FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MILTON M. PETTRY, JR.,	DISCRIMINATION PROCEEDING
Complainant,	Docket No. WEVA 2016-438-D MSHA Case No.: HOPE-CD-2016-03
v.	
PANTHER CREEK MINING, LLC, DOUG BENDER, MIKE BURKE, and GREG DOTSON,	Mine: American Eagle Mine Mine ID: 46-05437
Respondents.	

DECISION AND ORDER

Appearances: Samuel B. Petsonk, Esq., Bren Pompino, Esq., Mountain State Justice, Inc., Charleston, WV, Representing Complainant

Thomas S. Kleeh, Esq., Jonathan Ellis, Esq., Steptoe & Johnson, PLLC, Charleston, WV, Representing Respondents

Before: Judge Steele

This case is before me upon a complaint of discrimination and interference by Milton M. Pettry, Jr., a miner, against Panther Creek Mining, LLC, Doug Bender, Mike Burke, and Greg Dotson ("Respondents"). On May 11, 2016, Pettry filed a 30 U.S.C. § 815(c) complaint of discrimination and interference. He sought reinstatement for a discriminatory termination. A hearing was held on Tuesday, August 16, 2016, and Wednesday, August 17, 2016, in South Charleston, West Virginia.

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case's outcome, or lack thereof, consistencies or inconsistencies in each witness's testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Court's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. Findings of Fact

At the time of hearing, Milton M. Pettry Jr., ("Complainant," "Pettry," "Mickey,") had been an hourly fireboss and foreman for approximately 20 years. (Tr. 19, 175). Pettry worked for American Eagle Mine since 2000. (Tr. 19). As a fireboss, he was required to conduct examinations at the mine and find and record any hazards and violations he found. (Tr. 22). If Pettry found any hazards, he was required to either take corrective action or danger-off the condition. [1] (Tr. 107-09, 216-18, 358, 374). Pettry's firebossing duties required that he inspect for hazards and violations on the railway track and the electrical power systems on the main rail line running past panels 17, 18, 19, and 20. (Tr. 24, 25; CX 1[2]).

Panther Creek Mining purchased American Eagle Mine in October 2015, from Patriot Coal through a bankruptcy proceeding. (Tr. 194). Soon after the change in operators occurred, Panther Creek Mining began to lay off miners. (Tr. 31). Over 100 miners, including at least part of the support staff, were laid off between October 2015, and February 2016. (Tr. 31-32). Pettry testified that the outby crew was laid off. (Tr. 32).

After acquiring American Eagle Mine, there was an MSHA quarterly "closeout" meeting in December 2015. (Tr. 320-22). At such meetings, MSHA would review the "...safety performance at the complex or coal mine. They talk about the violations and trends that they are seeing at the complex." (Tr. 374-75). At the meeting, the operations manager Doug Bender and the general manager Greg Dotson testified that MSHA said there were problems with the examinations at the mine that needed to be addressed.[3] (Tr. 251-53, 321). In response, Mike Burke, the general foreman, testified that management created a two pronged approach to addressing MSHA's concerns: (1) offering training to the examiners and (2) holding examiners personally accountable for failing to conduct proper examinations, take corrective action, or danger-off hazards found.[4] (Tr. 251). As part of this plan, the mine conducted an eight-hour training course for examiners and firebosses on December 30, 2015. (Tr. 252; RX-1).

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[1] The term danger-off describes when a hazardous condition is sectioned off by some type of barricade, preventing miners from being exposed to the hazard.

[2] Each of Complainant's exhibits will be referred to as CX followed by its number, and Respondents' exhibits will be RX followed by its number.

[3] Doug Bender was the operations manager at Panther Creek since October 2015. (Tr. 373). His job entailed overseeing all of the aspects of the mine—production, safety, shipments, safety programs, compliance, daily management, and operations. (Tr. 373). He reported to Greg Dotson at the mine. (Tr. 373).

Greg Dotson was the general manager at Panther Creek since late October or early November 2015. (Tr. 319). He provided general oversight of the complex, coal preparation, shipping, refuse handling, the warehouse, purchasing, safety, and production at the mine. (Tr. 320).

[4] Mike Burke was the general foreman at American Eagle Mine since December 2015. (Tr. 250). Starting in 2000, he worked with Massey Energy as a management trainee for approximately three years in various areas of the mine. (Tr. 250). In 2003, he started as the

When Pettry started working at Panther Creek in October 2015, he understood he was a probationary employee for 90 days. (Tr.105). Pettry also testified that he knew from conversations with mine management that MSHA was focusing on improving examinations and reducing violations at American Eagle. (Tr. 138). Pettry testified that during the December 2015 training, he did not receive additional fireboss training, only training on belt violations. (Tr. 138-39). However, at hearing, Pettry reviewed a document he signed, entitled Training Class Report Form, dated December 30, 2015, which he signed. (Tr. 139; RX-1). The top of the form states that it was for examinations training. (RX-1). The document appears to show that multiple firebosses were at this training, and the safety director was present at the training. (Tr. 140-41). Pettry testified that this training did not concern violations or how to conduct examinations; instead it covered the condition of belts and how to properly clean them. (Tr. 142).

Shawn Endicott, the former general mine foreman, testified at hearing. (Tr. 28-29). Endicott testified that he left his job with American Eagle Mine on December 10, 2015, because he no longer felt safe operating the mine after the October 2015, layoffs. (Tr. 194, 197-98, 200). Endicott also testified that if a hazard or violation is noted, a fireboss must record the hazard and take and record some type of corrective action. (Tr. 217-18).

Alleged document alterations

At hearing, Pettry reviewed the preshift examination reports for the 19 headgate, from December 8, 2015, to December 10, 2015; he testified that the airflow measurements varied greatly, which could have indicated a hazardous condition. (Tr. 45-55; CX-3). The minimum amount of airflow allowed was 20,000 CFM. (Tr. 46; CX-3).

Pettry believed that two of the airflow measurements had been altered in the preshift examination reports. (Tr. 47-52). Pettry testified that a preshift examination report on December 9, 2015, by Travis Epling recorded the airflow at 24,625 CFM.[5] Complainant's counsel asked Pettry if the number could have been 29,625, to which Pettry said it was possible. (Tr. 47). Pettry believed that the first digit may have been altered from one to two. (Tr. 47-48). In Pettry's preshift examination report on December 10, 2015, the recorded airflow was 28,800 CFM, but Pettry alleged his fireboss notes reported the airflow at 25,800 CFM.[6] (Tr. 48-49). It also

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section foreman and moved to Elk Run until 2005 or 2006. (Tr. 250). He then worked as an outby mine foreman and block foreman, until 2007, when he transferred to Mammoth, where he was the mine foreman superintendent of the Coal Grove Mine. (Tr. 250-51). Burke then moved to Slab Fork Mine, then to Speed Mining in 2013, where he worked as a projects manager before becoming the mine foreman. (Tr. 251).

[5] Travis Epling worked at Panther Creek Mine making examinations. (Tr. 358). He was a longwall setup foreman, which is a salaried position he has had for five or six years. (Tr. 362). He worked examining the setup face or tear down areas that he worked in. (Tr. 363).

