FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX: 202 434-9949

December 1, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and JASON HARGIS, Complainants, v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. SE 2022-0001 MSHA No. BARB-CD-2021-02 Mine ID. 40-00131 Mine: Wilson County Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2022-0013 A.C. No. 40-00131-543032 Mine: Wilson County Quarry

DECISION AND ORDER AFTER HEARING

Appearances: Christopher M. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

Elaine M. Youngblood, Esq., Ortale Kelley, Nashville, Tennessee, for the Complainant

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, Washington, District of Columbia, for the Respondent

William K. Doran, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, Washington, District of Columbia, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 9237452, 30 C.F.R. § 50.20(a): Failure to report an occupational injury as defined in 30 C.F.R. § 50.2(e). The Secretary alleges that the operator failed to report an injury that rendered the miner unable to perform all job duties on any day after the injury.

Fact of violation Affirmed p. 15 (Slip Op.)

Negligence	High	p. 18
Penalty	$300.00	p. 18

Complaint BARB-CD-2021-02, 30 U.S.C. § 815(c)(1): Discrimination against miner for exercise of rights protected under the Mine Safety and Health Act of 1977, as amended ("The Mine Act" or "The Act."). The Secretary alleges that Complainant was terminated for requesting to see a physician for treatment of an occupational injury, in violation of the Act.

Fact of violation	Dismissed	p. 18

INTRODUCTION

The above-captioned dockets were heard in Nashville, TN, April 12–14, 2022.[1] The Secretary alleges that the operator had failed to report an occupational injury, in violation of Section 50.20(a) of Title 30 of the Code of Federal Regulations, and that the operator had discriminated against miner Jason Hargis ("Complainant") for reporting his injury and requesting treatment by a physician, in violation of Section 105(c)(1) of the Mine Act. As explained below, I affirm the citation for failing to report an injury as required, but I hold that the operator did not discriminate against the Complainant under Section 105(c) of the Act.

I. STANDARDS

A. Burden of Proving Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

B. Requirement to Report an "Occupational Injury"

The Secretary has defined an "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary reassignment to other duties, or transfer to another job." 30 C.F.R. § 50.2(e) (2022). Operators "shall report each accident, occupational injury, or occupational illness at the mine." 30 C.F.R. § 50.20(a) (2022).

C. Discrimination

To prove that an operator has discriminated against a miner in violation of the Act, the Commission has required the Secretary (or an individual miner or applicant, if proceeding under

[1] Mr. Hargis filed a timely complaint of discrimination on June 7, 2021. Compl. ¶ 8. The Secretary found that Mr. Hargis' complaint for discrimination was not frivolously brought, and upon agreement of the parties, I entered an order temporarily economically reinstating him, effective July 27, 2021. Tr. 14:11–25.

section 105(c)(3)) to establish that the miner engaged in protected activity; that the miner suffered an adverse job action; and that the adverse action was motivated, in whole or in part, by the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799–80 (Oct. 1980), *rev'd on other grounds sub nom.*, *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *see also Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 317–18 (6th Cir. 2013) (citing *Pendley v. FMSHRC*, 601 F.3d 417, 423 (6th Cir. 2010) (applying *Pasula-Robinette* to cases within the Sixth Circuit).[2] If this prima facie case is established, the operator may affirmatively defend against the charge of discrimination by proving that it would have taken the adverse action regardless of the miner's protected activity. *Id.* The miner may then rebut the defense by showing that it is pretextual. *Id.* The ultimate burden of proof does not shift under this analysis and remains with the Complainant. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064–65 (May 2011).

II. FACTS

A. Background, Witnesses, and Evidence

Respondent, Vulcan Construction Materials ("VCM" or "Respondent"), operates numerous aggregate and construction material mining, quarrying, and processing facilities throughout the United States. The mine at issue here is the Wilson Quarry, an aggregate facility in Wilson County, TN. Respondent's operations in the area including the Wilson Quarry include seven quarries and a truck shop. Tr. 502:1–4. Complainant had been employed as a miner at the Wilson Quarry.

The parties stipulated to all facts necessary to establish jurisdiction over this case and my authority to hear and decide it. S. Post Hr'g Br. at 3–4 (July 5, 2022). They also stipulated that Respondent discharged Complainant from employment on May 12, 2021. *Id.* at 4.

The Secretary called as witnesses Complainant, several of his co-workers at the mine, and two employees of the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA," "the Secretary" or "the Agency"). Complainant also called Respondent's safety director, Brandon Clemmons. Respondent's witnesses included Vulcan's area operations manager for the area including the Wilson Quarry, Philip Ellis; Mr. Clemmons; the company's human resources manager, Rex Lindsey; former plant manager, Anthony Humes; and current supervisor, Chris Williams.

[2] The Ninth Circuit recently decided that Commission discrimination cases must apply the standard established by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013). *Thomas v. CalPortland Co.*, 993 F3d 1204, 1210–11 (9th Cir. 2021). It is unknown whether the Commission will apply the *Gross-Nassar* standard to all cases within its jurisdiction, or only to cases in mines within the Ninth Circuit.

In addition to the miner witnesses who testified at hearing, Complainant introduced two statements made to MSHA Special Investigator Kenneth McClung. The witnesses, former miners Kenny Hurst and Pat Woods, were subpoenaed by the Secretary. *See* Tr. 474:8–488:20.[3]

The Secretary appears to have properly issued and served subpoenas for these witnesses but did not inform the Court that they were unavailable until the Solicitor sought to introduce their written statements as exhibits. The Solicitor said that efforts to reach the witnesses had been unsuccessful. These hearsay statements were admitted over Respondent's objections. However, I noted that the unavailability of the witnesses could affect the weight I would give to the statements. Tr. 480:17–22, 482:6–9.

I credit the statements only to the extent that they are corroborated by other evidence and are not cumulative. First, there is hearsay within hearsay in some of the material statements made by the declarants. Second, some of the persons quoted in those statements were witnesses at the hearing and available to be cross-examined, but neither the Solicitor nor the Complainant produced admissions from the operator witnesses, and even the use of leading questions did not produce full support for the Secretary's theory from miner witnesses.

Third, the statements chosen by the Secretary for emphasis in his post-hearing brief were not the focus of the somewhat limited questioning of Special Investigator McClung. This prevented the operator from effectively cross-examining the witness who was present about the statements.

Finally, there was extensive discovery in this case. Uncorroborated statements purporting to show a general discouragement of reporting injuries or alleged targeting of Complainant, based largely on the subjective "personal belief," speculation, or sweeping generalizations of Mr. Hurst and Mr. Woods, is insufficient to counter the weight of the evidence that was gathered beforehand and presented by actual witnesses at the hearing.

Complainant was represented by an attorney from the Department of Labor's Office of the Solicitor as well as his own attorney. The parties introduced numerous exhibits during the three-day hearing. I have carefully considered all the evidence admitted at the hearing in deciding the issues before me.[4]

[3] Mr. Hurst was personally served. Mr. Woods was served by certified mail. *Id.* at 487:11–488:20. The return receipt was returned and included with the subpoena as an exhibit; however, the receipt was unsigned. *Id.*

[4] Where necessary or appropriate, I have noted in my decision specific factors I considered in making credibility determinations or assigning weight to testimony or exhibits. The failure to do so for each witness or exhibit does not indicate that I did not fully weigh and evaluate all evidence in the record.

B. Complainant's Employment, Injury, Protected Activity, and Termination

1. Complainant's Work and Disciplinary History

Complainant was employed by VCM at the Wilson County Quarry from August 2018, until he was discharged on May 12, 2021. Compl. ¶ 3 (Oct. 1, 2021); Tr. 11:3–12. He mainly worked as a plant operator during the time relevant to this proceeding. Tr. 305:24–25. As plant operator, he controlled the operation of the plant, the crushing machinery used to break and size rocks mined at the quarry. *Id.* at 306:3–25. He was also responsible for cleaning and maintaining an area assigned to him under the company's "zone" policy. *Id.* at 348:22–24. As part of his duties, he was responsible for lubricating, or "greasing" the bearings daily. *Id.* at 415:1–11.

At hearing, miner witnesses praised Complainant's performance, testifying that he "did a good job" running the plant and that he was a highly efficient plant operator. Tr. 60:21. Mr. Ellis, VCM's area manager, agreed that Complainant operated the plant during its most productive period. *Id.* at 599:4–12.

Witnesses also testified that Complainant had a pleasant personality. One witness called him "one of the nicest guys I've ever met." Tr. 222:2–3. Another witness said he was a "normal, regular person," who was "not threatening" and always pleasant. *Id.* at 144:13–17. A third witness described him as "a big teddy bear" and "a pretty cool guy." *Id.* at 261:5–6.

During his employment as plant operator, Complainant worked under two direct supervisors, Kyle "K.B." Parr and Chris Williams, who worked as a fill-in supervisor following Mr. Parr's resignation. As plant manager, Anthony Humes managed the plant supervisors and was himself supervised by Area Manager Philip Ellis. At hearing, Complainant testified that Mr. Parr was a poor supervisor and that the miners felt "targeted" by management (micromanagement and disagreement with miners' complaints about it). Tr. 367:14–18.

Miners also generally agreed with Complainant's assessment of Mr. Parr as someone who did not know what he was doing. They testified that Mr. Parr was constantly urging Complainant to "run the plant hard," and noted that Complainant's discipline from Mr. Parr for failure to clean was imposed while the plant was old and in poor condition, causing constant leakage (although repairs were made to improve this). *See* Tr. 243:6–22 (testimony of Mr. Stultz).

Complainant acknowledged that greasing the equipment daily, which took about 35 minutes, was his job and that it was necessary to prevent damage to the equipment. Tr. 415:1–20. He said that he had been counseled about the need to clean more thoroughly, that he disagreed with Mr. Parr about this, and that he did not change what he was doing in response to Mr. Parr's input. *Id.* at 408:18–409:17.

