FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of SEAN MILLER, Complainant. v. SAVAGE SERVICES CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-404-DM MSHA Case No. RM-MD-14-01 Mine: Freeport-McMoRan Morenci Mine ID: 20-00024

DECISION ON LIABILITY

Appearances: Jeannie Gorman, Esq., Department of Labor, Seattle, WA, for Complainant
Daniel Wolff, Esq., Crowell & Moring, Washington, DC, for Respondent

Before: Judge Moran

This discrimination proceeding is before the Court under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012) ("Mine Act"). In this case, the Secretary of Labor and Sean Miller ("Complainant"), with Mr. Miller being a miner within the meaning of section 3(g) of the Mine Act, allege that Miller's employer, Respondent Savage Services Corporation ("Savage"), an operator as defined in section 3(d) of the Mine Act, terminated him in response to his protected activities as a miner. For the reasons that follow, the Court finds that Miller engaged in protected activity and that Savage terminated him because of such activity. The Court also finds that Savage did not establish a credible affirmative defense that it would have taken the adverse action for unprotected activity alone.

I. INTRODUCTION

This action began on October 21, 2013, when Miller filed a discrimination complaint with MSHA.[1] The testimony and exhibits referred to below were introduced at a hearing in Safford, Arizona, on June 10 and June 11, 2014. The Secretary contends that Miller's employment was terminated by Savage for engaging in protected activity, which was composed of several safety complaints to the operator, a hazard complaint to MSHA, and a prior

[1] On January 21, 2014, the Secretary filed a Complaint, followed by an Amended Complaint, a Second Amended Complaint, and, finally, a Third Amended Complaint on May 21, 2014. Sec'y's Third Am. Compl. at 2.

discrimination complaint to MSHA. In its defense, Savage argues that it fired Miller for violating "an express company policy as stated in the employee handbook," Answer to Second Amended Complaint 4, namely, that he was absent in violation of the no call/no show rule contained in the Employee Handbook. *See* Ex. R-1 at 35-36.

The Commission reviews 105(c) claims under the *Pasula-Robinette* framework. The framework requires a miner to "establish[] a prima facie case of discrimination by showing (1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of persuasion on these issues. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980). To rebut this *prima facie* showing, the operator may show "either that no protected activity occurred or that the adverse action was in no part motived by protected activity." *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). If the operator cannot rebut the *prima facie* case, it may still have an affirmative defense if it can prove "that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.* at 329. Savage has the burden of proof on its affirmative defense, and it must prove this defense by a preponderance of the evidence. *Pasula*, 2 FMSHRC at 2799-800.

In the complaint, the Secretary identifies several instances of protected activity, which he asserts led to Miller's termination. Savage does not dispute that Miller engaged in protected activity. Post-Hr'g Br. of Resp. Savage Servs. Corp. 18 ("Savage Brief"). Furthermore, because the adverse action in this case was termination, Savage does not dispute that an adverse action occurred. It instead argues that the Secretary failed to prove that Miller was terminated *because of* his protected activities.

At the hearing, four individuals testified for the Complainant: Sean Miller, the Complainant; David Funkhouser, an MSHA Investigator; Brian Hancock, a mechanic employed contemporaneously with Miller at Savage; and Kenneth Valentine, an MSHA Special Investigations Manager. Three individuals testified for the Respondent: Matthew Wheeler, a Savage Supervisor; Chris Thomas, a Savage Human Resources representative; and Richard Bjerke, another Savage Supervisor. In discussing the testimony and evidence from the hearing, the Court made determinations of credibility and relevance. This decision is also made from full consideration of all contentions made by the parties in their post-hearing briefs. Any omission of discussion of particular testimony or evidence should not be interpreted by the parties as a failure to consider the entire record.

II. FINDINGS OF FACT

Savage Services is a supply chain organization of roughly 3100 employees with operations in the United States, Canada, and Saudi Arabia. Tr. 583. It has four business groups: rail industrial chemical logistics; oil and gas midstream; energy and oil field services; and energy and power plant. Tr. 584. Savage's operation at the Morenci mine in Morenci, Arizona, is part of the energy and power plant business unit. *Id.* Among Savage's roughly 2900 employees in the United States, approximately 800 to 900 are truck drivers. Tr. 585.

Sean Miller was employed by Savage Services as a truck driver from November 2012 until September 3, 2013, the date he was terminated. Tr. 18; Tr. 515. Miller received his Commercial Driver's License in 2005, and, prior to his time with Savage, had driven for several companies. Tr. 60-61. For Savage, Miller would transport molten sulfur from Safford, Arizona, to the Morenci mine, a distance of approximately 57 miles each way, up to three times per day. Tr. 20. Miller was also required to perform twice-daily safety inspections of his truck, one at the beginning of his day ("pre-trip inspection"), and one at the end of his day ("post-trip inspection"). Tr. 19. The Secretary and Miller identified six safety complaints that he made in the months prior to his termination. Tr. 21.

A. The Safety Complaints

Miller's first complaint was made on January 30, 2013, when he discovered, during his pre-trip inspection of a trailer which had been newly assigned to him, that "the brakes were completely . . . gone, well beyond repair." Tr. 29. Miller had used that trailer previously and, according to the mechanic, Brian Hancock,[2] had talked to his first-line supervisor, Isaiah Krass, several times about the brakes on that trailer. Tr. 355.

In making his safety complaint about the brakes, Miller also texted a picture of the condition to Brian Cotton, the General Manager and VP of the sulfur transportation unit.[3] Tr. 30, 461-62. Although brake wear is an ordinary occurrence for Savage because their trucks run 24/7, Tr. 611, the brake pad from this truck was worn to such an extent that the rivets that hold the pad onto the plate were protruding past the pad itself. Tr. 30-31, 355; *see also* Ex. C-9 at 17. In fact, the pads were so far gone that the metal-to-metal contact ruined the brake drums, which had to be replaced. Tr. 32; *see also* Ex. C-9 at 14.

Typically, if a driver has a problem with brake pads, he would take the truck out of service by simply notifying the mechanic about the problem, Tr. 485, but, in addition to texting Mr. Cotton, Miller took one of the pads to his immediate supervisor, Isaiah Krass,[4] who said that

[2] Mechanic Hancock worked for Savage from August 2012 to August 2013. Tr. 349. He was initially hired as a truck driver, but almost immediately was reassigned as a mechanic. *Id.* A month into his job, he was a "supervisory truck foreman [/] mechanic." *Id.* At various times, for short periods, Hancock filled in as a supervisory foreman. Tr. 351.

[3] Throughout Miller's time with Savage, Cotton was located in Houston, Texas, and was Miller's third-line supervisor. *See* Tr. 462. He was present at the hearing but did not testify.

[4] Isaiah Krass was listed as one of Savage's witnesses, but did not testify. The Secretary would have the Court draw an adverse inference that the testimony of Krass and Cotton would have been detrimental to Savage's defense due to Krass's inclusion as a witness and Cotton's presence in the courtroom. Sec'y Br. 26. Savage candidly responds that it had "no obligation . . . to call a single witness," but that "both Cotton and Krass would have had nothing to add, and calling them would have unnecessarily prolonged the hearing." Resp. Br. of Resp't Savage Servs. Corp. 4-5 ("Savage Response"). The Court agrees that Savage had no obligation to call any witnesses, much less any particular individual. That said, it is noted that Miller made several safety complaints to Cotton, and that Krass, as Miller's first-line supervisor, potentially could have

"[t]hey needed the truck," which Miller took to mean that he was to continue driving the vehicle without getting the brakes repaired. Tr. 33, 39, 356.

Miller made his second complaint, regarding an air leak in his brakes, on March 1, 2013. Tr. 251. During pre-trip and post-trip inspections, drivers are required to perform a seven-step air test in which the driver turns the engine on, builds pressure in the brakes, turns the engine off, and holds the brakes. Tr. 42. If the brakes lose too much air, the truck may lose pressure while driving and the brakes will fail. Tr. 42. In this instance, the tractor had severe air leaks and was losing air even when Miller was not applying pressure. Tr. 42-43. Upon finding the safety issue, Miller contacted Krass and Hancock, and refused to drive the truck. Tr. 43-44. Hancock "tagged out"[5] the truck, and Miller drove another truck that shift. Tr. 45. The defects on the truck were such that they had probably existed for a longer period of time. Tr. 252.

Miller's third complaint, which occurred on March 19, 2013, concerned bald trailer tires. Tr. 34. All eight tires were spent, and some were showing the metal radial cords normally covered by the rubber of the tire. *Id.* Upon discovering the condition, Miller told mine management[6] about the problem, even though he could have just taken the truck out of service with the mechanic. Tr. 38, 485. Miller refused to drive the vehicle. Tr. 40.