[6] Pettry's notes were not brought forward or admitted at hearing.

appeared to him that the book was altered from 25,800 to 28,800, with the five being written over. (Tr. 48-49). Pettry called out this reading, which was recorded by another miner; Bobby Rader, a foreman, countersigned the report. (Tr. 52). Pettry also testified that his preshift examination report on December 11, 2015, was 15,500 CFM, and it did not appear to be altered in any way, even though it was 4,500 CFM below the minimum requirement. (Tr. 124).

Suspension for a water pump violation

On December 15, 2015, Pettry and another fireboss named Dwayne Hodges, met with operations manager Doug Bender, general manager Greg Dotson, and shift manager Bobby Harper, concerning an MSHA citation that American Eagle Mine received on Monday, December 14, 2015. (Tr. 65; CX-5). MSHA cited Panther Creek Mine for allowing water to accumulate in the primary escapeway in the intake of the 20 headgate, in violation of 30 C.F.R. § 75.380(d)(1) on December 11, 2015. (Tr. 65,129, 30; CX-10). The water had been accumulating in the area long enough that a pump had been installed to remove the water. (Tr. 133). The pump had come unplugged from a power station in what Respondents claim was Pettry's and Dwayne Hodge's examination area. (Tr. 133). At the meeting, Dotson suspended Pettry for three days, for failing to abate the unplugged water pump hazard, and warned him that further disciplinary action could result in discharge. (CX-5). Hodges was also suspended for three days. (Tr. 325).

A letter dated December 18, 2015, from Greg Dotson to Pettry, stated that during the December 15 meeting Pettry "openly admitted that this was part of [Pettry's] examination and due to [Pettry's] negligence, employees had to be removed from the section." (CX-5; Tr. 326). Pettry signed this letter and did not make any notations. (CX-5). The letter also stated that Pettry's "behavior is unacceptable and further incidents will subject you to further discipline up to and including discharge." (CX-5). Pettry testified that this letter contained falsehoods, and he claimed he objected to being suspended for a condition that was not part of his exam. (Tr. 65-67). Pettry testified that he understood that Dotson believed the water pump condition was the responsibility of Pettry and his fireboss partner. (Tr. 67). Pettry believed it was the airwalker's responsibility to make note of these types of hazards and that Pettry should not have been penalized for the water pump hazard because it was a pump that required only weekly examinations. (Tr. 71, 136). Thomas Elmore, a fireboss, also testified that he believed the airwalker was responsible for the water pump at issue. [7] (Tr. 19-20). However, Pettry also testified that the power center and the plug for the water pump at issue was in an entryway that he was responsible for. (Tr. 132-33). Pettry testified that Dwayne Hodges or Harper, the shift manager, stated that the firebosses were not familiar with, and were not responsible for, the water accumulations during the suspension meeting. (Tr. 68).

[7] Thomas Elmore was a fireboss at American Eagle Mine. (Tr. 225). He worked at Massey Performance Coal until 2006. (Tr. 225). Then he worked at Speed Mining, which is also known as American Eagle Mine, until January 2016. (Tr. 225-26). During the last five months at American Eagle, he worked with Milton Pettry. (Tr. 226). He worked on the 4 south belt, 3 west belt, and 3 south belt. (Tr. 227).

Dotson testified he was part of Pettry's suspension meeting and that Pettry had admitted he should have examined the area with the water pump accumulation more thoroughly. (Tr. 323-24). Dotson also testified that another fireboss was reprimanded for this condition and suspended along with Pettry. (Tr. 325-26). Dotson testified that he never disciplined someone for dangering an area off or taking corrective action. (Tr. 328).

Low airflow readings

On January 6, 2016, Pettry also reported an airflow of 19,600 CFM. (Tr. 56). He testified that Mike Burke told Pettry "you can't do that" and explained that "[Burke] was basically saying don't put that kind of air reading in the book." (Tr. 57). Immediately after, Complainant's counsel asked "Okay. And had Mike Burke talked to you before about how he wanted you to record your hazards in the book? Had he said to you before about how he wanted you to handle that?" (Tr. 57-58). Pettry's response was "Yes. He basically insinuated that whether you do corrective action or not, show—put it in the book." (Tr. 58). Pettry testified that he did what management wanted him to do, which was to report the low air reading. (Tr. 150). Pettry did not take any corrective action or danger-off this section of the mine. (Tr. 144-45). He believed that even if the area was dangered-off, miners would have still walked through it. (Tr. 186).

Burke, the mine's general foreman, testified after reviewing Respondents' exhibits 4 and 5 that an "owl shift" examiner took corrective action during the midnight shift and hung a curtain in the No. 5 room to correct the airflow issue Pettry reported. (Tr. 257-58). In his opinion, it would take two or three minutes to rehang the curtain if it fell down or a rock fell on it. (Tr. 258). Burke testified that examiners cannot decide to leave hazards for another shift without dangering-off the condition or taking corrective action. (Tr. 259). Burke then described several scenarios where miners were disciplined for inadequate exams or failing to take corrective action. (*See infra*).

Elmore, another fireboss, testified at hearing that Pettry did not work with him on Elmore's assigned belts unless Elmore was unable to complete his work because Pettry was usually busy with a different run. (Tr. 227). However, they did work together prior to making their runs, maintaining and repairing hazards from prior shift reports. (Tr. 227-28). Elmore testified that he "remember[ed] [Pettry] talking about [a low air reading] on 19, up on the setup face" on one occasion. (Tr. 230). Elmore testified he believed Mike Burke was the mine foreman at the time. (Tr. 230). Complainant's counsel asked Elmore "And do you remember when Mickey was finding that low air—and this would've been around the end of the year—do you remember Mickey talking about or do you remember witnessing what Mike Burke told Mickey to do in response to the situation with the low air?" (Tr. 230-31). Elmore responded "I just remember him telling Mickey not to put nothing in the book without consulting with him first." (Tr. 230-31). Complainant's counsel then asked, "Was that the conversation Mike Burke had had with you about how you were to handle your firebossing work?" (Tr. 231). Elmore testified in response, "He's told me that, yes." (Tr. 231). Elmore testified that this conversation concerned, initially "purposes of not shutting the belts off or for something in that order." (Tr. 231). Elmore also testified that he was not disciplined on December 3, 2015, December 15, 2015, or January 4, 2016, for dangering-off hazards. (Tr. 237-38).

Travis Epling, a mine examiner, also testified that he would have corrected the low air reading taken by Pettry on January 6, 2016, or dangered-off that area. (Tr. 359). He also testified that all examiners had the authority to danger-off or correct hazardous conditions and that he has dangered-off conditions in the past instead of fixing the hazard. (Tr. 359-60).

Written warning and the belt shutdown incident

On January 8, 2015, a written warning was issued to Pettry for reporting hazards in the fireboss books on January 6, 2016, without taking an action. (Tr. 147-49, RX-2). Pettry testified that action was taken because he talked to airway walker Bruce Gilmour and the preceding boss from the nightshifts. (Tr. 150). The only action Pettry took was to report the low air reading to management. (Tr. 150-51). Nothing was written on the warning in the plan for improvement section. (Tr. 173; RX-2).

