

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

December 31, 2024

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf of	:	Docket No. SE 2023-0007-DM
PAUL KIRK,	:	MSHA No. SE MD 2022-06
Complainant,	:	
	:	
v.	:	
	:	
CEMEX CONSTRUCTION MATERIALS	:	Mine: Brooksville South Cement Plant
FLORIDA, LLC,	:	Mine ID 08-01287
Respondent.	:	

DECISION

Appearances: Rachel M. Bishop, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Complainant; Michael T. Cimino, Esq., and Benjamin J. Wilson, Esq., Jackson Kelly PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Paul Kirk, against CEMEX Construction Materials Florida, LLC (“CEMEX”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2).¹

To prevail, the Secretary must prove by a preponderance of the evidence (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

¹ In this decision, volumes one and two of the hearing transcript, volume three of the hearing transcript, the joint exhibit, the Secretary’s exhibits, and CEMEX’s exhibits are abbreviated as “Tr.,” “II Tr.,” “Joint Ex. #,” “Ex. S-#,” and “Ex. R-#,” respectively. The following exhibits were admitted into evidence: R-2, R-3, R-5, R-9, R-10, R-12, R-14, R-16, R-18, R-19, R-20, R-21, R-23, R-24, S-1, S-2, S-3, S-4, S-5, S-8, S-9, S-10, S-12, S-13, S-14, S-15, S-18, S-21, S-27, and S-29.

I. STATEMENT OF THE CASE

In May 2022, Paul Kirk, an A-electrician and Union President at CEMEX's Brooksville South Cement Plant complained to management of hot dust emitting from a kiln at the plant. He initially complained via text about the safety of the kiln and when he felt his complaints were not heard, he interrupted a meeting held by the Plant Manager, Carlos Uruchurtu, to raise the issue again. Their tense exchange caused Uruchurtu to end the consultant meeting early to continue speaking with Kirk. Three days later, MSHA received a complaint from an unknown miner and upon inspection cited the plant for the same kiln conditions Kirk had recently raised to management. The following week, CEMEX formally disciplined Kirk for interrupting Uruchurtu's meeting.

On June 13, 2022, Paul Kirk filed a discrimination complaint with MSHA using the agency's Form 2000-123 and naming CEMEX as the violator. (Ex. S-1.) Thereafter, during July 2022, MSHA investigated Kirk's discrimination complaint. (Exs. S-3; S-4; S-5; S-29). On October 12, 2022, the Secretary filed a complaint with the Commission under section 105(c)(2), alleging CEMEX's written warning issued to Kirk was an adverse action taken in response to Kirk's protected activity of raising a safety concern. (Compl. 5.)² Prior to the hearing, CEMEX filed a Motion for Summary Decision which I denied. (Resp't Mot. for Summ. Decision; Order Denying Resp't Mot. for Summ. Decision.)

I held a hearing in Tampa, Florida, at which time I learned that Kirk recently retired from CEMEX because he was awarded veteran's benefits. (Tr. 31:19-32:3.) At the hearing, the Secretary presented testimony from Paul Kirk, the complaining miner and Union President at the CEMEX Brooksville South cement plant; Michael LaRue, a MSHA Special Investigator; and Patrick Pennington, a CEMEX electrician, union member, and Vice President of the Safety Committee. CEMEX presented testimony from Carlos Uruchurtu, Plant Manager of the CEMEX Brooksville South cement plant; Bruce MacConnell, Vice President of Proudfoot, an international consultancy firm; Jennifer Mulligan, Human Resources Business Partner for CEMEX; and Jacob Ekstrom, CEMEX's Line 1 Raw Materials and Calcination Superintendent. In addition to the parties' submissions of documentary and photographic evidence, the Secretary submitted two short videos taken at the CEMEX Brooksville South cement plant to demonstrate a dusting event. Per my request, the Secretary and CEMEX filed post-hearing briefs and reply briefs.

II. ISSUES

The Secretary argues that Kirk engaged in protected activity when he interrupted Uruchurtu's Proudfoot consultant meeting on Thursday, May 26, 2022, to express his concern that the cement kiln had not yet been shut down due to hot cement dust emissions, despite

² On November 16, 2022, the Secretary filed an unopposed Motion for Leave to File Amended Discrimination Complaint. After the filing of the initial complaint the Secretary assessed a penalty against CEMEX and sought to file an amended complaint reflecting the requested civil penalty of \$30,000. On January 31, 2023, I issued an order granting the Secretary's motion for leave to file an amended discrimination complaint.

assurances he received the previous day. The Secretary further alleges that—in response to an anonymous complaint made to MSHA on Saturday, May 28, 2022, resulting in the issuance of three citations to CEMEX over the weekend—CEMEX retaliated against Kirk by issuing a written warning to him on Wednesday, June 1, 2022.

CEMEX argues that Kirk engaged in unprofessional and disruptive behavior when he interrupted the Proudfoot consultant meeting on May 26, 2022, and Kirk’s formal discipline on June 1, 2022, was a written reflection of verbal discipline he received on May 26. CEMEX further argues that even if Kirk engaged in protected activity, it’s subsequent discipline of Kirk was in no way motivated by the protected activity, but rather was solely to address Kirk’s behavior when he interrupted the consultant meeting.

The following issues are before me: (1) whether the Secretary has established by a preponderance of the evidence that CEMEX discriminated against Kirk and or interfered with his right to make safety complaints in violation of section 105(c) of the Mine Act; and (2) if so, what are the appropriate remedies. Based on the entirety of the record before me, I conclude that CEMEX discriminated against Kirk and interfered with his protected rights in violation of section 105(c) of the Mine Act.

III. FINDINGS OF FACT

A. Parties’ Stipulations

At the hearing the parties stipulated in a joint exhibit to the following items, verbatim:

1. The Brooksville South Cement Plant is a “coal or other mine” as defined in Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1).
2. CEMEX is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
3. CEMEX is a person under Section 105(c) as statutorily defined by Section 3(f), 30 U.S.C. § 802(f).
4. Paul Kirk has been employed by CEMEX since July 2018.
5. Paul Kirk is a “miner” within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. § 802(g).
6. At all relevant times, Paul Kirk was employed by CEMEX as an industrial electrician.
7. At all relevant times, Paul Kirk was the president of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local Lodge No. D2020.

(Joint Ex. 1.)

B. Operations of Brooksville South Cement Plant’s Line 1 Kiln

CEMEX operates the Brooksville South Cement Plant in Florida. (II Tr. 45:25–46:3, 57:25–58:2.) This case centers around the Line 1 or “K1” Kiln (the “Kiln”) at the Brooksville South Cement Plant, which CEMEX uses to convert raw materials into cement. (Tr. 276:5–

277:25.) The Kiln consists of a preheated tower, and a reactor, or rotating kiln. (Tr. 262:21–263:4.) CEMEX first grinds the raw materials into a powder. (Tr. 276:14–17.) The powder is then heated in the preheated tower before it is fed into the reactor which transforms the material from solid to liquid and produces an artificial mineral called “clinker.” (Tr. 276:18–277:12.) As the clinker travels through the Kiln, it sticks to the Kiln’s walls and acts as a coating. (Tr. 278:14–19.) This coating shields the Kiln’s walls from the intense heat. (Tr. 278:20–25.) The clinker eventually enters the clinker cooler, which cools it from 7,000 degrees Fahrenheit to a range of 200 to 300 degrees Fahrenheit, whereupon it enters storage. (Tr. 277:13–20.) CEMEX then grinds the cooled clinker into a powder for use by customers. (Tr. 277:21–25.)

1. “Dusting” and the “Dog Box”

In this production system, a gap exists between the preheated tower, which is static, and the reactor, which rotates. (Tr. 263:5–14.) Any outside airflow entering the system through this gap will disrupt the suction process that moves materials through the Kiln. (Tr. 263:11–23, 308:21–309:10.) A mechanical seal, called the kiln seal, sits between the preheated tower and the reactor to prevent the inflow of air into the manufacturing process, as well as to prevent the outflow of cement dust from the system. (Tr. 263:5–23.) However, if there are gaps in the kiln seal, air can enter the closed system and cause kiln feed to escape from the system in the form of kiln feed dust. (Tr. 263:19–23.) The temperature of the dust can reach temperatures at or above 1,500 degrees Fahrenheit. (Tr. 41:20–25; II Tr. 14:23–15:2; Ex. S–29 at DOL_000051.) This release of dust, or “dusting,” can also occur when the liquid clinker coating the kiln’s interior walls becomes too thick and creates a “ring” that narrows the flow of material passing through the kiln, like a clogged artery. (Tr. 61:24–62:6, 279:3–17.)

Two screw conveyors are responsible for transporting any dust that escapes from the kiln seal. (Tr. 263:24–264:13.) One of the screw conveyors, “the preferred option,” known as the aeropul, catches and recycles the dust back into the system. (Tr. 264:4–7, 280:5–9.) The other screw conveyor only operates when the other screw conveyor fails or becomes overwhelmed and directs the dust into a large metal box known as the “dog box.” (Tr. 264:8–17, 279:25–280:20.)

The dog box is a metal structure, about the size of two industrial dumpsters, that sits outside the kiln and collects unrecycled spillage and allows it to cool. (Tr. 37:15–25, 39:11–12.) The dog box is not meant for continuous use. (Tr. 35:7–9, 37:4–6.) The dog box has doors that CEMEX can open to access and remove the dust spillage with front-end loaders. (Tr. 38:6–39:23; Ex. S–13.) Front-end loader operator error can create airborne dust during this process, causing clouds of hot dust to engulf the front-end loader. (Tr. 282:3–23; Ex. S–8.) Bobcats, which do not have enclosed cabs, are typically used to pick up and remove dust that has spilled outside the dog box after its doors are opened. (Tr. 40:9–41:6.)

Previously, hot dust was left in a pile outside the dog box causing the grass beneath it to catch on fire. (Tr. 38:21–39:10.) The dog box is also “not too far away from . . . alternative fuels which regularly catch[] on fire.” (Tr. 35:1–7, 71:19–23, 106:3–13, 251:8–14; Ex. S–13.) Miners can “slip [or] trip” on the dust material or develop “silicosis from breathing it in . . .” (Tr. 35:1–7.) Loader operators could suffer burns if the dust were to enter their loaders, as well as impaired visibility. (Exs. S–8, S–21.) Miners accessing the catwalk near the inlet level of the

kiln are also subject to severe burns if they were to travel through the accumulated piles of hot dust. (Ex. S-9.)

CEMEX observed the Kiln dusting intermittently after a new kiln seal was installed in January 2022. (Tr. 257:20–258:3, 283:23–284:18; II Tr. 103:23–104:25.) Management at the plant worked to troubleshoot the dusting, however the issue persisted. (II Tr. 105:9–14.) An MSHA inspector observed the kiln dusting during a February 2022 inspection, but did not issue any citations or orders regarding the dusting. (Tr. 200:23–201:23, 258:12–24, 285:8–21.) Rather, the inspector gave CEMEX twenty-four hours to stop the dusting, or he would “stop it for [them].” (Tr. 259:7–15.) CEMEX chose to voluntarily shut down and clean the kiln after the MSHA inspector’s visit, but the dusting continued thereafter. (Tr. 259:7–18, 286:3–6.)

2. Shutting Down the Kiln and “Shooting the Ring”

When needed, CEMEX can shut down the kiln. (Tr. 55:21–56:2.) To do so, CEMEX reduces the amount of material entering the kiln, runs the kiln until it is empty, and removes the flame to trigger a cooldown of the kiln. (Tr. 55:21–56:2.) The shutdown itself “can take a few hours,” but the kiln must then cool down for twenty-four hours before miners may enter it. (Tr. 56:9–20, 65:9–25, 113:24–114:9, 306:23–307:2, 307:10–12.)

After the kiln is shutdown, CEMEX can shoot the “ring”—the build-up of clinker that coats the kiln’s interior walls—to break it apart. (Tr. 60:21–61:2.) Shooting the ring prevents the backup and spillage of dust out of the rear-end of the kiln. (Tr. 62:2–9.) CEMEX normally chooses to shoot the ring to eliminate the buildup in the kiln. (Tr. 62:10–14.) However, shooting the ring is not the only solution. (Tr. 287:3–5.) CEMEX can also change the coal or petroleum intake to alter the chemistry of materials within the kiln to reduce the ring size, or it can use a hydraulic hammer to destroy the ring, though the latter method requires a shutdown of the kiln. (Tr. 287:3–15.)

