

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 2, 2015

MATTHEW A. VARADY,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-307-DM
WE-MD 14-03

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

DECISION AND ORDER

Appearances: Matthew A. Varady, *pro se*, Elko, Nevada, for Complainant

David M. Stanton, Esq., Goicoechea, Di Grazia, Coyle & Stanton, Ltd.,
Elko, Nevada, for Respondent

Before: Judge Moran

In this section 105(c)(3) action under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), Complainant, Matthew A. Varady, asserts that he was fired by Veris Gold USA, Inc., because of safety and health complaints he voiced related to his job at Veris’ Jerritt Canyon Mill.

A hearing was held in Elko, Nevada, from June 8-10, 2015. Although Varady’s *pro se* complaint contained several discrimination claims that are not cognizable under the Mine Act,¹ his claim that he was discharged because of safety/health complaints he made during September 2013 is cognizable. In connection with those complaints, it is undisputed that Varady was overexposed to ammonia gas while performing his work at Veris and suffered adverse health effects from that. While many issues are discussed in this decision, it must be highlighted that Veris defends its firing of Varady on a single basis, namely that Varady published an adverse Facebook post about a Veris supervisor and that this was the sole ground for his termination. For the reasons that follow, the Court finds that Varady was fired for invoking his safety and health rights under the Mine Act and rejects Veris’ claim that he was fired for a Facebook post.

¹ At the commencement of the hearing, the Court explained to Complainant that some of his grounds for discrimination claim were not cognizable. Tr. 13. One example noted by the Court was Varady’s assertion that information he had posted on a social website was protected activity, on the theory that the adverse action (i.e., his termination) taken by Veris for such a posting violated his First Amendment speech rights. Tr. 14.

The Basics of a 105(c) Discrimination Claim

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, Complainant must prove, by a preponderance of the evidence, (1) that 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).

The current action is brought under section 105(c)(3) of the Mine Act. That section provides that if the Secretary determines that a violation of section 105(c)(1) has not occurred, "the [C]omplainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007), "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation."

Findings of Fact

Overview

Veris is a large operation, with about 400 direct employees in November 2013. In addition, Veris had about 50 contractors that were employed in the mill area and about 200 contractors in the mining area. Tr. 362.

Mr. Varady's complaint of discrimination was filed on or about November 11, 2013. Ex. R-1.² Varady was discharged by Veris on November 8, 2013. He was employed as a mill "CIL" operator. CIL or "CIL circuit" refers to the carbon-in-leach circuit and pertains to a process for removing gold out of the slurry after it has been roasted. Tr. 669. The complaint asserted that Varady engaged in protected activity when he made safety/ health complaints related to exposure to toxic chemicals. It named several individuals as associated with the alleged discrimination, including Kiedock Kim, Chris Jones, and Josh Culver, each of whom, Varady alleged, knowingly and willfully required him to work in a toxic atmosphere against company policy, resulting in his overexposure to toxic substances. Varady maintains that, after he made complaints about that CIL circuit, he had a bull's-eye on his back and, in fear of losing his job, he

² Respondent's exhibits are designated with an "R," and Complainant's exhibits are designated with a "C."

then kept to himself and made no other complaints. Tr. 41. Varady contends that the culture at Veris put production over safety. Although Varady did not make a *formal* safety or health complaint at the time of his exposures to the ammonia gas, the Court notes that, as this is a section 105(c)(3) action, it must liberally interpret the *pro se* complaint.³ That complaint included his claim that that he “tried in earnest to discuss [health and safety] issues with supervisors and management, only to be threatened with disciplinary action up to and including termination.” Tr. 17-18.

It is important to bear in mind that Veris’ sole defense to this discrimination complaint is that Varady was fired because of his Facebook post, in which post, Varady stated: “Wouldn’t it be nice to be the assistant manager and sleep in the company truck on the job while ev1 [sic] else is freezing their asses off actually working.” Ex. R-2.

Testimony of Complainant Matthew Varady

Matthew Varady’s job at Veris was essentially to monitor the machinery at the CIL, as part of the leaching process for gold. His responsibilities included overseeing that equipment to make sure that the chemicals used in the process were at appropriate levels and also included mechanical operations and functions, inspections, and chemical sampling. These duties were performed in a semi-open environment. Those, such as Varady, who were working the CIL were subject to exposure to ammonia and hydrogen cyanide gas. Until he became ill, Varady had believed that his only risk was to the cyanide gas, for which there were monitors, measuring emission levels for that gas. However there was another chemical exposure risk, that of ammonia gas, for which there were no monitors. It is undisputed that at the time of Varady’s ill health reactions from exposure to ammonia gas there were no monitors for that chemical.

As mentioned, on or about September 17, 2013, Varady began prominently feeling the effects from his exposure to the toxic chemicals at the CIL tank. He would later learn that his illness stemmed from exposure to ammonia. Varady worked on top of the CIL tanks and as such he was exposed to the fumes and steam coming off the tops of those tanks. Tr. 47. He asserted that the adverse effects he experienced from the exposure were the result of cumulative effects over time. Tr. 48.

