management witnesses agreed that he did not.

Following the 24/48 hour meeting, management informed Bailey that he would be discharged. The mine's witnesses testified that he was terminated for excessive absenteeism alone. Bailey asserts that others missed more work than he did but remained employed. Justice testified that one miner in particular was not fired even though he used a backdated doctor's excuse after being put on a last chance agreement. Carl Egnor, the UMWA president, believed the miner's last chance agreement was extended because he had missed work to care for his wife while she was sick. When miners are put on last chance agreements, Egnor said he tells them they need to be perfect and try not to miss work at all, even if they are sick. Gary Scott, the safety committee representative for the union, explained that few miners get their last chance agreements extended and that it depends on individual circumstances.

Bailey filed a grievance challenging his discharge, but was unsuccessful. The union elected not to pursue the grievance and withdrew its support after the 24/48 meeting. Bailey claims he raised the issue of discrimination at his 24/48 hour meeting, but the union and management witnesses did not recall any statements about MSHA at the meeting. Bailey filed a complaint of discrimination with MSHA on November 23, 2015, claiming that he had been discharged because he made safety complaints and refused to work in return air. MSHA notified him that it was declining to pursue the complaint on January 21, 2016. He filed his complaint with FMSHRC on February 22, 2016.

Rockwell's Acquisition of the Gateway Eagle Mine

When Bailey was employed at the Gateway Eagle Mine, it was owned and operated by the Gateway Eagle Coal Company ("Gateway"). Gateway and its parent company, Patriot Coal, filed voluntary petitions for relief under Chapter 11 on May 12, 2015. A bar date for creditors to file proofs of claim was set for June 27, 2015. In early June 2015, Patriot entered into an agreement with Blackhawk Mining for the company to purchase Patriot's assets, including the Gateway Eagle Mine. The plan of acquisition was confirmed by the bankruptcy court on October 9, 2015. *In re Patriot Coal Corp.*, Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 9, 2015) (order confirming plan of reorganization) ("Confirmation Order").

Relevant to this case, the bankruptcy court's confirmation order of the sale of assets to Blackhawk states that the sale is "free and clear of all Liens, Claims and interests." Confirmation Order ¶ 114. It further states that:

> Blackhawk is not and shall not be deemed, as a result of any action taken in connection with the Blackhawk Transaction, to: 1) be a successor (or other such similarly situated party) to any of the Debtors) . . . .
>
> Blackhawk ... is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity . . . .
>
> [Blackhawk and its affiliates] shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environmental, successor or transferee liability, labor, employment or benefits law ... whether known or unknown as of the closing of the Blackhawk Transaction, then existing or hereafter arising ... with respect to the Debtors . . . .

Confirmation Order ¶¶ 76, 116, 120.

Rockwell Mining, LLC, a subsidiary of Blackhawk, now operates the Gateway Eagle Mine. The parties agree that Rockwell's operation maintains the same location, production methods, product, and many of the same employees and supervisors that Gateway used. They also agree that Gateway no longer has any assets and is unable to provide relief to Bailey.

II. DISCUSSION

For the reasons that follow, I find that while Bailey has shown he engaged in a number of activities protected by the Act, he has failed to meet his burden of proof that he was a victim of discriminatory discharge or that the mine operator or its agents interfered with his rights under the Mine Act.

A. Bailey's Discrimination Claim

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" or "because of the exercise by such miner ... of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden of proof for a prima facie case is "lower than the ultimate burden of

persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen*, 20 FMSHRC at 328-29; *Robinette*, 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by demonstrating that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen*, 20 FMSHRC at 328-29 (citing *Robinette*, 3 FMSHRC at 817; *Pasula*, 2 FMSHRC at 2799-2800). The operator bears the burden of persuasion for the affirmative defense. *Pasula*, 2 FMSHRC at 2800.

i. Protected Activity

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. Section 105(c)(1) enumerates four protected activities: (1) filing or making a complaint under or related to the Act, including a complaint of an alleged danger or safety or health violation; (2) being the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101; (3) instituting a proceeding under or related to the Act or testifying in such a proceeding; and (4) exercising "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). The legislative history of the Mine Act states that Congress intended that "the scope of the protected activities be broadly interpreted." S. Rep. No. 95-181 at 35 (1977).

