FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2019

GEORGE SCOLES, Complainant, v. HARRISON COUNTY COAL CO., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2017-0638-D Mine: Harrison County Mine Mine ID: 46-01318

DECISION

This case is before me upon a discrimination proceeding filed by George Scoles, through counsel, against the Harrison County Coal Company ("HCC" or "Respondent"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).[1] Scoles contends that Harrison County violated the Mine Act when it discharged him for engaging in protected activity. Scoles also argues that his discharge interfered with the ability of himself and other HCC miners to exercise their protected rights. HCC denies these claims and maintains that Scoles' discharge was solely motivated by his repeated failure to properly clock in and out in compliance with the mine's Hand Scanner Policy.

A hearing was held on October 16-17, 2018 in Morgantown, West Virginia. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the parties' post-hearing briefs, I find that HCC did not violate the Mine Act when it discharged Scoles.

I. STIPULATIONS

At hearing, the parties entered the following stipulations:

1. During Scoles' employment at Harrison County Mine, he was a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

2. The Harrison County Mine is a mine as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

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[1] In this decision, the joint stipulations, transcript, the Complainant's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. C–#," and "Ex. R–#," respectively.

3. The Harrison County Coal Company is an operator as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

4. Products of the Harrison County Mine entered commerce, or the operator or products of the Harrison County Mine affected commerce within the meaning and the scope of section 4 of the Mine Act, 30 U.S.C. § 803.

5. From January 1, 2016, through the present, the United Mine Workers of America Local Union 1501 and the UMWA International Union have represented the hourly production and maintenance employees at the Harrison County Mine. Tr. 14-15.

II. FINDINGS OF FACT

A. Background

The Harrison County Mine is an underground coal mine located in Mannington, West Virginia. Harrison County Coal Company (HCC) - a subsidiary of Murray American Energy Inc. - owns and operates the Mine. The Mine employs approximately 315 hourly employees and has an approximate annual payroll of 25 million dollars. Tr. 335.

George Scoles worked at the Harrison County Mine from January 2007 until May 2017 as a Longwall Outby Utility Man. Tr. 28. He supplied the longwall face and performed a variety of tasks to facilitate advancement of the longwall at the mine. Tr. 28. He also served as a miner's representative and as a walkaround with MSHA inspectors up to two to three times a week until his discharge. Tr. 85. Scoles is a member of the United Mine Workers of America ("UMWA") Local Union 1501 at the Harrison County Mine. Tr. 86.

Scoles has a mine-wide reputation as a safety advocate. Tr. 235-36, 256-58, 275, 277-78, 303-05. Aside from his walkaround duties, Scoles made numerous safety complaints to mine management. HCC was not always receptive to these complaints. Miner Christopher Yanero[2] described episodes where Scoles reported safety issues and management did not cooperate or assigned him to perform less desirable tasks while other miners were told to watch. Tr. 256-58. Miner David Hollis[3] testified that he often heard Scoles make safety complaints or recommendations over the radio that went unacknowledged by management. Tr. 305. Hollis noted that management responded when he personally acknowledged Scoles' comments over the radio. Tr. 308.

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[2] Christopher Yanero is a Plant Prep Helper at HCC. Tr. 249. He has worked at Harrison County Mine for 48 years. Tr. 250. He formerly served as mine committeeman and President of the Local Union for multiple terms. Tr. 259-60.

[3] David Hollis is the day shift dispatcher for HCC. Tr. 292-93. He has worked at the Harrison County Mine for 18 years. Tr. 292. His duties include monitoring all atmospheric elements at the mine and dispatching miners to different areas of the mine via radio. Tr. 292-93. He estimated that he hears about 80-85% of the radio communications that take place at the mine. Tr. 293.

These types of incidents, among others, prompted Scoles to file five section 105(c) complaints against HCC from 2014 to 2017. Scoles settled two of these complaints with the Mine. MSHA issued negative findings on another two and Scoles opted not to pursue them further. One of Scoles' 2015 complaints proceeded to hearing before Commission Administrative Law Judge Andrews. *See Sec'y on behalf of Scoles v. Harrison County Coal Co.*, 40 FMSHRC 1393 (Sept. 2018) (ALJ). In that case, Judge Andrews found that HCC violated the Act when it discharged Scoles for subordination following an altercation with his supervisor. *Id.* at 1420-21. Scoles was reinstated and awarded backpay. *Id.* at 1421-23.

In May of 2017, Scoles ran for safety and mine committeeman positions within the local Union. Tr. 87. The safety committeeman is charged with serving as a walkaround or assigning other miners to do so, performing safety inspections, and discussing miners' safety concerns with management. Tr. 88. The mine committeeman is authorized to represent miners in grievance proceedings and address any collective bargaining issues or mine-management conflicts that may arise. Tr. 88. Scoles easily won both races, but he was discharged pursuant to HCC's Hand Scanner Policy before he could assume office. Tr. 87-88.

B. The Hand Scanner Policy

HCC implemented the Hand Scanner Policy ("Policy") in January of 2016. The Policy serves as the primary time and payroll tracking mechanism for all hourly employees. Tr. 336-37. The Policy requires the mine's hourly employees to track their work hours by entering their employee number and scanning their fingerprint at designated kiosks at the beginning and end of each shift. Ex. C–1; Tr. 337-38. Miners can use either hand to scan, and the process takes about five seconds. Tr. 337-38. If the scan is rejected or if a miner has issues with a kiosk, they are instructed to notify management of the issue. Ex. C–1. In general, miners that experience scanning issues are instructed to return to the kiosk and try again or to try a different kiosk. Tr. 240, 272. Even miners experiencing issues are usually able to scan in after a number of attempts. Tr. 240, 272. Scanner issues appear to be infrequent and individualized. There is no record of a large-scale scanner malfunction affecting entire shifts or crews. Tr. 247, 400-01.

The Hand Scanner Policy outlines a four-step progressive discipline scheme to encourage miners to consistently scan in and out. Ex. C–1. Each time a miner fails to scan in or out, they are disciplined in accordance with the number of scans they previously missed. A miner will receive a verbal warning for their first missed scan, a written warning for their second, a two day suspension for their third, and a suspension with intent to discharge for their fourth. *Id.* The Policy allows miners to exonerate themselves; a miner moves back one step on the scale if they scan in and out without failure for 180 days. *Id.* Thus, a miner at Step 3 of the discipline program will move back to Step 2 if they scan in and out for 180 consecutive days, back to Step 1 after another 180 consecutive days, and so on. The Policy does not outline any factors aside from failures to scan that may result in discipline under the scheme. Ex. C–1.

Christopher Fazio[4] administers the Policy's progressive discipline program at Harrison County Mine. Tr. 334-35. He maintains a spreadsheet to track progressive discipline records for all of the miners. Ex. R–E; Tr. 340. When a miner misses a scan, he is notified by payroll via the timesheets and will check his spreadsheet to administer the proper discipline.[5] Tr. 340. The payroll records are sufficient to sustain a violation, and miners rarely dispute the missed scans. Tr. 415. When they do, Fazio pulls video footage collected by motion-activated cameras located near all of the kiosks to prove the missed scan. Tr. 345-47. The cameras record and store up to ten days' worth of activity. Tr. 345-46. If the miner does not dispute the scan, Fazio does not save the video footage. Tr. 347.

Fazio administers the first two steps of the Policy himself. He will hold a private meeting with miners to inform them of the missed scan and at Step 2 will issue the appropriate paperwork to the miner. Tr. 342. If a miner reaches Step 3, Harrison County Mine General Manager Scott Martin will also be present at the meeting. Tr. 342. Miners may file a grievance to dispute alleged missed scans under the policy; this is often where the video evidence will be shown to the miners. Tr. 193-94, 346. At Step 2, a local mine committee member and local management attend to try to resolve the dispute. Tr. 209. At Step 3, a district union representative will meet with a member of corporate management or Human Resources as well as the mine superintendent. Tr. 211.