As his health worsened, on September 17th Varady met with Veris safety personnel, who directed that he see Dr. Mattern in order for a blood analysis to be performed. Tr. 51. Varady learned of the test results a few days later. Those results are reflected in Exhibit C-12 and show that Complainant’s ammonia plasma was 56. The normal range for that value is 11 to 35. Tr. 54-55. Veris had no discussions with Varady following this result. Instead they simply removed him from the CIL area, transferring him over to the primary crusher, per Doctor Mattern’s orders. Tr. 55. At some point in late October the doctor released Varady from this work location

³ At the hearing, it was noted that MSHA conducted three interviews of individuals in connection with its investigation of the safety complaint, and the Court held that it would allow testimony related to those interviews because, by reasonable inference, they were related to and became part of Varady’s discrimination complaint, as the investigator’s interviews necessarily had to be spawned by allegations communicated to MSHA by Varady in connection with his complaint. Tr. 25.

restriction, though it was against Varady's wishes. Still, after his adverse health event, he never worked more than one shift at the CIL at a time somewhere between a month and a half and two months after his overexposure. Tr. 55.

Subsequently, on November 8, 2013, Complainant was fired. Tr. 57. When the firing occurred, Varady was told by phone that his termination was due to the two write-ups he received, both of which were issued to him on the same day of his exposure to the ammonia gas, September 17, 2013. Tr. 58. Those write-ups involved his alleged intemperate communication with another employee and his alleged failure to follow the chain of command in terms of reporting his original health issue, at least that is what a Veris human resources representative, Joe Stoddard, told him.⁴ *Id.* Varady maintains that those write-ups were actually generated by his safety and health complaints. Tr. 60. That Varady received two write-ups on the same day he became ill cannot be viewed as coincidental. As explained *infra*, the Court finds that Varady's safety/health complaints did spawn the write-ups. Varady made it clear that he had complained about not feeling well multiple times before September 17th, but that he was told that he would be all right, and that it was simply a time of year when sickness was going around. Tr. 62.

Regarding the September 2013 incident, when he became ill while working at his CIL work post, Varady stated that he verbally reported his unwell condition multiple times, informing his supervisor, Scott Mansanarez, that he had not been feeling well. Varady asserted that Mansanarez did not take his claim seriously and that his condition became worse. Subsequently, he met with Ms. Cheryl Garcia, who is a member of the safety department, and she noted that he looked very poor.⁵ Tr. 29. Varady maintained that there had been an increase in the cyanide in the carbon-in-leach circuit above the regular amount, that there was associated cyanide off-gassing for long periods, and that they were of a sufficient degree that alarms were sounding. Tr. 30. Prior to that event, Varady asserted that he made verbal safety and health complaints about similar concerns in July 2013 and that these were made to Charles Walker and Mansanarez. Tr. 31-32. Varady alleged that neither of those individuals addressed his complaints, telling him instead that he should continue doing his job. Varady also asserted that Kiedock Kim and Mr. Culver would countermand any reaction to the issue, if Walker or Mansanarez were to act upon his complaint. Tr. 33.

Dwayne Ward, Veris' human resources manager, was evasive in his testimony on the issue of whether Varady made safety complaints. When asked if he recalled whether Varady made any complaints of a safety or health matter, his response was "Not to my knowledge directly, no." The Court, displeased with the equivocal answer, then asked Ward if he knew whether Varady made any such complaints to any other department. His answer to that question was quite different, as he then admitted that he knew of Varady's complaints to the safety department in September 2013. Asked by the Court, he then admitted that he knew indirectly of

⁴ Only later did Varady learn from Shawn Rose, a safety department training coordinator at Veris, that his firing stemmed from a Facebook posting. Tr. 59.

⁵ Exhibit C-23 pertains to a report done by Cheryl Garcia regarding Varady's over-exposure. It reflects the time line of the events. It also reflects that Garcia started to investigate the matter and recommended that Varady see a doctor. Tr. 111.

safety complaints involving ammonia made by Mr. Varady during September of 2013. Tr. 494-95.

Varady stated that he was threatened with termination if he left his job post at the circuit. He did not then file a discrimination complaint, because he was insufficiently informed about what was transpiring at the CIL, asserting that he did not learn about the procedures that were involved at that location until later on, after he had been terminated. Tr. 33. Varady testified that he

told them [he] didn't feel safe in that environment. I mean, it was hard to control. It was — the pH was hard to control to prevent against off-gassing in one direction or another. And they were fully aware of it. I mean, we had alarms going off nonstop, so everybody on the mine site knew that there was an unsafe environment up there, yet we were forced by Mr. Kiedock Kim to remain in that environment in fear of reprisal of some sort. He threatened flat out for termination.

Tr. 34.

Preliminarily, the Court found Varady's claims to be credible and subsequent testimony only served to confirm that determination. From the exposure, Varady stated that he had various adverse health effects. Tr. 34. Those symptoms, he asserted, began in late August and became worse in September of that year. This prompted him to meet with Ms. Garcia and Mr. Danny Lowe, both with the safety department, on September 17th, and, as noted, the upshot of this meeting was that he was sent to a doctor for evaluation. Tr. 35.

In sum, Varady told originally Scott Mansanarez and Charles Walker for several shifts that he wasn't feeling well and then told Ms. Garcia about the problem, but Mansanarez simply told him to take it easy and suggested that he probably had the flu or a cold. Thus, Varady believed they did not take his concerns seriously. Varady affirmed that, while he could not know what was going on with his health, he was asserting a safety or health adverse reaction at that time, and thereby making a safety and health complaint, though it was not until later that he learned it was from his exposure to chemicals.

