

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 15 2016

MARK L. LUJAN,
Complainant,

v.

SIGNAL PEAK ENERGY, LLC,
Respondent.

DISCRIMINATION PROCEEDING:

Docket No. WEST 2015-252-D
MSHA Case No. DENV-CD 2014-17

Mine: Bull Mountain Mine No. 1
Mine ID: 24-01950

DECISION

Appearances: Mark L. Lujan, P.O. Box 4733, Grand Junction, Colorado, 81502

Christopher G. Peterson, Esq., Benjamin J. Ross, Esq., Jackson Kelly
PLLC, 1099 18th Street, Suite 2150, Denver, Colorado 80202

Before: Judge Barbour

This case is before the court on a Complaint of Discrimination brought by Mark L. Lujan, on his own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 815(c) (the “Mine Act” or “Act”). On September 23, 2014, Lujan filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration (“MSHA”). On November 24, 2014, MSHA sent Lujan a letter informing him it did not find sufficient evidence to establish that a violation of section 105(c) occurred. On December 30, 2014, Lujan filed an “appeal” of MSHA's determination with the Commission. The appeal was docketed by the Commission as a section 105(c)(3) discrimination complaint, and the case was assigned by the Chief Judge to the court.¹

Lujan alleges that he was first suspended illegally and then discharged illegally by his employer, Signal Peak Energy, LLC (“Signal Peak”), because he engaged in activity protected by the Mine Act. He seeks relief in the form of reinstatement to his former position as an underground coal miner with full benefits and medical accommodation as well as compensation for financial loss due to the alleged illegal discharge. Lujan charges that his discharge was a direct result of a medical condition, namely gout, about which Signal Peak allegedly knew when it hired him and which, prior to his discharge, caused him to miss several days of work. In particular, Lujan points to April 14, 2013, when he missed work due to a flare-up of gout. He states that he told his then supervisor, Ryan Stahl, that given his condition he was not coming to work as he would be a safety risk to himself and other miners, and that although Stahl told him to

¹ Section 105(c)(3) of the Mine Act provides that if the Secretary determines that a violation of section 105(c)(1) has not occurred, “the [C]omplainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination.” 30 U.S.C. § 815(c)(3).

stay home, the company nonetheless suspended Lujan for “mismanagement of days” and discharged him two months later.

Lujan’s employment ended on June 18, 2013, during or immediately following a confrontational meeting with management officials. P-Ex. 18 at 3-4. The company claims it believed that Lujan falsified his time cards to make it appear he worked overtime hours. Resp’t Answer to Complaint at 3. It states when management officials asked Lujan about the discrepancies, the meeting turned acrimonious and Lujan quit. *Id.* Lujan maintains that the company’s version of the meeting is false and that although his employment did indeed end on June 18, it was “not for the reasons given.” Dec. 20, 2014, Letter to Commission at 4. Instead Lujan maintains that the company terminated him during that meeting due to his medical condition and the company’s failure to reasonably accommodate him. *Id.*

PROCEDURAL BACKGROUND

In a March 4, 2015, Notice of Hearing and Prehearing Order, the court scheduled the case to be heard on June 30, 2015. The court also suspended discovery and the filing of pretrial motions and submissions until April 6, 2015, in order to provide Lujan time to obtain representation. Importantly, the court ordered the parties to exchange exhibits and lists of witnesses, with short summaries of the witnesses’ testimony and to do so by May 30, 2015.

Lujan failed to find representation, and Signal Peak moved for summary dismissal on May 8. Lujan opposed the motion. Central to the motion was the company’s assertion that Lujan had not engaged in protected activity, and that his complaint, having been filed 462 days after the end of his employment, was fatally untimely. The court expressed doubt about whether Lujan had in fact engaged in protected activity and whether his complaint was in fact timely, but the court ultimately concluded that fact finding was necessary with regard to both issues. June 12, 2015, Order Denying the Respondent’s Motion for Summary Decision at 5.

On June 3, Lujan requested the court send him subpoenas he proposed to serve upon an MSHA investigator and on an MSHA inspector. The court complied with the request, despite the fact that Lujan had not provided the court or Signal Peak with a list of witnesses as required by the March 4 Prehearing Order. The court did not realize at the time that Lujan had neglected to copy opposing counsel on the e-mailed subpoena request.

Four days prior to the hearing, Lujan contacted the court by email and requested that two of his witnesses be allowed to testify via telephone, given that they lived a prohibitive distance from the hearing site. The court denied the request on the basis of credibility and cross-examination difficulties, but explained to Lujan that he could place witness affidavits into the record at hearing. Lujan failed to obtain a sworn affidavit from either witness by the time of the hearing.

Exactly one day prior to the hearing, the court received a telephone call from Jennifer Casey of the Denver Office of the Solicitor of Labor. Casey explained that she had just learned that subpoenas had been served on MSHA employees, and that she did not yet know what the Secretary’s position would be regarding the witnesses appearing, but that even if the Secretary did not oppose the request, the subpoenaed officials could not appear at the hearing as both would be elsewhere on official business. Lujan asked Casey to relay to the court his request to

continue the hearing on this basis. The company opposed a continuance because it had only learned about the subpoenas one day prior to the hearing and because it had flown six witnesses to Denver for the hearing.

The hearing proceeded as scheduled in Denver, Colorado, from June 30 to July 1, 2015. At the hearing, Casey, appearing as an officer of the court, explained that it was her understanding that Lujan had only mailed the subpoenas on June 22, 2015, and that the Solicitor's office became aware of the subpoenas one day before hearing. Tr. 18-19. Additionally, she stated Lujan failed to comply with the Department of Labor's regulatory procedures for requesting testimony from Department of Labor employees in matters in which the Secretary is not a direct party. Tr. 20-21. On these bases, as well as on the basis of Lujan failing to comply with the March 4 Prehearing Order requirements regarding witnesses, the court denied the request for a continuance.

For the reasons that follow, the court concludes that Lujan has failed to meet his burden for proving a section 105(c) discrimination complaint.

THE LAW

To establish a *prima facie* violation of section 105(c)(1) of the Act, the Complainant must prove, by a preponderance of the evidence, (1) that he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by the protected activity. The operator may rebut a *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980) (*rev'd on other grounds*); *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

If the operator is unable to rebut the miner's *prima facie* case, it may nevertheless defend itself affirmatively by proving (1) that it was also motivated by the miner's unprotected activity and (2) that it would have taken the adverse action in any event for the unprotected activity alone. Unlike with the *prima facie* case, the operator bears the burden of proof in establishing an affirmative defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).

THE TESTIMONY

Testimony of Complainant Mark Lujan

Lujan was hired by Signal Peak in January of 2010 as an underground coal miner, primarily tasked with operating equipment. Tr. 37-38, 89. In a pre-employment physical examination on January 12, which he stated he was required to pass before being hired, and of which the company retained records, he informed the company that he had gout and was working with a doctor to address the issue. Tr. 39-40; P-Ex. 1. He testified that a human resources ("HR") employee at the company reassured him that flare-ups of his condition would not be an issue as long as he had a doctor's note. Tr. 44, 90. On cross-examination, Lujan stated that Signal Peak

subsequently changed this policy around 2012 so that “doctor’s notes were no longer sufficient” because “miners were getting fake doctor’s notes.” Tr. 103-04.

In February, 2010, approximately one month after being hired, Lujan experienced his first flare-up of gout that prevented him from reporting to work. Tr. 37. Starting around March 11, 2011, Lujan began having numerous gout-flare-ups and missed “many scheduled days” of work. Tr. 90. Dale Musgrave had become the new mine manager around this time. Tr. 90. Lujan filed for Family Medical Leave Act (“FMLA”) excused absences around May 2011, but the request was denied by Signal Peak. Tr. 41; P-Ex. 2, P-Ex. 3. Dr. Wagenaar, a physician that Lujan consulted as a part of his FMLA request, noted in a report dated June 9, 2011, that although Lujan’s gout had not been well controlled, hopefully it would be better managed in the future with a change of medication. The doctor also stated that Lujan would “need to miss work in the future.” Tr. 42; P-Ex. 2.

On July 13, 2011, Lujan received corrective counseling for missing work. Tr. 44; P-Ex. 4. Lujan contended that the counseling was for many days that were covered under the company’s leave policy, including two weeks’ worth of vacation days and four “dump days” that employees could use to call-in absent from work. Tr. 44-45. The corrective counseling form states that Lujan “reported off work 17 times” and that only four of the days were covered by “personal days” and four others were covered by vacation days. Tr. 100; P-Ex. 4. This left nine unexplained and unexcused absences. Lujan also testified that whenever he was absent for a day, he was given “less desirable” work upon returning, or work that was not a part of his normal duties. Tr. 90.