Complainant also testified about his employment record. He said that he had been given a pay raise in April of 2021, shortly before being terminated. Tr. 343:20–24.[5] He also testified about a previous injury. Complainant said he had been hurt on the job while operating a skid steer. He testified that Mr. Ellis and Mr. Clemmons were both personally concerned, investigated the incident, and put Complainant on light duty. *Id.* at 326:14–327:14.[6]

Mr. Clemmons said this was done because the plant was down for maintenance and not because Complainant could not perform his duties. Tr. 466:25–467:4, 739:22–740:7. Complainant also said that Mr. Clemmons had asked him what they could do to keep him from going to the doctor after the skid steer injury. *Id.* at 324:25–325:8. Mr. Clemmons denies saying this. *Id.* at 740:8–10.

Before his discharge, Complainant had previously been disciplined under the company's progressive discipline policy, under which employees were verbally warned, then given a written warning, followed by a second written warning and three-day suspension. Ex. GX-7, 8. The second written warning provides that the employee may be terminated for any subsequent violation of company policies. Ex. GX-8.

Complainant's disciplinary issues were not related to his primary duties as plant operator. Rather, they stemmed generally from failures to completely clean and grease areas and equipment for which he was responsible before leaving work.

Complainant received his first written warning by Mr. Parr on Dec. 4, 2020. Tr. 347:8. He wrote on the warning notice, "I do not agree," and testified that he had told Mr. Parr it was not possible to clean his area "spotless" every day. *Id.* at 348:2–349:11. He said that sometimes the power would be shut down, and cleaning could not be accomplished. He also noted that some areas were rarely travelled. *Id.* at 349:12–25.

After he was cited by Mr. Parr, Complainant and others began taking photographs of their areas to document that they had been cleaned. Ex. GX-5; Tr. 207:11–25, 351:13–16. Complainant provided photographs at hearing. Ex. GX-5. He admitted, on cross-examination, that he did not take photographs of his area every day. Tr. 413:17–25.[7] Complainant testified that it was "obvious that [Mr. Parr] used this to start a paper trail to terminate me." *Id.* at 355:15–17.

Complainant received his second written warning on Feb. 8, 2021, for leaving work before the end of the shift without permission on Feb. 1. Complainant and other witnesses who were on the crew testified that on that day, Mr. Williams had stopped to talk to them and had told

[5] Complainant's raise was $0.53/hour, from $19.10 to $19.63. Ex. GX-11. Mr. Ellis testified that comments made in the review process should have led to a reduced rating, and that the raise was made in error. Tr. 559:13–561:6. The recommendation and pay raise decision predated the injury and protected activity in this case and have no bearing on the outcome.

[6] Complainant had not requested to see a doctor for this incident. Tr. 443:16–25.

[7] None of the photographs were taken on any of the days for which Complainant had been disciplined for failing to clean his area.

them that they could leave once the graduation pad was cleaned. *Id.* at 365:15–23. Witnesses said that finishing the cleaning of the pad was a two-person job. *Id.* at 168:14. The truck used for this purpose employed a high-pressure water cannon, and miners in the area not handling the cannon or in the truck could be in danger of injury. *Id.* at 359:8–11.

Complainant and Mr. Evans left before the crew completed its work cleaning the pad, and all four miners left before 4:30 p.m. Tr. 247:15–16. The miners who remained said that they completed the cleaning job. *Id.* at 249:16–17. Complainant was nevertheless given his final written warning and a three-day suspension. *Id.* at 356:24–357:2; Ex. GX-8. Complainant testified that there was no known policy requiring miners to leave together prior to February 2. Tr. 365:5–8. He said that he waved to Mr. Humes, his second-level supervisor, as he left. *Id.* at 361:1–9.[8]

Mr. Humes acknowledged seeing Complainant leave and waving to him, but he said he did not know what Mr. Williams had told the crew and would have stopped him if he had known. Tr. 621:13–622:12. Clint Evans was also on the crew and was threatened with a verbal warning but disputed it, and it was withdrawn after he argued to Mr. Williams that nobody had told the crew there was a set schedule. *Id.* at 169:5–16.[9]

Mr. Williams disputed the crew's account of events and said they had not finished cleaning the area as he had instructed and that he had to clean it himself. Tr. 768:7-8, 769:4–14.[10] The next day, Mr. Williams told Mr. Humes that the miners had left early without cleaning

---

[8] Complainant testified that Mr. Humes was on the phone when he waved to him.

[9] The evidence as to whether Mr. Evans was disciplined or merely counseled is ambiguous. Mr. Evans said Mr. Williams called him to the office and told him he was getting a verbal warning for leaving work early. Mr. Williams' testimony is unclear about whether Mr. Evans was disciplined, while Mr. Evans said that he argued that it was unfair to punish him. Tr. 170:16–25. He said that Mr. Williams relented, telling Mr. Evans not to worry about it, and that the discussion was "just us talking." *Id.* at 189:1–4. Mr. Evans had no disciplinary history at the time. *Id.* at 185:7–10. I credit his account of the meeting, which is fairly detailed and consistent with his work history. I also infer from Mr. Evans' account that Mr. Williams called him to the office with the intent to discipline him for leaving work early. Complainant had already been issued his second written warning and suspension when Mr. Evans met with Mr. Williams. *Id.* at 180:11–14.

[10] It is difficult to assess Mr. Williams' credibility as a witness. No witness had anything negative to say about his character, and in fact the miner and operator witnesses spoke very highly of his personal qualities and his ability as a supervisor. However, Mr. Williams was often a poor witness. His recall of events was uneven. His testimony contradicted itself at times. He was combative and argumentative over even minor points. His testimony disagreed with that of other witnesses who seemed credible and were generally disinterested. On the other hand, many of the important facts he testified to are either corroborated or unrebutted and consistent with other witnesses' accounts.

I note that counsel for Respondent told the Court Mr. Williams would be late for the hearing on the day of his testimony because he had been essentially trapped on his property by

the area and that Complainant had left work early, and he testified that he communicated his "frustration" to Mr. Humes. *Id.* at 769:18–23.

Mr. Humes said Mr. Williams told him the crew had been told not to leave until 4:30. Tr. 621:25–622:2. He said Mr. Williams was "kind of adamant" about wanting Complainant and Mr. Evans to be disciplined. *Id.* at 624:1–6. He insisted on meeting with human resources, and after he and Mr. Humes met with HR, the notice of suspension was prepared and overnighted to Mr. Humes, who gave it to Complainant the next day. *Id.* at 624:8–14.

While Complainant disagreed with the disciplinary actions against him and his supervisors' views on cleaning and greasing, Respondent produced evidence supporting its reasons for taking seriously the zone cleaning and greasing responsibilities assigned to Complainant. MSHA Special Investigator McClung acknowledged that a violation of the requirement to keep areas where miners work and travel clean and free from debris, codified as a mandatory safety and health standard, 30 C.F.R. § 56.20003 (2022),[11] could result in an S&S citation to the operator. Tr. 490:7–491:5.

Operator witnesses also testified about serious damage to the plant machinery caused by a failure to properly grease the equipment. There was a "catastrophic" failure of the rotor bearings in November 2020. Tr. 546:15–547:21. This required a "very costly" and extensive repair. *Id.* Inspection revealed that the bearings were "charred and smoked" due to a lack of grease. *Id.* at 547:17–21. Respondent attributed the failure to Complainant. *Id.* at 547:15–17, 615:1–14.

2. Management Issues at the Wilson Quarry

Mr. Parr was the plant supervisor until he resigned from VCM. Mr. Humes was the plant manager during Complainant's employment through his termination, until being terminated himself. Mr. Humes testified at the hearing, and Mr. Parr did not.

---

trees that had fallen in the previous evening's severe thunderstorms. There were in fact numerous downed trees in the local area following the storm, which was prolonged and powerful. When he arrived at the hearing, Mr. Williams was flushed, and his clothes were dirty and torn. He appeared to be highly agitated. He testified that he was uncomfortable as a witness adverse to his brother-in-law. I do not find that he was an untruthful or generally unreliable witness, but in some instances, I have not credited his testimony where it disagrees with others.

[11] The provisions of the standard relevant here require that:

> At all mining operations—(a) Workplaces, passageways, storerooms and service rooms shall be kept clean and orderly; (b) The floor of every workplace shall be maintained in a clean, and so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable . . . .

30 C.F.R. § 56.20003(a)–(b).

Complainant complained about management generally, saying that Mr. Parr had "no clue" about plant operations, and that the miners generally felt "targeted" by micromanagement and disagreement with miners' complaints about it. Tr. 367:14–18. Complainant, like other miners, said that Mr. Parr had threatened to replace him and testified about Mr. Humes threatening to fire and replace the entire crew. *Id.* at 368:4–5.

The miner witnesses who testified also complained generally about Mr. Humes and Mr. Parr. Their testimony about Mr. Williams, who succeeded Mr. Parr at the Wilson Quarry after being temporarily reassigned there from another VCM operation, was generally positive.

Miners criticized Mr. Parr's ability as a manager. Andrew Tucker said Mr. Parr didn't know what he was doing. Tr. 59:2–11. Mr. Dycus characterized him as a "write-up happy person" who would try to "write people up for anything and everything." *Id.* at 207:3–8. Mr. Stultz said he was a "very bad man." *Id.* at 241:23.[12] Mr. Tucker said, "I think at one point in time, we all felt targeted" by Mr. Parr, *id.* at 65:14, and that he thought Mr. Parr was trying to create a "paper trail" against Complainant, *id.* at 64:24–25. He could not recall anything else that he would characterize as Respondent "targeting" Complainant. *Id.* at 65:16–19.

Mr. Dycus also testified that it "seemed" like Mr. Parr was targeting Complainant. Tr. 242:18–20. But he also said, "I believe that during that time period, every person was targeted by Anthony Humes." *Id.* at 256:13–15.

Mr. Tucker also testified that Mr. Parr had asked him to falsify a document, Tr. 61:3–12,[13] and that he believed Mr. Parr falsified the document himself, and witnesses generally believed he had resigned after the company opened an investigation into the incident. *Id.* at 113:19–114:7. Mr. Tucker discussed the incident in detail with Mr. Ellis, who said Mr. Parr resigned, and that he assumed that Mr. Tucker's complaint had been accurate. *Id.* at 570:17–571:19.

