FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 14, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JUAN SMITHERMAN, Complainant	DISCRIMINATION PROCEEDING Docket No. SE 2021-0153 MSHA Case No. SE-MD-2021-03
v.	
WARRIOR MET COAL MINING, LLC, Respondent	Mine I.D. No. 01-01247 Mine: Mine No. 4

DECISION ON LIABILITY

Appearances: C. Renita Hollins, Esq., for the Department of Labor, Timothy J. Baker, Esq., for the Complainant, and Brock Phillips Esq. and Allen B. "Josh" Bennett, Esq., for the Respondent

Before: Judge William B. Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (c)(1) ("Mine Act" or "Act"). At issue is whether Complainant Juan Smitherman ("Smitherman" or "Complainant") was wrongfully terminated by Respondent Warrior Met Coal Mining, LLC., in retaliation for exercising his rights under the Act by raising safety issues with his supervisor.[1]

For the reasons which follow, the Court finds that Mr. Smitherman was wrongfully terminated for exercising those rights; that Smitherman would not have been fired but for exercising those rights and that the Respondent failed to establish an affirmative defense.

[1] A virtual hearing was held on October 20 and 21, 2021. The Secretary, Complainant's counsel, and the Respondent each filed a post-hearing brief and a response brief. All contentions were fully considered by the Court and are addressed in this Decision.

I. Findings of Fact[2] with Discussion

Testimony of Zachary Salyers, foreman of the No.4 section and Complainant's supervisor

Testimony began with the Secretary calling Zachary Salyers, section foreman and Complainant Juan Smitherman's supervisor on the No. 4 Section since January 2021, to the stand as a hostile witness. Vol. 1, Tr. 37. Foreman Salyers agreed that on February 2, 2021, he and Smitherman, a roof bolter, had a disagreement about whether it was safe to roof bolt without dust bags. Vol. 1, Tr. 44, 100. Salyers, though disagreeing with Smitherman's view about the requirement to use dust bags, stated that he told Smitherman he did not have to bolt if he did not have dust bags. Vol. 1, Tr. 45. He also maintained that Smitherman never made any other safety complaints to him. Vol. 1, Tr 48. Salyers stated that a month elapsed between the dust bag incident and a subsequent matter, which involved a ventilation fly pad. Vol. 1, Tr. 101. Fly pads control ventilation, as they serve as "ventilation controls to force the air to ventilate working areas, face areas, things of that nature." Vol. 1, Tr. 49.[3]

By his own admission, Salyers confirmed that, on March 1, 2021, during the owl shift (i.e., the night shift) from February 28-March 1, two roof bolters on his section, Jonathan Banks and Steven Volts, made a safety complaint to him – namely that fly pads had not been installed in an entry. Vol. 1, Tr. 49, 149. Of significance, Salyers admitted that as foreman *it is his responsibility* to ensure that curtains or fly pads are installed or in place before mining. Vol. 1, Tr. 52. Salyers claimed that he did not know that Complainant Smitherman had any involvement in Banks and Volts raising the fly pads issue with him, and denied suspecting Smitherman brought the matter to the attention of Banks and Volts. Vol. 1, Tr. 53. The Court does not find this assertion by Salyers credible – while there is no direct evidence of his knowledge, Salyers admitted that Smitherman was on the section the night the issue arose and, given the evidence in the record as a whole of the friction between the Complainant and him, it is ineluctable that Salyers made the logical connection between Smitherman and his fellow bolters' complaints. Smitherman was, after all, the senior bolter on the section, working with Banks and Volts.

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[2] The Court's findings of fact are based on the record as a whole and on observation of the witnesses as they testified. The Court noted the witnesses' demeanor while testifying, whether they were forthcoming in answering questions or evasive. When witnesses' accounts differed, the Court considered the witnesses' interests, corroboration of their testimony or lack thereof, and consistency or inconsistency between the testimonies of the various witnesses. In reaching its findings and determinations, the Court considered the entire record, including the parties' post-hearing briefs and reply briefs. Omission of discussion of particular aspects of testimony as well as particular contentions made in the parties' post-hearing briefs does not mean that such aspects were ignored. Rather, the Court determined that such discussions were unnecessary, as they were deemed to be subsumed in the Court's findings of fact with discussion and/or in the analysis with further discussion sections of this decision.

[3] Salyers elaborated that a fly pad is a piece of belt line, about a 4-foot-wide, and 7 to 9 feet in length. When installed, they need to touch or overlap and thereby create a wall so that when air hits the pad it will move in a certain direction. They are distinct from curtains because a piece of equipment can pass through pads, without ripping them down. Vol. 1, Tr. 50-51.

Following the fly pad matter, Salyers recounted that Smitherman came to him before the beginning of the following shift (March 1, for the March 1-2 shift) and informed Salyers that he did not want to continue to work on his section and wanted to be transferred to the other side of the mine. Vol. 1, Tr. 54. Salyers denied that Smitherman gave a reason for the request.[4] Vol. 1, Tr. 54, 140-141. Salyers contacted his shift foreman, J.D. Earnest, about Smitherman's request to be moved, and Earnest told him to assign Smitherman to the Lo-Trac, which is a small, compact, diesel-powered forklift, about 5 feet wide and 12 to 15 feet long, and used to bring supplies to the section. Vol. 1, Tr. 55-56, 142.

At about 11:45 p.m. that evening, which was early in the shift, Salyers instructed Smitherman to bring supplies to the section. Vol. 1, Tr. 59. As noted above, Smitherman was the senior roof bolter on the shift at the time he was assigned to the Lo-Trac. Vol. 1, Tr. 57. Salyers stated that Smitherman got on the Lo-Trac, but that he did not see him again until 3 a.m., over three hours later. Vol. 1, Tr. 60-61. Pressed as to what Smitherman was doing between 11:45 p.m. and 3 a.m., Salyers admitted he had no information as to what Smitherman was doing during that time. Vol. 1, Tr. 63-64. Despite not seeing Smitherman during that time period, Salyers defended his conclusion that Smitherman did not bring up supplies because he did not see "all the water line that was supposed to [have been] brought up." Vol. 1, Tr. 60-61. Salyers added that around 6 or 6:30 a.m. when he next saw Smitherman "there was only 2 pounds of block and 1 pound of rock dust brought up." Vol. 1, Tr. 61-62, 65-66. When asked, Salyers admitted he did not tell Smitherman the exact number of supplies to bring up, but when he saw him at 3 a.m., he was not pleased at the speed with which Smitherman was bringing up supplies. Vol. 1, Tr. 65. However, Salyers did not tell Smitherman at the time that he was not pleased with his progress, testifying that he told Smitherman "we would get away from the water line since we can't get it done and we would work towards our block," Vol. 1, Tr. 65-66.

The Court has reason to doubt Salyers' version of the work Smitherman accomplished that evening. Salyers gave Smitherman instructions around 11:45 p.m., but did not see him again until 3 a.m. and after that did not see him until 6 or 6:30 a.m., the time of their encounter in the supply hole. Vol. 1, Tr. 59, 60-61, 66. With little personal contact, Salyers' judgment about Smitherman's efforts was based on deduction, not observation, which impeded his conclusion as to whether Smitherman was "loafing" or making an effort to complete his assigned tasks.

When asked about his instructions to Smitherman to bring a bundle[5] of water pipes, Salyers agreed that he told Smitherman to look in different locations for the pipes. Vol. 1, Tr 80. Salyers also admitted that Smitherman later informed him that he could not find the pipes. Vol. 1, Tr. 80-81. Salyers never found the pipes either, informing the Court that he never looked for them. Vol. 1, Tr. 81. Salyers confirmed that after the shift had ended the pipes were found in the supply hole; Salyers did not say who found them, and counsel did not ask. Vol. 1, Tr. 81-82. However, when

[4] As Counsel for the Secretary pointed out during redirect examination of the Complainant, Salyers never asked Smitherman why he wanted to be transferred to the other side of the mine. Vol. 1, Tr. 298. The Court would note that such a question from Salyers would have been natural and expected, unless one already knew the reason.

[5] A bundle consists of approximately 20 to 25 pipes. Vol. 1, Tr. 80.

pressed by the Court to directly answer the question, Salyers revealed that he did not see the water pipes in the supply hole. Vol. 1, Tr. 83.

The Court notes that throughout his testimony Salyers exhibited reluctance to answer straightforward questions, on subjects including but not limited to his role in "writing up" employees, his instructions to Smitherman about bringing up supplies on the Lo-Trac, and his reasoning behind his conclusion that Smitherman had not brought up supplies, answering only when repeatedly pressed on the issue by opposing counsel or, sometimes, by the Court itself. Vol. 1, Tr. 60-61, 69-70, 82-83.

As noted above, Salyers testified that he next saw Smitherman sometime between 6 and 6:30 a.m., asserting that the Complainant was sleeping on the Lo-Trac at that time. Vol. 1, Tr. 67. According to Salyers, Smitherman was on the Lo-Trac in the supply hole, with the Lo-Trac's lights and his miner's cap light both turned off. *Id.* No one else was then present in the supply hole, aside from Salyers and Smitherman. Vol. 1, Tr. 97 Therefore, as discussed further, *infra,* there were only but two individuals involved in this encounter; Salyers and Smitherman, and they presented very different accounts of the event.

According to Salyers, Smitherman told him he was taking a break; Salyers conceded that taking a break would be permissible "if he had just performed some type of strenuous task and he wanted like, say, a water break or catch-his-breath break." Vol. 1, Tr. 68, 79. Yet, when asked if he confronted Smitherman over this, Salyers answered that he "didn't tell [Smitherman that] he was taking an unauthorized break." Vol. 1, Tr. 67-68. Nor, when Salyers came upon Smitherman, did he use the word "sleeping" when speaking to him. Vol. 1, Tr. 71. Salyers denied that Smitherman told him he had just completed a strenuous task, namely loading a rock duster. Although Salyers agreed that Smitherman had put a crib under the track, he did not consider that task to be strenuous. Vol. 1, Tr. 69.