On April 14, 2013, Lujan called his foreman, Ryan Stahl, to inform him that he was experiencing a “major [gout] flare-up in both feet” and was unable to walk. Tr. 91. Stahl told him he needed to come to work, as he did not have any days of excused absences remaining. Tr. 91. Lujan then told Stahl that he was unable to operate some equipment due to his flare-up and the medication he was taking to treat it. Tr. 91, 104. The bottle for his prescription medicine contained a warning not to operate machinery, and his doctor had told him that he could not be in a mine during a flare-up. Tr. 93. Importantly, Lujan maintained that he would have been unable to leave the mine promptly in the event of an emergency. Tr. 93. Lujan recalled, “[Stahl] then decided there was no light duty for me and it would be too much of a safety risk to other miners and myself [to come into work], so he told me not to come in.” Tr. 91. On April 19, Lujan was suspended without pay for missing work. Tr. 47, 91; P-Ex. 5. Lujan testified that Stahl was likewise suspended for allowing Lujan to miss work. Tr. 91. P-Ex. 5.

After his suspension, Lujan stated he was told he would be terminated from his employment if he missed any more work. Tr. 92. He claimed that he went to Brett Miller, the HR director at Signal Peak, and asked him multiple times for a written directive stating what he should do during a flare-up now that he did not have any remaining excused absences. Tr. 92. Lujan said he never received a response to his request. Tr. 92. Sometime between April and May, 2013, Lujan stated that his foreman Ryan Stahl was told to terminate Lujan for missing too many work days. Tr. 92.

On June 18, 2013, Lujan was called into a meeting with mine manager Dale Musgrave, continuous mining (“CM”) coordinator Barry Schreckengost, and HR Director Brett Miller, with shift foreman Bryan Koppes participating by telephone. Tr. 92. During the meeting, Lujan stated

he was “confronted with allegations of falsifying time sheets on overtime days,” but he maintained at hearing that he “did no such thing” and that “this was a made-up reason with no proof of such allegations.” Tr. 92-93. Lujan explained that his son and brother were both employed by Signal Peak at the time of his firing, and that he “would never jeopardize being able to work with them.” Tr. 93. The meeting ended with an angry confrontation and Lujan’s departure, causing Signal Peak to contend that Lujan quit and Lujan to contend that he was fired. Tr. 93-94.

Lujan believed he was fired for “refusing to work due to being a safety risk to [himself] and others” which he characterized as a “protected activity” under the Mine Act. Tr. 93. Upon his termination, Lujan first pursued unemployment insurance benefits through the state of Montana. Tr. 94. After multiple rounds of appeals, the state ultimately awarded him all benefits and unemployment insurance on December 12, 2013. Tr. 95. He next pursued a claim with the Equal Employment Opportunity Commission, where he claimed he was first “informed of the potential to pursue a case through MSHA.” Tr. 96. He stated he was previously unaware of his Mine Act rights. Tr. 96.

Testimony of Kalena Oschner

Kalena Oschner is a “business and distributing supervisor” at the mine where she processes biweekly payroll for all employees. Tr. 114-15. The company tracks employee time and attendance primarily through the use of “time clocks” that can scan employees in and out when they slide their hands through the devices.² Tr. 115. The company also keeps “backup handwritten time cards written by the supervisors for each crew” in case the “time clocks” fail to work. Tr. 115. Oschner is the only person at the mine with the ability to upload information from the time clocks directly to her computer. Tr. 115. As a third, additional backup system for tracking time and attendance, when there are discrepancies between the time clocks and handwritten time cards, she will call the company’s dispatcher, who keeps records of whether employees have “tagged in and tagged out” during work days.³ Tr. 118.

Oschner testified that Lujan continuously experienced problems with the hand tracking system, and that a couple of other employees at the mine also experienced problems, albeit not as frequently as Lujan. Tr. 125-26. She stated that when she encountered an apparent hand tracking system error with employees, she was able to verify that they had worked at the mine by checking with the dispatcher. Tr. 133. She stated that she was informed about a problem on June 5, when the system failed to recognize Lujan’s hand. On that occasion, the dispatcher was able to verify that Lujan worked the shift in question and therefore he was paid for that date. Tr. 118-21.

² Respondent’s counsel referred to these devices as “biometric hand scanners.” Tr. 117.

³ In its post-hearing brief, Respondent explains, “Before going underground, miners must flip a tag on the board at dispatch to show that they entered the mine. When miners return to the surface, they flip the tag to indicate that they have exited the mine. . . . The [d]ispatcher records which tags are flipped indicating whether a miner has entered the mine.” Resp’t Br. at 1.

While examining payroll records for June, Oschner noticed that the time clock system had not registered multiple days during that payroll period that the backup time cards reported Lujan as having worked. Tr. 117. Consequently, she called the company's dispatcher. Tr. 118. This time, the dispatcher was unable to verify that Lujan was at the mine on the days for which the tracking systems showed discrepancies, and as a result Lujan was not paid for the following dates: June 7, 13, 14, and 15. Tr. 118, 122. She also admitted that she had noted a discrepancy in one additional date, June 6, but that after the company spoke with Lujan, management instructed her to pay him for that date.⁴ Tr. 131.

Oschner maintained that she checked the June dates in the course of her normal payroll duties, and that no one prompted her to specifically check Lujan's records. Tr. 119. She believed that dispatch contacted Lujan's shift foreman, Bryan Koppes, about the June discrepancies only after she inquired about them. Koppes did not bring the June discrepancies to her attention. She also maintained that when she checked on the discrepancies, she was unaware of Lujan's medical condition. Tr. 124.

On cross-examination, Oschner stated that it is her job to inform management about time discrepancies and to investigate the problem. In the case of Lujan, she did not have an opportunity to talk to anyone in management before dispatch informed Koppes about the problem. Tr. 129. She also admitted that when she had a chance to talk to management she only asked about two days, June 6 and 7, not June 13, 14, and 15. Tr. 131.

Lujan also questioned Oschner about the practice of employees initialing their own names on their time cards and recording their hours worked if their foremen forgot to do so. Tr. 127. Oschner stated that although she had seen the practice, she did not know whether it was allowed by management. Tr. 127. Additionally, she testified that when she came across an instance of the practice, she checked to verify that the employee actually worked the shift that he or she initialed, and in instances other than Lujan's the times were successfully verified. Tr. 132.

Testimony of Bryan Koppes

Bryan Koppes is a "shift coordinator" at Signal Peak. He oversees all miners working on his shift. Tr. 136. While Koppes was initially Lujan's direct supervisor, by 2013 he mostly oversaw Lujan's work during over-time shifts and did not directly supervise Lujan. Tr. 150, 154. Koppes is also responsible for ensuring that the information on time cards for miners working on his shift is accurate and for signing the cards on the last day of the period that each card covers. Tr. 138. Koppes believes that he can "[p]retty accurate[ly]" identify who works on a shift for him on any given day. Tr. 137. At the hearing, approximately two years after the end of Lujan's employment, Koppes testified that he could not remember the dates of the shifts Koppes believed Lujan fraudulently claimed he worked. Tr. 160.

⁴ Testimony from subsequent witnesses revealed that Lujan was paid for June 6 because he was able to satisfactorily explain to management officials the work that he performed on that date. Tr. 213-214; Tr. II 23-24. This means that although Lujan's hand scanner did not register his presence in the mine for three consecutive days between June 5th and 7th, he was paid for two of those days because of dispatcher verification on the 5th and Lujan's explanation about the 6th.

According to Koppes, he became aware of an issue with Lujan's overtime hours in June 2013 when he was contacted by a dispatcher about discrepancies on Lujan's time cards. Tr. 137. The time cards consist of a grid with crew member names in the first column, hours worked on individual days in a different column, and information about those hours worked (such as the shift in which they were completed and whether or not they were regular or overtime hours) in adjacent columns. R-Ex. 1. The court observes that the names of crew members are printed in the first column, but some names are handwritten into the column below the printed names. R-Ex. 1. All of the data in the remaining columns is handwritten. R-Ex. 1. At the bottom of each time card is the dated signature of the pertinent shift foreman. R-Ex. 1.

