FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

April 11, 2016

UNITED MINE WORKERS OF AMERICA (UMWA) on behalf of MARK A. FRANKS, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. PENN 2012-250-D PITT-CD 2012-04
v.	:	
EMERALD COAL RESOURCES, LP, Respondent,	:	Emerald Mine No. 1 Mine ID 36-05466
UNITED MINE WORKERS OF AMERICA (UMWA) on behalf of RONALD HOY, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. PENN 2012-251-D PITT-CD 2012-05
v.	:	
EMERALD COAL RESOURCES, LP, Respondent.	:	Emerald Mine No. 1 Mine ID 36-05466
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2013-305 Mine ID: 36-05466
v.	:	Docket No. PENN 2013-306 Mine ID: 36-05466
EMERALD COAL RESOURCES, LP, Respondent.	:	Emerald Mine No. 1

DECISION ON REMAND

Before: Judge Miller

These cases are before me on complaints of discrimination brought by the United Mine Workers of America (UMWA) on behalf of Mark A. Franks ("Franks") and Ronald Hoy ("Hoy") against Emerald Coal Resources, LP ("Emerald"), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c), and on petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), against Emerald pursuant to Sections 105 and 110 of the Act, 30 U.S.C. §§ 815 and 820. Following an evidentiary hearing in this case, I issued a decision on the merits of the discrimination cases. *UMWA on behalf of Franks v. Emerald Coal Res., LP,* 35 FMSHRC 1696 (June 2013) (ALJ). The Secretary subsequently filed petitions for assessment of civil penalties. The parties filed joint stipulations addressing the penalty criteria, and I assessed a total penalty of $40,000 against the mine operator. Unpublished Order dated Oct. 29, 2014.

Emerald petitioned the Federal Mine Safety and Health Review Commission for review of both the decision after hearing and the order assessing penalty. The Commission granted review as to the decision after hearing only, affirming the result. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088 (Aug. 2014). Emerald then appealed the Commission's decision and the order assessing penalty to the United States Court of Appeals for the Third Circuit. The Third Circuit consolidated the cases, vacated the Commission's decision, and remanded to the Commission for further analysis. *Emerald Coal Res., LP v. Hoy*, 620 Fed. Appx. 127 (3d Cir. 2015). The Commission in turn remanded the cases to me. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 38 FMSHRC __, slip op. at 3, No. PENN 2012-250-D (Feb. 10, 2016). In accordance with the Commission's order, I enter the decision below.

I. INITIAL DECISION AND REMAND

In the initial decision, I determined that Franks and Hoy had proven a *prima facie* case of discrimination and that the defense set forth by the mine operator was pretextual. 35 FMSHRC at 1697. My finding of discrimination was made under the *Pasula-Robinette* framework for analysis of discrimination claims under section 105(c). *Id.* at 1702-05. On review, the Commission affirmed my decision, but was split as to the rationale. Commissioners Young and Cohen voted to affirm the decision on the grounds that Emerald had *discriminated* against Franks and Hoy in violation of section 105(c) of the Mine Act. 36 FMSHRC at 2103. Chairman Jordan and Commissioner Nakamura voted to affirm the decision after concluding that Emerald had *interfered* with the protected rights of the miners in violation of section 105(c). *Id.* at 2119. On appeal, the Third Circuit held that the Commission had failed to articulate a rationale for its decision, and so vacated and remanded the decision. 620 Fed. Appx. at 129. The Commission then remanded the cases to me "to conduct the interference analysis in the first instance."[1] 38 FMSHRC __, slip op. at 3. Franks and Hoy, the Secretary, and Emerald were given the opportunity to submit briefs on the issue of interference, and I considered their arguments. For the reasons set forth below, I conclude that both Franks and Hoy have demonstrated a *prima facie* case of interference and that the defense set forth by the mine operator does not outweigh the harm to the rights of miners.

II. FACTUAL BACKGROUND

This case involves the Emerald Mine No. 1, an underground coal mine in Green County, Pennsylvania. At the time relevant to this case, July through November 2011, the mine was operated by Emerald Coal Resources, and Mark Franks and Ronald Hoy were employed as beltmen at the mine. Jt. Stips. ¶¶ 1, 3-7.

