FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 09 2017

MICHAEL WILSON, JUSTIN GREENWELL & BRANDON SHEMWELL, Complainants, v. ARMSTRONG COAL COMPANY, INC., Respondent.	DISCRIMINATION / INTERFERENCE PROCEEDING Docket No. KENT 2015-673-D MADI-CD 2015-18 Mine: Parkway Mine Mine ID: 15-19358
BRANDON SHEMWELL, Complainant, v. ARMSTRONG COAL COMPANY, INC., Respondent.	DISCRIMINATION / INTERFERENCE PROCEEDING Docket No. KENT 2016-96-D MADI-CD 2015-14 Mine: Parkway Mine Mine ID: 15-19358
JUSTIN GREENWELL, Complainant, v. ARMSTRONG COAL COMPANY, INC., Respondent.	DISCRIMINATION/ INTERFERENCE PROCEEDING Docket No. KENT 2016-108-D MADI-CD 2015-15 Mine: Parkway Mine Mine ID: 15-19358

DECISION

Appearances: Tony Oppegard, Esq., Lexington, KY, & Wes Addington, Esq., Appalachian Citizens' Law Center, Whitesburg, KY, Representing the Complainants

Marco Rajkovich, Esq., Rajkovich, Williams, Kilpatrick & True, Lexington, KY, Representing the Respondent

Before: Judge Lewis

These cases are before me upon complaints of discrimination and interference brought by Michael Wilson, Justin Greenwell, and Brandon Shemwell ("Complainants"), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

STIPULATIONS

A. Armstrong is subject to the Federal Mine Safety & Health Act of 1977.

B. Armstrong mines and produces coal at the Parkway Mine that enters into and has an effect upon interstate commerce within the meaning of the Federal Mine Safety & Health Act of 1977.

C. Armstrong is subject to the jurisdiction of the Federal Mine Safety & Health Review Commission and the Administrative Law Judge has the authority to hear this case and issue a decision.

Resp. Amended Prehearing Report, 4; Tr. 18-19.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. Summary of Testimony

A. Brandon Heath Shemwell

The Complainant, Brandon Heath Shemwell, appeared and testified at hearing. Tr. 45. He had worked at Parkway Mine since April 2009 in various positions, including roof bolt operator, "Ram" car operator, scoop operator, and bolter. Tr. 46. Shemwell had worked in the coal industry for 11 years, and was designated as a miners' representative on February 28, 2014. Tr. 45, 47. He had become a miners' representative because he had become concerned about safety issues at Parkway Mine, including his fear that Respondent had been cheating in its dust sampling procedures. Tr. 48.

After he had become a miners' representative, Shemwell noticed a change in attitude toward him by both management and coworkers. Tr. 48. Some of the men shunned him. Tr. 48.

During the 14 months prior to June 11, 2015, Shemwell had frequently accompanied MSHA inspectors—"pretty much every time [he] was asked." Tr. 50. During MSHA inspections, Shemwell would note safety issues that the MSHA inspector may not have noticed. Tr. 50-51. On one occasion, he had pointed out rub rails that had gone off a car, which led the MSHA inspector to order the car shut down. Tr. 51-52.

Management would become upset at Shemwell's pointing out of safety violations to MSHA inspectors. Tr. 52. A superintendent, Danny Thorpe, "cuss[ed] and rave[d]" at him. Tr. 52. The safety managers, Steven DeMoss and John T. Scott, had also become upset at Shemwell for pointing out safety violations. Tr. 52-53.

On June 11, 2015, the date at issue, Shemwell had been asked by DeMoss if he wanted to travel with the federal inspector. Tr. 54. Shemwell was instructed to call Danny Presley in order to arrange a ride with the inspector on a four-man buggy. Tr. 55-57. Shemwell usually accompanied the inspectors the entire time they were on mine property, including the time that MSHA inspectors would write up any citations. Tr. 58.

Shemwell contacted mine employees with a "mine site phone," which was like a cell phone and was issued to each miner who had his own extension number. Tr. 59. On June 11, 2015, after being told by DeMoss to contact Presley for a ride, Shemwell phoned Presley 12 times without success. Tr. 60. Presley neither answered the phone nor called Shemwell to determine whether Shemwell needed a ride to participate in the MSHA inspection. Tr. 61. Shemwell did not have the authority to order someone to give him a ride. Tr. 61.

Shemwell was finally contacted by John T. Scott who asked him to speak on the phone with the MSHA inspector, Alan Frederick. Tr. 62. Shemwell was informed by Frederick that the MSHA inspection had been completed and was asked if he had any questions. Tr. 62. Due to being so upset over not having been provided a ride, Shemwell did not ask any questions. Tr. 62.

Shemwell testified that if after this incident Respondent had again failed to provide transportation to him for an MSHA inspection, he would not have continued acting as a miners' representative. Tr. 63.

Shemwell testified that Complainants Justin Greenwell and Michael Wilson had reported to him that John T. Scott had stated that MSHA inspectors could not issue citations in situations where the safety violation was first discovered by the miners' representative. Tr. 64. Such a position would essentially prevent the miners' representative from fulfilling his duty to protect miners from potential safety hazards. Tr. 65. Further, if MSHA would not issue citations in such situations, there would be no assurance that the company would abate unsafe conditions in a timely fashion. Tr. 65. Shemwell mentioned the missing rub rails violation as a case in point. Only after Shemwell had pointed out the unsafe condition to an MSHA inspector, and only after Armstrong was cited, did Respondent finally abate the condition. Tr. 65-66.

Shemwell believed that Respondent had failed to timely notify him of and provide him with a ride to the MSHA inspection on June 11, 2015, because they had been irritated with him

for having fulfilled his miners' representative duties and because they were annoyed with Justin Greenwell for having pointed out safety problems a few days earlier. Tr. 67-69.

On cross examination Shemwell agreed that the rub rail problem had been in his and Greenwell's units. Tr. 73. Although DeMoss had not liked it when Shemwell pointed out safety violations to MSHA inspectors, he had never "laid hands" on Shemwell. Tr. 73. DeMoss's changed attitude toward Shemwell did not cause him to give up being a miners' representative, but did make him "hesitant' and had bothered him. Tr. 73. Shemwell, however, agreed with his prior deposition testimony that he did not care about DeMoss's attitude and could deal with it. Tr. 74. Neither of Respondent's employees, Thorpe and Scott, had directed anger toward Shemwell personally. Tr. 74. Shemwell was not prevented from doing his job as miners' representative despite Armstrong's unhappiness over his pointing out of safety problems. Tr 75.

During the "normal course of action" the company would call Shemwell on his mine cell phone to notify him of an MSHA inspection or call his boss to arrange a ride for him. Tr. 78. When Inspector Frederick had informed Shemwell that the MSHA inspection had been completed, Frederick told him that he did not know what had happened regarding the failure to contact Shemwell. Tr. 78-79.

Shemwell agreed that he had expressed no concerns to Frederick during their conversation, and neither did he question Respondent nor MSHA on the date at issue. Tr. 79.

According to company cell phone records, Shemwell had been able to contact Justin Greenwell's number on June 11, 2015. Tr. 79-80; See also JX-1.

Although Scott's reported statements made him hesitant, Shemwell continued in his miners' representative duties. Tr. 82.

B. Justin Neil Greenwell

The Complainant Justin Neil Greenwell also appeared and testified at hearing. Tr. 85.

Greenwell had worked for approximately four years for Respondent before quitting his employment a year previously. Tr. 86. He had worked nine years total in the coal industry. Tr. 86. Complainant had initially worked as an underground roof bolt operator for Respondent, later being moved above ground as a loader operator. Tr. 86. After discovering he had black lung disease, Greenwell had exercised his Part 90 right to work in a less dusty environment.[1] Tr. 87.

Greenwell had become a designated miners' representative on February 28, 2014, after becoming concerned about various safety issues at Parkway mine, including the tampering with of a dust pump. Tr. 87.