Shooting the ring entails using an industrial shotgun to shoot the built-up material. (Tr. 61:3–62:1, 306:9–15.) CEMEX first sets up the industrial shotgun before shutting down the kiln because “you basically want to be shooting [the ring] as soon as the last step is made to remove the feed so that the ring is bright red . . . easily visible and it’s still soft so we can knock it down.” (II Tr. 108:6–16.) It typically takes CEMEX forty-five minutes to one hour to prepare the industrial shotgun. (II Tr. 108:2–3.) CEMEX also must empty the kiln material before it shoots the ring. (Tr. 305:18–20.) If the kiln is still “full of dust, it will create a cloud that [makes it] impossible to see where you’re shooting.” (Tr. 305:1–8.)

C. CEMEX Brooksville Cement Plant Rules

When CEMEX hired Kirk in 2018, he received a copy of the Brooksville Cement Plant Hourly Employee Handbook. (Tr. 125:10–13; Ex. R-5.) Kirk read the rules of conduct therein and signed the Acknowledgement of Receipt. (Tr. 125:14–126:18; Exs. S-27; R-3; R-5.) The handbook contains rules prohibiting insubordination and use of abusive or threatening language codified in Rules 2 and 7 of Category I Rules. (Tr. 233:1–14, 317:17–19; Exs. S-27; R-5.) Specifically, Rule 2 prohibits “[f]ighting or attempting bodily injury to another individual while

on Company property; the use of abusive or threatening language towards another individual.” (Tr. 237:5–10; II Tr. 80:21–25; Exs. S–27; R–5.) Rule 7 prohibits “[i]nterference with, insubordination, or refusal to obey any supervisor, or other duly constituted authority.” (Tr. 233:12–14; Exs. S–27; R–5.) Suspected violation of either of these Category I rules results in CEMEX “immediately” removing the suspected employee from the work area, giving the employee the opportunity to provide a written statement, and suspending that employee “pending further investigation.” (Tr. 233:17–23; Ex. S–27; R–5.) Upon confirmation of the violation, CEMEX will take “disciplinary action” such as a one– to three–workday suspension or even termination. (Exs. S–27; R–5.)

Another rule—Rule 5 of Category III—pertains to use of language. (Tr. 235:23–236:3, 317:14–16; II Tr. 28:1–6, 80:13–14; Exs. S–27; R–5.) Rule 5 prohibits the “[u]se of abusive, threatening or profane language.” (*Id.*) Violation of a Category III rule results in CEMEX taking progressive disciplinary action against the employee with no investigation. (Exs. S–27; R–5.) The progressive discipline system begins with a verbal warning and ends with termination. (II Tr. 77:7–78:23; Exs. S–27; R–5.)

D. Kirk’s Position and Union Procedures to Address Safety Concerns

Kirk worked as an industrial electrician for CEMEX at its Brooksville Cement Plant, in which he made safety repairs and trained new employees in electrical safety. (Tr. 32:9–16.) Kirk frequently communicated safety concerns to management. (Tr. 130:15–17, 317:25–318:2; Ex. S–3 at DOL_000069.) Kirk also served as the President of the Boiler Makers, Local Lodge No. D2020, Union in May 2022. (Tr. 32:17–21, 81:19–25; Ex. Joint Ex. 1.) As Union President, Kirk appointed members to the Safety Committee³ and provided guidance to them. (Tr. 32:25–33:8, 111:21–23.)

The union’s contract with CEMEX allows the Safety Committee to resolve issues on their own with a union representative or to report issues to line supervisors. (Tr. 33:11–21.) If a union member cannot resolve an issue alone or with a supervisor, they report it to the plant superintendents. (Tr. 33:20–22.) If this does not resolve the issue, the union can report it to management and then to the plant manager. (Tr. 22–23.) After exhausting the internal chain of command, the union can seek help outside the plant, such as reporting the issue to MSHA. (Tr. 33:23–25.)

E. Events of May 25, 2022

On the morning of May 25, 2022, members of the Safety Committee raised concerns over the Line 1 kiln to Kirk. (Tr. 34:6–10, 242:23–243:2; Ex. S–29 at DOL_000050.) Specifically, members raised concerns about hot dust spilling from the dog box and a lack of barricades around this area. (Tr. 34:20–25, 87:4–7, 242:9–15; II Tr. 105:1–3; Ex. S–29 at DOL_000050–

³ Miners bring safety concerns to the Safety Committee and the Committee relays these concerns to management. (Tr. 259:19–260:16.) For example, miners have reported safety concerns to Pennington, the Vice President of the Committee, during shift change in the locker room where “[t]hey feel more comfortable.” (Tr. 248:18–25.)

51.) The dusting was “light,” but based on prior experiences,⁴ Kirk worried it would become a “large mess” if CEMEX did not act.⁵ (Tr. 87:8–88:4, 97:2–15, 140:3–13, 191:11–20.)

Kirk texted his concerns to David Singer, an Environmental Manager at the plant, who did not respond. (Tr. 42:14–20, 88:5–9.) Kirk then spoke with Marcelo Leal, his Production Manager, in Leal’s office. (Tr. 42:14–43:2.) Leal told Kirk that the Kiln needed to “get to tonnage,” i.e. return to a stable state, and the dusting would stop. (Tr. 42:24–43:2, 88:10–89:21.) At tonnage, the materials flow smoothly, and no dust exits the kiln. (Tr. 47:21–48:9.) Kirk did not view this as a complete solution to the dusting but acknowledged it could abate it. (Tr. 92:24–93:11.) Kirk asked Leal if someone could place a tarp-like thermal blanket over the dog box to mitigate the hazards caused by the dusting. (Tr. 88:14–16.) Leal approved this idea and stated that management was addressing the issue. (Tr. 88:17–89:10.) Kirk felt that Leal did not take his concerns seriously and “blew him off.” (Tr. 185:20–186:8.)

Kirk next raised his concerns with Chris Walz, the Quality Control Manager. (Tr. 43:15–18, 89:22–90:11.) Walz told Kirk he was aware of the issue and noted that when the kiln returned to tonnage, the dusting would abate. (Tr. 43:17–20, 89:22–90:11.) After this conversation, Kirk texted the Plant Manager, Carlos Uruchurtu,⁶ that his “safety team ha[d] asked for [the dusting] to be fixed and nothing [was done.]” (Tr. 44:8–11, 90:12–92:23, 256:11–16, 288:18–22; Ex. S–18.) Uruchurtu responded that Leal was “looking at it.”⁷ (Ex. S–18.) Although the text messages between Kirk and Uruchurtu did not explicitly address a kiln shutdown, Kirk believed a shutdown would occur that day based on the messages. (Tr. 45:6–10, 90:12–92:23, 289:1–13; Ex. S–18.) Based on this belief, Kirk did not visit the dog box after this exchange, nor contact anyone that evening regarding his concerns. (Tr. 95:11–96:6.)

Uruchurtu and Leal, along with members of the production and maintenance crews, continued troubleshooting the kiln seal into the night. (Tr. 289:17–23, 292:1–9.) Before the night shift began, Uruchurtu instructed the night shift supervisor, Wilson Garcia, to monitor the Kiln and notify him of any changes. (Tr. 292:10–21.)

⁴ Kirk testified that “from past experience” he knew the kiln dusting “creates a huge safety hazard” and the conditions would likely worsen if not addressed. (Tr. 46: 12–15, 118:20–22, 140:7–13.)

⁵ Kirk is “familiar but . . . not a subject expert” on the kiln, as he is not a process operator. (Tr. 84:11, 93:22–24.)

⁶ Carlos Uruchurtu worked for CEMEX in various capacities for 33 years and had been the Plant Manager at the Brooksville South Plant for approximately 19 months at the time of the incident. (Tr. 271:18–25.)

⁷ Uruchurtu had already been notified about the dusting during his morning meeting and from members of the Safety Committee. (Tr. 264:24–265:3, 287:22–288:4.) Uruchurtu directed maintenance and production teams to troubleshoot the Kiln dusting that morning. (Tr. 287:22–288:15.)

F. Events of May 26, 2022

On May 26, 2022, at 6:23 a.m., Garcia texted a photo of the Kiln along with the message “K1 looking good at the moment” to the “control room operator group,” which included Uruchurtu. (Tr. 292:10–293:18; Ex. R–9.) After viewing this photo, Uruchurtu believed the dog box was “100 percent clean” and “[t]here was no dusting at all.” (Tr. 293:4–8.) But 15 minutes later, at 6:38 a.m., Garcia texted this same group that the rotary feeder stopped working again so the kiln was now sending all material to the dog box and no material to the recycling system. (Tr. 294:24–295:11; Ex. R–10.) Uruchurtu testified that he then texted Leal at 6:41 a.m. to “get prepared to shoot the ring down and [shut] [sic] the kiln down when you’re prepared.”⁸ (Tr. 180:14–18, 257:1–3, 270:1–3, 296:24–298:3, 310:4–6; II Tr. 19:6–18.)

At 6:42 a.m., Leal texted Jacob Ekstrom, the Kiln Superintendent, directing him to “stop the kiln as soon as you are ready with the shotgun and enough shells” to shoot the ring. (Tr. 205:9–14, 298:4–13; II Tr. 105:18–22; Ex. R–12.) Ekstrom, who had not arrived at work yet, responded that setup for shooting the ring and shutting down the kiln would occur after the shift change, which typically occurs around 6:57 a.m. (II Tr. 106:16–107:1; Ex. R–12.) Ekstrom then called his supervisor Luis Martinez, the Dayshift Supervisor, and directed him to prepare the shotgun to shoot the ring in the kiln. (II Tr. 107:2–10.)

At 7:00 a.m. that morning, Kirk attended a safety meeting with superintendents and others working the electrical shop shift for approximately thirty minutes. (Tr. 45:23–46:3, 98:21–99:3.) The superintendents informed the group that the dog box was still emitting dust, to avoid the area, and to “be on the watch for safety concerns there.” (Tr. 46:4–17, 99:4–25.) Kirk and others expressed concern that the kiln was still running and requested that it be shut down. (Tr. 46:12–15.)

Meanwhile, Ekstrom arrived at the plant at approximately 7:05 a.m. and proceeded to inspect the kiln. (II Tr. 109:20–24.) Ekstrom observed that no dust was coming out of the inlet seal of the kiln. (II Tr. 109:20–110:6.) At 7:27 a.m. Ekstrom texted Leal a video documenting the condition of the kiln seal along with the message “[c]ompared to yesterday it looks a lot better.” (II Tr. 109:20–110:6; Exs. R–12; R–13.) Ekstrom then texted Leal a video documenting the condition of the screw conveyor to the dog box which was not as full as it had been previously. (II Tr. 110:8–11; Ex. R–13.) Following his inspection, Ekstrom went to his office to check the shell scanner.⁹ (II Tr. 110:12–14.) Ekstrom photographed images of the shell scanner, as well as a graph of the trend of the kiln feed and fuel on May 26, 2022. (II Tr. 111:20–112:13; Ex. R–14.)

⁸ This text message instruction was not admitted into evidence as it was in Spanish and counsel failed to provide a certified translation. (Tr. 296:1–21.)

⁹ The shell scanner shows the external temperature profile of the entire length of the kiln. (II Tr. 113:2–4.) The shell scanner will show whether there are heavy areas of coating on the kiln, like a ring, or if there are hot spots where the coating is very thin. (II Tr. 113:4–8.)

At 7:54 a.m. Uruchurtu texted members of the safety committee, including Pennington and Tompkins, that CEMEX would shut down the kiln in order to fix the failed rotary lock. (Tr. 298:25–300:9; Ex. R–23.) Kirk was not a part of this group message. (Tr. 48:11–18.) Uruchurtu arrived at the plant at approximately 7:55am.¹⁰ (Tr. 298:22–24.) He did not directly inform Kirk of the order to shut down the kiln nor witness anyone else do so. (Tr. 265:10–17.)