The fourth, and most contentious, safety complaint occurred on April 28, 2013. Tr. 252. On that day, Miller was making a run and, after loading his truck and getting weighed at the weigh-out gate, he learned that his truck was overweight. Tr. 47-48. The truck that he was driving was a rental, and the tractor was heavier than those normally used by Savage. Tr. 155. Because he was overweight, he was not allowed to leave the mine. Tr. 154. So, he returned to the nearby Savage Yard and called his supervisor, Richard Bjerke. Tr. 157.

Bjerke gave Miller two options: either wait for Krass to offload some of the material from his trailer, or disconnect from the trailer and use one of the other Savage trucks. Tr. 158. It would take Krass an hour and a half to get to Miller and offload the material. Tr. 624. Miller originally chose to have Krass offload the material, out of fear that the trailer, once disconnected from the tractor, would sink into the ground, but, after talking with another driver, he changed his mind and chose to use a new tractor rather than offload the material. *Id.* Bjerke, in response, started up the replacement truck while Miller unhooked the rental truck to hook up the trailer to the new truck. Tr. 626. Miller did not do a pre-trip inspection before driving the truck, but he said that he could not do a full pre-trip because there are parts of it that must be done before starting the truck. Tr. 172.

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provided enlightening testimony, especially regarding the five (out of six) safety complaints that occurred prior to Wheeler's installment at the Morenci Mine. Those observations aside, the Court will not speculate as to why these sources of possible information did not testify, and will not draw the adverse inference requested by the Secretary. This decision is based solely on the evidence of record and the Court's conclusions therefrom.

[5] "Tagging out" is a term describing when an employee literally puts a tag on the steering wheel of the truck and takes the truck out of service. Tr. 44.

[6] The record does not disclose which management individuals were informed.

Miller drove the truck to the scales[7] to weigh-out, but had issues on the way and called Hancock, the mechanic, to ask what was wrong with the truck. Tr. 55. The replacement truck had three bad tires and no highway horn, according to Miller. Tr. 174-75. Hancock, however, said that the truck was DOT legal, even though there was a smooth spot on a tire and the air horn did not work. Tr. 334. He did not tag out the truck before he left the Savage Yard earlier that night, but thought that someone would have called him before taking the truck out of the garage. Tr. 335. The operating procedure for taking trucks from the shop changed often, but while Hancock was at Savage, if a truck was in the shop, nobody would touch it except for Hancock. Tr. 358-59. Miller and Hancock disagreed about whether Hancock told Miller to do a pre-trip. *See* Tr. 176, 428. Miller told Hancock that the truck was BO,[8] and that he was "sick of Savage's bullshit." Tr. 375.

After talking with Hancock, Miller called Bjerke and asked him why he had dispatched a BO truck. Tr. 631. Bjerke told Miller that the truck was not BO'd at the time, and that's why drivers do pre-trips — to check for the types of problems that Miller found. *Id.* He then told Miller to wait for Krass, who would help get him moving. *Id.* Miller then called back and screamed at Bjerke, calling him and the company incompetent. *Id.*

Bjerke called Cotton to discuss the call, and Cotton and Bjerke decided to put Miller on a last chance agreement for being disrespectful. Tr. 632. However, after talking to Miller, they agreed to set the agreement aside. *Id.* After the April 28th incident, Bjerke testified that he and Miller got along fine.[9] Tr. 643. Accordingly, for the purposes of this decision, the last chance agreement became a non-issue.

Miller made another safety complaint on June 21, 2013. Tr. 178. He was driving on his route, and had to take a detour which involved a sharp turn that required him to drive on the berm. Tr. 60. There were flaggers, but he was three to four feet up the berm. *Id.* Miller called Cotton and reported the issue of the excessively sharp turn. Tr. 62. Bjerke called Miller back and left a voicemail telling Miller to park the truck if he felt unsafe. Tr. 182. Miller parked the truck, but the three other trucks made the turn and continued along the route. Tr. 62. This condition was on Freeport McMoRan property, not Savage property. Tr. 178.

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[7] The weigh-out scales are located approximately half a mile from the Savage Yard. Tr. 487.

[8] "BO" stands for "bad order," which means that the truck either was taken out of service or should be taken out of service. Tr. 631.

[9] Miller also made a hazard complaint to MSHA regarding this incident, but MSHA made no findings. Tr. 636. During the testimony about this instance of protected activity, the parties argued at length about whether Savage orchestrated Hancock's absence during the hazard inspection by sending him to safety training in Salt Lake City and whether Savage forged an email from Hancock. The Court was not convinced by the Secretary's arguments, but the Court finds that the conflicting versions of this side issue are not critical to the core determinations in this case. Consequently, as discussed more fully, *infra*, even if the Court were to find that Hancock's recollection on this was faulty, his overall credibility was intact.

Miller made his final complaint, this time concerning a leaky hose, on July 24, 2013. Tr. 184. When his truck was being loaded for the first load of that night, Miller noticed that molten sulfur was leaking onto his truck and pooling on the ground. Tr. 66. Miller asked the lead operator,[10] Javier Lopez, to stop loading the truck, but he would not. Tr. 68. Lopez was the crew leader and lead safety specialist on the shift. Tr. 490. When Miller called his supervisor, Matt Wheeler,[11] to make the complaint, he said that they were to continue loading the vehicle. Tr. 68. Wheeler called Lopez following his conversation with Miller. Lopez told Wheeler that he had wrapped the hose and put a "containment bin" under the leaking hose and felt it was safe. Tr. 490. Wheeler called Miller back and said that they would not be stopping production. Tr. 68. After the truck was loaded, Miller and others cleaned off the truck, and he continued on his route. *Id.*

Molten sulfur can be dangerous, especially when the sulfur is pressurized, as it is in the hoses used to load Savage's trucks. Tr. 70-71. Under pressure, the lead operator can get splashed.[12] Tr. 71. Pinhole leaks in the hose can develop near the end of a hose's three-to-four-month lifespan, and Savage replaced this hose the following morning. Tr. 498.

Miller made safety complaints in a different manner than other drivers. As Savage mechanic Brian Hancock testified, "[h]is safety complaints were above and beyond other safety complaints. Most drivers would complain. . . . But Mr. Miller was adamant to make sure that his safety issues were recognized by me and that they would be fixed." Tr. 353. Miller also took trucks out of service three times as often as other drivers.[13] Tr. 354. Whereas Miller "wanted to

[10] The lead operator is the person who loads the trucks with molten sulfur. Tr. 66.

[11] Matt Wheeler became the operations manager for Savage Services at the Morenci Mine in July 2013. Tr. 459. He has a Commercial Driver's License, which he obtained in 1990. Tr. 460. He was hired by Savage Services as a truck driver in March 2005, then, in June 2009, he was transferred to the mountain business unit in Price, Utah, to work as a hire and training manager. Tr. 461. After Price, he was transferred to an Elko, Nevada, startup operation, in which he had his first title of operations manager. Tr. 461. He was there until his current job at the Morenci mine.

[12] Wheeler testified that upon escaping the hose, molten sulfur is no longer dangerous as it solidifies and cools upon hitting the air. Tr. 496. Sulfur, however, has a melting point of 119.6 °C or approximately 247 °F, *Periodic Table of Elements: LANL*, Los Alamos National Laboratory, http://periodic.lanl.gov/16.shtml, and Miller stated in his interview that molten sulfur is kept at 380 °F. Ex. C-1 at 10. The Court does not know if Miller is accurate, but in order to remain "molten," the sulfur must be kept above its melting point. Consequently, at some point before reaching ambient temperature, this sulfur, due to its scalding temperature, could cause injury. More importantly, safety complaints need only be based on a "good faith, reasonable belief that a hazard exists"; they need not be scientifically accurate. *McClanahan v. Wellmore Coal Inc.*, 17 FMSHRC 1773, 1785 (Oct. 1995) (ALJ) (citing *Robinette*, 3 FMSHRC at 810-12).

[13] This is an appropriate point for the Court to note that it found Brian Hancock to be a credible witness for the Secretary and Miller. Hancock's testimony was instructive in several aspects. It demonstrated that Miller's safety complaints were genuine and, while not essential to support the

make sure that the truck he was driving . . . was safe[, o]ther drivers would just ask to get it fixed. If it didn't get fixed, they didn't really care." *Id.*

B. Other Protected Activity

The Secretary identified two other instances of protected activity: a hazard complaint and a prior discrimination complaint, both of which were made to MSHA. The hazard complaint made by Miller arose out of the April 28th "replacement truck" incident. Tr. 178. MSHA Inspector Larry Lunsford conducted the hazard investigation, and found that there was no violation because "the vehicle in question never left the mine site on the date of the complaint." Ex. R-6.

