

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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January 11, 2018

SECRETARY OF LABOR,  
U.S. DEPARTMENT OF LABOR on  
behalf of CARL EBERT,  
Complainant

v.

MARSHALL COUNTY COAL CO.,  
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEVA 2016-565-D  
MSHA No. MORG-CD-2016-19

Mine: Marshall County Mine  
Mine ID: 46-01437

**DECISION**

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Complainant;<sup>1</sup>  
Philip K. Kontul, Esq., Daniel D. Fassio, Esq., Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., Pittsburgh, Pennsylvania for Respondent

Before: Judge Feldman

This case is before me based on an August 19, 2016, discrimination complaint filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2006) (“the Act”) by the Secretary of Labor (“the Secretary”) on behalf of Carl Ebert against Marshall County Coal Co. (“Marshall County”). The hearing was conducted in Wheeling, West Virginia, on May 23 and May 24, 2017.<sup>2</sup> The parties have filed post-hearing briefs that have been considered in the disposition of this matter.

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<sup>1</sup> The United Mine Workers of America (“UMWA”) filed an unopposed post-hearing Entry of Appearance on September 29, 2017. However, the UMWA has not filed any briefs in this matter. A copy of this decision has been provided to the UMWA.

<sup>2</sup> There is an error in the pagination of the two-volume hearing transcript. Volume 1 ends at page 262. However, Volume 2 begins at page 163, instead of page 263. Consequently, in citing Volume 2 in this decision, the number 100 has been added to each of the numbered pages in Volume 2 so that the transcript pages can be cited consecutively. By way of illustration, page 164 in Volume 2 would be cited as page 264.

## **I. Statement of the Case**

The Secretary alleges that Marshall County violated the provisions of section 105(c)(1) of the Act,<sup>3</sup> 30 U.S.C. § 815(c)(1), when it suspended Ebert for two-and-a-half days for allegedly failing to timely complete a pre-operational (“pre-op”)<sup>4</sup> examination of his shuttle car on March 7, 2016, at the Marshall County Mine (“the mine”). The Secretary contends that Ebert’s suspension was motivated, at least in part, by Ebert’s safety related complaints that occurred in the weeks preceding Ebert’s suspension. Marshall County seeks dismissal of the subject discrimination complaint as untimely. Alternatively, Marshall County asserts that Ebert’s suspension was motivated by an independent business justification, and not by Ebert’s protected activity.

Activities on the subject shift at the working section began at approximately 9:05 a.m. on March 7, 2016. At that time, foreman Grant Paugh completed his pre-shift meeting with the section crew, at which time Paugh departed the power center to conduct his fire boss duties. After completing his fire boss duties, Paugh returned to the section power center at approximately 9:55 a.m. at which time he determined that Ebert had not begun the pre-op examination of his shuttle car. The evidence reflects it took Ebert approximately 30 additional minutes to complete his pre-op examination. Thus, Ebert was not available to begin his assigned routine mining activities, such as operation of his shuttle car, until approximately 10:25 a.m. Believing that Ebert did not have an adequate justification for the delay in his pre-op inspection, Paugh had Ebert removed from the mine, which ultimately resulted in the imposition of a two-and-a-half day suspension.

A mine operator has a legitimate business interest in ensuring that pre-op examinations are completed in a timely manner. Marshall County’s rejection of Ebert’s explanation for the significant delay in completing his pre-op duties is a reasonable exercise of its administrative prerogatives. Thus, Marshall County has demonstrated a credible business justification for Ebert’s suspension. Although Ebert did communicate several safety related concerns to Paugh in the weeks preceding Ebert’s suspension, Paugh took actions that reasonably addressed each of Ebert’s concerns. The Secretary has failed to demonstrate, through adequate direct or indirect evidence, that Ebert’s suspension was also motivated, in any part, by his protected activity. Consequently, Ebert’s discrimination complaint must be denied.

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<sup>3</sup> Section 105(c)(1), provides, in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

<sup>4</sup> For the purposes of this decision, the term “pre-op” examination is synonymous with the term “pre-shift” examination.

## II. Timeliness

Section 105(c)(3) of the Act provides that “[w]ithin 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred.” Section 105(c)(2) further provides that “[i]f upon [the] investigation [of a complaint], the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner . . . alleging such discrimination.” 30 U.S.C. § 815(c)(2). Commission Rule 41(a) has interpreted the statutory provision to “immediately file a complaint with the Commission” to mean that the Secretary is required to file a complaint with the Commission “within 30 days after his written determination that a [105(c)] violation has occurred.” 29 C.F.R. § 2700.41(a).

Thus, the operative time period for the Secretary’s filing of a discrimination complaint, as contemplated by Section 105(c) of the Act and Commission Rule 41(a), is 120 days (a total of 90 days in the Act plus 30 days in Rule 41(a), after the filing of the underlying complaint with the Mine Safety and Health Administration (“MSHA”). Ebert’s complaint was filed with MSHA on March 17, 2016.

Relying on the operative 120 day filing period, Marshall County argues that the Secretary was required to file the subject 105(c)(2) complaint on or before July 15, 2016. Resp’t Br. at 14-15. However, the Secretary did not file the complaint until August 19, 2016, approximately 155 days after the filing of Ebert’s original complaint. Thus, Marshall County seeks the dismissal of the complaint as untimely because it was not filed within 120 days. I construe Marshall County’s untimeliness claim as a motion to dismiss.

The Commission has stated that “[w]hile the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these timeframes are not jurisdictional.” *Sec’y of Labor on behalf of Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986). Thus, a late-filed complaint “is subject to dismissal [only] if the operator demonstrates material legal prejudice attributable to the delay,” and “absen[t this] requisite foundation, the judge [would] err[] in granting [a] motion to dismiss” on untimeliness grounds. *Id.* at 908-909. Specifically, the legislative history states that:

The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under section 10[5](c)(3) to notify the complainant within 90 days whether a violation has occurred. *It should be emphasized, however, that these time-frames are not intended to be jurisdictional.* The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 95-181 at 36 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (emphasis added).