Ekstrom testified that sometime during the past week, Leal had informed him more than once that Kirk and two members of the Safety Committee, David Tompkins and Patrick Pennington, complained about management’s lack of action to address the dusting. (II Tr. 114:10–115:15, 119:14–120:9.) Therefore, Ekstrom decided to speak with Kirk, Tompkins, and Patrick at approximately 8:00 a.m. to share the improvements he witnessed. (Tr. 46:24–47:8, 99:18–25; II Tr. 114:10–115:15.) Kirk testified that Ekstrom told him “we’re almost to tonnage. Things are looking smooth.” (Tr. 47:14–19.) Based on this exchange, Kirk believed the kiln was still running. (Tr. 47:11–19, 50:20–51:3, 100:4–20, 189:17–22.) In contrast, Ekstrom testified that he told Kirk that despite the Kiln’s improved condition, Uruchurtu ordered the Kiln to be shut down and his team was preparing the shotgun. (II Tr. 115:16–23.) Ekstrom testified that after sharing this information, Kirk responded by saying that management did not care about safety and that he planned to call MSHA. (II Tr. 120:10–18.) Ekstrom testified that in response, he repeated to Kirk that CEMEX was shutting down the kiln and preparing to shoot the ring. (II Tr. 121:10–17.) Ekstrom did not recall what either Tompkins or Pennington said during this conversation. (II Tr. 121:10–17.) Pennington did not offer any testimony regarding the conversation, nor was he asked about it at the hearing. (See Tr. 240:9–254:18.)

After Ekstrom spoke with Kirk, Tompkins, and Pennington, he radioed Martinez to check the status of the shotgun. (II Tr. 116:1–3.) Martinez responded that the shotgun was ready. (II Tr. 116:3–4.) Ekstrom then radioed the control room and instructed them to start decreasing the feed to the kiln. (II Tr. 116:4–5.)

Kirk, concerned that the safety issues caused by the dusting persisted, decided to speak directly to Uruchurtu and indicated his intent to do so to his supervisor, Chris Lanham. (Tr. 48:19–49:2, 51:4–23, 100:21–102:13.) Lanham told Kirk to “go ahead.” (Tr. 51:20–23.) Kirk did not visit the kiln to view its condition before speaking to Uruchurtu. (Tr. 48:19–49:7, 101:10–13.)

1. Kirk’s Interruption of the Proudfoot Consultant Meeting

Uruchurtu met with two consultants, Bruce MacConnell¹¹ and Christine Branston from Proudfoot Consulting, at 8:00 a.m. in the second-floor conference room. (Tr. 265:4–7, 300:21–301:16, 301:8–16; II Tr. 46:17–47:6; Ex. R–21.) During this meeting, Uruchurtu sat next to

¹⁰ In what could be a transcript error or oral mistake during the hearing, counsel for CEMEX stated that Uruchurtu arrived at the plant at 5:28, without mentioning a.m. or p.m. (Tr. 300:18–20.)

¹¹ Bruce MacConnell is the Vice President of Natural Resources for the international consulting group Proudfoot. (Tr. II 44:21–45:4.)

MacConnell, who was closest to the door. (Tr. 301:9–16.) Shortly after the meeting began, Kirk entered the conference room without knocking. (Tr. 52:1–5, 107:9–14, 301:18–20; II Tr. 47:11–14; Ex. R–21.) Kirk testified that he stood holding the door open, approximately fifteen feet away from Uruchurtu, waiting for Uruchurtu to acknowledge him. (Tr. 52:5–53:4, 109:18–22, 110:16–19.) In contrast, Uruchurtu testified that Kirk “stormed into” the room and stood over MacConnell “very close to [Uruchurtu] . . .” (Tr. 266:17–20, 301:18–302:5; II Tr. 27:20.) MacConnell similarly testified that Kirk “barged into” the meeting, did not wait for Uruchurtu to acknowledge him, and was “right in front of” MacConnell “leaning over in front of [him] in [his] work area.” (II Tr. 47:23–48:1, 49:16–22, 50:6–14; Ex. R–21.)

Kirk testified that he told Uruchurtu the plant needed to shut the kiln down as it was a safety concern. (Tr. 52:8–12, 109:9–17; II Tr. 47:15–17, 50:1–2, 53:9–15.) MacConnell testified that Kirk said, “[y]ou promised that you would fix that safety issue” to Uruchurtu. (II Tr. 47:15–17, 50:1–2, 53:9–15.) Kirk did not swear, but he pointed his finger at Uruchurtu as he was speaking. (Tr. 52:16–53:4, 109:18–22, 110:16–24, 195:20, 302:9; II Tr. 28:15–29:11.) Kirk testified that he spoke in a “dominant voice” and “firm manner.” (Tr. 52:7–15, 109:9–17, 195:20.) Uruchurtu testified that Kirk “was shouting really, really fast, at [a] machine gun pace.” (Tr. 266:14–24, 301:17 - 24; II Tr. 27:20–23.) MacConnell testified that Kirk was “more or less hollering at [Uruchurtu] . . .” (II Tr. 48:11–17.)

Uruchurtu asked Kirk to leave three times, but Kirk did not leave. (Tr. 52:13–15, 108:19–23, 111:10–13, 266:25–267:4, 302:14–19; II Tr. 47:18–48:1.) Kirk testified that he refused to leave because he thought Uruchurtu did not want to address the dusting issue, which he believed was a serious safety concern. (Tr. 52:13–15, 108:1–11, 111:4–9.) Although Uruchurtu had already ordered a kiln shutdown, he did not share this information with Kirk. (Tr. 53:8–13, 100:17–20, 108:19–109:8, 265:18–266:4.) Uruchurtu ended his meeting with the consultants and went to his office with Kirk. (Tr. 53:16–17, 111:14–17, 267:12–19, 302:18–19; II Tr. 48:2–8.) At an unspecified time, MacConnell and Branston wrote a summary of the preceding events after Uruchurtu asked them to do so. (II Tr. 48:9–49:7, 54:3–13; Ex. R–21.) Uruchurtu did not explain to MacConnell or Branston why he wanted them to prepare a statement. (II Tr. 54:14–20.)

2. Events Following the Interrupted Proudfoot Meeting

Jennifer Mulligan, CEMEX Human Resources Business Partner, and David Tompkins, President of the Safety Committee, joined Uruchurtu and Kirk in Uruchurtu’s office at approximately 8:15 a.m. (Tr. 53: 16–21, 66:16–67:8, 111:14–112:1, 251:22–252:1, 267:14–19; II Tr. 57:17–20, 59:24–60:4.) Mulligan took notes during the meeting on her phone. (Tr. 302:25–303:2; II Tr. 60:5–61:1; Ex. R–16.) Mulligan recorded in her notes that Kirk started the meeting by expressing his safety concerns about the dog box. (II Tr. 61:21–62:2; Ex. R–16.) Mulligan noted that Uruchurtu responded by noting that he was in a confidential meeting and that he asked Kirk to meet later. (II Tr. 62:3–10; Ex. R–16.) The notes also reflect that Uruchurtu updated Kirk about when the Kiln would be stopped, but Kirk kept talking. (II Tr. 62:3–10; Ex. R–16.) After this, Mulligan discontinued her notes. (II Tr. 62:3–10; Ex. R–16.)

Mulligan resumed her notes when Kirk stated he would file a labor charge if Uruchurtu “follow[ed] through.” (Tr. 62:3–14; II Tr. 91:14–92:4; Ex. R–16.) Mulligan testified that Kirk said this in response to Uruchurtu wanting to proceed with discipline. (Tr. 62:21–63:8.) There is no mention of discipline in her notes. (See Ex. R–16.) Uruchurtu told Kirk that his behavior during the interruption of the consultant meeting would not be tolerated but he did not use the words “write you up for this” or “discipline.” (Tr. 65:6–8, 268:1–12, 269:10–14, 303:7–13.) Kirk testified that he had no recollection of being disciplined at this meeting. (Tr. 65:6–8, 303:7–13.)

During the meeting, Kirk and Tompkins asked for the kiln to be shut down and other safety measures to be implemented. (Tr. 54:20–25, 59:23–60:11, 112:4–25, 114:17–20, 221:4–11, 310:17–311:1; Ex. R–16.) Kirk learned during the meeting that CEMEX was shutting down the kiln.¹² (Tr. 65:9–25, 113:12–23, 304:21–305:11; Ex. R–16.) This information assuaged Kirk’s concern about the dusting. (Tr. 66:9–11.) The parties also discussed how Kirk could best communicate urgent matters with Uruchurtu over text. (Tr. 55:4–7; Ex. R–16.) During the meeting, Kirk suggested two mitigation techniques to address the hazards caused by the dusting which Uruchurtu implemented later that evening. (Tr. 112:4–9, 310:17–311:5.)

Following the meeting, Kirk visited the dog box area to photograph what he described as a “mess” due to the dust spillage. (Tr. 66:12–15; Exs. S–12; S–13.) Kirk photographed Personal Touch, a company contracted to clean the plant, spraying a water hose on the hot dust that was coming from the dog box. (Tr. 69:1–13, 71:19–23; Exs. S–12; S–13.) Kirk observed the dust had spread along the walkway area and towards the alternative fuels, which he believed posed a fire concern. (Tr. 70:9–71:23; Ex. S–13.) Kirk also believed Personal Touch’s cleaning actions were unsafe because they were not wearing hot material gear. (Tr. 115:17–21, 119:6–16.) However, Uruchurtu testified that Personal Touch, a company of “hot material experts,” was not required to wear additional safety gear. (Tr. 118:6–15; II Tr. 38:8–24.) At an unspecified time that evening, CEMEX installed a thermal blanket over the dog box and restarted the kiln. (Tr. 310:14–15; II Tr 7:8–16.)

Uruchurtu and Mulligan testified that they discussed Kirk’s formal discipline after Kirk and Tompkins left Uruchurtu’s office. (Tr. 269:15–18, 312:8–18; II Tr. 11–15.) At an unspecified time that day,¹³ Mulligan texted her supervisor, Oscar Frias, that she wanted to discuss Kirk’s interruption of the Proudfoot meeting. (Ex. R–19.) Mulligan testified that she sought support from her supervisor to formalize Kirk’s discipline. (II Tr. 63:17–22.) The texts between Mulligan and her supervisor displayed in Exhibit R–19 do not mention disciplining Kirk. (See Ex. R–19.)

Uruchurtu testified he had a meeting with his supervisor at 4:00 p.m. to discuss his plans to discipline Kirk. (Tr. 313:6–19.) Uruchurtu testified that during this meeting the decision was

¹² The kiln stopped receiving new materials and fuel at approximately 9:00 a.m. (II Tr. 23:4–14, 117:19–25, 305:7–9; Ex. R–14.)

¹³ The timestamps on the text messages displayed in Ex. R–19 are not discernable, and a portion of the image was redacted.

made to document Kirk's discipline in writing. (II Tr. 33:24–34:3.) However, there is no documentation regarding this decision, and Uruchurtu followed CEMEX's counsel's advice not to reveal who attended this meeting or what was discussed during his deposition. (II Tr. 34:4–35:2.)

That afternoon, Kirk texted Mulligan, asking whether he could talk to her about a “non[] union issue.” (Tr. 119:17–120:6; II Tr. 65:4–66:14; Ex. R–2.) Sometime after Kirk finished his shift at 5:30 p.m., he called Mulligan. (Tr. 72:22–73:24, 214:19–25; II Tr. 65:4–66:20; Ex. R–2.) Kirk testified that they spoke about his representation of two employees in his role as union president regarding an unrelated event. (Tr. 72:22–73:24, 119:17–120:6.) Kirk testified that they did not discuss the dog box during the phone call. (Tr. 72:22–73:24, 119:17–120:6.) On cross-examination Kirk denied apologizing for how he spoke to Carlos, but clarified that he said he “was sorry if he hurt [Uruchurtu's] feelings in any way, but I'm human . . . I had reported a safety imminent danger.” (Tr. 121:20–24.) In contrast, Mulligan testified that Kirk called to apologize for acting inappropriately during the Proudfoot meeting. (II Tr. 67:10–20, 90:8–91:10.) After the call with Kirk, Mulligan texted Uruchurtu that Kirk “just called to tell me how tired he is of fighting and how he reacted inappropriately this morning.” (Tr. 313:20–314:25; II Tr. 68:2–69:8; Ex. R–24.)