Franks and Hoy both credibly testified at hearing that they complained of unsafe practices at the mine to a representative of the UMWA safety committee, David Moore, on two occasions in August 2011. Tr. at 24-25, 36-37, 53, 55-56. The complaints related to inadequate pre-shift examinations by one or more firebosses. Tr. at 24-25, 47, 53, 55-56. Hoy and Franks

[1] While the Commissioners did not agree to the basis of the adverse action, four agreed that the mine had violated the Act with regard to Franks and Hoy. My original decision discussed a finding of discrimination, but since the case has been remanded, I now decide the case under the interference provision. *See* 36 FMSHRC at 2104 (Jordan & Nakamura, Comm'rs); *id.* at 2125 (Althen, Comm'r).

testified that the conversations took place on August 17 and August 29, 2011. Tr. at 24, 25, 53, 55. David Baer, a UMWA member, testified that he overheard Franks and Hoy making the complaints on both days in August. Tr. at 64-65. Hoy's complaint related to a specific instance on July 15, 2011, in which a fireboss failed to walk the length of the beltline during his examination. Tr. at 35; Comp. Ex. 1. Franks's complaint related to a similar issue with an examination conducted on July 27, 2011. Tr. at 47, 61. Franks and Hoy both testified that they told Moore the name of the fireboss and the dates of the examinations when they made their complaints. Tr. at 18-20, 47. Both believed that once they provided the information to Moore, he would investigate the matter and then bring the issue to the attention of the company if necessary. Tr. at 19, 39, 43, 52.

At hearing, Moore agreed that Hoy complained to him about a specific instance of an inadequate belt examination by a fireboss. Tr. at 123. Moore believed the conversation occurred in July rather than August, however, and denied that a second conversation took place in August or that Franks and Baer were present. Tr. at 122-25. On the date when Hoy recalled the conversation happening, August 17, Moore testified that he was at the MSHA academy for safety training. Tr. at 122. He denied that Franks ever brought a complaint to him relating to firebosses. Tr. at 121-23. Regarding Hoy's specific complaint, Moore testified that he had been off the beltline when the fireboss went through on the day Hoy referred to, but that he checked the date board, which indicated that the exam had been performed. Tr. at 123-24. Moore testified that he did not see any evidence that the firebosses were not doing their runs, but he spoke to the firebosses about the issue anyway. Tr. at 124.

The testimony of the witnesses is inconsistent with regard to the complaints made to Moore. I do not find Moore to be a credible witness, and therefore I resolve the conflict in favor of Franks and Hoy. Moore's answers were opaque and evasive. He insisted that he only spoke to Hoy once, yet Franks, Hoy, and Baer remember Franks and Hoy speaking to Moore about the examination issue twice. The fact that Hoy may have remembered or written down the incorrect day in August does not change my assessment. Franks, Hoy, and Baer all agree that Franks and Hoy spoke to Moore twice in August. Both times, the miners expected that the information they provided to Moore would be investigated and passed on to the appropriate safety committee or to management. Both Franks and Hoy believed they were following UMWA rules by providing information to Moore as their safety representative, thereby remaining anonymous and protecting themselves from retaliation. Tr. at 43, 52.

On or about September 22, 2011, an anonymous 103(g) complaint was made to MSHA. Jt. Stips. ¶ 12. One of the allegations contained in the complaint was that firebosses had not been conducting adequate inspections of the beltline at the mine. Jt. Ex. 1. In response to the complaint, an MSHA inspector conducted a hazard complaint investigation of the mine. Jt. Stips. ¶ 13; Jt. Ex. 1. During the investigation into the hazard complaint, the MSHA inspector spoke to and took statements from approximately 34 miners and supervisory personnel, including Franks and Hoy. Jt. Stips. ¶¶ 13-15, 29-33, 38.

