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OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

February 28, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), obo TARA OTTEN Complainant v. CONTINENTAL CEMENT COMPANY, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. CENT 2021-0013 Mine: Hannibal Underground Mine ID: 23-02434

DECISION AND ORDER

Appearances: Megan J. McGinnis, Esq., for the Secretary of Labor, R. Lance Witcher, Esq., and Thomas R. Chibnall, Esq., for the Respondent

Before: Judge William B. Moran

In this discrimination matter brought under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., ("Mine Act" or "Act"), the issue is whether a miner walkaround representative, when accompanying an MSHA inspector during an inspection, is entitled only to the miner's regular rate of pay or to the upgraded pay that miner would have received, per the mine's employment agreement, but for the miner's participation in the walkaround.

The walkaround provision is set forth at 30 U.S.C. 813(f). Titled "Participation of representatives of operators and miners in inspections," in relevant part, it provides "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also

an employee of the operator shall suffer *no loss of pay* during the period of his participation in the inspection made under this subsection." (emphasis added).

For the reasons which follow, the Court finds that when Congress provided in 30 U.S.C. 813(f) that such representative of miners who is also an employee of the operator *shall suffer no loss of pay* during the period of his participation in the inspection made under this subsection, *it meant what it said: the representative shall suffer no loss of pay.* As Complainant Ms. Tara Otten did suffer such a loss of pay, Continental Cement Co. LLC, violated the Act's discrimination provision, 30 U.S.C.§815(c) .

FINDINGS OF FACT

Although the Court here includes its findings of fact from the hearing testimony, it does so only for the sake of completeness.[1] It makes this point at the outset because, in its estimation, the record does not reflect conflicting facts. There being no genuine facts in dispute for the Court to resolve, this case devolves into a legal interpretation of the no loss in pay provision for miners' accompanying an inspector during an inspection. Though not apparent to the parties, and not realized by the Court until the hearing testimony was well underway, this matter could've been resolved through cross-motions for summary judgment. With that observation noted, the findings of are now presented.

The Secretary's presentation began by calling MSHA Special Investigator Charles Lee Jones. Tr. 54-55. (Hereinafter, "Investigator Jones," "Investigator" or "Jones"). He works out of the MSHA Madisonville, Kentucky District Office. In 2020 he conducted such an investigation regarding a discrimination complaint made by Ms. Tara Otten. MSHA received the complaint from Ms. Otten, Complainant, on April 28, 2020. The essence of her claim, as related by the Investigator, was that Ms. Otten "informed [him] that she was the most senior laborer in the pool and that she would have been entitled to operate the equipment, to be upgraded. But because she chose to participate in the MSHA inspection, she was -- that pay was removed from her." Tr. 58. Joint Ex 1, J-1. , Ms. Otten's Complaint.[2] The Complaint named Terry Powell, Stacy Fujarski and Heather Ames as the persons who discriminated against her. Complainant alleged that she was entitled to the upgraded rate of pay as a mobile equipment operator during "the weeks of 3/21, 3/28, and 3/29, 4/4." Tr. 60.

The Court would note that there is no dispute that Ms. Otten is a miner and that acting as a miners' representative is protected activity. Only the third element is in dispute: did she suffer "some sort of discriminatory act, … in this case, loss of pay?" Tr. 61. Thus, Complainant seeks

[1] This approach also spares the Commission from scouring the transcript record to locate testimony.

[2] Per the parties' agreement, all the Joint Exhibits were admitted. Tr. 59.

her backpay and direction that the Respondent will not so reduce her pay in the future when so acting as the miners' representative.

As part of his investigation, Investigator Jones sought statements from the individuals named in Ms. Otten's complaint.[3] However, he only received one response, that from the mine operator. Tr. 62. Ex. J 3 is the Respondent Operator's position statement, which was prepared by Ms. Heather Ames. Tr. 64. Jones particularly pointed out from that position statement the Respondent's contention that "Miss Otten was correctly paid the upgraded hourly wage while performing work using mobile equipment as outlined in the Hannibal hourly CBA, but she did not receive an upgrade hourly wage for acting as a miners' rep as per the current CBA." J 3 and Tr. 65.

From that statement, Jones deduced that the Respondent was acknowledging that Ms. Otten would have been "entitled to that upgraded pay if the MSHA inspector was not there. In other words, if the MSHA inspector did not show up, or she did not participate in the inspection, there was no question she was entitled to it. They would have paid it without question, the upgraded pay. But because that she participated with MSHA, in the inspection, that was the sole reason for retracting the pay." Tr. 65-66.

Investigator Jones did interview the Complainant, Ms. Otten, on May 7, 2020. Tr.68, Ex. J 2. This was done over the telephone. Jones informed that, during that interview, the Complainant provided additional information, consisting of "e-mail exchanges between Heather Ames and LaRay Mundell,[4] or Stacy Fujarski was on some of them." *Id.* Ex. J3, at pages 5-6.

Ms. Otten provided additional information to Investigator Jones during the interview, beyond the walkaround pay issue.[5] Tr. 70-71. J 2 at page 3. Jones related that Otten informed that in connection with that "particular inspection cycle, … the Company had received several

[3] Due to the COVID 19 pandemic, Jones did not do in person interviews. Tr.62.

[4] Jones learned during his investigation that LaRay Mundell was Ms. Otten's supervisor at the time of her complaint. Tr. 69. Though unimportant to the outcome of this case, it is noted as an aside, that Mr. Mundelll also happens to be Ms. Otten's father. Tr. 95. Similarly, Jones learned that Ms. Fujarksi was the payroll specialist and Ms. Ames was the HR person. Tr. 69-70.

[5] The Court commented with regard to these other matters raised by Ms. Otten, that such other matters are not essential to her establishing her 105(c) complaint. Tr. 76-77. The Court stands by that observation. While those other issues may provide background to this case, they are not essential at all to this matter's determination.

citations. And she made the statement that she felt like that there was a target on her back because that she participated in these inspections."[6] Tr. 71.

On cross-examination, Jones stated that he did send individual letters to Mr. Powell, Miss Fujarski, and Miss Ames, but those were general letters, which did not request position statements. He also sent an inquiry to Mr. Gutierrez, the plant manager at Continental Cement. Tr. 79-81.[7]

Respondent's Counsel remarked that the Complainant did not reference any other, earlier, dates of alleged discrimination beyond those stated in her complaint. Tr.88. In connection with that observation, Counsel noted that there is a time limit within which a complaint is to be filed; namely 60 days. Tr. 89. Pointing to Exhibit J 1, the Investigator agreed that April 25, 2020 is the date on that exhibit and further noting that 60 days before that would be February 28th. From that, Respondent's Counsel asserted that alleged acts of discrimination before February 28th would be too late to assert as acts of discrimination. Jones did not agree however, maintaining that dates earlier than February 28th "go to show history of activity that [Ms. Otten] was subjected to." Tr. 89-90. Jones did concede that Ms. Otten's claim is over loss of pay, but countered with his view that the earlier events may be used to show "that she was being harassed, discriminated against, because of her involvement in these MSHA inspections." Tr. 91.

This decision rests upon the specific issue of the rate of pay Ms. Otten was entitled to during specific dates when she was accompanying an MSHA inspector during an inspection. As such, Ms. Otten's background allegations are not determinative of the issue in this case. However, those alleged preceding even ts provide useful context in making the penalty determination.[8]

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[6] Jones added a comment to his remark, to which the Court sustained an objection, and the comment was stricken.

[7] The Court considers the following to be inconsequential but again for the sake of completeness it is included here. It is noted that were it not for COVID, Jones would have done in-person interviews with Respondent's personnel. Tr. 83. Jones admitted that though Otten listed three individuals as responsible for the discrimination, he did not interview any of them. Tr. 85. Even though Ms. Ames submitted the company's position statement, Jones did not follow-up with her about that statement. Tr. 86-87.

[8] It is also worth noting that had the other, preceding, events, that Ms. Otten alluded to, been part of the core allegations, the 60 day time limitation for filing a complaint is not jurisdictional in any event. As noted in *Hollis v. Consolidation Coal,* 6 FMSHRC 21, 24 (Jan. 1984), "the purpose of the 60 day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Joseph W. Herman v. IMCO Services*, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states: While this time-limit is necessary to avoid stale claims being brought, it should not be construed

Still referring to Ms. Otten's remarks about prior workplace harassment, Respondent's Counsel, called attention to Ex. J 2 at page 3, wherein it reflects the Complainant's remark that "[d]uring that time [she] called in on the MSHA hotline about November 5th or 6th, because [she] felt [she] was being harassed, not to the point any money was being withheld from me, but it seemed like they were trying to push me out of the miners' rep position and to get me not to walk around with the inspectors." Tr. 93. Respondent's Counsel noted that the Complainant makes no claim that she was losing money as a result of those actions nor does she claim she was disciplined because of them, and Investigator Jones agreed. *Id.* As best as the Inspector could recall, when Otten made her hotline call to MSHA on November 5, 2019, she made no mention or claim that "she had accompanied MSHA all day that day and was only paid her laborer rate." Tr. 94. However, *regarding the time when she made the complaint in this matter*, Jones stated that Otten did complain that she had accompanied MSHA all day but was only paid a laborer's rate while other laborers were performing mobile equipment operations. Jones remarked that was the essence of her complaint – that "on days that she would have been entitled to that upgraded pay, a laborer with less senior time would run that piece of equipment, but then she was not paid that pay." Tr. 95. The investigator added that, at first, Otten was paid the upgraded pay but that it was later retracted.[9] *Id.*

Also referring to page 3 of that exhibit, Respondent's Counsel directed Investigator Jones to the Complainant's remark that in February 2020, at which time she was part of the safety focus group, she stated that Mr. Powell, "had to go to what [Powell] called MSHA court on February 5th and 6th. When he got back, he put me on a crappy shift." Tr.96. Concerning that remark, Respondent's Counsel asked Inspector Jones whether Otten explained why she considered that to be harassment? Jones answered that Otten "talked [to him] about the inspection where she participated with the MSHA inspector and [the mine] received … several D orders, or a couple of D orders." Tr. 96. Jones reaffirmed that Otten's complaints relating to those D orders were made to him at a point in time beyond the 60-day period for her to file a

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strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60–day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

[9] As mentioned earlier, a quirk in this case is that before the upgraded pay was retracted, originally it was paid by her supervisor, Mr. Mundell, who is her father. Tr. 95. This quirk, while interesting, has no bearing on this case.

complaint of discrimination. Tr. 98. The Court notes that, aside from providing useful contextual information, this issue is not relevant to the core issue in this case.

This is an appropriate point to highlight the core issue in this case. The Court believes that it may be simply stated:

> The Respondent believes that the Collective Bargaining Agreement ("CBA") carries the day. As applied here, that stance means that because the CBA does not provide that an employee is entitled to an upgrade or any higher pay classification if that employee *does not actually perform that work*, that employee is not entitled to such a pay increase. Period. Full stop.

That the Respondent may ardently believe this to be the case, does not make its position stronger. Accordingly, the Respondent's approach to present several witnesses affirming their belief that the CBA controls this matter does not make it so. In short, repetition of the viewpoint does not bolster the Respondent's position.[10]

Respondent's Counsel then turned to Ex J 4, which contains the collective bargaining agreement, and specifically to pages 37-49, the wage rate schedule. Tr. 107-108. Jones agreed he reviewed this to compare Otten's labor pay rate with the mobile equipment rate and he conceded that, within the mobile equipment operator rates and the wage rate schedule overall, there is no mention of a wage rate for miners' representatives.[11] Tr. 108-109. Nor, the Court would observe, is there a need to have such a provision, as the Mine Act speaks to the issue.

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[10] In a record replete with information that is immaterial to the core issue, another example from the Respondent involved, Investigator Jones, who upon being referred to Ex J 2 at pages 5 and 6, agreed that he received some emails from Ms. Otten in connection with his investigation and that her name was not on those emails as a sender or recipient. Tr. 102. Jones did not know how Otten acquired those emails. *Id*. Apart from suggesting that Otten inappropriately acquired the emails, the point attempted to be made by Respondent's counsel was that Miss Ames was responding to Mr. Mundell regarding employees Otten, Matson and Lucas and that they were ineligible for pay upgrades. However, it should not be lost that the latter two were *not* miners' representatives. Counsel's is pointing out that Ames was responding that, *per the CBA*, none of them were entitled to pay upgrades and that her response was consistent with the company's position regarding pay upgrades. Jones agreed that, to his recollection, the mobile equipment upgrade is defined in the contract as is the zipper clause. Tr. 103-104. Jones also agreed that the zipper clause eliminates all past practices. Tr. 104. This information does nothing to resolve the core issue. It is only part of the repeated assertions that Respondent's witnesses believed the CBA answers the issue as to the pay Ms. Otten was entitled to receive.

[11] Another example of matters that are distractions, as they do not help resolve the issue in this case, the Respondent tried to wrap into the discussion that the CBA has no rate schedule for carpenters. Raising this is an attempt to bootstrap the dispute by pointing to wage rates for carpenters. Carpenters' pay *is not* a relevant part of this case. Tr. 108-109.

