FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

December 8, 2023

CECIL MATNEY, JR., Complainant v. ROCKWELL MINING, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. WEVA 2023-0126 Mine: Gateway Eagle Mine Mine ID: 46-06618

DECISION

This matter involves a complaint of discrimination arising under Section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). For the reasons which follow, the Court finds that Respondent Rockwell Mining discriminated against Complainant Cecil Matney, Jr. by virtue of repeated violations of the requirements of Part 90 and that as a consequence the Secretary should consider seeking a civil penalty for those violations.

Apart from the Part 90 violations, the Court finds that Mr. Matney suffered no financial loss in connection with a short-lived and non-malevolent clerical error associated with a bonus. Further, the Court finds that Matney is not entitled to his claim of compensation for any supplemental income from Saturday work for two reasons: He is a salaried employee and has been paid in full per that salary, and assuming arguendo that he was entitled to Saturday pay while on the mine's decision to place him on paid leave of absence, he failed to meet his burden of proof to establish with any precision those Saturdays he would have worked had he not been on the extended leave of absence from his section foreman position.

Introduction: Cecil Matney's Discrimination Complaint

The Respondent has stipulated that Mr. Matney is a Part 90 miner. Tr. 6. Briefly stated, Matney's complaint began upon submitting his statement to MSHA on September 26, 2022. The statement initially alleged[1] that he was not afforded the same pay raise as other similarly situated

[1] In its initial form Matney's Complaint expressed "On June 25, 2022, I elected to exercise my Part 90 transfer rights. I was classified as a foreman both before and after exercising my Part 90 rights. My employer customarily provides periodic across-the-board raises to all salaried employees. All foremen have always received the same raise in my experience there. On the week of August 4, 2022, all outby and section foreman received a raise of $4,000. However, my raise was only $2,000.00. The raises became effective on the next payday. On that payday, it would reflect one week of the new raise and one week of the old salary rate. Human Resources (Kent Varney) confirmed that all section foreman did receive the same raise. I am currently a move crew foreman, which has always been treated the same as a section foreman for purposes of raises. As

foremen, but it was later amplified to include allegations of exposure to excessive dust in violation of the protections afforded under Part 90. Complaint at 10. Thereafter, on October 10, 2022, he signed his statement. On November 23, 2022, MSHA issued a letter to Matney stating that it investigated his complaint but determined that there was not "sufficient evidence to establish by a preponderance of the evidence that a violation of Section 105(c) occurred. … However, [MSHA informed that Matney] continue[s] to have the right to file a discrimination case on [his] own behalf with the [Federal Mine Safety and Health Review] Commission." November 23rd letter at 1. Mr. Matney did just that, filing this Section 105(c)(3) claim presently before this Court.

On December 23, 2022, Matney, through his legal counsel, filed his formal 105(c)(3) complaint. That document tracked his 105(c) statement, as outlined above. Per the second element in his statement, the Complaint asserts that the mine "fail[ed] to maintain Mr. Matney at all times in a work environment that complies with the respirable dust standards for Part 90 miners." Complaint at 1. The relief sought in the Complaint is for the Mine Review Commission to

> find that the Respondents did violate Section 105(c)(1) of the Mine Act, 30 U.S.C. Section 815(c)(1) through their interference, discrimination, and retaliation in reference to his Part 90 rights, that MSHA issue an appropriate citation, and that the Commission enjoin Respondents from further discrimination and interference, and further relief as set forth herein.

Id.

Matney asserted in his complaint that

> when he is not being sampled, he does not receive comparable help. Consequently, he is required to perform excessively dusty job tasks that he is not required to perform while his dust [sampling] pumps are running [on him]. Matney just wants the same number of people assigned to him at all times, on the section, as when he is wearing the dust sampling pumps. Or alternately, he requests that he moved to an outby or outside location that complies with the applicable dust limits at all times.

Complaint at 4.

As will be discussed, ultimately Rockwell did take the appropriate action, as required by Part 90, by moving Mr. Matney to outside work at the mine.

The essence of Matney's complaint has two aspects:

First, Matney asserts that the company withheld a pay full raise from him that they afforded to all section foreman at the mine.

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a Part 90 miner, I seek an order affording me the same raise that all other similarly situated foremen received." As explained *infra*, the Court rejected the Respondent's claim that Matney's Complaint is limited to his initial statement.

Second, he asserts that the company interfered with his Part 90 rights by failing to transfer him to a job that complies with the dust exposure limitations for Part 90 miners.

Matney asserts that his initial dust sampling was not representative of the work on his shift because he was told to refrain from his normal tasks when wearing a dust pump but that, when not being sampled, he is required to do the dusty jobs on his section.[2] He asserted that the mine provided the help he needed to do his job only when he was wearing a dust pump.

Findings of Fact

Cecil Matney Jr. is 49 years old. He has more than 24 years of employment with underground coal mining. His employment with Rockwell began with its Black Oak Mine. In late 2020, or early 2021, he began working where he is currently employed, at Rockwell's Gateway Eagle Mine. He was hired as a non-production move foreman on the mine's third shift. Tr. 34-36. In sum, his work consisted of fire bossing,[3] rock dusting and periodic roof bolting. Later, his job was changed to production foreman. Tr. 46. In March 2022, his health was deteriorating and he became eligible for Black Lung benefits. At that time he requested a return to his prior job on the third shift, that move was for the purpose of reducing the amount of dust he would be inhaling. Tr. 50. His supervisor, Shannon Dolin, tried to dissuade him from returning to his former position, but Matney told him his

> health is not going to get no better walking across the section. Being downwind of these miners every two hours, it's killing me. I literally could hardly breathe, and I was spitting up blood and coughing up -- I had to do -- I had to do something to make a difference.

Id.

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[2] The term 'section' refers to the 'working face.' Tr. 244.

[3] Matney described his work as fire boss as follows: "A fire boss, in accordance [with] the State of West Virginia, [requires one] to walk across your faces every two hours. That means your headings. You have to check for methane. You have to check for airflow and any hazards that you find in that face, whether a ventilation curtain be tore down, you have to replace it and fix it." Tr. 38. At that time the mine had nine entries. His fire boss duties encompassed "try[ing] to spend at least five minutes in each entry to make sure that you're catching everything: Loose bolts, kettle bottoms, bad ribs, et cetera. … just anything that you can find that's a violation … [and this has to be done] every two hours." Tr. 39. The job is done on foot. Matney added that "three hours prior to the day shift starting, [one has] to do what's called a pre-shift that MSHA and the State of West Virginia requires to be done three hours prior to the shift starting. You're going across the section, you're getting air readings in your -- return air reading air forces to make sure you have enough air going down your returns. You're making sure that you've got plenty of air in your non-idle faces. And you're making sure the ventilation is correct. And you're saying that this section of this mine is safe for the day shift to come in to perform their duties on that shift for the day shift." *Id.*

Matney's Return to the Move Crew Foreman position.

Following a talk with the general mine foreman, Scott Thompson, Matney was reassigned to his former job as the move crew foreman.[4] However, the return to that third shift position still presented too much for him and consequently on June 25, 2022, he then exercised his Part 90 transfer rights. Tr. 51-52. At some point in early July 2022 the mine was notified that Matney had elected Part 90 status. Tr. 138. At the end of the first week of July, he was then deemed a Part 90 miner and was so informed of that status by the mine's safety director, Bill Hardin. Tr. 57.

The mine then ran test samples, also referred to as 'engineering samples'[5] on Matney; two were done on the section and one was outby. Tr. 138-140. Dolin, Matney agreed, told him that he [Matney] would remain on the section as the move crew boss, telling him to take care of himself. Tr. 140. Matney agreed that following that, the mine ran the regular quarterly samples on him in July 2022. *Id.*

However, the return to the move crew foreman position was not a panacea. Matney informed that he still had to conduct the fire boss run[6] every two hours. And, he still had to rock dust the section and he still had to operate the roof bolt machine periodically. Tr. 54. This prompted him to start a journal reflecting the tasks he had to perform though he was then a Part 90 miner. Complainant's Ex. 1 is a copy of Matney's Journal,[7] reflecting the tasks he had to perform after becoming a Part 90 miner.

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[4] To avoid any confusion when dates are referenced about Matney's shift, on a given night he would start work near the end of a day, with the majority of his hours occurring after midnight. Therefore, references to dates will often reflect two days, but involve a single shift. For example, the reference *infra* to July 28th to July 29th, pertains to a single shift.

[5] The test or 'engineering' dust samples were conducted in mid-July 2022, and they were uploaded to MSHA. Tr. 326. These were done to help the mine determine the best location for Matney to work on the section. Tr. 327. One of those samples, which was outby, was over the exposure limit. Tr. 328. The mine did not keep those results. *Id.* Though the Court found it troublesome that the mine did not keep the results, it does not find that it was malicious. The mine reviewed the samples and went over them with Matney. *Id.*

[6] Holstein would later testify that there were times when he, Holstein, was doing his fire boss run and be downwind of the bolt crew when doing that, but he added that he had the right to tell his crew to shut off the bolting, and he stated that he has done that. Tr. 242. He then stated that he would tell the bolt crew to stop if downwind and close to them. *Id.* Holstein asserted that, when dusting the section, one side becomes clear within 15 minutes of dusting it. It was his contention that Matney could have told his crew not to bolt when he was fire bossing, especially if his practice was to do that task the same time each night. Tr. 246-248. Having observed Matney and Holstein closely during their testimony, the Court concluded that Matney was the more credible witness.

