FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 22, 2016

GENE ESTELLA, Complainant, v. NEWMONT USA LIMITED, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2016-0031-DM WE-MD-15-17 Mine: Phoenix Mine Mine ID: 26-00550

DECISION AND ORDER

Appearances: Ms. Debra M. Amens, Esq., Amens Law, Ltd., Battle Mountain, NV, for Complainant

Ms. Laura E. Beverage, Esq., Jackson Kelly PLLC, Denver, CO, for Respondent

Ms. Hiliary N. Wilson, Esq., Newmont USA Ltd., Elko, NV, for Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). At issue is the question of whether Complainant Gene Estella ("Estella" or "Complainant") was wrongfully terminated by the Respondent, Newmont USA Limited ("Newmont," or "Respondent") in retaliation for safety complaints made to the Mine Safety and Health Administration ("MSHA").

A hearing was held on Tuesday, April 26 through Thursday, April 28, 2016 in Elko, Nevada and the hearing then resumed and was completed on July 6, 2016. Javier Esquibel, Marcos Soto, and Robert Wells, current or former employees of Newmont, testified on behalf of the Complainant. Complainant Gene Estella, Monica Sampson, and Tanya Holland also testified for the Complainant. Dayne Heese, Respondent's health and safety manager, testified for the operator, as did Steve Blaskovich and John Cole, all managers with Newmont, and Rocky Mitchell, a mine employee relations specialist for management.

For the reasons which follow, the Court finds that Complainant Estella was discriminated against for making such safety complaints and that Newmont had no independent, legitimate, basis for the Complainant's firing.

Findings of Fact

Summary

Complainant Gene Estella, an employee at Newmont USA Ltd.'s Phoenix Mine at its copper/leach processing operation, filed a discrimination complaint against Newmont alleging that he was wrongfully terminated in retaliation for safety complaints made to MSHA. As set forth below, the Court finds that Estella and others made anonymous safety complaints to MSHA, that an MSHA inspection occurred as a result of those complaints, and that several citations were issued in connection with that inspection. Two (2) weeks after the complaint-initiated inspection, Newmont suspended and then fired Estella and two other employees who worked in the copper/leach area, which area was the focus of the safety complaints. At least as to Estella,[1] the Court finds that Estella was fired for making safety complaints, and established a prima facie case of discrimination. Further, Newmont was unable to rebut Estella's case and presented no legitimate independent reason for Complainant's firing.

Complainant's Evidence

Testimony of Javier Esquibel

Javier Esquibel, a current employee with Newmont, was called as a witness for the Complainant. At the time of the events in issue, he worked at the copper/leach operation, ("copper/ leach") but now works at the mine's mill. Tr. 12. At the copper/leach his job title was an "operator." Copper/leach has four crews, designated as A, B, C and D. Over the course of his employment there, Esquibel worked his way up from the tech 1 position. At the time of anonymous safety complaints made to MSHA, which prompted that agency to conduct an investigation in 2015, shortly after the Memorial Day weekend, Esquibel had progressed to a tech 5, although that is still not a supervisory position. Tr. 13-14. When MSHA arrived to conduct its investigation, Esquibel was on the C crew.

Esquibel knows the Complainant, Gene Estella, and they are friends. Tr. 19. When Esquibel began working at Newmont, as a temp, he and Estella were both assigned to the D crew. Later, he was assigned to the C crew, while Estella remained with the D crew. Esquibel had occasion to speak with Estella about safety issues at the mine.

Esquibel expressed that his concerns included,

> the stripping machine, the way they wanted us to lock it out. They wanted us to lock it out on the main panel. A few other ones were working, you know, without -- you know, people working on, doing stuff, without locking it properly. The fire alarm system that they cut the wires on the buzzer.

[1] Fellow copper/leach employee Shane Watson was also terminated by Newmont. While not strictly in front of the Court, because Watson did not file a discrimination complaint after his firing, the circumstances involved with Watson's termination are instructive in demonstrating Newmont's pretextual excuse for his firing.

Tr. 20-21.

Esquibel raised these concerns to his supervisor, who in turn took them to another supervisor, Steve Blaskovich, the superintendent for copper/leach. The response was that they should stop worrying about other crews and worry about their own crew. Tr. 21. Esquibel had similar discussions regarding his safety concerns with other employees besides Estella. Tr. 21. Esquibel informed Estella and Kyle White that he planned to call MSHA regarding these safety concerns, stating that he told them, "I was going to call MSHA, you know, of all these unsafe stuff that was going on, that they wouldn't do nothing about it." Tr. 22. Both Estella & White told Esquibel that they intended to call MSHA too. *Id*.

MSHA appeared at the mine on or about June 2, 2015 for the investigation. Esquibel asserted that the MSHA investigator asked him who had called MSHA. Esquibel did not want to identify who called but the investigator purportedly told him that the mine can't retaliate against the employees. Tr. 24. In response, Esquibel revealed that Estella had called MSHA and that a couple of employees from the C crew had called too. Tr. 24. Esquibel was called to help the investigator "go through the monitors so they could see what was going on, all the unsafe acts that was happening." Tr. 25. Esquibel stated that "numerous complaints" were made to MSHA; they were not solely about the control room. Tr. 25-26. He identified his complaints as "there (sic) were locking -- working on some stuff that wasn't locked out properly. Stripping machine, stuff that was in there that was unsafe. And the biggest one was the fire alarm system that they cut the wires on the buzzer." Tr. 26. This concern was that if there was a fire, but no alarms sounded, employees might not know there was a fire because only a blinking light on the machine would alert them to that hazard. His concern was not simply academic, as Esquibel stated they did have some fires. Tr. 26-27. One occurred in the rectifier. After MSHA arrived, the mine did have some people come and fix the problem. The MSHA cited violations were subsequently posted at the mine. Tr. 26-27.[2]

[2] The citations were admitted into the record. The Court expressed that this testimony would be considered in the context of "setting the stage" for what was going on at the mine. Tr. 31. Esquibel recognized Citation No. 8779858 as one of the posted violations. Issued June 2, 2015, it involved an access gate that was unlocked although that was not one of the matters he called MSHA about. Tr. 28, referencing Ex. P-1. Next was Citation No. 8779859, also issued June 2nd. It involved "Miners [who] were observed entering the moving machine -- machine part area of the stripping machine without locking out and tagging out." Tr. 30, referencing Ex. P 2. Esquibel saw miners doing that and he did call in a complaint to MSHA about this. Next, was Citation No. 8779860, Ex. P 3, also issued June 2, 2015, involving the tank house fire alarm system, which Esquibel identified as another of the safety issues about which he called MSHA. He added that Estella and Kyle [White] told him that they were going to call MSHA about this issue too. Tr. 32. Next was Citation No. 8779862, which was issued on June 3, 2015. This was not one of the safety issues called in by Esquibel. It involved a failure for a number of miners not having received task training. Tr. 33, referencing Ex. P. 4. Considering this context, the Court finds that there is no question but that an anonymous complaint or complaints were made to MSHA, that MSHA investigated the mine as a result of those complaints, and that citations were issued pursuant to its investigation.

On the first day of the MSHA investigation, Esquibel was called up to the copper/leach control room by Jesse Leon. Tr. 37. Leon was running the control room at that time. Tr. 38. Esquibel was called up to assist the MSHA investigator in understanding the video of a month or two earlier and explain what was being shown. Tr. 38. While this was going on, Steve Blaskovich, the mine's copper/leach superintendent, Jack Stull, the MSHA investigator, and other individuals, including Kyle White, Mike Peansnall and Dayne Heese, the safety manager at Newmont's Phoenix mine, came in to the control room at various times.[3]

According to Esquibel, it was while he was assisting in the control room that MSHA's Stull asked him who had called MSHA. Tr. 40. Heese, and Blaskovich, were present, right behind him, when Stull posed the question to him. Tr.41. Esquibel also asserted that throughout the investigation Heese made comments to him such as "[a]re you going to snitch on your crew." Tr. 41. Esquibel added that after MSHA's viewing of video showing violations, the mine terminated that review ability, stating that they took that "away from us, from us being able to go back and see anything that was recorded, you know." Tr. 43. He didn't know who took that action, but reiterated that while they "still have the videocamera system [miners] can't… go back into the computer" to view events from a previous week. Tr. 44 "At least," he added, "we can't, you know." *Id*. That change occurred the very next day. *Id*. Esquibel also related that, while viewing the video, the inspector remarked, "these guys need a lot of training." Tr. 48.

Esquibel stated that he was also present when Jesse Leon raised the issue of the alarm system. Tr. 49-50. According to Esquibel, mine management's Heese and Blaskovich asserted that the alarm was not a safety hazard in any way. At that point Esquibel spoke up, contending that it was a safety issue: "that's when I jumped in and said, 'Yeah, it is. That alarm right there will tell us if -- if there is a fire out in the cellars, it will tell you that there's a fire out there. With the buzzer being cut off, you can't hear nothing.'" Tr. 51. He continued,

> What happened with the buzzer was that it was going off for weeks. The buzzer was just going off. And then we -- we would have to put ear plugs in our -- just to be in the control room because the buzzer was going off. . . . the first day when we came back from our day off, that's when we noticed that the buzzer was off, was cut off, the wires. So we right away notified our supervisor. [An electrician was called and wired it back on but] [t]he next day we came back to work, it was cut off again. . . [it was only] the day that MSHA showed up, that was the day that they started fixing that stuff.

Tr. 51.

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[3] Though counsel in their questioning tended to refer to key players by their first names, the Court employs the last names for them, including Steve Blaskovich, Rocky Mitchell, Dayne Heese and Javier Esquibel.

After the first day of MSHA's inspection, a safety meeting was called in the control room where several members of management were present, including Cole, Blaskovich and Mike Peasnall, Esquibel's supervisor. Tr. 52. Most of the discussion pertained to the complaints which had been made to MSHA. Tr. 53. The subjects included working without properly locking out and the fire alarm defect. *Id*. The following day there were more questions, described by Esquibel as an interrogation. Tr. 54. This occurred in Cole's office with Mitchell and Blaskovich present. Everyone from the crew was questioned in a one-on-one fashion. Tr. 54. Leon joined with Esquibel, because he didn't want to be questioned alone.[4] Tr. 54. Esquibel thought he had revealed to White that he gave the names of those that had called MSHA. Tr. 55.

As noted, with Blaskovich and Mitchell present, Esquibel was questioned in Cole's office about the list of complaints made to MSHA. Esquibel inferred that they had figured he was the source because he had indirectly raised the issue with Blaskovich previously, by telling his immediate supervisor, Mike Peasnall, about it. Tr. 62.

To clear up some ambiguities, the Court asked about the safety complaints to MSHA. Esquibel denied that Mitchell or Cole expressed displeasure at him for making safety complaints during the investigation concerning safety complaints. Tr. 69. Esquibel also stated that he never gave Estella's name to Mitchell or Cole or to any other person with management and did not disclose to them that Estella had called MSHA. *Id*.

On the issue of the inspection on June 2, 2015, when Esquibel was in the control room with Leon, MSHA Inspector Stull, Mr. Blaskovich and Dayne Heese, Esquibel stated that Stull left the control room with Heese. He also stated that Blaskovich left the room. When Stull was in the control room Heese was there the whole time. When Esquibel called MSHA, he did not give his name, as he was scared to do so. Tr. 82-83. However, he stuck with his claim that Stull asked him who made the complaint. Tr. 83-84. Esquibel told Stull, "there were a couple of us on this crew and I believe one guy out of D crew, it was Gene." Esquibel did not know for certain that Gene Estella had made the call, but Estella told him that he was going to call MSHA. Tr. 84. On questioning by the Court, Esquibel stated that when inspector Stull came to the mine he disclosed Estella's name to him and his own, as the people who called MSHA. Tr. 88-89. It was only later, when Esquibel had his meeting with the mine related to people who made complaints to MSHA, that he maintained that he never disclosed Estella's name to mine management people. Tr. 89-90.

The Court finds that Esquibel was a credible witness. It also finds that it is fair to conclude, based on the number of management people involved and the extent of their reactions to the MSHA call, that the mine management was very perturbed over the call to MSHA. In support of this conclusion, the Court notes that the lockout and alarm issues could have been corrected without the interrogations which ensued. The Court finds that Esquibel did disclose who called MSHA, after he was reassured that any disclosure of the callers' identity could be

[4] The mine was also dealing with another problem – the theft of some copper. Tr. 57.

protected if adverse action were to occur. However, this finding is not critical to the decision in this case because all of the complaints were related to the copper/leach, and therefore the list of those who could have called was a small group. The subsequent, very close-in-time actions taken against three of the four members of the D crew made it clear to the Court that management had fingered the source of the calls, a deduction that was not hard to reach.

Testimony of Marco Soto

Marcos Soto also testified for the Complainant.[5] Soto began working at the Newmont Phoenix Project on the copper/leach D crew, under Bob Wells, about three years before the hearing, his employment having ended about a year before his testimony in this matter. Tr. 106. Soto ran the stripping machine, on the same crew as Gene Estella. At that time he lived in Battle Mountain, as did Estella, and they often drove to work together. Tr. 107. Occasionally, Estella and Soto socialized. From their conversations, Soto was aware that Estella was concerned about some safety issues. Tr. 108. Estella was the leadman in the crew, so it was natural that such issues would be discussed. Soto was a tech 4, and Estella, a tech 5, at Newmont. If Wells wasn't present, Estella would be the lead man. Tr. 109. Estella told him that he was considering calling MSHA and later revealed to him that he had called. Tr. 110. The subjects of Estella's call were the alarms and the stripping machine. Soto also had an issue with maintenance people wanting him to continue running the machine while maintenance was being performed. He refused to unlock it and run the machine during such maintenance. The maintenance people tried to force him to do that, and went to Mike Chopp over the dispute. Still, Soto refused and he then went to Wells, who supported his refusal. Tr. 111. Ultimately, Soto prevailed on this safety issue. Soto, during his two years and one month of employment at Newmont, was never written up for disciplinary issues. Tr. 114. Following MSHA's inspection, as a result of a citation, Soto and others received "5023" task training for the stripping machine. Tr. 117. However, a few weeks after MSHA came to inspect, following the anonymous safety complaint which precipitated the inspection, Soto was suspended and soon thereafter fired, along with Estella and Shane Watson. Tr. 114-115.

[5] As part of Complainant's effort to establish that he did call MSHA to make safety complaints, Monica Sampson testified. Tr. 97. The Complainant has dated her mother for the past nine years. Ms. Sampson worked most recently as a laundry folder and, before that, as a housekeeper at a motel. Tr. 98. Mr. Estella asked her how he could make an anonymous phone call and she told him about using the "*67" feature on a cell phone. She added Estella told her that he needed to make an anonymous call to MSHA to report a safety violation. Tr. 100. She let him use a track phone she possessed and, in her presence, he called MSHA. However, she wasn't sure what was being said, as Estella made the call in another room. Tr. 101. He then gave the phone back to her. An unseemly admission, Ms. Sampson stated that she "found" a phone at her former motel job which had been left in a room and that it was a simple track or "flip" phone. She maintained, after asking other housekeepers, that they advised if the phone was less than $30 in value, she need not turn it in to lost and found. Tr. 99, 104. This occurred over the Memorial Day Weekend. Estella later confirmed to her that he made the call to MSHA. Tr. 102.

Soto set forth the circumstances regarding that employment termination. On that early morning Watson was the carpool driver. Watson picked up Soto first at about 4:45 a.m. Watson was a co-worker on Soto's crew. Estella was then picked up. Watson lives in Winnemucca. Soto and Estella live in Battle Mountain. Tr. 120. The men were due at work at 6:00 a.m. They then stopped at the Midway Market to pick up items for lunch. Estella and Soto walked into the market together, but went their separate ways once in inside the store. It is undisputed that Watson remained in his car.

Soto bought chips, soda, and some beer and ice. He purchased the beer to drink at his home after work that evening. Tr. 122. He stated that it was his normal routine to purchase beer the night before. Tr. 122. Soto stated that he did not see what Estella purchased. Tr. 122. When Soto arrived at the register, Estella was walking out of the market. Tr. 123. Soto also saw Heese, a safety supervisor at the mine, entering the store as Estella was exiting. Soto did not normally see Heese at the market. Tr. 123. Heese and Soto exchanged routine greetings. At the checkout line, only Heese and Soto were present, Estella having already exited. Tr. 124. Soto stated that his purchases were plain to see, but Heese said nothing about the beer Soto was purchasing. Tr.125. The checkout person double bagged his beer purchase and Soto left with three bags, the beer, ice and his snacks for work. During the checkout process, Soto stated that he said out loud he needed to buy ice. Tr. 124. After Soto exited the store, he saw Estella looking in the car's trunk for something in his lunch box. Tr. 126. Estella then took his lunch box and went to the car's back seat. Soto then put the beer and ice in his cooler, which was in the car's trunk, and put the other items in his lunch box. Soto did not tell Watson he had beer. Tr. 126. Soto was sure that Estella did not see his purchases. Tr. 127. Soto stated that, when they left the market, Heese was standing outside as they departed. Tr.130.

Soto then informed Watson that he needed to drop off his cooler at his (Soto's) house. Tr. 128.[6] Before doing that, the three went to McDonald's for breakfast, using the drive-thru. By then it was about 5:25 a.m. and they were running late, since they were due for work at 6:00 a.m. Tr. 129. The McDonald's is directly across the street from the market, so Heese would have been able to observe Watson's car driving there. Tr. 130. Work was a 20 to 25 minute drive from the McDonald's. At that point, aware that they were running late, Soto forgot to go to his house to drop off the cooler. Tr. 129.

The three arrived at work at 5:50 a.m., and left Watson's car at the mine's parking lot. When Soto went to the car's trunk to retrieve his lunch, he did see the cooler and beer, but "didn't think too much of it. So [he] just closed the trunk and headed to the [mine's entrance] gate." Tr. 133. As Estella was in the back seat and had his lunch with him, he did not go to the car's trunk. Tr. 133.

They then took a company vehicle to the plant, whereupon Soto changed into his uniform at his locker and went to the control room to eat breakfast and attend the safety

[6] Soto was asked by Respondent's Counsel, "when you got in the car with Shane and Mr. Estella, did you say you needed to drop the cooler with the beer in it at your house?" Tr. 169. But Soto, was clear in his response, replying, "I didn't say beer. I just said, "I need to stop at my house to drop off the cooler." Tr. 169.

meeting. Tr. 134. Soto stated that he never told Estella or Watson that he had brought alcohol to the car. Tr. 134-135. Around 9:00 a.m., Soto went down to his locker to get some quarters for a soda at the vending machine. Heese followed Soto to his locker and asked what he was doing and he explained about the quarters to buy a soda. Heese said nothing but watched Soto the whole time he was at his locker. Tr. 135. Soto then bought a soda and returned to the control room. Watson then joined Soto for their break which they customarily took together.