C. Scoles' Discipline under the Policy

Scoles was disciplined and eventually discharged following five alleged violations of HCC's Hand Scanner Policy between May 2016 and May 2016. Scoles maintained at hearing that he never failed to scan in or out. Tr. 31, 60, 63, 66, 92, 94-95, 109, 116.

Scoles was issued a verbal warning on May 31, 2016 for a missed scan on May 19.[6] Ex. R–B, p. 2. Scoles' time sheet and time card for that date corroborate that Scoles failed to scan out. Ex. R–B, pp. 3-4. Scoles denied missing the scan, though later claimed that he was unable to

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[4] Christopher Fazio is the Human Resources Supervisor at the Harrison County Mine. Tr. 333-34. He has worked for HCC since June 2010. Tr. 333. His duties include conducting hiring and staffing procedures, managing collective bargaining, compensation and benefits, disability, and discipline. Tr. 333-34.

[5] Fazio only administers the disciplinary aspect of the Policy. He does not edit the payroll sheets. When a miner misses a scan, front line foremen and supervisors are responsible for adjusting miners' work hours to properly reflect the time they work. Those edits are done by hand, and according to Fazio, nobody can edit the timesheets through the computer system. Tr. 407-08.

[6] The verbal warning record states that the HCC was unable to issue the verbal warning sooner because the mine was idle from May 20 to May 30. Ex. R–B, p. 2.

scan out due to a scanner malfunction. Tr. 31-32. Miner Perry Heflin[7] testified that Scoles discussed the issue with him and that Scoles notified shift foreman Jim Coles of the matter. Tr. 238. Coles allegedly told Scoles and Heflin that he would take care of it. Tr. 32, 239. Scoles alleges that Fazio later spoke to him about the missed scan and told him that he would not be disciplined. Tr. 32-33, 349. Scoles therefore believed that he was not given a verbal warning for this missed scan.[8] Even though he believed he would not be disciplined, Scoles claimed that he asked to see video of the missed scan but was refused. Tr. 32-33.

Fazio denied Scoles' account and did not recall speaking with Coles about an alleged scanner malfunction. Tr. 349. He testified that he issued Scoles a verbal warning in accordance with Step 1 of the Policy and did not save the video footage because Scoles admitted to missing the scan. Tr. 348, 350-51. The record of the verbal warning states that "employee admitted that he did not scan out." Ex. R–B, p. 2; Tr. 354.

Scoles received a written warning for his second alleged missed scan on June 9, 2016. Ex. R–B, p. 5. Scoles' time sheet and time card show a missed out-punch on that date. Ex. R–B, p. 6-7. Fazio issued the warning to Scoles and to the Mine Committee the following day. Tr. 355-56. Scoles again denied missing the scan and did not sign the written warning. Tr. 47, 53, 113, 417. He claimed that HCC denied his request to see video of the missed scan. Tr. 54. Fazio disputed his account and claimed that Scoles once again admitted to missing the scan and accepted his discipline. Tr. 417. He did not think much of Scoles' refusal to sign the written warning because miners often decline to sign management documents. Tr. 417.

Scoles was suspended for two days for an alleged missed scan on July 6, 2016. Ex. R–B, p. 8. His time sheet and time card corroborate the missed scan. Ex. R–B, pp. 9-10. Scoles denied missing the scan. Tr. 61, 359, 413. He again requested video evidence of the scan but was denied. Tr. 61. However, it is undisputed that Scoles' representative at his grievance hearing did see video footage of this missed scan. Tr. 198-99.

On September 16, 2016, Scoles filed a grievance disputing the first two missed scans. Scoles was at Step 3 at the time he filed the grievance. The parties met on January 6, 2017. UMWA International Region 1 Representative Michael Phillippi[9] appeared at the grievance meeting on behalf of Scoles. Phillippi testified that he asked to see video of the alleged missed scans, but that HCC management claimed not to have them. For the first time in Phillippi's experience handling grievances, HCC declined to reverse its decision to discipline a miner under the policy.

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[7] Perry Heflin is an electrical mechanic at Harrison County Mine. Tr. 230. He has worked for HCC for 12 years. Tr. 230.

[8] Miners do not receive a written record for a verbal warning, but management does produce a form for its own records. Tr. 354.

[9] Michael Phillippi is an International Representative for Region 1 of the United Mine Workers Association. Tr. 187. He is involved in organizing and safety matters, but most of his work centers around grievance and arbitration, labor charges, and various policy matters. Tr. 187-88.

Tr. 193-95. He noted that management would usually reverse its decision when it did not have video evidence of the missed scan. Tr. 195. Fazio testified that he did not have video footage because Scoles admitted to missing the scans and emphasized that video proof is not required to substantiate a missed scan. Tr. 346, 357. HCC declined to reverse the decision and noted on the grievance agreement that as of September 16, 2016, Scoles was at Step 2 of the disciplinary scheme. Ex. C–6.

Scoles also grieved his discipline for the July 6 scan. At the meeting, Fazio showed Phillippi video of Scoles entering and exiting the Foreman's room without scanning. Tr. 198-99, 218, 359-60, 413. Phillippi subsequently withdrew Scoles' grievance. Tr. 199. However, he testified that he later considered his decision to withdraw Scoles' grievance to be a mistake. Tr. 198-99. Although HCC showed him the video, he believed that there were other cameras that may have captured Scoles' out-punch at a different kiosk. Tr. 199. Phillippi testified that based on his knowledge today he would not have withdrawn Scoles' grievance. Tr. 199-200. Fazio testified that he showed Phillippi video from cameras located at each scanner. Tr. 360.

Scoles received a second two-day suspension on February 9, 2017 for missing a scan the previous day. Ex. R–B, p. 11. Scoles' time sheet and time card show a missed out-punch for the date in question. Ex. R–B, pp. 12-13. Scoles was uncertain whether he missed this scan but again asked to see the video footage. Tr. 64-65, 364-65, 413-14. He was allegedly refused, although he admitted that he testified to the contrary during his arbitration hearing. Tr. 119-120. Scoles filed another grievance that was subsequently withdrawn upon viewing the video footage. Tr. 365-66.

Scoles was suspended with intent to discharge on May 10, 2017 for an alleged missed scan on May 8. Ex. R–B, p. 14. Scoles' time sheet and time card show a missed in-punch. Ex. R–B, pp. 15-16. His time card also shows a handwritten time adjustment. *Id.* Scoles testified that he did not miss the scan, but later acknowledged that he was uncertain about whether he missed it. Tr. 66-67, 126. Scoles viewed the video footage of the missed scan at his "24-48 hour meeting."[10] Tr. 68-69, 366. However, Scoles claimed that the video froze—or "glitched"—before it showed him entering the elevator. Tr. 69.

Scoles filed a grievance regarding his discharge and the matter was referred to arbitration. Exs. C–10, R–C. At the arbitration Scoles admitted that he missed all five of the scans and instead argued that discharge was a disproportionately severe punishment in relation to the conduct cited. Ex. R–D. On June 17, 2017, the Arbitrator did not find evidence of arbitrary or discriminatory enforcement of the Policy and upheld Scoles' discharge. *Id.* Notably, the arbitrator found no material issues of fact; Scoles admitted at the arbitration hearing that he missed all five scans for which he was disciplined. *Id.*

[10] Pursuant to the terms of the collective bargaining agreement with the Union, miners are entitled to a "24/48 hour meeting" with mine management to discuss their imminent discharge. Tr. 367-68.

