FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

NOV 14 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of FRED MCKINSEY, Complainant	DISCRIMINATION PROCEEDING Docket No. SE 2014-344 DM MSHA Case No.: SE MD 14-12
v.	
PRETTY GOOD SAND COMPANY, INC., Respondent	Mine: Great Pit Mine ID: 31-02014

DECISION

Appearances: Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, Representing the Secretary of Labor

Matthew R. Korn, Esq., Fisher & Phillips, LLP, Columbia, SC, Representing Respondent

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by the Secretary of Labor ("Secretary") on behalf of Fred McKinsey ("McKinsey"), a miner, against Pretty Good Sand Company, Inc., a corporation ("PGSC"), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

Complainant McKinsey alleged that Respondent unlawfully discharged him in January 2014, after he made a safety complaint to the Mine Safety and Health Administration ("MSHA") on November 25, 2013.

On February 18, 2014, McKinsey filed a discrimination complaint with MSHA. After conducting an investigation, the Secretary found that McKinsey's assertion was not frivolously brought and filed an Application for Temporary Reinstatement on March 26, 2014. Respondent requested a hearing regarding this application on April 10, 2014, via conference call. A hearing was held in Rocky Mount, NC on April 30, 2014. On May 6, 2014, the undersigned issued a Decision and Order Temporarily Reinstating McKinsey to his former position with PGSC.

On June 3, 2014, the Secretary filed a complaint on McKinsey's behalf with MSHA alleging discrimination under Section 105(c) of the Mine Act. On June 16, 2014, the Secretary filed an amended Discrimination Complaint to include the civil penalties assessed by MSHA.

On June 17, 2014, the parties submitted a Joint Motion to Amend Order of Reinstatement. Under the terms of that agreement, McKinsey would be economically reinstated rather than physically reinstated to the mine, retroactive to the date of the Decision and Order. On June 19, 2014 the undersigned issued a decision and order granting the economic reinstatement of McKinsey.

The discrimination hearing was held in Rocky Mount, North Carolina on July 22 and 23, 2014, at which both the Secretary and Respondent presented evidence and testimony. Subsequent to the hearing both parties submitted briefs which have been received and considered in rendering this decision.

For reasons set forth below, I find that the Secretary has presented a *prima facie* case of discrimination, and that the Respondent has failed to present an affirmative defense as it did not present a valid business justification for terminating the Complainant based on an accumulation of poor work performance and insubordination. However, the after-acquired evidence submitted by Respondent supports an independent non-discriminatory basis for the Complainant's dismissal.

I. Stipulations

At the hearing, the Secretary and PGSC entered into the following stipulations (Tr. 9-10)[1]:

a. PGSC is and was at all relevant times through this proceeding the operator of the Great Pit Mine, Mine ID number 31-02014.

b. Great Pit is a mine. The term mine is defined in Section 3(h) of the Mine Act, 30 U.S.C § 802(h).

c. At all times relevant to this proceeding, products of Great Pit Mine entered commerce, are the operations of products thereof affecting commerce within the meanings and scope of section 4 for Mine Act, 30 I.S.C. § 803.

d. PGSC is an operator, as the term operator is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

e. McKinsey was previously employed by PGSC. McKinsey is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. 302(g).

[1] "Tr." followed by a number refers to the appropriate page in the hearing transcript.

f. McKinsey was terminated from PGSC on January 10, 2014.

g. PGSC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding administrative law judge has authority to hear this case and issue a decision regarding this case pursuant to Section 105 of the Act, 30 U.S.C. § 815 as amended. (Tr. 9-10).

II. Summary of the Testimony

A. Fred McKinsey

Fred McKinsey began working at PGSC as a general laborer and equipment operator in July 2013. Prior to his employment with PGSC, McKinsey worked as a mechanic for 30 years in various capacities. (Tr. 45-46). The owner/operator of PGSC and Great Pit Mine, Roger Sauerborn ("Sauerborn"), hired McKinsey. (Tr. 25-26). During his initial interview for employment, McKinsey revealed to Sauerborn that he had Asperger's syndrome and detailed the effects it had on his personality and behavior. McKinsey explained that he liked to be left alone and "didn't deal the best in the world with a lot of people situations." [sic] (Tr. 27). McKinsey further explained that he did not like to shake hands or touch people and felt stress when attention was focused on him. (Tr. 27-28). At the conclusion of the interview, McKinsey signed a non-compete clause and began employment with PGSC. (Tr. 28-29; GX1).[2]

McKinsey's starting pay was $15 per hour and he worked an average of 45 hours a week. (Tr. 29). Dennis Cannon was McKinsey's initial supervisor and Cannon provided McKinsey work related instructions, which varied daily. McKinsey remained in this position for approximately two months before Sauerborn promoted him to supervisor. (Tr. 30-31). With the promotion, McKinsey received a raise of $2.75 per hour, which increased his salary to $17.75 per hour. The new supervisory position also increased McKinsey's responsibility, which included managing other employees and ensuring the safety and efficiency of the sand pit. (Tr. 31). McKinsey was required to fill out and review safety worksheets for equipment that the company used in the day-to-day operations. He would also fix machinery that he was able and permitted to fix, while bringing any major repair issues to Sauerborn. (Tr. 32-34; GX 2). McKinsey testified that he was not permitted to make repairs that would cost more than $100-$150 without first consulting Sauerborn. (Tr. 35, 47).

In his position as supervisor, McKinsey would make safety complaints to Sauerborn. Such complaints included issues with the high walls, as well as one incident where individuals were caught rifle-hunting on company property. (Tr. 35-36). McKinsey testified that Sauerborn would frequently deflect the safety complaints. (Tr. 36). Because Sauerborn refused to take

[2] The abbreviation "GX" refers to government's exhibit. The abbreviation "RX" refers to Respondent's exhibits.

action regarding the safety complaints, McKinsey filed a hazard complaint with MSHA on November 25, 2013, by calling a hotline number he found online. (Tr. 77). At the time, McKinsey felt that calling in safety complaints was "generally frowned upon by coworkers and employees," so he did not reveal that he made the call. (Tr. 77-78).

McKinsey called MSHA on two separate occasions during which time he complained of "unsafe equipment, high walls and hunting on company property." (Tr. 36-37). The first phone call was on November 25, 2013, and the inspector came to the site the following day. McKinsey made the second phone call while this inspection was being conducted because he testified that he had forgotten to mention the highwall issue in the original complaint call. (Tr. 39-40). Sauerborn closed the site following the inspection and gave the employees time off from Wednesday, November 27, through the Thanksgiving weekend. (Tr. 37, 39).

Upon returning to work the following Monday, December 2, McKinsey felt Sauerborn's attitude toward him had changed. (Tr. 40). McKinsey testified that Sauerborn treated him differently and would single him out and belittle him. (Tr. 38-41, 96).

McKinsey did not remember the precise reasons that he stated led Sauerborn to discriminate against him - whether it was for his Asperger's syndrome or something else- but he felt he was targeted in ways that he told Sauerborn "just don't work with him." (sic) (Tr. 90-91, 93, 96).

McKinsey did not reveal that he was the person who called in the complaint, but he did inquire verbally as to why he was being treated differently after the inspection. (Tr. 81-84). Prior to the inspection, McKinsey testified that he was not formally written up, disciplined or verbally reprimanded by Sauerborn. (Tr. 41, 74-75). After the inspection, Sauerborn began sending e-mails to McKinsey regarding his work performance and the fact that someone called MSHA to report a complaint. (Tr. 42).

The first e-mail was sent December 7, 2013. (Tr. 42; GX 3). The email raised the following issues: cracked mirrors on the D-250, installation of the flashboard on site, clay being improperly dumped in a drain fill area, issues with a berm, mechanical issues with a baby loader, inspection of the site's Suburban vehicle, repair of the site's International Truck and a wheel coming off a dump trailer. McKinsey felt the e-mail was accusatory in nature because it referenced the call to MSHA and asked him "what have you learned from this incident?" which McKinsey understood to be an accusation. (Tr. 48-49).

On redirect examination, McKinsey discussed the content of the e-mail sent December 7, 2013 in more depth. (Tr. 568; GX 3). McKinsey recalled the mirrors on the D-250 haul truck were cracked and Sauerborn said they had been cracked for years. Sauerborn also stated the mirrors were not an issue, and McKinsey could use the truck. (Tr. 568-569). Later, Sauerborn

approached McKinsey and told him to park the truck and find replacement mirrors in the boneyard.[3] (Tr. 569). After not being able to locate the proper mirrors, Sauerborn instructed McKinsey to replace them with mirrors that were made to fit other types of vehicles. (Tr. 569-570, 594). Ultimately the mirrors were loose and vibrated when the machine was operated. (Tr. 570).

The next issue mentioned in the December 7, 2013, email concerned PGSC employees Matt and Josh Lane installing flashboard risers.[4] Matt did not go to the site but Sauerborn and Lane went to repair the flashboard risers and McKinsey was unable to reach either of them by radio. McKinsey did not attempt a phone call to either because in his experience they rarely answered phones at the job site. McKinsey took a vehicle on the path to see where they were.[5] (Tr. 571-572).

McKinsey testified that he did not put clay in the drain fill area as Sauerborn stated in the email. (Tr. 572). McKinsey claimed that he was never in the drain fill area and followed Sauerborn's instructions regarding where to dump the clay. (Tr. 573-575). McKinsey also stated that it was part of everyone's duty to maintain the berms. McKinsey would have completed any berm he was working on had he seen a problem, but he could not be sure to which area the citation referred. (Tr. 575-576).

McKinsey admitted there was a mechanical issue with the WA-300 baby loader but refuted the fact that he said the WA-300 baby loader was going to "break in half" as Sauerborn stated in the email. McKinsey believed Sauerborn exaggerated what was written on the pre-shift sheet in the email and in his testimony. (Tr. 576-577).

In the email, Sauerborn also accused McKinsey of improperly repairing the site's dump trailer. At the hearing McKinsey denied that his repair work was the reason for the wheel coming off the dump trailer. If anything had been wrong with his repairs, the issues would have become apparent when he replaced the brake plate on the axle. (Tr. 578-580).