[1] On cross examination, Greenwell indicated that he had undergone a drug test two days before he had quit work. Tr. 113-115. He further confirmed that he had convictions for assault, possession of marijuana, and public intoxication. Tr. 114. He further confirmed that he had been involved in an incident at work, shortly before his resignation, in which he had backed into a guy-wire, cutting all power to the mine. Tr. 116-117.

Between February 28, 2014, and June 11, 2015, Greenwell frequently traveled with MSHA inspectors. Tr. 89. Greenwell would watch and observe the MSHA inspection and be on the look-out for unsafe conditions. Tr. 89, 92. Miners would also approach him to relay their concerns about safety issues to the MSHA inspector. Tr. 90.

Greenwell also noticed the rub rail problem and asked an MSHA inspector, who was uncertain as to safety implications to enquire into such, which ultimately lead to an MSHA citation. Tr. 92.

Greenwell also noted a change in management's attitude toward him after he had become a miners' representative: they had become "angry" at him. Tr. 92. An example of the hostile attitude of management was the action of a second shift foreman, Jeff Wilkins, toward Greenwell. The foreman demanded that Greenwell stay by the MSHA inspector's side–even after the inspector had finished his inspection and had told Greenwell that he could leave. Wilkins had gone so far as to order Greenwell to accompany the MSHA inspector to the bathroom and shower. Tr. 93-94. Greenwell felt Respondent was attempting to discourage him from accompanying MSHA inspectors on their inspections. Tr. 94.

Mine management would advise Greenwell that it wasn't his job to point out safety problems. Tr. 95.

Greenwell was also told that it imposed a "hardship" when he left his job duties to accompany MSHA inspectors. Tr. 96. One section foreman, Billy Harold, called Greenwell a "slow walker," advising Greenwell to think about what was more important–his job or his miners' representative duties. Tr. 96-97. On another occasion, Greenwell had reported management's failure to hold a required fire drill leading to a citation. Tr. 98. When the drill was eventually held, Complainant was singled out during the training. Tr. 98.

On June 11, 2015, Greenwell had been asked by Steve DeMoss if he'd like to accompany an MSHA inspector. Despite agreeing to such, Greenwell never received a call. Tr. 99. Only later in his shift did he happen to notice MSHA inspector, Jerry Walker, going into the bathhouse. Upon learning that Walker had already completed his inspection, Greenwell asked why he hadn't been called. Walker indicated that "they didn't have a ride" for Shemwell and that a company representative had accompanied the inspector rather than Greenwell. Tr. 101-102.

Greenwell had pointed out roof safety issues to an inspector on June 10, 2015, and he felt that this report motivated management's decision to not contact him on June 11, 2015. Tr. 103-104.

Greenwell had also pointed out a malfunctioning methane monitor to an MSHA inspector, which he also felt motivated management's decision to not contact him. Tr. 105-106.

On July 8, 2015, Greenwell was traveling with an MSHA inspector, Charles Ramsey, along with Complainant miners' representative, Michael Wilson. Greenwell had noted some loose roof bolts, which he had pointed out to Inspector Ramsey. Tr. 108-110. Greenwell also pointed out to the inspector a piece of machinery that was leaking oil. Tr. 110. Greenwell heard

John T. Scott express management's position to Ramsey that an MSHA inspector could not issue a citation if a miners' representative had first pointed out the safety violation. Tr. 111.

Such a position, in Greenwell's mind, would defeat the purpose of traveling with MSHA personnel during inspections because it would mean that no violation would be abated if first seen by the miners' representative. Tr. 112. Greenwell had sometimes not traveled with MSHA inspectors because of this. Tr. 112-113. In fact he eventually quit because he was tired of all the hostility directed toward him as a miners' representative. Tr. 113.

Greenwell agreed that neither DeMoss nor Scott had ever directly spoken to him in a hostile manner. Tr. 119. DeMoss had no problem with Greenwell traveling with an MSHA inspector on June 11, 2015. Tr. 119. Greenwell had sometimes declined to participate in MSHA inspections. Tr. 120. Nobody from Armstrong had ever told Greenwell on June 10, 2015, that there was no room for him to travel with MSHA inspectors. Tr. 121. Greenwell did not attempt to call management regarding such. Tr. 122-123.

Complainant again asserted that he never knew that Jeremy Walker was underground until he saw the inspector at the bathhouse. Tr. 120. Steve DeMoss had told him that the inspector had only wanted one person to travel with him. Tr. 127.

C. Michael Steve Wilson

Complainant, Michael Steve Wilson, appeared and testified. Wilson, whose nickname was "Flip," had worked in the mines for 40 ½ years, 37 of which as a continuous miner operator. Tr. 128. Wilson had become a miners' representative at Parkway mine in February 2014 and had retired from Armstrong in April 2015. Tr. 129. Complainant had started working for Respondent in 2009 and had become a miners' representative "to make it better for the young guys."[2] Tr. 130. Prior to becoming a miners' representative, Wilson had gotten along well with management. Tr. 131. However after Wilson became a representative, he felt that management had "turned on" him, treating him like "a piece of shit." Tr. 131.

Wilson filed for Part 90 after he had become a miners' representative. Tr. 132. He began to operate an above ground hand loader, leaving his underground continuous miner position. Tr. 132. Wilson testified that various members of management had become hostile toward him, including Danny Thorpe, John T. Scott, Steve DeMoss, Jeff Wilkinson, Danny Presley, and Keith Casebeer. Tr. 133. Wilson testified Respondent's employees engaged in various acts of vandalism toward him, including writing "die rat" on his locker and super-gluing his lock. Tr. 134.

After his retirement in April 2015, Wilson continued working as an unpaid miners' representative, traveling 25-30 miles each way from his residence to Parkway mine. Tr. 134-135, 149. As a non-employee miners' representative, Wilson still regularly traveled with MSHA. Tr. 135. During MSHA inspections, Wilson would point out possible safety violations. Tr. 136.

[2] On cross examination Wilson conceded that he himself had violated various safety regulations. Tr. 141-142. However, he asserted that he had taken "deep cuts' in the past at management's urging. Tr. 146-148. Wilson further admitted that he had been convicted of five counts of assault and receiving stolen property in the distant past. Tr. 142.

On July 8, 2015, Wilson traveled with MSHA Inspector Charles Ramsey, Justin Greenwell, and John T. Scott. Tr. 137. Complainant(s) noticed some loose roof bolts ("pins"), which they pointed out to the MSHA inspector. Tr. 137-138. John T. Scott objected to any citations being issued on the basis that federal inspectors could not issue citations in situations where the violation was first discovered by a miners' representative. Tr. 138-139.

Wilson had not stopped traveling with MSHA inspectors despite management's changed attitude. Tr. 144.

D. Steven James DeMoss

Steven James DeMoss appeared and testified at hearing on behalf of Respondent.

DeMoss was safety manager at Parkway mine in June 2015. Tr. 151. He had worked in the mining industry since 2002, first working as a halster on a bolter and then pinner. Tr. 153. He began working at Parkway mine in approximately 2009, working as a bolt man, pin man, ram car operator, belt examiner, and face boss. Tr. 154. Toward the end of 2013 he became a safety analyst for Respondent.

In June 2015 Armstrong used a miners' representative log to keep track of the MSHA inspections that each miners' representatives had accompanied and which miners' representative was next in line. Tr. 156. A record was kept of the miner's names, whether they had traveled, or whether they had declined to accompany the MSHA inspector.[3] Tr. 157. Prior to June 17, 2015, Justin Greenwell had declined to travel four times. Tr. 160.