As noted, the Court also finds that it was not coincidental that Varady received two disciplinary actions described as "employee warning notices," or "write-ups," on September 17, 2013, which was the same day he made his safety/health complaints with the safety department. Tr. 35-37. In reaction to his safety/health complaints, Varady stated that Veris responded adversely, claiming through the issuance of one of the write-ups that he did not follow the "chain of command" for reporting this issue. Responding to the claim that he violated the company's chain of command policy, Varady asserted that Veris Gold has an open door policy which states that at any time an employee can complain to anybody about safety or health complaints. Tr. 37-38. The record is undisputed that Veris in fact had such an open door policy. Varady added that Mansanarez stated that he was embarrassed that Varady didn't go through him in making the

complaint and therefore contends that he was written up as an act of reprisal.⁶ The Court finds, as set forth in more detail *infra*, and based on the entire evidence of record, that in fact the disciplinary write-ups issued by Veris were a façade, which were manufactured and came about because of Varady's safety/health complaints.

Regarding Varady's assertion in his discrimination complaint that Graham Dickson, Kiedock Kim, Chris Jones, and Josh Culver knowingly and willfully required him to work in a toxic atmosphere, resulting in overexposure to toxic substances, Varady stated that Kim threatened him with termination if he left his work station for any period of time. Mr. Kim did not testify. Varady also maintained that Graham Dickson knowingly and willingly provided a toxic environment by not having the proper monitors in place, and by not having a way to extract the toxic fumes from the environment, with no exhaust fan or induced fresh air entering into that work atmosphere. The absence of such fans is also undisputed. Thus, Varady believed that those individuals knew the environment was unsafe but would not countenance objections, adding that Chris Jones was another supervisory person who was chronically confrontational when interacting with miners. Employees understood, Complainant maintains, that they were to do as told, or they would be terminated. Tr. 45-46.

Recalling that Varady is not a lawyer and was acting *pro se*, the Court inquired if there were any other aspects to his discrimination complaint that had not yet been raised. Varady stated that he sent an email to Veris' Dr. Barry Goodfield, who was brought in after a new president was installed at the company. Goodfield was identified as a contact source within the company for any employees who did not feel comfortable contacting an immediate supervisor. That such an intermediary was created, to address the problem of employees who were in fear of speaking up, is instructive of the hostile atmosphere towards workers at Veris. Varady acted on that invitation, contacting Goodfield about Kiedock Kim's lack of concern over environmental issues and Kim's omnipresent threat to terminate anyone who left his work post. Varady told Goodfield about these concerns a few weeks after his chemical exposure. Goodfield made one response to Varady but the communications then stopped.⁷ Tr. 64-65. Varady then also noticed a

⁶ Varady further stated that another act of reprisal was Veris' claim, in the other write-up he received the same day, that he had a confrontation with Mr. Josh Culver, who was employed as a metallurgical technician by Veris at the time. The write-up asserted that Varady yelled at Culver and used profanity. Varady conceded that he may have been yelling at Culver, but that the ambient noise in the work environment made speaking loudly essential. As for the swearing, he essentially admitted to that, noting that he was working at a mine site where such terms are common usage. As noted, this event also occurred the same day he made his safety complaint, September 17th. Tr. 38-39. The exchange occurred in the context of Varady asking Culver why they were using so much cyanide. Culver did not take the inquiry from Varady well, viewing it as a complaint about how he, Culver, was performing his duties, which he believed was none of Varady's business. Importantly, Varady confirmed that it came at a point in time *after* he made a safety complaint about his safety and health reaction to these chemicals. As noted, only later did Varady learn that his adverse health reaction was due to ammonia exposure, not cyanide. Tr. 40.

⁷ Exhibit C-5, an email to Dr. Goodfield, dated September 27, 2013, reflects Varady's communication that he was exposed to the toxic fumes. Tr. 87. The email includes the contention that Varady was forced by Kim to remain in the circuit under fear of being fired if he

change in attitude towards him from Mr. Mansanarez. Of note, Mr. Varady had no disciplinary issues with Veris in a year's time before his discharge.⁸ Tr. 67.

At the conclusion of Mr. Varady's testimony, the Court announced that it found that Varady had identified protected activity: his safety/health complaints of September 17, 2013, and earlier. Those complaints could not have come sooner, as Varady did not know until then what was going on, adversely, with his health. Tr. 73. The Court finds, based on Mr. Varady's credible testimony, that he began vocalizing his adverse health symptoms prior to September 17th. Tr. 73-74. This meant that the next issue to resolve is whether the adverse action which ensued was brought about by his complaints.

To emphasize this finding, the Court announced at that point in the proceeding that Varady had established that element of his claim, and that it was within the four corners of his discrimination complaint before MSHA, where Varady identified four or five individuals who required him to work in a toxic atmosphere against company policy and in which he experienced an overexposure to toxic substances. Thus, Varady made a valid safety or health complaint, which was later brought to MSHA's attention and formed part of the basis of their investigation. Tr. 74.

Veris' Narrow Defense to the Discrimination Complaint

As noted in the Overview, Veris' defense is that Varady was fired for his Facebook posting and for no other reason. Veris stipulated that on or about September 17th, or some period of days before that time in 2013, in fact, Mr. Varady suffered an adverse health impact from exposure to ammonia gases at the CIL location. Veris also stipulated that there was no equipment on the CIL that monitored ammonia levels. Tr. 95. Thus, the sole basis for Veris' discharge of Varady was his Facebook post. Tr. 97. Separate from its defense, Veris also argued, procedurally, that Varady never actually made a safety complaint. Instead, Mr. Varady was asked to report to the industrial hygienist, Ms. Garcia, who initiated an investigation and was concerned that Varady might have had a cyanide gas exposure issue. Thus, Veris argues that only Garcia, if anyone, made a safety complaint and that all Varady did was appear to be ill.

left that post. Ex. C-6 is a response from Dr. Barry Goodfield to Varady's email, relating that he recognizes Varady's concern and that he passed it along to members of senior management, evidencing that they were fully aware of Varady's complaints.