Bailey engaged in a number of protected activities. He believed that the roof in Section 1 of the mine was too high for the roof bolter and that the safety of the bolting process was thus compromised. He described having to stand on top of the machine instead of under the protective canopy to install bolts and hang the ventilation curtain. He brought his concerns about the roof height to his union representative and to mine superintendent, Rex Osborne, directly. Bailey also complained about the dusty conditions when bolting in return air. He reported the conditions to his union representative and to management, including Osborne and the shift foreman, Frank Javins. Bailey further complained to the union and management about a bad odor in the water sprays, and complained to his shift supervisor, Chris Blankenship, about oil leaking from the roof bolting machine. He informed his coworker Marshall Justice of an oil leak in the bolter and about the high roof, and Justice in turn reported those issues to MSHA. Bailey also alleges that he told those present at the 24/48 hour meeting that he was going to complain to MSHA.

The many safety complaints Bailey made to management and the union constitute protected activity as contemplated by the Mine Act. Bailey also argues in his post-hearing brief that he engaged in protected activity by naming Marshall Justice as his personal miner's representative. However, he has offered no legal support for the existence of a right to name a

personal miner's representative, and there is little in the record to support his assertion factually.[1]

ii. Adverse Action

Bailey was put on the first level of the standard attendance control program on June 15, 2014. He received a second attendance warning letter on August 6, 2014, and a third on April 3, 2015. He was put on a last chance agreement on April 13, 2015. On September 10, 2015, he was notified that he was suspended with intent to discharge, and a meeting and grievance hearing were held shortly thereafter where the discharge became final. Each of these actions culminating in the discharge constitutes an adverse action.

iii. Discriminatory Motive

To prove that discrimination has occurred, a complainant must show that an adverse action taken against him was motivated at least in part by his protected activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). Thus, Bailey must prove that at least one of the actions taken against him was based on either his safety complaints or his refusal to work in return air. A complainant is not required to produce direct evidence of an operator's motive, but rather may prove motive through circumstantial evidence. *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). Facts that may be relevant to establishing motive include the timing of the adverse action in relation to the protected activity, the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, and disparate treatment. *Id.* at 2510-13.

In the instant case, the connection between Bailey's protected activities and his termination is tenuous. First, the timing of the adverse actions against Bailey weighs against a finding of illicit motive. Bailey first began making safety complaints in the fall of 2014. However, he received warning letters about his attendance prior to that, in June and August of 2014. While his ultimate discharge occurred after he made the complaints, the process leading up to the discharge was set in motion well before he engaged in protected activity.

The operator did have knowledge that Bailey was making safety complaints, which ordinarily weighs in favor of a finding of motive. Bailey raised his complaints about the roof height and excessive dust at safety meetings where management would have been present. However, decisions regarding the attendance discipline that Bailey received were made primarily by Colin Milam in the off-site human resources office. Milam sent out counseling letters and notices based on statistics sent to him from the mines and had little direct contact with miners. While it is possible that management conveyed to Milam that Bailey was making complaints or that Osborne would like to see Bailey terminated, there is no evidence to support that supposition in the record. For example, there is no evidence that Osborne and Milam spoke, how often or

[1] Bailey attached as an exhibit to his post-hearing brief a citation to the mine regarding Justice's status as a miner's representative. However, I indicated at the end of the hearing that the record was closed. Accordingly, the citation is excluded from the record. A discrimination complaint and records release attached as exhibits to Respondent Rockwell's post-hearing brief are also excluded.

what subjects they may have addressed. Instead, the only evidence in the record is that Milam received attendance information from each mine and sent out a number of letters each month. Milam then attended the meeting with Osborne to discuss attendance letters with workers. In addition, Milam indicated through his testimony that he was isolated in a number of ways from the mines and from management.