On September 28, 2011, MSHA inspector Thomas Bochna arrived at the mine as part of the investigation. Jt. Stips. ¶ 13. Bochna approached Franks and questioned him about whether he had observed a fireboss fail to perform a proper pre-shift examination of the belt. Jt. Stips. ¶

14. Franks responded that he knew of the incident, as well as the name of the fireboss and the date of the inspection. *Id.*

On the same shift, Franks was called into an office with Bochna; a supervisory MSHA inspector, David Severini; Emerald's compliance manager, William Schifko; an Emerald management trainee, Adam Strimer; the UMWA local president, Anthony Swetz; and the miners' representative, Bruce Plaski. Jt. Stips. ¶¶ 15, 16. Inspector Severini informed the group that Franks had spoken to Bochna that day and that he was aware of an incident where a fireboss failed to perform an adequate beltline examination. Jt. Stips. ¶¶ 19, 20. Franks was asked twice and refused to provide the name of the fireboss or the date of the inadequate examination. Jt. Stips. ¶ 22. Later that day, Franks was called into a follow-up meeting. Jt. Stips. ¶ 24. Inspector Severini again asked him to name the fireboss, and Franks again refused. *Id.*

On September 29, 2011, Franks met with inspector Bochna, Emerald compliance manager Schifko, and local president Swetz. Jt. Stips. ¶¶ 26, 27. Franks stated that he had written the name of the fireboss and the date of the inadequate exam in his personal calendar, but that he would not produce the document because it was not "worth it" for him to do so. Jt. Stips. ¶ 27.

On October 4, 2011, Hoy was called into Schifko's office for a meeting that included Schifko, MSHA inspectors Severini and Tony Setaro, Emerald management trainee Strimer, and UMWA mine committeeman Douglas Scott. Jt. Stips. ¶ 33. Severini informed Hoy that the mine could not retaliate against him for meeting with MSHA. *Id.* Hoy admitted that he had observed several occasions when an examiner had not properly examined the conveyor belts, but when asked, he refused to provide the name of the fireboss who had performed the exams. Jt. Stips. ¶ 34; Tr. at 33. Hoy also declined a request to name a foreman he had heard complaining about inadequate belt examinations. Jt. Stips. ¶ 35. He was asked to produce his personal calendar where he had recorded the names of the firebosses and the dates of the examinations, but he refused. Jt. Stips. ¶ 36.

MSHA concluded its investigation into the allegations in the anonymous complaint on October 4, 2011. Jt. Stips. ¶ 37; Jt. Ex. 2. MSHA issued seven citations to Emerald, but did not find evidence of inadequate examinations of the beltline. Jt. Stips. ¶ 38; Jt. Ex. 2.

Following the MSHA investigation, Emerald began its own investigation into the allegations in the 103(g) complaint. Jt. Stips. ¶ 39. On October 20, 2011, Franks and Hoy were called separately into meetings with Emerald human resources manager Christine Hayhurst, UMWA committeeman Douglas Scott, Schifko, and Swetz. Jt. Stips. ¶¶ 40, 42. Franks and Hoy again declined to provide the name of a fireboss or the dates of the examinations or to produce written records. Jt. Stips. ¶¶ 40-42. In a subsequent meeting with Schifko, Hayhurst, and Swetz on October 24, 2011, Franks again declined to name the fireboss or provide the date of the inspection. Jt. Stips. ¶ 43.

On November 9, 2011, Franks and Hoy were each summoned to yet another meeting with Emerald safety manager Joseph Pervola, Hayhurst, and UMWA mine committeeman David Baer. Jt. Stips. ¶¶ 45, 48. Both Franks and Hoy again declined to provide a name of a fireboss

or the date of an inadequate inspection. Jt. Stips. ¶¶ 45, 48. They were subsequently suspended from work without pay for seven days. Jt. Stips. ¶¶ 46, 49. Letters provided to Franks and Hoy indicate that the reason for their suspensions was the "failure to provide information you have concerning serious allegations of safety violations." Jt. Stips. ¶¶ 46, 49.