On June 26, 2017, Scoles filed a section 105(c) complaint with MSHA alleging discrimination. Ex. C–17. MSHA issued a letter of negative finding on August 17, and Scoles filed his section 105(c)(3) complaint on September 25. Exs. R–L, R–M.

III. DISPOSITION

Scoles alleges that HCC arbitrarily and discriminatorily enforced its Hand Scanner Policy against him to justify his discharge. Complainant's Post-Hearing Brief ("Comp. Br.") at 20. Scoles argues that, given his longstanding history of engaging in protected activity and of conflict with HCC management, he was subjected to strict discipline under the Policy where other miners were often granted leniency. *Id.* In addition, Scoles also contends that his discharge under the Policy constitutes illegal interference with the ability of himself and of miners to engage in protected activity at the Harrison County Mine. *Id.* at 36.

At the outset, HCC contends that Scoles' section 105(c)(3) complaint was not timely filed and should be dismissed. Respondent's Post-Hearing Brief ("Resp. Br.") at 14, n. 10. Respondent also challenges whether this Court was Constitutionally appointed under the Appointments Clause and thus has the authority to hear this case. *Id.* at 21. With regards to the merits of the case, Respondent denies all charges of discrimination and interference. *Id.* at 14, 19. It contends that Scoles was fired solely based on his repeated failure to comply with HCC's Hand Scanner Policy. *Id.*

A. Timeliness of Scoles' § 105(c)(3) Complaint

HCC contends that Scoles' complaint should be dismissed as untimely because he failed to file his complaint within 30 days of receiving MSHA's non-merit letter. Resp. Br. at 14, n. 10. Scoles contends that he timely filed his complaint, and that even if he did not, the alleged nine day delay was excusable and was not sufficiently egregious or prejudicial to merit dismissal. Complainant's Reply to Respondent's Post-Hearing Brief ("Comp. Rep.") at 18-19.

The Secretary is required to inform any miner that files a complaint of discrimination pursuant to section 105(c)(2) that he will or will not pursue that complaint before the Commission on the miner's behalf. 30 U.S.C. § 815(c)(3). If the Secretary declines, a complainant has the right to file an action on their own behalf with the Commission "within 30 days' notice of the Secretary's determination." *Id.* That 30-day window commences when the miner receives actual notice of the Secretary's determination. *Boswell v. Nat'l Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992).

The Commission has held that the filing periods for section 105(c) discrimination complaints are not jurisdictional in nature. *Boswell*, 14 FMSHRC at 257 (citing *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984). Judges determine whether a delay in filing should be excused on a case-by-case basis. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). The Commission has excused delays based on justifiable circumstances, including but not limited to "ignorance, mistake, inadvertence, and excusable neglect." *Perry v. Phelps Dodge Morenci*, Inc., 18 FMSHRC 1921-22 (Nov. 1996) (citations omitted). Failure to meet the time limits in sections 105(c)(2) and (3) should not result in

dismissal absent a showing of "material legal prejudice." *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994); *see also Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) (finding prejudice to the operator to be the primary consideration in cases involving late filing).

I find that dismissal of this case for untimely filing is inappropriate. The record is unclear as to when Scoles received actual notice of the Secretary's non-merit finding, but it likely did not amount to the entire 9-day period, if untimely at all. MSHA sent the letter to Scoles on August 17, 2017 and Scoles filed his complaint on September 25, nine days past the prescribed 30-day limit. Exs. R–L, R–M; Tr. 143, 145-48. Scoles' complaint acknowledges that he received the notice "on or around" that date, but he could not recall exactly when he received the letter. Tr. 143, 148. It is unlikely that Scoles received the letter on the same day that it was dated and sent. Scoles did not check his mail on a regular daily or weekly basis because he was often traveling for work and because his mailbox was located over a thousand yards from his house. Tr. 145, 161. Given these circumstances, I find it plausible that Scoles did not actually receive the Secretary's letter for up to or over nine days after it was sent, and that any delay was inadvertent or excusable.

Even assuming that Scoles' filing was untimely, the delay was *de minimis* and did not prejudice Respondent's ability to present its case. The 30-day filing window is not jurisdictional and does not merit dismissal absent a showing of prejudice. *Boswell*, 14 FMSHRC at 257 (accepting filing that was 12 days late where operator showed no evidence of prejudice); *Hale*, 8 FMSHRC at 908 (accepting filing that was 2 years late where operator showed no evidence of prejudice). Respondent offered no evidence that it was prejudiced by the delay. Accordingly, I reject HCC's contention.

B. Constitutional Appointments Clause Argument

HCC also argues that the Federal Mine Safety and Health Review Commission's ALJ appointment process is invalid pursuant to the Appointments Clause of the United States Constitution because the Commission improperly delegated its appointment authority to the Chief Administrative Law Judge. Resp. Br. at 21. Further, Respondent contends that the Commission's April 3, 2018 Notice ratifying the appointment of its ALJs does not remedy the defect because the process by which the ALJs were presented to the Commission was too limited to constitute valid exercise of its appointment power. *Id.* at 22.

To the extent that I have the authority to do so, I reject Respondent's arguments. The relevant case on this matter is the Court of Appeals for the 6th Circuit's decision in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), which applied the Supreme Court's decision in *Lucia v. Sec. & Ex. Comm.*, 138 S. Ct. 2044 (2018), to the Administrative Law Judges of the Federal Mine Safety and Health Review Commission. In *Jones Brothers*, the Court held that Commission ALJs were invalidly appointed inferior officers at the time that the ALJ heard the case. *Jones Bros.*, at 679. The Court acknowledged the Commission's ratification notice, but found that the notice did not remedy the Constitutional defect because it was issued after the Judge heard the case on the merits. *Id.* at 677-79. The 6th Circuit vacated

the decision and remanded the case to the Commission for fresh proceedings before a different ALJ. *Id.* at 679.

Unlike the circumstances in *Jones Brothers*, the instant case was heard on October 16-17, 2018; over six months after the Commission Chairman ratified the appointments of all of its Administrative Law Judges. Federal Mine Safety and Health Review Commission, *Commission Ratification Notice*, http://www.fmshrc.gov/about/news/commission-ratification-notice (Apr. 3, 2018). The case at issue is therefore before a validly appointed ALJ. Nor do I find merit in HCC's argument that the Ratification Notice did not cure the invalid appointment of the Commission Judges. Respondent's argument finds no support in the 6th Circuit's decision in *Jones Brothers*, the Supreme Court's decision in *Lucia*, nor the language of the Appointments Clause. In fact, the Court's decision in *Jones Brothers* suggests that the Commission validly "acted to cure [the] alleged constitutional defect by having every Commissioner ratify the appointment of every administrative law judge." *Jones Bros.*, at 677, 679. The Court also remanded the case for fresh proceedings before another ALJ, implying that the Ratification cured the defect. *Id.* at 679. I therefore accept the Commission's ratification as valid and proceed to the merits.

C. Discrimination

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

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

30 U.S.C. § 815(c)(1). The complainant miner bears the initial burden to establish a *prima facie* case of discrimination. To establish a *prima facie* case of discrimination under section 105(c)(1), the complainant must prove by a preponderance of the evidence: (1) that he engaged in protected activity, and (2) that the adverse action he complains of was at least partially motivated by that activity. *Turner v. Nat'l cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981).

