FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 25, 2023

TODD DESCUTNER, Complainant, v. NEVADA GOLD MINES LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2022-0201 MSHA Case No. WE-MD-2022-01 Mine: Leeville Mine ID: 26-02512

DECISION AND ORDER

Appearances: Larson A. Welsh, Law Office of Hayes & Welsh, 199 N. Arroyo Grande Boulevard, Suite 200, Henderson, NV 89074

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Before: Judge Simonton

This case is before me upon a complaint of discrimination filed by Todd Descutner ("Descutner") against Nevada Gold Mines ("NGM"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3).[1] Descutner contends that NGM terminated him for engaging in protected activity. NGM asserts that it properly terminated Descutner under the company's progressive discipline policy.

A hearing was held on December 6–7, 2022, in Salt Lake City, Utah. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observations of the demeanor of the witnesses, and the parties' post-hearing briefs, I find that NGM did not violate the Mine Act when it terminated Descutner.

[1] In this decision, the joint stipulations, transcript, Complainant's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. C-#," and "Ex. R-#," respectively. References to the transcript include numerals I or II to denote the volume of the transcript referenced, since each day's transcript is independently paginated.

I. STIPULATIONS

In their prehearing submissions, the parties submitted the following joint stipulations:

1. Todd Descutner was employed by NGM until his termination date of November 2, 2021.

2. Descutner was a "miner" as defined in sections 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g), 815(c).

3. NGM's Leeville Mine is a "coal or other mine" as defined in Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1).

4. The Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case pursuant to Section 105(c)(3), 30 U.S.C. § 815(c)(3) of the Mine Act.

II. FINDINGS OF FACT

A. Background

Nevada Gold Mines is a joint venture that formed in 2019 as a merger of two gold companies: Newmont Corp. and Barrick Gold Corp. Tr. I, 18; Respondent's Post-Hearing Brief ("Resp. Br.") at 2. The Leeville Mine ("Leeville" or "mine") is an underground gold mine operated by NGM and located in northern Nevada. Tr. I, 18–19; Resp. Br. at 2. At Leeville, hourly miners are required to take contracted buses to work at the mine site—they are not permitted to drive themselves to work. Tr. I, 23; Tr. II, 8–9. During each shift at the mine, the hourly workforce is divided into three groups: production, development, and compliance/paste. Tr. I, 156; Resp. Br. at 2. Each of these groups is supervised by a frontline supervisor, and each frontline supervisor reports to a general supervisor for that group. Tr. I, 155–56; Resp. Br. at 2. The general supervisors for each group report to the superintendent, who reports to the site-level mine manager. Resp. Br. at 2.

NGM utilizes a progressive discipline policy for its hourly employees. Tr. II, 52; Ex. R-C. The policy delineates three levels—or tiers—of disciplinary action that occur before an employee's termination. Tr. II, 52; Ex. R-C. The first is a documented verbal notice, the second is a written notice, and the third is a final notice, which may include a suspension from work. Tr. II, 52; Ex. R-C. Employees may be issued more than one level of discipline for a single incident. Tr. II, 83. Two separate, parallel discipline tracks are used at NGM—one for tardies, absences, and other attendance-related issues, and the other for behavioral issues and discipline relating to property damage. Tr. II, 56.

Descutner worked for NGM—and Newmont Corp. prior to the merger—from 2006 until his termination in November 2021. Tr. I, 17; Jt. Stip. 1. He started at Newmont's Deep Post Mine and began working at the Leeville Mine in 2010. As of 2019, Descutner was a tier 4 miner

in the development group at Leeville, regularly working four jobs in this role: shotcrete personnel, haul truck driver, loader operator, and utilities. Tr. I, 19.

To varying degrees, several management officials were involved in the events at issue in this case. Don Strong and Terry Krantz were Descutner's immediate frontline supervisors during the events described below. Tr. I, 40, 54–55. Derek Dominguez was a general supervisor over development at Leeville from December 2020 through September 2021, after which he became the interim superintendent. Tr. I, 157. Jeff Sorenson was a frontline supervisor for the maintenance shop. Tr. II, 148. Corey Myers was an interim general supervisor from August 2021 to February 2022, after which he became a general supervisor. Tr. II, 142–143. Amy Armstrong was the senior human resource business partner for NGM. Tr. II, 48.

B. COVID-19 Impacts on Descutner and NGM

After learning of the COVID-19 pandemic in early 2020, Descutner became concerned about contracting the virus because of his wife's health. Tr. I, 19–20. Descutner's wife has asthma and an autoimmune deficiency, and her physician contacted her early in the pandemic to tell her he was concerned that if she contracted COVID-19, she may not survive. Tr. I, 19–20. At that time, Descutner used approximately three months of FMLA leave to quarantine with his wife, during which time they decided that she should quarantine separately from him once he returned to work. Tr. I, 20. In May or early June 2020, Descutner purchased a trailer so that he could live apart from his wife. Tr. I, 20–21. He returned to work and began living in the trailer in June 2020. Tr. I, 21. Descutner lived in the trailer for approximately 300 days, until he and his wife were vaccinated and moved back in with one another. Tr. I, 21.

Like many employers, NGM modified its policies and procedures in response to the COVID-19 pandemic. In March 2020, the company stopped busing employees to work and instead used smaller light vehicles to transport them. Tr. II, 9. In June 2020, around the time Descutner resumed working after his FMLA leave, NGM resumed busing employees to work with its contracted bus operator, Coach. Tr. I, 26; Tr. II, 10. When these bus operations resumed, Coach implemented and enforced COVID-19 mitigation measures on the buses pursuant to state requirements. Tr. II, 11–12. The bus routes were changed so that they made fewer stops, and the number of buses was increased to accommodate a lower maximum number of passengers on each bus. Tr. I, 27; Tr. II, 10–12; Exs. R-BB, -CC. Additionally, miners were required to wear masks on the bus and sit in certain seats to allow for social distancing. Tr. I, 27–28, 134; Tr. II, 11, 21, 33–34; Ex. R-EE. At the mine site, miners were required to wear masks unless they were alone or could maintain six feet of distance between themselves and others. Tr. I, 196. The maximum number of miners allowed on the "cage," which is "a big elevator that takes [miners] underground," was reduced from 30 to 15, and the miners on the cage were required to wear respirators. Tr. I, 23, 196. Miners were provided with unlimited masks and respirator cartridges, as well as infrared thermometers to take their temperatures before coming in to work. Tr. I, 196–197. NGM also extended miners' short term disability allowance and gave employees their full years' worth of paid time off ("PTO") up front so they could take the necessary time off if they got sick. Tr. I, 197. If miners contracted COVID-19, they were required to obtain a doctor's release to return to work. Tr. I, 133.

C. Descutner's Complaints

1. December 2020/January 2021 Complaints about the Buses

Descutner felt that, to his coworkers and generally in the area he lived, COVID-19 "was considered kind of a hoax, a joke, [and] not taken very seriously." Tr. I, 22. He was particularly concerned about contracting COVID-19 on the bus contracted by NGM, which he was required to take to get to work. Tr. I, 22–23.

