FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

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SECRETARY OF LABOR, MSHA, on behalf of **MARK RICHEY,** Complainant, v.	:	INTERFERENCE PROCEEDING Docket No. LAKE 2015-616-D MORG-CD-2015-12
THE OHIO VALLEY COAL CO., and MURRAY ENERGY CORPORATION, Respondents.	:	Powhatan No. 6 Mine Mine ID: 33-01159

DECISION AND ORDER

Before: Judge Miller

These cases are before me upon a complaint of interference filed by the Secretary of Labor ("the Secretary") on behalf of six miner representatives pursuant to the interference provisions of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c). On January 20, 2015, Complainants filed complaints with the Mine Safety and Health Administration (MSHA) alleging that bonus plans implemented at Respondents' mines violated Section 105(c) of the Mine Act. On July 31, 2015, the Secretary filed this action on behalf of Complainants. The parties presented testimony and documentary evidence at a hearing on March 2, 2016, in Pittsburgh, Pennsylvania. For the reasons that follow, I conclude that Respondents interfered with the rights of Complainants under the Mine Act in violation of Section 105(c).

At hearing, the parties presented a number of stipulations, as well as a number of stipulated exhibits. The stipulations are a part of the record as Exhibit A, and the stipulated exhibits are entered into the record as numbered. Based upon the stipulations, there is no issue as to the jurisdiction of MSHA at the six mines named, and no issues of jurisdiction as to the

Commission. Jt. Stips. ¶ 1. Complainants were all employed at the mines or serving as representatives of miners at the time the matters arose. Jt. Stips. ¶¶ 15-26. Because the bonus plans at issue at the six mines and the complaints regarding them are nearly identical, I have addressed them together. The Secretary has proposed a civil penalty of $20,000 as to each of the six mines.

I. FINDINGS OF FACT

This case involves six mines located in West Virginia and Ohio: the Monongalia County Mine (previously known as Blacksville No. 2 Mine), the Ohio County Mine (previously known as Shoemaker Mine), the Marshall County Mine (previously known as McElroy Mine), the Marion County Mine (previously known as Loveridge Mine), the Harrison County Mine (previously known as Robinson Run No. 95 Mine), and the Powhatan No. 6 Mine. Jt. Stips. ¶¶ 5, 6, 8-13. The mines are owned and operated by wholly-owned subsidiaries of Murray Energy Corporation ("Murray Energy"). Jt. Stips. ¶¶ 2-13. The subsidiaries as well as Murray Energy are named as respondents. The six complainants are members of the UMWA and representatives of miners at the mines who work or have worked as miners at the named mines. Jt. Stips. ¶¶ 15-26.

In January 2015, Respondents implemented the "Safety and Production Bonus Plans" at issue at six underground coal mines under their control. Jt. Stips. ¶¶ 36, 39, 43, 46, 50, 54. Hourly employees were notified of the bonus plans in letters distributed in November 2014 and January 2015. Jt. Stips. ¶¶ 28, 30. The plans offer miners money bonuses if their assigned section produces a certain amount of coal during their shift. Jt. Exs. 20-25. The bonus amounts range from $50 to $250 per shift depending on how much coal is produced. *Id.* Miners who do not work in a coal production area ("outby employees") are eligible for bonuses at a lower rate—ten percent of the bonuses earned by the production crews on their shift. *Id.*

The bonus plans also provide that certain circumstances disqualify miners from receiving a bonus, notwithstanding sufficient coal production. First, to be eligible for a bonus, a section crew member must be "physically present the entire shift, including time spent switching at the face, during the shift the bonus share is earned." Jt. Exs. 20-25. Employees who are not on production crews must also be present for the entire shift to share in the bonus. *Id.* Second, if a "lost time accident" occurs that incapacitates a crew member, the entire crew is disqualified from receiving the bonus for that shift. *Id.* Finally, a crew working on a section may be disqualified if an MSHA inspector issues a certain type of citation or order to that section. If an MSHA inspector issues a citation designated as significant and substantial ("S&S"), all crews that worked on the cited section are disqualified from earning a bonus for that day. *Id.* If a withdrawal order under Section 104(d) or 104(b) of the Mine Act is issued and is attributable to the crews working on the section, all the crews on that section are disqualified from receiving the bonus for seven consecutive days. *Id.*

The bonus and safety plans at issue were designed by Senior Vice President of Murray Energy Corporation John Forelli. Jt. Stips. ¶ 31; Tr. at 265. Forelli based the plans in part on plans that were already in place for supervisors at the mine. Jt. Stips. ¶ 33; Tr. at 307-08, 310. Forelli testified that the company's motivation in implementing the plans was to improve

production and safety at the mines. Tr. at 265-66. The bonus amounts were intended to be high enough to motivate workers but not so high that miners would risk their safety. Tr. at 277-79; 315. Forelli also believed that awarding the bonus on a per-shift basis would minimize the chance of miners taking safety risks: a miner faced with addressing an unsafe condition would know that even if he lost the bonus that day, he would have an opportunity to earn it the next day. Tr. at 277-78.