When Sauerborn asked McKinsey to prepare the Suburban for inspection, McKinsey ran a diagnostic check and discovered the Suburban would require extensive repairs. McKinsey spent all day on the repairs focusing on what he thought was most important to fix and worked six hours of overtime on the vehicle. (Tr. 580-583). At the conclusion of the work, the

---

[3] A boneyard is a place where refuse, especially discarded cars, accumulates or is kept. *The American Heritage dictionary of the English language, 4th edition, Houghton Mifflin Harcourt Publishing Company, 2009.*

[4] The last name for the PGSC employee Matt was not used at the hearing.

[5] Sauerborn's testimony stated that taking a vehicle to the job site before exhausting all other means of communication was against company policy.

Suburban was still not ready for inspection and McKinsey informed Sauerborn of the situation. (Tr. 583).

Finally, the December 7, 2013, e-mail referred to the day Sauerborn instructed McKinsey to make the International Truck at the mine site "road worthy." McKinsey did not have the required parts to do so because Sauerborn wanted him to use parts from another truck at the mine. (Tr. 583-584). McKinsey had trouble with the repairs because both trucks were old and both had worn out parts. (Tr. 584). Additionally, once McKinsey began work on the truck, Sauerborn interrupted him several times, making it difficult to finish the job. (Tr. 585).

Sauerborn sent a second e-mail to McKinsey on December 11, 2013, which was the day McKinsey was demoted and Lane was promoted to the supervisory position. (Tr. 52-53, 55; GX 5). At the hearing, McKinsey indicated that the e-mail was sent after Sauerborn reduced his hours, began treating him poorly and sent him home. (Tr. 49-51; GX 4). Additionally, a handwritten note was attached to McKinsey's time card that described Sauerborn's issues with McKinsey's work performance. McKinsey further testified that he was not sure why he was demoted, but stated that Sauerborn did not reduce his pay in connection with the demotion. (Tr. 55, 85-86).

The third and final e-mail was sent to McKinsey on December 30, 2013. This e-mail referenced prior interactions between Sauerborn and McKinsey on December 20, 2013 that resulted in Sauerborn sending McKinsey home early and McKinsey refusing to leave. (Tr. 54; GX6).

McKinsey testified that he did not end his employment with PGSC voluntarily. (Tr. 56). He claimed he was fired after an incident that occurred on January 10, 2014. From the office, Sauerborn observed McKinsey cleaning up the area around a truck without a raincoat. Sauerborn retrieved a raincoat from the back of his vehicle and instructed McKinsey to wear it. (Tr. 56-57). When McKinsey told Sauerborn "no" because the raincoat was dirty and he did not like to wear other people's clothing, he was instructed to clock out and leave. No other employee was asked to don a raincoat nor did Sauerborn have additional raincoats available for the other employees in the field. (Tr. 57-60, 93-94, 130-131, 592-593).

McKinsey testified that he was unaware of a company policy requiring the use of a raincoat, and the rain was only "barely sprinkling." (Tr. 58, 60). After the encounter, Sauerborn returned to his vehicle and left the area where McKinsey was cleaning. McKinsey attempted to catch up with him and ask why he had to clock out, but was unable to do so because of an injured left foot. McKinsey testified that Sauerborn proceeded to attempt to run McKinsey over with his car. (Tr. 59-60, 94). McKinsey did not report Sauerborn to the police for allegedly trying to run him over with his car. (Tr. 93-94, 130).

On cross-examination McKinsey did not recall telling anyone connected to the Respondent about making the safety complaint, but did admit to telling friends unrelated to the company. (Tr. 98). McKinsey stated that he could not recall whether he mentioned something to Carol Medlin, a temporary secretary. (Tr. 98-99). McKinsey also did not recall telling the Employment Security Commission he was being harassed or discriminated against for the safety complaint he made to MSHA. (Tr. 115).

He admitted to posting a comment to Facebook about his termination and remarking on the discrimination as well as Asperger's syndrome. [6] (Tr. 119, 122-124). Lastly, McKinsey testified that the MSHA inspector informed him he could file a discrimination complaint after being terminated. (Tr. 130).

McKinsey was fired via text message and e-mail on January 13, 2014. (Tr. 61-62; GX 7). McKinsey has been unemployed since his termination and has actively been looking for work. (Tr. 63-65, 73, 99-100; GX 8). McKinsey does not want PGSC to reinstate him to his prior position. (Tr. 94-95). McKinsey has deferred his house payment and incurred late fees on various bills because of his termination. Additionally, he has accrued legal fees from consulting with a lawyer in connection with his termination. (Tr. 65-67, 125-126; GX 9). McKinsey did not remember the first time he contacted an attorney, but testified that he contacted attorneys "a whole lot," after January 2014 in an attempt to hire one for these proceedings. (Tr. 91-92). McKinsey also testified to being without health insurance from the date of his firing to his temporary economic reinstatement on May 6, 2014. (Tr. 68, 107, 124-125).

B. Roger Sauerborn

Roger Sauerborn testified that he is a consulting forester, a North Carolina real estate broker, and the owner of PGSC, a company that manufactures state approved concrete sand and mortar sand. PGSC also sells topsoil, fill sand, fill clay, sandy gravel and crushed rock. (Tr. 329-330). Sauerborn has owned the company since approximately 1987. (Tr. 330).

During the time McKinsey was employed with PGSC, there were nine employees. The employees' duties included loading trucks, running the plant, weighing the trucks out, invoicing tickets, and sending billings. (Tr. 330). PGSC was a small corporation and its net worth was "about a half million dollars" at the time the discrimination complaint was filed. (Tr. 331).

---

[6] The Facebook posts in pertinent part stated: ". . . I was fired from a job on 1/13/14 and have literally no means to support myself and at best it's nearly impossible to find a job in my area. Unless it's with someone that I already know is abusive. Where can I go to find help? I'm desperate and so ready for this life to be over." "...In fact yesterday morning I was fired because the boss man refused to recognize that I have a condition beyond what he can understand. In fact the owner of the company regularly picked on me and harassed me." (RX 4).

Sauerborn testified that there was an employee handbook provided to all new employees and the handbook was in effect at the time McKinsey was hired. (Tr. 331-332; RX 9). The handbook discusses types of behavior that are considered inappropriate or unacceptable. (Tr. 332). Sauerborn believes McKinsey received the handbook as part of the hiring procedure; however, McKinsey did not sign an acknowledgment form saying he received it because that was not procedure at the time. (Tr. 334-335).

Sauerborn hired McKinsey in July 2013, as a mechanic. (Tr. 336). McKinsey was hired with the understanding that the company would train him to complete other tasks because he had expressed an interest in learning all facets of the company's operation. (Tr. 337).

At the initial interview for employment, Sauerborn felt McKinsey possessed the skills necessary to perform the job as a mechanic at PGSC and that he would be well-suited for the position given his employment history. (Tr. 337-338). During the interview, McKinsey informed Sauerborn that he had Asperger's syndrome. (Tr. 338). Sauerborn had two nephews with autism and believed that he had some understanding of the condition and that knowledge could help McKinsey focus on his job. (Tr. 339). At the beginning of his employment, Sauerborn found McKinsey to be a good employee. (Tr. 339).

However, Sauerborn began noticing issues with McKinsey's employment sometime in August, 2013, when McKinsey and Dina Davis had a disagreement concerning use of the phone in the office. (Tr. 339). Sauerborn instructed Davis to write a letter regarding her version of the disagreement. (Tr. 339-340; RX 10). Sauerborn testified that the disagreement was over a new procedure that Davis and Dennis Cannon worked out concerning phone communication around Davis' desk. (Tr. 341). McKinsey was not yet informed of the new procedure and he asked to use the phone around Davis' desk. Davis told McKinsey to use another phone and an escalating confrontation occurred. Sauerborn believes McKinsey swore at Davis. (Tr. 341). Sauerborn testified that he discussed the incident with McKinsey, explained to him that his behavior was improper, and provided him an opportunity to write his own statement, but McKinsey chose not to do so. (Tr. 342-343). Sauerborn considered this conversation to be a verbal warning. (Tr. 342-343).

In September of 2013, shortly after this incident with Davis and after Cannon was terminated, Sauerborn promoted McKinsey to a supervisor position. (Tr. 343). McKinsey expressed interest in the job and Sauerborn believed that he would be a good supervisor. Sauerborn explained that there was a need for a supervisor because he was busy with other business obligations. (Tr. 343-344). McKinsey's promotion resulted in a raise, which increased his hourly pay from $15 to $17.75 an hour. (Tr. 344).

After a week in his new position as supervisor, McKinsey and Davis were involved in a second incident regarding a disagreement over a payroll estimate on McKinsey's new paycheck.

During this incident, Sauerborn testified that McKinsey swore and acted "really inappropriate." Davis wrote a letter detailing the events that occurred during the incident. (Tr. 345-346; RX 11). On September 10, 2013, Sauerborn discussed the issue with McKinsey and gave him an opportunity to write a statement, which McKinsey again chose not to do. (Tr. 348). Sauerborn testified that he also considered this conversation to be a verbal warning to McKinsey. (Tr. 349).

Sauerborn recalled two other incidents regarding McKinsey's work performance and referred to the text message record to clarify his testimony. (Tr. 349; RX 25). The first incident occurred in September and involved a bearing that had worn out and stopped production at the plant. (Tr. 351). The bearing needed to be replaced, yet McKinsey could not locate a replacement. Sauerborn testified that it was McKinsey's responsibility to keep an extra bearing available. (Tr. 351). Sauerborn ended up finding a replacement at a nearby store and picked it up on his way back to the pit. When Sauerborn arrived back, he felt that McKinsey was rude to him in front of several other employees. McKinsey blamed Sauerborn for not being able to locate an extra bearing because Sauerborn was "calling every few minutes." (Tr. 351-352). Sauerborn told McKinsey a number of times to praise people in public and say negative things privately. (Tr. 352-353, 355-356). Sauerborn gave a written warning to McKinsey regarding this incident on September 17, 2013. (Tr.353-354; RX 12). McKinsey disagreed with the letter because he felt Sauerborn contacted him too much, thereby inhibiting his ability to locate a bearing. (Tr. 354). Sauerborn did not feel as if he contacted McKinsey too much that day. (Tr. 354-355).