On the time card for the first full week of June, Lujan's name is handwritten at the bottom of the first column containing the names of crew members. The card lists Lujan as having worked 12 overtime hours on both June 6 and June 7. R-Ex. 1 at 2. While Koppes' signature is at the bottom of the card, Koppes claims that he did not write Lujan's name or hours worked on the card, as the handwriting is not his. Tr. 138-39. On the time card for the second full week of June, Lujan's name is again handwritten at the bottom of the first column, and the card lists Lujan as having worked overtime hours on June 13, 14, and 15. R-Ex. 1 at 4. Koppes' signature is once again at the bottom of the card. Koppes testified he was "pretty sure" that Lujan did not work on those days and "pretty sure" that Lujan's hours were not recorded on the time card when he signed it.⁵ Tr. 141.

When Koppes signed the time cards for the first week of June, he stored them in what he referred to as his "cubby space . . . in the corner of [his] office," where they would have remained "all night" for approximately 12 hours. Tr. 142-43. Koppes agreed that miners could easily reach the cards and that there is no security for the cards. Tr. 142.

Koppes described the tag-in/tag-out procedure at the mine. Under the procedure, miners are required to tag-in to enter underground and to tag-out to exit so that management knows when a miner is underground. Tr. 143-46. He explained that the exhibit marked R-Ex. 3 documented employees' tag-in and tag-out records, and that on this document Lujan is not registered as having tagged in or out on June 7, 13, 14, and 15. Tr. 143-45. While he agreed that a miner's absence in the tag-in/tag-out document could reflect a miner's forgetting to tag-in, he explained that usually if a miner forgot to tag-in, dispatchers would alert Koppes, and management would "call them out from underground and make them flip their tag," before returning underground. Tr. 146, 164-65. Koppes also testified that there were at least four independent, non-redundant systems in place to track miners, so that if one of them failed it would not affect the others.⁶ Tr. 170.

Koppes described the meeting on June 18, 2013, which marked the end of Lujan's employment. Tr. 147. Koppes was not physically present at the meeting. Rather, he participated

⁵ However on cross-examination, Koppes admitted he sometimes let employees complete and verify their timecards before he signed them. Tr. 158-59, 163.

⁶ In addition to the biometric hand scanners, time cards, and tag-in/tag-out system, Signal Peak also tracked miners' locations using the Strata wireless trackers that miners were required to carry with them in the mine. Tr. 149, 153, 183-84.

“[v]ia phone call” for 10 to 15 minutes. Tr. 147, 161. The purpose of the meeting, according to Koppes, was “[t]o find out why there was time documented when [Koppes] had no recall of [Lujan] . . . working” on those shifts. Tr. 147. He stated that “[t]here was no plan or discussion to terminate him.” Tr. 147-48. Koppes testified that the company tried to verify whether Lujan worked the shifts in question by “asking him what jobs or tasks . . . he had performed during those shifts.” Tr. 148. When Lujan failed to provide answers to the company’s satisfaction, an individual in the room, Barry Schreckengost, left to check the tag-in/tag-out documents and the Strata system (which can track miners’ location to within 200 feet) to verify if Lujan was present in the mine. Tr. 149, 153. After a period of silence, Koppes heard Lujan say, “I quit.” Tr. 149. He then heard Dale Musgrave, the mine manager, respond, “I accept [your] resignation.” Tr. 150. This was the last thing Koppes heard. Tr. 153.

Koppes testified that on June 18 he was unaware of any medical conditions or other attendance-related issues that Lujan had with the company.⁷ Tr. 150. Koppes maintained that at the June 18 meeting neither Lujan’s medical condition nor his prior absenteeism was discussed. Tr. 152. He stated that he did not expect the meeting to end with Lujan’s resignation or termination. Tr. 150. Rather, he expected to learn that there had been some misunderstanding about the hours Lujan worked. Tr. 151. If there had been a mix-up of dates and times, he expressed his belief that management would have handled the situation through a “verbal warning” or “correction letter.” Tr. 151.

On cross-examination, Koppes was asked about Lujan’s allegation that Lujan was the subject of retaliatory job assignments. Koppes denied that “being a third man on a bolter or cleaning up rags in a return” were less desirable jobs for a miner of Lujan’s position and further denied that he had ever “assigned these duties to somebody that [was] in trouble.” Tr. 161. He claimed that everyone does these kinds of jobs, himself included. Tr. 161.

Testimony of Dale Musgrave

Dale Musgrave was the mine manager at all times relevant to this matter. As such, his responsibilities included directing and supervising the underground work force, hiring and firing employees, and recommending disciplinary action. Tr. 176-77. His testimony largely concerns the June 18 meeting which ended Lujan’s employment at the company. Musgrave became involved when discrepancies on Lujan’s time cards and his tag-in/tag-out records were brought to Musgrave’s attention, and Musgrave sought to determine whether Lujan actually worked the times he claimed. To find out if Lujan’s time cards were accurate, Musgrave contacted three management officials: continuous mining (“CM”) coordinator Barry Schreckengost, shift foreman Bryan Koppes, and human resources (“HR”) director Brett Miller. Tr. 179. After consultations with the officials failed to produce a satisfactory explanation for the discrepancies, Musgrave directed Schreckengost to call Lujan out from underground and into a meeting so that management officials could ascertain more information. Tr. 179. The meeting took place in Musgrave’s office and consisted of Lujan, Musgrave, Schreckengost, Miller, and Koppes, the latter via telephone. Tr. 179-80.

⁷ Koppes agreed that if Lujan had given him a doctor’s note when he was absent from work due to a gout flare-up, Koppes would have known about the condition, but Lujan never gave him a doctor’s note. Tr. 155-56.

Musgrave first explained the discrepancies to Lujan and asked “if he could explain . . . what he did on those days that he had signed⁸] and who he worked for.” Tr. 180. Musgrave stated that Lujan was unable to answer the questions. Tr. 180. According to Musgrave, management then looked at dispatch tag-in/tag-out records and tracking system information and asked Koppes if Lujan worked on the disputed dates. Tr. 182. When Koppes did not recall Lujan working on the June dates, Musgrave asked Schreckengost to verify Lujan’s whereabouts through the Strata wireless tracking system. Tr. 183-84. Musgrave stated that Schreckengost left the room to check the system and, within a minute of Schreckengost leaving, Lujan got aggravated and voluntarily quit. According to Musgrave, Lujan’s exact words were, “You’re not going to believe me. You don’t believe me . . . I quit.” Tr. 186. In response, Musgrave stated that he accepted Lujan’s resignation. Tr. 186.

Musgrave speculated on how management would have dealt with Lujan’s situation had he not resigned. He stated, “If [Lujan] had continued to not show any proof or explanation, . . . he would have been terminated for falsifying his time cards.” Tr. 189-90. When asked how this process would have worked, Musgrave replied that he “would have asked Lujan to leave the room” so that management could discuss the appropriate disciplinary action. Tr. 190. Then he would have given him one more chance to explain himself. If Lujan did not have a satisfactory explanation, Musgrave would have announced to Lujan the disciplinary action management would take as a result of Lujan “falsifying time cards” and “[s]tealing time.” Tr. 190.

Musgrave stated he never had an employee falsify time cards before, but he had confronted two employees about potentially falsifying time cards in the past. Tr. 191. In the first situation, the company was able to verify that the employee was seen on the property on the day in question, and therefore Musgrave only gave him an oral warning. Tr. 191. In the second situation, where an employee’s time card listed two more hours than the employee actually worked, Musgrave claimed that the employee explained that “he was in a hurry” to leave, that “he was [not] trying to steal time,” and that “he would make it up to [the company], which he actually did.” Tr. 192. As a result, Musgrave testified he gave the employee a second chance. Tr. 192. He differentiated that case from Lujan’s by stating that Lujan “had no explanation for the time he clocked in on those shifts.” Tr. 192. Further, Musgrave appeared unwilling to entertain the possibility that Lujan’s time cards reflected a mistake, stating, “You don’t make a mistake three days in a row. That’s not a mistake.” Tr. 193.

Musgrave denied that the intent of the June 18 meeting was to fire Lujan. He also denied any discussion of Lujan’s medical condition at the meeting. Tr. 193. He was aware of attendance issues with Lujan, issues he characterized as “abusive.” Tr. 193. However, he claimed that Lujan could have been terminated at any time for those attendance issues, and therefore he would not have needed to use his alleged falsification of time cards as an excuse to terminate him. Tr. 194.

On cross examination, Musgrave agreed that gout “could pose a safety hazard to certain individuals” and that “not being able to push a brake pedal or escape in the mine in [an] emergency” would be a safety hazard. However he also stated that he had never seen Lujan at work with a medical condition that affected him. Tr. 197.