Before the plans were implemented, Forelli and other managers held meetings with members of the mine committee of the local union at each mine. Tr. at 147-50, 287. A number of alterations were made to the original plans as a result of these meetings. For example, in response to complaints from the union that the lost-time injury disqualification would discourage reporting of injuries, Forelli added the phrase "that incapacitates the crew member during the shift" to clarify that the disqualification would depend on when the injury was incurred rather than when it was reported. Tr. at 271, 288-89. To the provision disqualifying miners for 104(d) and 104(b) orders, Forelli added the phrase "attributable to the crews working on that section" so that crews would not be disqualified for violations that were beyond their control. Tr. at 270; Jt. Exs. 20-25. A term providing for an additional inspection by the union safety committee each month was added to the plans at the Ohio County and Powhatan No. 6 mines. Tr. at 268-69; Jt. Exs. 21, 25.

Forelli testified that once the plans were implemented, he reviewed production data from the mines to see whether production had improved, but he did not reach a definite conclusion. Tr. at 297-301. Forelli also reviewed daily and quarterly safety reports from the mines and did not see a discernible difference in safety after the plans were implemented. Tr. at 293-96.

The Secretary presented witnesses from the mines who testified about the effects the bonus plans had on conditions at the mines.[1] Several witnesses testified that they observed that miners were less willing to serve as walk-around representatives after the bonus plans were implemented. Tr. at 46-47, 117-18, 152. The witnesses agreed that a person who served as a walk-around representative on a shift would be counted as an outby employee for purposes of the bonus and so would earn ten percent of the bonuses earned by the production crews on his shift. Tr. at 46, 178, 243, 283. Ann Martin, chairman of the Safety Committee at the Harrison County Mine, testified that a young miner who had frequently volunteered to be a walk-around representative declined after the bonus plan was implemented because he did not want to miss out on earning the bonus. Tr. at 152. Martin observed that miners became more willing to walk

[1] Respondents argue that the Secretary failed to present any witness testimony regarding the effects of the plans at three of the mines. Resp. Br. at 28-29. At hearing, I did not allow the Secretary to put on several witnesses whose testimony I believed would be cumulative. I find that, in view of the similarity of the plans, the testimony of the witnesses at hearing was probative as to the effects of the plans at all of the mines, and the testimony of additional witnesses was not necessary. This manner of accepting testimony of a representative number of employees has been approved for many years in other employment related actions. Courts overwhelmingly recognize the propriety of using representative testimony to establish a pattern of violations that include similarly situated employees who did not testify. *See, e.g., Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir.2014), *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir.1997) ("[I]t is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA."); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."); *Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019–20 (8th Cir.1988)

with inspectors when the bonus plan was discontinued at her mine. Tr. at 156, 166. Timothy McCoy, a member of a production crew at the Marshall County Coal Mine, testified that his coworkers discouraged him from serving as a walk-around representative because a less experienced person would be sent to replace him, affecting the crew's ability to achieve a bonus. Tr. at 113-14.

Witnesses for the Secretary also testified about the plan's impact on miners' willingness to report injuries. The miners understood the plans to disqualify everyone on the crew from receiving a bonus for the day if anyone on the crew was involved in a "lost time accident" during the shift. Tr. at 53, 159-60; Jt. Exs. 20-25. Several witnesses had observed or heard about instances of miners deciding not to report injuries they sustained on the job because they did not want to disqualify themselves and their coworkers from receiving the bonus. Tr. at 54-55, 112. Levi Allen, UMWA local president at the Marshall County Coal Mine, described an incident in which a miner sustained a shoulder injury during his shift but decided not to report it because he "didn't want to take money off of everybody." Tr. at 226. Allen testified that after the bonus plan was implemented at his mine, he got three times as many calls about miners leaving the mine without reporting an accident. Tr. at 229. At the Ohio County and Powhatan No. 6 mines, the plan included a term providing that the Mine Safety Committee and Mine Safety Director would jointly review any accident to ensure that it was correctly documented. Jt. Exs. 21, 25. However, the chairman of the safety committee at Powhatan No. 6 testified that he had never been asked to review any accident reports. Tr. at 327-28. Thus, I find that the extra provision did not lessen the effect of the bonus plans on injury reporting at those two mines.