At that point Mitchell appeared and told Soto he was wanted for questioning in Blaskovich's office. Soto inquired what the matter was about and Mitchell told him there was a suspicion that he was under the influence of alcohol. Tr. 136. Blaskovich, and Mitchell, with Wells also present, asked Soto if he had purchased beer that morning and Soto immediately admitted that he had done so. Asked where it was, he informed that it was in the car. Asked why he brought it to work, he explained it was his intention to leave it at his house, but that they were running late for work and he forgot about the beer. Tr. 137. They also asked if Watson and Estella knew of the beer and he told them they did not know of it. Tr. 138. Mitchell then advised that they were going to check his lunch box and his locker to see if there was anything that should not be there. Tr. 138. They found nothing improper. Tr. 138. Soto was then taken for a drug and alcohol test, the results of which were negative. Tr. 138. He then went with Heese down to the car in order to search it. Soto had never seen the mine search cars before. Tr. 139. Soto was fired five days after the "beer in the car trunk" event.[7] Tr. 139. His fellow car poolers, Estella and Watson were also fired the same day. Tr. 140.

Returning to the events at Watson's car that day, Soto stated that Blaskovich, Heese, Mitchell and a security person were all there at that time but Complainant Estella was not there. Tr. 145-146. Soto had not spoken with Estella since the investigation events started that morning and he first spoke with Watson in connection with the events only when they had convened at the car. Tr. 146. The mine management officials had Watson open the trunk of his car and they had Soto retrieve the cooler. They took photos of the cooler. Then they gave Soto his cooler back, but now empty of the beer. Watson and Soto were then directed to return to the control room and not to do anything. Tr. 146. They returned with Blaskovich. Tr. 146.

Upon arrival at the control room Estella was then present. The three (Soto, Watson and Estella) were told to wait, and advised that they would be questioned for a second time. Tr. 147. This was Soto's first opportunity to speak with Estella about what was going on and he then told Soto that he had been questioned about the matter. Tr. 147. It was only then that Soto informed Estella about what was happening, revealing that he had purchased beer that morning. He told Estella that it had been his intention to drop it off at his (Soto's) house, but that they were running late for work and he had simply forgot about the beer in the trunk. Tr. 147. Soto also disclosed to Estella that Heese had seen him buy the beer and that was "why this was all going on." Tr. 147. Estella, in turn, told Soto that he too had been questioned about the matter. *Id*.

[7] The confrontation over the beer in the car's trunk occurred on June 17th Tr. 144, and Ex. P-6. Exhibit P-6 was also used to note that Soto's termination occurred on June 24th. Tr. 145. Exhibit P-6 was admitted for the limited purpose of establishing those dates.

Not only did Soto admit to the beer, he also admitted that he knew about the mine's policy prohibiting alcohol on the site. His only defense was that he simply forgot about having it in the trunk. Tr. 148. At Soto's second round of questioning, in the presence of Blaskovich, Mitchell and Wells, the same questions were asked of him and he gave the same response – he was running late for work and simply forgot about the alcohol in the trunk. The Court, evaluating Soto's testimony, found his account to be credible also concludes that it does not seem farfetched that such a sequence of events could occur. As such, it finds Soto's account to be plausible, as people can forget.

Following the questioning, Soto was told to "dress out," (i.e. prepare to leave the mine and go home) and he was advised that he was suspended until further notice. Tr. 149. Blaskovich then drove Soto and Estella back to their homes, and Watson drove himself home. Tr. 150.

Following that, on June 23rd Mitchell telephoned Soto, informing him that he was to meet with mine personnel the following morning at the Newmont office in Battle Mountain, Nevada. At that meeting, Soto was questioned for the third time about the beer incident and he repeated the same answers as before. The examiners also asked about Watson's and Estella's knowledge of the beer and again Soto said they did not know. Tr. 151. He was then informed that he was terminated, but also told it was possible that he might be rehired in the future, as the management acknowledged that he was a good worker and noted that he had received numerous safety awards. Tr. 151. Soto did not appeal their decision, as he figured that, since it was his beer, an appeal was pointless. *Id*.

In further testimony,[8] returning to the events of the morning of June 17th, Soto stated that he did not see what Estella purchased at the market that morning. He agreed that the beer, soda and energy drinks are all in the same area of the store in the Midway Market. Tr. 157. He estimated being in the market for five or ten minutes, but could not say how long Estella was in the market, as he only saw him walk out. Tr. 158. Soto repeated that "Gene [Estella] was never at the checkout with me and [Heese]." Tr. 160.

[8] Though the Court views the following as inconsequential to the issues to be resolved, it is noted that during cross-examination, Soto agreed that, following the MSHA inspection of June 2nd, he had to have task training and that he signed papers acknowledging that such training was received. Tr. 153. Although Respondent's counsel asserted that MSHA did not issue a citation for lack of task training on the stripper machine, Soto responded that the mine did receive a citation for lack of training on equipment, but he did not know specifically what type of equipment was involved. In addition, Soto also informed counsel that he had operated the stripping machine before receiving training on it, although he admitted that he was familiar with the machine's operation before receiving the training. Tr. 154. Soto affirmed that he and Estella would usually carpool to work and that Watson would join them periodically. Though not at all in controversy, as a point of fact he agreed that the A crew worked opposite the D crew and the C and B crews worked opposite one another. Tr.156-157.

When asked if he was aware that taking beer on the site was in violation of the company's policy, Soto noted, "Well, it was outside of the mine site, it was in the parking lot." Tr. 162. Ultimately, in response to a question from the Court, Soto agreed it was a violation. *Id*. Further, Soto admitted that there was signage posted in the parking lot prohibiting alcohol and drugs. Tr. 163. When the Court asked Soto why he did not take the beer home first, given that Soto's house was only a mile from the convenience store, Soto answered that he "forgot about it. I forgot about the beer since we were running late. I just got it in my head that I don't want to be late and I just forgot about it." Tr. 163.

The Court inquired further, trying to understand how Soto could forget about the beer so quickly: "But you just placed it in the car, you put the ice there. And somehow, in the time after you put the ice and the beer in together, you forgot that you had the beer, even though you are just a mile away?" Tr. 164. Soto stood by his statement that he had forgot about the beer, adding that they weren't running late when they next went to McDonald's, but after that stop they were running late. Tr. 165. Soto reiterated that he did not think about the beer in the trunk again until they arrived at the mine site. Tr. 165. As noted above, the Court finds this account plausible.

Soto agreed during cross-examination that R's Ex. 11 is a document that he had to sign when he was hired and that page 64 of the document provides, "Newmont strictly prohibits the following conduct anytime an employee is on company premises, work sites, parking lots, exploration sites, et cetera, including in company vehicles as well as private vehicles on company property or work site location, whether on duty or not on duty." Tr. 167. Thus, he agreed that the handbook specifically prohibits alcohol in a car in an employee parking lot. Tr. 167. Soto signed this agreement. Tr. 167-68, referencing Ex. R 11(the employee handbook) and Ex. R 11A. Soto admitted from the start that the beer was his, while, to the disappointment and consternation of Newmont, simultaneously absolving the others in the car from knowledge of the beer. That Soto signed an agreement acknowledging that alcohol is prohibited on Newmont's mine is of little pertinence to the issues at hand.

Soto did agree that he was aware that violating any of the rules in the handbook can result in discipline, including sanctions other than being fired. Tr. 173. Further, he agreed that he was fired for violating the drug and alcohol policy. *Id*. But the policy itself does not pronounce which infractions will result in firing; it provides: "Failure [to so comply] may subject you to corrective action up to and including termination of employment." Tr. 173-74 and Ex. R 11 at 2.1.1. The Court also pointed out that among the 28 listed sample reasons for termination, possessing alcohol is not listed. Tr. 174. Further, the Court noted that the exhibit does not establish that violations of any of the 28 examples mandates termination, rather it provides that failure to abide by them "*may* subject [an employee] to corrective action *up to and including* termination of employment." R's Ex. 11 at 2.1.1, Tr. 174 (emphasis added).

Accordingly, the Court expressed at the hearing that the Policy itself presents a problem for Newmont because it does not assert that violation of its drug or alcohol rule *will* result in firing. Tr. 174. Thus the Policy clearly anticipates that discipline less than firing may be imposed for drug or alcohol violations. Particularly here, both the circumstances and the degree of the violation are disproportionate to the punishment meted out. The Court considered all of

the attendant circumstances, below, in determining that the beer in the trunk incident afforded Newmont an excuse to take retribution against miners for calling MSHA with safety complaints.[9]

Testimony of Robert Wells

Robert "Bob" Wells testified. Wells is a mill shift foreman for Newmont at Phoenix, and has worked there for 18 years. Tr. 176. Wells is part of management. Tr. 179. Wells oversaw a crew of four employees working in the copper/leach area. As described earlier, there were four such crews for the copper leach operation, designated as A, B, C, and D. Tr. 178. Estella had worked for Wells at other mines and had known Estella for 18 years. Tr. 176. Estella worked in the control room as a tech 5 on Wells' crew at the time he was fired. In addition to Estella, the others on Wells' crew were Jeremy Tingey, Shane Watson, and Marcos Soto. Tr. 186. One can move up to a tech 6 in that job, which is a semi-supervisory position, as one fills in for the supervisors. Tr. 178. Despite being a tech 5, not a tech 6, Wells had Estella fill in for him on occasion and therefore he was performing tech 6 work at times. Wells also had Estella train new people. Tr. 178. Estella, Wells stated, was a good employee. Tr. 179. Exhibit P 7 is one of Estella's evaluations; this one being through December 2014. Tr. 180. Respondent voiced it had no objection to any of Estella's performance appraisals. Tr. 181. Other performance evaluations told the same story: Estella was a good employee. "Gene works well in all phases of the job, including the months filling in for myself while doing the control room operator job as well as keeping the crew on track and helping them to learn new tasks." Tr. 182, referencing Ex. P 8, Ex. P 9, and Ex. P 10. In summary, Wells considered Estella to be a very good employee, and he agreed that Estella brought safety issues to him. Tr. 188-89.

As for Estella's assertion that he called MSHA, Wells stated that he was not aware that such a call had been made. Tr. 190. When the MSHA investigator arrived at the mine, Wells was not at the mine, as it was his day off. Tr. 190. When he returned to work, there was casual discussion that MSHA had been at the mine, but Wells was not officially involved in those discussions. Tr. 191. After the MSHA investigation, Wells' crew had some additional training. On the day that three members of his crew were fired, Wells was present only for the first round of questioning. Tr. 192. The first member interviewed was Soto, followed by Watson. This occurred in Blaskovich's office. Wells works directly for Blaskovich and Mitchell. Wells involvement was limited, as he was there only as a listener. Wells' account of Soto's answers to the questions was consistent with the others who testified. Wells stated that Soto was asked if he brought beer to the mine that morning and he admitted to doing so. Tr. 194. When asked where the beer was, Soto informed that it was in the trunk of the car and that the car was in the parking lot. *Id.*

Wells did not think that they asked if Shane or Estella knew about the beer because Marcos told them, "I bought it and I brought it. The other guys had nothing to do with it." *Id.* Wells was sure that Marcos took sole responsibility. He offered no excuse, such as any claim that it was not on mine property. He informed that the beer was in the trunk of the car. Tr. 195.

[9] The Court is, in no way, passing judgment on the appropriate discipline to be imposed in these circumstances — that authority lies with Newmont.

When Watson was then interviewed, Wells' role was again that of a listener. Tr. 195. Watson was asked if he knew that [Soto] had bought beer and he told them he did not know that. Tr. 196. Watson told them the car with the beer was his car. Gene Estella was also interviewed and he too was asked if he knew about [Soto's] beer. He stated he did not know about the beer. Tr. 196. They asked where he was sitting in the car and he informed that he was in the back seat. Tr. 197. He also stated that he went into the store with Soto, but that he did not see what Soto was buying. Tr. 197. Once all three had been interviewed, they were taken down for a drug and alcohol test. Tr. 197. Wells was told to "go through the fridge and the cupboards and the trash cans to look for any beer cans . . . [for] [e]vidence or whatever," but Wells found nothing. Tr. 198.

Later, Wells was called back in for the second round of questioning. This occurred not long after the first round. Except for Soto, the others were called back in for more questioning. Tr. 199. According to Wells, the second round of questioning occurred before the employees were sent down for drug and alcohol testing. *Id*. The Court inquired about the new phase of questioning: "The second round, was it like the first round, they brought them in one at a time? Or were all three of them there for the second round at the same time?" Wells informed that the same procedure was employed; each employee was questioned separately, one at a time. Tr. 200. As noted, for the second round, Wells again was there strictly as an observer. Tr. 200-01.

During the second interrogation, Estella was asked again if he knew that Soto had brought beer. Wells stated, "[Estella] said -- I think he said, 'Yes, now that [Sotto] told me, I -- "I know." Tr. 203, 213. To be clear, Estella stated that Sotto had told him about the beer *after* the first round of questioning, so that it was only then that he became aware of it at the time of the second questioning. Tr. 204. According to Wells, the questioners challenged Estella's account, stating that he was right next to Sotto and therefore had to have known about the beer. However, Estella told his examiners that he was ahead of Sotto at the store checkout line. *Id*.

After the second questioning, the employees were taken down for urine and alcohol testing. Tr. 206. Neither Mitchell nor Blaskovich ever asked Wells for his view on what action should be taken against the three. Tr. 207. Wells considered it unusual that they did not seek his viewpoint. Wells' recollection was that he did express whether termination was appropriate before the first interviews and he told them that they were all really good employees. Tr. 208. However, before he uttered that view, Mitchell said words to the effect of "[w]ho are we going to fire first?" *Id*. Wells also stated that to the best of his recollection, he had never 'written them up' for anything negative. That was modest, because in fact his write-ups involved positive things they had done. Tr. 208-209.

Directed to the employee handbook at page 12, and the 28 or so examples of misconduct listed there, Wells, after reviewing that list, saw none that applied to Estella. Tr. 211. Wells was never informed of the reason for the employees' dismissals; instead he was told only of the conclusion that "after the investigation was done, that the findings were they were terminating all three." Tr. 212.

When further directed to item 16 from the employee handbook, providing, "[k]nowingly giving false or incomplete information which would affect the performance of your duties, other employees, or the course of an investigation [concerning] . . . Newmont operations," Wells couldn't state if that applied to Estella, as he was not at the store and therefore could not comment about the events. Tr. 212. Although neither Mitchell nor Blaskovich told Wells that Estella gave false information, after the questioning sessions, they stated to him that it was their belief that Estella was lying as to whether he knew there was beer in the car. Tr. 213.

Wells was also asked about the "Corrective Action Procedures" from the employee handbook at section 2.3. Tr. 214. Asked if the procedure applied was typical, Wells first stated, in so many words, that his involvement in such matters had been minimal. *Id*. However, he was then directed to read from that section of the handbook's provision that the disciplinary "actions include the following: recorded verbal warning, written warning, final warning, and termination." Tr. 215. He then agreed that this was the procedure the he would normally use. *Id*. In this instance he had no idea who determined that termination was warranted. Tr. 215-216. Continuing with the handbook's provision, Wells then read from section 2.3.3 which provides that "[t]he level of corrective action for any violation, including attendance, will depend on all of the circumstances involved, including the severity of the misconduct, willfulness, history of corrective action, and any other considerations." Tr. 217. As noted, Wells was never asked for his thoughts about the severity of the matter.

Wells did offer to Mitchell and Blaskovich for their consideration, "that all of them never missed a day, never called in, and that the only time they were -- had any paperwork at all, it was good paperwork." Tr. 218. In reaction, Mitchell and Blaskovich acknowledged to Wells that "it's never happened before -- or that they know of, so they would have to call other mine sites so they can be consistent." *Id*. However, he was never advised if that transpired or what was learned. *Id*. Instead, he was told to make arrangements for employees to do overtime, in order to compensate for the three who were suspended. *Id*. Wells was not involved with any of the employees' appeals. Tr. 219. The Court then asked if Wells, with his 19 years with Newmont if he ever could "recall any incident similar to that where an employee was fired for having alcohol -- no test, no positive test -- but alcohol in a vehicle, no consumption . . . where some other employees were fired for something similar to what happened here?" Tr. 221. Wells answered, "No." *Id*. The Court considered all of the matters raised during the cross-examination of Wells.[10]

[10] The Court did not consider much of the cross-examination of Wells to be significant to the issues to be decided. The information derived from it is recounted here only for the sake of completeness and to show that the Court considered the testimony and then decided that it was not significant. That cross-examination involved the following: When Wells was asked during cross-examination if he was surprised to learn that Estella had called MSHA over a safety complaint, the Court interjected, asking the witness if he knew that such calls were made on a hotline to protect the person from being identified and that at times the caller remains anonymous even to MSHA. Tr. 248-49. The Court then pressed further, asking the witness if it was equally plausible that, because of the hotline system's design, Estella could have called the number 10 times and he never would have learned of such calls. Wells agreed. Tr. 249. Counsel for Respondent pressed the point, however, that Wells did not believe that his

Testimony of Complainant Gene Estella

The Complainant, Gene Estella, testified. He had been employed by Newmont for 11 years, at three different sites. At the Phoenix mine he worked for nine years, with two and a half of those at the copper leach operation. Tr. 275. Estella stated that he had a good relationship with Wells and Wells' supervisor, Blaskovich. Estella similarly had a good relationship with James Polanco, Blaskovich's predecessor. Tr. 276. Estella was the control room operator in the copper leach area, in the role of a tech 5. Whenever he saw a safety issue, he would correct it himself or inform his supervisor of the problem. Tr. 277-78.

In the spring of 2015, Estella informed Wells of safety concerns he had with his crew. Tr. 280. Wells was responsive, at least for concerns that he could address. Design changes, for example, were outside of Wells' authority. Tr. 280. In that same spring, Estella also stated that he had safety issues, not with his crew, but rather with the actions of the other crews. Tr. 282.