⁸ In December 2012, Varady was disciplined for damage to a skid steer but, even from Veris' perspective, this formed no basis for his discharge. His record was otherwise unblemished. Another oddity, among many in Veris' putative defenses, Ward claimed Varady's skid steer incident was a write-up that should have been in his 2013 personnel file but it was not. Dwayne Ward, Human Resources manager with Veris, did not know of the document being removed from Varady's personnel file. Tr. 468-469. R-10 is a document relating to the skid steer incident investigation. Ward asserted that the last page of the three page document was the "writeup" pertaining to Varady. The Court noted that it considered the whole skid steer business to be too tangential to the issues in the case. Tr. 513.

The Court believes this inaccurately represents the events and finds instead that Varady did make complaints about his health but that he was constrained by his understandable fear of losing his job, a fear brought about by an atmosphere of intimidation directed toward employees who considered complaining about safety or health issues to supervisors. The Court also observed at the hearing, that an individual such as Mr. Varady can only report what he knows at a given point in time, and there is no requirement for a complainant to formally declare, as if an incantation, that he or she is “making a safety or health complaint.” Instead, the Court expressed that, in the context of the evidence in this case, a miner effectively makes such a complaint when asserting that he is ill. That set in motion a chain of events that eventually included going to the doctor. The Court then had to determine if the reason advanced by Veris for Varady’s firing, which occurred within a relatively short time period following his safety/health complaints, was valid or instead brought about by his complaints. As discussed below, the Court also finds that the two write-ups issued to Varady were trotted out as a pretext for his firing and that Veris’ fallback position of firing him for his Facebook post cannot withstand scrutiny.

Having found that Varady did make safety or health complaints, the reality is that Veris’ sole defense is an affirmative one, in that it asserts that Mr. Varady was fired for one reason — the Facebook post he made relating to a Veris supervisor sleeping in his truck at the mine. Thus, Veris procedurally relinquished, by the declaration of its attorney at the hearing, any claim disputing that there was protected activity by Varady and that adverse action resulted from his engaging in such protected activity. As long as Complainant put forward a prima facie case, which the Court finds that Mr. Varady did, Veris’ defense was limited to its affirmative claim that it fired Varady for reasons unrelated to his safety and health complaint.

Veris’ Shifting Reasons⁹ for Varady’s Termination and Its Ultimate Claim that Varady Was Fired Because of His Facebook Post

⁹ Yet another claim of Veris, despite its assertion that Varady was fired solely for his Facebook posting, is that he was lax in performing his duties at the CIL. But the Court finds that Veris cannot simultaneously assert there was one reason for firing Varady, while inferring that there were other problems with his work performance. One such contention was that Varady would wander away from his work post for 20 minutes and without notifying his supervisor. Veris claimed that bad things could develop if the CIL was left unattended for such periods. However, even testimony from one of Veris’ witnesses contradicts the claim that 20 minutes away from the CIL would risk problems. COO Dickson stated that leaving the post for 5 or 10 minutes was not an issue, but that problems could arise if one left that post for *over a half-hour*, as there could be some pH changes occurring. Tr. 397. In addition, witness Nicholas Garcia stated there are two operators in the CIL circuit, so there is always a person present there. Tr. 300-21. Veris’ Counsel, with no testimony to support his claim, suggested that Josh Culver was monitoring Varady in this regard. Tr. 140-42. However, Varady had a different perspective about Culver, who did not testify. Varady asserted that Culver, who was only a technician, not a metallurgist, was doing things with the circuit that created an unsafe environment. Tr. 145. Mention of this issue is included only for completeness; the Court views the issue both as collateral and without substance.

Veris' Initial Position that Varady Was Fired for Write-Ups

As alluded to earlier, the write-ups, originally issued as the grounds for Varady's firing, involved two separate alleged infractions. One involved an alleged intemperate verbal exchange by Varady with another employee, Josh Culver,¹⁰ who was not a supervisor, but only a peer on the same level as Varady. Tr. 98-99, 476. The other write-up was the claim that Varady did not follow the proper chain of command for reporting a safety or health issue.¹¹ Despite limiting its defense to the claim that Varady was fired for his Facebook Post, Veris tried to have it both ways, by making claims that Varady had these other failings as an employee. Varady responded to these, and in doing so established that those other claims had no merit. The effect of his rebuttals to the other claims had the collateral effect of diminishing Veris' claim that he was fired for the Facebook posting. Thus, the write-ups, which Veris later tried to walk away from as the reason for Varady's termination, are important to the decision because they tend to demonstrate the overall hollowness of Veris' defense.