After Mr. Parr resigned, Anthony Humes assumed his duties. Miners were unhappy with him as well. Mr. Tucker said he first reported Mr. Parr's request to falsify the examination report to Mr. Clemmons because he said he did not trust Mr. Humes to act on them. Tr. 75:5–24. However, he also said his disagreements with Mr. Humes were never about safety, and that Mr. Humes never asked him to do anything unsafe. *Id.* at 101:8–13.

Mr. Tucker and several other miner witnesses cited an incident in which Mr. Humes told the workforce that he would "fire everybody and start over himself." Tr. 64:1–21. He was characterized by Mr. Ellis and Mr. Lindsey as not being a good fit for the company. Mr. Ellis cited the company's desire to move to more "positive, coaching style" of management, and that Mr. Humes' focus on criticizing miners and style of communicating was "not appropriate." *Id.* at 566:1–14. He also cited input received directly from Mr. Stultz, in particular, about Mr.

[12] Mr. Stultz backtracked from this assessment, somewhat. Tr. 242:3–9.

[13] Subsequent testimony made clear that he was referring to a safety examination report concerning some guards that had not been repaired. Tr. 72:16–73:14.

Humes' management. *Id.* at 567:20–25. Mr Ellis also testified about an incident in which Mr. Humes had said something inappropriate over the company radio. *Id.* at 568:7–11.

Mr. Ellis also cited several calls from miners and from Mr. Lindsey after Mr. Humes threatened to fire the whole workforce. Tr. 569:1–570:15. Mr. Humes was counseled and apologized for those remarks. *Id.* at 570:10–15. After Mr. Ellis was told about the radio incident, Mr. Ellis consulted with Mr. Lindsey and others in the company and made the decision to terminate Mr. Humes in July of 2021. *Id.* at 565:1–22.

While miners criticized Mr. Humes, they did not all agree that he was "targeting Complainant." *See* Tr. 85:24–86:5, 111:10–14 (testimony of Mr. Tucker); *id.* at 125:32–136:4 (testimony of Caleb Walker that Mr. Humes was reportedly out to fire him and Mr. Tucker). But Mr. Dycus testified that Mr. Humes had told him, while Complainant was on medical leave, that he would be replacing Complainant as plant operator. *Id.* at 208:17–24.

Mr. Dycus said his experience with Mr. Humes was "horrible." Tr. 219:15. Mr. Stultz said of Mr. Humes, "To be quite frank, he was a jerk." *Id.* at 257:22–25. He said he had felt personally targeted by Mr. Humes and had complained about him to senior management. *Id.* at 258:1–4.

Other miners were apparently comfortable complaining to management about their supervisors. Mr. Tucker said he contacted the company's HR manager and Mr. Ellis after Mr. Humes threatened to fire everybody. Tr. 148:12–22. Mr. Tucker complained to Mr. Clemmons and Mr. Ellis about Mr. Parr's pressuring him to falsify an examination report.

Mr. Williams was brought to the Wilson Quarry and assumed supervisory responsibility over the plant. Miners were "not happy" with the "zone" policy holding them accountable for a particular area, Tr. 102:25–103:13, but they generally respected and got along with him. *See id.* at 103:5–7 (testimony of Mr. Tucker). Miners agreed that he was trying to improve housekeeping and plant maintenance. *See id.* at 104:11–105:24. Mr. Dycus said Mr. Williams was a "great supervisor." *Id.* at 219:14–23. Mr. Stultz was also complimentary. *Id.* at 259:5–8.

Mr. Ellis also praised Mr. Williams. When asked what he thought about Mr. Williams as a supervisor, Mr. Ellis testified:

> I think Chris Williams is a great person. He -- he cares about the people that work for him. He likes to help people out. His style is leading by example. He -- in some instances, he's probably too involved. He gets into every issue and -- but I think Chris to be in a lot of ways a manager like I am suggesting Vulcan wants to encourage.

Tr. 572:3–15.

While they were critical of their supervisors, the miner witnesses generally testified that Respondent was a safety-conscious operator. *See* Tr. 79:13–16 (testimony of Mr. Tucker saying the company's "biggest goal is to work safe and stay safe," and that the company did not have

any major injuries during his seven years at the quarry). This included Complainant, who agreed that the "company, as a whole, if you brought up anything safety-wise that was dangerous, they would address them [sic] as quickly as they could." *Id.* at 397:25–398:2.

No evidence was introduced from which one could infer that any miner had ever been disciplined by Respondent for anything related to safety. On the contrary, Mr. Dycus said that Mr. Parr and Mr. Humes spread rumors about him having called MSHA to "stir up trouble," but that he was never disciplined for anything, although he did leave his job at the Wilson Quarry. Tr. 195:15–199:15.

Miner witnesses speculated that miners were put on light duty or sent to the break room to avoid reporting injuries. *See* Tr. 199:22–200:5 (testimony of Mr. Dycus); *id.* at 117:3–16 (testimony of Mr. Tucker). But there was testimony that this was used to see if the injury would get better, and that it was assumed that a miner would see a doctor if it did not. *See id.* at 130:23–131:8 (testimony of Mr. Walker).

3. Complainant's Injury, Request to See a Physician, and Discharge

Complainant testified that he was injured on Saturday, April 10, when passing liner plates to a co-worker, Andrew Tucker, who was working inside the crusher. Tr. 314:4–19. The plates weighed 35–50 pounds each, and Complainant had to reach, lean, and twist to pick up the plates and pass them into the crusher for installation. *Id.* at 315:3–16.

After completing his work with the crusher plates, Complainant said he mentioned to Chris Williams, his direct supervisor,[14] and Mr. Tucker that "something really hurt" in his back, but he did not immediately report an injury. He said that the injury, when it occurred, was "not immediately debilitating," and that he did not think it was serious at first. Tr. 314:14–316:6, 425:6–9.

Complainant said that he reported to Mr. Williams on Monday, April 12, that his injury was more serious than he thought, and that it was not responding to heat and ice. Tr. 316:11–25. He said he told Mr. Williams at this time that he needed to see a doctor, and that Mr. Williams told Complainant he "would get it turned in" to upper management. *Id.* at 317:6–20. Complainant further testified that Mr. Williams instructed him to "run the plant and do nothing else" that afternoon. *Id.* at. 317:22–24.

On April 14, his last day of work before medical leave for his cardiac procedure, Complainant had a text message exchange with Mr. Clemmons. Mr. Clemmons asked about Complainant's condition, and Complainant replied that his back still hurt, and that Mr. Williams had told him to only run the plant and to do nothing else. Ex. GX-9. Mr. Clemmons acknowledged Complainant's response. *Id.* Complainant testified that his injury made running the plant uncomfortable and that other tasks, such as cleaning and greasing, were "very painful" to "unbearable." Tr. 323:2–12.

[14] Mr. Williams is also Complainant's brother-in-law. He said their relationship is not strained but that they are not close. Tr. 431:7-13.

On direct examination, Complainant testified that the operator was striving for "zero [reportable] incidents," and that there was a general sense that reporting injuries was discouraged. Tr. 328:4–14. He said that miners "were discouraged from reporting any type of injury" short of profuse bleeding or broken bones. *Id.* at 324:8–17.

In contrast, Mr. Clemmons testified about a number of documented cases in which a miner had been injured and had requested to see a doctor after that proved ineffective. *See generally* Tr. 732–737; Ex. R-P. The accidents were reported to MSHA. *Id.* None of the miners involved were disciplined for requesting to see a physician. *Id.*

While still feeling the effects of his injury, Complainant took medical leave for an unrelated cardiac catheterization procedure. Tr. 380:1–2. He was on leave for two weeks, beginning on April 15, before returning to work on May 4. *Id.* at 379:19–24. Complainant was thus only at work for two days before a two-week absence for his cardiac procedure and the recovery prescribed by his cardiologist.

While Complainant did not see a physician for his back injury, he did seek treatment while on medical leave from a chiropractor, who recommended he see a doctor. Tr. 385:7–17. Complainant said the chiropractor took x-rays and told him he had a muscular injury to his thoracic spine. *Id.*

After returning from medical leave on May 4, Complainant said he recalls reporting to Mr. Williams and Mr. Humes that the pain from his injury was still interfering with his job duties but does not recall talking with Mr. Ellis. Tr. 382:5–12. Complainant said the operator took no further action to address the effects of his workplace injury. *Id.* at 382:14–25.

He routinely saw Mr. Williams and Mr. Humes in the company's morning meetings. Tr. 331:1–19. As part of those meetings, employees were encouraged, but not required, to stretch their major muscle groups before working. *Id.* at 330:6–8. Complainant's injuries prevented him from participating. *Id.* at 330:17–25.

Complainant testified that he told Mr. Williams, Mr. Humes, and his co-workers that he was still unable to fully perform all his duties without pain, and that Mr. Williams and Mr. Tucker helped the cleaning and lifting parts of his job. Tr. 382:8–383:9. However, in his Complaint to MSHA, Complainant said that he did not often ask for help because he could get most of the cleaning done with a water hose. *Id.* at 433:3–13; Ex. R-T.

He also testified that he told Mr. Clemmons, while the plant was shut down due to a vandalism incident on May 8, that his back was still hurting. Tr. 383:16–384:2. When Mr. Clemmons asked if it was from April, Complainant said that it was, and that he wanted to see a doctor, *id.* at 384:2–5; "[a]t which point, he did not respond to me at all. He just drove away."

Id. at 384:5–6.[15] Mr. Clemmons denies that Complainant ever told him he needed to see a doctor. *Id.* at 748:9–21.

Mr. Williams and Mr. Humes testified that Complainant was not completing his assigned duties as required. Mr. Humes testified that Complainant and Mr. Walker were not cleaning their zones fully and were leaving hazards behind for the next morning. Tr. 612:15–613:14. This was discussed in "toolbox talks" and then with the miners one-on-one. *Id.*

Mr. Humes said Mr. Williams recommended Complainant be terminated for not cleaning his area and greasing the plant, and for leaving work without telling anyone these tasks had not been completed, on May 10 and 11. Mr. Humes said Mr. Williams reported the conditions to him on both days, that Mr. Williams cleaned the area and greased the plant on the morning of May 10, and that Mr. Humes personally went to the area to inspect on May 11, after Mr. Williams told him Complainant had again not cleaned the area. *Id.* at 630:17–631:3.

