FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2017

MATTHEW BANE, Complainant, v. DENISON MINES (USA) CORP., now known as ENERGY FUELS RESOURCES (USA) INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2012-1224-DM RM-MD-12-07 Mine: La Sal Complex Mine ID: 42-00769

DECISION AND ORDER

Appearances: Matthew Bane, pro se, Dolores, Colorado, Complainant

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, Colorado, for Respondent

Before: Judge L. Zane Gill

I. STATEMENT OF THE CASE

This proceeding arises from section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(3). Matthew Bane ("Bane" or "Complainant") alleges here that Denison Mines (USA) Corp., now known as Energy Fuels Resources (USA) Inc. ("Denison" or "Respondent"), terminated his employment because he engaged in protected activity. Procedurally, Respondent argues that Bane's discrimination complaint is untimely. Substantively, Respondent argues that Bane has failed to meet his burden to establish a prima facie case because no adverse employment action was taken against him and, even if Bane's termination were deemed adverse employment action, there is no causal nexus between the adverse action and the protected activity.

For the reasons that follow, I find that Bane engaged in section 105(c) protected activities and that his termination was an adverse action. However, I find that there was insufficient evidence to infer a causal nexus between Bane's protected activities and his termination. For this reason, I find that Bane has failed to state a prima facie case for a section 105(c)(3) discrimination claim. Even if Bane were to have met his prima facie burden, ultimately, I also

find that Respondent has provided sufficient evidence to rebut the prima facie case, or, alternatively, to provide an affirmative defense that Bane's layoff was motivated by an unprotected activity.

II. STIPULATIONS

The parties' Prehearing Report dated October 6, 2015, included three stipulations:

1. The Administrative Law Judge ("ALJ") and the Commission have subject matter jurisdiction over this action pursuant to section 113 of the Mine Act, 30 U.S.C. § 823.

2. The parties stipulate as to the authenticity and admissibility of Bane exhibits B–1 through B–27 and Denison exhibits R–1 through R–23.

3. The parties stipulate that the following parties would be allowed to testify: Bane, Jennifer Thurston, Kirk Kennedy, Larry Phillips, Race Fisher, Jim Fisher, and David Turk.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Background Facts[1]

1. The Mine

The La Sal Mine Complex[2] is an underground uranium and vanadium mine located near La Sal, Utah. (Tr.103:9–24; Ex. B–27, p. 2)[3] The mine is spread out over nine miles of surface

[1] The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (ALJ is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

[2] The La Sal Mine Complex's Mine ID is 42-00769. However, the parties have referred throughout the record to the Pandora Complex (Mine ID: 42-00470). (Tr.142:7, 15; Ex. R–20) La Sal and Pandora are actually one mine with different portals. (Tr.103:12–13) The Pandora Complex was operated by a contractor. (Ex. B–17, p. 2; Tr.103:18–19)

[3] For the sake of clarity, the following abbreviations will be used in referencing evidence in the record: "Ex. B" will refer to Complainant Bane's exhibits; "Ex. R" will refer to Respondent Denison's exhibits; "Tr." will refer to the hearing transcript; "AR" will refer to any document in the Administrative Record that is not part of Complainant's exhibits, Respondent's exhibits, or part of the hearing transcript.

area and is only visible on the surface through 27 boreholes and four major openings: Snowball Portal; Pandora Complex; La Sal Incline; and, Beaver Shaft. (Tr.73:19–21, 103:9–24, 105:3) While Bane was working at La Sal, ore was extracted from the mine entrance at the Pandora Complex and the Beaver Shaft. (Ex. B–27, p. 2) Vent shafts drilled in various locations allowed the mine operators to control the level of radon in the mine. *Id.* These vents could be adjusted to bring air into or out of the mine, depending on radon levels and where workers were working in the mine. *Id.*

Before Denison operated the mine, it sat vacant for approximately 16 years.[4] The mine was ultimately shut down on October 18, 2012. (Ex. B–17, p. 3; Tr.17:20–22, 104:2–5)

2. Bane's Work History at Denison Mines

Bane began working as an apprentice electrician at Denison on July 15, 2008. (Ex. R–9, p. 1; Ex. R–11, p. 2; Ex. R–23, p. 3, line 34) He was tasked with helping the head electrician fix and install ventilation fans and pumps. (Ex. R–23, p. 4, lines 3–4) While at Denison, Bane worked in the Sunday Mines (Topaz, Sunday, West Sunday, Saint Jude) in Colorado, the Egnar Office in Colorado, the Rim Canyon Mine (Rim Shaft) in Utah, and the La Sal Complex (Beaver Shaft) in Utah. (Ex. R–23, p. 4, lines 28–30; Ex. R–9) Bane estimates that he spent approximately fifty percent of his time underground and fifty percent of the time above ground. (Ex. R–23, p. 10, line 9) Prior to starting at Denison, Bane worked nearby at Lisbon Valley Copper Mine for 10–12 months. (Ex. R–23, p. 3, line 39)

During the 18 months he worked for Denison, Bane alleges that there were eight key events that constituted protected activity: (1) reporting Supervisor Hoffman's dangerous actions; (2) complaining about possible PCB contamination; (3) complaining about radon and dust exposure in the skip; (4) complaining about his respirator not working; (5) red-tagging a crane; (6) refusing to perform an unsafe heat taping; (7) developing mine-related health problems; and, (8) making an anonymous report to MSHA.

a. Supervisor Hoffman's Dangerous Actions

For the first four months, Bane primarily worked in the Sunday Mines, the Egnar Office, and Rim Shaft under the immediate supervision of Robert Hoffman. (Ex. R–9; Ex. R–23, p. 10, lines 31–43) Bane's personal notes state that "Bob acted strangely at times[.] [H]e would become angry, scream, throw things over stuff that wasn't really important." (Ex. B–18, p. 1) Bane stated that he observed Hoffman abusing painkillers, sometimes taking up to six Percocet a day. *Id.* (Ex. R–23, p. 10, lines 31–34) Bane's notes state that Hoffman injured himself after he decided to scale an unsafe heading with a scaling bar that was not long enough. (Ex. B–18, p. 3) Bane also reported that Hoffman had a near fatal accident when he forgot to shut off a 50 horsepower ("hp") fan while doing a continuity check on the bonding of a liquid switch. *Id.* In a separate incident, Hoffman became suspicious of other miners rewiring motor starters and "became angry and locked out the fan which shut down that section of the mine." *Id.* at 4.

[4] Race Fisher testified that the mines on the Colorado Plateau were shut down between 1989 and 1991 and were reopened in 2006. (Tr.103:5–8)

Management inspected the event, and ultimately found that Hoffman had wired up the motor starters a few months earlier but forgot that he had done it. *Id.* Bane recalled other disconcerting occurrences, including Hoffman hearing voices when nobody was around, slamming on his brakes to avoid a power line that he thought had fallen across the road, and failing to safely install and energize a pump. *Id.* at 2–7.

Bane considered Hoffman's actions a "danger." (Ex. R–23, p. 10, lines 31–39) On an unspecified date in October or November 2009, Bane made his first safety complaint. (Ex. R–23, p. 10, lines 31–34; Ex. B–18, p. 6) Bane asserts that he complained directly to Mine Foreman Race Fisher of his concerns. (Ex. R–23, p. 10, lines 36–37) Bane contends that in response to his complaint, he was transferred to La Sal to work at the La Sal Incline (Beaver Shaft) in December 2008, under the supervision of Albert Sagrillo, the head of the electrical department at the La Sal Incline. (Ex. R–23, p. 4, line 23 and p. 10, lines 38–39; Tr.49:17–18)

b. Possible PCB Contamination from the 4160 Volt Transformer Liquid Switch

Bane detailed in his personal notes that Hoffman negligently forgot to shut off a 50hp fan before attempting a continuity check on a 4,160 volt transformer at the St. Jude mine. (Ex. B–18, p. 3) When Hoffman tried to shut off the liquid switch, it went to ground, energizing "the casing on the liquid switch until it burnt the string fuse at the power line." *Id.* The cause of the explosion was found to be contaminated oil in the liquid switch. (Tr.47:15–16) Bane alleges that he was ordered by management to remove and replace all of the oil from the liquid switch. (Tr.47:17–19)

Bane subsequently complained to Sagrillo that he had to perform the oil removal with only "[his] coveralls and gloves on," (Tr.47:19–20) and, therefore, was not given proper personal protective equipment ("PPE") to handle a liquid switch potentially contaminated with polychlorinated biphenyls ("PCB" or "PCBs"). Bane recounts that he was present when Sagrillo relayed this complaint to Mine Superintendent Jim Fisher. (Tr.120:9–11) According to Bane, "Jim Fisher guaranteed that no equipment on this property contained PCBs," (Tr.50:1–2), and "refused to have testing done [...]." (Bane Prehearing Br. 1) Bane recalls that Race Fisher then brought non-PCB stickers from the main office and instructed Bane to place them on all electrical equipment containing di-electric fluid. *Id.* At the hearing, Bane admitted that it was impossible to ascertain whether the di-electric fluid in the liquid switches contained PCBs because the oil was disposed of. (Tr.49:1–4)

c. Radon and Dust Exposure in the Skip[5]

From approximately December 2008 until April 2009, Bane worked at Beaver Shaft with Kirk Kennedy, the Denison lead mechanic in charge of skip repair. (Tr.20:4) The Beaver Shaft Skip Station was a ventilation area designed to flush radon out of the mine, and Bane and

[5] The Kentucky Coal and Energy Education Project's Glossary of Mining Terms defines "Skip" as "A car being hoisted from a slope or shaft." KY. COAL EDUC., *Glossary of Mining Terms*, http://www.coaleducation.org/glossary.htm#S (last visited Mar. 22, 2017). In Kennedy's words, it is "[l]ike an elevator on a large cable." (Tr.25:16)

Kennedy were tasked with welding and reinforcing the main frame and pipes to stabilize the skip and allow air to be supplied to the bottom of the mine shaft. (Tr.23:21–24:12) Kennedy testified at the hearing that work on the skip at Beaver Shaft resulted in "extreme amounts of exhaust passing by our faces daily." (Tr.23:20) Bane described the conditions of the area at the time as having "approximately two inches of talcum powder like dust on the floor" from years of not being ventilated. (Ex. R–23, p. 9, lines 19–23)

In addition to the potentially high levels of radon and dust that Bane and Kennedy were exposed to during this period, Kennedy testified that "we had no safety apparatus to wear. We tied ourself [sic] onto the cable of the skip with ropes, et cetera, so that a fall wouldn't happen, we hoped." (Tr.24:1–7) Kennedy estimated that a fall from the skip would have been 800 to 900 feet. (Tr.24:5) It appears that Kennedy and Bane began to take safety matters into their own hands. At the hearing, Kennedy stated that "at one particular time, we were able to get some steel plate [sic] and cover the thing up so that it wouldn't blow that all right in our faces as we worked on that upper shaft or upper structure." (Tr.32:13–16) Prior to the steel plate, the miners in the skip had no real relief from "the winds coming up out of the mine right in our face." (Tr.32:16–17) Bane's personal notes mention that Kennedy procured the steel sheets from his house in Cahone, Colorado. (Ex. B–18, p. 12)

Between January and March 2009, Mine Safety and Health Administration ("MSHA") investigators issued nine citations relevant to this case. (Ex. B–5; Ex. R–20) Notably, MSHA issued Citation No. 6424411 on January 14, 2009, alleging that Denison failed to monitor the concentrations of radon gas and that "employees working at this location were continually exposed to high readings of radon gas while traveling to their working areas." (Ex. B–5A, p. 6)

In response, Denison had Terry MacKinnon, its Director of Mine Health and Safety, initiate a company-wide series of interviews with employees to inquire into employee health and safety concerns. (Ex. R–23, p. 6, lines 15–19) During his interview with MacKinnon in March 2009, Bane alleges that he complained about the "really bad dust conditions." (Ex. R–23, p. 6, lines 39–41) Bane did not disclose, however, whether he or anyone else complained to MacKinnon about the lack of proper safety apparatuses to protect miners from falling in the skip.