⁸ According to Musgrave, Lujan verified that it was his handwriting on the time cards. Tr. 180.

Testimony of Brett Miller

Brett Miller is the HR director at Signal Peak. Tr. 206. He is one of the individuals who was in the room with Lujan during the June 18 meeting. Tr. 208. Miller characterized the meeting as “a typical disciplinary meeting” and explained that his role at the meeting was “to make sure that the company was maintaining policies and treating the employee fairly.” Tr. 208. He also was there “to help question the employee.” Tr. 208. He stated he first learned about the issue with Lujan’s timecards from Dale Musgrave on the morning of June 18. Tr. 209. According to Miller, the company investigated whether Lujan was in the mine on the days in question using multiple means of verification prior to the meeting, however no one checked the tracking system until the meeting itself. Tr. II 12.

Miller took notes during the meeting. He also filled out and signed an “employee exit checklist.” Tr. 210-11. The items were admitted into evidence as R-Ex. 8. The checklist states that Lujan “voluntarily resigned,” that he was “suspected of claiming time that he did not work,” and that “he did not have any justification and resigned” when confronted. R-Ex. 8 at 1; Tr. 211. Miller stated that it is common practice to generate a record of such meetings. Tr. 212. He testified that the meeting consisted of Lujan, Miller, Musgrave, Schreckegost, and Koppes, and that Koppes participated via phone and stayed on the line during the entire time the meeting lasted. Tr. 212-13. Miller knew this because he and Musgrave were the two individuals present for the entire meeting. Tr. 213.

According to Miller’s notes and testimony, management was examining five dates during the meeting: June 6, 7, 13, 14, and 15. Tr. 213; R-Ex. 8 at 2. Lujan was asked who he worked for and what he did on those days. Tr. 213. Miller stated that although Lujan was able to remember what he did at the mine on June 6, he could not remember what he did during the other dates. Tr. 214. Miller remembered Musgrave telling Lujan, “You can have the 6th. Let’s talk about the [other four dates].” Tr. 214. Miller testified he asked Kalena Oschner to pay Lujan for June 6. Tr. 216. He explained that Lujan “was paid for that day because . . . he correctly explained what was going on that day in the mine.” Tr. II 19. Miller stated that if Lujan had provided similar information for the other dates in question, he would have been paid for those days as well and sent back to work. Tr. II 19-20.

As for June 7, 13, 14, and 15, Miller testified that Lujan named tasks that Koppes maintained were performed at the mine a week prior, rather than on the disputed dates. Tr. 214. According to Miller, Koppes did not have any recollection of Lujan working for him on those days. Tr. 217. Miller stated that, at this point, Schreckengost asked Lujan whether he used his own “marker number” or somebody else’s, so that management could determine whether he showed up on the tracking system data for those dates. Tr. 214. Miller speculated that “the tracking system could have cleared this up,” however Miller maintained data from the system did not reveal Lujan’s presence at the mine on the dates at issue. Tr. II 13. According to Miller’s notes and testimony, Lujan finally stated, “I will just quit,” and Musgrave responded “I accept your resignation.” Tr. 217; R-Ex. 8 at 5. Miller described the meeting as following a “pretty standard form,” except that management usually asks the employee to leave the room and then

brings him or her back in after a disciplinary decision is reached, but in this instance, Lujan “quit and stormed out of the room before [it] got to that point.”⁹ Tr. II 5.

Miller denied that any issues with Lujan’s gout, attendance, or safety concerns were discussed during the June 18 meeting, although he had been aware of Lujan’s claims that gout flare-ups caused his work absences. Tr. 218-19; Tr. II 8. Rather, the meeting concerned Lujan’s potential violation of the company’s policies on falsification of time records and/or theft of hours. Tr. 223. Miller had no doubt that Lujan was aware of these policies. All new employees undergo a “thorough” three-hour orientation on Signal Peak’s attendance, punctuality, and dependability policy handbook and are then given a form to sign that they acknowledge receiving the handbook. Tr. 219-20, Tr. II. 15. Lujan signed a form to that effect in 2008, and again in 2011 for an updated handbook.¹⁰ Tr. 220; R-Ex. 7. The time reporting policy section of the handbook states, “Reporting hours for another employee or falsifying a time keeping record is not permitted and is cause for disciplinary action up to and including discharge.” R-Ex. 5. The section on Signal Peak’s discipline policy contains a similar warning. R-Ex. 6. Miller stated that had Lujan not first quit and had he come up with a “reasonable explanation” for the time discrepancies, he likely would not have been discharged, as the company “tend[s] to err on the side of the miner.” Tr. 224.

Although Miller stated that the June 18 meeting was unrelated to Lujan’s pre-June 2013 attendance issues, at the hearing, he was asked about and testified extensively regarding those issues. Tr. 224-37. Miller was presented with a number of records of corrective counseling, some of which predated his time as HR director, but he was able to provide testimony on them due to his familiarity with such documents in the course of his job. Tr. 225-26. The records show that Lujan received a “Verbal Warning” on January 30, 2010, for calling off work when he did not have any personal days to use. Tr. 225; R-Ex. 9 at 1. As a step up from a verbal warning, he then received a “Written Notice” on February 22, 2010, for a similar reason. Tr. 225-26. On May 18, 2011, he received a “Written Notice” detailing his 15 absences since the beginning of the year, only five of which the company considered to be excused. Tr. 226; R-Ex. 9 at 3. On July 13, 2011, he received the “Written Notice” detailing 17 absences since the beginning of the year, only eight of which were excused by the company. Tr. 228; R-Ex. 9 at 9. On February 27, 2012, he received another “Written Notice” for attendance issues informing him that he had already exhausted his personal sick leave for the year, and that he had missed a shift on February 26 after he had been informed by management that his request for leave on that date was not approved. Tr. 228-29; R-Ex. 9 at 12.

⁹ An opinion from the Montana Board of Industry and Appeals (“MBIA”) stated, “All parties agree that discrepancies for three shifts [were] resolved to all parties satisfaction” at the meeting. P-Ex. 32 at 1. However, Miller claimed the statement was not correct. Tr. II 6. Instead, he maintained that Signal Peak never conceded that three of the shifts had been resolved. Tr. II 6. Indeed, the transcript of a subsequent MBIA hearing is devoid of any discussion of this topic from either party, so it is unclear from where the agency derived its conclusion. P-Ex. 26.

¹⁰ Miller was not aware of any changes to the attendance, disciplinary, or time reporting policy between the 2008 edition and 2011 update. Tr. 237.

Lujan was suspended on April 19, 2013, for not following proper call off procedure and for habitually abusing Signal Peak's attendance policy. R-Ex. 9 at 14. The suspension followed the gout-related work absence that Lujan primarily cites to as his protected activity in this matter. Related to this suspension, Miller felt that there were "a lot of inconsistencies with Mr. Lujan's supervisor, Ryan Stahl" and that "Stahl seemed to be covering for Mr. Lujan a lot of times on these shifts that he was missing." Tr. 233. As a result, both Lujan and Stahl received simultaneous suspensions. Tr. 233. Specifically, the company had directed Stahl to discipline Lujan for an unexcused absence, and Stahl had refused, which led to Stahl's suspension. Tr. II 27-28; R-Ex. 11.

While Stahl excused some of Lujan's absences, Miller stated he did not believe that an employee could always rely on a foreman's approval if such approval conflicted with the company's attendance policy guidelines. Tr. II 14. Miller stated that both the employee and supervisor are expected to have a general knowledge of the number of days the employee is allowed to take off and that company policy supersedes a supervisor's permission. Both the employee and the supervisor can be disciplined for violation of the policy. ¹¹ Tr. II 14. Stahl was eventually terminated by Signal Peak on October 4, 2013, for inadequate management of employees' time, "specifically regarding Mark Lujan's absences" and Stahl's "consistently excused absences for Mr. Lujan when he did not have time off available . . . in violation of Signal Peak's attendance policy." Tr. II 23-24; R-Ex. 11 at 4. Miller also maintained that Stahl's termination was related to issues regarding inadequate safety training of the miners working under him. Tr. II 24-25; R-Ex. 11.