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performance as Estella's supervisor would ever give Estella a reason to make such a call. (i.e. that Wells was unresponsive to Estella's safety concerns and therefor would have a need to bypass him and call MSHA.) Similarly, Wells expressed his opinion that Blaskovich was responsive to safety concerns, though he didn't work there for very long. Tr. 250. However when the Court inquired further, Wells' answer was more nuanced about Blaskovich's reaction to safety issues, stating there were times when he did not accede to a safety concern. Wells agreed with the Court's summary of his view of Blaskovich and his addressing safety issues that "there were times in your interaction with him when he was responsive, but if I understand your testimony there were some other times when he didn't agree and, therefore, didn't act upon your issues?" Tr. 251. Wells agreed that the mine has a "continuous improvement process" and agreed that suggestions for such improvements had been made using that process. *Id*. As to the June 17 incident with the alcohol in the car investigation, Wells agreed that alcohol is strictly prohibited and that it so states in the handbook. Tr. 252. Further he agreed that the drug and alcohol policy is reviewed annually with the miners. Tr. 253. Wells also agreed it was his understanding that "the information that had been provided by Mr. Heese about what had happened that morning at the Midway Market." *Id*. In a similar reaction, the Court ultimately considered much of the subject matter on re-direct not to be especially valuable. It too is recounted here as a matter of completeness: On redirect, Wells was asked about his relationship with Mike Peasnall, who was a supervisor on the C crew. Peasnall stopped being the supervisor of that crew a few months after the June beer issue. Tr. 260. Estella's attorney asked some questions about the fire pump issue, and Wells explained "We've had some kick on for no reason. We've had some that leak constantly. We've had the jockey pump, which is a pump that maintains pressure on the line where it would not shut -- it would run and stop running and stop running instead of just maintain pressure because there was probably a leak somewhere. We've had them locked out for various reasons during different pumps or sometimes all of them." Estella's attorney then asked, "So when they are locked out what is the fire suppression system that is available to the operation?" Wells responded, "There isn't," and that nothing occurs, although at one time they did have a water truck come over. Tr. 267. This was stopped, because water would not be effective to deal with that type of fire. Tr. 268. Wells never heard directly from anyone that a miner had called MSHA; all his information about that subject was secondhand. Tr. 271.

In particular, he cited his concern about "[a]ccess to the stripping machine while it was running. The fire alarm system and the pumps was concern of mine also, and other crews." *Id*. The audible alarm problem was that pumps were supposed to run if there was a fire. *Id*.

Estella stated that he shared his safety concerns with other employees during that spring of 2015, and that a plan was made with Javier Esquibel and Marcos Soto to call MSHA. Tr. 283-84. Kyle White had similar safety concerns, but Estella spoke "very little" with him. Tr. 284. Estella stated that he told both Esquibel and Soto that he was going to call MSHA, a decision he made around Memorial Day 2015. *Id*. Estella stated that, in fact, he did make one call to MSHA. *Id*. His call to MSHA was about 30 minutes long. Tr. 285. His complaint encompassed the audible alarm and the pumps, as they are linked together, and the lack of training and the stripping machine lock out and procedure. *Id*. He made the call anonymously to the MSHA hotline on a phone he borrowed, from Monica Simpson. Tr. 297. As noted, Ms. Simpson is his girlfriend's daughter. Tr. 285. He used that method in order to avoid being linked to his own phone. Tr. 286. Estella expressed his concern about the risks in calling MSHA with both Esquibel and Soto. *Id*. Later, though not right after he called MSHA, Estella revealed to Esquibel that he had made the call. Tr. 287. Esquibel works on the C crew. *Id*. Estella also informed Soto that he had called MSHA. Tr. 289. This occurred on the day before they went back to work after the Memorial Day Holiday. *Id*.

Upon Estella's return to work, he learned that MSHA had been at the mine on June 2nd and 3rd. *Id*. Estella asserted that his complaints to MSHA were covered by the subsequently issued MSHA citations. Tr. 290; Plaintiff's Ex. 2. That matter pertained to entering the moving machine parts area of the stripper machine without de-energizing it and not locking and tagging. *Id*. Estella affirmed to the Court that was one of his complaints made to MSHA and that he made that complaint to MSHA prior to the citation being issued. Tr. 290-91. Similarly, Plaintiff's Ex. 3, another citation, encompasses another complaint he made to MSHA during his hotline call. Tr. 291. That one related to the fire system, with the functional alarm disconnected inside the control room and a fire pump not functioning. *Id*.

Estella agreed that the MSHA citation went further as it involved more than the audible alarm, as it included the fire pump too. Tr. 292. Estella affirmed that Esquibel also called the MSHA hotline and later told Estella about that, but not until a week or two after MSHA appeared at the mine to conduct the inspection. *Id*. Plaintiff's Exhibit 4, Estella affirmed, is another citation issued to the mine, and it too pertains to a specific complaint he made to MSHA during his call. This one involved miners not being task trained in the tank house. Tr. 293.

When Estella was suspended, on the 17th, it was the last day of the rotation. At that time he was working on the day shift. Tr. 294. Estella carpooled with Soto and Watson that day, with the latter being the driver. Watson picked up Estella around 5:00 a.m. The group then traveled to the Midway Market, which was a custom for them. Tr. 296. Soto and Estella entered the market, while Watson stayed with his vehicle. *Id*. Estella purchased a burrito and then a drink from a display near the checkout counter. He did not see Soto at that time, and he paid for his purchase and left the store. Tr. 297. He did see that Soto and Heese were heading towards the checkout when he left the store. Tr. 297-98. Estella proceeded to Watson's car and Watson opened the car's trunk for him. Tr. 298. At the trunk, Estella put his items in his

lunchbox. Unable to find his gate badge card, because it was dark, he brought his lunch box to the car's back seat, entering on the passenger's side, and then made use of the car's dome light to continue searching for his badge. Tr. 299. At that time, Soto was leaving the store. Estella did not see what Soto had bought; he only noted that Soto had white bags. Tr. 300. As he was entering the back seat of Watson's car, Estella observed Heese leaving the market. However, there was no communication between Heese and Estella. Tr. 301.

The group then proceeded to McDonald's. Tr. 301. Though a visit to McDonald's for breakfast was not part of their routine, Soto was treating that day. *Id*. They used the drive-thru. From there, the trio went to Newmont's Phoenix mine, a trip that takes about 20 minutes. Tr. 303. They were on time, but close to being late. *Id*. Estella then left the car and went to the gate to clock in. He was the first of the group to enter. On that day Estella was working in the control room. Tr. 305. After changing into their work gear in the locker rooms, he went to the control room. The D crew assembled for a safety meeting and Wells was present for that as well. Tr. 306. Estella did not see Watson or Sotto after that meeting until they had come to the control room after the car had been searched. *Id*. The next event after that was Newmont performed a lunchbox search in the control room. Tr. 307. Mitchell then told Estella that the issue was "suspicion of alcohol." *Id.* Estella testified that he did not know what Mitchell was talking about. *Id*. Estella's lunchbox, which was right there in the control room, was searched but no alcohol was found. *Id*. They then conducted a locker search, with Mitchell still presiding in the searches. Again, Newmont found nothing. Tr. 308. Following that, they proceeded to Blaskovich's office. In attendance were Estella, Wells, Mitchell and Blaskovich. They didn't announce the purpose of the meeting; they simply started asking him questions. *Id*.

The questions posed to Estella were whether he knew that Marcos had brought beer to work and what kind of car Watson drove. *Id*. Estella replied that he didn't know that Marcos had brought beer and he only knew that Watson's car was white. *Id*. Estella could not recall if the examiners advised him about the incident at the Midway Market or Heese's presence at the market that morning. Tr. 309. Estella was then led for a drug and alcohol test in the company of Heese and a security guard. The results of that test were negative. *Id*. Following that, Estella was then taken to the control room by Wells and he began to perform his job operating the control room. Tr. 310.

Estella next saw Watson and Soto after they returned from Watson's car in the parking lot. Soto and Watson told him that management had searched the car. They also then told him what was going on, namely that Soto had brought beer in a cooler and forgot to drop it off at home before heading to work. Tr. 310. Estella had heard Sotto mention his cooler earlier but he didn't "put it together" until Soto told him of the beer. Tr. 310-11. Estella knew that alcohol and drugs were not allowed on the property and that it was a fireable offense. Tr. 311-12. He knew this as a matter of common sense – if one "show[s] up drunk, you're going to get fired." Tr. 312. However, he did not know of anyone who had been terminated for drug and alcohol use at the mine. *Id.*

After he was in the control room with Watson and Sotto, Estella was then again called back into Blaskovich's office. Tr. 313. Those present with him were the same group as before: Blaskovich, Wells, and Mitchell. *Id*. They asked Estella if he would like to change his story.

Estella said "yes." *Id*. But the *change* to his story is more accurately described as an *updating*, as he told them, "that Marcos Soto informed me that he had alcohol in the vehicle." Tr. 313-14. The group specifically asked Estella if he had seen the beer and he informed them, "No." Tr. 314.

The Court then stepped in, asking: "When was the first point in time when you became aware that Marcos [Soto] had beer in Watson's vehicle?" Estella responded, "When they came up from the car search in the control room." Tr. 314. The Court inquired further, "Is it your testimony that prior to that point in time you had no knowledge that there was beer in that vehicle?" Estella answered, credibly in the Court's assessment, "Correct." *Id*. Soto was the person who initially informed Estella of this in the control room. Tr. 315.

Due to its importance, the Court decided to delve further on this issue, asking, "When he informed you of that was that *after* your first interview with people about this incident?" Tr. 315 (emphasis added). Estella responded, "Yes." *Id*. The Court probed further, asking, "So you had one interview with the people, you say you know nothing about alcohol; is that right?" *Id*. Estella affirmed, "Correct." *Id*. The Court continued, "Then . . . you meet with [Watson and Soto] . . . [i]n the control room?" *Id*. Again, Estella affirmed that was correct. *Id*. The Court then asked whether, "It's at that point in time that Marcos [Soto] tells you he had beer in the vehicle?" and again, Estella affirmed, "Yes." Tr. 315. To be sure of his testimony on this point, the Court asked, "And that's the first point you knew of it?" *Id*. Again, Estella answered "yes." *Id*. Continuing, the Court asked, "You had no clue -- It's your testimony under oath that you had no clue there was beer in that vehicle until that moment in time?" Tr. 315-16. Again, Estella responded, "Yes." Tr. 316. The Court determined that Estella's testimony was truthful in his responses to these particulars.

Newmont's Phoenix Mine questioners asked Estella if he would have said something to Soto if he had known about the beer, and Estella responded that he would have said something. Tr. 316. Not insignificantly, Estella then brought up a pertinent point asking, "why didn't Dayne Heese say something to him when he was in there with him?" *Id*. The response, in Estella's view, offered no good reason: "They didn't really give me a good response on that. We kind of -- after that we kind of got arguing." *Id*. The meeting then became "a little contentious," with Estella "kind of getting upset." Tr. 317.

Estella stated that there was no recording of the meeting, although he believed that someone from management was taking notes. The second meeting lasted about ten minutes. Tr. 318. Following its conclusion, he was told that he was suspended until further notice. He then went to the lunchroom and waited there, alone, for about 15 minutes. After that, Soto and Watson entered the lunchroom. Tr. 317-19. Blaskovich then drove Estella and Sotto home. Tr. 319. They were advised that Newmont would be in contact with them. There was no contact from June 17th until the 23rd, and a meeting ensued on June 24th. On the 24th, Estella met with Mitchell and Blaskovich at a Newmont building in town. Tr. 320-21. Estella was told at that meeting that he was terminated, with the reason given as, "off the job behavior that adversely affected the company." Tr. 321. Estella appealed that determination, seeking reinstatement. During that meeting he was not asked again about his knowledge of the beer. This was the first time he was given a reason for his firing. Tr. 322. Concerning his appeal,

Estella was advised that he would have a meeting with John Cole and that occurred some 14 to 16 days after the meeting announcing his firing. Tr. 323. Mitchell was also at that subsequent appeal meeting. Oddly, Cole asked Estella to tell him about the events, as he didn't know much about what happened. Tr. 324. Estella repeated the events, reiterating that he had not seen the beer. When the meeting ended, Cole advised that he would get back with Estella. *Id*.

During the time between his suspension and his meeting with Cole, Estella filed for unemployment benefits. He was denied those unemployment benefits, and he then appealed that determination. Exhibit P 20 is a decision regarding unemployment, a letter to Estella, dated July 21, 2015. Tr. 327. Exhibit P 20 reflects that Estella was discharged for off duty behavior which adversely affected his employer. Tr. 328. Thus, the Court notes that Estella's testimony regarding the reason Newmont gave for his termination and the unemployment letter are in concert as to Newmont's first claimed basis for his firing. *See* Tr. 320-21. The Court finds that Estella's testimony is the more credible basis for Newmont's initial, professed, justification.

Subsequently, Cole advised Estella that he was upholding the original determination. Tr. 329. Estella informed that he would be appealing that determination, which involved a meeting with the mine manager, Ms. Cecile Thaxter. Tr. 330. While awaiting the appeal with Thaxter, Estella's appeal before the unemployment division was continuing. Upon meeting with Thaxter, Estella continued to seek reinstatement. Tr. 331. At his meeting with Thaxter, Mitchell stated that he was being terminated for not being truthful in an investigation. Tr. 332. This was the first time that basis, a lack of truthfulness, was asserted by Newmont. *Id*. Estella questioned Mitchell about the other reason that had been asserted, the beer on premises, and Mitchell stated that was *not* the reason. Estella then presented Mitchell with the unemployment division letter stating that *was* the reason. Tr. 333. That is, Estella presented to Newmont the reason that Newmont gave to the unemployment division for his termination. *Id*. Subsequently, Estella was able to have his unemployment benefits reinstated. Tr. 339.

Upon cross-examination, Estella agreed that he was aware of the company policy regarding alcohol, including that alcohol was not allowed at the company's parking lot. Tr. 341. Estella agreed that during his appeal process he never asserted that he was being wrongfully terminated because he made a safety complaint to MSHA and Newmont knew about such complaint. Tr. 342. In the Court's view, that proves nothing – it does not diminish the merits of Estella's claim as that was hardly the setting for him to raise such matters. He was, after all, seeking to be re-employed by Newmont. Further, as explained *infra*, Newmont's actions towards Estella made no sense other than to demonstrate that its termination stemmed from Estella's safety complaints, and that it seized upon the beer incident to exact punishment for making them.

In further questioning about the incident at the market, Estella acknowledged that the Midway market is a small store. Tr. 345. Estella reasserted that he did not notice that Soto was carrying a bag of ice. *Id*. He agreed that he did see Heese and Soto at the checkout line as he was exiting the store. Tr. 346. Estella also reasserted that he did not see that Soto had beer on the checkout belt. *Id*. Estella stated that, as he was entering Watson's car, he saw Heese exit the market. Tr. 347. Estella did express that, in his opinion, it was Heese's responsibility to say something about the beer while at the market.

As noted, on June 25, 2015 the Nevada Department of Employment was advised that Estella was discharged for off-duty behavior. Tr. 322, Ex. P 19. [11] Thereafter, on July 8, 2015, Newmont asserted that Estella's discharge was attributable to being "involuntarily separated for unacceptable job conduct – knowingly gave false or incomplete information during the course of an investigation." Ex. P 19 and Tr. 350-51. However, in the Employment Department's July 21, 2015, the decision denying benefits again reflects that Estella was discharged for off-duty behavior which adversely affected his employer. These exhibits were offered to show that Newmont changed the reason for his discharge. Tr. 353. Acting on his own, and without the assistance of legal counsel, Estella appealed the initial denial of unemployment benefits. *Id.*[12]

Respondent's Counsel then asked Estella about Ex. P 15.[13] That exhibit is the statement made by Estella in his attempt to obtain unemployment benefits. Estella stated that the letter was typed by his girlfriend. He had written out his unemployment statement and she typed it, but Estella stated that he believed it accurately recounts what he stated. Tr. 357. The exhibit can be viewed as problematic for Estella, but the Court's reaction is that it must focus on the Mine Act discrimination complaint, not the remarks he made in seeking unemployment benefits. In this regard it must be noted that Respondent's Counsel wanted to have unemployment matters both ways, seeking to invoke such matters when helpful and to distance those decisions when disadvantageous.

Estella, directed to Exhibits R-5 and P-15,[14] agreed that he stated "I admitted to hearing Marcos ask if we could stop by his house to drop off the cooler with beer in it[.]" Tr. 358. Estella then stated that he made that admission during *the second meeting* with his employer on June 17, 2015. Tr. 358. Estella was unsure but believed that he filed his discrimination complaint with MSHA around July 24, 2015. Tr. 359. Estella affirmed that he specifically discussed the pump situation, meaning the control panel, in his complaint to MSHA. Tr. 360. Shown Ex. P 3, Estella stated that in his complaint to MSHA he talked specifically about a fire pump malfunctioning. He also brought up the issues of wires being cut on a fire alarm and task training. His call to MSHA included the stripper machine and the lack of task training for that for the younger employees. Tr. 362. He also brought up lock out procedures as an issue. Estella did feel that those on his crew, the D crew, were adequately trained. Tr. 363. As an example of his awareness of the inadequate training for some of the younger employees on the

[11] Only Pages 1 and 2 from P 19 were admitted at that time; those pages also include a reference to Ex. 4 and Ex. 5 on bottom right corner, but those numbers do not relate to this decision and the exhibit remains identified as Ex. 19.

[12] When Estella made his statement to the employment division, he was not represented by legal counsel. Nor did Estella's attorney handle any of his employment appeal before that division. Tr. 404. R's Ex. 5.

[13] Estella recognized the document, but believed that, unlike Exhibit 15, the version of the document that he submitted had his signature on it. Estella was then shown Ex. R 5, which is the same as P15, except that the latter does have Estella's signature on it.

[14] As has already been noted, these are essentially the same document.

other crews, Estella cited learning of this when those other crew members worked overtime and how his crew would straighten them out, explaining how to do things correctly. Tr. 364. Estella affirmed that if Wells was unavailable, he would fill in for him as the shift relief foreman. *Id*.

Estella was then shown Ex. R 11, the Newmont employee handbook. Tr. 366. He admitted receipt of the handbook when he was hired. Ex. R 8 is Estella's acknowledgement of receiving the handbook, dated April 29, 2012. Tr. 368. Estella stated that he had a good relationship with Wells, Blaskovich, and had no problems with Mr. Cole. As for Cecile Thaxter, he stated that he didn't really know her. Tr. 370.

Estella stated that he informed Soto before Memorial Day, 2015 that he intended to call MSHA. Tr. 370. Shown Respondent's Ex. R 1, Estella stated that the first two pages are the discrimination report papers he completed when he filed his complaint with MSHA, dated July 24, 2015. He stated that he waited to file his complaint with MSHA until July 24, 2015 because he first wanted to exhaust his appeals within Newmont's appeal process. Tr. 372. The Court notes that it accepts this assertion as it makes sense in the totality of the events here. First and foremost Estella wanted his job back. A good employee of long-standing at the Phoenix Mine, Estella believed that the real reason he was terminated was because he called MSHA. Tr. 373. The Court agrees and so finds. Estella also believed that his character has been damaged within the mining industry because he is now known to have called MSHA. The Court would agree that, as a practical matter, calling MSHA with safety or health complaints is likely not to be applauded by the mining industry in general; it is effectively a scarlet letter for those miners who are so identified. Indeed, Thaxter admitted that Newmont was not thrilled by the complaint having been lodged and it would be naïve to think that its only irritation would be that there were safety issues without regard to the source that brought them to light. Tr. 903-906.