Pettry further testified about an incident when there were coal spillages on the 3 south belt which covered the belt drive at the distribution point. (Tr. 59). Pettry testified he and Tommy Elmore were verbally disciplined for turning the belts off. (Tr. 59). Elmore also testified that he and Pettry had the belt off for an "extensive time" and that "Mike Burke came and hollered at us for keeping the belts off that long." (Tr. 231). When asked by counsel, "What did [Burke] say would happen if you did put it in the book without talking to him first," Elmore replied "I don't guess he had to say it. You just kind of knew that you was going to get in trouble." (Tr. 231)

Elmore testified that firebosses were given some discretion as to how they wanted to split up their duties to address what would be taken care of. (Tr. 231-32). He further testified that the firebosses could decide their responsibilities amongst themselves unless a supervisor told them otherwise. (Tr. 232). Elmore testified that a violation that is not an emergency can be recorded and left for oncoming examiners to correct the hazard. (Tr. 239). However, he never left an air reading "to worry about it later." (Tr. 240).

January 20, 2016, morning meeting and termination

On January 20, 2016, Burke asked Pettry and the other firebosses to start "firebossing" the belts on the way in to their examination areas, at the start of the shift during a meeting from approximately 7:00 a.m. to 7:30 a.m. (*See* Tr. 79). Pettry testified that Burke wanted the firebosses to maintain the belts instead of the support help, who were laid off and would have worked on belt violations in the past. (*See* Tr. 81). All of the firebosses for that shift were in the meeting together, and one of his partners said "I've never heard of this, so, you know, how can we do it," in reference to maintaining the belts. (Tr. 81-82).

Pettry and his partner, Terry Buckner, reviewed the belt book. (Tr. 82, 156). They saw a violation on the 20 headgate recorded by a previous fire boss for coal spillage. (Tr. 82). Accordingly, Pettry and his partner began to head towards the 20 headgate. (Tr. 82, 155). They told Burke that they were going to the 20 headgate, because "that's what we always do." (Tr. 156-57). Pettry and his partner had to wait for transportation from the nightshift. (Tr. 82). When the vehicle was delivered to Pettry, he noticed it was "pretty well drained of charge. You

have to let it charge it up a little bit to proceed toward 20 headgate." (Tr. 83). Pettry traveled with his partner up to the mother drive at 18 where Pettry began charging his ride. (Tr. 83). Pettry reached the 18 headgate at 8 or 8:30 a.m., which would have taken him ten to fifteen minutes from the bathhouse. (Tr. 90).

Prior to reaching the mother drive, Pettry and his partner repaired "a couple" of fire valves and they cleaned the mother drive, filled the dusters up with 40lb bags of rock dust, applied rock dust, checked the longwall belt for splices (20-25 breaks, which are each 140 feet), and checked the store unit with belt equipment. (Tr. 83). Pettry's partner then caught a ride from the 18 to 20 headgate to work on a violation noted in the examination books, a coal spillage. (Tr. 83-84).

During this time, Pettry testified that he traveled to 19 headgate as soon as his vehicle was charged. (Tr. 84). Once Pettry was at the 19 headgate, a dispatcher ordered him to stay in the mouth of 19, off the main road, because a track crew was installing a spur on the 20 headgate, and there was a spad crew and inspectors on their way to the 20 headgate. (Tr. 85, 87). Pettry testified that the dispatcher controls traffic, and miners must follow a dispatcher's orders because it is a state law. (Tr. 86). He testified that a miner can be subject to discipline for disobeying a dispatcher's order, and the state could issue a citation for violating state law. (Tr. 86-87).

While waiting at the 19 headgate, Bender and "the company" (Pettry could not remember who else was there) passed by. (Tr. 89). Bender asked what Pettry was doing in the 19 headgate. (Tr. 89). Pettry said that the "motor crew was coming, the track crew, motor crew, spad crew and inspectors." (Tr. 89). Pettry remained at the 19 headgate for approximately 20 minutes. (Tr. 89). At approximately 10:30 a.m., Bender and the other members of management came across Pettry at the 19 headgate. (Tr. 157).

Bender testified that he encountered Pettry sitting in his vehicle, which "struck him [as] odd...[because] it was in the middle of the day." (Tr. 382). Bender testified he knew that Burke and other members of management had assigned "a couple" of people to work on the violations at the 20 headgate. (Tr. 382). Bender testified that he asked Pettry what he was doing in the 19 headgate, and Pettry told him the dispatcher asked him to wait until traffic passed by. (Tr. 396). Bender testified that Pettry would have to follow the dispatcher's orders. (Tr. 397). Bender also testified that he asked Pettry why he didn't walk up to the 20 headgate, and Pettry said he hadn't thought about it. (Tr. 411). Further, Pettry believed that he was parked under a lifeline, so he could not leave his vehicle and walk up to the 20 headgate, without the vehicle obstructing the travel path in violation of safety laws. (Tr. 421-24). After exiting the mine, Bender testified that he asked Burke if Pettry was supposed to be working on something when Pettry and Bender encountered each other underground. (Tr. 383).

Pettry testified that when the dispatcher cleared him to travel, Pettry went up to the 20 headgate where his partner had already abated the recorded hazard. (Tr. 88). Pettry testified that his partner was "pretty upset" because the hazard should not have been entered into the examination books. (Tr. 88).

Later that day, there was a meeting with Bender and management, and Pettry testified that management "felt that [he] was just sitting there doing nothing and had been doing nothing since 7:00, which was totally wrong, till 10:30." (Tr. 161). Burke testified that he, Doug Bender, possibly Carl Lucas, the superintendent, and Tony Osbourne, the Human Resources Director, were at this meeting where Pettry was terminated. (Tr. 273-74). Burke testified that the meeting was a "Return-to-work" meeting after Pettry's suspension, but they didn't believe Pettry was remorseful for his past poor work performance, and Pettry became agitated, so they terminated him that day. (Tr. 274). Bender testified that he was not disciplining Pettry for obeying the dispatcher, but that it was halfway through Pettry's shift and Pettry should have been where he was "supposed to be." (Tr. 411-12). Bender was also concerned about Pettry's disciplinary events within a short time period. (412). Bender did not write up any record of Pettry's discharge. (Tr. 394). He testified that either him or the human resources manager told Pettry he was terminated. (Tr. 395).

Bender also testified that the mine does have last chance agreements, which are sometimes used to give miners a final chance after discipline before there is a termination. (Tr. 399-400). Bender testified that management did not consider entering into a last chance agreement with Pettry. (Tr. 402).

Discipline of other miners

Pettry testified that he was unaware that on January 8, 2016, a fireboss was issued a verbal warning for recording hazards without recording an action; a section foreman was issued a written warning for failing to take corrective action on January 20, 2016; on January 21, 2016, a foreman was issued a verbal warning for failing to take corrective action; and a miner was issued a written warning for recording violations without taking corrective action on February 3, 2016. (Tr. 165-167).