Mr. Humes called Mr. Ellis and explained the issue to him on the morning of May 11. He recommended Complainant be terminated because of failure to improve his cleaning and greasing performance. Tr. 631:9–14.

Complainant testified that he finally told Mr. Williams, after the morning meeting on May 12, "I've put up with this as long as I am going to. I need to see a doctor today." Tr. 332:1–3.[16] He said Mr. Williams' response was, "I will let them know." *Id.* at 332:8–9. After the morning meeting, Mr. Williams called Mr. Humes and told him Complainant had requested to see a doctor, and Mr. Humes relayed this to Mr. Ellis. *Id.* at 632:23–633:5.

Respondent's witnesses testified about its plans to terminate Complainant on May 12, based on Mr. Humes' recommendation the previous day. Tr. 508:20–509:17. In anticipation of the meeting, Mr. Ellis prepared written notes, which he intended to use as a script for the termination meeting, and contacted Mr. Lindsey, who also prepared for the meeting. *Id.* at 520:7–21. They intended for Mr. Williams to bring Complainant to the office after the morning meeting so they could tell him he was being discharged.

However, when Complainant asked to see a physician, Mr. Williams instead allowed Complainant to go to the plant to begin his shift. He then contacted Mr. Ellis and told him

---

[15] Neither party questioned Complainant further on this exchange, and there was no testimony about any subsequent actions by the company or Complainant based on the alleged request.

[16] There was some confusion about the nature of Complainant's injury. Mr. Ellis said he thought Complainant had injured his ribs. Tr. 512:13–21. Complainant said he never claims his ribs had been "broken," and that the injury was the same back injury he had reported on April 12. *Id.* at 384:7–385:6. Mr. Williams' testimony on this point was confusing and ambiguous. He testified that he thought Complainant's ribs were injured, and his notes say that Complainant told him he had three broken ribs, but he acknowledged this was the same injury Complainant reported in April. I find that the injury reported on May 12 was the same muscular injury to Complainant's thoracic spine which had been reported on April 12. This confusion is not material to the matters in dispute here.

Complainant had requested to see a doctor. Mr. Lindsey said that Mr. Williams had to "pivot" from the original plan, and that he and Mr. Ellis decided to discuss the situation with risk management, which handles workers' compensation and liability issues for VCM. Tr. 671:13–672:11.

Mr. Ellis and Mr. Lindsey discussed the situation and contacted Mr. Clemmons and Andi Romano, Respondent's risk management officer. Tr. 682:22–683:14. After conferring, they decided to proceed with the termination, but to also provide Complainant with a list of physicians, as required by Tennessee workers' compensation law. *Id.*[17]

Mr. Ellis said he did not know Complainant had requested to see a doctor for his injury until the morning he was to be terminated, after the decision had been made. Tr. 509:23–25. He assumed that the request was for a new injury. *Id.* at 512:24–513:2.

Mr. Ellis also said that Respondent requested law enforcement officers be present during the termination. He said this decision was made based on input from Mr. Williams and Mr. Humes about Complainant possibly having a history of violence and gun possession and his reaction to previous discipline. Tr. 526:5–527:13.[18] Mr. Humes testified that Mr. Williams told him Complainant "normally had a gun on him."

Complainant said that Mr. Humes called him later that morning and said the company was trying to get him a doctor in Lebanon. Tr. 333:15–20. He said that he also spoke with Mr. Williams, who told him he was bringing a replacement to operate the plant so Complainant could go to the doctor. *Id.* at 334:8–15. Instead, Complainant was taken to the area outside of the mine's offices, where Mr. Ellis, Mr. Humes, and two Wilson County deputy sheriffs were waiting. *Id.* at 335:24–336:4. The group summoned him, and Complainant was informed that he was being terminated "due to a couple of previous write-ups and poor performance." *Id.* at 336:12–15.

Rex Lindsey, the company's area human resources director, was on the phone during the meeting. Tr. 337:9–14. He informed complainant of the "finer points" relating to his

[17] Tennessee's workers' compensation law requires the employer to provide the employee with a group of three or more independent reputable physicians, surgeons, chiropractors, or specialty practice groups in the injured employee's community, or, if no such providers are available in the community, within a one hundred (100) mile radius of the employee's community. Tr. 716:11–14; *see also* TENN. CODE ANN. § 50-6-204 (2022). The exhibit introduced included three physician practice groups.

[18] Mr. Williams testified he had seen Complainant carry a gun "at times," but never at work. Tr. 814:2–21. Neither Mr. Williams nor Mr. Humes said anything about Complainant having a history of violence. I note that such a characterization would be inconsistent with the testimony of Complainant's co-workers and the demeanor I observed during the hearing. It is difficult to fault an employer for being concerned about a possible workplace violence issue, and it appears Mr. Ellis may have drawn an inference about Mr. Hargis from the way the information may have been reported to him, but the way the termination was carried out was unfortunately embarrassing and should not be taken as a reflection on Mr. Hargis' character.

termination, including Complainant's last-chance notice. *Id.* at 337:21–338:5. Mr. Ellis did give complainant a list of doctors that he could see for his injury. *Id.* at 338:19–25. The form, Ex. GX-6, indicated that complainant had suffered an occupational injury. Respondent did not report the injury to MSHA until after it had been cited for failing to do so. *See id.* at 446:10–15, 468:24–469:1.

III. Disposition

A. Respondent Failed to Timely Report an "Occupational Injury" to MSHA.

1. Finding of Violation

Complainant was injured while performing maintenance on the operator's crushing plant. I credit his testimony that he felt pain while handing 35–50-pound liner plates to Mr. Tucker, who was working to install the plates inside the machine. Tr. 314:4–19. While Mr. Tucker testified that he does not recall Complainant saying that day that he had injured himself, Complainant claims that he told Mr. Williams about the injury in passing that day and reported it to him again on Monday, April 12. *Id.* at 315:14–316:3.

The nature of the injury and the operating environment do not support a finding that Complainant clearly reported an injury on Saturday, April 10. However, I find that he did tell Mr. Williams the following Monday, April 12, that his injury was worse than he had thought, and that he wanted to see a doctor.[19]

Complainant's ongoing pain after April 12, and Respondent's knowledge of and response to his complaints, show an awareness of an occupational injury at least as early as April 14, 2021. On that date, Complainant had a text message exchange with Mr. Clemmons. Ex. GX-9. In that exchange, Mr. Clemmons asked Complainant how his back was, and whether he was "still taking it easy?" *Id.* Complainant replied that he was, and that his supervisor, Mr. Williams, had told him to "run the plant and do nothing else." *Id.* Mr. Clemmons acknowledged this message. *Id.*

First, I find that Complainant suffered an "occupational injury" as the agency has reasonably defined that term. He was injured while working in a mine. The Agency's general definition of "occupational injury" has been affirmed by the Commission and the D.C. Circuit Court of Appeals. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 464 (D.C. Cir. 1994)

[19] My finding that Complainant requested to see a doctor at this point is based largely on the fact that Mr. Williams did not clearly contradict him but only said he did not recall Complainant ever requesting to see a doctor until the day he was terminated. Tr. 774:18–20. However, as discussed below, I do find it unusual that there was no apparent effort to elevate this initial request. I also do not find this request, by itself, to have produced any negative response from any of Respondent's agents, including Mr. Williams. None of the other witnesses acknowledged hearing about this initial request, and Mr. Williams placed Complainant on light duty and arranged for other miners to clean and grease Complainant's zone after he reported the injury.

(noting approval of definition of "occupational injury" and affirming finding that accident was reportable even if injury occurred while miner was at mine but not working when injured).

The only possible issue is whether Complainant's injury was serious enough to require reporting. The definition includes a requirement to report an injury that gives rise to an "inability to perform *all* job duties on any day after an injury." 30 C.F.R. § 50.2(e) (emphasis added).

Respondent claims that it limited Complainant's work out of "kindness," Tr. 539:5–10, but the record establishes that Complainant was in fact placed on light duty. The operator admitted as much in its answer. Ans. ¶ 5. Mr. Humes testified that Complainant had been placed on light duty. Tr. 628:5–14. This was a decision made by his supervisor, and VCM's safety manager was aware of the decision. *See* Ex. GX-9.

It is well-established by the record that Complainant's job duties included more than running the plant. Indeed, the record establishes that he was highly efficient as plant operator but was disciplined for his alleged failure to perform other duties adequately, including cleaning his area. Thus, an inability to clean his area supports a finding of occupational injury.

Complainant testified that his ability to perform several of his required tasks was impaired by his injury. Climbing stairs was "painful," using a hose to clean his area was "very painful," and "[s]hoveling was just basically unbearable." Tr. 323:8–12. On at least three days, his supervisor, Chris Williams, did the cleaning for him. *Id.* at 323:20–22. As noted above, Mr. Williams told Complainant to "run the plant and do nothing else," and Mr. Clemmons was aware of this directive. I therefore find that Complainant was unable to perform all of his required tasks due to his injury, and that his employer's management was aware of this disability.

As safety director for Respondent, Mr. Clemmons was also aware of MSHA's injury reporting requirements. *See* Tr. 732–40, Ex. R-P (discussing reports of occupational injury and illness and admitting exhibit containing those reports). I hold that he must have at least been constructively aware of the definition of "occupational injury" used by the agency to require reporting of such injuries.