G. MSHA Inspections on May 29 and 30, 2022

Kirk did not work on Friday, May 27, or over the holiday weekend of May 28–30. (Tr. 72:1–2, 216:9–12.) On Saturday, May 28, the Safety Committee informed Kirk that the dog box was still dusting.¹⁴ (Tr. 72:5–12, 219:6–9, 244:4–19; Ex. S–29.) Pennington texted Kirk that the miners “are not feeling safe with this and [are] not happy.” (Tr. 244:7–245:13; Ex. S–29.) Kirk responded, “[t]ell them to call MSHA.” (Tr. 72:13–16, 177:16–19; Ex. S–29.) Kirk testified that he did not call MSHA, but “a couple” people at the plant “suggested” that he did. (Tr. 72:17–21.)

MSHA visited the plant and issued two citations at 2:10 a.m. and 2:25 a.m. on Sunday, May 29, 2022. (Tr. 122:17–24, 220:22–24; Exs. S–8; S–9.¹⁵) The MSHA inspector observed “excessive” hot dust leaving the dog box, and noted miners were “subjected to injury . . . while

¹⁴ A member of the Safety Committee sent a video to Kirk showing dust surrounding a front-end loader. (Tr. 244:14–245:13; Ex. S–15.) The video was admitted as evidence over CEMEX's objection, but because I do not know who recorded it or when, I give it very little weight as to what happened or when it was alleged to have happened. (Tr. 246:15–247:17; Ex. S–15; Resp't Reply Br. at 2.) The Secretary showed another similar video at the hearing, which CEMEX objected to on the same grounds, and I admitted it with the same caveat. (Tr. 165:20–171:10; Ex. S–14.)

¹⁵ Counsel for CEMEX objected to the relevance of Exhibits S–8 and S–9. (Tr. 157:13–158:4, 160:7–19.) I overruled these objections, noting that the cited conditions did not reflect the alleged conditions on the dates of Kirk's safety complaints. (Tr. 159:5–8, 160:20–25.) Counsel for the Secretary noted these pieces of evidence “show one of the ways in which [the dusting] can get worse.” (Tr. 17:13–158:23.)

attempting to scoop the material out . . . if the dust were to enter the [front-end] loader.” (Tr. 156:22–25; Ex. S–8.) The inspector also cited CEMEX for not erecting barricades on the ground or catwalk levels of the kiln to “warn of the high temperature dust spilling out of the kiln,” and concluded the miners could obtain “severe burn injuries if they were to inadvertently travel through the high temperature dust . . .” (Ex. S–9.) On May 30, 2022, MSHA inspectors visited the plant again and issued an order at 2:30 a.m. for dust coming out of the dog box. (Tr. 161:8–22; Ex. S–10.)¹⁶ CEMEX and the Secretary later settled all these citations. (Tr. 315:10–18; Sec’y Br. at 10.)

H. Management’s Actions Addressing Kirk’s Interruption of the Proudfoot Meeting

On an unspecified date, Mulligan reviewed previous Employee Disciplinary Action Forms issued to other CEMEX employees to inform management which level of discipline for Kirk would be consistent with past company actions. (II Tr. 69:16–70:8, 71:3–95:20, 97:3–16; Ex. R–18.) She did not collect a statement or information from Kirk at any time because she believed the case did “not warrant collecting it . . .” (II Tr. 88:2–89:11, 100:8–18.) She collected an oral statement from Uruchurtu and a written statement from MacConnell that he prepared on May 26 or May 27. (II Tr. 54:3–13, 89:12–18.) Uruchurtu similarly testified he did not investigate the situation prior to deciding to discipline Kirk, “because it happened directly to me.” (Tr. 269:19–23.) Instead, Uruchurtu only told Mulligan to “make sure that she follow[ed] the] process.” (Tr. 269:22–24.)

I. Kirk’s Return to Work on May 31, 2022, and Formal Discipline on June 1, 2022

Kirk returned to work on Tuesday, May 31, 2022, after the holiday weekend. (Tr. 174:8–12, 217:11–218:1.) On Wednesday, June 1, 2022, Kirk received a written verbal warning from his supervisor, Chris Lanham, and maintenance manager, Jose Carlos Sepulveda. (Tr. 74:16–22, 76:5–18, 124:11–17; Ex. S–2.) Sepulveda and Lanham told Kirk the discipline arose from Kirk’s “unprofessional behavior when [he] interrupted the meeting” between Uruchurtu and Proudfoot. (Tr. 124:18–21.) Uruchurtu and Mulligan testified that CEMEX disciplined Kirk for violating Rule 5 of Category III prohibiting the “[u]se of abusive, threatening, or profane language.” (Tr. 317:13–16; II Tr. 80:11–14; Ex. R–5 at CEMEX000273.)

The “Employee Disciplinary Action Form” Kirk received cited him with a “verbal warning” for “conduct” which it described as follows:

On Thursday, May 26, 2022, you interrupted a private meeting that the Plant Manager was holding. As the meeting had nothing to do with you or anyone in the plant, you were politely asked to leave and meet with the Plant Manager later to discuss your issue(s). Rather than leave you became agitated, disrespectful, and

¹⁶ Counsel for CEMEX also objected to the relevance of Exhibit S–10. (Tr. 162:1–164:21.) I overruled this objection, noting that the cited condition did not reflect the alleged conditions on the dates of Kirk’s safety complaints. (Tr. 164:24–165:3.)

insubordinate after being asked to leave the room and come back later. This type of conduct is unwarranted and is not to be tolerated.

(Ex. S-2.) The form further specified that “[a]dditional incidents may result in further corrective actions up to and including termination.” (Ex. S-2.) The Secretary highlighted in her opening argument at the hearing that this record of a verbal warning stays on Kirk’s employe file for two years and is the first step of a progressive disciplinary process at CEMEX. (Tr. 15:12-14.)

After Lanham and Sepulveda issued the discipline, Kirk asked if he could provide a statement. (Tr. 74:25-76:4.) Sepulveda and Lanham left the room after Kirk began writing a statement. (Tr. 124:22-125:1.) Kirk later tried to submit his statement to his manager but “they didn’t take it.” (Tr. 125:1-6.)

J. Kirk Contacts MSHA and Files a Section 105(c) Discrimination Complaint

Kirk contacted MSHA on June 1, 2022, after he received the Disciplinary Action Form. (Tr. 77:4-10.) On June 13, 2022, Kirk filed a Discrimination Complaint with MSHA. (Tr. 77:16-24.) After receiving Kirk’s complaint, MSHA Special Investigator Michael LaRue was assigned to the case. (Tr. 151:3-12.) Investigator LaRue interviewed Kirk, Uruchurtu, Sepulveda, and Lanham. (Tr. 151:18-152:2; Exs. S-3; S-4; S-5; S-29.) Investigator LaRue also collected relevant documents from CEMEX and gathered the May 29 and May 30 MSHA citations to aid his investigation. (Tr. 152:10-14, 156:5-165:5; Exs. S-8; S-9; S-10.)

K. Safety Concerns Raised After Kirk’s Formal Discipline

Kirk and other CEMEX employees, such as Pennington, Vice President of the Safety Committee at the plant, continued to raise safety concerns with plant management after Kirk received the written verbal warning on June 1, 2022. (Tr. 130:18-22, 134:24-135:1, 135:18-23.) Specifically, Kirk raised safety issues and concerns with management on June 14, 2022, August 1, 2022, September 1, 2022, September 26, 2022. (Tr. 130:23-133:20)

IV. PRINCIPLES OF LAW

A. Establishing a Prima Facie Discrimination Case

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has

testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

To establish a prima facie case of section 105(c) discrimination¹⁷ under the traditional *Pasula-Robinette* framework, the Secretary must prove by a preponderance of the evidence (1) that the complainant engaged in a protected activity, (2) the complainant suffered adverse action, and (3) that the adverse action was motivated in any part by the protected activity.¹⁸ *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981).

A mine operator may rebut a prima facie of discrimination case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec’y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If a mine operator cannot rebut a prima facie case, it nevertheless may defend affirmatively by proving that it was also motivated by the miner’s unprotected activities and

¹⁷ The Commission’s decision in *Turner v. National Cement Company* discusses the level of proof necessary to support a miner’s prima facie discrimination claim. *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065–67 (May 2011). In its analysis, *Turner* drew nearly exclusively from Circuit Court decisions on Title VII claims. *Id.* *Turner* did not address *Pasula*’s holding that “the complainant ... establishe[s] a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.” *Pasula*, 2 FMSHRC at 2799 (emphasis added). See *Turner*, 33 FMSHRC at 1065–72 (discussing the complainant’s burden in proving a prima facie discrimination case). In remaining silent on this point, *Turner* does not overturn the well-settled principles set forth in *Pasula*, *Robinette*, and their progeny. See *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986) (“An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.”) (citations omitted).

¹⁸ Both the Secretary and CEMEX also address application of the non-binding case *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021). (See Sec’y Br. at 21 n.7; Sec’y Reply Br. at 15–16; Resp’t Br. at 13–14, 44–46.) In *Thomas*, the Ninth Circuit held that to establish a prima facie case of discrimination under the Mine Act the complainant must show that the adverse action would not have occurred but for the protected activity. *CalPortland Co.*, 993 F.3d at 1210. Because the case before me arises out of the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, I decline to adopt the heightened pleading standard therein. See *Sec’y of Labor ex rel. Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302 (June 2021) (holding that the “but-for” causation standard in *Thomas v. CalPortland Co.* only governs section 105(c) discrimination cases brought within the Ninth Circuit.)

would have taken the adverse action in any event based on the unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

B. Establishing a Prima Facie Interference Case: *Franks* and *Pepin* Tests

In addition to prohibiting discrimination, section 105(c) of the Mine Act also makes it unlawful for an operator to “interfere with the exercise of the statutory rights of any miner.” 30 U.S.C. § 815(c)(1). The Commission has not settled on the legal test for assessing claims of interference but has articulated two possible tests commonly referred to as the *Franks* test and *Pepin* test. See *Sec’y of Labor ex rel. Greathouse v. Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680 (June 2018). Under the *Franks* test, an interference claim is established when:

(1) A person’s action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Greathouse, 40 FMSHRC at 686 (Comm’rs Cohen & Jordan, separate op.) (quoting *UMWA ex rel. Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Chairman Jordan & Comm’r Nakamura, separate op.)).

Under the *Pepin* test, to prove an interference claim, the Secretary must show that: “(1) the Respondent’s actions can be reasonable viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and that (2) such actions were motivated by the exercise of protected rights.” *Sec’y of Labor ex rel. Pepin v. Empire Iron Mining P’ship*, 38 FMSHRC 1435, 1453–54 (June 2016) (ALJ); see also *Greathouse*, 40 FMSHRC at 708 (Acting Chairman Althen & Comm’r Young, separate op.) (holding that the language of section 105(c) requires proof of motivation related to protected activity to establish a claim of interference).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

I now turn to the individual claims. First, I will analyze the claim the CEMEX discriminated against Kirk for his protected activity of raising safety concerns by issuing Kirk a written verbal warning for alleged insubordination. Second, I will analyze the claim that CEMEX interfered with Kirk’s right to raise safety concerns by refusing to listen to his safety concerns and subsequent discipline.

A. Whether CEMEX Engaged in Discrimination Under Section 105(c)

1. Protected Activity

Under the Mine Act, a complaint about mine safety, made by the miner to the operator, is protected activity. 30 U.S.C. § 815(c)(1) (“[A] complaint under or related to this [Mine Act],” filed by a miner, his representative, or a job applicant is expressly protected under Section 105(c)). The Commission has repeatedly recognized that raising safety concerns “is, of course, paradigmatic ‘protected activity’ within the meaning of section 105(c)(2).” *Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 n.3 (2015); *see also Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1922 (2016).