It is not clear from the record whether remedial safety changes were made prior to or as a result of the MSHA inspection, but Kennedy recounted that "we were given masks after we had been there quite some time for the higher radon levels [...] I don't remember for sure, but I don't remember being pulled off of that position for any long times at all — pretty well there because this thing had to work." (Tr.32:8–12)

On March 31, 2009, MSHA conducted an E04 inspection in response to a verbal hazard complaint. (Ex. B–5B, p. 1) During the inspection, the MSHA investigator issued Citation No. 6425248 for high radon levels and exposure. (Ex. B–5B, p. 25) In April 2009, after the safety interviews with MacKinnon, seven miners were laid off. (Ex. R–8) Shortly thereafter, Bane alleges that he asked Race Fisher why people were being laid off when they were just opening up the mine. (Ex. R–23, p. 8, lines 18–20) Bane alleges that Race Fisher responded that it was "to get rid of the trouble makers." (Tr.174:3–6; Ex. R–23, p. 8, line 20)

d. Bane's Respirator was not Fitted Properly

In March 2009, during his health and safety interview with MacKinnon, Bane also complained that his respirator was not working properly. (Ex. R–23, p. 6, lines 17–19) Due to an unknown error—whether management oversight or accidental equipment switch by the miners—Bane got a respirator that was a size too large. (Ex. R–23, p. 7, lines 14–16 and p.10, lines 13–14) Bane did not recall ever receiving or being fit-tested for a respirator when he first started working at Denison. (Ex. R–23, p. 7, lines 36–37) As a result of the wrong fit, Bane reported having about as much dust on the inside as on the outside while wearing it. (Ex. R–23, p. 7, lines 14–15) Bane only realized that he was supposed to get fit-tested after observing two other crew members get fit-tested in early May 2009. (Ex R–23, p. 8, line 30–32 and p. 18, lines 8–9) After stating that he had not been fit-tested, Sagrillo sent Bane to get fit-tested for his respirator. (Ex. R–23, p. 8, lines 30–33)

On May 4, 2009, Bane was fit tested for a respirator by Darren Lee, Denison's radiation/safety officer. (Ex. B–3A) Bane asserts that it was the first time he was fit tested for a respirator at Denison, and that Lee acknowledged that the failure to fit-test Bane was a "major safety deal." (Ex. R–23, p. 20, lines 18–19) Bane alleges that he never refused to be fit-tested for a respirator at any time during his tenure at Denison. (Ex. R–23, p. 20, line 23) According to Bane, Lee said that he had informed Mine Foreman Race Fisher that Bane "hadn't been fit tested [for a respirator] for approximately a year [...]." (Ex. R–23, p. 9, lines 4–6)

e. Red-Tagging the Crane

In either June or July 2009, the bearings on a hoist at the Beaver Shaft in La Sal had to be replaced. (Ex. R–23, p. 11, lines 1–5) Bane alleges that Race Fisher assigned him to operate a fixed cab crane that, according to Bane, had no brakes, a tangled wire rope, a malfunctioning rear-stabilizer, bald tires, and had not been clean inspected for years. (Ex. R–23, p. 11, lines 18–21) Bane alleges that Race Fisher was aware of the crane's brake problems when he was assigned the task. (Ex. R–23, p.11, lines 33–41) To his knowledge, Bane was the only person at the site with past experience and certified to operate a crane. (Ex. B–8; Ex. R–23, p. 11, lines 9–10) Bane agreed to do the job, which required a "blind pick,"[6] because he believed he was most able to perform the job safely. (Ex. R–23, p. 12, lines 15–18) Bane testified that he told Lee about the safety issues prior to agreeing to operate the crane. (Tr.158:10–12) According to Bane, Lee stated that he would relay the safety concerns to Race Fisher after Bane performed the job. (Ex. R–23, p. 11, line 25)

In September 2009, after waiting approximately six to eight weeks for management to address the crane's safety issues to no avail, Bane alleges that he red-tagged the crane and marked it unsafe to operate. (Ex. R–23, p. 14, lines 3–5) According to Bane at the hearing, Sagrillo had run the crane the day before Bane allegedly red-tagged it. (Tr.160:5–6) Bane stated that he then informed Mike Palmer, the head mechanic, that he had taken the initiative to red-tag the crane. (Ex. R–23, p. 12, lines 34–35) Allegedly, Palmer then informed Race Fisher who thereafter confronted Bane to explain why he red-tagged it. (Ex. R–23, p. 12, lines 39–40) Bane alleges that he explained and pointed out the problems with the crane to Race Fisher (Ex. R–23,

[6] In his MSHA interview, Bane described the "blind pick" as having to "[take] the roof of the hoist-room and I had to ah lower the hook down back behind the wall where I wasn't ah in directly [sic] view of what I was picking up." (Ex. R–23, p. 12, lines 22–24)

p. 13, lines 28–38) From Bane's perspective, there was no indication that Race Fisher was upset with Bane's actions. (Ex. R–23, p. 13, 38)

f. The Heat Tape Incident

During the fall of 2009, Bane asserts that he and Terry Lynn, a master electrician, were assigned to hook up electrical heat tape to a waterline close to a bore hole that was freezing. (Ex. R–23, p. 14, lines 24–33) Lynn allegedly refused, claiming it was against the National Electrical Code's standards and unsafe. *Id.* Lynn subsequently found a new job elsewhere. *Id.* With Lynn gone, Bane alleges that management told him to do the job, but he also refused. *Id.* According to Bane, shift supervisor Jerry Goode threatened to fire him for refusing to hook up the electrical tape, and took him to Race Fisher to explain his refusal. *Id.* Bane claims that after justifying his refusal, Race Fisher told him to "go ahead and do it." (Ex. R–23, p. 15, lines 1–2) In the end, Bane alleges that the job was ultimately performed by Hoffman. (Ex. R–23, p. 15, lines 1–5)

g. Bane's Health Problems

Bane alleges that he was in good health prior to being transferred to Beaver Shaft, but thereafter quickly developed health problems. (Ex. B–18, p. 29) The record indicates that Bane did not use any sick leave prior to Spring 2009. (Ex. R–9, pp. 1–20) Bane's personal notes state that all of the employees who worked on the skip, with the exception of Sagrillo, began developing flu like symptoms. (Ex. B–18, p. 13) Bane sought treatment at the nearby Dolores Medical Center in Colorado and at the clinic in Blanding, Utah. *Id.*

Between April and May of 2009, having spent four months at Beaver Shaft, Bane took sick leave on seven occasions. (Ex. R–9, pp. 20–23) Notably, Bane was out sick for an entire week starting May 19, 2009. (Ex. R–9, p. 23) The timesheet for that week has a note written on it stating "out until Doctor Releases." *Id.* During this time, Bane was prescribed Prednisone burst therapy, which considerably mitigated the flu-like symptoms he was experiencing. (Ex. B–18, p. 13)

On July 23, 2009, Bane saw Dr. Opie Hainey, D.C., for approval for his respiratory protection equipment. (Ex. R–12, p. 1) Dr. Hainey wrote in his medical notes, "History – allergic to dust –severe reaction approx. two months previous." *Id.* at 2. This appears to be a reference to the period in Spring 2009 when Bane took sick leave. On the same day, Bane completed and signed a Respirator Medical Evaluation Questionnaire citing an "allergic reaction to dust." *Id.* at 1.

In late 2009, Bane complained of symptoms including hoarseness of voice, flu-like symptoms, uncontrollable coughing fits, and extreme pain and ringing in his left ear. (Ex. R–23, p. 15, lines 29–32) Bane took sick leave on December 9, 2009, for the first time since the spring. (Ex. R–9, p. 37) In the two weeks that followed, Bane missed work most of the days. (Ex. R–9, pp. 38–39)

On December 31, 2009, Bane sought medical attention at a nearby clinic in Monticello, Utah. (Ex. R–23, p. 15, line 36) He was treated by Blen Freestone, a Certified Physician's Assistant ("PA-C"). (Ex. R–23, p. 15, line 40) PA-C Freestone wrote Bane a doctor's note instructing that Bane "needs to stay out of the mine for the next week or two secondary to illness

which aggravates when he goes into the mine." (Ex. R–6; Ex. B–12, p. 13) During this period, Bane worked above ground, but was not assigned any meaningful work. In his interview with MSHA Investigator Funkhouser, Bane described this period as "kind of a dead time [...] I really had no job duties to speak of, no one told me what to do. I kind of wandered around helping whoever was around" performing "odd little make work jobs." (Ex. R–23, p. 16, lines 12–15)

On January 13, 2010, Bane had a follow-up visit with PA-C Freestone and reported that he felt "much better" during the two-week period above ground.[7] (Ex. R–7) Freestone concluded that the dusty conditions in the mine were likely the cause of Bane's ailments. (Ex. R–6) Freestone subsequently gave Bane a doctor's note, which stated, "Please excuse Matthew from work that involves dust, mine shafts, boreholes, etc." (Ex. R–6; Ex. B–12, p. 13)

h. Bane's Anonymous Complaint to MSHA

On January 12, 2010, at 7:23 p.m., Bane filed an anonymous complaint about working in areas with high levels of radon with MSHA's Utah Field Office. (Ex. R–23, p. 16, lines 38–40; Ex. B–5; Tr.140:18–24) The call to MSHA was made from an off-site Shell gas station in Moab, Utah. (Ex. R–23, p. 16, lines 33–34) Bane did not tell anybody at work that he had generated the anonymous complaint. (Ex. R–23, p. 16, line 42–p. 17, line 1; Tr.140:25–141:2) MSHA investigators inspected the La Sal Incline between January 19 and 21, but did not find radiation levels in violation of the standard. (Ex. B–5; Tr.141:3–9) Bane insists that the reason for the negative finding was due to the inspectors incorrectly inspecting a collapsed portal at the La Sal Incline despite his intention for them to inspect "the actual mine of La Sal Incline mine." (Tr.141:14–15)

At some point shortly after his anonymous complaint to MSHA, Bane alleges that Goode grabbed him by the front of his coveralls and asked Bane "what [he] was going to do now [...]." (Ex. R–23, p. 18, lines 18–23) Bane alleges that he defended himself by opening his hunting knife, which he used to strip electrical cable, between Goode's legs. *Id.* The alleged event took place during a safety meeting and was witnessed "by Tim Howe ah directly, indirectly it was witnessed by the whole crew [...]." *Id.* Bane recalls that the crew "all ah became laughing about him trying to intimidate me [...]." *Id.* At least once in the record, Bane stated that the incident also "took place in front of mine foreman Race Fisher [...]." (Bane Prehearing Br. 5)

3. Bane's Termination[8]

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[7] Bane's recollection of his improvement after the two weeks above ground was less enthusiastic than PA-C Freestone's notes. In his section 105(c) discrimination complaint, Bane stated that he did "improve somewhat" after staying out of the mine for two weeks. (Ex. R–1) Similarly, Bane described his condition during this time as having "improved slightly" during his interview with Investigator Funkhouser. (Ex. R–23, p. 16, line 7)

[8] The parties do not dispute that a series of conversations took place regarding what to do about Bane in light of PA-C Freestone's note prohibiting Bane from working in dusty areas. However, the specifics of what was said in these discussions, notably whether Bane initiated the

On January 18, 2010, Bane audiotaped a conversation he had with Sagrillo and Race Fisher. (Ex. R–15; Ex. R–17; Ex. B–19A; Ex. B–20) Sagrillo stated that earlier that morning he had asked Race Fisher about giving Bane medical leave, but was told that he could not do that. (Ex. R–15, p. 1) Bane also intimated that he had had a similar conversation with Race Fisher that morning about what his options were. *Id.* at 2. Bane told Albert, "I asked Race this morning and he says well what do you want done and I said well I don't know. I don't, I have no idea. And he says well, we can lay you off and I said well, that'd be all right." *Id.* Bane and Sagrillo then discussed the ambiguity of Bane's medical diagnosis along with the dusty conditions of the mine. *Id.* at 3–6. Toward the end of their discussion, Bane stated, "All I need to do is get well and I don't really give a shit what it takes [...]." *Id.* at 6.

Immediately after this discussion, Bane and Sagrillo met with Race Fisher. *Id.* at 7. Race Fisher stated to Bane, "What are we gonna do? [w]e'll get you laid off." *Id.* Race Fisher's stated rationale was that a layoff would allow Bane to "get signed up for unemployment, but where you got some money comin' in while your doctor stuff [inaudible]." *Id.* at 9. Bane ultimately responded, "Yeah. Well, we'll go with that. That sounds as good as anything I can think of, so. And we'll just, I'll keep in touch with you and tell you what [the doctors] say and whatever, you know [...] That sounds good to me. Well I appreciate it." *Id.* at 9–10.

Later that day, Race Fisher signed a Personnel Action Form requesting Bane's layoff. (Ex. R–11, p. 3) The stated reason for the layoff was a "Reduction in Force." *Id.* Jim Fisher and Philip G. Buck also signed the Personnel Action Form on the same day. *Id.* On January 20, 2010, by way of letter, Bane was laid off by Denison due to "a continuing decline in commodity prices [...] and a need to reduce its work force." (Ex. R–5)

On February 1, 2010, Bane went to the head office in Egnar, Colorado, to return his work keys. (Ex. B–18, p. 27; Ex. R–16) While there, Jamie Huskey, the office secretary, asked Bane whether he had decided to sign a release and waiver form that would release Denison Mines from all legal liability in exchange for a two week severance pay.[9] (Ex. B–18, p. 28) Bane declined to sign the letter, stating, "I don't want to sign anything away until the doctor says well you're good to go." (Ex. R–16, p. 1) Instead, Bane requested a "green card" to file a notice of injury with Denison in order to collect workers' compensation in the event that he did not recover from his illness. *Id.* at 2. Immediately thereafter, MacKinnon along with Jim Fisher, the Mining Superintendent, arrived. MacKinnon stated that he did not have any green cards. *Id.* A heated exchange ensued over whether Bane's allergic reactions to dust were contracted prior to working at Denison Mines or during his tenure at Denison. *Id.* at 2–4. The conversations from this day were audio recorded by Bane. (Ex. R–17; Ex. B–20A)

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conversation about quitting and, indeed, wanted to quit, are highly contested by the parties and will be discussed in greater detail in the sections that follow.