The prior discrimination complaint was filed by Miller in May 2013. Special Investigator ("SI") David Funkhouser, who investigated the current complaint and testified in this discrimination case, also investigated the prior complaint, which was designated by MSHA as Investigation Case No. 13-08. Tr. 241. Although SI Funkhouser believed that the prior complaint was meritorious, on August 22, 2013, MSHA declined to pursue that first complaint.[14] Tr. 246; Ex. C-6.

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good faith belief aspect of safety complaints, Miller's complaints were also founded in fact. Further, Hancock's testimony established that Miller's complaints were of a different order than the routine safety issues raised by other drivers for Savage. In all these regards, the Court, upon a close evaluation of Hancock during his testimony, concluded that he was an extremely credible witness. In tacit recognition of the adverse impact Hancock's testimony had on Savage's case, attempts were made by it to challenge his credibility. Those efforts began during the hearing and escalated with Savage's post-hearing motion to supplement the record. One of these avenues involved Mr. Hancock's denial that he sent an email that attached the last two documents of Exhibit C-4, and Mr. Bjerke's testimony that Hancock did send those directly to him. As the Court stated during a conference call post-hearing on this issue, that matter is collateral. Consequently, Respondent had to take Hancock's denial, with the subject of whether the issue impacted his credibility left up to the Court. Other attempts to challenge Hancock's credibility were of the same ilk. As such, they were not effective in supporting Savage's goal of undermining the Court's determination of that witness's credibility. For example, Savage argues that Hancock claimed to have had *one* phone conversation with Miller on the evening of April 28, 2013, but maintains that there actually were *two* conversations. Savage believes that Hancock's claim that there was but one call, not two, should impact the Court's credibility assessment of him. The Court does not agree.

[14] Miller has filed a separate complaint appealing MSHA's determination, which is before this Court under Docket No. WEST 2014-7-D.

C. Miller's Termination

In August of 2013, Miller asked Wheeler if he could have a few days off at the end of the month. Tr. 76-80. Wheeler told Miller to fill out a leave-request form, on which Miller requested three days off, indicating "Doctors" as the reason. Tr. 77; Ex. C-5 at 4. A doctor's appointment was a valid reason for requesting leave, as indicated on the "Time Off Request" form. *See* Ex. C-5 at 4 (providing "[p]lease use the following space to provide necessary information for requested days off, such as a critical appointment you cannot miss or reschedule (court, doctor, etc.)"). Miller's request for leave was approved by Krass. Tr. 505. Wheeler did not review or approve it. Tr. 505-07. Miller took his approved leave August 26th through 28th, 2013. Tr. 87.

The afternoon of August 28th, Miller called Wheeler, telling him that he would not be returning to work on August 29th because his doctor had changed his medication and he needed time to adjust to it. Tr. 81-83. During this phone call, Miller did not tell Wheeler when he would be back at work or how much time he thought he might need. Tr. 83. On the call, Wheeler requested a doctor's note from Miller. Ex. C-1 at 7. Miller stated that Wheeler said he needed the medical release as soon as possible, and Miller did not see the doctor again until September 2nd, at which time he got the medical release. *Id.* Miller maintains that he interpreted this request as requiring a doctor's note upon his return to work, noting that other miners had been allowed to extend their leave with a phone call in similar situations. *Id.*; Tr. 231-32. This expectation would have been consistent with the experiences of other miners interviewed during the investigation, who, according to Special Investigator David Funkhouser, were allowed to extend their leave with a telephone call to their supervisor and provide a doctor's note upon their return to work. Tr. 277. On the other hand, Wheeler testified that he asked Miller to provide a doctor's note by 4 p.m. on August 29th and he maintained that Miller agreed to do so. Tr. 504; Savage Br. 8. Miller did not bring a doctor's note on August 29th, nor did he show up for his shifts on August 29th, 30th, and 31st. Tr. 218-19, 509-10.

During this time, Wheeler stated that he called Miller once on Friday, August 30th, the day before the Labor Day weekend. Tr. 509. He asserted that he did not leave a message; instead, he let the phone ring three times and hung up.[15] Tr. 510. Wheeler stated that this was his usual practice, and that as a rule he never left messages, as, in his view, they are a waste of time. Tr. 510.

Savage's internal business records state otherwise, contradicting Wheeler. Specifically, they state, "9/3 - supv & manager left messages scheduled to work, no medical note received[.] [C]alled at start time, not coming in." Ex. C-5 at 3. No Savage witness testified that messages were ever left, or that two people made calls. Furthermore, Miller asserted that he did not miss a call nor did he receive a message from Wheeler. *See* Tr. 273. Given the discrepancy between Wheeler's account, in which he asserts that he called Miller on August 30th but did not leave a voicemail, and Savage's business records, which state that Wheeler and another person left

[15] During the hearing, the Secretary produced Miller's phone records, which did not show a phone call from Wheeler on August 30th. Savage argued that phone calls where no message is left and that are not picked up may not show up on the telephone bill. This disagreement is not important.

messages on *September 3rd*, the Court credits Miller's testimony and finds that Wheeler did not in fact call Miller.

Wheeler stated at the hearing that he made the decision to terminate Miller on the morning of September 3, 2013. Tr. 550. He spoke with Brian Cotton and Chris Thomas[16] about his decision because he wanted to be certain that his decision was consistent with Savage policy. Tr. 512. Thomas testified that Wheeler's determination was consistent with company policy. Tr. 591. He also stated that the discussion was "*solely around him not showing up to work*." Tr. 592 (emphasis added). Savage's position is that Miller had unexcused absences for the previous three days he had been scheduled to work, in violation of Savage's no call/no show policy, which states:

> If you are absent two consecutive shifts *without calling to report your absence directly to your supervisor*, we will assume you have abandoned your job. If you are having trouble seeing the importance of being to work regularly and on time, we ask you to consider your situation very carefully and to make a commitment to meet future work schedules as a condition of continuing to be a part of the Savage work team.

Ex. R-1 at 36 (emphasis added). Thomas admitted at the hearing that no provision in Savage's employee handbook requires an employee to submit paper documentation for an absence. Tr. 594. Under Savage's "coaching" model of discipline, as opposed to a "progressive discipline" model, "depending on the circumstances, an infraction might result in anything from mild counseling to termination under a one-strike-you're-out philosophy." Savage Br. 10.

When Miller called on the afternoon of September 3rd to tell Wheeler that he would be returning the work the following evening, Wheeler informed him that he was terminated because he was not a "good fit" with Savage's culture. Tr. 515. An internal Savage document states that Miller was terminated due to "cultural fit," *see* Ex. C-5 at 1, and Wheeler told MSHA that what he meant was that "our policy is that an absentee without a call-in, a no-call, no-show after three days is considered a quit." Ex. C-2 at 7. Wheeler stated that Miller's August 28th call did not meet the definition of "call" for the no call/no show policy:

> [H]e just said he wasn't coming in and he had been taken out of work by a doctor. And then I said I need the note. And until I had that note, it's just a call saying, he's not going [to] be there, with no end date, with no details.
>
> It doesn't give me anything to use when I'm discussing the [molten sulfur] levels with the customer. It's part of the policy. I have to — everybody's under this policy. If I let him just go absent without calling or showing up or communicating why he's gone, then that affects everybody.

Tr. 518. According to Wheeler, Miller insisted on the September 3rd call that Wheeler tell him why he was being fired. Ex. C-2 at 8. Wheeler stated that "at that point [Miller] was pretty irate

[16] Chris Thomas, at the time of the hearing, was a "VP of People Services" for Savage, which is equivalent to a human resources department. Tr. 580. He worked out of Savage's Salt Lake City headquarters and had held his title for over two and a half years. *Id.*

and [Wheeler] didn't want to get into a yelling match with him on the phone," so he did not give any more specific explanation than that Miller "[didn't] seem to be a good fit with the Savage culture." *Id.* He never told Miller that the basis for his termination was the no call/no show rule.

D. The MSHA Investigation

David Funkhouser was the MSHA investigator for Miller's complaint. He has been with MSHA since 1997, when he joined as a mine inspector. Tr. 236. From 2000 to 2007 he did special investigations in addition to his normal duties, and in 2007 he began doing special investigations full time. *Id.* He reports to Ken Valentine and is headquartered in the Salt Lake City field office for metal/nonmetal mines. *Id.* As a special investigator, he conducts Section 105 and Section 110 investigations. *Id.* In total, Funkhouser has done 70-75 investigations for discrimination complaints. Tr. 238. He made a recommendation of discrimination in this case. *Id.*

Funkhouser also investigated the previous discrimination complaint by Miller, 13-08, in which he interviewed Richard Bjerke and Isaiah Krass. Tr. 241. For the prior complaint, Funkhouser's investigation identified four protected activities by Miller, each present in this case: the January 30th incident, the March 1st incident, the March 19th incident, and the April 28th incident. Tr. 242-45. Funkhouser had recommended that the previous case go forward, but someone above him turned the case down. Tr. 246. The adverse action in the earlier complaint was harassment, not termination. Tr. 247.