[7] Though Respondent's Counsel attempted to have Matney endorse the idea that his journal was gospel, reflecting the entirety of a given day and from that premise that anything omitted from it did not occur, the Court does not agree. Tr. 143. The journal did not purport to be a compendium of each day's events. As Matney stated, he created the journal to help him remember events, an understandable and prudent practice, given his concerns about his duties post his Part 90 designation. The Court also asked Matney why he created a journal. He answered, "[t]o protect

Matney first wore a dust pump to measure his dust exposure on July 21, 2022. The mine's safety director, Bill Hardin, was with him then and Matney was told that the mine was going to keep him outby that night. While Matney was making belt splices and installing bottom rollers, Hardin told him that work was too dusty. Matney asserted that when wearing the pump he was told to "take care" of it and the mine only wanted him to walk across the faces. Tr. 59. Matney's interpretation of the "take care of the pump" remark was that it was made for the purpose of making sure the dust sample would show compliance, an interpretation supported by his claim that he "was even told on occasions to go to the intake and sit in fresh air." *Id*.

The Court finds Matney's claim about being directed to sit in fresh air to be credible. Matney contended that, when he was being dust sampled, management provided somebody else to perform the rock dusting duties for him or they wouldn't dust. Tr. 60. On that July 21st dust pump test, he was not working downwind of the roof bolting machine, nor did he spread rock dust, nor did they cut bottom. Thus, Matney contended that his work activities when wearing a dust pump were not representative of his dust exposure. Tr. 67.

On July 28, 2022, Matney's exposure to respirable dust was measured at .667, an amount over the allowable limit. Tr. 84. According to Matney, his journal entry for July 28-29 recorded that Hardin was with him that evening when he moved belt, and that for the next night, July 29, Matney cleaned faces, worked on ventilation, and hung cables. *Id.* The dust pump failed that night when he was doing those tasks. Tr. 85.

In further support of his claim that things were different when being dust sampled from times when no sampling was being made, Matney asserted that there were instances when he was not wearing a dust pump and he refused to spread rock dust. His decision to refuse that task was based on how much dust he'd inhaled that night. There were also instances when he requested someone to rock dust, but no one was sent, and he would not rock dust. Matney asserted that there were several such occasions when management told him that he will rock dust. Thus, it was an order for him to rock dust. Matney stated that mine superintendent Shannon Dolin told him that, emphatically. Tr. 60. According to Matney, Dolin "pointed his finger in [his] face and told [him] that [he] would rock dust every night and grabbed his hair and shook his head." Tr. 61. This instance of a command occurred after Matney had been designated as a Part 90 miner.[8] *Id.* The Court credits Matney's account.

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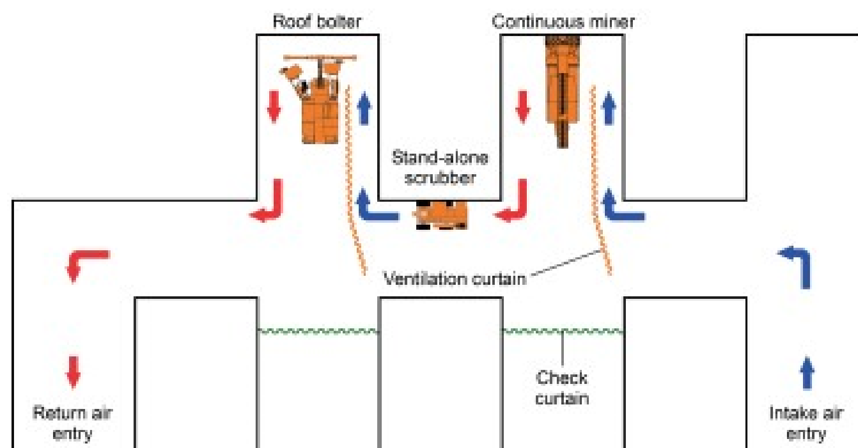
myself as a Part 90 miner." Tr. 199. By protect, he elaborated his purpose was "[t]o show that, if the company is not being compliant with the laws of a Part 90 miner, I have proof of it instead of word-of-mouth…. [he] figure[ed] if [he] could put dates and times down on paper, it's easier than . . . trying to remember, okay, on this date -- it's hard to remember exactly what you did or have done on that date." *Id*. He testified that the journal was his good faith effort to record what occurred and not an attempt to tell only his side of the events. Tr. 199-200. The Court concludes that the journal was not an exercise of fabrication, but rather a good faith attempt to note the events on a given day. Thus, overall, the Court finds that Matney's journal was credible and not a selective recounting.

[8] In a challenge to the completeness of Matney's journal, Matney agreed that some friction between him and Shannon Dolin was left out from it. The friction involved Dolin asking if Matney had rock dusted. Matney told him he had not, and according to Matney, Dolin "blowed off his handle and throwed his little temper tantrum, grabbed his head, and said, 'You will rock dust every night,'

Matney's stance was that, unless he had sufficient help, his job was incompatible with being a Part 90 miner. Tr. 62. This is because he would be downwind of many tasks such as roof bolting, drilling, cutting or trimming bottom, and rock dusting. *Id.* It is helpful to visualize the effect of being downwind:



Laboratory and Field Testing (Figure 2), *in Mobile Dry Scrubber Provides Cleaner Air for Downwind Roof Bolter*, THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, https://www.cdc.gov/niosh/mining/content/dryscrubber.html.

These dust-related obstacles meant that Matney was unable to complete all his tasks, and he asserted that management did not take well to that, inquiring why tasks were not done. Tr. 64. He maintained that this dust exposure problem was frequent, sometimes lasting all night. Tr. 65. Matney stated, and the Court notes that this is undisputed, that upon his return to the move crew foreman position, there were occasions when his crew was short. There was a difference between Matney and the mine management as to what that meant. To Matney, it meant that he had to do dusty jobs. Matney testified that on such occasions he would have to roof bolt, scoop, and flinger dust.[9] Challenging that claim, mine management contended that if things couldn't get done with the crew Matney had, and given his need to avoid excessive dust, then those tasks simply didn't get done. Matney told Shannon Dolin about the problem with the latter advising that the mine was working on the issue. Tr. 80.

Matney's Journal reflects that on August 12th and August 15th, he worked on the section, performing tasks such as cleaning and dusting, loading out the gob, and operating the bolter. *Id.* In contrast, the Journal for August 16th reflects that he wore a PDM [personal dust meter] 'dust

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and pointed his finger at my -- towards my face … And I asked him, I said, 'Are you giving me a direct order to dust?' He walked off and come back and said, 'No, but you have to dust every night.' If I don't have somebody on the section to dust, how am I supposed to dust every night?" Tr. 179. In the Court's assessment of this dispute, Matney's omission from his journal certainly did not help the Respondent's perspective, as his disclosure about the incident reflected underlying irritation between management and Matney.

[9] A 'dust flinger' refers to a machine that dispenses rock dust, not a person literally flinging dust by hand. Tr. 198.

pump,' but did not perform roof bolting that evening. Instead, a 'red hat' [i.e. a novice miner] did the bolting so that Matney could remain in fresh air. Tr. 80-81. The Court finds that this supports Matney's assertion that, when wearing a PDM, it was not business as usual, as accommodations were made for Matney's known and serious health condition.

Respondent's Counsel questioned Matney about his work as the move crew boss during September 2022. Matney agreed that there were three days in that month, September 22nd, 26th, and the 27th, that he was shorthanded or had to do tasks that were dusty. Tr. 150. Matney informed that on September 22nd, his crew consisted of himself, two roof bolters, and a scoop/utility man, but that the scoop man was needed outby. Matney had no idea why the scoop man was needed outby. *Id*. Regarding September 26th and 27th, Matney's crew consisted of two utility men and two roof bolters, but the utility men were taken outby. Tr. 151.

On redirect, speaking to his September 24th - 25th shift, his journal remarks that he had a work order to dust a section and that Chris Holstein advised that his two utility men would be outby at that time and Matney would have to dust the section. Tr. 189. Matney's journal stated that on September 26th maintenance chief Pete Green relayed Holstein's message that Matney had to dust. Tr. 189-190.

With regard to all those three dates, Respondent's Counsel asked Matney if the reason those miners were moved outby was important. Matney did not know why the miners were moved outby. *Id*. Still pressing on that issue, Respondent's Counsel asked if Matney knew if the reason was that a beltline had ripped and had to be replaced. Again, Matney stated he did not recall that. *Id*.

From the Court's perspective, those questions did not aid the Respondent's position, because they support Matney's claim that, despite his Part 90 status, he was shorthanded. That the mine, as suggested by Respondent's Counsel, had *important* matters to address does not excuse the conditions Matney then faced, shorthanded as he was. Though witnesses for the mine later testified that if Matney was unable to have tasks completed, they simply would not get done, the Court finds it difficult to accept that management would have such a cavalier view. This put Matney in an uncomfortable position, virtually a Hobson's choice,[10] as he would either have to accept that tasks would not be done, or he would have to do them himself. The Court's assessment of Matney's character, through his credible testimony, was that he was not built to dismiss tasks.