Having filed the subject 105(c)(2) complaint on August 19, 2016, instead of on or before July 15, 2016, the Secretary's filing is approximately one month late. Given the Secretary's rather brief filing delay, Marshall County does not assert that it has suffered actual prejudice. However, Marshall County seeks to support its request for dismissal on two theories. First, Marshall County asserts that the Secretary must justify the reason for the filing delay to successfully defeat a motion to dismiss for untimeliness. Resp't Br. at 16-17. While an explanation by the Secretary may be relevant in cases where there is a lengthy filing delay, the legislative history makes clear that the relatively brief one month delay in this case "should not [prejudice a complainant] because of the failure of the Government to meet its time obligations." S. Rep. No. 95-181, *supra*.

The second assertion raised by Marshall County is that the Secretary's failure to abide by the relevant filing deadline is inherently prejudicial. Resp't Br. at 16-17. In support of this proposition, Marshall County notes that Commission Judge Manning has held that the Secretary's delay in filing a 105(c)(2) complaint may be viewed as prejudicial *per se*. Respt. Br. at 16 (citing *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 793, 795 (June 2000) (ALJ)). However, unlike this case where the filing delay is approximately one month, the filing delay in Judge Manning's case was more than 36 months. The approximate 35 month differential is a distinction with a difference. Consequently, Marshall County's reliance on Judge Manning's decision is misplaced. Having failed to demonstrate any meaningful prejudice, Marshall County's motion for dismissal of the subject complaint as untimely **shall be denied**.

### **III. Findings of Fact**

#### **a. Background**

Carl Ebert has been employed at the Marshall County Mine for approximately seven years. Tr. 17. Grant Paugh began working at the mine as a section foreman in November 2015 and became Ebert's supervisor shortly thereafter. Tr. 55, 99, 282, 285. Paugh conceded that Ebert has a reputation at the mine as "a safety advocate," who does not hesitate to "bring safety issues he observes to" his supervisors. Tr. 340.

Ebert has worked at the mine as a shuttle car operator for the last five years. Tr. 17-18. A shuttle car is used to transport coal from the vicinity of the face to the dumping point ("tail piece") of a belt line, where it is then carried to the surface through a series of conveyers. Tr. 18.

With the exception of one incident that occurred in March 2015 that did not involve Paugh, for which Ebert received a verbal warning, there is no evidence that Ebert had been the victim of any disciplinary action as a consequence of his safety related advocacy. The March 2015 incident occurred when Ebert detected methane in the explosive range after noticing that there was no line curtain ventilating the section face. Tr. 93. Consequently, Ebert de-energized his shuttle car. Tr. 94. Although Ebert's supervisor Shannon Looney initially disagreed that there

was methane at potentially hazardous levels, he eventually allowed Ebert to retrieve and install line curtains at the face. Tr. 94. Disappointed by Looney's reaction, at the end of his shift Ebert asked his section coordinator, Justin Miller, if he could be transferred to a different crew with a different foreman. Tr. 95. Looney approached Ebert and Miller and disputed Ebert's version of events. Upon being challenged, and in the presence of Looney, Ebert told Miller that Looney "did not have enough brains to blow his own nose." Tr. 95, 146. Although Ebert was informally counseled as a result of this incident, there was no disciplinary action taken, nor was there any documentation placed in Ebert's personnel file. Tr. 163-66; Resp't Ex. 9.

Although there is no history of relevant adverse action suffered by Ebert prior to Paugh's employment at the mine, the Secretary asserts in his brief that "Ebert's safety efforts earned him the particular ire of Foreman Paugh, who viewed his safety complaints as delaying production." Sec'y Br. at 2. Roof bolter Todd Cross equivocally opined that he "never really had that much problems with [Paugh's response to safety complaints], but, I mean, on some of the safety issues, he's not the best." Tr. 222-23.

The Secretary relies on five instances of protected activity that are related to safety concerns communicated to Paugh in the weeks preceding Ebert's March 2016 suspension. Sec'y Br. at 10. The occurrence of these incidents is not challenged by Marshall County. Ebert testified that Paugh addressed each of the five concerns raised by Ebert that are enumerated below. Tr. 134-35.

b. History of Protected Activity

i. Unbolted Cuts

During the weeks preceding Ebert's March 2016 suspension, roof-bolter Cross informed Ebert that the mine had four unbolted cuts at the face and that the company's roof control plan required installation of a first row of roof bolts before a fifth cut could be taken. Tr. 113; Sec'y Ex. 4 at 5. Paugh took the necessary action to ensure that the first row of roof bolts was installed. Ebert testified that Paugh was unhappy because it took an hour to install the necessary bolts, which interfered with production. Tr. 113.

ii. Emergency Ride Brake

Several days prior to Ebert's suspension, a mechanic from the previous shift informed Ebert's crew that there was a problem with the section's emergency ride brakes. Tr. 108; Sec'y Ex. 4 at 5. Ebert asked Paugh to have the emergency ride brakes replaced. Tr. 108. Ebert testified that the mine's mechanic, Dean Williams, examined the problem and concluded that there was a leak in the brakes. Tr. 108. According to Ebert, Paugh told Williams, "Fill it with fluid, and let's go." Tr. 108. Ebert does not contend that mechanic Williams concluded that the brakes needed to be replaced. Ebert testified that he questioned Paugh's decision because he still did not think the emergency ride vehicle was safe. Ebert further testified that Paugh became upset when Ebert expressed his opinion. Tr. 108.

### iii. Loading Supplies

Prior to Ebert's suspension, Paugh requested Ebert and his crew to retrieve supplies that were located at the end of a track. However, there was a roof bolter on a flat car, used to transport equipment, that was chained to the flat car in a crooked manner, causing a blockage of the walkway. Paugh requested the crew to retrieve the supplies by having some individuals on one side of the flat car hand over the supplies to individuals positioned on the other side of the flat car by passing the supplies over the top of the bolter. Ebert suggested to Paugh that if a pile of trash, consisting of old mangled rib straps, bolts, cardboard, and oil cans, located on the side of the track where the supplies were located, was removed, it would provide a safer, direct path to the supplies. Paugh adopted Ebert's suggestion to remove the trash. However, Ebert testified that Paugh "became very irritated." Tr. 102-03; Sec'y Ex. 4 at 6.