The four 13-08 incidents dealt with taking a truck out of service. Tr. 248. Funkhouser found that Miller went beyond the pre-op requirements in those incidents, including during the January 30th brake shoe incident in which Miller took it off, showed it to Bjerke and Krass, and sent a photo of it to Cotton. Tr. 249. Funkhouser said that it is uncommon for a driver to go beyond pre-op and post-op requirements, Tr. 253, yet Miller did that in several instances.

Regarding Savage's reason for firing Miller, Funkhouser concluded that Respondent gave conflicting reasoning. First, the termination form stated that the reason for his termination was for "cultural fit." Tr. 263; Ex. C-5 at 1. However, Wheeler, in his interview, told Funkhouser that Miller was fired for being a no call/no show for three days. Tr. 264. In the face of that claim, Funkhouser saw that on the absentee calendar and related comments, Ex. C-5 at 2-3, Miller had approved time off at the beginning, then, as he should have done, Miller called to say that he would not be in on the 29th and subsequent days. Tr. 266. Yet, both the 29th and 30th were marked "no call, no show" on the comments page of Miller's absentee calendar. *Id.*; *see* Ex. C-5 at 3. Wheeler said that he had not seen Miller's time off for the doctor, so from his perspective, Miller's request was a last minute request over the phone. Tr. 269.

Funkhouser was also interested in the connection between the Secretary's notification in the 13-08 matter that he would not be bringing charges and the timing of Miller's termination. The letter declining to proceed on Miller's first complaint was dated August 22, 2013. Tr. 274; Ex. C-6 at 1. MSHA's district office, located in Salt Lake City, received a copy on August 27, 2013. Tr. 275. Funkhouser stated that "we [MSHA] always have a concern that once an operator[] [is] notified of a negative finding[], that . . . they don't perceive it as justification to

get rid of somebody." Tr. 276. During Wheeler's interview in October, there was an indication that Savage had received MSHA's August 22nd letter, but Funkhouser was unable to determine exactly when it was received. Tr. 275. Funkhouser assumed that Savage, headquartered in Salt Lake City like MSHA's district office, received the letter on the 27th. *Id.* Funkhouser considered Miller's original complaint to be protected activity, and he did not want the company to view the negative determination as reason to discharge Miller. Tr. 276.

Funkhouser also interviewed other drivers to see how they were treated with respect to medical leave. They informed him that if they needed more time off than the initial request, they were asked to provide a doctor's note *once* they returned to work. Tr. 277.

Funkhouser thought that Miller had met the policy in the employee handbook, and that, in addition to the medical leave request, he had been treated differently than other employees prior to that. Tr. 279. In a prior incident, Miller ran into a fuel island, denting a rim on his truck and for that he was issued a counseling statement. Tr. 281. In contrast, others involved in a spillage incident on a highway received a safety performance interview. *Id.* Miller's counseling statement also said that the matter would be reviewed at a later date; no other piece of discipline reviewed by Funkhouser had that "subsequent review" requirement. Tr. 289.

On cross-examination, Funkhouser stated that he believed Wheeler was influenced by others when he made the decision. Tr. 307. Funkhouser also interviewed two other miners. He did not ask for records or documentation because then those interviews would not be confidential. Tr. 318. Even without their statements, Funkhouser would have submitted the case as discriminatory, albeit slightly less enthusiastically.[17] Tr. 321.

III. DISCUSSION

A. The Secretary's *Prima Facie* Case and Savage's Rebuttal

The Secretary clearly met his burden of establishing a *prima facie* case of discrimination. He contends that Miller was targeted not simply for engaging in protected activity, but also for the manner in which and frequency with which he did so. Noting that Miller engaged in several instances of alleged protected activity, the Secretary identified six safety complaints, in addition to the hazard complaint and an earlier complaint of discrimination made by Miller. Sec'y of Labor's Closing Br. 16 ("Secretary Brief"). The Court finds that each of Miller's six safety complaints constituted protected activity because they were based on Miller's "good faith,

[17] During cross-examination Funkhouser seemed to agree that Savage's application of its no call/no show policy was not unreasonable, "*to a guy who's missed three days in a row*." Tr. 324 (emphasis added). Savage's counsel, however, then tried to move the question from the abstract to the concrete, by tying Miller's missing three days in a row as an example of such a "not unreasonable" application. Thus the testimony was unclear if Funkhouser was referring to the specific circumstances of this case, or to a situation in which Miller or another employee was absent for three days in a row without calling in to report their absence. The Court would add that, apart from the impossibility of interpreting Funkhouser's response to the vague question, the "not unreasonable" application was not within the four corners of the policy and, in any event, Miller's action cannot be categorized as a "no call."

reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812. The only instance in which Savage disagreed with Miller's opinion of a safety hazard was the July 24th incident involving a hose leaking molten sulfur, but the Court finds that Miller reasonably believed that leaking molten sulfur was hazardous. Miller's hazard complaint arising out of the April 28th replacement truck incident and his prior discrimination complaint, both of which were made to MSHA, were also protected activity. That Miller suffered an adverse employment action, termination, is not disputed by Savage.

The Commission has stated that "[d]irect 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). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.* Regarding the analysis of Savage's motivation for terminating Miller, the Court will analyze each of the *Chacon* factors and Savage's rebuttal testimony and evidence.

1. Knowledge of Protected Activity

Miller made six safety complaints directly to Savage management. Savage knew that Miller filed the hazard complaint with MSHA following the replacement truck incident. *See* Tr. 664-65, 668-69. Regarding MSHA's declination of Miller's previous discrimination action, 13-08, a reasonable inference can be drawn that Savage knew of it prior to firing Miller since the determination letter was sent 12 days before the termination, and MSHA's office in Salt Lake City, the same city where Savage's headquarters is located, received the letter on Tuesday, August 27th, a week before Miller was fired. However, this decision does not depend upon this inference to reach the conclusion that Savage had knowledge of the six safety complaints. Rather, the inference merely adds to that conclusion.

Savage failed to rebut the Secretary's knowledge showing. First, Wheeler admitted knowledge of both Miller's hazard complaint to MSHA arising out of the April 28th replacement truck incident and Miller's prior discrimination complaint to MSHA. Tr. 480. He also admitted that he knew, generally, about prior safety complaints. Tr. 483. Savage's argument that Wheeler did not know of some of Miller's protected activity because he was not working for Savage at the time is unpersuasive. The Commission has long held that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984); *see also Wiggins v. Eastern Associated Coal Corp.*, 7 FMSHRC 1766, 1771 (Nov. 1985); *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (Mar. 2000) (quoting *Metric* for the same proposition).

Significantly, Miller made his complaints to several people, all of whom were still employed at Savage when Miller was fired. During the January 30, 2013, safety complaint, Miller spoke with Isaiah Krass in person about the issue and texted Brian Cotton a picture of the condition. Tr. 30, 33. On March 1, 2013, Miller told Krass that his tractor had severe air leaks. Tr. 43. Miller made his March 19, 2013, complaint to mine management "[b]y phone and face-to-face." Tr. 38. Although it is unclear from the testimony whom Miller made this complaint to, mine management at that time consisted of Krass, Bjerke, and Cotton. Miller made his fourth complaint, occurring on April 28, 2013, to Richard Bjerke, Tr. 631, and he made his fifth complaint on June 21, 2013, to Cotton, although Bjerke called Miller back about the incident. Tr. 62, 182. Miller's sixth and final safety complaint was made on July 24, 2013, directly to Wheeler. Tr. 68. Bjerke stated at the hearing that he knew, at the time of the hazard inspection following the April 28th incident that Miller was the one who made the complaint. Tr. 668-69. Finally, Bjerke and Krass were both aware that Miller had made his prior discrimination complaint.

In sum, Miller made his safety complaints to Bjerke, Krass, and Cotton over the course of his time at Savage, and each of those three people was still employed by Savage when Miller was fired. Wheeler interacted extensively with all three of these management personnel in the course of his employment with Savage. As the Secretary aptly characterized the subject, citing Wheeler's testimony extensively,

> [i]nformation flowed freely between the managers. Tr. at pp.: 462: 4-9 (Mr. Wheeler spoke to Mr. Cotton daily initially, down now to every other day); 479: 18-24 (Mr. Wheeler spoke to Mr. Bjerke upon his arrival at Morenci); 480: 5-17 (Mr. Bjerke informed Mr. Wheeler of Mr. Miller's [prior] discrimination complaint, EEOC complaint and investigation); 482: 16-23 (Mr. Wheeler spoke with Messrs. Cotton and Thomas before terminating Mr. Miller); 501 (Mr. Bjerke told Mr. Wheeler about Mr. Miller's complaint; Mr. Thomas told Mr. Wheeler about MSHA' s findings regarding Mr. Miller's complaint); 512: 11-16 (Mr. Wheeler spoke to Messrs. Cotton and Thomas before terminating Mr. Miller); 516: 15-16 (Mr. Krass told Mr. Wheeler about Mr. Miller's leave status); 518: 25 to 519: 4 (Mr. Wheeler confirms he spoke with Messrs. Cotton and Thomas before terminating Mr. Miller); 548: 22 to 549: 6 (Mr. Bjerke told Mr. Wheeler who made the MSHA complaint).