The evidence shows that Respondent took pride in its safety record and spotlighted its favorable history of occupational injuries to shareholders. *See* Ex. GX-4. The evidence also shows that the operator knew of its duty to report occupational injuries and had a program for recording and reporting them. After Complainant contacted the MSHA District Office about his injury, the office apparently contacted someone at the plant, who admitted that Complainant had been injured on the job. Tr. 284:18–285:23. Yet it did not file an MSHA Form 7000-1. *Id.* at 284:23–24.[20]

[20] The inspector testifying, Otis Carroll, did not speak to Complainant or anyone at the quarry but was advised by the District office to cite the operator for failing to report the injury. Although this was hearsay testimony, it is corroborated by other facts and was unrebutted by the operator. I find Inspector Carroll's testimony to be credible and that it is reasonable to believe that

Finally, the evidence shows that the operator had a policy of seeking to treat minor ailments with the so-called "RICE" method—rest, ice, compression, and elevation. There is nothing wrong with this, in and of itself. But at least in this instance, it appears that an over-reliance on the "RICE" concept seemed to have been used as an alternative and not an adjunct to the operator's duty to investigate and report accidents and occupational injuries.[21]

While the incident resulting in Complainant's injury does not meet the definition of "accident" for immediate reporting purposes under Section 50.2(h), the Mine Act uses a broader definition of the term "accident," and the statutory definition includes an "injury to . . . any person." 30 U.S.C. § 802(k) (2022). This is significant because the operator is required to investigate, record, and report *all* accidents. 30 U.S.C. § 813(d) (2022). Because Congress took care to define "accident" in the Act, I find the statutory definition controls this responsibility.

Respondent was obviously aware of this duty because Mr. Clemmons and Mr. Ellis had in fact conscientiously investigated a previous minor injury to Complainant, involving a skid steer he had been driving. Tr. 327:11–14. It is thus inconceivable that Mr. Clemmons would not have known of his duty to investigate, record, and report the accident and occupational injury to the Complainant in this case.

Yet Respondent did not report the occupational injury in this case within 10 days of April 14—a date on which the evidence conclusively establishes Mr. Clemmons' knowledge of the occupational injury that prevented Complainant from performing all his duties on that date. I impute that knowledge to Respondent.

Indeed, it does not appear that the operator ever reported the injury, even after it provided a physician referral to complainant on the day he was terminated. When the operator did finally report the injury to abate the citation, the report appears to be incomplete and inaccurate. *See* Ex. GX-3.[22] This is inexcusable. MSHA takes seriously the duty to report occupational injuries, as well as the potential that such injuries will be under-reported. That is why the agency audits

---

someone in a management position at the quarry acknowledged Complainant had been injured on the job and admitted that no MSHA Form 7000-1 had been filed.

[21] "RICE" was cited repeatedly by Mr. Clemmons in his testimony. However, there is no evidence that Complainant was provided with the means for compressing the site of his injury or that he was ever assisted in elevating the injury. Due to its location (the thoracic spine), elevation could either be considered to have occurred naturally while he was standing, or not to have occurred because there is a therapeutic means for doing so that was not used. I thus conclude that the operator's approach consisted at most of merely providing ice that the complainant could use himself and limiting his activities while he was recuperating. In other words, he was only provided with rest and ice, and reciting "RICE" as a mantra is singularly unpersuasive. At some point, when this approach proved ineffective, the operator was duty-bound to treat Complainant as having suffered an occupational injury.

[22] The MSHA Form 7000-1 report of accident does not reflect any attempt to investigate the accident and gives the return-to-work date as April 14, even though Complainant continued to complain about his injury after this date, and Mr. Clemmons was aware of the complaints of injury and that Complainant's supervisor had placed him on limited duty.

operators to ensure their reports are accurate. *See generally Big Ridge, Inc.*, 34 FMSHRC 1003, 1011–22 (May 2012), *aff'd*, 715 F.3d 631 (7th Cir. 2013). However, the agency cannot audit every operator, and must generally rely on self-reporting of accidents, occupational injuries, and illnesses.

I do not find that the operator generally suppressed reporting of accidents and injuries, as suggested by the Complainant. Nor do I find sufficient evidence that the operator engaged in a pattern of under-reporting occupational injuries. But the evidence in this case does at least give rise to an inference that the operator may have diverted a miner to "RICE" to forestall medical treatment of a minor injury, and that in this case—at least—it did not fulfill its duty to report a relatively minor injury once it became aware that the injury affected the miner's ability to perform all his duties.[23] Though the injury was minor, it could carry the same statistical weight in the operator's record as a more serious lost-time injury.

2. Penalty

Several of the statutory penalty factors have been stipulated to, including the size of the operator, its record of previous violations, and the effect of the proposed penalty on the operator's ability to remain in business. The gravity of this violation is not such that it would result in an injury to any miners. However, it is a serious violation. The Act requires mine operators to assume primary responsibility to prevent unsafe conditions and practices. 30 U.S.C. § 801(e) (2022). Where the Secretary has expressly required the operator's assistance in this effort, by requiring occupational injuries to be recorded and reported, the failure to do so affects the integrity of the enforcement program.

I agree with the inspector's characterization of the negligence as "high." Tr. 288:8–21. However, I note that the operator was contacted by MSHA and admitted to not having filed the form prior to the citation being issued but did not file the form until after it received the citation. I therefore find that the operator should not be credited with rapid compliance after the fact for an affirmative duty it ignored until its failure had been cited. Instead, I find that the penalty proposed does not adequately reflect the aggravated lack of care in failing to report the injury when it knew of it, and I assess a penalty of $300.00.

B. Complainant Was Not Terminated Because of His Protected Activity.

Complainant's discrimination complaint fails because the evidence at trial did not establish discrimination under the *Pasula-Robinette* or *Gross-Nassar* standards.[24] As noted

[23] I have considered Respondent's difficulty in evaluating Complainant's condition. He was on the job for only three days after his injury and was then absent for two weeks on medical leave for an unrelated condition. But before the medical leave, VCM was aware that Complainant's supervisor had placed him on restricted duty due to his injury, giving rise to the duty to report it.

[24] A *Gross-Nassar* analysis requires the movant to establish that the impermissible motivation was a "but for" cause of the adverse employment action, i.e., the action would not have been taken but for a complainant's protected activity. Under *Pasula-Robinette*, the complainant must carry the burden of persuasion on the prima facie case of protected activity, discrimination, and a

above, the Commission has thus far only required that *Gross-Nassar* be employed in mines within the Ninth Circuit, but the Commission or other circuit courts may determine that the test must be employed. In the interest of judicial economy, I have considered both standards in reaching my conclusion.

Under either standard, the Secretary and the Complainant must prove by a preponderance of the evidence that Complainant engaged in protected activity, that he suffered an adverse employment consequence, and that there was a causal connection between his exercise of protected activity and the adverse action.

As explained below, I find that Complainant failed to meet his burden of proving a violation under *Pasula-Robinette*. While I do find that the bare minimum standard for a prima facie case has been met, the inference drawn for causation cannot withstand Respondent's well-supported explanation for its decision to discharge Complainant, and Complainant failed to demonstrate that the operator's cited performance issues were pretextual.

Considering the evidence under *Gross-Nassar*, I conclude Complainant was not terminated because of any consideration by the operator of any protected activity. I find that he did engage in protected activity, that the operator was aware of this activity, and that he was terminated from employment. However, there is no proof that would support a reasonable inference that his protected activity was a "but-for" cause of his termination.

As the Supreme Court has explained, "but-for" causation may be determined by isolating the possible rationales offered for an adverse employment action and determining how the outcome may be affected. *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020). ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we

---

causal nexus between them. But then the burden of persuasion supposedly "shifts" to the operator, who may prove that it would have taken the adverse action for unprotected reasons alone.

While the Commission has continued to rely on *Pasula*, generally, citing the legislative history of the Act, *see Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016), *Riordan* also noted that the Judge's correct application of *Pasula* was effectively a "but for" test. 38 FMSHRC at 1921, n.10; *see also Consolidation Coal Co. v. Marshall*, 663 F.2d 1211, 1222 (Sloviter, J., dissenting) (expressing opinion that Commission had effectively applied the "now accepted 'but for' rule in mixed-motivation cases.").

There may not be much of a practical distinction between the supposed burden-shifting under *Pasula* and the natural effect of evidence introduced in the normal course of a hearing. The Commission noted that the result would have been the same under either standard in *Riordan*, and the ALJ on remand in *Thomas v. CalPortland Co.* rather easily harmonized Commission precedent with the Ninth Circuit's decision. 43 FMSHRC 531, 540–41 (Dec. 2021) (ALJ) (citing *Sec'y of Labor on behalf of Thomas Robinette*, 3 FMSHRC 803, 818, n.20 (Apr. 1981) ("The 'ultimate burden of persuasion' on the question of discrimination rests with the Complainant and never 'shifts.'")).

have found a but-for cause.") In the present case, the possible reasons Complainant was separated from his employment include the disciplinary and performance issues cited by the operator, and Complainant's request to see a physician, which he claims is an activity protected against discrimination under the Act.

There is no evidence that Complainant's request for medical care played any role in a termination that was already underway when the persons making the termination decision learned about the request. There is thus no causal connection, and the analysis under the *Gross-Nassar* standard would produce the same result as under *Pasula-Robinette*.

1. Complainant's request to see a doctor for an occupational injury is protected activity under the Act.[25]

The Act protects miners against discrimination or interference because of their exercise of their *statutory* rights, including those enumerated in Section 105(c)(1) as well as "any [other] statutory right afforded by this Act." 30 U.S.C. § 815(c)(1) (2022). Thus, whether the Act affords miners the right to request medical treatment for an occupational injury is a threshold question in this case.

The Commission has apparently not held that a request to see a physician, standing alone, qualifies as protected activity. However, it has found that the reporting of injuries is protected against discrimination, even if there is no safety complaint associated with the report. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

I find that the Act does protect requests for medical care, even if the injury did not result from an unsafe condition or practice or was not made in conjunction with a miner's report of an alleged danger or safety and health violation. In addition to the reasoning in *Swift,* I rely on the text, structure, and purpose of the Act's anti-discrimination provisions.

As noted previously, Section 103(d) of the Act requires operators to investigate *all* accidents. 30 U.S.C. § 813(d). If the report of an occupational injury is the event which gives rise to this duty, it would thwart the clear and express intent of the statute to permit mine operators to suppress the recording and avoid the investigation of accidents by discouraging or punishing the report of occupational injuries.