When an MSHA inspector arrived at Parkway mine, DeMoss would normally ask the inspector if he wanted a miners' representative to travel with him, or the inspector himself would request such. Tr. 102. DeMoss would then check to see which miners' representative was next in rotation and ask that person if he wished to participate in the MSHA inspection. Tr. 162. If that miners' representative declined, then DeMoss would continue through the list until someone indicated their willingness to go. Tr. 162. The MSHA inspector could also indicate his preference as to miners' representative whom he wished to accompany him. Tr. 163.

On June 11, 2015, DeMoss noticed that the MSHA vehicle was in the mine parking lot. Tr. 164. He asked the miners' representatives if they wanted to participate in the MSHA inspection. Both Shemwell and Greenwell wanted to exercise their rights to travel. Tr. 165. DeMoss indicated that both would travel. Tr. 166. After pre-calibrating spotters (gas detectors), DeMoss saw District 10 Assistant District Manager, Brian Dodson, and District 10 Field Supervisor, Alan Frederick, arrive. Tr. 166.

DeMoss was asked if there was a miners' representative available and he indicated Shemwell would be participating. Tr. 166. Neither Dodson nor Frederick informed DeMoss where they wanted to go in the mine. Tr. 167.

[3] "Travel" meant that the miners' representative exercised his right and requested to travel with MSHA.

DeMoss testified that he told Dodson and Frederick that he would call Danny Presley to pick Shemwell up. Tr. 167. However either Frederick or Dodson stated to DeMoss that they wanted him to call Shemwell directly and to have Shemwell call Presley to pick him up. Tr. 167.

DeMoss agreed to follow their directives; however, he had never previously notified miners' representatives this way, and no MSHA inspector had ever made such a request in the past. Tr. 167.

DeMoss believed that he may have told Frederick or Dodson that this was not the normal way he contacted miners' representatives regarding MSHA inspections, but didn't question their instructions, believing they were concerned about "pre-notification." Tr. 167.

DeMoss then attempted to call Shemwell several times on the mine phone. Tr. 168. DeMoss testified "there was not a one hundred percent signal everywhere in the mines." Tr. 168. A miner might be tracked but not be able to talk or text on the phone. Tr. 168.

Referring to his call log, DeMoss stated he had first called Shemwell at 9:57 a.m. on June 11, 2015. Tr. 169-170; R-5. Despite 12 calls, DeMoss was unable to reach Shemwell. Tr. 171. At 10:10 AM Shemwell had successfully phoned DeMoss at which time DeMoss, pursuant to MSHA directives, instructed Shemwell to contact Danny Presley to get him a ride. Tr. 172. Presley would have been "at the rehab place" where reception would have been poor.[4] Tr. 172.

DeMoss himself did not accompany the MSHA inspectors; rather John T. Scott did. Tr. 173. DeMoss estimated that the group, Dodson, Frederick, and Scott, had been underground for two to three hours. Tr. 175. DeMoss "figured" that Shemwell had gotten a hold of Presley and assumed Shemwell had gotten a ride. Tr. 175.

DeMoss observed Scott, Frederick, Dodson, and Jeremy Walker emerging from the mine. Tr. 176. He asked Scott the whereabouts of Shemwell but Scott did not know. Tr. 176. DeMoss later learned that Shemwell had been unable to get a hold of Presley. Tr. 177.

DeMoss could not recall whether Walker had mentioned anything about a miners' representative not being present nor did he remember Frederick or Dodson saying anything about such (at the end of their inspection). Tr. 177.

DeMoss denied that Armstrong had ever attempted to block miners' representatives from obtaining rides. Tr. 177

Regarding the July 8, 2015, incident at issue, DeMoss recalled that MSHA inspector Ramsey, as well as Greenwell, Wilson, and Respondent's safety supervisor, Scott, had gone on an underground inspection. Tr. 178.

After the group had returned from the inspection, DeMoss recalled a discussion regarding miners' representatives finding violations before the MSHA inspector noticed the violations. Tr. 181. He testified that in such instances, "the negligence and gravity wouldn't be as high as if the

[4] The "rehab place" was the area where there had been a roof cave-in. Tr. 174.

inspector actually found it." Tr. 181. DeMoss testified that John Scott had gotten this information from either MSHA inspector, Jeremy Walker, or Alan Frederick. Tr. 182.

On cross examination DeMoss admitted to some inconsistencies in the miners' representative log. Tr. 182-187; 191-192; R-1. DeMoss agreed that beginning at 6:00 AM on June 11, 2015, with MSHA's arrival at the mine, a miners' representative had the right to travel with him. Tr. 189. He further agreed that MSHA Inspector Walker had been underground for several hours without a miners' representative. Tr. 190. On June 11, 2015, Alan Frederick and Brian Dodson were traveling together as MSHA inspectors. Though Brandon Shemwell had been designated as the next miners' representative to travel at 6:45 AM, and despite him having been asked by MSHA at 8:45 AM who would be the designated miners' representative, DeMoss first attempted to call Shemwell at 9:57 AM. Tr. 193.

DeMoss, in explaining the failure to timely contact Shemwell, asserted: "I'm going to do what the Assistant District Manager and the Field Supervisor tells me to do." Tr. 194.

DeMoss agreed that Shemwell did not have the authority to order other miners to give him a ride to where MSHA inspectors might be and was totally dependent upon management to provide transportations. Tr. 195.

DeMoss further agreed that MSHA could not order management to travel with them during an inspection. Tr. 197. Nor could management be ordered to provide MSHA with transportation. Tr. 197. Neither could management order an employee to give a miners' representative a ride to an inspection. Tr. 198.

Normally, DeMoss sent Danny Presley or someone else from the safety department to pick up a miners' representative. Tr. 198. DeMoss conceded that neither Frederick nor Dodson actually stated that they were worried about "pre-notification." Tr. 199.

On June 11, 2015, the chain of command at the mine was the following: (1) Danny Thorpe, Superintendent; (2) Chad Paldwin, Mine Manager; (3) DeMoss, Safety Manger; (4) John Scott, Safety Analyst. There was a tracking device outside at the Parkway mine which could track any miner within 200 feet of where they were. Tr. 201. On June 11, 2015, Presley was the day shift foreman and would have been in the rehab area of the belt line where phone reception would have been poor. Tr. 202. DeMoss indicated that it was "illegal" for a miner to power off his phone while he was in the mine. Tr. 205.

In order to assure that Shemwell had been able to travel with the inspectors he did one thing: he called Shemwell and told Shemwell that he'd need to arrange his own ride. Tr. 206.

DeMoss speculated that, although Shemwell could not get through to Presley, Scott was able to do so because Presley may have been standing in a better reception area. Tr. 207.

DeMoss had no explanation why Shemwell had been unable to contact Presley in 12 phone call attempts but he, in the middle of the calls, was able to do so. Tr. 209.

DeMoss agreed that Respondent did not have the right to tell a miners' representative that he could not travel with an inspector because only a two man ride was available to transport a MSHA inspector and company's representative. Tr. 211.

DeMoss himself was not present during the July 8, 2015, meeting between the MSHA inspectors, Safety Analyst Scott, and Complainants Greenwell and Wilson. Tr. 209-210.

After his recollection was refreshed by means of a prior deposition, DeMoss recounted that John T. Scott had told MSHA Inspector Ramsey that Ramsey's supervisor, MSHA's Field Office Supervisor, Alan Frederick, had stated that citations were not to be issued for any violations found by miners' representatives and only for violations that an inspector had found himself. Tr. 212. Frederick told DeMoss that if a miners' representative finds a violation but the MSHA inspector does not see it, a citation cannot be issued on the miner's word alone: the inspector would need to "actually visually see" the citation.[5] Tr. 213.

DeMoss testified that Scott's position that MSHA cannot issue a citation if a miners' representative sees the violation first was "crazy." Tr. 214. However, such a scenario might affect negligence and gravity. Tr. 214.

DeMoss made no attempt on July 8, 2015, or thereafter to talk to Frederick or anyone else at MSHA regarding its policy for issuing citations when a miners' representative first sees the violation. Tr. 215.