Similarly, Matney's responses to questions from Respondent's Counsel concerning events during October 2022 support Matney's position. Matney agreed that, as with the September crew issues, there were three days that month, October 13th, 27th, and 31st, when he was shorthanded or had red hats and consequently that he personally had to do tasks that were dusty. Tr. 152. For example, on October 13th, Matney had only an electrician, a greaser, and a Joy representative on his section. His journal noted that everyone else was outby working on violations. Tr. 153. Matney disputed that no work involving cleaning, dusting or roof bolting occurred that night, stating that he might not have done flinger dusting but that he ran a scoop and cleaned. *Id.* He

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[10] It is interesting, at least to the Court, that the origin of the familiar term 'Hobson's choice,' is of 17th century origin, named after Thomas Hobson (1554–1631), a Cambridge carrier who hired out horses, giving the customer the 'choice' of the one nearest the door or none at all. *Hobson's choice*, WIKIPEDIA, (Dec. 6, 2023), https://en.wikipedia.org/wiki/Hobson%27s_choice.

maintained that he did ventilation and cleaning on the 13th. *Id.* The Court credits Matney's account of his work that evening.[11] Matney agreed with Respondent's Counsel that MSHA sampled him for dust on October 24, 2022. Tr. 155.

Matney agreed that for November 2022, there were two days for which he was shorthanded and did tasks that were dusty. Those days were November 1st and 2nd. Tr. 157-158. On November 1st, there were only two roof bolters. Matney was unsure if the utility man was off work or needed outby, though he conceded that his journal would have noted such an absence. *Id.* He also agreed that on November 2nd, he had two red hats to clean and dust, a situation that Respondent's Counsel characterized as "not a lack of people." Tr. 158-159.

Respondent's Counsel then summed up Matney's position that "from the time [he] elected Part 90 as of July 6th or 7th through mid-November, roughly four and a half months, [he] identified eight occasions in [his] journal where [he] purport[ed] to either have been shorthanded or would have had to work in dusty conditions." Tr. 159. Matney also agreed that on some of those occasions the reason for being short-handed could've been employees were absent rather than being pulled off of his crew. *Id.*

On November 15, 2022, Matney's received an order from mine management directing him to stay at home. Tr. 85. According to Matney, this came about because it was time for the mine to conduct the quarterly escapeway walk and, as Matney was the move crew foreman, he had to do that. Tr. 90. The stay-at-home direction arose from Matney's inability to walk the airways out. Tr. 87. The stay-at-home order lasted until March 3, 2023. However, upon returning to work that March he did perform that walk along with Shannon Dolin on March 4, 2023. Tr. 90-91. It was Matney's view that walking the intake escapeway to the outside would be a dusty experience, with the dust created by the miners walking the route. Tr. 94.

Regarding the mine operator's decision to impose a paid leave of absence on Matney for the period of November 15, 2022, through March 3, 2023, an approximate leave of some three and half months, Matney agreed that escape drills are required for all miners and that he informed the mine that he could not perform the drill scheduled for November 2022. Tr. 160.

On direct examination of Respondent's witness, Christopher Holstein, who was the section boss at that time, about the circumstances prompting Matney's leave of absence, Holstein's related that Matney informed him that others would have to do the intake drill and in effect warned that if he had to do it, they would need an ambulance outside waiting for him. Tr. 236-237. The upshot was apparently that Holstein had his third shift fire boss[12] do the task. Tr. 237. Holstein agreed that he was referring to a fire drill and the weekly intake exam. *Id.* As for the intake examination, that is to be done once every seven days, with the purpose being to look for hazards. Agreeing with his Counsel's description, Holstein stated there was a misunderstanding of what was required

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[11] Although Respondent's Counsel asserted that Matney in fact had only two days in October for which he asserted working in dusty conditions, Matney never agreed with that assertion. Tr. 156. To the Court, the claim is beside the point. The protection to be afforded to Part 90 miners is to be free of excessive dust on every shift. Put another way, excessive dust exposure is not waived if it only occurs on a few days during a given month.

[12] A point of clarification, a 'fire boss' is another term for 'outby foreman.' Tr. 263.

by the work list. Tr. 238 and 279. In any event, in a subsequent talk that Holstein had with Shannon about Matney's reference to needing an ambulance, Shannon expressed he was "worried about the guys" as it's the section boss' job to get his crew outside. Tr. 239. While Matney was on his paid leave the mine had Johnny Wriston perform that task with the work crew. *Id.*

While Holstein asserted that all management wanted was to have one of the fire bosses conduct, i.e. 'boss,' the intake, Shannon Dolin's testimony contradicted this, with Dolin stating "[t]hey ended up not doing the fire drill." Tr. 280. Given his remarks, it would seem that in fact, management did want a fire drill, then backed off. Dolin did understand that Matney had conveyed that he would not be able to do such an escapeway drill and that it was based on his medical condition. *Id.*

In further support of the Court's finding that indeed, initially, management did want a fire drill to occur, was this exchange: "So, at that point, what are you -- what duty do you think you have towards Mr. Matney?" Dolin responded,

> Well, it kind of makes you -- it worries you, because, you know, if he's not able to do that exam -- or that walk, then once he expressed that and told us, as managers, like I said, I go to my bosses. And we had a meeting on it and we decided that is putting us in a lot of liability knowing that the man said he couldn't do it and we still sent him in there knowing that he said he couldn't walk the intake out. So they decided, as a group, that we needed to get him evaluated.

Id.

At that point, the group decided that it needed to have Matney take a physical to see if he was capable of doing *a fire drill*. Tr. 280-281. Matney was then told not to return to work, though he would continue receiving his pay. As it turned out, Matney never did have a physical exam before returning from his stay at home with pay suspension. Tr. 314.

When Matney returned to work, Holstein kept Wriston on the section to help Matney. *Id.* In the Court's estimation, Wriston's role was essentially an admission on the part of Rockwell that Matney could not do his job and still be Part 90 compliant. Holstein then agreed with Respondent's Counsel's words that Matney then made the faces and managed the workforce. Tr. 240. He also agreed that, not long after that, Matney left the third shift. *Id*. Once that occurred Holstein had no more supervisory role over Matney. *Id.* Holstein flatly denied that he had a conversation with someone in which he asserted that he wouldn't have given Matney a ride, nor pick him up somewhere. Tr. 240-241.

It is reasonable to conclude that Matney's Part 90 status produced some resentment with management. Matney's journal for May 17th reflects that Chris Holstein, then the mine's shift foreman, made a remark to others when Matney requested a ride out of the mine, allegedly stating that he [Holstein] "[s]hould have left his [Matney's] sick old ass walk out." Tr. 118. While Matney heard about this remark second-hand, the Court finds the claim to be credible. However, the Court does not have to resolve whether Holstein made either of the hostile remarks since, taking the testimony as a whole, it is reasonable to conclude that Rockwell management could not have been pleased with Matney. It's clear the job wasn't working out as management had hoped, and as it ultimately realized, as demonstrated by the Respondent's late-arrived decision to place Matney outside.

Upon the mine's direction that Matney return to work in March 2023, he agreed that he was required to make the escapeway drill. This occurred on March 6, 2023, when he walked the escapeway with Shannon Dolin. Tr. 163. During Matney's absence Johnny Wriston was on Matney's section and when Matney returned to work Wriston remained on the section. *Id.*

When back at work Matney's tasks consisted of making the required checks, doing the fire boss run of the faces and to pre-shift and make any ventilation changes. Tr. 163-164. Further, Matney agreed that at that time Wriston had largely taken over the other duties on the section. These included moving belt and power and cleaning and dusting, though Matney qualified the latter tasks as "if [Wriston] had people available."[13] Tr. 164.

Matney was dust sampled by MSHA on March 13, 2023, with MSHA's Bill Meddings traveling with him that day. No mine representative traveled with them that day. Tr. 165. Later in March, (March 23rd) the mine ran PDM's on Matney. *Id.* Referring to Respondent's Ex. B, a 19-page compilation of Dust Data Cards, page 9 of that exhibit, reflects that the sample was over the maximum dust level, coming in at .745. Matney agreed that the exceedance was because the mine was cutting bottom on that date. Tr. 166. Matney discussed with Bill Hardin, from the mine's safety department, as to the reason for the exceedance. There was a spike in the dust during that shift and the two tried to determine what Matney was doing at the time that occurred. Tr. 167. Further regarding the dust sample exceedance, Bill Hardin advised Matney as to how he should position himself regarding curtain and ventilation control. Tr. 170.

Matney stated that upon returning to work, the mine's first dust sample of him occurred on March 20, 2023. While the dust sample for that day did not exceed the allowable limit, Matney stated that the pump shut off three hours early that day, and therefore the result did not reflect a full-shift exposure. Tr. 96-98. As mentioned, Matney's dust sampling for March 23, 2023, recorded at .745, did exceed the limit, a significant exceedance over the .5 limit. Tr. 99-101. It was Matney's testimony that on March 23rd he still continued to be required to spread rock dust as move crew foreman and was required to do roof bolting and to perform his fire boss runs. Tr. 106.

A square peg in a round hole

In the Court's view, the larger point is that Mr. Matney was again exposed to a dust exposure above the maximum allowable level. The evidence does not show, nor does the Court believe that the mine was purposely exposing Matney to excessive dust levels in any of the instances of exceedances, but rather that the mine was not facing up to the fact that, by continuing to have Matney work as move crew foreman on the non-production shift, it was attempting to fit a square peg in a round hole. Motives aside, the mine was still not achieving the required level of protection for Matney's status as a Part 90 miner. As discussed later, eventually, the mine realized

[13] Respondent's Counsel asked Matney about certain dates in March and April 2023, but the Court considered the following aspects to be inconsequential to this matter. For March 11th, Matney asserted that he was exposed to rock dust from the flinger duster, but he acknowledged that he resolved the issue with Wriston and that the problem did not arise again. Tr. 164. For March 28th and April 3rd, his journal reflects that he operated the flinger duster, but he agreed that his journal did not assert that he was shorthanded on the section on those dates. *Id.*

this when it reassigned Matney to outside work. It is fair to conclude that Matney's discrimination complaint eventually brought about the mine's recognition of the true remedy required.