Chantelle Carter, NGM's transportation and logistics specialist, credibly testified that when busing resumed in June 2020, the bus contractor added buses to the schedule so that each bus no longer stopped at two pickup sites and two mine sites, but rather would stop at each pickup and mine site separately. Tr. II, 8, 10–11. From June through December 2020, there were seven buses taking miners to and from work at the two mine sites. Tr. II, 10, 18–19. Prior to the pandemic, there were three. Tr. II, 8–9. In December 2020, the total number of buses was reduced from seven to six, but service to Descutner's bus stop at Spring Creek was not impacted by this change. Tr. II, 18–19. Carter recalled receiving occasional complaints about bus protocols that she passed along to the bus operator, but could not recall at the hearing if she ever received any complaints from Descutner. Tr. II, 31–32.

Descutner testified about his belief that, beginning in June 2020, NGM was providing two buses instead of one to transport miners from the Spring Creek stop to the Leeville Mine. Tr. I, 26–27. He became frustrated when only one bus would arrive, which was common in the winter of 2020. Tr. I, 27. He also testified that few miners were abiding by the mask requirements. Tr. I, 27–28. When only one bus arrived, all the miners at the stop had to board the single bus, and, because "he had to get to work and that was the only way to get there," Descutner felt forced into an uncomfortable situation. Tr. I, 27.

In mid- or late December 2020, Descutner was involved in an incident involving a bus driver on his way in to work. Descutner had boarded the first bus at his bus stop when a second bus arrived. He got off the first bus before it departed and boarded the second. Tr. I, 28–29. He was the only miner who rode on the second bus, and he was frustrated and upset that the bus was late. Tr. I, 29, 128. He asked the driver why she could not be on time, but testified that he did not yell or raise his voice at her. Tr. I, 29–31. The bus driver responded that it wasn't her fault. Tr. I, 30. After he asked why she could not be on time, Descutner stopped talking to the bus driver and sat down. Tr. I, 29–30. Descutner testified that she "kept asking me where I was going," which he interpreted as "digging at me a little," because she did not like his question about being on time. Tr. I, 30–31.

Derek Dominguez, then a general supervisor over development at Leeville, testified that he and another general supervisor on site that morning, Zach Wright, were notified by a dispatcher that an employee on the bus inbound from Spring Creek was being "belligerent to the bus driver." Tr. I, 155, 185–86. He and Wright asked the dispatcher to call the bus operator and find out the bus number, and they then went to meet the bus in the area where employees offload. Tr. I, 186. When it arrived, they saw that Descutner was the only miner on board. Tr. I, 186. They had a conversation with Descutner about his interaction with the driver, and Descutner told

them they were in a position to do something about the bus situation. Tr. I, 31–32. Descutner talked to them about his wife's health and testified that it seemed like Dominguez had no empathy for him. Tr. I, 32–34. Descutner further testified that he referenced the "Labor Department" when telling Dominguez where else he might complain. Tr. I, 34–35.

After the conversation with Dominguez and Wright, Descutner went to work; he was not disciplined for his interaction with the bus driver. Tr. I, 38–39. According to Descutner, nothing was done to address his concerns regarding the frequent shortage of buses and the routine lack of masks on the bus. Tr. I, 39.

Shortly after the incident with the bus driver, Descutner also complained about the buses to his supervisor, Don Strong, in either late December 2020 or early January 2021. Tr. I, 40–41. Strong did not respond to the complaint verbally, but gave him a look that Descutner interpreted to mean, "give it a rest." Tr. I, 41.

2. Complaints to MSHA and Other Agencies

Between December 2020 and March 2021, Descutner and his wife made numerous calls to outside organizations to complain about NGM's lax enforcement of COVID-19 mitigation measures and what they believed to be unsafe working conditions. Tr. I, 35–38, 138–143; Ex. C-18. They called Nevada's Labor Commission, the Occupational Safety and Health Administration, MSHA, Nevada's Governor, and the American Civil Liberties Union. Ex. C-18.

3. June or July 2021 Complaint Regarding Low Morale and Promotions

In late June or early July 2021, Descutner also raised a concern unrelated to COVID-19 protocols at a crew meeting. Tr. I, 51. He felt that people should be "signed off" on the Tech 4 jobs they were doing but not being paid for. Tr. I, 51–52. Descutner believed this was a safety concern because people who were in this situation had bad attitudes. Tr. I, 51-52.

D. Descutner's Conduct and Resulting Disciplinary Actions

Descutner received discipline on multiple occasions before his termination:

1. January 2021 Unexcused Absence

In early January 2021, Descutner received discipline in the form of a Tier 1 documented verbal notice for an unexcused absence. Tr. I, 41; Ex. R-D. The night before his absence, Descutner experienced numerous unfortunate events related to a bad snowstorm. First, the bus taking him to his bus stop after work got to the Spring Creek stop around 9:30 p.m., more than an hour later than usual due to the snow. Tr. I, 42. Then, when driving home from the bus stop, Descutner's truck got stuck in the middle of the road and he had to wait for a tow truck. Tr. I, 42. He finally arrived home around midnight to discover that the power to his trailer had gone out, so he worked on that until going to sleep around 2:00 a.m. Tr. I, 42–43. In order to make it to work on time, he would have had to wake up at about 4:00 a.m. and be at the bus stop around

5:00 a.m. Tr. I, 43. Descutner woke up around 5:30 a.m. and called his supervisor, Don Strong, to request the day off work. Tr. I, 43. Descutner felt that he needed the day off because, given how little sleep he had gotten, he was not fit for duty and could not do his job safely. Tr. I, 44. Strong told Descutner that he did not have any PTO and had to come in to work. Tr. I, 44. Descutner did not go in and received a notice of discipline the next day called a Tier 1 documented verbal notice. Tr. I, 45–46; Ex. R-D. This discipline did not affect NGM's later decision to terminate Descutner because it was attendance-related, and that type of discipline accrues separately from behavioral and property damage-related discipline. Tr. II, 56, 58–59.

2. July 2021 Interaction with Supervisor Krantz

In July 2021, Descutner received another Tier 1 documented verbal notice for an inappropriate interaction with his supervisor at the time, Terry Krantz. Ex. R-E. The incident arose out of a disagreement between Descutner and another hourly miner, Dave Young, both of whom were assigned to apply shotcrete that day with a third hourly miner, Jesus Cabrera. Tr. I, 49–50. When applying shotcrete, two miners drive batch trucks that supply the material and a third operates the sprayer that applies the material to the roof and ribs of the underground mine. Tr. I, 49; Tr. II, 61. Initially, Cabrera had agreed to spray that day, but when the miners got underground, the sprayer they had planned to use was inoperable, and he was not authorized to use the one that was functioning. Tr. II, 62. Descutner and Young were both signed off on the functioning sprayer but got into a disagreement about who would spray that day. Tr. I, 49; Tr. II, 62. Young called Krantz over to determine who should spray that day. Tr. I, 50; Tr. II, 62. Descutner complained to Krantz about what he believed to be the real issue: "miners being asked to complete tasks they were not technically authorized to complete because they had not received the promotions they had earned." Tr. I, 51. Krantz became frustrated with Descutner's comments and raised his voice, leading Descutner to raise his voice as well. Tr. I, 52, Tr. II, 63. After some back and forth, Krantz told Descutner he was taking him to the surface, but Descutner refused to get in the vehicle with him. Tr. I, 53; Tr. II, 63. Krantz then called Don Strong, who took Descutner up to the surface. Tr. I, 53; Tr. II, 63.