Franks and Hoy claim that they refused to identify the fireboss at the meetings and during the investigation because they had already provided the information to the UMWA safety representative, David Moore. Tr. 18-22, 47, 49, 50, 52. Hoy informed the MSHA inspectors and Emerald management of his reason for refusing at the October 4th meeting. Tr. at 17-18. Franks and Hoy also believed that Section 103(g) of the Mine Act protected them from having to disclose the names of other miners involved in a safety complaint to management. Tr. 18-20, 38-39, 58. The record also indicates that the mine did know the names of the accused firebosses. Tr. at 22, 81, 95-96.

On November 10, 2011, Franks and Hoy filed separate discrimination complaints with MSHA. The miners stated that Emerald had "targeted" and "harassed" them for participating and cooperating in a 103(g) complaint investigation conducted by MSHA. Compl. of Discrim., Ex. A at 2, 4. MSHA investigated the allegations and determined that no violation of 105(c) had occurred. Compl. of Discrim., Ex. B at 1, 3.

On April 23, 2012, Complainants, through the UMWA, filed a joint complaint of discrimination with the Commission pursuant to 30 U.S.C § 105(c)(3). The complaint alleges and the miners testified that Emerald interfered with the miners' right to provide information to authorized representatives of MSHA during its investigation of a hazard complaint and discriminated against them for their exercise of that right. Franks and Hoy further allege that Emerald interfered with the miners' right to make an anonymous complaint about an alleged danger or safety or health violation to MSHA or to a miners' representative. The miners sought lost wages including regular, overtime, and holiday pay, and to have any reference to the suspensions removed from their personnel files. *Id.* at 10.

III. ANALYSIS

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

> No person shall discharge or in any manner discriminate 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 chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1) (emphasis added). This section of the Act is the basis for most discrimination complaints filed by miners. In addition, a majority of the Commission has

recognized that this section establishes a cause of action for interference that is separate and distinct from discrimination. *Franks*, 36 FMSHRC at 2103 n.22 (Young & Cohen, Comm'rs); *id.* at 2105-07 (Jordan & Nakamura, Comm'rs); *id.* at 2124 (Althen, Comm'r); *see also Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-10 (Jan. 2005).

The Secretary of Labor has proposed a test for evaluating interference claims that was adopted by two Commissioners in this case. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). Under the Secretary's test, a violation of the interference provision of Section 105(c)(1) occurs if

> (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.

Sec'y Amicus Br. at 7. The Secretary's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140 (1944)).

The first prong of the Secretary's test is derived from cases interpreting Section 8(a)(1) of the NLRA. Sec'y Br. at 7. That section makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in NLRA Section 7. 29 U.S.C. § 158(a)(1). Accordingly, courts analyzing claims under Section 8(a)(1) look to "whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 830 (7th Cir. 2005) (quoting *NLRB v. Gen. Thermodynamics, Inc.*, 670 F.2d 719, 721 (7th Cir.1981)); *see also Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 930-31 (D.C. Cir. 2013); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998); *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982). The Secretary's proposed standard is consistent with the Commission's analysis in *Gray*. *See* 27 FMSHRC at 9 (evaluating "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights" (quoting *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959))).

The second prong of the Secretary's test is also derived from NLRA precedent and examines the mine operator's justification for its action. Sec'y Amicus Br. at 10. In Section 8(a)(1) cases, a court will reject an employer's justification if the court finds that the justification is pretextual. *See e.g. United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004); *Cannondale Corp.*, 310 N.L.R.B. 845, 849 (1993). Consistent with this, the Secretary's test asks whether the employer's justification is pretextual or "legitimate." Sec'y Amicus Br. at 10. If the justification is legitimate, a court hearing a Section 8(a)(1) case is then directed to "strike the proper balance between the asserted business justifications and the invasion of employee rights

in light of the Act and its policy." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, (1967); *see also Medeco*, 142 F.3d at 745; *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976). Accordingly, the final component of the Secretary's test is a balancing inquiry that assesses whether the mine operator's justification is "substantial" enough to outweigh the harm to the protected rights of miners. Sec'y Amicus Br. at 10-11.

