FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

May 26, 2015

SECRETARY OF LABOR, MSHA, on Behalf of Charles Riordan, Complainant, v. KNOX CREEK COAL CORPORATION, Respondent,	DISCRIMINATION PROCEEDING Docket No. VA 2014-343-D NORT CD 2014-03 Mine: Tiller Number 1 Mine ID: 44-06804

DECISION PENDING FINAL ORDER

Appearances: Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant
Karen Barefield, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary of Labor
Stephen Hodges, Esq., Penn Stuart & Eskridge, Abingdon, Virginia, for the Respondent

Before: Judge Moran

Introduction

This case is before the Court upon a Complaint of Discrimination under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). For the reasons which follow, the Court finds that Complainant Charles Riordan engaged in protected activity, that subsequently he was terminated, and that his employment termination was motivated at least in part by that activity. Further, Respondent Knox Creek Coal did not prove that it was also motivated by the miner's unprotected activity and that it would have taken the adverse action for the unprotected activity alone. Accordingly, Mr. Riordan's discrimination claim is upheld.

The basics of a discrimination claim under the Mine Act are well-established and clear. In order to establish a prima facie violation of §105(c)(1) of the Mine Act, the Complainant must prove, by a preponderance of the evidence, that (1) he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by that protected activity. In order to rebut a prima facie case, the operator must either show that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v.*

Consolidation Coal Co., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). If the operator cannot rebut the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof in such an affirmative "mixed motive" defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).[1]

Overview of the Court's Findings

The details of the evidence, and the Court's findings regarding that evidence, follow but the essence of this case can be succinctly stated. Charles Riordan, a foreman at Knox Creek's Tiller Number 1 Mine, made numerous safety complaints, which were primarily, but not exclusively, directed at ventilation problems at the mine. There is no genuine dispute that the mine was having significant, continuing ventilation problems. This matter came to a head when Mr. Riordan participated in a conversation with mine president Ron Patrick at a company picnic, speaking with the president about the mine's continuing ventilation problems. Riordan's candor with the president did not sit well with his immediate supervisor, Mark Jackson, and he confronted him shortly after that event, telling Riordan that he had thrown him "under the bus" by his words to president Ron Patrick about the ventilation issues.

Knox Creek's defense is, at its core, a claim that Mr. Riordan was simply the unfortunate victim of the closing of sister mines and the consequent reduction in the number of its supervisory employees. Knox Creek asserted that it used a fair scoring system for deciding which employees would be retained, and that Mr. Riordan didn't make the cut. There are many holes with this claim and the Court finds that the system was not fairly applied and, of equal importance, it also finds that the witnesses offered up by the Respondent, Mr. Patrick, Mr. Jessee and Mr. Jackson were not credible in their testimony as to the scoring system nor as to their other claims about Mr. Riordan. In contrast, the Court finds that Mr. Riordan was a very credible and forthright witness.

Findings of Fact

At the hearing, Complainant Charles Riordan was called as the first witness. Mr. Riordan has had about 32 years of employment in the mining industry. Over those years he has worked as an electrician, mine section foreman, and on occasion he would fill in as a mine superintendent.[2] When he first began work at Knox Creek's Tiller No. 1 Mine, in 2004, he was an electrician repairman on the section. In addition to being a section foreman, Riordan began

[1] Knox Creek has contended that, in light of a decision by the United States Supreme Court regarding discrimination claims under the Age Discrimination in Employment Act (ADEA), the Mine Safety and Health's Review Commission's burden shifting formula must now be discarded. That argument is addressed *infra.*

[2] Without contradiction, Mr. Riordan testified that he is a certified electrician and a certified mine foreman.

conducting a mine foreman certification class in 2012. Riordan also conducted other miner training classes, such as newly employed experienced miner training. Tr. 33. He started the class so that employees could take the Virginia Mine Foreman, First Class Mine Foreman Test and become certified. Tr. 31. Riordan stated that, up until July 2013, part of his work was conducting newly employed experienced miner training, but the majority of his work involved outby examinations and filling-in on sections, as needed. Tr. 52. Those described work duties continued until he was dismissed. For the part of his job involving training, he conducted basic classroom discussions on air calculation readings, mine maps, and ventilation controls. Tr. 52. Presently there are foremen working at the Tiller No. 1 whom Riordan trained. Tr. 32.

The Complainant's Safety Complaints

The Mine's Continuing Ventilation Problems

Addressing the central basis of his complaint, Mr. Riordan testified that he began making verbal safety complaints about the mine's ventilation in late 2012 and that those ventilation conditions became progressively worse through the next year.[3] Regarding the ventilation

[3] Mr. Riordan also had issues about miner bits and bit lugs on continuous miners. Tr. 36. The Court did not consider the continuous miner bits issue to be a significant part of this matter and the decision is not based on the subject. The brief discussion of this is included here only for the sake of completeness. There was testimony that a lot of bit lugs on the drum of the continuous miners were being broken due to the nature of the roof. Tr. 39. The problem associated with this was that the lugs were not being replaced as they were being broken off and that there was an inadequate supply of replacement bits and that this was a problem for all the sections. Tr. 40. Mining with broken bits creates an ignition hazard and, compounding that, this is a gassy mine, too, being on a 10 or 15 day "iSpot" for methane liberation. *Id.* The bit lugs issue was also discussed with his immediate supervisor, Mark Jackson. Tr. 40. Riordan couldn't be sure if he spoke with mine superintendent, Scott Jessee, about the lugs, but as best as he could recall, Jessee told him he would look into it. Tr. 41. Respondent's Counsel questioned Mr. Riordan about the issue of bit lugs on the continuous miner. Tr. 74. Riordan stated that bits which are broken off are required to be replaced, and an MSHA policy letter in the summer of 2013 spoke to that problem. Tr. 75. Riordan did not contend that the machines were operating when in a dangerous condition but rather that there was too much delay in obtaining replacement lugs. Riordan agreed that Anthony Melcher, a maintenance foreman, also complained about the lugs and that he was not let go from employment. Tr. 77. Riordan also identified Raymond Slate as another employee who complained about the lugs issue and that there were others who complained besides those two. *Id.* Mark Jackson was one of the individuals to whom the bit lug issue was addressed. *Id.* Further, Riordan made complaints about this to Jackson, and in so doing continued to be a safety thorn for him.

In the Court's view, Respondent's Counsel's questions had a twofold purpose: to show that no one was fired for complaining about the lugs and that the miner was not run when the lug issue was present, with the latter point intended to show that there was no hazard present. The Court believes that those questions miss the point that Riordan's safety-based complaint about the bit lugs was both legitimate and shared by others. The matter does tend to show that Knox

problems, according to his testimony, those problems worsened to the point that the mine was not "able to comply with [its] ventilation plan and [this was] creating . . . problems . . . about methane accumulation and dust . . . [with Mr. Riordan noting that] all of these things work together or are a byproduct of inadequate ventilation." Tr. 36-37. Elaborating about his assertion that things were becoming progressively worse after 2012, Riordan stated that as the mine was developed deeper, the ventilation demands became greater and therefore the ventilation had to be increased to meet those higher demands. Tr. 37. By insufficiently addressing these issues, the result was the ventilation became weaker at the face. *Id.*

Riordan stated that he spoke with Mark Jackson, the general mine foreman, about the inadequate face ventilation, but that the attempts to fix the problem were inadequate. For example, adjusting the air on one side of the section, so that it was in compliance with the ventilation plan, then adversely affected the other side of the section, so that it might not then be in compliance. Tr. 37-38. At this mine, described as a "super section," there are two continuous miners operating, one on each side of the section. Employing two splits of air allows both continuous miners to operate at the same time. Tr. 53. Mr. Riordan's point was that one side of the section or the other was continually not having adequate ventilation. This meant that the mine would have inadequate ventilation and mining would have to stop to address the problem of inadequate ventilation at the face. In Mr. Riordan's words, addressing this ventilation issue with Mr. Jackson "was almost a daily conversation." Tr. 39.

Mr. Riordan asserted that Mr. Jackson "usually had a smart aleck comment about everything" Riordan raised with him. Tr. 41-42. Riordan also raised his safety issues with Mike Wright, who was aware of the problems, and they discussed what needed to be done. It was Riordan's belief that Wright would discuss the problems with Scott Jessee directly. Tr. 42. Jessee was not always available to discuss the issues with Riordan, and again Riordan stated that Jackson would essentially put him off, either by telling him that they were working on it or by making a smart aleck remark to him. *Id.*

Riordan also recalled another informative incident involving ventilation issues with Mr. Jackson, in addition to Jackson's alleged remark[4] about being thrown under the bus by Riordan. It involved some ventilation problems with the No. 3 section and Riordan inquired of Jackson if air readings had been taken there. Tr. 55. Jackson, according to Riordan, responded that he was at that location all day the day before and that they had good air. *Id.* Riordan persisted and asked if *air readings* had been taken, to which Jackson reportedly told him he could tell if there was adequate air by simply slapping the dust off his jacket to determine if there was 2,000 cfm behind the curtain. *Id.* Riordan could not be specific about the date of that incident, but believed it occurred prior to the picnic. Tr. 56. Riordan retorted that he would advise the mine inspector that there was no need for an anemometer to measure the air, as he could simply slap the dust off his jacket for an air reading. *Id.* The Court finds that this event also occurred, per Mr. Riordan's recounting of the exchange.

Creek did not promptly address other safety concerns beyond ventilation. Having made those observations, this decision is not based on that subject.

[4] To be clear, the Court finds as a fact that Mr. Jackson did make the remark about being thrown under the bus by Riordan.

On cross-examination, Riordan agreed that in 2013 he sometimes worked as a section foreman and at other times as an outby foreman. Tr. 57. His ventilation issues, he agreed, primarily pertained to his work as a section foreman. *Id.* Near the time he was discharged, more of his work then was doing outby work. *Id.* However, he went back and forth between those two duties, as assigned. Tr. 58. Riordan also agreed that both as an outby and a section foreman, he did on-shift and pre-shift exams. *Id.* Those exams can only be done by a licensed and certified state foreman. *Id.* Riordan acknowledged that he is required to report hazards and violations that do not meet the mine's ventilation plan. Tr. 58-59. Asked whether he is required to report ventilation readings that are not up to the plan, he replied that those may or may not be a violation and that they may or may not be a hazard. Tr. 59. Explaining further, he added that if there is no methane present or ignition source, then there is no hazard, though it may be a plan violation. Tr. 59. As to whether such violations are to be reported, Riordan advised, "Yes, now we are." *Id.*

Riordan affirmed that his complaints about ventilation were primarily made to Mark Jackson and that they were all verbal. Tr. 60. While he made some notes about air readings or conditions that he found on the section, he did not retain them. Tr. 60-61. Respondent's Counsel asked with disbelief about Riordan's assertion that he would not have kept the notes, but Mr. Riordan explained, credibly in the Court's view, that he did not expect to be involved with litigation down the road. Tr. 61. Riordan agreed that he probably did not record inadequate airflow readings during 2013, but maintained that he would note if a curtain was down and that if he found inadequate airflow, he would correct the problem. Tr. 63. Various measures were used to deal with such problems including reworking a curtain, regulating air on the returns, or regulating belt air. Tr. 64. Typically, fixing such problems would take much longer than five or ten minutes. *Id.*

In the Court's estimation, Respondent's Counsel, by his cross-examination of Mr. Riordan on these subjects, was trying to establish either that the Complainant was negligent in not recording ventilation problems in completing his on-shift or pre-shift exams, or that the problems were actually negligible, thereby undercutting the essence of his claim that he was discharged for making safety complaints. This line of questioning misses the central point, because it is undisputed that the Complainant did make safety complaints about the mine's ventilation to several management officials at the mine, including its chief officer. The real question is the legitimacy of the rating system as applied and whether it was manipulated in the case of the Complainant to obtain an adverse result because of Mark Jackson, who was the person identified as ignoring the ventilation issues and who therefore was very displeased with the Complainant making an issue over it to the mine president.

