FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 24 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of J. DON ARNOLD, Complainant. v. BHP NAVAJO COAL COMPANY, AND ITS SUCCESSORS, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2013-541-D MSHA Case No.: DENV CD 2013-11 Mine: Navajo Mine Mine ID: 29-00097

DECISION

Appearances: Karla Jackson Edwards, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, TX, Representing the Secretary

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, CO
Representing Respondent.

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by J. Don Arnold ("Arnold" or "Complainant"), a miner, against BHP Coal, LLC, ("Respondent"), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3).

Arnold filed a discrimination complaint in this matter with MSHA on February 28, 2013. On June 11, 2013, the Secretary of Labor filed the complaint with the Commission. Arnold requested revocation of a written warning and a re-evaluation on a performance review. Respondent answered on July 9, 2013, denying the substantive allegations and requesting a hearing. This docket was assigned on August 1, 2013. On November 7, 2013, Respondent filed a Motion for Summary Decision. The Secretary filed a timely Response to the Motion for Summary Decision on December 16, 2013; Respondent replied on December 20, 2013. On March 6, 2014, an Order Denying Respondent's Motion for Summary Decision was issued.

On April 19, 2014, a hearing was set in this matter for September 17-19, 2014. On May 15, 2014, the date was changed to October 21-23, 2014. The hearing was held on October 22 and 23, 2014, at the Dale Claxton Federal Building in Durango, Colorado. On January 23, 2015, both parties submitted Post-Hearing Briefs; on February 9, 2015, both parties filed Reply Briefs. All Briefs have been fully considered.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.[1] (Transcript at 228).[2] Those stipulations include the following:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this action pursuant to Section 113 of the Mine Act, 30 U.S.C. §823.

2. This action is brought by the Secretary and J. Don Arnold pursuant to the authority granted by Section 105(c) of the Mine Act, 30 U.S.C. §815(c).

3. At all relevant times, Respondent, BHP Navajo Coal Company was an "operator" as that term is defined by Section 3(d) of the Mine Act, 30 U.S.C. §802(d).

4. At all relevant times, Respondent was also a "person" within the meaning of Section 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§802(f) and 815(c).

5. Respondent produces products that enter commerce or has operations or products that affect commerce, all within the meaning of Sections 3(b), 3(h), and 4 of the Mine Act, 30 U.S.C. §§802(b), 802(h), and 803.

6. Respondent has employed Complainant J.D. Arnold since February 25, 1986, at Navajo mine.

7. At all relevant times, Respondent employed Complainant J.D. Arnold as a Maintenance-A Electrician.

8. At all relevant times, Complainant was a "miner" within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. §802(g).

[1] Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

[2] The hearing in this matter occurred on the second and third day of three days of hearings involving BHP Navajo. The first day of hearing concerned an unrelated matter which was later settled. However, the court reporter numbered the transcript pages continuously beginning on that first day. As a result, the transcript in this matter begins at page 223. Hereinafter the transcript will be cited as "Tr." followed by the page number.

9. Complainant engaged in protected activity within the meaning of Section 105(c)(1) of the Mine Act, 30 U.S.C. §815(c)(1) when he filed a complaint with MSHA on February 28, 2013.

10. MSHA issued Respondent a 104(a) citation, number 8480130, regarding a ventilation fan motor in the coal laboratory on February 20, 2013. On the afternoon of March 1, 2014, BHP was advised in a meeting with MSHA at the Navajo Mine that the citation was being modified to a 104(d)(1) order. At the hearing on the merits of this order on July 30, 2014, the citation was further modified to a 104(d)(1) citation because the underlying unwarrantable failure citation leading to an order had been modified to a section 104(a) citation.

11. On February 22, 2013, Complainant was "held out of service pending further Investigation" by Respondent.

12. On March 1, 2013, Respondent reinstated Complainant, allowed him to return to work and paid him for his time off.

13. On March 1, 2013, Respondent issued Complainant a written warning.

14. Respondent drafted a 2013 Performance Review of Complainant's performance.

15. MSHA proposes a civil penalty of $20,000.00 against Respondent on June 10, 2013 because of the allegations of discrimination against Complainant.

16. The payment of $20,000.00 will not affect BHP Navajo Coal Co.'s ability to remain in business.

(JX-1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant, J. Don Arnold, was present at the hearing and testified. (Tr. 241). Arnold had worked at the mine since 1986. (Tr. 241). As a Maintenance-A electrician, Arnold conducted monthly electrical inspections and repaired/maintained equipment based on work orders. (Tr. 241-243). Arnold was a member of the Operating Engineers Local 953 and served as union steward, miners' representative, and union board member for at least 15 years. (Tr. 242).

On January 19, 2013, Arnold received a work order to repair equipment in the mine's coal lab. (Tr. 243-244, 389). At the lab, Arnold noticed that there was an exhaust fan but did not know its purpose. (Tr. 243). Arnold followed the exhaust system to the roof (despite the fact that he was not tasked with doing so) and became concerned about an open-faced motor he found there. (Tr. 243-244). He was concerned because the lab monitored for explosive gases. (Tr.

243-244, 390). After he observed the motor, Arnold waited for his supervisor, the electric shop foreman, Kerry Steagall, to return to work.[3] (Tr. 244-245, 389).

On January 22, 2013, Arnold spoke with Steagall about the possibility of a problem with gas in the lab and they went to view the motor. (Tr. 244, 389-390). Steagall and Arnold had a relationship of mutual respect. Steagall did not question Arnold's credibility or believe he would make irrelevant safety complaints. (Tr. 392). This was the first time Steagall saw the fan and he did not know when it was installed. (Tr. 391-392). They discussed the issue and were concerned that if the gas was not shut off or if there was a leak that the fan was an improper installation and would allow gas to get inside. (Tr. 392, 403). They did not know how the fan was installed, what worked, what did not work, and if there were any safety issues with the set up. (Tr. 434).

Arnold asked if they should tag out the motor but Steagall did not see a hazard and asked him to wait until they learned more.[4] (Tr. 244, 282, 395). Steagall was unsure whether the motor needed to be changed and said he would ask Jim Berget, the chief electrical engineer.[5] (Tr. 244-245, 392-393, 477). Arnold knew Steagall's electrical experience and if he was uncertain about the existence of a hazard, Arnold was uncertain. (Tr. 245-246). Berget told Steagall that anything installed was up to code but that he would investigate and get back to them. (Tr. 245, 393). Steagall believed any changes should wait on Berget's reply. (Tr. 394). Berget testified that he never planned to follow up, but instead told them to contact those involved in the installation. (Tr. 477-478).

On the same day Arnold filed (and Steagall signed) a near miss report regarding other equipment on the roof that he claimed was improperly installed. (Tr. 379-380, 393-394, 775). Near miss forms were created to allow hourly personnel without computers to place reports in a searchable database for supervisors to review. (Tr. 775-776). This one stated, "[i]mmediate

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[3] Kerry Steagall was subpoenaed and testified at hearing. (Tr. 381). He worked at the mine for 36 years and retired in June 2013, last working as an electrical supervisor. (Tr. 381-383, 458-459). In that capacity he made schedules, kept records, and conducted inspections. (Tr. 383). He supervised Arnold and Alfred Bennally and was supervised by Tim Ramirez. (Tr. 383). Steagall was a qualified electrician for 40 years. (Tr. 383-384). No loyalty to Arnold or Respondent affected his ability to testify. (Tr. 382). He was trained on the Mine Act as it relates to locking/tagging out equipment and making complaints without retaliation. (Tr. 419-420).

[4] At safety meetings, miners were told that if they saw hazardous machinery they should tag it out and remove it from service. (Tr. 270). Arnold testified that, in reality, this rarely happened as certain equipment was never shut down and was kept running until it could be fixed. (Tr. 270-271). Here, if Arnold tagged out the motor, it would have affected the x-ray portion of the lab and the lab tech may not have been able to analyze coal. (Tr. 395-396).

[5] Jim Berget was present at the hearing and testified. (Tr. 474). Berget retired from BHP after 22 years on May 2, 2014. (Tr. 474). During 2012 and 2013, Berget worked as the only electrical engineer at Navajo Mine. (Tr. 475). He was a qualified electrician for 30 years. (Tr. 476-477). No loyalty to Arnold or Respondent affected his ability to testify. (Tr. 475).

action taken." (Tr. 380, 394). Anything uploaded to the database was monitored to prevent it from being overlooked. (Tr. 776-777).

On February 14, 2013, Arnold was assigned to conduct a monthly electrical inspection at the coal lab and noticed that nothing had been done with the motor.[6] (Tr. 246, 402). He turned in his examination form and spoke to Steagall, who also had not heard anything. (Tr. 246, 329, 396). They called Berget, who said that he had not found anything, that he was not getting involved because it was not his area of expertise, and that he thought the fan was installed correctly (based on the specific gravity of propane and the location of the fan on the ceiling). (Tr. 246-247, 396-398, 482-483). According to Berget, he had made no effort to research the issue and he again told them to contact those who installed the lab to discuss classification under the National Electric Code ("NEC"). (Tr. 478, 483-485). Berget left the issue up to Steagall and Arnold. (Tr. 398).

Arnold then called the Area 3 safety department between 2:00 and 3:00 p.m. and spoke with the safety specialist, Tyler Martin.[7] (Tr. 247, 399, 684, 718). Arnold called Martin because he was a former MSHA inspector and an underground miner and in his opinion they often had electrical skill. (Tr. 247-248). Arnold and Steagall asked Martin if the motor needed to be reclassified because of the explosive mixture of gas or propane in the exhaust system. (Tr. 408, 685-686). They wanted to know if the system was properly installed under the Mine Act. (Tr. 719, 722). Martin testified that Arnold threatened to call in a 103(g) complaint if the issue was not addressed. (Tr. 719). Arnold and Martin went to the lab and Martin took pictures with his company phone and said he would check with the company that installed the motor. (Tr. 247-248, 250, 399, 403, 404-405, 687, 693-694, 688). Arnold and Steagall believed Martin would get back to them about the issue in a few days. (Tr. 250, 405). Steagall did not mind the delay because he believed there was no hazard. (Tr. 405, 437-438).

Martin testified that during the conversation both Arnold and Steagall said there was an imminent danger in their opinion as electrical specialists. (Tr. 719). Martin did not believe there was a potential explosion hazard because the explosive level of CO was so high that anyone in the room would die before it was reached. (Tr. 686, 688-689). However, he was not a qualified electrician and did not have the same level of expertise as the electricians regarding the motor or

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[6] Monthly inspection forms and related work orders were numbered, tracked, and filed (both on computer and in hard copies) to ensure that repairs were done on time. (Tr. 306-307, 311-313, 467-468). These forms were available for anyone to review. (Tr. 308). Steagall did not always receive the forms but they always went to Tim Ramirez. (Tr. 307, 468-469). Ramirez only reviewed the forms when there was an incident that required documentation or root-cause analysis to prevent future issues. (Tr. 611-612).

[7] Tyler James Martin was present at the hearing and testified. (Tr. 683). In 2013 Martin was Respondent's safety specialist. (Tr. 683). Before that, he was an MSHA inspector and had received all MSHA inspection and NEC training. (Tr. 683-684, 717). He had no electrical training beyond MSHA inspection training. (Tr. 684). He had spent 21 years in the mining industry, including two with Respondent, at a variety of jobs. (Tr. 716-718).

the NEC. (Tr. 689-690). Steagall did not recall anyone saying "imminent danger" during the conversation but that was the reason they spoke with Martin, to determine whether this was an imminent danger. (Tr. 409-410).

Arnold testified he asked again if he should tag out the motor but that Martin said they did not know if there was an issue so it was not done. (Tr. 247, 282-283). Arnold told Martin and Steagall he was going to note that management told him not to tag out the motor in his monthly inspection notes (GX-1). (Tr. 248-249, 251). He wrote, "[c]oal lab, Room 508 exhaust fan needs to be Class 1, Div. 1 motor. This has been reported at least two months to management. Kerry Steagall and Tyler Martin are aware of the issue, did not remove from service as per their direction." (Tr. 249).

Steagall did not recall this discussion but he did recall he and Arnold agreed not to take action until they heard from Martin because it was not their area of expertise. (Tr. 403-404). Steagall never told Arnold not to tag out the fan. (Tr. 471). He recalled telling Arnold at other times that he could tag out equipment if they disagreed on the existence of a hazard. (Tr. 471-472). Martin also denied telling Arnold not to tag out the fan. (Tr. 730). He told Arnold and Steagall to research the NEC and that if they believed it necessary, they should tag out or repair the motor immediately under 30 C.F.R. §77.502 and the company policy. (Tr. 689, 719-721). He testified they persisted in calling the condition an imminent danger but did not tag it out. (Tr. 721).

On February 19, Steagall typed a short report about the motor based on his (and to an extent Arnold's) notes and gave a copy to Arnold and Tim Ramirez (GX-5).[8] (Tr. 412-413, 469-470, 505, 510). Arnold reviewed the report and may have corrected errors. (Tr. 469-470). Steagall was not asked to make the report; he wanted to make a record and update Ramirez. (Tr. 412-413). The report included notes on Berget, Martin, and the pictures. (Tr. 413-414, 505-506). The notes indicated that Martin had promised to get back to them as soon as possible but had not done so. (Tr. 414, 508). The document does not contain the phrase "imminent danger." (Tr. 414). Ramirez's copy was left on Ramirez's desk. (Tr. 470).

Later that day, Arnold and Steagall asked Martin what he had learned about the motor. (Tr. 249, 405, 508, 690-691, 794). Other electricians were present, including Ben Yazei and Lawrence Beyale.[9] (Tr. 252 406-407, 411, 794). Martin said he had contacted the manufacturer

[8] At hearing, Tim Ramirez was present and testified. (Tr. 486). At the time of the hearing, Ramirez worked in the mining industry for seven years, all with BHP. (Tr. 486, 589). In 2013, Ramirez was the superintendent of maintenance execution, coal plant. (Tr. 487, 588-589). He supervised four salaried employees, one admin, and 27 or 28 mechanics and electricians including Steagall. (Tr. 317, 487, 589). He was supervised by Halgryn and Goeckner. (Tr. 316-317, 850). He had a degree in mechanical engineering from New Mexico Tech. (Tr. 591).

[9] Lawrence Beyale was present at the hearing and testified. (Tr. 788). At that time, he was maintenance-A supervisor and had worked for Respondent for about 30 years. (Tr. 788-789). In February 2013, Beyale was the miners' rep and his supervisor was Steagall. (Tr. 789).

and then talked about gas, air mixtures, lower explosive limits, and the independent nature of the monitoring system. (Tr. 250-251, 691, 726). He also noted that, based on a letter written about the room by an outside electrical expert, the room did not fit any of the NEC classifications. (Tr. 691, 725).

According to Martin, Arnold and Steagall still thought an explosive mixture could make its way through the exhaust system. (Tr. 726). Arnold felt that Martin raised irrelevant issues unrelated to the installation questions he asked regarding the NEC. (Tr. 250-251, 371-373). At hearing, he conceded the NEC dealt with the topics Martin raised. (Tr. 375-376, 378). Steagall recalled that Martin did not have any answers to their questions despite having sufficient research time, though he did not recall specifics of the conversation. (Tr. 405-406).

Arnold and Martin looked at the fan again and saw that it was full of dust. (Tr. 400). Steagall told Arnold to vacuum out the motor and to take "before and after" photographs with his cell phone. (Tr. 252, 400, 410). Arnold was allowed to use his phone because the batteries in Steagall's camera were dead. (Tr. 401, 461). Arnold took pictures, cleaned, and then sent the photos to Steagall's company computer. (Tr. 253, 373). Steagall did not know if the fan was locked out while Arnold cleaned it. (Tr. 404). That would have been standard procedure, but failure to do so would not have been a big issue because there were no moving parts. (Tr. 404).

During the interaction with Martin, Arnold said that if the motor was not removed from service or fixed he was going to call in a 103(g) complaint. (Tr. 250-251, 692). According to Arnold, Martin told him to "do what he had to do." (Tr. 250-252). Martin testified he told Arnold he had every right to make a call if he felt there was a hazard, but asked if he had done everything in his power to address the situation. (Tr. 692, 726). In Martin's opinion, Respondent made safety a priority and miners should make a job safe before proceeding. (Tr. 692). Steagall did not recall this exchange. (Tr. 407-408). He also did not recall anyone saying "imminent danger" but it may have been part of the conversation. (Tr. 407). Beyale also did not hear anyone say "imminent danger" though he was only listening intermittently. (Tr. 794-795).