Respondent objects to the use of the Secretary's test, arguing that Section 105(c) should be read as establishing an "anti-retaliation remedy." Resp. Br. at 6. In Respondent's view, to succeed on a claim under Section 105(c)(1), a claimant should be required to demonstrate that he engaged in protected activity and that the operator acted in response with a discriminatory motive.[2] Respondent's argument is based primarily on the text of Section 105(c)(1), which states that it is unlawful for a person to "discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... *because* such miner" has engaged in protected activity under the Act. 30 U.S.C. § 815(c) (emphasis added). Respondent argues that the word "because" indicates that Congress intended to reach only cases where there is a causal connection between the miner's protected activity and the operator's discrimination or interference. Resp. Br. at 5. Respondent argues that the language in the Act, therefore, permits a claim for interference only where a miner engaged in a protected activity and there was an intent on the part of the mine operator to interfere with that activity. Resp. Br. at 12.

A number of factors, however, weigh against the Respondent's reading. First, the interference language of Section 105(c)(1) ("interfere with the exercise of the statutory rights of any miner") is substantially similar to the language in Section 8(a)(1) of the NLRA ("interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7). 30 U.S.C. § 815(c); 29 U.S.C. § 158(a)(1). The Secretary persuasively argues that in drafting the interference language of Section 105(c)(1), Congress would have been aware of Section 8(a)(1), a well-known provision of labor law. Sec'y Amicus Br. at 5. Thus, it is likely that in including the term "interfere" in Section 105(c)(1), Congress intended to employ a term of art from federal labor law. Sec'y Amicus Br. at 5. Interference under the NLRA is a separate concept from retaliation and does not require a showing that the employee actually engaged in protected activity. *Medeco*, 142 F.3d at 745; *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (holding work rule invalid under Section 8(a)(1) because of its "tendency to inhibit" protected activity without deciding whether protected activity in fact occurred). Further, it is well established under NLRA case law, and was at the time of the drafting of the Mine Act, that unlawful motive is not a necessary element of an interference claim. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964); *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959). Congress likely intended to incorporate a similar type of claim into the Mine Act when it chose to use the term "interfere." *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

---

[2] In the original decision, I found that Franks and Hoy did engage in a protected activity when they complained about safety and that it was directly related to a retaliatory action. That finding does not change here, but for purposes of discussing the application of the interference provision, I find that it is not necessary that the miners engage in a protected activity.

Additionally, the legislative history of the Act indicates that Congress's intent with regard to Section 105(c)(1) was to "protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work as a result of engaging in protected activity, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. Rep. No. 95-181, at 36 (1977). The Secretary notes that while the "common forms of discrimination" mentioned are all actions an employer might take in response to a protected activity by an employee, the "more subtle forms of interference," promises of benefit and threats of reprisal, are instead actions that would be taken to influence future activity. Sec'y Amicus Br. at 13. While in both cases the concern is that miners will be discouraged from future protected activity, with promises of benefit or threats of reprisal, the effect is the same whether or not the employer took the action in response to past protected activity. Congress's discussion of both types of activity together suggests that it intended to create more than just a basic anti-retaliation remedy. Protected activity is one of the important elements of a discrimination claim, but it loses its importance in substantiating a claim of interference based upon a threat or promise that may affect future action. Still, the analysis must include the existence of a protected right that was subject of interference.

The Secretary's approach is also consistent with Commission precedent. In *Moses*, the Commission affirmed a finding of interference with a miner's exercise of protected rights under 105(c)(1) where the operator believed that the miner had made a safety complaint, but he had not in fact done so. 4 FMSHRC at 1475, 1479-80. In reaching its decision, the Commission acknowledged that a "literal interpretation of [105(c)(1)] might require the actual or attempted exercise of a right before the protection of section 105 comes into play," but it ultimately rejected that reading. *Id.* at 1480. The Commission noted that Congress intended for Section 105(c)(1) to be "construed expansively to assure that miners will not be inhibited *in any way* in exercising any rights" afforded by the Act. *Id.* at 1480 (quoting S. Rep. 95-181, at 36 (1977)). The Commission also emphasized that 105(c)(1) should be interpreted to "redress or deter situations where an operator, with the intent of frustrating protected activity, takes action against an innocent miner." *Id.* Both the Commission's statement and the statement of the Senate committee point to the fact that Section 105(c)(1) prohibits not just retaliatory conduct, but also conduct that frustrates future protected activity. Finally, in *Gray*, the Commission suggested that intent was not a necessary element of an interference case, determining that the judge erred by focusing primarily on the intent behind statements made by a supervisor to a miner who testified against him in a grand jury investigation. 27 FMSHRC at 10. Instead, the judge should have considered the totality of the circumstances, including what meaning the miner could reasonably have inferred from the supervisor's statements. *Id.* at 10-11.