According to Miller, employees at Signal Peak are given four personal days per year, which they can use for any reason, including sick days. Tr. 230. They typically cannot use their vacation days as sick days since the company's policy book requires "that an employee give[] 30 days notice for a vacation day." Tr. 230. However, the company's miners "typically work half the year" on a "four on/three off schedule." Tr. 229. With 80 hours of vacation available to miners such as Lujan, Miller felt that Signal Peak's miners are "scheduled a lot of time off." Tr. 229. Thus, according to Miller, it is very "unlikely for somebody to have [as] many attendance issues [as Lujan]." Tr. 229.

Miller testified that during the time Lujan was employed at Signal Peak, from 2010 to June 18 of 2013, he missed 52 days of work. Tr. 231. Only 26 of those days were excused. Tr. 231. Miller stated there were seven doctor's notes in Lujan's file for those days, five of which pertained to gout. Tr. 231. If Lujan had given him additional doctor's notes, the unexcused absences would have become excused absences. Tr. 236. Although Lujan had testified to seeking guidance from Miller on how to manage his attendance issues and gout-flare ups, Miller maintained that he did not recall any such inquiry. Tr. 236; Tr. II 8-9.

Miller believed that Lujan could have been terminated for attendance issues alone, and that the company did not need to invent a pretext to fire him. Tr. 234. Signal Peak has a three-step discipline policy for attendance violations, with escalating consequences such that the "fourth occurrence, in a lot of cases, could be termination." Tr. 232. Miller stated, "There have

¹¹ In response to a question about whether Lujan would have been relying on Stahl's approval if he entered incorrect information into his timecards, Miller stated that he had no knowledge of any such approval. Tr. II 25.

been quite a few employees terminated for attendance issues” and far from being “singled out,” Lujan “was treated very favorably.” Tr. 235.

Regarding Lujan’s gout, Miller believed that Signal Peak had reasonably accommodated Lujan’s medical condition by sending him home when his condition was bad. Tr. II 9. He was not aware that Lujan refused to work on April 14 because of his gout, as he did not remember Stahl telling him that. Tr. II 10. In fact, he was unaware of *any* instances where Lujan refused to work, but he was aware of instances where Lujan was sent home because he was feeling ill, and, in accordance with the company’s disciplinary process, he was not written up for this. Tr. II 18-19. Nevertheless, Miller was certain that none of these attendance issues were involved during the June 18 meeting that immediately preceded the end of Lujan’s employment. Tr. II 29.

Testimony of Barry Schreckengost

Schreckengost is the continuous mining section (“CM”) coordinator for Signal Peak. As such, Schreckengost is “in charge of the continuous mining sections and all of the development work that takes place for the long wall mine.” Tr. II 30. Schreckengost stated he considered Lujan to be a “fair” worker. Tr. II 31. He testified that Signal Peak would address any safety complaints Lujan brought up, and the company did not force Lujan to work through an illness. Rather, it allowed him to go home when needed. Tr. II 31. In regard to whether Lujan was handed less desirable work after taking time off work for medical reasons, Schreckengost also denied that “picking up rags in the return is a less desirable job duty for a miner of [Lujan’s] status.” Tr. II 44. Schreckengost stated he does the same duty. Tr. II 44.

While Schreckengost acknowledged that an “inability to press the brake pedals on mobile equipment or escape from a mining emergency” could be a hazard to a miner, he did not know whether gout itself would present such a safety hazard since he had no personal experience with the condition. Tr. II 44. Additionally, he did not consider Lujan’s request to stay home on April 14 to be a protected work refusal because he “did not provide evidence of a medical condition to [Signal Peak] at that time,” such as a “doctor’s note . . . stating the reason why [Lujan] had a medical condition on that day.” Tr. II 51. While he was aware that Lujan had gout, he had no verification that his absence on April 14 was gout related. Tr. II 53.

Schreckengost testified he attended the June 18 meeting. Tr. II 32. The subject of the meeting was the problem presented by Lujan’s time cards. Tr. II 32. Schreckengost stated his “intent was to resolve the issue and have Mr. Lujan go back to work.” Tr. II 32. However, the issue was not resolved because, according to Schreckengost, Lujan could not tell the people in that room “anything” about the four days and 40 hours of work he said he performed.¹² Tr. II 33.

When Lujan’s claims he worked on the disputed days could not be verified, Schreckengost contacted Ryan Beesley regarding the Mine’s tracking system’s record of employee attendance and location. Tr. II 33-34. Schreckengost stated that the tracking system is in place in compliance with a requirement “to keep track of all [the company’s] employees in

¹² On cross-examination, he stated that he personally was not satisfied that Lujan had even worked on June 6 although he was paid for the date. Tr. II 39-40.

case of [an] emergency underground so [that Signal Peak] can evacuate the mine and know where [its employees] are.”¹³ Tr. II 34. Beesley is responsible for the operation of all underground electrical equipment, which includes the tracking system. Tr. II 34. Schreckengost stated that Beesley told him Lujan was not at the mine on the days in question. Tr. II 52.

Schreckengost testified that Lujan left the meeting before Schreckengost returned from his visit to Beesley. Tr. II 35. Schreckengost passed Lujan on the stairway leading back to the meeting room and met Dave Musgrave at the top of the steps. Tr. II 35. Musgrave told Schreckengost that Lujan had resigned. Tr. II 35.

After Schreckengost testified about the events of June 18, he was asked to describe how the company makes its miners aware of their Mine Act rights. Schreckengost described the 8-10 hour refresher training that Signal Peak holds annually, per MSHA requirements. Tr. II 38. The training session covers, among other topics, miners’ rights, which includes protection from discrimination under the Act. Tr. II 38-39. Signal Peak provides the training through a “Power Point” presentation on a screen to a class room of 40-50 people.¹⁴ Tr. II 42-43. He agreed it is possible for an individual to miss the presentation by being out of the room, but he was skeptical that Lujan could have missed the presentation every time it was given. Tr. II 43-44. Signal Peak also introduced into evidence a certificate of training, signed by Lujan on January 17, 2013, acknowledging that he had received the referenced training on that date. Tr. II 48-49; R-Ex. 12 at 4.

¹³ The requirement comes from the MINER Act of 2006, which specifies, in pertinent part:

Consistent with commercially available technology and with the physical constraints, if any, of the mine, the [mandatory accident response] plan [developed and adopted by each underground coal mine] shall provide for above ground personnel to determine the current, or immediately pre-accident, location of all underground personnel. Any system so utilized shall be functional, reliable, and calculated to remain serviceable in a post-accident setting.”

* * *

“[A] plan shall . . . provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground.”

30 U.S.C. § 876 (b)(2)(E)(ii)-(F)(ii)

¹⁴ One of the Power Point slides explains in pertinent part, “Miners cannot be fired, harassed, refused employment or transferred to a lower paying job because they exercise their rights under the Act, such as . . . refusing to work (or [being] withdrawn) because proper safety and health training was not received.” R-Ex. 12 at 3.

Testimony of Ryan Beesley

Ryan Beesley is the electrical manager at Signal Peak, a position he held for a little over three years at the time of the hearing. Tr. II 54. Beesley testified he has been employed at Signal Peak for six years, five of which he has spent working with electrical systems in the mine. Tr. II 54-55. Although he was initially in charge of installing and maintaining the personnel tacking system at the mine, he now has a crew of electricians that handle the maintenance duties for him. Tr. II 55-56.

Beesley explained that “the [personnel tracking] system consists of a wireless node network,” with “battery nodes at varying distances” throughout the mine that “operate on a wireless system.” Tr. II 56. This wireless “system . . . pick[s] up a tracker the miner[s] . . . carry and . . . measures the distance they are from the node,” thereby tracking the underground presence of miners throughout the mine. Tr. II 56. The system generates records of each miner’s location, which the company retains for two weeks. Tr. II 56. MSHA only requires the company to retain records for two weeks, which Beesley claims is partly because “so much information is processed and kept and stored on the server, [that retaining the records for longer than two weeks will] actually cause an overage on the system.” Tr. II 57. MSHA has also “stipulated that any operator or mine that has a tracking system is not allowed access to modify, clear or change the tracking system in any way, other than nodes in the mine” so that “it is impossible for [Beesley] to get in” the system to change the data. Tr. II 64.

Beesley described how the system works. Miners entering the mine pick up their trackers, which have been charging since they were last used. The trackers display a message reading “Checking in,” followed by a message asking whether it is clear to enter the mine. Tr. II 58-59. It is the miners’ responsibility to verify that the trackers are operational and fully charged, and to check themselves into the system. Tr. II. 60. Internal signals in the devices ensure that miners appear on the tracking system immediately after they pull their trackers out of the charger. Tr. II 60. Even if a tracker were to cease functioning immediately after a miner checked in, there would still be a record in the system that a miner had removed the tracker and checked in. Tr. II 61. The device does not track miners in areas where they do not regularly work and travel. Tr. II 61. But, the system will still register a miner as having picked up his or her tracker and will record his or her last tracked location, with a time recorded for that location. Tr. II. 61, 63.