If a miner establishes a *prima facie* case, the operator may rebut that case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. The operator may also defend affirmatively by proving that "it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

1. Prima Facie Case

The Mine Act's discrimination provisions provide miners with protections against adverse action for certain protected activities to encourage and enable miners to play an active role in the enforcement of the Act. A miner engages in protected activity if (1) they "ha[ve] filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation[;]" (2) they "[are] the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]" (3) they "ha[ve] instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]" or (4) they "ha[ve] exercised on behalf of himself or others...any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

It is undisputed that Scoles engaged in multiple forms of protected activity when he worked for HCC. First, Scoles made numerous safety complaints to mine management when he believed working conditions were unsafe. Tr. 235, 256-57, 275, 277-78, 303-05. Miner witnesses recalled specific instances where Scoles made complaints to management including but not limited to overheated beltline rollers, inadequate rock dust, excessive float dust, unset parking brakes, and malfunctioning scoops and door latches. Tr. 236, 256, 304. Second, Scoles served as a miner representative and walkaround during safety inspections two to three times each week in the eight months prior to his termination. Tr. 235, 256, 303-04. Third, Scoles filed five section 105(c) complaints against HCC for alleged retaliation for his safety advocacy. One of those complaints proceeded before the Commission and was adjudicated in his favor. *See Sec'y of Labor on behalf of Scoles v. Harrison County Coal Co.*, 40 FMSHRC 1393 (Sept. 2018) (ALJ). Finally, Scoles was running for two Local Union offices that assign walkarounds and raise miners' safety concerns prior to his discharge. Tr. 87, 237, 260-61, 278, 306. I find that Scoles engaged in protected activity as defined by section 105(c)(1).

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer's action qualifies as "adverse" is thus decided on a case by case basis. *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1848 n. 2 (Aug. 1984).

There is no dispute that Scoles suffered an adverse action when HCC suspended him with the intent to discharge him on May 10, 2017 and discharged him on June 17, 2017, following his arbitration decision. Exs. R–D, R–F; Tr. 371-72. "Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act." *Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998) (citing section 105(c)(1) of the Mine Act); *Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)). The crux of this case thus falls to whether Scoles can demonstrate a causal nexus between his protected activity and HCC's decision to terminate his employment.

A miner need not provide direct evidence of an operator's discriminatory motive, but may provide "circumstantial evidence...and reasonable inferences drawn therefrom. *Turner*, 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)).

Factors that may support such an inference include the operator's knowledge of the protected activity, evidence of hostility or animus toward the complainant, the temporal relationship between the complainant's protected activity and the operator's alleged adverse action, and the disparate treatment of the complaining miner. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I address each factor in turn.

a. Knowledge of Protected Activity

HCC does not dispute that it was aware that Scoles engaged in protected activity. That Scoles had a mine-wide reputation as a safety advocate and served as a walkaround appeared to be common knowledge among miners and management alike. Multiple miners testified to specific complaints that Scoles made directly to members of management as well as complaints that Scoles made over the mine radio communication system. HCC management was also personally involved with Scoles' past section 105(c) complaints. HCC settled two section 105(c) cases with Scoles and went to hearing before a Commission Judge on a third case.

I find that HCC had knowledge of Scoles' protected activity.

b. Animus or Hostility Toward the Protected Activity

Scoles argues that HCC repeatedly demonstrated hostility and animus toward his protected activity. Comp. Br. at 30. He contends that ALJ Andrews previously found that HCC was hostile toward Scoles in a prior section 105(c) case and that mine management ignored Scoles' safety complaints made over the dispatch. *Id.* at 31. More recently, Scoles contends that HCC demonstrated animus or hostility when HCC allegedly refused or delayed production of video evidence of his missed scans. *Id.* at 31-32. Finally, Scoles contends that HCC's introduction at hearing of Scoles' disciplinary documents under the mine's previous ownership constituted animus because they serve no basis for his discipline under the current Hand Scanner policy. Comp. Br. at 33.

Respondent argues that Scoles relies on protected activity and hostility that occurred long before his discharge and do not relate to his termination under the Hand Scanner Policy. Resp. Br. at 15. It also claims that Scoles or his representative viewed video footage of three scans and that Fazio was unable to show Scoles video evidence of the first two missed scans because Scoles admitted to missing them, prompting Fazio to delete the tapes. Fazio testified that miners were commonly unable to view the video promptly following notification of a violation of the Policy, and often were not shown the video until the grievance hearing. Tr. 413-15.

Given the history between Scoles and HCC there was ample opportunity for hostility or animus against Scoles' protected activity. The Court sees no reason to discredit Scoles' past interactions with HCC management that could and have been characterized as hostility in previous section 105(c) cases. These instances, however, were not shown at hearing to be connected to or to have played a role in Fazio and Martin's administration of the Hand Scanner Policy against Scoles.

I do not find merit in Scoles' assertion that HCC acted in a hostile manner when Fazio allegedly refused or intentionally delayed the production of video evidence of Scoles' alleged missed scans. At the outset, contrary to Scoles' testimony, Scoles or a representative on his behalf were able to see video footage of three of his five missed scans. Tr. 359-60, 364, 374, 412, 416-17. He was thus not categorically denied the ability to see video footage of his missed scans.

Although it is undisputed that Scoles was unable to view video footage of his first two missed scans, the parties disagree as to whether Scoles actually requested to see video evidence or whether he admitted to missing the scans, prompting Fazio to delete the videos. This conflict is more relevant to Scoles' allegation of disparate treatment under the Policy, and I will resolve the conflicts in detail in that analysis. Regardless of the testimonial dispute, the Policy does not require video footage of a missed scan to sustain a violation, nor does it require that management immediately show miners video footage of alleged missed scans. Ex. C–1. I accept Fazio's testimony that the payroll records were sufficient to establish a violation of the Policy. Tr. 346-47. Furthermore, even assuming that HCC refused to show Scoles video evidence of the first two scans upon his request, I find no evidence that the refusal was motivated by Scoles' protected activity rather than what appears to be confusion over whether Scoles admitted to the scans. Scoles cannot point to any comments or actions on the part of HCC that indicate hostility or animus based upon his prior complaints, his role as a walkaround, or the upcoming election. Scoles' violations occurred over the course of nearly an entire year. Over that period, none of HCC's comments or actions fail to align with the written policy or suggests abuse of the disciplinary scheme. Ex. C–1.

I likewise reject Scoles' contention that HCC demonstrated hostility when it unnecessarily delayed showing him or his miner representative the video footage of his other scans. Based on the record such a delay is not out of the ordinary in the context of enforcement of the Policy. Fazio testified that he generally waited until the grievance to show either the miner or his union representative video footage because miners so rarely disputed missed scans. Tr. 347,417, 423. He noted that these meetings could convene quite some time after the alleged missed scan occurred. Tr. 414. Indeed, Scoles' filed his grievance challenging his first two missed scans nearly three months after he was disciplined for them, and the hearing was held between seven and eight months after that discipline. Ex. C–6. Thus, the mine's failure to immediately show Scoles video footage in itself is not inconsistent with the general enforcement of the Policy or demonstrative of hostility toward the Complainant.

Finally, I reject Scoles' contention that HCC's introduction of Exhibit R–U, Scoles' disciplinary history for violating an attendance policy when the Harrison County Mine was under previous ownership, constituted animus. Scoles points to *Sec'y of Labor on behalf of Harrison v. Consolidation Coal. Co.*, 37 FMSHRC 1497, 1511 (July 2015) (ALJ), to argue that "introducing documents concerning the discipline of a miner when those documents should not rightfully have played any role in the disciplinary decision in question, is clear evidence of management hostility toward the miner and his exercise of Mine Act rights." Comp. Br. at 33.

The above noted temporary reinstatement decision is easily distinguishable from the instant case. In *Harrison*, the ALJ found evidence of animus where Respondent introduced at

arbitration an old safety slip as evidence of past disciplinary issues despite the terms of a previous settlement ordering Respondent to remove the slip from the miner's file. *Harrison*, 37 FMSHRC at 1511. Here, there was no such express violation of a previous agreement between the two parties. Furthermore, HCC did not enter the exhibit as support for its decision to discharge Scoles but to raise credibility questions as to his testimony that he had never failed to scan in or out. Tr. 106-110. Introduction of Exhibit R–U was thus relevant to the instant case and did not constitute animus.