I find that the Secretary's proposed test for interference is consistent with the text of the Mine Act and with Commission and other relevant precedent. Accordingly, I apply it here.

a. Interference with a Protected Right

An essential right of miners under the Mine Act is the "right to obtain an immediate inspection by giving notice to the Secretary" if the miner believes that a violation of a health or safety standard exists at the mine. 30 U.S.C. § 813(g)(1). The provision reflects Congress's belief that "mine safety and health will generally improve to the extent that miners themselves

are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. 95-181, at 30 (1977). The same is true of a miner's right to make safety and health complaints, not only to mine management, but to a miners' representative. 30 U.S.C. § 815(c)(1).

Franks and Hoy assert that, in interrogating and suspending them in relation to the MSHA investigation, Emerald interfered with their rights to make a complaint under Section 103(g) and to make a complaint to a miners' representative. Compl. of Discrim. at 8-9. The Commission has decided that "Whether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'" *Gray*, 27 FMSHRC at 8 (quoting *Moses*, 4 FMSHRC at 1479). In *Gray*, which involved potentially threatening statements made by a supervisor to a miner, factors that the Commission considered relevant to the interference analysis were the persistence with which the supervisor raised the subject of the protected activity; the accusatory manner with which the subject was raised; where the statements were made; the nature of the relationship between the supervisor and the complainant; the fact that the statements related to confidential grand jury testimony; and the fact that the supervisor attempted to speak to the complainant alone. *Id.* at 11-12. The Commission examined similar facts in *Moses*, which involved repeated, accusatory questioning of a miner about the reporting of an accident. 4 FMSHRC at 1479. The Commission emphasized that the essence of its inquiry was whether the operator's conduct "could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Id.* Finally, the Seventh Circuit has performed a similar analysis in determining whether an interrogation interfered with protected rights under the NLRA:

> Factors that ought to be considered in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union. We also consider whether questions about protected activity are accompanied by assurances against reprisal and whether the interrogated worker feels constrained to lie or give noncommittal answers rather than answering truthfully.

Multi-Ad Servs., Inc. v. NLRB, 255 F.3d 363, 372 (7th Cir. 2001) (citation omitted).

Like *Moses* and *Gray*, this case involves repeated questioning of miners regarding a safety-related enforcement action. In the course of MSHA's investigation into the complaint made at Mine No. 1, MSHA inspectors learned that Franks and Hoy had made a complaint about safety to their safety representative and knew the identity of a fireboss who had failed to conduct a proper inspection at the mine. As part of the investigation, Franks was called into three separate meetings with MSHA personnel, Emerald management, and union representatives, where he was asked four times to identify the fireboss. Jt. Stips. ¶¶ 15, 16, 22, 24, 26.[3] After

[3] There is some question of the propriety of MSHA's actions in informing the mine that Franks and Hoy were involved in the 103(g) allegations made in this case, thereby removing their right to at least some confidentiality.