Burke, the mine foreman, testified that he expected firebosses at American Eagle to look for violations and hazards, record the hazards, and take corrective action or danger-off the hazard and record the action. (Tr. 253). He testified that a preshift examiner was terminated for an inadequate exam; another miner was terminated for an inadequate exam, allowing water to accumulate in a primary escapeway, in addition to previous poor job performance. (Tr. 258-61; RX-6, 7). Burke also testified that two examiners were given warnings because they failed to take corrective action for hazards they found; one examiner failed to record a hazard and corrective action for a pre-shift area that later received a violation; another salaried fireboss was terminated for failing to take any action when there was a "gobbed out" tailpiece with coal spilling around it.[8] (Tr. 262-67; RX-8-11). Burke further testified that another examiner was terminated for failing to take corrective action, after reviewing Respondents' exhibit 12. (Tr. 267-68; RX-12). Burke testified that he did not ever instruct anyone to alter examination books and that there would be "severe consequences" if he found out examination books were altered. (Tr. 272).

[8] The fireboss who was terminated was initially suspended according to Burke. (Tr. 267). Additionally, it is noted by this Court that Pettry, an hourly paid fireboss, testified that a salaried fireboss would have been his superior. (Tr. 175).

Doug Bender, the operations manager testified that he knew of several miners who were terminated for failing to satisfy their job requirements. (Tr. 383). Respondents' exhibits 21, 22 and 23 described miners being terminated for an improper preoperational exam and a miner failing to wear protective gear. (Tr. 384-86).

III. Contentions of the Parties

Complainant contends that he engaged in protected activity when he reported hazards to mine management after Panther Creek Mining took over the mine in 2015. (Tr. 201-02; Compl. Br. at 7-8). Complainant also contends that he engaged in protected activity by documenting hazards during his preshift examinations and refusing to work in conditions that violate safety laws. (Compl. Br. at 8-10). Additionally, Complainant contends that the Respondents took an adverse action when they suspended and terminated Complainant, which was motivated in part by Complainant's protected activity. (Compl. Br. at 11-13). Further, Complainant argues Respondents interfered with his rights when Doug Bender tried to get Complainant to abandon his vehicle under the life line, interfering with the Mine Act's standards. (Compl. Br. at 14-15).

Respondents contend that Complainant was repeatedly disciplined for failing to detect, report, and correct or danger-off hazards. (Resp't. Br. at 5-17). Respondents contend that the Complainant was not engaged in any protected activity because he did not make safety complaints. (Resp't. Br. at 19-21). Respondents further argue that Pettry's termination was not motivated by any protected activity, but rather his repeated poor work performance. (Resp't. Br. at 22-25). Respondents contend that other miners were disciplined or terminated for the same actions or lack of action taken by Complainant. (Resp't. Br. 26-29). Furthermore, Respondents contend an affirmative defense of termination for Complainant's poor job performance, even if there was a prima facie case of discrimination. (Resp't. Br. at 30-31).

IV. Discussion

This case has been brought based on allegations that the Respondents discriminated against and interfered with the rights of the Complainant under section 105(c) of the Act, which states:

> No person shall...in any manner discriminate against or otherwise interfere with the exercise of the statutory right of any miner...because such miner...has instituted or caused to be instituted any proceeding under or related to this Act...or because of the exercise by such miner...of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

The Mine Act is remedial legislation that should be construed liberally to allow miner participation in its enforcement. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (1980). The Senate Report accompanying the Act states:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if

> miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978).

A. Complainant Has Successfully Proven a Prima Facie Case of Discrimination

To establish a *prima facie* case of discrimination, the Complainant must show that he (1) engaged in protected activity, and (2) suffered an adverse action that was motivated at least in part by the protected activity. *Sec'y of Labor on behalf of Miller v. Savage Svcs. Corp.*, 37 FMSHRC 936 (2015). The burden of persuasion is on the Complainant. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). An operator can rebut a *prima facie* case by showing that there was no protected activity or that the adverse action was not motivated by the protected activity. *Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-36 (Sept. 1997). The Commission has held that an operator may also affirmatively defend against a *prima facie* discrimination case by demonstrating it would have taken the adverse action for a miner's unprotected activity alone. *See Sec'y of Labor on behalf of Leonard Bernadyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (March 2000).

1. Complainant Engaged in Protected Activity When He Refused to Perform Work

The Commission has held that a work refusal is a protected activity. *See e.g. Bryce Dolan v. F& E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000). Although the Mine Act grants miners the right to complain of a safety hazard or violation, it does not expressly state that miners have the right to refuse to work under such circumstances. 30 U.S.C. § 815 (c)(1). Nevertheless, the Commission and this Court have recognized the right to refuse work in the face of such perceived danger. *See Bryce Dolan*, 22 FMSHRC at 176; *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Estrada v. Runyan Construction Inc.*, 36 FMSHRC 3156, 3166 (2014)(ALJ). A protected work refusal "...is an extremely important legal construct, particularly in the mining industry, where hazards often appear instantaneously and a miner's decision to remove him or herself from a dangerous situation could be the difference between life and death." *Bryce Dolan*, 22 FMSHRC at 179-80. The legislative history supports protected work refusals:

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include...the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

S. Rep. No. 95-181, at 35.

a. Complainant's Work Refusal Was Made in Good Faith because it was Honest and Reasonable

A miner only needs to have a good faith belief that there was a safety hazard for a protected work refusal. *Estrada*, 36 FMSHRC at 3166. A good faith belief is required to prevent fraudulent work refusals. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810 (April 1981);

The Commission held in *Robinette*, that a miner's good faith belief must be honest and reasonable. *Id.* at 812. Reasonableness is determined by the perception of the miner at the time the alleged protected activity took place. *Sec'y of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 152, 15349 (1983); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (1982). In *Bryce Dolan*, the Commission held that "the standard under which work refusals are analyzed includes the *subjective* element of a miner's 'honest belief that a hazard exists' as well as the *objective* requirement that the miner's belief be reasonable." *Bryce Dolan*, 22 FMSHRC at 177, n. 7 (citing *Robinette*, 3 FMSHRC at 810).

However, a miner's continuing work refusal "may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition." *See Bryce Dolan*, 22 FMSHRC at 177 (citing *Bush*, 5 FMSHRC at 998-99).

On January 20, 2016, Pettry was working as a fireboss at American Eagle Mine. (Tr. 78). Pettry was delayed that morning at the 19 headgate while his firebossing partner went ahead to headgate 20. (Tr. 82-85). Pettry testified that after he had charged his vehicle and had begun to travel to the 20 headgate, he was stopped by the dispatcher under the 19 headgate lifeline. (Tr. 85). Pettry testified that he was told by the dispatcher to wait on his vehicle until other traffic could proceed. (Tr. 85). At approximately 10:30 a.m., Doug Bender, the operations manager, came across Pettry on his vehicle in the 19 headgate. (*See* Tr. 414). Bender testified that he engaged in a conversation with Pettry, where Bender asked Pettry why he was sitting in his vehicle. (Tr. 396). Bender was irritated that Pettry had wasted time getting "tie[d] up...all day sitting on a ride." (Tr. 414-15). Further, Bender testified that he asked Pettry why he did not leave his vehicle and walk up to headgate 20. (Tr. 414-15).