Cecil Pranke, Veris' mill superintendent in 2013, testified. Tr. 665-66. Above him were mill manager Kim and Jones, the assistant mill manager. Consistent with Veris' approach of attempting to show that Varady was a problem employee per the two write-ups, Pranke's testimony continued that theme, but in a different regard, by trying to place the blame for the ammonia overexposure on Varady, asserting that he "overshot his pH and created ammonia off-gasses." Tr. 673-74. Despite this serious claim, Pranke did not tell others that something should be done about that claimed error, nor was any adverse employment action taken against Varady. Tr. 675. Unbelievably, Pranke believed that Varady should be written up for this error, yet he didn't express that view to anyone. Tr. 676. Assuming for the sake of argument that his claim was credible, given the seriousness of the charge and Pranke's view of it, it does not follow that Pranke would then do nothing about it. Casting further doubt on Pranke's claim that Varady was the source of the ammonia problem, Pranke admitted that he never produced documentation to support his investigation that the blame belonged on Varady. Tr. 692.

Regarding the claim that Varady improperly left his work station, Pranke conceded he had no documentation to support that assertion and that, as to any eyewitness to the claim, Pranke could only offer "Scott [Mansanarez]. I'm assuming." Tr. 698. As to the dispute between Culver and Varady, which formed the basis for one of the two write-ups Varady received on September 17th, Pranke admitted that *only one side* (Culver) was interviewed about the event and that normally both sides would be questioned. Tr. 699. As yet another example of

¹⁰ Among other significant deficiencies with the claim, it is also ironic that Varady's second write-up involved abusive conduct in his interaction with Culver, as Chris Jones was consistently identified by witnesses at the hearing as engaging in such conduct with many Veris employees and without adverse consequences.

¹¹ Introduced in connection with this write-up was Exhibit C-33, a declaration by Mansanarez expressing embarrassment at paragraph 13 that Varady went to the safety department with his complaint, instead of going directly to him. This was offered to show that his embarrassment was the motivating factor for the write-up, not a failure to follow chain of command. Varady also established at the hearing that because of Veris' open door policy, there was no required chain of command that had to be observed where health and safety issues were involved.

the overall lack of credibility of Veris' witnesses, when Pranke was asked if he ever received reports or documentation of poor work performance by Varady, Pranke responded that he could not recall. Tr. 699.

The Court inquired as to the basis for Pranke's conclusion that Varady and not some other employee was the source for the ammonia problem, a problem he attributed to Varady overshooting his pH. Pranke stated his conclusion was based on the trends. When the Court inquired what prompted Pranke to investigate and determine the reason for the excessive ammonia, he responded that Kim asked him to do that. Tr. 700-701. Demonstrating doubt on the credibility of Pranke's claim, when the Court inquired of Pranke as to the number of years in total that he had been involved in dealing with the CIL tanks, Pranke responded that his experience with this had been since 1983 and that the process, where one adds chemicals as part of the process of removing the ore from the raw material has been the same process over all those years. The Court then inquired how many other occasions in all those years had there been instances of other individuals operating the CIL tanks of overshooting the pH and Pranke responded this was the sole occasion in his entire experience. Further, Pranke, despite this being the sole such event in 30 years, never discussed his determination with Mr. Varady and he reaffirmed that, despite placing the blame at Varady's doorstep and believing that he should have been written up for the lime overshoot, he told no one about the alleged event. Tr. 703. Simply put, Pranke was not a credible witness.

It was Joe Stoddard, with Veris' HR (human resources) department, who called Varady on November 8, 2013, informing him that he had been fired. As Varady confirmed, Stoddard advanced but one reason for his termination, the previously described write-ups, alleging infractions. Tr. 144. Stoddard informed Varady that he was terminated because of the two write-ups, as previously described; one for not following the chain of command and the other for his confrontation with Josh Culver. Tr. 132-33. Human resources officer Dwayne Ward claimed that the "open door" policy was not as Varady interpreted it, asserting that the preference was to follow the chain of command and that, in any event, an employee must still first report to his supervisor before leaving his work area. Tr. 484. The write-up based on the chain of command infraction was patently inconsistent with Veris' own open door policy, which allowed any safety or health-related issue to be reported by employees to any member of management. Tr. 216-18, 242-43; Exs. C-3 and C-4. Yet another problem with that claim is that the write-up does not declare that Varady left his work area. Ex. C-36.

At the hearing Veris claimed that, while the write-ups were announced to Varady as the basis for his discharge, this was all a grand mistake and that the real reason he was fired was for his Facebook post.¹² Tr. 107. Despite that new stance, Veris maintained they were valid write-ups. It was not, the Court has determined, credible that the write-ups were "miscommunicated to

¹² Understandably, Varady was upset at Veris' revised basis for discharging him, noting that initially his termination letter didn't even state a reason, and after that, the write-ups were advanced as the reason, and still later that the claim was that he was fired for his Facebook post. As the Court pointed out to Varady, to allow Respondent to shift from initially providing no basis for Varady's firing and then to assert that his firing was due to write-ups and even later to light upon yet a new basis — the Facebook posting — is very different from implying that the Court was buying into such evolving claims.

Mr. Varady as the basis for the termination decision.” Tr.104. For his part, as noted, Varady asserts that the write-ups came about due to his making a safety and health complaint.¹³ Tr. 105; Exs. C-35, C-36. The Court so finds that was the case.