Salyers then informed Smitherman that he was going to write him up. Vol. 1, Tr. 69. Salyers clarified in his testimony that he does not actually do the write-up. Instead, he passed on his account of the event to those above him and those individuals create the write-up. To that end, Salyers called Pete Richardson, the Number 4 Section coordinator, and his direct supervisor, and informed him that he found Smitherman asleep on the Lo-Trac and that he should be written up or fired because of that. Vol. 1, Tr. 36, 97. After the end of the shift, Salyers met with Sherry Sterling, Human Resources manager, and Jason Lee, the general mine foreman. Vol. 1, Tr. 70-71. Salyers recalled telling Sterling and Lee that Smitherman was sleeping. Vol. 1, Tr. 71. Sterling instructed Salyers to make a written statement about the incident. Vol. 1, Tr. 72. The statement, written on March 2, 2021, consists of one, handwritten, page.[6] Ex P. 38, Vol. 1, Tr. 73.

[6] The following is the text of Salyers' statement: "at Section arrival (11:45 p.m.), I gave Juan Smitherman orders to operate Sec. Lo Trac and that his Job would consist of moving up supplies. The supplies that I ordered Juan to move up were block and 2" water line. I also gave Juan specific orders where to place these supplies. Neither the water line nor the block was placed where I asked for it to be placed by the end of the shift. When I seen Juan at his dinner break he told me he had just unloaded the flat car and I asked him where the 2" water line was that I had asked for + he said there was 11 joints 2 crosscuts outby, I told him there is a whole pile and

Aspects about Salyers' statement are disconcerting. Agreeing that his statement was written close in time to the event in issue, he admitted that the word "sleeping" is not in it. Vol. 1, Tr. 77. At odds with the foreman's claim, his statement includes that Smitherman told Salyers he was taking a break. Vol. 1, Tr. 78. Given that, one would expect Salyers' statement to have included his contradictory claim. It is noted that after giving his statement to human resources, no one from Warrior Met spoke to Salyers about the incident again. Vol. 1, Tr. 98.

In response to questions from counsel for the Complainant, Salyers acknowledged that as section foreman it is his goal to produce as much coal as possible. Vol. 1, Tr. 89-90. Salyers informed that he receives bonuses based on his job performance, which are based on production and safety statistics. Tr. 90-91. However, when asked, Salyers outright denied receiving any information or statistics from Warrior Met about the amount of production done on his shift. Vol. 1, Tr. 90.

Testimony of Complainant Juan Smitherman

The Court notes that Complainant's original MSHA Complaint erroneously reported that the events in question occurred on the March 7-8, 2021 owl shift, when in fact they occurred on the March 1-2, 2021 shift. Both parties agree March 1-2, 2021 is the correct date, and the matter is not disputed. Vol. 1, Tr. 189-90, 201.

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asked him if he looked in every long block along our travelway and he replied yes. I told him then, that now that our block had arrived and been unloaded from the flat car make it priority to get it to the sec. + stock out the night return stopping, he said okay. Later in the shift around 6:00 a.m. I walked towards the supply hole at break 6 and found Juan slumped down in the operating deck of the Lo Trac with his hat off his head + his light turned off. I asked Juan what he was doing and he said he was taking a break. I told him he had a lunch break and that I couldn't see that he had moved anything up. He said he hauled block to the sec. across from the charger. He said he had to unload the flat car today, I told him he shouldn't have even taken an hour. Then he said he was having trouble passing a place by the track. I told him the other Lo Trac men have no trouble. I asked him why he didn't seem to care if we got any work done on this section, he replied that he did not want to work on 4 sec. and I told him I couldn't help him because that is not my decision. I then told Juan I was writing him up when I got outside and that I did not want to catch him again. He replied do what you got to do and I walked back to the sec.*at 600 a.m. 3 loads had been moved up, 1 bulk bag of dust 2 pallets of block (neither pallet at right return) *The Lo Trac was not running when I found Juan and a pallet of block was on the forks. 3 – 2-21 -Zachary Salyers" Ex. P 38, Ex. R 5.

The Secretary then called the Complainant, Juan Smitherman.[7] The Complainant has over 19 years of experience as a miner. Vol. 1, Tr. 8. At the time of his termination, Smitherman was the senior roof bolter at the Number 4 Mine in Brookwood, Alabama, working on the Number 4 section under the direct supervision of Zachary Salyers. Vol. 1, Tr. 16, 57. Smitherman and Salyers work the owl shift at the mine, which begins at 10:30 p.m. and ends when the next shift arrives, at about 7:30 a.m. Vol. 1, Tr 153. Smitherman had worked as a roof bolter for several years before his employment with Warrior Met Coal, working for Jim Walters mining before it was bought out by Respondent. Vol. 1, Tr. 113.

Warrior Met Number 4 mine is a very gassy mine, meaning it emits large quantities of methane and there are ignitions at the mine. Vol. 1, Tr. 118. The gassy nature of the mine is not in dispute, as Salyers, too, concurred with that description and, as noted *infra*, Section 103(i) of the Mine Act requires the Secretary to provide one spot inspection every five days for mines that liberate "excessive quantities" of methane, which is more than one million cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i). Vol. 1, Tr. 36-37. Smitherman knows of such ignitions at the mine and experienced two of them himself. Vol. 1, Tr. 118-119. Relating one such incident, he noted an event when a spark from roof bolting set the "whole ceiling . . . on fire in a matter of a split second." Vol. 1, Tr. 119. Fire extinguishers were required to put the fire out. Vol. 1, Tr. 120.

Mr. Smitherman acknowledged that he was suspended for sleeping on the job some three years earlier, on February 2, 2018. He spoke of the incident, noting that at that time, it was during the last hour of the shift, around 6 a.m., when he and his partner "were finishing up for the day, and we put our tools up and sat at the little break table and waited until the shift was over with. And we were just talking, and it got quiet, and we both dozed off." Vol. 1, Tr. 122, 128.

[7] Complainant's MSHA Discrimination claim, admitted as Ex. P 2, is dated March 31, 2021 and sets forth under the "Summary of Discriminatory Action," section, the following: "On 3-7-21 I was working on four section. I walked across from 3 entry to 2 entry. I noticed that the roof bolter was in #2 entry in front of the slant that had just been cut, it was the second cut in. Their was no slider or line curtain up in the slant. They were in the process of putting the drop board across #2 entry. At this point no air was being forced into the slant. I assisted in putting up the drop board. I went to lunch when I got back to the bolter it was in the slant. Their was no ventilation because the fly pads had not ben hung on the drop board. I told the bolters that I would not bolt the slant until the fly pads were hung and that the shouldn't either. At this point the slant had been unventilated for at least 40 minutes. The other roof bolters found Zack and told him what I said about 30 min later the fly pads were hung. On 3-8-21 I got to work about 15 min early and told Zack that I didn't want to be a part of 4 section any more because of the incident the day before. He said that he would work on it. When we got to the section he told me that I wouldn't be working on the roof bolter and that I would be working out by. At the end of the shift he asked me how many pallets I have moved and I told him. He started harassing me saying what a sorry job I had done and threatened me with a write up. On the way out of the mine he told me to go to the manager's office. They gave me 5 days off with the intent to fire me. I told them that had happened and that this was retaliation and they said that they would investigate. After the 5 days they said that they were going ahead with termination. I am seeking back pay and reinstatement."

Smitherman and the fellow miner were suspended for 30 days. Ex. P 14, Vol. 1, Tr 124. The record of disciplinary action was admitted as Exhibit P 14. Vol. 1, Tr. 126. Smitherman stated that he has never slept on the job since that event. Vol. 1, Tr. 127.

Salyers became Smitherman's supervisor around January 2021; and the Complainant had already been working on the section prior to Salyers' arrival. Vol. 1, Tr. 129. Smitherman described having "several disagreements" with Salyers "as far as how safety goes in the section." *Id.* The Court finds this accounting by the Complainant was credible and as such it is informative about the atmosphere between the two men prior to the incident in issue. Smitherman characterized the issues between him and Salyers as "generally, [Salyers] didn't make sure that the ventilation was correct when people were doing different jobs on the section, and he didn't put out the adequate amount of rock dust in the returns to keep the – in case of an explosion to keep the – the—the intensity of an explosion down." Vol. 1, Tr. 129-130.

Smitherman recalled his disagreement with Salyers about using dust bags on the roof bolter differently.[8] Vol. 1, Tr. 130. His recollection was telling Salyers "the roof bolter didn't have any dust bags and that there wasn't any on the section, and I told him that I wasn't going to run it without the dust bags because, you know, it's against company policy." Vol. 1, Tr. 131. Smitherman's basis for the company policy claim was that he was aware of Warrior Met receiving a citation from MSHA about dust on the section and dust behind the roof bolter filters. *Id.* Smitherman recounted that to rectify the violation, "they had us sign a form saying that we're going to change that filter at the beginning of each shift and we're not to run the roof bolter without the filter." *Id.* The dust bags prevent dust from getting behind the filter and contain the dust in the dust box, to prevent it from becoming airborne when the box is emptied.[9] *Id.* Salyers disagreed, believing Smitherman could run the bolter without the dust bags. Smitherman took issue with Salyers' view, stating "[a]nd I told him, No, you're wrong. I said, I'm not supposed to run that without a dust bag." Vol. 1, Tr. 133. Salyers then left to consult his supervisor. When he returned, according to Smitherman, "[Salyers] didn't say anything else to me, but he got the other two roof bolters and talked to them and see if they were willing to run it without the dust bag, and they did run it without the dust bag." *Id.* Smitherman asserted that he customarily used dust bags before Salyers became his supervisor. Vol. 1, Tr. 136. After the end of his shift, Smitherman went to the safety department and talked with the union safety representative and the company safety foreman, "and they told me that – that I was right and I shouldn't operate it without the dust bag. They asked me who told – who told me to run it, and I told them I wasn't trying to get anybody in trouble. And then they said, the man I told him – and I told him [Salyers] told [me] to do it. And he said that he'd have a talk with [Salyers]" Vol. 1, Tr. 136-137.

[8] Smitherman initially gave the date as February 5; upon cross-examination, he freely conceded he was not certain of the exact date and that it may have been February 2. Vol. 1, Tr. 130, 247.

[9] Explaining the significance of dust bags on a roof bolter, Smitherman explained "It's a – it's a – like a vacuum cleaner bag. If you ever changed a vacuum cleaner bag, that's pretty much what it looks like." Tr. 132. The dust bag sits in the dust box on the roof bolter. Tr. 133. Without the bag, the dust goes into the box and one would later need to shovel that dust out of the box. Tr. 134. That process, shoveling it out, creates a lot of dust. *Id.* Smitherman cared about this because use of the bag keeps respirable dust down in the mine. *Id*. He also asserted that the roof bolter he was using normally had dust bags. *Id*.