Beesley testified that during the June 18 meeting regarding Lujan’s time cards, Schreckengost asked if Beesley could show him records of everyone in the continuous mining section of the mine on June 13, 14, and 15. Tr. II 67. He responded that the system could not identify and track a group of miners, but that it could track the locations of specific individuals. Tr. II 68. Schreckengost narrowed his request to Lujan, and Beesley responded that “he was not shown underground anywhere” on those three dates. Tr. II 69.

Beesley then checked with dispatch records to see if Lujan had been given an alternate tracker for those days, or if his tracker had been dead or nonoperational.¹⁵ Tr. II 69. He could not find anything to support those possibilities. Tr. II 69. He also showed Schreckengost screenshots of several other miners’ progress in the section on those dates in order to demonstrate that the system was operational and tracking at the time. Tr. II 70. Beesley thought

¹⁵ Beesley explained that if a tracker was sufficiently low in battery power, the tracking system would send an alert out to the dispatcher to make him or her aware of the problem. Tr. II 63-64.

that it would be impossible for a miner working underground to not be on the tracking system or tag-in/tag-out sheets for three consecutive days. Tr. II 70. He had never known it to happen. Tr. II 70. He testified that he had been asked to locate miners on the tracking system before, and that as far as he could recall, he had always been able to do so. Tr. II 72. Beesley thought the data conclusively showed Lujan was not underground on the days in question. Tr. II 71.

Beesley acknowledged the tracking data from June 13, 14, and 15 no longer existed. The data had been overwritten, which was the usual practice at the mine. Beesley explained that if he had known the data would be needed, he could have retained copies, but after Lujan's employment ended, retention of the data seemed to Beesley a "nonissue." Tr. II 71.

The remainder of Beesley's testimony on both direct and cross examination focused on an interview he had given to MSHA employees investigating Lujan's discrimination complaint. An MSHA statement summarizing the interview reads, "Beesley stated he was requested by Barry Schreckengost . . . to check tracking for Mark Lujan, and Beesley determined Lujan had been tracking." P-Ex. 11 at 2. The report continued, "Beesley stated Lujan did not show up on the battery default list." P-Ex. 11 at 2. Finally, the report noted, "Beesley stated he checked the tracking of Lujan on June 7, 13, 14, 15, 2013, and determined Lujan was in the continuous mining section. . . . SPE Attorney, Peterson, clarified Lujan was not in the section." P-Ex. 11 at 2. Beesley testified, "[T]he [MSHA investigators were] misunderstanding what I was saying." Tr. II 73. He stated that he "never told [the investigators] that [Lujan] was in the mine on those dates." Tr. II 83. He also clarified that his statement that Lujan did not show up on the default list meant that his "battery had not shown up as dying at any point." Tr. II 78. Beesley attributed the misunderstanding to the investigators not understanding how the tracking system worked. Tr. II 80. According to him, the MSHA representatives "were confused by the layout and the structure of the system." Tr. II 80. He also added that for one of the MSHA representatives in the interview, Mark Albright, "it appeared that this was his first time doing this." Tr. II 80. The other MSHA representative, Lois Duwenhoegger, was an MSHA Special Investigator, and presumably had more experience in these matters. Tr. II 77-78. When asked whether he was threatened by Dale Musgrave or anyone else in management to change the testimony that he provided to MSHA investigators, Beesley replied that he has never been threatened by any individual in management. Tr. II 79.

Rebuttal Testimony of Mark Lujan

Lujan reiterated his contention that he would have been a safety risk to himself and others if he had entered the mine on April 14. Tr. II 86. He would not have been able to push the brake pedal on the machinery he was operating, and would not have been able to leave the mine in the event of an emergency. Tr. II 86. And once again, he testified he suffered adverse actions for refusing to work by being given less desirable duties after missing work, and then by being suspended and fired. Tr. II 86.

Lujan was asked on cross-examination whether he ever supplied information from his doctor to Signal Peak verifying his medical condition on April 14, the date on which he claims he made a protected work refusal. Tr. II 88. Lujan replied that he supplied that information to his foreman, Ryan Stahl, but that he did not have a copy of that letter anywhere that he could present

to the court. Tr. II 88. Lujan did not have any document from his doctor that specifically addressed April 14. Tr. II 90.

LEGAL ANALYSIS

I. Timeliness of Lujan's Complaint

Signal Peak argues that “Lujan’s Discrimination complaint should be dismissed because it was untimely filed and [he] failed to prove that justifiable circumstances caused that late filing.” Resp’t Br. at 5. Lujan did not address this argument in his post-hearing brief. However, his complaint and testimony indicate that he would ask the court to excuse his untimely filing on the basis that he was unaware of his 105(c) rights. *See* P-Ex. 7 at 5; Tr. 96.

Under section 105(c)(2) of the Mine Act, Lujan was required to file his complaint with the Secretary “within 60 days” of being discharged or otherwise discriminated against in violation of the Act. 30 U.S.C. § 815(c)(2). Lujan filed his complaint on September 23, 2014, which was 402 days late. However, according to Commission case law, this 60-day period is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff’d mem.*, 750 F.2d 1093 (D.C. Cir. 1984). A judge is required to review the facts “on a case-by-case basis, taking into account the unique circumstances of each situation,” in order to determine whether a miner’s late filing should be excused. *Id.*

The Commission has held that “a miner’s genuine ignorance of applicable time limits” as well as “mistake, inadvertence, and excusable neglect” “may excuse a late filed discrimination complaint.” *Schulte V. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984); *Perry v. Phelps Dodge Morenci, Inc.* 18 FMSHRC 1918, 1921-22 (Nov. 1996); *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230-31 (Aug. 1991). A primary consideration in cases involving late filing is whether there was evidence of material prejudice to the operator. *See Sec’y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908-09 (June 1986); *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1387 (Dec. 1999); *Sec’y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2213-14 (Nov. 1994). Other factors that the Commission has considered in excusing untimely filing include the complainant’s proceeding without the benefit of counsel and the complainant’s pursuit of related complaints, which can indicate that he was not “sleeping on his rights.” *Morgan*, 21 FMSHRC at 1387.

Lujan claims that he was unaware of his 105(c) rights before he contacted the EEOC to file a separate discrimination complaint with that agency.¹⁶ Tr. 96. The court does not find the

¹⁶ Lujan did not testify as to when this happened, so the court cannot determine whether he filed his complaint with MSHA within 60 days of allegedly becoming aware of his rights. The record is confusing on this point as well. In his December 30, 2014, Letter to the Commission at 3, Lujan stated that the EEOC claim was filed on February 13, 2013, but that he was made aware of his 105(c) rights on September 23, 2014, the date that he filed his complaint with MSHA. Given the order of events in the timeline, the court concludes that Lujan meant February 13, 2014. In its Answer to Lujan’s Complaint, the company states that Lujan filed a complaint with the EEOC on or about April 10, 2014.

claim credible. A mine operator has a duty to provide training on Mine Act rights, so that a miner can be assumed to be reasonably competent to exercise those rights once trained. The record establishes that Signal Peak provided Lujan with annual refresher training on his rights as a miner, which included an explanation of discrimination and protected activity under the Act. Tr. II 38-39; R-Ex. 12. Lujan provided no evidence or testimony that he was absent for these explanations, and indeed Lujan signed a statement acknowledging that he received this training. R-Ex. 12 at 4. In such circumstances, the court is unwilling to accept post hoc claims of ignorance. Nor is there any evidence that Lujan's untimely filing was the result of a mistake or inadvertence. Rather, the court can reasonably infer from Lujan's 464-day delay that he chose not to exercise the right to which he knew he was entitled.

All of that said, Signal Peak has not demonstrated material prejudice from Signal Peak's late filing. Indeed, the company has not addressed the issue. Additionally, Lujan's pursuit of "related claims" through the EEOC and state unemployment board could suggest that he was not "sleeping on his rights,"¹⁷ while his failure to obtain counsel could weigh in his favor on this specific issue. In any event, given that the Commission has found material prejudice to be a primary factor in cases involving untimely filing, the court must conclude that Lujan's late filing is excusable.¹⁸

II. No Protected Activity

Lujan claims that he "engaged in a protected activity by refusing work due to safety concerns for himself and other miners" during flare-ups of gout, most notably on the morning of April 14, 2013, when he refused to come into work. Pet. Br. at 6-7. The company responds that "Lujan did not establish that he engaged in protected activity by failing to report to scheduled shifts due to a medical condition," because the "Commission has held that an inability to work due to a medical condition does not constitute protected activity for purposes of [section] 105(c)." Resp't Br. at 7.