Mr. Riordan steadfastly, and quite credibly in the Court's estimation, maintained that there were no ventilation violations while he was present during production and that if one developed while they were producing, they would stop production and fix the issue before resuming. Tr. 66-67. As another example of Respondent's Counsel missing the key point, Riordan agreed that management did make attempts to correct the ventilation deficiencies during 2013. Tr. 67. In fact, Riordan acknowledged that the mine made "quite a number of changes" to change the ventilation. Tr. 67, 68-73. Indeed, that was not his issue, nor the issue before the Court. The issue is whether Riordan was discriminated against for making the safety complaints,

which specifically came to rest on Mr. Jackson's doorstep, and about which Mr. Jackson took umbrage. While the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge.

On a different topic, Riordan stated that he had knowledge of about 20 ventilation citations being issued during 2013 at the mine. Tr. 96. Many of them were in the area where Riordan was working, a fact he learned from MSHA's website, which lists all the citations it issued for the mine. Tr. 96-97. In fact, some of those citations were served upon Riordan when he was traveling with the MSHA inspector and also when he was a section foreman. Tr. 97.

Dave Smith, a special investigator for MSHA out of its Norton, Virginia, office, was also called as a witness. Tr. 103. He was the investigator assigned to Mr. Riordan's discrimination complaint. As part of his investigation into the complaint, Smith found between 20 to 30 ventilation violations in 2013 at this mine, Knox Creek's Tiller No. 1. Tr. 104. Those findings also serve to support Mr. Riordan's allegations that the mine had ventilation issues. Tr. 104; Gov't Ex. 2 (Knox Creek's ventilation violation history). All of the violations were Section 300 violations, although not all of those pertained to airflow. Tr. 109. While the Respondent made the contention during cross-examination that all of the airflow violations were abated within 30 minutes, the Court notes that it was Mr. Riordan's unrebutted testimony that fixing one area often created a new problem on the other side of the section. Tr. 34-35.

As noted above, there is no serious dispute that Knox Creek's Tiller No. 1 was having significant and chronic ventilation problems and the testimony of Respondent's own witnesses demonstrates this. In this regard, it is noted that mine president Ron Patrick did acknowledge there being ventilation issues at the mine in 2013 and that these issues were present *before* the picnic. However, Mr. Patrick described the issue as a small one: "The concern I had was one section had more volume of air than the other and never was we [sic] below the standard MSHA requirements or the State requirement, never were even close." Tr. 139. Patrick, doing little more than concurring with his attorney's descriptions,[5] agreed that he "would have liked to have had more air," but he stated that they had 65,000 but wanted 80,000 on the section. *Id.* The problem, according to Patrick, was being addressed, both under a short-term and a long-term plan. Tr. 140.

For such a small problem, that is, a problem which Mr. Patrick described as one that did not come even close to not meeting the federal or state requirements, the mine was doing quite a bit. His testimony reveals this to be the case:

[5] On direct examination, Respondent's attorney habitually questioned his witnesses in a manner that required little more from them than to assent. Objections to the more-than-leading questions were infrequent and the Court did not intercede on its own, but that did not prevent the Court from discounting the ersatz testimony that was offered by the witnesses in their diminished role. Thus, apart from the Court's independent determinations that the credibility of many of the Respondent's witnesses was poor, the words that those witnesses did offer, essentially agreement with assertions by Respondent's counsel, carry less weight for that additional reason as well.

> The short-term plan we started on immediately. I had a spray machine brought from one of the other operations within DR [Dickenson-Russell Coal Company] to the Tiller coal mine.
>
> Scott [Jessee] and I had a discussion that we short term would start plastering the brattices to better seal them to eliminate any leakage that would get us more volume of air to that one what we called No. 2 Section.
>
> The long-term plan was on the No. 2 Section [where] we had a super section. That was two [continuous] miners, two roof bolters, four shuttle cars.
>
> Our plan then was to take that miner, half of that equipment, one miner, one roof bolter, two shuttle cars take that and half of the crew two miles outby, two miles from that section and start a new construction section that would improve the restrictions in the airways, and those restrictions were at the time when the coal mine -- the main line was developed, they hit adverse conditions, low to zero coal.
>
> It also had about a 12-foot separation in the coal. In other words, the seam split. Part of it was up here, some of it down there and very adverse roof conditions.
>
> To develop the main line through there whenever they drove that main line, they narrowed down the [entries] that they took through there, and I'm sure it was due to economics, and that forced a restriction through that area.
>
> So long term we chose to take half of that section equipment down there in adverse conditions, poor roof, little to no coal and develop entries through there to relieve that restriction.

Tr. 140-41.

That process was, again as effectively answered through the question presented by Respondent's counsel, "already planned and under way before this picnic in 2013." Tr. 141. Patrick affirmed the description offered. *Id.* Also, Patrick, responding to the suggestion, affirmed that the mine built overcasts. *Id.* He described that as part of the "short term" solution, calling it "quick relief." *Id.* The mine "added an overcast along with plastering those brattices. That was a short-term fix, but the long-term fix was going to take six to eight months to develop those entries." Tr. 142. Patrick also agreed that during 2013 he regularly spoke with Mike Wright about the fact that one section was getting more air than the other and that he also spoke regularly with Mr. Jessee about the balancing of airflow. Tr. 160.

In sum, the Court makes two observations about this testimony. First, this was not quite the small problem that Patrick characterized it to be, not by a long shot. Second, the detail about it and all that they were planning to address the issue, makes it highly unlikely that Patrick would not be able to recall if the ventilation issue was discussed at the picnic. That, among other responses from Mr. Patrick, led the Court to conclude that his credibility was poor.

Scott Jessee is the superintendent at the Tiller No. 1 Mine, a position he has held for about a decade. Tr. 197. His boss is the aforementioned Ron Patrick. Tr. 198. His principal subordinate is Mark Jackson, who is the general mine foreman. *Id.* Mr. Riordan testified about his relationship with Jessee. While he had a good relationship with Jessee initially, around 2013 that cooled, as Jessee was less open with him than before. Tr. 33. Riordan had been evaluated by Jessee before 2013. Tr. 34. In 2013, in connection with bonuses earned for the prior year, Riordan received a very good evaluation and in that same year, Riordan never received any counseling (i.e., counseling reflecting that there was a problem with the job he was doing) about his performance as a foreman from Mr. Jessee. Tr. 35. Riordan affirmed that he discussed ventilation problems with Jessee. Tr. 53. When asked if the ventilation problems he raised with Jessee were addressed by him, Riordan advised they were not and Riordan was also sure that there were some ventilation issues raised with Mr. Jessee prior to August 2013. Tr. 53-54.

In his testimony, Mr. Jessee acknowledged that Mr. Riordan brought up the subject of safety issues with him. Jessee also admitted that Riordan did speak with him about problems with balancing air on the section and that this issue was raised with him during August and September 2013. Tr. 233. In that regard, Jessee also conceded that they "talked about ventilation. We talked about roof control, stuff like that." Tr. 207. However, he did not consider those to be complaints, describing them instead as "just everyday issues [which were the same as those] discussed with other foremen." *Id.* These topics, to which Jessee agreed, but which were not expressed in his own words, were in Respondent's Counsel's words, "a part of their job" to discuss anything that was going on underground. *Id.* Jessee, again playing the role of one who agreed with characterizations from Knox Creek's Attorney, as opposed to testifying about subjects, affirmed that Riordan was no different than any of the other foremen. That is, Riordan didn't complain or talk about such issues any more than any of the other foremen. Tr. 208. Jessee believed that he was doing a good job with the ventilation at the Tiller mine in 2013. Tr. 236.

Regarding the issue of the mine's problem with ventilation, Respondent's Counsel asked if the two super sections were first started in 2013. Jessee agreed and added that was in early 2013. Tr. 208. Benignly characterizing the problem, Counsel for Respondent asked if the super section "creat[ed] somewhat of a different pattern of airflows around the face. . . . [and that it was a different pattern] than what people had been used to." *Id.* Jessee again agreed. Tr. 208. Jessee agreed that this is called "split air." Tr. 209. However, once again in the posture of one who was a "witness who would agree" with assertions from the Respondent's attorney, Jessee affirmed that there was adequate ventilation in all places in the mine and that the air at all times met the ventilation plan. *Id.* Continuing his role as an affirmer of questions, he then agreed that the ventilation issue required "more attention and maybe more work," as Counsel put it, than before the super section was started. *Id.* Despite his rosy affirmations to the statements from his attorney, technically presented in the form of questions, Jessee next affirmed that the mine did

get some "violations in 2013 concerning airflow," but that they were all abated through simple means by tightening a curtain or a fly. *Id.* That line of questioning ended with the point that *it was the section foreman's job* to tighten the curtain or fly. Tr. 209-10. Although this was obviously an attempt to suggest that it was up to Riordan to address the problem, it is, in the Court's estimation, also misleading because it infers that Riordan was the source of the problem. However, the evidence was very clear that the ventilation problem was not a matter of any foreman's lack of attention, and that it ran much deeper than that.

For a host of reasons, the Court did not find Mr. Jessee's testimony to be credible overall. Jessee agreed that he has been the superintendent at the mine for 10 years. Tr. 242. Over those ten years he had not ever filled out another employee evaluation form. Tr. 243. Yet, Jessee affirmed, incredibly in the Court's view, that he had no curiosity or questions about being faced with this evaluation form, his first in ten years. Tr. 244. Jessee also affirmed that Mr. Jackson told him that he had trouble getting Riordan to go underground and trouble getting him to start work. *Id.* Asked when these problems arose, Jessee stated it was "around March." *Id.* The Court then asked if such problems would not constitute an offense and that such individuals would be written up. Jessee responded that Jackson spoke with Riordan about it. *Id.* As to the number of times these issues were raised, Jessee informed that, for *both asserted problems*, the verbal discussion with Riordan over these matters happened *once*, not several times. Tr. 245. Surprised, the Court inquired whether Jackson thought it was important enough, based on one time, to bring it to Jessee's attention. Tr. 245. Jessee affirmed that such was the case, adding that "it must have been important to [Jackson] so he brought it to my attention." *Id.*

The Court then turned to Mr. Jessee's assertion that Riordan had a deficiency in terms of his ability to lead as a foreman, which Jessee repeated. Tr. 246. Asked for a concrete example of this, Jessee stated,

> Okay. Say for instance when you go up there and you need to loop your curtain a little bit tighter to get your air up in the place and stuff like that, in your ability to lead as a foreman you have to tell your guys, hey, let's tighten this curtain up, so we can get air up there in the place.