Sec'y of Labor's Reply to Resp't's Post-Trial Br. 8-9 ("Secretary Reply"). Accordingly, the Court rejects the claim that Savage and Wheeler did not have knowledge of Miller's protected activity that occurred prior to Wheeler's installment as a Savage manager.

Regarding MSHA's decision not to pursue Miller's prior discrimination claim, 13-08, the Court finds that the letter reflecting that decision was received by Savage prior to Miller's firing. Moreover, since Wheeler spoke with Chris Thomas, the vice president of people services (Savage's human resources department), the Court infers that Wheeler specifically knew that Miller's previous discrimination claim had been dismissed and that this was one of several reasons that Miller was fired.

It is noted that Savage argues that the Secretary has not produced sufficient evidence from which the Court can infer that it received MSHA's letter denying Miller's prior discrimination claim. It argues that as it was sent by regular mail, there was no tracking, and that it was sent to Savage headquarters, which was in Salt Lake City, far from the Savage Yard in Safford.[18] Savage Br. 24.

This assertion, however, fails to account for the presumption of receipt afforded to the Secretary via the common law "mailbox rule," which presumes that a letter, properly mailed, "reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). Courts in various jurisdictions have continually recognized that "[u]nder the common law Mailbox Rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Dandino, Inc. v. U.S. Dept. of Transp.*, 729 F.3d 917, 921 (9th Cir. 2013) (quoting *Mahon v. Credit Bureau of Placer Cnty. Inc.*, 171 F.3d 1197, 1202 (9th Cir. 1999) (internal quotation marks and citations omitted)); *see also Konst v. Fla. E. Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir. 1996).[19]

The Commission has stated that it "presume[s] that a properly mailed letter reache[s] its destination," and found that a "declaration by counsel . . . does not rebut the presumption." *H&K Materials, Inc.*, 33 FMSHRC 2709, 2711 n.1 (Nov. 2011) (denying motion to reopen). Commission judges, similarly, have applied the presumption that "[w]hen mail is properly addressed and deposited in the United States mail, there is a rebuttable presumption of the fact that it was received by the addressee in the ordinary course of the mail." *Lund v. Anamax*

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[18] Savage also argues, in the alternative, [that] MSHA's denial of Miller's claim was not protected activity, so it is therefore irrelevant. Savage Br. 24. The Court need barely address this argument, except to say that it is *entirely plausible* that an employer will refrain from terminating an employer while awaiting word of an MSHA investigation, then believe that it is "home free" when it receives a letter declining to prosecute the employer for prior discrimination. In fact, Special Investigator Funkhouser addressed this exact scenario: "[MSHA] always ha[s] a concern that once an operator's notified of a negative finding[], that . . . they don't perceive it as justification to get rid of somebody." Tr. 276.

[19] In *Dandino*, an action under Title VII, the court applied a three-day rebuttable presumption of receipt of a right-to-sue letter from the EEOC. 729 F.3d at 922 (citing *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 148 n.1 (1984)). Similarly, the court in *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001), stated that "[w]hen the receipt date for an EEOC right-to-sue letter is unknown or disputed, federal courts have presumed various receipt dates ranging from three to seven days after the letter was mailed." The court then concluded that a presumption of receipt of an EEOC decision to an *employer* is appropriate where "the actual receipt date is unknown or disputed." *Id.* The issue before the court in *Lozano* was similar to the one at hand. The EEOC mailed a decision to the parties on September 29, 1993, and the employer had sixty days to modify or reject the EEOC's findings. *Id.* at 1162. The employer alleged that it did not receive the EEOC decision until October 14th. *Id.* at 1163. The other party received the letter on October 5th. *Id.* The employer produced an affidavit based on hearsay and a disputed photocopy of the date-stamped copy of the EEOC decision, but the court found both insufficient under the Federal Rules of Evidence and applied a five-day presumption, finding that the employer failed to rebut it. *Id.* at 1166-67.

Mining Co., 4 FMSHRC 249 (Feb. 1982) (ALJ); *see also Jones v. D & R Contractors*, 6 FMSHRC 1312 (May 1984) (ALJ) (assuming five days for the mailing of a letter).

In the present case, Savage does not dispute receiving MSHA's denial, which proves that the letter was, in fact, mailed. Furthermore, the MSHA field office, located in the same city as Savage's headquarters, received the letter on August 27, 2013, bearing a stamp dated August 22, 2013. Ex. C-6 at 1. From these facts, the Secretary has created a presumption that Savage received the letter prior to its termination of Miller on September 3, 2013, a full 12 days following the mailing date of the letter.

The Court finds that Savage has failed to rebut this presumption and that it had adequate notice that the timing of this determination letter would be an issue at trial. *See* Third Am. Compl. 3. Savage elicited testimony from Inspector Funkhouser that he did not know when Savage received the letter or what address it was sent to, but Savage did, of course, receive the letter. Tr. 338. It is noted that Wheeler presented some rebuttal testimony, stating that he did not learn of MSHA's determination until the middle of September through a phone call with Chris Thomas (although he could not specify the date of the alleged call), and that he had not seen the actual letter until after litigation had begun. Tr. 502-03. Chris Thomas, although he testified, was not asked by either party about when the letter was received. Absent corroborating evidence, the Court cannot find that Wheeler's vague, self-serving testimony rebuts the presumption, leading to an inference that Savage's termination of Miller was motivated, at least in part, by Miller's prior discrimination complaint.

Although the Court finds that Savage knew of MSHA's negative determination, that finding is neither integral nor necessary to support a finding of discrimination in this case. Savage's knowledge of the other instances of protected activity, the manner in which Miller engaged in protected activity, and the shifting, inconsistent rationale provided by Savage for the termination also support the conclusion that Savage fired Miller for his protected activity.

2. Hostility Towards the Protected Activity

While the Secretary does not contend that Savage was ever openly hostile toward Miller, he states that two of Miller's complaints demonstrate Savage's hostility toward his protected activity. Sec'y Br. 18. The first instance was during the April 28th overweight truck incident. The Secretary argues that by choosing an unsafe, out-of-service truck, Bjerke "communicated his disinterest in Mr. Miller's safety." *Id.* Wheeler's disagreement with Miller over the spilling of molten sulfur over the side of a truck, similarly, showed an absence of support for Miller, especially considering the pictures Miller took of the incident. *Id.*

In rebuttal, Savage cited to Miller, Bjerke, and Wheeler's testimony that they got along fine with each other, and Miller even stated that he had a "fairly positive view" of Wheeler and did not feel that Wheeler was personally motivated to terminate him for his prior acts. Savage Br. 37; Tr. 478, 184, 208, 608. Savage also argued that on July 24th, when Miller called Wheeler about the leaky molten sulfur hose, he was not there. Consequently, Wheeler had two accounts to rely on in evaluating Miller's reasonable belief that the condition presented a hazard: that of Miller, and that of Javier Lopez, the lead operator. Those accounts conflicted, and

Wheeler went with Lopez's characterization. Savage Resp. 9. The Court notes that Wheeler's decision does not undercut the reasonable belief held by Miller that the sulfur leak presented a hazard.

The Court finds that Savage, on several occasions, demonstrated a marked disregard for driver safety based on the well-established incidents that Miller complained about. In Miller's first complaint, for example, the evidence is clear that the brake pads on his trailer had deteriorated to the point that the rivets were protruding past the pad itself, ruining the brake drums. Tr. 30-32. Miller's third complaint concerned bald trailer tires, some of which were so worn that the radial cords were showing. Tr. 34. Those conditions were likewise unrefuted. Such conditions would have appeared and worsened over the course of several shifts, meaning that, until Miller forced Savage to address the situation, the dangerous condition had been allowed to remain, unabated.[20]

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

The Court does agree that the Secretary's evidence of a temporal nexus, i.e., evidence of discrimination based solely on the amount of time between the protected activity and the adverse action, gives rise to an inference of discrimination. The Secretary characterizes the temporal proximity of the protected activity to the termination in the following manner:

> Miller made safety complaints from January 30, 2013 to July 24, 2013. On or around August 27, 2013, Savage learned that MSHA would not be litigating 13-08 [Miller's first discrimination complaint] on Mr. Miller's behalf. *See* TE C-6, p. 1. A day after Savage's notification of the non-litigability of 13-08, Mr. Miller called his supervisor to advise that he would need an unspecified amount of more time on leave. Four workdays after that, Savage terminated Mr. Miller for failing to advise his supervisor he would not be available for work.