The witnesses also testified that they believed miners were less willing to report dangerous conditions in the mine while the bonus plans were in effect. Tr. at 48, 50, 112, 158, 213. They attributed this in part to the provisions of the plan disqualifying miners from the bonus for citations and orders received inby the tailpiece. Tr. at 48, 112, 162. The witnesses explained that even if MSHA did not issue a disqualifying citation, reporting a dangerous condition to management or requesting an inspection took time away from production and so would lessen the crew's chance of earning a bonus that day. Tr. at 50, 251. McCoy described an incident in which a miner expressed that he was unwilling to report a safety hazard because MSHA would come and the crew would lose the bonus the next day. Tr. at 141-42. Martin testified that in her capacity as chairman of the local union safety committee, she received fewer reports from miners about safety hazards while the plans were in effect. Tr. at 158, 166. As with the injury disqualification provision, the witnesses believed that peer pressure exacerbated the effect of the plans on safety reporting. Tr. at 50-51, 114, 163. Martin emphasized the importance the miners placed on earning a good income, which meant that the bonuses had a substantial effect on them. Tr. at 163.

At all of the mines except for Harrison County, the bonus plan contained a provision stating that all "production and safety standards, including roof control, ventilation, and rock dusting, shall be maintained on all shifts where the bonus thresholds are reached. Any major deviation will disqualify a crew from receiving the bonus award." Jt. Exs. 20-23, 25. Presumably, this provision was meant to encourage compliance with safety standards even where MSHA was not involved. Allen described an incident at the Marshall County Coal Mine in which a crew had failed to rock dust as required but had attained the level of production to

qualify for a bonus. Tr. at 217-18. The next crew reported the rock dusting problem to management, and the first crew lost their bonus under the "standard deviation" provision. *Id.* However, the second crew also ended up not achieving a bonus because of the time it took them to report the problem to management and correct the problem. Tr. at 219-20. Allen thus explained that in most cases, a crew would not bother to report the deviation and so the provision would have little effect. Tr. at 220.

Finally, the witnesses for the Secretary testified that the plans had resulted in miners taking shortcuts related to safety, particularly in the areas of rock dusting, roof bolting, equipment checks, and ventilation. Tr. at 51-52, 105-07, 153, 223. They explained that safety-related maintenance tasks and fixing hazards slowed down production and so could prevent the crew from receiving the biggest bonus. Tr. at 49, 107-08, 159, 218. Not only the bonus itself but also peer pressure motivated miners to move quickly and skip safety steps. Tr. at 50, 106-07.

The local union membership at the Powhatan No. 6 and Harrison County mines voted against adopting the bonus plans, and as a result, the plans are no longer in effect at those mines. Jt. Stips. ¶¶ 52, 53, 56, 57. The plan was discontinued as a result of arbitration at the Marion County Mine. Jt. Stips. ¶¶ 48, 49. The plans remain in effect at the Monongalia, Ohio County, and Marshall County mines. Jt. Stips. ¶¶ 38, 42, 45.

II. ANALYSIS

The prohibition against interference is established in Section 105(c)(1) of the Mine Act, which provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or *otherwise interfere with the exercise of the statutory rights* of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits a miner or his representative to file a discrimination complaint with the Secretary if he believes "that he has been discharged, interfered with, or otherwise discriminated against" in violation of the Mine Act. 30 U.S.C. § 815(c)(2).

A majority of the Commission has recognized that "the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the

more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Young & Cohen, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07 (Jordan & Nakamura, Comm'rs). To make out a claim of discrimination under the *Pasula-Robinette* framework, an employee must prove that he engaged in protected activity and suffered an adverse employment action motivated at least in part by the protected activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, in interference cases, the Commission has accepted claims where the complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than a classic adverse employment action. *See Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). In these cases, the Commission has focused not on the employer's motive, but rather on whether the conduct would "chill the exercise of protected rights," either by the directly affected miner or by others at the mine. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

Although the Commission as a whole has not outlined a framework for analyzing interference claims, two Commissioners recently proposed a framework that has since been adopted by several of the Commission's Administrative Law Judges. *Franks,* 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs); *see Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 37 FMSHRC 2597, 2603-04 (Nov. 2015) (ALJ); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015) (ALJ). Under the *Franks* test, an interference violation occurs if:

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

Franks, 36 FMSHRC at 2108. This approach is consistent with Commission precedent addressing interference with employee rights, in which the Commission has focused on the effect of the employer's conduct on employees' exercise of protected rights rather than on the motive behind the employer's conduct. *See Gray*, 27 FMSHRC at 9 (analyzing whether employer's statements were coercive based on reasonable inferences of the miner); *Moses*, 4 FMSHRC at 1479 (holding that actions constituted interference because they "could logically result in a fear of reprisal and a reluctance to exercise the right in the future").