### iv. Shuttle Car Cable

On March 4, 2016, Ebert observed that a shuttle car power cable was tied to a rib strap by a tow rope. Tr. 104; Sec'y Ex. 4 at 4. Ebert believed this was not a safe method of securing the power cable because the rib strap was sharp and could slice through the cable's rubber jacket, creating a shock hazard. Ebert told Paugh that a proper anchor bolt was needed to secure the power cable. Cross testified that Paugh was not happy about having to install an anchor bolt instead of using the rib strap as an anchor. Tr. 222. However, after initially disagreeing, Paugh acquiesced to Ebert's suggestion that an anchor bolt was required. It took approximately 20-25 minutes to install the anchor bolt. Tr. 104.

### v. Excessive Rail Cars

On March 5, 2016, Marshall County attempted to bring an additional rail car to the end of the mine section's track. At that time, there were already 10 supply cars on the track. Ebert believed West Virginia mine regulations only permitted a maximum of seven cars at the end of the track. Ebert testified that when he raised this issue, Paugh reportedly "became very irritated with [him]" and asked, "'Why are you always trying to shut me down?'"<sup>5</sup> Tr. 99-100.

Paugh had been Ebert's foreman since December 2015. During the approximate three month period preceding his March 2016 suspension, Ebert continued to raise safety issues when appropriate, despite his testimony that Paugh was resentful. Ebert testified that although the safety issues he raised were always addressed, he claimed they were done so reluctantly. There is no evidence that Ebert was the victim of any adverse action as a result of his safety concerns during the months preceding his March 2016 suspension. Tr. 134-35. Paugh continued to be Ebert's supervisor for an uneventful eight month period following Ebert's March 2016 suspension. Tr. 182.

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<sup>5</sup> Ebert raised an additional safety related concern expressed to Paugh regarding the location of a refuge chamber during a March 2016 interview with an MSHA special investigator at MSHA's District 3 Field Office in Clairsville, Ohio. *See* Sec'y Ex. 4 at 6. This incident was not addressed during testimony.

c. March 7, 2016 Incident

On March 7, 2016, there were three operational shifts at Marshall County's mine: a morning shift, from 8:00 a.m. to 4:00 p.m.; an afternoon shift, from 4:00 p.m. to midnight; and a midnight shift, from midnight to 8:00 a.m. Tr. 47-48. On that day, Paugh's crew of approximately 10 miners, including Ebert, was assigned to work the morning shift in a continuous mining section driving entries in preparation for setting up the 14 East longwall section. Tr. 35, 55, 282-83. Each shift for a continuous mining section has two shuttle car operators. On March 7, Ebert and John Harris were partnered together as the two shuttle car operators for the morning shift. Tr. 30-31.

On March 7, 2016, Paugh's crew reported to the mine at 8:00 a.m. and traveled underground via elevator, whereupon they traveled to the working section via a mantrip, arriving at the 14 East power center at approximately 9:00 a.m. Tr. 305. Beginning shortly after 9:00 a.m., Paugh conducted a routine "safety talk" with the crew at the power center, during which he provided general information about the roof control plan and the layout of the section. Tr. 55-56, 288; Resp't Ex. 7.

Upon completion of the safety talk at approximately 9:05 a.m., Paugh left the crew to perform his fire boss duties and returned to the section at approximately 9:55 a.m. Tr. 293; Resp't Ex. 7. During this time, Paugh traveled to each section face and to the track where the mine's charger was located. In addition, he took air and methane readings, checked the refuge alternatives, and inspected for violations of mandatory health and safety standards. Tr. 292-93. In the meantime, Ebert was required to conduct a pre-operational check on his shuttle car, after which he was expected to start loading supplies on the continuous miner. Tr. 56, 291. Ebert's shuttle car was used on the previous shift without evidence of any reported problems. Tr. 48-50, 197-98.

Paugh testified that a typical pre-operational examination of a shuttle car takes approximately 10-15 minutes. Tr. 307. For example, Paugh testified that Ebert's partner Harris routinely took 5-10 minutes to perform the part of the pre-op that involved inspecting the shuttle car and that it would then take him roughly another 5 minutes to perform the rest of his pre-op duties, which would include watering the roads. Tr. 356. In contrast, Ebert testified that the pre-operational examination of his shuttle car on a typical day with no major problems took him approximately 40-45 minutes. Tr. 33.

The right of a miner to perform a thorough pre-op examination is protected by section 105(c)(1) of the Act. Sec'y Br. at 12. Although Paugh was aware that it normally took Ebert up to 45 minutes to complete a pre-op inspection, there is no evidence that Paugh had expressed any objections or concerns over the length of time Ebert took to complete his pre-op responsibilities. Tr. 356.

Ebert testified that he began his pre-op duties by assisting his partner Harris in watering the tram road as required. Tr. 56-57. The hose used to accomplish watering the road is the equivalent of a three-quarter inch garden hose. Tr. 390. Ebert claims the hose was tangled with other cables along the mine's ribs. Tr. 59. Therefore, while Harris watered approximately

300 feet of the tram road, Ebert reportedly assisted him by untying the water hose to create the slack necessary for Harris to water the entire length of the road. Tr. 60-61.

In his initial interview with MSHA, Ebert claimed that it took him only a few minutes to untangle the hose from around the shuttle car cable. Gov't Ex. 4 at 2. At trial, Ebert initially testified that untying the hose and providing the requisite slack for watering the roadway took approximately 10-15 minutes that day. Tr. 60-61. On cross-examination, he stated that it took him 15-20 minutes. Tr. 118-119. Minutes later, after further deliberation, Ebert stated that it took him half an hour. Tr. 120-121.