Bailey also presented evidence that the operator exhibited animus towards Bailey's protected activity. On several occasions, his shift supervisor, Chris Blankenship, hassled him about bolting too slow. However, there is no evidence that Blankenship played any role in human resources decisions at the mine or that Osborne was aware of Blankenship's actions. Blankenship was let go on some undisclosed date and Bailey had a number of other foremen up until the time he was terminated. Bailey also alleges that Osborne was hostile to his protected activity. He states that he brought complaints to Osborne about having to stand on top of the roof bolter to bolt in certain areas of the mine, and that Osborne dismissed the issue. Osborne denies that he received such complaints, saying that he would not have allowed the practice of climbing and standing on the roof bolter. Bailey also testified that he at one point fell off the roof bolter and injured his neck, and that Osborne told him not to report the accident and threatened that Bailey would become a target if he made a compensation claim. The conversation is denied by Osborne and I credit the nature and content of the conversations as described by Osborne. Finally, Bailey alleges that mine management in general was hostile to his refusal to bolt in return air. He alleges that other roof bolters were pressured to bolt in return air and were afraid to refuse. However, the testimony of union and management witnesses indicated that most bolters at the mine did not bolt in the return, that it was accepted by the mine, and that no other roof bolter has been terminated who worked with Bailey or who refused to bolt in the return air. I credit the testimony of the union witnesses that the mine responded quickly to complaints about dust and did not pressure miners to bolt in return air.

Bailey has also not been able to show that he was treated differently than other miners. The mine had a strict attendance policy that was instituted to deal with attendance problems and appears to have been applied uniformly. At the final stage of the attendance program, mine management had discretion as to whether to discharge a miner. Bailey alleges that two other miners with attendance problems similar to his were not discharged after receiving a last chance agreement, whereas he was. One of those miners appears to have been excused because he had taken time off to care for his sick wife. There was little evidence regarding the second miner to show that Bailey was treated differently. Additionally, many of the issues Bailey complained about, such as the bad smelling water and the dust, were also complained about by other miners, and there is nothing to demonstrate that those miners were discharged or otherwise subject to an adverse action.

Moreover, I find that the mine had a legitimate reason to terminate Bailey's employment based on the attendance policy it had negotiated with the union. The documents produced at hearing show that Bailey missed the requisite number of days to receive counseling letters and to be discharged. He was given several opportunities to improve his attendance but failed to do so. Bailey argues that several of the days he missed should have been excused, and that the mine unfairly applied an unwritten rule against so-called backdated doctor's excuses as a pretext for discharging him discriminatorily. However, the mine produced an example of a similar

backdated excuse from another miner, which it did not accept. Finally, Bailey told those present at his discharge meeting that he had obtained a doctor's excuse for a day when he was not actually sick. It is true that management had the discretion to continue Bailey's last chance agreement after the discharge meeting. However, I find that their decision not to was based not on Bailey's safety complaints, but instead on his absences and his behavior in submitting a doctor's note for a day on which he was not sick. Bailey's absences and falsified excuse violated the mine's attendance policy and constituted just cause for discharging him.

In consideration of these factors, I find that Bailey has failed to prove that the mine had a discriminatory motive in discharging him, and that the mine had a legitimate business purpose for doing so.

iv. Affirmative Defense

A company that discriminates on the basis of protected activity may avoid liability by proving that its action was also motivated by unprotected activity, and it would have taken the action based on the unprotected activity alone. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000). While I find that the mine did not have a discriminatory motive in discharging Bailey, I will nevertheless address its affirmative defense.

In evaluating whether an operator had a legitimate, non-discriminatory reason for its action, the Commission looks to factors including "evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question." *Pero*, 22 FMSHRC at 1365 (citing *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982)). The Commission has indicated that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Id.* (quoting *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)). An employer's asserted justification is more likely to be pretextual if it is "weak, implausible, or out of line with the operator's normal business practices." *Id.* (quoting *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990)).

As described above, I find that the mine did have a legitimate reason to discharge Bailey because of his chronic attendance problems. He was disciplined throughout his time at the mine consistent with the mine's attendance policy. Even if mine management had a discriminatory reason for discharging Bailey, I find that he would have been discharged anyway because of his frequent absences and fraudulent doctor's excuse. I agree that the attendance policy was harsh, but it was enforced against all miners, and it was negotiated and agreed to by the union at the mine.