Sec'y Br. 19.

Savage failed to rebut this evidence. First, as stated earlier, the Court does not agree that MSHA's determination not to file an action on his behalf in connection with Miller's prior complaint is irrelevant, as Savage argues. *See* Savage Br. 24. Because Savage, upon receiving

[20] While "hostility towards the protected activity" is one of the factors the Court can consider to support an inference of discrimination, *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC at 1066, the Court cannot connect Bjerke's actions on April 28th, when he chose a truck from the garage for Miller, to any of Miller's protected activity, nor can the Court infer that Bjerke would intentionally give Miller a tagged out truck. On that night, Miller had yet to make his safety complaint, and the Court sees no reason to infer Bjerke's action was in response to any of Miller's prior protected activity. Wheeler's reaction to Miller's leaky hose complaint, similarly, does not rise to the level of "hostility"; as noted, Wheeler received two different accounts of the incident and went with the more experienced view of the lead operator. The Secretary's reference to pictures taken by Miller of the scene are irrelevant — at the time of the complaint, Miller had not sent those pictures to anyone. *See* Sec'y Br. 18; Ex. C-9 at 4-8. The Court finds no evidence of *open* hostility to Miller's protected activity, but, then again, "[d]irect evidence of motivation is rarely encountered." *Chacon*, 3 FMSHRC at 2510.

the letter, knew that MSHA did not find discrimination in the earlier case, the determination is relevant to Miller's protected activity of filing the prior discrimination complaint, especially considering the overlapping protected activity alleged in each discrimination complaint.

The Commission has not established any rigid amount of time between protected activity and adverse action beyond which the Court may not find evidence of a discriminatory motive. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999). For example, in *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361 (2000), the Commission found that a period of four months between a safety complaint and termination was sufficiently close in time. In the present case, Miller engaged in several instances of protected activity, beginning approximately eight months prior to his termination and continuing until approximately a month before he was fired. Miller's effectively continuous protected activity was close enough in time to his termination such that the Court can find discriminatory intent.

4. Disparate Treatment of the Complainant

The Secretary identifies two instances of alleged disparate treatment of Miller. The first instance was a requirement for additional follow-up in a "counseling statement" issued to Miller for hitting his tire rim on a fuel island and bending the rim.[21] Sec'y Br. 20. During the course of Miller's employment, seven other disciplinary documents of varying seriousness were issued to others. Four employees were issued the least-severe "safety performance interview" statement: three for the employees' involvement in a molten sulfur spill, and one for an employee brushing his hand on a steam pipe. Ex. C-7 at 6-11. One employee was issued the most serious form of discipline, the "last chance agreement," for speeding. Ex. C-7 at 5. The only other employee issued a counseling statement, like Miller, was Miller's supervisor, Isaiah Krass, for "inappropriate conversations." Ex. C-7 at 3. Miller's counseling statement, however, indicated that "[t]hese matters will be reviewed on 4-19-13," a month after the date of issuance. Ex. C-7 at 13. The Secretary characterizes this as showing that Miller was disparately treated in that "he was subject to an additional obligation (future follow-up) which was not imposed on any other employee for what appear to be far more serious events." Sec'y Br. 21.

In rebuttal, Savage argues that the disciplined conduct for each employee was not sufficiently similar to be comparable, that the Secretary did not show that the safety performance interview was a less severe form of punishment than the counseling statement, and that the employees issued a safety performance interview statement also had their bonuses docked, which

[21] The Secretary relegates to a footnote the argument that it was suspicious that Bjerke issued the counseling statement on April 28th, five weeks after the bent rim incident. Sec'y Br. 20. Insofar as the Secretary has not abandoned this argument, the Court does not find it persuasive. The statement was issued prior to the bad replacement truck incident on April 28th, so Bjerke could not have been issuing the statement in retaliation for that. Furthermore, Savage's explanation for the delay was persuasive. Bjerke worked days whereas Miller worked nights, and, while admitting that the delay was not normal, Bjerke was spending four-to-five days in Galveston every two weeks, and he stated that it was difficult to find a time to deliver it to Miller. Tr. 619.

probably mattered more to them than what type of statement they got.[22] Savage Br. 31; Savage Resp. 11.

The Secretary's second instance of disparate treatment was that Savage did not allow Miller to call in his absence following his doctor's appointment, even though, "[d]uring MSHA's investigation of 13-08, two Savage employees told [Special Investigator] Funkhouser that they extended their leave with a phone call to their supervisor and provided a doctor's note upon their return to work." Sec'y Br. 21; *see also* Tr. 277, 290. Savage did not count Miller's call reporting his absence as satisfying the Employee Handbook's requirement that employees report their absences. *Id.* Savage also did not allow Miller to extend his medical leave over the phone, as other employees had done. *Id.* Finally, other employees were allowed to bring a doctor's note *upon their return to work* — Savage required Miller to do so while he was on leave. *Id.*

Savage argues in rebuttal that the Secretary failed to demonstrate that Wheeler's request for a doctor's note when Miller requested extended leave was inconsistent with Savage's treatment of other employees because the Secretary failed to show that any other employees were similarly situated to Miller. Savage Br. 28.

Regarding the counseling statement issued by Savage after Miller hit the fuel island, the Court does not find evidence of disparate treatment. The Commission has stated that in order to show disparate treatment, the Secretary must "introduce evidence showing that another employee guilty of the same or more serious offenses escaped the disciplinary fate suffered by the complainant." *Driessen*, 20 FMSHRC at 332 n.14. Yet, the Commission in *Pero* recognized that "in analyzing a claim of disparate treatment under traditional employment discrimination law, 'precise equivalence in culpability between employees' is not required." 22 FMSHRC at 1368 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). When looking at the proffered examples of discipline, even considering the follow-up requirement, the Court cannot say that Miller bumping the tire rim on a fuel island was more or less dangerous or discipline-worthy than the spilling of sulfur on a highway, for example, or that a counseling statement is so much more serious than a safety performance interview when comparing such different infractions. Additionally, the Court notes that the counseling statement issued to Krass contained an even more severe statement than that issued to Miller: "I have advised the employee if this is to happen again that it would be grounds for termination." Ex. C-7 at 3. Thus, the Court cannot find evidence of disparate treatment arising out of the follow-up requirement contained in the counseling statement.

The Court, however, does find evidence of disparate treatment in the application of the no call/no show policy and Miller's subsequent termination. While Savage argues that there is not sufficient evidence for the Court to infer disparate treatment, the Court has credible testimonial

[22] Savage also argues that when assessing whether disparate treatment occurred, a Court should only make a "comparison between the complainant's adverse action and the treatment of others who were similarly situated." Savage Resp. 10. Relying on this incorrect assumption, Savage reasons that because the issuance of the counseling statement following the fuel island incident is not the complained-of adverse action in this discrimination case, any evidence of disparate treatment in response to Miller hitting the fuel island is irrelevant. *Id.* The Commission, however, has never restricted the disparate treatment analysis in this way.

and documentary evidence from which it finds disparate treatment. The Court has the statements of Investigator Funkhouser and Miller that two other employees were allowed to extend their leave with a doctor's note being provided upon *returning* to work, not *prior to* the return. Savage's own documentation, a 2012 absentee calendar for Larry Arrietta, corroborates Funkhouser's testimony. It shows that Arrietta on September 17, 2012, was allowed to take off the rest of the week due to a problem with his foot. Ex. C-5 at 13. A week later, he was allowed to take off another week. *Id.* Then, on September 28th, he was allowed to take off a third week. *Id.* This document, Funkhouser's testimony, and Miller's testimony all support that Miller was treated differently from similarly situated employees. So, while Arrietta's medical situation was not exactly the same as Miller's, a driver being allowed to extend leave for foot problems and an employee being allowed to extend his leave *due to a doctor's orders, after a doctor's visit,* are clearly similar enough to be comparable.[23]

5. Other Rebuttal Arguments by Savage

Savage offers several other rebuttal arguments, which the Court will briefly address. Savage argues that Miller could not have been terminated for his protected activities because Wheeler was not motivated to do so. As support, Savage cites Miller's testimony that "he was not alleging that Wheeler was motivated to terminate him on account of his protected activities. In fact, Miller testified that he had a 'fairly positive' opinion of Wheeler." Savage Br. 3. This assertion is slightly different than the question posed at the hearing:

> Q. So you're not alleging here that Mr. Wheeler personally was motivated, by your prior acts, to terminate you on September 3, 2013, correct?
> A. No.
> Q. No, you're not alleging that?
> A. That's correct.