Next, Ebert testified that before proceeding to his shuttle car to complete his pre-op duties, he was stopped by two mechanics, Kirk Roth and Tim Black, who sought information concerning the layout of the section and directions to the tool car, as they did not normally work on the 14 East Longwall setup section. Tr. 61-62, 243. Black was a union mechanic, and Roth was a company maintenance foreman. Tr. 62. Ebert claims this conversation lasted 10-15 minutes. Tr. 119. Black testified that the conversation lasted around 7-10 minutes. Tr. 245.

Having completed his fireboss duties, Paugh returned to the power center at approximately 9:55 a.m. and noticed Ebert talking to Roth and Black, in the same vicinity at which he had last seen Ebert at 9:05 a.m. Tr. 295-96; Resp't Ex. 7. Paugh instructed Ebert to begin helping the crew supply the continuous miner. However, Ebert responded that he could not do so because he had not yet completed his pre-op. Tr. 295. Paugh told him that "quite a bit of time had [e]lapsed," somewhere between 45-50 minutes by his estimation, and then "asked him why he hadn't completed his pre-op [in] that time." Tr. 296. Ebert testified he explained that he had some difficulty untying the hose earlier and that he was then interrupted by Roth and Black, who needed assistance. Tr. 63, 196. In response, Paugh told Ebert to finish his pre-op. Tr. 64. Consequently, Ebert continued to his shuttle car and completed the remaining tasks for his pre-op examination, which he estimated required another 30 minutes. Tr. 64, 82-84.

The evidence with respect to the extent that Ebert assisted Harris in watering the road is equivocal. Paugh testified that he immediately sought out Harris to confirm whether Ebert had been assisting him with his tasks. At that time, he observed Harris still watering the road. Tr. 300. However, Paugh did not notice any entanglement of the hose. Tr. 302-03. Paugh testified that Harris responded he had watered the roads himself, "just like always." Tr. 300. Paugh testified that although this job was the responsibility of both Harris and Ebert, Harris did the job himself on the majority of occasions. Tr. 301. Paugh claimed to have spoken to Ebert about this problem before. Tr. 301-02. Tim Black testified that when he first observed Ebert before engaging him in conversation, he believed Ebert "was dragging a hose or something." Tr. 249.

Paugh testified that, after speaking to Harris, Paugh returned to Ebert and told him that it was "ridiculous" and "unacceptable" that Ebert did not finish his pre-op and assist with other tasks as needed during the preceding approximate 45 minute interval when Paugh was conducting his fire boss examination. Tr. 308-09. Paugh sought a further explanation from Ebert to account for Ebert's apparent inactivity during this period, but did not receive any. Tr. 308-09. Paugh testified that he told Ebert that his insubordinate behavior would not be tolerated. Tr. 309.



According to Paugh, Ebert responded, "You do what you got to do." Tr. 309. Ebert denies that this conversation took place. Tr. 129-130. However, Ebert does not deny that he was significantly delayed in completing his pre-op examination duties. Tr. 82-83.

Paugh testified that after failing to get an adequate explanation from Ebert, he called his own supervisor, Brad Racer, to request Ebert's removal from the section. Tr. 310. Paugh testified that he wanted someone else to remove Ebert from the mine because he wanted to avoid a confrontation. Tr. 312.

At around 10:20 a.m., after unsuccessfully attempting to reach the mine superintendent, Paugh called the mine's general manager, Eric Grimm, to inform him that he was removing Ebert from the mine. Tr. 313-314. Then, Paugh took notes to record his version of these events. Tr. 318; Resp't Ex. 7.

After completing the pre-op of his shuttle car, at approximately 10:25 a.m., Ebert proceeded to walk to the continuous miner where he helped load supplies on a bolter. *See* Tr. 64, 69, 82-84. The operable 10:25 a.m. time is consistent with Ebert's testimony that he needed an additional 30 minutes to complete the pre-op of his shuttle car after speaking to Paugh, who had returned to the power center at approximately 9:55 a.m. Tr. 84, 294. Thus, the evidence reflects Ebert was not available to engage in production activities for at least a one hour and 20 minute period, beginning the calculation from approximately 9:05 a.m. when Paugh completed his safety meeting at the power center.

After Ebert completed loading the supplies on the bolter, he asked Paugh if there was anything else Paugh wanted him to do. Tr. 70. Paugh told him to go to retrieve his shuttle car. Tr. 70. When Ebert reached the shuttle car, he was greeted by Racer, who informed him that Paugh had requested Ebert's removal from the mine. Tr. 70. Ebert testified that Racer told him that he was being removed for refusing a direct order and being argumentative. Tr. 71. Ebert testified that he disputed these charges and told Racer that Roth could corroborate his account. Tr. 71.

When Ebert reached the surface, he clocked out and went to the human resources ("HR") department to seek clarification from Amy Bailey, an HR employee, about his next course of action. Tr. 73-74. Ebert was paid for the time he worked that day. Tr. 75-76.

Later that day, Paugh spoke with General Manager Grimm, who ultimately was responsible for disciplining miners. Tr. 319-20, 358-59. Paugh related to Grimm what had occurred with Ebert and explained his reasons for removing him from the mine. Tr. 319-20. Paugh also provided Grimm with his notes. Tr. 362-63; *see* Resp't Ex. 7. In addition, Paugh related to Grimm what Harris reportedly had told him. However, Grimm did not seek to verify this information from Harris. Tr. 367-68.

Ebert was later contacted by telephone and asked to appear for a meeting with mine management. Tr. 75-76. The meeting took place several days after the March 7, 2016, incident. Tr. 265; Resp't Ex. 10 at 2. At the meeting, Ebert was accompanied by two union officials. Tr. 75; 172-73. During the meeting, Grimm asked Ebert to account for his time during the

“47 minute” period Paugh was absent from the face while conducting his fire boss duties. Tr. 367. Grimm concluded that Ebert did not offer a “credible” and “satisfactory explanation” for “what he did for 47 minutes when he should have been pre-oping his shuttle car.” Tr. 367.