Tr. 246-47. Jessee affirmed that he personally knew that Riordan failed to tell his employees to tighten up a curtain. Tr. 247. When asked if he was written up for that, Jessee advised that "[h]e was talked to." *Id.* Asked how many times Riordan failed to tighten up a curtain, Jessee stated, "Two, I'd say." *Id.* Inquiring further, Jessee stated that these two instances occurred "maybe four weeks apart" in 2013. Tr. 247-48. He could not recall the month this occurred. Tr. 248. Asked if the problem continued or stopped, Jessee stated that the problem did not continue. *Id.* Asked if that meant that Riordan's deficiency to lead as a foreman was no longer an issue, Jessee stated "*Yes*." *Id.* (emphasis added).

Another assertion of Jessee was Riordan's failure *to go above and beyond*. An example of this was asked to be provided by Jessee to the Court, who responded,

> Say for instance we're cutting our first section move. Okay, you've cut it out. You squared your faces off, and you need to go ahead and start on your -- the next

> phase of it is moving your equipment or getting a stopping built down there, to go ahead and get your equipment moved. [Riordan] wouldn't go to the next step to go ahead and do that without some pushing like or saying, hey let's go ahead and get this done, next phase.

Tr. 249. The Court asked if Jessee remembered that Riordan failed to do that and Jessee affirmed he did so remember. *Id.* This event, Jessee stated, was around March 2013 when they had just cut out on the 3 Section and were getting ready for pillars. *Id.* Jessee stated that he personally observed this. *Id.* This occurred on one occasion. Tr. 250. To be sure about his testimony, the Court asked, "So your complaint about Mr. Riordan's inability *to go above and beyond* is limited to *one* occasion?" *Id.* (emphasis added). "Yes, sir," Jessee affirmed the Court's understanding. *Id.* In response, the Court, which was astounded that Jessee's criticism was over an alleged *single event*, remarked, "Well, you have very high standards." Tr. 250.

Further, Jessee affirmed that he has never specifically stated that Riordan was his most unsafe foreman. Tr. 252. In attempting to show the alleged problem with getting Riordan to go underground, Jessee advised that in fact it occurred only once and, as to whether on that *one* occasion Jackson told him that the problem happened *more than one time*, Jessee did not aid Knox Creek's attorney, as he could only offer, despite being asked twice, that he did not recall. Tr. 253.

Complainant's Attorney, Mr. Addington, followed up on the issue of the statement that a verbal warning was made to Riordan. In that asserted instance, Jessee stated that Mark Jackson allegedly spoke to Riordan.[6] Tr. 254. However, when asked if verbal warnings are memorialized on paper, Jessee stated that "No, not all of them [are written down]." *Id.* Some verbal warnings, however, are written down. *Id.* Jessee was unaware that either of the claimed verbal warnings to Riordan were ever written down. Tr. 255.

Respondent also called Mark Jackson, who is currently the general mine foreman at Knox Creek. Tr. 276. At the time of Riordan's termination, Mr. Jackson was his immediate supervisor. *Id.* Jackson stated that in 2013 Riordan was a section foreman and worked outby, too. Tr. 277. As mentioned, near the end of his employment with Knox Creek, Riordan was doing more outby work. Tr. 278. Earlier in 2013, Riordan had been working on the section frequently and he and Riordan had discussions about ventilation in 2013. *Id.* In terms of those discussions, Jackson described it as "[j]ust every day concerns of balancing the air and stuff." *Id.* These were discussed, with Respondent's Counsel again providing the words through his questions, by asking if Jackson "discuss[ed] these things [with the other mine foremen] generally the same way that [he] discussed them with Mr. Riordan." Tr. 278-79. Jackson responded, "The same way." Tr. 279. Asked how many times Riordan discussed the ventilation balance issue in 2013, Jackson answered, "a couple of times." *Id.* Respondent's attorney then asked, "A couple being two?" *Id.* Jackson answered, "Yes." *Id.*

[6] The transcript states that "Mark Jessee talked to him" but it is presumed by the Court that Mark Jackson was the intended reference and that Mr. Jessee either misspoke or the transcript incorrectly listed Jessee.

Finally, an objection was made to the leading questions. Tr. 280. Jackson then described the substance of the talk with others as "[j]ust where we went to split air the changes in the difference it makes, make sure we had our curtains hung and stuff like that." *Id.* The split air, Jackson said, made it so that the foremen "had to direct the air, and they ha[d] to hang their curtains better." *Id.* Jackson said the he was "replastering stoppings," too, in addressing ventilation in 2013. Tr. 281. Then, in response to whether a new section was then being developed, he answered, "Yes, we were also driving another set of mains up through there so we could help the mine breathe." *Id.* The mining conditions in those mains, he said, were "[v]ery bad." *Id.* The mains, he agreed, were driven only for the purpose of helping with the ventilation. *Id.* Then, upon further questioning, he answered that they built overcasts and that those also helped with ventilation. *Id.* Thus, in the Court's estimation, Jackson, though initially describing the ventilation as a minimal problem, then answered the questions in a way that showed that it was a more significant issue. Everything they were doing, Jackson stated, was helping to get "more air to the section." Tr. 282. Jackson maintained that during safety meetings, Riordan spoke up about safety issues the same as the others and that, when asked, "[d]id he even talk about ventilation at those meetings as far as [he could] *recall*," Jackson answered, "*not that I remember*." Tr. 282 (emphasis added).

Jackson could not say whether the number of times Riordan raised ventilation issues with him was two or three times, nor could he remember when those discussions occurred, nor even the season of the year. Tr. 302-03. Further, incredibly, and in contradiction to the substance of his own testimony, Jackson was of the view that there were *not* ventilation issues at the mine in 2013. Tr. 302.

Mr. Jackson denied that he ever made a statement that Riordan tried to throw him under the bus or any words to that effect. Tr. 285-86. He stated that he was Riordan's direct supervisor for "[p]robably about four or five years." Tr. 286. Overall, he characterized Complainant's performance during that time as "Poor." *Id.* Asked the basis for that characterization, Jackson answered,

> He was -- when you go up on the section, he would not be up there with the men where they was mining. He would be outby down there at the feeder or around the shuttle cars. And I'd have to go up there, and the curtains wouldn't be hung real good. They'd be hung but the ends wouldn't be nailed up and stuff, and I'd go get him and talk to him about it and stuff.

Id. As for the alleged number of times Jackson had to raise the issues relating to hanging around the feeder and the curtains, during 2013, Jackson answered, "Two or three times, I think." Tr. 287. Jackson asserted that over the years of Riordan working for him, things got worse, "[t]he longer he worked, the worse he got." Tr. 287. Jackson also maintained that he had nothing to do with Riordan being terminated, nor did he score or rate him in any way. Tr. 288.

Jackson agreed that he spoke with Mr. Jessee a lot and that they discussed "[e]verything about the mines," by which he meant "[j]ust the day in and day out running of it." Tr. 289-90. He allowed that he discussed Riordan with Jessee "[o]n occasion." Tr. 290. When asked how often he spoke with Jessee about Riordan in 2013, Jackson answered, "Probably a couple of

times. Like I said, *I don't exactly remember*." *Id.* (emphasis added). As for the substance of those talks, Jackson stated, "When I'd go up on the section and find the curtains I would tell Jessee about it." Tr. 290-91. As for any other discussions, Jackson replied, "That's all I can remember." Tr. 291. In the course of some 50 weeks in 2013, Jackson agreed that he would see Riordan three or four times per week and that, in sum, that amounted to seeing Riordan bossing hundreds of times. *Id.* Yet, even with the "couple of times," among hundreds of opportunities that he claimed speaking about this issue with Riordan concerning curtains, he never issued Riordan either a verbal or a written warning. Tr. 292-93. Further, while Jackson admitted that Riordan did discuss ventilation with him, he did not view those discussions as complaints. Tr. 294. This occurred two or three times in 2013.

In terms of when Jackson told Jessee that Riordan was a poor employee, *he could not remember* when he said that, *nor could he recall* if was before August 2013. Tr. 295. The Court then became involved, asking if it Jackson's testimony that he told Jessee that Riordan was a poor employee one time only. *He could not remember* when that occurred. The Court then asked for a month and year, observing that, as it was one time, it must have stood out. Jackson answered, "*I can't remember* exactly the date on it." Tr. 296 (emphasis added). Jackson also *could not remember* whom he spoke with upon returning from a vacation on August 26, 2013, and that no one filled him in on what happened while he was gone. Tr. 297. His memory was better however on the subject of whether Riordan went inby pillars as he recalled seeing that occur. Tr. 297. That event happened on the first day Jackson returned to work. Tr. 298. In fact, Jackson was the one who brought Riordan outside after the alleged infraction occurred. Tr. 299.

Jackson agreed that he was present on the day Riordan was terminated, December 13, 2013, and he was sure that the two of them talked that morning. Tr. 300. However, Jackson asserted that he had *no idea* that Riordan was going to be fired that day. *Id.* Further, he asserted that no one told him that one of his foremen was going to be fired that day. *Id.* This assertion included the claim that Jessee did not tell him that one of the foremen would be fired. Tr. 301.

In terms of his issue with Riordan not being up on the section bossing his men, Jackson was asked to be more precise than describing this as something which occurred a "couple" of times. He then stated that it was on two occasions. Tr. 303. Jackson confirmed that he never wrote Riordan up for those alleged transgressions. *Id.* As for Riordan's record of training miners, Jackson stated that he *couldn't remember* that Riordan did that. Tr. 304.

The Court then asked some questions of Mr. Jackson. Jackson confirmed that while he spoke with Riordan about his work as a section foreman, he never gave him a verbal warning. Tr. 305. Instead, he just "talked to him." *Id.* He then stated that was probably the same as a verbal warning but that it was not written. *Id.* Jackson then agreed that, as part of his duties as the general mine foreman, it was part of his responsibility to note any serious failure on the part of one of his foremen and further agreed that he never made any such notation regarding failures by Riordan. *Id.* When the Court asked if the next logical step was a fair conclusion — that because Jackson didn't note anything, that none of the things that he brought to Riordan's attention were considered by him to be serious, because, as he admitted, he wrote down serious matters — Jackson would not agree, stating "[n]o, they was serious. I mean maybe I should have wrote it down." Tr. 306. Jackson then agreed that sometimes he writes down serious violations

and sometimes he does not. *Id.* However, he conceded that it is company policy, that is, the company handbook provides that all verbal warnings are then to be noted in writing. Tr. 309.

As noted, the Court found Mr. Jackson's credibility to be seriously wanting.

The Mine Picnic

As mentioned earlier, a mine picnic occurred during the summer of 2013 on August 22nd. Tr. 160. The picnic was a social event, and on this occasion it was prompted in part by the mine not having a lost time accident in the past year. Tr. 43. According to Mr. Riordan's testimony, Mr. Patrick would give a speech at these periodic social gatherings, but communication was also an objective of those events. *Id.* During the summer of 2013 event, Mr. Patrick, asked in the presence of Mr. Riordan, Mr. Les Blankenship, and several others who had gathered in the lamp house, how things were going. *Id.* It was Mr. Blankenship who then first brought up the inadequate air on the section, and the others then joined in discussing that topic. *Id.* The participants made specific suggestions about how to address the problem. Riordan himself suggested that overcasts be constructed.[7] Tr. 44. The roof had been developed to have overcasts, but they had never been built. *Id.* Mr. Patrick, it can be said, had a positive response to the concerns expressed and stated that if overcasts needed to be built, that would happen. *Id.*

According to Mr. Riordan's credible testimony, it was his comments about the mine's ventilation problems to Mr. Patrick at the picnic that caused Mark Jackson to become upset with him. Tr. 45. As noted, Riordan was part of that conversation with Patrick along with Les Blankenship. Tr. 81. Riordan related that he offered specific steps to Patrick about how to deal with the ventilation problem. Tr. 83-84. Riordan agreed that Patrick did not balk at the suggestions, nor suggest that he would not consider them, Tr. 84, but to note that Patrick did not react poorly to his comments, again misses the point in this discrimination proceeding, that it was *Jackson* who resented Mr. Riordan's candor with the boss. Riordan reaffirmed that Jackson's hostile remark to him occurred either the day after the picnic or near to that time, when they came into contact with one another. Tr. 85.