The second incident occurred in December and involved a work truck that required a fuel line cleaning. (Tr. 349). Specifically, McKinsey wanted to perform $3,000 worth of repairs when Sauerborn believed that the truck only needed a $30 replacement piece. (Tr. 350). Sauerborn considered this to be inadequate performance on McKinsey's behalf. (Tr. 350).

On December 7, 2013, Sauerborn created a document detailing roughly a month of McKinsey's performance issues and sent it to McKinsey via email. (Tr. 357-358, 485-488; RX 13). Sauerborn testified that he did not write the e-mail regarding these incidents until December 7, 2013 because he was busy investing his time into his other businesses. (Tr. 366, 369).

The December 7, 2013, email addressed the following issues Sauerborn had with McKinsey's performance. At the hearing, Sauerborn testified about the contents of the e-mail:

- In the e-mail Sauerborn addressed the lack of communication regarding work assignments and the quality of that communication. Sauerborn testified that he thought communication could improve between them and he felt McKinsey needed to communicate more effectively. (Tr. 360-362).

- In the e-mail Sauerborn also addressed an incident when McKinsey was driving a truck with broken mirrors on November 18, 2013. McKinsey failed to indicate

the damage on the pre-shift report, which is a guaranteed citation. (Tr. 363). Another argument took place regarding the replacement of the mirror. Sauerborn felt McKinsey did not properly perform his duty as foreman because he failed to replace or report the broken mirror. (Tr. 364-365).

- On November 20, 2013, McKinsey did not follow procedure by ensuring tasks were completed by the employees who were assigned to complete them which Sauerborn addressed in the e-mail. Sauerborn testified that when he followed up with McKinsey two days later he discovered that Matt had a recurrence of a hernia and McKinsey failed to obtain a doctor's note from him and did not inform Sauerborn of Matt's condition as required. (Tr. 367-368).

- On November 21, 2013, McKinsey dumped clay on a tract of land that was being built up for use as a residential property which Sauerborn stated in the e-mail. Sauerborn testified that he instructed McKinsey not to dump clay in the only area a septic tank could be placed. Sauerborn contends McKinsey dumped the clay there despite being told not to do so. McKinsey again dumped clay there the following day and may have destroyed the potential land use. (Tr. 369-372).

- An unknown person called MSHA with five allegations of wrongdoing and then a sixth was called during the inspection on November 26, 2013. The e-mail stated that McKinsey volunteered that he did not call MSHA but suggested it may have been one of his girlfriends or Josh Lane's parents. Sauerborn testified that at the time McKinsey made the statement he did not know which one of the employees called MSHA, but he knew the statements were too specific to come from the public. (Tr. 374).

- The e-mail stated that McKinsey also failed to alert Sauerborn of a "noise" issue with the WA-300 machine, which could have been repaired for $500 and ultimately cost $5,000 to fix because of the fine from MSHA. Sauerborn testified that McKinsey, as a supervisor and mechanic, should have known that repairs were needed and alerted Sauerborn via the office white board. (Tr. 376-378, 429-430).

- The e-mail addressed repair issues concerning a dump trailer that McKinsey cleared for operation but 30 miles of use resulted in the trailer losing a wheel on November 27, 2013. Sauerborn testified that he blamed McKinsey's repairs for the issue and also testified that the issue should have been identified by McKinsey during his inspection of the vehicle before putting it back in service. (Tr. 379-

380).

- The e-mail stated that Sauerborn instructed McKinsey to prepare the Suburban on site for inspection around November 20, 2013. (Tr. 380). Sauerborn testified that after charging six hours of overtime to fix the Suburban, McKinsey still had not completed the repairs needed for a passing inspection and Sauerborn experienced issues when driving the vehicle. (Tr. 380-383; RX 14).

- The e-mail referred to a note Sauerborn left on McKinsey's timecard on December 5, 2013, instructing McKinsey to fix the International Truck on site because the steering linkage needed to be swapped. Sauerborn testified that McKinsey ignored his request to fix the International Truck and Sauerborn found McKinsey a half mile away in an area that was "important but unurgent." (sic). (Tr. 385-386). When Sauerborn confronted McKinsey about the International Truck not being operable, McKinsey said he was leaving early and did not fix the issue. McKinsey also stated Sauerborn was not his supervisor and he did not have to inform him when he was leaving early. (Tr. 386-387).

- The last item in the e-mail warned McKinsey that if he disrespected Sauerborn in front of others again, he would be sent home and have his hours cut. (Tr. 388). Sauerborn testified that he did not permanently cut McKinsey's hours but he did reduce them the following Monday after the International Truck incident by telling him to come in at noon the following Monday. *Id.*

Sauerborn did not consider terminating McKinsey after the incidents described in the December 7 email. Rather, he wanted to make allowances for McKinsey's Asperger's syndrome and to articulate that his choices had consequences. (Tr. 388-389). Sauerborn considered his discipline policy as progressive discipline that included verbal warnings, written warnings, time cuts, and sometimes pay-cuts. (Tr. 389, 407).

On December 11, Sauerborn demoted McKinsey from his supervisory role. He did not, however, reduce his pay because McKinsey threatened to quit if his pay was reduced. (Tr. 390, 393). Sauerborn decided to promote Lane to McKinsey's supervisory position. He felt that as McKinsey's cousin, Lane could help steer him in the right direction. (Tr. 408). Sauerborn testified that McKinsey was demoted because he chose to work in the rain despite verbal and written policies not to work in the rain. (Tr. 391). On December 11, Sauerborn also gave a list to McKinsey that contained tasks to complete if it was raining and tasks to complete if it was not raining. (Tr. 392; RX 15). McKinsey did not follow the written instructions on the list and changed a tire on an Explorer in the rain despite shelter being available. (Tr. 394-395).

On December 11, Sauerborn created another list of tasks for McKinsey and was disappointed to see McKinsey had not completed the third item. (Tr. 397; RX 16). McKinsey had damaged the four-wheeler and he did not fix it or report it; therefore, Sauerborn was unable to use it. (Tr. 397-398).

There was also a handwritten letter drafted on December 11, in which Sauerborn addressed communication and performance issues regarding the lists. (Tr. 400; RX 17). Sauerborn testified that policies about working in the rain were in place because during the cold winter months he feared his employees would get their clothes soaked and then need a change of clothes and/or end up getting ill. (Tr. 401). Sauerborn testified that during his 30 years of ownership, he had believed that employees had contracted the flu from working in the outdoor environment. He also testified that he considered a raincoat as being necessary protective garment. (Tr. 402).

The letter to McKinsey also praised his work on a successful reinstall of 330 boom cylinders. (Tr. 403). However, Sauerborn was concerned with McKinsey's choice not to take a lunch or bathroom break because those activities were not on the list. Sauerborn did not think he should have to write those activities down. (Tr. 404). Sauerborn also referenced a phone call between he and McKinsey where McKinsey became upset because he felt Sauerborn hung up on him. (Tr. 405). Due to the phone incident, McKinsey addressed Carol Medlin in a loud voice when Sauerborn was present in a way that Sauerborn categorized as "bullying." (Tr. 405-406).

The letter also stated that during a meeting they had earlier on December 11, McKinsey would not reveal to Sauerborn the name of the lawyer he contacted. Sauerborn testified that McKinsey accused him of discriminating against him because of his Asperger's syndrome (and Sauerborn's disbelief that he had the syndrome), but he never claimed Sauerborn discriminated against him for the safety complaint call. (Tr. 411-412). Sauerborn noted these events in the letter dated December 11, 2013. (Tr. 410; RX 18). McKinsey did not take the opportunity to comment on the letter. (Tr. 413).

On December 20, Sauerborn attempted to say "hello" to McKinsey while he and Lane were driving in the Suburban. (Tr. 413). McKinsey exited the vehicle and told Sauerborn in a loud voice that he was discriminating against him. *Id.* McKinsey then began to advance toward Sauerborn. Sauerborn put up his hands and told McKinsey to clock out for an hour and cool off because the company Christmas party was later that day. (Tr. 413-414, 416-417). Sauerborn noted this event in a letter signed by Lane, dated December 30, 2013. (Tr. 414-415; RX 19).

A second incident occurred when McKinsey and Lane were working on the 300 bushings and Sauerborn again said "hello" to McKinsey. McKinsey once again accused Sauerborn of discriminating against him because of his Asperger's syndrome. (Tr. 418, 493). Sauerborn then asked him to clock out, which McKinsey did not do, so Sauerborn instructed Lane to send

McKinsey home. *Id.* Sauerborn asked Lane and Ms. Medlin to document the incident and to put in their own words what they had observed. (Tr. 420-421; RX 20-21). Sauerborn did not fire McKinsey that day because he was still holding out hope that McKinsey would do better. (Tr. 422).

On January 13, 2014, Sauerborn sent an e-mail terminating McKinsey's employment and explaining the reasons for the termination. (Tr. 423; RX 22). Sauerborn drafted the e-mail at 3:15 pm on January 10, 2014. (Tr. 424). Sauerborn testified that he fired McKinsey because of a "progression of action and inaction" on McKinsey's part over the course of his employment. However, there was one particular incident that occurred on January 10, which prompted Sauerborn to terminate McKinsey. When Sauerborn arrived at work there was a "misting" rain, so he retrieved a fresh raincoat out of the break room and asked McKinsey to put it on. (Tr. 425). McKinsey said "no," so Sauerborn instructed him to clock out. Sauerborn testified that at that point, McKinsey became noticeably agitated so Sauerborn got back into his car. As Sauerborn was trying to pull away, McKinsey jumped on the hood of his car and climbed up to the windshield. (Tr. 425-427). Sauerborn stopped the car and reached for his camera phone in an effort to film McKinsey as evidence. When McKinsey jumped off the car and cleared the path, Sauerborn left the premises and later texted Lane to send McKinsey home. (Tr. 425-428). Sauerborn considered McKinsey's response of "no" when asked to put on the raincoat to be an act of insubordination. (Tr. 427). Sauerborn also testified that McKinsey's action of jumping on the hood of the car was part of the reason for termination. (Tr. 433). Sauerborn did not call the police about the incident but informed Lane to call the sheriff if McKinsey did not leave the pit. (Tr. 499-500). After he returned to the pit, Sauerborn had Lane and Rogers Leggett put raincoats on as well. (Tr. 498, 510). Lane also drafted a witness statement about the incident. (Tr. 432; RX 23).