Complainant Smitherman recounted some other safety issues that he raised to Salyers before February 28, 2021. Vol. 1, Tr. 137. In one incident, the Complainant found a miner working, cutting at the face, with no slider curtain. He brought the issue to Salyers' attention and, by his account, Salyers became upset with him, asking "why [Smitherman] got a problem with everything." Vol. 1, Tr. 139. Smitherman continued, "we just exchanged words, and it got loud. And then it calmed down after a little while." *Id.* The Complainant also testified to a second safety issue instance, when he found a slider curtain down on the ground when it was supposed to be hung up; he also brought the issue to Salyers. Vol. 1, Tr. 140-141.

A third safety disagreement was recounted by the Complainant. It involved Smitherman's assertion that insufficient rock dust was being laid down in the returns. Smitherman explained that five bags of rock dust are supposed to be applied to reduce both the risk of an explosion occurring and the extent of any explosion that may occur. Vol. 1, Tr. 141. Salyers, Smitherman recounted, was "supposed to put five bags down – bags of it down to make sure there's enough coal-to-dust ratio. And sometimes [Salyers] would put one bag out, or sometimes he wouldn't put any bags down, and he'd take – he'd get the service team to bring . . . the scoop back there and hand dust it with a bantam duster. I mean, he would just – regularly didn't do what he was supposed to do." Vol. 1, Tr. 142. When Smitherman raised the issue with him, Salyers responded "there was enough dust back there." Vol. 1, Tr. 143. Smitherman related these instances to others in the section, but did not convey those concerns beyond those miners. *Id.*

Regarding the February 28, 2021 fly pad incident, Smitherman recalled on that day, while on his way to lunch, noticing a face where, following a cut, "there was no drop board up, there were no fly pads on the drop board, there was no curtain line established, and there was no slider. And this was the second cut into the slant."[10] Vol. 1, Tr 145.

Smitherman informed:

> [T]his was the second cut, so they were about 40 feet in. And so they're supposed to establish that curtain line from . . . the drop board all the way to within 10 foot of that face when they start to cut. And none of that was done; none of it.
>
> And then you're supposed to hang up – as the miner advances, he – into the coal cuts it deeper and deeper, he's supposed to have a slide up there that extends out with him so he can constantly stay within 10 foot of that face when he slides the

[10] Explaining the role of fly pads and the drop board, Smitherman testified that "The drop board is the – it's a long piece of wood about 20 – a little less than 20 feet long, and it – it's mounted to the ceiling – the roof bolter mounts it to the ceiling, and that's to hold the fly pads. If you ever walked in – seen like an industrial freezer and they have those plastic pads that they go in – that the forklift goes in and out of, that's what – that's what – what a fly pad does. But it still – it allows people to go through it, but it still directs air. Okay? That's what the fly pads are. And then the curtain line is supposed to start at the end of that fly pad, and it extends out until you cut. And then like I said, this was the second cut in. So the first cut, normally, you don't put one because you can go in 10 feet without putting one up." Vol. 1, Tr. 145-146.

curtain out. That wasn't out. It was on the foot – it was on the ground."

> And I saw that . . . they were backing the roof bolter out of number 1, which was the next entry, and they were backing it out to put this – the drop board up, which should've been done before they even made the cut. They made the cut out of turn. Normally, you do all that before you make that second cut. All that should've already been established.
>
> But [Salyers] wanted to go ahead and get to cutting so – to run his numbers up, so they went ahead and cut without following the procedures that we normally do.

Vol. 1, Tr. 146-147.

Thinking that the deficiencies would be corrected, Smitherman went to lunch, but upon his return he discovered that the fly pads had not been installed. Vol. 1, Tr. 148. With the roof bolters about to start their job, Smitherman intervened, pointing out that there was no air coming through the slant. *Id*. He then informed that he would not be bolting and advised the other bolters that they should not bolt, either. In a gassy mine without the air moving as it should, Smitherman worried that bolting under such conditions "could blow this mine up, you know." Vol. 1, Tr. 149. His fellow bolters advised they would seek out Salyers as to what to do. *Id.* Smitherman continued that the other bolters found Salyers "[a]nd they said they told him what I said and that I was going to tell on them if they run that roof bolter . . . in that cut or whatever." Vol. 1, Tr. 150. He reiterated this recounting from the bolters to him, stating "[t]hey said that they told [Salyers]what I said and that I wasn't going – I wasn't going to bolt it and that . . . they did not bolt it either. They . . . said that they told him that I might – that they was scared I was going to tell on them." Vol. 1, Tr. 151. According to Smitherman, after the corrections were completed, he resumed his roof bolting duties. Vol. 1, Tr. 152.

The Court notes that throughout his testimony, Smitherman was able to recall and describe the instances of his safety concerns in detail and with particularity, a consideration leading the Court to find his recollection credible. For his part, Salyers did not challenge Smitherman's claims of several safety disputes in early 2021 beyond merely denying them and reiterating generally his commitment to safety. Vol. 2, Tr. 127-128. Salyers did recall a conversation with Smitherman about dust bags on February 2, 2021, but denied that he became upset with Smitherman in the course of that conversation. Vol. 2, Tr. 129-132. Aside from the dust bag issue, Salyers denied Smitherman ever complaining to him about any practices or condition underground. Vol. 2, Tr. 132. Salyers maintained that Banks and Volts were the ones to inform him of the fly pad issue. Vol. 2, Tr. 137-138.

Based upon its assessment of the Complainant's testimony, the Court finds that Smitherman had real and substantial disagreements on safety issues with his supervisor, Salyers, and that these disagreements likely damaged the relationship between the two men and gave Smitherman a reputation as a nuisance in the eyes of his supervisor. Accordingly, the Court finds Smitherman's safety concerns credible and reasonable, and particularly so given the gassy nature of the Number 4 mine. Apart from this determination, it should not be overlooked that a finding of discrimination does not rest on a miner's safety concerns being correct. *Marshall Cty.*

Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n, 923 F.3d 192, 204 (D.C. Cir. 2019). Thus, Smitherman's concerns did not have to be accurate to be protected activity.

At the beginning of the next owl shift, around 10:30 p.m. on March 1, 2021, Smitherman told Salyers that he did not want to continue working on his section.[11] Vol. 1, Tr. 153. He informed that he couldn't work that section anymore "with them doing what they did the day before." Tr. 154. Smitherman expressed that his desire to move was because he believed Salyers' section was dangerous "because of what was going on up there." Vol. 1, Tr. 156. Thus, he made it clear that his desire to move was because of his safety concerns with Salyers' section. Vol. 1, Tr. 157. Smitherman recalled that he had also spoken with the shift foreman, James Earnest, about his desire to move to another section on the other side of the mine a few days earlier, but Earnest informed him he had to wait until another miner moved from a section. Vol. 1, Tr. 155.

The Court notes that Salyers in his earlier testimony, *supra*, claimed not to know why Smitherman wanted to be transferred from his section. Given the events of the previous shift and the history between the two men, the Court finds that Salyers knew exactly what Smitherman was referring to when he expressed a desire to move "because of what was going on up there."

In the wake of that exchange, Smitherman was then directed to run the Lo-Trac, a task that involved bringing up supplies. Smitherman was the senior roof bolter on the section that day, and an assignment of that nature, bringing up supplies, would usually go to the least senior person. Vol. 1, Tr. 158-159. Smitherman had brought up supplies before, but he had not done it in years and never in his time working on the Number 4 section. Vol. 1, Tr. 160. Smitherman interpreted the work assignment from Salyers as intended to keep him off the faces and thereby prevent Smitherman from slowing coal production on the section. Vol. 1, Tr. 161-162.

Salyers told Smitherman to bring up some water line, advising him where he believed it was located. Vol. 1, Tr. 162-163. However, Smitherman went to that location and did not see the water line. Vol. 1, Tr. 163. Next, according to the Complainant, supply cars arrived and it took him all the way to lunchtime to unload those three full cars of supplies. *Id*. On his way to lunch, Smitherman saw Salyers, who asked him how many supplies he had brought up. *Id*. The Complainant informed his foreman that he "took two pallets" of supplies because he had to unload the supply car. Salyers responded to Smitherman, "Oh, okay" and then instructed Smitherman to bring up block and the dust as well. *Id.*

Smitherman encountered obstacles in fulfilling his assigned tasks. In the course of repairing the mine track, that crew installed ties, akin to railroad ties, some 6 to 8 feet in length, under the track, making the passage too narrow for the Complainant to pass through on the Lo-Trac. Smitherman testified that he had to remove all the ties out by himself and then let the track back down in order to pass. Vol. 1, Tr. 165. As he passed, a pallet on the Lo-Trac tipped over, requiring him to restack the blocks and he had to fill in a hole where the ties had been placed.

[11] As noted, the Complaint and other records in this case erroneously listed the dates of the shift at issue as March 7 and 8, rather than March 1 and 2, 2021. Both parties agree that the latter dates reflect the correct days. Vol. 1, Tr. 189-90, 199-201.

Smitherman stated that he got out a few more pallets but the maintenance foreman then asked him to bring up the rock duster from the millie track.[12] Vol. 1, Tr. 165-166. Smitherman then resumed bringing up pallets. Vol. 1, Tr. 166. In summary, the Court finds that Smitherman provided a detailed account of obstacles hindering the tasks he was initially assigned to accomplish and of the additional tasks he was assigned while trying to complete the tasks Salyers assigned him.

At that point, according to Smitherman's account of the events that day, he felt he needed a break from his exertions, so he drove the Lo-Trac into a supply hole and turned the machine off. Vol. 1, Tr. 168. Because there is little air circulation in the supply hole, it was necessary for him to turn off the machine so that diesel fumes and heat from the running machine would not accumulate. *Id.* It was at this point, during his break, that Salyers came to Smitherman's rest location. Smitherman recounted telling Salyers that he was taking a break, and the supervisor responding that Smitherman had not finished the work he assigned him.[13] *Id.* Smitherman informed Salyers he was not finished yet. *Id*. According to Smitherman, Salyers then yelled at him, stating that he "ought to write him [Smitherman] up." *Id.* Smitherman disputed Salyers' claim in his testimony that he had only brought up two pallets in eight hours, asserting that he had done several tasks and that Salyers saw him several times before lunch and knew Smitherman had been working. The Complainant also contended that Salyers knew that the pipes he assigned him to get were not in the three locations he directed him to go. Vol. 1, Tr. 168-173. Smitherman also asserted that, by the end of the shift, he had brought up the remaining pallets that Salyers wanted. Vol. 1, Tr. 175. Smitherman felt that Salyers was trying to provoke him. Vol. 1, Tr. 169. Having considered the entirety of the testimony of Salyers and Smitherman, the Court finds the Complainant's characterization credible.