In his Complaint filing with MSHA, Estella listed Dayne Heese first and then Mitchell, Cole, Blaskovich, and Thaxter for the discriminatory action against him, although he could not name any specific discriminatory action taken by them when he filed his claim. Tr. 374. This is not surprising, given the circumstances, that the Complainant or any complainant would know such information. Inherently, at that stage the best a complainant can do is name likely suspects. Estella confirmed for the Court that those individuals were listed because they were part of Newmont's management. Tr. 375. Estella was then shown Exhibit R-2, which is the letter from MSHA denying his discrimination claim. Tr. 376. Of course, an MSHA denial of a discrimination claim is only that – it carries no other import, or silent suggestion, that the complaint is without merit. MSHA's conclusion is that there is insufficient information to meet the preponderance of evidence standard and nothing more. MSHA can get it wrong however, as occurred here, a fact Congress recognized by including the provision for a miner to proceed on his/her own with a claim.

Exhibit R 3 is Estella's appeal to the Commission of the denial of his claim, dated October 5, 2015. The appeal was drafted by Estella's attorney, and the Court would note that there is nothing unseemly about that. This is part of the attorney's role in representing the client. That appeal letter stated: "I'm certain that they have recognized that the reason given for

my termination is only an excuse, but I feel that their final decision is based on wanting to send a message to current employees that if you utilize MSHA's complaint reporting process you will no longer have a job at the mine." Tr. 378-79; Ex. R 3. Estella agreed with the assertion by Respondent's counsel that "[i]n [his] appeals process not once did [he] raise the issue that [he] believe[d] that [he] [was] being discriminated against or defamed because [he] had called MSHA." Tr. 379. The Court wanted the record to be clear that, regarding the questions posed to Estella about not raising the issue of his termination based on Newmont wanting to send a message to its employees for those who might contemplate calling MSHA, his failure to make that claim was in the context of appealing his termination within the *Newmont's* appeal process. *Id*. The point is that one would hardly make such a claim before one's employer when seeking to have that employer grant reinstatement.

Estella was then shown Ex. R6, which is the August 4, 2015 interview he had with MSHA investigator Kyle Jackson. Tr. 380. Estella did express a worry for Wells, fearing that if there was any perceived link between him and Wells, it would be a problem for Wells. As Estella put it, "he will bear the wrath of it and it was my - " [Estella's answer was interrupted by Respondent's attorney, asking the basis for his claim that Wells would bear the wrath of Newmont.] Tr. 382. Estella then continued, "Just you don't want to be linked with calling MSHA. You want to keep it as quiet as you can." *Id*. This theme of Estella has been mentioned earlier in this decision. The Court does not believe Estella's perspective is irrational.[15]

Turning to Newmont's code of conduct, in further cross-examination, Estella agreed that it is his responsibility as an employee of Newmont to abide by that code. Tr. 383. He also agreed that he had observed the mine property signage, per Exhibit R 16, prohibiting alcohol, drugs or firearms at the site. Tr. 384. Estella, it will be recalled, was not terminated for any alcohol, drug or firearm violation. Estella also agreed that during his second meeting on June 17th, he told Mitchell, Blaskovich and Wells that he was "old school," meaning that he was not a tattletale. Tr. 385. The Court inquired about Estella's education level and he informed that he finished high school and went to community college for auto mechanics but did not finish that program. Tr. 387.

The Court also inquired why it was that Estella never asserted to Newmont that they were firing him because he made a safety complaint. He responded, "You know, I don't know. I thought if I could appeal it that I would get reinstated." He explained further, "I was just because of the -- because of why they told me they fired me is what I was going after." Tr. 388-89. Asked when he first came to believe that the real reason he was fired was for making a safety complaint, Estella stated "After, what is his name, [Esquibel] expressed to me that he mentioned my name." *Id*.

[15] Estella was then asked about Esquibel's testimony that he provided Estella's name to the MSHA inspector. Tr. 382. Estella agreed that Wells continues to work at Newmont and that nothing bad employment-wise has occurred against him. Tr. 383. The point of this question, obviously, is that Esquibel has not been terminated. Of course, no infraction has been made by Esquibel. In addition, this case is about *Estella's* discrimination complaint.

Also, in answer to the Court's inquiry, Esquibel stated that the first time he was told that he was fired for knowingly giving false or incomplete information was when he had his interview with Mitchell and Thaxter. Tr. 390. The Court then asked Estella about Ex. R 5, directing his attention to middle paragraph of the second page of that exhibit and, noting that it was a document that he signed, noted, "It says I admitted to hearing Marcos ask if we could stop by his house to drop off the cooler with beer in it. They thanked me for being honest and then informed me that I was suspended until further notice." Tr. 392. The Court expressed that passage sounded like Estella admitted that he did know about the beer in the cooler. Estella agreed that it sounded like that but explained that he didn't word his answer very well. Given that, the Court then asked of Estella just what was "the truth of the situation." *Id.* Estella explained, that he "didn't admit to the cooler full of beer. I admitted -- Well, he [Soto] told me previously when we were in the control room what was in the cooler and then I told them that he told me that he did have a cooler in the beer or beer in the cooler." *Id*.

The Court expressed to Estella that the apparent conflict was a troublesome part of his case. Estella reiterated that the letter with the troublesome language was typed by his girlfriend. The Court pursued this line of questioning with a last inquiry,

> What is the truth of the matter, Mr. Estella? Did you admit to hearing -- did you admit to Newmont, did you admit to Newmont hearing that Marcos [Soto] asked if all of you could stop by his house to drop off the cooler with beer in it, did you admit that to Newmont?"

Tr. 393.

Estella responded, "No." *Id*. Thus, Estella maintained that the words expressed there were not correct. *Id*. Further, he repeated that he never made such an admission to Newmont. *Id*. The Court finds that, notwithstanding the language used in the letter (Ex. R 5) that within its four corners the letter contradicts itself on this question and therefore is equivocal on the issue, and perhaps more importantly, the Court finds that Estella's testimony on the issue was credible – he only admitted to knowledge of the alcohol *after* the first interrogation, when Soto disclosed his violative behavior about the beer to him.

On redirect by Attorney Amens, Estella affirmed that he had made a general complaint about training. Tr. 396. He also complained to MSHA on its hotline about the stripping machine. *Id*. He stated that when he filed his complaint with MSHA, per Ex. R 1, he did not have legal counsel. Estella read from his statement to MSHA investigator Jackson (Ex. R 6) that he was wrongfully terminated for being revealed as an employee that contacted MSHA. Tr. 398. His interview with Jackson was after he had been fired by Newmont. *Id*. Estella did not type that claim; it was prepared by MSHA. Tr. 399. In one of his responses to the MSHA investigator, Estella named Dayne Heese as one of the persons that heard Estella's name mentioned in the control room. Tr. 400. Estella reaffirmed, and the Court finds credible, that he waited to file his discrimination complaint because his primary interest was in being reemployed by Newmont. The Court construes this approach to speak well of the Complainant, as he was foregoing a discrimination complaint in the hope of being reemployed. Also, as noted in this decision, Newmont's actions against Estella, so out of proportion to the mine's claimed

offense of Estella being initially untruthful, supports the Court's conclusion about the driving force behind its action against complainant. Tr. 402.

On continued redirect, in attempting to address Estella's conflicting remark in his letter to the employment division that he admitted to hearing Soto state that he needed to drop off the beer, Estella reaffirmed that he never admitted to Newmont that he knew of the beer in the car. Tr. 407. Estella explained that the sentence in his unemployment statement was inaccurate, and he attributed it to Marcos [Soto] and his girlfriend all being present with him, when his girlfriend typed the statement. Estella's girlfriend typed up both his and Soto's unemployment claims. Tr. 410. Both were typed at the same time. Tr. 413-14. As noted, the Court finds, in the context of the entire letter, and considering the record in its entirety, that Estella's assertion is credible.[16]

Thus the Court finds that it is understandable that Estella's letter could reflect a lack of articulateness,[17] in that Estella did learn of Soto's admission about the beer, *but that such knowledge was acquired after* Newmont's inquisition began, between the first and second questioning. Estella himself made this clear, stating, "I told them that I did know what was in the cooler *after* I talked to Marcos [Soto] in the control room." Tr. 407. (emphasis added).

Continuing with this issue of Estella's statement to the unemployment division, the Court noted that it would be helpful to see Estella's girlfriend's letter that she typed for Estella. Complainant's Counsel states that letter was provided to the Respondent. This was identified as P 6. Tr. 412. Again, Estella backed away from his statement in that document, asserting that it is inaccurate with the claim within it that he "admitted to hearing Marcos ask if we could stop by his house to drop off the cooler with beer in it. They thanked me for being honest and then informed me that I was suspended until further notice." Estella affirmed that statement is inaccurate. Tr. 416. In addition, Estella asserted that he made it clear during the Newmont questioning that he only learned of the beer when he and Marcos were in the control room after the first round of questioning.

On re-cross examination, Respondent's Counsel revisited Estella's claim that he didn't bring up his safety complaints to MSHA when before Newmont because he was afraid of the repercussions. His concern was not limited to Newmont's reaction, as he believed that any mining operation would not view him favorably, if he were known as one who called MSHA. The Court then commented,

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[16] The Court reaches the same conclusion regarding the sentence in Ex. R 5 stating the Newmont thanked him for being honest. Tr. 407. Estella's "honesty" was qualified in that his honesty was intact in both rounds of questioning, the difference being that by the second round he had new information, as provided by Soto after the first questioning.

[17] Even Blaskovich testified that he wasn't so sure that "articulate" would describe Estella. Tr. 622. This has relevance to the conflicting assertions made by Estella in his unemployment claim and his discrimination claim. Nor could he say that Estella was quick to understand new procedures, but rather he understood and would pick things up. Thus, he agreed it would take Estella a little while for him to fully understand new procedures. Tr. 622-23.

> In context my understanding of his testimony was that he was saying that if he were to disclose he called the MSHA hotline and that became known in the mining community that he was the type of guy that would call the MSHA hotline, he viewed that as being not helpful to his future job opportunities, and I think that's a reasonable conclusion for one to reach.

Tr. 419-20.

Estella's belief about that company reaction was based upon his entire experience with his mining community acquaintances – if one is branded as an MSHA caller, "your mining career is done." Tr. 420. Estella reaffirmed that he heard Esquibel say that MSHA investigator Jack Stull asserted to Esquibel that Estella would be protected. Tr. 421. While Estella agreed that his annual training informs that one can contact MSHA without fear of retaliation, he responded "Yes, they *say* you can." Tr. 422 (emphasis added). The Court would comment that, clearly, Estella did not buy into that claim, which the Court views as reasonable.[18]

Respondent's Evidence

Testimony of Dayne Heese

The Complainant then rested and Respondent called its first witness, Dayne Heese. Tr. 426. Heese is employed at Newmont's Phoenix mine. His title is "[s]enior manager of health, safety and loss prevention." Tr. 427, 546. His work at the mine began around September 2012. Five people report to him; Jeneca Fitzgerald, Josh Wiley, Kerry Tuckett, Deb Teskey, and Jade Austin. Tr. 428.

Mr. Heese has about 40 years of mining experience. He described his educational background as follows:

> I have got a high school education. I've got lots of college classes that I've taken, training classes, certification, lots of certifications in loss control management. I went through the ILCI program, the auditing programming. That's the International Loss Control Institute. It's now DMV. . . . I'm an EMT. I still hold my EMT license.

Tr. 431

Asked whether "the [mine's] health and safety group over which [he was] the manager have (sic) responsibility for administering the drug and alcohol program?" Heese answered, "That's correct." Tr. 432. Heese answered that he was aware of, and familiar with, Newmont's rules concerning drugs and alcohol on the mine property. He added,

[18] As the Court remarked at hearing, it views Estella's claim as encompassing his consideration of whether he could continue working in the mining community, close-knit as it is, if he became known as a worker who is likely to call MSHA. Tr. 424.

> Well, on two different fronts. So they are not allowed on the mining property at least through the 30 CFR by MSHA. They are not allowed on property by company policy through the employee handbook. *We* reemphasize it every year at the annual refresher, during new hire training, any time there are changes to the drug and alcohol policy or the program *we* reeducate everybody on it and there are signs on the parking lot. There used to be signs out on the access road as well, but *we* have them as you're coming into the employee parking lot.

Tr. 432-433. (emphasis added).

It was brought up by counsel for the Respondent that Mr. Heese is an ordained minister, asking, "Are you an ordained minister?" He responded, "I am." Tr. 433. Minister Heese has served as the senior pastor of a congregation in Battle Mountain since 2000.[19] Tr. 433. Heese stated that it was correct that he has had "a lot of jobs in the mining industry relating to health and safety" and that it required him "to fairly regularly interface with MSHA inspectors."[20] *Id*.

Focusing upon May and June 2015, Heese was asked about his participation with MSHA. He answered,

> Well, they usually come right into the building and they usually stop by my office and let me know that they are there for a regular inspection or sometimes they do the walk and talks and they just stop by to, you know, bring up some safety alerts or things of that nature or they will come in with a hazard complaint, but they usually stop and talk to me and then if I have one of my employees available then they will go with them from there.[21]

Tr. 434.

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[19] Heese has been a minister since October 2000. He did not attend any divinity school. Self-study is the basis for his title. Tr. 547. He explained that "the title minister was bestowed "through our church by my senior pastor, previous senior pastor and the church board, and [he] also had to go through a process with Calvary Chapel Association." Tr. 548.

[20] Heese stated that, prior to the 2015 incident, the last time the mine had more than the usual two inspections per year was in 2012. Tr. 531. Further, the last time he had dealt with a hazard complaint was in 2008. Therefore it is fair to observe that these events have been rare for Heese. Tr. 532.

[21] Heese admitted that, as senior manager of health and safety, he would be immediately informed of an MSHA hotline complaint and that he would be very much involved if MSHA is coming to the mine for a 103(g) inspection. *In fact, he would be the mine's lead person* for such an inspection. Tr. 550. Consistent with that, Heese admitted that he was involved as the lead person when Inspector Stull came to the mine and also when Inspector Jackson came to the mine regarding the discrimination complaint. Tr. 551.

Heese informed that he knows about and has participated in about perhaps eight or nine hazard complaints. In all that time he has never heard an MSHA inspector ask an employee who made a hazard complaint. Tr. 435. Addressing events related to this action, he was asked about the MSHA inspection on June 2, 2015, and he responded that inspector Jack Stull was at the Phoenix Mine on that date for a hazard complaint. *Id*. He elaborated that the inspector "came in, right into my office, said he had a hazard complaint, briefly showed me what it was about a -- about a stripping machine, said where is this stripping machine. So we went for a walk and headed for copper leach." *Id*.

Responding to the question whether the inspector showed him information ahead of the physical inspection with a summary of the complaints, Heese stated, "He showed it to me, just one sheet, and it had a couple of line items on it. The first one was the stripping machine and that's when we headed straight for the stripping machine at copper leach." Tr. 435-36. The inspector and Heese went alone to the stripping machine and then met Kyle White, the machine operator at that time. The inspector looked at access points around the stripping machine. The inspector inquired whether the operator knew of people accessing that area without locking it out. The operator advised that he did not know of that practice. Tr. 437.

The group then noticed some gates that weren't signed and locked. Observing this, Heese then had the stripping machine cathodes shut down until everything was signed and correctly addressed. Tr. 437-38. He admitted that some signage was down on a gate. That sign stated that fall protection was required beyond that point and that the machine had to be locked out before accessing. Tr. 438. The party then went to the control room, where Jesse Leon was the operator for that day. Shown Ex. R 24, the crew schedule for May and June, Heese advised that on the day of the inspection, the C crew, Mike Peasnall's crew, was working. Tr. 439. The inspector then inquired if Leon ever saw anyone accessing the stripping machine without locking it out. Leon affirmed that did happen and he went to video footage to prove that. Leon was looking at the video to show the B crew failing to lock out. Tr. 442. Javier Esquibel, a member of the C crew, then entered the control room. Esquibel asked Leon if he could run the video machine, as he was more efficient at that task. Esquibel then found within the video footage of an employee going over the handrail so that the inspector could observe that improper practice. Tr. 443. Esquibel then continued to go through the video to show other things that the crew was doing improperly. Blaskovich then entered the control room. They continued to look at video, with Heese present nearly, but not all, of that time. Tr. 444. Heese recalled that just before he left for a moment, Mike Peasnall, the shift supervisor for the C crew, came into the control room. The inspector inquired of those present if, when they observed the issues shown on the video tape, they brought those matters to their supervisor. They advised they did not do that. Tr. 445. Peasnall stated that no one had ever brought those issues to him and, if they had, he would have taken immediate action. *Id*.

Heese was then asked, "[d]uring the course of the time you were in the control room with Javier Esquibel that day did [he] hear Jack Stull ask Javier [Esquibel] who made the complaints - that led to the hazard complaint?" Heese responded, "No." Tr. 446. Yet, when the question was raised again as to the claim that Esquibel told inspector Stull who called in the MSHA complaint, Heese responded later, "I don't know. I'm not aware of that." Tr. 519. Heese stated that at no time did he speak with Esquibel while he was in the control room. Tr. 447. However,

when asked how long he was in the control room with Esquibel, he answered, "It seemed like quite a while." *Id*. Respondent's counsel asked how many hours were involved, suggesting two, three or four hours. Among the choices offered, Heese picked two hours for his answer. Heese agreed that all of that time was while Esquibel was looking for instances of B crew misconduct. *Id*.

Heese was then asked about the MSHA enforcement actions that were issued as a result of the hazard complaint inspection. Shown Complainant's Ex. 1, the safe access violation issued by inspector Stull, Heese stated that violation was issued "[p]rimarily because … the signs that we found that weren't posted and then because of the observation that we saw on camera on May 24th, the video evidence." Tr. 449. Complainant's Ex. 2, was likewise issued because of the things observed on the video tape. Heese agreed that Esquibel was able to show events on May 9th and May 24th, regarding the violative actions. *Id*. Complainant's Ex. 3 involved the issue with the fire alarm. For that one, Heese stated that the complaint was that the wires had been cut to the fire alarm system. Tr. 450. Heese downplayed the violation, "not all the wires were cut. The wires were cut just to the warning buzzer, the audible alarm and that was for a system failure, not a fire alarm. It was on the system side." *Id*. Referring to the same Exhibit 3, Heese was asked what it meant by its statement that "fire pump number 1 not functioning." He did not know what that meant. *Id*. As best he could recall, it had to do "with a bypass valve that was in the rectify room that wasn't functioning properly and that's what the system alert was for." *Id*. However, when Heese was asked if the system still functioned with respect to fire protection, he answered "very much so." *Id*.

Heese was then asked about the vital behaviors program at Newmont. He described it as,

> an employee driven program and it's based on the behavior based side of safety of making good decisions and part of that, how they decided which vital behaviors to use, which talking points or decision points to use for the program . . . [and it considered things] like close calls, accidents, things, situations that happened over the course of many years . . .

Tr. 451-52.

Heese was then shown Ex. R 21, which he identified as the vital behaviors that were developed. One of those vital behaviors is to "speak up." Tr. 452.