[9] Reference to the severance pay policy can also be found in Denison Mines' termination letter. It states: "In addition to the foregoing, the Company is willing to pay you an additional amount equivalent to two weeks wages, less applicable deductions, upon execution of the attached Release and Waiver releasing the Company from any and all liability arising out of your employment and the cessation of your employment." (Ex. R–5)

B. Procedural History

On May 18, 2012,[10] Bane filed an MSHA Form 2000-123 Discrimination Complaint, and alleged that he was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). (Ex. R–1) The complaint listed four persons responsible for discriminatory action: Race Fisher, Jim Fisher, Randy Marsing, and Terry MacKinnon. *Id.* On June 6, 2012, Bane was interviewed by MSHA Special Investigator David B. Funkhouser in Cortez, Colorado. On July 2, 2012, the Secretary declined to pursue a discrimination case on behalf of Bane after investigating the allegations. On July 19, 2012, Bane filed a section 105(c)(3) claim appealing MSHA's determination. On November 14, 2012, Denison filed a motion to dismiss the complaint on the grounds that Bane filed his 105(c) complaint outside the allowable time limit. With the Court's permission, Bane responded to the FMSHRC request for additional information on May 9, 2014.[11] On June 20, 2014, this Court denied Respondent's motion to dismiss the complaint.

On October 14, 2015, the parties presented testimony and documentary evidence at a hearing in Durango, Colorado. After the hearing, both parties submitted briefs which have been received and considered in rendering this decision.

IV. LEGAL PRINCIPLES

Under section 105(c)(1) of the Mine Act, a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "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).

To establish a prima facie case of discrimination under section 105(c)(1), Bane must show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of was motivated, at least in part, by that activity.[12] *Drissen v. Nev. Goldfields, Inc.*, 20 FMSHRC

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[10] Although the statement of discrimination that Bane submitted to MSHA was dated April 11, 2012, it was not received and filed until May 18, 2012. (Ex. R–1, pp. 1–2)

[11] Bane was given additional time to file because it was discovered that both the Court and opposing counsel had been sending case documents to the wrong address.

[12] The legitimacy of the *Pasula-Robinette* framework was recently challenged in *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). In *Riordan*, the respondent mine operator argued that the *Pasula-Robinette* test was no longer appropriate because the Supreme Court invalidated the burden-shifting framework in the ADEA and Title VII contexts. *Id.* at 1919. The Commission, citing the legislative history and intent of the Mine Act, found that the burden-shifting framework of the *Pasula-Robinette* test is still applicable and appropriate. "Congress envisioned such a burden-shifting framework when drafting the discrimination protections of section 105(c)(1) [...] Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission's reasoning in *Pasula* was sound, and we decline to overturn it." *Id.* at 1921.

324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *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 (3d. Cir. 1981).

The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *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). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and (4) disparate treatment. *Id.* at 2510–12. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2511. In *Bradley v. Belva Coal Company*, with regard to the issue of motivation, the Commission found that "circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case." 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510–12). Furthermore, the Commission has held that "inferences drawn by judges are 'permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.'" *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799–800. If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving that it was motivated by the miner's unprotected activity. It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions. *Chacon,* 3 FMSHRC at 2516–17. Additionally, the ALJ may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sept. 2001).

The Commission has explained, however, that "pretext may be found, for example, 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). Further, "[a] plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate

discharge.'" *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1073 (May 2011) (emphasis in original) (citations omitted). Additionally, a company's failure to follow its own policies can be evidence of pretext. *See Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (failure to follow company's own procedures may be evidence of pretext); *see Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (determining that employer's proffered justification was pretextual when company failed to follow its own procedures). While the intermediate steps of the *Pasula-Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

V. PRIMA FACIE DISCRIMINATION

As part of his burden to make a prima facie showing of discriminatory intent, Bane must show that his termination was motivated, at least partially, by his engagement in protected activity under section 105(c). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

A. Bane Engaged in Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Bane must show that he engaged in protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Protected activity under the Act has been found to include tagging out equipment because it may be unsafe, *see Sec'y of Labor on behalf of Schafer v. Consolidation Coal Co.*, 8 FMSHRC 1568 (Oct. 1986) (ALJ), making a complaint to an operator or its agent of "an alleged danger or safety or health violation," *see Sec'y of Labor on behalf of Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ), and reporting potential safety or health hazards to MSHA or an MSHA inspector, *see Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206 (Feb. 2010) (ALJ). The language of the statute prohibits discrimination against a miner for filing complaints under sections 105(c) or 103(g), which in and of itself qualifies as protected activity. 30 U.S.C. § 815(c)(1). Additionally, a miner "subject to a medical evaluation and potential transfer" may qualify as protected under section 105(c) under limited circumstances. *Id.*

When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1323 (June 2016) (citing *Pasula*, 2 FMSHRC at 2789). In determining whether an activity is to be considered protected activity, the legislative history makes clear that Congress intended for courts to liberally construe the Act. Congress stated that "[t]he Committee intends that the scope of the protected activities be broadly interpreted by the Secretary" and that "[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive." S. Rep. No. 181, 95th Cong., 1st Sess. 35–36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623–24 (1978). It further stated that section 105(c) was 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.

For the reasons that follow, I find that Bane engaged in five instances of protected activity between July 15, 2008, and January 21, 2010, the day he was terminated.

1. Relevant Health and Safety Complaints

Bane alleges that he made seven health and safety complaints to management during his tenure at Denison. Although the basic factual backgrounds of all seven complaints were outlined above to establish a timeline of events, the following includes the contested factual details along with my analysis and findings. It is fundamental that the ALJ, as trier-of-fact, assess the credibility of all witnesses and determine the weight their testimony deserves. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) ("[A] Judge's credibility resolutions cannot be overturned lightly.").

a. Supervisor Hoffman's Dangerous Actions

After witnessing Hoffman's behaviors while taking painkillers on several occasions, Bane alleges that he complained directly to Race Fisher about the incidents and, as a result, was transferred to work at the La Sal Incline (Beaver Shaft) under Sagrillo, his new immediate supervisor. (Ex. R–1, p. 2; Ex. R–23, p. 4, line 19)

In *Secretary of Labor on behalf of Long v. Island Creek Coal Company*, the judge found that a complaint to management about a co-worker carrying powder and blasting caps in a truck not equipped to haul explosives, without a warning sign, and across a highway was protected activity. 2 FMSHRC 1529 (June 19, 1980) (ALJ). Similarly, here, Bane complained to Race Fisher after witnessing three to four months of what he considered reckless and dangerous behavior by Hoffman. While Hoffman's actions allegedly ranged in severity—from having erratic mood swings to hearing voices—at least one of Hoffman's actions, e.g., his failure to shut down a 50hp fan before running a continuity check, was potentially fatal. As Hoffman's subordinate and supervisee, Bane's safety was reasonably likely to be directly impacted by Hoffman's actions. I find Bane's recollection of these events credible. The timeline in Bane's personal notes is consistent with his work reports, (Ex. B–18; Ex. R–9), and Denison did not directly dispute the events.

I conclude that Bane's complaint to Race Fisher regarding Hoffman's unsafe behavior constitutes protected activity.

b. Possible PCB Contamination from the 4160 Volt Transformer Liquid Switch

Hoffman's failure to shut down a 50hp fan while running a continuity check resulted in a liquid switch exploding. (Tr.47:12–13) The cause of the explosion was found to be contaminated oil in the liquid switch. (Tr.47:15–16) Bane testified that he was then ordered by management to remove and replace all of the oil from the liquid switches at the mine. (Tr.47:16–18) Bane further testified that he conducted the cleanup without PPE, and that it was unknown whether the oil was contaminated with PCBs. (Tr.47:19–20)

In *Hatfield v. Colquest Energy, Inc.*, the Commission recognized that a miner cannot expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC 544, 546 (Apr. 1991). The Commission recently reiterated that *Hatfield* stands for the proposition that "it [is] not the terms of the initial complaint to MSHA that [control] whether the amended complaint [can] go forward, but the *Secretary's investigation of the initial complaint.*" *Hopkins Cty. Coal, LLC*, 38 FMSHRC at 1323 n.9 (emphasis added).

In Bane's discrimination complaint filed with MSHA as well as his interview with Investigator Funkhouser, there was no mention of PCBs or adverse effects from PCB exposure. Additionally, and notably, there is no evidence in the record that the Secretary investigated anything related to PCB exposure, contaminated oil, or exploding transformers. I find that Bane's claims of possible PCB exposure are tenuous and speculative at best and are an attempt to broaden the original basis for his complaint. For this reason, I conclude that Bane's claim of possible PCB exposure is outside the permissible scope of section 105(c)(3).

c. Radon and Dust Exposure in the Skip

Bane told Investigator Funkhouser that he complained to MacKinnon about the dusty conditions in the Skip.[13] (Ex. R–23, p. 6, lines 17–18) In his affidavit, MacKinnon did not confirm or deny the occurrence of the March 2009 health and safety interview with Bane or any subject matter discussed as part of such an interview. (Ex. R–4) With regard to the conditions of the skip, Race Fisher testified at the hearing that he was aware of the high radon levels in certain areas of the mine while they were "getting the mine flushed out, opening new areas in the mine" between 2008 and 2010. (Tr.72:11–12) Fisher further testified that "[a]nytime you open a mine that's been closed, there is [sic] going to be hazards that have developed over the years if it's sitting idle, and when it's opened, you systematically take care of the hazards as you find them." (Tr.68:11–12)

On January 14, 2009, MSHA issued Citation No. 6424411, alleging that Denison failed to monitor concentrations of radon gas and that "employees working at this location were continually exposed to high readings of radon gas while traveling to their working areas." (Ex. B–5, p. 6) It appears that Denison responded immediately. Under the "Action to Terminate" section, MSHA noted, "[Denison] has pulled the miners from the location and will concentrate on correcting the ventilation problem." *Id.* Additionally on March 25, 2009, miners made a verbal complaint to MSHA alleging, among other things, high radon levels in the Pandora mine. (Ex. B–5B, p. 1) On March 31, 2009, MSHA conducted an E04 inspection in response to the complaint. (Ex. B–5B, p. 1) During the inspection, the MSHA investigator issued Citation No. 6425248 for high radon levels and exposure. (Ex. B–5B, p. 25)

[13] At the hearing, Bane stated, "[R]adon is a dust basically. It's a radioactive dust—real, real small particle of dust." (Tr.82:18–20) Although it appears that Bane only complained to MacKinnon about "dust" in the safety interview, for purposes of establishing his prima facie case, I will assume that Bane intended that his complaint about "dust" to MacKinnon to include radon.

Kennedy testified at the hearing that "we were given masks *after* we had been there quite some time for the higher radon levels." (Tr.32:8–9) (emphasis added) It is not clear, however, whether these PPE changes were made directly in response to Bane's complaints, the MSHA citations, or for some other reason. Regardless of the actual impetus for change, the fact that safety changes *were* eventually implemented in the skip suggests that management became aware of radon and/or dust problems at Beaver Shaft at some point *after* the skip detail had begun working at the location.

Reviewing the totality of the evidence —Race Fisher's testimony, MSHA Citation Nos. 6424411 and 6425248, and Kennedy's testimony —I find that that the conditions of the mine were likely as Bane described them. Notably, Bane's alleged health and safety complaint to MacKinnon about the dusty conditions in the mine was not disputed. Therefore, I conclude that Bane's complaint to management regarding potentially high levels of dust constituted protected activity.

d. Bane's Respirator was not Fitted Properly

Bane contends that he was never fit tested for a respirator when he started at Denison and was, therefore, exposed to dust and radon while working in the Beaver Shaft skip. Bane told Investigator Funkhouser that he complained about his respirator not working to MacKinnon in his March 2009 safety interview. (Ex. R–23, p. 6, lines 15–19) When asked by Investigator Funkhouser whether MacKinnon gave "any indication that he could replace [Bane's] respirator or anything of that nature," Bane responded in the negative. *Id.*

MacKinnon's affidavit states that he started at Denison at the same time as Bane and took the same MSHA training course. (Ex. R–4, p. 1) Contrary to Bane's recollection of events, MacKinnon's affidavit states that Bane, like all newly hired miners, *was* issued a respirator and fit tested by means of both irritant smoke and breathing/head movement/talking tests at the beginning. *Id.* at 3. In his affidavit, MacKinnon did not confirm or deny the occurrence of the March 2009 health and safety interview with Bane. Additionally, MacKinnon did not confirm or deny that Bane made a complaint about his respirator not fitting.

To bolster his claim that he was not fitted with a respirator upon starting at Denison, Bane produced a "Respirator Fit Test Record" dated May 4, 2009, and signed by Lee. (Ex. B–3A) Respondent provided a "Certificate of Training" form dated July 17, 2008, showing the "Self-Rescue & Respiratory Devices" box checked, (Ex. B–3B; Ex. R–10), but failed to produce a "Respirator Fit Test Record" that corroborates MacKinnon's statement that Bane was actually fit tested for a respirator when he first started at Denison in July 2008. Additionally, Bane's contention that he was not timely fitted for a respirator was corroborated by Kennedy's testimony. At the hearing, Kennedy testified that he was only fitted for a respirator during the last "two or three months at the outside." (Tr.51:21–22) While Kennedy's testimony does not establish a pattern of Denison failing to properly fit respirators, it does serve to diminish the credibility of MacKinnon's unqualified statement that "newly hired miners are issued respirators." (Ex. R–4, p. 2) I also recognize that more than a month passed between Bane's safety interview with MacKinnon (March 2009) and when he was ultimately issued a new, properly-fitted respirator by Lee (May 4, 2009).