Smitherman gave additional details, beyond those recounted here, in his testimony as to his work activities during the shift and the obstacles he encountered in trying to complete his work assignments. The Court, having heard Smitherman's additional recounting, finds Smitherman's further testimony involving his activities on that day to be detailed and credible. *See*, generally Tr. 168-179.

The Complainant also contested Salyers' claim regarding the circumstances when he came upon him in the supply hole, asserting instead that when he was taking a break in the supply hole, his headlamp and light *were not off*. Vol. 1, Tr. 179. Smitherman further denied that he was asleep. Vol. 1, Tr. 180. Asked why his claim to not being asleep should be believed, he stated that after his previous discipline and suspension for sleeping at work, he learned from his mistake and did not want to have that happen again. Vol. 1, Tr. 181. Smitherman stated that when Salyers

[12] This was a task requiring some exertion on Smitherman's part. His testimony was uncontradicted that the rock duster is used to pull dust. It is about 4 feet long and 2 feet wide, and all metal. It has a big hopper on top of it, and a hydraulic pump. He described it as "real heavy, weigh[ing] about 150 pounds." Vol 1, Tr. 166.

[13] Later, on redirect by the Secretary, Smitherman affirmed he had moved up all the block and the rock dust by the end of the shift. Vol. 1, Tr. 299-300.

approached him, the supervisor made no claim that he was sleeping. *Id.* After Salyers' remark that he was going to write him up and Smitherman responding "to do what he had to do," Salyers then asked him if he had found the pipe. Vol. 1, Tr. 181-182. Smitherman told Salyers he had not, and Salyers instructed him where to look for the pipe. Vol. 1, Tr. 182. However, Smitherman did not find the pipe at the location Salyers gave him. *Id.* Smitherman also attested that by the end of his shift he had moved all of the supplies, save the pipes, to where they were to be delivered. *Id.*

At the end of his shift, Salyers told Smitherman to go to the office of Jason Lee, the general mine foreman; Smitherman did so, but was redirected to the office of Sherry Sterling, the mine's Human Resources Manager. Vol. 1, Tr. 183. At the meeting in Sterling's office, Lee was present, along with Roscoe Boyd, a representative from the union. Vol. 1, Tr. 184. Smitherman recounted Boyd asking him, before Sterling and Lee walked into the room, why Smitherman was there; Smitherman told him he did not know. Upon entering the room, Sterling and Lee asked him if he knew why he had been called into the office; Smitherman told them he did not know the reason. *Id.* Smitherman was then asked to tell them what happened on the section. Upon hearing his recounting of the prior safety-related events, Sterling and Lee asked him why he had not raised those safety concerns earlier. Smitherman testified that his response to them was that Warrior Met put production over safety, but he added that Lee did not agree with that claim. Vol. 1, Tr. 184-185. Smitherman was then informed that he was going to get "five days off with intent" (i.e., suspended) while the matter was investigated. Vol. 1, Tr. 185.

Subsequent to his meeting with Sterling and Lee, Smitherman called Sterling and left a voice message, advising her that "they need to go to the return on this section and do a dust sample. I told them that they're going to find out that [Salyers was] not putting out rock dust in the returns, and I told her to . . . check on that. And I never got a response back from her." Vol. 1, Tr. 186. Smitherman never received any other information from Sterling about the investigation, never learned who investigated the matter, and was never asked to give a written statement. Vol. 1, Tr. 187. To the Court, these uncontested failings evince a lack of objectivity on the part of Warrior Met in their investigation of this matter, of which more will be said later.

Smitherman also recalled providing the names of individuals who saw him on the shift at issue, Chris Walls and Wesley Koots. He believed those two men saw him shortly before his encounter with Salyers in the supply hole. Vol. 1, Tr. 188-90.

After his five-day suspension, Smitherman met with management – Sterling and Chris Thielen were there, and possibly also Lee, along with "four or five other union officials." Vol. 1, Tr. 191. At the meeting Smitherman was informed that the investigation had been completed and he would be terminated. Vol. 1, Tr. 191-192. Smitherman recalled that Thielen stated that he did not know which side to believe on the sleeping allegations, instead asserting that Smitherman would be terminated because he turned "the Lo-Trac off and stopped working, and [Thielen] said [Smitherman is] not allowed to stop working without an – that's an unauthorized break, and that's what he was firing me over." Vol. 1, Tr. 192. Smitherman testified that he had never heard of an "unauthorized break." *Id.* In contrast, Smitherman recalled it being normal for miners to occasionally take breaks for water or just to collect themselves, and that he had never requested prior permission before taking a break. Vol. 1, Tr. 193. Thielen did not explain why Smitherman's break was unauthorized. Instead, he moved from that conclusion to relying upon Smitherman's

2018 signed agreement wherein the Complainant agreed that any future infraction would result in termination. Vol. 1, Tr. 194.

The complainant also stated that, during the meeting announcing his termination, both he and the union representatives asserted that they believed Salyers' claim was in retaliation for Smitherman's ventilation complaint, but that neither Thielen, nor Sterling, responded to that claim. Vol. 1, Tr. 195. Smitherman never receive a written copy of the investigation report and was never informed with whom management spoke in the investigation. *Id*.

The Secretary introduced "Employee work location, Mine 4. Clock number, 1307," entitled "Warrior Met Coal Record of Disciplinary Action," admitted into evidence as Exhibit P4. Vol. 1, Tr. 204. That exhibit provides under the topic of Reason for Disciplinary Action "Violation of work rule No. 1." Tr. 199. Smitherman characterized the exhibit as the "premise they used to fire me on for breaking work rule 1: wasting time, loafing, and loitering." Vol. 1, Tr. 204-205.

Upon cross-examination, Respondent's counsel turned to that Warrior Met work rule 1, which prohibits "insubordination." Vol. 1, Tr 231. That rule gives examples, including "wasting time, loafing, loitering on the job, neglect of job duties and responsibilities." Vol. 1, Tr. 232. The Court, while surprised that the Respondent's use of the term "insubordination" applies to behavior such as wasting time, and neglecting job duties, takes the mine's construction of the word on its own terms. However, such an application does not excuse the Respondent from establishing that such behavior occurred. On the basis of the record as a whole, which includes credibility determinations, the Court does *not* find that the Complainant was insubordinate.

Regarding the dust bag dispute with Salyers, Respondent's counsel challenged Smitherman's reference to the MSHA citation he referred to earlier in his testimony, contending that the citation actually regarded an air filter; and in that context Smitherman agreed that the citation did involve an air filter and that an air filter is different from a dust bag.[14] Vol. 1, Tr. 233-234. The Court notes again that, in order to be protected activity, a miner need only have a good-faith belief in the safety concern; whether Smitherman was correct about dust bag use is not determinative. Additionally, while distinct, an air filter and a dust bag both involve dust issues for the same piece of equipment, making the distinction more of nuance.

Respondent's counsel also noted that the text of Smitherman's discrimination complaint makes no mention of the three or four other safety issues he described in his testimony, other than the dust bag issue and the fly pad ventilation issue. Vol. 1, Tr. 237, 239. Smitherman agreed and he also agreed that he did not raise those three or four other safety concerns to anyone at the mine beyond Salyers. Vol. 1, Tr. 234-235. Smitherman explained his reasoning for not bringing the issues to others: "As long as – I've been underground for 19 years, and we normally handle underground underground. We don't normally take stuff outside, because you have to have the trust of the guys around you in case you're in a fire or any – get a rock on you, or – you got to depend on that next man to get you out. The people outside can't get you out." Vol. 1, Tr. 236.

[14] Respondent's Counsel only alluded to the citation. It was not offered in evidence.

Respondent's counsel then asked Smitherman "[t]hese three or four other safety issues that you mentioned, those aren't an issue in this proceeding, are they?" to which Smitherman disagreed, responding "Yeah, they are issues because they – they happened." Vol. 1, Tr. 237.

The Court notes that the Complaint does not address those other safety issues, but the Complaint need not be a compendium of all the safety related concerns associated with it; rather it represents the core charges. There is no bar to a complainant amplifying the background and context for those core allegations, as Smitherman did in his testimony on direct. Thus, the complaint represents the basic claims and does not foreclose admission of additional relevant information in support of it. Further, the Court notes that its decision in this matter does not rest heavily on Smitherman's alleged prior safety complaints, and that it stated as much during the hearing itself. Vol. 1, Tr. 245-246.

Returning to the dust bag dispute of February 2, 2021, Smitherman agreed with Respondent's counsel that not all roof bolting machines are required to have dust bags; asserting that primarily the newer ones are so equipped. Vol. 1, Tr. 247-248. He also agreed that after raising the dust bag issue, more dust bags were provided on the next shift and he was never disciplined for bringing up the issue. Vol. 1, Tr. 252. The Complainant also agreed that Derrick Wade, another roof bolter working with Smitherman that day, also had an issue with the lack of dust bags, and was not disciplined for complaining about the dust bag issue either. Vol. 1, Tr. 253.

However, the Court would note that, cumulatively, Smitherman's repeated safety-related complaints, placed in the context of the events that led to his suspension and subsequent termination, cannot be ignored. Considering the testimony surrounding those events, and the Court's evaluation of the witnesses' credibility in their recounting of those events, it is hard to dismiss those prior instances as merely disconnected events which played no role in Smitherman's firing.

Turning to the ventilation issue on the owl shift which began on February 28, 2021, and continued through the next morning, March 1, Smitherman agreed that bolters Banks and Volts were bolting without proper ventilation on those dates, and that Smitherman told them they should not be bolting under those conditions and that they should approach Salyers in order to have the proper ventilation installed. Vol. 1, Tr. 254-255. Smitherman agreed that he had no evidence that Salyers knew that the bolters were bolting without proper ventilation and he acknowledged that the ventilation issue was corrected during the shift when the issue was raised. Vol. 1, Tr. 255, 258.