B. Bailey's Interference Claim

Bailey also alleges that mine management interfered with his rights under the Mine Act on a number of occasions. He has raised this claim inconsistently throughout the proceeding and often confuses the interference and discrimination causes of action. Bailey claims that several actions of mine management interfered with his right to refuse to work in unhealthy conditions. First, he alleges that after he refused to bolt in return air, his shift boss, Chris Blankenship,

denied him lunch breaks and sat on the deck of his bolting machine telling him to work faster. Bailey also alleges that Rex Osborne individually interfered with Bailey's rights by making comments pressuring him to work faster. He next alleges that in a safety meeting where miners complained about the dust levels in the mine, Osborne ran a dust monitor in his office and told the miners there was more dust in his office than underground. Bailey interpreted this as trivializing miners' complaints about the dust and discouraging them from making future complaints. Finally, Bailey alleges that Osborne threatened him with retaliation if he reported a workplace accident.

Section 105(c) of the Mine Act states that "[n]o person shall discharge or in any manner discriminate against ... or *otherwise interfere with* the exercise of the statutory rights of any miner." 30 U.S.C. § 815(c)(1) (emphasis added). While the Commission has not yet settled on a test for analyzing interference claims, it has approved of the application of the test advocated by the Secretary in other litigation, under which a claim for interference is established when:

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

See Sec'y of Labor on behalf of McGary v. Marshall County Coal Co., 38 FMSHRC __, No. WEVA 2015-583-D, slip op. at 7 n.11, 22 n.22 (Aug. 26, 2016); *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs).

Here, I do not credit Bailey's allegation that Osborne threatened him with retaliation if he reported a workplace injury. Bailey asserts that he fell off a roof bolter and injured his neck in the fall of 2014. He worked light duty for several days after the incident, then became unable to work and sought treatment. He claims that Osborne called him at home and threatened that he would become a target if he made a compensation claim. Osborne agreed that he called Bailey to check on why he had missed work after the accident, but said he did not threaten Bailey or ask him not to report the accident. I found Osborne to be a credible witness and credit his account.

I also find that, while Blankenship may have limited Bailey's lunch breaks, this had nothing to do with Bailey's safety complaints. Bailey did not explain how this interfered with a protected right, but union representative Gary Scott testified that miners on Bailey's shift do not receive a full unpaid lunch, but rather are asked to take a short break during the shift. If Bailey is alleging that Blankenship somehow interfered with his right to make complaints about working in dusty returns, the allegation is not supported by the record.

As to Bailey's allegations regarding Blankenship and Osborne pressuring him to work faster, Osborne admits that he discussed Bailey's production levels with him and there is no dispute that Blankenship also addressed the issue with Bailey. While there is limited evidence on the issue, I credit Bailey's account of Osborne's comments about the dust monitor as the mine did not dispute the account. However, I do not find that these occurrences constituted

interference with Bailey's protected rights. While Bailey has the right to make safety complaints, Osborne and Blankenship were within their rights to tell Bailey to work faster. Osborne testified that Bailey's production rates were below that of other roof bolters, including those who did not bolt in return air. It is reasonable to expect a mine manager to address production issues with a miner and I cannot find that the manner in which it was done was intimidating. In any event, there is not sufficient evidence to surmise that the conversations were retaliatory or that they discouraged Bailey from refusing to bolt in return air. In fact, Bailey and other miners continued to bolt in return air. A reasonable person would not have interpreted the incidents described by Bailey as tending to interfere with his rights under the Act. As discussed above, the claims made by Bailey are more appropriately analyzed pursuant to the discrimination provisions.

The mine's witnesses credibly testified that it is common practice at the mine for miners not to work in return air. While there was brief discussion over the issue when it first arose, management quickly accepted the practice and does not object to it. The management and union witnesses indicated that miners are comfortable raising safety issues at the mine and are not pressured into working in unsafe or unhealthy situations. I do not find that the events alleged by Bailey jeopardized or interfered with his right to complain to the union or to the mine.

C. Liability of Colin Milam and Rex Osborne

There is no evidence that Milam or Osborne acted independently or engaged in any action that could be construed as discriminating against Mr. Bailey individually, and therefore the complaint against each is dismissed.

D. Liability of Rockwell Mining, LLC

Bailey has named Rockwell Mining, LLC, as a party in this action under a theory of successor liability. The Commission has determined that a corporate successor may be held liable for its predecessor's violations of the Mine Act. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987); *see also Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act case). Imposing successor liability in cases brought pursuant to federal labor and employment statutes is often necessary to achieve the statutory goal of protecting workers' rights, since "the workers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them." *Teed v. Thomas & Betts Power Sol., L.L.C.*, 711 F.3d 763, 766 (7th Cir. 2013). While I have found that Bailey's discrimination and interference claims are without merit, I will nevertheless address the successor liability issue.