Investigator Jones also agreed that in the CBA there is "a defined provision in the contract that governed when an employee would receive an upgraded wage rate for performing higher classification work." *Id.* Ex. J 4, Section 9 of Article 6 in that exhibit, page 16 of 49. Tr. 110. That section is titled, "Rate of pay for temporary transfers." *Id.*

Accepting that the provision was "negotiated and mutually agreed upon by the Union and the Company," Jones agreed that there is nothing in that document providing that "employees [are] entitled to a higher classification wage simply because another employee who's junior gets that upgrade." *Id.* All of this continues the Respondent's theme that the CBA addresses the issue of upgrades in pay and therefor that it controls the rate of.pay when a miner is engaged in a walkaround. This theme is repeated over and over in the Respondent's case.

Jones agreed that the CBA provides "[w]hen work of a higher paid classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours," and that this means "if an employee works less than four -- a minimum of four hours at a higher wage classification that they're going to get an upgrade for at least those four hours." Tr. 110-111. And so too, if an employee works more than four hours, that employee's pay will be upgraded for the whole day. Tr. 111.

Respondent's counsel, building on those admissions from Investigator Jones, then noted that the provision speaks to "[w]hen *work* … of a higher paid classification it required an employee," emphasizing that the term "work" is used. Tr. 111. However, the Court considers this to be a fatuous argument. Jones was asked if Otten is performing miners' representative duties by accompanying MSHA on an inspection, if she was required to operate mobile equipment at that time. Tr. 111-112. Naturally, the investigator responded that Otten was not required to operate mobile equipment at those times, explaining that she was exercising her rights as the designated miners' rep to travel with the inspector. Tr. 112.

Thus, the argument made by Respondent's Counsel is that "in order to get that paid a higher pay classification upgrade, *work* had to be performed at that higher paid classification upgrade." Tr. 113. (emphasis added). Ex. J 3 was raised to make the same argument: that "a laborer [is] [ ] eligible for upgraded hourly wage *when running a piece of equipment* classified as mobile equipment." Tr. 123. (emphasis added). With *actually running the equipment* being a prerequisite in the Respondent's eyes, that would be impossible when Ms. Ottten was acting as a miners' rep during MSHA inspections. Tr. 123-124.

Investigator Jones did not agree with the Respondent's assertion that that the issue in this case is simply a matter of contract interpretation, restricted to how each side sees the CBA. Tr. 142. The Court agrees with the investigator's perspective.

The Secretary then called, Norris Laray Mundell who has been employed at the Continental Cement Plant at Hannibal, Missouri for 28 years. Presently, his job title is "laborer" in the yard department. During those many years of employment he held other positions in the

yard; advising that "for seven years [he] was acting foreman of the yard department," and for many years before that, he was a 'knockout' foreman, meaning if the foreman was absent, he would assume those duties. In short, Mundell had many years working in the capacity as a supervisor at the mine. As noted, Mr. Mundell is the father of the Complainant, Ms. Otten.

Speaking to the events in issue, Mundell explained the job assignment process at the mine. That process takes into account seniority. The yard department, he informed, is a big cleanup crew for the entire plant. Thus, he stated, "Any place on the plant that spills stuff onto the ground, or makes messes, piles, shuts down stuff, the yard department is called in to clean up all this mess so that they can keep operating." Tr. 154-155. The yard department has its own physical location, that is to say, its own building, from which everyone in the yard works out of." Tr. 155. Miners in the yard report in the morning and are given the day's assignments.

At the time in issue here, Mundell had four mobile equipment operators, with everyone else in the position of laborer. *Id.* A key factor in this matter, it is the practice that when there are insufficient mobile equipment operators, laborers are assigned to operate those pieces of equipment. Tr. 156.

The Court here takes note that the mine's seniority process is *not* in dispute in this case. In his role as yard supervisor, Mundell gives out work assignments each day. Critical to this matter, Mundell explained that "if there was more work to be done on mobile equipment, than they had mobile equipment operators, he would assign laborers to run such equipment by seniority. Tr. 155, 167.

Several types of mobile equipment are listed in the CBA and many are pieces of equipment that laborers may be needed to operate. Tr. 160-167 and Ex. J 4 at page 39. When there are insufficient operators, laborers are upgraded to run such equipment. If there is a need for a mobile equipment operator, Mundell stated "when a job comes up for bid, it's always the senior person that gets it if they're qualified." Tr. 167.

Referring to Ex. J 7, that exhibit lists the names of the laborers Mundell supervised in the yard for the week of March 22, 2020. Tr. 170. Speaking to March 24 through March 26 of that week, Mundell agreed Ms. Otten participated in an MSHA inspection on March 24th.

It is worth noting again, because it is important, that there is no dispute between the parties as to the days during this week that Ms. Otten participated in MSHA inspections.[12]

[12] Though unnecessary to recount these details, because there is no dispute about them, for the sake of completeness regarding the days in issue, Mundell stated, without contradiction, that laborer William "Enoch," Matson was operating a Bobcat on March 2020. Tr.172-173. Charles, "Bub," Lucas, another laborer also ran a different Bobcat, also referred to as the 'baby' Bobcat and a skid steer, on that day. Reid Pullman, another laborer, also ran the 'baby' Bobcat on that day, after Lucas moved to another task. Tr. 173-174. Jason Stewart's name is also listed for that

date. He too operated a Bobcat on part of that day. Tr.175. Mundell confirmed that for March 24th, when considering employees Matson, Lucas, Pulliam and Stewart, Ms. Otten had seniority over all of them. *Id.*

In response to an inquiry from the Court to Mundell, and referring to Ex. J 7, he confirmed that "on these days, there were insufficient numbers of mobile equipment operators and that's why th[o]se individuals[,] Otten, Matson, Lucas, Pulliam, Stewart, were called in to operate mobile equipment because the number of people you have to operate the mobile equipment were insufficient on those days, and therefore, these people had to take over these mobile equipment tasks." *Id.* All four of them operated mobile equipment on that day. Tr. 176.

Turning to March 25, 2020, Mundell confirmed his email notes "MSHA all day" meaning that Ms. Otten was called to walk around with the MSHA inspector all that day. Tr. 176. He believed that each of the other four laborers operated mobile equipment on that day, March 25th. Id. Mundell's notes for March 26 reflect that Ms. Otten was with MSHA all that day too and that Matson was assigned to operate mobile equipment that day. Tr. 177. Lucas too on that date operated mobile equipment and Pulliam as well as Stewart did also. Tr. 178. So too, in his recounting of Ms. Otten's work during the week of March 23 – March 27, Mundell informed that Otten was operating a skid steer all day on March 23 and March 27th. For the remaining days of that week, she was acting as the miners' rep with MSHA. Tr. 183. Turning to the following week, March 30th, that email reflects the work the laborers performed that week. Tr. 184. Ex. J 7, M.

Speaking to the work performed by the yard laborers during the week of March 30, 2020. Mundell stated that Ms. Otten was with MSHA during a walkaround on March 31st, April 1st and 2nd. Referring to the other laborers, Mr. Matson, Mr. Lucas, Mr. Pulliam, and Mr. Stewart, he reaffirmed that each of those men were junior laborers to Ms. Otten, and that Enoch, Lucas and Reid were on mobile equipment all that day. *None of this is in dispute*. For April 2nd, Lucas and Matson were on mobile equipment. Tr. 198. Ms. Otten operated mobile equipment on March 30th and on March 31 she spent 2 ½ hours on a skid steer. On April 1st she was on a forklift after 10:00 in the morning and on the next day, the 2nd, she was on a loader after 9:00 a.m. On the 3rd Ms. Otten was on vacation. Tr.199. Though unsure if he marked upgraded pay for Ms. Otten on the 3rd, he stated that, if he had done that, it was in error, as she would not be entitled to a pay upgrade on a vacation day. Tr. 199-200. Mundell affirmed that Ms. Otten would've been entitled to operate the Bobcat on March 24th, but for the fact she was accompanying an MSHA inspector as a walkaround rep on that day. Tr. 201. The same applied to March 25th; Ms. Otten would've been offered the mobile equipment job that day too. Tr. 201. In fact, she would have been the first one offered that job. *Id.*

Addressing March 26th, the same applied, with several other laborers operating mobile equipment that day, but for her walkaround duty, Ms. Otten would've been offered the mobile equipment operator job, as Matson, Lucas, Pulliam and Stewart all operated such equipment on that day. *Id.* Mundell confirmed that, other than Ms. Otten being with MSHA on that day, she would've been operating a Bobcat. He also confirmed that she is well qualified to operate a Bobcat and had done so on many prior occasions. Tr. 202. Last, referring to Ex. J-7 (n), at page

The case, very simply, devolves down to whether Ms. Otten was entitled to a pay upgrade as a mobile equipment operator during those times she was accompanying the MSHA inspector as the walkaround representative. In fact, there are no significant factual disputes between the parties on these issues. Accordingly, in retrospect, the Court believes that the parties could have stipulated to all of these facts, leaving only a motion for summary judgment, as important as that issue is, for the Court to resolve.

The Court also takes note that there is no dispute regarding Otten's seniority status vis-à-vis the other laborers. She had the most seniority on the dates in issue. Tr. 181 and Ex. J 5. This again highlights that the only genuine dispute in this case is whether, when acting as the miners' walkaround representative during an inspection Ms. Otten was entitled to the upgraded pay of a mobile equipment operator during the days identified in her complaint.

Upon cross-examination, Respondent's Counsel again raised the carpentry work theme, a contention the Court has noted to be non-starter because it is not involved in this dispute and is otherwise inapplicable, as set forth in the following footnote.[13]

Mundell agreed that under the CBA there is no provision "that sets a wage rate or offers a pay upgrade for miners' rep duties." Tr. 212. Apart from past practices at the mine and the gentleman's agreement in the past, it was Mundell's position that Ms. Otten should not be penalized because she was with an MSHA inspection as the miners' rep and that view was apart

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2, Mundell agreed that he spoke to personnel upon learning that Ms. Otten's pay upgrade had been retracted. Tr. 204.

[13] In an attempt to support the Respondent's position, Counsel for the Respondent asked, and Mundell agreed, that per a gentleman's agreement it had been the case that when a laborer performed *carpentry* work, the individual would be upgraded to mobile equipment operator pay. Tr. 207. Mundell agreed that for March 24th, one of the days in issue in Ms. Otten's Complaint, Enoch Matson received such an upgrade on that day and on that day he operated a skid steer loader for a time and then in the afternoon, Matson did office remodeling work. Tr. 207-208. Ex. J 7, tab p. The Court would comment that the obvious point by Respondent's Counsel is that if Ms. Otten were given carpentry work on a day when she was accompanying an MSHA inspector, she would not be given a pay upgrade to mobile equipment pay. But this is a classic straw man argument because the CBA impacted the pay rate for carpentry work. Whereas before that agreement, per a longstanding gentleman's agreement, carpentry work was considered upgrade pay work, the CBA changed that so that the pay increase no longer applied. What the hypothetical, and the question behind it, miss is that carpentry work was no longer eligible for a pay upgrade. As a consequence, after the CBA, no employee performing carpentry work was thereafter ever eligible for a pay upgrade. Accordingly, if the only work beyond laborer, on a given day, was carpentry work, that pay would be at the same rate as the laborer position. Thus, the question misses the mark because on the days in issue in Ms. Otten's complaint, *she was eligible* to perform mobile equipment operator work, *which work does provide for a pay upgrade under the CBA*.

from those prior arrangements. Tr. 218-219. Respondent's Counsel noted that Mundell could not point to a provision *within the CBA* that miners are entitled to a pay upgrade when they voluntarily choose to serve as a miners' representative. Tr. 220-221. Along the same theme – that the CBA controls the issue in this case, Respondent asserts that its position is enhanced because the CBA's "zipper clause" eliminated past practices.[14] Tr. 222. However, whatever Mr. Mundell's position happens to be on that issue, it is necessary to point out that it is a matter for the Court decide as a legal question under the facts as determined by the Court.

Respectfully, the Court finds that Respondent's Counsel continued to pursue hypotheticals which were off the mark and, as such, they are mentioned only in footnotes.[15]

For purposes of clarification, the Court then asked of Mundell if it correctly understood the types of work performed in the yard, inquiring if those categories consisted of laborers, operators of mobile equipment, and carpentry. He agreed that was, for the most part,

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[14] Other tangential issues ensued, such as whether "*new*" *past practices*, (an interesting turn of phrase), can be created post the CBA. Subjects such as these are all connected with the Respondent's theme that the CBA controls the outcome of the issue in this case. There were several permutations of these theme advanced by the Respondent during the hearing, such as whether another supervisor, other than Mundell, had ever given a pay upgrade to a miners' rep on a shift when they never actually operated a piece of equipment during that shift. Tr. 224-225.

[15] These include the uncontested points that a miner would not be able to claim an upgrade to mobile equipment operator if he was not trained for the type of mobile equipment to be used. Tr. 241-242. Unfortunately, other off the mark observations continued. They included remarks that a senior laborer with a broken leg, who can't operate the equipment, would not be entitled to an upgrade just because a junior laborer operated the mobile equipment. Tr. 243. Other arguments of the same ilk were presented, with Respondent's Counsel asking Mundell, "[i]f a senior laborer is attending annual refresher training, they're at the mine, they're there to work, but they're attending annual refresher training, they wouldn't be entitled to an upgrade just because a junior laborer gets a mobile equipment upgrade while they're unavailable?" Tr. 244. Mundell agreed no upgrade would be due. *Id.* In the same vein, when then asked if things like "vacation, FMLA, jury duty, parent-teacher conference, voting, bereavement leave," were involved, if he agreed that such miners "wouldn't be available to operate mobile equipment … even if they were the senior laborer," and that "they wouldn't get the upgrade just because a junior laborer was operating the equipment," Mundell noted that under such circumstances those miners would not even be at work and therefore they would not be getting such pay. Tr. 245.