Respondent's counsel, revisiting the March 1-2 owl shift, at which time the events leading to the Complainant's suspension, and later his termination, occurred, Smitherman agreed that before the beginning of the shift, he told Salyers that he wanted to be transferred to the other side of the mine. Smitherman again stated that he told Salyers he wanted to be transferred because of the events of the prior night. Vol. 1, Tr. 261-262, 298. Though Salyers himself testified that he did not know why Smitherman wanted to be transferred, when Respondent's counsel attempted to suggest Salyers may not have known because Smitherman did not specify why he wanted the transfer, Smitherman flatly rejected the claimed ignorance, responding, "Yes,

[Salyers] knew. There wasn't any other incident happened the night before . . ." Vol. 1, Tr. 262.

Given the proximity in time to the ventilation issue, the Court finds that Salyers' claim defies common sense, especially when viewed in the context of the history of conflicts between the two. Clearly, Salyers would have known why Smitherman wanted the transfer and the Court commented to that effect during the hearing. Vol. 1, Tr. 265-266.

Regarding whether he was earnestly performing the work assigned that day, Smitherman stated that after lunch he did not see Salyers again until the incident, referring to their confrontation in the supply hole. Smitherman added that Salyers "didn't give me time to tell him what went on. He just started yelling and – and talking about other stuff." Vol. 1, Tr. 270. Smitherman informed that the need to unload the car supply and the belt crew activity prevented him from bringing supplies up. Vol. 1, Tr. 271. He did admit to taking a break around 6 a.m. that day, and that he did not seek Salyers' permission to do that, nor did he tell him that he needed a break. Vol. 1, Tr. 273. Subsequently, on redirect, Counsel for the Secretary asked if it would have been reasonable for him to ask Salyers for a break, to which the Complainant explained that it would have taken him a long time just to find Salyers, and that it was not common practice to seek out the supervisor for permission to take a break. Vol. 1, Tr. 301. At least in this context the Court agrees that seeking such prior approval would have been impracticable, especially given that it was very near the end of the shift.

Despite much questioning over exactly what Smitherman did during the shift when he was assigned to the Lo-Trac, Smitherman responded, convincingly in the Court's estimation, to those questions. In one such exchange, Smitherman responded that Salyers "knew he told me to go load the roof bolter, and he knew that I had unloaded the supply car, and he knew that I had went to look for pipe. So he knew I had five and a half hours to do all of those things." Vol. 1, Tr. 281. When asked if he had moved the pipe by 6 a.m., Smitherman responded, consistently with his prior testimony during the hearing, that he had not accomplished that, "because [he] had never found the pipe [Salyers] asked for." *Id.* As another example, when Respondent's counsel asked the Complainant if Salyers expressed surprise that he had only moved two pallets in eight hours, Smitherman answered that Salyers' claim "was nonsense because he told me to do all of those other things." Vol. 1, Tr. 282.

Respondent's counsel then referred to Smitherman's Record of Disciplinary Action,[15] which, at least by the Respondent's account, played an important role in his termination. Vol. 1, Tr. 288, Ex. P 4. Within that exhibit, Respondent's counsel drew attention to the alleged violation of Work Rule 1, which he summarized as "prohibit[ing] wasting time and loafing" and "unacceptable work performance." Complainant agreed with this characterization. Vol. 1, Tr. 288-289. Additionally noted by Respondent's counsel, the Complainant's disciplinary record

[15] The exhibit, P 4, has some oddities to it. A single page, it is dated effective 3 -8-2020 but signed 3-8-2021. Under the reason for the disciplinary action, it recites aspects of Work Rule 1, and then it adds "violation of work rule #5 with no elaboration. One might have expected more detail for such a "record" of disciplinary action and that it would have had consistent dates. To the Court, its summary nature reflects that it was merely assertions on a piece of paper which were singularly unilluminating.

also cites Smitherman as having violated Work Rule 5, which Respondent's counsel characterized as "prohibit[ing] sleeping on the premises." Complainant agreed with this characterization too, though those words are nowhere in the exhibit. Vol. 1, Tr. 289, Ex. P 4.

The fundamental problem with citing to those work rules – sleeping and loafing – is that *before* applying them the Court must find that those prohibited behaviors occurred in the matters at hand. The Court does not find that the credible evidence supports a finding that any of those prohibited behaviors occurred in this instance.

Although Smitherman agreed that Salyers did not make the decision to terminate him, he made the salient observation that "[Salyers] recommended it." Vol. 1, Tr. 289. And while Counsel for the Respondent then asserted that "[s]o someone else made an independent judgment to terminate [Complainant's] employment," Smitherman agreed that the actual decision to terminate was made by Chris Thielen, but he added, significantly in the Court's view, that it was "[b]ased off of what [Salyers] said." Vol. 1, Tr. 289-290. The Court, in consideration of the entirety of the record, finds that the Complainant's point is well-taken and the fact.

Testimony of Thomas O'Donnell, MSHA Special Investigator and MSHA Conference Litigation Representative

The Secretary called Thomas O'Donnell, MSHA employee since 2005 and conference litigation representative since 2012, to the stand. Tr 311,315. O'Donnell investigated Smitherman's discrimination complaint. Tr. 325. He confirmed that the Number 4 Mine is a gassy mine, and that the mine has been on a five-day spot inspection at least since he was hired with MSHA. Tr 322-323. It is a matter of great significance for a mine to be designated for such inspection frequency. The Mine Act speaks to this, providing, pursuant to Mine Act section 103(i), that there is to be a spot inspection every five days for mines liberating for excessive quantities of methane of more than one million cubic feet of methane or other explosive gases during a 24-hour period.

In conducting his investigation, O'Donnell interviewed Smitherman, Salyers, Volts, Banks, Koots, Walls, and Sterling; he attempted to interview Earnest but ran out of time. Vol. 1, Tr. 330. However, of the interviewees, only Smitherman was able to review O'Donnell's memorandum of the interview, comment upon it, and vouch for its accuracy. Vol. 2, Tr. 12. As such, with the other interviewees not afforded the opportunity to review the memorandum O'Donnell created of their respective interviews, it would be fundamentally unfair for the Court to consider those unreviewed interviews.

Accordingly, in making its determinations in this matter, the Court has not considered any of the testimony presented by special investigator O'Donnell as it pertains to his remarks regarding the information he ostensibly obtained in his interviews of Volts, Banks, Walls, Sterling, or Koots, nor has it considered the statements themselves. This determination does not infer that the statements obtained by Investigator O'Donnell, were manipulated or otherwise inaccurate recountings of his interviews. Rather, the determination is simply that it would be inconsistent with fundamental fairness to consider them, given the lack of an opportunity for those individuals

to have reviewed them. Instead, in making its decision in this matter, the Court relies upon the firsthand testimony of the principal actors: Smitherman, Salyers, Sterling, and Thielen.

Subsequent Testimony of Zachary Salyers

Respondent's counsel recalled Mr. Salyers for direct examination. Initially, it will be remembered, Salyers was called by the Secretary and denominated as an adverse witness. Salyers revisited his dispute with Smitherman about the necessity of using dust bags on the roof bolter. Vol. 2, Tr. 130. The Court finds that whether Salyers or Smitherman was correct in their view about dust bags is not important, but rather that the encounter goes toward establishing that Smitherman and Salyers had a history of clashing about safety issues. It was from this history of conflict, and the testimony of the two, that the Court concluded that Salyers viewed Smitherman as a thorn, giving rise to animus towards him.

On the February 28-March 1 owl shift, Salyers admitted that Banks and Volts were in the dinner hole after Salyers "came back from the return," and that at that time Banks and Volts informed him that they needed to get the fly pads up in the slant. Vol. 2, Tr. 137-138.

Asked about the following shift, March 1-2, Salyers recounted that Smitherman told him he did not want to work for him and wanted to be transferred. Vol. 2, Tr. 140-141. Salyers claimed Smitherman said nothing about safety, fly pads, ventilation, or dust bags during that exchange and that he did not get upset with Smitherman then either. Vol. 2, Tr. 141. Instead, Salyers told Smitherman he would speak with the shift foreman, Earnest, about the matter. When asked if he had "any notion at all why Juan [Smitherman] wanted to be moved?" he answered "No." Vol. 2, Tr. 142. Given the testimony from Smitherman and Salyers as a whole, the Court does not find Salyers' assertion to be credible.

In furtherance of the claim that the Complainant was loafing, Salyers characterized the work assignments he gave Smitherman as much less burdensome than Smitherman's recounting. Salyers added that the distance one would have to travel using the Lo-Trac to get supplies was only five crosscuts, or 1500 feet, and doing so would only involve a 15-minute roundtrip and that during a shift, a Lo-Trac operator will move about 9 to 11 loads. Vol. 2, Tr. 146-147. Salyers also characterized using the Lo-Trac as "definitely the easiest job on the – as far as section work goes." Vol. 2, Tr. 148.

If Salyers' version were accepted by the Court, it would be reasonable to conclude that the Complainant had a light workday. However, when asked for an accounting of the times he "interacted" with Smitherman, Salyers gave only the following: "Once at arrival, once at his dinner break, and once at 6:00 to 6:30, and then again as we were getting on the man trips [to leave for the surface]." Vol. 2, Tr. 154.

A similar conflict in their recounting of events was presented with Salyers' assertion that he found Smitherman asleep within an hour of the end of the shift. Salyers stated that, when coming upon him, he asked him "why he hadn't got anything accomplished that night." Vol. 2, Tr.158. Salyers' accounting was that Smitherman response to him was "I told you I didn't want

to work for you." Vol. 2, Tr. 158. Such irreconcilable versions required the Court to make another credibility determination. In that regard, it finds it highly unlikely that Smitherman would respond to his supervisor with an answer that would effectively be an admission that he had not done the work assigned that day. Smitherman was already aware that such a response would result in his termination because of his prior suspension. Accordingly, the Court finds the Complainant's version to be more credible as it is highly improbable that the Complainant would make such a harmful admission to Salyers of all people. Further, Salyers' remark that *during that same exchange* Smitherman told him he "was having trouble passing a spot on the track and that he had to put a crib under it," is incongruous with the supervisor's retelling of the event. Simply put, Salyers' remark that Smitherman told him he "was having trouble passing a spot on the track and that he had to put a crib under it," does not fit with his claim that the Complainant asserted he did not want to work for him. Vol. 2, Tr. 159.