The lack of a record showing that Bane was actually fit tested when he first started, in conjunction with Kennedy's testimony, compels me to find that Denison failed to fit test Bane in violation of 30 CFR § 57.5005.[14] Accordingly, Bane's complaint to Denison management about his respirator not working was a protected activity.

e. Red-Tagging the Crane

In his discovery request, Bane requested all crane safety certifications possessed by Denison. (Ex. B–8, p.1) Denison's initial response stated, "[t]here are no such certifications for areas where Mr. Bane worked. The La Sal complex did not have any crane that would require inspection or certification." *Id.* At the hearing, however, Denison changed its position, stating that they "don't dispute there was a crane." (Tr.96:22) Race Fisher also acknowledged that the crane was red-tagged and relocated. (Tr.96:23–24) It is, therefore, undisputed that the crane existed and that it was red-tagged. However, the critical question of whether Bane engaged in protected activity by either complaining to management about the crane's safety issues or by red-tagging it himself remains. As mentioned above, tagging out equipment has previously been found to constitute protected activity. *See, e.g., Schafer*, 8 FMSHRC at 1586 ("Tagging out equipment believed to be unsafe is a safety activity protected by the Act and required.").

MacKinnon challenged Bane's allegations that Bane made complaints about the crane. MacKinnon's affidavit stated that "Pursuant to Denison procedures, and 30 C.F.R. § 56/57.14100, Mr. Bane would have completed a pre-operation check of the crane before operating it and that paperwork should have listed any defects affecting safety, if indeed there were any." (Ex. R–4, p. 3) The affidavit further stated that "no pre-operation check records created in 2009 for equipment had been retained as of April 11, 2012." *Id.* MacKinnon's statement about the nonexistence of a preoperation check as evidence that Bane never expressed safety concerns is not convincing. When asked by Investigator Funkhouser whether Bane documented any of the defects on the crane, Bane replied that workers at the mine were not in the habit of filling out daily walk-around sheets on a frequent basis. (Ex. R–23, p. 12, lines 3–4) Other evidence in the record suggests that Denison's procedures were not always perfectly executed, as MacKinnon would claim. For example, Denison's biweekly employee time report

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[14] Section 57.5005 dictates the control of exposure to airborne contaminants in metal/nonmetal mines:

> Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, *while establishing controls* [...]) employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels *if they are protected by appropriate respiratory protective equipment.*

30 C.F.R. § 57.5005 (emphasis added)

sheets are missing dates and required signatures, (Ex. R–9), dates were incorrectly printed on worksheets, (Ex. R–9, pp. 23, 34), and, as noted above, PPE was not always timely issued.

Although Bane admits that he cannot provide documented evidence that he complained about the crane or red-tagged it, (Ex. R–23, p. 12, lines 3–4), I find that Bane engaged in protected activity here, at least for the limited purpose of establishing his prima facie case.

f. The Heat Tape Incident

The Commission has determined that among the statutory rights protected by section 105(c) is the right to refuse to work in dangerous conditions and the refusal to comply with orders which are violative of the Act or any related standard. *Pasula,* 2 FMSHRC at 2791. However, Bane failed to provide any corroborating testimony or other evidence to support his version of the incident. Notably, Bane did not question Fisher at the hearing about the event despite having an opportunity to do so.[15] Consequently, I am unable to find that Bane engaged in protected activity here.

g. Bane's Anonymous Complaint to MSHA

On January 12, 2010, at 7:23 p.m., Bane filed an anonymous complaint with MSHA's Utah Field Office alleging that he was required to work in areas with high levels of radon. (Ex. B–5, pp. 109–11) Reporting potential safety or health hazards to MSHA or an MSHA inspector has consistently been found to constitute protected activity. *See, e.g., Sec'y of Labor on behalf of McKinsey v. Pretty Good Sand Co., Inc.*, 36 FMSHRC 1177, 1186 (May 2014) ("There is no question the sending of a complaint to MSHA to discuss a safety concern is protected activity. In fact, this is precisely the interaction between miner and MSHA that §105(c) was drafted to protect."); *Sec'y of Labor on behalf of Bragg v. Maple Coal Co.*, 35 FMSHRC 70, 82 (Jan. 2013) (ALJ) ("An anonymous complaint to MSHA about a health or safety violation is protected activity."); *Chaparro*, 32 FMSHRC at 210 ("Speaking with an MSHA inspector about conditions at a facility where the complainant works is protected under the Act."); *Sec'y of Labor on behalf of Nelson v. U.S. Steel Mining Co., Inc.*, 9 FMSHRC 346, 351 (Feb. 1987) (ALJ) (finding that a miner telling MSHA inspectors about the failure of the company to properly rock dust the face of the coal bed was protected activity). Accordingly, I conclude that Bane's anonymous complaint to MSHA on January 12, 2010, constituted protected activity.

2. Medical Evaluation and Potential Transfer

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[15] It appears that Bane was planning to discuss the electrical heat tape issue while questioning Race Fisher at the hearing. (Tr.99:2–7) However, Counsel for Denison requested and was granted permission to ask voir dire questions. The voir dire dealt with the unrelated issue of an audiotape that Bane recorded. (Tr.99:19–21, 100:11–15) After this, Bane did not come back to ask Race Fisher about the electrical heat tape incident despite having a clear opportunity to do so.

Although the majority of section 105(c) cases focus on unsafe work refusals, health and safety complaints to management, or health and safety complaints to MSHA,[16] there is a narrow line of case precedent involving section 105(c) protections for miners who develop health problems. Section 105(c)(1) provides that: "No person shall discharge or in any manner discriminate against [...] [any miner] [...] because [such miner] is the *subject of medical evaluations and potential transfer* under a standard published pursuant to section 101 of this title." 30 U.S.C. § 815(c)(1) (emphasis added).

During Bane's interview with Investigator Funkhouser, Bane twice stated that he believed that the reason he was laid off from Denison Mines was fifty percent attributable to health issues. (Ex. R–23, p. 6, lines 7–9 and p. 19, lines 21–24) At the hearing, Bane insisted that he had a right to a medical evaluation and right to transfer to a different position at Denison, citing an MSHA webpage titled "Miners' Rights and Responsibilities[:] A Guide to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977." (Tr.85:13–15; Ex. B–12) Under the sub-heading "What Are My Rights?", the webpage states that miners have a right to:

> A medical evaluation or to be considered for transfer to another job location because of harmful physical agents and toxic substances. (For example: a coal miner has the right to a chest x-ray and physical examination for black lung disease [pneumoconiosis] and potential transfer to a less dusty position if the miner has a positive diagnosis.)

Miners' Rights and Responsibilities A Guide to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977, U.S. DEP'T OF LABOR, http://arlweb.msha.gov/S&HINFO/minersrights/minersrights.asp (last visited Oct. 26, 2016).

The problem with the MSHA webpage is that it fails to include the phrase "under a standard published pursuant to section 101 of this title." 30 U.S.C. § 815(c)(1). This conditional language serves as an important limitation on the types of medical conditions that trigger medical evaluation and potential transfer ("ME&PT") protection. Furthermore, the use of the phrase "For example" on the MSHA webpage is misleading, as it suggests that the protection extends generally and broadly to harmful physical agents and toxic substances. To date, it appears that the ME&PT clause has only been successfully used in cases that have involved workers who developed pneumoconiosis in an underground coal mine. *See, e.g., Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 10 FMSHRC 152 (Feb. 1988); *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891 (May 1987); *Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776 (Nov. 1985). In all of the cases where ME&PT protections were found, either 30 CFR Part 90 ("Part 90") or its predecessor, 30 U.S.C. §843(b), were cited. Part 90 grants coal miners who work at underground coal mines and develop pneumoconiosis the right to wage protections after being transferred to less dusty environments.[17]

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[16] "The vast majority of cases arising under Section 105(c) of the Mine Act concern matters of safety." *Atkins v. Cyprus Mines Corp.*, 8 FMSHRC 279, 290 (Feb. 1986) (ALJ).

[17] 30 C.F.R. § 90 states:

An analysis of ME&PT case law shows how Part 90 is to be understood. First, Part 90 is not to be interpreted expansively to include protections for non-coal miners. *See Atkins*, 8 FMSHRC at 291 ("But there was no indication in the decision that the Commission intended to extend the doctrine any further than to encompass those situations *where the Secretary specifically addressed, by his rulemaking authority, the issues of medical evaluations and transfers*.") (emphasis added); *Janoski v. R&F Coal Co.*, 7 FMSHRC 402, 408 (Mar. 1985) (ALJ) ("As correctly pointed out by the respondent, [Part 90] only [applies] to miners who are employed at underground coal mines or at surface work areas of underground coal mines."); *Clemens v. Anaconda Minerals Co.*, 5 FMSHRC 1434, 1437 (Aug. 1983) (ALJ) ("Since no similar regulations (allowing transfer for medical reasons with no reduction of pay) have been promulgated for non-coal mines [...] I concur with Anaconda's arguments and conclude that no statutory right to medical evaluation, and resulting transfer with maintenance of pay, exists for non-coal mines.").

Second, Part 90 is not to be interpreted expansively to include protection for miners who suffer from ailments other than pneumoconiosis. *See Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 496 (Apr. 1988) (finding that industrial bronchitis is not covered by Part 90); *Cullinan v. Peabody Twentymile Mining LLC*, 36 FMSHRC 205, 210 n.3 (Jan. 2014) (ALJ) (finding that asthma does not constitute protected activity under Part 90); *Atkins*, 8 FMSHRC at 291 (finding that medical evaluations or potential transfers do not apply to miners suffering from high levels of mercury).

Third, Part 90 protection does not guarantee a dust-free transfer, but is instead triggered only in areas with respirable dust levels of 1.0 mg/m^3 or greater. *See Perando*, 10 FMSHRC at 496 ("Exposure to some amount of respirable dust is inherent in virtually all underground coal mining.").

Fourth, Part 90 is an example of the Secretary promulgating a regulation pursuant to section 101(a)(7), but does not preclude the creation or existence of other similar mandates. *See id.* at 495 ("*To date*, the Secretary has implemented this statutory mandate by providing under 30 C.F.R. Part 90[...].") (emphasis added); *Goff*, 7 FMSHRC at 1777 ("The Part 90 standards, promulgated pursuant to section 101(a)(7) of the Act, *are clearly the kind of standards* to which that clause applies.") (emphasis added); *Clemens*, 5 FMSHRC at 1437–38 ("However, such mandatory health and safety regulations have only been promulgated for coal mines, under 30 C.F.R. 90[...] no similar rule pertaining to non-coal mines has been promulgated.").

Given the metes and bounds of Part 90, I conclude that Part 90 cannot extend to cover Bane, a uranium miner who suffers from a dust allergy. I recognize that the mere fact that a

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> This part 90 establishes the option of miners who are employed at coal mines and who have evidence of the development of pneumoconiosis to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift is continuously maintained at or below the applicable standard as specified in § 90.100.

scenario similar to Bane's has never successfully supported such a claim in the past does not preclude the possibility of a successful ME&PT claim for a non-coal miner suffering from something other than pneumoconiosis in the future. However, I am not aware of, and Bane has not cited to, any regulation or authority similar to Part 90 that supports the recognition of ME&PT rights for non-coal miners or miners who suffer from medical conditions similar to his. Simply put, the only authority Bane offers is the MSHA webpage that misinterprets section 105(c)(1).

Because there is no authority outside the MSHA webpage to support the contention that a uranium miner who suffers from a dust allergy qualifies for protections under the ME&PT clause of section 105(c)(1), there was no protected activity here.

B. Bane's Termination Constitutes Adverse Employment Action

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Denison took an adverse action against Bane that was motivated, at least in part, by Bane's protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be further separated into two sub-questions: (1) whether there was an adverse action; and, if so, (2) whether there was a motivational nexus, at least in part, between the adverse action and the Complainant's protected activity. This section will address the "adverse action" sub-question, and the following section will address the "motivational nexus" sub-question.

The Commission has defined "adverse action" as:

> "[A]n action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." 601 F.3d at 428 (quoting *Sec'y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984)). [...] [T]he Commission has recognized that, while "discrimination may manifest itself in subtle or indirect forms of adverse action," at the same time "an adverse action 'does not mean any action which an employee does not like.'" *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so -- such as a discharge or suspension would be -- the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. "Determinations as to whether an adverse action was taken must be made on a case-by-case basis." *Id.* at 1848 n.2.

Sec'y of Labor on behalf of Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012).

The Commission has found that a discharge, demotion, or termination is an adverse employment action. *See McKinsey*, 36 FMSHRC at 1186 (citing 30 U.S.C. § 815(c)(1)); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). The plain language of section 105(c), which expressly lists "discharge," does not address whether a layoff is treated, for discrimination purposes, as an adverse employment action. Section 105(c) case law, however, makes it clear that the layoff of a miner falls within the ambit of adverse employment action. *See, e.g., Sec'y of Labor on behalf of Ratliff v. Cobra Nat. Res., LLC*, 35 FMSHRC 394, 397 (Feb. 2013) ("This is because the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action."); *Sec'y of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 129 (Feb. 1999) (stating that four miners suffered an adverse employment action when they were permanently laid off); *Sec'y of Labor on behalf of Harper v. Kingston Mining Inc.*, 37 FMSHRC 1577, 1589 (July 2015) (ALJ) ("It is uncontested that Harper was laid off on April 10, 2015. Therefore, Harper's claim that he suffered an adverse employment action is not frivolous.").