The framework proposed in *Franks* is similar to that used by the National Labor Relations Board (NLRB) in cases involving the interference provision of the National Labor

Relations Act (NLRA). Section 8(a)(1) of the NLRA provides that "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. 29 U.S.C. § 158(a)(1). In evaluating Section 8(a)(1) claims, "the Board first examines whether the employer's conduct reasonably tended to interfere with Section 7 rights. If so, the burden is on the employer to demonstrate a legitimate and substantial business justification for its conduct." *Cal. Newspapers P'ship,* 343 N.L.R.B. 564, 565 (2004). The analysis "does not turn on the employer's motive or on whether the coercion succeeded or failed." *Am. Freightways Co., Inc.*, 124 N.L.R.B. 146, 147 (1959); *see also Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998). Rather, the question is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA]." *American Freightways*, 124 N.L.R.B. at 147. If the employer produces a "legitimate and substantial business justification" for its action, the Board must then "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the [NLRA] and its policy." *NLRB v. Fleetwood Trailer Co., Inc.,* 389 U.S. 375, 378 (1967); *Cal. Newspapers P'ship,* 343 N.L.R.B. at 565.

Respondents urge the Court to instead apply the test for interference used in a 2001 ALJ decision, *Secretary of Labor on behalf of Feagins v. Decker Coal Co.*, 23 FMSHRC 47 (Jan. 2001) (ALJ). Resp. Br. at 9. Under the *Decker* test, the complainant must prove either that "the challenged action was taken with the intent to damage or deny rights assured under the Act" or that there is a causal relationship—that is, "exercise of a protected right[] is the acknowledged *cause* of damage to the person attempting to exercise the protected right." 23 FMSHRC at 50. This test is rooted in the statutory language of Section 105(c), which prohibits "interfere[nce] with the exercise of the statutory rights of any miner ... *because of* the exercise by such miner ... of any statutory right afforded by" the Act. 30 U.S.C. § 815(c)(1) (emphasis added). However, the Commission in *Gray* rejected a "literal interpretation" of Section 105(c)(1), which "might require the actual or attempted exercise of a right before the protection of [that section] comes into play." 4 FMSHRC at 1480. Instead, the Commission has focused on the likely effect of an operator's actions on the future exercise of rights by miners. *See Gray*, 27 FMSHRC at 9; *Moses*, 4 FMSHRC at 1478-79. Additionally, the Commission suggested in *Gray* that intent is not a necessary element of an interference claim, finding that the judge erred by focusing primarily on the intent behind a supervisor's statements to a miner. 27 FMSHRC at 10.

The Commission's approach is consistent with NLRB cases involving interference, which do not require proof that the employee actually attempted to exercise a protected right. *See, e.g., Medeco*, 142 F.3d at 745 ("An employer's coercive action affects protected rights whenever it can have a deterrent effect on protected activity. This is true even if an employee has yet to exercise a right protected by the Act."); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (holding work rule invalid under Section 8(a)(1) because of its "tendency to inhibit" protected activity without deciding whether protected activity in fact occurred). Further, it is well established under NLRA case law that unlawful motive is not a necessary element of an interference claim. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964); *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959). I find that the test used in *Decker Coal* does

not accurately reflect the Commission's current approach to interference, and thus reject the Respondent's argument to apply it here.

a. Interference with Protected Rights

The Commission has recognized conduct as tending to interfere with the exercise of protected rights on a number of occasions. In *Moses v. Whitley Development Corp.*, the Commission found that coercive interrogation and harassment of a miner after an accident report was made at the mine constituted interference because it could chill the exercise of protected rights by miners. 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Two Commissioners came to a similar conclusion in *Franks*, where two miners were interrogated and suspended after a safety complaint was made at the mine. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2104 (Aug. 2014) (Jordan & Nakamura, Comm'rs) (finding that the actions could have a chilling effect on miners' willingness to make complaints in the future), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). Finally, in *Gray*, the Commission determined that potentially threatening comments made by a supervisor about an employee's participation in a grand jury proceeding could constitute interference if the judge found that the comments were coercive in light of the totality of circumstances. *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 10-11 (Jan. 2005).

A number of ALJ decisions have also addressed the issue of interference. These cases have primarily involved threatening or harassing behaviors towards miners in relation to safety complaints. *See e.g. Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ) (finding that interference occurred when coworker verbally and physically harassed miners' representative while he exercised his walk-around rights); *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 2352 (Aug. 2014) (ALJ) (finding that interference occurred where supervisor told miner it was futile to make safety complaints and encouraged other employees to build a record against the miner after he made a complaint); *Sec'y of Labor on behalf of Clapp v. Cordero Mining*, LLC, 33 FMSHRC 2977 (Dec. 2011) (ALJ), *aff'd*, 699 F.3d 1232 (10th Cir. 2012) (noting that threatening comments made to an employee after she made a safety complaint were interference, but resolving case under discrimination provision because she was actually discharged). The issue of a work rule or policy that interferes with employee rights was addressed in *Secretary of Labor on behalf of McGary v. Marshall County Coal Co.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ). In that case, the ALJ found that a mine operator interfered with employee rights to make complaints to MSHA when the operator required employees to report all safety complaints to mine management and announced the policy in a speech by the CEO threatening closure of the mine. *Id.* at 2606-07.