Accordingly, Scoles has not demonstrated that HCC's administration of the Policy constituted animus or hostility or that the alleged animus was in response to his protected activity at the mine.

c. Temporal Relationship between Protected Activity and Adverse Action

Scoles argues that his discharge occurred close in time to his protected activity. Comp. Br. at 34. He contends that he commonly took part in protected activity and was terminated on the day of the Local Union elections, in which he was running for two positions. Respondent contends that the timing supports its defense because Scoles was terminated immediately after HCC became aware that Scoles reached Step 4 of the Hand Scanner Policy's disciplinary scale.[11] Resp. Br. at 15.

As discussed above, Scoles consistently engaged in protected activity up until his discharge. For the purposes of this decision, I find that a coincidence in time between the protected activity and the adverse action exists.

d. Disparate Treatment

Scoles contends that he was the subject of disparate treatment under the Hand Scanner Policy because he was strictly disciplined for each alleged missed scan whereas other miners were granted leniency in similar situations. Comp. Br. at 24. Scoles also argues that he was singled out and disciplined for his first missed scan even though he informed his supervisor that the scanner malfunctioned. *Id.* at 28-29.

Respondent maintains that it disciplined all miners, including Scoles, strictly in accord with the Hand Scanner Policy. Resp. Br. at 17. It contends that neither Scoles nor his comparator witnesses could support their claims of disparate treatment under the Policy when scrutinized against HCC's time, payroll, and enforcement records. *Id.* at 15.

As an initial matter, I find that Scoles did in fact fail to scan in or out on the five occasions for which he was disciplined. Although Scoles claimed that he did not miss *any* scans, his testimony was inconsistent at the hearing and contradicted his testimony at previous hearings. In his testimony before this Court, Scoles' varied from outright denial that he missed any scans, to uncertainty regarding a couple of scans, to an eventual acknowledgment that he missed one scan

[11] Respondent's argument is fully addressed below in my analysis of its affirmative defense.

because the kiosk malfunctioned. Tr. 31-32, 60, 63, 66, 92, 94-95, 109, 116. His assertion also contradicted his arbitration and unemployment compensation testimony, in which he admitted to missing all five scans. Exs. R–D, R–F, R–J; Tr. 94, 134-39, 140-41.

Scoles' account was similarly inconsistent regarding the video footage of his missed scans. He initially testified that he was only shown video for his final missed scan during his 24/48 hour meeting. Tr. 68-69. Although he testified that he could not remember seeing any video footage, he later admitted that either he or his representative was shown video evidence for three of the missed scans. Tr. 69, 119-20, 198-99, 366, 414. When crossed on these inconsistencies, Scoles was unable to produce a satisfactory explanation, and I therefore have grave doubts regarding Scoles' recollection of the facts surrounding the missed scans. *See* Tr. 134-144.

Meanwhile, Fazio provided a credible and consistent account of Scoles' disciplinary history that was supported by documentary evidence. HCC's time and payroll records and Fazio's disciplinary spreadsheet show that Scoles missed scans on each date alleged. *See generally* Exs. C–19, R–B; Tr. 351-53, 356-57, 358-60, 363-64, 365-67. The record also contains the verbal warning record, the written warning,[12] both 2-day suspension notices, and the suspension with intent to discharge notice, all of which support Fazio's account. Exs. C–18, R–B, p. 3. Furthermore, each of Scoles' grievances regarding missed scans were subsequently withdrawn or disposed of in the mine's favor. Tr. 198-99, 365, 374-75. The evidence supports that Scoles missed all five scans for which he was disciplined.

Having held that Scoles missed all five scans, I turn to his contention that he was subjected to harsher enforcement under the Policy compared to other miners. Scoles does not have a like-to-like comparator because no other HCC miners reached Step 4 of the disciplinary program. Rather, Scoles points to various instances in which miners avoided disciplinary action despite failing to scan in or out, whereas he was disciplined in strict accordance with the Policy on every occasion.

I find that Scoles was not treated differently than any other miner under the Policy. First, the comparators' accounts of disparate treatment consistently failed to match the dates in HCC's time and payroll records. Although every comparator expressed absolute certainty regarding the dates of unpunished missed scans HCC offered time and pay records that systematically refuted each miner's account. *See* Exs. R–AA, R–BB, R–CC, R–DD, R–EE, R–FF. Christopher Yanero testified that he missed a scan on February 13, 2018, but was not disciplined. Tr. 253. He also stated that miners Mark Heldreth and Jason Williams missed scans around the same time but that neither were disciplined. Tr. 254. Respondent provided time and pay records demonstrating that Yanero did in fact scan out on and around February 13 and that Heldreth and Williams scanned

[12] Although Scoles did not sign the written warning, I find that it was nonetheless properly issued. Scoles testified at hearing that he did not sign it because a miner representative was not present. Tr. 53. I accept Fazio's testimony that he did not press the matter because it was commonplace for miners to refuse to sign records. This disregard for mine documents is supported by Ezelle's testimony that he threw his Step 2 written warning into the garbage upon receipt. Tr. 286.

out on the days Yanero alleged they did not. Exs. R–V, R–BB, R–CC. Fay Ezelle claimed that he missed scans on February 27 and August 26 of 2018 and was not disciplined. Tr. 277. He also testified that he was only disciplined once under the Policy but then acknowledged that he had received a verbal warning, written warning, and 2-day suspension for missed scans. Tr. 276, 281. When asked about his Step 2 violation, he testified that he threw his written warning into the trash upon receipt. Tr. 286. Respondent again provided time sheets showing that Ezelle indeed reached Step 3 of the Policy and properly scanned in and out both on and around February 27 and on August 28. *See* Exs. C–19, R–V, R–W, R– X, R–Y; Ex. R–DD. David Hollis testified that co-worker Sam Marra missed two scans that were excused by management. Tr. 298-99. Respondent's records again show that Marra was not working in the same part of the mine as Hollis during his alleged first missed scan and that Marra had accurately scanned on and around the date of the second alleged missed scan. Ex. R–EE. Not one of the comparators' accounts of missed scans could be substantiated by the business or payroll records or in any way corroborated.

Scoles nonetheless asserts that "the fact that miners could not remember exact dates or confused times does not detract from the fact that they testified forthrightly regarding their recollections." Comp. Rep. at 7. The Court acknowledges the miners' earnest testimony but cannot credit any of it for the purposes of establishing disparate treatment in light of HCC's business records clearly showing otherwise. Complainant has not provided any evidence that casts doubt on the veracity of those records or that suggests that the testimony of his comparator miners is entitled to more weight.[13]

Business records aside, the comparators also demonstrated misconceptions as to how the scanners worked and how HCC administered the Policy that casts further doubt on the accuracy of their testimony. Yanero testified that he believed that he was not disciplined when scanner errors occurred because the records showed attempted or failed scans. Tr. 252. Hollis testified that he believed that scans could be excused if a supervisor filled out an exculpatory form letter. Tr. 300-302. Both of these claims appear to be inaccurate. Fazio testified that neither he nor any foremen have access or authority to excuse or alter missed scans. Tr. 372-73, 380, 407-08. Indeed, foremen handwrite the adjusted time onto the time sheet when a miner fails to scan in or out rather than entering them into the electronic system. Tr. 407-08.