---

[25] The Complaint in this matter cites only the request to see a doctor as protected activity. *See* GX-1. A miner may introduce evidence of other protected activity outside the scope of his complaint only if the evidence was investigated by MSHA. *Hatfield v. Colquest Energy, Inc*., 13 FMSHRC 544, 546 (Apr.1991); *see also Thomas v. CalPortland Co.,* 42 FMSHRC 43, 51 (Jan. 2020) (declining to modify *Hatfield*). Complainant did not produce other evidence of protected activity in this case. The scope of my decision is thus constrained by the report of protected activity cited in the Complaint—the request to see a physician—but I do consider each of Complainant's alleged requests, and not merely the May 12 request on which the Complaint appears to rest, because such requests arising from the same injury at issue would naturally be within the scope of inquiry by a competent investigator.

Extending the Act's protection to requests for medical care is consonant with the protection of other rights under the Act. When a miner requests to see a physician, the report may affect the operator's safety record, either because the complainant will require and receive medical treatment (as opposed to evaluation) or because the treating physician may proscribe activities necessary for the miner's job.

The Mine Act is a remedial statute, and its terms must be understood broadly to effectuate Congress' purpose—to eliminate unsafe and unhealthful conditions and practices in mines, relying primarily on the active involvement of operators in the prevention of such conditions and practices. 30 U.S.C. § 801(d)–(e); *see also Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). The Commission's embrace of activities beyond those enumerated in the Act has been consistently and broadly inclusive. *See Emery Mining Corp.*, 10 FMSHRC 276, 283, 293 (Mar. 1988) (permitting walkaround inspection participation under Section 103(f)); *So. Ohio Coal Co.*, 5 FMSHRC 729, 759 (Apr. 1983) (ALJ) (permitting post-inspection conference participation under Section 103(f)); *Sec'y of Labor on behalf of Bennett v. Emery Mining Corp.*, 3 FMSHRC 2648, 2657 (Nov. 1981) (ALJ) (requiring operator-provided training under Section 115).

Further, the D.C. Circuit has consistently (and recently) relied on the intent to achieve the goals of the Mine Act in affirming miner's rights. In *Marshall County Coal Co. v. FMSHRC*, the court recognized a miner's Section 103(g) rights—enabling the raising of anonymous complaints—as a basis for a protected activity in an interference claim. 923 F.3d 192, 195, 201 (D.C. Cir. 2019). The operator activity complained of there was a requirement to report complaints to management. *Id.* at 197.

In *Harrison County Coal Co. v. FMSHRC*, the court denied the operator's petition for review because there was substantial evidence of six protected activities—mostly regarding reporting health, safety, and discrimination complaints. 790 Fed. Appx. 210, 212, 213 (D.C. Cir. 2019). The court reiterated that reporting is a right bolstered by its importance to achieving the Act's purpose:

> Since the participation of miners in reporting unsafe working conditions is essential to the effectiveness of the Mine Act, Congress explained miners "must be protected against any possible discrimination which they might suffer as a result of their participation."

Id. at 212 (quoting S. Rep. No. 95-181, at 35, *reprinted in* Senate Subcomm. on Labor, Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 626 (1978)). This is in line with the Commission's reliance, in *Swift,* on the command of Section 2(e) that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such miners." 30 U.S.C. § 801(e).

Consistent with Commission and court precedent and Congress' clearly expressed intent, I find that a mine operator may not discourage, interfere with, or discriminate because of a miner's request to see a doctor because he was injured at the mine.

2. The Operator was aware of Complainant's protected activity.

I credit Complainant's testimony that he twice communicated a request to see a doctor to his supervisor, Chris Williams. His testimony regarding his requests is discussed more thoroughly below, but he at least made the requests on April 12, the Monday after he was injured, and on May 12, the day he was terminated. Mr. Williams, an agent of Respondent, was aware of both requests. The managers who made the decision to terminate Complainant were aware of the request he made on May 12.

3. Complainant suffered an adverse employment consequence in this case.

Complainant's employment was terminated. Discharge from employment is expressly prohibited by Section 105(c) of the Mine Act and is the classic example of an adverse employment action. 30 U.S.C. § 815(c)(1).

4. The evidence is insufficient to support an inference that Complainant was terminated because of his request to see a physician.

The burden of producing sufficient evidence to support a prima facie case of discrimination is not especially great in the abstract. A complainant may provide direct evidence that the adverse employment action was discriminatory. But if such evidence is unavailable, as is usually the case, the Complainant is only required to demonstrate that the available circumstantial evidence *could* support an inference of discriminatory treatment. *Turner,* 33 FMSHRC at 1065–66.

I find that the Complaint for discrimination fails because there is no direct evidence of discriminatory intent and no reasonable basis for inferring that his discharge from employment could have been causally related to Complainant's protected activity. This is true under either legal standard the Commission might apply to his discrimination claim.

a. There is no direct evidence of discriminatory intent or motivation.

The operator has denied that Complainant was discharged because of his protected activity. The Secretary and the Complainant must show at the prima facie stage that the protected activity could have motivated his discharge, and then carry the burden of proving by a preponderance of the evidence that his discharge was so motivated.

Complainant could not provide any direct evidence of discriminatory motive. However, the absence of direct evidence is not fatal to Complainant's case. "'[D]irect evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent.'" *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693, 700 (6th Cir. 2018) (quoting *Sec'y of Labor on behalf of Howard v. Cumberland River Coal Co.,* 34 FMSHRC 1396, 1397 (June 2012)).

Therefore, I must consider whether inferences reasonably drawn from the evidence in the case may be used to support Complainant's contention that he was fired because he engaged in protected activity. Such inference may be supported by the following factors:

> (1) [T]he operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' towards the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner.

Id. (quoting *Cumberland River Coal Co.*, 712 F.3d at 319; *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)).

b. The record does not support an inference that Complainant was discriminated against because of his protected activity.

1. There is scant evidence of disparate treatment of the Complainant.

The record in this case is replete with complaints by miner witnesses of unfair, arbitrary, and harsh treatment by lower-level supervisors. However, this was a burden borne by the entire workforce. There is little evidence that Complainant was an especial target of abuse, and no evidence that any protected activity may have motivated Respondent's agents.

On the contrary, miner witnesses testified that everyone in the workforce felt targeted by poor supervisors who did not know their jobs well. Some miners did testify that Complainant's supervisors had "targeted" him for termination, but the bases for their assertions are grounded in actions that predated any protected activity in this case.

When questioned about the operator's management, the miner witnesses complained about generally arbitrary and unfair supervision of employees by Mr. Parr and Mr. Humes. In fact, Complainant and several other witnesses noted that at one point Mr. Humes threatened to fire and replace the *entire* workforce.

It was clear that none of the miners felt genuinely intimidated by these threats. After Mr. Humes' tirade, witnesses noted that "every employee called [human resources] that day;" Tr. 86, and Mr. Ellis noted that he had discussed the situation with several miners and the company's human resources department, and he required Mr. Humes to apologize.

There is some evidence that Complainant was treated less favorably than other miners. However, he himself testified this began under Mr. Parr—who was separated from his employment before claimant requested to see a physician. On cross-examination, Complainant admitted that he had been verbally counseled by Mr. Parr for failing to thoroughly clean his area. Mr. Parr subsequently issued a written warning to Complainant for the same issue.

Complainant testified that he believed Mr. Parr was trying to make a "paper trail" to terminate him. Even if this were true, however, any motivation Mr. Parr might have had to harass or oppress Complainant could not have been related to protected activity that had yet to occur. It is thus not logically possible to infer that Mr. Parr targeted claimant because of his protected activity.

Complainant subsequently was formally disciplined again, by a different supervisor, before his termination. However, the second written warning and suspension also took place before his injury and subsequent protected activity. When Complainant was injured, he was therefore already on a "last chance" letter, having been suspended by the operator and told, in writing, that *any* future violation of policies or failure on his part could lead to termination.

I have considered the possibility that Complainant was the only miner disciplined for leaving work early when he was suspended. At least one other miner, Mr. Evans, left at the same time as Complainant, and all four miners on Complainant's crew left without completing the cleaning tasks assigned to them, according to Mr. Williams. But this suspension also occurred well before the injury upon which Complainant's claim of protected activity rests, and Complainant's discipline here was thus entirely unrelated to his request to see a doctor for an injury that had not yet occurred.

Furthermore, while Mr. Evans may not have been formally disciplined, it appears that Mr. Williams at least intended to do so. Mr. Evans was summoned to the office, where Mr. Williams told him that he was going to be issued a verbal warning. Because Mr. Evans had no prior disciplinary history, his treatment under the company's progressive disciplinary policy was equivalent to Complainant's. While he may have talked his way out of formal discipline, Mr. Williams did not ignore the actions of the other employee whose actions were the same as Complainant's.

Additionally, Complainant's discipline does not appear to be inconsistent with that assessed to other miners for similar conduct. Mr. Walker had a similar disciplinary history and had also received a second written warning and three-day suspension for the same alleged failures that led to Complainant's suspension. Tr. 548:24–549:10; Ex. R-L. There was no evidence that Mr. Walker had ever engaged in protected activity before his suspension.

In summary, there is insufficient evidence to support the contention that Complainant was treated more harshly than other miners, and no evidence at all for inferring that any actions of his supervisors had anything to do with mine safety or health. There is thus no basis for me to impute an improper motive for any of the predicate disciplinary actions on which Complainant's termination was grounded.

In fact, this hypothesis is refuted by Respondent's treatment of Complainant before and after he engaged in protected activity—which might be a more appropriate consideration than alleged disparate treatment of Complainant and other similarly situated miners. *See Riordan*, 38 FMSHRC at 1927 (finding of pretext upheld where written record of miner's performance was inconsistent with reasons given for termination).

Before his protected activity, Complainant was formally disciplined three times, by or at the insistence of three different supervisors, for failure to complete cleaning and greasing tasks that Respondent had assigned to him as part of his job. After his injury and earliest request to see a physician, Complainant was discharged for the same conduct that he had been disciplined for at least three times prior to his injury and protected activity.

The discharge was consistent with company policy, and Complainant had been warned when he was suspended that he could be discharged for any future failing or violation of company policy. He himself admitted that he had not fully cleaned his area or greased the plant on May 9 and 10, and he does not know whether anyone else did so. Tr. 422:13–22.[26]

My decision is mindful of the Commission's admonition that operator justifications in discrimination cases should not "be examined superficially or be approved automatically when offered," but that my careful analysis may not "substitute [my] business judgment or sense of 'industrial justice' for that of the operator." *Cumberland River Coal Co.*, 712 F.3d at 320 (quoting *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)).