Later, Arnold called Barry Dixon and suggested filing a 103(g) complaint.[10] (Tr. 253, 803). An employee could make a 103(g) complaint, but Arnold usually went through Dixon. (Tr. 336-337). If Arnold and Dixon disagreed, Arnold would file anyway. (Tr. 337, 806). Arnold contacted Dixon because miners were encouraged to follow the chain of command and give the company a chance to fix things before contacting MSHA. (Tr. 253, 270, 273, 338, 418, 548-549, 551, 755, 807). If an issue brought to a supervisor was not addressed in a day or two the miner would continue up the chain before calling MSHA. (Tr. 270, 418, 755, 807). However, imminent dangers could be tagged out immediately. (Tr. 273, 418-419, 471). Managers discussed this policy during safety meetings, Part 48 training, and had it posted on the union bulletin board. (Tr. 253-254, 272-273, 548, 652-653, 676, 807). Ruth Williams testified

[10] Barry Dixon was present at the hearing and testified. (Tr. 802). He was the union president and business manager for the local at BHP Navajo as well as an electrician for 27 years. (Tr. 802-803, 810). He retired in 2006 after an entire career with BHP. (Tr. 336, 803, 810).

she had, at Respondent's request, told miners to contact supervisors before making 103(g) complaints.[11] (Tr. 826-827). In light of this policy, Arnold was afraid of retaliation if he called MSHA. (Tr. 806). In fact, Dixon testified that Shawn Goeckner[12] and Mark Hoffman[13] told him in 2007 or 2010 that they believed Arnold was making 103(g) complaints. (Tr. 675-676, 807-809). Dixon believed the company was not supposed to seek the source of anonymous complaints. (Tr. 809).

Here, Arnold explained the issue and Dixon agreed, as an electrician, that there was an explosion hazard and that the configuration did not meet NEC standards. (Tr. 803-804). During the discussion Arnold did not use the term "imminent danger" and did not believe there was one. (Tr. 253, 804-805). Dixon believed there was an imminent danger because management had known of the condition for two months and failed to act. (Tr. 804-805). Dixon did not recall Arnold mentioning whether Martin told him twice he should tag out the motor if he thought there was a hazard. (Tr. 812-813). After the conversation, Dixon agreed to call in a 103(g) complaint because he believed there was an imminent danger. (Tr. 253, 336, 496, 804-805).

At 4:00 p.m. Martin was traveling with MSHA Inspector Williams when Hager called to tell her about the 103(g) complaint. (Tr. 693, 815). Williams told Martin about the complaint and noted that Martin seemed familiar with the issue. (Tr. 694, 816). Martin assumed Arnold had made the call and told Williams that he knew Arnold had made the complaint while describing their earlier exchange. (Tr. 694-696, 816-817). The complaint was anonymous but he believed his assumption was logical. (Tr. 695-696). Williams testified she ignored Martin's comment but that he repeated it several times. (Tr. 817). Martin could not recall if he told Williams that Arnold only gave him half a day to address the issue. (Tr. 696).

Williams, Martin, and Beyale (the miner's rep) then went and looked at the motor. (Tr. 696, 789-790, 815-816). At the lab, Williams spoke to the lab tech, Collins, who said he was the only person who worked on the fan. (Tr. 817-818). This was the first time Beyale saw the motor and he did not know who installed it. (Tr. 698-699, 790, 816, 818-819). Beyale admitted to Williams that the electricians had not inspected the roof each month, but that they should have.

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[11] Ruth Williams was present at the hearing and testified. (Tr. 813-814). She was an MSHA inspector for 17 years and her supervisor was James Hager. (Tr. 814). She conducted EO-1, 103(g), and imminent danger inspections. (Tr. 814-815). She completed two EO-1 inspections at Navajo Mine each year. (Tr. 815).

[12] Goeckner was present at the hearing and testified. (Tr. 837). At the time of the hearing, Goeckner was the general manger at Navajo Mine, a position he had held for two years. (Tr. 837-838). He had worked for Respondent for 23 years, including 16 at Navajo. (Tr. 838). He received a mining engineer degree in 1990 from the University of Idaho. (Tr. 838-389). He had worked in various capacities in U.S. and Australian mines. (Tr. 838-839).

[13] Mark Hoffman was present at the hearing and testified. (Tr. 627). Hoffman started with Respondent in 2011 and it was his first job in the mining industry. (Tr. 628-629). He had around 30 years of experience in human resources. (Tr. 627, 658-659).

(Tr. 698-699). Williams inspected the motor and saw that the wires were visible from looking at holes in the structures and that there was coal dust on the motor and wires. (Tr. 818). Beyale felt the dust could catch fire if the wires got hot. (Tr. 819). The group then discussed whether the motor was suited for the area and Martin provided detailed information about the motor. (Tr. 699-701, 731, 790, 819). Martin never opted out of the conversations because he was not a qualified electrician or unfamiliar with the coal lab. (Tr. 699-700). Martin pushed dust out of the way to take pictures of the rotating motor with his company phone. (Tr. 699-701, 731-732, 819).

Martin told Williams he believed that the motor was in compliance and without issue. (Tr. 791). However, he later said that Arnold had asked him to look into the motor but had only given him half a day. (Tr. 791, 820). Martin was upset about the situation and not having enough time and said that if he went down he would bring Arnold, Steagall, and everyone else involved down with him. (Tr. 791-792). Beyale made note of Martin's comment (GX-3). (Tr. 793). Williams was only concerned with the 103(g) and told Martin to stop worrying about Arnold. (Tr. 256, 792-793).

Martin, Williams and Beyale then returned to the electrical shop to discuss and research the NEC with respect to open-type motors. (Tr. 701, 729, 819-820). Williams determined that there was no imminent danger but that a citation may have been appropriate. (Tr. 702, 820-821). She wanted to review the NEC and the monthly electrical inspection before making a decision. (Tr. 702). They discussed whether the examiners had conducted inadequate examinations because they may have known about the condition for months without taking corrective action. (Tr. 702, 729). Martin believed he gave Williams the monthly inspection reports from November 2012 to February 2013. (Tr. 702, 819-820). Williams also spoke with other MSHA personnel to get their opinions. (Tr. 702, 729, 820-821). During the discussion Martin asserted his research showed the lab was not classified under the NEC. (Tr. 702, 820).

Sometime that evening, Martin called Val Lynch to tell him that a 103(g) complaint was filed.[14] (Tr. 735). Lynch and Martin had already spoken earlier in the day about the issue (the first Lynch had heard about it) and Lynch had believed that Martin had the condition under control. (Tr. 734-735, 741, 758-759). During the call, Martin told Lynch that Arnold had threatened to call in a 103(g) complaint if nothing was done and updated him on all of the other details with the motor. (Tr. 735-736, 742, 769-770).

Around 8:30 - 9:30 p.m., Martin called Lynch again and told him about the 103(g) inspection. (Tr. 702-703, 736, 769). Martin described the pending citation and that Williams planned to return the next day. (Tr. 736). He described his discussion with Williams about the NEC, which he believed had settled the issue unless her supervisors disagreed. (Tr. 736-737,

[14] At hearing, Val Lynch was present and testified. (Tr. 734). He served as Mine Representative and heard the testimony of Arnold, Steagall, Ramirez, Hoffman, Martin, and Berget. (Tr. 734). In 2013, Lynch was the safety manager and he held that position since March 2007. (Tr. 734, 766). Martin reported to Lynch. (Tr. 734). Lynch was in charge of regulatory issues, safety, security, training, and compliance. (Tr. 766-767). Lynch had worked in safety at three different mines starting in 1995 and had been in the mines since 1980. (Tr. 767-768).

770). At one point Lynch testified that they did not discuss Arnold on this call but later he recalled Martin saying he told Arnold and Steagall to tag out if they believed there was a hazard.[15] (Tr. 703-704, 737, 770). In neither call did Martin say he thought there was a hazard. (Tr. 782). Lynch did not hear about the complaint again that night. (Tr. 737).

At 9:44 p.m., after speaking to Lynch, Martin e-mailed management about the 103(g) inspection (GX-4). (Tr. 703, 487-490, 592). Lynch did not tell him to send the e-mail. (Tr. 704). The e-mail contained several references to Arnold. (Tr. 704). Specifically, it contained information about the motor and that Martin had learned about it from Arnold (meaning Martin was aware of the hazard and Arnold's threat to call in the complaint). (Tr. 489, 529-530, 618-619, 704, 739). Martin wrote that he had told Arnold that he believed the fan complied with the NEC and that if they believed there was an imminent danger they should tag out and make repairs. (Tr. 594-595, 722). The e-mail indicated that a citation was possible for the motor or for an inadequate exam. (Tr. 613-615, 705). Martin did not think it was inappropriate to write about the motor even though he was not a qualified electrician. (Tr. 704-705).

Ramirez received this e-mail because he was responsible for the area at issue. (Tr. 487-490, 592). This was the first he heard of the complaint. (Tr. 488-490). Despite the e-mail placing Arnold's name in the same sentence as the phrase "103(g) complaint," Ramirez did not believe that Arnold called in the complaint. (Tr. 489-490). Ramirez concluded that the problem may have been resolved. (Tr. 595). Ramirez did not question Martin's motives in sending an e-mail despite never receiving such an e-mail before. (Tr. 522). Lynch received Martin's e-mail the next day. (Tr. 737, 742, 769). He learned from that e-mail that Arnold had gotten Dixon to call in the 103(g) complaint and believed Arnold had told Martin about it. (Tr. 737-739, 742). He believed that Arnold called in the 103(g) but he did not care who did it, he only cared about dealing with the issue. (Tr. 739, 742-743). Berget learned about the complaint from someone in electrical. (Tr. 481-482). Hoffman learned about it from Ramirez shortly after it was received and never saw Martin's e-mail or the complaint. (Tr. 627-629). Hoffman and Ramirez later spoke about the issue, but not specifically about the 103(g). (Tr. 629-632). Rudy Halgryn also learned about the motor from Ramirez.[16] (Tr. 831-832). There were rumors that Arnold made the complaint, but Halgryn saw documentation showing Dixon had made the call. (Tr. 835). Halgryn did not recall if Martin's e-mail said Arnold made the call. (Tr. 835-836). Like Lynch, Halgryn testified he was not concerned with who called. (Tr. 836).

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[15] In Martin's testimony, he referred to only a single call, the second, in which Arnold was not discussed. (Tr. 703-704). He either did not recall or simply failed to mention the earlier call where Arnold and the 103(g) were discussed.

[16] Rudy Halgryn was present at the hearing and testified. (Tr. 829). He was the maintenance manager at the mine. (Tr. 829-831). During 27 years in the mining industry he had worked many jobs in different types of mines. (Tr. 829-831). He held a degree in electrical engineering. (Tr. 830). Halgryn was from South Africa and was certified as an electrician there; he did not have an MSHA electrician's card and was not a certified U.S. professional engineer. (Tr. 834-835).

On February 20, Arnold learned Respondent knew about the 103(g) complaint because the miners knew and Williams and James Hager were at the mine. (Tr. 254-255, 822-823). Beyale was the first person to speak with Arnold and he told Arnold that Martin was upset, said that he had not been given enough time, and that he would take Arnold down with him. (Tr. 255). When Arnold saw Williams at the electrical shop, she confirmed Martin's comments. (Tr. 257). Steagall did not recall anyone being upset by MSHA's presence. (Tr. 415-417).

Williams and the miners then discussed the motor, the citation, the complaint, and the NEC. (Tr. 257, 824). Steagall, Gary Long, Ramirez, and Ned Begay were also in the shop. (Tr. 257-258). Arnold mentioned that he took photographs of the motor. (Tr. 257). Williams requested copies, Steagall printed them out, and then Arnold gave them to her. (Tr. 257, 414, 491, 823). Begay asked where Williams got the photographs and she referred to Arnold and Steagall. (Tr. 823). Ramirez learned about the photographs later. (Tr. 491). While they were talking, Val Lynch arrived. (Tr. 258, 415). There was a confrontation between Lynch and Hager about the law and the monitoring system. (Tr. 258).

Because the confrontation was getting out of hand, Hager said they would go look at the motor to see how it worked. (Tr. 258, 823-824). The group, including Arnold, Lynch, and Martin (but not Ramirez or Steagall) drove to the coal lab. (Tr. 260, 496-497, 705, 745). After they arrived at the lab, they went to the roof and looked at the open-faced motor. (Tr. 260). While there, Martin provided information about the lab, the fan, and the NEC. (Tr. 745-746). Martin was knowledgeable and experienced with electrical issues even though he was not a qualified electrician and Lynch did not question his ability to discuss these issues. (Tr. 746). Lynch did not seek Arnold's input as an electrician. (Tr. 746).

After looking at the motor, a heated discussion occurred over whether Arnold should have locked or tagged out the motor. (Tr. 260, 497-498). Lynch and Hager discussed whether lock out was appropriate if someone was complaining about an imminent danger. (Tr. 824-825). Williams testified Lynch looked at Arnold when he spoke. (Tr. 825). Arnold testified that Lynch said Arnold had failed to do his job and questioned his qualifications and abilities. (Tr. 260-261). Williams quoted him as saying "I believe I have unqualified people here. If they walk away, then you are not a qualified electrician." (Tr. 825). Lynch testified that he said whoever did the examination was bound by the Mine Act to lock it out or tag it out. (Tr. 706, 750-751). Lynch asserted that he did not say the electricians were unqualified, but instead that if electricians were not seeing imminent dangers, they needed to look at their qualifications. (Tr. 705-706, 748). At hearing, Williams agreed that she would be concerned if an electrician did not tag out or correct potentially dangerous conditions. (Tr. 827). Lynch also said that reporting an issue to a supervisor was not a mitigation of a hazard. (Tr. 747-748). Lynch testified that he was not angry, but that he was frustrated and may have raised his voice. (Tr. 748-749).

In response, Arnold asked Williams and Hager if Lynch's statements amounted to threatening, harassing, and intimidating a miners' rep. (Tr. 261, 706-707, 749, 825). Arnold never specifically said there was harassment or threats. (Tr. 750). Lynch said he was asking questions, not threatening. (Tr. 749). Hager and Williams tried to intervene, but Williams could not recall if she told the managers not to retaliate. (Tr. 825). The meeting devolved into free-for-

all argument. (Tr. 261). At one point, Arnold stated that Hager stepped between Lynch and Arnold because Lynch was so upset. (Tr. 261). Lynch stated that he simply stepped back to lessen the tension. (Tr. 750-751). Ramirez heard about this confrontation and later heard during the grievance process that Arnold felt threatened. (Tr. 498-499). Ramirez also talked to Martin about the confrontation, but overlooked the issue and never spoke with Lynch. (Tr. 499-500).

Martin and Arnold also argued over whether Arnold had called the condition an "imminent danger" on February 19. (Tr. 261-262, 707). At one point, Martin called Arnold a liar. (Tr. 262). When they left the area to return to the electrical shop, Martin and Arnold were still arguing. (Tr. 262). Eventually, Arnold said that he might have said "imminent danger" in the heat of the moment on the 19th but that if he did he was sorry and Martin and Arnold shook hands. (Tr. 262-263, 330-331, 707). Arnold did not believe he actually said "imminent danger," he was trying to calm the situation but he conceded that management may have relied on his statement. (Tr. 263, 331). Inspector Williams' notes for that day included two references to "imminent danger," which indicates to Arnold that she heard that phrase before reaching the lab (Tr. 332-333, GX-2). He also conceded that he may have said the words "imminent danger" when Martin was talking about irrelevant issues. (Tr. 372).

Martin did not believe Arnold was trying to calm tension, he believed he was trying to cover up a lie but finally accepted the truth. (Tr. 707-708). Martin believed that no one discovered this lie until a later MSHA investigation found Arnold had written about an imminent danger in his monthly inspection report and failed to report it.[17] (Tr. 714). Martin was frustrated that qualified personnel were not making a good faith effort to follow Respondent's policy and the Mine Act to correct or tag out hazards. (Tr. 707-708, 726-727, 729-730). However, there was no tension between Martin and Arnold on a personal level. (Tr. 708). Ramirez did not know about Arnold and Martin's confrontation until the investigation. (Tr. 523).

When the group returned to the electrical shop, Williams said Respondent would get a citation for the motor (GX-3). (Tr. 263-264, 491, 705, 708, 753-754). No imminent danger order was issued, indicating that the hazard was not apparent to the inspector. (Tr. 333-334). Lynch received the citation, which included photos he later learned Arnold took. (Tr. 744-745). Lynch tried to argue that the citation was written under a mistaken belief about the correct version of the NEC and a misapprehension as to whether the room was classified. (Tr. 771-772). Martin also reviewed the citation that day. (Tr. 708-709). Steagall went home before the citation was issued and was not aware of it until he returned to work on March 1, 2013. (Tr. 385-386, 417). Steagall testified that employees were general upset when a citation was issued and in this case they were upset both because they thought it was not citable and because they wanted to maintain a safe working environment. (Tr. 417). However, Steagall never heard about anyone being angry. (Tr. 418).

When he learned of the citation, Ramirez's first thought was that he needed to get the issue resolved by modifying or replacing the motor. (Tr. 593). At some point before or after the

[17] As will be discussed *infra*, Martin was not a part of the consensus triangle that disciplined Arnold and did not know it had copies of the electrical report in March 2013. (Tr. 714-715).

citation, Ramirez ordered Steagall to tag out the motor while they talked to MSHA. (Tr. 427-429). While he was addressing the issue, Ramirez learned that Steagall and Martin had known about and had discussed the issue for a while but that nothing was done to correct or isolate the problem. (Tr. 593). Ramirez was concerned that a potentially hazardous condition was not isolated to prevent injury. (Tr. 593-596). This concern led Ramirez to review Arnold' previous monthly inspections, where he found that Arnold had written in the section reserved for imminent dangers but that his supervisor told him not to lock out. (Tr. 596). At some point, Ramirez contacted Halgryn and Hoffman to discuss whether those involved, including Arnold, failed to act properly. (Tr. 833).