Sauerborn testified that he felt threatened after he contacted Calvin Lynch and heard his description of what happened on December 20, 2013 (discussed *infra*). (Tr. 444). After learning of the events, Sauerborn moved his place of residence. (Tr. 446). He also informed MSHA Special Investigator LaRue of the threat. (Tr. 447). Sauerborn did not directly tell LaRue that he fired McKinsey for insubordination but described the incident on January 10, 2014, as "the straw that broke the camel's back." (Tr. 501).

Sauerborn testified that he encourages employee safety because his brother died trying to save someone from an unsafe condition in the navy. (Tr. 449-450). He further denied firing McKinsey for calling in the hazard complaint. (Tr. 451). The first time he was sure McKinsey called in the complaint was when McKinsey filed EEOC documents. (Tr. 451-452).

On cross-examination Sauerborn acknowledged that when he observed Davis disobeying doctor's orders he wrote her up and gave her the opportunity to explain her side of the situation in writing. (Tr. 461-465; GX 21, RX 10). However, Sauerborn did not write a letter

reprimanding McKinsey for the incident regarding the new phone policy. Only a verbal warning was given. (Tr. 466). Sauerborn concedes that he did not know whether McKinsey knew about the new phone rule. (Tr. 467). Sauerborn also never documented in a letter that McKinsey shouted or cursed at Davis during the incident. (Tr. 469). Sauerborn did not afford McKinsey an opportunity to respond in writing to the incident but believes he treated McKinsey and Davis the same way. (Tr. 472).

Sauerborn testified that he gave McKinsey wide latitude in ordering parts and supplies stating that McKinsey could order parts up $300-$400. (Tr. 474, 475).

Sauerborn conceded there was in fact an error with McKinsey's paycheck in September 2013 and he verbally reprimanded Davis for the error. (Tr. 476). Sauerborn also admitted that pursuant to the employee handbook verbal reprimands should be documented, but were not in certain circumstances. (Tr. 477-478, 494).

Sauerborn testified that he considered McKinsey's refusal to follow instructions insubordination and contended the raincoat he brought for McKinsey on January 10, 2014, was not filthy and disgusting. (Tr. 510-511).

C. Roger Ouellette

Roger Ouellette ("Ouellette") was a mine safety health inspector for MSHA who previously worked as a maintenance manager/supervisor for an open pit sand mine, construction demolition landfill and dump truck company. (Tr. 136-137). After receiving an allegation summary, Ouellette contacted McKinsey who asked repeatedly to remain anonymous throughout the investigation process for fear of reprisal from the operator, and Ouellette agreed. (Tr. 140, 169). The reason McKinsey feared reprisal was because of the instruction he was given to tag any defective equipment as being out of service if an MSHA inspector showed up. (Tr. 150, 169) McKinsey also informed Ouellette that he had Asperger's syndrome. (Tr. 142, 169).

On November 26, 2013, Ouellette conducted an inspection of PGSC's sand pit. (Tr. 144). Ouellette discussed the allegation summary with Sauerborn and made notes regarding each of the allegations contained therein. (Tr. 145-147; GX 12). When discussing allegation number 5 of the complaint (gunshots fired on company property) and the issue of who called the allegation in, Sauerborn stated it could have only been two employees, McKinsey or Lane. (Tr. 148-149, 156, 165). Ouellette conducted interviews with all employees on November 26. (Tr. 150). At the conclusion of the inspection, Ouellette issued two citations to Sauerborn for a violation of the berming standard and a documentation violation, all of which were unrelated to McKinsey's allegations. (Tr. 153-154, 160-161; GX 13). Ouellette conducted a close out conference with Sauerborn and completed a close out form after the inspection. (Tr. 154-156; GX 14). Ouellette

also agreed that there was another complaint called in by McKinsey at lunch on November 26, and he added it to the list of inspection items. (Tr. 176).

D. Michael LaRue

Michael LaRue ("LaRue") was a mine safety and health inspector for the U.S. Department of Labor, collateral duty special investigator, and collateral duty fatal accident investigator. (Tr. 177). After receiving an initiation process package, LaRue made contact with both parties and informed them of the investigation. (Tr. 180). LaRue testified that he believed a discrimination claim was a possibility after speaking with and taking formal statements from both parties. (Tr. 180-183; GX 16, GX 17). Specifically, LaRue stated that Sauerborn would not directly answer the question of whether he knew who reported the violations, and Sauerborn said he wanted to move on as a company. *Id.* LaRue also took a statement from Joshua Lane via telephone because he did not want to meet in person for fear of reprisal if anyone found out he was meeting with a MSHA investigator. (Tr. 188-189; GX 18).

During his investigation, LaRue found what he believed to be multiple discriminatory acts including demotion, cutting of hours, and termination, all of which were directly related to the protected activities in which McKinsey was engaged. (Tr. 192). Based on Ouellette's report and Sauerborn's comments, LaRue believed that McKinsey was discriminated against. (Tr. 192-194). Additionally, LaRue noted there were no incidents marked in McKinsey's personnel record prior to the safety complaint being filed with MSHA. (Tr. 193). LaRue testified that he felt Sauerborn avoided the question of who filed the complaint and, therefore, asked him three separate times if he knew which employee made the complaint. Sauerborn never directly answered the question. (Tr. 212).

E. Daniel Daughtridge

Daniel Daughtridge ("Daughtridge") was a psychotherapist at an outpatient mental health clinic. (Tr. 258-259). He began to treat McKinsey for anxiety and job related stress in January of 2014. (Tr. 260, 266). The subject matter of the treatment sessions mainly included his termination and the events surrounding it. Daughtridge and McKinsey particularly discussed the incident with the rain coat and the subsequent incident where McKinsey thought he was going to be hit by a car. (Tr. 261).

Daughtridge recommended McKinsey for Asperger's syndrome testing and after discussing the results, he believed the tests confirmed an Autism Spectrum Disorder ("ASD"). (Tr. 262). ASD often affects the way a person sees the world and how they relate to other people and have social difficulties. (Tr. 264).

Daughtridge conceded during his testimony that he did not have the expertise to diagnose ASD, which is why he referred McKinsey for additional testing. (Tr. 266). An intake therapist and colleague of his provisionally diagnosed McKinsey with a mood disorder. (Tr. 267). Daughtridge also agreed that all of the symptoms he observed could have been presented prior to McKinsey's employment with PGSC. (Tr. 268).

F. Calvin Lynch

Calvin Lynch ("Lynch") was a customer of PGSC who had purchased sand from the company on three different occasions. (Tr. 302-303). Lynch purchased sand twice on the morning of December 20, 2013. (Tr. 304; RX 8). On his second trip to purchase sand, Lynch entered the office and described seeing McKinsey upset. Lynch testified that he was scared both for himself and for the woman working in the office. (Tr. 306, 309). Lynch explained that McKinsey was swearing and getting very upset, (he could not recall the name of the person McKinsey was upset about) and that the woman working in the office attempted to calm him down but he continued to be upset. (Tr. 307). Lynch stated that McKinsey kept saying, "they don't know me," and that he had "some type of syndrome." (Tr. 307-308). Lynch further testified that McKinsey was in a rage - saying he was being lied about by the same man and he was going to "...knock him in the head. I will kill him." (Tr. 308, 310). McKinsey apologized to Lynch several times but continued to complain about his treatment at the company including being lied about and losing working time. (Tr. 310-311).

Sauerborn called Lynch in April of 2014, and asked if he recalled the events that occurred on December 20, 2013. (Tr. 311-312). Lynch said that he did remember and agreed to meet with Sauerborn and the Respondent's counsel Matthew Korn regarding the events on that day. (Tr. 313-314). Lynch agreed to testify about the events the best he could recall. That was the end of the interaction between Sauerborn and Lynch. (Tr. 313-315).

Lynch went on to testify that he was initially afraid during the confrontation because he had seen instances of disgruntled employees harming people at the workplace on TV and that is what came to his mind. (Tr. 320). When he went back to the office after loading the sand in his truck, he recalled McKinsey still being upset and shaking. McKinsey proceeded to apologize to Lynch again. (Tr. 321).

G. Dina Davis

Dina Davis ("Davis") began employment at PGSC on February 18, 2013, first as a delivery truck driver and then as an office employee. (Tr. 513). Davis took medical leave effective September 25, 2013, and returned the latter part of January 2014. (Tr. 514). Prior to her leave, she worked with McKinsey at PGSC, and she knew him previously because they went to high school together. *Id.* Davis told Sauerborn that she knew a mechanic (McKinsey) but did not

know his work ethic, and was hesitant at hearing to definitively say she recommended him for the position. (Tr. 515).

With regard to the altercation between McKinsey and Davis over his use of the office phone in late August 2013, Davis testified that she wrote a letter describing the incident which stated that McKinsey had a "temper tantrum" and acted inappropriately in front of customers. (Tr. 516, 518, 538; RX 10). Davis testified that she had seen McKinsey act in a similar fashion during high school when he would get confrontational with teachers. (Tr. 520). Sauerborn took Davis' statement and discussed the incident with McKinsey. (Tr. 521, 539-541).