Following the meeting, Grimm decided to suspend Ebert for two and a half days for insubordination. Tr. 367-71; Sec’y Ex. 9. Insubordination is defined, under Marshall County Coal’s Employee Conduct Rule Number 4, as “refusal or failure to perform work assigned or to comply with supervisory direction.” Resp’t Ex. 16. Ebert returned to the mine to resume work on March 15, 2016. Tr. 75-76.

#### **IV. Further Findings and Conclusions**

##### **a. Analytical Framework**

Section 105(c) prohibits retaliating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners “to play an active part in the enforcement of the Act,” recognizing that “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 95-181, at 35 (1977), *reprinted in Legis. Hist.* at 623. It is the intent of Congress that, “[w]henver protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

The Secretary has the burden of demonstrating a prima facie case of discrimination. In order to establish a prima facie case, the Secretary must establish that Ebert engaged in protected activity, and that Ebert’s March 2016 two-and-a-half day suspension was motivated, in some part, by that activity. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

Marshall County may rebut a prima facie case by demonstrating, either that no protected activity occurred, or, that Ebert’s suspension was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Consequently, Marshall County seeks to challenge Ebert’s discrimination complaint by asserting that his suspension was solely predicated on a legitimate business justification. Specifically, Marshall County contends that Ebert’s March 7, 2016, failure to timely perform the pre-op duties required of a shuttle car operator was the sole basis for his suspension.

Marshall County may also affirmatively defend against a prima facie case by establishing that it was also motivated by unprotected activity, i.e., a failure to timely perform pre-op examination duties, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d 738, 750 (11th Cir. 1990), *citing with approval E. Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission’s *Pasula-Robinette* test).

The Secretary contends that Ebert's protected activities were a motivating factor in Marshall County's decision to suspend Ebert. It is undisputed that Ebert had a reputation for being a safety advocate during his seven year employment at the mine. In addition, the Secretary relies on a series of safety related concerns communicated by Ebert to Paugh during the weeks preceding his March 2016 suspension.

When viewed in a vacuum, given the undisputed knowledge and coincidence in time of the protected activities relied upon by the Secretary, the Secretary has presented sufficient prima facie evidence "from which the trier of fact *could infer* retaliation." *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1824 (Aug. 2012) (quoting *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011)). (Emphasis added).

Marshall County has not disputed this series of safety related complaints voiced shortly before Ebert's suspension. Despite Ebert's history of expressing safety concerns, Marshall County seeks to rebut Ebert's proffered prima facie case by contending that Ebert's safety related activities played no role in its decision to suspend him.

b. Alleged Business Justification

The evidence reflects that during the day-shift beginning at 8:00 a.m. on March 7, 2016, Paugh and his crew traveled to the 14 East Longwall setup section, arriving at the power center at approximately 9:00 a.m., at which time Paugh conducted his daily roof control meeting with his crew. Tr. 305. At approximately 9:08 a.m., Paugh left the power center to perform his fireboss duties, returning to the power center at approximately 9:55 a.m. Tr. 292-93. During this approximate 47 minute interval, Paugh expected Ebert and Harris to water the relevant roadway and perform pre-operational examinations for each of their respective shuttle cars. Tr. 56, 291.

Upon his return to the power center at approximately 9:55 a.m., Paugh observed Ebert talking to Roth and Black. Tr. 294-96. Black testified that the conversation with Ebert was about the layout of the section and directions to the tool car. Tr. 243. Upon approaching them, Paugh requested that Ebert help supply the continuous miner. Tr. 295. At that time, Ebert informed Paugh that he was unable to assist because he had not yet performed a pre-op examination of his shuttle car. Tr. 63. Ebert estimated that he needed an additional 30 minutes to perform the pre-op on his shuttle car. Tr. 64, 82-84.

To account for his failure to pre-op his shuttle car, Ebert told Paugh that he was delayed because he had some difficulty unangling the hose in preparation for assisting Harris with watering the tram roadway. He also told Paugh that his pre-op was further delayed because of his conversation with Roth and Black. Tr. 63-64.

Paugh questioned Harris to determine if Ebert's explanation for failing to pre-op his shuttle car during the 47 minute interval that had elapsed was justified. Paugh testified that he asked Harris if Ebert had helped him water the road. Paugh testified that Harris responded that he had done the watering by himself, "just like always." Tr. 300.

Paugh's recollection at trial is somewhat inconsistent with his March 7, 2016, contemporaneous notes for the disciplinary action taken that day with respect to the degree that Ebert did, or did not, participate in watering the tram roadway. The notes, when read in conjunction with Paugh's testimony, reflect that when Paugh returned from his fireboss duties at 9:55 a.m., he found Ebert talking to Roth and Black at the power center. Tr. 295-96; Resp't Ex. 7. It is not difficult to imagine Paugh's state of mind when he found Ebert at the power center at 9:55 a.m., the very same location in which he had last seen him at approximately 9:05 a.m., when Paugh had departed to conduct his fireboss duties. When asked why Ebert did not complete the pre-op of his shuttle car, the notes reflect that Ebert replied that he "had to help stretch out [the] wash down hose." The notes further reflect that Harris stated that "this only took a couple minutes to do." Resp't Ex. 7.

In any event, both Paugh's testimony and his contemporaneous notes reflect that Paugh did not believe the "tangled hose" explanation was an adequate justification for the pre-op delay. In this regard, Paugh's contemporaneous notes further reflect that Paugh concluded that if it took five minutes to stretch the hose, "that leaves 42 minutes to complete [the] pre-op, which was not done." *Id.*

Although Ebert denies that this conversation occurred, Paugh testified that, given Harris's failure to corroborate Ebert's story, Paugh told Ebert that it was "ridiculous" and "unacceptable" that Ebert had not performed his shuttle car pre-op or assisted with other pre-op duties, and that Ebert's insubordination would not be tolerated. Tr. 129-30, 308-09. Paugh further testified that Ebert responded, "'You do what you got to do.'" Tr. 309.