In addition to these cases, the Commission has recognized that "case law interpreting the National Labor Relations Act, upon which the Mine Act's antidiscrimination provisions are modeled, provides guidance on resolution of discrimination issues." *Sec'y of Labor on behalf of Johnson v. Jim Walter Res.*, 18 FMSHRC 552, 558 n.11 (1996); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990); *see also Gray*, 27 FMSHRC at 9-10 (reviewing NLRB precedent in discussion of interference provision). Courts interpreting the NLRA have determined that conferral of a benefit on employees can constitute interference under Section 8(a)(1) if the benefit is withheld from employees who exercise a protected right. For instance, in

NLRB v. Rubatex Corp., the Fourth Circuit determined that a company interfered with employees' right to strike when it paid a $100 bonus to employees who worked through a strike. 601 F.2d 147, 150 (4th Cir. 1979). Similarly, in *Lynn-Edwards Corp.*, the NLRB held that interference occurred when a company included a provision in its retirement plan suggesting that coverage would be withdrawn if employees unionized. 290 N.L.R.B. 202, 205 (1988); *see also Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 907 (6th Cir. 1997) (holding that solicitation of grievances during union campaign violates Section 8(a)(1) if employer suggests that grievances will only be resolved if employees reject union representation).

Respondents' bonus plans promise bonuses ranging from $50 to $250 per shift (or less for outby employees) based on the amount of coal produced. Jt. Exs. 20-25. Testimony at hearing indicated that the effect of the bonuses is to create pressure on miners to maximize short-term production at the expense of safety. Because the bonus is based on the amount of coal produced by the crew as a whole, each worker feels pressure to work as fast as possible so as not to take away from potential bonuses for the other workers. The result is that miners take shortcuts that affect safety and result in a denial of the plan benefits to miners who exercise their rights under the Mine Act. Several witnesses described seeing areas that were not adequately rock dusted because miners were in a hurry, or where additional roof bolts should have been installed but were not. Tr. at 51-52, 105-06, 153, 217-18. These safety-related tasks take additional time, and miners are therefore reluctant to do them under the bonus plans because they are less likely to achieve the production goals. Tr. at 119.

In addition to creating a climate adverse to safety, the bonus plans affect miners' willingness to exercise specific rights under the Act. The Commission has observed that in framing the Mine Act, Congress believed that the "participation [of miners] in the enforcement of the Act is essential to the achievement of safe and healthful mines." *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2790 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981). Thus, the Act gives miners the right to notify MSHA officials or the operator of unsafe conditions or practices in the mine that require attention. *See id.*; 30 U.S.C. §§ 813(g)(1), 815(c)(1). The Commission has determined that miners also have the right to refuse to work in conditions that threaten their health or safety as well as to report injuries and accidents to the operator. *Pasula*, 2 FMSHRC at 2790-93; *Swift v. Consol. Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). Yet, under the bonus plan, a miner who refuses to work, along with everyone else on his crew, will not receive the benefit of a bonus. Finally, the Act provides that when MSHA conducts an inspection of the mine, a representative of the miners at the mine "shall be given an opportunity to accompany the Secretary or his authorized representative . . . ." 30 U.S.C. § 813(f). If the representative of miners is an employee of the operator, the Act guarantees that he "shall suffer no loss of pay during the period of his participation in the inspection . . . ." *Id.* The right to accompany an inspector is frequently referred to as the "walk-around right." The Secretary alleges that the bonus plans at issue here interfere with all of these rights. First Amended Comp. at 16-19.

The Secretary's witnesses at hearing explained that miners are reluctant to report safety issues to management or MSHA under the bonus plans because making the report and

undergoing an inspection take away from production time.[2] Tr. at 50, 251. Further, the bonus plans disqualify a crew working on a section from receiving the bonus if an MSHA inspector issues an S&S citation during any shift on that section that day. Jt. Exs. 20-25. If a withdrawal order under Section 104(d) or 104(b) is issued to a section and is attributable to the crews working on that section, all the crews on that section are disqualified from receiving the bonus for seven consecutive days. *Id.* The effect of these provisions is to penalize miners who make safety complaints to MSHA, since a complaint to MSHA that results in a violation will prevent the miner from receiving the bonus. The provisions also create peer pressure against making complaints, since the entire crew loses the bonus if a violation is found. The witnesses described instances of miners being unwilling to report violations because of a desire to keep the bonus. Tr. at 112, 114, 141, 158. Representatives from the safety committees at the mines reported that miners were reporting fewer violations and were less likely to bring up safety concerns when asked. Tr. at 158, 166.