The Court recognizes that the many examples presented by the Respondent's Counsel simply represent energetic advocacy, that is, trying to make the best case one can. The problem, as the Court sees it, is that none of these analogies advance the Respondent's case.

accurate.[16] Tr. 246-247. Mundell also confirmed that a laborer who is bumped up from that work to operate mobile equipment is paid at a higher rate. Tr. 247-248. There is no dispute about this. He further confirmed that a laborer who is given a carpentry assignment used to be paid at a higher rate, but that this is no longer the case, as there is no longer any carpentry classification under the current CBA. Tr. 248.

This last point, that there is no carpentry classification *now*, pursuant to the CBA, is part of the Respondent's contention, as the CBA was in effect at the time of the events Ms. Otten cites in her complaint. Thus, Respondent's Counsel asserts that is the effect of the 'zipper clause,' which refers to the elimination of past practices including things like upgrades for carpentry work. From that change, through the CBA, Respondent contends that clause dictates the same result, controlling the issue of walkaround pay. Whatever might have been the past practice for walkaround pay, the zipper clause of the CBA put it to an end, so says the Respondent.

The Secretary then called Terry G. Powell. He is the quarry and auto garage supervisor at the Hannibal plant and Hannibal Mine and from April of 2016 to February 2020, he was the yard supervisor. Tr. 271. His testimony was consistent with the witnesses who preceded him.

He confirmed that if he did not have sufficient mobile equipment operators to do jobs, he "would assign laborers to run mobile equipment." Tr. 272. The yard supervisor determines if it's necessary to assign a laborer to operate mobile equipment. If needed mobile equipment work was needed there would be an upgrade in pay and the work would be assigned based on seniority. Tr. 277. If that was not followed, and the work was assigned to a miner with lesser seniority, the more senior laborer employee would still be paid the upgrade rate, though he did not operate the mobile equipment. This was in line with the contract, meaning the Collective Bargaining Agreement. Tr. 280-281. The provision, he admitted, keeps one from giving the money to a junior person because maybe he didn't like the senior person, or whatever. It's a provision in there to guarantee equality in pay and opportunity."[17] Tr. 278.

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[16] Mundell explained that there are infrequent occasions when miners from the yard perform other duties, but most of the work involves those three categories. Tr. 246-247.

[17] As an aside, it is noteworthy that Mr. Powell had an instance when he assigned a less senior laborer to run mobile equipment and this resulted in his having to pay the more senior laborer the upgraded pay, even though that more senior laborer never operated mobile equipment on that day. This result was brought about under the terms of the CBA. Powell violated the terms of the CBA by assigning the mobile equipment operator job to a less senior laborer. *And who was that more senior employee that Powell bypassed, you may ask? None other than Ms. Otten.* The circumstances when this occurred involved Powell assigning mobile equipment work to Mr. Matson, bypassing Ms. Otten, though she had seniority over Matson. Tr. 279. Powell's excuse

for bypassing Ms. Otten was not persuasive to the Court. He stated: "for whatever reason, Tara wasn't -- I -- I didn't either go across the plant, or Enoch [Matson] was handy, he was right there, I just assigned him to do it because it was -- I don't know that it was an emergency, but it was something that needed to be done right away, so I had Enoch do it and -- and just paid 'em both. I mean, that's -- that's -- do I – I don't remember the reason why I didn't go get Tara [Otten], but -- so I just paid 'em both." Tr. 279. Powell later added that the decision to bypass Otten "wasn't a mistake. It was a decision I made 'cause -- because Enoch was available, okay? And although Tara may have been available, at the time, I had to have somebody on it right now. So rather than run her down, or go look for her, I made the decision to put him on it. So therefore, by contract, I have to pay her." Tr. 281-282.

Thus, Powell knew he was bypassing the terms of the CBA; his decision was, as he put it. "was done right -- right out the gate. That was done right as soon as I paid him [Matson], I would have to pay her. Then there is no dispute on pay or anything. Tr. 282. Powell then attempted to justify his action, describing that "[i]t was an *emergency call*, so that's how -- that's just how I have to handle it, how I had to handle it." Tr. 283 (emphasis added). When the subject was revisited, in which he gave a job to a less senior miner, bypassing Ms. Otten, he reiterated that "the circumstances around that, whether she was available, *it was an emergency, you know*." Tr. 296 (emphasis added). On cross-examination by Counsel for the Respondent, and pertaining to the event when he assigned mobile equipment work to a junior employee, sidestepping the Complainant, Powell again affirmed that it was an emergency that prompted that action, although he edged back from that description when asked again, stating "[t]hat I remember, yes." Tr. 306. Though unsure, he believed the event was "sometime in 2019." *Id.* When Counsel for the Respondent asked the question yet again, asking if Powell's "concern was that some activity needed to be performed on [the manlift, which was called the], JLG in an emergency fashion," he modified his response further, answering this time "[*i*]*n a timely fashion, yes*." Tr. 307. Uncertain what Powell meant, Counsel for Respondent noted that "timely fashion" could be in a week, or in a day, or in a matter of hours." Powell then answered "Well, I -- then I guess I should say, yes, it was an emergency, if you look at timely and that. Timely, to me, means right now. So it's a difference in -- in description of what timely means. So timely, to me, means it has to be done right now." *Id.* His definition of an emergency included "if somebody had an appointment or something that I wasn't made aware of, whether it be USDA to deal with birds, we have vultures, or Reliable Pests to deal with pigeons or whatever, nuisance things, and they were scheduled there at a certain time to be taken to do their thing at a certain time, then we can't just – you can't just turn them away and say no, come back an hour later, or tomorrow, or whatever. They've scheduled that time." Tr. 308.

The Secretary's Attorney later returned to the subject of Powell paying two employees the upgraded pay, which event, as noted, involved Ms. Otten. Powell reiterated that the incident "was an emergency, but she's not available." Vol II, Tr. 12-13. He then confirmed again that it

As noted in footnote 16, the Court finds that Mr. Powell was not exactly a fan of Ms. Otten. It is also of concern to the Court that his testimony was equivocal at times and that he had an unusual definition of an "emergency." Adding to these concerns, the Court notes that when Powell was asked if he spoke with Heather Ames about, …[his] experience in supervising Tara Otten while she was on MSHA inspections, he could not recall but added that he was "not going to say it didn't happen, but we're talking quite some time ago, so no. I -- I don't think we had any particular conversation about that, but I can't be certain." Tr. 287. When then asked about Exhibit J-7, an email from Ms. Ames to Mr. Robert Pickering, the HR Manager, on April 9, 2020, Powell changed his previous answer stating, it appeared that he did have such a conversation. Tr. 288.

Powell also adopted the Respondent's perspective about the controlling effect of the CBA. Thus, he did not take issue with the accuracy of Ms. Ames's email including his remark to her that "[i]f Tara is unavailable for a job, she is not available." To him, it was "[*n*]*o different than if she was on vacation, or in the storehouse filling in*." Tr. 289 (emphasis added). When asked if Ms. Otten is 'unavailable' while working with MSHA, whether that it is no different

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was an emergency situation. Vol. II, Tr. 13. This time, Powell offered the reason he had Matson operate the JLG instead of Ms. Otten, stating "I didn't want to go down that rabbit hole, but I will. So there was an incident involving a JLG with her father. He had injured hisself previous to that. There was quite some time that had went by, but Tara had made numerous complaints about the equipment, that it was unsafe. We had had numerous mechanics in to work on that. And every time she operated that, we would have to call a mechanic in to look at it. That the safety equipment wasn't working, that -- that there was a problem with it. She would leave the piece of equipment set somewhere, we would have to retrieve it. We do not work on this equipment. United Rentals does. They bring in their mechanic to work on it. They would come in and they think would find nothing wrong with it. So it was easier to, rather than deal with that, was to put someone else on it that had no issue operating it, found no safety issues with it. So that's what the issue was. I tried to be tender when speaking about that, but that -- that's how it is." Vol. II, Tr. 13-14. Powell stated that Ms. Otten had made numerous prior complaints about the piece of equipment, again referring to the JLG, and to avoid having her complain again about it, he assigned the task of running the equipment to Matson. Vol. II, Tr. 16-18. To be plain, in the Court's view, Powell's claim that the incident was an "emergency" was false. As the Court alluded to earlier in this decision, while this event does not impact the legal question, it is, in the Court's view, reflective that at least some in management were not big fans of Ms. Otten and her active stance on safety matters. It therefore can be taken into account in determining an appropriate penalty applying a *Pasula-Robinette* analysis, or under a straight violation of section 103(f) analysis.

than if she was on vacation, Powell reaffirmed that is his view, stating "It's -- it's no different. If she's unavailable to do the physical work, she's unavailable to do the physical work." *Id.*

Very simply, Powell's position on the issue of the pay upgrade was that employees "have to be able to work the job. You can't run mobile equipment if you're not available to do it. If you can't sit in the seat and operate it, then by the Collective Bargaining Unit Agreement, you -- you don't get the pay. I mean, that's pretty much the way it is with every job at Continental. If you cannot do the job, y ou do not get the pay." Tr. 295-296.

Powell's testimony for the day concluded with a reference to Joint Ex 4, the CBA, at page 28 of 49, wherein that document provides "[a]ll hours worked in connection with the work of the committee by a Union representative, including all time spent in pre or post inspection conferences and walk-around time spent in relation to Federal MSHA inspections and investigations as provided above, shall be compensated according to the provisions of this agreement." Tr. 317. The Court notes that, though asserted in different ways, the Respondent's position still boils down to whether the CBA controls the walkaround pay due a miner when accompanying an inspector during an inspection.

At the outset of the second day of testimony, the Court notified the parties that "[f]or the dates that are mentioned in the complaint, and just those dates," they were directed "to present their proposed findings of fact as to whether the Complainant, Tara Otten, would have worked on those days in question, and what that job would have been, and the hours that that would have been. It would either be a mobile equipment operator, or none of the above, or potentially carpentry, if that was the only thing available. … [and that more was required than simply asserting them as findings of fact because for each proposed finding they were to supply] the record support, through testimony or exhibits, … for those assertions." Vol II Tr. 7.

With Powell's testimony resuming on the second day of the hearing, Respondent's Counsel tried to create a distinction, namely that when an employee is acting as the miners' representative during a walk-around, that person is then with the safety department, not with the yard. Powell concurred, expressing, "[i]f [Ms. Otten's] called out by the safety department to walk with MSHA, *she's with the safety department* until she is released to come back to yard. Then when she would come back to the yard, she would be assigned her duties that day, whether it be laborer work or an upgrade to mobile equipment once she returned to the yard department." Vol II, Tr. 23-24. Powell thus claimed that during the time Ms. Otten was with MSHA, "she's not working for the yard department at that time because she's unavailable to do the duties. Yes, she is working basically for the safety department." Vol II, Tr. 24.

While creative, the Court holds that these attempts to create new administrative labels do not change the analysis. This is because if Ms. Otten accompanied an MSHA inspector on a given day and on that day, but for that walkaround role, she would have been in the yard and assuming there was a need for a mobile equipment operator on that day, she would be entitled to

the pay upgrade, regardless of the purely semantic attempt to claim that she was then in the employ of the safety department when accompanying the inspector. To the Court, this argument amounts to an admission that the CBA theory may not carry the day, and for that reason the pretense that she became part of the safety department was nothing more than an invention.

Further, as Powell then conceded, while claiming that Ms. Otten was working "basically for the safety department, [*s*]*he's actually working on behalf -- she's representing miners*." Vol II Tr. 24. Yet, Powell believed that the Mine Act provision providing that a representative of miners shall suffer no loss in pay, means no loss in pay but that doesn't mean they would be *upgraded* in pay. *Id.* at Tr. 25.

The flaw in the analysis, as the Court sees it, is that Ms. Otten's pay is to be measured by the pay she would have received during the time she was serving as a miners' rep. If she would've been working as a laborer during those times, she would receive the laborer pay rate, but if she would've been working as a mobile equipment operator during those times, that is the pay rate she would've received and to pay her the labor rate under those circumstances would certainly be a loss of pay by any definition.

Still another angle presented by the Respondent arose from Ex. J-4, at page 11, wherein it states that "[p]lant seniority shall be in effect at this location." Powell agreed that the provision says nothing else about seniority. From that, Respondent's Counsel asked if the provision provides that "just because someone's seniority they get an upgrade for a particular day." Vol II Tr. 41. Unsurprisingly, Powell answered it does not so provide. This led Counsel to ask how seniority works, which fed into Powell's, repeated response that seniority "is for bidding processes. It is for upgrading in pay, *as long as they're available for that*. And it's also for if two people put in for the same vacation, then the senior person would get first choice." *Id.* But the Court notes that this amounts to yet another run at the Respondent's claim that one must be *available* to perform the work and, if the person is engaged in a walk-around role, they are perforce not available. Vol II, Tr. 44-45 and Ex. J-4 at page 16.