Once they were on the surface, Descutner attended a due-diligence meeting and Amy Armstrong, senior human resources business partner at NGM, got involved. Tr. II, 60. Armstrong took ample notes during the meeting with Descutner and the interviews she conducted with the other miners involved. Tr. II, 65; Ex. R-K. She credibly, in a straightforward, consistent and unequivocal fashion, testified that Descutner agreed his interaction with Krantz was inappropriate. Armstrong's contemporaneous notes support her testimony. Tr. II, 69; Ex. R-K at 18. Descutner, Young, Cabrera, and Krantz each provided statements concerning the incident. Exs. R-G, R-H, R-I, R-J. Krantz was also disciplined for his behavior relating to this incident. Tr. II, 70; Ex. R-F.

3. October 2021 Loader Incident

On October 19, 2021, Descutner was involved in an incident at the mine. Tr. I, 63. On that day, he was assigned to repair a vent bag with co-worker Garrett DeSart in the maintenance shop. Tr. I, 64, 225–226; Ex. R-P. Before the repair could be made, a loader that was blocking access to the area needed to be moved. Tr. I, 64, 227.

Descutner spoke to the shop supervisor, Jeff Sorenson, about moving the loader and told him, "if it's a 9-yarder I could move it." Tr. I, 65. He testified Sorenson told him it was a "loader 80, it's a 9 yarder, move it." Tr. I, 64. Descutner was signed off to operate 9-yard loaders and asserts he did a complete equipment inspection prior to moving the loader. Tr. I, 66, 83–84. While in the shop area he did not utilize a spotter to help guide his movement of the loader. Tr. I, 68. In the process of moving the loader approximately a hundred feet, he struck and damaged a trash dumpster. Tr. I, 66–68. After the incident occurred, Descutner was required to take a drug and alcohol test, which yielded a positive result due to a prescription medication he was taking. Tr. I, 69. The issue of his positive drug and alcohol test was later cleared up. Tr. I, 69. Descutner was sent home after the test and never returned to work at NGM. Tr. I, 70.

Interim general supervisor Cory Myers conducted an initial investigation into the October 19 incident by first gathering information from frontline supervisor Orry Stevens, who provided pictures of the incident scene as well as a statement from Descutner. Tr. II, 144. Myers obtained statements from other people who were in the area of the incident when it occurred and looked into Descutner's training records to see if he was signed off on the loader involved in the incident. Tr. II, 144. After Stevens told Myers which loader was involved, Myers could tell it was an 11-yard loader, not a 9-yard loader as Descutner believed. Tr. II, 144.

A due-diligence or fact-finding meeting was conducted to get Descutner's input as to what happened. Present at the meeting were Descutner, Myers, interim superintendent Derek Dominguez, human resource partner Hailey Cavaness and union representative Josh Jauer. Tr. I, 70–71, 166–167; Tr. II, 73, 145; Ex. R-W. Myers conducted additional investigation into the incident that occurred on October 21, 2021. After concluding his investigation and consulting with senior human resource partner Amy Armstrong, both Myers and Armstrong concluded that Descutner's incident with the loader constituted four separate infractions of NGM's employee standards. Tr. I, 165, 176–177; Tr. II, 85–86, 120–121, 151.

The first infraction charged to Descutner was that he failed to conduct a pre-operational check on the loader. Tr. I, 178; Tr. II, 86, 94–95, 119–120. Descutner asserts that he did, in fact, conduct a complete equipment check prior to operating the loader and completed a pre-operational checklist card. Tr. I, 66, 83–84. He does not recall whether he ever turned in the card after the October 19 loader incident. Tr. I, 84, 113. No pre-operational check card could be found to confirm his assertion that he completed a pre-operational inspection. Tr. I, 11, 84–86, 110, 174, 178; Tr. II, 74. NGM asserted at hearing that, had Descutner actually conducted a pre-operational inspection, he would have noticed that the loader was not one he was authorized to operate. Tr. I, 11, 174. Second, Descutner was not signed off to operate the 11-yard #80 loader involved in the incident. Tr. I, 105, 165, 180–181; Ex. R-U. Descutner testified he relied on shop supervisor Sorenson's representation that the loader in question was a 9-yarder and that he could move it. Tr. I, 65. Descutner's testimony is in conflict with a statement Sorenson provided to Myers during NGM's investigation of the event, in which Sorenson indicated he told Descutner the loader was a 1700 series loader before he moved it. [2] Tr. II, 148; Ex. R-PP.

[2] The 1700 series breaks down into sub models. Tr. II, 148–149. The 9-yard loader and the 11-

Third, Descutner failed to use a spotter when moving the loader. Tr. I, 105, 165, 178. Descutner acknowledged this infraction. Tr. I, 68, 91–92. Fourth, Descutner caused damage to NGM equipment when the loader hit and damaged a company owned dumpster. Tr. I, 165, 177; Ex. R-T. Descutner acknowledged this infraction as well. Tr. I, 67–68, 92.

With a documented verbal discipline notice in his personnel file for an inappropriate interaction with a supervisor in July 2021, Descutner was already at Tier 1 of NGM's progressive discipline policy. Tr. I, 177; Tr. II, 68,151–152; Exs. R-C, -E. Based on this one prior active discipline and the four infractions related to the loader incident, Armstrong, Myers and Dominguez collectively met and made the decision to recommend to the mine manager that Descutner should be terminated pursuant to NGM's progressive discipline policy. Tr. I, 158–159, 175; Tr. II, 81–82, 84–87, 150–152; Ex. R-C.[3] Both the mine and human resource managers for NGM agreed and Descutner was terminated from NGM effective November 17, 2021. Tr. I, 218; Tr. II, 87; Ex. R-V. The decision was communicated to Descutner in a meeting with Dominguez, Myers and Armstrong, followed by a written termination letter dated November 17, 2021. Tr. I, 72; Tr. II, 153; Ex-R-V. The specific reasons for termination were communicated to Descutner at a union grievance meeting prior to November 17. Tr. I, 72, 74. Descutner's union grievance challenging his termination stopped at the step two level with a board consisting of two members of NGM management and two union members. Tr. II, 93.

E. MSHA's October 2021 Investigation

On October 14, 2021—three days before Descutner's incident involving the 11-yard #80 loader—MSHA Inspector Charlie Snare came to Leeville to investigate an anonymous hazard complaint that NGM was not enforcing COVID-19 pandemic guidelines. Tr. I, 190–191; Ex. C-4. Descutner testified he does not remember making this complaint to MSHA. Tr. I, 59. Dominguez met with the inspector to discuss the reason for his visit to the mine. Tr. I, 191. The inspector explained that they had received an anonymous complaint that NGM was not following their COVID-19 policies. Tr. I, 191. The inspector informed Dominguez that MSHA does not enforce NGM's COVID-19 policies and stated that he wanted to explain this to all of the miner's representatives in a meeting at the mine. Tr. I, 191. Dominguez proceeded to pull twelve underground miners off of their equipment for a meeting in the mine conference room. Tr. I, 192. Inspector Snare explained to the miner's representatives that MSHA is not responsible for enforcing any state or company COVID-19 policies and they were getting tired of getting "Johnny miner" calls related to COVID-19.[4] Tr. I, 192. Snare warned the miner's representatives that if the calls continued, he would shut the mine down until he was able to have the same conversation with each individual miner. Tr. I, 192. Snare also conveyed to

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yard loader are both in the 1700 series. Tr. II, 158.