MSHA concluded its investigation and Emerald began its own investigation into the allegations in the complaint, Franks was called into three more meetings with Emerald management and union representatives. Jt. Stips. ¶¶ 39, 40, 43, 45. Each time he was asked to identify the fireboss. Jt. Stips. ¶¶ 40, 41, 43, 45. At the last meeting, Franks was suspended for refusing to provide the information. Jt. Stips. ¶ 46. Hoy's experience was similar to Franks's. He was called into one meeting as part of the MSHA investigation, where he was asked to identify a fireboss but refused. Jt. Stips. ¶¶ 29-34, 36. When Emerald began its own investigation, Hoy was called to two more meetings, where he was again asked to name the fireboss. Jt. Stips. ¶¶ 42, 48. At the final meeting, he was suspended for failing to provide the requested information. Jt. Stips. ¶ 49. Clearly the mine was persistent in accusing both miners of wrongdoing based upon safety complaints. Further, the accusations were made in management offices, with a number of mine management and representatives present and questioning them.

I find that these circumstances were intimidating and coercive from the perspective of a reasonable miner. Franks's and Hoy's behavior throughout the complaint process and subsequent investigations demonstrates the importance to them of confidentiality when making a complaint. Both testified that they chose to bring their complaints to Moore, the safety committeeman, because of their concern for confidentiality. Tr. at 43, 48, 52. Franks explained that he believed that by making the complaint to Moore he would be protected from retaliation by the company and would avoid getting "flack from the other workers." Tr. at 48, 52. Hoy testified that after the meeting during the MSHA investigation, another miner told him he "had a big target on [his] back for talking to the inspectors." Tr. at 33. Both Franks and Hoy clearly believed that they would be put in a precarious position with other miners if it were known that they had reported another miner for safety violations. The meetings with MSHA and Emerald made clear, however, that the miners' right to raise safety concerns directly with their miners' representative would not be respected. Franks and Hoy both indicated at the first meeting with MSHA that they did not wish to disclose the name of the fireboss to MSHA and management, but that they had already provided it to Moore. Tr. at 18, 19. Nevertheless, both were called in for multiple meetings and repeatedly asked to provide the information. A reasonable miner would have understood this as pressure from the company to disclose the information. The presence of multiple management officials at these meetings undoubtedly increased the pressure. *See* Jt. Stips. ¶¶ 40-43, 45, 46. Finally, the suspensions that Franks and Hoy received were a clear signal that they were not free to make complaints in the manner they wished. Franks and Hoy could reasonably have interpreted this coercive questioning and ultimate suspension to be the result of having made a safety complaint. They reasonably would have believed that in the future they would be subjected to scrutiny if they made safety complaints to their representative or if any of their concerns appeared in a complaint to MSHA, and so would be dissuaded from making future complaints that could lead to MSHA investigations. *See Moses*, 4 FMSHRC at 1479 (finding that interference occurred where conduct "chill[ed] the exercise of protected rights"). I thus find that the actions of Emerald in this instance interfered with the right of Franks and Hoy to make safety complaints to their union representative or to MSHA under Section 103(g).

b. Emerald's Legitimate and Substantial Reason

Under the Secretary's test for interference, once a finding of interference with protected

rights is made, the operator has an opportunity to "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." Sec'y Amicus Br. at 7. It is then the court's duty to "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

Emerald asserts as the justification for its actions that it had a responsibility "to provide a safe workplace, a responsibility that necessarily involves investigation of safety issues." Resp. Br. at 11, 17. Indeed, the Mine Act states that "the operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices" in the mines. 30 U.S.C. § 801(e). The Commission has recognized that "[i]n order to carry out this responsibility, mine operators need to know about unsafe conditions." *Swift v. Consol. Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). Schifko, Emerald's compliance manager, testified that examinations of conveyor belts are vital to mine safety, and that after MSHA finished its investigation, Emerald felt the need to investigate further to see if there was any merit to the complaints about inadequate inspections. Tr. at 75-76.

I find that Emerald's need to investigate the 103(g) complaint was a legitimate and substantial justification for seeking to learn the identity of the firebosses from Franks and Hoy. I do not find, however, that it outweighed the harm caused to the protected rights of miners. First, while Emerald had a legitimate need to learn the identity of the firebosses, the record shows that the company could have, and in fact did, obtain the information from sources other than Franks and Hoy. Specifically, Franks and Hoy had both provided the name of a fireboss to safety committeeman Moore, and Hoy and possibly Franks informed Emerald of this fact during the MSHA investigation. Tr. at 18, 19, 47. Emerald did interview Moore as part of its investigation, and he stated that he did not know of any problems with belt inspections. Tr. at 80. At that point, though, Emerald could have inquired more deeply into the complaints Moore had received and in order to find out the dates and times of the alleged bad inspections. It is in fact clear from the record that the mine did learn the names of the firebosses mentioned in the complaints of Franks and Hoy. Yet Emerald focused on extracting the identity of the fireboss from Franks and Hoy, even though both had indicated they were unwilling to disclose the information.