Thus, the Respondent tried "Six ways from Sunday"[18] in its attempt to show that Ms. Otten was not entitled to the pay upgrade when acting as the miners' walkaround representative. Tr. 50-52 Accordingly, all of their attempted analogies, for example, bereavement leave, work

[18] The idiom "six ways from Sunday" means in every way possible, having done something completely, having addressed every alternative. Six ways from Sunday seems to have its origins in the middle eighteenth century as the phrases both ways from Sunday and two ways from Sunday. These earlier phrases referred to the eye condition known as strabismus, where someone's eyes do not focus in unison, giving the appearance of looking in two different directions. From there, the terms both ways from Sunday and two ways from Sunday gained the figurative meaning of looking at something askew. … the idiom carries the same meaning, which is in all ways possible." https://grammarist.com/idiom/six-ways-from-sunday/

in the storehouse, jury duty, etc., and their contention that one must in fact actually performing the higher classification work, fail, because the Mine Act specifically addresses the issue and provides that there is to be no loss of pay.

The Secretary then called Miss Heather Ames. She is presently the human resource and labor relations manager, but at the times in issue in this litigation she was the HR labor relations specialist, a position she held during March and April of 2020. Vol II, Tr. 56. In that role, she was involved in the decision to retract the Complainant's pay upgrade for the days named in the complaint. *Id*. at Tr. 58. Ames was aware that Ms. Otten had participated in an MSHA inspection during the week of March 23rd. *Id.* at Tr. 60. She also admitted that the Complainant Otten was the most senior laborer on duty at the times in issue in this matter. Vol II, Tr. 65-66. In retracting Ms. Otten's pay upgrade, that decision was based on one factor only, namely she determined that Ms. Otten was "unavailable." *Id*. at Tr. 63. She determined that Ms. Otten "was unavailable to perform the mobile equipment upgrade." *Id.* at Tr. 66. By using that term, Ames meant Otten "was not present … [meaning] [n]ot physically present in the department to be able to get on to that piece of mobile equipment." *Id.* However, Ames was fully aware of the reason Ms. Otten was not "available," stating "[b]ecause she was accompanying the MSHA [inspector] during an inspection." *Id*. at Tr. 67. And Ames stated that was the only reason she found Ms. Otten to be unavailable. *Id.* at Tr. 67-68. In making that decision, Ames instructed Miss Fujarski that Ms. Otten was not available to receive the upgrade in pay because she "was not eligible according to the contract," by which she meant the collective bargaining agreement. Vol II at Tr.68-69. Ames discussed the issue with several other personnel at the plant including Scott Allen, Terry Powell, Jose Gutierrez and Bob Pickering. Tr. 70-71. In retracting the pay rate, removing the upgrade, Otten's pay was reduced from $28.21 per hour to $25.05 per hour. Tr. 75.

Thus, Ames agreed with Powell that upgrading Otten for MSHA work is no different than her being on vacation or in the storehouse. Tr. 78. Ames also agreed that she told Mr. Pickering that Ms. Otten "chooses to work with MSHA." *Id.* She then added "I mean, she doesn't have to be a miners' rep. That's an elected position by the Union, but she -- she's not forced to be miners' rep, is what I mean." *Id.* Ames agreed that Ms. Otten was with MSHA all day on March 25, 2020. Tr. 80, Ex. J-7 (p). The same was true for March 26th. Tr. 81. Ames informed that she was relying upon the CBA , Article 6, Section 9, right of pay for temporary transfer and Article 14, Section 3, under health and safety. Tr. 82. Ames was the person who wrote the mine's position statement regarding Otten's complaint.[19] *Id.*

[19] A side note, ultimately of no consequence, Ames agreed that, initially, and when speaking with Darin Douglas, the Union President in April 2020, about the pay issue with Ms. Otten in this case, she admitted that she found no provision in the CBA that spoke to the situation where a miner, acting as a walk-around with an MSHA inspector, was not entitled to an upgrade. Tr. 85-87.

Ms. Ames did not acquit herself well in her remark regarding pay for miners accompanying an MSHA inspector, when she commented that "[n]o employees have been upgraded to higher hourly rate for being a miners' rep under the current CBA." Tr. 87-88 and Ex. J-3 at page 5. She affirmed that by that remark she "meant that none of those employees listed as miners' reps received upgrades or special rate for acting as a miners' rep under this current Collective Bargaining Agreement." Tr. 88. But a closer look at her remark reveals, in the Court's estimation, that it was disingenuous. This is because among the list of six miners who were miners' reps, which number included Ms. Otten, *not one* of the other five miners were yard personnel. *Id.* Further, she conceded that not one of the other five employees would even have been eligible for a mobile equipment upgrade. *Id.* As if that were not bad enough, Ames conceded that it was true that those "other five employees, a welder, an electrician, a maintenance electrical welding, and a crush operator, they are paid a higher rate than the laborer throughout the time that they were with MSHA. They were always paid a higher rate on the wage scale than a laborer." Tr. 88-89 and Ex P-7.

The Court may be naïve but considers it possible that some mine operators, rather than having an implicitly negative view towards miners' representatives, could embrace the practice, as such informed personnel might observe hazards to miners that might otherwise be overlooked and thereby make their operations safer, to their benefit and to the miners.

As with other employees called by the Respondent, Ames' position was in line with those management employees of the Respondent, that if Ms. Otten is with MSHA as a walkaround representative, she is deemed "not available." Vol II Tr. 92. Turning to Ex. J-4 at page 5, under Article 2, general, Section 1, the non-discrimination provision, Counsel for the Secretary noted that it provides that: "[a]ll provisions of this agreement shall be applied to all employees without regard to race, color, sex, religious creed, ancestry, disability, age or national origin, *or other status protected by applicable law*." Tr. 94. (emphasis added). Ames agreed that the designated miners' representative is a status protected by the Mine Act. *Id.*

The Secretary's questioning then turned to an investigation made by Mr. Pickering regarding potential harassment against Ms. Otten. Vol II Tr. 100 and Ex. P-9(a) through (i). In November 2019, Pickering was the HR manager and the exhibit just noted above reflects his notes regarding a meeting he held with Miss Otten, Mr. Clayton, the Union representative and a plant manager, Matt Helms. Vol II Tr. 99. Ames was present at the meeting too. The Court, employing a landscape and trees analogy, commented that the exhibit would not be outcome determinative to the core issue, but that it could have relevance to the broader picture. Vol II, Tr. 103.

Continuing with the theme of the defense, Counsel for the Respondent asked if Ames had ever reinstated any upgrades after they had been retracted. Ames answered that she had done that and that such changes were all based on the terms of the CBA.[20] Tr. 107. In what the reader will recognize as more of the same contention, Ames affirmed her view that seniority does *not* mean that a senior employee is entitled to a wage upgrade that a junior employee receives if that senior employee is *not available* to do the work of that higher classification. Tr. 118. Ames believed that paying Otten the upgrades while acting as the walkaround representative violated the CBA and that such an upgrade was no different than the inappropriate upgrades paid to Matson and Lucas when they were replacing ceiling tiles, which was considered to be carpentry work. Vol II Tr. 129-141. She maintained that the decision to retract the upgrades for all three was based solely on the Collective Bargaining Agreement. Vol II Tr.140.

Again, the Court must note its view that the Respondent's many revisitations of the same contention does not advance the persuasiveness of that contention. Numerosity, at least in terms of counting the number of times witnesses affirmed that the provisions of the CBA control the issue of the pay due, does not translate into prevailing on the issue. This is because of two fundamental things – the facts attendant to the work Ms. Otten would have performed on the days in issue in her complaint are not in dispute and the question, given those undisputed facts, is a legal determination of the no loss in pay provision when a miner is engaged in a walkaround with an MSHA inspector. Attempted analogies such as entitlement to pay upgrades when a miner is on jury duty, required MSHA training, bereavement and the like are off the mark, because the walkaround right is in a class by itself.

And though it could not be clearer from all the foregoing testimony from the Respondent, Ames affirmed that her response to the MSHA special investigator Jones, was made on behalf of the mine operator and it was "based on the language of the Collective Bargaining Agreement." Tr. 177. Amplifying its view, Ames expressed that Ms. Otten's pay upgrades were retracted not because she was with MSHA for inspections, but rather because the upgrades "didn't comply with the Collective Bargaining Agreement."[21] Tr. 179.

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[20] It should be noted that the Court finds that many issues raised by the parties were immaterial to the resolution of this case. One example involves whether Mr. Mundell improperly coded payroll matters. Tr. 109-110,129. This is a distraction from the issue before the Court. If the CBA and provisions within it, such as the zipper clause, rule the day, then Mundell, or anyone who coded a pay upgrade when the CBA did not allow such an upgrade would have made a coding error. However, if as the Court finds in this case, the walkaround, *no loss in pay*, provision encompasses pay one would have received but for that person accompanying an inspector during a walkaround, then the CBA takes a back seat to the statutory provision.

[21] In support of its position, Respondent pointed to Ms. Otten's filing of a grievance in connection with her pay upgrade issue. Tr. 181. Ex. R 4. The complainant filed her grievance

The Court then made a few comments about the conduct of the hearing through that point of the proceeding. First it noted that the procedural rules allow it to control unduly repetitious and cumulative evidence. It remarked that it had not invoked that authority up to that point, but that it had heard much repetitious testimony. Tr. 189. The Court then noted that, as there was testimony of pay being retracted from Ms. Otten which pay was then reinstated, those specific times would then be moot. In those instances, the parties' briefs should take note of these corrections. Tr. 190.

The Court also expressed that certain issues were, effectively, dead-ends. These included items such as Mr. Mundell's coding errors regarding pay, talk of jury duty, MSHA required training and bereavement leave, with the Court advising the parties that none of those were material to the issues in this case. The Court expressed that the labor grievance process is of the same non-material ilk. Vol II, Tr.191-192. Instead, the Court expressed that, at that point in the hearing, the critical issue is whether the CBA "reign[s] supreme vis-à-vis the Mine Act walk-around provision. Vol. II, Tr. 192.

Following the Court's remarks, testimony resumed. In an attempt to repair the adverse inferences raised earlier in the testimony, regarding whether she harbored a negative view of Ms. Otten, Ames agreed that in connection with her email references to Ms. Otten having so many issues with Terry Powell, she then conceded that Ms. Otten, as the Union steward, would be expected to have such issues because she represented fellow employees in such matters. Vol II Tr. 196-197. Further, Ames acknowledged that when she contacted Powell on the pay upgrade issue in this case, she knew that Powell did not get along with Ms. Otten. Vol II, Tr. 197. The Court, reflecting on this additional testimony, reconsidered its earlier view, and advised that further testimony on the matter could be of value. During this revisitation of the issue, Ames acknowledged that there was "turmoil" within the labor department and this was a factor in Powell's decision to leave that department. Vol II Tr. 210-211. Ames then admitted that the Powell's decision to leave that department was based mostly on his interactions with Ms. Otten. Tr. 211.

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on April 20, 2020. This was at a time before she made her complaint to MSHA. In her grievance, Otten asserted that removing her mobile equipment upgrades violated the CBA on the basis that the upgrades were a past practice. Tr. 182. It is recognized by the Court that past practices were eliminated under the CBA by virtue of the zipper clause. Tr. 183. Following a "second step" denial of the grievance, there was no third step or arbitration requested by the union. Tr. 187-188. The Court commented that, while Ex R 4 was admitted, that action did not imply that the Court was suggesting that it would be material to this decision. For the reasons within this decision, the Court finds that, like the CBA, the outcome of the grievance action also has no bearing on this decision.

Ms. Stacy Fujarski then testified.[22] She is a payroll specialist at Continental Cement Company. Vol II Tr.219. Part of her job involves entering the proper coding for payroll processing. In performing that task, she endeavors to have the timecards correspond with the contract. Tr. 221. If she sees a possible error, she contacts a member of management to resolve such questions. Tr. 222. Though Ms. Fujarski was a pleasant person, who explained her role in ensuring that timecards are correct, the Court finds that none of her testimony is of any value to the issues before this Court.[23] Tr. 224-233.

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[22] Though out of the anticipated order of testimony, an accommodation was made between the parties so that the Respondent could call Ms. Stacy Fujarski to testify. Vol II Tr. 218.

[23] Worn out, figuratively speaking, from witnesses uttering the same contention, the Court inquired of Respondent's Counsel: "So what's your point, counsel? And you're going back to … adhering to the Respondent's view of what the CBA required, and through this payroll process you are correcting it to reduce the pay from what was originally incorrectly listed as an enhanced pay. Am I -- am I correct about that? Vol. II, Tr. 233.

Counsel for Respondent, Attorney Chibnall, responded: "*You're correct*, Your Honor. This was mostly for … explanatory purposes, … to explain how the process worked and what it looked like for Your Honor's convenience, so that when you looked at these documents, or if you did, you'd understand what they meant." Vol II, Tr. 234. (emphasis added).