Respondents argue that under the bonus plans, "there is no correlation between reporting rights under the Mine Act and the disqualification provisions." Resp. Br. at 15. They contend that "there is absolutely no correlation between the act of reporting and the issuance of a citation or order resulting from a hazard in the mine." *Id.* But in fact there is an obvious correlation: when a miner reports a hazard to MSHA, the hazard is substantially more likely to be discovered by an MSHA inspector and thus result in a citation than if the miner were to ignore the hazard and wait for someone else to address it. Thus, the miner who reports the violation, along with his co-workers, are more likely to be disqualified from the bonus that day. The provision disqualifying miners from bonuses for S&S violations is analogous to the situation in the NLRB case *Rubatex Corp.*, in which a bonus was offered to employees who worked through a strike. 601 F.2d at 150. Employees who exercise their statutory right are less likely to receive the bonus, and therefore are discouraged from exercising the right. This is interference with a protected right under Section 105(c).

The bonus plans provide for different levels of bonuses for miners working on production crews at the face and those working outby. Employees working outby receive only ten percent of what the production sections on their shift earned. Jt. Exs. 20-25. The miner witnesses testified that this provision has affected miners' willingness to serve as walk-around representatives during inspections of the mine. *See* 30 U.S.C. § 813(f). The witnesses explained that under the bonus plan, miners who serve as walk-around representatives are treated as outby employees. Tr. at 46, 178, 243, 283. Union representatives from the mines testified that they

[2] Respondents argue that much of the Secretary's evidence about the impact of the bonus plans on miners was in the form of inadmissible hearsay testimony. Resp. Br. at 18-20. Respondents also argue that they did not have the opportunity to cross-examine witnesses when information was provided through hearsay. *Id.* at 19. I reject these arguments for several reasons. First, pursuant to the Commission's Rules of Procedure, hearsay testimony is admissible when relevant. 30 C.F.R. § 2700.63. Here, the testimony was based on first-hand conversations and observations, and with few exceptions was not only reliable but relevant. Next, much of the hearsay testimony to which Respondents objected went to the state of mind of miners with regard to the plan, which would in most cases be admissible even under the Federal Rules of Evidence. Fed. R. Evid. 803(3); *see, e.g.*, Tr. at 141, 152. Finally, counsel for the respondents put on no evidence to refute the hearsay testimony, nor did they put forth a witness who was not adversely affected by the bonus plans. The Secretary argues persuasively that admitting hearsay testimony serves the Mine Act's goal of protecting miner informants, which is necessary in an interference case where miners may feel intimidated. Sec'y Br. at 28 (citing *Revelation Energy, LLC*, 36 FMSHRC 1581, 1599 (June 2014) (ALJ)). I do not find that the Secretary's use of hearsay evidence was problematic here.

had difficulty finding miners to walk with inspectors after the plans were implemented because the miners did not want to miss out on the larger bonus. Tr. at 46-47, 152. Although a miner who typically works outby would earn the same bonus if he walked with an inspector, a miner who typically works in the production area could see a substantial difference in pay. Section 103(f) specifically guarantees that a miner serving as a walk-around representative "shall suffer no loss of pay during the period of his participation in the inspection." 30 U.S.C. § 813(f). Respondents argue that there would be no loss of pay if a production crew member served as a representative, since there is no guarantee that production crew members will earn a bonus every shift. Resp. Br. at 16. In some circumstances, the bonus earned by a miner on walk-around could even be higher than what he would have earned working on the production crew. *Id.* But I find that this would make little if any difference to a miner considering whether or not to act as a walk-around representative. There is no question that some miners are discouraged from serving as walk-around representatives because they would miss out on the chance to get a larger bonus.

Finally, the bonus plans provide that if a "lost time accident" occurs that incapacitates a crew member, the entire crew is disqualified from receiving the bonus for that shift. Jt. Exs. 20-25. Several witnesses had observed or heard about miners deciding not to report injuries they sustained on the job that they otherwise would have reported, instead choosing to "rough it out" so they and their coworkers would not lose the bonus for the shift. Tr. at 54-55, 112. A miner's right to report injuries to the operator is essential to the "free flow of information" about the conditions at a mine, and the bonus plans have undermined that arrangement at these mines. *See Swift*, 16 FMSHRC at 205. A miner who incurs a "lost time" injury must choose between exercising his right to report the injury and getting a bonus. This is an impermissible burden on his right to report.