On April 4, 2023, Matney's job duties changed from foreman to fire boss.[14] Summing up his new arrangement, Matney agreed that his tasks initially were to fire boss the belts, roadways, and the return pumps, and that prior to the mine's corrective action on May 10th, it had removed his duty to check the return pumps. Matney elaborated that Scott Thompson stated that he (i.e. Matney) didn't need to be in the return air course. That left him with the duties of fire bossing the belts and roadways and the weekly airways. Tr. 172.

Following those job duties' change, he was next tested for dust exposure on May 8, 2023. On that date he fire bossed the belts, and roadways, while wearing a company PDM dust pump. At the shift's end the pump read .46 on that occasion. Tr. 109 and Ex.2. The following day, MSHA's Bill Meddings traveled with Matney on his shift. Matney fire bossed the roadways and belts that night. His dust inhalation that evening exceeded the maximum exposure, the result coming in at .65. Tr. 110. Thus, for his May 9th sample, he was over the .5 standard. The mine took corrective action the next day. Tr. 172-173. That exceedance resulted in reducing Matney's fire bossing duties to roadways. This corrective action involved removing his fire boss runs on the belts and also changing the route of travel to fire boss the roadways. The latter involved taking a different travel route in order to minimize dust. Tr. 173. This corrective action is reflected in Respondent's Ex. C. *Id.* With his fire bossing duties removed, Doug Lamb, a shift foreman took over that task. Following that change, Matney wore a dust pump on May 15, 2023, and he fire bossed the roadways during that shift.

May 24, 2023: A significant change occurs for Matney's work duties

A significant change in Matney's duties occurred starting on May 24, 2023, as he then began greasing the stacker belt, checking splices in the 1 belt and fueling rides outside.[15] Tr. 120. By Matney's account, the belt splice checking duty still exposed him to excessive dust. He conceded however that the mine had since been watering the roadways heavily, to reduce dust. Tr. 126. Matney had the same view regarding greasing the stacker,[16] stating that during that task he

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[14] It is noted that MSHA issued citations associated with these dates, but they did not involve dust exceedances. Citation No. 9592733 was issued for the mine not submitting five valid representative dust samples. Tr. 111. Complainant's Ex. 5. Another citation, No. 9591268, was issued for records regarding the length of each shift worked for the Part 90 miner [Matney] not being maintained as required. Tr. 111-112.

[15] Matney remarked that Respondent's Counsel's description of his new work duties left out his work on Saturdays, such as on May 20th, when he did the roadways' on-shift, and the belts and fire run belts. Tr. 174. They ran coal on that day, Matney stated. *Id.*

[16] As its name implies, the stacker moves fresh or raw crushed coal into a pile. Tr. 122. As Matney described it, the stacker "hauls the coal -- it dumps the coal out into the stockpile in the yard where they load coal trucks." *Id.* When greasing it, Matney is beside the stacker belt all the way up to the top. *Id.* During that task he is hit on his head with loose coal and stuff coming off the belt while he is greasing it. Tr. 123. Though he complained about the dust exposure from those tasks, Matney stated that neither Doug Lamb nor Shannon Dolin did anything about it. *Id.* However, he

is hit on his head with loose coal and stuff coming off the belt while he is greasing it. Tr. 123. The stacker task is done once a week and performed completely outside. Fueling up rides is done entirely outside too and the office position is on the surface. Tr. 175.

As for the task of checking a belt for splicing, Matney was assigned to check the No. 1 belt. That belt sticks out of the portal. Tr. 176. This task of checking the belt takes about 30 minutes at most. Per his journal, Matney agreed that being exposed to dust while checking the splices occurred on one occasion, not other times. *Id.* Matney concurred that as of May 10th, the vast majority of his work has been either outside or the mine's office, which is also outside. Tr. 177.

The nature of Matney's duties from Respondent's perspective.

Respondent's first witness, Christopher Holstein, nicknamed 'Oz,' was the section foreman[17] at the time Matney began working on the third shift. Tr. 220. After Holstein was informed that Matney was a Part 90 miner, mine superintendent Shannon Dolin met with Holstein and others[18] in the mine office about having Matney "staying out of the dust" and that "[a]nytime the [flinger] duster starts up, [Matney] should be in the intake." Tr. 225. Thus, Holstein stated that anytime the dust flinger was running, Matney would go to the intake to be in fresh air. *Id*.

According to Holstein, when Matney would advise that he "had to do this or had to do that" Shannon would tell him "[a]bsolutely not," and further that this issue "got to the point that he told [Matney] if he heard of it again, he'd write him [Matney] up." *Id*. Holstein stated that he expected Matney to "[m]ake sure his faces are fire bossed." Tr. 226. He added that Matney had supervisory authority over anyone on the section. *Id.*

Holstein informed that when he worked as a shift foreman, in fact he did pull employees from the move crew to work outby. *Id.* This was for "anything that might not have the mines ready to run the next morning." He agreed with Respondent's Counsel description of these as "bigger tasks that had to be taken care of." *Id*. He described these events as infrequent, "[t]wo, three times a month." Tr. 227. When such events occurred, Holstein described what he expected Matney to do: "he has to be in the face every two hours; [i.e. fire bossing, making his runs]… have [the] day shift ready to run. … I mean, you know, have, you know -- 'cause usually always the bolt men was up there. Have them move the equipment and have it set up in a new cut or, you know, whatever it has to be." *Id.*

In the Court's view, Holstein's testimony demonstrates that the mine would have "bigger tasks" that had to be done. The effect was that Matney's ability to do his tasks would on occasion take a back seat to those bigger tasks. Also undercutting the relaxed tone presented about Matney being unable to perform all his tasks on some nights, Holstein's remark that Matney was to have the "day shift ready to run" put Matney in an impossible position – perform his tasks and be exposed to dust or let them slide. Rockwell was not facing up to the fact that the requirements for Matney's Part 90 status and his move crew foreman position were in conflict.

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conceded that the next time a splicing was required, the day shift did it and he has not had to do a splice since his complaint. *Id.*

[17] The term 'section foreman' is used interchangeably as 'move foreman.' Tr. 254.

[18] The 'others' were not identified by Mr. Holstein.

Holstein maintained that he did not expect Matney to do the other actual tasks and he asserted that his approach with Matney was the same whether he was wearing a dust mask or not. Tr. 227-228. It was Holstein's view that if a miner was pulled off a section, Matney still had other people, such as bolt men, or a utility man, on the section to do dusty tasks. Tr. 228. Yet, in his next remark, when asked what happened if Matney couldn't get a task done, Holstein remarked "He didn't get it done. Multiple times I didn't get it done."

In the Court's view, this was a contradiction with Holstein's earlier remark that Matney had others on the section who could do such tasks. In what seemed to the Court as an odd, and impractical state of affairs for Matney's job, Holstein agreed with his attorney's characterization that it was "fairly regular" that tasks that needed to be done, couldn't be done. *Id.* In fact, Holstein remarked that situation occurred "[s]eventy-five percent of the time." *Id.* Respondent's Counsel then received Holstein's agreement that the mine's 'task list' was "more aspirational." Tr. 229. To the Court, such an arrangement seemed to constitute an odd 'to do' list.

Asked about the night shifts of September 25th-26th and the following night, September 26th-27th, Holstein recalled those occasions. While he confirmed that the mine needed two utility men to perform a big task, putting up a thousand feet of belt and that the task would take all night, his account differed from Matney's. Holstein agreed that rock dusting needed to be done, but that he spoke with Matney about the rock dusting task, telling him that he had two roof bolters to do that and that Matney was not to personally do the dusting. The same situation existed the following night with Holstein taking Matney's utility men from the section.

The Court notes that Holstein agreed that the rock dusting *had* to be done and to that end he had bags of rock dust delivered to Matney's section and further that the belt line work was essential or the mine would not be operational. In the Court's view, apart from determining whether to credit Matney's version or Holstein's, the problem highlights that Matney was ill-suited as the move crew foreman, restricted as he was due to his Black Lung disease. If the roof bolters were diverted from rock dusting, that meant other tasks would not be completed. Roof bolting is not optional, it too must be done for mining to continue. The 'aspirational' view of the tasks to be completed for those on the section can only be taken so far. Both roof bolting and dusting had to be done.

Matters were much the same for October 13, 2022. Holstein did not dispute that Matney's journal referenced that "everyone was working outby on violations, except for Matney, a Joy (mining equipment) representative, and a greaser." Holstein agreed that the mine was addressing violations at that time. Tr. 232. For October 27, 2022, Matney wrote that he moved power with three red hats. Holstein did not dispute Matney's journal about this either, but stated that such work was not particularly dusty. *Id.* Holstein asserted that there would not have been any rock dusting performed that night, "not if you only had three red hats." *Id.*

October 31, 2022 was addressed next. Matney's journal stated that he cleaned and dusted the section with one black hat and one red hat, but this question was of little value because Holstein did not recall that night. Despite that absence of recollection, Holstein agreed that Matney should have been able to clean and rock dust that night with one black hat and one red hat. Tr. 232.