[3] NGM's employee standards policy lists "operating or driving equipment without authorization or outside its design criteria" as a first-time violation that may result in termination. This is one of the four infractions Descutner was charged with as a result of the loader incident. While the policy states one could be terminated for a single violation of this type, there is no indication that NGM ever considered removing Descutner for this reason alone. Ex. R-C.

[4] "Johnny miner" is a nickname used to refer to a miner's rights call. Tr. I, 191.

Dominguez that he thought NGM was doing everything it could with regard to COVID-19. Tr. I, 195.

Descutner contends that NGM had reason to believe that he called in the anonymous complaint to MSHA and that this belief, though mistaken, factored into NGM's decision to terminate him after the loader incident. Complainant's Post-Hearing Brief ("Comp. Br.") at 17. Dominguez, Armstrong and Myers denied having any belief or suspicion that Descutner called in the hazard complaint that prompted MSHA's October 2021 appearance at the mine site. Tr. I, 193–194; Tr. II, 87–88, 97, 100, 101–102, 152–153. Dominguez confirmed that Descutner was the first miner who complained to him personally about COVID-19 protocol enforcement issues in December 2020, when the two men discussed Descutner's comments to the bus driver about being late. Tr. I, 216–217. However, Dominguez was aware there was at least one other COVID-19 protocol enforcement related complaint regarding the lack of social distancing on the cage that took miners down into the mine. Tr. I, 219–220. As a result of that complaint, NGM began requiring miners to wear respirators while riding in the cage. Tr. I, 196, 219–220. Armstrong testified that she personally investigated COVID-19 protocol enforcement complaints made by miners other than Descutner. Tr. II, 97–100.

Dominguez, Armstrong and Myers, the three individuals involved in the investigation and recommendation to terminate Descutner, testified that Descutner's December 2020 and January 2021 COVID-19 protocol enforcement complaints played no role in their October 2021 investigation or November 2021 unanimous recommendation. Tr. I, 218–219; Tr. II, 100, 152–153. Armstrong and Myers testified they were not aware, at the time of the investigation or termination recommendation, that Descutner had previously made COVID-19 protocol enforcement complaints to Dominguez or supervisor Strong, respectively. Tr. II, 100, 152–153.

III. DISPOSITION

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). It specifically 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, including a complaint notifying the operator or the operator's agent . . . . of an alleged danger or safety or health violation in a coal or other mine."

For more than forty years, the Commission has utilized the *Pasula-Robinette* framework to adjudicate claims of discrimination brought under section 105(c) of the Mine Act. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds sub nom*; *Consolidation 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 805, 817–18 (Apr. 1981). Under the traditional *Pasula-Robinette* framework, a miner alleging discrimination established a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson*

Turner v. Nat'l Cement Co., 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817–18. If a miner established a *prima facie* case, the operator could then rebut the case "by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. If the operator could not rebut the *prima facie* case, it could nevertheless defend affirmatively by proving that although part of its motivation was unlawful, the adverse action was also motivated by the miner's unprotected activity, *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id.*; *Pasula*, 2 FMSHRC at 2799–2800.

The Ninth Circuit recently abrogated this longstanding framework in *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021) (remanding 105(c)(3) case for Commission to apply "but-for standard"). Looking to recent Supreme Court precedent, the Ninth Circuit noted that section 105(c) of the Mine Act uses the term "because of" four times—each time without any modifiers—and concluded that it thus plainly incorporates a "but-for" causation standard. *Id.* at 1210. Accordingly, "[s]ection 105(c)'s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation." *Id.* at 1211.

In a recent FMSHRC ALJ case, *Walker v. Capurro Trucking*, 44 FMSHRC 1, (January 7, 2022), Judge Sullivan articulated the "but for" causation standard well. A discrimination complainant must show that (1) he engaged in what is known as "protected activity" (i.e., "the exercise of statutory rights"); and (2) that the adverse action complained of (here the Complainant's discipline and termination) was "because" of that protected activity. In other words, at least in cases ultimately subject to Ninth Circuit review as this present case is, a Complainant must show that his employer would not have taken the adverse action against him, "but for" the protected activity he engaged in. *Thomas v. CalPortland Co.*, 43 FMSHRC 314 (June 2021) (ALJ) (decision on remand applying but-for standard), pet. for rev. filed Dec. 29, 2021; *see also Sec'y of Labor on behalf of Saldivar v. Grimes Rock*, *Inc.*, 43 FMSHRC 299, 302–303 (June 2021).

A. Protected Activity

A miner has engaged in protected activity if they (1) have "filed or made a complaint under or *related to* this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) have "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 (4) have "exercised on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1) (emphasis added).

Unquestionably, raising safety concerns at work constitutes "protected activity" within the ambit of section 105(c). *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1922 (2016) ("Raising safety concerns is paradigmatic 'protected activity' within the meaning of section 105(c)(2).").

1. December 2020 – January 2021 COVID Protocol Related Complaints

It is undisputed that Descutner raised concerns to then General Supervisor Dominguez in December 2020 relating to COVID-19 protocols on the buses that transported miners to the mine site. Descutner also complained about the buses to his supervisor, Don Strong, in either late December 2020 or early January 2021. Tr. I, 40–41. Specifically, he was concerned about the lack of mask-wearing and that, at times, only one bus would show up when there should have been two to insure proper social distancing. Tr. I, 22–23.

Between December 2020 and March 2021, Descutner and his wife made numerous calls to outside organizations to complain about NGM's failure to enforce COVID-19 mitigation measures and what they believed to be unsafe working conditions. Tr. I, 35–38, 138–143; Ex. C-18. They called Nevada's Labor Commission, the Occupational Safety and Health Administration, MSHA, Nevada's Governor, and the American Civil Liberties Union. Ex. C-18.

NGM asserts that Descutner's expressed concerns over COVID-19 related protocols are beyond the purview of MSHA and therefore are not protected by the Mine Act. Resp. Br. at 15. Specifically, NGM argues there is no provision under the Mine Act or any MSHA mandatory standard that specifically addresses exposure to COVID-19. Resp. Br. at 16. They go on to argue that MSHA's actions on October 21, 2021—whereby an inspector, as an authorized representative of MSHA, informed both NGM management and designated miners' representatives that MSHA is not responsible for enforcing company or state COVID-19 policy—supports the conclusion that Descutner's protocol-related complaints do not constitute protected activity under the Mine Act. Resp. Br. at 17. I disagree.

The legislative history of the Mine Act states that Congress intended the scope of protected activity to be broadly interpreted. In enacting section 105(c) of the Act, Congress specifically noted that: "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S.Rep. No. 95–181 at 35. Congress further stated that the Act is "illustrative and not exclusive," and should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id*. at 36.