Respondents place much emphasis in their brief on the Commission's decision in *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (1994). In that case, the Secretary argued that a program that penalized miners who sustained injuries on the job interfered with miners' rights to report injuries. *Id.* at 202-03. The Commission found that the program did not on its face violate Section 105(c). *Id.* at 208. However, the Commission noted that the case did not involve any evidence of actual negative effects on miners' exercise of their rights. *Id.* at 207 n.6. In this case, by contrast, the Secretary has presented ample evidence of actual interference. Additionally, *Swift* was decided as a 105(c) discrimination case rather than an interference case, and thus is distinguishable from the case at hand. *See id.* at 205-06.

The evidence presented at hearing demonstrates that the bonus plans discourage miners from exercising their rights to make safety complaints, report injuries, and serve as walk-around representatives. However, Respondents argue that a miner who decides not to report an injury or safety violation or who otherwise disregards safety is not acting "reasonably," and therefore any effect the plans have on miners' exercise of their rights should not be considered interference. Resp. Br. at 21-23. Rather, Respondents argue that the "reasonable miners" relevant to the case are the Secretary's witnesses at hearing, who testified that they were not affected by the financial incentives in the bonus plans or by peer pressure to disregard their safety rights. *Id.* at 23. I do not find merit to this argument. First, the miners who testified gave a number of examples of how the plan interfered with miners, and even if some of those who testified were not swayed by the bonus, they observed and talked to others who were. The appropriate inquiry under the

Franks test is whether the actions of the operator in instituting the plan could reasonably be viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the rights of the miners. The Secretary presented sufficient evidence to demonstrate that a reasonable miner would in fact be swayed by the promise of additional income to sidestep some safety precautions. The Commission has clearly expressed that "reasonable miners" can be dissuaded from exercising their rights in some instances of extreme pressure. *See Gray,* 27 FMSHRC at 9-10; *Moses*, 4 FMSHRC at 1478-79 ("Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights.").

While the Secretary has the burden of proof in this case, the Respondents had the opportunity to present evidence on any issue raised by the Secretary, including the effect the plan had on miners. Respondents raise issues about how reasonable miners reacted to the plan, yet Respondents called no witnesses and provided no other evidence to the contrary. The Secretary, on the other hand, has demonstrated the strong effect of the bonus plans on miners' behavior. While the bonus amounts are not extraordinarily large, the amounts for production crewmembers are large enough to matter to most miners. Tr. at 163. The witnesses at hearing also emphasized the intensity of the peer pressure fostered by the plans. The bonus plans make it so that a miner must decide whether it is worth taking money out of his own pocket and those of his entire section every time he considers reporting an unsafe condition or an injury. This impact on a miner's decision to exercise his rights constitutes a coercive pressure analogous to the interrogation and harassment discussed by the Commission in *Moses* and *Gray*. A reasonable miner would be dissuaded from exercising his rights in this situation. Therefore, the bonus plans interfere with the protected rights of miners.

b. Legitimate and Substantial Reason

Under the *Franks* framework, if it is determined that a mine operator's conduct interfered with the protected rights of miners, the inquiry proceeds to whether the operator had a "legitimate and substantial reason" for the action "whose importance outweighs the harm caused to the exercise of protected rights." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). *Franks* involved the coercive interrogation and ultimate suspension of two miners after a safety complaint was made at the mine. *Id.* at 2113-16. The operator justified its actions by arguing that it had a responsibility to investigate safety complaints at the mine. *Id.* at 2116. While the Commissioners agreed that this was an "important interest," they noted that the operator could have obtained the information it sought through other means, particularly through speaking with the union safety committeeman. *Id.* at 2117. The operator's interest therefore did not outweigh the potentially long-term negative consequence of discouraging miners from making safety complaints. *Id.* at 2117.

In NLRB cases, courts typically take a similar approach of requiring that the employer's conduct be calibrated so as to minimize the effect on employee rights. *See, e.g., Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) (blanket confidentiality rule on all matters under investigation by employer was overbroad); *Consol. Diesel Co. v. NLRB*, 263

F.3d 345, 353-54 (4th Cir. 2001) (investigation of employees for harassment after they discussed union with coworkers not justified by interest in maintaining harmonious workplace because effect on rights too great); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998) (confidentiality term in contract with employee that interfered with his right to discuss conditions of employment with coworkers not justified by interest in preventing misinformation among employees, since providing accurate information would have served the same purpose); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (rule prohibiting discussion of wages not justified by desire to keep employees working during work hours, since it applied all the time). Courts are more likely to find an employer's substantial business justification to be persuasive when the employer's interest is important and the impact on employee rights is minimal. *See, e.g., Desert Palace, Inc.*, 336 N.L.R.B. 271, 272 (2011) (confidentiality policy regarding an investigation of drug activity at workplace justified as means of protecting witnesses and preserving evidence); *Cal. Newspapers P'ship,* 343 N.L.R.B. 564, 565-66 (2004) (editors who informally reprimanded reporter for speaking to city council about union had legitimate interest in protecting newspaper from appearance of conflict of interest, which outweighed impact on employee). Tenuous or speculative benefits are insufficient to justify interference. *See, e.g., Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271-72 (D.C. Cir. 1998) (employer's videotape surveillance not justified where it provided minimal additional security and employer had little reason to suspect misconduct would occur); *Cal. Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1100 (9th Cir. 1998) (anticipation of violence did not justify surveillance where employer showed no basis for its concern).