At hearing and in their post hearing brief, Respondents conceded that a miner disobeying a dispatcher's order would violate state law and that ultimately violating the dispatcher's orders would result in a disciplinary action. (Tr. 397-99). Pettry testified that he could not leave his vehicle or move his vehicle under the lifeline until the dispatcher cleared him to move. (Tr. 87). Pettry said this was because he could not violate the safety requirement to obey a dispatcher's orders. (Tr. 86-87). Because Respondents admit the danger of violating a dispatcher's order, Pettry's refusal to move his vehicle was made in good faith because it is honest and reasonable to refuse to violate state law and put himself or others in a potentially dangerous situation. A dispatcher controls underground mine traffic to prevent vehicle collisions and any hazardous blockages from occurring. As Respondents admit in their post hearing brief, "Respondents do not deny that in the abstract, when a dispatcher directs a rail car to stay put, it is illegal for the driver to proceed on in the vehicle." (Resp't. Br. at 17 (citing to W. Va. Code § 22A-2-37(t)(2)).

Respondents argue that Pettry should have already caught a ride up to the 20 headgate with his partner or walked instead of waiting per the dispatcher's instructions. (Respt. Br. at 17). However, this does not effectively persuade this Court that the work refusal is not protected. Once Pettry was under the lifeline, whether he should have been there or not (an issue to be determined in the affirmative defense analysis), it only matters how he believes he could have safely acted.

As a result, this Court finds Pettry's refusal to proceed on foot to be made in good faith, because it is both honest and reasonable for him to want to keep from abandoning his vehicle in such a manner that could violate a federal safety regulation. While Respondents may imply that there was no direct order to proceed up to headgate 20, Bender had a problem with Pettry waiting under the lifeline in his vehicle and Bender asked Pettry why he was there and why Pettry did not proceed ahead on foot or catch a ride. (Tr. 396, 411). A question delivered in the format of "Why are you not engaged in a certain activity?" by a disapproving superior is enough to make a miner reasonably believe that they have received a work order.

Perhaps Pettry should have proceeded up with his fireboss partner earlier, before he was stopped by a dispatcher in the lifeline. But once Pettry was in the lifeline, he was required by state law to remain there until released by the dispatcher. Pettry could also not abandon his vehicle and walk or catch a ride once in his vehicle, because it would violate federal law. Thus, Pettry's choice to remain on his vehicle satisfies an honest subjective belief of a hazard that is objectively reasonable because Pettry provided safety standards that would have been violated if he left the lifeline at the time that Bender approached him.

Respondents contend, via the testimony of Bender and in their post hearing brief, that "Pettry does not explain...why he did not catch a ride with another driver...or why he could not simply have walked. It was, after all, just three quarters of a mile, which would have taken him only ten or fifteen minutes." (Resp't. Br. at 17.) This offer by the Respondents of a reasonably safe alternative could violate a federal regulation. 30 C.F.R. §75.380(d)(7)(iv) states that a lifeline must be "located in such a manner for miners to use effectively to escape." A reasonable step to dissipate Pettry's fear of remaining in his vehicle to comply with a dispatcher's order cannot be to abandon his vehicle and potentially violate a different safety standard. (Tr. 422). Thus, this Court also finds Pettry's refusal to abandon his vehicle and walk up to the 20 headgate, where Bender and management wanted Pettry to be, is not a reasonably safe alternative. Consequently, Pettry's refusal to move or abandon his vehicle in headgate 19 constituted a protected work refusal under section 105(c) of the Mine Act.

2. There Was a Nexus between the Protected Work Refusal and Termination

There were two adverse actions in this case. Pettry was suspended for three days on December 15, 2015, and he was terminated on January 20, 2016. [9] Both the suspension and termination were not disputed by either party.

Once an adverse action has been established, the Complainant must prove that the adverse action was motivated at least in part by his protected activity. *Driessen v. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). In the instant case, Pettry must demonstrate that either his suspension or termination was related to his work refusal.

Direct evidence of a discriminatory motive is not required; instead a Complainant may use circumstantial evidence to demonstrate a connection. *Sec'y on behalf of Chacon v. Phelps dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). The time between the adverse action and protected activity, the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, and disparate treatment are considered in a circumstantial case. *Id.* at 2510-13.

Only the termination will be analyzed in relation to the work refusal because this protected activity did not occur until after the suspension. The adverse action and protected activity occurred on the same day. Pettry refused to leave his vehicle under the lifeline and was called into a meeting with management where he was terminated on January 20, 2016. This shows a very close time period between the protected work refusal and termination.

The operator had knowledge that Pettry made a work refusal. On January 20, 2016, Bender and other members of mine management found Pettry waiting under a lifeline on his vehicle. (Tr. 382). Bender was dissatisfied that Pettry was sitting on his vehicle, rather than up at headgate 19 abating a violation. (Tr. 414). Bender testified that he asked Pettry why he was not up at headgate 19 and why Pettry would not merely walk up to the next headgate. (Tr. 411). Pettry subsequently refused to move up to headgate 19, where his partner fire boss was working, because the dispatcher told him to wait there for traffic to pass through. Since Bender, the operations manager, testified that he was aware Pettry refused to leave headgate 19, this demonstrates the operator's knowledge of Pettry's work refusal. As Bender was the operations manager, he qualifies as management for the purpose of demonstrating the operator's knowledge.

The operator demonstrated hostility to Pettry when Bender revealed his displeasure at finding Pettry sitting beneath the lifeline in his vehicle. Bender asked Pettry why he was there and why Pettry could not just walk up to headgate 20. This suggestion of action and questioning by management confirms Respondents' hostility toward Pettry's choice to remain in headgate 19.

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[9] In his brief, Complainant appears to allege the suspension meeting was on December 11, 2015, which is not the date testified to by Complainant at hearing, December 15, 2015. (*Compare* Compl. Br. at 11-12 *with* Tr. 65).

Complainant failed to establish that he was treated differently than other miners or firebosses. Respondents brought forth evidence of several examiners who were suspended and terminated for not performing examinations properly. (*See supra*). In fact, one of the instances leading up to Complainant's termination involved a failure to work on a water pump hazard, for which Pettry and his partner were both suspended for three days.

Consequently, there was a protected work refusal the same day as the termination meeting; management was aware at the work refusal; and there was a least a measure of hostility shown to Complainant. However, there was no evidence of disparate treatment. In totality, Complainant has demonstrated a *prima facie* discrimination claim.

3. Complainant Engaged in Protected Activity When He Made Safety Complaints and Documented Safety Hazards

The Mine Act states that a miner cannot be discharged because he "has filed or made a complaint under or related to this chapter, including a complaint notifying the operator...of an alleged danger or safety or health violation." 30 U.S.C. §815(c)(1). The Mine Act's legislative history indicates that the scope of protected activities should be broadly interpreted. S. Rep. No. 950181 at 35 (1977).