Section 105(c) of the Mine Act protects miners from discrimination motivated by their protected activity, which includes exercising any statutory right afforded by the Act. 30 U.S.C. § 815(c)(2). While the Act does not expressly state that miners have the right to refuse work under conditions involving health or safety dangers, "the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger." *Dykhoff v U.S. Borax, Inc., Jr.*, 22 FMSHRC 1194, 1198 (Oct. 2000) (citing *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985)). Lujan is effectively asserting that

¹⁷ According to the December 30, 2014, Letter to the Commission at 3, Lujan filed his claim for Unemployment Insurance on June 20, 2013, two days after the end of his employment, and his appeal process ended on December 12, 2013. As previously mentioned, there is some confusion as to when Lujan filed his EEOC claim, but this event appears to have occurred between February and April of 2014.

¹⁸ The court observes, in its view the Commission's leniency in excusing late filing all but writes timeliness out of the Act and potentially undermines the effectiveness of the requirement that operators train miners in their rights.

he engaged in a protected work refusal under section 105(c) of the Mine Act by staying home on April 14, 2013, because his gout flare ups would have made working conditions unsafe.

The court noted in its June 12, 2015, Order Denying the Respondent's Motion for Summary Decision that Commission case law "strongly suggest[s] that medical-related absences cannot form the basis of a protected activity claim," but that "the issue remains unsettled as a matter of law." This is in part because the Commission has held in *Bjes v Consolidation Coal Co.*, 6 FMSHRC 1411, 1417-18 (Jun. 1984) that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations." While Commission members have signaled, in subsequent concurrences and plurality opinions, that extending that holding to protect medically related absences might be a bridge too far, none of the language to that effect is binding precedent. See *Dykhoff, Jr. v U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198 (Oct. 2000) (Riley and Verheggen plurality opinion); *Price v. Monterey Coal*, 12 FMSHRC 1505, 1518-20 (Aug. 1990) (Doyle concurrence).

The court, however, is convinced by the considerable persuasive authority in the *Dykhoff* and *Price* opinions and by the decisions of those Commission Administrative Law Judges (listed below) who have examined the issue in depth and found that the type of activity cited to by Lujan is not protected under the Act. In particular, the court finds persuasive the reasoning of a plurality of Commissioners in *Dykhoff* in refusing to treat a miner's medically related absence as a protected work refusal on the grounds that doing so would "stretch[] the work refusal doctrine far beyond its contours as heretofore recognized by the Commission" and risk turning every work absence due to an illness into a protected work refusal. *Dykhoff*, 22 FMSHRC at 1200, 1200 n.9. The plurality noted that this expansion "would make enforcement of otherwise valid attendance policies difficult if not impossible," conflict with Commission precedent "recogniz[ing] that operators may discipline employees who violate non-discriminatory time and attendance policies," and "trivialize the concept of protected activity." *Id.*

In *Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129, 134 (Mar. 2003) (ALJ), a case in which a miner told his employer he could not perform heavy duty work due to a back sprain, Judge Manning noted that "[s]ection 105(c) does not grant a miner the right to refuse his assigned duties because he is no longer capable of performing them as a result of an injury." Under a similar set of facts in *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ), Judge Melick explained that the Mine Act was not designed to "provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries, would find working most jobs in the mining industry impossible." Rather, "worker's compensation, social security disability and other similar laws [are available] to provide loss of income protection under these circumstances." *Id.*

In accordance with this reasoning, the court finds Lujan did not establish he engaged in protected activity. It is important to note that, in contrast to the facts of *Bjes*, 6 FMSHRC at 1417, Lujan was not refusing an at work order to perform a specific task or set of tasks. He was calling into work sick because of a flare-up of gout, after an extensive history of absences that had resulted in corrective counseling. Tr. 91, 44. The *Dykhoff* plurality's concern that treating medically-related absences as protected work refusals "would make enforcement of otherwise valid attendance policies difficult if not impossible" is especially on-point here. Signal Peak's

reasonable policy was to pay miners for a number of unexcused and unplanned work absences, but to impose discipline after the number was exceeded. Tr. 44-45, 229-30. To deem an unexcused sick call-in to be protected activity would put Signal Peak in the impossible position of being unable to impose otherwise legitimate discipline without running afoul of section 105(c), a situation outside the boundaries of the Act.

Moreover, there is no evidence that Signal Peak forced Lujan to work when he demonstrated to the company that he was ill. A work refusal in the face of such behavior could potentially be protected under the Act. However the evidence conclusively establishes the opposite. When Lujan came to work and complained of feeling ill, he was allowed to go home. Tr. 106, Tr. II 9; Tr. II 31. Miller also testified credibly that Lujan's absences could have been excused with a doctor's note justifying the specific date in question. Tr. 236. However, Lujan failed to provide any evidence that he had offered the company a note from his doctor confirming that his absence on April 14, 2013, was in fact gout-related. Tr. II 88-90. For these reasons, the court fully agrees with Signal Peak that under the circumstances of this case, "Lujan's inability to work because of his medical condition does not constitute protected activity." Resp't Br. at 8.

III. No Adverse Actions Motivated by Protected Activity

Lujan claims that he suffered adverse actions in the form of suspension and then termination of his employment on June 18, 2014, as a result of the protected activity alleged above.¹⁹ Even if the court were to assume that Lujan engaged in protected activity, it would still find that Lujan failed to establish a prima facie case of discrimination, because the record supports the conclusion that the actions of which he complains either did not qualify as adverse actions or were not motivated by his supposed protected activity.

Generally, an adverse action is an act or omission by the operator that subjects the affected miner to a detriment in his employment relationship or to discipline. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). Adverse actions include discharge, suspension, demotion, coercive interrogation and harassment over the exercise of protected rights. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). In order to prove that an adverse action was motivated by protected activity, a complainant will often have to rely on circumstantial evidence, since "direct

¹⁹ Lujan also claims that he was harassed and assigned to "less desirable jobs" outside of his normal responsibilities, including picking up rags in the return, as punishment for missing work. Tr. 90. However he failed to provide dates for these events and failed to specify whether those alternative duties were assigned to him specifically after a gout-related work refusal. Tr. 90.

Lujan also failed to provide any evidence of disparate treatment through which discriminatory motivation could be inferred. Koppes and Schreckengost credibly testified that every miner, including themselves, performs the duties that Lujan points to as less desirable jobs. Tr. 161, Tr. II 44. Lujan did not offer any testimony to rebut those claims, nor did he establish that those duties were outside of his job description. Therefore, the court finds that Lujan experienced no adverse action in the form of alternative work assignments.

evidence of motivation is rarely encountered.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has clarified that circumstantial evidence may include: (1) knowledge of protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510.

1. Complainant Was Not Terminated or Constructively Discharged

Lujan’s claim that he was terminated because of Signal Peak’s failure to reasonably accommodate his medical condition requires the court to first address whether Signal Peak actually terminated him. The record supports the finding that he was not terminated, and instead quit. The consistent testimony of Koppes, Musgrave, and Miller, as well as Miller’s contemporaneous notes, establish that during the course of the meeting in which his work attendance was questioned, Lujan stated that he quit, and his resignation was accepted. Tr. 149, 186, 217; R-Ex. 8 at 5. Further, Miller and Musgrave provided consistent descriptions of the company’s normal procedure for disciplining an employee, which was to ask the employee to leave the room while management discussed the appropriate disciplinary action, and then calling that employee back into the room to render a decision. Tr. 190; Tr. II 5. The court accepts that if the company had terminated Lujan, it would have done so in accordance with this procedure, as opposed to abruptly firing him when Schreckengost was out of the room and still attempting to verify Lujan’s story with Beesley using the wireless tracking system.

The court could construe Lujan’s decision to leave his job voluntarily as a constructive discharge if the evidence supported finding that Signal Peak’s management engineered the meeting so as to force Lujan to quit. But the evidence does not support that conclusion. Rather, the testimony supports finding that the meeting involved legitimate concerns on management’s part that Lujan was reporting that he worked, and requesting to be paid, for hours when he was not present at the mine. The court accepts that Oschner identified time and attendance discrepancies in the course of her normal payroll duties, without prompting from management, and that the company’s concerns originated there. Tr. 119. Management justifiably investigated the discrepancies Oschner identified, and several other discrepancies that they independently identified at that point.²⁰ Tr. 178-79, 131.