On June 11, 2015, if he had called a foreman underground to alert him of MSHA arrival, DeMoss agreed this would be advance notice. Tr. 219. Had he called underground, DeMoss feared that MSHA might have perceived such as "prenotification." Tr. 220. Although telling Shemwell to call Presley to arrange transportation might also be giving advance notice of a MSHA inspection, DeMoss did what MSHA instructed him to do. Tr. 223.

E. John T. Scott

At hearing John T. Scott appeared and testified on behalf of Respondent.[6] Tr. 224. In June 2015 Scott was employed by Respondent at Parkway mine as a safety supervisor. Tr. 226. DeMoss was his boss at the time. Tr 226. He had received training as a police officer, had a Class A mine foreman paper through the state of Kentucky, was a certified mine emergency technician, and held a Kentucky Mine Inspector certification. Tr. 227-228. He had worked in the mines as a general laborer, roof bolter operator, car operator, equipment face operator, scoop operator, and mine foreman. Tr. 228-229.

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[5] This testimony, as discussed *infra*, conflates and confuses two different issues: violations based solely upon hearsay miners' representative reports versus violations based upon initial miners' representatives' observations subsequently confirmed by MSHA inspectors.

[6] Scott indicated that his actual middle name was Ellis but that as an adolescent he was nicknamed "Trouble," which stuck. Tr. 225.

Scott began working at Armstrong in 2009 until being terminated on June 24, 2015. Tr. 230. It was his understanding that miners' representatives' job was to represent miners as to health and safety issues, with their job duties including accompanying MSHA inspectors. Tr. 230. Scott indicated that in June 2015, a rotational list was utilized at Armstrong to determine what miner would travel with MSHA. Tr. 231. Scott stated that it was ultimately up to MSHA to decide which miners' representative would travel with them. Tr. 232. Various MSHA inspectors–Charlie Jones, Josh Orr, Jeremy Walker, Alan Frederick, Charles Ramsey, and another unnamed individual–had so advised him. Tr. 232. As Scott understood it, miners' representatives had to stay with the inspector. MSHA Inspector Richie Breen had so advised him. Tr. 234.

On June 11, 2015, there had been a rock fall on the belt line and Scott had accompanied MSHA Assistant District Manager Alan Frederick and Brian Dodson underground to examine the fall area. Tr. 236. Scott later learned that Inspector Jeremy Walker was also underground but did not know this earlier in the day because he "was not supposed to know" where Walker was at. Tr. 237.

Scott heard DeMoss inform Frederick and Dodson that Shemwell was the designated miners' representative and that he would call Shemwell and send somebody after him. DeMoss, however, was instructed to call Shemwell, tell him MSHA was at the mine, and that Shemwell should call somebody for transportation. Tr. 238. DeMoss explained that normally Respondent would go and get the miners' representative but was told: "you're not doing it that way...you tell him to have somebody come and get him." Tr. 238. Dodson told DeMoss that he didn't want anyone to know that MSHA was there. Tr. 238. Scott heard DeMoss call Shemwell informing him of the MSHA inspection and Shemwell's need to contact Presley for a ride but did not hear Shemwell's side of the conversations. Tr. 239.

Scott, Frederick, and Dodson proceeded to the rock fall area where the inspector, Jeremy Walker, and a mine examiner rode up. Tr. 240. Frederick instructed Walker to get off his ride and to accompany the group to the belt line. Tr. 240. Scott drove a four seat ride with Walker, Frederick, and Dodson. Tr. 241. Frederick asked Scott about Shemwell's location. Tr. 241. Using his cell phone Scott reached Shemwell on his first attempt, telling Shemwell that Frederick wished to speak to him. Tr. 242. Scott heard Frederick tell Shemwell that the MSHA inspection had been completed, that there had been a mix-up on their end, and that he was sorry but they were leaving. Tr. 242. Scott questioned Frederick as to Shemwell's reaction and was told everything was fine. Tr. 243.

Scott denied that he had ever attempted to block miners' representatives' rides. Tr. 244.

As to the incident on July 8, 2015, Scott was with Complainants, Wilson and Greenwell, and MSHA Inspector Ramsey when Wilson pointed out something wrong with the door switch. Tr. 246. MSHA Inspector Ramsey thereupon issued a citation, which lead to Respondent repairing the door. Tr. 246-247. Subsequently Wilson pointed out a high cable in front of a door, which resulted in another citation. Tr. 247. Later, Ramsey informed Scott that he was also citing Respondent for a roof bolt safety violation, which prompted Scott to enquire who first discovered the violation. Tr. 248.

It was Scott's belief that if he or another miner first discovered a safety violation, this was a mitigating circumstance that would affect the gravity because "that shows we're looking." Tr. 248. Scott asserted, "that's part of the law," which had always been told him by all Federal inspectors. Tr. 248. If a violation is first identified by a miner or management and is flagged and corrected, "it's not that serious and lessens the gravity." Tr. 248.

Scott further asserted that he had in the past been instructed by Alan Frederick and Jeremy Walker that if a miners' representative first noticed a safety problem, this should not be a violation. Tr. 249-250.

Scott conceded that (when Ramsey had cited him for a roof bolt violation) he argued in the presence of Greenwell and Wilson that a citation should not be issued because a miners' representative first pointed out the violation. Tr. 250. Citing Frederick's past opinion, Scott further argued that, if Ramsey still followed through with a citation, the gravity should be lower. Tr. 250.

Scott admitted that Greenwell had become upset over his remarks, stating, "a violation is a violation." Tr. 250. Scott reasoned that miners' representatives are not inspectors: "Their job is for the health and safety of the men." Tr. 250.

A few days after the incident Scott met Wilson at a "Burger Queen" where Wilson advised him that he was filing a complaint which wasn't against Scott, but "against Federal" for their faulty advice. Tr. 250-251. Greenwell subsequently saw Scott at the mine where he told him substantially the same thing that the complaint was against MSHA. Tr. 252.

On cross examination Scott was questioned regarding the discrimination complaint filed against Respondent regarding the July 8, 2015, incident at issue. Tr. 254-255.

Scott admitted that the Complainants' discrimination complaint's pleadings were accurate in that he had tried to talk MSHA Inspector Ramsey out of issuing a citation for safety violations first pointed out by miners' representatives, arguing that citations could only be filed in instances where the MSHA inspector was the first individual to discover the violation. Tr. 254-255, Exhibit E. Scott again testified he was relying upon information given to him by MSHA Inspector Alan Frederick. Tr. 255-256.

Scott conceded that the inspectors *had also* seen the violations at issue but only *after* they had been *first* pointed out by miners' representatives. Tr. 250. Scott agreed that Wilson was only doing his job in pointing out the safety violations: "If you see something wrong, for God's sake tell somebody." Tr. 251, 256-257.

Scott further conceded that he did *not* mention a lowering of gravity or negligence to Ramsey on July 8, 2015, but only that Ramsey shouldn't issue a citation at all because miners' representatives first pointed out the violation. Tr. 257.

As to the June 8, 2015, incident at issue, Scott had not actually heard Dodson voice concerns about "prenotification" to DeMoss. Tr. 259. Although he was a safety assistant, Scott

made no efforts to locate Shemwell when Shemwell did not appear at the rock fall inspection site. Tr. 261. Nor did he raise the matter with any other supervisors at the scene. Tr. 262. Scott could not cite any statutory provision or rule barring Respondent from sending somebody to pick up a miners' representative. Tr. 264-265. Scott further agreed that MSHA did not have the authority to order a particular miners' representative or management official to accompany it during an inspection. Tr. 265. He also agreed that a miners' representative was totally dependent upon the company to provide him with a ride to travel with federal inspectors. Tr. 266.

Scott further agreed that management could have looked at their tracking system on the surface of Parkway mine to determine where Shemwell was on June 5, 2015–as long as the system was up and functioning. Tr. 267.