To avoid a confrontation with Ebert, Paugh asked Racer, Paugh's immediate supervisor, to remove Ebert from the mine. Tr. 310-12. A disciplinary meeting was conducted by Mine Manager Grimm on March 9, 2016. Resp't Ex. 10. Participants at the meeting included members of mine management, Ebert, and union President Thomas McGary as well as union Vice-President Ryan Sparks. *Id.* Paugh was not present at the meeting and did not have the authority to suspend Ebert. *Id.*; Tr. 283. After hearing Ebert's account of the events of March 7, 2016, Grimm concluded that Ebert did not adequately explain why he had not begun the pre-op examination of his shuttle car for 47 minutes. Tr. 367. Consequently, Grimm imposed a two-and-a-half day suspension as a sanction against Ebert. Tr. 367-71.

The parameters for analyzing a claimed business justification for disciplining a miner who has brought a discrimination claim before this Commission are well settled. The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

*Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission subsequently further explained that it is not the role of the judge to substitute his or her judgment for that of the mine operator if the proffered business justification is facially reasonable. The Commission stated:

[A] judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

*Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

The Commission has addressed the parameters for showing that a mine operator's explanation for the adverse action complained of is not credible. Consistent with *Turner*, the Secretary must demonstrate that Marshall County's reasons for suspending Ebert either: (1) had no basis *in fact*; (2) did not *actually* motivate his suspension; or (3) were *insufficient* to motivate his suspension. See *Turner*, 33 FMSHRC at 1073 (citing *Madden v. Chattanooga City Wide Service Dep't.*, 549 F.3d 666, 675 (6th Cir. 2008)) (additional citations omitted) (emphasis in original).

The first and third showings addressed in *Turner* are inextricably intertwined. With respect to (1) basis in fact and (3) sufficient motivation, obviously mine operators have a legitimate interest in requiring their employees to complete their pre-op examinations in a timely manner. The evidence reflects that Ebert had not begun the pre-op examination of his shuttle car during the 47 minute period following the termination of Paugh's roof control meeting at the power center. Ebert testified that he needed approximately 30 additional minutes to complete his pre-op examination when Paugh requested, at 9:55 a.m., that he help load the continuous miner. Tr. 82-84. Thus, by his own admission, Ebert would not have been able to place his shuttle car in service or perform other routine activities as assigned until approximately 10:25 a.m.

Determining whether the 47 minute delay provides a reasonable justification for Marshall County's suspension of Ebert requires consideration of the chronology of the March 7, 2016, events. Ebert testified that his conversation with Roth and Black lasted approximately 10-15

minutes. Tr. 119. Black testified that the conversation took 7-10 minutes. Tr. 245. Thus, I conclude that the conversation with Roth and Black took no more than 15 minutes. This leaves approximately 32-37 minutes during which time Ebert failed to perform a pre-op examination of his shuttle car. In justifying this failure, Ebert, in effect, claims that it took him and Harris this period of time to jointly untangle the equivalent of a garden hose and water the roadway. Tr. 66. Thus, Ebert would have Marshall County believe that it took the equivalent of between 64 and 74 man minutes to water the roadway.

While it is true that the right to conduct a thorough pre-op examination is protected, it is also true that operators retain the authority to ensure that pre-op examinations are not unjustifiably delayed. The evidence reflects, when viewed in context, that Ebert's "tangled hose" explanation for the significant delay in the completion of his pre-op examination duties is not credible. It is noteworthy that Ebert has not adequately explained how long his reported attempts to untangle the hose delayed completion of his pre-op duties. In this regard, as previously noted, Ebert initially testified that this task took 10-15 minutes that day. Tr. 61. On cross-examination, he stated that it took him 15-20 minutes. Tr. 118-119. Minutes later, after further deliberation, Ebert stated that it took him half an hour. Tr. 120-121. In his initial interview with MSHA, Ebert claimed that the task took him only a few minutes. Gov't Ex. 4 at 2. Consequently, I find that Marshall County's rejection of Ebert's claimed justification for the delay in performing his pre-op examination on March 7, 2016, must be viewed as a legitimate exercise of its business judgment. Therefore, the record, on balance, reflects that Marshall County had a reasonable business justification for disciplining Ebert.

c. Alleged Discriminatory Motive

Having determined that the reasons advanced by Marshall County for Ebert's suspension were both factual and sufficient to motivate its disciplinary action, the first and third elements contemplated by *Turner* support Marshall County's claimed business rationale. We now turn to the second element in *Turner*: whether Ebert's untimely pre-op examination actually was the sole motivation for his suspension. Ebert's suspension was consistent with Marshall County's permissible conduct rule that prohibits "refusal or failure to perform work assigned or to comply with supervisory direction." Resp't Ex. 16. The rationale given to Ebert at the time of his suspension is consistent with the rationale proffered by Marshall County during the course of this proceeding. However, Marshall County does not simply prevail by showing that its justification for suspending Ebert was not implausible or otherwise pretextual. The Secretary may still prevail by showing that the operator was motivated, at least in part, by Ebert's protected activities.

As noted, the Commission has recognized that it is not uncommon for operators to attempt to mask discriminatory motivation by asserting that unprotected activity is the sole justification for the adverse action complained of. *Chacon*, 3 FMSHRC at 2516-17. In evaluating whether an operator's claimed business justification is disingenuous, the Commission has noted that direct evidence of a discriminatory motive is rare. As such, discrimination can usually only be demonstrated through circumstantial evidence. *Id.* at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)).