In the recorded conversation between Bane and Race Fisher on January 18, 2010, Race Fisher stated to Bane, "What are we gonna do? We'll get you laid off." (Ex. R–15, p. 7) Race Fisher then filled out a Personnel Action Form marking "layoff" as the reason for termination and noting "Reduction in Force" in the comments section. (Ex. R–11, p. 3) Consistent with Race Fisher's statements and actions, Denison's termination letter cited a "continuing decline in commodity prices" and a "need to reduce its work force" as the reason that Bane's "services with the Company are no longer required and your employment with the Company will be terminated, effective January 21, 2010." (Ex. R–5) Given the above, I find that, at least for purposes of establishing Bane's prima facie case, Bane was laid off, and, thus, suffered an adverse employment action.

C. <u>Bane was not Terminated Because he Engaged in Protected Activity</u>

Having established the existence of both a protected activity and an adverse action, the complainant must next show that the adverse action was motivated, at least in part, by the protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). The Commission has noted that "direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id.* These four "*Chacon* factors" are not the exclusive means of proving a mine operator's motivation in taking an adverse action against an employee. The Commission has stated that "inferences drawn by judges are 'permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.'" *Colo. Lava, Inc.*, 24 FMSHRC at 354 (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

1. Coincidence in Time Between the Protected Activity and the Adverse Action

The Commission has stated that "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the

legality of the employer's motive [...]." *Chacon*, 3 FMSHRC at 2511. The Commission has also stated, "[W]e 'appl[y] 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.'" *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Often, improper motivation is found "where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999) (citing *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997)).

Improper motive has been found in cases with varying periods between the protected activity and the adverse action, ranging from a few hours to a few months. *See, e.g., McGill*, 23 FMSHRC at 986–87 (finding that the ALJ was correct in inferring a discriminatory motive from adverse action taken less than two hours after complainant's safety complaints); *Sec'y of Labor on behalf of Houston v. Highland Mining Co., LLC*, 35 FMSHRC 1081, 1093 (Apr. 2013) (ALJ) (finding that a five-day gap between the adverse action and protected activity constituted circumstantial evidence of a nexus); *Baier*, 21 FMSHRC at 961 (finding that two weeks between complainant's discussion with MSHA inspector and discharge was sufficiently coincidental in time to support a finding of discriminatory motive); *see also Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009) (finding that three weeks between the protected activity and adverse action was sufficient to find discriminatory motive); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (Commission found that an adverse employment action four months after a protected activity constituted close temporal proximity where the operator had knowledge of the protected activity); *Hyles*, 21 FMSHRC at 120–21, 132 (finding temporal proximity despite 16-month gap between miners' contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA's issuance of penalty as a result of the miners' notification of the violations and given evidence of intervening acts of hostility, animus, and disparate treatment).

However, where there is a long gap between the protected activity and adverse action, judges have often found no causal connection. *See, e.g., Lee v. Genesis, Inc.*, 32 FMSHRC 1392, 1399 (Sept. 2010) (ALJ) (finding no improper motive for seven-month gap even though employer's knowledge of protected activity was established); *Sec'y of Labor on behalf of Beckman v. Mettiki Coal (WV), LLC*, 33 FMSHRC 258, 278 (Jan. 2010) (ALJ) (finding no improper motive for gaps of 17 months and six months where there was no evidence of any material intervening hostility); *Dowlin v. W. Energy Co.*, 28 FMSHRC 23, 30 (Jan. 2006) (ALJ) (finding no improper motive for 19 month gap even though employer had knowledge of protected activity); *Haro v. Magma Copper Co.*, 4 FMSHRC 1948, 1954 (Nov. 1982) (ALJ) (finding no improper motive for 31 month gap even though employer had knowledge of protected activity).

During Bane's interview with Investigator Funkhouser, Bane twice stated that he believed that the reason he was laid off from Denison Mines was fifty percent attributable to his "constant complaining about [...] unsafe conditions and refusal to do certain unsafe acts." (Ex. R–23, p. 6, lines 7–9 and p. 19, lines 21–24) Bane stated at the hearing that "once a guy starts complaining over and over and over again, the company gets tired of it [...]." (Tr.43:23–25)

Although Bane admitted that he was unable to point to any specific evidence that Denison deemed him to be a problem, he contended that his constant complaining established a pattern of him being perceived as a troublemaker. (Tr.44:4, 51:11–17) In Bane's words, the complaints "finally broke the camel's back." (Tr.137:1–2)

In *Turner*, the Commission held that this "last straw" theory of discrimination (i.e., a series of complaints followed by a "last straw" event resulting in termination) is permissible as a means of connecting various protected activities. 33 FMSHRC at 1071; *see also, Hyles,* 21 FMSHRC at 132 ("These penalties provide the proverbial 'straw that broke the camel's back [...].'"); *Sec'y of Labor on behalf of Carter v. Kino Aggregates, Inc.*, 34 FMSHRC 417, 428 (Feb. 2012) (ALJ) ("The MSHA inspection on December 22, 2009 [...] was the 'straw that broke the camel's back,' Mr. Carter having lodged multiple complaints to Mr. Plant over a variety of safety issues over his two-and-one-half-year employment by Kino Aggregates."). The Commission in *Turner* stated:

> Turner made a string of complaints in the months preceding his termination [...] Considering the evidence as a whole, a judge could reasonably conclude that there is a coincidence in time between Turner's safety complaints and his termination. Given Turner's history of safety complaints, *his most recent complaints in the days immediately preceding his termination could have been the last straw for the operator. Thus, the close proximity in time between Turner's latest complaints and his termination* could support an inference that National Cement may have been improperly motivated by Turner's complaints when it fired him, and the judge therefore should have considered the proximity in time and whether it indicated any improper motivation.

Turner, 33 FMSHRC at 1070–71 (emphasis added).

With *Turner* as guidance for how to link Bane's history of safety complaints to the most recent complaint before termination, I will consider whether Bane's protected activities, either alone or together, were sufficient to establish a causal connection with the adverse action in the analysis that follows below.

2. Knowledge of the Protected Activity

The Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be "proved by circumstantial evidence and reasonable inferences." *Id.* The Commission has also held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that "a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment." *Sec'y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33

FMSHRC at 1067–68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.").

At the outset, Denison denies that management had any knowledge of any of Bane's "complaints that were made to MSHA or any internal complaints that Mr. Bane may have made with regard to conditions of either safety or health at the mine." (Tr.14:18–21) As stated above, I am aware of the time gap between Bane's protected activities and his bringing of the discrimination case. While it is true that memories fade and details blur, I do not find Denison's blanket statement denying knowledge to be persuasive. As such, I will analyze each of Bane's protected activities on a case-by-case basis in order to determine whether Denison management had knowledge of Bane's protected activities.

3. Hostility or Animus

The Commission has held that "[h]ostility towards protected activity – sometimes referred to as 'animus' – is another circumstantial factor pointing to discriminatory motivation. The more the animus is specifically directed toward the alleged discriminatee's protected activity, the more probative weight it carrie[s]." *Chacon*, 3 FMSHRC at 2511. Animus can take the form of action or inaction. *Turner*, 33 FMSHRC at 1069 (Commission noted possibility of animus where operator was not responsive to the miner's safety concerns).

4. Disparate Treatment

Disparate or inconsistent treatment is another, indirect indicium of discrimination. "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." *Chacon*, 3 FMSHRC at 2512. It has been recognized that "precise equivalence in culpability between employees" is not required in analyzing a claim of disparate treatment under traditional employment discrimination law. *Pero*, 22 FMSHRC at 1361, 1368 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). Rather, the complainant must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.* at 1368.

Although disparate treatment is often asserted by a complainant to show that a mine operator's justification for termination is pretextual, here, Bane suggests that he was treated disparately by not being transferred in the same fashion as a co-worker who suffered from a knee injury. On direct examination, Bane questioned Race Fisher why he was not transferred to another work area while another miner, Trent Davis, was granted a temporary transfer to the Egnar Office until his knee injury healed. (Tr.87:11–15) Fisher responded that miners who sustained on-the-job injuries were placed on light duty; however, if the miner sustained off-the-job injuries, they probably would not be allowed to come back to work absent a full doctor's release. (Tr.88:5–10) Although identical circumstances are not necessary to show disparate treatment, I find Bane's and Davis' situations to be sufficiently distinguishable.

First, Bane did not address whether Denison had a policy of allowing permanent transfers, let alone permanent transfers removed from dusty conditions. Indeed, it is undisputed that Denison temporarily transferred Bane out of the mine after PA-C Freestone's first doctor's note. While the first doctor's note read, "[Patient] needs to stay out of the mine *for the next week or two*," the second doctor's note read, "[p]lease excuse Matthew from work that involves dust, mine shafts, bore holes, etc." (Ex. R–6) (emphasis added) Thus, without the same short-term, temporary language (e.g., "for the next week or two"), PA-C Freestone's second doctor's note was tantamount to a total, permanent prohibition of Bane engaging in work involving "dust, mine shafts, bore holes, etc." (Ex. R–6) Such a prohibition would require Denison to permanently transfer Bane —something beyond the scope of what was contemplated in Davis' case.

Second, although Bane contends that management incorrectly categorized his condition as a non-occupational illness ("NOI"), he did not provide any evidence that management knew or suspected otherwise at the time. The record indicates that during Bane's employment, he was only listed as sick with an NOI on the following days: December 17, 2009, December 20, 2009, December 21, 2009, December 22, 2009, December 23, 2009, and December 24, 2009. (Ex. R–9, p. 38) However, the record shows that Bane first went in for treatment with PA-C Freestone a week later on Dec 31, 2009. (Ex. R–6) Bane's personal notes state, "I started to miss work during Dec 09. PAC Freestone ordered numerous tests *but wasn't able to come up with a firm diagnosis for my condition*." (Ex. B–18 p. 25) (emphasis added)

At the hearing, Bane surmised that the reason his work sheet listed his days off as NOI was because "the company was trying to separate themselves from me and the dust issue because at that time, Mr. PAC Freestone had no idea what it was." (Tr.182:4–6) However, although Bane points a finger at Denison and management, it appears that Sagrillo, arguably Bane's closest ally at Denison, was the individual actually responsible for either filling out or, at the very least, certifying the biweekly time report sheet that listed Bane as having an NOI. (Ex. R–9, p. 38) Based on his close interaction and intimate knowledge of Bane's health complaints and concerns, had Sagrillo believed that Bane's sickness was in fact an occupational illness, it seems reasonable that he would have indicated that on the time sheet.

Because Bane has failed to provide evidence that he was treated differently than other employees in a similar situation, I cannot find that Bane was the recipient of disparate treatment. Since I have already addressed the issue of disparate treatment here, I will not mention it in great detail in the analysis that follows.

5. Denison's Pattern of Firing "Troublemakers"

Bane contends that Denison engaged in a pattern of firing miners who made health or safety complaints. In his prehearing statement, Bane states that every employee at the La Sal Incline was called in for a safety meeting in March and instructed not to call MSHA. (Bane Prehearing Br. 6) After miners were laid off in March and April, Bane states that "[t]he message was clear[:] speak up and you would be laid off." *Id.* At the hearing, Bane stated that when the mine was first opened, a group of miners complained to MSHA and were subsequently laid off. (Tr.172:6–8) Kennedy also testified at the hearing that he believed safety complaints by miners played a significant role in the termination decisions at Denison. (Tr.54:13–15) Additionally,

Bane alleged at the hearing that Race Fisher told him that the seven layoffs in April 2009 were done "to get rid of the trouble makers." (Tr.174:3–6; Ex. R–23, p. 8, line 20) In his post-hearing brief, Bane wrote, "Denisons [sic] had used lay offs [sic] to handle past trouble with miners who complained about working conditions to MSHA." (Bane Post-Hearing Br. 1)

While it is true that six miners were laid off on April 24, 2009,[18] only a few days after an MSHA inspection, (Ex. R–8; Ex. B–5, p. 53), this coincidence in time alone does not indicate causation. Without further information, there is no way to know or infer that the individuals who were laid off were the same miners who made safety complaints to MSHA or that Denison had reason to be suspicious of these particular individuals. The only corroborating support for Bane's contention that Denison engaged in a pattern of impermissible layoffs was Kennedy's testimony that he believed his own layoff was due to his complaining to Jim Fisher. (Tr.44:10–14) However, when questioned, Kennedy acknowledged that he could not point to any evidence beyond his own belief that Denison had terminated Bane because of his safety complaints. (Tr.55:6–15) Likewise, there is nothing in the record to corroborate Bane's claim that Denison's prohibition on calling MSHA was presented at a "company[-]wide meeting." (Bane Post-Hearing Br. 1)

Contrary to Bane's allegations, Race Fisher denied ever making a statement or any related statement to Bane that the April layoffs were to "get rid of the trouble makers." (Tr.174:20–25) Irrespective of Race Fisher's denial, Bane's accusation raises doubts. A manager who explicitly tells an employee that other employees were fired because they were "troublemakers" would be temerarious and unwise. Nothing in the record or my in-court observations suggests that Race Fisher is either of those things.

6. Analysis of Bane's Protected Activities

a. Supervisor Hoffman's Dangerous Actions

Bane's complaint to management that Hoffman was abusing painkillers and making the workplace unsafe took place approximately 14 months prior to his being laid off. It can be inferred from the record, notably Bane's time sheets, that management was aware of the problems since Bane was moved to another work location. However, because Denison complied with Bane's safety concerns by moving him to work in a safer environment with Sagrillo, I am unable to find hostility or animus here. Additionally, Bane did not assert any disparate treatment in this instance.