In this case especially, I note the performance issues cited by the operator may be vital to its safe and efficient operation. Special Investigator McClung testified that a violation could be cited as an S&S violation of MSHA's housekeeping standards. Tr. 490:7–491:5. It would be contrary to the Act's purpose and text to punish an operator for holding miners accountable for compliance with a mandatory safety and health standard. And the operator provided credible testimony about the severe costs and inconvenience produced by a failure to grease the plant bearings and other equipment, which is a daily requirement.

His disciplinary history left Complainant in a precarious position, where any subsequent violation of company policies would result in his termination. As noted, acts predating the protected activity cited in this case could not have been motivated by that activity. Complainant nevertheless could have established a basis for inferring a nexus between his protected activity and his discharge but was unable to prove that the operator's termination decision—which was consistent with its policies and Complainant's work history—was ever treated differently because of activity protected under the Act.

[26] Complainant also testified fellow employees, including Mr. Williams, helped him to clean his area after he returned to work on May 4. Even if true, this cannot be reasonably related in any way to a hostility toward his protected activity. Although one might question whether it would be fair in a general sense to discharge an employee who had been led to believe others would help him clean his area, Complainant did not report to his supervisor that he had been unable to clean or grease on May 9 or 10.

2. The record does not support an inference of animus toward the Complainant because of safety or health related issues or general animus toward safety and health concerns.

While the record does not support an inference that he was treated differently because of his protected activity, Complainant could have provided a reasonable basis for inferring his termination was motivated by improper animus against safety and health generally, or against him for his involvement in or advocacy on safety and health issues. There is not a basis in the record for this inference, either.

First, there is no evidence at all that Complainant ever engaged in any advocacy on safety and health issues.[27] Nor does he appear to have had any specific, material involvement in those issues during his employment.

There is also no evidence that Respondent harbored any animus against safety and health generally. On the contrary, witnesses almost without exception testified that the company tried to operate safely and to correct hazardous conditions that were brought to its attention. Complainant himself provided such testimony. *See* Tr. 397:25–398:2.

I also note the weight of circumstantial evidence undermining any inference of hostility to safety and health. Respondent held "morning stretch" sessions for employees, which testimony acknowledged as having a safety purpose. Tr. 147:3–5. Employees apparently felt comfortable calling human resources and senior managers to complain about their supervisors. When Mr. Humes supposedly posted a new policy requiring workers to leave the jobsite at the same time at the end of their shift, an employee removed the message so that he could bring it to the morning meeting for discussion.

Testimony by other miners also refutes any notion that Respondent was hostile to safety and health complaints. Mr. Dycus testified that it was generally known that he had made a complaint to MSHA, and yet was never disciplined by the company for anything. Even more telling is the incident where Mr. Parr allegedly tried to persuade Mr. Walker to falsify an examination report before an inspection, Mr. Walker's refusal, and his reporting the incident to Respondent's management. VCM opened an investigation. Mr. Parr then resigned. The inescapable inference is that miners believed they could report safety matters to management, and that when they did so, those matters would be properly addressed.

Nor is there any evidence that the Company showed any hostility toward Complainant because of his request to see a doctor. As noted, every prior disciplinary action occurred before his injury and protected activity. When Complainant requested to see a doctor, there was no adverse response to the request from anyone in mine management.

[27] While not advocacy per se, Complainant did testify about reporting safety issues to his supervisors and management. However, he acknowledged that Respondent's agents were responsive to those reports, and there was no evidence of any hostility to them.

At worst, Complainant's request for medical care was ignored. If Complainant's previous requests had any effect, it was to have him placed on limited duty due to his injury. Mr. Williams and Mr. Clemmons both inquired about Complainant's injury after that. There is no conduct from which I could infer any hostility arising from his injury.

Complainant's request for medical care on May 12 certainly had no effect on a termination decision that was well underway before the decisionmakers were aware of it. Mr. Ellis testified that he made the decision to terminate Complainant, with input from Mr. Humes and Mr. Lindsey. They had intended for Mr. Williams to bring Complainant to the office after the morning meeting so that they could communicate the decision to him.

Mr. Ellis prepared notes in anticipation of that action. While Mr. Ellis testified that Mr. Williams was not involved in the termination decision, his notes suggest otherwise.[28] His unrebutted testimony shows that he took those notes before he learned of the request to see a physician in preparation for the meeting at which Complainant was to be terminated, the next day. The context and the content of the notes together clearly support his testimony.

There is no evidence that Mr. Ellis was aware that Complainant requested to see a doctor before making the decision to terminate his employment, or that he discussed any previous requests with Mr. Humes, Mr. Williams, or Mr. Clemmons. Nor is there any evidence that any of the other individuals involved in the decision to discharge Complainant ever evinced anything worse than indifference in response to his request to see a doctor.

This evidence supports Respondent's contention that it took seriously safety and health issues brought to its attention. I thus find that there is no evidence in the record from which one could reasonably infer any hostility to protected activity, including Complainant's request to see a doctor.

3. Coincidence in time between Complainant's request to see a doctor and his termination raises a superficial inference of potential discriminatory intent that does not survive evidence raised in response to his prima facie case.

Coincidence in time between protected activity and an adverse employment action justly creates suspicion that there may be a relationship between the two. A miner may establish a prima facie case where the adverse employment action is imposed soon after the exercise of protected activity. *See Turner,* 33 FMSHRC at 1066 (citing *King v. Rumsfeld*, 328 F.3d 145, 150–51 (4th Cir. 2003) (reversing trial court's conclusion that plaintiff failed to make out a prima

[28] The Secretary has suggested that this should detract from Mr. Ellis' credibility. S. Post Hr'g Br. at 20. However, the wording of the question, the answer, and Mr. Ellis' notes leaves open the possibility that Mr. Humes told Mr. Ellis he had discussed the issue with Mr. Williams. *See* Tr. at 517:17–22 (testimony of Mr. Ellis, stating that information was given to him "by Chris through Anthony"). Whether and to what extent Mr. Williams was involved in the decision is not material because there is no evidence suggesting that Mr. Williams, or any of Respondent's other agents, may have been motivated by Complainant's protected activity.

facie case of retaliatory discharge based on evidence proffered by the plaintiff that "his termination came so close upon his filing of [an EEOC] complaint giv[ing] rise to a sufficient inference of causation to satisfy the prima facie requirement")).

The Commission has held that coincidence in time, combined with knowledge of a miner's protected activity, may establish discriminatory motivation. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May1997); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982 (June 1982). I credit Complainant's testimony that he requested to see a physician on May 12, the morning he was terminated. It is undisputed that all of those involved in the decision to terminate Complainant were aware of the protected activity on May 12.

Mr. Williams, who provided input to Mr. Humes in support of the latter's termination recommendation, testified about the request to see a physician. Mr. Humes, who made the recommendation to terminate Complainant, was also aware of the request before the termination was carried out. Mr. Ellis and Mr. Lindsey, who made the decision to terminate Complainant, also knew of the request because Mr. Williams reported it to them.

Here, as in *Knotts*, the Complainant was terminated soon after his protected activity. Indeed, he was discharged almost immediately after requesting to see a physician on May 12. This close proximity in time is sufficient to establish a prima facie case of discrimination, because in the absence of other evidence, a causal relationship is strongly suggested by the timing of the two events.

While Complainant has provided sufficient proof for a prima facie case, the analogy to *Knotts* cannot survive close scrutiny. In *Knotts,* the miner/complainant had an extensive conversation with a representative of the mine's owner. 19 FMSHRC at 834. Subjects of the conversation included safety, equipment and production problems, morale, mine policy, and other subjects. *Id.* The mine's vice president was working underground and listened to the conversation by phone. *Id.*

The next day, Mr. Knotts was discharged. 19 FMSHRC at 835. Knotts said the vice president told him that the company had suspected that Mr. Knotts had been talking to the mine owners for some time. *Id.* The vice president's own testimony indicated he was upset that Mr. Knotts had criticized mine management in the conversation. *Id.* While the company argued that Mr. Knotts was fired for engaging in a lengthy conversation instead of doing his job, the ALJ found otherwise. *Id.*

In affirming the ALJ's rejection of the operator's affirmative defense, the Commission noted that there was no evidence of past discipline or performance issues in Mr. Knotts' work record. 19 FMSHRC 838. In fact, the company admitted he was "one of the best employees." *Id.*

That is practically the inverse of the situation in the present case. Here, Complainant's disciplinary record placed him on a "last chance" agreement before he was injured or engaged in any protected activity. The disciplinary record was based on his alleged failure to clean and

grease his zone and his alleged early departure from work on February 1, 2020, for which he was suspended.

Even if the previous disciplinary actions were questionable, there is no evidence that they were motivated in any part by any activity cognizable under the Act. To the extent safety was implicated at all, even MSHA's investigator acknowledged that the failure to clean areas where miners work or travel could lead to S&S violations.

Complainant nonetheless could have shown that the final action taken by the operator, ending his employment with Respondent, was motivated by his protected activity. However, the coincidence in time turns out to be just that—a coincidence—and is insufficient to overcome the operator's explanation for Complainant's discharge. It appears that the request to see a physician did not influence, but rather interrupted, the execution of the termination decision.

4. Respondent acted consistent with its business practices, and the record does not support a finding that its explanation was pretextual.

The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC at 1937–38). In this case, Respondent's evidence explains the coincidence in time, and the termination process was consistent with VCM's progressive disciplinary policy and its maintenance and housekeeping policies.

The operator's witnesses gave consistent, credible accounts of the termination and their consideration of Complainant's request to see a physician. The plan to terminate Complainant was already in motion when the key management players learned of Complainant's request to see a physician. Termination was the logical next step under Respondent's progressive disciplinary policy.

In accordance with its internal procedures, the operator had choreographed an elaborate, scripted plan for carrying out the termination. But when they heard that Complainant had requested to see a doctor, VCM's management paused to consider its plan and decided to provide a list of physicians to the Complainant in addition to proceeding with the planned termination.