F. Danny Presley

At hearing Danny Presley appeared and testified on behalf of Armstrong. Tr. 271.

Presley worked for Armstrong in June 2015 but was now off work due to a back injury. Tr. 272. Presley could not recall any conversations with Shemwell on June 11, 2015. Tr. 275. Presley testified that he was on pain medication and had memory problems. Tr. 275.

II. Contentions of the Parties

The Complainants argue that Shemwell's miners' representative rights were interfered with when the Respondent did not notify Shemwell of the June 11, 2015, inspection, did not offer Shemwell transportation to meet a separate inspection party on that date, and told Shemwell that he had to arrange his own transportation. The Complainants further argue that Greenwell's miners' representative rights were interfered with when the Respondent did not notify Greenwell of the June 11, 2015, inspection and failed to provide him transportation so that he could accompany the inspector. Furthermore, the Complainants argue that Safety Supervisor Scott generally interfered with miners' representative rights due to his statements on July 8, 2015, in the presence of miners' representatives that MSHA inspectors could not issue citations for violations found by miners' representatives.

The Respondent argues that this Court should apply the interference test developed by ALJ Barbour in *Secretary on behalf of Pepin v. Empire Iron Mining*, 38 FMSHRC 1435 (June 2016), rather than the interference test endorsed by two Commissioners in *UMWA on behalf of Franks & Hoy v. Emerald Coal Resources*, 36 FMSHRC 2088 (Aug. 2014), and applied subsequently by several ALJs. However, the Respondent argues that under either of the tests, it should prevail.

The Respondent argues that it acted properly and did not interfere with any miners' representative's rights. With respect to the events of June 11, 2015, Respondent argues that it was within the discretion of the MSHA inspector to decide who, if anyone, would accompany the inspector. They argue that MSHA Assistant Manager Dotson and Field Supervisor Frederick rejected the practice of calling the mine foreman to pick up Shemwell as the miners' representative. Instead, they directed DeMoss to call Shemwell and for Shemwell to call the

mine foreman for a ride. The MSHA personnel indicated that the usual procedure for calling the miners' representative and offering a ride would constitute unlawful pre-notification. Respondent argues that the evidence shows that the Respondent did not engage in interference against Shemwell or Greenwell.

With respect to the statements made by Safety Supervisor Scott, the Respondent argues that Shemwell was not present for the statements, and therefore should not be permitted to bring a claim. Further, Respondent argues that the First Amendment and Due Process counsel against a finding of interference.

III. Character Evidence and Evidence of Past Crimes

At hearing the Respondent questioned the Complainants' veracity due to their past criminal convictions. Tr. 115, 142. Justin Greenwell had reportedly been convicted of first degree assault, possession of marijuana, and public intoxication. Tr. 114. Michael Wilson had been convicted of five assaults and receiving stolen goods. Tr. 142.

This Court recognizes that the Federal Rules of Evidence allow, under certain circumstances, for the admission of evidence regarding a witness' character, including evidence of past crimes. (See *inter alia* Rules 404, 405, 608, 609). However, this Court found such evidence to be of little or no probative value in resolving the material factual questions in the case *sub judice*. Indeed, the most critical factual question of what Scott uttered in the presence of Complainants, Greenwell and Wilson, on July 8, 2015, was resolved by Scott in his hearing admissions. As such, there was no need to make any credibility determinations as to what Complainants allegedly heard and as to what Scott actually said.

Traditionally, in most jurisdictions, felonies, without regard to the mature of the particular offense, and *crimen falsi*, crime(s) involving falsity, without regard to the grade of the offense, were admissible to attack a witness' character for truthfulness. (see also commentary to Rule 609 of Federal Rules of Evidence).

On their face, Greenwell's convictions do not appear to fall within either category nor do Wilson's assault convictions. Moreover, this Court observes that history is replete with examples of individuals who, though pugnacious and alcoholic, were men of great character–Ulysses S. Grant, Audie Murphy, and Winston Churchill being only a few of many examples.[7]

As to Mr. Wilson's conviction for receiving stolen goods, such appears to have been in the distant past. Rule 609(b) essentially provides that any conviction taking place more than 10 years previous should only be admitted if its probative value outweighs it prejudicial effect. This Court found little probative value as to this evidence of past crimes–especially in view of Scott's admissions and Wilson's obvious passion to be an advocate for miners' safety in his miners' representative capacity.

[7] Indeed, during 40 years in the practice of law, this Court has encountered more than a few lawyers and judges who, though bellicose and tippling, were men of recognized honesty and truthfulness.

Under the total circumstances–regardless of Respondent's evidence of Greenwell's and Wilson's character–this court found that both Complainants reasonably viewed Scott's interactions with and comments to the MSHA inspector as tending to interfere with their protected rights under § 105(c). None of the character evidence or past crime evidence presented by Respondent persuaded this Court that the Complainants were being less than honest in their testimony as how their willingness to exercise their rights as miners' representatives was chilled.

At hearing Respondent's witnesses sometimes appeared to conflate and confuse two distinct issues: whether a MSHA inspector can issue a citation solely based upon the alleged observation of a safety violation by a miners' representative that is not seen by the inspector versus whether a MSHA inspector can issue a citation if the violation is *first* pointed out by the miners' representative and *then* only confirmed by the inspector. Tr. 250, 254-55; Ex-E.

There is no need to address the former issue as in the case *sub judice* the safety violations were also subsequently seen by the MSHA inspector. (see inter alia: Tr. 256.)[8] As to the latter issue, there is no question that Scott's asserted position would violate § 103(g).

IV. Credibility Assessment

A. Steven James DeMoss

This Court found this witness only partially credible.[9] At times DeMoss seemed purposely obtuse during cross-examination. The efforts he exerted in attempting to contact Shemwell and ensuring that Shemwell participated in the June 11, 2015, MSHA inspection suggested, in the best light, a benign indifference to Shemwell's § 103(g) rights. Likewise, his expressed fears of being cited for "prenotification" were not altogether convincing. Further, his unquestioning embrace of Scott's position on the lowering of gravity and negligence in cases where miners' representatives first find safety violations was also disconcerting.

B. Brandon Heath Shemwell

This Court fully credited Shemwell's testimony that he wanted to exercise his § 103(g) right to travel with a MSHA inspector on June 5, 2015, that he made honest attempts to participate in the inspection, and that he was genuinely upset over being thwarted at such. Shemwell's testimony was essentially uncontradicted by Respondent as to the critical elements of his interference claim. This case turned not on Shemwell's testimony as upon respondent's

[8] Moreover, this Court observes that there is abundant Commission case law holding that the fact of violation may be based upon (reliable) hearsay alone. *Secretary Of Labor Mine Safety And Health Administration v. Productos De Agregados De Gurabo*, 37 FMSHRC 2441, 2451-53 (Oct. 28, 2015)(ALJ).

[9] At hearing DeMoss' private counsel indicated that there might be reason for DeMoss to invoke his fifth amendment privilege if questioned regarding an alleged dust pump tampering incident at subject mine that had a collateral connection to the within controversy. This Court, of course, took no adverse inference from such in assessing DeMoss' testimony. See Tr. 71-72.

claimed justification for its failure to contact and provide him with transportation to the MSHA inspection.

C. Justin Neil Greenwell

Justin Greenwell gave consistent testimony regarding the July 8, 2015, incident at issue. As noted within, Greenwell's recollections of Scott's remarks regarding MSHA inspectors being barred from issuing citations where violations were first pointed out by miners' representatives were essentially confirmed by Scott at hearing.

Whether Greenwell ultimately left his employment for other non-discriminatory grounds is not ultimately dispositive of his within interference claim in that this Court fully credited Greenwell's testimony that Scott's remarks on July 8, 2015, chilled his desire to exercise his § 103(g) rights. This Court found Greenwell to be also quite sincere in his expressed desire to protect miners' health and safety in his position as miners' representative.