When Dwayne Ward was asked if Kiedock Kim demanded that Varady be fired and that he didn't care how it was accomplished, Ward's memory failed him, stating that he didn't "remember that." Tr. 503. The Court inquired further whether Ward's answer meant that it was possible that Kim did say that but that he forgot, and Ward responded that it "could be." *Id.* In a related inquiry, as to whether Kim interrupted a meeting between Shawn Rose and Ward stating that someone needed to be fired and that he wanted to beat someone to death with a hockey stick, Ward stated that he didn't remember the event. Tr. 504. When the Court inquired whether one would be apt to remember if someone said that he wanted to beat a person with a hockey stick, Ward admitted that "[i]t could be but, you know, a year and a half is a long period of time to remember a lot of different conversations." Tr. 504-05. Ward also could not explain why Varady was written up on the same day he was injured, answering only, "I have absolutely no idea." Tr. 508. Ward's memory failed him again on the subject of whether Ward had a discussion with Mr. Lowe regarding Varady's write-up as violating his rights under the Mine Act, stating again that he could not recall, nor could he recall if either Kim or Jones ever gave him anything to support a claim of poor work performance by Varady. Tr. 515-16.

Ward stated that the decision to write-up Varady on September 17, 2013, came from Scott Mansanarez. Tr. 495-96. In Ward's statement to the MSHA special investigator, he stated that Mansanarez told him that he issued Varady the write-ups but that Varady refused to sign them. Thus, Ward admitted that he had the write-ups in his possession from Mansanarez. When asked how Mansanarez could have issued the write-ups to Varady if he didn't have physical possession of them, Ward could only state that that was a "good question" and that he didn't have an answer for that. Tr. 499. The typical process for write-ups, Ward informed, is that a supervisor writes it up and then presents it to the employee. A witness is supposed to be present when a write-up is presented. Ward stated that Varady refused to sign the write-ups. Tr. 502. Ex. C-26. As noted below, this claim was contradicted by Scott Mansanarez, who stated that he did not show the write-ups to Varady.

Ward characterized the process of terminating Varady, as carried out by Stoddard, as a "learning process" for Stoddard and he also described it as "on-the-job training." Tr. 461-62. Ward then stated that Stoddard went to his office to "put[] together" the termination letter. Ward stated that Stoddard terminated Varady "but not for the correct reasons." Ward claimed that "the following week" he found out that Stoddard terminated Varady "for performance issues." Ward then claimed this was contrary to the instruction he gave Stoddard.¹⁴ Tr. 462. Continuing with

¹³ Further establishing the dubious nature of the write-ups, Exhibit C-37 was admitted for the purpose of demonstrating that the recent write-ups did not adhere to Veris' customary past practice. The skid steer write-up incident shows that such documents are signed by a supervisor and presented to the employee. Tr. 106-08. The two write-ups issued on the day Varady made his safety/health complaint did not follow Veris' practice.

¹⁴ In an ironic twist, Ward then revealed that Stoddard was later fired for insubordination, but for a matter not related to the Varady issue. Tr. 463.

what the Court viewed to be a very tall tale, Ward stated that “about two weeks later” Stoddard gave him a letter apologizing for his action in the Varady matter and other matters. Tr. 464. The Court inquired about this, asking if the apology letter was ever disclosed to Varady. It was not. Tr. 464.

Ward was presented with Exhibit C-30, which is a company-wide e-mail that was sent encouraging open door policies as well as communication with Dr. Barry Goodfield, if employees didn't feel comfortable communicating with anybody else. Tr. 510. He agreed that the email from Goodfield stated that any concern could be brought to him at any point in time and that the policy applied to any complaint from anybody at any time. Tr. 511.

With oddities abounding, Ward revealed that Varady's write-ups were not placed in his personnel file, but rather in a “sort of separate filing system,” as Veris' attorney expressed it. Tr. 482. The claimed justification was that this was a more secure place for the second file, but at best this amounted to keeping two sets of books. Ward maintained that Varady's firing was strictly for his Facebook posting. Tr. 483. The Court did not view Ward's testimony to be credible.

Scott Mansanarez also testified. He is the mill shift supervisor. In that position, he supervises 8 to 10 people, including those working the CIL. Tr. 536. In what the Court considered to be an odd response, when he learned of Varady's exposure to ammonia, around September 17, 2013, he did not believe that presented an issue affecting miner safety. Tr. 542. Mansanarez, referring to Exhibits R-3 and R-4, the Varady write-ups, acknowledged that he wrote them and gave them to Dwayne Ward. He did not show them to Varady. Tr. 543-44. Regarding the write-up involving Varady's verbal exchange with Culver, Mansanarez conceded that one would need to speak loudly due to the noisy environment at the mine and also that Culver commonly used profanity. Tr. 555. He then conceded that Culver's competency as a med lab tech, was only “to a point” and that some of his decisions adding chemicals to the circuits were “maybe questionable.” All of this supports Varady's position that he had a basis for being upset with Culver. Tr. 556. Further, Mansanarez agreed that on September 17, 2013, the cyanide usage increase decision by Culver may have possibly created a toxic environment. Tr. 557. Mansanarez also agreed that Culver should have been equally disciplined over the same matter for which Varady was disciplined. However, Mansanarez had no authority over Culver. Tr. 564.

Regarding Varady's job performance as a CIL operator, Mansanarez praised Varady multiple times for the job he was doing and expressed that he was a sufficient and competent CIL operator. Tr. 558-59. Mansanarez also agreed that on September 17, 2013, Varady was doing his job properly. Tr. 562-63. Lastly, Mansanarez never witnessed Varady leave his post unattended for any long duration. Tr. 564.