Mine president Patrick did acknowledge ventilation issues at the mine in 2013 and that these issues were present *before* the picnic. Tr. 139. Given that, the Court considered it highly unusual that Mr. Patrick would not recall the discussion, which is central to this case, about the ventilation at the picnic. This was another factor in the Court's finding that Patrick was not credible.

Regarding that picnic event in August 2013, Patrick estimated that he arrived in the mid-afternoon. Tr. 137. He talked with attendees but *could not recall* if Mark Jackson was present for the event. *Id.* He *could not recall* if he spoke with Mr. Riordan at that event, although he admitted that he could have. Tr. 138. Further, as to whether Les Blankenship and Mr. Riordan spoke with him, Mr. Patrick could only offer: "They could have *but I do not recall that*." Tr. 138

[7] Mr. Riordan continued to make complaints about inadequate ventilation after the picnic incident. Tr. 48. These complaints were made to Mark Jackson, primarily, but were also discussed with Mike Wright on a regular basis. *Id.*

(emphasis added). The Court then offered, "So you don't deny it. You just don't remember whether there was a conversation." *Id.* Mr. Patrick responded, "No, sir, I do not deny it." Tr. 138. However, Mr. Patrick did recall, when his attorney asked, "So, Mr. Patrick, did you talk to Mr. Jessee about anything that happened there that day at that I'll call it a picnic?" *Id.* His answer was "No, sir." Tr. 139. In the Court's assessment, Mr. Patrick's memory seemed to be selectively good and poor. The Court considered that most of Patrick's responses were not credible. Of no surprise, when asked on direct if "Riordan's employment [was] terminated because of any safety complaint by him," he responded "[a]bsolutely not." Tr. 143.

The next work day following the picnic, Mr. Riordan immediately was faced with a change in attitude from Mr. Jackson towards him. As he was preparing to go underground that next day, Mark Jackson told him that he "had thrown him under the bus by discussing th[ose] [ventilation] problems with Mr. Patrick." Tr. 45. Again, as noted, the Court has found that Jackson made such a remark to Mr. Riordan. Riordan, reasonably in the Court's view, took Jackson's remark to mean that he, Jackson, was angry at Riordan for mentioning the ventilation issue with Mr. Patrick. Tr. 45. As Jackson was not present when the ventilation issue was discussed the previous day with Mr. Patrick at the picnic, Riordan could not know if Mr. Patrick spoke to Jackson about the matter, but clearly Jackson learned of Riordan's words to Patrick. Tr. 45. Riordan's relationship with Jackson, which was declining before the picnic incident, continued to go downhill after that event. Tr. 46.

As noted, in August 2013, Riordan received a written warning. *Id.* This occurred right after the 2013 picnic. *Id.* Scott Jessee came to the section where Riordan was working and believed that Riordan was inby the pillar line and therefore under unsupported roof. Tr. 47. Riordan did not agree, believing that he was actually in a bleeder entry, but the upshot was that Mr. Riordan "received three days off and a written warning." *Id.* That warning was issued by Mark Jackson. Tr. 47-48. Much later in the testimony, replacing indefinite statements about the date of the company picnic, it was revealed that the picnic occurred on August 22, 2013, which was a Thursday. Tr. 262-63. It is undisputed that Mr. Jackson was on vacation, returning to work on Monday, August 26, 2013. *Id.* The Court cannot simply ignore the "coincidence" in time between Riordan's critical remarks about the mine's ventilation issues and his alleged infraction, occurring the first day Jackson was back on the job. Nor, it should be noted, did Respondent present *any* other such infractions as part of Mr. Riordan's work history at the mine. The inference that this was the first reaction of displeasure over Mr. Riordan's frankness about the mine's ventilation problems cannot be ignored.

The Mine Employee Evaluation "System"

Background – Prelude to the Layoffs

As noted, Ronnie Patrick is the general manager for Dickenson-Russell Coal Company ("DR") and the Knox Creek Coal Company. DR consists of three deep mines and two prep plants, one active and one inactive. Tr. 117-18. Knox Creek Coal, a subsidiary of Alpha Natural Resources, Inc., has one deep mine, Tiller No. 1, a prep plant, and a refuge area. Tr. 118. Knox Creek, DR, and Paramont[8] Coal are all subsidiaries of Alpha Natural Resources. Tr. 128-29,

[8] The hearing transcript incorrectly spells Paramont as "Paramount" throughout.

174. In 2013 DR's Roaring Fork and Laurel Mountain mines closed. Tr. 118-19. Remaining open were the Cherokee and Tiller mines. Forty employees at Roaring Fork and ninety-three at Laurel Mountain lost their jobs in connection with those closings. Tr. 121. Mr. Patrick asserted that with those mines' closures, it was their goal to "see that the best of the foremen, in particular the best of those foremen were retained and held positions within the existing coal mines as much as practicable." Tr. 122. Attempts were subsequently made to rehabilitate Patrick's first remarks that the efforts to find employment for displaced workers applied to *both* closed mines. *See, e.g.*, Tr. 186. In that regard, the Respondent expended much energy trying to show that the efforts were focused on the first group to become unemployed, the approximately 40 employees at Roaring Fork, but not for the larger number of displaced employees, the 93 miners at Laurel Mountain. *See* Tr. 186-87, 331-32. About one-third of the displaced workers from both mines were given jobs within Alpha. Tr. 122.

Patrick stated that the first wave of layoffs was with Roaring Fork and the second was with Laurel Mountain. Tr. 190. Patrick agreed that the scoring system was in place at the time of the layoffs at Roaring Fork, and that the same scoring system was in place when the Laurel Mountain layoffs subsequently occurred. Tr. 190-91. The Court inquired if Patrick reached out to Paramont Coal twice. Tr. 191. Patrick stated that he recalled asking Paramont if there were any jobs for the Roaring Fork people, but when asked if he similarly reached out for the Laurel Mountain layoff, he stated, "*I don't recall. I don't recall* that as -- me specifically, no, sir, I did not." *Id.* (emphasis added). This struck the Court as peculiar, as Patrick recalled the effort made with regard to the first layoff, but not for the more recent layoff. *See id.* Odder still, Patrick stated that 40 employees were affected by the Roaring Fork layoff, and then agreed that something on order of 93 employees were impacted by the Laurel Mountain layoff. Tr. 192. Summing up his testimony on this, the Court asked if it was correct that he remembered reaching out for the 40 employees but had no recollection about reaching out for the 93 at Laurel Mountain. Tr. 192-93. Patrick then answered, "I did not at Paramount [sic]. Whether HR did or not, I do not know." Tr. 193.

The Evaluation System

As framed by Respondent's Counsel, Patrick agreed that there was "a system used to rank or rate the folks who were being -- losing the work at these two mines to try to determine who the better employees were." Tr. 123. The evaluation "system" used a "standard form" and the four mine superintendents filled those forms out for the salaried employees. *Id.* All of those forms went into, again as described by Respondent's attorney, "a central database" and the numbers were maintained by "HR [human resources] people." Tr. 123-24. Christy Viers[9] did

[9] Ms. Christy Viers is the HR representative for the Knox Creek mine. Tr. 256. She learned of Mr. Riordan's termination from Deidre Helbert, around December 12, 2012. Tr. 256-57. Ms. Helbert is the manager of human resources for Dickenson-Russell Coal. Tr. 325. Viers was present at the meeting when Riordan was terminated, and she had a packet of information that was presented to him at that time. Tr. 257-58. According to Viers, Riordan had questions about the severance package and other matters but, most pertinent, was Viers assertion that Riordan allegedly stated that "he knew this was coming to make room for other people." Tr. 258.

Ms. Viers stated that she received the employee evaluation scores from Mr. Jessee around August 9th. Tr. 260. Viers was also shown an email she sent to Ms. Helbert and Mr. Jackson after Riordan was terminated. That email stated that Riordan was informed about his termination and other aspects, but the email also included the remark, as just noted, that "[Riordan's] only other comment was he knew this was coming, to make room for other people." Tr. 261; Resp't Ex. 4. Viers stated that she had a role in the input of the evaluation scores that she received from Mr. Jessee, stating that she entered all of them into the spreadsheet that they had set up. Tr. 265. Also, she typed in any comments Jessee had. *Id.* After she entered the scores, she then printed it, saving a copy and filing it. *Id.* During her deposition, Viers affirmed that Jessee gave her *paper copies* of his evaluations *and that she still had those in her office*. Tr. 267 (emphasis added). However, at the hearing she stated that she was mistaken in her deposition and that Jessee did not give her handwritten copies. Tr. 271. Rather, he entered the information on the computer, printed a copy and then sent it over. Tr. 268. Revisiting Ms. Viers' deposition, at the hearing Viers stated then that Jessee "was to do those evaluations and get them back to [her] to be entered in the computer." Tr. 270 (reading from page 13 of Viers' deposition). When asked at her deposition, "How did [Jessee] how did he get the -- how did he get you the information?", Viers answered, "He printed the forms out and wrote in his answers and I -- and he sent them back to me in an envelope." *Id.* Viers was then asked, "Okay. Did he handwrite them?", to which Viers responded, "I think so, yeah, these printed copies are what comes out after I enter the information that he puts on the form." *Id.* She then reaffirmed, that Jessee handwrote the information. Tr. 271. Therefore, Viers contradicted her earlier testimony, now maintaining that the evaluations were not handwritten. *Id.* In terms of assessing Ms. Viers' credibility, the Court did not view this change in her testimony favorably.

Ms. Viers conceded that not only was Riordan's job not eliminated, but that *additional* people came to Knox Creek, including Dale Slemp; his brother, Steve Slemp; and Shawn Greer. Tr. 272. Further, Knox Creek hired a fire boss. Tr. 273. In terms of hiring and firing, Viers stated that she did not think that anyone was fired in 2014 and she agreed that the workforce is now larger than it was in December 2013. Tr. 269.

Deidre Helbert, as stated, was the manager of human resources for Dickenson Russell Coal. Her testimony was of no impact to the findings by the Court, and is noted here only for the sake of completeness. It is the Court's view that Ms. Helbert was called for damage control, because of testimony the day before from Ms. Viers which did not help the Respondent's contentions. Helbert stated that Roaring Fork closed in October 2013 and Laurel Mountain closed on December 13, 2013. Tr. 327. She stated that Riordan's loss of employment was in connection with the second closing, that of Laurel Mountain, not Roaring Fork. Tr. 331. When Roaring Fork closed, she stated there was an attempt to place people with another Alpha Company, called Paramont, and some people were placed as a result of those efforts. *Id.* Thus, Respondent's Counsel, through this rehabilitative witness, was attempting to show that the only effort to find other jobs for displaced miners was with the mine closing that occurred first and that no similar efforts were made when Laurel Mountain closed. Tr. 332.