A second incident occurred in early September 2013 regarding an issue with payroll. (Tr. 521). McKinsey felt he should have been paid more pursuant to his supervisor position raise. McKinsey asked Davis for the phone number to ADP -- the payroll company. When Davis explained that he was not authorized to speak to ADP, McKinsey became irate and began yelling and swearing at her in front of other employees. (Tr. 522-523, 527, 539). McKinsey also shared his time card and income information with another employee, which is against company policy. (Tr. 523).

Davis testified about a separate occasion where McKinsey encouraged her to sue Sauerborn for violating HIPPA because he claimed Sauerborn contacted Davis' doctor and tried to get information about her condition. (Tr. 531). Davis also heard McKinsey make various threats against Sauerborn including both suing and killing him. (Tr. 532). Davis testified that she would not feel comfortable if McKinsey were reinstated because she does not trust him and he was a "loose cannon." (Tr. 533).

Davis testified that McKinsey received preferential treatment from Sauerborn such as driving the company truck, taking company product without paying, and receiving work boots that Sauerborn paid for personally. (Tr. 534). McKinsey also got paid for holiday vacation time, which was against company policy because McKinsey had not worked with the company for the required year. (Tr. 535).

Davis does not believe Sauerborn would terminate an employee for making a safety complaint. Additionally, McKinsey never told Davis he was being discriminated against for making the complaint. (Tr. 535).

H. Alton Lorenzo Moses

Alton Lorenzo Moses ("Moses") began working at PGSC in approximately December 1996. (Tr. 544). At the time of the hearing, he was the acting supervisor, a position he took when Josh Lane left the company. (Tr. 556). When McKinsey began working at PGSC, he informed Moses that he had Asperger's syndrome. (Tr. 546). Moses' interactions with McKinsey were never straightforward. Moses testified that when he addressed McKinsey he

could never get a straight answer. Moses explained that he heard McKinsey cursing at work from time to time and he overheard McKinsey call Sauerborn stupid. (Tr. 547-548). McKinsey never told Moses that he was being discriminated against because he filed the safety complaint, but he did say someday he would own the place. (Tr. 548). Moses testified that Sauerborn could be difficult to work with, but he is difficult with every employee at the mine. (Tr. 548-549).

Moses acknowledged that there was a policy in place regarding working in the rain and raincoats were available for employees to use. (Tr. 549-550). Moses further acknowledged that the employee handbook contains company policies and was available to all employees. (Tr. 550).

Sauerborn never indicated to Moses that he believed McKinsey made the complaint to MSHA. Additionally, Moses did not believe Sauerborn would fire someone for making a safety complaint. (Tr. 552). Moses was never punished for reporting safety issues to Sauerborn, and Sauerborn would fix the safety issues whenever they were called to his attention. (Tr. 553).

Moses testified that he heard from multiple employees that Sauerborn terminated McKinsey for an incident that occurred in the rain when McKinsey jumped on Sauerborn's car. (Tr. 554-555).

III. Contentions of the Parties

The Secretary contends that the elements necessary to establish a *prima facie* case of discrimination have been satisfied. First, the Secretary argues that McKinsey was engaged in protected activity when he filed the safety complaint with MSHA and when he made routine complaints to his supervisor, Sauerborn. *Secretary's Post-Hearing Brief* at p. 7. Second, the Secretary argues that adverse action was taken against McKinsey as a direct result of his participation in such activity. *Id.* at 8. The circumstantial indicia of discriminatory motivation including knowledge, hostility, coincidence in time, and disparate treatment have all been established as evidenced by McKinsey's reduced hours, the demotion from his supervisory capacity, repeated harassment by Sauerborn, and ultimately his discharge from PGSC. *Id.*

The Respondent, however, asserts that a *prima facie* case has not been established, as the Secretary failed to demonstrate a nexus between the protected activity and the adverse action. *Respondent's Post-Hearing Brief* at p. 17. Specifically, the Respondent contends that there was a legitimate, nondiscriminatory basis for terminating McKinsey – failing to follow a direct order from a supervisor and inadequately performing job duties – and that PGSC would have terminated him on those grounds alone. *Id.* at 18. In fact, Respondent argues Sauerborn did not know it was McKinsey who filed the hazard complaint with MSHA. *Id.*

However, assuming the ALJ finds a *prima facie* case has been made, Respondent alleges it has successfully rebutted such. *Id.* at 18-19. The Respondent further contends that the proffered reasons for terminating McKinsey are independent and alternative in nature, not cumulative as suggested by the Secretary. *Respondent's Reply to Post-Hearing Brief* at p. 8. PGSC ultimately terminated McKinsey for his refusal to follow direct instructions from his supervisor and then jumping on the hood of his supervisor's car, reasons that are both independently sufficient to warrant termination. *Id.*

The Secretary argues that the multiple reasons offered by the Respondent for terminating McKinsey are cumulative in nature. *Secretary's Post-Hearing Brief* at p. 14. Furthermore, when one of the reasons fails for a lack of credibility, as it does in the instant matter, the entire basis for termination is deemed not credible. *Id.* at 14-24. The Secretary takes the position that both proffered reasons -- poor work performance and failure to don a raincoat -- fail as pretext. *Id.* Specifically, the reasons either did not actually motivate the adverse action or were insufficient to justify termination, and therefore, the affirmative defense must also fail. *Id.* at 14, 21-24.

The Secretary contends, *arguendo* that if the ALJ finds the Respondent successfully put forth an affirmative defense, it must still fail because McKinsey was provoked into committing the conduct for which he was fired and should, therefore, be granted leeway for his actions. *Secretary's Post-Hearing Brief* at p. 24.

The Respondent contends that there was no provocation on the part of Sauerborn because he was simply trying to get McKinsey to wear a raincoat, an act consistent with PGSC policy. *Respondent's Post-Hearing Brief* at p. 26. If however, the ALJ finds provocation, the Respondent would argue either, it was not wrongful under the Mine Act, or to the contrary, McKinsey's response was disproportionate to the wrongful conduct.[7] *Id.* at 27-28.

IV. Findings of Fact and Conclusions of Law

Section 105(c) of the Mine Act prohibits any discrimination against a miner for exercising a right established under the Act.[8] Pursuant to Commission case law, a *prima facie*

---

[7] This Court need not reach a decision as to whether McKinsey's unprotected activity was provoked by the employer's wrongful conduct as the Respondent was unsuccessful in establishing a valid affirmative defense.

[8] Section 105(c)(1) of the Act provides in 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, representative of miners or applicant for

case for a violation of section 105(c) is established if the complainant proves by a preponderance of the evidence that (1) he was engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Sec'y of Labor or behalf of Pasula v. Consolidation Coal. Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 63 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Commission will consider the following factors in determining whether the complainant has established a causal connection between the protected activity and the adverse action: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

It is rare for a section 105(c) case to be proven solely on direct evidence. Rather, it is more typical for such a case to be made by relying on indirect or circumstantial evidence. Therefore, it is of no surprise that the Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999)(quoting *Chacon*, 3 FMSHRC at 2510).

Once a *prima facie* case is established, the mine operator is given an opportunity to rebut by showing that either there was no protected activity or the adverse action was not motivated in any way by the protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If the operator is unable to successfully rebut, it may still establish an affirmative defense by proving that the adverse action was motivated by unprotected activity, and it would have taken the action based solely on the unprotected activity. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-2800.

A. Protected Activities

In the instant matter, the record clearly establishes that McKinsey engaged in protected activity, thus satisfying the first element of a *prima facie* case under section 105(c). This Court

---

> employment in coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . .

accepts as true McKinsey's testimony at hearing that he not only voiced complaints with his supervisor Sauerborn, but also that he filed a formal hazard complaint with MSHA on November 25, 2013. (Tr. 35-37, Tr. 77-78). As part of his supervisory position, McKinsey was required to fill out and review safety equipment that was used in the company's day-to-day activities. (Tr. 32-34). There were also occasions where McKinsey made specific safety complaints to Sauerborn, including an issue with the highwalls and an incident where individuals were caught hunting on company property. (Tr. 35-36). However, McKinsey testified that Sauerborn routinely deflected his safety complaints. (Tr. 36). Consequently, McKinsey decided to file a hazard complaint directly with MSHA on November 25, 2013. (Tr. 77). Both the internal safety complaints made on equipment check sheets and directly to Sauerborn, as well as the formal hazard complaint filed with MSHA qualify as protected activity pursuant to section 105(c). 30 U.S.C. § 815(c); *see e.g. Sec'y of Labor on Behalf of Munson v. Eastern Assoc. Coal Corp.*, 23 FMSHRC 654, 662 (June 2001); *Descutner v. Newmont USA*, 34 FMSHRC 2838 (Oct. 2012).

B. Adverse Action Motivated by Protected Activity

The record further establishes that the second element of the *prima facie* case has also been satisfied, as McKinsey was terminated by Sauerborn -- the clearest form of adverse action under the Act. *See Driessen v. Nevada Goldfields Inc.*, 20 FMSHRC 324, 329 (Apr. 1998). The Secretary has provided sufficient circumstantial evidence to support a finding that McKinsey was terminated at least in part for his protected activity and/or PGSC's belief that he had engaged in protected activity. McKinsey also suffered less severe forms of adverse action including a demotion, a reduction in hours, and an increase in e-mails that highlighted his allegedly poor work performance. (Tr. 49-53, 55, 388, 390, 393, 400, 423).

a. Knowledge

At hearing, Respondent went to great lengths to show that Sauerborn had no direct proof or actual knowledge that McKinsey was the individual who had made anonymous safety complaints to MSHA. (Tr. 374). However, Commission case law does not require that an operator have positive certainty that a miner had engaged in protected activity. It is enough for the Secretary to establish that an operator suspected a discriminatee had made safety complaints. *See Elias Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1992)(finding "discrimination based upon a suspicion or belief that a miner has engaged in a protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)").

In this case, there is circumstantial evidence that Sauerborn suspected McKinsey of making safety complaints. At the time the safety complaints were made, there were only a handful of employees working at the Great Pit mine. (Tr. 330). McKinsey was a recent hire. (Tr.