In analyzing whether it is appropriate to impose liability on a successor, the Commission applies a nine-factor test derived from Title VII case law. *Corbin*, 9 FMSHRC at 397-98; *Munsey*, 2 FMSHRC at 3465-66. The relevant factors are:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or

> substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

Munsey, 2 FMSHRC at 3465-66 (alteration in original) (quoting *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974)).

The Commission has not specified what weight is to be given each factor of the *Munsey* test. However, some federal courts have determined that notice in successor liability cases is mandatory or nearly so. *See, e.g., Golden State Bottling Co., Inc. v. NLRB*, 414 US 168, 172 n.2 (1973) ("[O]ne who acquires and operates a business of an employer ... under circumstances which charge him *with notice* of unfair labor practice charges against his predecessor should be held responsible . . . ." (emphasis added)); *Rabidue v. Osceola Ref. Co., a Div. of Tex.-Am. Petrochems.*, 805 F.2d 611, 616 (6th Cir. 1986) (finding that lack of notice removed the case from rationale of successor liability) *overruled on other grounds by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Scott v. Sopris Imports Ltd.*, 962 F. Supp. 1356, 1359 (D. Colo. 1997). These courts have emphasized that the successor liability doctrine is derived from equitable principles, and that "it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser ... when the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement or a lower purchase price." *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985); *see also Teed*, 711 F.3d at 766. In view of the rationale for the notice prong, the relevant time for notice is at the transfer of the business. *Rabidue*, 805 F.2d at 616; *Musikiwamba*, 760 F.2d at 740.

As noted above, Rockwell acquired the Gateway Eagle mine after Rockwell's parent company, Blackhawk Mining, purchased the assets of Gateway's parent company, Patriot Coal, as part of Patriot's reorganization in bankruptcy. There is evidence that Rockwell has continued to use substantially the same employees and managers as did Gateway, as well as the same equipment at the same location. However, the evidence indicates that Rockwell did not have notice of the charge prior to Blackhawk's acquisition of Patriot. Bailey was suspended with intent to discharge on September 10, 2015. The plan confirming the sale of Patriot to Blackhawk was approved by the bankruptcy court on October 26, 2015. But Bailey did not file his complaint with MSHA until November 23, 2015. Further, the mine and union witnesses agreed that Bailey did not raise the issue of discrimination in his 24/48 meeting with the mine after his discharge or in his grievance of the discharge. I thus find that there is insufficient evidence to find that Rockwell and its management had knowledge of Bailey's intent to file a complaint with MSHA at the time of the acquisition of Patriot.

In light of the equitable principles underlying the successor liability doctrine, I conclude that it is inappropriate to impose liability where the successor did not have notice of the potential liability. Accordingly, I find that, even if Bailey had proven a valid claim of discrimination, it would be not be appropriate to impose liability on Rockwell.

Rockwell has also made the argument throughout this litigation that it cannot be held liable for the actions of Gateway because Rockwell's parent company, Blackhawk, purchased the

Gateway mine in a bankruptcy sale "free and clear," and the bankruptcy court declared in the confirmation order that "Blackhawk ... is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity." I rejected this argument in an earlier order, finding that the bankruptcy court's determination that Rockwell is not a successor to Gateway could not be binding on Bailey consistent with due process. 38 FMSHRC __, No. WEVA 2016-241-D (July 14, 2016) (ALJ). I indicated to the parties at hearing that I would reconsider Rockwell's argument on this point based upon new case law on the issue, and the parties addressed the issue in their post-hearing briefs. After reviewing the new information, I conclude that my original order is correct and remains as issued. I incorporate my previous findings here.

V. ORDER

The complaints against Rex Osborne, Colin Milam, and Rockwell Mining, LLC, are hereby **DISMISSED**. Each party shall pay its own costs and expenses. Respondent Gateway Eagle Coal Company failed to appear at the scheduled hearing. Accordingly, it is **ORDERED** that Gateway Eagle Coal Company be held in default and that all relief sought by Bailey against Gateway is hereby awarded.

Margaret A. Miller
Administrative Law Judge

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