Salyers stated that, following that event, which he dubbed a "conversation," he then phoned Pete Richardson, informing that he "had just found Juan [Smitherman] asleep in the Lo-Trac and asked if [Richardson] could stay outside to handle it." Vol. 2, Tr. 162. Richardson was otherwise occupied and advised Salyers that "Jason Lee would handle the matter." Vol. 2, Tr. 162-163.

When asked by Respondent's counsel "by the end of the shift, how much of what you had assigned [Smitherman] that night had he accomplished?" Salyers answered "Nothing." Vol. 2, Tr. 163. He then repeated the word, "Nothing." *Id.* The Court, surprised at Salyers' assertion, then asked "[b]y the end of the shift, [Smitherman] had accomplished nothing?" Salyers then qualified his response, stating "Nothing that I had asked him at the beginning of the shift to do, no." Vol. 2, Tr. 163-164. This was a distinctly different answer from his twice-repeated claim a moment earlier.

When the shift concluded and Salyers was on the surface, either Richardson or Lee flagged him and told him that they needed to meet in Sterling's office. Vol. 2, Tr. 165. At that meeting, they asked Salyers what had happened, and then he was directed to give a written statement about it. Vol. 2, Tr. 165. Salyers stated that he was not present for any interviews conducted by Sterling or Thielen.

Salyers agreed that his written statement and his oral statement combined were the basis for the decision to suspend Smitherman. Vol. 2, Tr. 171. Again, Salyers denied that Smitherman told him that he didn't want to work for him because of the previous night's events. Yet, Salyers again admitted that he did not ask the Complainant why he didn't want to work on his section anymore. Vol. 2, Tr. 172.

Testimony of Sherry Sterling, Human Resources Manager

Respondent then called Sherry Sterling, Human Resources Manager at Warrior Met Coal, Mine Number 4. Vol. 2, Tr. 176. Her duties include overseeing disciplinary investigations. She described the termination process as follows: "After the investigation is complete and the company decides that they want to move forward with a termination, we will suspend the employee with intent to discharge." Vol. 2, Tr. 179. Following that, the UMWA "would contact

us to let us know whether they want to have a 24- or 48-hour meeting, which is a meeting between the union, that employee that's being disciplined, and the mine manager, and myself. And from there, the mine manager makes the determination, whether he wants to retain that employee or whether he wants to uphold the discharge." Vol. 2, Tr. 179-180.

Sterling agreed that the investigation is "something that falls within [her] purview of responsibility," however she informed that Chris Thielen, the mine's manager, is the ultimate decisionmaker when it comes to discharge. Vol. 2, Tr. 180, 184. Sterling testified that she does not take written statements in all instances, nor does she "normally issue any kind of report to either the person who raised the concern or the person about whom the concern is raised." She agreed that conflicting accounts about events occur frequently. Vol. 2, Tr. 182. To resolve such conflicts, Sterling stated "we follow where the evidence takes us. And we have to decide who is the more credible witness. And that's – that's not easy, but . . . It is – it is part of my job." Vol. 2, Tr. 182-183.

Referencing Warrior Met's work rules 1 and 5, Ex. R18, Sterling confirmed that other employees have been fired for violating those rules. Vol. 2, Tr. 187.

On the morning of the incident at issue Thielen told Sterling that Salyers "was bringing someone from underground *for sleeping*," telling her to speak to Salyers and to the employee because Thielen had to go underground. Vol. 2, Tr. 188 (emphasis added).

Sterling first spoke with Complainant Smitherman, who told her he did not know why he had been brought out. Smitherman, Sterling testified, also told her that "he did not like working for Zach [Salyers], and he didn't like the way Zach operates, and he wanted to be removed from this section." *Id.* Asked if Smitherman told her that he had reported safety concerns to Salyers, she responded "No, not that day, he did not to me." *Id*. As to whether Smitherman said anything about ventilation issues or fly pads, Sterling responded in a like fashion, "No, not that I can recall. Not that day." Vol. 2, Tr. 188-189. At the meeting with her, Smitherman said that "he was not sleeping. He said that that was untrue." Vol. 2, Tr. 189. Sterling stated that, when asked, Smitherman did admit that he did not complete the work that night. Vol. 2, Tr. 189.

Beyond those statements, Sterling testified to not recalling anything else the Complainant said in that meeting, "not anything that stands out. I mean, we didn't speak for a long time." Vol. 2, Tr. 189. The Court finds this information-gathering process at odds with the professed goal of conducting a neutral investigation. Sterling did not believe a written statement from Smitherman was needed, because his version of events "was simple. He said, no, he wasn't sleeping; no, he didn't complete the assignments that Zach gave him." Vol. 2, Tr. 190. The Court notes with dismay that Sterling apparently felt no need for elaboration or further questions.

After the meeting with Smitherman, Sterling met with Salyers. Salyers, in Sterling's recollection, "told me that he walked up on Juan, and Juan was slumped over with his lights off, and he was asleep, and that he didn't complete the assignments that he had given him." Vol. 2, Tr. 189-190. Sterling recounted that Smitherman was then suspended, pending the investigation, allowing the mine "to investigate what happened." Vol. 2, Tr. 192.

Sterling agreed that sometime after their initial meeting, Smitherman telephoned her. Vol. 2, Tr. 192. It was during that conversation, Sterling recalled, that Smitherman told her that Salyers "had been letting people cut without curtains, and he [Smitherman] had an issue with that. And that he was being unsafe." *Id.* However, Sterling, the investigator, could not remember "if [the call] was that day or the next day. He called me and we had a conversation about that." Vol. 2, Tr. 192-193.

Sterling recalled that in their in-person meeting on March 2, Smitherman mentioned Chris Walls and Wesley Koots "came by." Vol. 2, Tr. 193. Sterling does not explicitly state what she understood that remark to mean but, in context and given that it came from Smitherman, it is apparent that he meant the two men "came by" and saw him working. For that reason, Sterling explained that "[w]e" spoke with those two men and with people on the crew, and particularly with Banks about the ventilation issue Smitherman raised with her. *Id*. Walls and Koots *both said they did not see Smitherman working or sleeping* that night – that they did not see him at all that night. *Id*. Walls also stated that he did not give Smitherman an assignment that night. *Id*. Thus, significantly in the Court's estimation, it is again noted that the only person Sterling identified in her investigation who claimed Smitherman was sleeping was Salyers. Vol. 2, Tr. 194.

Sterling acknowledged that Banks informed her that he had been cutting without a curtain and that Smitherman confronted him about the issue.[16] Banks reportedly told her that Salyers had no knowledge of it. Vol. 2, Tr. 196. Thielen also spoke to Banks about safety and had him written up, with the write-up entered into Banks' file. Vol. 2, Tr. 196-197. Thus, the upshot of curtain issue was that discipline was meted out, but only to the roof bolter, not to Salyers.

As part of her 'investigation,' a term the Court believes is a stretch to use in this matter, Sterling revealed that she "pulled [Smitherman's] file from my office to look through his previous disciplinary actions, to see if there was anything in there." Vol. 2, Tr. 197. This, it seems to the Court, was nothing more than a plain attempt to dig up dirt regarding the Complainant, and cannot be construed as any part of an objective investigation. That search bore fruit, as Sterling found Smitherman's 2018 citation for sleeping. *Id.* Sterling testified that this past infraction "was a big factor" in her analysis "because it said any further infractions of any kind – which means it could be big or small. Whatever it is could result in immediate discharge." Vol. 2, Tr. 198. Though Sterling stated that she spoke to other miners, aside from Volts, she could not recall their names – and none had anything negative to say about Salyers' safety practices. Vol. 2, Tr. 201-202. She claimed her inability to recall their names stemmed from the conversations occurring "so long ago." Vol. 2, Tr. 202. The Court does not share Ms. Sterling's view that it was "so long ago," and further, such a vague recounting strikes the Court

[16] At first, Sterling testified about Banks cutting coal, and then when reminded by Respondent's counsel corrected herself, that she "believe[d] he was a roof bolter," then adding "Yeah, bolting without a curtain." Tr. 196. When next asked if "Mr. Smitherman's report to [her was] that there was bolting without curtain or cutting without curtain," Sterling responded that she didn't "remember the verbiage. I assumed it would be bolting because that was what their job assignment was." *Id.*

as inconsistent with her evidence gathering role. Sterling claimed that she had no idea of a safety grievance, save the curtain issue Smitherman raised with her after his suspension, until the day before Smitherman's arbitration when the union contacted them. Vol. 2, Tr. 202-203.

When asked during cross-examination how she knew Salyers claimed Smitherman was sleeping, when she met with Smitherman before meeting with Salyers, Sterling responded that she knew this information from the mine manager, "because [he] told me to go over there because [Salyers] was bringing someone from underground that he had caught sleeping." Vol. 2, Tr. 204.

The Court finds a pattern in Sterling's testimony of not recalling important facts relating to the conduct of her investigation. The Court further observes Sterling's tendency to avoid probing further in the investigation for additional details. When asked about Smitherman telling her that he did not like working for Salyers, and whether she followed up by asking Smitherman why he had that view, Sterling responded only, "I think I did ask him why." She recounted that Smitherman "said he didn't like the way that [Salyers] operates." Vol. 2, Tr. 213. A natural follow-up, the Secretary's counsel then asked, "Did you ask him what he meant by that?" To which Sterling answered she could not "remember if [she] asked him that." *Id*. Surprised, counsel for the Secretary then asked, "You can't remember if you asked him what he meant by he didn't like the way [Salyers] [17] operated?" Sterling answered, "No, ma'am. I can't speculate because I just don't remember if I asked him that or not."[18] *Id.*

And there is more demonstrating the inadequacies of Sterling's 'investigation,' as reflected with these exchanges:

The Secretary, asking Sterling if Jason Lee, in the meeting with Smitherman, asked him why he did not like the way Salyers operated, Sterling answered, "I don't remember." Vol. 2, Tr. 214. And then, asked if she remembered "whether or not Mr. Lee asked [the Complainant] why he did not want to work for Zach [Salyers]," again, she answered "I don't remember." *Id*. This lack of recall persisted; when Sterling was asked, in speaking with Salyers, if she recalled "whether or not [she] asked [Salyers] if he knew why [the Complainant] might want to be removed from his shift, from his section," again her answer was "I don't remember." Vol. 2, Tr. 215. Nor, Sterling admitted, after she completed her 'investigation,' did she have any follow-up questions for either Salyers or the Complainant. Vol. 2, Tr. 216.