Thus, there is little question that safety complaints made to management constitute protected activity. *Sec’y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). However, such a complaint must be based on a reasonable, good-faith belief that a safety hazard exists. *Pasula*, 2 FMSHRC at 2793; *Robinette*, 3 FMSHRC at 810. Commission precedent clarifies that a good faith belief on the part of the miner “simply means [a] honest belief that a hazard exists.” *Robinette*, 3 FMSHRC at 810 (Apr. 1981). And “[r]easonableness can be established at a minimum through the miner’s own testimony as to the conditions responded to.” (*Id.* at 812.)

Kirk repeatedly raised safety concerns about the Kiln with plant management, including Uruchurtu, on May 25, 2022. (Tr. 42:14–43:20, 44:5–8, 88:5–90:22.) Kirk felt management did not take his concerns seriously and did not address the issue. (Tr. 89:11–14, 185:20–186:8.) He texted Uruchurtu that his “safety team ha[d] asked for [the dusting] to be fixed and nothing [was done.]” (Ex. S–18.) On the morning of May 26, Kirk attended a safety meeting in which the superintendents told Kirk and other workers that the kiln was still dusting and to “be on the watch for safety concerns.” (Tr. 46:1–9; Sec’y Reply Br. at 4.) In response, Kirk and the other workers questioned why the kiln was still running. (Tr. 46:10–15.) Kirk believed that the continued use of the dog box would lead to “dust[] everywhere . . . [dust would even] cover[] the parking lot . . .” (Tr. 140:7–13, Exs. S–3.) Kirk worried that the dusting would cause “slip/trip fall[s] . . . silicosis . . . [a] fire . . .” (Tr. 35:1–35:9.) Indeed, the dust emitted from the dog box can reach temperatures at or above 1,500 degrees Fahrenheit. (Tr. 41:20–25; II Tr. 14:23–15:2.) Thus, Kirk interrupted the Proudfoot consultant meeting on May 26 because he believed the kiln’s dusting posed an imminent danger that could cause life-altering injuries. (Tr. 102:7–13, 108:1–11.) During his interruption of the meeting, Kirk referred to the dusting as a “safety issue” multiple times. (Tr. 52:8–12, 109:9–17, 195:20; II Tr. 47:15–17, 50:1–2, 53:9–15.) Both the Secretary and CEMEX acknowledge such language in their post-hearing briefs. (*See* Sec’y Br. at 13; Resp’t Br. at 22.) Therefore, it is clear the Kirk engaged in protected activity by raising safety concerns with plant management on May 25 and May 26.

The Secretary asserts that Kirk had reasonable, good-faith belief that a safety hazard existed on May 26, 2022, based on:

- (1) concerns expressed by others about the Kiln on May 25 and May 26
- (2)[] his belief the Kiln was still dusting when he interrupted the meeting;
- (3) previous incidents of dusting, including one resulting in MSHA shutting down the Kiln, and Uruchurtu’s concern it would happen again; and
- (4) MSHA’s subsequent citations to Respondent related to the dusting.

(Sec’y Br. at 13–14.) The Secretary also highlights that Kirk was told at his morning meeting on May 26 that the Kiln was still dusting and to be on the watch for safety concerns. (Sec’y Br. at 14.)

Specifically, the Secretary argues that the fact Uruchurtu testified he was concerned about the consequences of MSHA visiting the plant on the morning of May 26, 2022, further supports the reasonableness of Kirk’s belief that the Kiln posed a safety hazard. (Sec’y Br. at 15–16.) In fact, MSHA issued two citations and an order to CEMEX when it visited the plant three days later regarding the Kiln dusting again. (Exs. S–8, S–9, S–10.) The Secretary noted that Kirk’s past experiences with the Kiln dusting also provided a reasonable basis for concluding the dusting posed a serious hazard. (Sec’y Br. at 16.) Kirk testified that “from past experience,” he knows the dusting “creates a huge safety hazard” that can lead to “sc[a]lding.” (Tr. 46:12–15, 118:20–22.) Moreover, Kirk previously observed that the dusting could get worse and pose further hazards if it is not addressed because “the material goes all over the place and it dusts everywhere.” (Tr. 97:8–15, 140:7–13.)

CEMEX argues that Kirk did not engage in protected activity based on a reasonable, good-faith belief that a safety hazard existed on May 26, 2022. (Resp’t Br. at 17.) Specifically, CEMEX argues that Kirk’s belief that a safety hazard existed was not reasonable because he had no direct knowledge of the Kiln or the dog box at the time he interrupted the Proudfoot consultant meeting. (Resp’t Br. at 18.) However, section 105(c) of the Mine Act does not require the complainant to have direct knowledge of a danger or safety violation. Rather, under the Mine Act, protected activity includes any “complaint notifying the operator . . . of an *alleged* danger or safety violation . . .” 30 U.S.C. § 815(c)(1) (emphasis added).

CEMEX asserts that before Kirk interrupted the Proudfoot consultant meeting Ekstrom told Kirk twice that despite the Kiln’s improvements, he had been instructed to shut down the kiln and his crew was setting up the shotgun. (Resp’t Br. at 19.) CEMEX highlights that Kirk testified at the hearing that Ekstrom told him that there was no dusting. (Resp’t Br. at 19.) CEMEX adds that it is improbable that Ekstrom gave the impression that CEMEX was going to continue running the kiln since he had already directed his team to prepare to shut down the Kiln. (Resp’t Br. at 21.)

Ekstrom and Kirk discussed Kiln operations on May 26th. (Tr. 47:11–19, 50:20–51:3, 100:4–20, 189:17–190:2; II Tr. 115:16–23.) However, they each offered conflicting testimony regarding the Kiln’s shutdown. Ekstrom testified that he told Kirk that Uruchurtu ordered the Kiln to be shutdown. (Tr. 189:23–190:2; II Tr. 115:16–23; Resp’t Reply Br. at 5–6, 22; Ex. R–16.) However, Kirk believed the Kiln was still running based on his exchange with Ekstrom. (Tr. 47:11–19, 50:20–51:3, 100:4–20, 189:17–22.)

Kirk worked for CEMEX for nearly five years. (Tr. 32:4–16.) At the time of the hearing, Ekstrom worked for CEMEX for approximately four years. (II Tr. 103:1–10.) Accordingly, I give weight to both of their testimonies regarding their conversation. However, a significant portion of Kirk’s work for CEMEX and his union was addressing safety concerns. (Tr. 32:12–33:14.) This is demonstrated by his record of reporting safety concerns to the plant’s management, including Uruchurtu, as well as appointing members to the Safety Committee. (Tr.

32:25–33:2, 311:14–16, 317:25–318:12.) Thus, I find Kirk’s unabated safety concerns following this conversation credible. Pennington observed this conversation but was not asked about it on cross examination, and Ekstrom did not remember what Pennington said during the conversation. (II Tr. 121:10–17.) I am therefore less inclined to believe that Ekstrom explicitly and clearly stated the kiln would be shut down. (Tr. 115:16–23.) Additionally, as the Secretary points out in her Post Hearing Brief, Kirk had a reasonable basis for believing CEMEX was not addressing the kiln’s dusting, because he believed the kiln would be shut down on the 25th and it was not. (Sec’y Br. at 15, Sec’y Reply Br. at 2–5.) Therefore, Kirk could have reasonably doubted CEMEX would shut down the kiln even after his conversation with Ekstrom. (Sec’y Br. at 15.)

CEMEX also points out that Uruchurtu texted the Safety Committee at 7:54 a.m. that they were shutting down the kiln and argues it is likely that members of this Committee, specifically Pennington and Tompkins, shared this information with Kirk before he interrupted the Proudfoot consultant meeting. (Resp’t Br. at 21–22.) However, CEMEX has not provided any direct evidence that Kirk knew of this text message. Specifically, CEMEX did not ask Pennington any questions about whether he remembered receiving this text message or if he told Kirk about it at the hearing. (See Tr. 249:7 – 254:12.) CEMEX itself also highlights that Pennington and Tompkins received this message while Ekstrom was talking to them and Kirk. (Resp’t Reply Br. at 7.) Thus, it is unlikely that Pennington and Tompkins saw the message and shared its contents with Kirk before he left to talk to Uruchurtu. Even if Pennington or Tompkins saw the message, the message did not provide a timeline for the Kiln being shut down, rather Uruchurtu only said “[w]e will stop kiln to get rotary locked fixed it was not dusting when it ran for 1 h.” (Ex. R–23.) Thus, Uruchurtu’s text does not clearly explain that he had already ordered the Kiln to be shut down.

CEMEX contends that Mulligan’s notes establish that Uruchurtu told Kirk when he interrupted the Proudfoot consultant meeting that the Kiln would be shut down, but Kirk kept talking. (Resp’t Br. at 23.) However, CEMEX also acknowledges that neither Kirk nor Uruchurtu remember Uruchurtu telling Kirk this information when he interrupted the meeting, rather the only evidence to support this is Mulligan’s notes. (Resp’t Br. at 23.) Similarly, Uruchurtu made no such claim in his interview with Investigator LaRue. (See Ex. S–3.)

CEMEX also argues that Kirk believed that the Kiln only posed an imminent danger to the Personal Touch contractors cleaning up the hot dust, despite admitting the Personal Touch contractors were subject-matter experts in cleaning up hot material. (Resp’t Br. at 25.) However, the Secretary need not prove that the conditions Kirk complained about to management were objectively unsafe. See *U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001) (holding that “[w]hether the conditions were objectively unsafe is not determinative of the protected status of the complaints”). Additionally, it was reasonable for Kirk to believe the extremely hot dust posed safety hazards. Miners could “slip [or] trip” on the dust material or develop “silicosis from breathing it in . . .” (Tr. 35:1–7.) Loader operators could suffer burns if the dust were to enter their loaders, as well as impaired visibility. (Exs. S–8, S–21.) Miners accessing the catwalk near the inlet level of the kiln could also suffer severe burns if they were to travel through the accumulated piles of hot dust. (Ex. S–9.)

CEMEX also argues that no hazard existed at the time Kirk interrupted the Proudfoot consultant meeting. However, Kirk interrupted the meeting shortly after it began at 8:00 a.m. and Uruchurtu testified “the kiln stopped very close to 9:00 in the morning.” (II Tr. 47:11–12, 23:8–14.) Thus, the Kiln was still running and posed a hazard when Kirk interrupted the meeting to raise his concerns to Uruchurtu. More importantly, Kirk had a good faith belief that the Kiln posed an ongoing hazard at the time he interrupted the meeting. As discussed above, a miner’s safety complaint is protected even when it addresses only an alleged safety concern. 30 U.S.C. § 815(c)(1). Therefore, it is immaterial whether dusting occurred the morning of May 26. The discrimination claim instead turns on Kirk’s good faith belief. Pertinent, however, is that hours after speaking with Ekstrom, Kirk photographed Personal Touch spraying a water hose on hot material emitted from the dog box. (Tr. 69:1–13, 71:19–23; Exs. S–12; S–13.) The photographs show dust along the walkway area and next to the alternative fuels. (Tr. 70:9–71:23; Ex. S–13.) Given the potential undisputed hazardous consequences of the dust, as well as the superintendents’ warnings regarding the dog box area that morning, I draw a reasonable inference that the area around the dog box presented dangers to the miners working the morning of May 26. I therefore conclude that Kirk had a reasonable, good-faith belief that a safety hazard existed when he engaged in protected activity on May 25 and May 26.

2. Adverse Action

The Mine Act protects miners against a broad range of adverse actions. *Sec’y of Labor ex rel. Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012) (noting that “section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against ‘common forms of discrimination . . . [and] more subtle forms of interference . . .’”) (quoting *Moses v. Whitely Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982) (quoting S. Rep. 95–19 at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978))). The Commission has adopted the test articulated by the United States Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) to determine whether adverse action has occurred. *Pendley*, 34 FMSHRC at 1931–32. In *Burlington*, the United States Supreme Court held the term “discriminate against” included employer actions against an employee that would be “materially adverse to a reasonable employee.” *Burlington*, 548 U.S. at 57. The Commission clarified that “[b]y this, the Court meant ‘that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.’” *Pendley*, 34 FMSHRC at 1932. In adopting this test, the Commission recognized that “retaliatory action does not only affect the targeted miner, but other miners on whom it could have a chilling effect regarding the reporting of safety hazards.” *Pendley*, 34 FMSHRC at 1932.