In sum, the Court concludes that neither of the write-ups, even apart from their more than strange issuance on the date Varady became ill, were sound. The write-up for failure to adhere to the chain of command is flatly contradicted by Veris' own policy, and the alleged intemperate exchange by Varady with a peer did not follow Veris' own procedure for addressing the subject. Clearly, by both their timing and lack of substance, the write-ups were created in response to Varady's adverse health reaction.

Veris' Subsequent Claim that Varady Was Fired Because of His Facebook Posting

On November 8, 2013, Matthew Varady posted on his Facebook page the following: "Wouldn't it be nice to be the assistant manager and sleep in the company truck on the job while ev1 [sic] else is freezing their asses off actually working." Ex. R-2. There is no dispute that Varady posted this and that he was referring to Assistant Manager Chris Jones whom he saw sleeping in a Veris truck at the mine not long after that same manager confronted some Veris employees who were resting in the lunch room.¹⁵ Tr. 121. The posting, Varady agreed, referred to Chris Jones and eventually was seen by some twenty co-workers at Veris. Tr. 124. Varady stated that his Facebook posting is private, allowing only friends to see it. Tr. 279. Varady agreed that he and Jones did not have a good relationship. Tr. 124-25.

As noted, Veris eventually presented Varady's Facebook posting as the sole reason for discharging him. Tr. 119; Ex. R-2. His firing occurred on November 8, 2013, which was the same day that Varady posted his Facebook message regarding Chris Jones sleeping in the company truck. Subsequent to Veris' first contention that Varady was fired for the write-ups he had been issued, Varady heard from Veris' Dr. Goodfield that he was fired for the Facebook post.¹⁶ Tr. 134.

¹⁵ The incident, which was raised by both sides, involved an occasion when Jones saw several employees sleeping in the lunchroom. The versions of this encounter differed, with Varady maintaining that Jones was abusive to the resting employees and that they were on unpaid lunch anyway. Jones then apparently spoke to Scott Mansanarez, complaining that the miners were sleeping on the job. Tr. 128. Varady and other employees felt they had been unfairly accused by Jones. This confrontation had an effect on a subsequent event when, a few nights later, Varady and other employees observed Jones sleeping in a company truck. Tr. 129. Varady took this as a double standard, even while he maintained that the employees Jones criticized were not sleeping, whereas Jones was asleep. This prompted him to post the Facebook statement, as Jones himself was doing what he criticized others doing. As discussed *infra*, more important than this particular lunchroom set-to and Varady's reaction by the Facebook posting, is the character and credibility of Chris Jones and the aggressive, confrontational, environment he cultivated at Veris.

¹⁶ One of the claims by Veris in its attempt to show that Varady's firing was only for the Facebook posting was its assertion that Graham Dickson knew nothing about Varady's ammonia exposure. However, apart from the other evidence showing that Veris was motivated by Varady's safety and health complaints, Varady noted that Dickson was copied on an email from Dr. Goodfield about that subject. Tr. 134-35. The Court finds that it is reasonable to conclude that Dickson in fact did know about the ammonia exposure issue.

It was fellow employee Tia Monahan who forwarded Varady's private Facebook post to Ward and Stoddard, but her intention was not to create problems for Varady but rather to give those individuals a heads up that someone was sleeping on the job. Ward and Stoddard then forwarded the Facebook post to Kim and Dickson, after which Varady's termination was discussed. Tr. 282. She could not recall any other instance of a person being terminated for a social network post. Tr. 286. Monahan was of the view that company policies were applied unevenly at Veris.

Graham Dickson, who is the Chief Operating Officer (COO) at Veris, stated that he and Dwayne Ward, human resources manager, have the authority to fire employees. Tr. 353. Dickson stated that he first saw the Varady Facebook posting referring to Chris Jones sleeping in his truck on November 8th and that he considered it to be mocking the assistant manager, Jones. Tr. 355. Within *seconds* of viewing the Facebook posting, Dickson made the decision to fire Varady, and he asserted it was made without any discussion with Chris Jones. Dickson affirmed that it was only *after* he made his snap decision that he spoke with Chris Jones as to whether Jones had, in fact, been sleeping. Tr. 366-67. Dickson stated that he took the Facebook post down to the human resources officer, Dwayne Ward, and informed him that he wanted Varady fired for the posting. Tr. 365.

Critically, when Dickson was asked if he had ever fired anybody other than Matt Varady for insubordination at Veris, his answer was no. Tr. 384. This encompassed quite a significant period of time, as Dickson admitted, covering eight years. In fact, he had never fired anyone for insubordination: Varady was the first. Tr. 384. Nor has anyone subsequently been fired for insubordination during his tenure at Veris, although that claim conflicts with Ward's statement that Stoddard was fired for insubordination. Dickson attempted to explain his brash act as reflecting the importance of chain of command, a consideration he apparently believed was threatened by the Facebook posting. Tr. 385. Oddly, in view of the parade of witnesses presented by Mr. Varady, Dickson asserted that defending his supervisor, Jones, was critical because such individuals are Veris' "safety stars." Tr. 386-88. As discussed *infra*, Dickson's characterization of Jones as one of his "safety stars" is at odds with the preponderance of testimony of Jones' attitude towards safety matters, and it flies in the face of Dickson's admission that Veris was having significant safety problems in late 2013 and that health issues were not being addressed, to the point that Veris was put on a potential pattern of violations notice by MSHA. Tr. 401-06.