Without evidence of intervening hostility, animus, or disparate treatment, I cannot infer the existence of a nexus between this protected activity and Bane's layoff 14 months later.

b. Radon and Dust Exposure in the Skip

Bane complained to MacKinnon about the dusty conditions in the skip in his March 2009 safety interview, approximately ten months prior to Bane's termination.

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[18] Seven miners were laid off in April 2009. One miner was laid off on April 9, 2009, while the other six were laid off on April 24, 2009. (Ex. R–8)

In his affidavit, MacKinnon did not deny Bane's allegations that he complained about the dusty conditions in the skip during the health and safety interview. While MacKinnon's personal knowledge of Bane's protected activity is not disputed, it is unclear whether either Jim or Race Fisher were aware of Bane's complaint. Although it is reasonable to infer that management was informed to some degree of the complaints gleaned from the March 2009 safety and health interviews, the record does not indicate or imply whether management was told which miners actually provided safety and health complaints that would constitute protected activity. Additionally, MacKinnon's personal knowledge cannot be imputed to upper-management since there is no sign that he was consulted or in any part influenced the decision to terminate Bane. *See Colo. Lava*, 24 FMSHRC at 359 (Commissioner Jordan, concurring) (discussing the "cat's paw" theory of a supervisor's imputed prejudice).

Although Bane alleged that Race Fisher told him that the seven layoffs in April 2009 were done "to get rid of the trouble makers," (Tr.174:3–6; Ex. R–23, p. 8, line 20), Fisher denied ever making any such statement to Bane. (Tr.174:20–25) I do not find Bane's recollection credible.

The circumstantial evidence of Denison management's knowledge and any animus arising from Bane's protected activity are too tenuous to infer a nexus between this protected activity and Bane's layoff ten months later.

c. Bane's Respirator was not Fitted Properly

According to Bane, Lee said that he had informed Mine Foreman Fisher that Bane "hadn't been fit tested [for a respirator] for approximately a year [...]." (Ex. R–23, p. 9, lines 4–6) However, Fisher testified that he had no personal knowledge that Bane was fitted for a respirator by Lee on May 4, 2009. (Tr.70:20) Given the seeming importance of this safety violation (i.e., failing to fit Bane with a respirator when he was first hired), it is not unreasonable to conclude that Lee likely shared this procedural error with Race Fisher consistent with Bane's testimony. For this reason, and for the purposes of establishing Bane's prima facie case, I find that Race Fisher likely had personal knowledge of Denison's failure to properly fit Bane for his first nine months as well as his subsequent protected activity.

Regarding animus, the Commission has noted that inaction may constitute animus. In *Turner*, the complainant had made various safety complaints that were ignored. *Turner*, 33 FMSHRC at 1083. The Commission remanded the case, noting the importance for the judge to address "whether [the supervisor's] characterization of Turner as 'difficult' may have, at least in part, represented animus for his safety complaints."[19] *Turner*, 33 FMSHRC at 1070.

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[19] At the hearing, Turner's supervisor testified that Turner "doesn't listen. He's very hard to communicate with and he takes a lot of things personal [sic] that shouldn't be personal." *Turner v. Nat'l Cement Co. of Cal.*, 31 FMSHRC 1179, 1185 (Sept. 2009) (ALJ). Additionally, Turner's supervisor stated that Turner "didn't follow instructions [...]. The few other people in the shop expressed the concern that they would not work with him. They didn't like working with him." *Id.*

Here, even given the six-week delay between Bane's first report to MacKinnon that his respirator did not fit and the ultimate fitting of the respirator by Lee, I am unable to find convincing indicia of hostility. This inaction to furnish Bane with a properly fitted respirator, unlike those contemplated in *Turner* above, does not necessarily implicate ill-will, hostility, or animus. Essentially, the delay was caused by MacKinnon's failing to act after Bane complained that his respirator was not working. This appears to be a consequence of procedural sloppiness rather than animus. It is reasonable to suspect that MacKinnon did not fully appreciate the severity of the problem at the time of Bane's complaint during the March 2009 safety and health interview for two reasons: (1) Bane himself did not realize the seriousness of the situation; and, (2) MacKinnon was not put on alert because Bane's Certificate of Training form incorrectly stated that Bane was trained in "Self-Rescue & Respiratory Devices." (Ex. B–3) In fact, the record shows that once Denison was actually aware of the gravity of the problem, it acted immediately to remedy the error. (Ex. R–23, p. 9, lines 1–2)

Even assuming that Race Fisher knew of Bane's protected activity here, I find that the length in time between the protected activity and adverse action —ten months for the initial complaint and eight months for the subsequent fitting —is too long to infer an improper motive absent a more concrete showing of hostility, animus, or disparate treatment.

d. Red-Tagging the Crane

Bane first used the crane and noted safety issues in June or July of 2009. However, he estimates that he waited until September 2009 to red-tag the crane. Therefore, the protected activities took place between four and seven months before Bane was terminated. Bane does not allege any disparate treatment or incidents of hostility related to his crane-related protected activities.

Regarding management's knowledge of the protected activities, Bane asserts that Race Fisher was aware of the problems with the crane before, when, and after Bane red-tagged it. However, when questioned about it at the hearing, Race Fisher testified that he did not recall Bane ever telling him that there were safety problems with the crane. (Tr.94:23) Fisher admitted knowing that the crane was red-tagged, (Tr.96:23–24), but denied ever knowing Bane's role in red-tagging the crane. (Tr.95:1–3) I recognize that Race Fisher is not a disinterested witness. And despite the possibility that he testified to protect his employer, I also note that six years passed between the hearing and the incident in question. Memories do honestly fade and details blur. What might have seemed like a critical exchange for a miner might have been only one of many issues on the mind of the foreman. For these reasons, I find Race Fisher's testimony on this point believable, at least insofar as he was unable to recall knowing about the crane's problems or who specifically red-tagged it.

The question remains, however, whether management knew or suspected that Bane had made complaints or red-tagged the crane at the time that he was terminated. Despite Bane's claims that multiple people knew about Bane's safety complaints regarding the crane and his role in red-tagging it (e.g., Lee, Sagrillo, and Palmer), Bane did not call anyone to verify his version of the events. Bane also told Investigator Funkhouser that he did not have any documented evidence of any of the crane's alleged defects or that he had complained to anybody. (Ex. R–23, p. 12, lines 3–4) Additionally, I am cautious to rely exclusively on Bane's testimony due to an

inconsistency with Bane's rendition of the incident. During his interview with Inspector Funkhouser, Bane stated that, to his knowledge, the crane was never operated after he completed the blind pick. (Ex. R–23, p. 13, lines 1–4) However, at the hearing, Bane recalled that he and Sagrillo used the crane on multiple occasions after the blind pick. (Tr.159:16–17, 160:3–6) In the absence of evidence corroborating Bane's rendition of the incident in question, and given the inconsistencies in his own statements, I find that Bane's testimony alone is insufficient to establish that management was aware of his protected activities.

Consequently, given the totality of the circumstances and lack of credible evidence, I am unable to find a nexus between the crane-related protected activities and Bane's termination.

e. Bane's Anonymous Complaint to MSHA

The decision to lay Bane off was made on January 18, 2010, six days after the protected activity. (Ex. R–11) In response to questioning from the bench, Bane stated that the only evidence he could present on this point was the coincidence in time between his anonymous complaint to MSHA and the layoff. (Tr.29:14–24) While a short period between a protected activity and subsequent adverse action can suggest an improper motive, I cannot conclude that Denison was motivated by animus toward Bane in response to this protected activity.

First, there is no evidence of knowledge. As stated above, "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Baier*, 21 FMSHRC at 957 (quoting *Chacon*, 3 FMSHRC at 2510). Bane admitted that he did not tell anybody at work that he filed the anonymous complaint. (Ex. R–23, p. 16, line 42 and p. 17, line 1; Tr.140:25–141:2) Both Jim and Race Fisher testified that they were not aware of Bane having ever contacted MSHA. (Tr.94:17–95:3, 178:3–5) Additionally, there is no evidence from which to impute knowledge. Bane was asked by Denison's counsel whether anyone from management "ever approached you or accused you of contacting MSHA at any point in time?" (Tr.150:6–8) Bane responded, "Albert Sagrillo had a conversation with me about it, and he was my manager, so [...]. But I don't believe it went any farther than him." (Tr.150:12–19)

Even without actual or imputed knowledge, "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Moses*, 4 FMSHRC at 1480. Here, however, it is unlikely that Denison management would have been suspicious of Bane. Bane could not recall ever expressing any health or safety concerns at the weekly safety meetings. (Tr.156:23–157:16; Ex. R–23, p. 19, lines 1–4) Also, both Jim and Race Fisher testified that they believed at the time that Bane had never raised any safety concerns. (Tr.94:17–95:3, 178:3–5) David Turk also testified that he had never heard any reports of Bane being a "troublemaker of any sort." (Tr.124:13–18) Furthermore, in accordance with his doctor's note, in the weeks leading up to his layoff, Bane was physically removed from working in the underground area ultimately investigated by MSHA. (Ex. R–23, p. 16, lines 1–15) Because Bane was working on the surface and away from the mine shafts, management would have less reason to suspect that he was the one who made the complaint. *See, e.g.*, *Jim Causley Pontiac, Div. of Jim Causley Inc. v. NLRB*, 620 F.2d 122 (6th Cir. 1980) (where the discharged employee was one of only three people working at the specific area cited in a MiOSHA complaint, and was the only employee who had

complained to management about the specific issue cited to the inspector). It is also unlikely that Denison eavesdropped on Bane's call to MSHA. Bane reported to Investigator Funkhouser that he made the anonymous phone call to MSHA from a Shell gas station in Moab, Utah. (Ex. R–23, p. 16, lines 33–34)

Most notably, Denison had no reason to suspect that Bane was responsible for anonymously contacting MSHA because the decision by Denison management to terminate Bane was finalized *before* MSHA began their on-site investigation. The MSHA inspectors responding to Bane's anonymous MSHA complaint conducted their inspection/investigation from January 19, 2010, until January 21, 2010. (Ex. B–5, p. 109) However, as shown on Bane's personnel action form, the decision to lay Bane off was finalized and approved by Race Fisher, Jim Fisher, and Denison Vice President of Mining Philip G. Buck on January 18, 2010. (Ex. R–11) Given the temporal propinquity, had this sequence of events been switched —with the MSHA on-site investigation immediately preceding the layoff decision —it would have raised a red flag. However, because the layoff decision preceded the MSHA on-site investigation, I cannot conclude that Denison knew or even suspected that Bane was responsible for the MSHA complaint.

Second, there is no credible evidence of animus. When asked by Investigator Funkhouser whether anybody from management ever approached or accused him of contacting MSHA at any point in time, Bane responded in the negative. (Ex. R–23, p. 20, lines 3–6) Bane reiterated this position at the hearing. (Tr.152:4) The only suggestion in the record of animus directed at Bane was Topaz shift boss Jerry Goode's alleged threat at a weekly safety meeting in January 2010. At some point shortly after his anonymous complaint to MSHA, Bane alleges that Goode grabbed him by the front of the coveralls and asked Bane, "what [Bane] was going to do now [...]." (Ex. R–23, p. 18, lines 17–21) Bane alleges that he defended himself by opening his hunting knife between Goode's legs. *Id.* Bane interpreted Goode's action as Denison's "attempt to intimidate me." (Tr.166:14–15) Despite Bane's multiple statements throughout the record that "the whole crew" witnessed the incident, he failed to provide a corroborating witness. Additionally, the fact that Bane changed his story with each telling undercuts the weight of this evidence. In one version, Race Fisher and the whole crew witnessed the altercation directly. (Bane Prehearing Br. 5) In another, mechanic Tim Howe viewed it directly, but the rest of the crew only viewed it indirectly. (Ex. R–23, p. 18, lines 21–23; Ex. B–18, p. 27) When asked about the incident at the hearing, Race Fisher testified that he had not known about the Goode incident until a few weeks prior to the hearing after receiving Bane's prehearing statement. (Tr.180:6–7)

Even if the event in question did happen as Bane alleges, Goode only stated, "what are you going to do now?" when he grabbed Bane. On their face, the words are too ambiguous to explain why Goode assaulted Bane. Given the proximity in time between Bane's anonymous MSHA complaint and Goode's alleged action, this language could reasonably be seen as a threat or retaliation from management *if* Denison had known about Bane's anonymous MSHA complaint. However, as stated above, it is unlikely that Denison was aware or even suspicious that Bane had engaged in protected activity in January 2010. Without Denison's knowledge or suspicion that Bane engaged in the protected activity, I cannot infer that Goode's alleged conduct was intended to send a message from Denison management.

The Commission has stated that "inferences drawn by judges are 'permissible provided they are *inherently reasonable* and there is a *logical and rational connection between the evidentiary facts and the ultimate fact inferred*.'" *Colo. Lava, Inc.*, 24 FMSHRC at 354 (citing *Mid-Continent Res. Inc.*, 6 FMSHRC 1132, 1138 (May 1984)) (emphasis added). Based on the limited evidence Bane provided, and given the unique facts of this case, I cannot find the six-day gap between Bane's protected activity and management's adverse action, by itself, to be sufficient evidence of management's improper motive. Bane argues that his MSHA complaint was the final straw. Although the "straw that broke the camel's back" argument in a series of safety complaints was found to be acceptable in *Turner*, the facts here are distinguishable. I cannot conclude that Bane's anonymous call to MSHA resulted in or motivated his termination. Notably and critically, the "final straw" in *Turner* was a safety complaint *to management* a mere four days before his discharge. Here, the last protected activity was done without management's knowledge.