The Court then expressed about the lack of value to this testimony, stating: "So isn't this surplusage? I mean, …no one is really challenging that there were mistakes from the Company's perspective in terms of Miss Otten being paid too much. And apparently some instances when there was a correction made and pay was to be increased because she was available; that is, she was not working for an MSHA inspector doing a walk-around. These records just show how the Company corrected it one way or the other, right? But it doesn't change the philosophy. The [Respondent's] philosophy is you're not available, you don't get the enhanced pay because you're not available to operate mobile equipment at that time. Why? Because you were with an MSHA inspector." Vol II Tr. 235-236.

Attorney Chibnall responded: "And that's correct, Your Honor. And the purpose of Miss Fujarski's testimony here was mostly explanatory for the exhibit itself. It's already been admitted. But I also had questions regarding the -- the technical piece of it and how to actually perform that operation, which I think is somewhat relevant here."

The Court responded that it will "be interested to hear how it's relevant, but go ahead." Tr. 236. However, upon review of Transcript pages 236-244, with the last page being the end of Ms. Fujarski's testimony, the Court concludes that the testimony did not add anything of value to the issues in this case.

The Secretary, then called the Complainant, Ms. Tara Lynn Otten. Tr. 246. At the time of the events in issue, March and April 2020, Otten was a laborer at the mine, but around February 2021 she became a mobile equipment operator.[24] *Id.* She has been a miners' representative since May 2018. Tr. 247. Otten capsulized the essence of her complaint: "The discriminatory action was that my money was retracted. I suffered a loss of wages, loss of pay, for performing my protected act of walking with MSHA." Tr. 253. As she expressed in her complaint, she "would like to have the backpay and continue to receive the upgrade as I always have when acting as a miners' rep." By the term "backpay," Otten meant the difference between labor rate and the mobile equipment upgrade that was retracted. Tr. 254-255. It was also Otten's belief that "this entire thing is an attempt to get [her] to step down as a miners' rep."[25] Tr. 256.

[24] This change in Ms. Otten's job classification, from laborer to mobile equipment operator, does not moot the issue of whether she was entitled to the upgraded pay level for the dates identified in this case, as they were before her job change. Further, the broader issue before the Court has not become moot as a consequence of Ms. Otten's new job classification, because the mine would still take the same position regarding pay upgrades for any laborer who would find himself in a similar situation. Thus, the Respondent, through Ames, stated that it would still deny a pay upgrade to anyone else in a situation similar to Otten's in this litigation. Vol II Tr. 206-207.

[25] While not critical to the Court's determination of the walkaround issue in this matter, there is some useful background which at least Ms. Otten believed precipitated this dispute. According to her, before she filed the complaint in issue, "going back to November of 2019, we had started an inspection that … actually started in October. It was a terrible inspection. I mean, it was one of our worst. And at that time, I had filed a complaint with MSHA, and it was against Crystal Hudak at that time. And I had overheard her -- I had given focus notes, which was our safety -- at joint safety committee in their Focus safety meetings. I had given notes to the MSHA inspectors." Vol. II, Tr. 256. The notes were made by Otten whenever an employee would raise a safety issue to her, but other miners in the focus group made notes when such issues were brought to them. Otten informed that many of these issues involved things she had personally witnessed. Tr. 266. All of these notes were given by Otten to MSHA. Tr. 265. They had asked [her] for [the] notes. … [a]nd then [she] had found out that [Ms. Crystal Hudak] was going around having secret meetings, or closed-door meetings with supervisors regarding the fact that [she, Ms. Otten] gave these notes to MSHA." Tr. 256-257. Otten knew about the "secret" meetings because she overheard Hudak speaking with another supervisor, Dean Welder. At that time Otten heard Hudak speaking, saying, "So Tara is giving focus notes to MSHA." Tr. 257. Having overheard that, Otten "immediately felt as if [her] rights were being violated as a miners' rep." *Id.* Though she felt constrained not to open the door of the closed meeting, not knowing what else to do, she did speak from outside the door, informing "Crystal [Hudak], I can hear everything you're saying." Tr. 257. Following that event, Otten filed a complaint to MSHA about it. She did this by calling the MSHA hotline. This complaint was made *prior* to the event in issue. This event, occurring on November 4, 2019, was not in the distant past to the matter in

At the time of her complaint, when Ms. Otten worked as a laborer in the yard, she informed that generally she operated mobile equipment nearly every day, most often running a Bobcat or skid steer. Tr. 268. Otten identified Ex. P 11 as the document "representing the times and the hours, the dates that [she] walked with MSHA, and where [she] was not given the mobile upgrade, that a junior laborer was on a piece of mobile equipment." Tr. 269. Working with Counsel for the Secretary, Otten prepared the document, which is a summary of dates and times she was denied the mobile equipment operator pay level because she was accompanying an MSHA inspector as the miners' rep. For example, per that exhibit, Otten stated that for March 24, 2020, she contends that $44.24 was due her that day but was instead paid at the labor rate. Tr. 270-277. It should be noted that there is no genuine dispute about the mobile equipment operator pay rates on the days in issue, nor that Ms. Otten was accompanying an MSHA inspector during the days and times identified in Ex P 11.

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this case. Tr 258. Otten also brought the incident to the attention of her Union representative, Wil Clayton and also to Heather Ames. Tr. 259. Ex. J 2. For this earlier incident, Otten was also interviewed by Investigator Jones. During that interview, Otten informed that she told the investigator of other incidents, all preceding the event in this case. Tr. 262. Otten believed that the operator was frustrated after the MSHA inspection, because, as one example, Terry Powell kept mentioning the D orders that MSHA issued with his name on the orders. Tr. 262-263. Powell also referenced having "to go to MSHA court" about the D orders. Tr. 263. One of those orders emanated out of messes in the yard department, the department where Otten then worked as a laborer. Tr. 264. Subsequently, Otten left the safety focus group. This occurred on February 11, 2020 when she was informed by Tim Schlosser, with corporate safety, that in the future all such notes would have to be turned over to corporate. Tr. 267. As that didn't sit well with Otten, she left the focus group in March or April of that year. *Id*. As Otten put it, upon being told about the requirement to turn over the notes, at the end of the meeting she "thanked everyone for the opportunity, I folded up my notebook, I handed it to Crystal Hudak. I told them that I did not think that our safety program was working as they intended and I stepped down from Focus. But I still remained a miners' rep." *Id.*

Although, the incidents recited above are not critical to, nor a necessary predicate to Ms. Otten's discrimination claim, the Court concludes that, contextually, they are important to a fuller understanding of this matter. Clearly, based on Ms. Otten's credible testimony, Continental was not pleased with her proactive approach to mine safety including her courage to inform MSHA of her safety concerns. It is also noted that Ms. Hudak was disciplined as a result of Ms. Otten's complaint regarding that incident. Vol II, Tr. 300. Otten did not agree with the suggestion by Counsel for the Respondent that the incident with Hudak had no connection with the Complaint in this matter. It was her view that at the time involving the Hudak matter she was unaware of "all of [Bob Pickering's] investigation" and therefore did not know at that time that Hudak had "talked to all of these supervisors, had given them names, had insinuated [that Otten] was throwing people under the bus." Vol. II, Tr. 301.

Again, the only genuine dispute in this matter is whether Ms. Otten should've been paid at the mobile equipment operator rate or the laborer rate.[26] In response to the Court's inquiry, Otten stated that Ex. P 11 reflects the entirety of her monetary damages. Tr. 278. To be clear, Otten is not and has not contended that she was entitled to the mobile equipment operator pay rate *every time* she accompanied an MSHA inspector. Rather, her claimed damages were limited to "entitle[ment] to the upgrades when [she] walked with MSHA if a junior laborer was on a piece of mobile equipment. It was not every time. It wasn't every time I got called out. It was only if a junior employee was on a piece of mobile equipment, then I was entitled."[27] Vol II, Tr. 279-280.

The third day of testimony began with the Respondent calling Darin Douglas. He is employed by Continental Cement and is presently the yard supervisor, a position he has been in for the previous nine months. Vol III, Tr. 15. He then stated how upgrades work for temporary work performed by laborers, including as in this dispute, the pay a laborer receives when assigned to operate mobile equipment. With no disrespect by the Court, Douglas' testimony was cumulative, an attempt at reinforcing the Respondent's position as to the procedure for laborer pay upgrades when such individuals operate mobile equipment.[28] Vol III, Tr. 16-18.

[26] The amount calculated by Ms. Otten, per Ex. P 11, also reflects her 401K match. Under that when miners like her "contribute 4 percent into [the mine's] 401K, the Company will match 100 percent of that 4 precent. And [she does] contribute that amount. And so that is the 4 percent of the total amount that [she] feels [she] was owed. That $14.94 is 4 percent of all of that." Tr. 277, and Ex. P 11.

[27] To avoid potential confusion for those reviewing this record and Ex. P 11, the miners received a pay raise and the difference between the two rates is also reflected in that exhibit. Again, there is no genuine dispute about the figures in this case; the dispute is over the pay rate due to miners' representatives under the circumstances identified in Otten's Complaint.

[28] For example, referring to the CBA, Douglas, who informed that he was involved in the negotiation of that agreement, expressed his view that "[t]he miner that walks around for the safety of the Union should be paid their normal wage rate. In this case, Miss Otten was at JC1, which is [the] labor rate. I've been there 26 years and I have never heard of anybody being upgraded when they walked around with MSHA." Vol. III, Tr. 21. Upon cross-examination, Douglas expressed that Ms. Otten had no case. In support of his view, he pointed to page 26 of the contract, asserting that it states "that there should not be an upgrade to walk around with MSHA." Vol III Tr. 27. Joint Exhibit 4 at page 28.

Analysis

Case law regarding the Mine Act's Walkaround Provision

The Court endeavored to research relevant cases construing the walkaround provisions under the Mine Act. Those holdings are referenced here.

In *Magma Copper,* 1 FMSHRC 1948, (Dec. 1979), *aff'd* 645 F.2d 694 (9th Cir., May 18, 1981), the Commission held that "one miners' representative *in each* inspection party must be paid for time spent accompanying an inspector who is engaged in an inspection of the mine 'in its entirety' under 103(a) of the Federal Mine Safety and Health Act of 1977." *Id.* The language employed by the Commission is instructive, as it remarked that "[w]alkaround pay was designed to improve the thoroughness of mine inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states that the purpose of the right to accompany inspectors is to aid the inspection. The Senate committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a 'full' inspection, and 'enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-617 (1978) ["1977 Legis. Hist."]. The purpose of the right to walkaround pay granted by section 103(f) is also clear: *to encourage miners to exercise their right to accompany inspectors*." *Id.* at 1951-1952, (emphasis added).

It was Congress' judgment that a failure to pay miners' representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. If only one of the inspectors would be assured of receiving the assistance of a miners' representative when conducting a 103(a) inspection of the mine, only a part of the mine would be likely to receive the kind of inspection that Congress expected the walkaround pay right to help assure. *Id.* at 1952. (emphasis added).

The Court considers the language, as italicized above, to be useful in this matter, because if the Respondent's view were adopted, reducing the pay of the walkaround representative from the amount of pay that representative would have received during that time accompanying the inspector "*would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners*."

In *Quarto Mining*, 12 FMSHRC 932 (May 1990), the Commission upheld the right to walkaround pay where a mine operator's employee accompanied an inspector, even though the focus of the inspection arose as a result of safety hazards associated with activity of an independent contractor at the site. As instructive here, the Commission noted the 9th Circuit's decision affirming its holding in *Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), referencing that Court's remark that "[t]he walkaround pay provision and the participation right are both aimed at the protection of the health and safety of miners - the single overriding purpose of the legislation." *Id.* at 698.

The Commission then continued "[a]s the Senate Committee that by-and-large drafted the Mine Act stated, paid participation in inspections by the miners' representative 'will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness.' Senate Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 616-17 (1978). In addition, Congress recognized that paid participation by representatives of miners would, because of the representatives' particular knowledge of the conditions at the mine, make the inspection 'much more thorough.' Thus, the right of paid participation by the miners' representative provides MSHA's inspectors needed familiarity with the specific working conditions in a particular mine." *Quarto Mining* at 937.

The Commission's decision in *Secretary of Labor on behalf of Greathouse v. Monongalia Coal Co.*, 40 FMSHRC 679 (June 2018), is also believed to be of value. Though it involved bonus plans at the mine, there was testimony from miners' representatives describing "how the bonus plans negatively affected miners' willingness to exercise their protected rights (such as the right to report injuries to management, to report safety hazards to management and MSHA, *and to exercise their walkaround rights*)." *Id*. at 703. (emphasis added). The point being that actions by a mine operator, in *Monongalia*, a bonus plan, and by comparison in this instance, denial of the pay that a miner would have received on a particular day, can impact participation in protected rights, here the walkaround right.

Consolidation Coal, 19 FMSHRC 1529, (Sept. 1997), was a discrimination proceeding under the Mine Act, wherein the issue was whether the administrative law judge properly found that the mine operator violated section 105(c)(1) of the Mine Act when it transferred two mine representatives from their positions as "scooter barn" mechanics to positions as underground mechanics. Both miners were told that their transfer, ostensibly brought about because of inadequate transportation and mantrip availability and the decision to have the repair barn operating on a 24-hour basis, could be avoided if they stopped their walkaround activities. The Commission affirmed the violation, noting that a link had been established between the miners' exercise of their walkaround rights and the decision to transfer them, and rejecting the claim that their absences from the repair barn was the motivating reason for the action. The Commission also took note that, in another case, it had recognized a link between walkaround rights and absenteeism, expressing that "in enacting the walkaround right, Congress recognized 'that an

operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights.'" *Id*. at 1536, citing *Secretary obo of Labor on behalf of Truex v. Consolidation Coal*., 8 FMSHRC 1293 (September 1986).