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[17] From context in the transcript it is clear that counsel for the Secretary and Sterling briefly confused Smitherman and Salyers, using Smitherman's name when she clearly meant Salyers. Vol 2, Tr. 213.

[18] The Court's view that Sterling's 'investigation' was a conclusion first, followed by a half-hearted inquiry, is also reflected by her remark that "Juan *kept saying* that he did not like the way Zach [Salyers] operated and he didn't want to work for him." Tr. 212 (emphasis added). Yet, while the Complainant *kept saying* he had an issue with the way Salyers operated, she did not inquire further.

Sterling also admitted that while she stated that both the Complainant and Salyers told her that not all of the work assigned to the Complainant had been completed, she had "*no idea*" what that meant, as she agreed that it could have been 10 percent or 50 percent that wasn't done. Vol. 2, Tr. 223 (emphasis added).

It is of note that although Sterling asserted that Warrior Met does not permit employees to take unauthorized breaks, she was unable to articulate what constitutes Warrior Met's definition of an "unauthorized break," offering only the tautology that it is break that your supervisor did not authorize. Vol. 2, Tr. 228. Inconsistently, Sterling stated that the company would not consider it a violation of that company policy if a miner stopped for water or used the restroom, though without a supervisor's permission. *Id*. Although it was her understanding that a miner seeking a break following strenuous activity should ask their supervisor for permission, she could not point to any company policy addressing that issue or specifying precisely what sort of break requires explicit supervisor permission, other than the Collective Bargaining Agreement that grants a 30-minute break. Vol. 2, Tr. 231-232.

That Sterling's investigation was one-sided and superficial is demonstrated by this exchange with the Secretary's Counsel: "Would you agree that the statement of – that the report from Zach Salyers was what led to everything that we're here about today?" Sterling's answer was "[h]is written and his verbal statement, yes, ma'am." Vol. 2, Tr. 233-234.

Sterling, in response to questions from the Court, stated that before she went to meet with Mr. Thielen, the mine manager, she had *not* formed an opinion as to which version, Salyers or the Complainant's version, was more credible. Vol. 2, Tr. 240. However, she then modified that response, stating that "it was not until after I spoke with Chris Walls and Wesley Koots that I determined which version was credible." Vol. 2, Tr. 243. It should be noted that her view from speaking with the two miners related only to the sleeping allegation. Vol. 2, Tr. 244. Yet, neither Walls nor Koots asserted seeing Smitherman sleeping; rather their remarks to Sterling pertained to Smitherman's claim that Walls had given him an assignment, with Walls stating that was not true. Although the Complainant stated to Sterling that both Walls and Koots came by and saw him working, Walls and Koots, the latter an hourly employee, both said that that was not true. Vol. 2, Tr. 244. The Court notes that neither Walls nor Koots testified at the hearing and that Sterling did not present a statement from either one. Neither one asserted seeing Smitherman sleeping either. Vol. 2, Tr. 246. Again, in the Court's view, it is revealing that the only statement Sterling took was from Salyers.

In trying to determine the bases for Sterling's determination, the Court asked what she was "left with that led [her] to conclude that Mr. Salyers' version was more credible than Mr. Smitherman's version?" Her answer was damning and revealed her lack of objectivity, stating: "[*Salyers*] *is a supervisor*. *We have to have faith in the supervisors that we hire*. … I didn't find anything that [Salyers] said was untrue." Vol. 2, Tr. 249-250 (emphasis added). Sterling concluded her remark on this issue by stating that her determination was based on the sleeping issue and the issue of "whether Smitherman was being insubordinate by not completing his work tasks. It was two separate situations." Vol. 2, Tr. 250. The Court finds that Sterling's conclusion was clearly a predetermined result.

Testimony of Chris Thielen, Manager of the Number 4 Mine

Chris Thielen, manager of the mine, testified as the final witness for the Respondent. Respondent's counsel drew his attention to a time study, dated February 5, 2021, conducted by Warrior Met on 4 Section from February 1-4, 2021. Vol. 2, Tr. 265, Ex. R30. Thielen was questioned about the time study; though he denied it as being used directly against Smitherman or any miner in particular, the time study findings were critical of the right side bolter crew on owl shift, claiming a "lack of urgency or motivation on the right side bolter crew on owl shift." Vol. 2, Tr. 267. Thielen described the purpose of the time study as to "ensure [that] the foreman is informing [the] crew of standards and expectations on a section." Vol. 2, Tr. 270-271. When asked, Thielen affirmed that he assumed Salyers would have seen the time study. Vol. 2, Tr. 296, Ex. R 30. Thus, it is obvious that Salyers knew at least about the results of the time study and that it did not reflect well upon him.

The Court notes further that the summary sheet on the time study, lists as one of the "observed deficiencies," that "[o]n owl shift 2/2, right side bolters refused to bolt due to lack of dust bags for bolter on section." Ex. R30. Furthermore, the time study summary sheet specifies, as the remedial action to remedy the observed deficiency of the "lack of urgency/motivation displayed by right side bolter crew on Owl shift," to "[e]nsure that the foreman is informing bolt crew of performance standards on section." Ex. R 30. The time study summary sheet, which is in e-mail format, is addressed to Chris Thielen, Jason Lee, and Pete Richardson, among others. Ex. R30.

Salyers under cross-examination, *supra*, flatly denied ever receiving information or statistics about production on his section. Vol. 1, Tr. 90. The Court finds this claim not credible, as the time study summary, sent to Salyers' direct supervisor Pete Richardson, directs that foremen be made aware of the owl shift right side bolter crew's "lack of urgency/motivation" and refusal to bolt due to lack of dust bags, and to take remedial action. Ex. R 30.

Regarding the investigation, Thielen testified that at first he delegated the issue to Jason Lee. Vol. 2, Tr. 271. Later, with Sterling, he spoke with Chris Walls, electrician Wesley Koots, and Jonathan Banks. Vol. 2, Tr. 274, 275. Thielen corroborated that Banks and the other bolter were bolting without proper ventilation. Vol. 2, Tr. 275. Banks was reprimanded for this but, the Court would again note, *not* Salyers. Vol. 2, Tr. 274.

With respect to the issue of Smitherman's work on the day which led to his suspension and subsequent termination, Thielen recalled that Volts saw or thought they saw Smitherman on a Lo-Trac. Vol. 2, Tr. 275-276, 294-295. He later stated that Koots and Walls told him that they "could see the Lo-Trac operating." Vol. 2, Tr. 280. Asked to clarify, Thielen affirmed that Koots and Walls both said they saw someone on the Lo-Trac – that is, they saw lights, but could not see who was operating the Lo-Trac. Vol. 2, Tr. 295. The Court would note that there was no testimony during the hearing that anyone other than Smitherman operated the Lo-Trac on that day. Thus, at least to that extent, Koots' and Walls' statements did not advance Salyers' claim that Mr. Smitherman did nothing on the day in issue.

Thielen stated that, in assessing the issue, he looked at Salyers' statement and Smitherman's record. From the latter, he deemed the "most important" aspect to be the write-up for Smitherman's prior sleeping incident. Tr. 276. Noting that any further infraction or violation would mean Smitherman's discharge, he concluded Smitherman was "engaged in unsatisfactory work performance. He was found not attempting to complete the tasks that he was assigned to do. His Lo-Trac was off, and he was slumped over or asleep in his Lo-Trac." Vol. 2, Tr. 277-278.

Under cross-examination, Thielen stated what amounted to, in the Court's view, a fall-back position: whether Smitherman asleep or not, when Salyers approached him, he was "not attempting to complete the tasks he was assigned to do." Vol. 2, Tr. 281. An indication that he was not about making an objective determination of the facts, Thielen admitted that he did not speak with Smitherman until the union meeting. Vol. 2, Tr. 281 and Tr. 289-290. In fact, Thielen did not even ask Smitherman if he was sleeping. Only Sterling asked Smitherman about that. Vol. 2, Tr. 282.

Thus, by his testimony, Thielen came to the conclusion that Smitherman had been asleep, but with that conclusion being based on Sterling's view and Salyers' statement. Vol. 2, Tr. 285. As Sterling was never underground at the time of the alleged incident, it should not be lost that the information distills into but one statement – that of Salyers, alone, with Thielen giving weight to Smitherman's prior sleeping incident. Thielen also admitted that, regarding the separate issue of the work accomplished by Smitherman on the day in issue, he never spoke with Smitherman to consider his account of what work he completed that night, relying instead upon Sterling's recounting. Vol. 2, Tr. 289. When asked by Respondent's counsel "So everything that you have about what Mr. Smitherman said comes from what Sherry told you; is that right?" Thielen responded, "And Zach [Salyers]. Yes." Vol. 2, Tr. 294. The Court would note that Thielen's remarkable admission was of the same order as Sterling's – both individuals had a predetermined conclusion about the matter.

II. Additional Analysis and Discussion

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 exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment 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).

It is noted that Congress adopted the Mine Act "to protect the health and safety of the Nation's coal or other miners." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202 (1994). Further, as noted in the legislative history for that Act, Congress intended for Section 105(c) "to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law." S. REP. No. 95-181, 36 (1977).

Decisional Law in Discrimination Matters under the Mine Act

For over forty years the Commission decisions of *Sec'y on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), and *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981) have been the touchstone for evaluating discrimination claims under the Mine Act. Under those decisions, the standard for making a prima facie case of discrimination under Section 105(c)(1) of the Mine Act, has been expressed as follows:

> Under *Pasula-Robinette*, a miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula, 2* FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that the adverse action also was motivated by the miner's unprotected activity and the operator would have taken the adverse action against the miner for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Sec. obo Riordan v Knox Creek Coal, 38 FMSHRC 1914, 1919 (Aug. 2016). *See, also, Thomas v CalPortland Co.,* 42 FMSHRC 43 (Jan. 2020).