The Secretary alleges CEMEX’s issuance of a written verbal warning to Kirk on June 1, 2022, indisputably qualifies as an adverse action. (Sec’y Br. at 16–17.) The Secretary notes that an oral warning’s documentation in writing triggers the formal progressive discipline process. (Sec’y Br. at 17). The Secretary also contends that the issue of a written verbal warning to Kirk dissuaded other miners from reporting safety concerns. (Sec’y Br. at 33–34.) CEMEX concedes that a verbal warning, documentation of which was placed in Kirk’s file, constitutes an adverse action. (Resp’t Prehearing Statement. at 8.)

CEMEX issued a written verbal warning to Kirk on June 1, 2022. (Tr. 74:16–22, 76:5–18, 124:11–17; Exs. S–2.) Written verbal discipline is the first step in CEMEX’s progressive discipline system, which can ultimately lead to termination. (II Tr. 77:7–78:23; Exs. S–2, S–27; R–5.) Kirk followed the desired safety reporting chain of command, but he was disciplined. I conclude that the written verbal warning issued to Kirk on June 1, 2022, was an adverse action.

Additionally, since Kirk held a leadership position, the effect of his discipline reaches beyond him. In his statement to Investigator LaRue, Kirk said that after he was disciplined the safety committee was upset and one miner said he “has issues but doesn’t want to bring them up and [he] is one of the lead production guys.” (Ex. S–29.) I determine that when the Union President, who is “most responsible for representing the miner” is disciplined for raising safety concerns to plant management, it can dissuade other miners from raising safety concerns. (Tr. 177:8–15.) Considering these circumstances, I determine that a reasonable miner could be dissuaded from raising safety concerns due to Kirk’s discipline.

3. Motivation/Causal Connection

I now turn to the most crucial element in a prima facie discrimination case, the motivational nexus between the protected activity and the adverse action. In determining whether the nexus exists, the Commission examines four factors: “(1) the mine operator’s knowledge of the protected activity; (2) the mine operator’s hostility or “animus” toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator’s disparate treatment of the miner.” *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec’y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

a. Operator’s Knowledge of Protected Activity

The Secretary argues that CEMEX knew of Kirk’s protected activity when it issued Kirk’s written verbal warning on June 1, 2022, because Kirk complained directly to Uruchurtu on May 26, 2022. (Sec’y Br. at 18–19.) The Secretary highlights that Uruchurtu cited his presence in the interrupted Proudfoot consultant meeting as a basis for not thoroughly investigating the incident. (Sec’y Br. at 18.) CEMEX acknowledges that Uruchurtu witnessed Kirk raising safety issues when he interrupted the Proudfoot consultant meeting. (Resp’t Br. at 29.)

First, on May 25, 2022, Kirk shared miners’ concerns about the kiln dusting with Environmental Manager Singer over text message. (Tr. 42:14–20, 88:5–9.) Second, Kirk spoke with Production Manager Leal to raise these same concerns. (Tr. 42:14–43:2, 88:10–89:21.) Third, Kirk personally expressed these concerns to Quality Control Manager Walz who responded that he believed the kiln would sort itself out. (Tr. 43:15–20, 89:22–90:11.) Fourth, Kirk texted Plant Manager Uruchurtu about these concerns and noted that management had thus far failed to address the underlying issue. (Tr. 45:6–10, 90:12–92:23, 289:5–13; Ex. S–18.) Fifth, on May 26, 2022, Superintendent Ekstrom spoke with Kirk, Pennington, and Tompkins about their concerns regarding the kiln dusting. (Tr. 46:24–47:8, 99:18–22; II Tr. 114:10–14.) Sixth, Kirk told his direct supervisor, Lanham, he believed the dusting endangered miners and he

planned to address the issue with Uruchurtu. (Tr. 51:4–23, 100:21–102:13.) Seventh, Kirk interrupted Uruchurtu’s meeting with Proudfoot consultants to address this “safety issue.” (Tr. 52:1–12, 107:9–17, 195:20; II Tr. 27:20–25, 47:15–17, 50:1–2, 53:9–15.) Kirk therefore exhausted the internal chain of command by speaking with his direct supervisor, superintendent, multiple management officials, and the Plant Manager about his safety concerns regarding the Kiln dusting. (Tr. 33:20–25.) I conclude that CEMEX had knowledge of Kirk’s protected activities.

b. Hostility or Animus Toward the Protected Activity

The Secretary alleges that CEMEX displayed animus towards Kirk due to his history of reporting safety concerns to management and status as Union President. (Sec’y Br. at 19.) CEMEX argues that it did not display any animus towards Kirk, but rather it was receptive to his safety concerns and proposed solutions to address the hazards caused by the dusting. (Resp’t Br. at 31–32; Resp’t Reply Br. at 11–12.)

The Commission has held that an operator’s negative opinion statements about a miner, coupled with a lack of response to repeated safety concerns raised by the miner may suggest animus. *Turner v. Nat’l Cement Co.*, 33 FMSHRC 1059, 1070 n.8 (May 2011). Kirk reported to Investigator LaRue that he had a contentious history with CEMEX as Union President. (Ex. S–29.) Lanham also told Investigator LaRue that Kirk was “known for” unprofessional behavior. (Ex. S–5.) Despite his “unprofessional” reputation, Kirk followed company policy and raised his safety concerns up the chain of command before anyone contacted MSHA. (Tr. 42:14–44:11, 88:5–21, 89:22–92:23, 185:20–186:8, 288:18–22; Exs. S–18; S–29.) While CEMEX did attempt to “troubleshoot”¹⁹ the Kiln on May 25, it did not adequately address Kirk’s underlying safety concerns related to the dusting. (Tr. 42:14–44:11, 88:5–93:15, 185:20–186:8, 287:16–288:22, 289:17–23, 292:1–21.) Additionally, Uruchurtu ordered Marcelo to prepare to the shoot the ring in the kiln at 6:41 a.m. on May 26. (Tr. 296:24–298:3.) However, management did not share this decision with Kirk, the Union President tasked with advocating for the miners whose safety is a “top priority” for CEMEX, until after he interrupted the Proudfoot consultant meeting. (Tr. 275:12, 303:25–305:6; *see* Ex. R–5.) It was also not till after Kirk interrupted the Proudfoot consultant meeting that Uruchurtu implemented one of Kirk’s proposals to address the hazards caused by the dusting. (Tr. 111:25–112:9.)

CEMEX’s disregard of its own procedure in disciplining Kirk also demonstrates animus towards Kirk. CEMEX argues that it has flexibility in determining what discipline rules to apply, noting that “several of the categories [of rules] overlap to encompass related conduct.” (Resp’t Reply Br. at 16–17.) CEMEX contends that Kirk violated Category III, Rule 5, noting that Category III violations do not require an investigation into the conduct or a statement of the accused. (Tr. 317:13–24; Ex. S–27; Resp’t Br. at 36; Resp’t Reply Br. at 16.) Category III, Rule 5 prohibits the: “[u]se of abusive, threatening or profane language.” (Tr. 235:23–236:3, 317:14–16; II Tr. 28:1–6, 80:13–14; Ex. S–27; Ex. R–5.) However, the words “threatening” and

¹⁹ Specifically, CEMEX asserts that on May 25, the Plant’s maintenance team “inspect[ed] the physical placement of the kiln and kiln seal and . . . analyz[ed] the overall internal chemistry, temperatures, and flame of the kiln.” (Resp’t Reply Br. at 20–21.)

“abusive” do not appear in the Employee Disciplinary Action Form Kirk received. (II Tr. 31:15–32:7; Ex. S–2.) Additionally, in his interview with Investigator LaRue, Uruchurtu said he disciplined Kirk for “insubordination”; he did not mention any threatening or abusive language. (Ex. S–3.) There is also no record of Uruchurtu describing Kirk’s conduct as “threatening” in Mulligan’s notes from the meeting on May 26 between herself, Uruchurtu, Kirk, and Tompkins. (See Ex. R–16.)

Even if Kirk’s physical presence and behavior made Uruchurtu feel threatened as he claims, this does not constitute a violation of Category III, Rule 5, which prohibits the use of threatening *language*, not physical presence or behavior. (Tr. 235:23–236:3, 302:7–11, 317:14–16; II Tr. 28:1–6, 80:13–14; Exs. S–27; R–5.) Uruchurtu testified that he could not remember any threatening language that Kirk used. (II Tr. 29:8–11.) Mulligan testified that she believed Kirk used abusive language when raising his safety concerns to Uruchurtu on May 26, however she could not recall any specific language, stating instead that she would need to reference the statement provided by MacConnell. (II Tr. 85:25–86:19.) However, the only statement by Kirk included in MacConnell’s written statement is “[y]ou promised us Carlos, you promised us that safety.” (Ex. R–21.) I do not find this statement abusive.

Kirk’s Disciplinary Action Form includes the word “insubordinate.” (Ex. S–2.) Uruchurtu also reported to Investigator LaRue that Kirk was disciplined for insubordination. (Exs. S–3.) Category I, Rule 7 prohibits “[i]nterference with, *insubordination*, or refusal to obey any supervisor, or other duly constituted authority.” (Ex. S–27 (emphasis added).) Thus, Kirk’s interruption of the Proudfoot consultant meeting is better categorized as a violation of Category I, Rule 7. (Tr. 233:1–14; Ex. S–27.) Category I rules mandate an investigation into the conduct and require providing the suspected employee with an opportunity to provide a written statement regarding the events that occurred. (Tr. 233:17–23; Ex. S–27.)

After Lanham and Sepulveda issued Kirk the Disciplinary Action Form, he requested that he be given the opportunity to write a statement. (Tr. 74:23–75:4.) However, Lanham and Sepulveda left the room before Kirk could finish composing his statement. (Tr. 124:22–125:6.) Afterwards, they refused to accept his statement. (*Id.*) CEMEX argues no formal investigation was necessary in this case because the events happened directly to Uruchurtu. (Tr. 269:19–24; Resp’t Reply Br. at 18.) However, precisely because Uruchurtu was directly affected by the incident, his testimony may be biased, or at a minimum only reflect his perspective of what occurred. CEMEX also asserts that it engaged in some investigation by taking statements from the Proudfoot consultants, however these consultants have strong financial interests in CEMEX and therefore are also possibly biased. (Resp’t Reply Br. at 18.) “A company’s failure to follow its own policies can be evidence of pretext.” *Garza v. Hanson Aggregates, LLC*, 36 FMSHRC 974, 992 (2014.). Thus, I conclude that CEMEX did not properly investigate the incident before disciplining Kirk, demonstrating its animus towards Kirk.

c. Coincidence in Time

The Secretary argues that the close temporal proximity of Kirk’s protected activity on May 25 and 26, MSHA’s citations and order issued to CEMEX on May 29 and 30, and Kirk’s receipt of a written verbal warning on June 1 demonstrate discriminatory animus. (Sec’y Br. at

19–20.) CEMEX argues it did not provide Kirk with a written record of the verbal warning he already received on Thursday, May 26 until Wednesday, June 1 due to the Memorial Day Weekend holiday. (Resp’t Br. at 32–35; Resp’t Reply Br. at 8–10.)

During their meeting after the incident, Uruchurtu told Kirk that his interruption of the Proudfoot meeting was not acceptable, and this kind of behavior would not be tolerated. (Tr. 269:10–14, 303:7–13; II Tr. 62:21–63:8.) However, Uruchurtu admits he did not use the words “write you up for this” or “discipline” during this meeting. (Tr. 65:6–8, 268:1–12.) Nevertheless, CEMEX argues Kirk’s statement in the meeting “I will file a labor charge if you follow through” clearly demonstrates that Kirk knew he was being disciplined. (II Tr. 62:11–20, 64:20–24, 91:22–92:4; Ex. R–16; Resp’t Reply Br. at 8; Ex. R–16; Resp’t Reply Br. at 8–9.) Mulligan’s nearly three-and-a-half pages of notes from the meeting lack any mention of Uruchurtu disciplining Kirk. (Ex. R–16.) Rather, Mulligan’s notes primarily reflect discussions of dust mitigation and communication processes, undercutting CEMEX’s argument that the meeting constituted counseling that initiated its progressive disciplinary procedure. (Exs. R–16, R–5; Resp’t Reply Br. at 9–10.) While Uruchurtu told Kirk his behavior would not be tolerated, I find this admonishment was not formal discipline.