25, 336). McKinsey's awkward attempts at denying that he was the whistleblower would have been transparently inculpatory to even the most obtuse operator, much less an individual of Sauerborn's intelligence and perception. It would not have taken a Sherlockian process of elimination for Sauerborn to have settled upon McKinsey as a prime suspect. The testimony of the Secretary's witnesses, Inspector Roger Ouellette and Special Investigator Michael LaRue, further supports a finding that Sauerborn, despite his assertion to the contrary, believed McKinsey to be the anonymous whistleblower. Specifically, Ouellette testified that when he and Sauerborn were discussing who could have potentially called in the MSHA complaint, Sauerborn stated that it could only have been two employees – either McKinsey or Josh Lane. (Tr. 148-49, 156, 165). Similarly, LaRue testified that Sauerborn was reluctant to answer the question of whether or not he knew who reported the violations to the extent that LaRue had to ask him three different times. (Tr. 180-83, Tr. 188-89; GX 16, GX 17, GX 18).

Having heard and considered the testimony of Respondent's witnesses, Dina Davis and Alton Moses, it is highly unlikely that Sauerborn would have suspected either as being the anonymous source. The same would go, of course, for Sauerborn's daughter. Furthermore, Sauerborn's letter to McKinsey, dated December 7, 2013, when he stated "an unknown person called MSHA with five allegations of wrong doing . . . Most of the allegations were topics you and I discussed and had disagreements . . . I would like you to tell me what you have learned from this incident" appears as a non-subtle accusation by the operator that McKinsey was the anonymous source. (Tr. 48-49).

b. Hostility

Additionally, this Court finds McKinsey credibly testified that Sauerborn's attitude changed towards him after the MSHA complaint was filed. (Tr. 38-41, 96). Following his participation in a protected activity, Sauerborn began treating McKinsey differently by singling him out and belittling him. (Tr. 38-41). Sauerborn began increasingly sending e-mails to McKinsey, listing issues with him, some of which occurred well before the complaint was filed. (Tr. 41). In one of the warnings mention *supra*, issued in a letter dated December 7, 2013, Sauerborn specifically referenced the MSHA complaint and asked McKinsey what he had learned from this incident. A second e-mail was sent on December 11, 2013 in conjunction with a handwritten note that was left on McKinsey's time card, which stated various work performance issues. (Tr. 49-51). On that same day, Sauerborn also demoted McKinsey from his supervisory position. (Tr. 52-53, 55). The third and final e-mail was sent on December 30, 2013. This particular e-mail addressed a prior incident between McKinsey and Sauerborn that occurred on December 20 when Sauerborn unsuccessfully attempted to send McKinsey home early. (Tr. 54). This Court finds that these events, when looked at as a whole, reflect an obvious increase in hostility towards McKinsey after he filed the complaint with MSHA on November 25, 2013.

c. Coincidence in Time

Commission case law has established that a short proximity of time between the miner's protected activity and the adverse action can evidence a discriminatory motive. *See Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). However, the Commission has not set any hard and fast rules for determining when the time between a protected activity and an adverse action is indicative of discriminatory motive. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999); *see also Chacon*, 3 FMSHRC at 2511 (finding complaints filed anywhere between four days and one and a half months prior to the adverse action sufficient to establish a coincidence in time); *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361 (2000)(finding that a period of four months between a safety complaint and termination was sufficient to establish proximity).

The Secretary and Respondent disagree about whether McKinsey was disciplined prior to the hazard investigation. The Secretary contends that McKinsey was never disciplined prior to the safety complaint being filed with MSHA. *See Secretary's Post-Hearing Brief* at pp. 15-17. Respondent asserts there were at least three prior occasions where Sauerborn reprimanded McKinsey either verbally or in writing before the complaint was ever filed. *See Respondent's Post-Hearing Brief* at pp. 3-5. The record, however, clearly reflects a temporal proximity between the time the complaint was filed and the increased discipline of McKinsey which ultimately resulted in his termination. McKinsey filed the complaint with MSHA on November 25, 2013. (Tr. 36-37). Shortly thereafter on December 7, 2013, McKinsey began experiencing a reduction in hours. (Tr. 51). McKinsey was then demoted on December 11, 2013, and terminated on January 13, 2014, only 46 days after the complaint was filed. (Tr. 51-52, 61). This time frame easily satisfies the Commission's requirements for a finding of coincidence in time.

Thus, this Court finds sufficient evidence has been presented that McKinsey engaged in protected activity, that he suffered adverse action, and that there was a nexus between the two, such that a *prima facie* case of discrimination under section 105(c) has been established.[9] Furthermore, the Respondent has failed to successfully rebut the *prima facie* case. Based on the circumstantial evidence presented at hearing, this Court is not convinced the Respondent was not motivated at least in part by the protected activity when it took adverse action against McKinsey.

---

[9] The Secretary contends that there is also evidence of disparate treatment against McKinsey evidenced during the raincoat incident. The Secretary takes the position that Sauerborn had a markedly different response to McKinsey's failure to don a raincoat versus that towards other similarly situated employees. (*See Secretary's Post-Hearing Brief* at pp. 11-12). However, this Court agrees with Respondent that the Secretary failed to present any evidence of other employees who did not obey a direct order from their supervisor and were not terminated. (*See Respondent's Post-Hearing Brief* at p. 23).

C. Respondent's Affirmative Defense

When a mine operator is unable to successfully rebut the complainant's *prima facie* case, it may establish an affirmative defense by asserting that the adverse action was motivated by non-protected activity and that it would have taken such action against the complainant for that activity alone. *Robinette*, 3 FMSHRC 803, 817-18. Simply showing that the miner deserved to be disciplined is not sufficient to satisfy the Respondent's burden. *Pasula*, 2 FMSHRC at 2800.

PGSC contends that it would have terminated McKinsey for unprotected activity which included his poor work performance, inappropriate behavior, and his act of insubordination. *See Respondent's Post-Hearing Brief* at pp. 20, 23. Additionally, Respondent argues that McKinsey's refusal to don the raincoat when given a direct order to do so by his supervisor was an act of insubordination that alone warranted his termination. *Id.* at 23; *see also Respondent's Reply to Post-Hearing Brief* at p. 8. When Sauerborn told McKinsey to put on a raincoat, he simply said "no" without offering any explanation for his refusal. (Tr. 93-94, 425). Furthermore, McKinsey failed to produce any evidence of other miners who similarly failed to follow a direct order from a supervisor. Respondent contends these facts support a valid business justification for terminating McKinsey.

At the hearing, both parties gave contradictory versions of various events – the completely differing accounts of the motor vehicle run down episode, which occurred following the raincoat incident, being the starkest example of such. However, after a careful review of the total circumstances, I find that Sauerborn did not attempt to run down McKinsey and that McKinsey did not attempt to jump on Sauerborn's motor vehicle. Rather, I find that the most reasonable and likely explanation of this incident was that Sauerborn accidentally bumped McKinsey causing the miner to fall onto the hood. Thus, the episode was ultimately not a factor in reaching the decision within.[10]

---

[10] In attempting to resolve these conflicting narratives, I have proceeded on the bases that neither party was deliberately committing perjury and that most litigants tend to perceive themselves as the innocent party and their opponent as the culprit.

As a young law student, I was once advised by an old professor that to successfully practice law I had to study human nature and the best way to do so was to study Shakespeare. During the hearing – which had more than the usual drama with both sides breaking down – I was struck by how much McKinsey saw himself as a kind of Hamlet terribly wronged by his evil step-father King Claudius (Sauerborn) and how much Sauerborn saw himself as a kind of King Lear grievously injured by the ingratitude of his child (McKinsey). For the reasons described within, I did not, however, find either party to be quite as tragic a figure as they portrayed

When evaluating an affirmative defense, the ALJ must first analyze the merits of the employer's business justification to make a determination as to whether such justification is merely pretextual in nature. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982). If the employer's justification is not "plainly incredible or implausible, a finding of pretext is inappropriate." *Id.* at 1938. Pursuant to *Pasula*, the analysis must focus "on whether a credible justification figured into motivation and, if it did whether it would have led to the adverse action apart from the miner's protected activities . . . [T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner." *Chacon*, 3 FMSHRC at 2516. Moreover, when analyzing an operator's business justification affirmative defense, the judge may not "substitute for the operator's business judgment [his or her] views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.'" *Id.* at 2516-17. Rather, the judge must determine whether a credible justification has been offered by the operator and if that justification "would have led to the adverse action apart from the miner's protected activities." *Id.*

It is black letter Commission case law that a judge cannot substitute his own judgment for that of the operator with regard to what constitutes an appropriate business practice. *Id.* at 2516. The Commission has repeatedly held that it "is enough for the operator to show that it had and was motivated by legitimate business reasons for taking the action that it did." *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1925 (Aug. 2012) (citing *Chacon*, 3 FMSHRC at 2516-17).

The Secretary argues that Respondent's affirmative defense should fail because the reasons proffered are pretext. A finding of pretext may be established if the judge concludes that the reasons offered have no basis in fact, the reasons did not actually motivate the adverse action, or the reasons were insufficient to justify the adverse action. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1073 (May 2011). The Secretary takes the position that allegations of McKinsey's poor work performance merit close review for possible pretext as Sauerborn did not begin to criticize his work until after the complaint was filed with MSHA. *See Secretary's Post-Hearing Brief* at p. 15.

Additionally, the Secretary contends the Respondent's argument -- that by directly disobeying Sauerborn's order to don a raincoat, McKinsey was insubordinate and that alone was grounds for termination -- holds no water. *Secretary's Post-Hearing Brief* at p. 21. The Secretary

---

themselves to be. Given the storm scene when the motor vehicle episode took place, I could go on with the analogy of Lear on the Heath.

asserts that the applicable rule at Great Pit is to wear a raincoat when it is raining, not to wear a raincoat when given a direct order. *Id.* As such, similarly situated employees who were not wearing a raincoat should have also been disciplined. *Id.* Yet, McKinsey was the only employee told to clock out. *Id.* The Secretary argues this disparate treatment of McKinsey is evidence of pretext.