I cannot conclude that other miners were disciplined less stringently than Scoles under the Policy. The comparator' accounts either conflict with HCC's business records or have plausible explanations for the discipline administered or lack thereof. In fact, examples of the Comparators' own discipline demonstrates that the Policy was enforced upon them as written. The miners were disciplined when they forgot to scan but likewise not disciplined when they experienced a scanner error and informed a supervisor.

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[13] Scoles maintains that the Court should credit his comparators' accounts over HCC's time and pay records because the operator offered no support for its records aside from Fazio's "self-serving testimony." Comp. Br. at 27. Yet Complainant offers nothing of substance to convince the Court that the time and payroll records are invalid. That the time and pay records support Fazio's testimony and refute the comparators' testimony is not a valid reason to discredit them.

Scoles alleges a specific example of disparate treatment when he was disciplined for missing his first scan on May 19, 2016, even though he informed his supervisor that he was unable to scan in due to a malfunction. Tr. 32. Scoles testified he immediately informed his supervisor, Jim Coles, who told him he would "take care of it." Tr. 32. Miner Perry Heflin corroborated Scoles' conversation with Coles but could not recall the exact date it occurred. Tr. 238-39. Scoles noted that Fazio later spoke to him regarding the missed scan and told him that he would not be punished. Tr. 32-33. Scoles was nonetheless put at Step 1 for missing the scan. Tr. 32-33.

Fazio disputed Scoles' account. He denied telling Scoles that he would not be disciplined and did not recall Scoles mentioning any conversation with Coles about the scan. Tr. 354. Rather, Fazio testified that Scoles admitted to missing the scan, telling him that "he was a big boy" and that "he could take it." Tr. 351. HCC provided evidence of the verbal warning with written acknowledgment that Scoles admitted the miss and accepted the discipline. Ex. R–B, p. 2; Tr. 349-50. Fazio noted that he did not save the video recording of the first missed scan because Scoles admitted that he failed to scan out. Tr. 351-54.

I have already found that Scoles missed the scan, and I accept Fazio's testimony that Scoles admitted as much. Fazio's account is supported by the time and pay records, his spreadsheet, and the notes recorded on the verbal warning record. Ex. R–B p. 5, C–19; Tr. 354, 357. His account explains why Fazio did not save the video footage and was unable to show Phillippi the video months later during Scoles' grievance meeting.

Scoles argues that he reported a malfunction and that Fazio informed him he would not be disciplined for the missed scan. I do not credit this contention. As noted above, I found Scoles' testimony to be severely inconsistent and seriously question his recollection of the events surrounding each of his five missed scans. With regard to the May 19 scan at issue, Scoles wavered between outright denying that he missed the scan and acknowledging that he did not scan in because the scanner malfunctioned, in both cases claiming that Fazio told him he would not be disciplined. Tr. 31-32, 92-95, 109, 116. Nonetheless, Scoles testified that he demanded to see the video and was refused. Neither of these sequences of events explained why Scoles would demand to see the video if he admitted to missing the scan, acknowledged that he missed the scan due to a kiosk malfunction, or was told that he would not be disciplined.

Scoles points to his and Heflin's testimony that Scoles spoke with his supervisor about the scanner malfunction to argue that he was improperly disciplined for immediately reporting the issue. Heflin's testimony corroborated Scoles' account but did not provide sufficient detail to confirm that it pertained to the May 19 scan, or what exactly Coles meant when he said he would take care of the scanner malfunction. Tr. 238-239. Assuming Scoles experienced a scanning issue and that the conversation with Coles occurred on May 19, I find that Coles likely "took care" of the payroll aspect of the scanner issue but could not address the disciplinary side of the missed scan. This explanation reconciles Coles' statement with Fazio's testimony that front-line foreman and supervisors do not have the authority to excuse missed scans, only to annotate and validate time to ensure miners are paid according to hours work. Indeed, Scoles' time and pay for that date is handwritten and apparently initialed by Coles. Ex. R–B, p. 3. This finding also

explains why Fazio had no recollection of speaking with Coles about the matter, as Fazio is not involved with the payroll side of the Policy.

However, even accepting Scoles sequence of events, it does not necessarily follow that he did not miss the scan in violation of the Policy. Although multiple miners testified that they were not disciplined when they immediately informed a supervisor that they were unable to scan in or out, none claimed that they were simply excused as Scoles believed to be. Tr. 239-40, 254, 276, 297. Rather, most of the miner witnesses explained that their supervisors instructed them to return to the kiosk and continue trying to scan in or out until it was finally accepted. Tr. 240, 272, 311. In situations where miners informed supervisors that personally came to address the machine issue, the miners recalled attempting to scan in again after they reported the issue. Tr. 240, 272. Thus, I find it plausible that Scoles could have reported the issue and still missed the scan in violation of the Policy by not attempting to rescan.

In sum, I do not find that Scoles was treated differently than other miners when he was disciplined for missing the May 19 scan. Scoles' testimony was inconsistent and did not fully match his alleged sequence of events, while HCC provided business and disciplinary records consistent with Fazio's recollection of the missed scan, including the verbal warning that noted Scoles' acceptance of the discipline. Ex. R–B, p. 2; Tr. 351, 354. I therefore find that Scoles admitted to missing the May 19 scan and accepted the Step 1 discipline for it. Hence, his treatment was consistent with that of other miners that missed scans in accordance to the Policy.

Accordingly, I find that Complainant was not subject to disparate treatment under the Policy.

e. Conclusion

In light of the above, I conclude that Complainant did not establish a *prima facie* case of discrimination. The Complainant was unable to establish a nexus between his protected activity and his discharge under the Policy. Although HCC knew of Scoles' reputation as a safety advocate and had come into conflict with Scoles before regarding these matters, Scoles did not sufficiently show that HCC discharged him because of his protected activity. Most conclusively, Scoles was unable to establish that he was treated any differently than other miners for violating the Hand Scanner Policy. Scoles' own testimony regarding his scanning history lacked any semblance of credibility, and his comparators were unable to show examples of disparate treatment under the Policy. On the other hand, HCC provided business records supported by Mr. Fazio's credible testimony that showed a detailed and consistent enforcement of the policy. Accordingly, I find that Scoles failed to establish a *prima facie* case of discrimination.

2. *Affirmative Defense*

An operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and that the operator would have taken said action based solely on the unprotected activity. *Pasula* at 2799-2800. In reviewing the defense, the judge should determine whether it is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The complainant may show that the alleged non-discriminatory reason is pretext for the adverse action by showing that

the "asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Respondent contends that Scoles was terminated in accordance with the Mine's Hand Scanner Policy and would have been terminated for that reason alone. Resp. Br. at 16. Scoles was disciplined upon each violation and was terminated immediately once HCC management discovered that he reached Step 4. *Id.* HCC argues that it has a legitimate and important business interest in accurately maintaining the time and payroll records for its workforce. *Id.* Thus, Scoles' discharge was consistent with the Policy and solely determined by his repeated failure to scan in and out. *Id.*

Scoles maintains that HCC used the Hand Scanner policy as pretext for his discharge. Comp. Rep. at 11. Scoles points to the other miners' testimony to argue that HCC enforced the Policy in an inconsistent and lenient manner and thus did not discharge Scoles solely for his failure to scan in and out. *Id.* Furthermore, Scoles argues that HCC inflated its purported business interest in maintaining accurate payroll records because the mine regularly used an alternative means of tracking time that was more reliable than the hand scanners. *Id.* at 12-13.