Tr. 208. The Court draws a distinction between Wheeler's "personal" motivation and his business motivation as a Savage manager. Such personal motivation would likely have shown itself in Wheeler's interactions with Miller, affecting Miller's "fairly positive" opinion of Wheeler, and providing direct evidence of discriminatory intent on the part of Savage. Direct evidence is, of course, not necessary to support a finding of discrimination, and the absence of such evidence is not determinative. Wheeler may not have been personally motivated, but that does not disturb the Court's finding that *Savage, through Wheeler,* terminated Miller due to his hazard complaint to MSHA, his prior discrimination complaint to MSHA, and his numerous safety complaints that affected Savage's bottom line.

Savage also argues that Miller's protected activity, both legally and factually, comprised normal, everyday actions that all of its drivers take. Savage Br. 19. Factually, Savage points out that much of Miller's protected activity occurred during pretrip examinations, which all drivers

[23] Additionally, the Court notes that it does not agree with Wheeler's completely inapt comparison that a doctor's visit is "no different than taking a day to go fishing or shopping." Tr. 517. It does not take much to imagine other instances in which a doctor's visit gives rise to situations, like this one, requiring additional leave.

perform and which Savage and MSHA require.[24] Savage Br. 19. From this fact, Savage concludes that "[c]ommon sense says an operator would not be inclined to terminate an employee for doing his or her job." Savage Br. 21. The Court, however, heard testimony that Miller took trucks out of service three times as often as other drivers, Tr. 354, and that the manner in which Miller reported these safety issues, by communications with his first, second, and third-line supervisors rather than merely taking them out of service with the mechanic, was different from the way other drivers made safety complaints.[25] Both of these factors set Mr. Miller apart from other drivers. When asked why it was important that Miller provide a doctor's note by 4 p.m. the next day, Wheeler stated:

> I'm responsible for keeping the [sulfur] levels at the appropriate mark with the customer. And when I don't do that, the customer asks me why. I can't just say, well, I have a driver that's gone. I don't know when he's going to come back.
>
> I need something to explain the reasoning why I shorted him the loads. I need to have some sort of documentation that tells me that the driver's out on an excused absence, *the doctor's taken him out of work.* That satisfies the customer. But just telling him, I don't know when they'll be back, that makes us look bad if our inventory levels drop. The customer's not happy. That's my whole job, to keep the customer happy and his inventory levels correct.

Tr. 511-12 (emphasis added). Wheeler's statement is at odds with Savage's policy and with its claimed reason for terminating Miller. Besides, Miller effectively did tell Wheeler that his "*doctor's taken him out of work*" when he called Wheeler on August 29th. In addition, the Court can easily infer that, by tagging out trucks for safety defects at a greater rate than other drivers, thereby affecting inventory levels, and by doing so in such a vocal manner, Miller became a target for discrimination.

Savage also argues that the manner in which Miller made complaints is not protected — only the complaints themselves are. In support of this assertion, Savage declares that protecting the manner in which someone makes a complaint "is not the law." Savage Br. 22. Savage cites no precedent, persuasive or otherwise, to support this claim. To follow Savage's logic would be shortsighted and would greatly restrict the protections afforded miners under the Mine Act, as it would permit employers to discharge miners exercising their rights as miners, based on the manner in which they assert those rights. At least on the facts in this record, such a contention is not meritorious. Nor can it be ignored that Savage has never asserted that it fired Miller because of the manner in which he made his safety complaints.

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[24] Savage misses the larger point — the fact that safety exams are part of every driver's responsibility does not dilute Miller's claim. Any driver who made a safety complaint and then suffered adverse action would be entitled to make a complaint if he believed the complaint spawned the adverse action, just as happened here.

[25] Savage also states that there is no reliable evidence in the record to support an inference that Miller made complaints in a different manner than other drivers. Savage Br. 23. This statement fails to take into account the testimony of David Funkhouser and Brian Hancock, which the Court credits.

The Court agrees with Judge Manning's statement in *Pollock v. Kennecott Utah Copper Corp.*, 26 FMSHRC 52, 59 (Jan. 2004), in which he stated that "[t]he Mine Act protects all miners who engage in protected activities[,] including those who do so in an aggressive manner or in a manner that mine management believes is not helpful or positive." Miller asserted his rights strongly, taking physical evidence of a defect to his supervisor, sending pictures to his third-line supervisor, and even becoming upset at what he thought was an intentional act of a supervisor to give him a tagged out truck. The Court need not decide, additionally, whether Miller's action, calling Bjerke "incompetent," was protected, because that issue is not central to the Secretary's *prima facie* case, nor is it related, in any way, to the proffered reason for firing Miller.[26] *See generally Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 522 (Mar. 1984) (finding discrimination where the operator claimed the termination was for profanity during time at which protected activity occurred and not for the protected activity itself).

For the foregoing reasons, under the totality of the circumstances, the Court finds that the Secretary established a *prima facie* case of discrimination, and that Savage failed to rebut that case. Miller engaged in several instances of protected activity over the course of several months. Savage knew about each instance of protected activity. The proximity in time between Miller's numerous protected activities and his termination was sufficiently close to create a strong inference of discrimination. *Cf. Pero*, 22 FMSHRC at 1365 (finding that "uncontradicted record evidence of protected activity, employer knowledge of that activity, adverse action, and a close temporal proximity between protected activity and adverse action established a motivational nexus sufficient to make out a prima facie case of discrimination"). Finally, Savage's disparate treatment of Miller in connection with his termination provides further evidence of discrimination.

B. Savage's Affirmative Defense

The Secretary bears the ultimate burden of persuasion in this case, but, as noted, regarding the affirmative defense, that burden rests with Savage. In *Pasula*, the Commission stated clearly that the employer must prove its affirmative defense "by a preponderance of all the evidence . . . [and that] the employer must bear the ultimate burden of persuasion" on its affirmative defense. 2 FMSHRC at 2799-800. As the *prima facie* burden on the Secretary has been met and the Secretary's case has not been rebutted, the burden falls to the operator to prove that it would have fired Miller for his unprotected activities alone. *See id.* at 2800.

When evaluating an affirmative defense, the Court does not sit in judgment of an operator's business decisions. Instead, the Court follows the two-step analysis as outlined by the Commission in *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether "the

[26] Regarding the April 28th replacement truck incident, Savage also attributed significance to the following facts: (1) Bjerke gave Miller a choice of using the truck or waiting an hour and a half until Isaiah Krass could get to the scales to offload some of the material, Tr. 624; and (2) Miller failed to perform a pre-shift examination, Tr. 172. The Court does not believe that these facts have any bearing on Miller's safety complaint that the truck he had been given the option to drive had three bad tires and no highway horn.

justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." 3 FMSHRC at 2516.[27]

The Court finds that Savage's proffered reason, Miller's violation of the no call/no show rule, was pretextual. Miller complied with the leave policy on its face. In addition, the Secretary introduced testimony and evidence that the policy was applied differently to Miller than to at least one other employee, and Savage's explanation for why it fired Miller shifted as time went on, each of which independently demonstrates that Savage's claimed reason was pretextual.

Savage argues in its affirmative defense that even though Miller called to report his absences, the call on August 28th did not excuse his absences on August 29th, 30th, and 31st "because Miller had given [Wheeler] no end date . . . and Wheeler at least needed something in his file to document the reason, more than just that vague phone call."[28] Savage Br. 49. Savage asserts that Wheeler required a doctor's note prior to Miller returning to work for two reasons. First, Savage claims that he needed it to "substantiate the open-ended leave that Miller was requesting." *Id.* at 50. Second, Wheeler claimed to need the note because he thought Miller might be on mind-altering medication that he would need to run by the company's physician due to safety concerns. Tr. 507-09.

As noted, both at the hearing and in his interview with David Funkhouser, Wheeler stated that he fired Miller for violating the no call/no show policy. The relevant policy provides in its entirety:

> Each person working for Savage and the job they perform is important. Savage makes an investment to provide you a job. Someone must be there to fill it. Everyone—customers, other employees and the Company **alike—is** hurt when our equipment sits idle, maintenance is not performed or work piles up. Everyone loses when an employee has to fill in for someone else. The absent person also loses some feeling of responsibility and possibly some pay.

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[27] If the Court finds that the justification is *not* pretextual, that does not end the inquiry. At that point, the Court is to engage in a "*limited* examination of its substantiality." *Chacon*, 3 FMSHRC at 2516. This involves the narrow question of "whether the reason was enough to have legitimately moved that operator to have disciplined the miner." *Id.* at 2517. In either case, if the operator fails to prove that it would have fired Miller in the absence of his protected activity, the affirmative defense must fail.