For the reasons discussed below, this Court finds the Respondent's affirmative defense has failed, as it did not present a valid business justification for terminating the Complainant based on an accumulation of poor work performance and his act of insubordination.

The Secretary contends the Respondent's reasons for terminating McKinsey's employment are cumulative in nature. If the ALJ decides the reasons for termination are in fact cumulative that would mean each individual reason must be a credible basis for discipline. *Pendley v. FMSHRC*, 601 F.3d 417 (6th Cir. 2010). In making such a determination, the judge can look to whether the operator based its decision on all the reasons listed in the notice of termination as well as the operator's testimony. If, however,. the judge finds that the reasons given were viewed by the operator as an independent basis for termination, then the "falsity or incorrectness of one may not impeach the credibility of the remaining articulated reasons." *Id.* In contrast, when cumulative reasons are given and the judge finds one to be incredible, it cannot find the other reasons to be sufficient by themselves to support the adverse action.

The Respondent contends the reasons for terminating McKinsey are independent and alternative, as his "failure to follow direct instructions from his supervisor and then jumping on the hood of Sauerborn's car would be sufficient to credibly warrant termination." *See Respondent's Reply to Post-Hearing Brief* at p. 8.

Relying greatly on the testimony of Sauerborn, this Court finds that the Respondent's asserted reasons for terminating McKinsey were cumulative in nature. At hearing, Sauerborn testified that he fired McKinsey for a "progression of action and inaction," basing his decision on McKinsey's insubordination, the incident where McKinsey jumped on the hood of his car, and his history of performance issues and behavioral problems.[11] (Tr. 423-427). Sauerborn further testified that after his history of performance issues with McKinsey, he essentially found the January 10 incident to be the figurative "straw that broke the camel's back." (Tr. 501). This implies there had been a series of events leading up to the climactic event referenced as the final "straw." Furthermore, this Court finds the additional reasons listed in the termination letter given to McKinsey did not play a part in the ultimate decision to terminate him. Rather, they were

[11] As discussed *supra*, no credible evidence was submitted regarding the car incident, so this Court did not consider it in reaching this decision.

merely issues Sauerborn had previously intended to discuss with McKinsey prior to reaching this decision. (Tr. 429).

Having made a finding that the reasons for terminating McKinsey were cumulative rather than independent and alternative, this Court must now determine whether each independent reason was in a fact a credible basis for discipline.

An affirmative defense will be found not credible if the complainant is able to establish that the operator's proffered reasons have no basis in fact, the reasons did not actually motivate the adverse action, or the reasons were insufficient to motivate termination. *Nat'l Cement Co. of California*, 33 FMSHRC at 1073. However, the Commission has provided ways that an operator can demonstrate that it would have terminated the alleged discriminatee based on unprotected activity alone, such as by showing "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

At hearing, Sauerborn presented evidence that he terminated McKinsey for issues related to his work performance and insubordination. The record establishes that McKinsey was hired in July of 2013. (Tr. 25). Sauerborn first began noticing issues with his job performance the following month in August when McKinsey was involved in a verbal altercation with a co-worker, Dina Davis. (Tr. 339). Sauerborn testified that he verbally warned and wrote McKinsey up for his behavior. However, despite this incident, Sauerborn promoted McKinsey to a supervisory position sometime in September and testified that he generally found McKinsey's work performance to be satisfactory. (Tr. 473, 479). Shortly after the promotion on September 10, McKinsey was involved in a second altercation with Davis for which Sauerborn testified Mckinsey received another verbal warning and write up. (Tr. 475).

During the time McKinsey was employed at PGSC, the company had a progressive disciplinary policy in place in order to ensure that all employees were treated fairly. The policy included a rule that all disciplinary "warnings, second chances, and any action" taken against an employee needed to be documented. (Tr. 459, RX 9). Yet, Sauerborn testified that following both incidents between McKinsey and Davis, he did not document or place any type of record in McKinsey's personnel file regarding the alleged warnings. (Tr. 466, 478). Sauerborn did, however, address the first altercation with Davis that very same day in a letter. (Tr. 464). In that letter, Davis was given an opportunity to respond in writing with any comments or thoughts she may have had regarding the discipline and what occurred between her and McKinsey. No such

opportunity was given to McKinsey.[12] (Tr. 463-64, 473, 475). According to Sauerborn's testimony, he simply showed Davis' response to McKinsey and considered that to be an appropriate verbal warning and written warning. (Tr. 471).

The second incident was handled in a similar fashion. Sauerborn testified that Davis was given a verbal warning for this altercation and she then drafted a letter detailing her version of the events. (Tr. 477). Sauerborn gave a copy of that letter to McKinsey and testified that it too represented both a verbal and written warning. *Id.* Sauerborn further testified that during his conversation, McKinsey was given an opportunity to write his own statement.[13] (Tr. 348). Sauerborn did not, however, present any evidence corroborating his testimony that he intended the alleged conversations with McKinsey referencing Davis' letters to constitute an actual verbal or written warning. When considering this lack of evidence combined with the fact that McKinsey was not afforded the same opportunity to respond as was Davis, and that neither incident was handled in compliance with PGSC's disciplinary policy, this Court does not find that either one constituted a formal warning that would serve to put McKinsey on notice that future poor work performance could result in more serious consequences.

Throughout his testimony, Sauerborn attempted to establish that a written warning was given to McKinsey by e-mail on September 17 and by text message on November 23. (Tr. 482, 485). However, this Court finds that the evidence presented was insufficient to establish that either incident constituted a valid written warning to McKinsey. Rather, the record reflects that following the second incident with Davis, McKinsey did not receive any formal warnings or discipline from Sauerborn regarding his work performance until after he made a safety complaint on November 25 and MSHA conducted its investigation.

Specifically, as discussed *supra*, Sauerborn issued the first formal written warning to McKinsey by e-mail on December 7, at which time he reduced McKinsey's hours for the upcoming Monday. (Tr. 388). This took place a mere twelve days after McKinsey engaged in protected activity by filing a safety complaint with MSHA. (Tr. 77, 388). The letter addressed numerous issues that had allegedly occurred during roughly a month of McKinsey's work

---

[12] Sauerborn testified that he did not give McKinsey a written invitation to explain his perspective on the incident with Davis because he did so verbally. (Tr. 466, 471). However, Sauerborn failed to document the warning in either his employment records or McKinsey's personnel file. (Tr. 466, 473, 478, 479). Without any evidence corroborating Sauerborn's testimony, this Court cannot find Sauerborn's testimony that he verbally gave McKinsey a chance to respond and give his perspective on the incident credible.

[13] For the same reasons discussed *supra,* this Court does not find Sauerborn's testimony regarding the verbal warning and McKinsey's opportunity to respond to be credible. Per his testimony, nothing was documented that would indicate whether such events really transpired. (Tr. 477).

performance at PGSC. (Tr. 357). As the record reflects, the majority of the incidents -- including acts of insubordination -- took place prior to McKinsey filing the safety complaint. (Tr. 364, 366-367, 371, 380). Furthermore, Sauerborn did not issue a warning, suspend, or terminate McKinsey for any of the alleged issues at the time they occurred. Consequently, McKinsey was again not put on notice that adverse employment action could potentially be taken against him for any future acts of poor work performance or insubordination. Therefore, Sauerborn's argument that the January 10 incident of insubordination alone was sufficient to warrant termination fails, as termination would not be consistent with his treatment (or lack thereof) of McKinsey following his prior bad performance.

This Court finds that the Respondent failed to establish that it would have terminated McKinsey for the unprotected activity of January 10 alone. Rather, the evidence presented establishes that Sauerborn's animosity and hostility towards McKinsey for filing the safety complaint played a substantial role in his decision to take discriminatory adverse action against McKinsey.

Within limitations, a business owner should have the right to control the work environment and his or her employees, and this right should not be eviscerated simply because a safety complaint has been filed. But this right cannot allow the facts of the present case and the protections afforded a miner under the Act to be overlooked. Congress intended not only to encourage miners to participate in the Act's enforcement but also to protect them from "any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Congr., 1st Sess. 36 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Res., 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623. Perhaps Sauerborn honestly believed that he had been magnanimous in the past with McKinsey, and that by filing the safety complaint McKinsey showed just how unappreciative he was of Sauerborn's efforts. However, pursuant to section 105(c) of the Act, McKinsey had every right to file the complaint. Unfortunately, it is likely because of his lenient attitude towards McKinsey that Sauerborn failed to give any warnings or discipline McKinsey prior to the safety complaint being made. Given the almost complete lack of prior warnings or discipline in McKinsey's work history for poor performance and insubordination, this Court cannot find the Respondent has successfully established that the cumulative effect of such could have rendered his unprotected activity on January 10 the fatal "straw." *Sec'y of Labor on Behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 961 (Sept. 1991).

As discussed *supra*, when one of the proffered reasons for terminating an employee fails and such reasons are cumulative in nature, the ALJ cannot find the other reasons to be a sufficient basis alone. Respondent argued that it terminated the Complainant for both his poor work performance and his act of insubordination. However, this argument fails as pretext as the

evidence supports a finding that the operator was not motivated by a legitimate history of poor work performance when it reached its decision to terminate the Complainant. Therefore, based on the foregoing reasons, this Court finds that the Respondent's proffered reasons for terminating McKinsey are insufficient, and such action represents unlawful discrimination under section 105(c) of the Act.

D. After-Acquired Evidence

Having found that the Respondent failed to establish an affirmative defense, this Court must now determine whether the remedy afforded McKinsey will be limited due to after-acquired evidence of wrongdoing. The Supreme Court has held that an employee's wrongful conduct would not be an absolute bar to the employer's liability, but could potentially limit the employee's available remedies. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885-86 (1995). Specifically, the Court concluded that reinstating an employee or granting front-pay would not be practical when an employer acquires evidence of wrong-doing that is so severe, it would have warranted termination if the employer had known. *Id.* at 886; *see e.g. Asarco, Inc., Contestant*, 18 FMSHRC 317 (March 1996) (finding that after acquired evidence of an employee inadvertently taking a pre-shift examination card off company grounds would not have warranted termination).