Additionally, I find that the impact of Emerald's conduct on the exercise of protected rights at the mine was significant. Franks and Hoy were subject to multiple interrogations in front of a crowd of managers and officials and were ultimately suspended. They were repeatedly asked to provide information related to safety complaints they anonymously made at the mine. These events reasonably could have dissuaded Franks and Hoy from reporting safety violations in the future. Further, other miners at the mine were aware of the treatment of Franks and Hoy during the investigations. *See e.g.* Tr. at 33, 48. It is likely that these other miners could also be dissuaded from reporting safety violations in the future out of a fear of similar repercussions. An atmosphere where miners are afraid to make safety complaints is directly contrary to Congress's vision of miners actively participating in mine safety enforcement, and can have negative consequences on safety at the mine. Because these effects are directly opposed to the policy of the Mine Act, I find that Emerald's justification for its actions does not outweigh the harm to miners' rights "in light of the Act and its policy." *Fleetwood Trailer*, 389 U.S. at 378.

Therefore, I find that Emerald's actions violated Section 105(c)(1).

IV. PENALTY

After I issued my initial decision in this case, the Secretary proposed two penalties of $20,000.00 for the violations in this case. The Secretary based these penalties on my findings of discrimination in the proceeding above. 36 FMSHRC at 2100. I find that the Secretary's proposed penalties are also appropriate for interference violations.

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. The mine has a history of two previous 105(c) violations. Emerald is a large operator and Mine No. 1 is a large mine. Respondent admits that the penalties will not affect its ability to continue in business. Ans. to Pet. for Assessment at ¶ 6. I find that a good faith reduction is not appropriate for these violations. The gravity of the violations is serious in that Respondent compromised the willingness of miners to participate in mine safety enforcement at the mine. Respondent's negligence was significant given the persistence of its conduct in the face of the obvious unwillingness of Franks and Hoy to name the fireboss. Accordingly, I find that the Secretary's proposed penalties are appropriate.

V. ORDER

Emerald Coal Resources is **ORDERED** to pay back pay to Mark Franks in the amount of $1,168.68, and to Ronald Hoy in the amount of $1,963.93, with interest at 8% from the date it was due.[4] Emerald is **ORDERED** to pay the sum of $40,000.00 to the Secretary of Labor. All payments shall be made within 40 days of the date of this order. Emerald shall, within 40 days of the date of this order, post this decision along with a visible notice on a bulletin board that is

[4] The back pay calculation is based upon the calculations in Respondent's Exhibit 1, agreed to by the parties.

accessible to each and every employee, explaining that the company has been found to have interfered with the exercise of protected rights by employees, that such interference will be remedied, and that it will not occur in the future. The notice shall inform all employees of their rights in the event that they believe they have been discriminated against and shall remain posted for 180 days. All reference to the reprimand received by Franks and Hoy, and the reasons therefore, shall, within 40 days of the date of this order, be removed from their respective personnel files or other employment records. Such reprimand shall not be used or considered as a basis for any future action against Franks or Hoy.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Laura Karr, United Mine Workers, 18354 Quantico Gateway Drive, Triangle, VA 22172

R. Henry Moore, Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Ave. Pittsburgh, PA 15222

Ronald Hoy, 13 Bonasso Drive, Fairmont, WV 26554

Mark Franks, 253 Braddock Avenue, Uniontown, PA 15401

Melanie Garris, Office of Civil Penalty Compliance, MSHA, U.S. Department of Labor, 201 12th Street South, Arlington, VA 22202

Jason Grover, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Arlington, VA 22202