An earlier *Consolidation Coal* case, 16 FMSHRC 713 (April 1994), held that, even where an operator has a good faith, reasonable belief that the area to be inspected is too dangerous to permit a miner from accompanying the inspector during a walkaround, the operator may not restrict the walkaround right. As enlightening here, the Commission, in recounting the history of the walkaround right, noted "that the walkaround right provided in section 103(f) existed under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). That provision stated: At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection. 30 U.S.C. § 813(h) (1976) (amended 1977) *Id*. at 717, (underscoring in original).

The Commission went on to state that "[i]n enacting the Mine Act, Congress continued the Coal Act's broad application of the walkaround right and expanded rights incident to it. The Conference Report on S.717, the Senate's version of the bill, explained: The conference substitute expands the concept of miners' participation in inspections by authorizing miners' representatives to participate not only in the actual inspection of a mine, but also in any pre- or post-inspection conferences held at that mine. H.R. Conf. Rep. on S. 717, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1361 (1978). In addition to adding a right of the miners' representative to participate in inspection conferences, the Mine Act added a compensation provision in section 103(f). The Mine Act did not restrict the types of inspections to which the walkaround right applies.

The only qualification to the walkaround right in section 103(f) is that it is subject to regulations issued by the Secretary. The Secretary's regulations have not limited the walkaround right in the manner urged by Consol. Moreover, although Congress recognized that a walkaround representative could be exposed to danger, (the inspections enumerated in section 103(a) include inspections to determine whether an imminent danger exists as well as inspections of especially hazardous conditions), it did not curtail the walkaround right in dangerous situations. Thus, upon 'employing traditional tools of statutory construction, including text, structure and legislative history,' Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989); Chevron at 842-43, we conclude that Congressional intent is clear on this issue. Accordingly, we hold that section 103(f) precludes denying the walkaround right on the basis of an operator's good faith, reasonable belief that the area to be inspected is too dangerous to be entered.

The right of a miners' representative to accompany the inspector on all section 103 inspections has been consistently recognized by the Commission and the courts. It has been uniformly held that the walkaround right includes the right to accompany the inspector during section 103(i) "spot inspections" which, significantly, occur in mines that liberate excessive quantities of explosive gases or that present some other especially hazardous condition. …" 16 FMSHRC 713, 717-719.

The question for the Commission in *Magma Copper Co*, 1 FMSHRC 1948 (1979), was "whether a mine operator [was] required to pay only one representative of miners for time spent accompanying an inspector when the inspection is divided into two or more parties to simultaneously inspect different parts of a mine," with the Commission reversing the administrative law judge's determination that only one representative could be paid, holding instead that "one miners' representative in each inspection party must be paid for time spent accompanying an inspector who is engaged in an inspection of the mine "in its entirety" under 103(a) of the Federal Mine Safety and Health Act of 1977." *Id*.

Employing words that this Court considers to be of value in this proceeding, the Commission informed "[w]e do not think it is enough to rely, as the administrative law judge did, only upon the literal language of section 103(f). The literal words of a statute may not be the best guide to the legislative purpose when they appear to conflict with the congressional purpose for creating a right or produce a result that is illogical." *Id.* at 1950.

Expounding on the importance of this, *the Commission continued, "[i]t was Congress' judgment that a failure to pay miners' representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners.* If only one of the inspectors would be assured of receiving the assistance of a miners' representative when conducting a 103(a) inspection of the mine, only a part of the mine would be likely to receive the kind of inspection that Congress expected the walkaround pay right to help assure." *Id.* at 1952. (emphasis added).

Utilizing those words, in this Court's judgment, given that the Mine Act is a remedial statute, and taking into account the Commission's remarks, as italicized above, it would make sense that, as a matter of construction, the Commission's remarks be read as "it was Congress' judgment that a failure to *fully* pay miners' representatives to accompany inspectors would discourage miners from exercising their walkaround rights." The logic of this interpretation, at least to this Court, is inescapable, as paying less than the miner would have received would discourage miners from exercising their walkaround rights.

Perhaps the most instructive words regarding the 'no loss in pay' provision appears in *Monterey Coal Co.*, 743 F.2d 589 (Seventh Cir. Sept. 1984). There, the Court of Appeals for the Seventh Circuit remarked that "[i]n describing the changes of the new Act, the Senate and conference reports on the 1977 Act pointed out the new walkaround pay provisions and stressed the importance of those pay provisions in ensuring miner participation in safety matters. S. Rep. No. 181, 95th Cong., 1st Sess. 28–29, 1977 U.S. Code Cong. & Admin. News 3401, *reprinted in* Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 616–17 (Comm. Print 1978) [hereinafter "Legislative History"]; S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Legislative History at 1323." *Id.* at 593. And "[t]he floor debate in the Senate on a proposed floor amendment to eliminate the walkaround pay provisions also emphasized the need

for walkaround pay to provide for effective miner participation in inspections. 123 Cong. Rec. 20019–20 (1977) (remarks of Senators Javits and Helms), *reprinted in* Legislative History at 1053–56. *Id.* Thus, the mine operator sought to "bifurcate the participation rights and the walkaround pay rights granted by section 103(f)." *Id.* at 594.

The Seventh Circuit noted that the conference committee expressed that "the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-conferences, **at no loss of pay** *only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety,* including pre- and post-inspection conferences." *Id.* (*italics* in original, bold added). *Id.*

Of significance in the Seventh Circuit's analysis, it pointed to "[t]he Senate committee report [which] stressed the importance of involving miners in the inspection process in order both to improve the quality of inspections and to enhance miners' safety and health awareness. S.Rep. No. 181, 95th Cong., 1st Sess. 28–29 (1977), *reprinted in* Legislative History at 616–17. The committee said the bill provided for walkaround pay to encourage miner participation. "[t]o provide **for other than full compensation** would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.'" *Id.* at 596-597. (emphasis added).

Finally, it is noted that an administrative law judge faced with a similar issue regarding the compensation due during a walkaround, observed "[i]n commenting on the provisions of section 103(f), the Senate Human Resources Committee in its report on Senate Bill 717, the bill which was the basis for the 1977 Act, stated that: "to encourage such miner participation, [in walkaround activities] it is the committee's intention that the miner that participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties." Senate Report No. 181, 95th Congress, 1st Session reprinted in U.S. Code Congressional and Administrative News 3428-3429 (1977). Within this framework it is clear that if [the Complainant] suffered a loss of pay as a result of his statutorily protected walkaround activities then he suffered discrimination under section 105(c)(1)." *Sec. obo Scott v. Consolidation Coal,* 2 FMSHRC 1056, 1057 (May 5, 1980).

There, as in this case, the mine operator was contending that, per a wage agreement, the walkaround representative was due less than the pay grade one would receive for performing overburden removal work.

The judge held that "[i]n order to assure that [the miners' representative] is not unfairly penalized for having performed his duties as a representative of miners, I find that he must be compensated in an amount equivalent to the grade 5 rate for the maximum time worked in that mine by any other single employee in the capacity of a grade 5 scraper operator during the time [the Complainant] was engaged in his walkaround activities. To provide him anything less would discourage his participation in these important functions, contrary to law and the clear intent of Congress. Since the evidence indicates that at least one other scraper operator employed at this mine performed the grade 5 work during the entire 21-1/4-hour period at issue, [the miners'

representative] is entitled to the grade 5 pay differential for the entire period." *Id.* at 1058.

Thus, at least to this Court, given the many broad interpretations by the Commission and the federal courts of the 103(f) walkaround provision, it would be inconsistent to find that a miners' representative could be, literally, shortchanged by being paid less than the representative would have received but for being engaged in the walkaround.

Must a 103(f) walkaround, 'no loss of pay,' violation only be established through application of the *Pasula-Robinette* framework?

The Court believes that while a 103(f) walkaround, no loss of pay, violation may often be established through application of the *Pasula-Robinette* framework, it is not the only avenue for such relief, especially where a slavish application of that framework would work an illogical result, at odds with the statute. Thus, because *Pasula-Robinette* is not a one-size-fits-all formula, it should not be viewed as the sole means for achieving relief from discrimination. In this instance, the Court applies an alternative analysis approach to this discrimination action, with the view that both are appropriate to employ.

It is true that the argument section of the Secretary's Post-hearing brief, after first noting the text of Section 105(c), begins with a discussion of the *Pasula-Robinette* framework, wherein it is noted that the Secretary establishes a *prima facie* case of discrimination when he proves by a preponderance of the evidence that the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by that protected activity.

Insisting on this 3rd element in *all* discrimination claims would ignore the broader statutory language of Section 105(c) addressing discrimination, which language permits an action upon showing the first two elements.

Nevertheless, if the analysis of an alleged section 103(f) no loss of pay violation must be wedded to *Pasula-Robinette*, the Court still finds that the Secretary established such a case. And this remains true upon application of both the rebuttal and affirmative defense features of *Pasula-Robinette*.

An alternative avenue to provide relief from discrimination where a statutory right is involved

However, the Court believes that making *Pasula-Robinette* the only avenue for redress against discrimination results in a cramped reading of discrimination claims, insisting as it were that a square peg must be inserted into a round hole, and ignores a significant and distinct part of Section 105(c) of the Mine Act. Read, without distorting the words in that section, but focusing on a separate feature within that provision, the Court believes such a reading demonstrates that *Pasula-Robinette* need not be the exclusive analysis for discrimination claims.

The following, **bold text added**, text of Section 105(c) shows this to be true.

> **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 … in any coal or other mine subject to this chapter … **because of the exercise by such miner**, representative of miners … on behalf of himself or others **of any statutory right afforded by this chapter**.

30 U.S.C. §815 (c)

Another, perhaps clearer, way to express this, as particularly apt to the discrimination claim here would thus be expressed as:

> **No person shall in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner because of the exercise by such miner of any statutory right afforded by this chapter**.

This focus on particular words within the provision does not work any distortion of it. And, so read, the Court finds that the Respondent violated Ms. Otten's *statutory right* to accompany the MSHA inspector as the miners' representative by *interfering* with the exercise of that right by imposing a loss of pay upon her.

And while it is true that the Commission has applied the *Pasula-Robinette* framework in Section 103(f) walkaround cases, it has not invoked it each time. For example, in *Quarto Mining*, 12 FMSHRC 932 (May 1990), referred to above, the judge, in finding that the operator denied the miners' rep the opportunity to participate in an inspection of the mine without a loss of pay, made no reference to *Pasula* in his decision, 11 FMSHRC 523 (April 6, 1989), nor did the Commission's in affirming it.

When this focus on language within Section 105(c) is applied to the walkaround right, per Section 103(f), the applicable language within that provision, establishing the statutory right, plainly provides that the right is to be exercised so that the walkaround representative *does not suffer any loss of pay*. Undeniably, Ms. Otten suffered a loss of pay per the dates identified in her Complaint.

Thus, the Court finds as fact, that "Otten was entitled to the mobile equipment hourly wage upgrade while she performed walkaround duties on March 24-26 and March 31, 2020, because she would have operated mobile equipment if not for the MSHA inspection." Sec. Brief at 26. Accordingly, the Court also finds that "to be fully compensated on March 24, 25, 26 and 31, Otten needed to receive the mobile equipment hourly rate of $28.21, not the laborer hourly rate of $25.05." *Id* at 27. Further, as set forth below, Ms. Otten is also entitled to reimbursement for the other dates, as established by the Secretary and through the joint stipulations, when she incurred

additional losses of pay. Equally important, and speaking to Congress' clearly expressed intention in establishing the Section 103(f) right, the Court finds that "Continental discouraged [Ms. Otten's] participation in MSHA inspections and unfairly penalized her for protected activity, contrary to Congressional intent." *Id.*

The Court also finds that "[b]y refusing to pay Otten the mobile equipment upgrades, Continental took an action that could dissuade a reasonable employee from participating in an MSHA inspection [and that] [w]hen faced with the choice of accompanying MSHA on an inspection of unpredictable duration or receiving $3.16 more per hour (the difference between the laborer and mobile equipment rates), a reasonable miners' representative could be dissuaded from exercising the[] statutory walk-around rights. The Act does not require a miners' representative to have to make this choice." *Id*. at 28.

Given the above analysis, the Court does not believe that the Secretary *must* show, per the *Pasula-Robinette* framework, that Continental's refusal to pay Otten the wage upgrades was motivated by Otten's walkaround activities. That is to say, *Pasula-Robinette* is not the exclusive means to establish discrimination because Section 105(c) is not so restricted. Simply stated, showing an unjustified loss of pay, and thereby violating the statutory command of Section 103(f) is sufficient under the plain language of Section 105(c) to establish discrimination.

Application of the Pasula-Robinette framework

Under the *Pasula-Robinette* framework the Court has found direct evidence, through the testimony of Respondent's witnesses, Ames, and Powell, that the adverse action, loss of pay, was motivated by Ms. Otten's protected activity as miners' representative, to the end of having her forego her salutary participation, providing keen eyes when accompanying MSHA inspectors, and making her choose between such participation or suffer a loss of pay. Clearly, the record establishes that the adverse action was motivated by safety-advocate Otten's protected activity.