Respondent did not fire Complainant "because" he had asked to see a doctor. Rather, its management continued with an already-formulated plan to terminate him, but made a slight modification to that plan, providing him with a list of physicians he might see about his injury.

Thus, instead of summoning Complainant from the morning meeting, the operator made a "pivot" after Mr. Williams told them he had requested to see a doctor. This request on May 12 could not have motivated a plan that was already under way, based on a decision that was made the previous day.

I have also considered that Complainant's first request could have motivated a discriminatory response by Respondent. *See Riordan,* 38 FMSHRC at 1924 (citing *Gorzynski v. JetBlue Airways Corp*., 596 F.3d 93, 110 (2d Cir. 2010); *Pero v. Cyprus Plateau Mining Corp*.,

22 FMSHRC 1361, 1365 (Dec. 2000) (holding a gap of several months between protected activity and discharge to be probative of animus)). But nothing in the record suggests that it did.

The first request to see a doctor was made to Mr. Williams, who was an agent of Respondent. But there is no evidence that Mr. Williams told anybody else about that request, or that any of the persons involved in the termination decision—Mr. Ellis, Mr. Lindsey, or Mr. Humes—were otherwise aware of the request.[29]

Mr. Williams himself did not respond adversely to Complainant's protected activity. After Complainant had requested to see a doctor, but before he was terminated, Mr. Williams asked about Complainant's back nearly every day. Tr. 430:23–431:2.

This case is thus unlike *Riordan*. As the Commission noted, the complainant/miner in that case was disciplined immediately after his most recent protected activity, and then terminated months later. *Riordan*, 38 FMSHRC at 1927 ("*Taken together,* these two incidents raise an inference that Riordan's termination was not coincidental.") (emphasis added). There are no corroborating facts to support such an inference in this case.

Complainant testified that he made his request on two other occasions. While Complainant only cited as protected activity his May 12 request to see a physician, Ex. G-1; Tr. 439:21–440:2, any previous requests would have been within the scope of MSHA's investigation.

Furthermore, credible testimony about previous requests could be used to establish knowledge and might be a basis for finding that the operator's business justification was pretextual. I have therefore considered Complainant's testimony that he told Mr. Clemmons on May 8, and that he told Mr. Humes, on a day he could not recall, over the radio.[30]

Complainant's recollection of these requests is oddly vague and does not reflect a progression or escalation of his concern with the company's failure to refer him to a doctor for an injury serious enough to affect his work. He also testified that his pain from the injury was so serious that he could not sleep and that it was "affecting everything about [his] daily life." Tr. 332:4–7. Yet he does not appear to have followed through or complained about the operator's alleged inaction on his request until May 12.

I do not credit Complainant's testimony that he told Mr. Clemmons he needed to see a doctor on May 8. Mr. Clemmons allegedly asked if this was due to his injury in April, and when

[29] Despite having the opportunity to depose witnesses in discovery and subpoena and question witnesses at the hearing, Complainant produced no evidence that Mr. Williams had ever discussed his initial request or any subsequent conversations about his need for medical attention with anybody else in the company.

[30] Complainant also says that after he returned to work in early May, following his April 15 cardiac procedure, he told Mr. Williams, Mr. Humes, and his co-workers in passing that his back was still hurt and that he could not complete all his tasks. Tr. 382:3–25.

Complainant said it was, Complainant said Mr. Clemmons drove away without responding. Tr. 384:2–6.

This testimony is inconsistent with other facts in the record, as well as human nature and common sense. Complainant said that his injury was serious enough to have affected him profoundly for more than a month. He knew Mr. Clemmons was aware of the injury. Mr. Clemmons had previously investigated an incident in which Complainant was injured. Mr. Clemmons had also inquired about Complainant's condition while he was recovering from the injury at issue in this case. Yet there was no follow-through with Mr. Clemmons, or anyone else, until the day he was discharged.

Perhaps realizing the weakness of his case, Complainant also claimed Mr. Clemmons had previously asked what could be done to keep him from going to the doctor after the skid steer injury. Mr. Clemmons denied this, and Complainant's testimony is at odds with his own testimony about the investigation into the incident, which characterized the investigation as careful and thorough.

Furthermore, the comment seems out of character with Mr. Clemmons' text messages to Complainant, evincing what appeared to be genuine concern about his injury. In that context, I credit Mr. Clemmons' denial, in part because the record includes incidents where other miners had requested to see a doctor and had their requests granted. *See* Ex. R-P. Some of these requests were for relatively minor injuries, contrary to Complainant's claim that the reporting of anything short of "profuse bleeding or broken bones" was discouraged.

Complainant also claims to have told Mr. Humes over the radio that he wanted to see a doctor. I am skeptical of this for several reasons.

First, Mr. Humes denied that Complainant ever told him he wanted to see a doctor. Tr. 625:1–4. I found Mr. Humes to be a disinterested witness who was forthright and candid about his own shortcomings, and I credit his testimony here because it is more consistent and reasonable than Complainant's version of events

Second, Complainant says he cannot remember how Mr. Humes responded to the request, and there is again no linkage made between this request and other requests that were allegedly made. He did not testify that he had told Mr. Humes about his earlier request to Mr. Williams, shortly after his injury. As with the requests allegedly made to Mr. Clemmons and Mr. Williams, the testimony relates a solitary statement that the operator's management allegedly ignored, and Complainant did not testify about any effort to follow up on or escalate his requests.

Finally, the record establishes that comments made over the radio could be heard by other persons generally. Mr. Humes was discharged from employment in part because of something offensive he said over the radio that was heard by employees. Yet none of the other miner witnesses testified that Complainant ever made a request to see a physician over the radio.

There is also no testimony about or basis for inferring a correlation between the alleged previous requests and any consideration of them by Respondent's management when it decided to discharge Complainant from employment. As the party with the burden of proof, it is incumbent on the Complainant to not only suggest an inference, but to support it with credible evidence. Even accepting that all his requests to see a doctor were made as stated, there is no evidence that anyone might have considered them when Respondent made the decision to terminate him.[31]

The operator relied on input from Mr. Williams and Mr. Humes in making that decision. I have credited Complainant's testimony that he had previously told Mr. Williams on April 12 that his injury was not improving and that he needed to see a doctor. But even Complainant did not testify that Mr. Williams reacted adversely to this request, or that he attempted to discourage or interfere with his pursuit of medical treatment.

Mr. Williams claims not to have made a recommendation to fire Complainant, and Mr. Humes claims responsibility for the recommendation. But the termination decision was the last in a chain of disciplinary actions, undertaken by or with input from three different supervisors. Each of the previous disciplinary actions preceded Complainant's request to see a physician, and there was no protected activity or evidence of any other relevant health and safety activities or views that could have influenced those decisions.

It therefore appears that Complainant was discharged for the same type of performance issues that contributed to his adverse disciplinary record. He himself acknowledged that he failed to clean or grease the plant on May 9 or 10, as reported by Mr. Williams to Mr. Humes. He said that the company had obtained a new grease gun for him to use. Tr. 435:13–436:2. Although Complainant said that grease gun had the "wrong" tip and could not be used, he acknowledged that other grease guns were available. *Id.*

Greasing the plant was part of Complainant's job and was an important, daily responsibility. Mr. Williams notes—in a statement of some significance—that Complainant did not tell him that the plant had not been greased at the end of his shift, and that this is something that he believed Complainant should have told him, because it was vital that the plant be greased every day. Tr. 785:2–4.

Given the costs and inconvenience created by the catastrophic damage to the plant bearings after a previous such failure, I credit Respondent's proffered justification for its decision to terminate Complainant as reasonable. Complainant produced no evidence that suggests the operator's justification is pretextual. Instead, it appears that the suggested

[31] I also find it odd that Complainant was under the care of physicians for a cardiac procedure unrelated to his employment but testified he did not discuss his occupational injury with his treating physicians. While he was seen by a cardiologist for a specialized procedure, any person who has been provided with medical care is aware of the general requirement to provide a detailed medical history before receiving that care. It is not necessary to my decision that I take administrative notice of this common imposition, but this is another instance where the absence of evidence is not helpful to Complainant's credibility.

connection between the final request to see a physician and the discharge from employment is not a causal nexus but merely a *post hoc, ergo propter hoc* fallacy.

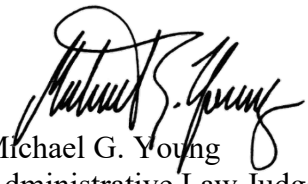
CONCLUSION

The evidence in this case leaves open the possibility that Complainant may have been treated unfairly by his employer prior to his protected activity. Accepting as true his account of events, he received a written warning, which he disputed, from a supervisor who was widely disliked and who eventually resigned under unfavorable circumstances. Complainant was then suspended when other workers who engaged in similar conduct were not disciplined. He was fired for not performing some of his duties during a time when he was injured, and when there appeared to be at least some understanding that other people would assist him with those tasks while he recovered.

However, there is no evidence that improper discriminatory motivation played any role in any of these disciplinary actions. I therefore find that Respondent did not discriminate against the Complainant in violation of Section 105(c)(1) of the Act, and his complaint is **DISMISSED.**

The order of temporary reinstatement entered July 27, 2021, is hereby **DISSOLVED.**

Citation No. 9237452 is **AFFIRMED**. Respondent is **ORDERED TO PAY** the Secretary of Labor $300.00 within 30 days of the date of this decision.[32]



Michael G. Young
Administrative Law Judge

Distribution (First Class Mail and email):

Christopher M. Smith, Esq., Office of the Solicitor, U.S. Dep't of Labor, 618 Church Street, Suite 230, Nashville, TN 37219, smith.christopher.m@dol.gov; nash.fedcourt@dol.gov

Elaine M. Youngblood, Esq., Ortale Kelley, 330 Commerce Street, Suite 110, Nashville, TN 37201, eyoungblood@ortalekelley.com

Margaret S. Lopez, Esq., & William K. Doran, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, 1901 K Street NW, Suite 1000, Washington, DC 20006, margaret.lopez@ogletree.com william.doran@ogletree.com

[32] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check of money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box. 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.