CEMEX also offered no documentary evidence of further engagement with the disciplinary process on Friday, May 27, when Uruchurtu was working, nor on Tuesday, May 31, when both Uruchurtu and Kirk were working.²⁰ I agree with Investigator LaRue that a reasonable company would “want to discipline somebody as rapidly as possible so they could correct that issue, and it wouldn’t happen again.” (Tr. 218:16–18.) Kirk did not receive the disciplinary action form until June 1, 2022, three business days and six calendar days after the interruption occurred. (Tr. 74:16–22, 76:5–18, 124:11–17.) Given the lack of corroborating evidence and testimony establishing discipline on the 26th, I find that CEMEX did not discipline Kirk until June 1, 2022.

The key intervening events between Kirk’s protected activity on May 25 and 26 and his receipt of written discipline on June 1 is MSHA issuing two citations and one order to CEMEX on May 29 and May 30. (Exs. S–8; S–9; S–10.) In response to the report on May 28, MSHA visited the plant and issued two citations on Sunday, May 29, 2022. (Tr. 122:17–24, 220:22–24; Exs. S–8; S–9.) On May 30, 2022, MSHA inspectors visited the plant again and issued an order. (Tr. 161:8–22; Ex. S–10.) Kirk did not call MSHA on May 28 to report the kiln’s continued dusting. (Tr. 72:17–21.) Rather, he directed the miners reporting their safety concerns about the dusting to him to call MSHA themselves. (Tr. 72:13–16; Ex. S–29.) However, “a couple” of people at the plant suggested to Kirk that they believed he called MSHA. (Tr. 72:17–21; Ex. S–

²⁰ CEMEX offered that, per a collective bargaining agreement, it has five business days to administer discipline to an employee. (Resp’t Br. at 30 n.8.) No witnesses testified to this. (See Tr. 218:19–21.) The agreement is absent from the evidentiary record. Kirk and Uruchurtu seemed to reference this same collective bargaining agreement in their statements to Investigator LaRue. (Exs. S–3, S–29.) Kirk stated that CEMEX’s lack of investigation violated the agreement. (Ex. S–29.) Uruchurtu stated that “we have 5 days to do the procedure.” (Ex. S–3.) Given the lack of evidence proving the collective bargaining agreement, I disregard CEMEX’s assertion that it had five business days to administer discipline to Kirk.

29.) Ekstrom also testified that Kirk told him he planned to call MSHA. (II Tr. 120:10–121:5.) This fact is significant because Uruchurtu testified that he feared MSHA would visit the plant while the dog box dusted. (II Tr. 25:10–27:14.) The Commission has found discrimination under section 105(c)(2) when an operator mistakenly believed a miner had engaged in protected activity. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982) (affirming the judge’s finding of discrimination when the operator mistakenly believed the complainant engaged in protected activity). I conclude that CEMEX’s issuance of formal written discipline to Kirk on June 1, just two days after MSHA’s second inspection, indicates animus towards the protected activity of reporting safety concerns to MSHA.

When I view the above timeline combined with the beliefs of multiple employees and at least one manager, I draw a reasonable inference that CEMEX mistakenly believed Kirk reported the continued kiln dusting to MSHA, resulting in the inspection and subsequent citations and order. Uruchurtu’s admission of concern about an MSHA inspection and CEMEX’s mistaken belief lead me to conclude that CEMEX displayed animus towards the protected activity of contacting MSHA when it issued written discipline to Kirk.

d. Disparate Treatment

The Secretary alleges that CEMEX engaged in disparate treatment since it did not discipline Kirk a few months prior to May 2022 for interrupting another private meeting and continuing to speak after being asked to leave. (Sec’y Br. at 20–21.) The Secretary asserts that this prior incident did not involve a safety concern, as Kirk testified that he did not raise safety concerns to Mulligan. (Sec’y Br. at 21.) CEMEX argues that Kirk did not suffer disparate treatment because it consistently and fairly enforced a policy of professionalism at the plant. (Resp’t Br. at 35–37; Resp’t Reply Br. at 12–13.) CEMEX adds that Kirk was actually treated better and received less discipline than some of his comparators. (Resp’t Br. at 35.)

CEMEX analogizes Kirk’s behavior to employees who threw and slammed equipment, raised their voices, engaged in threatening and abusive conduct towards coworkers, hung up on supervisors, swore, texted managers “in a disrespectful manner,” or used racial epithets toward coworkers. (Resp’t Br. at 35–36; Resp’t Reply Br. at 13–14; *see* Ex. R–18.) However, Kirk did not throw or slam objects, refuse to speak with his supervisors, swear, or use racial epithets during his interruption of the Proudfoot meeting. (Tr. 107:9–111:16, 195:15–22; *See* Tr. 52:4–53:21, 301:18–302:22; II Tr. 28:15–29:11.) These previous employee disciplinary actions also did not involve a safety complaint or a union representative. (*See* Ex. R–18.)

Only Kevin Schoenborn’s disciplinary record contains behavior analogous to Kirk’s interruption of the meeting. (Ex. R–18 at 503.) The Employee Disciplinary Action Form Schoenborn received states that he—

was disrespectful with Hector Lazarin (HR Manager) when discussing about some PTO/Paycheck’s questions. . . The employee did not like Hector’s response and got agitated, raising

his voice and complaining about it . . . The employee turned around while Hector was talking to him and said something to him. Hector followed the employee and asked him to threat [*sic*] him with respect. The employee said he did not want to talk to him as he did not like Hector's response.

(Ex. R-18 at 503.) Schoenborn received a "written warning," rather than the recorded "verbal warning" that Kirk received. (Ex. S-2; R-18 at 503.) A written warning is the second step in the progressive discipline process. (*See* II Tr. 77:14-78:22.) Thus, this comparison cuts towards CEMEX's argument that Kirk did not suffer disparate treatment.

Kirk, however, previously interrupted a meeting between Mulligan and her Superintendent and was not disciplined. (II Tr. 98:17-23.) Although CEMEX argues that Mulligan's job does not include administering discipline, that did not prevent her from reporting the incident and having a member of management discipline Kirk according to CEMEX's rules and procedures. (Resp't Reply Br. at 12 -13.) CEMEX failed to discipline Kirk for similar prior behavior. I therefore conclude that CEMEX engaged in disparate treatment against Kirk when it issued written verbal discipline on June 1, 2022, for raising a safety concern.

e. Conclusion

On May 26, 2022 Kirk interrupted the Proudfoot consulting meeting which upset Uruchurtu. Uruchurtu then met with Kirk to address his behavior and safety concerns during which time the Kiln was shutdown. However, the Kiln later resumed operations and the dog box began dusting again over the weekend which miners reported to Kirk. Kirk recommended the miners report this to MSHA. MSHA inspected the plant and issued two citations and an order on May 29 and May 30, respectively. Kirk returned to work on Tuesday, May 31 and CEMEX notified Kirk of his disciplinary written warning for the first time on Wednesday, June 1. Given CEMEX's refusal to disclose the discussion between Uruchurtu and his supervisor at 4 p.m. on May 26 in which Uruchurtu testified the decision was made to document Kirk's discipline in writing (II Tr. 33:24-34:3), I draw a reasonable inference that they did not in fact discuss actual discipline. (II Tr. 34:4-35:2.) Rather, it is reasonable to infer, based on based on testimony and evidence submitted, that the decision to discipline Kirk took place after the MSHA investigation and the issuance of the two citations and order.

Considering the above four factors, I conclude that CEMEX's discipline of Kirk was motivated in part by Kirk's protected activity. CEMEX had knowledge of Kirk's protected activity of reporting safety concerns. It previously displayed animus towards Kirk for reporting safety concerns and in its response to Kirk's report of safety concerns on May 25 and 26 and subsequent administration of discipline to Kirk. CEMEX's issuance of formal written discipline to Kirk on June 1, just two days after MSHA's second inspection, also indicates its animus towards the protected activity of reporting safety concerns to MSHA. The discipline Kirk received for interrupting the Proudfoot consultant meeting was not consistent with CEMEX's prior discipline, or lack thereof, of Kirk for similar behavior. Thus, the Secretary established a prima facie case of discrimination.

B. CEMEX's Affirmative Defense

When evaluating an operator's business justification for an adverse action,

[T]he inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The Commission may not impose its own business judgment as to an operator's actions.

Pendley v. FMSHRC, 601 F.3d 417, 425 (6th Cir. 2010) (citations omitted). The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y ex rel. Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug 1990) (citations omitted).

The Commission has cautioned that an operator's reasons should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1,935, 1,938 (Nov. 1982). In reviewing business justifications, the judge must "determine whether they are credible, and if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

CEMEX argues that even if I find that the Secretary established a prima facie case of discrimination, the complaint still must be dismissed because it had a legitimate business justification²¹ for disciplining Kirk. (Resp't Br. at 37–39.) CEMEX asserts that Kirk "interrupted a private meeting, yelled at Uruchurtu in front of third-party consultants, invaded both MacConnell's and Uruchurtu's personal space, was agitated, and pointed his finger directly in Uruchurtu's face." (Resp't Br. at 39.) Thus, CEMEX argues that it "had little option but to discipline [Kirk] for such a flagrant violation of its professional policy." (Resp't Br. at 39.) In response, the Secretary argues that CEMEX failed to prove it would have disciplined Kirk for interrupting the meeting alone. (Sec'y Br. at 21–28; Sec'y Reply Br. at 9–10.)

As I previously concluded, *see* discussion *supra* V.A.3.d, CEMEX's history of disciplining Kirk for interrupting meetings is inconsistent. Kirk previously interrupted one of Mulligan's meetings (II Tr. 81:11–82:2, 98:17–19), but he was not disciplined for this behavior (II Tr. 98:20–23), despite Mulligan's supervisor reporting that Kirk spoke to Mulligan "in a manner I never thought possible in the workplace." (Ex. R–20.) Therefore, Kirk's interruption on May 26 on its own was, at best, an insufficient motive for discipline. Uruchurtu admits that shouting was "normal behavior" for Kirk, who had not been previously disciplined for doing so. (II Tr. 29:12–30:4.) Therefore, it is reasonable to surmise that the volume of Kirk's voice was likely not the motivating factor behind his discipline.

While Uruchurtu testified that "felt threatened," when Kirk interrupted the Proudfoot meeting, he entered his office alone with Kirk immediately thereafter. (Tr. 53:16–17, 111:14–

²¹ CEMEX's business justification is an affirmative defense pled in the alternative after assuming, *arguendo*, that the Secretary has established a prima facie case of discrimination.

17, 267:12–19, 302:18–19, 317:20–25.) Uruchurtu testified he “felt threatened by [Kirk] just being right in front of me and by pointing [his] finger at me,” but he could not recall any threatening language Kirk used. (Tr. 302:6–11; II Tr. 28:15–29:11; Resp’t Reply Br. at 14–16.) In fact, Kirk was not “right in front of” Uruchurtu, but in front of MacConnell. (II Tr. 49:16–50:16.) While I can sympathize that Uruchurtu felt disrespected by Kirk, I am not convinced that Kirk’s physical presence in the room threatened Uruchurtu, especially since Uruchurtu was accustomed to Kirk raising his voice and becoming agitated during previous discussions. (II Tr. 29:12–30:4.) I determine that Kirk’s interruption of the Proudfoot consultant meeting was pretext for a written disciplinary warning to Kirk. I conclude that CEMEX failed to establish a legitimate business justification for its adverse action against Kirk.²²

C. Whether CEMEX Engaged in Interference Under Section 105(c)

To establish interference under the *Franks* test, CEMEX’s discipline must be reasonably viewed, from the perspective of miners and under the totality of the circumstances, as tending to interfere with the exercise of raising a safety complaint, and CEMEX must fail to justify the interference with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of raising a safety complaint. *Franks*, 36 FMSHRC at 2108. Under the *Pepin* test, the Secretary must also establish that CEMEX’s interference was motivated by animus towards raising safety complaints. *Pepin*, 38 FMSHRC at 1453–54.