The Court did not find Heese to be an especially credible witness. This determination was made upon an overall assessment of his demeanor during his testimony. One such example for the Court's determination came about when he was asked to explain the "speak up" vital behavior. Heese answered,

> Well what we find many times is that people feel like they can't speak up or they shouldn't speak up, it's not their place, and *it's an expectation that we set for everybody*, not just our employees, but all contractors, everyone that comes on-site. *We expect them to speak up. If you see something, say something about it.*

> *If you are concerned about something, bring the point up.* If something needs to be changed say something. That is what the speak up is for.

Tr. 453. (emphasis added).

Yet, despite all that he claimed to have viewed at the Midway Market that morning, Minister Heese did none of those things.

Heese was then asked about the continuous safety improvement program at the mine. Tr. 453. He described it as a program for employees to convey safety concerns, ideas, and ways to make their jobs easier. Employees are encouraged to participate in the program and they may do so anonymously. Perhaps reflective of the environment at the Phoenix Mine, it does seem odd to the Court that the program provides for anonymity, given its stated purpose.

Shown Exhibit R 23, Heese identified it as the field level risk assessment sheet for tasks the workers perform. Tr. 454-56. He did not know if the copper leach workers were participating but he was sure they had an opportunity to do so. Tr. 457. Heese could not speak with definiteness on the issue of whether the training for this program had been completed for the copper leach employees. He could only state that, "[i]t was starting to be rolled out with this particular program to the supervisors" but he couldn't speak to how much the copper leach people were utilizing the cards during May and June. Tr. 458. Heese also didn't know if the hourly people had training about this program. *Id*. The Court then intervened and advised that it could not admit R 23, at least not with the infirmities about Heese's understanding of its implementation. The Court then added that it was obvious that the document was intended to show how safety conscious Newmont was and is and counsel for the Respondent agreed that was the intent behind its hope to introduce the exhibit. Tr. 460. However, the Court explained that it viewed the intended exhibit to be of minimal interest in the sense that it viewed it as a cul-de-sac, in that, while the information may be interesting and even if Newmont demonstrated that it has a wonderful program regarding safety, the Court could still find that it discriminated against Estella. The two matters are not mutually exclusive. Instead the Court viewed the information as "an interesting side trip along our main journey." Tr. 460. Therefore, it concluded that it was not worth spending a lot of time on it. *Id*. The Court advised that in its view the more significant testimony from Heese was, without then opining about the credibility of the assertion, Heese's "statement that he did not hear Mr. Esquibel volunteer Mr. Estella's name when meeting with the MSHA investigator." Tr. 461. As the Court summed up its thoughts on this issue, "These other things are interesting, but it's not going to be that my decision rests upon the fact that Newmont has a wonderful safety program." *Id*.

Testimony then turned to other subjects, beginning with whether Heese took any notes during the course of his inspection with MSHA Inspector Stull. Heese stated he did take notes. Tr. 462. The Court then inquired whether the citations that were issued as a result of the MSHA hotline calls were admitted as violations or contested. Heese stated that he did not know the answer. *Id*. The Court was surprised by this, as Heese had just stated that he took notes during the inspection and he admitted that he tries to offer as much mitigating circumstances about such violations, yet he stated that he never learned of the final disposition. Tr. 463. In any event, Ex. R17 reflects Heese's notes about the citations. Tr. 464.

Heese's testimony then turned to the events of June 17, 2015 at the Midway Market. As with Estella and Soto, Heese likewise was there to get some breakfast, describing himself as a creature of habit. According to Heese, at that time Estella and Soto were also in the market and he first saw Estella at the cash register, with Soto "standing right beside him." Tr. 465. Heese stated that it looked like Estella was purchasing food items. As for Soto, Heese stated that he had food items and "a six pack of beer." Elaborating, Heese stated that "[w]hen [he] got to the cash register Mr. Estella's stuff was already – was being checked across by the cashier. Mr. Soto's stuff was on the conveyor right next to his." *Id*. Heese stated that he said "hi," but couldn't remember which person replied hi back to him. Heese then stated that Estella did not exit the store before Soto. Instead, he waited at the end of the counter and waited for Soto to check his items. Heese continued that Soto then told Estella he needed to get a sack of ice. Soto then got the ice, and returned to the register to pay the cashier for that additional purchase. Tr. 466.

The Court would note that, if Heese's version was truthful, both Soto and Estella would have been keenly aware that Heese had seen Soto's beer purchase. In the Court's estimation, it defies common sense to think that both Estella and Soto would have simply brushed this aside and not considered the danger associated with Heese's alleged observations. It would have been imperative in both Soto's and Estella's mind that the beer, having allegedly been viewed by Heese, would need to be dropped off at Soto's home.

Asked if he said anything about the beer, Heese answered, "I did not." His reasoning was he "didn't feel it's [his] place to direct people on their days off or their free time. [he, i.e. Heese] wouldn't want someone asking me why [he] was buying what [he] was buying at the store." Tr. 467.

The Court would note that Minister Heese's solicitous manner did not require him to approach the matter that way. At 5:30 that morning, with the work day shortly to arrive, he could've simply stated something along the lines of "Hey Marco [i.e. Soto], a friendly reminder, there is the no liquor requirement at Newmont." Certainly Heese did not hesitate to throw the hammer down on Soto and Estella shortly after they arrived at work, his courtesy about the impropriety of mentioning the issue having then completely evaporated.

The Court also concludes that Heese's response lacked credibility with his claim about Estella and Soto being on their days off. The Court probed Heese on this point, "[b]ut you're not telling me, are you, that you thought these gentlemen were on their day off when you saw them that morning, are you?" Tr. 467. Unbelievably, Heese maintained he had no clue, "I didn't know where they were, if they were on their day off. I had no idea." *Id*. Heese agreed that this encounter occurred at 5:00 o'clock in the morning. The Court pressed further, "And so you made no presumption, you had no clue as to whether they were going to work, Mr. Estella and Mr. Marcos [Soto], you had no clue as to whether they were going to work or just having a day off; is that right?" *Id*. Heese answered, "That's correct." *Id*. Heese also admitted that, despite his claim of having no clue, at 5:20 in the morning, "[m]ost everybody is on their way to the mine at that time." Tr. 468. On these responses alone, the Court finds that Heese was not a credible witness but, as noted, that is not the only basis for the Court's strong conclusion that Heese's testimony was simply not credible.

Continuing with his recounting of the events at the Midway Market, Heese's testimony demonstrated that he kept an unusually close eye for the persons that he thought might be on their day off at 5:00 that morning. When asked if he saw Estella and Soto after they left the market, he stated that he did observe them after they left and that they "were behind a white Chrysler with the trunk open." Tr. 469. He placed himself as two spaces over from the Chrysler, stating, "[t]hey were loading items into the trunk. Mr. Estella had ahold of the trunk lid. Mr. Soto was standing to his left. Mr. Soto was loading stuff in." *Id*.

This degree of alleged detailed recounting came from a man who claimed he had no clue that the liquor would be an issue. After all, as far as the minister knew, the two might have been off that day, at 5 a.m. that morning, and not on the way to work. Bearing in my mind that Heese was claiming a presumption of innocence with the beer purchase, he continued with his watchful, unusually detailed, observations of the group's actions, even noting that the car did not go in the direction of work when it left the market parking lot. *Id*. Heese then went to work, arriving around 5:40 or 5:41 a.m. After he checked into work he went down to the health and safety building where random drug and alcohol testing was going on that morning. Tr. 470. That testing finished up around 7:00 a.m. The practice for the testing involves looking to see which employees are working that day and then calling such employees' supervisors so that the employees are brought for the testing. Stating he was bad with names, Heese could not identify who was scheduled to be tested that day. Tr. 472.

The Court, again surprised, asked of Heese, "[y]ou don't know the people who were on the crew list for that [C] crew, you don't know the C crew list. You can't tell me what people were on the list at that time?" Heese answered, "[o]nly by looking at the list." The Court queried of Heese, "[s]omehow by looking at the list and seeing the names you're going to remember which of those individuals were tested that day?" *Id*. Heese answered that he could do that. Shown Exhibit R 24, Heese answered that Shane Watson was on the list for testing that day. Looking at the list, Heese stated that, upon seeing that Estella was on the C crew list, "[a]t that moment when I looked at the crew list, [t]hen I started to get concerned." Tr. 474. His concern was that "we would have alcohol on the mine site, that either it would be on the mine site or being consumed." *Id*.

Once the testing was completed, Heese then went to see Mitchell, the mine's human resources representative. As he recounted that meeting with Mitchell, Heese told him,

> what [he] observed that morning and that [he] thought they were on their days off, but just realized that they were on property and that they may have alcohol on-site, [and he] told [Mitchell] that [he] saw alcohol being placed into a white Chrysler sedan and asked [Mitchell] if he could accompany [him] down to the guard shack to make sure that -- whether that car was on the mine site or not.

Tr. 474.

Again, in the Court's view, this is a most implausible story, as its foundation is that Heese believed that the three employees were on their days off, *but just realized* that morning that they were on mine property and that they may have alcohol on-site. The hunt, so to speak, was then on in full for the 6 bottles of beer. Heese was directed to the trio's locker room by Mitchell and directed to, "just be staged [sic] there in case something, the beer went in there or, you know, what happened, just stay there, make sure that nothing went in or out of the building." Tr. 476. A security guard was sent to another location, but Heese didn't know where that other location was nor, apparently, the purpose for the adventure to the other location. Next, Estella and Soto, with the help of a security guard, were apprehended and taken for drug and alcohol testing. *Id*. Ostensibly, this was to rule out the possibility that alcohol had been consumed on the mine site. Tr. 477. Asked if they passed the alcohol testing, Heese answered, "[t]hey were all negative." *Id*. No evidence of alcohol was found in the lockers or lunch boxes either. The investigative crew, then consisting of Heese and a security guard then went to the employee parking lot, and Soto was also brought along. *Id*. Watson joined the group separately, with all arriving at about the same time. Tr. 479. Heese could only say that "roughly" five people were then at the site of the car, and then that number was amended, for a total of seven people present. *Id*. Upon questioning by the Court, Heese agreed that Mitchell, Estella and Blaskovich were also at the site of the car. *Id*. Their purpose was "[t]o have them open up the trunk so we could look in the car to see if the alcohol came to the site." Tr. 478. Heese then volunteered, "At that point we didn't know if it had." *Id*. As with much of Heese's testimony, the Court considered that last remark of his to be without any credibility.

Asked if Watson gave permission to open the trunk, Heese answered, "He [Watson] opened the trunk." Tr. 481. Heese stated that on their way to the car, Soto admitted to him about the beer. Tr. 482. Worried that he might lose his job, Heese remembered very well telling Soto he couldn't "imagine someone risking a 60 to $80,000 a year job over a six pack of beer. I remember that very well." *Id*. Dealing with the six pack of beer, Heese reported, "we dumped all the beer out. We took pictures of it. We made sure it was disposed of, because we don't allow it on property, not even if it's in custody. As if they were dealing with heroin, Heese informed that he "*said let's get it destroyed so no one can use it* and they took pictures of the whole event." Tr. 483. (emphasis added). Heese stated that marked the end of his involvement with the matter, but he added that he wrote down that happened at the Midway Market and submitted a statement about it, "just to document everything that happened." Tr.484; Ex. R 19, Heese's statement.

Expressly asked by Counsel for Respondent Newmont, if "the reason [he, i.e. Heese]] didn't say anything at the Midway Market was because [he was] planning some sting operation of these individuals at the site," Heese answered, "No." Tr. 485. In fact, Heese contended, "I was very hopeful they weren't going out to the site." *Id*. The Court does not believe Heese was truthful about this either. A strong proponent of the no alcohol policy, Heese stated, "[i]t keeps our employees safe. There's no -- there is no room for anybody being inebriated or high or anything else. It's a matter of safety. It cannot happen." Tr. 486. Yet, full of innocence, he allegedly perceived no issue associated with his close watch of the activities that morning. Of course, it should not be lost, though a tangential matter, but nevertheless significant factor, that no one was found to be inebriated or high or *anything else.* But while he firmly asserted that

there was *no room* for alcohol, as it was a matter of safety, Heese nevertheless *found room* to say nothing when he observed the beer purchase.

Cross-examination began with questions about Heese's interaction with MSHA investigator Stull on June 2nd. As noted, Heese agreed that MSHA's inspections would begin first with a visit to his office. Thus, Heese was the point man at the mine where MSHA inspections were involved. Investigator Stull advised Heese of the complaint ID numbers that MSHA received, a total of 5 complaints. Referencing Exhibit R 17, the complaint ID numbers brought to his attention on that date, Heese was first asked about the complaints made and he agreed there were three. Tr. 492. The inspection first went to the stripping machine. Esquibel came to the control room shortly after the inspector and Heese had arrived there. Blaskovich also was present. As noted earlier, Esquibel took command of the computer operation and while doing that pointed out substandard actions or conditions to the inspector. As to whether Heese heard Stull ask Esquibel who called in the complaints to MSHA, Heese stated Stull did not ask but then stated that he didn't "remember that." Tr. 498. Heese asserted that, apart from three minutes, he was in the control room the whole time, and that Blaskovich was there during his brief absence. Tr. 499. Following the inspection by Stull, Heese met with Cole, explaining what had occurred during the inspection. Tr. 501. Heese could not recall if he had a close-out conference after the inspection. *Id*. Yet, Heese admitted that a close-out conference is customary and that he is typically involved with them. Tr. 502. Directed to his own notes, Heese agreed that he was involved in such a conference regarding the inspection, along with Cole. Tr. 503; Ex. R 17. Heese agreed that, although he spent two days with Inspector Stull, he never learned of the results of the inspection. Tr. 504. The Court then asked Respondent's counsel to provide it with the outcomes of the inspections. Tr. 505. Respondent's counsel stated that the training citations were in contest but the others had been paid. Four citations were in issue, beginning with Exhibit P1. *Id*.

Heese agreed that he is an employee advocate, but he defined that to include management, as he told the Court, "[t]hey are employees, too, sir." Tr. 509. Directed to Exhibit R 21, the mine's "vital behaviors" program, Heese stated that it applied to *all* employees. One of those behaviors, as noted, is to "speak up." It provides "when I see something good or bad, I will say something. I will communicate openly, honestly and voice my concern." Tr. 510. However, Heese maintained that even though the night shift does not finish prior to 5:20 a.m., he believed it "very plausible" that Estella and Soto were just on a day off. "I see employees -- Usually they are a tight group. They go fishing together. They go hunting together. It's very plausible that they could be – if they are not on shift that they would all be at a grocery store together." Though it was 5:20 in the morning, Heese still maintained "[i]t's possible." Tr. 511. The Court would note that almost anything is possible, but Heese's claim, contrary to his assertion, was decidedly not plausible.

While in the check-out line with Soto and Estella, Heese stated that he saw Estella had food items, while Soto had food and beer, adding "I was *really focused* on the beer." Tr. 516 (emphasis added). The Court notes the inherent incongruity in Heese admitting he was *focused on the beer*, while simultaneously asserting the employees could be on their day off, buying beer for hunting or fishing that day. Heese was also aware that the ice was brought to the trunk

of the car. *Id*. Despite his offering an innocuous view to explain the beer purchase – that they were off for a jaunt of fishing or hunting that day – Heese stated,

> Let me clarify something. The reason why this is so clear in my mind is *he kept gaining* (sic) *eye contact with me and I thought it was odd*. He would look at me and he would just kind of stare me down and the same thing happened out at the car. Before he just -- at the trunk *he gained* (sic) *eye contact with me* and then when he was going to get in the front seat of the car he stood there and gazed over and looked at me like -- I just felt -- *I felt it odd*. That is why *it's so clear in my mind, that whole situation*. We're the only people in the store and *he's gaining this eye contact with me* and it was just -- *it's so vivid*.

Tr. 518-519 (emphasis added).

The Court notes that while Heese stated it was "so vivid," it did not impact his professed belief that the workers were likely on their way for a jaunt that day. Tr. 519.

Heese's testimony continued the next day. Further undercutting his claim that he presumed the beer purchase had no connection with work, and that it was all plausibly quite innocent, ever watchful, he stated that he observed Estella and Soto placing items in the trunk. He added, "Mr. Estella glanced over at me." Tr. 537-38. Then, he added, "Mr. Estella went up to the front door, opened the door and he glanced back over the top of the roof towards me and made eye contact with me again." *Id*. Yet, suspicions still apparently unaroused, Heese apparently did not reassess his view that the fellows were probably off for recreation that day.

Asked if Estella ever gave Heese a reason to believe that he would not be honest, Heese answered, "No." The same was true for Soto; Heese never had a reason to believe that he would be dishonest either. Tr. 546.

Further regarding the Midway Market event, Heese confirmed that in his testimony the previous day he expressed being "very hopeful that the men weren't going out to the mine site." Tr. 552. He also reconfirmed that the previous day in his testimony he stated there was no room for alcohol and that it was a matter of safety and that it cannot happen. *Id*. Yet, despite the professed depths of his concern and despite being an "employee advocate," and despite seeing the alcohol, and seeing it placed in the car's trunk, along with furtive looks from Estella, Heese said nothing to the employees. Tr. 553.

Regarding the 103(g) complaint, Heese admitted that Newmont is not pleased when such a complaint is made, nor is it pleased when citations or orders are issued to the mine. Tr. 553-54. Heese, while not agreeing, semantically, that the responsibility and heat for such matters falls principally and initially upon him, effectively contradicted himself, by then admitting that he takes "ownership" for them. Tr. 554.

On redirect, Newmont's attorney asked if Heese's salary was affected by the number of violations issued at the mine. He responded, "No." Tr. 555. Nor has he ever been disciplined because of MSHA issuing citations or orders. *Id*. As to whether the citations impacted his

bonus, Heese responded, "No." Tr. 562. He repeated, "No," when asked if there was any adverse effect to his bonus. *Id*. However, the Court inquired further about the bonus issue. Heese admitted that the bonus for 2015 was given out in March and he stated that he received a bonus. Tr. 566. It is fair to state that Heese was initially not forthcoming about the bonus issue. In that connection the Court asked, "Did you receive a bonus for 2015?" and Heese answered, "Yes." Asked what the bonus amount was, Heese responded that he did not remember. Inquiring about the bonus for 2015, which was given out in March of 2016, Heese affirmed that he received a bonus for 2015. The Court continued, "just for simplicity sake [we're] talking about the year 2015 no matter when you get it; right?" Heese agreed. The Court then got to the key question, "So what was your bonus for 2015?" *Id*. Heese acted uncertain about what seemed to be a straightforward matter, asking, "[t]he bonus amount?" The Court affirmed that was the question. Continuing to act flummoxed, Heese then asked, "Before or after tax?" *Id*.