D. Michael Wilson

Michael Wilson was quite credible in his descriptions of Scott's fundamental misapprehension of § 103(g)'s statutory intent–that miners themselves should play an integral role in the enforcement of mine safety and health standards by alerting others to hazards. Indeed, Scott was Wilson's best corroborating witness.

Whatever the character flaws imputed to Wilson by Respondent–this Court nonetheless found Wilson to be an individual sincerely devoted to his duties as a miners' representative and honestly committed to miners' health and safety. That Wilson was willing to continue in his role in an unpaid capacity post-retirement is persuasive evidence of such.

Given the total circumstances it was abundantly clear to this Court that Wilson in good faith reasonably viewed Scott's remarks as tending to interfere with Wilson's protected § 103(g) rights.

E. John T. Scott

This Court found Respondent's witness, John T. Scott, to be a credible and honest individual. A former police officer, Scott readily admitted that he had argued with MSHA Inspector Ramsey–in the presence of Complainants Greenwell and Wilson–that MSHA inspectors could not issue citations for safety violations that were first pointed out by miners' representatives. Indeed, Scott's forthright admissions, as a matter of fact and law, substantially established Wilson's and Greenwell's interference claims arising out of July 8, 2015, incident at issue.

Scott's testimony essentially corroborated much of Complainants' hearing testimony. (See *inter alia* Scott's acknowledgement that his remarks regarding the issuance of citations had generally upset Greenwell.)

While finding Scott to be a quite believable witness, this Court nonetheless found much of Scott's testimony to be troubling. Given Scott's years of coal mine experience and his position of safety supervisor this Court was shocked at Scott's fundamental lack of understanding regarding § 105(g) protections. That Scott in good faith believed that mine operators were to be given a carte blanche waiver of responsibility as to safety violations first pointed out by miners' representatives is profoundly disturbing.

This Court wonders if Scott, as a former police officer, would so blithely embrace a proposition that criminal wrong-doers could not be charged for crimes whose existence was first pointed out by their defense counsel to the police.

Because of the Secretary's discovery refusals discussed herein, this Court is unable to determine what was actually said by MSHA personnel to Scott and/or whether Scott misinterpreted or misunderstood any of such remarks. However, even assuming that Frederick provided misinformation to Scott, Scott's failure to have reasonably questioned such patently erroneous advice affecting miners' health and safety is baffling and saddening.

V. The Test for Interference

The test for interference under Section 105(c) is not well-settled, and each party argues that this Court should apply a different test. Section 105(c) states:

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

30 U.S.C. 815(c)(1).

The Act prohibits both discrimination because of protected activity and interference with the exercise of statutory rights. Most cases before the Commission are of the former, and follow the *Pasula-Robinette* framework, wherein the Claimant presents a *prima facie* case by showing that he or she engaged in protected activity, that there was an adverse action, and that the adverse action was motivated in any part by that activity. *See Turner v. Nat 7 Cement Co. of*

California, 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* 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).

However, the Act's text and legislative history make clear that the Act protects miners against "not only the common forms of discrimination, such as discharge, suspension, demotion..., but also against the more subtle forms of interference, such as promises of benefits or threats of reprisals." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978). Interference cases have been relatively rare at the Commission, with an increased frequency of such cases in the past few years, so a majority of Commissioners have never explicitly laid out a test for interference.

In *United Mine Workers of America obo Mark A. Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), two Commissioners endorsed a test suggested by the Secretary. According to this 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.

Id. at 2108. This test has been applied by several ALJs in a variety of interference cases. *See e.g. Lawrence Pendley v. Highland Mining Co. & James Creighton*, 37 FMSHRC 301 (Feb 12, 2015)(ALJ Andrews); *Scott D. McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 11, 2015) (ALJ Feldman); *Sec'y of Labor obo Greathouse et al. v. Ohio County Coal*, 37 FMSHRC 2892 (Dec. 30, 2015) (ALJ Miller).

However, in *Sec. of Labor on behalf of Mindy S. Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435 (June 6, 2016), ALJ Barbour cast doubt on the *Franks* test. Judge Barbour held that the Secretary's interpretation of Section 105(c) was unreasonable and not entitled to *Chevron* deference because it "entirely reads out the word 'because' and all subsequent language" from the provision.[10] *Id.* at 1449. Judge Barbour held that the word "because" required that the Complainant prove that the Respondent's interference with the

[10] The pertinent language of Section 105(c)(1) states: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...because such miner... has filed or made a complaint under or related to this Act..." 30 U.S.C. 815(c)(1)(emphasis added).

exercise of miners' statutory rights was motivated by the exercise of protected rights. Id. at 1453-54. While acknowledging that the Commission has traditionally based its interpretation of interference on the NLRB's interpretation of similar language, which does not require a showing of intent, and that courts have held that the word "because" in Title VII disparate impact cases does not require a showing of intent, the judge held that a plain reading of the Act required such. *Id.* at 1450-51, n. 11. Accordingly, he created the following test, which places intent front and center: In order to prove an allegation of illegal interference under section 105(c)(1), the Secretary must show that "(1) the Respondent's actions 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 that (2) such actions were motivated by the exercise of protected rights." *Id.* at 1453–54.

Following *Pepin*, the Commission had the opportunity to determine the appropriate interference test in *Sec. of Labor on behalf of Thomas McGary and Ron Bowersox and UMWA v. The Marshall County Coal Co., McElroy Coal Co., Murray American Energy, Inc. and Murray Energy Corp.*, 38 FMSHRC 2006 (Aug. 26, 2016)(hereinafter referred to as "*McGary*")[11]. The Secretary in *McGary* argued that the Commission should apply the test from *Franks*, whereas the Respondent argued before the Commission that because there was no interference test endorsed by a majority of Commissioners, it should only apply its previous precedential decisions in *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), and *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982).

Commissioners Young, Nakamura, and Althen held that the "*Franks* two-step test is consonant with the Commission's decisions in *Gray* and *Moses* and thus it was not error for the Judge to apply it in this instance." 38 FMSHRC at 2012. The Commission further stated:

> The language of the first prong of the *Franks* interference opinion test is entirely consistent with *Moses* and *Gray*. In *Moses*, the Commission concluded that the operator's conduct constituted interference because it would "chill the exercise" of miners' protected rights. 4 FMSHRC at 1478-79. Consequently in *Gray*, the Commission analyzed "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of [protected] rights." 27 FMSHRC at 9 (citation omitted).
>
> The second prong of the *Franks* interference opinion two-step test is similarly grounded in Commission precedent. In *Moses*, the Commissioner recognized that an operator may have legitimate and substantial reason for its conduct in question. *See* 4 FMSHRC at 1479 n.8 ("This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem ....").

Id. In a footnote, Commissioners Young and Althen clarified that they "do not find it necessary

[11] In *McGary*, the Respondents did not challenge the application of the *Franks* interference test before the ALJ, which complicated the procedural posture of the issue before the Commission. *McGary*, 38 FMSHRC at n. 11, n. 22.

to settle upon a final, specific test of interference in this case." *Id.* at n. 11. They noted that the question of which test should apply to interference cases has never been fully briefed before the Commission, and therefore it would be inappropriate for the Commission to settle on one test over another. *Id.* Commissioner Nakamura noted that he believed that the *Franks* test was the appropriate test for interference cases. *Id.* Citing Supreme Court precedent in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), he observed, "that the Supreme Court has often recognized that statutes prohibiting discrimination "because of" congressionally designated criteria need not include a motive element." *Id.*

Commissioners Jordan and Cohen wrote a separate decision, concurring in part and dissenting in part. In pertinent part, they agreed with the Judge's application of the *Franks* test. *Id.* at 2028-2030. Commissioner Jordan noted in a footnote that she joins Commissioner Nakamura in his endorsement of the *Franks* test. Commissioner Cohen noted that he would apply the *Franks* test in the *McGary* case, but explained that "absent briefing from the Secretary, the regulated community and miners, however, Commissioner Cohen does not believe it prudent to settle upon a specific test for interference under the section 105(c) of the Mine Act at this time."[12] *Id.* at n. 22.