1. Whether CEMEX Interfered with the Exercise of Protected Rights

First, to prove interference, a claimant must demonstrate that a person’s actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights. *See Franks*, 36 FMSHRC at 2108; *Pepin*, 38 FMSHRC at 1453-54 (ALJ); *Sec’y of Labor ex rel. McGary v. Ohio Cnty. Coal*, 38 FMSHRC 2006, 2011–12 n.11 (Aug. 2016). Because this first part of the test focuses on the tendency to interfere, actions that could reasonably chill the exercise of protected rights may qualify as acts of interference even if the miner has not been actually prevented or deterred from exercising his rights. *Pepin*, 38 FMSHRC at 1454 n.15 (ALJ).²³

The Secretary argues that a reasonable miner would view CEMEX’s refusal to listen to Kirk’s safety concerns and subsequent discipline of Kirk as tending to interfere with the exercise of protected rights. (Sec’y Br. at 33–34.) Alternatively, CEMEX argues that it did not interfere with Kirk’s protected rights.²⁴ (Resp’t Br. at 40–44.)

²² As I determine that CEMEX has not met its burden of establishing an affirmative defense, I need not consider the Secretary’s argument that any misconduct by Kirk was provoked by CEMEX. (See Sec’y Br. at 28–30.)

²³ Although the Commission Judge’s decision I cite herein is not binding precedent, *see* 29 C.F.R. § 2700.69(d), I find the decision’s reasoning persuasive.

²⁴ CEMEX focuses on Investigator LaRue’s testimony that when Kirk was told the dusting was being resolved on May 25 and it was not, “may be inferred denial of that action.”

When Kirk interrupted the Proudfoot consultant meeting, Uruchurtu did not ask him any questions about his safety concern or attempt to address it. (Tr. 53:5–13, 266:5–13; II Tr. 53:19–22.) Instead, Uruchurtu repeatedly instructed him to leave. (Tr. 53:8–13, 108:19–22, 266:5–11.) And even when Uruchurtu left the Proudfoot consultant meeting and met with Kirk, he testified that the main purpose of meeting with Kirk was to address Kirk’s alleged misconduct. (Tr. 303:3–6.) Although Uruchurtu did discuss Kirk’s safety concerns afterwards, I determine Uruchurtu’s initial refusal to respond to Kirk’s safety concerns in the Proudfoot consultant meeting constitutes interference with the protected right to raise safety concerns.

Additionally, CEMEX’s discipline of Kirk could reasonably create a chilling effect among other miners, thereby deterring other miners from raising safety concerns. Kirk noted that his discipline “showed the hourly employees that their voice can’t be heard. It discourages people from bringing up safety concerns, because I’m supposed to be able to . . . bring up safety concerns, but the company just shuts you down and disciplines you if you oppose them in any way.” (Tr. 76:20–77:3.) Investigator LaRue similarly concluded that Kirk’s discipline “certainly had an opportunity to send a chilling effect throughout the mine site when the person that’s most responsible for representing the miner and the rank and file personnel is disciplined in trying to bring an issue up to the plant manager.” (Tr. 177:8–15.)

CEMEX argues that there is no evidence that Kirk’s discipline had a chilling effect on the exercise of protected rights. (Resp’t Br. at 42.) CEMEX highlights Pennington’s testimony that he and other miners continued to report any safety issues observed at the plant after May 26. (Resp’t Br. at 43.) However, Pennington specifically responded to the question whether other miners continued to report safety issues after May 26 “[y]es. As far as I know.” Thus, Pennington did not base his testimony on any concrete evidence. Moreover, as Vice President of the Safety Committee, it is probable that Pennington felt more comfortable raising safety concerns than other rank-and-file miners.

CEMEX also highlights Uruchurtu’s testimony that CEMEX’s emphasis on safety more than likely led to a yearly increase in safety improvement cards than the year before the incident. (Resp’t Br. at 43.) However, Uruchurtu testified that he did not know how many safety improvement cards were submitted the previous year. (II Tr. 36:7–10, 36:25–37:2.) Uruchurtu also explained that he believed that more safety improvement cards were submitted than the previous years because CEMEX is constantly encouraging people to formally document hazards and safety improvements in the safety improvement cards. (II Tr. 36:14 – 24.) Being that I find Kirk’s testimony on this topic particularly credible as opposed to the other witnesses, I conclude that CEMEX’s discipline of Kirk could reasonably chill the exercise of protected rights among other miners, especially given Kirk’s leadership role as Union President.

2. Whether CEMEX can Justify its Actions under *Franks*

(Resp’t Br. at 40; Tr. 188:10–189:3.) However, the Secretary does not argue that CEMEX interfered with Kirk’s rights by an inferred denial of his right to report safety hazards.” (See Sec’y Br. at 33–34.) Thus, I disregard any arguments related to an “inferred denial.”

Under the *Franks* test, CEMEX must justify its interference “with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.” *Franks*, 36 FMSHRC at 2108. The opinion of Chairman Jordan and Commissioner Nakamura in *Franks* noted that the operator’s actions must be “narrowly tailored” . . . to promote its business justification without undue interference to the rights of miners.” *Franks*, 36 FMSHRC at 2118 n.14

CEMEX argues it possessed a legitimate and substantial reason for disciplining Kirk. (Resp’t Br. at 44.) Namely, CEMEX asserts that it fairly enforced its professional policy by disciplining Kirk for storming into a private meeting, invading two individuals’ personal space, and pointing and yelling at the plant manager in front of a third party. (Resp’t Br. at 43–44.) The Secretary asserts that CEMEX failed to provide a legitimate and substantial reason for its interference with Kirk’s right to relay a safety concern that outweighs the harm caused to his protected rights. (Sec’y Br. at 35–37.)

CEMEX has not shown that its desire to enforce its professionalism policy outweighs the harm to Kirk’s protected right to relay safety concerns. As CEMEX repeatedly notes in its briefing, “[a] cement plant is a hot, dirty, and tough environment.” (Resp’t Br. at 2, 38, 44; Resp’t Reply Br. at 20.) As Judge Harner observed in a discrimination case where actual foul language was used, “this is a mine, nor a nursery.” *Sec’y of Labor ex rel. Harrison v. Consolidation Coal Co.*, 37 FMSHRC 1497, 1507 (July 2025) (ALJ). While Kirk did not use any profanity, he was forceful in making his safety concerns known. Thus, it is imperative that CEMEX takes safety concerns seriously and addresses them immediately. Additionally, the dust expelled from the dog box can reach temperatures at or above 1,500 degrees Fahrenheit. (Tr. 41:20–25; II Tr. 14:23–15:2.) Kirk sought to prevent risks associated with such extreme temperatures. (See Tr. 140:3–13.) However, when Kirk interrupted the Proudfoot consultant meeting Uruchurtu did not respond to his concerns but directed him to leave. (Tr. 53:5–13, 108:19–23, 266:5–13.) Moreover, CEMEX has not shown that its discipline of Kirk was narrowly tailored to serve its interest in enforcing its professional policy. As the Secretary points out, Uruchurtu could have addressed Kirk’s safety concerns before ordering him to leave the meeting and then later respond to Kirk’s perceived disrespectful behavior. (Sec’y Br. at 37). I determine that CEMEX’s justification for interfering with Kirk’s right to raise safety concerns is not outweighed by CEMEX’s desire to discipline Kirk’s “unprofessional” conduct in raising his concerns.

3. Whether CEMEX’s Actions were Motivated by the Exercise of Protected Rights under *Pepin*

Under the *Pepin* test, the Secretary also must establish that CEMEX’s interference was motivated by animus towards Kirk’s protected right to raise a safety concern. *Greathouse*, 40 FMSHRC at 708 (Comm’rs Cohen & Jordan, separate op.). In affirming the *Pepin* test, Commissions Cohen and Jordan noted that “*Pasula–Robinette* has long provided a framework and clear authority for deriving improper motivation from circumstantial evidence. Without doubt, evidence of motivation may be drawn from circumstantial evidence.” *Greathouse*, 40 FMSHRC at 724 (Comm’rs Cohen & Jordan, separate op.). As previously discussed, see discussion *supra* Part V.A.3, circumstantial evidence may include “(1) the mine operator’s

knowledge of the protected activity; (2) the mine operator's hostility or "animus" toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d at 318.

As described above, *see* discussion *supra* Part V.A.3., CEMEX's knowledge of Kirk's protected activity, the timing of Kirk's discipline, CEMEX's response to Kirk's report of safety concerns on May 25 and 26 and subsequent administration of discipline to Kirk, and CEMEX's disparate treatment of Kirk interrupting meetings, all support finding CEMEX acted with improper discriminatory intent in disciplining Kirk. Although the Secretary argues that Uruchurtu's initial refusal to listen to Kirk's safety concern at the Proudfoot consultant meeting also constitutes interference, she has not met her burden of proving Uruchurtu acted with animus in that instance. Therefore, I conclude that under the *Pepin* test, the Secretary has only established interference based on CEMEX's discipline of Kirk.

4. CEMEX Engaged in Interference

I conclude that CEMEX's discipline of Kirk can be reasonably viewed as tending to interfere with the right to raise a safety complaint with both management and MSHA. With regard to its affirmative defense, CEMEX failed to justify its discipline with a legitimate and substantial reason that outweighs the harm of chilling miners' right to raise safety complaints. I also conclude, *see* discussion *supra* Part V.A.3, that CEMEX displayed animus toward Kirk's protected activity at various stages. Therefore, I conclude that CEMEX interfered with Kirk's protected rights under both the *Franks* and *Pepin* standards by disciplining Kirk on June 1, 2022.

VI. CONCLUSION

Based on the reasons stated above, I conclude that the evidence as a whole establishes that CEMEX discriminated against Kirk for engaging in protected activity and interfered with his protected right to do so in violation of § 105(c) of the Act, 30 U.S.C. § 815(c).

VII. PENALTY

The Secretary requests that I assess a civil monetary penalty against CEMEX in the amount of \$30,000. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). I must consider the factors under section 110(i) of the Mine Act in assessing a civil penalty. *See* 30 U.S.C. § 820(i).

Although the Secretary has established a nexus between Kirk's discipline and his protected activity of raising a safety concern for both the discrimination and interference claims, I do not believe that CEMEX's discipline of Kirk was solely motivated by animus towards reporting safety concerns. Similarly, I determine that the conflict between Kirk and CEMEX was caused in part by miscommunication, rather than completely ignoring Kirk's safety concerns. I also determine that CEMEX did not ignore safety at the plant, but prioritized it and engaged in collaborative efforts with the miners, such as working the safety committee. This

case did not involve termination, but rather an oral admonishment that was recorded in Kirk's personnel file on June 1, 2022. In my experience, the proposed \$30,000 penalty is akin to proposed assessments in termination cases. Considering these mitigating factors, I assess a civil monetary penalty of \$5,000 against CEMEX.

VIII. ORDER

The Secretary also requests that I enter an order directing CEMEX to completely expunge from Kirk's employment records all references to the circumstances involved in this matter and enter an order requiring all members of CEMEX's management team to participate in a training course on rights protected under Section 105(c) of the Mine Act. The legislative history of section 105 supports removing the discipline from Kirk's file. Specifically, the legislative history describes "appropriate relief" for violations of Section 105(c) as "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct . . ." S. REP. NO. 95-181, at 37 (1977). If Kirk were to return to work, he would likely need to indicate he had been disciplined by a former employer on a job application. I therefore conclude that removing the discipline is necessary "to remove the deleterious effects" of CEMEX's misconduct.

The Secretary does not offer specific justification for an order requiring all members of CEMEX management to participate in a training course on protected rights under Section 105(c). CEMEX has not had any 105(c) violations in its ten-year history. (Sec'y Br. at 40.) Rather, the expungement of Kirk's record will make the complainant whole. Therefore, I do not grant the request to enter an order requiring all members of CEMEX's management team to participate in a training course on rights protected under section 105(c).

In light of the foregoing, it is hereby **ORDERED** that CEMEX completely expunge from Kirk's employment records all references to the circumstances involved in this matter and pay a civil penalty of \$5,000.00 within 40 days of this decision.



Alan G. Paez
Administrative Law Judge

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