[28] Page three of Exhibit C-5, according to Savage, shows Savage's "present-sense intention on August 29 and 30 to treat Miller's absences as no-call, no-show occurrences." Savage Br. 26. As the Court stated earlier, it doubts the veracity of this document due to inconsistencies between it and Wheeler's testimony regarding whether he left a voicemail or called Miller during his absence. Furthermore, Sherma Garner, the employee who kept the record, did not testify regarding the document. Consequently, the Court cannot find the record probative of showing a "present-sense intention" of Savage. More importantly, present-sense intention or not, that claim cannot rescue Savage's core defense that Miller violated Savage's "no call" policy, when the record is clear that Miller did call.

> We ask all employees to make [a] special effort to develop good habits. You need to be at work, ready to work, on time—every time. If you have an emergency and cannot be to work on time, get in touch ***directly*** with your supervisor, as soon as possible. Whenever you are late or absent it is ***your*** responsibility to notify your supervisor in a timely manner.
>
> *If you are absent two consecutive shifts without calling to report your absence directly to your supervisor, we will assume you have abandoned your job.* If you are having trouble seeing the importance of being to work regularly and on time, we ask you to consider your situation very carefully and to make a commitment to meet future work schedules as a condition of continuing to be a part of the Savage work team.

Ex. R-1 at 35-36 (last emphasis added). Examining the policy, it is clear that Miller complied with it. It is undisputed that on August 28th, Miller called Wheeler, his supervisor, to report his absences for the coming days, as required by the third paragraph of the policy above, and therefore fully meeting the requirements of the no call/no show policy. Thus, Savage's claim that "[t]he evidence . . . shows that Wheeler terminated Miller 'by the book,' literally" is clearly incorrect. Applying Savage's "by the book" theory actually works in Miller's favor. It was Miller who literally complied with the no call/no show policy, by the book. *See* Savage Br. 4.

In addition, as discussed *supra*, Miller and Funkhouser gave examples of two other employees that took time off and then asked for more time. Tr. 231-32, 277. As noted, Larry Arrietta's absentee calendar shows a period of three weeks where he was off due to a foot injury. In the calendar's comments, it merely states, "9/17 – problem with foot, off rest of week," "9/24 – off 2nd week," and "9/28 – off 3rd week." Ex. C-5 at 13. The testimony of Miller and Funkhouser corroborates that Arrietta was allowed to take off and extend his stay, providing a doctor's note only upon his return, not before the return.[29]

The Court finds that, contrary to his claim, Wheeler did not, in fact, ask Miller to provide a doctor's note prior to returning to work. Even if Wheeler had made such a request, Miller's failure to provide a note prior to returning to work does not mean that Miller violated the no call/no show policy. The policy does not require a note, and it says nothing about the need to provide supporting documentation of the reason for requesting leave prior to returning to work. As for the rationale that Wheeler needed the doctor's note because he was concerned about Miller's statement that his medication was being adjusted and therefore needed to run those medications by Savage's own physician, in his interview with Funkhouser, Miller stated that he told Wheeler what medicine he was taking, why he was taking it, and that he already had

[29] Savage argues that "there is absolutely no evidence in the record that any other employee interviewed by Funkhouser was similarly situated to Miller in terms of the context of their leave." Savage Br. 18. As the Court previously stated, the testimony of Miller and Funkhouser, corroborated by the notes from Arrietta's absentee calendar, shows that the circumstances of Arrietta's leave were comparable to those of Miller's leave. Savage, additionally, did not bring in testimony or evidence to show that Arrietta's situation was so different that it could not be considered instructive, nor did it proffer any evidence that Savage's treatment of Miller was in line with its treatment of other employees.

disclosed the medication on his "long form," but that he just hadn't been taking it. Ex. C-1 at 7. While the parties did not highlight this statement at the hearing or in the briefs, Complainant's Exhibit 1 was properly admitted, *see* Tr. 395, and is part of the record. Additionally, this putative reason for requiring the note is *completely unrelated* to Savage's purported reason for firing Miller, and, to that extent, Wheeler's request for the note, whenever he might have wanted it, is immaterial to the reason that Savage fired Miller.

The Court finds that Savage's stated reason for terminating Miller was pretextual. The reason stated for firing Miller does not make sense given his actions and the policy under which he was fired. Miller was required to call Savage to report his absence — and he did so. Even Wheeler, Miller's supervisor, acknowledged that Miller reported his absence. Tr. 562. The Court has already found that Wheeler did not ask Miller to get him a doctor's note by 4 p.m. on August 29th, but even if the Court did make such a finding, that was not something required under the no call/no show policy, nor had it been asked of other miners in similar situations.

The Court has already stated that the Secretary has established that Savage was motivated to terminate Miller for engaging in protected activity. Savage's claimed defenses, as discussed above, are rejected.

C. Conclusion

In its post-hearing brief, Savage concedes that the Court can rely upon circumstantial evidence as long as reasonable inferences can be made from it. Savage Br. 5. [30] This decision does just that — it marshals the circumstantial evidence and makes reasonable inferences from it. Accordingly, the Court finds that the Secretary has proven by a preponderance of the evidence that Savage Services discriminated against Sean Miller on the basis of his protected activity.

The Secretary identified six safety complaints, a hazard complaint to MSHA, and a discrimination complaint to MSHA, all of which were instances of protected activity. Savage had knowledge of each one at the time Miller was terminated, the activity occurred sufficiently close in time for the Court to infer discrimination, and Savage engaged in disparate treatment when it fired Miller under the no call/no show policy. The Secretary met his *prima facie* burden, showing that "by making so many safety complaints and elevating those complaints beyond his first-line supervisor and the mechanic, Mr. Miller identified himself as an individual engaging in protected activity under the Act," and, consequently, a target of discrimination. Sec'y Br. 17. As the D.C. Circuit stated in *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974), "Safety costs money. . . . Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine [foremen] or top management."

[30] Savage's reliance on *Mullens v. U.S. Steel Mining Co.*, 26 FMSHRC 62 (Jan. 2004) (ALJ), on page five of its post-hearing brief, is misleading. The ALJ in that case clearly relied on credibility determinations adverse to the complainant, and, in essence, found that the mine prevailed on its affirmative defense — that it did not fire the complainant for his protected activity. *Id.* at 72.

Savage's reason for firing Miller was not persuasive — it was pretextual. Savage, at first, fired him in the broadest possible terms, telling Miller that he was not a "good fit," only narrowing it to a violation of the no call/no show policy when questioned by the MSHA investigator. Yet even Wheeler, the individual who terminated Miller, admitted that Miller met the policy's requirements. Tr. 562-63. Instead, Wheeler said he fired Miller for not providing a doctor's note by 4 p.m. the day after Miller called to report his absence, a requirement not contained in the policy and one that other employees were not asked to meet. Because of this shifting explanation and the fact that Miller complied with the no call/no show policy, the Court finds that Savage's reason for firing Miller was pretextual, and Savage's affirmative defense is without merit.

At this point, the Secretary would have the Court rule on damages, Sec'y Br. 27, but damages were not discussed at the hearing. For now, pending the response to the Court's Order, that aspect must be postponed.

ORDER

Having determined that Sean Miller was discriminated against unlawfully, and unlawfully discharged, in violation of Section 105(c) of the Mine Act, it follows that he is entitled to the relief sought in his complaint. Accordingly, subject to the direction that the parties confer, as stated below, it is ORDERED that Respondent:

1. Expunge from Sean Miller's personnel file all references to Miller's unlawful termination and the circumstances involved in this matter.

2. Post this decision at all of its mining properties in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, with a notice stating that Savage Services will not violate section 105(c) of the Mine Act.

3. Reinstate Miller to his position as a truck driver, at the same rate of pay, along with all benefits that relate to that position, with the same shift assignment and the same or equivalent duties, and without any break in seniority, OR inform the Court within 14 days of this decision that the parties have arrived at a fixed amount of compensation, in lieu of reinstatement, and in full settlement of all claims regarding WEST 2014-404-DM that Miller has against Respondent.

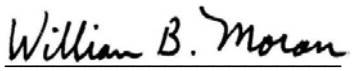
4. Pay an appropriate civil penalty to MSHA for its violation of section 105(c)(1) of the Mine Act, in accordance with the provisions of section 110 of the Act.

The parties are also ORDERED to confer within 14 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that Respondent will undertake to carry out the remedies set out above. If an agreement is reached, it shall be submitted within 30 days of the date of this decision.

If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the parties should so state.

This Court, or its duly appointed successor, retains jurisdiction in this matter until the specific remedies to which Mr. Miller is entitled are resolved and finalized and the civil penalty determination has been made by the Court. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages has been entered.

SO ORDERED.



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