So long as a miner has a good faith belief that a safety hazard exists, they are protected in bringing their concern to the operator. *Robinette,* 3 FMSHRC 803; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). It is well established that a "good faith belief simply means [an] honest belief that a hazard exists." *Id.* Whether perceived hazards are *actually* unsafe is not determinative of the protected status of a complaint. *Sec'y of Labor obo McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001); *Consolidation Coal Co. v. Marshall*, 663 F.2d at 1215. Alleged hazards are considered to be "related to" the Act, and are therefore protected by 105(c)(1). *Cullinan v. Peabody Twentymile Mining LLC*, 36 FMSHRC 205, 207.

First, it is important to note that Descutner's complaints to NGM management and outside agencies regarding the failure of miners to follow state-mandated and company-

established COVID -19 protocols occurred as early as December 2020—well before MSHA appeared at the mine in October 2021 to announce to the miners' representatives that they would not enforce COVID-19 protocols. Tr. I, 28–37, 40–41, Tr. I, 190–191; Exs. C-4, -18; Ex. R-DD. Second, it is undisputed Descutner had well-founded safety related reasons for lodging his complaints—especially given that his spouse was immunocompromised. Tr. I, 19–38. Without question, I find Descutner acted reasonably and with the good faith (albeit mistaken) belief that the failure to follow COVID-19 protocols was a health and issue under MSHA's Mine Act purview. NGM has presented no evidence supporting its argument that Descutner had any reason to believe otherwise. I find that Descutner engaged in protected activity as it relates to his complaints to Dominguez and Strong from December 2020 extending into early 2021. This activity included complaints regarding the number of buses available for transportation to maintain social distancing, the failure of miners to maintain that distancing and the failure to abide by mask protocols mandated by the state and company.

2. June or July 2021 Complaint Regarding Low Morale and Promotions

In late June or early July 2021, Descutner raised a concern unrelated to COVID-19 protocols at a crew meeting. Tr. I, 51. He felt that people should be "signed off" on the Tech 4 jobs they were doing but not being paid for. Tr. I, 51–52. Descutner believed this was a safety concern because people who were in this situation had bad attitudes. Tr. I, 51–52.

Despite the broad scope cited above regarding Descutner's complaints related to COVID-19 protocols, I cannot agree that his complaints regarding failure to promote miners and resulting morale issues meet the broad standard of protected activity in this case. These complaints are simply too tangential to rise to the level of a protected activity under the Mine Act. Other than his own declarations at hearing, Descutner has failed to proffer any connection between low employee morale and a real or perceived risk to the health and safety of miners.

Accordingly, I find insufficient evidence to conclude that Descutner's expressed concerns in June or July 2021 about low morale and inadequate promotions was protected activity under the Mine Act.

B. Adverse Action Motivated by Protected Activity

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer's action qualifies as "adverse" is thus decided on a case-by-case basis. *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984).

"Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act." *Driessen*, 20 FMSHRC at 329. It is undisputed that after he first complained about the lack of COVID-19 protocol enforcement by NGM in December 2020, Descutner was subject to discipline beginning in January 2021. On January 6, 2021, Descutner was issued a Tier 1 documented verbal notice for an unexcused absence. Tr. I, Ex. R-D. On July

20, 2021, Descutner was issued a Tier 1 documented verbal notice for an inappropriate interaction with a supervisor. Tr. I, Ex. R-E. On November 2, 2021, Descutner was ultimately terminated from employment with NGM for violating NGM employee standards related to the October 19, 2021, loader incident. Tr. I, Ex. R-V. Descutner has clearly been subjected to adverse actions dating as far back as January 6, 2021.

Having established both protected activity and adverse actions related to discipline and discharge, Descutner must now demonstrate by a preponderance of evidence that "but for" his protected activity he would not have been disciplined or terminated from employment with NGM.

In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d 311, 318 (6th Cir. 2013); *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–2512 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors in turn.

1. Knowledge of Protected Activity

NGM does not dispute that Descutner expressed concerns to management officials about miners failing to follow state and company established COVID-19 protocols on the buses. Tr. I, 28–37, 40–41, 190–191. As discussed above, I find that Descutner's expressed concerns related to COVID-19 protocol constitute protected activity and that NGM had knowledge of Descutner's protected activity.

2. Animus or Hostility Toward the Protected Activity

Descutner argues that every time he engaged in protected activity, he was soon thereafter subject to discipline which ultimately led to the termination of his employment. In essence, Descutner asserts that the discipline he received and his resulting termination would not have occurred had he not engaged in protected activity.[5] Tr. I, 92; Comp. Br. at 2.

After considering all of the evidence and testimony, I do not agree with Descutner's assertions. As noted above, I found that Descutner did engage in protected activity in December 2020 and January 2021 when he complained to Dominguez and Strong, respectively, about the failure of NGM to enforce state and company-mandated COVID-19 protocols. At each instance, Descutner was met with, at most, indifference or lack of motivation by Dominguez and Strong to address his complaints. Tr. I, 33–34, 39–41, 47–48. In other words, Descutner failed to proffer

[5] Descutner may not have necessarily raised each point explicitly as stand-alone evidence of animus, but I include them here to exhaustively analyze his claim of discrimination. I do not find any evidence proffered by Descutner to be preponderant evidence of discriminatory motive or animus.

any evidence beyond his own bare assertions of any animus on the part of NGM toward his protected activity as it relates to any of the discipline he received.

The first noted discipline issued to Descutner after he expressed concerns related to COVID-19 protocol was a Tier 1 documented verbal notice on January 6, 2021, for an unexcused absence. Tr. I, 41–46. Ex. R-D. While Descutner provided a reasonable explanation at hearing for his unexcused absence, the fact remains he had exhausted his PTO. Thus, his supervisor Strong would not approve Descutner's absence. Tr. I, 42–44. It is undisputed that NGM supervisors have the discretion to approve or disapprove absences. Tr. II, 56–57. Descutner testified Strong had previously allowed him days off even though he had exhausted his PTO. Tr. I, 44–45. Yet later, on cross examination, Descutner stated he did have PTO prior to this incident when he previously asked for and was granted days off. Tr. I, 137–138. Descutner's supervisor Strong did not testify, nor were any leave record exhibits proffered on this issue. The record is left unclear as to whether Strong approved some absences after Descutner exhausted his PTO and, if so, whether specific circumstances justified the approval of those absences. Whether the approved absences in question occurred prior to or after Descutner engaged in protected activity is also an unresolved question.

Descutner invites the Court to draw, from these indeterminate facts, an inference that Strong's actions were marked by hostility. I decline the invitation. The burden of proof is on Descutner to demonstrate by a preponderance of evidence, not an inference, that he was denied time off because of his protected activity. Descutner has simply failed to meet his burden here as it relates to the unexcused absence he received on January 6, 2021.