Holstein was then asked about November 1, 2022, a date for which Matney's journal recorded that he cleaned and rock dusted the faces and that there were only two roof bolter

operators on the section with him. Tr. 234. Asked why the utility man was not present, Holstein remarked that he may have had the man outby or he could've been absent. The Court notes that the larger point is that he couldn't recall. *Id*. However, Holstein still maintained that Matney still had two miners bolting and he could've used them "however he need[ed] them." Tr. 235.[19]

It is fair to observe that Holstein agreed with the accuracy of Matney's journal for the dates just mentioned. The other work was in fact being done, subtracting from Matney's available help on the section. The dispute boiled down to whether, as Holstein contended, there was still sufficient help for Matney and, alternatively, whether it mattered to Holstein if tasks could not be completed. The Court finds, crediting Matney, that there was not sufficient help and that it did matter to the mine that tasks were not completed.

Shannon Ray Dolin, the mine superintendent at Gateway, also testified. Dolin learned of Matney's Part 90 status in July 2022. Tr. 270. Respondent's Ex. Tab A, letter from MSHA, informing the mine of Matney's exercise of the option to work in a low dust area. As mentioned, to meet that requirement, the mine conducted engineering samples for the purpose of determining the location on the section with the least amount of dust, with the goal of finding out where the mine would be in compliance. Tr. 272. The mine ran three samples, two outby and one on the section. The sample on the section came back less dusty than the outby sections, and that led the mine to leaving Matney on the section, as the section foreman. *Id*. Matney was shown the sample results.

In line with the testimony of other witnesses for the Respondent, Dolin stated that management had discussions with Matney. As he put it "we did have several meetings with Cecil on his -- how he had to change his culture and mindset of getting things done. Dolin contended that by 'mindset,' he was asserting that foremen tend to think they can do tasks better, so they have a tendency to take over tasks. Tr. 273.

Dolin's description of Matney's duties in that role as the move crew foreman made it sound as if they were very easy to achieve: "[Matney] ha[d] to put his DTIs [dates, times and initials] up. He ha[d]to examine the section every two hours and manage the people, manage the men." Tr. 274. By 'managing the people,' Dolin stated that meant "[Matney] has a list of things that's left for him to try to get done. And he just has to manage the people that he has at that time to get -- try his best to get it done." Tr. 275.

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[19] Continuing with his testimony that was not particularly helpful to the Respondent's case, Holstein was next asked about November 2, 2022, for which Matney's journal recorded, as described by Respondent's Counsel, that the "left return at the No. 3 head flooded and that you [Holstein] and Shannon wanted him to clean and dust the section, plaster stoppings, clean the tail, pull slack on the 450 roof bolter [and that Matney] claim[ed] that he had two roof bolter operators and two red hats." Tr. 235. However, Holstein stated that he didn't recall that there was flooding at the No. 3 that particular night, yet he added "But I mean, sure." *Id.* Despite that lack of recollection, he denied telling Matney to do any of those tasks. *Id.* Holstein asserted that the tasks would just be listed on the work clipboard. Tr. 235-236. As for whom Matney had working for him that night, Holstein stated that Matney said he had two bolt men on the section. As to whether a utility man had been pulled to work outby that night, Holstein also could not recall. Tr. 236.

Dolin stated that Matney "voiced several times that "[he] just can't handle not getting it done [adding that Matney was] used to getting everything done." *Id*. Dolin's emphasis was that Matney "ha[d] to manage the people. And if he don't have the people and if he don't get it done, then he just don't get it done." Tr. 276.

To the Court, the mine's asserted very forgiving approach to work not getting done and Dolin's testimony that work not getting done happened regularly on every shift and further that miners were never reprimanded for not getting things done, is difficult to accept as an accurate depiction of the mine's attitude.

Dolin agreed that people were pulled from the move crew to work outby to deal with things "more pressing than things on the section to get done." However, he asserted that management continued to tell Matney to stay out of the dust. Tr. 277. Dolin maintained that Matney's work was the same, whether or not he was wearing a PDM. *Id.* In describing the instance when Matney was tested for dust exposure by the mine, and Bill Hardin, the mine's safety director, was with him, Dolin asserted that Hardin was there "[t]o train him. Train him where to -- how to do his job and staying out of the dust, how to manage the people." Tr. 278. The Court also finds this assertion as difficult to accept, given the mine's high regard for Matney, that he would need 'training' on how to keep out of the dust.

In support of the Court's skepticism, was Dolin's testimony when asked about Matney's remarks in his journal for November 2, 2022. That entry referred to the left return at 3 head being flooded, and Matney's assertion that Dolin and Holstein wanted him to clean and dust the section, plaster stoppings, clean the tail, and pull slack on the 450-roof bolter. The journal also stated that Matney had only two roof bolters and two red hats that night. Dolin asserted that he did not recall that instance. Tr. 278. Despite the lack of recollection, Dolin expressed that the work Matney described in his journal for that date was not a big task. *Id*. As to whether he, Dolin, personally told Matney to do any of those tasks, again Dolin's memory failed him, stating he "[didn't] recall telling Matney to do it." *Id.*

Upon Matney's return to work in March 2023, his job duties had changed, as the mine decided that Johnny Wriston, who had taken over Matney's work during his absence, would remain on the section. Under this new arrangement, Wriston was to do the 'dead work,' the term Dolin used to mean the "cleaning and dusting and ventilating, the maintenance of the section." Tr. 282. Matney would fire boss the section. *Id*. In March MSHA sampled Matney, but Dolin said he did not know exactly the results. *Id.*

In late March, Matney was tested for dust exposure again, this time by the mine. *Id.* Dolin conceded that one of those samples taken by the mine exceeded the .5 limit.[20] *Id.* That resulted in the mine learning that the overage was from the roof bolter and once again they instituted a corrective action, making sure Matney was not downwind from the bolter and further that the bolter was shut off before he went downwind to date the faces.[21] Tr. 283.

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[20] Dolin stated that the mine did not receive any dust sample compliance violation for March 2023, informing that there have to be two or more exceedances. Tr. 283-284.

[21] The record is unclear whether the Respondent actually meant 2023. The transcript reflects 2022, but as Respondent's Counsel remarked, "Was there another time -- and I think we might be confused as to dates now. I apologize. I just want to refresh your recollection as to referring to a

The Court construes the unified responses from the Respondent's witnesses as expressing their view that the problem with the instances of non-compliance with the dust exposure level was Matney's fault. The Court finds otherwise – the source of the problem with exceedances was the nature of Matney's position. In the Court's view, it simply didn't work – the efforts to contort Matney's duties and locations during the shift were impractical and the realities of performing that job exposed him to the documented dust exceedances.

In questioning by the Court, Dolin repeated that he had many meetings with Matney on the issue of getting his tasks done. In sum, his testimony had two themes: that Matney had to 'manage' his people, implicitly meaning manage his people better. With that, and in the Court's view, contradicting his remark was that "that's what you normally want, to get everything done" on the list, if you "don't get the list done, then you just don't get it done." Tr. 336-337. The Court finds it hard to accept Dolin's assertion that "we got to where we thought we was going to have to reprimand, I guess you would say, as far as writing it down and write him up to make sure he didn't do it." Tr. 336-337. Yet, Dolin asserted that the meetings were initiated by Matney, not by the mine. Tr. 337.

Rockwell makes a major change in Matney's work duties

Dolin was asked about the spring of 2023. He affirmed that Matney then became an outby foreman, also described as a fire boss. Dolin stated that the mine was not required to move him to the new position. He thought the change occurred in April 2023. The offer to the new position as fire boss consisted of fire bossing the belts and roadways and some pumps but not the return pumps. Tr. 285. Matney was then sampled in his new role but again one of the samples was non-compliant, exceeding the .5 limit. Tr. 285-286. The mine then took corrective action by removing Matney from fire bossing the belts. *Id.* Respondent's Ex. C. The mine determined that the belts were the source for Matney coming out of compliance. Tr. 286. Thereafter, Matney fire bossed only the roadways. *Id.* He was then sampled again and this time was below the .5 limit. Tr. 287. MSHA was present during that new sample. The mine did not receive a citation in connection with this event. *Id.*

Dolin described Matney's new March 2023 duties as follows:

> Most of his duties, or all of them, are outside. He does some paperwork outside for Doug Lamb. He fills up the diesel rides when they're sitting outside. And he checks belt splices on No. 1 belt, which is outside. Or it comes outside. He can check it outside. And he greases the stacker belt once a week outside.

Tr. 289. Respondent's Ex. K.

At that point, the only genuine issue in terms of dust exposure, would be associated with checking splices in the No. 1 belt. That task is performed outside. This is done to determine if

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roof bolter corrective action. Was there a corrective action in July of 2022? Tr. 283. Dolin responded "[t]here was one on adjusting curtains." *Id.* Asked if that was in March 2022, Dolin answered it could have been and that he and Scott Thompson undertook the corrective action. *Id.* 2023 makes sense as the correct year.

there are defects with the belt in need of repair, such as a splice. *Id.* Dolin stated that task takes less than five minutes, the time it takes for the belt to make a complete revolution. Tr. 291.