On February 22, Ramirez summoned Arnold to a meeting with a union rep and gave him a form (GX-9) stating that he would be held out of service pending an investigation and that they would contact him when they were ready for his return. (Tr. 264-266, 514-517, 633-634). The investigation would cover whether there was an improper examination. (Tr. 515-517). Mark Hoffman had drafted the notice with help from Lynch, Martin, and Leonard Palmer without consulting with Ramirez or Halgryn. (Tr. 518-519, 632-633, 709-711, 835). In drafting the notice, the group discussed the lock/out tag out policy, Arnold's identification of the motor as an imminent danger as a certified electrician, the life-saving rules, the regulations, miner's rights information, refresher training, and the Mine Act. (Tr. 660-662, 709-710, 727-728).

The notice stated that Arnold told Martin that the condition was an imminent danger, that he did not attempt to isolate it once identified, and the he violated the Mine Act. (Tr. 274-276, 515-516). With respect to lock out/tag out, Respondent had policies requiring the isolation or repair of electrical issues if an electrician had a good faith belief that there was an imminent danger and prohibiting leaving defective equipment in place. (Tr. 349-350, 354-355, 602-603, 810, RX-8, p.2). Goeckner testified that even potential hazards that could cause injury, not just imminent dangers, should be tagged out. (Tr. 841-842). At hearing Arnold reviewed the lock out/tag out policy (RX-1) and related isolation policy (RX-6). (Tr. 345-346, 348, 353-354). Arnold was familiar with the requirement that he tag or lock out hazards and saw it on the policy on the bulletin board (RX-4), though he was not familiar with the policy in written from. (Tr. 346-352). The collective bargaining agreement (RX-5) prohibited miners from violating the law or company rules, including the lock out/tag out policy. (Tr. 352-353). The law, in particular 30 C.F.R. §77.502, was consistent with the lock out/tag out policy. (Tr. 357-359, 370, 462, 811).

At hearing, Arnold noted that the specific company policy regarding lock out/tag out and the Mine Act were not included in the suspension notice. (Tr. 276-278, 355-356). Arnold disputed these claims because he never believed the condition was an imminent danger. He had only failed to lock out the condition because he had been ordered not to, and, he had never been written up for violating the Mine Act. (Tr. 274-276, 300, 350-351, 355, 358). Arnold believed that he was competent in energy risk recognition and isolation procedures. (Tr. 348). In fact he had followed company policy in the past and tagged out a fan on an earlier occasion. (Tr. 368-369). He was not disciplined though he believed he was supposed to report, rather than tag out, equipment because of production needs. (Tr. 368-370).

The notice also alleged Arnold violated Respondent's cell-phone policy (RX-2) because he took pictures with his camera phone without permission. (Tr. 276-277, 355, 517, 520). The cell phone policy prohibited the use of non-company cell phones at the mine. (Tr. 356). The policy had been in place but had not been enforced against the electricians until June or July 2013. (Tr. 759-761). A meeting was held at that time to explain that the policy would be enforced. (Tr. 760-761). Arnold agreed that he violated the policy, but maintained that Steagall had given him permission. (Tr. 277, 357).

A related policy (RX-3) prohibits taking and distributing photographs outside the company without written permission from management. (Tr. 356, 526-527). No permission was needed to take a photo (if it was taken without a phone) unless it was being distributed outside the company. (Tr. 530-531). Arnold had told Ramirez that he gave photographs to MSHA. (Tr. 528). While Arnold had oral permission from Steagall, he did not have written permission from upper management. (Tr. 356-357). Steagall agreed that Arnold had permission and believed that if there was any problem that he, Steagall, should have been held responsible. (Tr. 460-461).

Arnold testified that he believed Lynch held him out of service because of the 103(g) complaint and that he told Ramirez that this was the case, but that Ramirez did not respond. (Tr. 265, 274). Ramirez did not recall this comment; he did recall Arnold signed the documents and left without speaking. (Tr. 514-515). Beyale agreed the suspension was retaliation for the 103(g). (Tr. 795-796). Ramirez was upset that Arnold did not follow the chain of command and that Arnold did not bring the issue to him. (Tr. 265-266, 270, 338-339, 509-510, 545). Arnold explained that Ramirez was a mechanical engineer and that he did not see the benefit of going to him with an electrical issue. (Tr. 266, 339). However, Arnold knew Ramirez could have contacted Steagall, Berget, or anyone else to address the issue but still did not call him. (Tr. 339). Ramirez testified that even if Arnold had come to him, Arnold was the qualified electrician and expert on the issue. (Tr. 510).

Ramirez did not say anything to Arnold indicating how long the investigation would take, only that he would be notified when he could return to work. (Tr. 266, 340, 517). The suspension started that day and was indefinite. (Tr. 266-267, 517, 676). Ramirez testified he said he would conduct the investigation as quickly as possible, but Arnold did not recall this comment. (Tr. 340, 516-517). According to Hoffman, when an investigation begins, no one knows if it will be with or without pay. (Tr. 649). If, upon investigation, a suspension is justified then it is unpaid but if it is a punishment less serious than suspension, the worker is paid. (Tr. 649, 657). It was easier for payroll to hold out of service without pay and then pay afterwards. (Tr. 657-658. 676). However, if Respondent wanted to, it could have held Arnold out with pay. (Tr. 649). Hoffman explained that Respondent understood that it was difficult to be held out of service without pay, so it was important that investigations would be conducted quickly. (Tr. 677-678). He believed seven days would be a long time to be held out of service; the longest he could recall was four days. (Tr. 677).

On the same day Ramirez also told Steagall he was being held out of service for an investigation into whether he failed to take the motor out of service, despite telling Martin there was an imminent danger, and for ordering Arnold not to take it out of service (RX-8). (Tr. 434,

440-442, 596-597). He was told he would be paid. (Tr. 434, 682). Ramirez would not say if anyone else was being held out of service -- even though Steagall specifically asked about Berget and Martin. (Tr. 435). He asked about Berget because, as an engineer, he needed to be involved when Steagall had questions about a possible imminent danger. (Tr. 438). He asked about Martin because he once worked for MSHA. (Tr. 439). Steagall was surprised he was held out of service because only he and Arnold had all of the facts and documentation he had sent to Ramirez (GX-5). (Tr. 435-437). Steagall offered to answer questions at that time, but Ramirez told him to go home and not to talk to anyone. (Tr. 436-437). Steagall did not agree with his discipline because they had never determined a hazard was present and never told Martin there was an imminent danger. (Tr. 439-442). He was familiar with the policies at issue, but did not believe the scenario described in the write-up occurred. (Tr. 442). This document did not mention the cell phone policy or Section 77.502. (Tr. 461-463). He noted on the document that he did not agree with it, signed it, and gave it back to Ramirez. (Tr. 442).

Steagall believed the management generally held supervisors to a higher standard than hourly employees. (Tr. 433-434). However, he believed that in the electrical department everyone was treated equally because they were all certified. (Tr. 433-434). That was why they worked jointly on this issue and contacted Martin and Berget together. (Tr. 434). Lynch, Ramirez, and Hoffman did not believe that supervisors were held to a higher standard than hourly employees or that long-term employees were held to a higher standard than new hires. (Tr. 548, 653-654, 761). Ramirez never worked at a place where rules were enforced differently than written policy or were enforced inconsistently. (Tr. 576-577).

During the week he was off, Arnold argued with his wife who was nervous because she had just started a new business and they were uncertain about his job. (Tr. 267). Arnold had six children. (Tr. 267). During his suspension, Arnold considered that he should stop complaining about safety issues and argued with his wife about his propensity to make complaints. (Tr. 267-268).

While Arnold and Steagall were suspended, Ramirez conducted an investigation. (Tr. 639, 833, 840). During that investigation, Ramirez tried to determine issues with the lab, efforts made to address these issues, and whether the motor had been isolated. (Tr. 524, 597). He gathered information from Arnold, Steagall, Berget, Lynch, Martin, and people at the lab. (Tr. 524, 526, 598). He also looked through the lab inspection records. (Tr. 526, 597). The investigation found that Arnold and Steagall were confronted with some level of electrical hazard and that they did not lock it out or correct it. (Tr. 842). He also learned that Martin was aware of the condition. (Tr. 491-492).

During the investigation, Ramirez and Lynch met to discuss the situation and Ramirez sought Lynch's input on potential discipline for Arnold. (Tr. 757). They discussed the severity of the condition, the response Arnold sought from Steagall, and the chain of command issue. (Tr. 494-495). Lynch wondered whether the fan issue had suddenly arisen, whether changes were made, and why Steagall had not acted. (Tr. 496, 501, 740). It did not bother Lynch that he had a confrontation with Arnold before working on his discipline. (Tr. 759). He considered it

part of his job and there were often people upset with him. (Tr. 759). Also, Lynch's input focused on the technical support and the regulations. (Tr. 759).

Part of Ramirez and Lynch's discussion dealt with the monthly inspection form. (Tr. 493-494). Around the time of the citation, Lynch had requested that Ramirez bring him the monthly electrical reports from November 2012 to February 2013. (Tr. 492-493, 587-588, 612, 740, 743). He had received all of the reports that day, except for the February report, which he received on March 1 from MSHA. (Tr. 743, 756-757, 765). Lynch wanted the reports to learn what had occurred, how it was handled during examinations, and how they found an imminent danger regarding the fan. (Tr. 740). When he and Ramirez met, Lynch noted that the reports required electricians to note hazards or imminent dangers and to correct or repair them immediately. (Tr. 757). Anyone who did not complete the form also broke not only the lock out tag out policy and the life-saving rules, but also the nearly identical standard in 77.502. (Tr. 757-758, 778-779). Ramirez had already spoken with Arnold about the Act, but Lynch wanted to emphasize the life-saving rules, which were visibly posted in the mine. (Tr. 758, 779-780).

Ramirez and Lynch also agreed that they believed Arnold had done an inadequate exam of the coal lab. (Tr. 501-502). The inadequate exam was self-evident because the condition was discovered a year after it was installed. (Tr. 502). The investigation determined that Arnold had only listed the condition in the electrical inspection reports for two months. (Tr. 502-503). However, Ramirez did not know when the electricians learned about the motor on the roof of the lab and they had complained to him about items being installed in the lab without their knowledge. (Tr. 504-505). Steagall's e-mail included these complaints, though Ramirez did not remember when he got it or if it was available when he was doing the investigation. (It was not date stamped). (Tr. 506-509). He did not recall using it during the investigation and probably would have used such if he had it. (Tr. 509).

During the investigation, Ramirez had access to an e-mail Berget sent on February 20. (Tr. 478-481, 510). He received this e-mail before holding Arnold out of service. (Tr. 524-525). Berget's email described the issues at the lab, including the motor that Berget did not want to handle (GX-7). (Tr. 478-481, 510). Berget requested that Ramirez instruct the electricians whom he supervised to stop asking him about those issues. (Tr. 478-481, 510). The electricians wanted to know if the motor was safe, but Berget had no expertise in the area and did not want to do research. (Tr. 484-483, 512). Berget was the chief electrical engineer, a qualified electrician but not an expert in coal labs. (Tr. 512-513). This letter showed Berget was aware of the motor and that Ramirez knew it before disciplining Arnold. (Tr. 510, 513). Ramirez was not concerned about this letter because Berget was not an expert. He might not have inspected the area; and he told Arnold and Steagall to follow up with those who installed the motor. (Tr. 511-513). Ramirez believed he followed up with Berget about what he had told Arnold and Steagall. (Tr. 511-512).

Ramirez also investigated the cell phone policy and whether someone had taken and distributed photographs outside the company. (Tr. 597-598). Ramirez learned during the investigation that Martin had also taken photos but did not know if Martin gave them to MSHA (GX-30). (Tr. 527-528, 530). Ramirez did not ask whether Martin had received permission for

the photos, because he was a salaried employee. (Tr. 531). Ramirez did learn whether Martin used his phone to take photos; he was not concerned about it. (Tr. 531-532).

During the investigation, Ramirez also learned that Steagall told Arnold he could hold off on the motor until he received more information. (Tr. 545). However, Ramirez felt that if Arnold felt there was an issue he should have acted. (Tr. 545-546). Management believed contacting supervisors to get more information or going through the chain of command was insufficient and did not relieve the miner of the obligation to follow the lock out/tag out policy or the life-saving rules. (Tr. 545-546, 656).

Ramirez was not concerned that Berget and Martin knew about the condition and never considered disciplining either. (Tr. 496, 513-514, 520-521). He never considered disciplining Martin because he was not a qualified electrician. (Tr. 520-521). Lynch testified that while Martin was not an electrician, he, and everyone at the company, was bound by the law and company policy to lock out or correct hazards. (Tr. 546-547, 657, 746-747). Ramirez never spoke to Martin about his previous knowledge of the potential hazard. (Tr. 496, 513-514). If Martin was disciplined, Ramirez would not know because Martin did not report to him. (Tr. 521). Lynch also never considered disciplining Martin because he had the knowledge and expertise to determine whether the fan was a hazard and was doing his due diligence to investigate the issue. (Tr. 758, 782-783). Hoffman also never considered disciplining Martin, even though he knew about the condition on February 14. (Tr. 642-643, 650-651, GX-9). Ramirez did not consider disciplining Berget, who was a qualified electrician, because he did not report to Ramirez (though he could have gone to Berget's supervisor). (Tr. 521-522).

On February 27 Ramirez interviewed Arnold. (Tr. 281, 366, 525, 598). Benally and Dixon were also present. (Tr. 281). This was the day Arnold would have returned to work if he had not been held out of service. (Tr. 340-341). Ramirez did not recall why it took five days to talk to Steagall and Arnold. (Tr. 525). It was likely day-to-day business got in the way; it was not an additional punishment. (Tr. 525). He could have interviewed them on February 22, but he could not recall his schedule. (Tr. 525-526). He did not talk to anyone else about the specifics of this incident during those five days. (Tr. 525). In the meeting Arnold told Ramirez that, as an electrician, he did not know if the motor was a hazard and that he was seeking more information. (Tr. 281-282). Ramirez asked Arnold whether he had given pictures to MSHA, even though Arnold and others had told him about such earlier. (Tr. 526, 528-529). Arnold also told Ramirez that he had documented the cited issue in the monthly inspection report. (Tr. 532). Ramirez had already received and reviewed that report, but had not spoken to Lynch about it. (Tr. 533).

On February 28 Ramirez held a "consensus triangle" meeting with Hoffman, Halgryn, and Goeckner to discuss Arnold's discipline. (Tr. 534-535, 539, 598, 632, 833, 840). Ramirez, as the person with the most information on the situation, presented his findings including Martin's e-mail, Berget's e-mail, Steagall's documents, the monthly inspection report, the interviews, and perhaps the citation, policies, standards, and collective bargaining agreement. (Tr. 535, 539-540, 543-544, 619, 639-645). The group determined that Arnold violated Respondent's "life-saving rules" by placing people in the "red zone" where they could be killed

and by knowingly violating a policy that could result in a fatality by not isolating or locking out the hazard. (Tr. 600-602, 661). The group was worried that miners with less expertise would be exposed to an explosion, because someone with more expertise did not alert them. (Tr. 601). The group was also concerned Arnold was not addressing other issues. (Tr. 537).

After discussing Arnold's actions, the consensus triangle determined discipline. (Tr. 535, 645). The options included verbal warning, written warning, and suspension. (Tr. 841). While he could not recall who made the various suggestions, Hoffman (who had final say) likely suggested a written warning to ensure fairness and consistency with past discipline. (Tr. 535-536, 645-646). Ramirez approved of a written or verbal warning (though he made no recommendation). (Tr. 536). A verbal warning may have been proper because Arnold had a clean record. (Tr. 537). The life-saving rule issues were serious enough to warrant termination but given Arnold's record nothing more serious than a written warning was discussed. (Tr. 538, 602). The group came to a consensus on a written warning because Arnold saw an imminent danger and a potential for explosion but had taken no action. (Tr. 536-537, 645-646, 599-600, 833-834, 841). The 103(g) complaint was not discussed other than to say that Arnold should have taken action right away. (Tr. 538-539). Hoffman drafted the warning by himself, including language about the Mine Act, and Ramirez wrote it. (Tr. 540-541, 543-544, 647, 835).

Arnold requested reinstatement by MSHA on February 28, 2013, while he was still off work (GX-11). (Tr. 268-269). He listed the discriminatory actions as his argument with Martin on February 19 and his arguments with Lynch and Martin on February 20 after the 103(g) complaint. (Tr. 268). While Arnold had issues with Respondent in the past, this was the first time he was disciplined for a 103(g) complaint. (Tr. 269). Under the collective bargaining agreement, Arnold was not required to file a grievance, an EEOC complaint, or a Wage and Hour complaint before filing a 105(c) complaint. There is no requirement to exhaust remedies. (Tr. 296-297). Lynch learned about the complaint from Goeckner on March 1. (Tr. 765-766).