On July 20, 2021, Descutner was issued a Tier 1 documented verbal notice for an inappropriate interaction with a supervisor, Terry Krantz. Ex. R-E; Tr. I, 54. Descutner does not dispute that the event took place related to his above-referenced concerns regarding the morale of workers not being promoted or compensated for getting certified to operate equipment. Tr. I, 51–52. In addition, he acknowledged that he engaged in the verbal altercation with supervisor Krantz. Tr. I, 49–52. However, his testimony expresses a belief that he was provoked into the altercation by Krantz and so should not have been disciplined. Tr. I, 53–54. Krantz was also disciplined for the altercation with a July 21, 2021, letter of concern. Ex. R-F. Even if provoked there are no indicia this event or resulting discipline was in any way related to Descutner's COVID-19-related protocol complaints to Dominguez and Strong from December 2020 or January 2021. Descutner has failed to meet his burden of proof that but for his protected activity, he would not have been issued this documented verbal notice.

Finally, on November 2, 2021, Descutner was ultimately terminated from employment for violating NGM employee standards related to both his July 20, 2021, discipline as well the October 19, 2021, loader incident. Specifically, with regard to his loader incident he was cited with four separate and specific infractions: (1) Unauthorized operation of equipment; (2) Failure to use a spotter; (3) Failure to conduct a pre-operations check; and (4) Damaging company property. Tr. I, 165, 176–177; Tr. II, 85–86, 120–121, 151. Ex. R-V. Descutner admitted that he failed to use a spotter and damaged company property. Tr. I, 67–68, 91–92. However, he disputes the other two infractions, testifying that he relied on Sorenson's statement that the loader was a 9-yard loader and that he did, in fact, conduct a pre-operations check of the

equipment before moving the loader. Tr. I, 64–66, 83–84. The statement Sorenson allegedly made to Descutner that the loader was a 9-yarder is disputed by NGM. Sorenson did not testify. However, supervisor Myers, who conducted the loader incident investigation, testified that when interviewed, Sorenson stated he told Descutner only that it was a 1700 series loader. Tr. II, 148–149; Ex. R-PP. Dominguez convincingly testified that, "regardless of what someone tells you, it is the miner's responsibility to know what kind of equipment they are getting on to operate and to insure they are signed off or authorized to operate the machinery." Tr. I, 176. Descutner's co-worker who was present during the loader incident, Garrett DeSart, corroborated Dominguez by testifying that a supervisor is not authorized to allow a miner to operate a piece of equipment they are not signed off on or certified to operate. Tr. I, 180–181, 230–231. Both DeSart and Armstrong testified that if a miner has any question or concern about whether they are authorized to operate a piece of equipment, they can simply contact dispatch to confirm their status on the piece of equipment they intend to operate. Tr. I, 231; Tr. II, 85. DeSart further testified that if he is ever asked by management to operate a piece of equipment he is not authorized to operate, he merely explains that to the manager and they find someone else who is signed off on the equipment to operate it. Tr. I, 231. I find that even if Sorenson did mistakenly tell Descutner the loader in question was a 9-yard loader, it was Descutner's responsibility to ensure he was authorized or signed off on the loader to operate it. This leads to the critical importance of the pre-operational examination infraction.

During the hearing, NGM presented comparison photos showing the differences between a 9-yard loader and the 11-yard #80 loader involved in the incident to support their conclusion that Descutner did not do a pre-operational inspection of the loader before operating it. Ex. R-S. NGM maintains that had he conducted a pre-operational inspection he would have noticed the obvious differences between the 11-yard #80 loader and a 9-yard loader he was authorized to operate. Tr. I, 11, 174. I find that the photos illustrate no less than seven differences that a casual observer could detect in examining both pieces of equipment. Ex. R-S. Four of the differences are especially compelling: (1) the difference in the number of steps used to access the loader cabs; (2) the control panel or dashboards in each loader; (3) the number of pedals used to operate the loaders (11-yard loader #80 has two pedals while 9-yard loaders have three); and (4) the width of the buckets on the front of loaders. Ex. R-S. Armstrong testified that during the due-diligence meeting with Descutner, when asked if he noticed anything specific about the #80 11-yard loader, he responded, "I thought it was pretty big, thought the bucket volume was different." Tr. II, 94–95; Ex. R-W.

At hearing, when asked about how he failed to observe the differences between the loaders during his pre-operational inspection, Descutner's responses were unconvincing given the number of obvious differences between the loaders, especially if he had conducted a thorough pre-operational inspection as he asserts. Tr. I, 79–83. Specifically, he testified once Sorenson confirmed for him it was a 9-yard loader (a point of contention discussed above), he was looking for safety defects—not differences. He stated he looked at the tires, but failed to see the three-inch tire height difference. Tr. I, 79, 81. Further, "When I was in the cab, I was basically doing a brake test and I was, you know, these fuel - - they say check your gauge, but your gauges work. Sometimes you just look at them and see if there's anything reading bad. The backup camera was the same, you know, the controls and everything that I used were all in

the same place." Tr. I, 80–81. With regard to his failure to notice the different number of pedals and the difference in steps leading up into the cab he stated:

> The thing is I was not operating this piece of equipment for work and that third pedal is a D brake. So, what a D brake is if you go into a pile and you want to still use your accelerator power you can use that so you don't – you're not pushing forward on your brakes, you don't have to kick it in neutral where, you know, that's an extra step. I was only moving it a hundred feet. I had no need for that third pedal. All I needed was the brake and the accelerator to move it and get it out of the way, and that's all. And when you're sitting in those, you can't really just look down and see that pedal. And when you're climbing in those, you gotta focus on 3-pont contact because they're very tight, there's not a lot of room, there's a lot of metal. So, you gotta just – you're focusing on getting in, you're not focused – you're not standing there or looking down and looking at it.

Tr. I, 81–82.

The different-sized buckets, the different number of steps, the different number of operational pedals, the different control panels between the 11-yard #80 loader and 9-yard loader can clearly be observed in the record comparison photos proffered by NGM. Ex. R-S. Of particular note with regard to the pedals, and in direct conflict with Descutner's above testimony on this issue, Dominguez in a straightforward, unequivocal and credible fashion testified:

> So, between the 9-yard and the 11-yard I guess it would be - - to explain it, it's kind of the difference between a manual versus an automatic. The 9-yard loader has three pedals. It's got a gas pedal, a brake pedal, and a declutch brake pedal, and the 11-yard just has the throttle pedal and the declutch brake pedal. So, the proper procedure for starting the 9-yard loader is putting your feet on the brake and the declutch brake pedal to keep the machine from potentially lurching when you start it.

Tr. I, 172.

I also credit Dominguez's testimony specifically describing the control panel differences between the two loaders:

> A. . . . the 11-yard loader has a digital control spring for the gauges and systems in the machine and it also has a back-up camera and back-up screen in it.
>
> Q. What about the 9-yard? What does it have?
>
> A. The 9-yard's got analogue gauges, the switches for the lights and various functions are in different spots, and that machine did not have a - - backup camera in it.

Q. When a - - miner goes to move, like the miner goes to move the loader, let's say loader 80 here, the 11-yard, and turns it on, do the gauges come on?

A. Yes. So on loader - - on loader – the 9-yard loaders, the gauges do what's called a sweep. The needles will move back and forth. And the 11-yard loader is the screen physically comes on like you turn on a television and then it shows you your gauges.