This Court acknowledges as a fireboss, Pettry's job required constant reporting and recording of safety hazards as well as abatement of safety violations on a daily basis. Thus, there is too large of a number of safety complaints, and documentation, to analyze all protected activities Pettry engaged in. Therefore, this Court will limit its analysis of safety complaints to solely relevant complaints and/or those raised in the Complainants' briefs. [10]

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[10] In an attempt to impeach Pettry with his deposition, Respondents' counsel, without entering the deposition into the record, thus questioned the Complainant:

> Q. We asked you in your deposition, Mr. Pettry, to explain to us the factual basis for why you believe you were terminated because you were calling MSHA, which you didn't do, but you just told us that was your firm belief, right?
> A. Part of it.
> Q. And that if you had any facts or evidence to show that, you would've presented it to us by now, correct?
> A. On the contact with MSHA?
> Q. Yes, sir.
> A. No.
> Q. You told us you thought you were fired because you were trying to do the right thing, correct? (Tr. 163-64).

There is insufficient other evidence in the testimony and filings to demonstrate that Pettry had any belief that he was being discriminated against because the operator believed Pettry made a complaint to MSHA. Therefore, an MSHA complaint or the belief of an MSHA complaint made by Pettry will not be considered as a protected activity.

Complainant testified that he reported an air reversal to superintendent Dale Smith and general mine manager Endicott after Panther Creek took over the mine in November 2015. (Tr. 201-02, 213). Pettry made this complaint to management around the time that MSHA cited the mine for air reversals during the fall of 2015. (Tr. 201-04). This Court agrees with Pettry: any complaint or report of a safety hazard, which in this case was an air reversal, qualifies as a protected activity.

Next, Pettry testified that during a meeting with Burke, on January 20, 2016, Pettry complained to Burke that the decreased staff at the mine impacted examiners' abilities to correct all of the hazards they encountered and conduct pre-shift examinations. (Tr. 81, 419; Resp't. Br. at 7-8). This complaint made to management would also be a protected activity because it involved Pettry's perceived ability to keep the mine safe as a fireboss and belt examiner.

During the January 20 meeting, Pettry testified that Burke told the firebosses that they were going to have to start "taking care" of the belts because there was no support help anymore due to layoffs. (Tr. 81). Pettry's counsel then asked "Okay. So you voiced your opposition. Did you say you—what did you say or what did you and the other firebosses say in response to Mike's order that morning to begin firebossing the belts on the way into the mines?" (Tr. 81). Pettry responded "We voiced the question, my partner, one of my partners—there's three fire bosses on a team—he's a senior, senior fire boss and he's been doing it 34 years and he questioned, he said I've never heard of this, so you know, how can we do it. But he said, you know, because he's been doing it for a long time." (Tr. 82). His counsel again asked "Right. But did you also voice your personal concern about it?" (Tr. 82). And Pettry responded "Yeah, we were all in there—we were in there together." (Tr. 82). This Court finds that there is sufficient evidence that a group of firebosses including Pettry could have been reasonably perceived by management to be making a complaint together, at the meeting. Thus, I find this complaint concerning belt maintenance to be a protected activity.

Pettry also alleges that the inadequate airflow on the 19 setup panel he documented constitutes a protected activity. He appears to have documented inadequate airflow on several occasions. (CX-3) Pettry's documentation of inadequate airflow on the 19 setup panel would also qualify as a protected activity because it involved a safety concern of the lack of airflow to miners.

4. Complainant Failed To Demonstrate a Nexus between Protected Safety Complaints or Documentation and Adverse Actions

Mr. Pettry was suspended on December 15, 2015, and he was terminated on January 20, 2015. After reviewing the safety complaints and documentation in conjunction with the suspension and termination, there is no direct evidence of a nexus between these protected activities and adverse actions. Therefore, I will turn to the indicia of discriminatory motive: the time between protected activity and adverse action, management's knowledge of the protected activity, animus or hostility towards the protected activity, and disparate treatment. *Chacon*, 3 FMSHRC at 2510.

The suspension occurred on December 15, 2015, and the termination occurred on January 20, 2016, while the safety complaints occurred in November 2015, December 10, 2015, and January 20, 2016. All of these safety complaints occurred within three months of the suspension and termination. This is a close enough time period to show a coincidence in time between protected activities and the adverse actions.

Management also had knowledge of all three safety complaints. The November 2015 airflow complaint was made to Dale Smith, who was the superintendent at the mine. (Tr. 213). The documented air reversal called out by Pettry on December 10, 2015, was recorded in the preshift examination report, which was signed by foreman Bobby Radar and another member of management. (CX-3). The third complaint made by a group of firebosses was delivered directly to Burke, a mine foreman. (Tr. 81, 419). Thus, management had knowledge of all of the protected safety complaints.

However, this Court does not find there to be any animus or hostility towards Pettry before the work refusal above. First, Complainant alleges Respondents showed hostility by management's "rationalizations" as to why Pettry was discharged. (Compl. Br. at 12). This is a vague and circular argument that need not be addressed. Nonetheless, this Court does not find the termination justification to demonstrate hostility as Respondents provided a legitimate non-discriminatory reason for his termination: Pettry's recurring poor job performance.[11] (Tr. 83-84).

The second act of hostility alleged by Complainant is that Pettry was given a written warning on January 8, 2016, for failing to record an action after reporting a low air reading on January 6, 2016. [12] The written warning states that Complainant failed to take an action in violation of safety policy. Pettry alleges that Burke did not want him to even record low air readings, but also testifies that management did want firebosses to record hazards in the book; thus, I don't find Pettry credible in his testimony that management insinuated to not record low airflow. (*See* Tr. 58). Pettry admitted he did not take a corrective action, which is a safety hazard in itself and would have allowed for managerial intervention. (Tr. 144-45). Moreover, I do not find a warning by management for Pettry not taking a corrective action or dangering-off the condition to be animus, especially when another miner was able to abate this condition by rehanging a curtain. (Tr. 157-58).

Additionally, Pettry testified that on December 10, 2015, Pettry recorded the airflow at 25,800 CFM, which he wrote in his notes and called out for another miner to record. (Tr. 48-49). After reviewing his preshift examination report at hearing, he testified that the airflow was recorded by someone at 28,800 CFM. (Tr. 48-49). It appeared to him that the airflow report was altered from 25,800 to 28,800 CFM. (Tr. 48-49). Pettry testified that he called out this reading and that Bobby Rader countersigned the report. (Tr. 52). Pettry testified that the minimum

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[11] This argument is more fully addressed in the affirmative defense analysis.

[12] Complainant appeared to describe the written warning on January 8, 2016 as the "hostile" disciplinary action. (Compl. Br. at 13-14). It is not completely clear, but from the testimony by the parties and the reference to the January 6, 2016, airflow report made by Pettry it appears the Complainant is referring to the written warning on January 8, 2016.

amount of air allowed is 20,000 CFM. (Tr. 46; CX-3). Since the airflow was well above the minimum requirement, and there is no evidence to demonstrate that this alteration in numbers had an effect on examiners or mine safety, this Court does not find this unexplained alteration to demonstrate animus.

Therefore, this Court does not find there to be any hostility towards the safety complaints made by Complainant. Rather, this Court finds it concerning that Complainant admits to not taking corrective action and dangering-off conditions when that is what his job required. The Act promotes safe conditions in mines, and a miner failing to take safety action, when required to, is dangerous. Warning such a miner does not constitute hostility.

There was also no disparate treatment of Pettry. Complainant does not allege disparate treatment and several of Respondents' witnesses point to a variety of occasions where firebosses and examiners were warned, suspended, and terminated for failing to record, correct, or danger-off safety hazards.