In terms of any claimed affirmative defense, the Respondent presented no unprotected activity to justify that the loss of pay was motivated by unprotected activity. This is because the Court has determined that the CBA does not override Congress' walkaround no loss of pay provision.[29] Relying upon the CBA could conceivably amount to unprotected activity, but not when paired with a deprivation of the walkaround no loss of pay provision, as happened here. Since there was no cognizable unprotected activity, one does not proceed to the second step of the

[29] Because the Court has determined that the CBA does not override the statutory protection and command that miners' representatives are not to incur a loss of pay when serving in that capacity, the Court will not engage with the claim that the CBA prevents the Respondent from paying the mobile equipment operator rate in this instance, nor, because it is unnecessary to do so, as it would elevate the stature of the CBA, will it delve into the Secretary's assertion that the Respondent's interpretation of the CBA conflicts with that agreement's terms.

affirmative defense – that the operator would have taken the adverse action against the miner based on the unprotected activity alone.[30]

Comments Regarding the Parties' Post-Hearing Briefs[31]

The Respondent contends that no adverse action was established. This argument lacks merit. If this were merely a pay dispute involving only the CBA, then arguably the Respondent could be correct. However it is not such a matter; Ms. Otten's pay was inextricably tied to the exercise of the walkaround provision. As the designated walkaround representative, the Court has determined that, as a matter of law, she was entitled to perform that valuable safety related function *with no loss of pay.* This is what the statutory provision expressly provides. Such a deprivation of pay constitutes an adverse action. Whether the Respondent was motivated to take the adverse action because Ms. Otten was acting as the miners' representative, does not matter in a case such as this because she was exercising the statutory right to perform such assistance and she suffered a loss of pay by the Respondent's actions.

To be clear, *in addition to and separate from* the previous remark, the Court also finds that in fact the Respondent was motivated in part by Ms. Otten's exercise of that right, because she was a safety nuisance in the eyes of the Respondent. Because the walkaround right is in a class by itself, the claim that the CBA negates that clear right and with it the provision that the

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[30] Thus the Court agrees with the Secretary that the "mixed motive defense does not apply because Otten did not engage in any unprotected activity that would justify the adverse action." Sec. Br. at 36. Ames admitted that the denial of the pay upgrade was based on the theory that Ms. Otten was 'unavailable' to run the mobile equipment, but her 'unavailability' was solely attributable to her serving as the miners' representative and the foundation for all of that was that the CBA dictated the loss of pay provision. In short, the Court agrees with the Secretary's remark that "Continental cannot use the CBA to take away a right provided to miners under the Act." *Id*. at 37 (italics omitted). As the Secretary has noted, the Commission held in *Sec'y v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, (July 1997) ("*Akzo*") that "the judge should not have looked to the collective bargaining agreement in fashioning his relief under section 105(c). The Commission has stated that it does not 'decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights.' *Mullins v. Beth-Elkhorn Coal Corp*., 9 FMSHRC 891, 899 (May 1987) (citing *Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp*., 3 FMSHRC 1175, 1179 (May 1981))." *Akzo* at 1259 and Sec's Br. at 37-38.

[31] Although the Court read and considered the entirety of the parties' post-hearing briefs, this section comments upon particular contentions raised in those briefs, with the Court concluding that other contentions were implicitly addressed in the findings of fact and/or in the case law discussion. As one example, the Respondent's assertion that any suggestion of animus towards Ms. Otten was negated by Ms. Ames' "independent investigation," needs no further comment, as the issue was addressed earlier by the Court. Respondent's Reply at 9.

right applies with no loss of pay attendant to it, the idea that the CBA can, Zombie fashion, be resurrected as an affirmative defense is likewise a non-starter.[32]

The Secretary's Reply Brief

The Court takes note of and agrees with the Secretary's remark that "Continental concedes, in its Proposed Findings of Fact 1, that Otten would have been presented the

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[32] Respondent cites *St. Joe Zinc Company*, 2 FMSHRC 3594, 3600 (Oct. 28, 1980) for the proposition that the "Mine Act only requires miners receive their regular rate of pay." R's Br. at 10. As a decision by an administrative law judge, it has no precedential impact but, beyond that, the case is inapt. Further, Respondent misreads that decision because, in fact, it supports the Court's determination in this matter. In *St. Joe Zinc,* the miners' representative, who was an oiler-tool nipper, cleaned toilets as part of that job. When he accompanied an MSHA inspector as a miners' representative, the mine operator did not pay him for the toilet cleaner part of his job because he did not clean toilets during that week. The operator maintained that it would be unfair to require it to pay the miner for housekeeping duties he not actually perform.

The judge in *St. Joe Zinc,* explicitly stated that "[a]t issue in this litigation is the proper construction of the requirement contained in section 103(f), 30 U.S.C. § 813(f), of the Act that a designated walkaround representative "shall suffer no loss of pay during the period of his participation in the inspection." *Id*. at 3597. The operator in *St. Joe Zinc* looked to *another* decision, *Consolidation Coal*, 2 FMSHRC 1056 (May 5, 1980), which decision has been discussed above, for the proposition that, *per a wage agreement*, *the higher rate need only be awarded when the specified work is actually performed*. That argument should sound familiar to the reader. The judge in *Consolidation Coal* found that the miner was unfairly penalized for exercising his walkaround rights, and that the failure to compensate him at the rate applicable to the duties he would otherwise have performed was an act of discrimination within the meaning of section 105(c) of the Act.

Because the *St. Joe Zinc* decision referred to *Consolidation Coal*, this could be confusing to the reader, and therefore it is important to understand that the judge in *St. Joe Zinc* rejected the operator's claim, reasoning that the miner's toilet cleaning duties "were performed as part of that [miner's] regular 40-hour work week" and, construing the provision in issue, the judge in *St. Joe Zinc* stated "[t]hat the requirement of section 103(f) that miners exercising their walkaround rights 'shall suffer no loss of pay' means they are to receive their customary and usual compensation [as] made abundantly clear in the legislative history." *Id.* at 3600. Thus, the judge in *St. Joe Zinc* held that "[i]f nonperformance of [the miner's] maintenance duties is excused by the walkaround provision, then nonperformance of his sanitation duties must likewise be excused." *Id*. 3599-3600. The Court applies the same logic. There is no dispute that but for serving her fellow miners as the miners' representative, Ms. Otten would have been operating mobile equipment on the dates she identified in this litigation and the parties have agreed to the amounts she would have been entitled to receive on those dates, subject to this Court's determination of the proper construction of the no loss in pay provision for walkaround representatives.

opportunity to operate mobile equipment for 8 hours on the[ ] days [in issue]" and that "[i]t was established at trial [that] Otten would have performed mobile equipment operator work if she had not spent time on walkaround activities."[33] Sec. Reply at 2.

As expressed by the Court in this decision, the *Pasula-Robinette* framework[34]need not be applied slavishly in every discrimination case. The walkaround provision of Section 103(f) is such an instance because demanding its use could lead to irrational results.[35] Thus, the Court agrees with the Secretary's observation that "direct evidence of discrimination [was established] by Continental's failure to pay Otten the wage she would have received on the days of the walkaround because she participated in the walkaround." Sec. Reply at 5. As the Secretary concisely expressed it, "[w]hat this boils down to is, the only reason Continental deemed Otten ineligible was because she accompanied MSHA instead of operating mobile equipment; this was a plainly impermissible and discriminatory reason to deny wage upgrades."[36] *Id.*

The Court agrees that concepts like "mixed motives" are also inapt in this instance.[37] Thus, the Court subscribes to the view that Continental violated section 103(f) because it allowed

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[33] Though a matter of semantics, while it is undisputed that Ms. Otten would have been paid as a mobile equipment operator on the days in issue, the Court is reluctant to employ the phrase "regular rate of pay," the key is that Otten suffered a "loss of pay" on those dates.

[34] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub. nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

[35] "The Commission has adhered to the principle that when interpreting the Mine Act and safety standards, constructions that lead to absurd results must be avoided. [citing, as one example] *Central Sand and Gravel Co.,* 23 FMSHRC 250, 254 (Mar. 2001)," *Secretary of Labor on behalf of Greathouse v. Monongalia Coal Co.*, 40 FMSHRC 679, 689 (June 2018). Constructions which lead to absurd results are rejected. *Consolidation Coal*, 15 FMSHRC 1555, 1557 (Aug. 1993)

[36] Although the Secretary asserts that Ms. Ames acted *intentionally* in denying Ms. Otten's upgrades, the Court believes that, whatever her intent, misguided or malevolent, it does not matter; the loss of pay Ms. Otten incurred in these circumstances violated Section 103(f), constituting cognizable discrimination under Section 105(c) of the Mine Act.

[37] The Court agrees that many of the arguments advanced by the Respondent are simply not on point. As one example, that Matson and Lucas had pay upgrades retracted is of no moment because neither was acting as a miners' representative. The Court views many of the other arguments raised by the Respondent as distractions which do not warrant individualized discussion. For example, the claim that Ms. Otten was *not required* to perform work of a higher classification is of that ilk because it diverts the analysis from the core, and undisputed, fact. On the days in issue, Ms. Otten would have been first in line to operate mobile equipment and, as the

its interpretation of the CBA to govern whether Otten should be paid the upgraded wage. When the CBA contradicts the Mine Act's statutory walkaround provision, the Mine Act must prevail.

The Respondent's Reply Brief

As discussed above, the Court does not buy into the Respondent's argument that, beyond the *Pasula-Robinette* test applied in many discrimination claims, the Ninth Circuit's "but-for" test should be used. Respondent's Reply at 1-2. The jurisdiction of the Ninth Circuit does not apply to actions arising in Missouri, the location of the Respondent's mine. End of argument. Full stop. That said, the Court finds that the loss of pay to Ms. Otten would not have occurred *but for* her engaging as a miners' representative during a walkaround inspection.

The Respondent's contention that Ms. Ames acted neutrally, free of any discriminatory animus, and that Ames' statements reflect "only that performing walkaround duties did not independently qualify Otten for a mobile equipment operator upgrade under the terms of the CBA," is rejected for several reasons. *Id.* at 4. First, it reaffirms the Respondent's core challenge that the CBA takes precedence over the statutory walkaround "no loss of pay" provision. Second, such discriminatory animus need not be shown to establish a violation of that provision – it is sufficient to show that the miner suffered a loss of pay. Third, assuming for the sake of argument that such animus must be shown, Ames, through her actions and testimony, clearly showed such animus, as demonstrated *supra.*

As to the Respondent's contention that it rebutted the Secretary's *prima facie* case by "establish[ing] [that] it relied on the terms of the CBA in making its decision to retract [Ms. Otten's] pay," that only reinforces the Court's point – the terms of the CBA do not control the determination of whether Ms. Otten incurred a loss of pay. *Id.* at 5. And, as to the idea that the Secretary must establish that the Respondent's pay determination was pretextual, if one assumes for the moment that there was no pretext whatsoever, the outcome would be the same. Under the facts of this case, Ms. Otten suffered a loss of pay within the meaning of section 103(f). And this is not simply a matter of math. Congress made it clear that the purpose served by the walkaround provision is to aid the inspection. Miners' representatives who incur a loss of pay would have the effect of "discourag[ing] miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners." *Magma Copper,* 1 FMSHRC 1948, 152 (Dec. 1979), *supra*. Accordingly, pretext is not an essential element in 103(f) matters. Imposing a loss of pay, for whatever reason, is essential and has been established.

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designated walkaround representative, she would have done so but for the fact that she was accompanying the MSHA inspector at those times. Respondent's Reply at 17.

Similarly, the Respondent's contention that it proved its affirmative defense by showing that Heather Ames relied upon the terms of the CBA has no merit, as it is founded upon the premise that the CBA may override Congress's expressed intent of the no loss of pay provision.

Further Discussion: Relief due Ms. Otten and the Appropriate Civil Penalty

Relief due Ms. Otten

As forewarned at the start of this decision, the Court determined during the course of the hearing that this dispute could have been submitted via cross-motions for summary judgment. This is because it has concluded that there are no genuine issues of material fact to be resolved. That being the case, the matter strictly involves a legal determination. The Court, recognizing that there were no genuine factual disputes, directed by email to Counsels that they:

> confer with one another and advise me, either through a joint email or in a statement in the post-hearing briefs, or both, regarding the pay dates in issue. Per Exhibit P 11, there does not seem to be a **genuine** dispute about the figures identified in that exhibit. This includes the 401 K contributions, and a pay raise affecting all miners, all as identified in that exhibit and through testimony from Ms. Otten about these issues, including Ms. Otten's remark that she was mistaken about a date when she believed she was underpaid, but then realized she had not been short-changed. See Tr. pages 270-283.
>
> Rather, the dispute is over the pay rate due to miners' representatives under the circumstances identified in Otten's Complaint – pay at the laborers' rate or the mobile equipment operator rate. Therefore, **absent a genuine dispute**, I am directing that the parties stipulate as to the amounts Ms. Otten would have received **on each** of the days identified in her complaint. These figures are obviously apart from and distinct from the controlling issue I must decide – whether Ms. Otten was entitled to the mobile equipment operator rate or the laborer rate.