Assuming arguendo that Complainant established his *prima facie* case, I find that HCC established a valid affirmative defense. Scoles reached Step 4 of the Hand Scanner Policy due to his multiple failures to scan in and out over the course of a year. The designated punishment at Step 4 is suspension with the intent to discharge, and HCC immediately disciplined Scoles accordingly when he reached that step. The Hand Scanner Policy's language is singularly directed toward enforcing consistent compliance with HCC's time and attendance system and clearly outlines the repercussions for repeated failure to do so. Ex. C–1. Although they may not have agreed with the Policy itself, Scoles and the other miners were aware that failing to scan in or out constituted a violation and testified to their personal experiences with the progressive discipline scheme.

Fazio's testimony lends credibility to HCC's proffered reason for discharging Scoles. He described his interactions with Scoles at each disciplinary step and his process for administering the Policy throughout the mine in detail. His disciplinary spreadsheet and the mine's time and payroll records indicate that Fazio meticulously tracked missed scans and disciplined culpable miners in accordance with their status on the progressive discipline scheme. Ex. C–19. His testimony did not indicate that his disciplinary interactions with Scoles differed from those with other miners, were out of step with the Policy, or were motivated by factors other than Scoles' failure to scan in our out. Furthermore, his testimony and HCC's time and pay records systematically and consistently refuted the testimony of Scoles and his comparators' regarding inconsistent enforcement of the Policy. As discussed in detail above, none of the miners' testimony was sufficiently credible to cast doubt on the veracity of HCC's records or that HCC's implementation of the policy was implausible or out of line with normal business practices.

Complainant argues that HCC overstated its business interest in enforcing the Hand Scanner Policy because front-line foreman and supervisors regularly enter the time and pay accurately and without malfunction whenever miners missed a scan. Comp. Br. at 12-13. I reject this

argument. The mere existence of a reliable backup system does not lessen HCC's business interest in ensuring accurate time and pay for its workforce or the legitimacy of the Hand Scanner Policy as a means to do so. Mines have a clear business interest in ensuring its employees are paid correctly, consistently, and without dispute. They thus have a clear interest in ensuring that miners use the system put in place. Computerizing those calculations serves to provide an objective means of doing so and eliminate suspicion that mine management may abuse their power in making those calculations themselves. Supervisors are only authorized to adjust time and pay when miners fail to use the Hand Scanners, and they must do so by hand on the time sheet. It is therefore clear that HCC implemented the Hand Scanner Policy and system to minimize supervisors' involvement in calculating time and insulate the electronic system from their control. The Court finds this interest both reasonable and plausible.

I find that HCC's offered business justification was not pretextual. The Hand Scanners are a plausible means to accurately calculate time and pay of all 315 miners working at the Harrison County Mine and to hold miners accountable for scanning in and out. The system is designed to avoid disputes between employees and management regarding pay by using an objective electronic timekeeping system. It cannot be effective, however, unless miners regularly scan in and out, and the Policy is unequivocally intended to ensure that they do so. HCC's desire to implement a disciplinary scheme that effectively deters miners from failing to scan in and out is therefore reasonable. Scoles reached Step 4 of the Policy's progressive discipline scheme when he failed to scan in or out on five different occasions without being exonerated more than one time. While discharge was the harshest measure available, it was clearly outlined within the Policy, and the Court declines to substitute its view of what may be good business practice for that of the operator with an opinion as to whether the adverse action was "just" or "wise." *Sec'y of Labor on behalf of Silva v. Aggregate Indus. WRC, Inc.*, 40 FMSHRC 552, 572 (Apr. 2018) (ALJ) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981).

D. Interference

Scoles also contends that HCC's "action of disciplining Scoles to the point of discharge under the [Hand Scanner] Policy, while declining to discipline other similarly-situated miners each time management alleged them to have committed the exact same violation, is not only inherently likely to interfere with Scoles' exercise of Mine Act rights; it is completely destructive of that exercise, inasmuch as it ended his employment at the Mine." *Id.* at 37. Complainant also contends HCC's decision to terminate him interferes with the rights of other miners because it will chill their desire to make safety complaints at the mine. *Id.* Complainant urges the Court to adopt the *Franks* test, which finds an interference violation when:

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

UMWA on behalf of Franks v. Emerald Coal Res., LP, 36 FMSHRC 2088, 2108 (Aug. 2014).

HCC disagrees and contends that Scoles' discharge should not be analyzed under an interference framework. Resp. Br. at 20. Respondent argues that doing so would "create a 'perverse' incentive for miner complainants to plead interference claims in lieu of or in addition to discrimination claims to avoid the more rigorous *Pasula/Robinette* framework." *Id.*; *see also Sec'y of Labor on behalf of Pepin v. Empire Iron Mining P'ship*, 38 FMSHRC 1435, 1453 (June 2016) (ALJ). If the Court does consider Scoles' claim, HCC urges the adoption of an interference test for facially neutral company policies as outlined in *Feagins v. Decker Coal Co.*, 23 FMSHRC 47, 50 (2001) (ALJ) (holding that to constitute illegal interference a facially neutral policy must (1) overtly impose negative consequences to a person for the exercise of a Mine Act Right or (2) damage or deny rights assured under the Act even if there is no overt causal connection between the damage suffered and the exercise of the protected right). Resp. Br. at 19. Should the Court apply the *Franks* test to Scoles' claim, however, HCC argues that its decision to discharge Scoles cannot be reasonably viewed as tending to interfere with Mine Act rights, and was nonetheless justified by its legitimate interest in accurately tracking time and payroll that outweighs any harm caused to the exercise of said rights. *Id.* at 20-21.

Unlike discrimination cases, the Commission has accepted interference claims where a miner complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than an adverse employment action. *See Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985). In these cases, the Commission focuses not on the employer's motive but on whether the conduct would "chill the exercise of protected rights," either by the directly affected miner or by others at the mine. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

A majority of the Commission has not endorsed a single analytical framework to apply when determining whether an operator interfered with the exercise of protected rights under section 105(c). *Sec'y of Labor on behalf of Greathouse, et al. v. Monongalia County Coal Co. et al.*, 40 FMSHRC 679, 680 (June 2018). Two Commissioners in *Greathouse* and multiple Administrative Law Judges have applied the *Franks* test. The remaining two Commissioners held that the Complainant must also demonstrate that the alleged interference was motivated by animus to the exercise of protected rights. *See Greathouse*, 40 FMSHRC at 708. At this time, no Commissioner has explicitly endorsed Respondent's proposed interference test for facially-neutral policies as put forth in *Feagins*, while at least one Commission Judge has found that test to be out of line with Commission's current case law on interference. *See Sec'y of Labor on behalf of Greathouse*, 39 FMSHRC 941, 948 (May 2016) (ALJ) (holding that Commission precedent has de-emphasized proof of a miner's attempted exercise of a protected right and not required a showing of intent to interfere).

At the outset, the Court has grave reservations in accepting Complainant's alternative argument of interference and in applying the *Franks* test to a case that so obviously implicates protected activity and an adverse employment action. *Cf. Gray*, 27 FMSHRC at 8. To expand the use of interference claims to clear adverse actions such as discharge would allow complainants to sidestep the elements required to prove a *prima facie* case of discrimination

under section 105(c). *Pepin*, 38 FMSHRC at 1452-53. In a case such as this one, where protected activity and adverse action are clearly present and where discriminatory motive has not been found, permitting an alternative pleading of interference runs the risk of rendering the *Pasula/Robinette* superfluous. If, upon failing to prove up its *prima facie* case of discrimination, a complainant may then resort to a claim of interference, there is little stopping a Complainant from avoiding *Pasula/Robinette* analysis altogether by alleging interference to prove its claim under the less stringent *Franks* test. *See* 38 FMSHRC at 1452-53.