The Commission has identified that some of the more common circumstantial indicia of discriminatory intent are: 1) knowledge of the protected activity and coincidence in time between the adverse action and that protected activity; 2) hostility or animus towards the protected activity; and 3) disparate treatment of the complainant. *Id.*

To successfully demonstrate a discriminatory motive by indirect evidence requires a rational connection between the indirect evidence and the fact in issue, i.e., the motivation for Ebert's suspension. *See Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (Nov. 1989) (citing *Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138 (May 1984)) (noting that there must be a rational connection between the evidentiary facts and the adverse action complained of). An evaluation of whether there is sufficient indirect evidence of discriminatory intent follows.

i. Knowledge and Coincidence in Time

Marshall County does not dispute that Ebert had a reputation as a safety advocate who frequently brought safety related issues to his supervisors' attention. Tr. 340. It is also undisputed that Ebert communicated at least five safety related concerns to Paugh in the weeks preceding his March 2016 suspension. Paugh's knowledge of Ebert's expressed safety concerns is imputed to Grimm. *See Turner*, 33 FMSHRC at 1068 (holding that a supervisor's knowledge of protected activity may be imputed to a decision maker without such knowledge, who nonetheless relied on the supervisor's recommendation). Moreover, there is a coincidence in time between these expressed safety related concerns and Ebert's suspension. Thus, two of the circumstantial elements identified in *Chacon* have been demonstrated. However, in apparent recognition that coincidence in time and knowledge, alone, may be inadequate to infer a discriminatory motive, the Secretary also asserts an animus toward Ebert's safety related activities, and, that Ebert was the victim of disparate treatment. Whether the Secretary has adequately demonstrated that these two elements of *Chacon* played a role in Ebert's suspension is discussed below.

ii. Animus

The Secretary alleges that Paugh exhibited hostility toward Ebert as a consequence of the following safety related concerns which were communicated to Paugh in the weeks preceding his suspension: (1) Ebert's insistence on ensuring adequate roof bolting before continuing production in a working section; (2) Ebert's concern regarding a defect in the brakes on an emergency ride; (3) Ebert's suggested safer alternative method for retrieving supplies from the end of a track; (4) Ebert's insistence that the safe anchoring of a power cable required installation of an anchor bolt rather than reliance on a rib strap; and (5) Ebert's concern regarding an excessive number of supply cars at the end of a section track. Sec'y Br. at 10, 14.

In evaluating whether there is sufficient evidence to infer animus toward protected activity, it is helpful to consider, by analogy, the Commission's longstanding case law with respect to a protected work refusal. In this regard, once a miner expresses a good faith, reasonable belief in a hazard, the focus shifts to whether the mine operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). Significantly, Ebert's testimony reflects that Paugh adequately

responded to each of Ebert's enumerated safety related concerns by taking appropriate remedial actions.

Despite Paugh's responses to Ebert's complaints, the Secretary relies on Ebert's self-serving assertion that these complaints were not welcomed by Paugh. In this regard, Ebert testified that he perceived Paugh as being "angry," "irritated," and "upset" over Ebert's expressions of safety related concerns. Tr. 103, 108, 113. Ebert also alleges that Paugh accused Ebert of "always trying to shut [him] down." Tr. 100.

On balance, the evidence is insufficient to infer hostility on the part of Paugh based on Ebert's self-serving accounts without sufficient supporting evidence by a witness, or, objective evidence of discriminatory intent, such as relevant past verbal or written disciplinary actions. It is true that Cross testified that Paugh was "not happy" about having to install a roof bolt instead of using a rib strap as an anchor for a power cable because Paugh apparently believed that the rib strap did not jeopardize the integrity of the cable's outer jacket. Tr. 222. It would be naïve to think that a mine foreman will always welcome a subordinate miner's insistence on an alleged safety related remedy which the foreman believes is unnecessary. Of course, operators should err on the side of caution when deciding whether to address reasonable safety related concerns expressed by miners. Thus, it is the totality of the foreman's response which is dispositive of the issue of animus.

I am cognizant that hostility to safety related complaints can cause a chilling effect. However, the record does not reflect objective evidence of hostility in this case. There is no evidence of any adverse action suffered by Ebert at the hands of Paugh, either before or after his March 7, 2016, suspension, as a result of Ebert's practice of performing thorough pre-op examinations or because of his expressed safety related concerns. To assume animus as a motivating factor requires the conclusion that Marshall County implemented a "lying in wait" strategy by disingenuously seizing upon Ebert's failure to adequately explain the reason for the delay in completing his pre-op examination duties. Such an assumption is a bridge too far based on the evidence of record.

Although Cross testified that Paugh was "not the best" about responding to safety complaints, Cross also testified that he never personally experienced a problem with Paugh with respect to any of his safety related concerns. Tr. 222-23. Cross's equivocal testimony is insufficient to satisfy the Secretary's burden of demonstrating animus.

Notwithstanding the Secretary's claimed animus toward Ebert's history of protected activity, the Secretary relies on general concerns about a loss of productivity as additional indirect evidence of animus. In this regard, the Secretary sought to elicit testimony from Paugh that Paugh resented Ebert's safety complaints because they resulted in an interruption of production. The following testimony elicited from Paugh by the Secretary's counsel is illustrative:

Q. Okay. Now, Mr. Paugh, Mr. Ebert is clearly a safety advocate; is that fair to say?

[A]: Yes. . . .

Q. And he'll bring safety issues he observes to you, correct?



A. Yes.

Q. And when those issues have to be addressed, they can slow down production?

A. Not always.

Q. But sometimes, right?

A. Yes.

Q. So, for example, . . . [d]id [the] roof control plan for the mine only allow for you to have four unbolted entries, right?

A. Yes.

Q. And before you can begin mining a fifth, you have to roof bolt the first, right?

A. Yes.

Q. So if Mr. Ebert was to bring that issue to your attention, it would certainly slow down production?

A. Yes.

Q. And it would take probably over an hour to bolt an entire entry, right?

A. An entire entry?

Q. Yes.

A. It could.

Q. And it is your job to try to maximize production, right?

A. Yes.

Tr. 340-42.

The Commission has concluded that the goal of maximizing production is a legitimate business motivation as long as it does not interfere with a miner's statutory right to engage in protected activity. *Sec'y of Labor on behalf of Zecco v. Consolidation Coal Co.*, 2 FMSHRC 985, 994 (Sept. 1999). Consequently, management's desire to "maximize production" is not, in and of itself, evidence of a discriminatory motive as long as safety related concerns are not subordinated. To hold otherwise would be tantamount to concluding that an operator's interest in maximizing production is discriminatory per se.