Concurrent with Ramirez's investigation, Hoffman conducted an investigation into Arnold's harassment claim. (Tr. 638). At some point, perhaps during the consensus triangle, Hoffman learned that Lynch and Arnold had an argument and that Arnold was concerned that Lynch was harassing him. (Tr. 634-635). HR became involved with a formal grievance procedure under the collective bargaining agreement. (Tr. 635-636). Hoffman conducted the investigation but never spoke with Arnold or Lynch and did not investigate their conversation. (Tr. 636-637, 659). Hoffman eventually determined that Dixon, not Arnold, filed the 103(g) complaint, so he found there was no retaliation. (Tr. 636). Hoffman did not talk to Dixon about Arnold, because Respondent did not know who filed the complaint. (Tr. 675).

On March 1, 2013, Respondent reinstated Arnold and told him that he would be made whole for his time off. (Tr. 267, 273-274, 278, 280-281, 335, 523, 658). While he was held out seven days, he only missed four days of work. (Tr. 334-335). When he returned to the mine site, Ramirez gave him his first ever written warning (GX-10). (Tr. 278, 283). The reasons for Arnold's written warning were different from those given for his suspension; it did not include references to imminent danger, Martin's statements, or company policy, including the cellphone policy. (Tr. 278-280, 282, 541-542). The cell phone policy was not included because Steagall

confirmed he had given permission. (Tr. 282, 355, 544-545, 598-599, 648). Instead, the written warning included what Arnold's electrical inspection report had indicated, including his notation that there was potential hazard. (Tr. 279-280, 542, 544, 620, 647-648). The warning stated Arnold had seen a hazard but, as a qualified electrician, did not correct or lock it out and referred to 77.502. (Tr. 542, 549, 623-624). Arnold was also disciplined for giving photos to MSHA and Dixon. (Tr. 534). The written warning also stated Arnold violated the Mine Act. (Tr. 280). The warning did not mention the "lifesaving rules" and Ramirez did not recall mentioning them to Arnold. (Tr. 620, 657). Ramirez told Arnold to bring issues to him in the future. (Tr. 545).

Steagall also returned that day and received a written warning. (Tr. 442). He disagreed with the warning because he never determined there was a hazard with the motor-- just a possible condition. (Tr. 442-443). He believed, but did not know or particularly care, that he got a warning because Respondent received a citation. (Tr. 444-445).

A written warning is the first step in the progressive disciplinary process.[18] (Tr. 325, 570, 761). Notices of discipline were in the maintenance department and the off-site HR office. (Tr. 569-570, 573-574, 587). However, the collective bargaining agreement did not cover progressive discipline, it was an unwritten rule. (Tr. 670). For purposes of progressive discipline, Respondent considered disciplinary action, including written warnings, to be active for 12-18 months. (Tr. 671). Records were kept for different times depending on the miner's behavioral record and the seriousness of the transgression. (Tr. 671-672, 762). Records were kept so that discipline could be graduated if changes to a miner's behavior were not made. (Tr. 762). After the 12-18 month period, the records were not used but were retained in the employee's permanent file-- though Hoffman could not say why. (Tr. 672-673). Hoffman never considered these older discipline reports for miners with clean records, though he did see them in the files. (Tr. 673-675).

The mine operator conducted performance reviews for electricians every six months. (Tr. 286, 452, 847). Arnold received a performance review in June 2013 from Steagall, the person most familiar with his work (GX-12). (Tr. 287-288, 452, 454, 847). The review was solely Steagall's responsibility and no one could tell him what to include. (Tr. 454). In that review, Arnold received a "meets requirements" grade for safety. (Tr. 288, 452-453, 560, 604). The comments section stated, "[n]eeds to follow up on safety hazards by doing the SLARS to inform others as to hazards found on the mine site." (Tr. 289, 453-454, 844). SLARS was a safety program created by the company and electricians were encouraged, but not required, to enter at least two hazards into SLARS each month.[19] (Tr. 283-286, 453, 572). Arnold did not report two

[18] Lynch believed the steps of the progressive discipline plan were verbal warning, written warning, suspension, and termination. (Tr. 761-763).

[19] SLARS stands for Safety Leadership Achievement Recognition. (Tr. 607). Under the system miners were encouraged to look for hazards, correct them, document issues, and isolate problems. (Tr. 607). The goal of SLARS was to improve health and safety and to reduce citations. (Tr. 607-608). Miners were evaluated under SLARS but for electricians it was optional. (Tr. 608).

hazards each month, but he did report some hazards. (Tr. 285). Steagall felt Arnold was not getting his documents in, but he was not missing hazards or doing anything wrong. (Tr. 453-454).

Arnold asked Steagall why SLARS was used in the evaluation because Goeckner had told him that non-participation would not result in discipline. (Tr. 289, 453, 604, 680, 842-843). Steagall told him that the order to include SLARS had come from "upstairs," and Arnold understood this as retaliation from Lynch, who was still mad about the 103(g) complaint. (Tr. 289-290). Arnold then raised the issue with Goeckner. (Tr. 291, 297, 360-361, 842). Goeckner agreed that SLARS should not have been used and promised to speak with Ramirez. (Tr. 291, 297, 843-845). Arnold expected his review to be changed to "very good" and for the references to SLARS to be removed. (Tr. 291). Arnold was told that the performance review was going to be redone by Ramirez. (Tr. 291-292, 360-361). Ramirez had already signed the document as the superintendent (RX-16). (Tr. 624-625).

Shortly thereafter, Goeckner told Ramirez about Arnold's concern with his rating. (Tr. 561, 604, 843). Goeckner also spoke with Steagall about it even though he was retired. (Tr. 843, 845). Ramirez and Stegall said that Arnold was not participating in SLARS, but Goeckner explained it was not mandatory. (Tr. 843). Goeckner told Ramirez to re-do the crews' safety ratings without SLARS, but did not tell him to increase Arnold's rating.[20] (Tr. 561, 604-605, 843-846, 849). Goeckner had no further involvement. (Tr. 843-844). Ramirez followed Goeckner's instructions and reevaluated Arnold's entire safety rating (not just the SLARS information). (Tr. 562-563). Goeckner did not recall telling Ramirez to review the entire rating and he expected Ramirez to simply remove references to SLARS. (Tr. 845, 848, 850). Ramirez decided that Arnold had not met expectations because he walked away from a hazard without taking action. (Tr. 562). Ramirez changed the rating to show that Arnold needed to take action and follow the chain of command. (Tr. 562, 610). Ramirez referred to the motor issue and the fact that Arnold did not bring the issue to him. (Tr. 563, 610). Ramirez did not believe Arnold was being held accountable and wanted to convey that information. (Tr. 622).
Ramirez did not change the "accountability" section that was marked "very good," because he had only been asked to look at safety. (Tr. 566, 605, 622).

Arnold found his changed performance review on the desk of his new foreman, Gene Lee, where anyone could see it (GX-13). (Tr. 292-293, 567-568). Steagall's writing was whited out to make room for new notes. (Tr. 455, 457). No one discussed the changes with Arnold or gave him the document (though he never asked for it); he had just found it. (Tr. 294, 365-366, 567-568). Ramirez testified that Arnold was not contacted because the overall grade of "good" was unaffected and it had been given to Lee. (Tr. 365, 568-569). The last two paragraphs of the comments section had been changed to say Arnold needed to take accountability when he saw issues, that he was vocal about bringing up safety issues, that he needed to greatly improve on

[20] There were nine total evaluations and almost all noted the need to participate in SLARS. (Tr. 604-605). Ramirez believed he raised one electrician's safety rating, Will Charley, because he produced documentation and addressed issues quickly. (Tr. 605-606, 620-621). Arnold was not aware of Charley causing or filing a 103(g) complaint. (Tr. 620).

bringing issues up the chain of command (and that this would be his focus in the future), and that he actively looked to improve the mine site. (Tr. 294-296, 362-363, 566-567, 603-604, 610, 621-622, 846). The safety section had also been whited out and lowered from "meets expectations" to "needs improvement." (Tr. 292-293, 295, 363, 845-846). No one contacted Steagall about the changes and he disagreed with them. (Tr. 455-457). The changes were unsigned, but the comments were in Ramirez's handwriting. (Tr. 361-362). Arnold believed the notes referred to the motor, the 103(g) complaint, and failing to bring issues to Ramirez. (Tr. 294-296, 363-364). Ramirez stated the notes were related to the motor but not the 103(g). (Tr. 563, 566).

Ramirez and Goeckner did not discuss the changes and Goeckner was not aware of them. (Tr. 846, 849-850). Goeckner was not surprised by the changes. (Tr. 847-848, 850). Goeckner believed the changes were appropriate given the written warning and the conduct leading to it. (Tr. 849-851).

Arnold expressed concern to Lee over the changes. (Tr. 292). Lee told him Ramirez made the changes, so Arnold made a note about the changes and went to Ramirez to initial it. (Tr. 292-293, 361-362, 567-568). Arnold and Ramirez did not discuss the changes. (Tr. 293-295). Arnold knew that Ramirez would request, review, and sign some (but perhaps not all) evaluations, but he did not know Ramirez would make changes. (Tr. 337-338, 361). Ramirez assumed that Arnold would be upset about the rating and take it as a gut punch. (Tr. 569). Hoffman later investigated the evaluation and found that Respondent was fair and consistent in discipline involving life-saving rules. (Tr. 637).

Unlike written warnings, evaluations were not supposed to be a part of the progressive discipline process and, under an agreement with the union, they were not supposed to be kept. (Tr. 325). However, Arnold believed the records were kept and that when a miner was disciplined, the earlier evaluations were brought up to show a trend or history. (Tr. 325). Ramirez and Hoffman disagreed that the files were used for discipline and argued they were only used by front-line supervisors to improve performance. (Tr. 570-571, 668-669). However, Ramirez conceded that performance evaluations were sent to HR and sometimes mistakenly left in the files. (Tr. 571, 587). The amount of time they stayed in the file would vary depending on the particular manager; Ramirez had never cleaned out his files. (Tr. 587, 618). The CBA was specific on how employees were paid and the evaluations had no bearing on miners' pay (it could affect salaried employees). (Tr. 669-670). Dixon believed that an evaluation could affect a miner's pay because discipline on the record (including discipline for violating an MSHA regulation) could be used to disqualify an employee for different positions. (Tr. 811-812).

At hearing, Arnold reviewed several previous monthly examination reports for which no one was disciplined. (Tr. 297-313). One such record was for an exam in October 2012 (GX-13). (Tr. 297-298, 301). In the imminent danger and potential hazard section, Arnold wrote "Pole No. 6" but did not tag out the equipment. (Tr. 298). Steagall agreed that the pole was broken and that something needed to be done but the decision to tag out a damaged pole would depend on severity. (Tr. 299, 450-451). Here, in order to tag out this equipment, Arnold would need to kill the power on the catenary line, which would have shut the train down (though it was possible to shut down only one side of the rail). (Tr. 299-303, 451). It took a few days to get a new pole

for repairs and during the wait the pole remained energized to ensure coal haulage. (Tr. 298-299). Arnold was not disciplined for this action. (Tr. 298). Arnold reviewed another monthly exam where Beyale filled in the imminent danger section but was not disciplined. (GX-16). (Tr. 306-307). As union steward, Arnold would have heard if Beyale was disciplined. (Tr. 308). Another monthly examination with writing in the imminent danger section for which no one was disciplined (GX-17). (Tr. 309). In fact, the work order for that condition was put in place on June 29, 2013, but the repairs did not begin until May 14, 2013. (Tr. 309-313).

Arnold and Steagall also recalled incidents involving other miners that did not result in discipline. (Tr. 314-322, 430). In 2012 or 2013, Halgryn and Ramirez contacted a moving belt with a shovel while using a metal detector. (Tr. 314, 316, 420, 554-555, 799-800). Steagall and other electricians were present. (Tr. 316, 421). Ramirez recalled they were conducting an inspection. (Tr. 555). Steagall stopped Halgryn and told him that he needed to lock the belt. (Tr. 316, 420-421). Ramirez also should have locked it. (Tr. 422). The belt was already locked; Steagall believed Halgryn and Ramirez needed to add their locks. (Tr. 329, 555-556). Ramirez believed the group lock was sufficient. (Tr. 555-557). Halgryn was upset but put the locks on, to err on the side of caution. (Tr. 316-317, 557). Later, Halgryn, Steagall and Arnold went back and Halgryn demonstrated that he had not contacted the belt and that a lock was unnecessary. (Tr. 317-318). Halgryn also argued Steagall could not see anything from where he was standing. (Tr. 318). Ramirez was present for this explanation and agreed with it at hearing. (Tr. 423-424, 555-556). Steagall did not. (Tr. 423). Ramirez and Steagall later learned that company policy did not require salaried employees to lock out during an inspection. (Tr. 557-559). That policy was later changed. (Tr. 559). Steagall did not think they followed the policy. (Tr. 558).

Afterwards, Ramirez told Steagall that he should conduct an investigation and make the incident go away. (Tr. 424, 558). Steagall believed this meant he was to investigate and make a report. (Tr. 424). He was not sure if Ramirez was asking him not to include everything, but he was a bit intimidated. (Tr. 425). Stegall would never lie, but he felt that management wanted the incident investigated and put away. (Tr. 425-426). Steagall created a report and it included what he saw. (Tr. 420-421, 424-425). Ramirez did not recall seeing the report. (Tr. 559).

Steagall and Arnold were not aware of Halgryn or Ramirez receiving discipline for this incident. (Tr. 317, 421-422). Steagall testified that HR would handle discipline and it would not reach him directly, but that miners would hear rumors of discipline. (Tr. 421-422, 466). Ramirez testified that Halgryn coached him after the incident. (Tr. 559). Coaching is not discipline. (Tr. 577). There was probably no record of the coaching and Ramirez was not suspended. (Tr. 559-560). He did not know if Halgryn was disciplined. (Tr. 559-560). Halgryn testified he never coached Ramirez about the lock out/tag out policy. (Tr. 836).

In another incident, Beyale and Roger Benny saw Robert Arthur standing on a boom belt. (Tr. 321, 552, 554, 801). Beyale brought it to Benny's attention. (Tr. 321, 801). As soon as the condition was discovered Beyale locked down and shut down. (Tr. 321, 328, 801). Arnold spoke with Ramirez about the incident as the shop steward, but as far as he knew Ramirez did not do anything because Beyale did not raise the issue. (Tr. 321-322). Ramirez recalled an electrician was concerned (he did not believe it was Arnold) but he did not know anything about

the incident. (Tr. 554). Arnold believed that neither Arthur nor Benny was disciplined. (Tr. 322). Beyale did not know if Benny was disciplined. (Tr. 801). Ramirez testified that Benny disciplined Arthur for the incident with re-training. (Tr. 552-553). He did not know if there was a record but if there was he would have seen it as Benny's supervisor. (Tr. 553). Benny had been disciplined in the past, but Ramirez did not recall if it was related to lock out/tag out. (Tr. 553-554). Beyale was not disciplined for telling Benny to get Arthur off of the belt. (Tr. 802).

In another incident, a locomotive derailed and was not tagged out before the person left the train. (Tr. 430-431, 473). The person who failed to tag it out was a plant supervisor. (Tr. 431). The supervisor may have been Roland Lee, who was terminated at some point. (Tr. 465-466). Lee may have been terminated before this incident. (Tr. 473). There were several foremen in the area that could have locked or tagged out the locomotive. (Tr. 472).

Another incident involved a crusher that was not locked out during an inspection. (Tr. 431). No one was in the crusher but the cover was open. (Tr. 431-432).

In another incident, Lynch asked Arnold to tag out broken reclaimers. (Tr. 271). Arnold replied, "see what happens because that power plant doesn't get coal" and then contacted his supervisor, Steve Flamang. (Tr. 271). The reclaimers continued to run for two or three days until they could be repaired and no one, including Arnold, was disciplined. (Tr. 272).

Steagall recalled another incident where there was a line on the ground. (Tr. 446). Engineers, truck drivers, and pit foreman were present (the engineers closest) but the line was not locked out. (Tr. 446, 448-449). If the line snapped, regardless of electricity, someone could have been killed. (Tr. 446). Steagall ordered the line locked out. (Tr. 447-449). A crew disassembled the equipment to get weight off the line and the area was isolated for repair. (Tr. 447-448). Steagall made a report for upper management. (Tr. 445-446, 466). Steagall did not know who was in charge or to whom the engineers would report. (Tr. 449). Steagall was not aware of anyone being disciplined for this event, but he would never see the discipline if they were. (Tr. 447).

By contrast, Lynch recalled an incident where a supervisor, Lee, breached the lock out/tag out policy by giving an employee a key and allowing him to unlock equipment. (Tr. 780). Lynch heard about the issue, researched it, and terminated Lee. (Tr. 780-781).