At the request of Respondent's Counsel, the mine conducted an engineering dust sample for the belt check task. Tr. 292. That sample result was below the .5 level. *Id*. and Respondent's Ex. L. Regarding the task of greasing the stacker belt, it is done outside once a week and it takes about an hour to do it. Tr. 293. A dust sample was performed for this task too and it also came back below the .5 level. In addition, MSHA sampled Matney under his new work tasks. This was done on August 25, 2023, and that sample was below the .5 level. Tr. 296. Ex. N at Tab 9, Ex. 0.

The Respondent then called Billy Hardin, a safety technician at the mine. Hardin's testimony was in line with other witnesses for the Respondent in that in their view the burden was on Matney to avoid the dust on his section, stating, "[y]ou know, [Matney] has to assess the situation, look for dust." Tr. 346. He stated that he was 'training' Matney how to stay out of the dust. Yet, while 'training' him, Matney exceeded the dust limit. Tr. 348. The dust sample on Matney for July 28, 2022 exceeded the .5 level.

Based on the entirety of the evidence, the Court finds that the essential problem was the mine's effort to keep Matney in the section though the job really could not be done without exposing Matney to excessive dust. Hardin's various reasons – a belt crew making a splice, the crew performing rock dusting, the process of moving a belt, and Matney passing through some fly pads and curtains that had dust on them[22] – for Matney's exposure to dust demonstrate the unsuitability of keeping him on the section. Tr. 348-353, 357. While additional examples to demonstrate the inappropriateness of having Matney continue to work on the section are not necessary, Hardin testimony about the May 9th dust sample, which sample was above the exposure limit, is revealing of the insolubility of having Matney remain on the section. Though Hardin stated that the mine investigated this, he didn't remember what happened, nor did he know about any corrective action. Tr. 358. Hardin acknowledged that the dust sample for May 9th was above the limit.

Douglas Lamb, the mine's evening shift foreman was the final witness for the Respondent. Tr. 376. He only began working with Matney in March 2023. *Id.* At that time Matney's job was to fire boss and check belts. Tr. 377. Initially, Matney fire bossed everything, meaning roadways, beltlines and pumps. Tr. 377-378. Later, they removed checking the pumps from Matney's tasks. Lamb agreed that one sample was above the limit, at .65. He added that an MSHA inspector was with Matney on that occasion. It was his belief that the inspector had Matney do more than he normally would, expressing "that inspector, he wanted him to go in and do an on-shift on the belts and then they come back out, and then they had to go back in and fire boss." Tr. 379. This, Lamb stated, increased Matney's dust exposure that day. Tr. 380. Nevertheless, Lamb took corrective action, removing fire bossing of the belts and the weekly air flows from Matney's duties. *Id*.

As for the roadway fire bossing, Lamb informed they had Matney "fire boss his way *in* ***and let it clear up****, and then he could come back down the roadways*." *Id*. (emphasis added). The

[22] The last example, simply passing through some fly pads and curtains, exemplifies the error of having Matney continue to work in the section and the 'corrective action' serves to underscore the error with Hardin advising Matney to "watch where you position yourself walking through curtains." Tr. 357.

Court takes note that this is yet another example that Matney's job on the section simply was inconsistent with avoiding dust exceedances.

Referring to the mine's May quarterly samples, Lamb stated that the mine exceeded the .5 limit with an exceedance at .65. *Id.* The 'corrective action' for that was for Matney to only fire boss the roadways. Tr. 381. This was when Wriston came on to do those former tasks of Matney. Thus, after that, Matney's duties became "do[ing] paperwork, fill[ing] up the diesel rides, a weekly greasing of the stacker belt, and then, Lamb's recollection was that a few weeks later, the mine decided that Matney could be outside and check splices on 1 belt." *Id.*

The Court inquired of Matney what his job title has been since May 16, 2023, to which he replied "outby foreman." The Court also asked Matney if it is correct that the only remaining issue with dust exposure since May 2023 now stems from splicing belts, an issue about which Matney stated that the mine had now started watering down the area. Matney essentially agreed that the dust exposure issue for him is now limited to the belts. Tr. 131-132. But, he added that there is some dust exposure when he is on the stacker belt too. Tr. 132. The stacker belt task is performed once a week and is done entirely outside. Tr. 175. The Court tried to have Matney describe the extent of his present dust exposure from those sources, and he responded that it was 20 percent of the workday. Tr. 132. To state the obverse, Matney tacitly agreed that presently his job duties do not expose him to excessive dust for 80% of his workday. Tr. 133.

The Court inquired further about Matney's present work environment, asking if he still had Part 90 issues going forward with his present work duties or whether looking ahead, if his present job duties still present Part 90 issues or if they are now resolved. Tr. 196. Matney responded that he couldn't answer the question because he has not yet been sampled for dust by the company under his new tasks. *Id*. He elaborated that for checking belt splices, fueling up rides and greasing the stacker belt, and when the roads are dusty, without having a dust pump sampling, he couldn't know if those tasks were above the .5 dust limit. Tr. 197. Yet, Matney agreed that those dust concerns constituted about 20% of his day, with 80% not presenting a dust exposure issue, as he is in an office or otherwise outside apart from the dust exposure sources he just mentioned. *Id.* The Respondent's dust testing at the belt splice location and the greasing task evidence that one performing those tasks would not be exposed to dust levels over the maximum. As noted *supra,* the mine conducted an engineering dust sample for the belt check task and for the stacker belt greasing task and both came back below the .5 level. Tr. 292, and Respondent's Ex. L. Neither task requires much time in Matney's current position, with the stacker task involving an hour once a week and the splice check task taking less than five minutes, the time it takes for the belt to make a complete revolution.

ANALYSIS

Subpart B – Dust Standards, Rights of Part 90 Miners; provides:

> After the 20th calendar day following receipt of notification from MSHA that a part 90 miner is employed at the mine, the operator shall *continuously maintain* the average concentration of respirable dust in the mine atmosphere during each shift to which the part 90 miner in the active workings of the mine is exposed, as measured with an approved sampling device and expressed in terms of an equivalent concentration, at or below: (a) 1.0 milligrams of respirable dust per cubic meter of air (mg/m 3). (b) 0.5 mg/m 3 as of August 1, 2016.

30 C.F.R. § 90.100; 79 Fed. Reg. 24989, (2014).

There is no dispute that for the time periods in issue in this matter Cecil Matney was a Part 90 Miner, nor is there a dispute that, on more than one occasion of dust sampling, the sampling revealed exceedances of the maximum dust exposure. As discussed above, the demonstrated exceedances were on July 28, 2022, March 23, 2023, and May 9, 2023.

As noted in *Mullins v Beth-Elkhorn Coal Corp*., 9 FMSHRC 891, 897 (May 1987), ("*Mullins*"),

> [t]he Part 90 transfer option encompasses three basic rights: (1) to be assigned work in "an area of a mine" where the required Part 90 dust concentration levels are continuously maintained (30 C.F.R. §§ 90.3(a), 90.100 & 90.101); (2) in "an existing position" at the same mine on the same shift or shift rotation or, if the miner agrees in writing, in "a different coal mine, a newly-created position or a position on a different shift or shift rotation" (30 C.F.R. § 90.102(a)); and (3) at no less than the regular rate of pay earned by the miner immediately before exercise of the transfer option (30 C.F.R. § 90.103). It is the duty of operators to effectuate these rights as applicable with respect to their Part 90 miners.

Id. at 897.

Mr. Matney had it right when, during cross-examination, he was asked about the MSHA dust standard, correctly expressing that the dust standard for a miner who is not [covered by] Part 90 is 1.50 whereas for one who is under Part 90, it is .50. And that if one is above the .50 level, the operator has "to do a corrective action and they have to remove you from that job or figure out a way to keep you in fresh air, keep you out of the dust." Tr. 181.

And that is the central deficiency on the part of Rockwell – it failed to keep Matney out of the excessive dust. Rockwell's noncompliance with Part 90 vis-à-vis Mr. Matney continued until May 24, 2023.

DISCRIMINATION DECISIONS UNDER THE MINE ACT BASED ON PART 90 CLAIMS[23]

While Part 90 involves particular rights, the analysis of a claim stemming from those rights has been routinely assumed to be no different from any discrimination case under the Mine Act. The Court believes that, at least in this instance, the atypical violation of Mr. Matney's right to be protected from excessive dust does not fit the one-size-fits-all formula presented in the Commission's *Pasula–Robinette* test.

In the Part 90 discrimination case noted above of *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 895-896 (May 1987), the Commission stated:

> The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2797–2800 (October 1980) rev'd on other grounds sub. nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); *Secretary on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817–18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir.1987); *Donovan v. Stafford Construction Co*., 732 F.2d 954, 958–59 (D.C.Cir.1984); *Boich v. FMSHRC*, 719 F.2d 194, 195–96 (6th Cir.1983) (specifically approving the Commission's Pasula–Robinette test).

Id.

In this Matney v. Rockwell matter, the Court examined all the pertinent Commission cases for Part 90. It also reviewed the lone Part 90 decision issued by the United States Courts of Appeals. The Commission has issued 11 decisions involving Part 90. Two of the 11 are related to the D.C. Circuit's reversal of the Commission decision in *Sec'y of Labor ex rel. Bushnell v Cannelton Indust.,* 867 F.2d 1432, (D.C. Cir.1989) ("*Bushnell*") and therefore they are not discussed.