Tr. I, 170–171.

I credit the photos as well as the supporting testimony of Myers, Dominguez and Armstrong over Descutner's attempted explanation of overlooked differences, and I find that it was reasonable for NGM to conclude Descutner failed to do a pre-operational examination. Tr. I, 169–174; Tr. II, 74–77, 149–150. At a minimum, if he did in fact conduct an examination, it was cursory and ineffective.

Descutner asserts that because he made COVID-19 protocol-related complaints in December 2020 and January 2021, management had reason to suspect he was the one who complained to MSHA, prompting them to visit the mine in October 2021 and threaten to shut the mine down if further complaints were submitted. Comp. Br. at 16. This undisputed and unfortunate threat by MSHA to shut down the mine just two weeks prior to Descutner's termination certainly created a scenario of *potential* animus or hostility toward Descutner. However, there is absolutely no indicia management believed it was Descutner who made the anonymous complaint that prompted the MSHA site inspection.

Indeed, both Dominguez and Armstrong—who, along with Myers, recommended that Descutner be terminated—credibly testified in a consistent and straightforward fashion that other miners had complained about the lack of mask-wearing and social distancing. Tr. I, 219–220. Dominguez stated he had no reason to think Descutner called in the October 2021 hazard complaint because there was a percentage of, "people on site that were strong about COVID-19 policies. So, it could have been somebody off our site, it could have been a spouse. It doesn't have to just be the miner." Tr. I, 193–194. Armstrong testified that NGM received several complaints from miners other than Descutner that COVID-19 protocols were not being followed. She specifically testified about two different instances between January and October 2021 when she investigated complaints that miners were not wearing masks or social distancing as required. These were not at the Leeville mine site. Tr. II, 97–100, 126. Further, Armstrong testified on cross examination that she heard grumblings at the Leeville mine site regarding masks and social distancing during the time NGM made use of light vehicles to transport miners to the mine site. Tr. II, 127–128.

Neither Armstrong nor Myers, who conducted the investigation of Descutner's loader incident and recommended to Dominguez that Descutner be terminated from employment, were aware of Descutner's December 2020 or January 2021 bus-related COVID-19 protocol complaints to Dominguez and Strong. Tr. II, 100, 126, 152–153. Dominguez, for his part, credibly testified convincingly, unequivocally and without reservation that Descutner's COVID-19 protocol complaints had no bearing on the decision to recommend his removal from

employment. Tr. I, 218. I find no evidence to support Descutner's suspicions that his December 2020 and January 2021 complaints some eight to nine months prior had anything to do with MSHA's October 2021 site inspection, threat to shut the mine down or that NGM management officials Armstrong and Myers involved in recommending his termination had any awareness of his prior complaints or, in Dominguez's case, used those complaints as motivation to terminate Descutner.

Even recognizing MSHA's inflammatory threats as fodder for potential protected activity animus or hostility by NGM, other than through inference, I find no evidence Descutner's protected activity directly or indirectly led to either his discipline or termination from employment. Descutner has simply failed to prove by a preponderance of evidence that but for his protected activity he would not have been disciplined or terminated. In fact, the preponderance of the evidence demonstrates but for his own actions of an inappropriate interaction with a supervisor and the loader incident he would still be an NGM employee.

3. Timing

Descutner was first disciplined on January 6, 2021, for an unexcused absence within weeks of complaining to Dominguez about the lack of mask-wearing and social distancing on the transportation buses. Tr. I, 41–45, 58; Ex. R-D. Descutner continued to complain to his supervisor Strong in January 2021 and was next disciplined on July 20, 2021, for an inappropriate interaction with supervisor Krantz. Tr. I, 48–55, 59–69; Exs. R-E, -G, -H, -I, -J, -K. Finally, Descutner was terminated from employment on November 17, 2021, some eight to nine months after his last recognized protected activity and within weeks of MSHA threatening to shut down the mine if they received anymore COVID-19 protocol related complaints. Given that it is undisputed Descutner complained in December 2020 and was first disciplined on January 6, 2021, I find sufficient evidence to determine via temporal proximity that it was certainly possible Descutner's protected activity played a role in the three documented disciplinary events presented in this case. The Commission does not apply "hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Accordingly, I acknowledge and find that a coincidence in time exists in this case.

4. Disparate Treatment

Descutner has proffered alleged instances of disparate treatment. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. At hearing, comparator evidence was presented with a focus on Descutner's coworkers Steve Mann and Rowan Gardner. Tr. I, 183–184, 210–212; Tr. II, 102–104, 123.

Mann, in the process of moving a haul truck out of the tire shop, did not conduct a pre-operational inspection of the vehicle, failed to obtain a spotter and while operating the truck damaged a portable toilet. Tr. I, 183. NGM cited him for three infractions putting him at a Tier 3 final written notice. Tr. I, 183; Ex. R-Z. Mann's notice of discipline also stated he altered the

scene of an incident by driving away after making contact with the portable toilet. Ex. R-Z. Both Dominguez and Armstrong testified this was not counted as a separate infraction because he stopped the haul truck as soon as he realized that he hit the portable toilet. Tr. I, 184; Tr. II, 131–133. Mann had no other active discipline in his employment record. Thus, NGM determined the single incident with the haul truck did not merit termination. Tr. I, 138; Tr. II, 131, 133. Descutner argues Mann should have received a fourth infraction for altering the scene of an incident. Comp. Br. at 21.

Gardner, while operating a haul truck, pulled into and out of a shop without using a spotter. While exiting the shop, the truck made contact with the fire door frame causing property damage to the door frame. Ex. R-Y. Gardner received a Tier 2 written notice of discipline. Ex. R-Y. Descutner argues Gardner should have received a Tier 3 final written notice because pulling into and out of the shop without a spotter should have been considered two separate infractions. Comp. Br. at 22. Armstrong testified that they decided the failure to use a spotter was one infraction. Tr. II, 105.

I credit the testimony of both Dominguez and Armstrong regarding the distinctions in discipline for Mann and Armstrong's comparator testimony regarding Gardner. Their testimony was straightforward, consistent and unequivocal. It is important to first note that Descutner had prior active discipline in his record while these comparators did not. Second, Descutner's four loader incident infractions were each defined elements or separate and distinct violations of NGM's policies. Exs. R-C, R-L. Descutner, to his credit, admitted to two of the infractions – failure to obtain a spotter and that his actions caused property damage. Tr. I, 67–68, 91–92.

The other two infractions, unauthorized operation of equipment and failure to conduct a pre-operations check, are contested here. For the reasons previously stated, I find that it was Descutner's responsibility to ensure he was authorized to move the loader at issue in this case and that he failed to conduct an effective or adequate pre-operations check on it. I further find that if Descutner, a well-experienced miner, had in fact conducted a viable pre-operation inspection of the 11-yard #80 loader he would have recognized it was not a 9-yard loader and concluded he could not operate the loader, even for a brief time, to move it out of the way.