Lynch also recalled an incident in which two electricians removed the safety devices on a draft line cable at a substation so they could try to find the bad spots. (Tr. 781, 785). This method was not a proper troubleshooting technique and exposed four people to electrocution. (Tr. 781). It was not a company shortcut, but it was a practice of the electrical department. (Tr. 783-784). This was not a violation of the lock out/tag out policy, it was a violation of other policies. (Tr. 785-786). Lynch first learned about this practice during this incident and did not know if other members of management were aware. (Tr. 784-785). Both electricians were terminated and several members of management were disciplined. (Tr. 781-782, 786-787). Lynch did not know the nature of that discipline or if it was documented. (Tr. 786-787).

Arnold widely held a reputation as a safety advocate and perhaps a troublemaker with respect to safety.[21] (Tr. 429-430, 456, 547, 653, 712, 754). Since this event, other miners' reps (including Charley, Beyale, and Yazei) were more hesitant to raise issues. (Tr. 322-323). They were concerned because Arnold had the most training and experience and the company disciplined him. (Tr. 323). They only brought up small issues and gave Arnold large issues. (Tr. 323-324). Beyale was no longer sure if electricians would be reprimanded for tagging things out. (Tr. 796). However, he still followed the policy. (Tr. 798-799). The mine has a non-retaliation policy for miners who bring up a safety issue to management, the union, or MSHA. (Tr. 432-433, 551, 654, 755). Bringing a complaint to a supervisor or union steward would be covered by that policy. (Tr. 551-552, 654, 755-756).

Until this incident, Arnold had a 30-year clean record. (Tr. 325). He believed the evaluation was retaliation. (Tr. 325-326). People at the mine knew he had a target on his back. (Tr. 326). The union only filed a grievance for the written warning, not the suspension or the changed evaluation, despite the fact that those were issues that could be grieved (RX-11).[22] (Tr. 359-360, 571, 667). Hoffman testified that the evaluation had been discussed during the grievance process. (Tr. 666-667). Arnold wanted the negative performance reviews and discipline removed from his personnel files and an apology. (Tr. 324-325).

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and subsequent reply briefs in support of their respective positions. Complainant argued that Respondent had retaliated against Arnold for engaging in activity protected by the Mine Act. (*Complainant's Post-Hearing Brief* at 22-41). Specifically, Complainant alleged that Arnold's actions in raising the issue of the coal lab fan motor and, eventually, complaining about that motor constituted protected activity under the Act. (*Id*. at 23). Complainant also asserted that Respondent's actions in suspending Arnold, issuing him a warning, and changing his safety evaluation, constituted adverse employment actions. (*Id*. at 25-33). Complainant further argued that the adverse employment actions were motivated, in part, by Arnold's protected activity. (*Id*. at 24-28, 35-41). Finally, Complainant argued that Respondent failed to rebut the *prima facie* case showing retaliation. (*Id*. at 28-41). As a result of these arguments, Complainant requested a civil penalty of $20,000.00, revocation of the written warning, and a re-evaluation of the June 2013 performance evaluation without animus or reference to SLARS. (*Id*. at 41).

Respondent argued that Arnold's discipline was the result of his failure to follow MSHA regulations and company policy. (*Respondent's Post-Hearing Brief* at 8-9). It further alleged

[21] Martin disagreed that Arnold was a reputed safety advocate and believed that he had a reputation for being confrontational and vindictive. (Tr. 712). He knew Arnold's reputation while at Respondent and at MSHA. (Tr. 712). Martin heard rumors Arnold would purposefully leave work incomplete and then call in 103(g) complaints resulting in citations. (Tr. 712-713).

[22] At the time of the hearing, the grievance had already been through Respondent's three-step grievance procedure and was awaiting arbitration. (Tr. 663-666).

that, even in the absence of protected activity, Arnold would have received the same discipline. (*Id*. at 10). According to Respondent, all of Arnold's disciplines were related to his inaction with respect to the coal lab fan motor and not related to any of his protected activity. (*Id*. at 10, FN 6). In fact, Respondent alleged that Arnold had no good-faith belief that a safety condition actually existed and, therefore, his actions were not really protected activity. (*Id*. at 17-19). Finally, it argued that the discipline issued to Arnold was minor and was in no way a material adverse action. (*Id*. at 10, note 6). As a result of these arguments, Respondent requested that the civil penalty be eliminated or greatly reduced and for a finding that Respondent did not retaliate against Arnold. (*Respondent's Reply Brief* at 9).

HOLDING

For the reasons set forth below, I find that the Complainant satisfied his requirement to prove a *prima facie* case of discrimination in this matter. Further, Respondent failed to rebut that *prima facie* case or to establish an affirmative defense. As a result, I find Respondent discriminated against Arnold under the Mine Act.

ANALYSIS

This case is before me on allegations that Respondent retaliated against Arnold for engaging in protected activity in violation of §105(c). That provision states:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. §815(c)(1).

The purpose of this section is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181,

95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 35 (1978). The section was intended "to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation …" *Id*. at 36.

I. Claimant Established a *Prima Facie* Case of Discrimination

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette,* 3 FMSHRC at 818 n.20. The complainant bears the burden of persuasion. *Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-1536 (Sep. 1997).

a. Claimant Engaged in Activity Protected by the Mine Act

The first inquiry is whether, in this particular matter, Arnold engaged in protected activity. Section 105(c) defines "protected activity" broadly to include the "fil[ing] or ma[king] [of] a complaint under or related to [the] Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" *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); *see also U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (Sep. 2001). Section 105(c) also explicitly protects notifying the "representative of the miners" of complaints. 30 U.S.C. 815(c)(1). Finally, protected activity includes instituting or causing to be instituted a proceeding under or related to the Act. *Id*.

The record clearly establishes that Arnold engaged in several forms of protected activity. Specifically, Arnold raised a possible safety issue with the coal lab fan motor to his supervisors on January 22, February 14, and February 19. (Tr. 244-246, 249, 389-390,396, 405, 508, 690-691, 794). He raised this issue with three members of management: his immediate supervisor (Steagall), Respondent's only electrical engineer (Berget), and a former MSHA inspector and safety expert (Martin). (Tr. 244-247, 389-393, 399, 477, 684, 718). Arnold then contacted a representative of miners, specifically the local union president, and convinced him to call in a complaint under Section 103(g) of the Act. (Tr. 253, 803). This action caused an inspection at the mine and led to a citation. During the Section 103(g) inspection, Arnold acted as the miner's representative and also provided Inspector Williams with photographs. (Tr. 257, 260, 414, 491, 823). Finally, after he was suspended, Arnold filed a 105(c) action with MSHA. (Tr. 268-269). Arnold's actions, individually and cumulatively, are protected under the Mine Act.

In its post-hearing submissions, Respondent attempted to rebut this evidence by arguing these actions were not protected. Respondent's witnesses conceded complaining to a supervisor or the union president would be protected by the company's anti-retaliation policy and by the Mine Act. (Tr. 432-433, 551-552, 654, 755-756). However, Respondent argued that a miner that seeks to avail himself of these protections must have a "good-faith basis" for believing a safety hazard exists and for making those complaints. (*Respondent's Post-Hearing Brief* at 18). In short, Respondent argues that the Act only protects *bona fide* safety complaints-- not bad-faith attempts to cause trouble. Respondent asserts that Arnold's actions were the latter rather than the former. (*Id*.).

To support this assertion, Respondent noted that Arnold, as a certified electrician, called MSHA to make a complaint but had failed to address the motor issue as mandated by MSHA regulations and the company's written policy. (*Respondent's Post-Hearing Brief* at 18). Further, it drew attention to Arnold's testimony that the NEC was "irrelevant" and his later concession that the code actually addressed pertinent issues. (*Id*.). It also noted that Arnold testified that that he was not supposed to lock out/tag out equipment because of production issues, but, on the other hand, had also stated that he had locked or tagged out equipment in this same area in the past. (*Id*. at 18-19). Finally, Respondent raised the fact that, despite Arnold's claims that Respondent's actions had dissuaded him from making safety complaints, he continued to raise safety issues at the mine. (*Id*. at 19). Respondent alleges that these facts show Arnold's complaints were made in bad faith and therefore, did not constitute protected activity. (*Id*.).

Having heard the testimony at hearing, evaluated the credibility of the witnesses, and having carefully evaluated the evidence, I find that Arnold's expressed safety concerns had been made in good-faith. Regardless of whether there were actual hazards associated with the fan motor, Arnold's expressed concerns about the possible existence of such hazards, given the totality of the circumstances discussed herein, were reasonable and made in good faith. Arnold credibly testified that he happened upon a fan motor that he did not know existed and had never been told about. (Tr. 243-244, 390). He had questions about the installation. He was not certain it was hazardous. He contacted his supervisor, the electrical engineer, and a safety expert searching for answers. (Tr. 244, 389-390, 434). There is no reason to doubt Arnold was reasonably uncertain about whether there was a hazard-- especially in light of the fact that MSHA eventually issued a citation for a hazard at the fan-- albeit possibly a different hazard than the one Arnold feared.

I also credit Arnold's testimony that he had been told not to lock or tag out the condition pending research regarding his concerns. (Tr. 244, 247, 274-283, 300, 350-358). Rather than supporting Respondent's argument, the fact that Arnold had locked or tagged out equipment in the area before corroborates his testimony that he was told not to act here. Arnold was not shy about tagging out conditions he believed to be hazardous, but here no one was positive if there was a hazard and Arnold was told to hold off. Steagall further corroborated this testimony, explaining that he had told Arnold to hold off on acting until they had answers.[23] (Tr. 244, 282,

[23] Steagall was retired at the time of the hearing. Further, he was forthright about issues that he could not recall or things for which he lacked knowledge. As a result, I found him to be

385, 403-404). There is no reason to believe Arnold acted in bad-faith in failing to lock out or tag out the equipment.

Similarly, I credit the testimony of Arnold and Steagall that they believed the issues Martin raised with respect to the NEC were not relevant *in the context of their discussion*. (Tr. 250-251, 371-372, 405-406). Whether the NEC actually brought anything to bear on this situation is beyond the scope of this matter, suffice it to say that Arnold had acted in good-faith.

Finally, whether or not Arnold was dissuaded from making safety complaints in the future is not relevant to his good-faith in making the initial complaints. To argue that Arnold's completely unforeseeable future discipline and his reaction thereto could somehow shed light on his good-faith at the time this issue arose is extremely questionable.

In a related argument, Respondent asserted that while it stipulated that Arnold's 105(c) complaint was a protected activity, it was not aware of the complaint until after Arnold's written warning was already drafted. (*Id*. at 21). While it is true that Respondent was not aware that Arnold filed the claim at that time, it was certainly aware at the time Arnold's evaluation was completed several months later. Further, the filing of the 105(c) complaint was just one of many instances of protected activity, as listed *supra*. There is no question Respondent was aware of the other protected activity.

b. Claimant Suffered An Adverse Employment Action Motivated In Part By That Protected Activity

Having determined that Arnold engaged in protected activity, the next inquiry is whether the adverse action complained of was motivated in any part by that activity. In practice, this second half of the *Pasula* and *Robinette* framework really consists of two inquiries: (1) whether there was an adverse employment action and (2) whether there was a nexus between the miner's protected activity and that adverse employment action. *See Kenneth L. Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998); *United Mine Workers of America (UMWA), on behalf of Mark A Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2096 (Aug. 2014) (Cohen and Young) (Decisions where Commission first held that miner engaged in protected activity, then determined that the complained of action, a termination, was an adverse employment action, before addressing the nexus). Therefore, the Complainant must first establish that an adverse employment action occurred before the issue of a nexus is reached.

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disinterested in the outcome of the hearing and extremely reliable as a witness.

i. Claimant Suffered An Adverse Employment Action[24]

The legislative history of the Mine Act showed that the forms of discrimination should be considered broadly, stating:

> It is the Committee's intention 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, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.

Legislative History at 36. In keeping with the Congressional intent, the term "adverse action" has been broadly defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010). The Commission has recognized that adverse action may be "subtle or indirect" but nonetheless must be more than an action "which an employee does not like." *Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 FN 2 (Aug. 1984) (*quoting Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981). To differentiate between legitimate adverse actions and an actions which an employee simply does not like, the Commission adheres to Supreme Court's test in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). *Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012). Under that standard, adverse actions are those that are "materially adverse to a reasonable employee," meaning "that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id*.

In this matter, the record clearly establishes that Arnold suffered three discrete adverse employment actions. Arnold was suspended indefinitely without pay (though that suspension ultimately lasted for a week after which time he was reimbursed). (Tr. 264-267, 514-517, 633-634, 649, 675-676). He received a written warning which was placed in his personnel file-- the first such warning in his nearly 30 years with Respondent. (Tr. 278, 283, 325). Finally, Arnold had an evaluation downgraded to "needs improvement" with respect to safety, despite a previously spotless record. (Tr. 292-295, 363, 845-846). Each of these actions, individually, constitutes an adverse employment action. Moreover, an employer's actions are to be evaluated cumulatively. See *Burlington Northern* at 68 and 73; *see also Moore v. Cricket Communications*, 764 F. Supp 2d 853, 862 (S.D. Tex. 2011). When considered together, there is no question these actions form an adverse employment action. A reasonable miner, considering the way in which Arnold was held out of work, disciplined, and then unfavorably reevaluated, could easily be dissuaded from making a complaint.

[24] In my March 6, 2014 Order Denying Respondent's Motion for Summary Decision, I addressed the issue of whether any of Respondent's post safety complaint actions toward complainant – singly or in combination – constituted a "material adverse action," so as to raise a cognizable claim under §105(c). I hereby incorporate the rationale contained therein without full recitation thereof.

In its post-hearing submissions, Respondent argued that the actions taken with respect to Arnold were not "materially adverse." (*Respondent's Post-Hearing Brief* at 23). For the suspension, Respondent argues that Arnold was only held out for four days, ultimately received his full pay, and was not harmed in his employment. (*Id*.). It asserted that the holding out of service during an investigation was not an adverse employment action, but instead a necessary action to ensure that other miners understood that safety regulations and company policy were important. (*Id*. *citing Gerald v. Locksley*, 785 F. Supp. 2d 1074, 1117 (D. N.M. 2011)). It further asserted that his suspension lasted only long enough to determine the appropriate course going forward. (*Id*.). Finally, it argued that a short suspension was appropriate given Arnold's action in failing to lock out/tag out the motor and that other miners had been terminated for similar actions. (*Id*.). Respondent asserted that, given Arnold's improper actions, the actual punishment that it meted out would not dissuade others from making safety complaints. (*Id*. at 23-24 *citing Dehart v. Baker Hughes Oilfield Operations*, 214 Fed. Appx. 437 (5th Cir. 2007).

The record does not support Respondent's characterization of the suspension. Arnold was held out of service for seven days-- between February 22 and March 1. (Tr. 334-335). While Arnold was only scheduled to work four days in that time period, that did not shorten his time of actual suspension by three days. (Tr. 334-335). Respondent's human resources specialist, Hoffman, agreed that he had never heard of a suspension longer than four days and that a week would be a long time to be held out of service. (Tr. 677). It hardly sounds like the time taken by Respondent was just long enough to conduct the investigation --especially given that Arnold and Steagall were both available February 22 for interview on that day and Ramirez had already assessed all of the documents he would later rely on at the consensus triangle. Further, while the suspension eventually lasted seven days, Arnold had no way of knowing until he was actually called in to return to service how long the suspension would last. He had been told it was indefinite. Similarly, Arnold had no way of knowing if he would be paid for the week.[25] Arnold credibly testified as to the financial, familial, and psychological pressures that he felt during his suspension. (Tr. 267-268). A reasonable miner, knowing about the nature of Arnold's suspension, may have been dissuaded from making a safety complaint.[26]

Respondent's argument that a suspension to conduct an investigation was not an adverse employment action reaches outside of Mine Act jurisprudence and draws unsupportable analogies. The case Respondent cited, *Gerald v. Locksley*, deals *inter alia* with an assistant

[25] That Arnold's suspension was, in fact, a punishment is further bolstered by the fact that Hoffman testified that miners were held out of service without pay generally in case a suspension was later deemed necessary. (Tr. 649). However, in this case Ramirez testified that at the consensus triangle, nothing more serious than a written warning was discussed because of Arnold's work record. (Tr. 538, 602). If Respondent had no intention of suspending Arnold, the only explanation for this holding out of service without pay was that it was a separate punishment outside the company's normal procedures.

[26] Respondent's admission that it could have held Arnold out with pay pending the investigation but instead opted to hold him without pay further supports the conclusions of material adverse action and discriminatory bias.

football coach's claim of racial discrimination under Title VII of the Civil Rights Act. 785 F.Supp.2d at 1085. In that case, the Court noted "[o]nly acts that constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits will rise to the level of an adverse employment action." *Id*. at 1117 *citing Robinson v. Cavalry Portfolio Serv., LLC*, 365 Fed.Appx. 104, 114 (10th Cir. 2010)(internal quotations omitted). These are clearly the "common forms of discrimination" to which Congress chose not to limit the Mine Act. *Legislative History* at 36. Put simply, an action that would not be an adverse employment action under Title VII (as articulated by the Federal District Court of New Mexico) may be an adverse employment action under the Mine Act. The Mine Act is broader and more protective of miners. Simply because the discipline here was more subtle than a discharge or change in long-term benefits does not mean that it was not an adverse employment action under the Mine Act. The question, under the Mine Act, is whether in light of the disciplines given to Arnold a reasonable miner would be dissuaded from making a safety complaint. As noted *supra*, this court finds such to be the case instantly

Respondent's assertion that the miner's suspension was justified punishment for his failure to lock out/tag out is not pertinent to the issue of whether said suspension was an adverse employment action. The appropriateness of Arnold's punishment will be addressed, *infra*, in the discussion regarding the affirmative defenses.