Accordingly, *McGary* clarifies that whereas there is no settled test for interference cases, the *Franks* test is an appropriate test, and not contrary to the Act or Commission precedent. The undersigned will apply the *Franks* test for these reasons, and because the *Pepin* test would appear to lead to absurd results under too many circumstances.

Unfortunately, Section 105(c) is not the model of legislative precision.[13] Section 105(c)(1)—a 203-word run-on sentence—is no exception. This is perhaps due to the fact that the history of mining legislation follows quickly on the heels of the history of mining disasters. The

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[12] Commissioner Cohen did not describe a circumstance in which an interference case would warrant a different test.

[13] For example, Section 105(c)(2), which describes the procedures for Temporary Reinstatement, states that the Secretary shall commence an investigation of a complaint "within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. 815(c)(2)(emphasis added). Read plainly, this clause, with its use of the word "shall," would seem to deny the Commission ALJs of any discretion in granting or denying a Temporary Reinstatement application, and would make a hearing wholly unnecessary. However the Commission has not interpreted the clear words of the statute in this manner, and has instead detailed procedures for a Temporary Reinstatement hearing, 29 C.F.R. 45, and Commission ALJs have denied applications by the Secretary for Temporary Reinstatement. *See e.g. Sec'y of Labor obo Lawrence D. Hagene v. Prairie State Generating Co., LLC,* 38 FMSHRC 290 (Feb. 22, 2016) (ALJ); *Sec'y of Labor obo Levi Bussanich v. Centralia Mining Co.*, 22 FMSHRC 107 (Jan. 27, 2000)(ALJ), *aff'd by the Commission*, 22 FMSHRC 153 (Feb. 22, 2000); *Sec'y of Labor obo Daniel R. Brusca v. Twentymile Coal Co.*, 30 FMSHRC 552 (June 25, 2008)(ALJ).

1969 Coal Act was passed soon after the 1968 Farmington Mine disaster.[14] Public Law 91-173 (Dec. 30, 1969). Similarly, the 1977 Mine Act was passed soon after the 1976 Scotia Mine disaster and the 1977 Porter Tunnel Mine disaster.[15] One should of course give effect to every word in a statute, but one should not interpret words so narrowly such that they lead to absurd results that are contrary to the purpose of the law.

Though the *Pepin* test's strict reading of the word "because" in the Act to require the Complainant to show that the Respondent was "motivated by the exercise of protected rights," has some appeal, it would lead to results that are contrary to the Act's and the provision's purpose. According to the *Pepin* test, an agent of the operator would be legally permitted to interfere with a miner's statutory rights because he doesn't like the miner, because there was a lack of resources, because he was ignorant of the miner's statutory rights, or a host of other reasons that are not motivated by the exercise of protected rights.

Additionally, because the *Pepin* test requires that "such actions were motivated by the exercise of protected rights," it would only find interference as a reaction to miner's conduct, and not in instances where the operator preemptively interfered with miners' rights. Such an example of preemptive inference can be found in the *McGary* case, where the mine CEO held mandatory "Awareness Meetings" wherein miners got the impression that all safety complaints should first be reported to mine management, in contravention to their statutory rights to make anonymous complaints to MSHA. *McGary*, 38 FMSHRC at 2015-16. In the *McGary* case, the CEO's conduct was perhaps in response to previous complaints, but what about an instance where a mine operator opens a mine and includes such information in the initial training? If the Complainant cannot show that the operator's motivations were because of the exercise of protected rights—and how could he if the mine just opened—should that conduct be permissible?

This requirement is in conflict with the first prong of both the *Franks* test employed in *McGary*, as well as the first prong of the *Pepin* test, which asks if the Respondent's actions can be reasonably viewed "as tending to interfere with the exercise of protected rights." *McGary*, 38 FMSHRC at 2011; *Pepin*, 28 FMSHRC at 1453-54. The phrase "tending to interfere" indicates

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[14] Indeed, the first two sentences of the Purpose of the Coal Act in the House Report state:

> During the early hours of November 20, 1968, an explosion rocked Consolidation Coal Co.'s No. 9 mine near Farmington, W. Va. When the mine was sealed several days later, it became the tomb for 78 miners working that tragic midnight shift who could not have escape and for whom no rescue operation could succeed.

H. Rept. 91-563, 91st Congress, 1st Session, October 1969.

[15] The Introduction of the Senate Report accompanying the bill provides a long list of mine disasters, ending with Scotia and Porter Tunnel (Tower City). S. Rep. 95-191, 95th Cong., 1st Session (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978).

that the employer's conduct is inclined to interfere with future miner conduct. However, the second prong in *Pepin* requires a predicate exercise of protected rights that the conduct be in reaction to. If a mine operator is interfering with a miner's statutory rights, why should the Complainant who is in a worse position to make a showing of the operator's motivations be required to show why the operator is acting in such a manner? Instead, the operator should be required to show why the interference with a miner's statutory rights was due to "a legitimate and substantial reason whose importance outweighs the harm cause to the exercise of protected rights," as required by the *Franks* test. If it cannot, then the conduct should be prohibited under Section 105(c).

VI. Respondent's Conduct Tended to Interfere with the Exercise of Miners' Rights in Docket Nos. KENT 2016-96-D and KENT 2016-108-D, However There was a Legitimate and Substantial Reason Present in Docket No. KENT 2016-96-D

In Docket Nos. KENT 2016-96-D and KENT 2016-108-D, Complainants Shemwell and Greenwell allege that Respondent's failure to notify them of the June 11, 2015, MSHA inspections and failure to provide Shemwell transportation to accompany the inspector constituted interference. Shemwell and Greenwell were designated as miners' representatives on February 28, 2014. Tr. 45, 47, 87. Both Shemwell and Greenwell testified that mine management treated them worse once they started serving as miners' representatives. Tr. 48-49, 93-95. The Respondent does not deny that neither Shemwell nor Greenwell were notified about the inspection or provided transportation, but states that the failure to notify Shemwell was due to the MSHA inspector's specific orders regarding notification.

The relevant facts of these cases are that on June 11, 2015, inspector Walker arrived at the mine at 6:00 am. Tr. 187. DeMoss was unaware if Walker had asked for a miners' representative or if one was available when he arrived, but he later learned that an Armstrong examiner had been accompanying Walker. Tr. 190, 221.

At 6:45 am DeMoss asked Shemwell and then Greenwell if they wanted to walk around with the MSHA inspector should one be there on that day, to which they both responded yes. Tr. 54, 99, 165. DeMoss did not tell them that there was already an inspector at the mine, and they did not know that there was an inspection already proceeding. Tr. 100, 126, 190-91. Based on Inspector Walker's notes, it is likely that he did not go underground until approximately 6:45 am, when DeMoss was meeting with the miners' representatives. EX. R-2.

Later in the morning, between 8:30 am and 9:00 am, MSHA District 10 Assistant Manager Brian Dotson and Field Supervisor Allen Frederick arrived at the mine for inspection. Tr. 166. DeMoss told them that he would call Presley to pick up Shemwell so he could accompany the inspectors. Tr. 167, 238. MSHA personnel told DeMoss not to do so, and instead instructed DeMoss to call Shemwell, and have Shemwell call Presley for transportation. Tr. 238, 259. Though not specifically told the reason behind this directive, DeMoss testified that he believed it was due to MSHA's concern with pre-notification of the inspector's presence.[16] Tr. 167, 238-39. Over the following 13 minutes, DeMoss tried to call Shemwell 12 times, but was

[16] Advance notice of an inspection is prohibited by Section 103(a) of the Act.

unable to reach him. Tr. 170-71. When Shemwell called back, DeMoss explained that Shemwell had to contact Presley for a ride. Tr. 56-60, 172.