Ms. Helbert was also used to support the alleged basis for keeping Donald Duncan, but not Mr. Riordan, which rested upon the ground that Duncan was a mine rescue team member for Dickenson-Russell Coal. Tr. 334-35. Ms. Helbert agreed that she made no decisions about

this at Tiller, and Deidre Helbert did it at Dickenson-Russell. Tr. 124. The hierarchy for the underground mines consists of the section foreman, a maintenance foreman, a general mine foreman, and a superintendent. Tr. 125. As noted, Scott Jessee is the superintendent at Tiller, and he reported to Patrick. Tr. 125. Patrick did explain the process of job relocation as the decision making being made by himself and Mike Olsen, with Olsen being the superintendent at the Cherokee Mine. Tr. 126. Olsen is also the president of DR, and he reported to Patrick and to his, Patrick's, HR person, Ms. Helbert. *Id.* Patrick and Helbert met with Olsen and Jessee. *Id.* They had a list of all the openings for salaried people, and "then [they] took the rankings of the foremen and tried to match them up to where [they] had the highest ranking foremen continuing in employment." *Id.* Patrick stated that he "did not evaluate one person," nor did he affect the scoring in any way, by telling, for example, any superintendent to mark up or mark down any individual. Tr. 127. Patrick noted that Dickenson-Russell's operating budget restricts the number of employees it may have for its operations. Tr. 127-28. However, efforts were made to absorb as many employees as possible from the two mine closings. Tr. 128. Patrick was acquainted with Mr. Riordan, first coming to know him some two and half years ago when he, Patrick, was a general manager at Knox Creek. Tr. 129.

Patrick stated that, in total, six (6) section foremen were not able to get placed from the closings. Dale Slemp, also referred to as Ricky D. Slemp, replaced Mr. Riordan at the Tiller Mine. Tr. 130, 194. Slemp was hired by Patrick. He had known Slemp for 10 or 11 years. Patrick described Slemp as a "very strong section foreman" for whom, again agreeing with Respondent's Counsel's description, he had a personal high regard. Tr. 131. Slemp, Patrick stated, again agreeing with the words offered by Respondent's Counsel, "score[d] highly on this scoring system [Patrick] described." *Id.* Using his own words, Patrick stated that Slemp "took a step backwards, demotion from general mine foreman and shift foreman down to section foreman, but that's all I had for him." Tr. 131. When asked, "But at least he maintained employment?" by his attorney, Patrick responded, "That was our goal." Tr. 132.

Patrick also acknowledged that Donald Duncan was a section foreman who received a lower score than Mr. Riordan, yet he did not lose his employment. Tr. 135. Duncan's score was one (1) point lower than Riordan's. *Id.* For reference, Mr. Slemp's score was 61, Mr. Riordan scored 46, and Mr. Duncan had a 45. *Id.* According to Patrick, Duncan was retained because he was "a mine rescue member, and that [mine rescue] station was located at [DR's] office, which is mandated through State and Federal that the facility be within an hour of reporting times." *Id.* Therefore, Patrick stated that the mine rescue site had to stay in place, intact. *Id.* In contrast, Mr. Riordan has not been trained to be a mine rescue member and has never participated in such activity. Tr. 136. It was Patrick's position that if Duncan had not been retained, the mine rescue

---

which employees stay and which leave and that she simply follows the orders of others. Tr. 336. Ms. Helbert conceded that during her deposition she had stated that, in terms of retention, *the evaluation score is the primary factor and dictates the outcome, unless there is a tie*. *Id.* She also conceded that Mr. Patrick gave her a list of employees who were considered to be high performers and that those people were identified by the people at Cherokee, Laurel Mountain, *and* Roaring Fork as the people the mine would like to see placed in any vacancies that might exist. Tr. 337. She also agreed that the superintendents at the mines would have identified the high performers, and that Mr. Patrick would have given her a compiled list of the high performers. *Id.*

team would have been short of the required number of members and therefore he, in the words used by Respondent's counsel, was treated as a "special case," i.e., outside of the scoring system.[10] Tr. 137.

Patrick stated that he had no input into the evaluations that determined who was kept and who was not kept. He agreed that Mr. Riordan was *the only* management employee and foreman at the Tiller mine who was terminated in December 2013. Tr. 160. While Patrick conceded that *he had the discretion to retain a lower-scoring foreman*, he only did so in one instance, the Donald Duncan versus Charlie Riordan instance, with scores of 45 versus 46, respectively. Tr. 161. Further, Patrick agreed that the work force at Knox Creek was not actually reduced in 2013. Tr. 162. Instead, replacement employees came over to Knox Creek. *Id.* Patrick also knew that Riordan did foreman training at the Tiller mine and he admitted that, since Mr. Riordan's termination, they also hired more than one pre-shift or fire boss at Tiller mine too, agreeing that the mine needed to "hire additional folks."[11] Tr. 163. Further, during that time, in response to the question whether the Tiller Mine "hired a management position *off the street* during that time period," Patrick responded, "Could have, yes, sir." Tr. 163. (emphasis added). Beyond that, Patrick admitted that in 2014 at the Tiller mine it had management positions open there. These included more than one fire boss and possibly two section foreman positions in 2014. Tr. 163.

[10] Counsel for the Secretary showed Mr. Patrick a spreadsheet produced by Knox Creek, apparently reflecting the scoring and notes for all the foremen that were evaluated. Tr. 150; *see* Gov't Ex. 3; Gov't Ex. 4 (also Bates Stamped by Respondent as KCCC8). When the Knox Creek scoring compilation was presented to Mr. Patrick and his attention was directed to the comments regarding the "areas for improvement," he stated that he had never seen those comments before. Tr. 155. Patrick maintained that he looked at the ranking and scoring only, not the comments. Tr. 156. Nevertheless, it was then pointed out to Mr. Patrick that, despite stating he had not seen the comments before, there were comments, some positive and some negative, but that, for Mr. Duncan, there was no reference to his mine rescue qualifications in the comments. Tr. 156. When asked if the document at least reflected the information that human resources had in order to make its decision about who would be retained and who would be let go, Mr. Patrick again stated that all he had reviewed was the final scores. *Id.* It was his position that he left it to the mine superintendents to identify the best employees, but without explanation for their conclusions. Tr. 158. The Court concludes that, for this and other reasons in the record, the scoring evaluation system was followed or ignored, as convenient for the Respondent. Patrick's own testimony supports this conclusion.

[11] Regarding new hires, Jessee's statement was that the employees that were added were people that were already there, hourly people that were moved up to salaried positions. Tr. 237. In sum, when asked how many more salary people were at Tiller in 2014 than at the time that Riordan was terminated in December 2013, Jessee stated, "around three." *Id.* The Court then inquired whether, when they promoted those people from the hourly jobs, they filled those hourly position openings that had been created. Tr. 238. Jessee affirmed those positions were in fact filled with new hires. *Id.*

Mr. Riordan was fired on December 13, 2013. Tr. 48. As he was preparing to enter the mine that day, Mr. Jackson asked him to wait, and then he was told that he was to go to the office. Tr. 49. There, he met Christy Viers, who informed him that he was being dismissed or discharged. She informed him of this in the presence of Scott Jessee. *Id.* Mr. Riordan could not recall his specific comment upon learning of the news, but may have made some comment that maybe he should have known.[12] *Id.* Riordan stated that no other foremen were discharged that day and he was also unaware of any other foremen who were fired or terminated in December 2013. Tr. 50. However, he did know that one other salaried employee was fired from the mine, Tiller No. 1, as a result of the reduction in force. *Id.* Since those terminations, Riordan stated that he learned that the mine has added a number of other salaried people. *Id.*

Speaking to the scoring system, which was allegedly used in determining whether he was to be retained or let go, Riordan informed that he only learned of that during the course of the depositions made in connection with this litigation. Tr. 51. Riordan subsequently learned that a miner at Laurel Mountain mine was retained, despite having a lower score under the mine's scoring system. *Id.* It is not disputed that one employee, identified as "Employee No. 8," received a lower score than Riordan but did not lose his job. Tr. 54. Mr. Riordan's understanding was that the employee was a section foreman. *Id.* Riordan confirmed that it was his belief that he was discharged because of his safety complaints concerning the ventilation problems at the mine. Tr. 51. As noted, the Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks on that subject to mine president Ron Patrick and not because he was simply the "unfortunate" recipient of a lower evaluation score.

As yet another indication that the evaluation system was manipulated when needed to reach a desired outcome, Patrick himself agreed that the score reflected the total of all the categories, and that one of the categories was being a mine rescue team member, for which one point was assigned. In this regard, Patrick had one of his several attacks of "recall-itis"[13]: in this instance, his inability to recall a point already being awarded for being a mine rescue member. Tr. 167-68. When shown the employee evaluation form and that it allowed for one point for those on a mine rescue team, he then acknowledged, "that appears to be the case." Tr. 168.

---

[12] The Respondent later tried to make much of this, apparently attempting to demonstrate not just that Mr. Riordan made the remark, or something to that effect, but that Mr. Riordan knew his termination would be coming *and* that it was for legitimate reasons. *See* Knox Creek's Post-Trial Memorandum 31 ("Resp't Br.").

[13] "Recall-itis" is the Court's term for when a witness whom one would expect to be able to recall certain events or conversations cannot do so, while still being able to recall other events of no greater, or even lesser, significance. It usually takes the form of a witness saying, in some fashion, that he can't recall something, with the symptoms most often appearing when a question involves something the answer to which could be adverse to a party's position. At times, as in the Court's view of this case, the condition can spread like an epidemic to other witnesses. Having viewed the witnesses and the context in which the recall-itis symptoms arose, the Court has weighed these instances as part of its determinations about witnesses' credibility.

The Court then asked some questions of Mr. Patrick, who informed that Mr. Jessee was the one who evaluated Mr. Riordan. Tr. 169. Jessee, he stated, was the only one who determined the number of points to be assigned for each category. *Id.* When asked about particulars of the form, Patrick stated that he didn't know if categories had point scales of 1 to 5, 1 to 10, or whatever. Tr. 170. He also did not know if there was any guidance on how to determine the number of points to be given for any category. *Id.* Patrick, even at the time of the hearing, did not know if there was any guidance for assigning points. Tr. 171. Beyond knowing that Jessee would put down a number for a given category, Patrick maintained that he knew nothing about how that number was derived. *Id.*

Illuminating to the issue of Mr. Riordan's claim of discrimination, as well as to Respondent's claim that the evaluation system was neutral and fair, when asked if there was any other employee, aside from Mr. Riordan, who had a lower score that was kept over a person with a higher score, Patrick stated that Riordan was the only instance. Tr. 172. Patrick stated that 133 were facing termination, but that not all of them were salaried people, and that only the salaried people were scored under the evaluation system. Tr. 173. Patrick agreed that he was concerned about *all* employees who were losing work and that he tried to reach out to other affiliates within the organization, one of which was Paramont. Tr. 174. Patrick stated that between salaried and employed people there were 35 to 40 people needing work and he agreed that he sent a list to Paramont with those peoples' names on the list. *Id.* Patrick stated that this would have been done by Deidre, with the Human Resources Department. Tr. 175. But the Court inquired further. Patrick agreed that there would have been a list of names for Paramont to consider for work. Tr. 176. Patrick agreed that he had to compile a list of names for this, but how this was accomplished or transmitted to HR, he could not recall. *Id.* Agreeing that there had to be a list of names compiled, he then stated that he did not create the list, but rather that HR did that. Tr. 177. Asked if Mr. Riordan's name was on that list, Patrick again with his recall-itis affliction, stated, "*I don't recall*." *Id.* The Court inquired further about Mr. Patrick's knowledge of Mr. Riordan being on such a list, as Patrick seemed to equivocate in his answer. Asked if he then recalled that Mr. Riordan's name was on some list of employees needing work, Patrick answered, "No, sir."[14] Tr. 178.