E-mail from the Court, December 27, 2021. (emphasis in original)

Shortly thereafter the parties responded, providing the following:

> Counsel for Respondent and Counsel for the Secretary met and conferred regarding your emails, particularly your email concerning Exhibit P-11 and the figures identified in that exhibit. You asked for the parties to stipulate to the amounts Ms. Otten would have received on the days identified in her complaint. As Ms. Otten is not contesting her pay on April 1st and April 2nd, the only days identified in the complaint are March 24-26, and 31st.
>
> Without admitting Ms. Otten was entitled to such amounts, the parties can stipulate that Ms. Otten would have received a total of **$116.67** for the days identified in her complaint.

For a more specific breakdown, the parties stipulate to the following figures by day:

- March 24, 2020 – the parties stipulate that Ms. Otten would have received $44.24 more if she had operated mobile equipment for the entire 8 hour shift;
- March 25, 2020 – the parties stipulate that Ms. Otten would have received $25.28 more if she had operated mobile equipment for the entire 8 hour shift
- March 26, 2020 - the parties stipulate that Ms. Otten would have received $27.65 more if she had operated mobile equipment for the entire 8 hour shift
- March 31, 2020 - the parties stipulate that Ms. Otten would have received $15.01 more if she had operated mobile equipment for the entire 8 hour shift
- Wage Total = $112.18
- 401K contribution (4%) = $4.49
- Combined Total = $116.67

Email from Counsels to the Court, December 29, 2021.

The stipulation does not encompass all the compensation due Ms. Otten because the Court notes that the Secretary also asserts that:

> [a]dditionally, in the interests of justice, Otten should receive the full compensation she would have earned but for continuing discriminatory action on eight more days: June 9, 2020; July 8, 2020; July 14, 2020; July 15, 2020; July 21, 2020; July 22, 2020; January 28, 2021; and January 29, 2021. … Continental had notice of the continuing violations. Potential future losses of pay were alleged in Otten's discrimination complaint filed with MSHA in April 2020. See, for example, Otten's discrimination complaint asserting, "many hours, by me, will be spent acting as a miner's rep and this action by my Company has the potential to cost me a lot of money through the years." Ex. J-1 at 2. Otten also requested in her complaint that she continue to receive the upgrade. Joint Stip. ¶ 72; 11/10/21 Tr. 255; Ex. J-1 at 2. Similarly, in the complaint filed with the Commission, the Secretary alleged Continental was continuing to refuse to pay Otten the wage rate she was entitled to and would have received if she had not been performing duties as a miners' representative. Compl. at 2 ¶ 8. Finally, there is a clear basis for awarding further relief because of the continuing violations. Evidence shows that on these eight additional days, Otten engaged in walkaround activities with MSHA and received the laborer wage rate, there was a need to operate mobile equipment and junior laborers operated mobile equipment for wage upgrades, and when Otten would have operated mobile equipment had it not been for her walkaround duties. Joint Stip. ¶¶ 30, 59, 60, 66; 11/10/21 Tr. 276-77; Ex. J-13 at 24-25, 31-32; Ex. J-14 at 5; Ex. J-15 at 19, 25; Ex. J-19 at 3-4; Ex. J-20 at 78, 83-84, 110; Ex. J-27. **Therefore, the Court should also award Otten $261.27 in lost wages and $10.45 in lost employer contributions for the period from June 9, 2020, to January 29,**

2021; for a total monetary award of $388.39. Ex. P-11. Continental should pay pre-judgment interest on this amount.

Sec.Br. at 41-42 (**bold** text added).

The Court, examining Ms. Otten's complaint again, notes that the dates identified in it are "4/9/2020 and 4/16/2020" and in the accompanying "Discrimination Report," the dates are identified as "3/21/- 3/28/20 and 3/29/20 – 4/4/20." Joint Ex. 1. The Secretary's Complaint does not identify additional specific dates for the alleged discrimination involving loss of pay, nor was the Complaint amended. Joint Stipulation 30, while mentioning dates in June and July in 2020 and in January 2021, does not tie those dates with loss of pay. However, Joint Stipulations 59 and 60 do mention those dates and that, per those stipulations, she "performed her role as the designated miner's [sic] representative by accompanying MSHA on an inspection for the entirety of her shift and did not operate mobile equipment. Further, for those same dates, June 9, July 8, July 14, July 15, July 21, and January 28 and 29, 2021, "Otten received her regular rate of pay *as a laborer*." Joint Stipulations 59 and 60, *italics* added. The other documents cited by the Secretary, as listed above, confirm that, by virtue of those Joint Exhibits, that the Secretary is correct and that the Court should also award Ms. Otten $261.27 in lost wages and $10.45 in lost employer contributions for the period from June 9, 2020, to January 29, 2021; for a total monetary award of **$388.39, plus pre-judgment interest on this amount.**

Appropriate Civil Penalty

Under section 110(i) of the Act, the Commission has independent authority to assess civil penalties for violations. 30 U.S.C. § 820(i); *Sec'y v. Lehigh Anthracite Coal*, 40 FMSHRC 273, 278 (Apr. 2018). Per that provision, the Commission is to consider six statutory factors in its penalty assessment: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Parties' views on the appropriate civil penalty

Secretary of Labor's position

The Secretary states that "[b]ased on the six statutory factors and the evidence presented in this case, a penalty of $17,500 is appropriate. First, the violation was serious considering Otten played a critical role in ensuring miner participation safety and health inspections and Continental's actions unfairly penalized her for serving in that role. *See Highland Mining Co*., 37 FMSHRC 2436, 2438 (Oct. 2015) (ALJ) (finding mine operator's interference with a miners' representative's rights was serious considering the important function that miners' reps serve in ensuring a safe and healthy environment for miners). Second, Continental exhibited negligence in

violating Otten's rights. When considering the negligence factor, the proper inquiry is whether the operator engaged in intentional conduct in committing the violation, rather than whether it intended to discriminate. *See Sec'y obo Poddey v. Tanglewood Energy, Inc*., 18 FMSHRC 1315, 1319 (Aug. 1996) (Commissioners Marks and Riley). On April 2, 2020, when Ames directed the payroll specialist Fujarski to remove the wage upgrades and let the miners "fight it later," she clearly intended to not pay Otten at the mobile equipment rate for time spent with MSHA on the April 9, and subsequently the April 16, paycheck. 11/10/21 Tr. 75; Ex. J-7f at 1.

Third, Continental did not demonstrate any good faith attempt to achieve compliance. In April 2020, Temporary Supervisor Mundell warned Continental's actions would unfairly penalize Otten for traveling with MSHA, but Ames remained obstinate in her decision to retract Otten's wage upgrades and, consequently, Otten suffered a loss in pay. 11/09/21 Tr. 205; 11/10/21 Tr. 269-70; Ex. J-7k at 1; Ex. P-11. Between April 2020 and January 2021, Continental continued to take the position that Otten was ineligible for an upgrade when she exercised her statutory walkaround rights, resulting in more lost pay for Otten. 11/10/21 Tr. 95, 276-77; Ex. P-11. The violations would have continued if Otten had not bid for and received a job as a mobile equipment operator in February 2021, considering Ames testified that she would make the same decision if another laborer were to fill the miners' representative role today. Joint Stip. ¶¶ 8-9; 11/10/21 Tr. 206-07, 277-78.

Fourth, although Continental has no previous discrimination violations, it does have a history of safety and health violations and these past violations must be considered as part of the penalty assessment. Ex. P-5, P-6. As to the final two statutory factors, the record establishes Continental is a medium-sized operator that could remain in business if a civil penalty of $17,500 were imposed. Ex. P-6 (Continental had 255,694 hours worked in 2019); Joint Stip. ¶ 82. Therefore, the Court should assess a civil penalty of $17,500 against Continental. A penalty of this amount would encourage future compliance with section 103(f) and section 105(c)." Sec. Br. at 42-44.

Respondent's view of the appropriate civil penalty

Regarding any civil penalty, in its post-hearing brief, the Respondent asserts that no civil penalty should be imposed, expressing the following:

"Without conceding that a civil penalty is warranted or justified, assuming *arguendo* that a penalty should be assessed, the Secretary has failed to establish the six statutorily-required penalty criteria to establish the proposed civil monetary penalty amount …[reciting the criteria] *Sherwin Aluminum Company, LLC v. MSHA*, 37 FMSHRC 2153, 2186 (Sept. 25, 2015) (citing *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000)). "The Commission is not required to give equal weight to each of the criteria …" *Id*. (citing *Spartan Mining Co*., 30 FMSHRC 699, 723 (Aug. 2008)).

Respondent has no history of any discrimination findings or 105(c) violations. (Exhibit P-5; Exhibit P-6). Respondent's proposed negligence in this case is non-existent, as its actions show it

was not negligent in any way as it thoroughly and painstakingly evaluated and vetted its reasons for retracting improper mobile equipment operator upgrades not just from Otten, but also from two laborers who did not engage in any protected activity. The gravity of the alleged violation is low, as evidenced by the uniqueness of this situation and the fact that it is not capable of occurring again as there are no designated miners' representatives who would be eligible for upgraded work. Lastly, all actions taken by Respondent in this matter were done with the sole intention and purpose of complying with the terms of the CBA, to which Respondent is contractually bound." Respondent's Brief at 25-26.

The Court's Penalty Determination

Having considered both arguments on the civil penalty issue, the Court cannot abide by the Respondent's assertions. From the Court's perspective the gravity of the violation and the Respondent's negligence associated with it were significant. The negligence and gravity evaluations, while distinct evaluations, go hand in hand.

In the face of the explicit language in Section 103(f) directing that the miners' representative suffer no loss of pay, it was not reasonable for the Respondent to conclude otherwise. No fair reading of the statute supports the Respondent's view and the Respondent was seriously in error by concluding that the CBA would trump Congress' express command to the contrary that there be no loss of pay.

And this conclusion makes sense when considering gravity as well, because Congress wanted miner participation in the inspection process, bringing their personal knowledge of the mine to bear in that process. This determination was coupled with the Court's finding that in fact Continental wanted to discourage Ms. Otten, who was very proactive in safety matters at the mine. Miss Ames' testimony made the Respondent's intent clear. As the Respondent put it, Ms. Otten didn't *have to* participate in the inspections; she could've opted to run the mobile equipment instead on those days.

When considering the history of violations, that term is not limited to violations of section 103(f). As noted in *Jim Walters*, 18 FMSHRC 552, (April 1996), "Section 110(i) provides in part that, in assessing civil penalties, "the Commission shall consider the operator's history of previous violations ...." 30 U.S.C. § 820(i). Thus, the language of section 110(i) does not limit the scope of history of previous violations to similar cases. The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of all safety and health standards are considered for his component." *Peabody Coal Co*., 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). The appropriate weight, if any, to be attached by the judge to older violations should be based on relevancy." *Id.* at 557. *See also, Cantera Green*, 22 FMSHRC 616, 623, (May 2000).

Accordingly, the Court considered the Respondent's violation history, per Ex. P-5, P-6. With 115 violations over a 15-month period, and the violations per inspection at 0.97, the mine falls within the mid-range for that category. Similarly, the size of the mine falls within the mid-range, and the controlling entity is likewise in the moderate range. Taking the penalty criteria into consideration as applied to this matter, the Court concludes that the appropriate civil penalty is $17,500.00.

ORDER

WHEREFORE, Respondent is **ORDERED** to pay Ms. Tara Otten the amounts, as identified above, constituting the loss of pay she incurred, in the total amount of **$388.39, plus pre-judgment interest on this amount.** The loss of pay amounts are to be calculated to include the interest accrued on those amounts for each date, per *Sec'y of Labor on behalf of Bailey v. Ark-Carbona Co*., 5 FMSHRC 2042, (Dec. 1983). Such payment shall be made within 30 days of the date of this decision.

Upon consideration of the six statutory criteria, as discussed above, Respondent is **ORDERED** to pay the Secretary a civil penalty of **$17,500.00, (seventeen thousand five hundred dollars)**. All payments shall be made within 30 days of the date of this decision, following the exhaustion of its appeal rights in this case.

FURTHER, the mine is ORDERED to remove from Tara Otten's personnel file any mention of this incident unless the Respondent wishes to admit in that file that it improperly denied Ms. Otten the pay she was entitled to receive during the walkaround events identified in the Complaint. Further, for a period of 30 (thirty) days, Continental Cement Company, LLC shall post a notice at the office of the Hannibal Underground Mine and, if different, also post the notice in a conspicuous location where employees of the mine can readily see it, with both notices on hard stock paper of at least 8 x 14 size, in at least 14 point font, setting forth the rights of miners protected by 105(c) of the Mine Act.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Megan J. McGinnis, Esq. Trial Attorney, U.S. Department of Labor, 2300 Main St., Suite 1020, Kansas City, MO 64108 mcginnis.megan.j@dol.gov

R. Lance Witcher, Esq. and Thomas R. Chibnall, Esq., OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., 7700 Bonhomme Ave., Suite 650, St. Louis, MO 63105 lance.witcher@ogletree.com, thomas.chibnall@ogletree.com

Ms. Tara Otten, 813 Country Club Dr., Hannibal, Missouri 63401, tara.mundell@hotmail.com