Respondent also asserted that Arnold did not experience an adverse employment action with respect to the written warning. (*Respondent's Post-Hearing Brief* at 24). It argued that warning an employee of safety obligations is not enough, without more, to dissuade someone from making complaints. (*Id*. *citing Foreman v. Western Freightways, LLC*, 958 F. Supp. 2d 1270, 1284-1285 (D. Colo. 2013); *see also Respondent's Post-Hearing Brief* at 25, note 8). It argued that it could have terminated Arnold for his failure to lock out/tag out the motor and that adverse employment action cannot occur when the punishment could have been more severe. (*Id*. *citing National Cement Co. v. FMSHRC*, 27 F.3d 526, 534 (11th Cir. 1994)). The mine operator again contended that the punishment was justified and that a warning for being insubordinate and/or for being argumentative could not dissuade a reasonable worker from making safety complaints, especially when justified. (*Id*. *citing Dehart*).

The warning provided to Arnold here was more than simply a reminder to Arnold of his safety obligations. In the case Respondent cited, *Foreman v. Western Freightways, LLC*, a worker making a discrimination claim under Title VII of the Civil Rights Act failed to establish an adverse action because he had already received similar warnings before his protected activity occurred and his warnings brought him no closer to terminations. 958 F. Supp. 2d at 1284-1285. That scenario was clearly inapposite to the situation here. Arnold had an immaculate record at Respondent and had never received a written or verbal warning with respect to safety before. (Tr. 278, 283, 325, 537). Further, because a written warning was part of Respondent's unwritten progressive discipline system, receipt of the warning placed him closer to termination. Beyond these substantial differences, it is unnecessary to reach into Title VII litigation when several Commission ALJs have determined that in the context of the Mine Act a written warning can constitute an adverse employment action. *See Howard v. Cumberland River Coal Company*,

2010 WL 3616453, *5-6 (August 13, 2010)(ALJ Hodgdon)("The letter could have had a potential chilling effect on further documentation of hazardous conditions by…other miners aware of the disciplinary action"); *see also Palmer v. Asarco Inc.*, 28 FMSHRC 669, 678-679 (Aug. 2006)(ALJ Manning) and *United Steelworkers of America on Behalf of Bird v. General Chemical Company*, 15 FMSHRC 2475, 2489-2490 (Dec. 1993)(ALJ Lasher). A reasonable employee, seeing a miner with Arnold's spotless record receive progressive discipline, could be dissuaded from raising safety issues.

Similarly, Respondent's argument that the warning could not be an adverse action because a more severe punishment was possible does not comport with the law or logic. This is clear from a closer reading of the case cited by Respondent, *National Cement Co. v. FMSHRC*. In that case, the complainant's claimed adverse action was an offered reassignment to a different position. 27 F.3d at 534. That new position was actually at a higher pay grade (though the miner would make less money without overtime). *Id*. The court determined that a change of position to a higher pay grade could not be an adverse action. *Id*. That is not the situation here. Arnold does not claim that a change in position to a higher pay grade occurred. He claims that he was disciplined with a written warning. In no way could a written warning be seen as a lateral move or an improvement in Arnold's position. Further, if Respondent's argument were to prevail, then management could simply provide "termination" as the penalty for breaking any rule and claim that any action that fell short of termination could not be an adverse action. The question presented here is whether a written warning would dissuade a miner from making safety complaints – not whether a promotion to a higher pay grade would have such a chilling effect.

Finally, Respondent claims that Arnold did not experience an adverse employment action with respect to the employee evaluation. (*Respondent's Post-Hearing Brief* at 25). Specifically, Respondent claimed that all the changes were minor because his overall grade was unchanged and it did not affect the terms and conditions of employment. (*Id*. at 25-26 *citing Daniels v. United Parcel Services*, 701 F.3d 620, 638 (10th Cir. 2012)).

I see no reason to consider the negative aspects of Arnold's evaluation to be "minor" simply because the overall grade was unchanged. Respondent's witnesses took great pains to explain that safety was of the utmost importance to the operator. As such, a "needs improvement" rating on the "safety" category of the evaluation must be extremely important.

Further, the evidence suggests that the change in evaluation was more significant than Respondent and its witnesses implied. Arnold credibly testified that, while evaluations were not supposed to be kept, they were used to show a trend or history during discipline. (Tr. 325). Further, Dixon credibly testified that evaluations could be used to disqualify employees for different positions. (Tr. 811-812). As the local union president, Dixon would be in the position to know how Respondent used miners' evaluations. Further, despite Ramirez's testimony that evaluations were not used, Ramirez conceded that he left the evaluations in the HR files. (Tr. 570-571, 587). It stretches credibility to claim that the evaluations were ephemeral and inconsequential and, for practical purposes ignored, but then concede that these evaluations were also kept in two separate locations and sometimes saved indefinitely. While I credit Hoffman's testimony that the CBA dictated pay for Arnold and that the evaluations did not directly affect

the CBA, I also find that evaluations were indirectly used in decisions related to promotion and other job conditions. (Tr. 669-670). Even if the company truly did not use the evaluations to dictate terms and conditions, I find that it would be reasonable for a miner to believe a grading of their job performance by supervisors would be important and could be dissuaded from raising conditions as a result.

Therefore, notwithstanding Respondent's assertion that it only reviewed performance appraisals 12-18 months retroactively and that the appraisals in any case fell outside the CBA, I find that the negative appraisal modifications were material and adverse in nature. Also, the disclosure that the performance appraisals were kept "permanently" only further persuaded this court of the untoward consequences for miners facing additional disciplinary action. Indeed, if there is one thing that many years of legal and judicial experience has taught this court, it is this: the collection and retention of negative data regarding individuals never has benign consequences.

Finally, Respondent argued that the various claimed adverse actions taken as a whole could not have dissuaded a reasonable miner from making safety complaints. (*Respondent's Post-Hearing Brief* at 26-27). To that end, Respondent noted that despite Arnold's claim that he would be dissuaded from making further safety complaints, he had continued to do so even up to the time of the hearing. (*Id*. at 26 *citing Somoza v. University of Denver*, 513 F.3d 1206, 1214 (10th Cir. 2008). It also noted that no other miners had ceased to act as miner's representatives. (*Id*.). It claimed that Arnold's testimony was self-serving, contrary to other evidence, and should be disregarded. (*Id*. *citing Cox v. Pammlid Coal Company*, 9 FMSHRC 435. 522 (ALJ Koutras).

The fact that Arnold was a particularly persistent (albeit abrasive) safety advocate and refused to be cowed is beside the point. As the Supreme Court noted in *Burlington Northern*, "We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." 548 U.S. 53 at 68-69. The issue is not whether Arnold was dissuaded but if a reasonable miner would be dissuaded. (Unfortunately, American Mining History is replete with examples of mining disasters involving "reasonable" miners who had failed to speak out about blatant safety hazards because fear of operator retribution.) I credit the testimony of Arnold and Beyale that, though no BHP miners had quit as representatives, they were nonetheless concerned about how they would be treated for raising safety issues. (Tr. 323-324, 796). This court is convinced that each of the above adverse actions, considered singly, would be sufficient on its own to dissuade a reasonable miner form making safety complaints. The cumulative effect of the serial adverse actions was undoubtedly more than adequate to do so.

In short, the suspension, the written warning, and safety evaluation were individually and cumulatively adverse employment actions that would reasonably deter a miner from engaging in protected activities.

ii. A Nexus Existed Between The Protected Activity And The Adverse Action

Having determined that there was protected activity and an adverse employment action, the next inquiry is whether there was a nexus between the two. To establish that nexus, the Commission has identified these indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *See Secretary 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 will consider each indicia in turn.

1. Respondent Had Knowledge of the Protected Activity

There is no question that Respondent had knowledge of the protected activity. As Judge Bulluck recently observed, knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730, 736 (March 2014). Well-settled Commission case law establishes that when an agent of an operator has knowledge or should have knowledge of a safety hazard, such knowledge should be imputed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977) aff'd 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that acts or knowledge of an agent are attributable to a principal). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is "any person charged with responsibility for the operation of all or part of a…mine or the supervision of the miners in a…mine."). In this case, the evidence of knowledge is overwhelming. Steagall, a member of management, was aware of Arnold's safety complaints as early as January 22, 2013.[27] (Tr. 244, 389-390). As a result, Respondent had knowledge of Arnold's protected activity on that date.

[27] Occasionally in its briefs and often at hearing, Respondent argued that "upper management" did not have actual knowledge of the protected activity. (*See e.g. Respondent's Post-Hearing Brief* at 12). Neither the term "upper management" nor anything similar is defined in the Mine Act and no distinctions between "types" of management exist in Mine Act jurisprudence. It is uncontested that Steagall was management and therefore his knowledge is imputed to the corporate person of the Respondent. It is not Claimant's responsibility to show that each member of management was personally aware of his protected activity. If "lower management" was delinquent in passing messages to "upper management" it would constitute a management concern.

However, that was not the extent of Respondent's knowledge. Berget, also a member of management, learned about Arnold's safety complaints on January 22, 2014, the same day as Steagall. (Tr. 244, 245, 392-393, 477). Martin, again a member of management, learned about those complaints on February 14, 2014. (Tr. 247, 399, 684, 718). On February 19, Martin learned that Arnold was going to file a 103(g) complaint if nothing was done regarding the motor. (Tr. 250-251, 692). Later that day, after Dixon had filed the 103(g) complaint, Martin told Williams that he knew Arnold had been the person to call. (Tr. 694-696, 816-817). In response, Martin wrote an e-mail that evening which explained Arnold's complaints and the 103(g) inspection. (Tr. 487-490, 592, 703). Lynch and Ramirez, both members of management, received this e-mail. (487-490, 592, 737, 742, 769). Lynch testified he believed from this e-mail that Arnold had caused the 103(g) complaint to be filed. (Tr. 739, 742-743). Halgryn and Hoffman, both members of management, learned about Arnold's safety complaints and the 103(g) inspection from Ramirez. (Tr. 627-629, 832-832). Berget heard about the 103(g) complaint from someone in the electrical department. (Tr. 481-482). Finally, everyone at the company became aware of the 105(c) complaint (after the suspension and written warning but before his lowered evaluation). Around half a dozen members of management were aware of Arnold's various forms of protected activity at the time Arnold suffered adverse employment actions.

2. Respondent Displayed Hostility Towards Claimant's Protected Activity

The record contains several instances in which members of mine management displayed hostility towards Arnold's protected activity. When Martin accompanied Williams on the 103(g) complaint inspection, he repeatedly stated that he knew Arnold had called in the complaint and expressed anger. (Tr. 694-696, 816-817). In fact, Williams had to tell Martin to stop discussing the issue. (Tr. 256, 817). During the inspection the next day, Lynch provoked a confrontation with Arnold and angrily questioned his credentials while discussing the motor at issue. (Tr. 260-261, 497-498, 706-707, 749-751, 824-825). Arnold and Williams testified that the MSHA inspectors had to step between Lynch and Arnold to prevent the confrontation from spiraling out of control. (Tr. 261). Even Lynch conceded that he had to take two steps back to cool down. (Tr. 750-751). During the suspension and when Arnold received his written warning and performance evaluation, Ramirez told Arnold to "follow the chain of command" before calling MSHA. (Tr. 265-266, 294-296, 338-339, 362-363, 509-510, 545, 621-622). Similarly, Hoffman had complained to Dixon about Arnold calling in 103(g) complaints. (Tr. 675-676, 807-809). Martin expressed deep, almost personal hostility toward Arnold and characterized his actions as vindictive and confrontational. (Tr. 712). He even claimed that Arnold would stage unsafe conditions to provide a pretext to call in 103(g) complaints. (Tr. 712-713). Whatever motive he believed existed for Arnold's alleged actions was left unstated. Such negative characterization of a miner can be indicative of hostility toward protected activity. *Turner v. National Cement*, 33 FMSHRC 1059, 1069-1070 (May 2011). In sum, several different members of management expressed opinions or behaved in a manner which indicated hostility toward Arnold's protective activity in this matter.

Respondent argued that it displayed no hostility toward protected activity. (*Respondent's Post-Hearing Brief* at 19-22). It noted that all of its witnesses testified that the punishment was based on Arnold's failure to lock out or tag out the equipment in violation of company policy and MSHA regulations. (*Id*. at 19-20). It argued that if there had been hostility, Arnold would have received punishment for the telephone or photograph violation, but that there was no piling on here. (*Id*.). Similarly, it argued that if it were hostile, Arnold would have been discharged. (*Id*. at 19-21). It also noted that it could not have hostility towards Arnold for the 105(c) because it was not aware of it until Arnold had returned to work. (*Id*. at 21 *citing Cyprus Bagdad Copper Co.*, 12 FMSHRC 1239, 1259 (Jun. 1990)(ALJ Cetti). Finally, Respondent argued that Arnold's evaluation was only changed after he requested the review and it was changed, along with all the other electrician evaluations, to ensure conformity. (*Id* at 21). During the review, it was determined that Arnold's review did not accurately reflect the conditions for which he was punished so it was changed and an explanation added. (*Id*. at 21-22). Respondent argued that if hostility actually motivated the change, Arnold's entire rating rather than only his safety rating would have been changed. (*Id*. at 22).

None of Respondent's arguments are compelling and some show a lack of understanding as to the nature of discrimination under the Mine Act. The legitimacy of Respondent's claim that Arnold's punishment was for failure to lock out or tag out the motor will be discussed more fully with respect to Respondent's affirmative defenses, *infra*. Regardless, as Arnold experienced each of his punishments in this matter (the suspension, the written warning, and the changed evaluation) Arnold was told that his failure to follow "the chain of command" contributed to the discipline. (Tr. 265-266, 294-296, 338-339, 362-363, 509-510, 545, 621-622). This point is essentially undisputed and several of Respondent's witnesses openly testified that they were upset or concerned that Arnold went outside of the chain of command to contact MSHA. (Tr. 494-495, 509-510, 545, 610, 651-652). In fact, concern over Arnold's failure to follow the chain of command was written into Arnold's evaluation. (Tr. 294-296, 362-363, 621-622). Williams testified that the Respondent asked MSHA to explain that miners should follow the chain of command. (Tr. 826-827). Similarly, it is undisputed that Respondent was upset that Arnold gave photographs to MSHA personnel and, in fact, this was cited as being one of the reasons for his suspension, though not for the written warning or evaluation. (Tr. 356, 526-528).

Respondent and its witnesses seem oblivious to the fact that their open admission to antipathy toward going outside of the "chain of command" to MSHA was an explicit, open admission to hostility toward protected activity. If anything constitutes protected activity under the Mine Act, then filing (or causing the filing) of a safety complaint with MSHA must be such. In fact, filing a complaint is one of the few forms of protected activity unambiguously referred to in the relevant provision of the Mine Act. 30 U.S.C. §815(c)(1)(prohibiting discrimination against a miner "because such miner…has filed or made a complaint under or related to this Act."). I find that Respondent's witnesses essentially conceded that they were hostile to this most fundamental form of protected activity. While Respondent is certainly free to ask miners to bring their safety concerns to the company, it cannot punish miners for speaking to MSHA at any time. Euphemistic language about "chain of command" does not change the fact that in this matter, Arnold was disciplined, in part, because he complained to MSHA.

Further, even if there was some basis for requiring Arnold to "follow the chain of command" before contacting MSHA, he did so. As noted *supra*, Arnold told Steagall and Berget about the condition on January 22 and later told Martin about the condition on February 14. While he may not have gone to "higher levels of management" as Respondent urges in its brief, he still made Respondent aware of the condition. And, as noted *supra*, the Mine Act does not recognize "upper management." Apparently, under Respondent's policy, Arnold was required to bring safety issues to every single member of management until one of them took action. If none of those members of management took any action, then Arnold was still responsible for any safety hazards he observed. This is, of course, absurd and shows that Respondent's insistence on "chain of command" is, in reality, a post-hoc justification for hostility to miners contacting MSHA.

Respondent's arguments that imply that there was no hostility because they could have behaved more egregiously are likewise disregarded. Specifically, Respondent argues that it showed no hostility because it did not "pile on" with additional written warnings for taking photographs or using the camera. Similarly, BHP argues if it was hostile it would have discharged Arnold. Finally, it claims that Arnold's performance evaluation was only changed with respect to safety issues, and did not impact on the overall score. Simply because a Respondent could have been more hostile to protected activity does not mean that it was not hostile at all. To claim that only the most egregious levels of hostility can meet the requirements of the *CAM Mining, LLC*, framework has no basis in law and is absurd on its face.