[14] Counsels for Riordan advised that they had not been provided with the list that Patrick stated had been created by HR. Tr. 177. The Court expressed that it would not have been burdensome for the Respondent to have provided the purported document sent to Paramont and that it would have helped Knox Creek's case "immensely" had Mr. Riordan's name appeared on it. Tr. 185. Respondent's Counsel, in the Court's estimation trying to thread the needle, then suggested that the list related to Roaring Fork job losses, and that Mr. Riordan only lost his job in connection with Laurel Mountain's closing. Tr. 186. However, the Court responded that Mr. Patrick's testimony suggested that the great effort to find employment applied to *all* displaced miners, and if Mr. Riordan's name was missing from the list, that would be troublesome. *Id.* At odds with Mr. Patrick's testimony, Counsel for Respondent asserted that the Respondent "did try to place what they perceived to be their better people." *Id.* Respondent's Counsel submitted that the testimony was only regarding reaching out to Paramont in connection with the earlier layoff at Roaring Fork and that Riordan lost his job in connection with the second layoff, at Laurel Mountain. Tr. 187. Obviously, Counsel's characterization of testimony is not a substitute for the testimony received.

On the issue of points assigned for being on a mine rescue team, the Court expressed its understanding that the questions asked on that subject were intended to show that such membership on a mine rescue team *was already built into the scoring*. Tr. 180. Respondent's Counsel was attempting to show that "[r]egardless of whether there was *extra scoring* for mine rescue on the score," the mine could not operate without Mr. Duncan being employed. Tr. 182 (emphasis added). The idea, conceded by Respondent's Counsel, that there could be "extra scoring" demonstrates again the malleable nature of the evaluation system. *Id.* Respondent's Counsel's attempted point was that, even if Duncan's score was *10 points lower*, he had to be retained. *Id.* The Court then inquired if that made the point system "pointless" in that there were times when the mine would not apply its own point system. *Id. Respondent's Counsel contended that Knox Creek had "never said otherwise."* Tr. 183 (emphasis added). Thus, Knox Creek admitted that, depending on its needs, it could put aside its scoring system.

Mr. Jessee agreed that the scores given to Riordan in his evaluation were completely apart from his training activities and thus that he was scored on the basis of his skills and performance as a foreman. Tr. 205. Yet, while mine rescue membership meant points would be awarded, and more if need be, safety training did not.

The Court has found Mr. Jessee's testimony, both at the hearing and in his deposition, to be incredible. In his September 19, 2014, deposition, Jessee stated he had *no idea*[15] whose decision it was to terminate Mr. Riordan, even though he admitted to being the mine's superintendent. Tr. 219. Jessee maintained that he was *never told* why he was to evaluate all of his employees. *Id.* In terms of entering the evaluations into the computer, he stated that no one from HR gave him any guidance about the purpose of the evaluations nor did he ask for any guidance about filling them out. Tr. 220. Jessee also maintained that in his discussions with Mr. Patrick, he never discussed the shutdown of Roaring Fork or Laurel Mountain and never discussed the possibility that any employees from those mines would be coming over to Knox Creek. *Id.* In fact, Jessee asserted that, even when Dale Slemp was at the mine, he had *no idea* that Slemp was coming. Tr. 221. The Court found all of this to be incredible. Jessee maintained that his realm was safety, cost, and productivity and, in effect, it was his testimony that in terms of personnel he did not consider anything beyond the bottom line of the budgeted number of employees, neither inquiring, nor knowing, about anything beyond that. Tr. 220-21. These assertions, especially when consider as a whole, run counter to common human behavior.

Jessee also stated that, *he could not recall* ever giving an evaluation of Mr. Riordan before 2013. Tr. 221. He disputed as inaccurate Mr. Riordan's claim that he, Jessee, had evaluated him prior to 2013. Tr. 222. However, when challenged if that meant that Mr. Riordan was being untruthful about that, Jessee reiterated that he was "saying *I don't recall*." Tr. 222 (emphasis added). Asked how Alpha received the information that went into the performance evaluations which resulted in bonuses for all salaried employees, Jessee stated he had "*no idea*." Tr. 223.

[15] "No idea-itis" is another condition closely related to "recall-itis." The conditions seem to occur together. As with the latter, which focuses on an ability to remember something, the former appears in situations where one would expect a witness to have some information about a line of inquiry, yet the witness responds that he has "no idea" about the matter.

Jessee maintained that when he learned, around December 12, 2013, that Riordan would be terminated, he did not discuss that with Mark Jackson or with anyone else for that matter. Tr. 224. Further, Jessee stated that he had no plan for who would be taking over Riordan's shift and would wait until the next day to figure that out "on the fly." Tr. 225. Yet, Jessee acknowledged that he spoke frequently with Mark Jackson "about different issues of the mining from day-to day." *Id.* As discussed, he admitted that he spoke with Jackson about Riordan, stating that he had such a discussion in "Mid Spring of 2013." *Id.* This conversation, Jessee stated, involved "some problems -- about getting [Riordan] -- when he worked on the outbys, getting him to go underground, start work and stuff like that." Tr. 226. Jessee admitted that the workforce at Knox Creek is now larger than it was on December 13, 2013, and that the mine has more salaried people there now than back then. *Id.* He estimated that there was one additional hire plus the transfers from Cherokee mine, which shut down in March 2014. Tr. 227.

Directed to the comments section of the employee evaluation form, Resp't Ex. 2, and particularly to the section addressing areas the employee needs to improve, Jessee read that it stated "follow-up on jobs." Tr. 228. In another area of the evaluation, it reflects Riordan "wants to work in the safety department." *Id.* The same remark, that Riordan needs to follow-up on jobs, appears in Gov't Ex. 3, which is the spreadsheet. Jessee agreed that in the section for improvements, only the one matter, the need to follow-up on jobs, was listed. Tr. 230. A discrepancy was noted, under the follow-up from field section, where the Secretary's Exhibit 3 states: "Disciplinary measures regarding red zone areas had to be instructed and reinstructed on work projects, needed to be completed. It does not take initiative to identify mine concerns so that down time can be minimized as well as potential violations minimized." Gov't Ex. 3. Mr. Jessee stated that he did not give that information. Tr. 231. He had *no idea* who would have given that information nor how the additional information about discipline got on the spreadsheet evaluation for Mr. Riordan. Tr. 234. Continuing with the theme that Riordan's motive was to get out of the mine and become a full time safety trainer, Jessee stated that Riordan had back issues and that it made it hard for him to get around. Tr. 207. However, Jessee conceded that the evaluation made no reference to any physical limitations for Riordan including back issues. Tr. 234. When asked if physical limitations would be important in evaluating one's ability to perform a job, Jessee only allowed, "Yes, to a certain point I guess you could say." *Id.* He then agreed that Riordan's physical limitations were not important enough to include on the evaluation form, stating, "No, I guess not." *Id.* Yet, Jessee admitted that he was the only person involved in the evaluation for Mr. Riordan. Tr. 232. Unsurprisingly, he had *no idea* where HR would have gotten that additional information which was added to Mr. Riordan's evaluation. *Id.*

The "Running Right" Category

There was a "Running Right" category on the employee evaluation form. Tr. 235. Mr. Riordan agreed that he has filled out "Running Right" cards. Tr. 93. The cards afford an anonymous method for commenting on mine operations. *Id.* They can involve compliments or criticisms. *Id.* He estimated that, over a period of many years, he had filled out probably hundreds of such cards. Tr. 94. Specifically, when asked about his using such cards in 2013, Riordan stated that he submitted on the order of one hundred Running Right cards in that year, and quite a few of them dealt with the ventilation issues. *Id.*

The typical practice was for the comments to be read during the safety meeting before each shift. Tr. 95. Again, consistent with the Court's conclusion that he presented highly credible testimony, Mr. Riordan did not claim that the Running Right cards were connected with his loss of employment. In fact, the Court expressly noted on the record at the hearing of its evaluation of Mr. Riordan's testimony as honest. Tr. 100-01.

In contrast, when asked about the Running Right category on that form, Jessee at first denied that they were all safety-related. Tr. 235. He was then shown his deposition and asked if his answer was "Yes," that they were all safety-related. Tr. 236. When asked if that was his answer at his deposition, a serious moment arose as the Court had to intercede, instructing Jessee that he was "not to look at [his] attorney" before answering. *Id.* Jessee then stated, "No, but I did send in a change form on that." *Id.* The Court then continued, advising that it was instructing Mr. Jessee that he was "to answer questions either [by] looking at [the Court] or [at] the person that's asking the questions. You are not to look out at counsel[']s table." *Id.* Jessee then resumed his testimony agreeing that *was* his testimony at the time of the deposition. *Id.*

When asked if, in the Running Right category, among all the foremen Jessee evaluated, Riordan was rated the lowest, he ultimately agreed. Tr. 239. When asked why, with Riordan rated as the lowest foreman in the Running Right "safety evaluation topic," he was the foreman used to train potential new foremen and new miner hires at the Tiller Mine, Jessee stated that they had no one else and he, Jessee, would have had to do the training. Tr. 240. As this was odd, Jessee then conceded that "[a]s a trainer . . .[he, Jessee,] didn't have a problem with [Riordan] . . . with training and stuff . . . [the rating was not based on his training capabilities, it] was as a foreman." Tr. 241. The problem, highlighted by Riordan's Counsel Addington, was that while Riordan was rated as his least safe foreman,[16] Jessee was still fine with having him train new miners. *Id.* As Riordan's Counsel noted for emphasis, Jessee was "perfectly comfortable having what [he] considered to be, based on [the] evaluation forms, the least safe foreman at [Jessee's Tiller] mine, do all the training for new foremen classes, and also new hires at the Tiller mine." Tr. 242. Jessee responded, "Yes." *Id.* On re-direct, Respondent's attorney asked if Running Right was limited to safety issues. Tr. 251. Jessee responded that it included operation improvements. *Id.*

Respondent's Attempts to Undercut Mr. Riordan's Discrimination Claim

The Suggestion that Mr. Riordan Invented His Discrimination Claim

This assertion arises from the contention that Mr. Riordan knew he would be terminated upon learning of the closing of the sister mines and for that reason concocted his discrimination claim. It is the Court's view that this assertion is an attempt to use legerdemain to distract from the proper analysis of a complaint of discrimination. The issue before the Court is whether Riordan was discriminated against as a result of making safety complaints. The Court has found that to be the case. Mr. Riordan's statement, roughly to the effect that he knew his termination would be occurring, does not alter that conclusion for several reasons. This is because his

[16] Respondent's Counsel objected to the characterization that Knox Creek regarded Riordan as its least safe foreman. Tr. 241. The Court noted in that regard that Riordan received the lowest score for that category. Tr. 242.

statement is not material to the test to be applied in a discrimination action. To begin with, one must not lose sight of the fact that Mr. Riordan's statement, even adopting the version Respondent urges, did *not* include the reason for his termination. Respondent's version, which the Court does not adopt as verbatim in any event, requires an inference as to what Riordan meant by some form of those words. Respondent's interpretation of the meaning would require mind reading. Further, even if, for the sake of argument, Mr. Riordan had expressly added that his termination was due to the closing of the other mines, that would not change Respondent's culpability if the record established, as it has, that his termination under the evaluation system was corrupt as applied to him, as Respondent was motivated by his safety complaints. In short, the claim of discrimination and its defense cannot be established based on what Mr. Riordan *may have thought* to be the reason for his termination on the day he was terminated, when the record shows that it stemmed from his safety complaints.