Finally, the Secretary seeks to infer animus by asserting that Grimm's inquiry into the facts surrounding Paugh's suspension was inadequate by virtue of the fact that Grimm "did not interview Harris, Black, or Roth, all of whom could have confirmed either Paugh or Ebert's version of events." Sec'y Br. at 15. Grimm testified that he did not find Ebert's explanation for the significant delay in the completion of Ebert's pre-op examination duties to be plausible. Grimm's inquiry afforded Ebert significant procedural protections, in that Grimm's fact-finding was conducted in the presence of union officials. Tr. 75. As previously noted, the Commission and its judges do not sit as a super grievance or arbitration board. *Chacon*, 3 FMSHRC at 2516-17. It is not within the purview of a Commission judge to substitute how the judge would have conducted the inquiry, provided that the inquiry was not so perfunctory or otherwise procedurally deficient to suggest an underlying animus.

In the final analysis, the reported self-serving perceived hostility of Paugh, a general company goal of maximizing production, and the claimed insufficiency of Grimm's inquiry, do not provide an adequate basis for inferring animus.

### iii. Disparate Treatment

In order to prevail with respect to a claim of disparate treatment, the Secretary must show that a similarly situated employee who committed the same or a more serious offense did not suffer the same disciplinary fate as the complainant. *See Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 331 n.14 (Apr. 1998) (citing *Schulte v. Lizza Indus., Inc.* 6 FMSHRC 8, 16 (Jan. 1984); *Chacon*, 3 FMSHRC at 2512).

The Secretary alleges that Paugh treated Ebert differently from shuttle car operator John Harris, who was still watering the road when Paugh returned from his fireboss run at 9:55 a.m. By virtue of Harris's watering activities, the Secretary asserts that Harris, like Ebert, had not completed his pre-op duties by 9:55 a.m. Therefore, the Secretary alleges that Paugh's failure to discipline or even question Harris constitutes disparate treatment. Sec'y Br. at 16-17.

Paugh testified that when he saw Harris watering the road at approximately 9:55 a.m., he assumed Harris had already completed his pre-operational inspection of his shuttle car, which Paugh testified routinely took Harris 10-15 minutes. Tr. 346-47. Paugh further testified that Harris informed him that Ebert had not assisted him in watering the roads that morning. Tr. 300. Consequently, Paugh testified that Harris refuted Ebert's claim that he was busy helping Harris water the road. *See* Tr. 300.

In any event, at approximately 9:55 a.m., Paugh observed Harris fulfilling his watering duties and actively working. Tr. 302. At that time, in contrast, Paugh observed Ebert near the power center, where he had last seen him, talking with Roth and Black. Tr. 294-95, 298. When Paugh broke up that conversation by requesting that Ebert help supply the continuous miner, he first learned that Ebert had not yet begun the pre-op of his shuttle car, which Ebert estimated would take approximately an additional 30 minutes. Tr. 82-84; 295. Consequently, as previously noted, the record reflects that Ebert was not available to perform his routine shift duties, such as supplying the continuous miner and operating his shuttle car, until approximately 10:25 a.m.

The Secretary's assertion that Harris was similarly situated is speculative. It is unclear whether Harris, like Ebert, would not have been available until later that morning to resume his operational duties. It is equally unclear whether Ebert had done any meaningful work that morning prior to his encounter with Paugh at 9:55 a.m. While it is true that Marshall County could have called Harris to support Paugh's testimony, it is also true that the Secretary could have called Harris to support Ebert's testimony. Neither having availed themselves of Harris's testimony, on balance the weight of the evidence must be given to Paugh, given that the Secretary bears the burden of proof in this discrimination proceeding. Thus, the evidence presented by the Secretary is insufficient to warrant the conclusion that Ebert was the victim of disparate treatment.

In sum, the Secretary has demonstrated indirect evidence consisting of knowledge and coincidence in time. However, the Secretary has failed to demonstrate animus and disparate treatment. As previously noted, successfully relying on indirect evidence to prove a discriminatory motive requires a rational connection between the indirect evidence and Ebert's suspension. *Garden Creek Pocahontas*, 11 FMSHRC at 2153. Reliance solely on Marshall

County's knowledge of Ebert's protected activity that occurred shortly before his suspension to infer discriminatory motive is inadequate in this case, when Ebert's transgression was sufficiently serious in nature to warrant a reasonable disciplinary response. Simply put, a miner's exercise of protected activity shortly before the disciplinary action complained of does not insulate the miner from the consequences of conduct that an operator reasonably views as unacceptable. Significantly, the two-and-a-half day suspension imposed on Ebert was not disproportionate or overly harsh, and, thus is not indicative of a discriminatory motive.

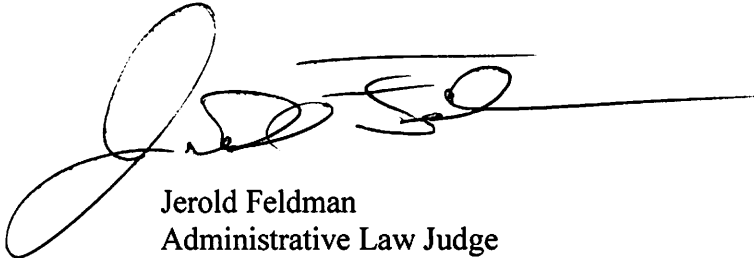
Having determined that Marshall County has successfully rebutted the Secretary's case by adequately demonstrating that Ebert's suspension was not motivated, in any part, by his protected activity, I need not address the alternative affirmative defense raised by Marshall County.

**ORDER**

In view of the above, **IT IS ORDERED** that Marshall County's motion to dismiss the subject discrimination complaint as untimely **IS DENIED**.

The Secretary has failed to present sufficient circumstantial evidence to demonstrate that Ebert's March 2016 suspension was motivated, in any part, by his protected activity. Consequently, **IT IS FURTHER ORDERED** that the discrimination complaint filed by the Secretary of Labor on behalf of Carl Ebert **IS DENIED**.

As such, **IT IS FURTHER ORDERED** that Docket No. WEVA 2016-565-D **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

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