Respondent also argued that the change in Arnold's performance appraisal should not be considered evidence of hostility in that Steagall's initial evaluation was not discriminatory and that Arnold himself initiated the process of reevaluation. These arguments are beside the point. The critical issue is whether the ultimate changes in Arnold's performance evaluation were grounded in Respondent's hostility toward the miner for having made safety complaints. As noted *infra*, failure to follow the chain of command would be a critique from which a hostile, discriminatory animus could be inferred.

Respondent's argument that it could not have had animus toward the 105(c) complaint because it was not aware that the complaint had been made has some support in the record. However, this argument only has merit with respect to the suspension and the written warning. By the time Arnold's performance evaluation occurred, the Respondent was clearly aware of the 105(c) complaint.

In short, I find various members of Respondent's management team showed hostility toward Arnold's protected activity and none of Respondent's arguments to the contrary are compelling.

3. There Was A Coincidence In Time Between The Protected Activity And The Adverse Action

The third circumstantial indicia of animus, coincidence in time between the protected activity and the adverse action, is also clearly present. The Commission has found delays lasting

several weeks to several months to be sufficient to show animus. *See, e.g.*, *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks); *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 *1932 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has explained that it applies "no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *All American Asphalt*, 21 FMSHRC at 47 (*quoting Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In this matter, Arnold was suspended a mere three days after Dixon filed the 103(g) complaint and two after Respondent received a citation. As chronicled *supra*, Arnold made a whole series of complaints leading up to this event. The written warning occurred a week later. Finally, Arnold's evaluation occurred a few months after his suspension and covered the time period during which the suspension and written warning occurred. The time delay is clearly within the limitations set by the Commission.

4. Claimant Experienced Disparate Treatment

While the traditional animus framework outlined in *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining*, contains only three kinds of discriminatory indicia (those discussed above) the Commission has often also considered disparate treatment. *Chacon v. Phelps Dodge Corp.*, *supra*. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Id*. at 2512. However, the existence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id*. at 2510-2513. I conclude that, because there was clearly knowledge, hostility, and coincidence in time in this matter that Claimant need not prove disparate treatment here. However, I will still address the issue.

In this matter, Arnold's treatment was clearly far different, and harsher, than the way in which Berget, Martin, and even Steagall were treated.[28] Arnold was ostensibly punished for failing to follow the lock out/tag out procedure. (*Respondent's Post-Hearing Brief* at 11-16). He was also told at all relevant times during his punishment that he should have followed the chain of command to bring issues to other members of management. (Tr. 265-266, 294-296, 338-339, 362-363, 509-510, 545, 621-622). Berget, Martin, and Steagall all learned from Arnold that there was a possible problem with the coal lab fan motor. (Tr. 244-247, 389-393, 399, 477, 684,

[28] While Arnold was a rank-and-file worker and Berget, Martin and Steagall were members of management, in all ways relevant to this discussion, they were similarly situated here. All four had the power to lock out or tag out equipment. Various witnesses credibly testified that management and workers were held to the same standard. (Tr. 548, 653-654, 761). And Steagall credibly testified that in the electrical department, the distinction between management and worker was insignificant because everyone was a certified electrician. (Tr. 433-434).

718). Steagall and Arnold attempted to move this concern up the chain of command to Berget and Martin. (Tr. 244-247, 392-393, 399, 477, 684, 718). Berget and Martin never raised this issue with anyone higher until after the 103(g) complaint was already filed. Berget, Steagall, and Martin also failed to lock out or tag out the coal lab motor fan. Arnold was indefinitely suspended (initially without pay), received a written warning, and a lowered performance evaluation. (Tr. 264-266, 514-517, 633-634. 649, 676). Steagall was suspended with pay. (Tr. 434, 440-442, 596-597, 682). Neither Berget nor Martin suffered any adverse employment action for doing exactly what Arnold had done. This is a textbook example of disparate treatment. Arnold was treated more harshly for engaging in the exact same behavior as his superiors.

Respondent argues that Berget and Martin were in fundamentally different positions than Arnold and, as a result, cannot be used to show disparate treatment. (*Respondent's Reply Brief* at 4-5). With respect to Berget, Respondent claims that he was unfamiliar with the coal lab and told Arnold and Steagall to contact the installer. (*Id*. at 4). Berget was not involved with the upgrading or modification of the coal lab, so he had no knowledge of the specifics of the installation. (*Id*.). His lack of knowledge was so great that he asked Ramirez to tell the miners not to ask him about it. (*Id*.). Berget simply relied on his certified electricians. (*Id*.). Finally, Berget never concluded that there was a hazard or left a perceived hazard of others. (*Id*. at 4).

The evidence suggests that no one was particularly knowledgeable about the coal lab. The room was installed by an outside contractor, and the electricians were not even sure about what equipment was in place. (Tr. 243, 391-392, 478-483). Arnold did not have any additional information that Berget did not have and, in fact, Arnold went to Berget hoping he would have some expertise. (Tr. 247). Berget was a certified electrician as well, in addition to being Respondent's only electrical engineer. (Tr. 244-245, 475-477, 698-699, 790, 816-819). In short, Berget, as a member of management, was arguably more qualified than Arnold and was in the same (or perhaps a better) position to learn information about the fan motor as Arnold. His far more lenient treatment has no rational basis in the record.

Respondent's claim that Arnold and Berget are not comparable because Berget never concluded that a hazard existed is likewise unpersuasive. In its briefs, Respondent argued that Arnold was punished for failing to lock out or tag out the motor. (*Respondent's Post-Hearing Brief* at 11-16). It believed this failure was particularly serious because that possible condition exposed miners to a grave hazard. (*Id*.).

Respondent's argument does not align with the facts in this case. Perhaps most importantly, Arnold and Steagall credibly testified at all times that they were by no means certain that there was a hazard. (Tr. 244-246, 282, 389-395, 403-404, 477, 408, 685-686). The two electricians talked to two other members of management, including Respondent's only electrical engineer, to seek answers. Berget essentially said the same thing; he did not know if there was a hazard . Each told Arnold and Steagall to follow up with the manufacturer or promised to follow up himself. (Tr. 245-247, 393, 396-398, 477-478, 482-483). There is simply no reason to make a distinction between Arnold and Berget.

However, Respondent's argument on this point raises more fundamental problems in its case. Respondent took great pains to note in its briefs that Arnold "perceived" or "believed" there was a hazard, rather than claiming such a hazard existed. (*see e.g. Respondent's Reply Brief* at 1). It points to the fact that Arnold filled out the "imminent danger" section on his monthly inspection report and that Martin testified he heard Arnold call the condition an "imminent danger." (Tr. 249, 719-721). This is because Respondent maintains that the fan motor at issue was properly installed and never was a hazard. (*Respondent's Reply Brief at 5*). And this was Respondent's basis for contending Arnold and Berget are differently situated: Arnold believed that a hazard existed and wrongfully failed to act, while Berget believed there was no hazard and appropriately declined to act. But even if Arnold subjectively believed there was a hazard and Berget subjectively did not-- that does not change the facts that Arnold and Berget were both similarly situated and received disparate treatment.

With respect to the fan motor, a hazard either existed or did not. Arnold or Berget's subjective belief about whether a hazard existed would not change that status. A whole subchapter of the Mine Act regulations (Subchapter H) deals with training of miners. 30 C.F.R. §§46-49. That training is designed, in part, to ensure that miners are able to recognize the existence of hazards. Whether a miner sees and ignores an unsafe condition or sees an unsafe condition and fails to recognize it as such, miners will in any case still be exposed to a hazardous condition and the requirements of the Act will not be met. It is beyond of the scope of the instant matter to determine whether the fan motor was hazardous. However, if there was a hazard then both Arnold and Berget saw it and should have recognized it. If that were the case, then both should have been punished for failing to lock out or tag out the hazardous motor. If it was not hazardous then neither Arnold nor Berget should have been punished for not locking or tagging it out. Their subjective beliefs or reasons for not locking or tagging out the motor are irrelevant.[29]

With respect to Martin, Respondent claims the he was not a certified electrician and unfamiliar with the installation. (*Respondent's Reply Brief* at 5). It argues that Martin told Arnold and Steagall that they should lock out or tag out the equipment if they believed it appropriate. (*Id*.). Finally, as with Berget, it argues Martin never concluded that there was a hazard or left a perceived hazard of others. (*Id*.).

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[29] Respondent's position, when taken to its logical conclusion, would be extremely dangerous. Here, Arnold was punished for recognizing a hazard but failing to lock out and tag out (despite the fact that he went to three of his supervisors). Berget did not recognize a hazard and therefore was not punished. However, they were both looking at the same condition. The message is clear: If a hazard exists, it is better to be entirely ignorant about it than to recognize it and bring it to your superiors. You can violate the lock out/tag out regulations and policies so long as you say you do not believe the hazard exists. Conversely, if there is no hazard, asking questions and raising issues without locking and tagging out (which given the lack of a hazard would be inappropriate) can lead to punishment just as though you ignored an actual hazard. In short, the safe bet with respect to safety hazards (real or potential) is keep your eyes closed and your mouth shut.

As with Berget, I find that Arnold did not have any particular knowledge about the installation and was unfamiliar with it as well. While it is true that Martin was not a certified electrician, he was nonetheless apparently relied on for electrical issues and could have locked or tagged out the equipment if he was so inclined. In fact, he was a former MSHA inspector and received MSHA's standard electrical training. (Tr. 683-684, 717). The argument regarding Martin's subjective belief is rejected for the same reasons discussed with respect to Berget, *supra*. I see no reason to believe that Berget or Martin were differently situated than Arnold in any substantive way and find that their lenient treatment, when contrasted with the harsher punishment dealt Arnold, clearly showed disparate treatment.

Beyond the issues with Berget and Martin, I find that Arnold experienced disparate treatment with respect to the length of time he was held out. Arnold was held out of seven days, while Hoffman testified that the longest amount of time he could recall for an investigation was four days. (Tr. 677-678).

Arnold also credibly testified, and provided documentary evidence, to show that other miners had entered information into the "imminent danger" section of their monthly reports without discipline over the lock out tag out issue. (Tr. 297-313). This also clearly shows disparate treatment.

Further, Arnold and Steagall recounted several incidents in which miners who failed to lock or tag out equipment were not given a written warning. Arnold and Steagall both recalled an incident in which Halgryn and Ramirez contacted a belt with a shovel while using a metal detector. (Tr. 313-322, 420, 430, 554-555, 799-800). Steagall and Arnold were not aware of Halgryn or Ramirez having received any discipline for this incident. (Tr. 317, 421-422). Ramirez testified that he was coached, but did not receive a written warning for this condition. (Halgryn testified that even this had not occurred). (Tr. 559-560, 836).

With respect to this incident, Respondent argued that the equipment was locked out but that Ramirez and Halgryn simply did not add a group lock. (*Respondent's Reply Brief* at 3-4). The testimony supports this assertion. (Tr. 329, 555-556). Respondent argues that this was only a technical violation which placed no one in danger, unlike Arnold's failure to lock out or tag out the motor here. (*Respondent's Reply Brief* at 4).

The testimony on the purpose of a "group lock" and an "individual lock" was meager. It would not be appropriate at this time to parse the technical aspects of Respondent's various rules. It is sufficient to note that Arnold was punished for failing to lock out or tag out equipment while Halgryn and Ramirez were not punished (or punished more lightly) for the same issue. Furthermore, even if the group lock did render the condition totally safe, Respondent also asserts that the motor at issue here posed no danger and that only Arnold and Steagall believed there was a danger. In light of such, from Respondent's perspective, the situations were identical with respect to safety, making the disparate treatment all the more stark.

Arnold and Steagall recounted several other incidents involving miners who failed to lock or tag out equipment. Those incidents included an event where Beyale and Benny saw Arthur

standing on a belt boom, one where a locomotive derailed and was not tagged out before the person left the train, another involving a crusher not locked out during an inspection, another involving Arnold not locking or tagging out reclaimers, and a final one where electrical wires were not locked out. (Tr. 271, 321, 430-431, 446, 473, 552, 554, 801). Arnold did not believe anyone was punished with respect to these incidents and Steagall was uncertain. (Tr. 272, 322, 447, 472-473). Respondent argued that, with respect to the incident involving Benny and Beyale, the equipment was locked out and tagged out immediately and the miner was disciplined. (*Respondent's Reply Brief* at 5). Further, Lynch testified to several other lock out/tag out incidents where miners were punished. (Tr. 780-787). I find that the testimonial evidence with respect to these events was too vague and uncertain to support Arnold's claim of disparate treatment.

Regardless of these incidents, the treatment of Berget and Martin, the length of the suspension, the other miners who entered information in the imminent danger section of their reports, and the incident involving Halgryn and Ramirez are ample support for a finding of disparate treatment.

In light of the foregoing findings regarding Arnold's protected activity, the adverse employment actions he suffered, and the discriminatory nexus between those two (as shown by the circumstantial evidence of knowledge, hostility, coincidence in time, and disparate treatment), I find that Claimant established a *prima facie* case of discrimination under the Mine Act. Further, for the reasons discussed *supra*, I find that Respondent was unable to rebut this *prima facie* case.

II. Respondent Proffered Affirmative Defense Was Pretextual

If a Claimant establishes a *prima case* of discrimination, the operator may make an affirmative defense by proving by a preponderance of all the evidence that the adverse action would still have occurred absent the protected activity. *See Pasula*, 2 FMSHRC at 2799-2801; *Robinette*, 3 FMSHRC at 819-820; and *U.S. Steel Mining Company*, 23 FMSHRC 981, 988-989 (Sept. 2001). An affirmative defense is usually made by showing "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (Jun. 1982). The Commission summarized the judge's task in evaluating affirmative defenses in, *Turner v. National Cement Company of California*, stating:

> [A] defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found … where 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) (*citing Haro*, 4 FMSHRC at 1937-38).

33 FMSHRC 1059, 1072 (May 2011). In the interest of ensuring that judges adequately scrutinize the operator's affirmative defense, the Commission has explained "[i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." *Pasula* at 2800. The operator must show that it considered the employee deserving of discipline for the unprotected activity alone and would have disciplined him solely for that. *Id*.

In its brief, Respondent challenges the Commission's allocation of the burden of proof with respect to affirmative defenses. (*Respondent's Post-Hearing Brief* at 11, FN 7). In addressing Respondent's argument, it might be helpful to first understand the various burdens at play in a discrimination proceeding under the Mine Act. In *Robinette*, the Commission clearly explained those burdens:

> The "ultimate burden of persuasion" on the question of discrimination rests with the complainant and never "shifts." As we indicated in Pasula, above, there are intermediate burdens which do shift. The complainant bears the burden of producing evidence and the burden of persuasion in establishing a *prima facie* case. The operator may attempt to rebut a *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut, he may still affirmatively defend... The twin burdens of producing evidence and of persuasion then shift to him with regard to those elements of affirmative defense. If the operator cannot rebut or affirmatively defend against a *prima facie* case, the complainant prevails. Of course, the complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have been taken in any event for such unprotected activities alone. If a complainant who has established a *prima facie* case cannot refute an operator's meritorious affirmative defense, the operator prevails. This latter consequence stems from the fact that the "ultimate" burden of persuasion never shifts from the complainant. Cf. *Wright Line*, 251 NLRB No. 150, 105 LRRM 1169, 1173-1175 (1980) (adopting a discrimination test substantially the same as the one announced in Pasula).

Robinette at 818 FN 20.

Respondent objects to this framework, claiming it was rejected in several Supreme Court decisions. It notes, "In light of recent decisions of the Supreme Court under similar statutes, to establish Arnold's claim, he and MSHA now must carry the burden of proof and show that 'but for' Arnold's protected activity he would have received no discipline or change in his

evaluation." (*Respondent's Post Hearing Brief* at 11, FN 7 *citing Gross v. FBL Financial Services, Inc.*, 557 U.S. 17, 176 (2009); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S.___, 133 S. Ct. 2517, 2525 (2013); and *Burrage v. U.S.*, 571 U.S.___, 134 S. Ct. 881, 888 (2014)). Respondent explains that under the Supreme Court's holdings in those cases, the protected activity must be "the straw that broke the camel's back" leading to the discipline/evaluation modification. (*Id*.).

However, after analysis of the cases cited by Respondent, it is evident that the definition of "because" applied in *Gross* and its progeny does not apply here. In *Gross*, the Court held that the phrase "because of" under the ADEA meant that a plaintiff must prove that age was a "but-for" cause of the employer's adverse decision, a conclusion it repeated in *Burrage*. *Gross* at 174 and *Burrage* at 888-889. However, it also warned courts to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross* at 175 *quoting Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008). This indicates that rather than making a broadly applicable definition of "because" in all statutes, the Court was indicating that the phrase "because of" can mean "but-for" in certain circumstances. In analyzing statutory language with respect to this burden-shifting issue, the Court has emphasized both that determining the meaning of a term like "because" requires analysis of both the text of the provision at issue and an understanding of the overall structure of the statute. *See Nassar* at 2527-2528.