The Court tried to simplify what it believed to be an uncomplicated inquiry, continuing, "You get a check; right?" Heese admitted he receives the bonus via a check, then disclosed that it was $21,000.00. The Court then asked what Heese's bonus was for the prior year and Heese answered "[i]t was 27 [thousand dollars.]" The Court replied, "So about $6,000 less for 2015; correct?" and then reminded Heese, "[y]ou have to answer." Heese then responded, "[y]es sir." Tr. 567. That is, to express it succinctly, in the year of the anonymous call to MSHA with validated safety complaints, Heese was impacted adversely by a reduced bonus. Further, Estella's attorney asked Heese if civil penalties affected profitability and whether the time spent on those matters would affect productivity, as each of those categories are listed on the bonus components. Heese admitted they did affect profitability and productivity. Tr. 569-70.

In terms of his involvement with the vital behaviors program, Heese stated he was not a "key author" of it. Rather, an individual from Denver started the program. Asked if he was heavily involved in tailoring it to the Phoenix mine, Heese again engaged in semantics, disavowing that he *tailored it*, but rather describing his role as *supporting it to a great degree*. Tr. 563. However, he agreed that the vital behaviors that were identified came from teams within the Phoenix site. *Id*. Heese also conceded that the vital behaviors were not limited to work, as the program states those behaviors are "[v]ital at work, vital at home, vital for life." Tr. 564. Asked if that meant such behaviors extend outside of work, Heese responded, "Yes, yes." *Id*. Next, still reading from the program, Heese stated that it provides, "When I see something good or bad, I will say something. I will communicate open and honestly and voice my concern." *Id*. Despite that language, Heese remained firm that he was not obligated to say anything upon his observations of the beer incident at the Midway Market. Tr. 565. This view, expressed by Heese as the safety manager at Newmont's Phoenix mine, under the circumstances about which he was very attentive, and contrary to his own statement about the vital behaviors, forms yet another reason for the Court's conclusion that Newmont discriminated against Estella.

Testimony of Steve Blaskovich

Steve Blaskovich, project manager at the Phoenix mine, also testified for the Respondent. Tr. 571. When he was the process management superintendent at the Phoenix mine, he was responsible for operating the copper leach facility at that site. Tr. 573. At the relevant time, four persons reported to him: Mike Peasnall, with the C crew, Marco Diaz, with

the B crew, Cory Mills, with the A crew, and Bob Wells with the D crew. Tr. 577. Blaskovich knew Estella, who was the relief supervisor when Wells was off. He believed he had a good working relationship with Estella. Tr. 578. He stated that during the time the two worked together at the copper leach facility, Estella would bring up safety issues, although he could not recall the specifics of the matters Estella raised to him. Tr. 579. Blaskovich stated that no one ever told him about B crew employees accessing the stripping machine without locking it out. *Id*. As for the issue of anyone ever telling him about inadequate task training, he answered, "[n]o, I don't recall anybody coming to me with that." Tr. 580. In May 2015, he was told about wires on the fire alarm being cut, explaining,

> I think I was off for a week and when I came back I had heard that there was some malfunctions in the fire control system and the alarm was going off on a continuous basis and the operators weren't able to turn it off by just hitting the acknowledge button and over a course of time they ended up disconnecting wires on the horn on the control cabinet to disengage the alarm, the audio alarm.

Tr. 580.

This did not make the fire system inoperative, as a digital display still functioned, but the horn would no longer buzz. Tr. 580. The contractor who installed the system had to order parts to repair it and it disengaged the alarm pending receipt of the needed parts. Tr. 581-82.

Blaskovich did recall that there was an MSHA hazard complaint inspection on June 3rd. He added that the contractor's visit to repair alarm was before the MSHA visit. Tr. 582. Blaskovich learned of the MSHA visit while it was in progress and he went over to copper leach facility where the inspector and Heese were in the control room, along with Javier Esquibel, who was showing them video of the B crew entering the stripping machine without locking it out. Tr. 583. While Blaskovich was in the control room most of the time that Esquibel was there, he wasn't there the whole time, stating, "[t]he only time I wouldn't have been in there is when Dayne [Heese] brought him over prior to me coming into the control room when I was not in the facility." Tr. 584-585. However, Blaskovich maintained that he was in the control room for the entire time Esquibel was there. *Id*. Asked if he heard "Mr. Stull ask Mr. Esquibel who had made the hazard complaint," Blaskovich answered, "[n]o, I did not." Additionally, Blaskovich was asked while inspector Stull was in his presence, did the inspector inquire who had made the complaint, responding, "No, he did not." Tr. 586.

In terms of the four crews getting along with one another, Blaskovich stated that the A and D crews got along well, but the B and C crews did not. Tr. 587. The Court considered much of Blaskovich's testimony to be tangential to the issues to be decided in this matter. Counsel for the Respondent offered this testimony "to establish on the record that there were personality conflicts between the B and C crew, none of which had anything to do with Mr. Estella." Tr. 590. Estella's attorney, sharing the Court's view that the information was not central to the case, stipulated to the testimony about the lack of inter-crew harmony. *Id*.

After the first day of the hazard complaint inspection, MSHA inspector Stull requested a safety meeting with all four of the crews. Tr. 592. Blaskovich and Cole were present at that

meeting. Blaskovich claimed that Esquibel brought up an issue concerning pilfered muffins and the safety issues too. Tr. 593. The Court will not address the missing muffin caper further.

Turning to June 17, 2015, Blaskovich stated that he learned of the market incident through Mitchell and that Heese reported, "two of our employees were in the grocery store in Battle Mountain that morning and he was also in the store at the checkout stand and he reported that [Estella] and Marcos Soto were in front of him at the checkout and that [Soto] was purchasing beer that morning." Tr. 596. Though obvious, the Court notes that all of this is secondhand, a re-telling of Heese's account.

Blaskovich then related his involvement with the interview process related to the beer incident, stating that they (i.e. he, Wells, and Mitchell) spoke individually with the three employees involved, beginning first, apparently, with Watson, the car driver. Tr. 597. Watson stated he was not aware of the beer. Tr. 598. Soto was interviewed next and he admitted that he purchased the beer and that it was in the car in the parking lot. Estella was then questioned. Estella told them "he knew nothing about alcohol being in the car." Tr. 599. Blaskovich then stated that, following drug and alcohol testing and the trip to Watson's car, where the beer was observed in the trunk, they were all re-interviewed. Watson told them on this second round of questioning what he told them on the first round, but adding a new piece of information, that he "didn't know there was beer in the car until [Soto] told [him about it] in the control room after the first interview." Tr. 600.

The Court finds that Watson's version was quite credible. The three employees were effectively under complete control by Newmont at that point, with no time to hatch a collaborative lie. Thus, it is found that Watson did not know of the beer until Soto informed him about it after the first round of questioning.

For Soto, on the second interview, his story remained the same. For Estella, however, Blaskovich stated that the Complainant had a different story during his second round, asserting,

> [Estella] admitted right away that he knew that beer was purchased that morning and that he saw [Soto] *coming out of the store*[22] with a bag and he knew that there was beer in the bag. . . [and that] the reason he didn't say anything during the first interview was that he -- he's old school and he wasn't going to narc on anyone.

Tr. 600-01.

Curiously, while Heese disclaimed any responsibility to speak up when he observed the beer purchase at the market, in contrast, Blaskovich believed that Estella did have a responsibility to *speak up*, stating,

[22] It is noted that Blaskovich's version is less inculpatory than the story Heese presented in his hearing testimony, in that in this telling Estella did not remain with Soto in the store, as Heese contended.

> We did talk to [Estella] a bit more about it while he was still present with us and we discussed how, you know, he would – he was the person that could have changed the outcome of this whole event that morning[23] and with the position that he is in as a lead control room operator and leading the crews and that that *we would have expected him to speak up* and not be in a position to allow anybody to bring alcohol onto the property.

Tr. 601 (emphasis added).

Yet this duty did not extend to Heese. Blaskovich larded his testimony on this point and the double standard he employed, "we just expressed that we were disappointed in what had taken place and that he didn't take *the leadership in his role with his experience and speak up*." Tr. 601 (emphasis added.)

The three miners were then suspended, with Blaskovich driving Watson to his car and then taking Estella and Soto to their homes. According to Blaskovich, when driving them, the three "were still jovial with each other," which behavior seems quite unlikely, given the events. Tr. 602. Conflicting with his claim that there was joviality, Blaskovich also stated that in his presence, Estella and Soto "did discuss on the way back [ ] that they felt that at the store when [Heese] saw them where [Soto] was purchasing beer that he should have said something to them and stopped them from doing that, and they talked back and forth for a while about that." Tr. 602-03. In the Court's view, this account doesn't add up, as Blaskovich's recounting would mean that the two recognized they were about to violate the company policy but wanted Heese to bring it up to them and only then would they elect to leave the beer at Soto's house.

Following that, Blaskovich returned to the mine, reviewed matters with Mitchell and it was expressed that they wanted "to be able to treat this [discipline] in a consistent manner that has taken place over a period of time." Tr. 604. Blaskovich recounted that after Mitchell consulted with others within Newmont about the issue, it was decided that Soto and Watson would be terminated. Regarding Estella, Blaskovich stated that "his role was that he wasn't honest during the investigation and that because of him not being honest it was recommended that he would also be terminated for that." Tr. 605.

Blaskovich was then asked about the employee handbook, Ex. R 11. He agreed that Estella violated section 2.1.3 of that handbook by failing to provide honest and complete information during an investigation. Tr. 606. He stated Estella was informed of the basis for his dismissal when he and Mitchell met with him in Battle Mountain. According to Blaskovich, Estella did not have any specific questions about that, but did inquire about the appeals process.

[23] "Speak up," the reader will recall, is a mantra of Newmont's selectively applied "vital behaviors." Blaskovich's perspective absolved Heese of any concomitant responsibility to speak up, and of Heese's leadership role as part of mine management. Accepting for the sake of argument that Heese's version was credible, he too could have changed the outcome of the whole event and, as part of the leadership credential that comes with a management position, with more forceful effect.

Tr. 607. That appeals process began with the process manager, Coles, and after that a further appeal would be with Cecile Thaxter.

Counsel for the Respondent acknowledged that Estella had no prior disciplinary action of any sort, and therefore inquired why Newmont decided to terminate him. Blaskovich answered, "in our disciplinary process we have a step by step process, but you also have flexibility depending upon the situation where you can bypass steps up and to termination depending upon the situation that has taken place." Tr. 608. In short, in the Court's view, this was a non-responsive explanation. Blaskovich stated that, in his experience, a termination for failing to be honest occurred once before, in February 2015, where an employee denied damaging some property while using a forklift. A video of the event showed otherwise and the employee was terminated. Tr. 609. The Court notes that property damage was involved in that incident and the mine had video to show that the employee was lying.

On cross-examination, Blaskovich was asked if Estella ever gave him any reason to doubt his honesty, and he responded, "Not during the time that he worked at the copper leach," and acknowledged that Estella "was good about all aspects of the jobs that he did." Tr. 621-22.

On the day of Inspector Stull's visit to the mine following the hazard complaint, Blaskovich stated that Heese, Jose Leon, and Esquibel were in the control room when he arrived there. At that time Esquibel was showing the inspector video associated with the B crew. Interestingly, he acknowledged that the video system was changed so that operators could no longer go back and view what occurred a couple of months earlier. Tr. 625. That system feature was changed after Stull's inspection. *Id*. The explanation Blaskovich offered for this change was, "it was *management's right* at that point to have the system set up so that they could review them only. We didn't feel there was a need for the operators to be able to go back and look at things that had transpired." Tr. 626 (emphasis added). He admitted that the footage displayed safety violations. *Id*. The Court would comment that this change can hardly be characterized as a change in the interest of safety. Rather, it was to ensure that the embarrassing footage would not be available for future MSHA inspections.

Interestingly, Blaskovich stated that they did follow-up with the individuals committing the safety violations, asserting that all of them were disciplined. Tr. 627. That discipline, he stated, was that they were "written up," though he was not sure if the write-ups were first or second level warnings. *Id*. On the recurring question, this time posed to Blaskovich, of whether he heard Javier [Esquivel] tell Stull who called in the violation, Blaskovich answered, "I never did hear that." Tr. 631. He stated he did not hear Esquibel tell the inspector that he and another person on his crew and Estella called in the violation. Tr. 631-32. Blaskovich further stated that the inspector was asking [Heese] questions during that time. Tr. 632. He also admitted that he was not present the whole time that inspector Stull was present. Tr. 634.

On the subject of fireable offenses, Blaskovich did not believe there is a list of fireable offenses. Tr. 635. He denied that Mitchell made any remark to the effect of "which one do we want to terminate first." Tr. 636. According to Blaskovich, when the first of the three, Watson, was interviewed, and he denied awareness of the alcohol, Blaskovich made no credibility determination about Watson's truthfulness. Instead they "just listened." Tr. 637. The Court

notes that this claim is inconsistent with human nature. Anyone in that circumstance could not help but make a credibility assessment of the claims made by Watson and the other two employees. Instead, he maintained, Mitchell was simply documenting things. In contrast, when asked if he made an assessment of Soto's answers, Blaskovich contradicted his earlier statement, stating that Soto "appeared to be honest." Tr. 637.

On the important question of whether Soto asserted that Watson and Estella had nothing to do with the beer, Blaskovich's memory failed him, stating, "You know, I can't recall that, but he – I can't recall if he said that specifically." Tr. 638. Though he thought that Mitchell might have asked Soto about that subject, he could not remember what Soto said. That he could not remember such an important point is surprising, and informative, to the Court's assessment of Blaskovich's credibility.

When Blaskovich was asked about the interview of the third employee, Complainant Estella, and his assessment of Estella's credibility, he fell back to his answer for Watson, asserting they "just listened to what [Estella] had to say." Tr. 638. During the first round of questioning, Blaskovich acknowledged that Estella did not say that he waited for Soto at the checkout stand. Tr. 639. According to Blaskovich, when the three employees were all assembled at the scene of the beer violation, at Watson's car, none of the three said anything. Tr. 640-41. After the trip to the beer scene at Watson's car, the three were taken to the main facility for the second round of questioning. Tr. 641.

During the second round of interrogation, according to Blaskovich, Watson continued to maintain that he was unaware of the beer but he added an important factual development, which occurred between the first and second round of questioning – Soto told him there was beer in the car, "[Watson] said that he wasn't aware that there was beer in the car in the morning when they arrived on the property and *it wasn't until after the first set of interviews that Marcos* [Soto] *told him that there was beer in the car*." Tr. 642. (emphasis added). Thus, Blaskovich, in effect, agreed with Watson's statement, because upon being asked *when* Watson said he spoke to Soto, Blaskovich answered, "*It would have been <u>after</u>* the two of them were interviewed." Tr. 642. (emphasis added). As Blaskovich and Mitchell did not employ a method to keep the three separated from one another between questioning sessions, Blaskovich was "sure that they spoke in the control room." Tr. 642-43. Further, Blaskovich stated that Watson "appeared to be telling the truth" that he only learned about the beer *after* the first round of questioning, when Soto then informed him about it. Tr. 644.

On the important question of whether Soto asserted that the other two, Estella and Watson had nothing to do with the beer, Blaskovich's memory let him down again, as he asserted "*I don't recall* him saying that during the interview." Tr. 645. In both the first and second round of questioning, Soto stated that he simply forgot about the beer being in the trunk. Tr. 645.

Curiously, despite Watson's statement about when he learned of the beer, when it came time for Estella's second round of questioning, Blaskovich asserted that Estella reversed course, and then admitted that he "was aware that beer was purchased and it was in the car." Tr. 646. In Estella's case, Blaskovich maintained, Estella described that "he saw Marcos [Soto] coming

out of the store with a plastic bag and he could see the six pack of beer in the bag." Tr. 647. Thus, Blaskovich denied that Estella informed him that he learned about the beer while sitting with Soto in the control room. *Id*. As noted earlier, Blaskovich's recounting conflicts with management member Wells, who was present during both rounds of questioning for Estella. Wells testified that Estella made it clear that he learned of the beer *after* Soto so informed him about it, which disclosure occurred following the first round of questioning. Tr. 203-04, 213.

Blaskovich acknowledged that the vital behaviors program applies to management too. Tr. 653. His answer about Heese's obligation to speak rested upon the dubious claim, in line with Heese's assertion, that "[y]ou know, at that point does Dayne [Heese] even know whether they are going to work or they are going home?" Tr. 653. That response suggests that their answers were coordinated. Further, under the circumstances, the claim is simply not credible, whether voiced by Heese or Blaskovich, as Blaskovich maintained that he continued his discussion with Mitchell after he returned from driving Estella and Soto home. Mitchell and Blaskovich agreed between themselves that it was not Heese's responsibility to speak up – that responsibility rested solely with the employees. Tr. 654. For Watson, his blame was having alcohol in his personal vehicle, a determination made without regard to his knowledge of its presence. Termination was imposed for Watson, despite the apparent acknowledgement that the unwitting driver did not even enter the market that day. To this point, displaying Newmont's pretext for discharging the miners, Complainant's counsel observed that by Blaskovich's admissions, the mine's contract bus drivers who drive many employees to the mine do *not* have the same obligation to ensure that there is no alcohol in the miners' lunch pails. Tr. 655.

Blaskovich, when asked again about lying and whether it is listed as a fireable offense in Newmont's code of conduct, admitted "[i]t doesn't say so specifically, no." Tr. 659. Further, in the mine's disciplinary process, while admitting that it is not stated that discipline steps can be skipped, Blaskovich responded, "Yes, it's interpreted that way, yes." Tr. 660. Blaskovich defended the decision to forego a recorded verbal warning, a written warning and a final warning, this time asserting there were two lies on Estella's part; not being honest during the mine's investigation and not being honest about bringing alcohol onto the property. As Newmont conceded that the beer was Soto's alone, it had to find another reason to discipline Estella for the improper act of another. Therefore, it latched onto the dishonesty claim. While completely excusing Minister Heese, who admitted seeing the beer, and being fixated on the conduct he allegedly observed at the Midway Market, the standard applied for Estella was Newmont's "looking for him to also provide leadership away, and if he was to see something -- somebody, for instance in this case here, bringing alcohol onto the property we would have expected [Estella] to have stopped that even before it got to the car." Tr. 664. The Court then highlighted Blaskovich's varied approach, asking, "But not Mr. Heese; correct?" Blaskovich responded succinctly, "Correct." Tr. 664.

Upon questioning by the Court, Blaskovich agreed that the four citations issued by MSHA occurred during June 2nd through June 3rd, 2015 and that "all four of those citations related to violations found within the copper leach SXEW part of the operation." Tr. 668. As counsel for the Respondent admitted, the citations in Exhibits P 1 through P3 were paid, and the citation admitted as Exhibit P4 was settled. Thus, the citations all arose from the area where the three fired employees worked. As the Court pointed out, and about which observation

Blaskovich agreed, the other crew employees, to the extent any of them received any discipline, were only written up. While such a write up becomes part of their employment record, no one, on any of the crews, other than the alleged beer violators, was suspended, nor lost any time at work, nor lost any pay. Tr. 669. This is also instructive on the issue of Respondent's pretext for disciplining Watson and Estella.