As a result, in reference to safety complaints and documentation, Pettry is only able to show a close proximity in time between complaints and the adverse action, and management's knowledge of said complaints. No hostility or disparate treatment has been demonstrated. Therefore, I do not find a nexus between the safety complaints and adverse action, and the Complainant has failed to demonstrate by a preponderance of evidence a *prima facie* case of discrimination here.

B. Respondents Successfully Proved an Affirmative Defense for Complainant's Poor Work Performance

While Complainant has not established a *prima facie* discrimination case involving safety complaints or documentation, a *prima facie* case has been demonstrated involving his work refusal under the 19 headgate. Accordingly, this Court will address Respondents' affirmative defense.

An operator may defend against a *prima facie* case by showing that its action was also motivated by unprotected activity and that it would have taken the action for an unprotected activity alone. *See Robinette,* 3 FMSHRC at 817-18; *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSJRC 1361, 1365 (Dec. 2000). Since the Respondents conceded that the conversation between Pettry and Bender under the 19 headgate triggered Pettry's termination meeting, this Court finds a *prima facie* case of discrimination.

To demonstrate a legitimate, non-discriminatory reason for termination, the Commission considers "evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practice forbidding the conduct in question." *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHC 1361, 1365 (Dec. 2000). An affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An operator's defense can be pretextual if it is "weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res.*, 12 FMSHRC

1521, 1534 (Aug. 1990). Additionally, an affirmative defense may fail if the Complainant was terminated for conduct that was provoked by the operator. *U.S. Steel*, 23 FMSHRC 981, 992 (Sept. 2001).

This Court finds that Respondents had a legitimate reason to terminate Pettry's employment due to repeated disciplinary action for poor work performance. Pettry was a fire boss responsible for examining the mine and dangering-off or abating hazardous conditions. Respondents cite to three different instances involving Pettry's failure to follow instructions and complete his daily job tasks. (Resp't. Br. at 7-17).

First, Pettry and his partner were suspended for three days for allowing a water pump accumulation in an area that they were responsible for examining. (CX-5). Pettry signed his suspension letter without adding any denial, and he admitted that the plug for the water pump was in his examination area. (Tr.132-33). Therefore, I do not find Pettry's protestations at hearing that the water pump condition was not part of his examination area to be credible.

Second, Pettry received a written warning for failing to take and record an action to correct or danger-off an airflow hazard. (RX-2). Pettry admitted he only reported the low air reading to management. (Tr. 150-51). Pettry did not testify that he took corrective action or dangered-off the condition, which was a fireboss job requirement, as testified to by all the witnesses at hearing. Any accusations by Pettry that management encouraged miners to ignore hazards are not credible due to Pettry's vague and contradictory testimony concerning this claim. (Tr. 56, 58, 145-51, 186).

Third, Pettry was terminated due to his failure to follow work orders on January 20, 2016. Pettry received examination books that recorded a hazard on headgate 20 at the morning meeting. Pettry and his partner then admittedly chose to go address that hazard and reported their plan to management because Pettry said "that's what we always do." (Tr. 156-57). He entered the mine after the 7:00 a.m. meeting, which lasted approximately 30 minutes, where they waited for a vehicle to travel to the 18 headgate mother drive where Pettry began to charge his vehicle. Pettry testified that they reached the 18 headgate at approximately 8 or 8:30 a.m.—although it took only 10-15 minutes to get there from the bathhouse. While at the 18 headgate, he and his partner cleared the belt, rock dusted, and checked for splices. Then Pettry's partner caught a ride up to the 20 headgate where the violation they had to abate existed. Pettry chose not to take a ride up with his partner, but instead stayed back and charged his vehicle, while his partner traveled up to and resolved the hazard before Pettry joined him. Pettry's choice to remain at the 18 headgate and charge his vehicle was a work refusal to join his partner. No reason was provided as to why Pettry could not have left his vehicle in the 18 headgate—there is no allegation there was also a lifeline here—or why Pettry found it necessary to charge his vehicle when his partner did not.

At approximately 10:30 a.m., Doug Bender, the operations manager, came across Pettry on his vehicle in the 19 headgate. (*See* Tr. 414). Bender felt that Pettry should have already been working at the 20 headgate instead of sitting in the 19 headgate. This Court agrees with Complainant that Pettry could not have left the 19 headgate once the dispatcher told him to wait. However, this Court does question why Pettry refused to travel with his partner earlier. His

partner evidently believed the hazard at the 20 headgate was important enough to not wait while their vehicle charged. Pettry could have easily made the same decision. It is unclear whether the time from the meeting at 7 a.m. to Pettry's 10:30 a.m. encounter with Bender was spent by Pettry attempting to fulfill his work responsibilities in good faith. However, it is clear that Pettry gave no compelling explanation for why he had to remain to charge his vehicle. This Court finds that the Respondents credibly believed Pettry to have refused a reasonable work request at the 20 headgate by refusing to travel there with his partner—when it was safe. The decision to terminate Pettry for poor work performance is consistent with the previous suspension and warning he received for failing to conduct examinations safely and properly.

Additionally, Respondents brought forward enough evidence demonstrating that other firebosses and examiners were similarly being held responsible for unsafe work practices. Respondents' witnesses credibly testified that once Panther Creek Mining took over American Eagle Mine, there was a MSHA closeout meeting. At the meeting, one of the primary complaints made by MSHA was that the examiners were not making satisfactory examinations, which needed to be remedied in the upcoming year. As a result of this meeting, Respondents decided to take two steps to ensure better examinations. Panther Creek first retrained the miners, and then management began to hold examiners responsible for inadequate examinations. (RX-1). Pettry along with several other firebosses were thus disciplined for failing to adequately perform examinations.

A fireboss is responsible for examining and reporting the hazardous conditions in a mine. When he fails to do so, the mine becomes unsafe for him and other miners. Therefore, I find Respondents had a legitimate non-discriminatory reason for discharging Pettry due to poor work performance evidenced by his previous warnings and suspension.

C. Complainant Failed to Prove Respondents Interfered with Complainant's Protected Rights

Complainant also alleges an interference claim against the Respondents. This claim is made in Complainant's filings and his post hearing brief. However, in the post hearing brief, Complainant appears to use the same occasion that he alleged for discrimination (the work refusal *supra*) to allege interference.

Section 105(c) of the Mine Act states that no person shall interfere with the rights of any miner. 30 U.S.C. 815(c)(1). In *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources,* LP, 36 FMSHRC 2088, 2104-19 (Aug. 2014), the Commission approved a test for interference suggested by the Secretary. The test established interference occurs 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.

See Sec'y of Labor on behalf of McGary v. Marshall County Coal Co., 38 FMSHRC 2006, 2011 (Aug. 26, 2016); *UMWA on behalf of Franks and Hoy v. Emerald Coal Res. LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs).

Complainant argues that Bender interfered with Pettry's statutory rights to refuse unsafe work orders because Bender pressured Pettry to leave the lifeline, and work elsewhere. (Compl. Br. at 14, 15). Complainant argues that "Mr. Bender intended to cause Mr. Pettry to abandon his ride under the lifeline and to interfere with Mr. Pettry's decision to do what was both safe and mandatory under the Mine Act," which was to wait until the dispatcher cleared Pettry to move. (Compl. Br. at 15).