Shemwell thereafter attempted to call Presley 12 times between 10:12 am and 11:21 am to arrange a ride, but he could not reach him. Tr. 58-61. Shemwell called Greenwell and asked if there were any rides available to transport him to the inspection party, but Greenwell could not locate any. Tr. 121-122. Later that morning, Shemwell spoke with Scott, and Scott told him that the inspection had concluded and asked Shemwell if he had any questions. Tr. 62-63. Shemwell responded that he did not. Tr. 62-63.

Later, when Greenwell enquired with Inspector Walker and DeMoss why he was not informed about the inspection and offered transportation, they both indicated that there was no room on the ride. Tr. 101-102, 120, 126. Greenwell testified that had DeMoss informed him that there was an ongoing inspection during the 6:45 am meeting, he would have traveled with the inspector. Tr. 102. He further testified that if the company continued to fail to inform him of inspections and offer him transportation, he would not continue to exercise his rights as a miners' representative. Tr. 113.

According to the Mine Act, miners' representatives "shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine...for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. §813(f). Such opportunity must mean that miners' representatives are provided notification, as well as the time and resources necessary to facilitate the walkaround. Miners' representatives are dependent upon mine management for appropriate notification of inspection. Furthermore, the record clearly shows that miners' representatives like Shemwell or Greenwell have no authority to order anyone to provide a ride, and are instead dependent on mine management. Tr. 61, 195-196. I find that a failure to notify a miners' representative or provide him with adequate transportation would tend to interfere with the exercise of the miners' representative's statutory rights of accompanying the MSHA inspector.

However Shemwell's case (Docket No. KENT 2016-96-D) contains evidence that MSHA representatives ordered the Respondent to notify Shemwell in the manner it did, which further led to the lack of transportation. Tr. 167, 238-239, 259. Although the undersigned agrees with Complainant that the Respondent could have, and perhaps should have, engaged in further efforts in ensuring that Shemwell was notified and provided transportation, the MSHA inspector's orders complicate this matter.[17] If a federal inspector orders mine personnel to use a specific means of notification and arrangement for transportation, even if inefficient or problematic, there is a legitimate and substantial justification for complying.

In Greenwell's case (Docket No. KENT 2016-108-D), no such justification exists. Respondent made no efforts in informing Greenwell of Inspector Walker's presence, or trying to find him transportation. In this instance, they simply shirked their duties. Accordingly, I find that the conduct contained in KENT 2016-108-D constituted unlawful interference.

[17] MSHA repeatedly refused to make personnel available for deposition.

VII. Respondent Interfered With the Exercise of Miners' Rights in Docket No. KENT 2015-673-D

The circumstances surrounding Docket No. KENT 2015-673-D involve statements made on July 8, 2015, by Armstrong safety director, John T. Scott, to MSHA inspector, Charles Ramsey, in the presence of miners' representatives Wilson and Greenwell. During the July 8 inspection, Greenwell pointed out some loose roof bolts, a piece of machinery that was leaking oil, and a problem with a door switch to the MSHA inspector. Tr. 108-110, 137, 246-47. This led to the inspector issuing three citations. Tr. 247-48. Scott challenged the citations, and told the MSHA inspector that citations could not issue if a miners' representative had first pointed out the safety violation.[18] Tr. 111, 138-39. I find that such comments made in the presence of miners' representatives would tend to interfere with the exercise of miners' rights, and there is no legitimate and substantial justification.

Wilson, Greenwell, and Shemwell each testified that if the Respondent continued to argue to MSHA that if a miners' representative points out a violation to an inspector a citation cannot issue, or if MSHA did not issue citations for those violations, they would not continue to exercise their walkaround rights. Tr. 66, 81, 112, 138-139. Indeed, miners' representatives serve in this important capacity to make the mines safer. Any reasonable miners' representative would reason that if his presence lessened MSHA's ability to issue citations, he would likely rethink his role, and would perhaps conclude that it would be safer if no miners' representative walked around with the inspector.

Scott testified that he was told by MSHA inspector Frederick or Walker of the rule that MSHA cannot issue a citation if a miners' representative first discovers the violation. Tr. 182. Though a mine operator has a right to challenge any citation or defend its conduct to the inspector, the comments made in the instant case were unreasonable and should not have been made in the presence of miners' representatives. However, there are several problems with Scott's conduct. Even if Scott was indeed informed on a previous occasion by MSHA personnel that a citation cannot issue if a miners' representative first discovers the violation—or he misunderstood their statements to mean such—as safety director he should have found the notion unreasonable and suspicious. The Mine Act is a strict liability statute, meaning that the circumstances surrounding discovery would not impact the fact of violation. Furthermore, if such were the case, then miners' representatives would be dissuaded from speaking up, and simply hope silently that the MSHA inspector noticed the violations. Indeed, mine safety manager DeMoss called Scott's position "crazy." Tr. 214.

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[18] I find Wilson and Greenwell's account of Scott's statement challenging the citation more credible than Scott's testimony that he was challenging the gravity and negligence. Tr. 250. In addition to Wilson and Greenwell providing more credible testimony, Scott's testimony was inconsistent. After testifying that he was only referring to gravity and negligence, he admitted that the Complainants' discrimination complaint's pleadings were accurate in that he had tried to talk inspector Ramsey out of issuing the citation because miners' representatives first discovered the violations. Tr. 254-55; Ex-E.

If Scott somehow believed this unreasonable notion, he should have discussed the matter with MSHA either prior to, or after, the inspection, while out of the presence of the miners' representatives. Any reasonable person would recognize that raising the argument in the presence of the miners' representative would have the unintended, or intended, consequences of dissuading miners' representatives from reporting violations to MSHA inspectors. Respondent raises a freedom of speech argument, stating that one should not suffer liability under the Mine Act for clarifying one's rights under the Act. However, the Respondent's arguments are misplaced, and the cases it cites in support are inapposite. The issue in the instant case is not solely what was said, but that it was said in the presence of the miners' representatives. The First Amendment often requires a balancing of the right to free speech with other rights. *See eg. NLRB v. Gissel Packaging Co.*, 395 U.S. 575 (1969) (Supreme Court found interference under NLRA based on threats of plant closure made by employer to employees to dissuade unionization). If the Respondent's argument was followed, then much of the Act's discrimination protections (as well as many other regulatory provisions) would be hollowed of all meaning.

The Respondent certainly had the right to clarify its understanding of MSHA's citation protocol. However, in doing so in the presence of the miners' representatives, its comments tended to interfere with the representatives' rights. Furthermore, there is no significant justification for why the comments were made in their presence. As such, I find that Scott's comments made in the presence of miners' representatives constituted interference under Section 105(c) of the Mine Act.

ORDER

Based on the above, the Court finds that Respondent violated Section 105(c) in Docket Nos. KENT 2016-108-D and KENT 2015-673-D by unlawfully interfering with miners' protected activities. The Court finds no interference in Docket No. KENT 2016-96-D.

It is hereby **ORDERED** that Armstrong Coal cease and desist from interfering with the rights of miners' representatives.

It is **FURTHER ORDERED** that Armstrong Coal's management personnel undergo comprehensive specialized training by MSHA personnel in the statutory rights of representatives under Section 105(c) of the Act.

It is **FURTHER ORDERED** that Armstrong Coal post this decision at the Parkway Mine in a conspicuous unobstructed place where notices to employees are customarily posted, for a period of 60 days.

It is **FURTHER ORDERED** that Respondent pay Complainants' reasonable attorney fees and costs.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Highland 9 Mine is located so that the Secretary may take the actions required by the rule.[19]

John Kent Lewis
Administrative Law Judge

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[19] It should be noted that any significant penalty based upon the negligence or gravity of Respondent's conduct will be closely scrutinized by the undersigned in light of MSHA's refusal to make available information necessary to this case.