The Claim that Mr. Riordan Was One of the Mine's Weaker Foremen

The chief contention in its defense is Respondent's claim that Mr. Riordan would still be working were it not for the closing of the two sister mines. Apart from that, Respondent has, inaccurately and unfairly in the Court's view, effectively characterized Mr. Riordan's work performance as passable, while maintaining that he was still one of the weaker foremen it employed. Respondent has claimed that it was its evaluation system and Riordan's low score under that system that resulted in his dismissal.

However, through testimony during the hearing, the Respondent also attempted to insinuate that Riordan had other flaws and by implication that there were other reasons for his termination or that the flaws demonstrate the basis for his low score. Examples include Riordan's allegedly walking inby a pillar line; that supervisors had to keep after him to do his job; that he had a bad back,[17] suggesting that the condition both made him a weaker foreman and that the condition also prompted his desire to leave underground work for a less demanding position in the safety department; and that it's the foreman's job to make sure the ventilation is adequate, thereby implying that the ventilation problems Riordan complained about were due to his own shortcomings. While these many contentions were raised, Respondent did not directly make this part of its case. Instead, it maintained that, as poor a foreman as he was, at least according to Respondent's telling, he still would have been kept on at Knox Creek, but for the

[17] Mr. Riordan admitted that he has back problems and that he has had them for 15 years or longer. Tr. 91. He also agreed that "at times" it is difficult for him to do the physical parts of work in an underground coal mine. Tr. 92. Consistent with his forthright testimony, he admitted that he had been treated for his back issue for years and that he wanted to get a job as a safety trainer on a full-time basis. *Id.* To that end, he had numerous discussions with Mr. Jessee about his desire to perform safety training work on a full-time basis. Tr. 93. Riordan, to his credit, was very forthcoming in his entire testimony, including his testimony about his back. The Court concludes that Complainant's back was not a basis behind the filing of his discrimination claim. There is no credible evidence that Mr. Riordan's back issues prompted his claim nor that his back adversely affected his work performance at Knox Creek. There is, for example, no evidence of Complainant's loss of work time for such annoyances that he may have had regarding his back. In the Court's estimation of his credibility, that candor and honesty, worked in his favor when it came to evaluating his credibility on the critical issues in this matter.

closing of the sister mines and his poor evaluation score. To be clear, the Court was not impressed at all with any of these claims about Mr. Riordan's other alleged deficiencies, but the larger point is that Respondent itself did not claim during its opening statement that Riordan's termination was due to anything other than his low score. Unfortunately, the low score defense, as discussed above, did not hold up either.

Mr. Jessee also agreed that the evaluation made no reference to any physical limitations for Riordan, including back issues. Tr. 234. However, when asked if physical limitations would be important in evaluating one's ability to perform a job, Jessee only allowed, "Yes, to a certain point I guess you could say." *Id.* He then agreed that Riordan's physical limitations were *not important enough* to include on the evaluation form, stating, "No, I guess not." *Id.* Accordingly, it is found that Mr. Riordan's undefined back problems do not shed light on this discrimination claim.

Though Mr. Patrick was never a direct supervisor for Riordan, he claimed that Scott Jessee mentioned to him his impression of Riordan as a foreman. Patrick stated that "[o]n one occasion Mr. Jessee mentioned to [Patrick] that Mr. Riordan was one of his weaker section foremen." Tr. 132. That this topic would even come up between the two seems quite odd. Further, Jessee never explained the basis for that view and apparently Patrick never inquired about the basis for the opinion either. *Id.* Patrick, upon the Court's inquiry about the time of that comment, stated that he was "going to say that was probably 2012." *Id.* Explaining further, Patrick offered that he had noticed that Mr. Riordan seemed to always be at the Knox Creek main office, instead of at the mine, and therefore asked "who this was and what his job duties were." Tr. 133. Jessee's response was that Riordan didn't want to be a section foreman but wanted instead to work in the safety department. *Id.*

Adding to the Court's skepticism about this story, when asked during his deposition about Jessee's alleged remark that Riordan was one of his weaker foremen, Patrick stated that he had *no idea* and could not recall when Jessee made that comment, nor even how it was transmitted, by phone or in person. Tr. 145-46. Further, Mr. Patrick *could not recall* whether he initiated the remark about Mr. Riordan or if Jessee volunteered it. Tr. 146. As his deposition conflicted with this testimony at the hearing, the Court noted the obvious import of the line of questioning — that Mr. Patrick's recollection seemed to be better at the hearing than earlier in time, during his deposition. Tr. 147. The Court expressly stated that Mr. Patrick's improved recollection is not the way memories usually operate. Tr. 147-48. Mr. Patrick then stated that as far as his observing Riordan in the office in 2012, that "*was on one occasion*." Tr. 148 (emphasis added). When the Court picked up on that remark, that he noticed Riordan "at the office on one occasion," he then immediately recanted, stating, "No, I noticed Mr. Riordan being at the office several times, and that being in 2012." *Id.* Suffice it to say, the Court did not place stock in this alleged occurrence between Patrick and Jessee regarding Mr. Riordan.

In subsequent cross-examination, revisiting the number of times Patrick had conversations with Mr. Jessee regarding Mr. Riordan, Patrick then responded that there were two entirely separate incidents and that they occurred in different time frames. The first was in connection with Patrick's questions about Mr. Riordan's "appearance daily at [the] mine office," while the other time was in connection with the claim that Jessee told him that Riordan was one

of the "lower performing section foremen." Tr. 164. Patrick was then asked if Riordan was still training people at the time it was asserted that he was one of the weaker foremen. Tr. 165. Patrick, at the time of his deposition, had another bout of his "recall-itis." *Id.* In contrast, at the hearing, Patrick stated that he didn't think that Riordan was still doing training at the time he had the conversation with Mr. Jessee. *Id.*

In further cross-examination, regarding Patrick's statement that he spoke with Jessee about Riordan one time, Patrick stated that the conversation involved the remark that Riordan was "a lesser performer as far as section foremen." Tr. 166. When asked details about who initiated that conversation, Patrick stated that *he could not recall*, but he did recall that Jessee told him that Riordan really liked the safety department, that is, the training side of it, more than he enjoyed being a section foreman. Tr. 166-67.

Mr. Jessee was Riordan's superintendent for "[a]bout ten years." Tr. 202. Jessee stated that he goes underground "frequently" at the mine, elaborating that meant about three times per week. *Id.* While underground he checks on the status of the mine's operating areas and "over the years," as Respondent's Counsel put it, he had the opportunity to observe Mr. Riordan. *Id.* Jessee maintained that, in 2013, Riordan was "one of [his] weaker foremen." Tr. 203. He next agreed with Respondent's Counsel's words, that "he was at least good enough to keep his employment," if not for the layoffs at Respondent's other mines. Tr. 204. Again, not merely leading but effectively testifying for Jessee, Respondent's Counsel continued, "But compared to your other foremen, he was one of the weaker ones?" Jessee responded, "Yes," but when asked to elaborate about what was "weak about him," he responded, "Just his ability to lead as a foreman and actually the ability to go above and beyond what's required of him." *Id.* The utter emptiness of this claim has been discussed by the Court.

Mr. Riordan's Work as a Safety Trainer at the Mine

Mr. Jessee agreed that Riordan wanted to be a safety professional, and if he had that job it would have relieved him of his duties as a foreman. Tr. 204. Further, he acknowledged that Riordan did some safety training at the mine in 2013, but that he was not the principal trainer. *Id.* The principal trainer was Ronnie Stevenson. *Id.* Jessee agreed that Riordan sometimes filled in and did various types of training and he agreed that he had an opportunity to observe Mr. Riordan's performance in doing that work. Tr. 205. When asked for his opinion of his performance in those tasks, Jessee described it as "fair." *Id.* Continually, Respondent's Counsel, through leading questions, suggested that Riordan's desire was to be out of the mine and performing training in place of that work. *See* Tr. 134, 204, 205, 226. The idea behind these questions was to suggest that Riordan's real motive was get out of mine work and that safety complaints were not his real agenda. Mr. Patrick acknowledged that Riordan did some training for the company, but that he was never a "regular" trainer. Tr. 134. Instead, he was the "second" for that work, filling in if the primary person was away. *Id.*

The Court was not impressed with Respondent's attempt to diminish Mr. Riordan's role as a safety trainer, whether labeled as the principal trainer or not. Further, Knox Creek can't have it both ways, simultaneously, grudgingly admitting that Mr. Riordan did safety training for its miners while claiming that it was difficult to get him to go underground or to be safety

conscious, and that he was one of its poorer foremen, all while allowing him to do *any* safety training at all. Either he was really a poor foreman, and yet Knox Creek allowed him to safety train its employees, which does not speak well of Knox Creek's view of the importance of safety training, or the characterization painted by the mine about Mr. Riordan was untrue. The Court finds that the latter description applies.

Respondent's Post-hearing Brief

The Court read and considered all points and contentions raised in Respondent's post-hearing brief. Resp't Br. 1-31. Although those arguments have been addressed through the findings of fact, one other matter is discussed here. The Respondent contends that, by virtue of a Supreme Court decision in *Gross v. FBL Financial Services, Inc*., an age discrimination matter,[18] the Mine Act's burden-shifting formula in its discrimination matters now must be discarded. Respondent first notes that under current law,

> Commission decisions set out a shifting burden of proof in cases under Section 105(c). Under these decisions, the Secretary's initial burden is only to prove that the adverse action was motivated "in any part" by the protected activity. The burden then shifts to the operator to prove that the adverse action was motivated "in no part" by the protected activity or, alternatively, that the adverse action would have been taken solely for non-protected activities. *See, e.g., Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980); *Driessen v. Nevada Goldfields, Inc*., 20 FMSHRC 324 (Apr. 1998).

Resp't Br. 14.