Recently, the Court of Appeals for the Ninth Circuit took issue with the *Pasula-Robinette* framework, holding that, because the language of Section 105 (c) of the Mine Act provides, in relevant part that "[n]o person shall discharge or in any manner discriminate against … the exercise of the statutory rights of any miner … in any coal or other mine subject to this chapter ***because*** such miner … has filed or made a complaint under or related to this chapter," that language

"requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation." *Thomas v. Calportland*, 993 F.3d 1204, 1209-1211, (April 14, 2021) (emphasis added).

Because the Warrior Met mine in this matter is located in Alabama, and therefore outside of the states within the purview of the Ninth Circuit, its decision is not binding on the Commission. However, for the reasons articulated in this decision, the Court, separately applying both the *Pasula-Robinette* test and the Ninth Circuit's *but for* test, finds that Mr. Smitherman meets both tests.

Accordingly, as set forth in the findings of fact, Juan Smitherman engaged in protected activity by raising safety concerns; he suffered adverse action as was terminated because of that activity, and the Respondent failed to rebut the established prima facie case. Further, because the Court rejected the asserted affirmative defense that the Complainant was sleeping and/or loafing, finding that neither was established by credible evidence, no unprotected activity was proven.

Additionally, to be plain, applying the stricter standard set forth in *CalPortland,* the Court separately finds that Respondent Warrior Met would not have terminated Juan Smitherman's employment *but for* his invoking his protected activity under the Mine Act and to put it differently, Warrior Met's action in terminating would not have occurred *but for* Complainant Smitherman's protected activity of raising safety concerns and that the putative reasons advanced by the Respondent mine were little more than a ruse, as neither the claim that the Complainant was sleeping, nor that he was loafing, was credibly established.[19]

III Summary Remarks

As set forth above, Complainant Juan Smitherman established a prima facie case. He engaged in protected activity, primarily by raising the safety complaint about insufficient ventilation on the February 28-March 1 owl shift. This issue made up the core of Smitherman's complaint, but he also testified to a series of other safety disputes he had with section foreman Salyers, such as the early February 2021 dispute about bolting without dust bags. Though it is true that Smitherman did not include every safety issue he raised with Salyers in his complaint, that is not a prerequisite to receiving testimony about such issues, as the Complaint represents the broad outline of its basis.[20] Further, the Court's decision is based on the core charges.

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[19] It is noted that the prima facie case remains unchanged, even within the Ninth Circuit, at least in terms of the preponderance of the evidence standard. As before, in the absence of direct evidence of discrimination, the miner may bring forward indirect evidence of discrimination, such as the operator's knowledge of the protected activity, the operator's hostility towards the protected activity, the coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Sec'y of Labor on behalf of Johnny Chacon v. Phelps Dodge Corp.*, 3 FMSHRC at 2510.

[20]The Court has observed that Smitherman's action is not limited only to those matters specifically addressed in his initial MSHA complaint, but rather to any issue arising in the MSHA investigation. *See Carmichael v. Jim Walters Res., Inc*., 20 FMSHRC 479, 484 n.9 (May

Those core charges were established and by themselves were sufficient to find for the Complainant. While the other safety issues were part of the record, they were not determinative of the outcome, but they did provide useful context for the two days directly involved in the Complainant's termination. *Sec'y of Labor, MSHA v. Hopkins Cty Coal, LLC*, 38 FMSHRC 1317, 1323 n. 9 (June 2016).

Obviously, by his suspension and termination, Mr. Smitherman suffered adverse action. Further, as described above, the Court rejects the claim that Salyers was oblivious to the core protected activity involving the fly pads and that Smitherman was the source behind it. Salyers and Smitherman had a history together and certainly the former, as the Complainant's supervisor, was able to put two and two together.

As set forth above, in multiple ways, and founded upon the Court's credibility determinations, Salyers demonstrated his hostility towards the Complainant's protected activity. Regarding the core events, assigning Mr. Smitherman, though the senior roof bolter, to run the Lo-Trac was itself indicative of such hostility. That, in the course of the same day as that assignment, Salyers would find that Smitherman was *both* loafing, not doing work and sleeping is telling. Such events meet, *writ large*, the adverse action 'close in time' consideration.[21]

The Respondent's attempted rebuttal, as discussed above, asserting that its suspension and termination of the Complainant were not motivated by protected activity have been rejected by the Court as pretextual. A pretext may be found where Respondent's justification is "weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of*

1998) ("[w]hatever its value as evidence, the complaint to the Commission, much like a complaint in a court proceeding, *is a basic pleading* that serves to frame the issues to be tried.") (emphasis added). The Commission, in *Thomas v. CalPortland Co.*, held that the miners' claim need not be limited to the protected activities he alleged in his initial section 105(c)(2) complaint, but rather could include any matter investigated by MSHA in response to the section 105 claim. *Thomas v. CalPortland Co.,* 42 FMSHRC 43, (Jan. 2020), citing *Hatfield v. Colquest Energy, Inc.,* 13 FMSHRC 544, 545-46 (Apr. 1991). The Commission remarked that Hatfield "only precludes a miner from broadening his complaint to request relief for an *adverse action* that was neither pled in the initial administrative complaint or investigated by the Secretary after receipt of such complaint." *Id*. at *11, (Commissioners Jordan and Traynor, concurring). This is important, because "miners are comparatively less likely to specifically reference in their initial complaint other allegations critical to the evidentiary burden of establishing a discrimination case, such as protected activity and unlawful motivation, because their importance is only apparent to those familiar with the legal requirements of our *Pasula-Robinette* framework." *Id*. at 57.

[21] The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and *temporal proximity* between the protected activity and the adverse action. *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.* 22 FMSHRC 323, 325-26. (March 2000). That case involved eight days. This matter came about in less than 48 hours.

Price v. Jim Walter Res., Inc., 12 FMSHRC 1521, 1534 (Aug 1990). Furthermore, cursory, superficial investigation into alleged employee behavior undermines the credibility of the investigation. *Con-Ag, Inc. v. Sec'y of Lab.,* 897 F.3d 693, 704 (6th Cir. 2018). Warrior Met's investigation was not only superficial and cursory, but also biased.[22] Sterling took a written statement from Salyers, but not from Smitherman. She asked few follow-up questions when meeting with Smitherman, appearing uninterested in understanding his side of the story. When Smitherman called Sterling to inform her of his safety concerns with Salyers, Sterling and Thielen's response was to conduct casual, informal, superficial questioning of miners on Smitherman's section. At the hearing Sterling frequently admitted to not recalling basic facts about her investigation process, which either indicates an investigation done carelessly or an attempt to obfuscate the facts. The investigation was biased in that Sterling and Thielen, upon realizing there were no other witnesses to the supply hole confrontation other than Salyers and Smitherman themselves, opted to believe Salyers because he is a supervisor. Vol. 2, Tr. 249-250

In a real sense, Thielen and Sterling could not quite get their dance duet together as to whether it was insubordination or sleeping that was the basis for Mr. Smitherman's termination.[23] For that matter, Salyers' himself was inconsistent as to which claim applied.

Last, as also discussed above, the Court finds that the Complainant's protected activity was the genesis for his termination. Put in the parlance of the Ninth Circuit, *but for* Mr. Smitherman's protected activity, he would not have been terminated

[22] That the 'investigation' had the aroma of conviction followed by investigation is plain with Sterling's examination of Smitherman's personnel file. Such an examination would not yield any information as to whether the assertion that the Complainant was loafing or sleeping was true. It points only to a search for potential assistance to a predetermined outcome.

[23] Tellingly, as discussed above, Warrior Met Coal's management could not even consistently define an "unauthorized break." At first, they insisted it is simply when a miner takes a break without asking their supervisor first, but then they conceded that miners may take breaks for water or to use the restroom without consulting their supervisor. Tr. 192, Day 2 228-232 When pressed, Sterling could not define the threshold at which a miner would require supervisor permission for a break, except to insist that Smitherman was on the wrong side of it. Tr. Day 2 228-232 The Commission has held that "an operator does not establish a *Pasula-Robinette* affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible." *Sec'y on behalf of Price v. Jim Walter Res., Inc*., 12 FMSHRC 1521, 1534 (Aug 1990).

CONCLUSION AND ORDER

Based on the foregoing, the Court finds that the Respondent violated Section 105(c) of the Act by discriminating against Complainant Juan Smitherman for engaging in protected activity. Respondent is hereby **ORDERED** to reinstate Juan Smitherman to his former position with Warrior Met Coal with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove from Juan Smitherman's personnel file all mention of any employment action stemming from this incident.

Other Terms of Relief

Counsels are Ordered to confer during the next fifteen (15) days in order to determine if there can be agreement as to the terms of relief for Complainant Juan Smitherman and to notify the Court as to the results of these discussions. Section 105(c)(3) of the Act provides, in pertinent part: Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner … for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

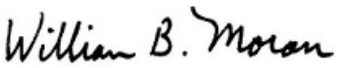
Counsels are Further Ordered at that time to state their specific areas of disagreement, if any, and if they believe that a further hearing may be required on the remedial aspects of this matter, to so state that, identifying the grounds for their positions.[24]

Typically, reinstatement to the Complainant's former position, back pay with an appropriate interest rate, medical expenses, if any, benefits, such as pension contributions, if any, and lost overtime, are among the remedial matters that may be present. The parties are also directed to address the impact of the strike against the Respondent's mine as it affects the remedies due. In addition, the remedies typically also include: expungement from Juan Smitherman's personnel file of all references to the unlawful disciplinary action taken against him, including any such references to the events and circumstances associated with his wrongful termination, from any other records maintained by the company; and a posting of this decision at all of its mining properties where Respondent operates, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Warrior Met at its mining properties that it will not violate the Mine Act. The issue of MSHA's civil penalty also is to be addressed including, if possible, a settlement on the amount.

[24] While not addressing all aspects of the relief sought, at the hearing the Secretary identified that he is seeking permanent reinstatement for Smitherman, back pay from the day of suspension up to the date of temporary reinstatement, out-of-pocket medical and dental expenses incurred during the period of termination, and damages and penalties calculated by the Secretary, seeking $20,000.00. Vol. 1 Tr. 10-11.

The Court retains jurisdiction in this matter until the specific remedies to which Mr. Smitherman is entitled are resolved and finalized. Accordingly, this decision will not become final, and therefore not appealable, until an order granting specific relief and awarding monetary damages has been entered. Per the above, Counsels are directed to discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order.

SO ORDERED.



William B. Moran
Administrative Law Judge

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