Bushnell involved Secretary's interpretations of 30 C.F.R. § 90.103 and section 101(a) of the Mine Act. The Commission "held that the regulations and the Mine Act protect a miner against pay reductions only upon his transfer to a low-dust work area after exhibiting evidence of

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[23] The Court read and considered the parties' post-hearing briefs and all contentions raised within them. Either directly or implicitly in this decision, such contentions were addressed, including for example, Respondent's assertions regarding the elements of an interference claim. R's Br. at 20-21.

pneumoconiosis (black lung disease), and not upon subsequent transfers for other reasons." *Id*. at 1433. The D.C. Circuit reversed the Commission's holding. While the focus of the case was the rate of pay for a Part 90 miner who is transferred, the Court of Appeals made some important remarks which are useful to this matter, Matney v. Rockwell.

That Court noted that Section 101(a)(7) of the Mine Act, specifically provides:

> Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, **that miner shall be removed from such exposure and reassigned.** Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. *Id*. § 811(a)(7).

Id. at 1433, quoting 30 U.S.C. § 811(a)(7). (emphasis added).

The Court believes that only one of the Commission's Part 90 decisions, *Goff v. Youghiogheny & Ohio Coal Co.,* 8 FMSHRC 1860, (Dec. 1986) ("*Goff*"), is useful to the analysis of the matter at hand. For the sake of completeness, a brief recap of the other Commission Part 90 decisions are footnoted here.[24]

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[24] *Mullins v Beth-Elkhorn Coal*, 9 FMSHRC 891 (May 1987).

The Commission's own introduction for this decision shows that it is of no value to the issues in this matter:

> This proceeding involves a discrimination complaint filed by Jimmy R. Mullins pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The complaint alleges that Mullins' removal from a dispatcher's job pursuant to an arbitration award resolving a seniority grievance violated section 105(c)(1) of the Mine Act by contravening his rights under 30 C.F.R. Part 90 ("Part 90").1 Former Commission Administrative Law Judge Richard C. Steffey *892 found that the removal of Mullins from the dispatcher's job constituted unlawful discrimination, ordered that Mullins be reinstated to that position, and awarded back pay, expenses, and attorney's fees. 7 FMSHRC 1819 (November 1985) (ALJ). … Because we conclude that miners' Part 90 rights do not entitle miners to particular transfer positions, we reverse.

Id.

Perando v. Mettiki Coal Corporation, 10 FMSHRC 491 (April 1988).

Goff involved a discrimination complaint in which the Commission, upon finding that Goff's complaint did state a cause of action, remanded the matter to the judge to determine whether

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This decision is similarly not instructive. There, the miner's work refusal "would not have been protected under the Mine Act. Such an action by Perando would have to be interpreted as a refusal by a miner (not suffering from pneumoconiosis) to report to work unless and until assigned to a dust-free area. Such a right is not granted by the Mine Act. Section 101(a)(7) of the Act, 30 U.S.C. § 811(a)(7), authorizes the Secretary to develop improved mandatory health or safety standards providing that miners whose health has been impaired by exposure to a designated hazard "shall be removed from such exposure and reassigned" and that such transfer shall be without loss of pay. To date, the Secretary has implemented this statutory mandate by providing under 30 C.F.R. Part 90 that a miner who has been determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis shall be afforded the option to transfer without loss of pay to a mine area where the average concentration of respirable dust is at or below 1.0 mg/m3. 30 C.F.R. §§ 90.3, 90.100, & 90.103; See generally *Jimmy R. Mullins v. Beth–Elkhorn Coal Corp*., et al., 9 FMSHRC 891, 896–98 (May 1987). As the Secretary emphasizes in her amicus brief on review, the Department of Labor has not promulgated any similar transfer-pay retention standards applicable to miners with industrial bronchitis, the illness suffered by Perando. Also, even a miner who falls within the protections of Part 90 does not have the right to refuse to work pending transfer to a job in a mine atmosphere totally free of respirable dust. *Gary Goff v. Youghiogheny & Ohio Coal Co*., 8 FMSHRC 1860, 1865 (Dec. 1986). Exposure to some amount of respirable dust is inherent in virtually all underground coal mining. Thus, even if the Secretary had included miners suffering from industrial bronchitis within the scheme of the present Part 90 transfer-pay retention regulations, Perando would not have had a right under those provisions to transfer with pay retention to a less dusty position since her underground work areas at Mettiki were consistently below the required Part 90 respirable dust level of 1.0 mg/m 3. M. Exh. R–2, Tr. 74–77, 100–102 (May 1, 1986). To accord Perando the right asserted in this case would confer upon her greater transfer-pay retention protection than that enjoyed by Part 90 miners, an anomalous result. *Id.* at 495-496.

Canterbury Coal Co., 20 FMSHRC 718 (July 1998)., involving a citation issued by MSHA charging Canterbury with violating 30 C.F.R. § 90.102(a)1 "when it transferred a Part 90 miner without his written consent, to a position on a different shift rotation in a low dust area of the mine," similarly is not useful to this matter. The Commission upheld the administrative law judge's determination that the operator violated the provision by so acting. *Id.* at 723.

Rochester & Pittsburgh Coal Corp., 12 FMSHRC 189 (Feb. 1990), is also inapplicable. There the Commission upheld the administrative law judge's determination that R&P failed "to compensate a Part 90 miner at not less than the regular rate of pay received by that miner immediately before his exercise of the Part 90 option." *Id.* at 193.

the miner was discriminatorily discharged. The judge then found that the miner's discharge was not made in in violation of section 105(c)(1), a determination upheld by the Commission.

Although *Goff* did not shed light on the particular issue in this matter, the underlying *decision*, in which the Commission determined that the miner did state a cause of action, is of value. There, it held that:

> a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based on the miner's being 'the subject of medical evaluations and potential transfer' under 30 C.F.R. Part 90 [as] [those] provisions contain mandatory health standards governing transfer of miners evidencing the development of pneumoconiosis.

7 FMSHRC 1776, 1776-1777 (Nov. 1985).

The Court notes that the Commission, examining the updated discrimination provision under the Mine Act, stated that it "*granted miners broader protection and relief for a wider range of discriminatory actions* ***and was intended by Congress to be interpreted expansively***." *Id.* at 1780-1781. (emphasis added). Further, the Commission observed that "where it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, **the miner shall be moved from such exposure and reassigned**." *Id.* at 1781. (emphasis added).

Based on the decisions cited above, it seems clear that the operative Part 90 provisions apply to Mr. Matney. Indeed, the operator has agreed that Matney is a Part 90 miner. Per the Court of Appeals decision in *Bushnell,* the applicable mandatory standards required that Matney should have been "removed from such exposure and reassigned." *Bushnell* at 1433.

The Commission's decision in *Goff* is completely in line with *Bushnell*, with its statement that "where [as with Matney's condition] it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, **the miner shall be moved from such exposure and reassigned**." *Goff* at 1781. (emphasis added). In applying that requirement, the Commission noted that the Mine Act discrimination provision "*granted miners broader protection and relief for a wider range of discriminatory actions* ***and was intended by Congress to be interpreted expansively***." *Id*. at 1780-1781. (emphasis added).

In the Court's view, a strict application of the Commission's *Pasula–Robinette* test does not work well in this unusual set of facts. Yes, per the first part of that test, Matney certainly engaged in protected activity, but to say that the adverse action – keeping Matney in the section foreman position despite several dust samples showing that he was exposed to levels above the maximum allowed – was motivated by Matney's engaging in the protected activity, would be a stretch. While Rockwell attempted to invent a contorted, and demonstrated to be unworkable, section foreman role for Matney, the Court cannot conclude that its motivation was due to Matney's protected activity.

Instead, Rockwell's motivation was exposed by Rockwell itself. Shannon Dolin, Matney's supervisor, gave Rockwell's motivation away, when he expressed that with Matney's background and experience he was more valuable to the mine in the section position.[25] Tr. 339. To the Court, that explains why the mine did not take the action it eventually did, transferring Matney to the outside – he was more valuable in his move crew foreman position.

ROCKWELL'S ATTEMPT TO LIMIT MATNEY'S COMPLAINT TO THE INITIAL BASIS ASSERTED.

Though Respondent has attempted to make much of the one-issue basis for Matney's first filing, his Discrimination Report, that argument fails. This is because the Commission has long held that a miner is not limited to the initial basis stated in a discrimination complaint.

As stated in *Sec. obo Callahan v. Hubb Corp*., 20 FMSHRC 832, 837 (Aug. 1998)

> Section 105(c)(2) both authorizes the Secretary to bring discrimination complaints under the Mine Act and governs that complaint process. According to the language of section 105(c)(2), the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint to her, and not merely on the initiating complaint itself. *See also Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.,* 19 FMSHRC 1009, 1016-18 (June 1997) (scope of complaint Secretary may pursue before Commission not circumscribed by matters addressed in original complaint filed with her, but by subject matter of investigation conducted by Secretary in response to that complaint). Section 105(c)(2) also clearly states that the hearing held and the order subsequently issued by the Commission are on *the Secretary's complaint and proposed order for relief.* The provision in section 105(c)(2) that a complainant miner "may present additional evidence on his own behalf" is a further indication that *the Secretary's* case may be separate and independent from the complainant's.

Id. at 837.

See also, *Sec. v. Hopkins County Coal*, 38 FMSHRC 1317 (June 2016) at n.15, wherein the Commission noted that:

> if the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

Id. at n. 15.

[25] Dolin's candid remark came with his acknowledging that Matney had asked about whether he could take the dispatcher job. Dolin admitted "we talked about it. But, you know, with Cecil's knowledge and his ability and certified, you know, we tried to utilize him better for the mines and make sure that he was in a safe location." Tr. 339.