While the work refusal demonstrated a protected activity for a *prima facie* case of discrimination, Bender asking Pettry why he was sitting on his vehicle under the lifeline does not rise to the level of interference. (*See* Tr. 396, 412). The protected class here is miners, specifically firebosses. Bender asking Pettry why he was waiting under the 19 headgate, and why he did not walk up to the 20 headgate, is not enough to be reasonably viewed by a fireboss, who has to interact with management regularly, as tending to interfere with his right to refuse to disobey a dispatcher's order or block a lifeline by abandoning his vehicle there. Therefore, the first step of the test for interference has not been satisfied because Bender's questioning of Pettry and Pettry's ultimate work refusal is not enough to be considered as reasonably tending to interfere with a fireboss's protected work refusal.

Complainant fails to also satisfy the second element of interference. Bender and management demonstrated, through Pettry's documented poor job performance, that their termination was not due to any attempt to prevent miners from exercising protected activities. Instead it was due to Pettry repeatedly failing to perform his job adequately. Bender testified that Pettry's work refusal triggered a disciplinary action because he was not performing the work required from him on January 21, 2016, which was to abate a hazard at the 20 headgate. (Tr. 382, 387-89, 369). Pettry's fireboss partner was able to obtain a ride up the headgate, while Pettry effectively refused, instead choosing to spend excess time charging a vehicle that was not shown to be necessary to any miner's safety. Pettry continuing to perform his job poorly and ignore a hazard arguably created the greater threat to the safety of miners.

This Court will also address any perceived, but not specifically alleged, interference by Pettry. Pettry testified that he believed a preshift examination report on December 9, 2015, by Travis Epling appeared to him to be 24,625 CFM. Pettry then conceded the number might have been 29,625 CFM. (Tr. 47-48). Pettry testified that he believed the airflow reading should have been either 14,625 CFM or 19,625 CFM without the alteration he perceived.[13] (Tr. 47-48). Additionally, in Pettry's preshift examination report on December 10, 2015, Pettry testified that air recorded was 28,800, but he wrote in his fire boss notes 25,800. (Tr. 48-49). It appeared to him that the book was altered from 25,800 to 28,800. (Tr. 48-49). Pettry testified that he called

[13] It is unclear whether Pettry believed the original report should have stated 14,625 CFM or 19,625 CFM, as he changed his testimony as to what he observed in the report at hearing. (Tr. 47-48).

out this reading and that Bobby Rader countersigned the report. (Tr. 52). Pettry also testified that the minimum amount of acceptable airflow is 20,000 CFM. (Tr. 46; CX-3).

This Court now addresses both of these alleged document alterations. The alleged number change on Epling's preexamination report is not apparent to this Court when reviewing the report in CX-3. (*See* CX-3). Additionally, Complainant had the opportunity to question Epling about whether or not the numbers he reported in that preshift examination report were altered, but Complainant failed to do so. As a result, this Court does not find that there was an alteration to Epling's pre-examination report. However, it does appear to this Court that Pettry's airflow recording was altered by someone writing over the 5, from Pettry's alleged finding of 25,800. (*See* CX-3). Because this report was written by someone else—Pettry called out the airflow reading—it is unclear who altered it or why this number was changed. Both 25,800 and 28,800 CFM are well above the minimum airflow requirements of 20,000 CFM, and there has been no sufficient evidence or testimony to show that these airflow measurement reports could reasonably be viewed as interfering with a fireboss's protected rights. It is also not clear to this Court that the change was not made due to an error in first recordation or how it would significantly benefit the operator.

Further, this Court will address Pettry's testimony that Burke insinuated that Pettry should not record low airflow measurements without first reporting them to management. (Tr. 57). However, Pettry contrarily testified that Burke told him to record whatever action he took in the examination books. (Tr. 58). I find that Pettry's inconsistent testimony on this allegation lacks credibility. Complainant attempts to bolster this allegation with Elmore's testimony. I also find Elmore not credible concerning these alleged insinuations by management. Elmore inconsistently testified that he witnessed this interaction and that he merely heard about it from Pettry. (Tr. 230-31). Thus, these allegations are not credible as the witnesses are unable to convincingly articulate why and what Burke warned them specifically not to do.

The final allegation this Court addresses is that Elmore and Pettry were scolded by management for keeping a belt shut down for too long. Pettry and Elmore testified that they were working to clear the belt after a large amount of accumulations created a hazard. (Tr. 59, 231). This Court finds it equally possible that a fireboss who has continuously been disciplined for failing to adequately do his job could be criticized by management for keeping a belt shutdown for an excessive amount of time. Firebosses have the responsibility to regularly report uncomfortable truths, such as hazards and violations, to management. Firebosses should be able to work with management and be aware that management will sometimes be irritated with the existence of hazards, and therefore cannot credibly claim to be afraid of reprisal in these alleged circumstances.

When examining all of the facts presented at hearing and in the filings, this Court does not find there to be sufficient evidence of interference. This Court finds that the protected class of firebosses would not reasonably view the actions of Respondents as tending to interfere with the exercise of protected rights. Management disciplining firebosses for failing to find and take action on safety hazards does not interfere with a fireboss's protected rights. Nor does an unexplained alteration to an acceptable airflow reading, or a supervisor being upset that a belt has been shut off (without more) for an excessive period of time constitute reasonable

interference. This Court does not find the other allegations above credible; accordingly, in totality, there is not enough to demonstrate a fireboss, who is trained to report and take action on safety hazards, would reasonably believe his protected rights were being interfered with by Respondents. Therefore, the first element of interference has not been satisfied.

Even though the first element has not been satisfied, and so an interference claim fails, this Court will still address the second element. Respondents have been able to demonstrate that MSHA had a problem with the quality of examinations at American Eagle. Thus, management retrained examiners, including firebosses, and started to hold them accountable to ensure greater compliance with MSHA regulations. Respondents were protecting mine safety by disciplining and holding firebosses, like Pettry, accountable for poor work performance. Multiple examples of firebosses being disciplined for failing to conduct safe examinations and take corrective action were presented at hearing. Consequently, Respondents have demonstrated a legitimate and substantial reason of improving mine examinations that outweighs any perceived harm to the exercise of protected rights. As a result, Complainant fails to satisfy the second element of interference.

In conclusion, Complainant has shown a *prima facie* case of discrimination, which Respondents were able to defeat by successfully asserting an affirmative defense, and Complainant has failed to prove interference.

D. Doug Bender, Mike Burke, and Greg Dotson Are Not Liable for Discrimination or Interference

There is no evidence that Bender, Burke, or Dotson acted independently or engaged in discrimination or interference that is not rebutted by Respondents affirmative defense. Accordingly, the complaint against each is dismissed.

V. ORDER

Therefore, complaints against Panther Creek Mining, LLC, Doug Bender, Mike Burke, and Greg Dotson are **DISMISSED**. Each party shall pay its own costs and expenses.

William S. Steele

William S. Steele
Administrative Law Judge

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