It is Respondent's contention that since the Supreme Court has invalidated the same burden-shifting scheme in Age Discrimination cases, the burden-shifting scheme under Mine Act cases must also be invalidated as it contains the same operative language. Resp't Br. 15. The Mine Act, it argues, is like the ADEA's discrimination provision and Title VII's retaliation provision in that it remedies discrimination which occurs "because of" the protected status or activity. *Id.* Respondent asserts that the Mine Act provides no remedy where the protected activity was simply "a motivating factor." *Id.* As Knox Creek sees it, the cited Supreme Court cases establish two important principles pertinent to this case:

[18] Respondent cites to *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), stating that the Supreme Court held that burden-shifting does not apply under the Age Discrimination in Employment Act ("ADEA"), 28 U.S.C. § 621 et seq., "because, under the ADEA, the discrimination must be proven in the first instance to be 'because' of age. *Id*. at 176. The Supreme Court revisited the issue in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013), holding that even under Title VII, 'retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.' In *Burrage v. United States*, 134 S. Ct. 881, 888-89 (2014), the Supreme Court restated that – under federal statutes that use of the word 'because' in setting the causation standard – the burden is on the plaintiff to prove that the protected status was the 'but for' cause of the employer's adverse employment decision." Resp't Br. 15.

> First, the Secretary must prove as part of her case in chief that Riordan would not have been terminated "but for" the protected activity. It is not enough for him to prove the protected activity motivated the discharge "in any part." Second, the burden of proof on causation never shifts to Knox Creek, but remains with the Secretary from start to finish.

Resp't Br. 15-16.

Under the burden of proof required by *Gross v. FBL*, Knox Creek maintains that it is "the Secretary's burden to prove by the greater weight of the evidence that Riordan would not have lost his job if he had not engaged in protected activities." Resp't Br. 16. The burden of going forward or of persuasion on all issues would "never shift to Knox Creek, but remain[] upon the Secretary throughout the trial." *Id.*

Applying its view of the applicability of the Supreme Court ruling under a different statute, unrelated to mine safety law, to this case,[19] Knox Creek maintains that it showed a non-discriminatory reason for Riordan's job termination — namely, a reduction in force and realignment which affected dozens of people besides Riordan and was driven by mine closures at sister mines. Riordan's termination occurred on the very day of the closure of the Laurel Mountain mine, the event which caused it. Tr. at 327.

Per *Gross v. FBL*, it then was the Secretary's burden to show that the reasons given by Knox Creek for Riordan's termination were "pretextual," meaning they had no basis in fact, the proffered reasons did not motivate the adverse action, or the reason given was insufficient to motivate the adverse action. It maintains that the realignment/layoff, involving dozens of employees at four mines, individual comparative evaluations, and efforts to place and retain the better employees, cannot be characterized as pretextual. No one would invent and implement such an involved, far-reaching decision-making protocol as a subterfuge to cover unlawfully motivated discrimination against a single employee among dozens who were affected by the process.

Knox Creek's argument for why, upon providing its asserted business justification, it should prevail, is as follows:

> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. *Chacon*, 3 FMSHRC at 2516. The Commission's function is not to pass on the wisdom or fairness of Knox Creek's asserted business justification, but rather only to determine whether it is credible and, if so, whether it would have motivated Knox Creek. *Secretary of Labor on behalf of Michael Price v. Jim Walter Resources, Inc*., 12 FMSHRC 1521, 1534 (Aug. 1990).

[19] For the sake of argument only, Knox Creek assumes that the Secretary met its initial burden.

> The reduction and realignment of dozens of employees at the four affiliated mines is not "plainly incredible or implausible." That the reduction and realignment occurred is clear and uncontested. The narrow statutory issue remaining is whether Knox Creek's reason for Riordan's termination – the reduction and realignment – was enough to have legitimately moved Knox Creek terminate Riordan's employment. *See Chacon*, 3 FMSHRC at 2517. Undoubtedly it was. One hundred thirty three jobs were eliminated by the closure of two of the four mines in the group. There was nowhere to place all of them. Some jobs, including section foreman jobs, were eliminated. This is not a case of an employer claiming to have fired someone for an insubstantial offense, indicating the stated reason is not the true reason. While the loss of Riordan's job was understandably a disappointment to him, it was one of dozens of changes to employment of more than 130 people resulting from the closure of half the mines in the group.
>
> Determination of motivation in cases of this sort almost always involves inferences to be drawn from proven facts, but only inferences which are inherently reasonable and logically and rationally connected to evidentiary facts may be inferred. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). "Inferences must be based upon findings of fact followed by a logical and rational conclusion and may not be spun out of speculation or piled one on another to an inferred result that collapses the weight of its own insubstantial structure." *United Mine Workers of America on behalf of Mark A. Franks v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2124 (Aug. 2014) (Althan, Commissioner, dissenting).

Resp't Br. 18-19.

The Court finds that Knox Creek's contention lacks merit for several reasons. First, the Supreme Court decision in the Age Discrimination Act case does not represent Mine Act law. The Mine Act has a long-established analysis for discrimination claims, and it is that current law which this Court follows here. While age discrimination is a worthy subject for relief, as reflected by Congress' recognition of that form of discrimination, it has neither the hazard-filled history, nor the deadly consequences, that are inextricably part of mining, as recognized by the federal government's role in enacting mine safety and health laws since the Federal Coal Mine Safety Act of 1952. Discrimination is an integral and essential part of the federal formula for the protection of the health and safety of persons working in the mining industry. Section 105(c) makes this plain, in providing in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . because such miner . . . has filed or made a complaint under [the Mine Act] including a complaint *notifying the operator* . . . of an alleged danger or safety or health violation in a coal or other mine." 30 U.S.C. § 815(c).

As the Court also noted at the start of the hearing, in addressing the Respondent's Memorandum of Law in support of its contention, if it were to accede to the contention, it would seem to make it impossible for an alleged discriminatee to ever prevail because they would have to get inside the head of the mine operator. That would be impossible and therefore the task would be insurmountable. Tr. 5-6. The Court is not alone in this view. In the 5–4 decision of the Court in *Gross v. FBL*, Associate Justice Breyer, joined by Justices Souter and Ginsburg, said the following:

> Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.
>
> I agree with Justice STEVENS that mixed-motive instructions are appropriate in the Age Discrimination in Employment Act context. And I join his opinion. The Court rejects this conclusion on the ground that the words "because of" require a plaintiff to prove that age was the "but-for" cause of his employer's adverse employment action. *Ante*, at 2350. But the majority does not explain why this is so. The words "because of" do not inherently require a showing of "but-for" causation, and I see no reason to read them to require such a showing.
>
> It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.
>
> All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word "because," *i.e.*, the employer dismissed the employee because of his age (and other things). *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). I therefore would see nothing wrong in concluding that the plaintiff has established a violation of the statute.

But the law need not automatically assess liability in these circumstances. In *Price Waterhouse*, the plurality recognized an affirmative defense where the defendant could show that the employee would have been dismissed regardless. The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation. See *id.*, at 242, 109 S.Ct. 1775; cf. *ante*, at 2356 (STEVENS, J., dissenting) (describing the Title VII framework). I can see nothing unfair or impractical about allocating the burdens of proof in this way.

The instruction that the District Court gave seems appropriate and lawful. It says, in pertinent part:

> "Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:
>
> .....
>
> "[The] plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.
> "However, your verdict must be for defendant ... if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.
>
> .....
>
> "As used in these instructions, plaintiff's age was 'a motivating factor,' if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff." App. 9–10.

For these reasons as well as for those set forth by Justice STEVENS, I respectfully dissent.

Gross v. FBL, 557 U.S. at 190-92.

Accordingly, for the foregoing reasons, Knox Creek's contention that the Supreme Court's decision in *Gross v. FBL* requires a new standard of proof for Mine Act discrimination cases is rejected.

Conclusion, Order, and Assessment of Civil Penalty

As noted at the outset, Riordan's termination was adverse action. It is undisputed that Charles Riordan was terminated by Knox Creek on December 13, 2013. There was a close proximity between Riordan's protected activity and that adverse action.[20] Mr. Riordan was a long-employed and well-regarded employee until he continued to voice his safety concerns over the mine's persistent ventilation problems. In good faith, thinking that an honest discussion of safety issues was encouraged, he spoke frankly to the mine president about that ventilation problem. Aside from the Knox Creek's human resource witnesses, its other witnesses conceded that there were indeed continuous ventilation problems. One individual in particular, Mr. Jackson, took particular umbrage at Mr. Riordan's candid remarks about the problems and he told Riordan directly about his reaction on the first day following his return from vacation, stating that Riordan had thrown him under the bus. It was no coincidence that the same day, Mr. Riordan supposedly was found to be working under unsupported roof, the first time such an infraction had been leveled at him. Though the Respondent made other claims of Mr. Riordan's alleged shortcomings, they either did not actually occur, occurred once, or assuming generously that his failures did occur they were not written down, nor were any adverse actions taken, even when it was conceded that normally such alleged infractions would require action of some sort.

Then, too, it is completely contrary, and frankly unbelievable, that Riordan, as one of the mine's alleged "weaker foremen" would still be entrusted to conduct mine safety training. Further, in terms of the evaluation system, putting aside the lack of any detailed explanation of how points were assigned to the salaried people, putting aside Mr. Jessee's unbelievable testimony about his role in that process and the conflicts between his deposition and hearing testimony, the system itself, by the words of witnesses and counsel for the Respondent, was malleable. Scores were supposedly the determinative factor for determining who was retained and who was not, except when they were admittedly not decisive. Desired outcomes trumped scores when needed. Beyond that, there is the whole matter of Knox Creek adding employees after Mr. Riordan's discharge and the absence of any evidence that he was on a list of those eligible for the openings which subsequently arose. Beyond these reasons, regrettably, witnesses Patrick, Jessee, and Jackson were simply not credible.

Accordingly, for all of above, the Court finds that Knox Creek Coal unlawfully discriminated against the Complainant, Charles Riordan, for engaging in protected activity. The Court directs the Respondent to permanently reinstate the Complainant to his former position at Knox Creek together with any back pay which may be due and with all entitled benefits.[21]

---

[20] As Riordan's Counsel has noted, close proximity in time between a miner's protected activity and an operator's adverse action is itself evidence of a discriminatory motive, citing *Donovan on behalf of Anderson v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev'd on other grounds sub nom. Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

[21] As is customary in these proceedings upon a finding of discrimination, the Court directs the parties to confer and to stipulate as to these terms and to report within 14 days of this

In terms of the civil penalty, the Court has considered each of the statutory criteria and notes that the Secretary believes that a penalty of at least $20,000.00 (twenty thousand dollars) should be assessed. The parties' stipulations and the record have spoken to some of the statutory criteria, but in arriving at the civil penalty, uppermost in the Court's evaluation are the lack of good faith, the gravity, and the negligence involved, each of which are deemed to have been significantly lacking on the Respondent's part and fully warrant the civil penalty of $25,000.00 (twenty-five thousand dollars), which penalty amount is hereby imposed by this decision for the violation of section 105(c) of the Mine Act and which is to be paid within 30 days of this Order.

Within ten days of this Order, Knox Creek shall post this decision along with a visible notice on a bulletin board at the mine that is accessible to each and every employee, explaining that Knox Creek has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also inform all employees of their rights in the event they believe they have been discriminated against. All references to the termination of Mr. Charles Riordan and the reasons asserted therein, are to be removed from his personnel file.

The Court retains jurisdiction of this matter until the specific remedies to which Charles Riordan is entitled are resolved and finalized. Accordingly, this decision will not become final until an Order granting any specific relief and awarding damages has been entered.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Karen M. Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858

Stephen M. Hodges, Esq., Penn Stuart & Eskridge, P.O. Box 2288, Abingdon, VA 24212

Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522

---

decision whether an accord could be reached or whether it will be necessary to conduct an immediate hearing to take evidence on such issues as may be unresolved.