Respondents argue that their reason for implementing the bonus plans was to improve production and safety at the mines. Resp. Br. at 24; Tr. at 266. Senior Vice President John Forelli testified that he gathered data on production at the mines after the plans were implemented to see if it had improved. Tr. at 297. He was unable to reach a definite conclusion as to whether the plans were effective, in part because he did not have data from before the plans were implemented. Tr. at 297-301. Murray also had a system for reviewing safety data that pre-dated the bonus plans. Tr. at 306. Forelli personally compared safety data from before and after the bonus plans were implemented to see if the plans had affected safety, but did not observe any clear patterns. Tr. at 294-95.

A mine operator certainly has a right to implement programs to assure that miners are producing at the best rate possible. However, because I have found that the plans at issue interfere with safety and the rights of miners, they must be reviewed with a more careful eye. Respondents credibly assert that their motivation in implementing the plans was to increase production. Respondents also claim that the bonus plans were tailored so as not to interfere with any rights under the Mine Act. Resp. Br. at 23. The bonuses are of a moderate size and are renewed each shift, which Forelli believed would ensure that miners were not tempted to bypass safety measures. Forelli met with union representatives before implementing the bonus plans and attempted to address some of their concerns about safety. Respondents also argue that the provisions disqualifying miners from earning the bonus for safety violations and injuries were intended to encourage safety. Resp. Br. at 26. However, the company is unable to show that the plans have actually been effective at improving or maintaining safety at the mines. Even more significantly, the company has been unable to establish that the plans actually resulted in increased production at any of the mines. In contrast, the harm to miners' rights is evident. Miners at these mines are discouraged through peer pressure and personal financial incentives

from making safety complaints, reporting injuries, and serving as walk-around representatives. These rights are essential to safety at the mines. For the Mine Act to function as Congress intended, miners must be able to freely participate in its enforcement scheme. *See* S. Rep. No. 95-181, at 30 (1977). The uncertain benefits that Respondents put forth do not outweigh these harms. Accordingly, I find that the bonus plans violate Section 105(c) of the Mine Act.

III. PENALTY AND REMEDIES

Section 105(c)(2) authorizes the Commission to require a person who has committed a violation of section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate." 30 U.S.C. § 815(c)(2). The Secretary asks the Court to order the mines to rescind the bonus plans, post a notice at the mines for six months reflecting the court-ordered rescission, and mail such notice to the homes of all miners and all representatives of miners at the mines. In addition, the Secretary asks the Court to assess a civil penalty of $20,000 for each of the six violations.

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

In this case, Murray is considered a large operator for penalty purposes. The gravity of the matters is serious, as the bonus plans could reasonably threaten safety for all employees at the mines. The mines have received numerous discrimination complaints in the past, including a recent interference complaint in which they were fined $30,000 per mine. The operator was moderately negligent in instituting the bonus plans. At three of the mines, the plan is no longer in effect as a result of arbitration initiated by the UMWA. Considering all of the factors, I find that a $25,000 penalty per mine is appropriate.

IV. ORDER

Based on my conclusion that the bonus plans interfered with the protected rights of miners under the Act, Respondents are **ORDERED** to rescind the bonus plans that remain in effect and cease and desist from implementing any other similar plans. Respondents are further **ORDERED** to post a notice at each of the six mines for a period of six months. The Notice shall

be no smaller than 10" by 13", on white paper with clear lettering in a font over 12-point, and shall indicate that miners have a right to file any claim of interference without fear of harassment or retaliation, that the bonus plans are rescinded effective immediately, that the mine has interfered with the rights of miners in putting the plans in place, and that all bonuses earned up until that date will be paid as promised. The notice shall be posted, within 30 days, in a conspicuous place in at least two locations at each mine where it is available to all miners on all shifts.

Finally, within 40 days of the date of this decision, Respondents are **ORDERED** to pay a civil penalty of $150,000 to the Secretary of Labor.

Margaret A. Miller
Administrative Law Judge

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Anthony Jones, Jordana Greenwald, Philip Mayor, U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202

Philip K. Kontul, Thomas A. Smock, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One PPG Place, Suite 1900, Pittsburgh, PA 15222

Art Traynor, Laura Karr, United Mine Workers of America, 18354 Quantico Gateway Drive, Suite 200, Triangle, VA 22172