Moreover, accepting the notion that a miner's discharge interferes with that miner's ability to exercise protected activity would excise the burden of proof under the first prong of the *Franks* test. That a miner's discharge interferes with his or her own ability to engage in protected activity is a tautology. To hold that HCC's decision to discharge Scoles pursuant to the Hand Scanner Policy interfered with his rights would obfuscate the intended purpose of "interference" under the Act and open the door for any and every miner to challenge the mere fact of their termination with or without a demonstrated impact on protected activity. This could not have been Congress' intent when it identified two causes of action under section 105(c): "not only the common forms of discrimination, such as discharge, suspension, [and] demotion..., *but also* against the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982) (citing S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], *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 624 (1978)); *see also Pepin*, 38 FMSHRC at 1452-53 (emphasis added).

Regardless, the Court need not dwell upon whether multiple tests are necessary for factually different interference claims or endorse a specific interference framework because Scoles' claim does not satisfy the *Franks* test, so far the least stringent interference test endorsed by the Commission.

1. Whether HCC's decision to discharge Scoles pursuant to the Policy can be reasonably viewed as tending to interfere with the exercise of protected rights.

The Hand Scanner Policy implemented a four-step progressive discipline system for each instance where a miner failed to use the hand scanner to start or end their shift. Ex. C–1. HCC discharged Scoles after his fifth missed scan in slightly less than a year. He was moved back one step in accordance with the policy after scanning in and out for 180 consecutive days during that period.

When compared to other programs or plans found to interfere with miner's protected rights, HCC's Hand Scanner Policy does not implicate the exercise of protected rights under the Act. In other cases, the policies at issue either directly chilled a miner's exercise of rights or provided an incentive for miner's not to exercise those rights. *See, e.g., Greathouse*, 40 FMSHRC 679 (June 2018) (addressing bonus plan that awarded miners for production and thus discouraged safety complaints); *Sec'y of Labor on Behalf of Thomas McGary et. al. v. The Marshall County Coal Co. et. al.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ) (policy requiring miners to report safety complaints to management before making the complaints to MSHA interfered with miners right to make anonymous complaints). Unlike those cases, the Hand Scanner Policy itself does not

create any disincentive to refrain from engaging in protected activity. Miners cannot be disciplined for engaging in protected activity under the Policy and are not deterred from doing so based on any implication of the Policy's language. *See* Ex. C–1. A miner cannot be discharged under the Policy for anything other than repeatedly failing to scan in or out. In short, if a miner simply scans in and out every day, the Policy will not impact them or their actions whatsoever.

When considering the totality of the circumstances surrounding Scoles' discharge, however, I find that miners may reasonably view HCC's decision to discharge him in close proximity to his election to the Union Safety Committee as tending to chill the exercise of protected rights. Hollis testified that he warned Scoles not to run for the Union positions and refused to vote for him for fear of adversely impacting his employment at the mine. Tr. 306-307. Given Scoles' reputation for safety advocacy, his pending candidacy for two Local Union positions, and his past conflicts with HCC management, miners could conceivably view HCC's decision to discharge Scoles under the Policy as a statement discouraging miners' exercise of protected activity for fear of being subject to stricter enforcement of the Policy.

For the purposes of this decision, I find that Scoles' discharge satisfies step 1 of the *Franks* test.

2. *Whether HCC's decision to discharge of Scoles' pursuant to the Hand Scanner Policy outweighs the harm caused to the exercise of protected rights.*

The second prong of the Franks test turns to whether the operator had a "legitimate and substantial" reason for the action "whose importance outweighs the harm caused to the exercise of protected rights." *Greathouse*, 40 FMSHRC 679, 702 (June 2018) (citations omitted). An operator's substantial business justification is most persuasive when it is narrowly tailored to promote the justification and the operator's interest is important and the impact on employee rights is minimal. *See Franks*, 36 FMSHRC 2088, 2118 (Aug. 2014); *Greathouse*, 38 FMSHRC 941, 954 (May 2016) (ALJ) (citations omitted).

Scoles contends that HCC cannot offer a legitimate and substantial reason for discharging him under the policy that outweighs its interference with miners' rights because it took the most severe action possible in discharging him.[14] Comp. Br. at 39. HCC contends that it has a legitimate and substantial interest in ensuring accurate timekeeping and the payment of correct wages to its employees and ensuring that miners consistently scan in and out. Resp. Br. at 21. It notes that the Hand Scanner Policy is narrowly tailored to minimally affect employees' rights by focusing solely on whether miners properly scan in and out of their shifts. *Id.*

I find that HCC's interest in enforcing the Policy outweighs the minimal and attenuated impact upon miners' exercise of their protected rights. The mine is large and must track the time

[14] Scoles contends that because HCC's enforcement of the Hand Scanner Policy was pretextual in that it treated Scoles differently than other miners, it is unnecessary to balance that purported reason against the resulting interference with miners' rights. Comp. Br. at 39. Since I have already found that HCC's enforcement of the policy was not pretextual, I need not address this argument or its implications for interference claims in general.

and pay of 315 miners. It uses the hand scanners to quickly and effectively do so. Tr. 335-37. The system does not operate as effectively or efficiently as intended if miners do not use the scanners. The progressive discipline scheme is in place to ensure compliance. Scoles' termination was in accordance with the established Policy, and HCC had a legitimate and substantial interest in enforcing the Policy so that miners consistently use the hand scanners to track their hours.

In contrast, Scoles' discharge under the Hand Scanner Policy caused minimal and attenuated harm to other miners' exercise of protected rights because he was solely responsible for remembering to scan in and out at the end of his shifts, especially as he progressed further along the disciplinary scheme. Scoles offers no evidence that he felt the Policy deterred him from exercising his rights or any evidence that the Policy was implemented as a threat against his exercise of those rights. Rather, Scoles demonstrated a flippancy toward the Policy, calling it "a joke," "piddly," and "heinous" during his deposition and reiterating that belief at hearing. Tr. 95-99. Any harm that HCC's decision to discharge Scoles may have caused to miners' exercise of protected rights is tempered by Scoles' failure to adhere to the Policy. While a reasonable miner may conceivably view HCC's decision to discharge Scoles as a warning not to engage in protected activity, I find it much more likely that a reasonable miner would view Scoles' discharge as a warning to remember to scan in and out each day.

Contrary to Scoles' claim, HCC's decision to discharge him was narrowly tailored to promote compliance with the Hand Scanner Policy. Although Complainant correctly characterizes HCC's decision to discharge him pursuant to the Policy as the most severe action possible, discharge for repeated failure to scan in and out is clearly stated in the Policy, and the Court will not impart judgment on the "fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Sec'y of Labor on behalf of Beckman v. Mettiki Coal (WV), LLC*, 33 FMSHRC 258, 274 (Jan. 2010) (ALJ) (citing *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990)). Here, the Policy does not directly or indirectly implicate miners' abilities to exercise their rights under the Act, and the act of scanning in or out does not impose any burdens on miners that might obstruct or deter them from making complaints. The Policy clearly notes that a miner will be suspended with the intent to discharge upon reaching Step 4 of the Policy. A miner can only reach Step 4 by failing to consistently scan in or out, and HCC discharged Scoles for this reason.

I therefore find that HCC's interest in ensuring that miners consistently use the hand scanners to track time outweighs the harm that Scoles' discharge caused to the exercise of protected rights at Harrison County Mine. Inconsistent or lenient enforcement of the Policy compromises its purpose of ensuring consistent, mine-wide use of the Hand Scanner system. Scoles continuously violated the Policy and was disciplined accordingly to deter him from doing so in the future.

I find that Scoles' discharge pursuant to the Hand Scanner Policy did not unlawfully interfere with miners' exercise of protected rights pursuant to section 105(c) of the Mine Act.

IV. ORDER

Accordingly, the complaint brought by George Scoles is **DENIED** and this proceeding is **DISMISSED**.

David P. Simonton
Administrative Law Judge

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