Although Lujan argues that the company “did not verify all avenues of determining Complainant’s attendance before the meeting on June 18, 2013” and “did not exhaust all means of determining the truth before the Complainant was confronted with all the allegations,” the court concludes that the investigation was thorough enough to justify calling Lujan into a meeting for additional information. Pet. Br. at 6. The court credits Koppes’ testimony that there was no plan or discussion at or prior to the meeting to terminate Lujan (Tr. 147-48), and it credits Schreckengost’s testimony that the intent of the meeting “was to resolve the issue and have Mr.

²⁰ Cross-examination revealed that Oschner only informed the company about the June 6 and 7 discrepancy, but not the 13th, 14th, and 15th. Tr. 131. Lujan implies that this fact adds credibility to his complaint. Pet. Br. at 5-6. The court however does not find it unusual that the company investigated additional discrepancies after learning about the first two apparent discrepancies from Oschner.

Lujan go back to work.” Tr. II 33. Once the meeting was underway, Lujan’s inability to adequately describe the work he did at the disputed times, according to the consistent testimony of Koppes, Miller, and Schreckengost (Tr. 148, 214; Tr. II 33), made it reasonable for company officials to press Lujan for an explanation.

Therefore, the court finds that Lujan experienced no adverse action in the form of termination. Rather, and as found above, he quit on June 18.

2. Suspension Was Not Motivated By Protected Activity

While the court has found that Lujan suffered no adverse actions in the form of termination or the assignment of less desirable jobs, there is no dispute that Lujan was suspended without pay on April 19, 2013, and that suspension would normally qualify as an adverse action. Tr. 47, 91. The question is whether the suspension was motivated by Lujan’s alleged protected activity. This court finds that it was not. His suspension was the culmination of a pattern of absences that violated non-discriminatory company policy.

All of the testimony and evidence indicates that Lujan had considerable attendance issues during his time at the mine. The court finds, consistent with Miller’s testimony, that during Lujan’s roughly three years at Signal Peak, he missed 52 days of work, only 26 of which were excused under company policy, and only five of which were excused by a doctor’s note pertaining to gout. Tr. 231. Lujan believed that some of his absences should have been covered by the four “dump days” and two weeks of vacation days he was allowed to use each year. Tr. 44-45. However, Lujan’s records of corrective counseling clearly indicate that vacation days had to be planned in advance so that the company could make arrangements for the employee’s absence and that Lujan did not do this. P-Ex. 4. (Lujan did not indicate at hearing whether or not he tried to comply with this policy.)

On top of the 52 absences, Lujan was excused from work and permitted to leave when he reported a gout flare-up at work, and he was not written up for the incidents. Tr. II 18-19. At the hearing, he did not deny that the company made these accommodations for him. The court finds that the company’s behavior does not indicate any animus or hostility toward Lujan’s medical condition.

Lujan was unable to prove that he provided a doctor’s note for more than 5 of his 52 absences, or even that he had provided a doctor’s note to excuse the one work refusal he claims triggered his suspension. Tr. II 88-90. While management officials in the company were generally aware of Lujan’s condition, they also understood, as per the explanation provided by Lujan’s own physician, that gout flare-ups are sporadic and unpredictable. P-Ex. 2 at 4. Without a doctor’s note, management officials would not have had knowledge that Lujan was legitimately refusing to work because of the safety hazard his condition posed on most of the specific dates that led to his suspension, including on April 14.

Additionally, Lujan was not able to identify any disparate treatment in the manner in which the company dealt with his attendance issues. Indeed, Miller testified that “[t]here have been quite a few employees terminated for attendance issues” and that far from being “singled out,” Lujan “was treated very favorably in comparison.” Tr. 235. The court finds this testimony believable, as Signal Peak has a three-step discipline policy for attendance violations, with a

fourth violation potentially leading to termination, and Lujan had received corrective counseling for attendance violations at least five times prior to his suspension. R-Ex. 9.

In light of these findings, Lujan has not met his burden to establish that his suspension was motivated by his protected activity.

IV. Affirmative Defense:

Even if the court assumes that Lujan did not voluntarily resign his job but rather was fired or constructively discharged in part for his protected activity, the record supports finding that he would have been fired in any event for a legitimate business reason, and that Signal Peak would have been motivated in part by this reason. The court finds that Signal Peak genuinely and reasonably arrived at the conclusion that Lujan was stealing time from the company, and this legitimate business reason would have provided the company with an affirmative defense to Lujan's discrimination claim.

The company discovered, in the normal course of business, discrepancies between Lujan's time cards and hand scanning records, which it then investigated in good faith. Tr. 119. It consulted with Koppes, who had been Lujan's foreman during the disputed shifts, and additionally checked to see if Lujan had tagged in or tagged out during those dates. Tr. 137. Other than the time card itself, all of these methods indicated that Lujan did not work the hours that were listed. Tr. 179, 209.

Lujan raised the possibilities, both in his MSHA interview and during cross-examination, that his biometric hand scanner may have failed to work properly on some of the dates in question (Tr. 125-26; P-Ex. 7 at 3), that he may have forgotten to tag himself in or out (Tr. 164-65), and that his foreman may not have remembered that Lujan was working. Tr. 173-74; P-Ex. 7 at 3. However, the chances of all of these things happening at once are so unlikely that the company would have been entirely justified in calling the meeting and pressing Lujan for more information.

At the meeting, company officials asked Lujan what he had done on the days in question. He was able to provide satisfactory answers for one date (June 6) and was paid for that date as a result, but he was not able to satisfactorily answer questions pertaining to the other dates. Tr. 214-16; Tr. II 19-20. Schreckengost then left the room to check with Beesley to see if the wireless tracking system at the mine could confirm Lujan's presence on the disputed dates. Tr. II 33-34. Beesley said that it could not, but Lujan's employment ended before Schreckengost returned with that answer. Tr. II 35, 52.

Even if it assumed that Lujan was terminated, the fact that he was paid for one date in question when he was able to adequately answer management's questions suggests that he would still be employed by Signal Peak had he demonstrated to management that he had worked at the mine on all or most of the dates in question.


The court has found that Lujan quit. However, if the court assumes Lujan did not quit, it concludes that he would have been terminated. The company's investigation prior to the meeting, Lujan's inability to provide satisfactory answers to management's valid questions at the meeting,

and Beesley's answer to Schreckengost's wireless tracking inquiries would have provided the company with a legitimate business reason for terminating him.²¹

That Signal Peak would have been at least in part motivated by this reason is bolstered by the lack of evidence of disparate treatment in the company's handling of similar incidents. Musgrave stated that he had never had an employee falsify time cards before and adequately distinguished this case from two prior accusations that did not result in termination. Tr. 191-92. In prior situations employees suspected of falsifying time cards were able to verify their presence or credibly explain their absence as a misunderstanding, but given the number of dates with discrepancies in this situation and Lujan's failure to provide satisfactory answers during the meeting, Signal Peak would have been justified in treating Lujan's case differently. Tr. 192-93.

CONCLUSION

Having concluded that Lujan has not established that he was unlawfully discriminated against, the court hereby **DISMISSES** the complaint and this proceeding.²²


David F. Barbour
Administrative Law Judge

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²¹ The court recognizes that a conflict exists between Beesley's testimony and the summary of his interview by MSHA investigators. Tr. II 77-80; P-Ex. 11 at 2. However, Beesley's credible testimony that he did not tell Schreckengost or MSHA special investigators that Lujan was at the mine on the dates in question, and his reasonable explanation for why the investigators may have been confused about the technical details of the tracking system, have been given more weight by the court than the far less detailed hearsay briefly summarized in the investigation report. Tr. II 77-80; P-Ex. 11.

²² After the hearing, both parties moved to reopen the record, and each party opposed the other party's motion. The company moved to introduce an affidavit describing comments their witnesses allegedly overheard Lujan make after the hearing. Lujan moved to introduce a signed statement from Ryan Stahl, which he had been unable to produce at the hearing, and also moved to introduce testimony and interviews from the MSHA employees that he had attempted to subpoena for the hearing, provided that the Secretary agreed to his request. The court denied both motions. July 23, 2015, Order Denying Motion to Reopen; August 6, 2015, Order Denying Motion to Reopen; July 23, 2015, Order Denying Motion to Reopen.

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