Descutner raises numerous other comparators in his post-hearing brief not referenced or presented during the evidentiary presentation of his case. Employee # 73710 is one of those comparators. *See* Comp. Br. at 22. The only reference to employee #73710 during the hearing is through Respondent's exhibit HH which is a chart that lists employees disciplined for not being signed off to operate particular equipment. Tr. II, 106; Ex. R-HH. Descutner argues in his brief that employee #73710 was issued a Tier 2 written notice even though four separate NGM policies were violated. Comp. Br. at 22. Specifically, employee #73710 was written up for: (1) directing an employee, "to complete a task on a powder truck that he knew the employee was not signed off on or trained on", (2) directing an employee to operate a truck without clear guidance; (3) a lapse in communication; and (4) a "broken window." The exact description listed in exhibit HH follows:

> When acting as a lead man on 6/7/22 (redacted name) directed an employee to complete a task on a powder truck that he knew the employee was not signed off

> on or trained on. (Redacted name) directed the employee to operate the powder truck without clear guidance and proper documentation needed to operate that piece of equipment. Lapse in communication that occurred on the transfer raise near miss that resulted in a broken window.

Ex. R-HH.

There are several critical points to make about this comparison. First and foremost, there is no testimony by any witness to explain the number of infractions counted by NGM for purposes of issuing the Tier 2 written notice. The written description referenced above could easily be interpreted to count "without clear guidance" and a "lapse in communication" as one infraction or step instead of two as Descutner argues. Without testimony to address this discipline, the Court has no way of assessing how NGM viewed this event or determined the number of infractions or steps to assess. Nor can the Court assess any level of credibility to the testimony when the testimony does not exist.

Second, the Court notes that employee #73710 worked at the Meikle mine site not Leeville thus Armstrong, who was the lead NGM management official in charge of Descutner's loader incident discipline determination process, was not involved in employee #73710's discipline. Tr. II, 106–107; Ex. R-HH. In fact, Armstrong testified Descutner's loader incident was the only investigation she had personal experience with that involved the issue of operating equipment without being signed off. Ex. R-HH. In that light, Descutner argues the miner who actually was directed to drive the powder truck without being signed off as authorized to drive the vehicle was not disciplined. Comp. Br. at 26. This is yet another assertion made in Descutner's post-hearing brief without any testimony or evidence in the hearing record for the Court to properly weigh the reasons for the actions or lack of disciplinary action on the part of NGM. I am confined to weighing the evidence and testimony presented during the evidentiary hearing rather than making an inference based on an unexplained outcome raised in a post-hearing brief. I cannot and will not infer disparate treatment under such circumstances.

Third, it bears repeating that Descutner had not only four infractions related to the loader incident but prior active discipline in his record for an inappropriate interaction with a supervisor. There are no indicia employee #73710 or any of the other comparators to whom Descutner points had prior active discipline in their record. Again, Descutner has the burden of proof by a preponderance of evidence. The preponderance of evidence in no way demonstrates that employee #73710 was treated more favorably under similar circumstances than was Descutner.

Specifically, with regard to Descutner's admitted failure to utilize a spotter during the October 2021 loader incident, he asserts he was treated less favorably than his co-worker Desart who was working with him at the time of the loader incident. Comp. Br. at 22–23. Desart testified he could not recall a specific instance in the six years he has worked at NGM where he ever used a spotter but that he may have once or twice. Tr. I, 236. At the time of the loader incident, he was operating a scissor lift, a large piece of equipment, without a spotter but was not disciplined. Tr. I, 228. However, Descutner, in his own due-diligence meeting about the loader incident, when asked whether Desart had a spotter responded: "I don't think so I think Jeff pulled

right up in the bay. He was not really in the shop area, he was in the wash bay. A lot of the time you do not need one there – he was in [the] entrance of [the] shop." Ex. R-W. Descutner, by his own words, makes the distinction between his own circumstance and Desart's, making his post-hearing argument on this point misleading and disingenuous.

Another comparator Descutner raises with regard to the spotter infraction is employee #104914. Comp. Br. at 23. This employee was given a Tier I documented verbal notice for causing damage to a fire door while attempting to pull into the shop. Ex. R-II; Tr. II, 125. The referenced exhibit states the employee failed to use a spotter. Ex. R-II. However, Armstrong testified: . . . [T]echnically he wasn't going into the shop yet, he was trying to get lined up so that then he could call a spotter to get him in, and he ended up doing damage while trying to get lined up." Tr. II, 108. Descutner argues likewise he did not move loader 80 into the shop yet he was still disciplined for not having a spotter. Comp. Br. at 23. However, Descutner admitted he did not get a spotter and fully believed and understood that NGM's policy required a spotter while moving the Loader 80 within the shop itself. In regard to this issue, he testified at hearing about his admission, referring to a written statement he wrote on the loader incident statement form:

> Q. There's a description, it looks like, that you wrote of the events. Will you read the last two lines, please?
>
> A. Sure. "Did not have a spotter, did not ask for one. My bad."
>
> Q. Can you explain to me, please?
>
> A. Well, I mean, if you screw up, you gotta own it. I mean, you gotta be - - and I didn't have a spotter, so it was my bad. I mean, I do believe that a lot of things could have been different, but the thought of mine is that I didn't make sure I had a spotter, so yeah.
>
> Q. So you accept responsibility for it?
>
> A. I do.

Tr. I, 87; Exs. R-O, R-W.

The bottom line is employee #104914 is not a similarly situated comparator because Descutner was moving a loader already within the shop itself while #104914 had not yet pulled into the shop where a spotter was required. In addition, as noted above, both during the investigation of the loader incident as well as at the hearing, Descutner freely admitted he was wrong for not engaging a spotter when moving the loader within the shop. Tr. I, 87; Ex. R-W. Now, in his post-hearing brief, I am being asked to ignore that admission and determine instead that the failure to utilize a spotter should not have been one of the charged infractions that NGM found and relied upon to terminate his employment. This I will not do.

Descutner's post-hearing brief goes into great detail about various other comparators related to each of the four infractions or steps he was charged with in regard to the loader incident. Comp. Br. at 22–27. Post-hearing briefs are for summation and argument only and are not considered part of the record as evidence. Just as noted above with employee #73710 there is no record testimony from any witness which addresses any of these additional comparators. Accordingly, I find the very limited comparator evidence in the record to be unpersuasive.

In sum, Complainant has failed to show by a preponderance of the evidence that he was treated less favorably than similarly situated individuals who had not engaged in protected activity. Descutner is the only miner who had prior active discipline in his record and was issued a Tier 3 level final notice based on four separate and distinct infractions or violations of NGM's employee policies. Interim superintendent Dominguez testified that with Descutner's prior active discipline he could have been terminated with just three additional infractions or violations related to the loader incident rather than four that NGM ultimately charged him with. Tr. I, 181–182. I find not one comparator proffered by Descutner had the same or similar record as his.

For the reasons noted above, Descutner has failed by a preponderance of evidence to demonstrate he was treated less favorably under similar circumstances than his co-workers who did not engage in protected activity. I find that he was not subject to disparate treatment.

C. Conclusion

Despite valiant efforts, Descutner has failed to show that his protected activity played any part in NGM's decision to discipline and ultimately terminate him, let alone that but-for his protected activity, he would not have been disciplined or removed from employment.

ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by Todd Descutner is hereby **DISMISSED**.

David P. Simonton
Administrative Law Judge

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