There are also multiple National Labor Relations Board decisions that have applied the after-acquired evidence principal established in *McKennon.* Such decisions not only deny reinstatement but also limit back pay when an employer learns that the employee in question engaged in wrongful conduct for which it would have been terminated. *See La Film Sch., LLC & Its Branch, La Recording Sch., LLC & California Fed'n of Teachers & Brandii Grace*, 358, NLRB No. 21 (Mar. 2012); *see also John Cuneo, Inc.* 298 NLRB 856, 861 (June 1990). Moreover, in another NLRB case, *C-Town*, 281 NLRB 458 (Sept. 1986), the Board reiterated that the conventional remedies afforded an employee in unlawful discharge cases – reinstatement and backpay – are denied when the employee has engaged in "serious misconduct which renders them unfit for future employment with their employer." However, the Board also noted that not every impropriety would cause the employee to be deprived the protections of the Act. *Id.* Rather, such a denial would only occur in the "flagrant cases 'in which the misconduct is violent or of such character as to render the employees unfit for further service.'" *Id.* (citing *J.W. Microelectronics Corp.*, 259 NLRB 327 (1981)).

In the instant matter, the mine operator learned from a PGSC customer, Calvin Lynch, during the course of the proceedings that McKinsey had in fact threatened Sauerborn's life and had terrified the customer in the process. Lynch volunteered his time to testify at hearing as to the events that occurred on December 20, 2013. Prior to the incident, Lynch testified that he had

never even spoken to Sauerborn and had only been a customer of PGSC on three occasions. (Tr. 302-303). He was completely disinterested in the outcome of the proceedings and as such, this Court finds Lynch to be a very credible witness and that his testimony was extremely reliable.

Lynch testified that he was at the PGSC office that day for the second time purchasing sand. (Tr. 304). When he arrived, McKinsey was in the office and seemed very upset as he was yelling and using profanity. (Tr. 306, 309). A female employee who was also present in the office tried to help calm him down, but was unsuccessful. (Tr. 307). Lynch described McKinsey as being in a rage -- he overheard McKinsey say repeatedly "they don't know me," "I'm going to knock him in the head...I will kill him." (Tr. 307-308, 310). Lynch testified that he was very scared and could tell the female employee was also terrified based on the expression on her face. (Tr. 309).

Sauerborn did not learn of this incident and the threats made by McKinsey until April 25, 2014. (Tr. 311-312, 446). At that time, Sauerborn called Lynch and asked him to explain what he had seen and heard that day. (Tr. 311-312). After Lynch informed Sauerborn of the details, Sauerborn began to feel very threatened, to such an extent that he moved from his home to a new residence. (Tr. 446).

This Court finds that, despite Respondent's failure to mount a viable affirmative defense based upon the Complainant's non-protected activities discussed *supra*, there is an independent non-discriminatory basis for Complainant's dismissal grounded in the after-acquired evidence of threats made by Complainant on December 20 against Sauerborn and the traumatizing effect of such on Respondent's customer, Calvin Lynch. These threats made against Sauerborn's life, and the traumatizing of a customer, rise to a level that would be considered not only flagrant but also of such a nature as to render McKinsey unfit for future employment at PGSC. As a result, McKinsey's right to backpay is cut-off as of the date Sauerborn learned of the threats and would have been justified in terminating McKinsey on April 25, 2014.

V. Penalty

This Court finds that Fred McKinsey is entitled to an award of back pay in the amount of $12,647.25[14] plus interest[15] from the period of January 13, 2014 until April 25, 2014.[16] This

[14] The backpay award calculation was based on McKinsey's regular rate of pay at $17.75 per hour for his 40 hours of work per week, plus five hours of overtime pay at $26.63 per week. This Court considered the average hours worked by McKinsey from the start of his employment until the date adverse employment action was taken against him in response to his protected activity, which occurred on December 7, 2013.

[15] The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method,

Court further finds that McKinsey adequately attempted to mitigate his damages by seeking new employment following his termination. (Tr. 63-65, 73, 99-100). The Secretary's request for compensatory damages for additional expenses incurred by McKinsey as a result of his discharge has been considered and such request is denied.

The Secretary proposed a civil penalty amount of $20,000 against PGSC for its violation of section 105(c) arguing the conduct involved both high negligence and high gravity. When assessing a civil penalty, the ALJ is independently responsible for determining the amount of the penalty in accordance with the six criteria set forth in section 110(i) of the Act; 30 U.S.C. § 820(i). *See Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (citing *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000)). The six criteria include: the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of previous violations, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*

The Respondent has never had a previous violation under section 105(c). At the time the present violation occurred, Respondent's operation was relatively small with assets totaling approximately $500,000 and it was comprised of only nine employees. (Tr. 330-31).

When applying the negligence criterion, Commission case law has provided that the ALJ must consider whether "the operator intended to commit the violation of section 105(c) rather than whether it intended to chill future protected activities." *Sec'y of Labor on Behalf of Poddy v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1319 (Aug. 1996). However, a finding of intentional conduct does not necessarily lead to a finding of high negligence. *Id.* To find high negligence, the ALJ must make a determination that there was "an aggravated lack of care that is more than ordinary negligence." *Id.* at 1320.

This Court has already determined that the Respondent failed to successfully mount an affirmative defense as it was unable to prove it would have terminated McKinsey based on unprotected activity alone. This determination necessitates a finding that Respondent's actions in

---

which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Secretary on Behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

[16] The backpay period runs from McKinsey's date of termination until April 25, 2014, the date the after-acquired evidence surfaced, which justified McKinsey's termination from PGSC. In light of the after-acquired evidence, the Secretary's request for front pay is denied as is the request for two hours of overtime pay from May 6, 2014, until the date of judgment.

violation of 110(c) were intentional. The Secretary contends that this in turn should lead to a determination of high negligence. However, this Court finds that there were mitigating circumstances present at the time Complainant was terminated and these circumstances preclude a finding of an aggravated lack of care. Complainant was facially insubordinate when he refused to put on the raincoat when told to do so by his supervisor. Under different circumstances, this behavior could have contributed to a legitimate termination. Furthermore, although Sauerborn's actions unlawfully stemmed from filing of the complaint, this Court finds that Sauerborn honestly believed that McKinsey's work performance was also worthy of the discipline, and that his primary motive was not to chill his speech or punish him for filing the complaint. Rather, Sauerborn had finally decided to stop cutting McKinsey so many breaks and giving him the benefit of the doubt. In light of these mitigating circumstances, this Court concludes that the Respondent's actions involved a low level of negligence.

When analyzing the gravity criterion, the ALJ must look to both the seriousness of the violation and the importance of the standard violated. In implementing section 105(c), Congress intended to "protect miners against the chilling effect of employment loss they might suffer as a result of illegal discharge." *Poddy*, 18 FMSHRC at 1321. A chilling effect is not, however, presumed for every violation. *Id.* To determine whether a chilling effect has occurred, the Commission must look at both a subjective (testimony as to whether there was a chilling effect) and an objective (whether the adverse action would reasonably tend to discourage miners from engaging in protected activity) standard. *Id.*

This Court does not find that objective evidence has been presented tending to show the discharge would discourage miners from engaging in protected activity. As discussed *supra,* the Respondent's actions were partly motivated by his belief that the Complainant deserved to be disciplined for poor work performance and insubordination. Furthermore, the working relationship between the two had become increasingly strained with each passing day. It, therefore, seems unlikely that Respondent would have retaliated against Complainant but for the particular circumstances of the case. Furthermore, two witnesses, Davis and Moses explicitly testified that they did not believe Sauerborn would fire them for making safety complaints, which indicates they did not feel a chilling effect. (Tr. 535, 552-553). As such, this Court does not find subjective evidence of a chilling effect to be present in the instant matter and that the violation involved low gravity.

The Respondent did not argue at hearing or in its brief that if the operator was assessed a civil penalty in the amount of $20,000 it would not be able to continue in business.

In a discrimination case, the mine operator is not obligated to reinstate an employee simply because the Secretary brings a 105(c) action. However, if a temporary reinstatement order

is issued, the operator must comply with such order as a good faith effort in attempting to achieve rapid compliance after receiving notice of the violation. In the instant matter, this Court issued an amended order on June 19, 2014, granting temporary economic reinstatement to the Complainant during the pendency of these proceedings. To date, this Court has not been made aware of the operator's failure to comply with the order. Therefore, this Court concludes that the Respondent has satisfied the 110(i) criterion requiring a good faith effort for rapid compliance.

After applying the 110(i) criteria and reaching the aforementioned conclusions regarding the Secretary's request for a civil penalty assessment, this Court finds that a penalty in the amount of $20,000 is too high and should be reduced to $5,000. The reduced penalty amount appropriately reflects the negligence and gravity of the violation as well as the relatively small size of the operator and its net worth at the time of the violation.

ORDER

It is hereby **ORDERED** that:

1. The Respondent **PAY** Fred McKinsey **$12,647.25** in back pay within thirty (30) days of the date of this decision with interest using the *Arkansas-Carbona/Clinchfield Coal Co.* method.

2. The Respondent **EXPUNGE** Fred McKinsey's employment record of any negative reference to the discrimination proceedings and provide a neutral reference from PGSC.

3. The Respondent **PAY** a civil penalty in the amount of **$5,000**, for its violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.[17]

4. The 5/6/2014 Decision and Order temporarily reinstating McKinsey, as amended by the 6/19/2014 Order of economic reinstatement, is hereby **DISSOLVED**.

John Kent Lewis
Administrative Law Judge

[17] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution:

Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, SW, Room 7T10, Atlanta, GA 30303

Fred McKinsey, 6888 US Hwy 258 N, Tarboro, NC 27886

Matthew R. Korn, Esq., 1320 Main Street, Suite 750, Columbia, SC 29201