Testimony of Rocky Mitchell

Rocky Mitchell also testified for the Respondent. Until just before the hearing, Mitchell had been employed by Newmont as the Phoenix mine employee relations specialist. Tr. 674. Mitchell became aware of MSHA's hazard complaint inspection of June 2 and 3rd, 2015 on the day the inspector first arrived. Heese advised him of MSHA's presence. Tr. 676. It was Heese who informed Mitchell of the June 17, 2015 alcohol investigation, stating,

> Heese shared that he was in Battle Mountain prior to the start of shift at the Midway Market, had come across some employees of ours. He mentioned that he saw Gene Estella and Marcos Soto in the Midway Market there standing at the checkout counter. He told me that he had greeted them, at least one had responded. He said Gene had walked out before Marcos, turned around and said something about don't forget the ice. He said when he walked out of the building that both of them were standing at the rear of the vehicle. He said he went to his pickup, didn't think too much of it, to report to site. He saw that their vehicle went the opposite direction of the property and that morning he was conducting random drug and alcohol tests.

Tr. 677-78.

At odds with Heese's version, Mitchell stated that Heese told him that the white four door sedan was Shane Watson's car. Tr. 678.

Mitchell took notes during the two interrogations of the three employees, describing them as his "notes of *the majority* of my investigation." Tr. 680 (emphasis added), R's Ex. 29, 30, 31 and 32. It was not just Estella who appealed; Watson appealed too. Tr. 683. Turning to Newmont's code of conduct, Mitchell described it as "set[ting] expectations of behaviors for *all* Newmont employees." Tr. 685, Ex. R 14 and Ex. R 15, with the latter showing Estella's signature on a sign-in sheet for the code of conduct training.

Further demonstrating Newmont's inexplicable overreaction in terminating all three employees, all of them passed their drug and alcohol testing. At worst, there was a simple mistake, yet three were fired. Essentially, Mitchell's testimony echoed that of Blaskovich, but fortunately credibility determinations are not made by counting up the number of people who tell essentially the same story.

Mitchell did concede that Soto continued to deny at his second interrogation that Estella was aware of the beer purchase. Tr. 693. However, when it came to the recounting of Estella's second round of questioning, Mitchell asserted that Estella's story "completely changed from

the original meeting," admitting, in essence that he knew all about the beer being in the trunk of the car. Tr. 694. Of course, Mitchell did not feel that Heese had any duty or responsibility to say something at the market,

> [Estella is] a senior level experienced miner. He fills in as a relief foreman. There are expectations of our employees to do the right thing. Our code of conduct talks about our values and acting with integrity and doing the right thing. That's part of all of our responsibility as a Newmont employee is to look out for what's best for the company and each other.

Tr. 695.

It does not wash with this Court that Mitchell perceived a "Heese exemption" under the code of conduct. His quoted remark, above, makes no such distinction either.

In trying to justify the termination of Estella, Mitchell cited the Ortiz employee example and added a Mr. Johnson as another example of an employee terminated for lying. In the latter's case, that employee was injured while performing work. Though he first asserted that he followed *a lockout procedure*,[24] he then admitted he did not follow the procedure. That individual provided Newmont with a handwritten confession about the incident. Tr. 708-09.

As mentioned, Newmont's appeal process has a second and third step. In this instance, Cole, the process manager conducted the second appeal step, while Cecile Thaxter did the third, and final, step. Tr. 712. Mitchell, who was present during the second step appeal, recounted that Estella reviewed his long tenure with the company, having a good record, and "talked about his accolades," but she responded that he was terminated for being dishonest. Tr. 714. Mitchell noted that Estella pointed out that his drug/alcohol tests were negative, that nothing was found on him, that the guilty party, Soto, confessed and therefore he felt that termination was unfair. *Id*. When before Cole, he repeated that he only learned of the presence of the beer during the interval between the first round of interrogation and the second round, when he was in the control room with Soto. Tr. 714-15. None of those reasonable mitigating and exculpatory points made any headway in Estella's attempt to regain employment. This does not add up. Rather, it points to the Court's conclusion that Newmont's reason for terminating Estella was purely pretextual.

In a leading question of an extreme variety, counsel for Respondent posed to Mitchell,

> I want to make sure I understand this and this is clear on the record. Did [Estella] tell Mr. Cole that he had heard in the car on the way over to work . . . Mr. Soto tell Mr. Watson that he needed to stop off and drop off his cooler of beer?

Tr. 715.

[24] Apart from the instance cited to demonstrate termination for lying, it will be recalled that problems adhering to lockout procedures surfaced again in this case, prompting, among other safety concerns, the anonymous call to MSHA.

Unsurprisingly, Mitchell answered "Yes," to the question. *Id*. The Court comments that both the leading question and the predictable answer are both clear on the record, but that does not mean that the Court must adopt the loaded question and robotic answer — and it does not.

Mitchell was also present for Watson's second step appeal. Watson's defense was unchanged; he stated he was simply unaware of the presence of the beer. The third step deserves little discussion; the appeal outcome was the same. One twist was that Mitchell asserted that Estella expressed disagreement with the alcohol on site prohibition. Ms. Thaxter was reportedly taken aback by his alleged claim. To her, according to Mitchell's telling, this meant that Estella wasn't supportive of the mine's drug and alcohol free environment. Tr. 719. Mitchell maintained that Estella was never told that his firing was due to off-duty behavior which adversely affected Newmont. Tr. 720.

On cross-examination, Mitchell acknowledged working at the Phoenix mine until just before the April 28, 2106 hearing, having then started work with a new employer. Tr. 722. When MSHA came to the mine pursuant to the hazard complaints it received, and citations were issued as a result of that investigation, at the close out meeting, Cole, Thaxter and Heese were all present. Tr. 725. Unbelievably, Mitchell maintained that among the management people there was no discussion or speculation as to who might have called MSHA. Tr.726, 727. When the Court followed up, posing to Mitchell, "[n]o one was curious, it was just the farthest thing from your mind?" Mitchell responded, "That's right." Tr. 727. However, Mitchell then did allow that he assumed the complaint must have come from someone in the department where Steve Blaskovich is responsible. Tr. 728. Again, the Court inquired about the subject, with Mitchell stating that he didn't share that assumption of the source of the complaint with anyone. *Id*. In the Court's view, Mitchell's representation, being at odds with human nature, was not credible.

In terms of Mitchell's recounting of Heese's disclosure to him about the Midway market event, Mitchell stated that Heese said he "wasn't sure. He didn't know that they were going to be reporting to work [that morning]." Tr. 730. He also stated that Heese identified Watson as the car driver. Tr. 731. They went to the car just to confirm that it was Watson's car. *Id*.

As Mitchell stated,

> So [Heese] identified [Watson] there at the Midway Market. So he knew whose car that was. So we went out to the parking lot to see if that same car was indeed at our property, which it was, and so we suspected that was [Watson's] car. That's when we went to security to notify them of what is taking place and what the concerns were.

Tr. 731.

Mitchell did admit that Estella denied being in the checkout line with Heese, that he had denied speaking with Heese, that he had no knowledge of the beer. Tr. 734. As to whether Mitchell found Estella credible, his answer was an indirect affirmation, stating, "Did I find Gene [Estella] credible? Gave him the benefit of the doubt, absolutely." Tr. 735. Mitchell reached the same conclusion regarding Soto, finding him credible. When asked, "Did you find [Soto] credible?" he responded, "Yeah, he admitted to having alcohol on-site, absolutely. Again we gave him the benefit of the doubt." Tr. 738. Mitchell's memory failed him when then asked, "did anyone say thank you [to Soto] for being honest?" responding, "I don't remember." *Id*. Yet, at the end of the day, Mitchell, contradicting his credibility assessment, opted for Estella's discharge. Tr. 735.

The Court observes that even Newmont's version presents a very odd outcome, to say the least. Of the three employees, one, Soto, admits to the whole thing. As Mitchell himself stated, "So Marcos acknowledged responsibility for purchasing the beer. It was his beer. It was in the car and he claimed that both Shane and Gene had no knowledge of the alcohol." Tr. 737. Consistent with Soto's statement to his examiners at the mine, the other two, Estella and Watson denied any knowledge of the beer. The stories of all three mesh. Further, there was no time to collaborate or rehearse a unified story prior to the first round of interrogations. Yet, all three were fired. This can only be rationally explained by the close-in-time events of MSHA's arrival and issuance of citations pursuant to the anonymous hazard complaint call. Further, given the area of the citations, it would not take much insight to figure out the source of the calls, at least at to the crew that made the call. As noted below, overt evidence of discrimination is rare.

Mitchell was asked about the second round of interrogation for Soto and he confirmed that Soto gave the same version of the events and repeated that he was the culpable party. When Mitchell was asked, this time relating to the questioning of Soto, if he was being truthful, he responded, "I thought he was being truthful, yes." Tr. 745.

According to Mitchell, during Estella's second round of questioning he admitted to it all; that he knew about the beer, etc. Mitchell denied that Estella told them he only learned of the beer after the first round of interrogation. Tr. 746. Obviously, *if* Estella really told such a revised version, it would mean that Soto had been lying during his first and second round of questioning, yet Mitchell did not assert that he revised his assessment of Soto's testimony.

Inconsistently, and in the Court's view, lacking credibility, Mitchell reiterated that if Estella had told the truth the *first* time he was questioned, instead of the second time, which was shortly after the first interrogation, he would not have been fired. Tr. 758. Mitchell stated that favorable outcome, not being fired, would have occurred even though the underlying violation involved the drug and alcohol policy. *Id*. The Court would note that this too, does not add up. No one asserted that Watson was untruthful, and not even Heese's testimony claimed that Watson was in the store, nor did Heese claim that Watson observed the beer, yet Watson was fired too, for violation of the beer and alcohol policy. If Mitchell's testimony were truthful then at least Watson would not have been terminated. That didn't happen.

The Court wishes to emphasize that this is *not* a case of the Court substituting its judgment for that of Newmont as to the appropriate sanction to be imposed. Rather, it is a determination about Newmont's real motive and the lack of credibility of its witnesses, as their collective story simply does not add up.

According to Mitchell, the order of the initial interrogation was Estella, then Soto, and last, Watson. Tr. 777. Also, Mitchell stated that there was a time gap between each individual's questioning. Illustrating this, Mitchell stated that after questioning Estella, there was a search of his locker and then he was given a drug and alcohol test. Only then was the second person, Soto, interrogated. Tr. 778.

The Court inquired why it was that the mine decided to do another round of interrogation, when they had all three miners' statements. Mitchell contended that it "didn't make sense that none of them knew." Tr. 781. Of course, that is not true, as Soto knew and confessed immediately to the transgression. Simply put, Mitchell and the others just didn't believe them, as he put it, "the other two had to have known." Tr. 781. Thus, it is clear that the minds of the inquisitors had been made up. Questioning was unnecessary because the determination of guilt had already been reached. Concluding that they "had to have known," there was no point to the next round, except for the hope of one of them tripping up.

Because the Court believed that the management stories meshed too well, it asked Mitchell about his contacts with Heese. Mitchell admitted that between June 2015 and prior to the April 28th hearing, he had multiple conversations with Heese. Tr. 783. The same is true with regard to Cole and Blaskovich; Mitchell had multiple conversations with them prior to testifying on April 28th. Tr. 784. Mitchell then admitted that his conversations with those individuals included what his testimony would be, "Yes, I had to tell them what my findings, were, yes." *Id*. However, Mitchell stated he never had such conversations with Heese. *Id*.

Testimony of John Cole

John Cole testified for the Respondent.[25] Since February of 2015 he has been the process manager at the Phoenix Mine. Tr. 789. In that role, he is "responsible for the operation and maintenance of the process areas at the Phoenix Mine." Tr. 790. His job encompasses the copper leach, the concentrator, crushing, and the laboratories both at Phoenix and at Lone Tree, which is another Newmont Mine. *Id.* Cole was asked about his role in the appeals process at the Phoenix mine. As the area manager, he is tasked with the second level of appeal, with the third appeal level carried out by the general manager. Tr. 792. Cole had no prior experience with this process; this was Cole's first appeal meeting for Newmont. Respondent's Ex. 35 reflects the notes he took at the appeal meeting, which were typed up shortly thereafter. Cole stated that during the appeal meeting, he showed his notes to Estella. As for the actual decision making, Cole stated that he was consulted via a conference call. While he could not recall

[25] Regarding the testimony of Mr. Cole, generally, the Court noted that "with no offense to Mr. Cole I consider him to be a secondary player in this process. He comes in sort of late to the process." Tr. 815.

talking about any one of the three employees in particular, all participating in the decision reached the conclusion that termination was the appropriate action. Tr. 795.

The Court asked Cole about Estella's inquiry at the appeal meeting, when he asked for the reason he was being terminated. The Court continued that it was its "understanding is that your answer is that he was not -- [Mitchell] nor you did not at that point tell him oh, you're being terminated because we believe you lied, that did not happen; is that right?" Tr.799. Cole responded, "That's correct. I have no recollection of saying your termination was for this reason. It was talking about some paperwork." *Id.* The Court asked for further confirmation on this point, "So the answer -- he was not given an answer then?" Cole replied, "Correct. I did not state the reason for termination. I do not recall Rocky stating a reason for termination at that meeting." The Court, "Neither of you?" Cole again confirmed, "Correct, neither." *Id*.

However, before the appeal meeting began, Cole knew that Estella was terminated for lying. Tr. 800. Estella did state at that meeting that he had not been given the reason for his termination, and Mitchell responded that it would be mailed to him. In any event, Cole stated that he wanted to hear Estella's side of the story and that this occurred. Tr. 801. Estella also sought reinstatement and gave his grounds for that relief. According to Cole, Estella never brought up making a complaint to MSHA as one of those grounds. Cole's approach was the same for Watson, to hear his recounting of the events.[26] Tr. 802.

Cole's standard for reversing the determination to terminate was "new information," for which there was none, and the absence of a "compelling reason to overturn." Tr. 804. Apart from the "compelling reason" standard Cole applied, the Court did not think much of the "appeal process," as it was clear that it was a formality, the outcome preordained. Cole admitted that in all his time with Newmont he has never seen anyone successfully appeal a termination. Tr. 823. That said, the questionable process employed by Newmont is not at all the basis for the Court's decision finding discrimination. Further, it doesn't matter whether Cole or, for that matter, whether Mitchell or Blaskovich, believed Estella's claim that he didn't know of the beer, as that determination is reserved for the Court.

Along with Thaxter, Heese and the mine manager, Cole did participate in the June 3rd close-out meeting with MSHA following the hazard complaint. Tr. 808. He admitted that the nature of the close-out conference reasonably led him to conclude that the hazard complaints came from the copper leach facility. Tr. 809. Following the MSHA investigation and the issuance of citations, Cole admitted there were "additional management, upper management meetings regarding the hazard complaints" and that Heese, Thaxter, Mitchell and others

[26] Though it is of no moment, the Court can only conclude that Cole was mixed up when referring to Watson's appeal, as he contradicted himself within his own remarks, stating at first that Watson "said *he knew about the drug and alcohol*. He didn't think he was on company property because he wasn't inside the gate. I pointed out to him that he crosses onto company property about a mile and a half before the employee parking lot and there is a sign stating no firearm, drugs or alcohol just at the entrance to the employee parking lot. I also did point out to him that having the alcohol, he didn't feel that it was -- that he was at fault because *he didn't know the alcohol* was in his car. I said it's your car, you're in control of it." Tr. 802-03.

attended them. Tr. 812. Despite that, Cole maintained that there was never a time "where there was discussion about who called in the complaint," and that there was no conjecture about it either. Tr. 813. As noted earlier, this claim is not credible. Tr. 816.

Finally, Cole's meeting notes demonstrate that, despite Estella's presentation at his appeal before Cole of a wealth of *undisputed facts* – that he is a long term employee, with a good safety record, and good job performance and that the beer found in the car was not his, that the car the beer was in was not his car, that he had a clear drug and alcohol test the morning of the incident, that his locker was searched and no drugs or alcohol were found, and that someone else, Soto, confessed to buying the beer and has not appealed his termination, none of that mattered. Ex. R 35. The same meeting notes reflect Estella's version of the events, including his lack of knowledge that Soto had bought beer that morning. The Court notes again that, without an opportunity for forethought or collaboration, Estella presented that version during his first interrogation. All of that was for naught; Estella and Watson were fired.

Testimony of Cecile Thaxter

The testimony resumed on July 6, 2016 with Respondent's witness Cecile Thaxter, general manager at the Phoenix mine. Thaxter has held that position since December 2014. Tr. 837. Thaxter took the job at Newmont because she "had always wanted to be responsible for a business, be responsible for a profit and loss statement." Tr. 838. Although the Court, again for the sake of completeness, notes Thaxter's testimony, it must be said that she is not a key witness in this case, at least in terms of the issues the Court must resolve. Her testimony, relating primarily to her role as the official presiding in Newmont's third appeal, is of no moment to the issues before the Court.

Ironically, Thaxter did speak about the mine's vital behaviors program, with the first such behavior being to "speak up. So, we encourage folks to speak up." Tr. 840. As noted by the Court, Newmont applies this behavior unevenly and selectively, under the "Heese exemption" its witnesses invoked.

Thaxter informed that, in the wake of the citations that were issued after the hazard complaint and MSHA's requirement that the violations had to be posted, someone "put red dots beside three names and the three persons on that crew felt that they were being singled out, they were being targeted so they complained about it." Tr. 847. The dots were next to the names Leon, Esquibel and White, each a member of the C crew. Tr. 848. The C crew worked opposite the B crew, which was a crew associated with the citations issued by the inspector during his complaint investigation. Tr. 849. However, Thaxter did not look into who put the dots beside the names, unlike the muffin caper, a matter apparently of a different order.[27] She did meet with each of the crews after the "dot" incident. Also, following the hazard complaint, supervisor Cory Mills complained that someone had written on his car, using a finger, "you're next." Tr. 847. Thaxter was also present at the close-out meeting with the MSHA inspector, following the complaint investigation. Tr. 885.

[27] See page 36 regarding the muffin matter.

As alluded to above, it is fair to say that, in the Court's estimation, Thaxter's testimony did not shed any additional useful information regarding the central issues in this case. Rather, in large measure, it was a regurgitation of things others had told her, such as Mitchell's recounting of the employees' interviews regarding the six bottles of beer. Tr.858-59. Thaxter contended that Estella, during his appeal before her, asserted that the alcohol policy was "stupid" and that it did not make sense. Tr. 864.