A close reading of the text of section 105(c) of the Mine Act and an understanding of the context of that language shows that the Commission's intermediate burden shifting described in *Robinette* is appropriate. With respect to text, the ADEA (which was at issue in *Gross*) states it is unlawful to "discriminate against an individual… *because of* such individual's age." 29 U.S.C. §623(a)(1)(emphasis added). The text refers to a status or criteria that an employer cannot consider when making employment decisions. By contrast, the Mine Act states, "[n]o person shall discharge or in any manner discriminate against…any miner…because such miner…has filed or made a complaint under or related to this chapter, including a complaint notifying the operator… of an alleged danger or safety or health violation." 30 U.S.C. §815(c)(1). Unlike the ADEA in *Gross* (or Title VII in *Nassar*), the focus in the Mine Act is not the unlawful actions of the employer, but instead based on the protected activity in which the miner engaged.

This is a significant textual difference. It shows that despite the use of the term "discrimination" in the Act, Section 105(c) is more akin to federal whistleblower protection than the discrimination protections of the ADA. *See e.g.* 18 U.S.C. §1514A(a)(1); 42 U.S.C. §5851; and 49 U.S.C. § 42121(b)(1) (statutes providing protection to people who report specific wrongdoing). The goal of whistleblower statutes is not to protect a certain passive class of people. Instead, the goal is to encourage people to act in a manner desired by law and to protect them when they do so. *See Day v. Staples Inc.*, 555 F.3d 42, 53 (1st Cir. 2009)(whistleblower protections encourage and protect employees who report fraud); *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998) ("Laws protecting whistleblowers are meant to encourage employees to report illegal practices without fear of reprisal by their employers."); and *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995)("[t]he [Whistleblower Protection

Act] was clearly intended to encourage such disclosures and to prevent reprisals against the whistleblowing employee."). The government has no interest (or ability) to encourage people into a passive class, but it can encourage miners to raise safety issues.

The legislative history of the Mine Act similarly shows the Congress' intent to encourage miners to actively participate in ensuring their own health and safety and to protect them when doing so. As noted *supra*, Section 105(c) was intended to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." *Legislative History* at 35. Clearly Congress did not think of miners as a passive class, but instead sought to make miners into active protectors of their own health and safety and to ensure that miners felt safe in blowing the whistle on unsafe conditions.

After careful and critical examination of textual and structural differences between the Mine Act and the statutes discussed in *Gross*, *Nassar*, and *Burrage* I find no reason to divert from the Commission's traditional analysis of affirmative defenses. Given the Mine Act's purpose in encouraging and protecting miners to report health and safety conditions, the requirement that Respondent show by a preponderance of the evidence that it would have taken the same action regardless of the protected activity is entirely appropriate. This ensures miners will suffer absolutely no punishment for fulfilling the purposes of the Act and acting as stewards of their own health and safety. Respondent must justify *all* discipline as being related to unprotected activity.

With those burdens in mind, the question is whether Respondent can prove that it would have taken the same action regardless of Arnold's protected activity. In its brief, Respondent argued that it would have punished Arnold because of his failure to lock out/tag out the motor, regardless of his protected activity. (*Respondent's Post-Hearing Brief* at 11-17). Respondent stated that even if it was motivated in part by Arnold's protected activity, Arnold violated the clear language of the lock out/tag out policy and §77.502. (*Id*. at 12 and 14). It noted that Arnold, Beyale, and Dixon all acknowledged the requirement to lock out serious safety issues under the company policy. (*Id*. at 14). Respondent noted similar requirements under the life-saving rules and the isolation management policy which Arnold also violated. (*Id*.). It also stated that all of the adverse employment actions suffered by Arnold were justified by this unlawful failure. (*Id*. 12-17).

Additionally, Respondent asserted that Arnold was only held out of service when it learned a potential hazard was not locked or tagged out-- not because Arnold reported that condition to management, Dixon, or MSHA. (*Respondent's Post-Hearing Brief* at 13). It further asserted that the suspension only occurred when it learned Arnold may have failed in his obligations and lasted only as long as necessary for Respondent to conduct an investigation. (*Id*. *citing Colowyo Coal Company*, 26 FMSHRC 105, 115 (Feb. 2004) (ALJ Manning) and *Myers v. Freeport-McMoran Morenci, Inc.*, 34 FMSHRC 1593, 1610-1611 (Jul. 2012) (ALJ Manning)). That investigation showed Arnold had failed to follow the lock out/tag out policy. (*Id*. at 14). Once the investigation was completed, Arnold was returned to work with full pay. (*Id*. at 13).

Respondent also argued that not giving Arnold a written warning would have turned the purpose of the Act on its head by encouraging a miner not to be actively engaged on safety matters. (*Respondent's Post-Hearing Brief* at 15 *citing Ross v. Shamrock Coal Company, Inc.*, 13 FMSHRC 1475, 1485 (Sept. 1991) (ALJ Fauver). It also asserted that Arnold's evaluation was only changed because he requested it. (*Id*. at 17). It avowed that, in light of the locking and tagging out issues, it was appropriate and reasonable for Ramirez to modify the evaluation and add comments. (*Id*.). It further noted that Arnold's overall score was unaffected and his next evaluation was given top marks. (*Id*.).

On the whole, Respondent argued that the punishment Arnold received was reasonable because he did not act and knew he was placing miners in danger. (*Respondent's Post-Hearing Brief* at 16). It noted that employers are allowed to punish employees whose unlawful conduct threatens the physical welfare of other miners. (*Id*. *citing Collins v. FMSHRC*, 42 F.3d 1388 (6th Cir. 1994). Respondent asked what actions it could have taken if it believed an electrical hazard existed and that an electrician did not lock it or tag it out or bring it to "higher management" to resolve the issue. (*Id*. at 12). It asserted that Arnold's complaint did not insulate him from the repercussions of his actions. (*Id*.).

Respondent argued that, even if Arnold was engaged in protected activity, his misconduct – in the way he went about that activity – provided sufficient ground for discharge. (*Respondent's Post-Hearing Brief* at 12 *citing Benes v. A.B. Data, Ltd.*, 724 F.3d 752, 754 (7th Cir. 2013). Consistency with Respondent's history required at least a written warning. (*Id*. at 16-17). Respondent argues that, in light of these circumstances, the written warning, holding out with pay, and encouragement to be proactive was "minor" and "understated." (*Id*. at 14-16).

With respect to history, Respondent argued that at least three other employees were terminated for lock out/tag out violations. (*Respondent's Post-Hearing Brief* at 16). Respondent argued that Ramirez and other "upper management" people had never received the monthly inspection reports Arnold cited as evidence of disparate treatment and that, as a result, they were not part of the decision-making process. (*Id*. at 15-16). BHP further argued Martin was not punished because he did not believe there was a hazard and said that Arnold could lock out or tag out the equipment if necessary (*Id*. at 15). Further, Martin was not an electrician with lock out/tag out responsibilities. (*Id*. at 15).

After careful review of the evidence, I have determined that Respondent failed to establish that it would have taken the same actions here in the absence of Arnold's protected activity. Complainant has conclusively established that Respondent's explanations were mere pretext. Respondent suspended Arnold, gave him a written warning, and gave him a lower performance evaluation not because he failed to lock out or tag out equipment-- but because he caused a 103(g) inspection and that inspection resulted in a citation.

The evidence establishes that the failure to lock out or tag out the equipment at issue was not Arnold's responsibility. Arnold credibly testified that management told him on numerous occasions not to lock out or tag out the equipment. (Tr. 244, 247, 282-283). The evidence

establishes that no one was certain on January 22 or February 14 about whether a hazard actually existed. In light of that fact, Arnold was told to refrain from taking action until they received a more definitive answer. (Tr. 244, 282, 395). Steagall broadly confirms that he instructed Arnold to wait until they had answers. (Tr. 403-404). As noted *supra*, on February 19, Martin gave Arnold and Steagall information about the fan motor, but the electricians still did not believe their questions were answered about whether there was a hazard. (Tr. 250-251, 371-373, 405-406). In an attempt to get information he deemed relevant to making an informed decision, Arnold threatened to call in 103(g) at that time. (Tr. 250-251, 692).

If Martin had given Arnold permission at any time to lock out or tag out the motor, Arnold would have done so. Despite the presence of many electricians (including Steagall) for parts of the various conversations between Arnold and Martin, no one besides Martin could recall this permission. The record establishes that Arnold was constantly on the lookout for safety issues and had consistently locked out and tagged out equipment regularly in the past. (Tr. 379-380, 393-394, 429-430, 456, 547, 653, 712, 754, 775). Arnold had an immaculate performance record for over his nearly 30 years at Respondent's mine and there was no indication he had a history of failing to lock out or tag out equipment in the past. (Tr. 278, 283, 325). In light of this history, there is simply no reason to believe that Arnold vindictively and willfully sought to saddle Respondent with a fraudulent citation. It is likely that Martin's evident disdain for Arnold as a professional and the passions that arose as a result of the 103(g) inspection caused Martin to misremember what he had told Arnold. (Tr. 712-713).

Given the fact that Arnold was told by management to hold off on acting, Respondent's argument that he should have told "upper management" for resolution is also inappropriate grounds for discipline. As noted earlier with respect to the *prima facie* case, an operator has knowledge of a condition when an agent of the operator knows or should know about it. *Martin Marietta Aggregates* at 637. As soon as Steagall knew about the condition on January 22, under the Mine Act's case and statutory law , Respondent had actual, constructive, and/or imputed knowledge of such. The Mine Act does not define "upper management" and does not require miners to inform all members of this vague class of managers about safety conditions. Similarly, Respondent could point to no company policy which required miners to report to "upper management". Respondent instead noted there was a policy in place requiring miners to "give the company a chance." (Tr. 253, 270, 273, 338, 418, 548-551, 755, 807). Arnold had in fact given the company a chance in his expressed concerns about the coal lab fan and thus fulfilled the company policy. In fact, he gave it three chances on January 22, February 14, and February 19. Further, Arnold and Steagall were punished for not raising issues to "upper management" but Martin and Berget were not, showing disparate treatment. Therefore, this explanation for Arnold's punishment is implausible and exceptionally weak. Instead, this evidences that the upper management requirement was a pretext used to justify punishing Arnold for the 103(g) inspection and citation .

Ultimately, whether Arnold was told he could lock out or tag out the motor is immaterial. Even if Martin told Arnold he could act with respect to the equipment, the evidence establishes that Respondent would not have taken the same action absent Arnold's protected activity. The time-line of events at issue show clearly that this was the case. On January 22 Arnold informed

management about the fan motor. At that time he did not lock out or tag out the equipment. Steagall and Berget were unquestionably aware of that failure. Arnold was not punished that day. Steagall and Berget were also not punished for failure to lock out or tag out. On February 14, Arnold again raised the issue, this time with Steagall, Berget, and Martin. Once again he did not lock or tag out the equipment, all three members of management were aware, and no one was punished. Finally, on February 19, Arnold raised the issue with Martin. Once again, he did not lock or tag out the equipment; Martin was aware of that fact, and no one was punished.

However, later that day Arnold implored his local union president to call in 103(g) and that action eventually resulted in a citation for Respondent. (Tr. 253, 263-264, 491, 705, 708, 753-754, 803). Only then was Arnold punished. Respondent's claim that he was now punished for failure to lock out and tag out defies logic. Arnold had been failing to lock out and tag out, with management knowledge, for nearly a month without repercussions. He was only punished for such when he had engaged in protected activity and contacted MSHA. As noted *supra*, "[i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." *Pasula* at 2800. Furthermore, two other people at the mine, Martin and Berget, who had also failed to lock out and tag out the fan, were not punished.[30] In fact, Martin had input into Arnold's discipline. Clearly, the punishment was not about locking out or tagging out, it was about getting the company in trouble with MSHA. The message from management was clear: Respondent will indefinitely tolerate a failure to follow safety policies, but if you complain to MSHA, punishment will be swift.

The justification for Arnold's punishments therefore are pretext. If Arnold had not caused a 103(g) inspection and citation, matters would have continued as they had for the previous month: the motor would not have been locked out; management would have known it was not locked out; and no one would have cared. Arnold would not have been suspended; he would not have received a written warning; and he would not have received a more pejorative evaluation. The timing and nature of the punishments in this matter confirm the pretextual nature of the justification. If Arnold's indefinite suspension without pay were for failure to lock out and tag out, then it would have arguably occurred in January. Further, Steagall would not have been paid during his suspension and Berget and Martin would have been suspended as well. If that was the cause of the written warnings, then Berget and Martin also would have been warned. Respondent's evidence showing other employees had been terminated for lock out/tag out violations was vague and confusing, whereas the treatment of Steagall, Berget, and Martin

[30] Respondent's claim that Martin and Berget are differently situated from Arnold is rejected for the same reasons discussed in the *prima facie* case, *supra*. In a related argument Respondent asserted that Martin was differently situated from Arnold because he sent an e-mail to Lynch, "well before the dispute here arose." (*Respondent's Reply Brief* at 2). Presumably this was intended to show Martin was behaving "proactively" with respect to dangers. However that email (C-4) was mailed on February 19, after Martin had already learned about the 103(g) inspection and possible citation.

was quite apparent. The best documented evidence shows that other miners had written in the imminent danger section of their monthly reports without suffering any adverse action.

In light of the evidence presented, I find that Respondent's claim that Arnold was disciplined for failing to lock out or tag out equipment was weak and implausible. In short, I have determined that that Respondent's asserted justification is merely pretext to excuse unlawful discriminatory. Therefore, Respondent's affirmative defense must be rejected.

PENALTY

The Secretary proposed a civil penalty amount of $20,000.00 against Respondent for the violation of 105(c). When assessing a civil penalty, the ALJ is independently responsible for determining the amount of the penalty in accordance with the six criteria set forth in section 110(i) of the Act; 30 U.S.C. § 820(i). *See Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (citing *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000)). The six criteria include: the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of previous violations, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.* The Commission has used these factors in the past while assessing civil penalties in discrimination proceedings. *See Sec'y of Labor on Behalf of Poddy v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1313-1322 (Aug. 1996).

At the time the instant violation occurred, Respondent's operation was very large, employing over 500 people. (*Secretary's Post-Hearing Brief* at 41).

The Secretary provided no evidence of previous 105(c) violations committed by Respondent.

The Secretary asserted Respondent's action constituted "High" negligence. (*Secretary's Post-Hearing Brief* at 41). With respect to negligence, Commission case law has provided that the ALJ must consider whether "the operator intended to commit the violation of section 105(c) rather than whether it intended to chill future protected activities." *Poddy* 18 FMSHRC at 1319. However, a finding of intentional conduct does not necessarily lead to a finding of high negligence. *Id.* To find high negligence, the ALJ must make a determination that there was "an aggravated lack of care that is more than ordinary negligence." *Id*. at 1320.

I have already determined that the Respondent failed to successfully mount an affirmative defense and was unable to prove it would have punished Arnold based on unprotected activity alone. This determination necessitates a finding that Respondent's actions in violation of 110(c) were intentional. Respondent lacked a good-faith basis for punishing Arnold and knew that it was attempting to retaliate against one of the mine's strongest safety advocates. Nothing presented mitigates this negligence in any way. As a result, Respondent's actions constituted aggravated lack of care and a finding of "High" negligence is appropriate.

When analyzing the gravity criterion, the ALJ must look to both the seriousness of the violation and the importance of the standard violated. In implementing section 105(c), Congress intended to "protect miners against the chilling effect of employment loss they might suffer as a result of illegal discharge." *Poddy*, 18 FMSHRC at 1321. A chilling effect is not, however, presumed for every violation. *Id.* To determine whether a chilling effect has occurred, the Commission must look at both a subjective (testimony as to whether there was a chilling effect) and an objective (whether the adverse action would reasonably tend to discourage miners from engaging in protected activity) standard. *Id.*

For the reasons discussed in the discussion on adverse employment actions *supra*, Respondent's actions would reasonably tend to discourage miners from engaging in protected activities. Further, both Arnold and Beyale testified to actual, subjective chilling effect at the mine. (Tr. 322-323, 796). Therefore, Respondent's actions were sufficiently grave to support a civil penalty.

Respondent did not argue at hearing or in its brief that if the operator was assessed a civil penalty in the amount of $20,000.00 it would not be able to continue in business. *See also* Stipulation 16 at JX-1.

Respondent has taken no action that would constitute "abatement" of the suspension, the written warning, or the negative performance review.

After applying the 110(i) criteria and reaching the aforementioned conclusions regarding the Secretary's request for a civil penalty assessment, this Court finds that a penalty in the amount of $20,000 is appropriate.

CONCLUSION & ORDER

Based on the above, I find that Respondent violated §105(c) of the Act by discriminating against Arnold for engaging in protected activity. Therefore, it is hereby **ORDERED** that Respondent remove any and all negative references to this matter in Arnold's personnel records. It is further **ORDERED** that Respondent ensure someone without animus complete Arnold's June 2013 performance review without negative reference to this matter or the SLARS program. Finally, Respondent is hereby **ORDERED** to pay a civil penalty of $20,000.00.

John Kent Lewis
Administrative Law Judge

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