Because Bane's earlier protected activities rely on his last protected activity, and because his anonymous MSHA complaint fails to sufficiently establish that the adverse action he complained of was motivated, at least in part, by his protected activity, I conclude that Bane has not established a prima facie case of discrimination.

VI. RESPONDENT'S REBUTTAL OF COMPLAINANT'S PRIMA FACIE CASE

Once the complainant has established a prima facie case, the operator may rebut it by showing that no protected activity occurred or the adverse action was not motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. While I have already found that Bane failed to provide sufficient evidence to meet his prima facie burden, I will nevertheless address Denison's rebuttal.

A. Denison Unable to Rebut Occurrence of Protected Activity

In its post-hearing brief, Denison stated that "[w]hile Denison does not admit these [events] occurred, it is simply not in a position to now dispute Bane's assertions, and has thereby been prejudiced by Bane's inordinate delay." (Resp't Post-Hearing Br. 10) As discussed above, Bane engaged in five instances of protected activity.

B. Denison's Decision to Lay Off Bane was not Motivated by his Protected Activity

1. Bane's Layoff was Adverse Action

Denison argues that Bane initiated the termination discussion when he "spoke with managers Jim Fisher and Race Fisher at Denison's mine" and allegedly "[told] both of them that he was quitting his employment with Denison." (Resp't Post-Hearing Br. 2) Denison contends that it conferred a benefit to him in the form of unemployment compensation and continuation of health insurance benefits under COBRA by laying him off. *Id.* at 2, 8–9. It further argues that leaving Bane in a better position than he would have been in had he quit "is not adverse action. It is certainly not discriminatory in violation of Section 105(c) [...] it demonstrates no animus against Bane, but rather shows a willingness to benefit him." *Id.* at 8. Respondent's contention necessarily rests upon the credibility of witnesses who appeared at the hearing and the weight I give their testimony.

In *Secretary of Labor on behalf of Carter v. Kino Aggregates, Inc.*, a similar argument was made by the respondent. 34 FMSHRC at 417. In *Carter*, the respondent contended, *inter alia*, that "no discrimination claim may be made because no adverse action had actually ever occurred. The Complainant voluntarily withdrew from employment [...] and was never, in fact, fired by [the company]." *Id.* at 428. In *Carter*, the complainant walked off the worksite after being told to leave by the owner of the mine for assisting an MSHA inspector. *Id.* at 421. After receiving no callback from the company, the complainant concluded that he had been terminated. *Id.* Here, unlike in *Carter*, Denison management discussed the layoff with Bane, (Ex. R–15), filed a Personnel Action Form terminating Bane via layoff, (Ex. R–11, p. 3), and furnished Bane with an official termination letter. (Ex. R–5) These actions leave no ambiguity that Bane was being laid off. As discussed above, the Commission has consistently found that a layoff is an adverse action. *See, e.g., Ratliff*, 35 FMSHRC at 397; *Hyles*, 21 FMSHRC at 129; *Harper*, 37 FMSHRC at 1589. Accordingly, I find that Bane's layoff by Denison constituted adverse action.

2. No Connection Between the Adverse Action and Bane's Protected Activity

In assessing an operator's reasons for discharge, "[t]he inquiry turns on what the operator actually believed at the time, not what the Commission later reasons the operator *could* have relied upon in making its disciplinary decision." *Pendley v. FMSHRC*, 601 F.3d 417, 426 (6th Cir. 2010) (emphasis in original) (citing *Pasula*, 2 FMSHRC at 2800). Denison contends that it laid off Bane in accordance with statements he made to Race Fisher intimating his intention to quit. Therefore, the critical issues in evaluating Denison's argument are as follows: (1) whether Bane communicated an intention to quit or resign to Denison; and, (2) whether that communication was the sole motivating factor for his layoff. For the reasons that follow, I find that Bane communicated his intent to leave Denison to Race Fisher on January 18, 2010, and that the communication was the sole motivating factor in his layoff.

a. Bane Communicated his Intent to Leave Denison to Race Fisher

(1) The First Conversation (January 18, 2010)

There is no dispute that two conversations took place on January 18, 2010, between Bane and Race Fisher. (Ex. B–18A; Ex. B–19; Ex. R–15; Ex. R–17) Although Bane surreptitiously recorded the second conversation with Race Fisher on January 18, 2010, it appears that no audio recording of the first conversation was made. The parties' recollections of what was said during the first conversation largely conflict. I realize that the parties are not disinterested, and I am fully aware of the nearly six years between the events in question and the hearing.

At the hearing, when asked about the events surrounding the first conversation, Race Fisher stated:

> Matt had came in [sic] in the morning and said he was going to have to quit. He just couldn't work at the mines anymore. He was tired of being sick, and we talked about the issues a little bit, and I knew we were going to be cutting back. We were overstaffed a little bit. So I told him that, why don't [sic] he give me a chance to see if we could get him laid off. That way, he could draw some

> unemployment, give him some options on the insurance, stay on the COBRA plan and stuff. And he left, went back over to the electric shop. I talked to Mr. Marsing, and he called whoever he had to call with Human Resources, I'm sure, and said, "Yeah, we could do that."

(Tr.109:10–22) On recross examination, Race Fisher reiterated his version of the events:

> Matt came into my office that morning, said he was going to have to quit because of his health issues, that the doctor was not going to let him work around a mine or anywhere that was dusty, smoke [sic]. Talked a little bit about the places in the mines that were dust-free, smoke-free, and there really isn't. I mentioned to him that rather than quit that I knew we were going to have some reductions later coming up in a week or two, that we could get him on that list. But I would have to check with upper management and see if that was a possibility. And he left. And I checked with upper management, and they said, "Yeah, it was about numbers, not individuals."

(Tr.176:4–16)

Bane's recollection of what was said during the first conversation on January 18, 2010, was dramatically different. Bane denied ever telling Race Fisher that he was quitting. (Tr.123:24, 162:4–6, 195:17–20) Likewise, Bane wrote in his personal notes, "The following Monday, I went to Race Fisher and asked what they were going to do about the situations [sic], transfer me or what. He stated that the company was going to lay off several employees, and he would put me on the layoff list." (Ex. B–18, p. 25) Bane's personal notes ended with the statement "[t]his is true and correct as far as my memory serves me," dated November 4, 2011, and signed by Bane. *Id.* at 30. It is clear that Bane's personal notes were prepared in anticipation of litigation, and I have factored this into my weighing of the evidence.

Here, the parties' recollections of what was said during that first conversation on January 18, 2010, are in direct contradiction. Unlike the conversation that took place later in the day, the first conversation was not recorded and without witnesses. Ultimately, I will need to make a credibility determination. In order to better assess what was said in the conversation between Bane and Race Fisher, I will analyze the events and representations that were made prior and subsequent to January 18, 2010.

(2) PA-C Freestone's Notes

On January 13, 2010, a week prior to meeting with Race Fisher, Bane went to the San Juan Clinic for a follow-up checkup with PA-C Blen Freestone. In his notes, PA-C Freestone wrote the following:

> On our last visit, which took place approximately a week to ten days ago, [Bane] was instructed to stay out of the mines. He

> thought he could work it so that he could do basically office work and not have to go into the mines. He was given a medical order for this. He comes in today reporting that he is much better. He states that everything has cleared up except for the ringing in his ears, and a little bit of sinus pressure, but otherwise he feels much better. *On my inquiry as to whether he will be able to continue this at his existing place of employment, he stated that he has already made arrangements to work elsewhere, and will be working as an electrician in the oil fields beginning the first of next week* [...].

(Ex. R–4, p. 7; Ex. R–7; Tr.168:1–5) (emphasis added) In response to PA-C Freestone's notes, Bane stated the following at the hearing:

> This is kind of hearsay, and it's kind of screwed wrong. *I told him that I was planning on applying for Newby Electric and trying to get a job there at the time*, and he is kind of misscrewed [sic] a little bit of the deals here because it was quite a while later that I did get on with Newby Electric. I was *planning* to go to work there –or *hoping*.

(Tr.168:24–169:5) (emphasis added)

Because Freestone is an objective third-party and because the note was contemporaneously written, I find Freestone's personal note to be a highly persuasive piece of evidence corroborating the theory that Bane intended to leave Denison when he spoke with Race Fisher a week later. Here, Bane not only planned to leave Denison prior to his conversation with Race Fisher, but he also communicated that intent to a third-party. As an ancillary consideration, Bane's credibility is also at issue here since the record indicates that, contrary to what he told Freestone, he did not begin working in the oil fields the following week.[20] However, even if I were to accept Bane's statement that Freestone misunderstood his words during the follow-up

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[20] I note that the ALJ in Bane's Social Security Administration case also noted credibility issues after finding that Bane was attempting to claim both disability benefits and unemployment benefits concurrently:

> Although the claimant alleged total disability beginning in January 2010, he collected unemployment benefits until at least the second quarter of 2012. The Colorado unemployment insurance program is based on the principle that only those persons who are willing and able to work are entitled to unemployment benefits. It is reasonable to conclude that claimant would have been telling the State of Colorado that he was willing and able to work throughout the time period he was collecting unemployment benefits. This does not reflect well on his credibility.

(Ex. R–13, p. 7) (citations omitted)

checkup, Bane's in-court statement that "I was *planning* on applying for Newby Electric and *trying* to get a job there at the time [...] I was *planning* to go to work there —or *hoping*" implies, at the very least, an intention to leave Denison. (Tr.168:24–169:5) (emphasis added) In either case, Bane's intention to leave Denison is evident.

(3) The Second Conversation (January 18, 2010)

Although two conversations occurred between Bane and Race Fisher on January 18, 2010, Respondent notes that Bane only recorded what appears to be the second conversation.[21] In its post-hearing brief, Respondent argues that Bane's selectivity in not recording or, alternatively, not submitting the earlier conversation on January 18, 2010, between Race Fisher and Bane "necessarily raises significant issues as to Bane's overall credibility." (Resp't Post-Hearing Br. 9) I have taken this point into consideration in assessing the weight the audio recording deserves.

I nevertheless find the audiotape recording of the second conversation —a contemporaneous piece of direct, physical evidence—to be credible and objective. This audiotaped conversation, standing alone, does not support Denison's argument. While it is clear that there was much uncertainty that day —the phrase or a variant of "I don't know" was used 35 times —nothing in the recorded discussion directly supports Denison's theory that Bane initiated the conversation in which he said he wanted to quit earlier that morning. (Ex. B–19A; Ex. R–15) Bane stated at the hearing that "[a]t no time did I say I was going to quit because I knew I was in trouble and if I quit, or was fired, I believed that that would have cut me off from any further actions." (Tr.195:17–20) Consistent with this statement, the words "quit" or "resign" were never uttered by Bane, or any party, in the January 18, 2010, recorded conversation. (Ex. B–19A; Ex. R–15)

There is also no indication from the audiotaped conversation that Bane initiated the idea of leaving Denison. In fact, the audiotaped conversation suggests the opposite. While referencing the first conversation Bane had with Race Fisher that day, Bane told Sagrillo,

> I asked Race this morning and he says well what do you want done and I said well I don't know. I don't, I have no idea. And he says well, we can lay you off and I said well, that'd be all right. Lay me off and then *if I get better I come back*, if not, I go down the road and find another job [...].

(Ex. R–15, p. 2) (emphasis added) This suggests that Bane, while aware of the possibility that he might not be able to work at Denison if his health condition did not improve, hoped to go back to work at Denison if he recovered from his dust allergy. This implied possibility of a continued relationship with Denison is also supported later on in the recorded conversation. In response to

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[21] In addition to being recorded, the second conversation also involved Sagrillo as a participant in the discussion; whereas the first, unrecorded conversation that day appears to have only involved Bane and Race Fisher.

Race Fisher's statement that Bane would be laid off, Bane responded, "I'll keep in touch with you and tell you what [the doctors] say and whatever, you know." (Ex. R–15, p. 10)

However, Bane's statements in the audio recording also indicate that Bane had no objection to the layoff. In response to Race Fisher's statement that they would lay off Bane so he could sign up for unemployment and insurance benefits and focus on recovering from his illness, Bane responded, "Yeah. Well, we'll go with that. *That sounds as good as anything I can think of, so* [...] I don't know. *That sounds good to me. Well*[,] *I appreciate it.*" (Ex. R–15, p. 7, 9–10) (emphasis added)

(4) The Egnar Office Conversation (February 1, 2010)

Bane also surreptitiously recorded the conversation that took place on February 1, 2010, between Bane, MacKinnon, and Jim Fisher at the head office in Egnar, Colorado. (Ex. B–20A; Ex. R–16) While turning in his keys and requesting a "green card," a heated exchange ensued over whether Bane's allergic reaction to dust was contracted prior to or during his tenure at Denison Mines. (Ex. R–16, pp. 2–4) I note that Bane never challenged or expressed discontent with his layoff during this exchange despite having an opportunity to do so.