The Court finds it highly unlikely that Estella would assert such a claim, given that his goal was to be re-employed. Assessing Estella's intelligence, as the Court did during his testimony, he certainly had enough wisdom to avoid attacking Newmont's alcohol policy when trying to become re-employed. Further, though this was brought out by Respondent's counsel, when questioning Thaxter, it must be recalled that Estella was discharged for allegedly being untruthful, not for any alcohol violation. Tr. 868. After Thaxter stated that Estella failed to take responsibility "for being there when the alcohol was being bought, having knowledge of it, being -- recognizing that we do have a policy," the Court observed at the hearing that "a given individual could deny what was alleged about what transpired, but at the same time one could still, seems to me, be opposed to a policy without that, therefore, translating into some sort of indirect admission that that's what happened."[28] Tr. 869.

Thaxter learned of the alcohol investigation about midday on the date of the occurrence, and that the D crew was involved. Tr. 909. She also knew that Mr. Estella was involved and that Mitchell, Blaskovich and Wells were involved with the investigation. She also knew that Heese was the reporter of the incident. *Id*. Accordingly, it is quite clear that Thaxter was informed of the incident from the start. As alluded to above, the Court commented that Thaxter's role in this matter was quite limited, as it was restricted to the appeals process. Though the Court concluded that Thaxter's answers and demeanor demonstrated that she was first and foremost a company person, her disposition had been tainted even before the pro-forma appeal began, as she had already heard Mitchell's and Blaskovich's view of the matter about Estella's denying that he knew of the alcohol. That said, even in that limited role, based on her testimony as a whole, Thaxter certainly cannot be viewed as any sort of an independent mind in the appeals process. Even with her predisposition, her objectivity, or lack thereof, is not of concern, as the Court must make the critical credibility determinations. Apart from the Court's conclusions about Thaxter, her own admission about her involvement in such employee appeals is instructive. She was asked, "Have you ever reversed an appeals hearing at your level," she answered, "No." Tr. 924.

[28] To make that point clear, the Court elaborated that, "for instance, to personalize it, I could be against a policy. I could say that I think it's ridiculous, hypothetically, that the company has a policy that says you can't even bring alcohol in the trunk of your car, even though there is no intent to consume it until you leave the property at the end of the day, just to store it in your car. I could be against that policy without having any sort of conflict about what happened at the market. Being against the policy does not, therefore, what I'm expressing, equate with knowledge about what happened at the market . . . .that does not translate into meaning ah, he not only was against that policy, but then he also -- that means indirectly because he was against the policy he knew there was alcohol being brought to the vehicle." Tr. 870.

Complainant's Rebuttal Evidence:

Testimony of Tana Holland

Tana Holland, girlfriend of Estella, was called as a rebuttal witness for the Complainant. Tr. 949. Holland's primary topic pertained to her involvement in the letter sent to the unemployment office, the entire subject of which is a side issue, and which has been discussed previously and resolved by the Court. As with witnesses Cole and Thaxter, the Court finds that, as a tangential witness, Ms. Holland's testimony was of minimal import to this case. In any event, Holland stated that in the spring of 2015 Estella voiced safety concerns to her about the Phoenix mine. Estella never told her that he had called MSHA until the day he was sent home (i.e. suspended) from work. Tr. 954.

Holland typed up Estella's and Soto's statements for unemployment benefits. Essentially, Holland claimed that between Estella's and Soto's confusing statements to her and her trying to edit that information and make it comprehensible for the typed version she was creating, errors were made. Tr. 956-59. Soto and Estella had handwritten notes. She was typing from what they had written for her. Tr. 969. Exhibit P 6 is Soto's statement to unemployment, as typed by Holland, while R 5 is Estella's statement. Tr. 957, 960. Within the statement that Holland prepared is the sentence, "I admitted to hearing Marcos [Soto] ask if we could stop by his house to drop off the cooler with beer in it." Tr. 961, Exhibit R 5. However, though typed, Holland stated that was an error, "[b]ecause [Estella] never said anything about knowing about the beer in the cooler." Tr. 962. Holland typed both R 5 and P 6. Tr. 966.

Rebuttal Testimony of Gene Estella

Complainant Estella was then recalled, for rebuttal purposes. Asked about the third appeal level, Estella stated that he brought a paper with him to that appeal as "the only thing that [he] knew of why [he] was terminated was on that piece of paper." Tr. 978. At that meeting he asked Thaxter why he was being terminated; he wanted a written copy of the reason for Newmont's action. That paper, which Thaxter read, contained what unemployment was told as to the reason for his termination. The letter from unemployment stated that Estella was terminated for "off the job behavior that adversely affected the company." Tr. 981. Estella denied that he ever raised a claim that he was discriminated because of his Native American heritage, noting that no one even knew his heritage. Tr. 986.

Mine Act Discrimination Claims

This discrimination complaint was brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or

> related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c).

Where, as in this case, the Secretary has decided not to bring case on behalf of the miner, Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, "the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

As the Commission stated in *Jaxun v. Asarco*, "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation." *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing "(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

Protected activity often takes the form of complaints made to the operator or its agent of an "alleged danger or safety or health violation. 30 USC § 815(c)(1). Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action. The Commission has stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

An adverse action is any "act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in

Burlington North v. White. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motived by protected activity." *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative "mixed motive" defense by proving that the adverse action was motivated only in part by protected activity, and it "would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co*., 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id*., *see also Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge*. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether "the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a "*limited* examination" of the justification's substantiality, and assesses the narrow question of "whether the reason was enough to have legitimately moved that operator" to engage in the adverse action." *Id*. at 2516-17. At no point in this analysis is the Court sitting in judgment of the merits or demerits of the operator's business decisions.

Further Discussion[29]

By way of summary of the foregoing, the Court finds that Esquibel was a credible witness and that he did disclose that Estella was one of those who called MSHA about Newmont's safety issues. Those safety issues were essentially confined to the copper/leach operation. Apart from, and independent of, that finding, given the particularity of the location of the safety complaints, Newmont had to have been quite aware of the pool of employees who could have made the call to MSHA from the beginning. From there, it did not take rocket scientists to narrow the list of likely callers. It was logical to deduce that Estella, the lead in the C crew, one of the best crews at the copper/leach operation, would have been suspect. Fortune came to Newmont when Dayne Heese, the safety manager at Newmont's Phoenix mine, espied Soto purchasing beer at about 5:00 a.m. that morning of June 17, 2015 at the Midway Market. Although Heese and other Newmont employees sanctimoniously described how *all* employees had a duty to "speak up" under the company's "vital behaviors" program, Heese was considered exempt from that policy.

[29] The Court fully considered the parties' post-hearing briefs.

To be clear, the Court rejects Heese's claim that he presumed that Watson, Soto, and Estella were just as likely to be on a convivial jaunt together that morning, rather than on their way to work. As set forth above, Heese was plainly not a credible witness. In contrast, the Court also found Wells, Soto and Estella to be credible in their testimony. The Court finds that Estella did not know of Soto's beer purchase until after Soto disclosed it to him, following the first round of the three employees' interrogation.

The Court also wants to make it clear that it is not substituting its judgment for that of Newmont's in terms of the punishment it meted out for Estella's alleged lie to it. First, as just mentioned, the Court, weighing the credibility of the various witnesses, has found that Estella did not know of the beer purchase when first interrogated by Newmont. Therefore, it finds that he did not lie to Newmont.

Second, it is undisputed that Soto, immediately owning up to his mistake, was not seeking reinstatement. Moreover, Newmont's reaction of firing three employees, not just Soto, did not wash and Newmont itself recognized that it had to come up with a second reason in order to fire Estella. The Court cannot help but observe that the mine's reaction to the event, as evidenced by the repeated interrogations, the drug/alcohol testing, the parade involved with the visit to the "crime scene," the search of the car and the destruction of the six pack of beer in the trunk, was out of proportion to the event. More was clearly driving those involved with the infraction – a six pack of beer, completely unconsumed, in a car trunk at the mine parking lot, which lot was some distance from the actual work location – simply does not add up as a rational reaction.

Thus, as none of the men were found to have alcohol in their bloodstream; with the alcohol technically on the property, but not at the work station, nor in their lockers, management's response was not reasonable and inexplicable on its face.[30] The alcohol in the trunk provided a convenient pretext to apply a sledgehammer, where a tack hammer would've been anticipated.[31]

[30] Newmont's emphasis over the employee handbook, when it was never in dispute that Estella received it when hired and acknowledged such knowledge and receipt of it, amounts to a distraction. Tr. 366-68, Ex. R 8. Estella was not accused of violating Newmont's alcohol policy. Tr. 366.

[31] While Respondent elicited from Estella that he had a good relationship with Wells and Blaskovich, and that he had no problems with Cole and didn't really know Thaxter, all intended to show that those individuals had no ax to grind with him, nor he with them, for the reasons already articulated, the MSHA complaint-induced inspection disrupted whatever may have appeared on the surface in the parties' prior relationships with one another.

A number of additional observations are made with regard to Newmont's claim that it fired Estella based on its claim that he lied about his knowledge of the beer.[32] Newmont's reaction to the six pack of beer issue was so disproportionate that they cannot have been motivated only by Estella's presumed dishonesty in regard to that situation. Thus the Court finds, with ample testimony to support its conclusion, that the safety complaints were the real source of its undue reaction. Finding beer only, and little of it, and located only in the car's trunk, there was a patently disproportionate reaction by management, a reaction which was irrational and inexplicable by itself, especially considering the punishment meted out. Accordingly, while it is not for the Court to substitute its judgment as to the proper punishment for a claimed lie, the Court can observe if the claimed reason simply isn't plausible. The Court so finds that to be the case – Newmont's claimed reason does not add up. Rather, the presented reason was pretextual. The underlying reason for the mine's irrational decision to fire the three employees was the MSHA inspection initiated by miner complaints.

The Court also notes that Mitchell's first claim, that Soto was under suspicion of being under the influence of alcohol, turned out to be empty. Then, Newmont had to formulate new charges. Following the first round of interrogation, Mitchell then advised that they were going to check Soto's lunch box and his locker to see if there was anything that should not have been there. Newmont found nothing improper there either. In addition, following the interrogation of the three employees, Wells was told to go through the fridge and the cupboards and the trash cans to look for any beer cans for evidence, but again nothing was found. Further, the Court notes that Soto immediately admitted that he had brought the beer and told Newmont right then that neither Estella nor Watson knew of the beer, when he had had no time to concoct a story.

The flavor of Mitchell's testimony, as well as that of Heese and Blaskovich, was that they were dealing with an armed robbery. Security was partnered and called to standby at the gate: "to ensure that nobody was making themselves -- I guess, gaining access or leaving property with the alcohol, just to ensure that alcohol wasn't being transported right there and now that we know there is a potential that it could be on-site." Tr. 679. Those actions were completely out of proportion.

The Court considered certain aspects of this case to be confounding on both sides. For example, Soto's choice to buy beer on the way to work, instead of picking it up on his way home, was somewhat illogical. Nonetheless, it does not follow that the Court considered his responses to be untruthful. As to Newmont's side of the case, management did not articulate a predictable discharge policy, nor apply its internal policies in a coherent and reasonable way. For example, on the issue of whether alcohol is a fireable offense, Heese did not know if the employee handbook so stated that to be the case. Tr. 562. Instead, he expressed that *any*

[32] As noted, Newmont's inquisition-style questioning produced nothing vis-à-vis Estella, finding no alcohol in his lunchbox, nor in his locker, and nothing in his body system via the drug and alcohol testing. Although Estella did express that, in his opinion, it was Heese's responsibility to say something about the beer while at the market, it should also be remembered that it was not Estella's beer, nor was it Estella's car. Therefore the only thing Newmont had against Estella was the claim that he lied about his knowledge of the beer in the trunk and for that claimed lie, it decided to discharge him.

offense could lead to termination, depending on the circumstances. *Id*. Referencing Newmont's employee policies, contained in Exhibit R -11, the Court noted that the Policy

> lists all these things. But it doesn't tell [the Court] anything that [it has] seen yet -- maybe [Newmont] will educate [the Court] on this -- about fireable offenses. [The policy] just says, don't do this, don't do that. It doesn't [identify] grounds for discharge. . . . but it doesn't make that next step and say, "By the way, if you do X, Y and Z, you're fired."

Tr. 172.

Newmont's actions did not add up in terms of any reasonable application of the Corrective Action Procedures from the employee handbook. The handbook does provide that the disciplinary actions include the following: recorded verbal warning, written warning, final warning, and termination. However, it also states that the level of corrective action for any violation, including attendance, will depend on all of the circumstances involved, including the severity of the misconduct, willfulness, history of corrective action, and any other considerations. Clearly that standard was not applied.

There are other holes in Newmont's story. Finding Soto truthful, Mitchell can't simultaneously claim that Estella's version amounted to a lie, as his version was consistent with Soto's. Estella simply didn't know of the beer. Blaskovich asserted that Estella's offense was dishonesty during the first round in which he was questioned. Even if this were momentarily accepted by the Court as an accurate recounting, (which to be clear, it is not so accepted), under the Respondent's claim, Estella's rapid acknowledgement counted for nothing – termination was still imposed.

As to the side-issue of Exhibits R 5 and P 15, which are, essentially, the same document, in which Estella stated that he admitted to hearing Marcos ask if they could stop by his house to drop off the cooler with beer in it, Estella then explained that he made that remark during the second meeting with his employer on June 17, 2015. Tr. 358. While Respondent energetically points to that language in Estella's unemployment letter, the Court finds that it is not as definitive as suggested. This is because at the start of his letter Estella effectively denied knowing of the beer, stating that he "did not notice what [Soto] had purchased due to the fact that [he, Estella] was looking for [his] badge" which was needed for entry to the mine gate. Ex. P 15.

The inculpating remark only occurs in the context of the second interrogation, when he was asked if he wanted to change his story. While the Court does not wish to insult Estella, neither he nor his girlfriend (who typed up the letter for him) could be described as wordsmiths and their education level was modest, a fact displayed in their respective testimony.

As noted, Respondent made much of the Newmont employee handbook and that Estella was aware of it and signed an acknowledgement of receiving a copy of it. The Court was not impressed by it, especially as it was applied to Estella and, for that matter, to Watson. The only clear violator of the alcohol policy was Soto, who immediately admitted to the violation. But it

cannot be denied that the admitted violation was on the low end of the spectrum for that violation, as it was beer, a small amount of it at that, and which was untouched by anyone. Newmont's reaction to the six bottles of beer, destroying it because God only knows what havoc could've ensued if it was left in the car's trunk in the parking lot, evidences that it was motivated by more than the beer. Of course, Estella was not charged with the alcohol violation, but rather for, according to the mine's telling of the story, not admitting initially to knowledge of the alcohol but then, again by Newmont's account, admitting to such knowledge during the second interrogation, which occurred shortly after the first interrogation. For this alleged lie, Newmont opted to go immediately to the ultimate sanction, firing, bypassing its own handbook's provision providing for other possible sanctions being imposed.

Further demonstrating that something beyond the infraction was motivating Newmont, it fired Watson for being the driver. But Watson was not driving a getaway car, he was simply the hapless driver that day, which Newmont presumed to have knowledge of the beer. No claim was made that Watson had lied – even Newmont never made that claim. Instead, it presumed that as the driver he had to have known of the beer, though there is no dispute in the record that he never entered the market that morning. That Newmont decided to fire all three employees demonstrates that it was acting for reasons other than the pretext presented.

At the end of the day, what was going on is clear. The mine had just experienced an MSHA visit, an inspection which was not part of the semi-annual statutorily mandated inspections, but which was prompted by one or more safety complaints. The number of management persons involved with that complaint-prompted inspection was large, and the meetings following it were numerous. Further, the inspection did not absolve Newmont, but cited it for the complaints that were lodged and for which it acknowledged culpability for the cited violations.[33] Clearly, Newmont was quite displeased over the complaint, the ensuing

[33] On December 15, 2016 the Court sent an e-mail to the parties about the following issue: Thaxter was shown MSHA mine data retrieval information and that it tracks citations, orders and safeguards for each mine. Tr. 893. There was an issue of an inadequate foundation for the admission of the document, which Estella's counsel represented was derived from MSHA's website. Tr. 892-96. The Court ruled on the question of admissibility and whether the document was self-authenticating, as follows, permitting Complainant's counsel "within two weeks to give me authority for the admission of this, but first I will have you state on the record exactly what [the] documents [are] . . . [and to provide] the reason that [the information] is important." Tr. 897-98. With that ruling, per the Court's instruction, Complainant's counsel identified the proposed exhibit's purpose "to show that the number of citations that the Phoenix Mine had in 2015 were a large number compared to other the other Newmont sites, which also would have been visible internally at Newmont, and second, it was also a large number of citations and a large penalty that was assessed in comparison to the last ten years within the Phoenix operation." Tr. 898. Proposed, (Provisional) Ex. P 27. The parties responded to the Court, with Newmont advising that it did not continue to object to judicial notice of the exhibit which includes various Newmont mines from MSHA's data retrieval system, but that its acquiescence did extend to Complainant's summary of that data. Complainant noted Respondent's position in its response, while noting that it did not use the data from the exhibit in

inspection, and the outcome of that inspection. It took the beer in the trunk opportunity to retaliate against employees suspected of complaining, and to exact a severe price from them, while simultaneously sending a clear message to any other employees at the mine about what happens to those who call MSHA.

CONCLUSION AND ORDER

For all of above stated findings of fact, together with the Court's associated reasons and analysis, the Court finds that Newmont unlawfully discriminated against the Complainant, Gene Estella, for engaging in protected activity and thereby interfering with his statutory rights, in violation of §105(c) of the Act.

The Court directs Newmont to permanently reinstate the Complainant to his former position at Phoenix Mine together with any back pay and interest due and with all entitled benefits. All references to the termination of Mr. Estella, and the reasons asserted therein, are to be removed from his personnel file.

Within ten days of this Decision, the Phoenix Mine shall post the decision along with a visible notice on a bulletin board at the mine that is accessible to each and every employee, explaining that Newmont has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also inform all employees of their rights in the event they believe they have been discriminated against.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which Newmont's Phoenix Mine is located so that the Secretary may take the actions required by the rule.

Damages

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co*., 10 FMSHRC 1493 (Nov. 1988)("Local 2274"). When a discrimination complainant's claim is granted, Section 105 (c)(3) of the Act provides that the administrative law judge may grant "such relief as it deems appropriate."[34]

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its post hearing briefing. The Court did not consider the exhibit as significant in resolving the issues in this case.

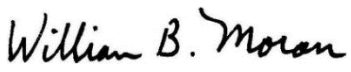
[34] The cited section provides, in pertinent part, "if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, . . . for, or in connection with, the institution and prosecution of such proceedings shall be

Accordingly, the parties are **ORDERED TO CONFER** within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within 30 days of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations, and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

The Court retains jurisdiction of this matter until the specific remedies to which Gene Estella is entitled are resolved and finalized, at which time a final decision will be issued. Accordingly, this decision will not become final until an order granting any specific relief and awarding any monetary damages has been entered.

SO ORDERED.



William B. Moran
Administrative Law Judge

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assessed against the person committing such violation. . . Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title." 30 U.S.C. §815(c)(3). Medical expenses, if any, that would have been covered, are within the ambit of this relief.