Accordingly, Respondent's effort to limit Matney's action to his pay disparity issue fails.

COMPLAINANT MATNEY'S CLAIM THAT HE WAS GIVEN A LESSER RAISE BECAUSE HE WAS A PART 90 MINER

Matney's "Discrimination Report," dated September 13, 2022, addressed one issue only: his assertion that he received a smaller raise than others in the same position because he had declared Part 90 status on June 25, 2022. Complainant's Ex. 3, designated as PINE CD 2022-04. It is undisputed that section foremen received a $5,000 raise and outby foremen received $4,000. The problem arose in the context of what may be described as a conflict or confusion over the raise due Matney.

The testimony is undisputed that Mr. Matney did not receive the appropriate pay raise he was due for his position. Matney was a section foreman, but his raise was the amount for an outby foreman. Tr. 67-68. Thus, he did not receive the same pay amount as the rest of the foremen in his classification.

The Respondent called Michael Gosnell, the general manager of the Rockwell complex on the subject of these raises. Tr. 212. The raises went into effect on August 1st. *Id.* The raises were not equal. For example, the pay for a section foreman was more than an outby foreman.[26] Tr. 213. Gosnell believed that Matney came to the mine as an outby foreman; however the computer showed him as a section foreman. Tr. 214. Later, after Matney told Varney that he did not receive the correct raise, Varney told Gosnell about the problem and Gosnell stated that the pay would need to corrected, if Matney was in fact employed in the role of section foreman. Tr. 215.

Aaron Kent Varney, the regional HR manager for Rockwell, testified about the pay issues in this matter. Varney had Matney listed as an outby foreman, which is the role Matney was listed as having on the mine's staffing sheet when Matney began working at Gateway. Tr. 251. No one advised Varney otherwise about Matney's position description. *Id.* The amount of the raise, which was the initial basis for Matney's complaint in this matter, was to be effective as of August 1, 2022. *Id.* Varney affirmed that the employees' raises varied; however every section foreman or outby foreman got the same dollar amount of a raise. Tr. 252. Matney's raise was at the outby foreman rate, at 2.4%. Subsequently, Matney came to Varney's office about the raise issue, and it was then that he informed Varney that he was a section foreman. Varney advised that his list showed him as an outby foreman. Tr. 254. Varney said it wasn't until that conversation with Matney that he learned he was a Part 90 miner. Subsequent to that conversation, Dolin confirmed that Matney was indeed a move foreman/section foreman. *Id.*

The error was corrected promptly. Tr. 256. In less than a month, Matney's received the full raise he was due. Tr. 141. Though Matney believed that his insufficient raise stemmed from his new status as a Part 90 miner, he had no evidence to support that view, other than it made sense to him, as every other foreman got the full raise. Tr. 142.

However, based on the credible testimony of Varney and Gosnell on this issue, it is clear to the Court that not only was the error quickly corrected but also that it was brought about by a

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[26] As noted earlier, the terms 'outby foreman' and 'fire boss' are used interchangeably. Tr. 263.

misunderstanding of Matney's true position. The Court finds that the error was accidental, without malice, and not brought about by any animus over Matney's Part 90 miner status.

COMPLAINANT MATNEY'S CLAIM THAT THE MINE DEPRIVED HIM OF INCOME FROM HIS WEEKEND WORK.

Part of Matney's damages arise from his claim of the "every other weekend" pay he would often receive. Tr. 86. More particularly, Matney asserts that during the time he was on paid leave absence, from November 15, 2022, through March 3, 2023, he would often work on Saturdays every other weekend, and was paid $400.00 for each such weekend work. Pay stubs support that Matney was indeed paid for extra shifts. See, for example, Ex. 7, November 2022, at stamped page 87.

In his attempt to show that he lost such income during his paid absence, Matney relied upon a letter from Kent Varney, the human resources manager at Rockwell. That letter included the statement "[a]s of today, 9/14/2022, year-to-date pay, out of the above bonuses are retention bonus 5,700 [and the remark that] Mr. Matney is required to work weekends, which are scheduled for every other weekend, but it does depend, and the pay is $400 per shift." Tr. 77-78.

However, to be fair, and for the purpose of limiting the apparent concession that Matney was paid for Saturday work every other weekend, the letter was created essentially as a favor because Matney was applying for a home loan. Varney was directed to Tab 4 from Complainant's exhibit notebook. That exhibit reflects Matney's request for Varney to issue the letter reflected in that exhibit. Matney was purchasing a house and the bank wanted specific information in connection with the loan application. Dated 9/14/2022, the letter, which was for the bank, reflected Matney's salary at that time. Tr. 258. The last paragraph of that letter for the bank states "Mr. Matney is required to work weekends which are scheduled for every other weekend, but it does depend, and the pay is $400 per shift." Tr. 259. This amount referred to "extra shifts" and Varney stated that the mine tries to project two Saturdays every month, but he added that, in fact, sometimes it's more, sometimes less. *Id.* Thus, he maintained that the shifts are not guaranteed, though they usually do happen. *Id.*

Matney confirmed that he did work every other weekend. This was in connection with his role as a certified EMT. On such weekends when he worked, the mine called it an extra shift and he would be paid $400 for that work. Thus, he worked two of the Saturday shifts each month in that capacity, unless the mine was idle. Tr. 78-79. This practice began when he started working for Gateway Eagle. *Id*. Matney acknowledged that there were times he would have a Saturday off. Such days off would be especially true in November and December as well as during January through March. Tr. 160-161.

As Matney expressed it, though paid his full salary during the four months he was told to stay home,[27] he did not believe that he had been made whole because he "did not get [his] extra

[27] Matney agreed that during his leave of absence he was paid everything due him; his regular pay, and all bonuses. Tr. 163. Matney is not an hourly employee. Tr. 314.

shift paid that [he] would have received if [he'd] normally been at work working, …[he contended this amount would be] somewheres between $2400 and $3200." Tr. 127.

While Matney undoubtedly would have worked some, indeterminate number, of those every other weekend times, earning the extra income from that, Counsel for Matney failed to identify the particular weekends when such work, as Matney often performed, was performed by someone else during November 2022 through March 2023. At the hearing the Court directed Counsel for Matney to calculate the sums asserted to be due during this time period. Tr. 130. This did not occur. The Court would also point out that Mr. Matney was a salaried employee and that he received his full compensation during his stay-at-home period. Tr. 377.

Accordingly, because Matney was paid his full salary while on paid leave of absence and because the Saturday work was 'extra' work and not guaranteed to occur every other weekend, by not establishing the specific work that was done by someone else and the specific Saturdays such work occurred, he failed to meet his burden of proof.

ROCKWELL'S ATTEMPT TO LIMIT MATNEY'S COMPLAINT TO THE INITIAL BASIS ASSERTED.

Though Respondent has attempted to make much of the one-issue basis for Matney's first submission, his Discrimination Report, that argument fails. This is because the Commission has long held that a miner is not limited to the initial basis stated in a discrimination complaint.

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Id. at 837

The Court also takes note of *Sec. v. Hopkins County Coal*, 38 FMSHRC 1317 (June 2016) wherein the Commission noted that:

> if the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by

the early and often uninformed statements made by a miner in his charging complaint.

Id. at n.15

Accordingly, the Respondent's attempt to limit Matney's Complaint to the initial basis asserted is rejected.

Conclusions

Based on the foregoing, and the Court's assessment of the credible testimony, the Court finds that Rockwell exposed Complainant Cecil Matney to excessive dust by keeping him in the position of move crew foreman. This violated Part 90. Instead of complying with the Part 90 exposure requirements, Rockwell attempted to contort Matney's position putting him in an impossible position – as a practical matter Matney could not perform his job without being exposed to excessive dust and Rockwell had to know this. Its recalcitrance in properly placing Matney in a Part 90 compliant position was admitted by Respondent's own witness who admitted that Matney's value to the mine was best served by keeping him as the move crew foreman. As noted above, as of **May 24, 2023**, Rockwell finally came into compliance with Part 90 by placing Cecil Matney Jr. in a position which stopped exposing him to excessive dust.

For the many reasons discussed above in support of the Court's findings, and in accordance with Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Court is notifying the Secretary of this decision, sustaining the discrimination complaint brought by miner Cecil Matney pursuant to section 105(c)(3) of the Act, so that the Secretary may file a petition for assessment of a civil penalty with the Commission.

As discussed above, the Court concludes that Complainant Cecil Matney's temporary inadequate raise was a clerical error, unrelated to his Part 90 status. Apart from the brief error relating to the raise due Matney, all aspects of his salary and benefits were paid in full.

Further, for a failure of proof, Matney did not establish that he was entitled to the indefinitely identified Saturday work, which potential work was unrelated to his salary.

William B. Moran

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William B. Moran
Administrative Law Judge

Distribution:

Samuel B. Petsonk, Esq., Petsonk PLLC, 417 East Main Street, Oak Hill, WV 25901 (sam@petsonk.com)

Jonathan R. Ellis, Esq., STEPTOE & JOHNSON PLLC, 707 Virginia Street, East, P.O. Box 1588, Charleston, WV 25326 (jonathan.ellis@steptoe-johnson.com)

Robert S. Wilson, Esq., Office of the Solicitor, Mine Safety and Health Division, 201 12th Street South, Arlington, VA 22202-5450 Wilson.robert.s@dol.gov