(5) Other Considerations

Bane's acceptance of the layoff option was also conveyed during the June 2012 MSHA investigation interview. In the interview, Bane stated, "I saw Race as I was coming to work and I asked him what are we gonna do about this situation here, he stated he could lay me off, I says [sic] alright that would be fine [...]." (Ex. R–23, p. 18, lines 24–26) When asked by Investigator Funkhouser if he "truly want[ed] to be laid off," Bane responded, "at the time I was ill and I hated to be there and ah I wanted an end to the situation, ah, I didn't really care if it was being laid off, being transferred, what I was trying, what I was hoping for was they to give me ah sick leave but they refused to." (Ex. R–23, p. 18, lines 34–39) Likewise, in response to Race Fisher's offer to lay him off, Bane wrote in his November 2011 personal notes that "[t]his was alright with me because I was still ill and didn't want to be around anything at mine [sic], as everything agrivated [sic] my condition." (Ex. B–18, p. 25) Based on these two sources, it is evident that Bane understood and accepted the layoff.

However, Bane appears to have changed his narrative during the period between filing his section 105(c) complaint with MSHA in June 2012 and the hearing in November 2015. In an email correspondence sent to FMSHRC on June 20, 2014, Bane wrote, "I never asked to be laid off. I went along with it because the only other options [sic] I had was to be fired. Federal sick leave was asked for and denied. They wouldn't change my position to one were [sic] I could work." (AR. "Bane Letter June 11, 2014", p. 2) During the hearing, Bane stated that he only accepted the layoff by Denison because his requests for medical leave or a workplace transfer were refused. (Tr.89:5–13, 92:14–25, 97:14–22, 121:22–25, 195:11–13)[22] In his post-hearing

[22] As outlined in great detail above, the medical evaluation and potential transfer clause in section 105(c) does not pertain to a uranium miner suffering from dust allergies. 30 U.S.C. § 815(c)(1). Additionally, although Bane frequently cited Denison's alleged failure or refusal to

brief, Bane reiterated his hope for medical leave and his having "no choice in the [layoff]." (Bane Post-Hearing Br. 1) What matters here, however, are Bane's intentions and thoughts at the time of the layoff, not years later in contemplation of litigation. Therefore, with regard to Bane's change in feelings regarding the layoff, I credit Bane's statements made closer in time to January 18, 2010.

In any case, it is not clear whether his requests for medical leave or transfer actually made their way to management. Bane testified that he asked Race Fisher for medical leave on one occasion. (Tr.93:5–7) Additionally, Bane stated that he had requested additional medical leave from Sagrillo, who, acting as an intermediary, asked management on Bane's behalf. (Tr.92:20–24) In his post-hearing brief, Bane wrote, "I gave the [doctor's] note to my supervisor Albert Sagrillo. He then tried to get management to change my work location, grant me sick leave, anything to keep me working until I became better [...] Albert Sagrillo had tried everything to keep me working but management refused." (Bane Post-Hearing Br. 1) This is corroborated by the audio recording from January 18, 2010, in which Sagrillo told Bane, "I asked [Race Fisher] about giving you a medical leave [inaudible] said couldn't do that." (Ex. R–15, p. 1) However, Race Fisher testified that he did not remember ever being asked about medical leave, (Tr.92:3–10, 93:11–17), and was not aware that Denison ever denied medical leave for Bane. (Tr.88:12)

As a general matter, I note Bane's continuous reliance on statements that Sagrillo allegedly made as an intermediary between Bane and Denison management. For example, although Bane alleges that he made complaints about being in dusty conditions to Sagrillo, he admitted at the hearing that he was not sure if Sagrillo actually conveyed the message to management. (Tr.90:22–24) Similarly, here, although Sagrillo stated in the recording from January 18, 2010, that he asked management for medical leave on Bane's behalf, I am hesitant to accept its veracity without reservation. Without Sagrillo to testify about what he told mine management in the days and weeks prior to the layoff, assuming that those conversations actually occurred, Bane's reliance on the unknown content of Sagrillo's conversations with upper management is insufficient to carry Bane's ultimate burden of persuasion. For this reason, I credit Race Fisher's testimony over Sagrillo's recorded statement, and find that there is no reliable evidence that medical leave was requested from management.

In addition to his medical leave claims, Bane alleges that Denison refused to grant him a transfer. He insinuated that this was out of line with Respondent's normal business practices, citing to another miner, Trent Davis, who was temporarily transferred for an occupational knee injury. (Tr.87:11–20) I have already disposed of this matter in the sections above. Nevertheless, even assuming that Bane did request a transfer and that it was communicated to management, it is not clear whether a transfer would have been realistically possible. Bane himself was unable to suggest an appropriate position that he could be transferred to. In the recorded conversation on January 18, 2010, Bane stated, "I don't, I don't have a clue what to do either, Al. There's, *I can't see that there's anything around here that you can't get in dust*

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grant him medical leave, the issue of whether Denison violated the Federal Family and Medical Leave Act, 29 U.S.C. § 2601, is outside the jurisdiction of this court.

'cause there's just dust everywhere." (Ex. R–15, p. 2) (emphasis added) Sagrillo was also unable to suggest a transfer post for Bane. In the same conversation, Sagrillo stated, "So, I asked well what am I going to do 'cause I don't know where to send [Bane] to what he can do and what he can't do [...] Everywhere you go. Can't go in that hole [inaudible] can't go in that [inaudible] over there 'cause [inaudible] there, that bother you." (Ex. R–15, pp. 1–2) The fact that neither Bane nor Sagrillo were able to suggest a place where Bane could be transferred where he would be able to continue to perform the essential functions of his job as an electrician supports the notion that a permanent transfer was not feasible. Indeed, during the two weeks that Bane was temporarily transferred away from the mine, Bane admits that he was unproductive and that he had a limited ability to perform the functions of his job. He described it to Inspector Funkhouser as a "dead time" in which he "kind of wandered around" looking for "odd little make work jobs." (Ex. R–23, p. 16, lines 12–15, 27–29) Bane's personal notes also state, "For about a week, I just hung out, helped mechanics, had no clear job duties." (Ex. B–18, p. 26)

I also note a glaring inconsistency between Bane's insistence at the hearing that he wanted medical leave or a workplace transfer and his statements and actions contemporaneous with the layoff. In response to Race Fisher's announcement that Bane would be laid off during the second conversation on January 18, 2010, Bane stated, "that sounds as good as anything I can think of [...]." (Ex. R–15, pp. 9–10) Bane had a second opportunity to challenge his layoff when he met with MacKinnon and Jim Fisher at the Egnar Office a few weeks later on February 1, 2010. Bane surreptitiously recorded that conversation as well. (Ex. B–20A; Ex. R–16) At no point in the recorded conversations on January 18, 2010, or February 1, 2010, did Bane mention the possibility of extra medical leave or a workplace transfer to Race Fisher, Jim Fisher, or MacKinnon. A reasonable person who did not want to accept the terms, particularly one who was knowingly recording the conversation, would likely take these opportunities to express opposition to being laid off or, at the very least, interject with a counter proposal. Instead, here, Bane appears to have been content with the layoff option and found it to be "as good as anything" he could think of.

For the reasons stated in the sections above —notably, Bane's representations to PA-C Freestone in conjunction with the pattern of inconsistencies between Bane's statements at hearing regarding his feelings about the layoff and his actions contemporaneous with the layoff—I find Race Fisher's testimony to be more credible. While I note that it is entirely possible that Bane did not explicitly use the words "quit" or "resign" consistent with his testimony, (Tr.195:17–20), I nevertheless find that he sufficiently expressed to Race Fisher his intent to leave Denison during the first conversation on January 18, 2010.

b. Bane's Communication was the Sole Motivating Factor in Denison's Decision to Lay Off Bane

Race Fisher testified that the decision to lay off Bane was motivated by Bane's communication about leaving. (Tr.109:1–3) In response to Bane's communication, and anticipating upcoming workforce reductions due to Denison being overstaffed, Race Fisher sought to add Bane to the layoff list so that Bane could collect unemployment compensation and have continued health insurance benefits under COBRA. (Tr.109:14–18, 176:11–12) Race Fisher testified that Denison was not producing a lot of uranium at the time, so it had to reduce costs steadily from the time they opened until closing up in October 2012. (Tr.176:25–177:5)

Consistent with this testimony, Bane's termination letter discussed "a continuing decline in commodity prices [...] and a need to reduce its work force." (Ex. R–5) After getting approval from Marsing and the Human Resources Department to add Bane to the layoff list, Race Fisher met with Bane and Sagrillo. (Tr.109:19–24) After discussing that Bane had been added to the layoff list, Bane stated, "I appreciate it." (Tr.110:4–5; Ex. R–15, p. 10)

The record supports Race Fisher's statements. According to Denison's termination records, on January 22, 2010, the day that Bane's termination was finalized, Mark Ward, an electrician helper, was also laid off. (Ex. R–8) On April 14, 2010, a few months after Bane was laid off, fourteen other employees were laid off. *Id.* Among those laid off was Lee, whom Bane had listed in his prehearing brief as one of the people responsible for his alleged discrimination. *Id.* On June 21, 2010, Marsing, whom Bane officially named as one of the people responsible for his layoff in his complaint to MSHA, was also laid off. *Id.* Jim Fisher, who was also officially named in Bane's MSHA complaint, retired on February 28, 2012. (Ex. R–4, p. 3) By mid-October 2012, the complex was shut down, and all remaining employees other than a few managers were laid off. (Tr.104:4–5) None of the retained miners were electricians. (Tr.104:15–16)

Notably, there is no credible indication in the record that Denison planned to terminate Bane at any time prior to his discussion with Race Fisher on January 18, 2010. On the contrary, during the two weeks immediately before Bane's conversation with Race Fisher, Denison had temporarily transferred Bane to work aboveground in compliance with PA-C Freestone's first doctor's note. This appears to be a good-faith effort to keep Bane at Denison, and directly conflicts with Bane's theory that Denison harbored ill-will towards him for his protected activities.

The most persuasive pieces of evidence —the contemporaneous note written by PA-C Freestone along with the recorded conversations with Denison management on January 18, 2010, and February 1, 2010— strongly suggest that Bane ultimately intended to leave Denison. Although Bane changed his position on how he felt about the layoff years later, his own contemporaneous, recorded statements from 2010, personal notes from 2011, and statements to Inspector Funkhouser from 2012 all indicate that he intended to leave, he communicated his intent to management, and he accepted the terms of the layoff. Finally, the record and credible evidence establish that Denison's decision to lay off Bane was motivated solely by Bane's representations to Race Fisher on January 18, 2010, that he was planning on leaving.

For the reasons stated above, I conclude that Denison would have successfully rebutted Bane's prima facie case.

VII. RESPONDENT'S AFFIRMATIVE DEFENSE

If the operator cannot rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity, it may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800; *see also E. Assoc. Coal Corp.*, 813 F.2d at 642–43 (applying *Pasula-Robinette* test). However, an operator's business justification

defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An asserted reason may be found to be pretextual "where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534. In the context of other federal discrimination statutes, "[a] Plaintiff may establish that an employer's explanation is not credible by demonstrating either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Turner*, 33 FMSHRC at 1073 (emphasis in original) (citations omitted).

A. Denison would have Laid Off Bane for the Unprotected Activity Alone

As discussed above, I find that Denison discharged Bane in response to Bane's decision to leave. However, even assuming that Denison was partially motivated by Bane's protected activities, there is sufficient evidence to find that Denison was motivated by Bane's unprotected activity and would have conducted the layoff for the unprotected activity alone. The unprotected activity in this case was Bane's representation to Race Fisher on January 18, 2010, that he wanted to leave Denison. It is reasonable that an employer mine operator would be willing to lay off an employee who directly expressed his intent to leave, especially if the employer was already anticipating workforce reductions.

Additionally, I find that Denison's reason for terminating Bane was plausible and not pretextual. First, although Bane and Race Fisher offered contradicting accounts of what was said during the first conversation on January 18, 2010, for the reasons discussed above, I credit Race Fisher's testimony that Bane communicated his intent to leave. Accordingly, I find that the proffered reason has a basis in fact. Second, Race Fisher credibly testified that he was motivated by Bane's communication on January 18, 2010, that he intended to leave. Additionally, Bane provided no credible evidence that Denison contemplated terminating his employment prior to communicating his intent to leave to Race Fisher. Accordingly, I find that the proffered reason actually motivated the discharge. Finally, I find that it is reasonable that an employer mine operator might lay off an employee who expressed an intention to leave. Accordingly, I find that the proffered reason was sufficient to motivate discharge. Given these findings —that the proffered reason had a basis in fact, actually motivated the discharge, and was sufficient to motivate the discharge —I find that Denison's reason for terminating Bane is plausible and not pretextual.

For the reasons stated above, I find that there is substantial evidence to support the plausibility of Denison's stated reason for discharging Bane.

B. Procedural Argument: Bane's Section 105(c) Filing was Untimely

Because Respondent ultimately prevails on the substantive merits of the case, I decline to address its procedural arguments that Bane's section 105(c) complaint to MSHA was untimely under the Mine Act.

VIII. CONCLUSIONS OF LAW

In conclusion, Bane failed to establish a prima facie case of discrimination under section 105(c)(3) of the Mine Act. Denison's stated reasons for discharging Bane were plausible and not

pretextual. Denison affirmatively defended its termination of Bane. Therefore, based on a thorough review of the record, I conclude that Bane failed to prove, by a preponderance of the evidence, that Denison discriminatorily terminated him in violation of section 105(c) of the Act.

IX. ORDER

Matthew Bane's complaint and this proceeding are **DIMISSED**.

Judge L. Zane Gill
Administrative Law Judge

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