Dickson then offered up another reason to explain his intense and immediate reaction to the posting. That involved a prior incident involving another Veris employee who was sleeping on the job, in that instance, due to sleep apnea. That person was also photographed sleeping on the job but Dickson could not determine who distributed the photo. Therefore, Varady was also paying the price of Dickson's pent up anger from the earlier event. In fact, Dickson expressed, upon seeing Varady's posting,

I got someone. I'll make an example of him. I will fire him and everyone will understand that this kind of behavior is not acceptable. That's why I was so quick to act. I had been incensed by the fact that I couldn't find who passed around the photograph of [the other employee] sleeping, and now I had someone I could make an example of, and that's what I did.

Tr. 386-87. Therefore, Dickson himself conceded that Varady's firing was not for that conduct itself but rather to set an example. That admission, by itself, demonstrates that Veris' action was not motivated by Varady's activity by itself and that it did not take for that reason alone.

Dickson asserted that he considered the Facebook posting to be a violation of Veris' company policy. *See* Ex. R-5 (containing applicable pages from the Veris Employee Handbook addressing work rules). However, it is of significance that Dickson admitted that he was not familiar with the Veris employee handbook, nor did he consult it before deciding to fire Varady. Tr. 380-81. Later, he attempted to repair that damaging admission by then asserting that he was generally familiar with the handbook pertaining to insubordination and that one could be fired for that. Dickson then defined insubordination as “[a]nything that reduced the effectiveness of the chain of command,” which he further defined as demeaning or mocking a supervisor. Tr. 381. This “definition” was also made without his consultation or knowledge of the employee handbook, and whether it had anything to say about that. Tr. 382. Thus, the Court took note that not only did Dickson not consult the handbook, he did not even know what it said about the issue. Tr. 383.

On the subject of the appropriateness of firing an employee for a Facebook post, the Court posed the following hypothetical to Dickson: If he had an employee in a supermarket checkout line, and that employee, speaking to another Veris employee, said exactly the same words that appeared in Varady's post, upon learning of the remark, would Dickson fire that employee? Dickson demurred, stating that it was only a hypothetical and that he didn't know the answer. Then, when pressed, he believed there is a distinction in that he deemed the supermarket conversation to be private and he did not believe he could have much to say about it, whether he liked it or not. This is an appropriate time to remind that Varady's posting was private, distributed to a select group of friends and was not posted for consumption by the general public. Given that limiting distribution, it was no different than if Varady had telephoned each of those Facebook friends and instead spoke the same words of criticism. Another hypothetical was then posed by the Court, this time asking about a cookout at an employee's home where a number of employees are invited to the gathering, and again the same information as the Facebook post is conveyed. In that hypothetical, Dickson said the communication was “getting closer” to a firing. In the Court's view, Dickson's responses to the hypotheticals demonstrate that his action was arbitrary and unjustified.

Fatally to Respondent's defense, Dickson admitted that if there had been no history of the earlier, embarrassing photo of the other employee and Varady's photo was the first time one had taken a picture of a sleeping supervisor, he *would not* have fired Varady, but instead would have brought him in, had a conversation, and maybe had him apologize.¹⁷ Tr. 441-44.

In trying to deal with the problem of the emails from Dr. Goodfield to Dickson that established Dickson's knowledge of the events involving Varady, Dickson claimed that he did not read all of the emails Goodfield sent him during that time frame. This is most curious because, to believe Dickson's claim, one would have to simultaneously believe that he was very much attuned to some issues, like his supervisors sleeping on the job, but quite inattentive about things like Varady's ammonia overexposure and selectively inattentive to some of Goodfield's emails to him. Tr. 389. Thus, Dickson claimed that he was not aware of emails between Goodfield and Varady, even though he was copied on them. Tr. 390. To be plain, the Court found Mr. Dickson's testimony to lack credibility.

¹⁷ When asked if, in effect, there was a double standard applied to employees at Veris sleeping on the job, Dickson responded, "Other people can be fired for sleeping on the job." Tr. 359. Dickson, evidencing his dual standard, then went on to state:

The reality is, I expect people to show up at Jerritt Canyon and to be able to do the work they are being paid for, and that does not mean they sleep on the job. So, yes, if people show up and they are not in a fit state to do the job and they sleep, they will be fired. There is no doubt about that.

Id. But then, Dickson applied his other standard:

The difference about [Jones] is, he was sleeping on the job because he had been on the job for over 48 hours. Okay. He was living and working on the job. That's the reality. That's why he's sleeping there, not because he's not putting in enough performance, it's because he's over performing.

Id. Yet, he simultaneously asserted that he was

not happy about him doing it. I can't reprimand him because he knows very well that I have spent too long at the mine site and ended up sleeping under my desk. So the reality is, there is two different reasons for sleeping; one is you are not doing what you are paid for, and the other is you are just there too long to be able to go on safely and so you sleep on the job. There is a difference.

Tr. 360. Jones admitted to him that he had been sleeping in the company truck. Tr. 365.

Dickson agreed that the managers' conduct within the company policy handbook allows miners to report a violation without fear of retaliation and that that protection extends to regular or email communication. Dickson, however, tried to distinguish social networking emails from other methods of reporting violations, an illusory distinction in this Court's view. Tr. 420. When presented with Veris' policy and the section titled "unacceptable conduct," which includes sleeping on duty as willful misconduct, and asked how one could be fired for a social network posting when that subject is not addressed in Veris' policy, but not fired for sleeping on the job, Dickson asserted there were distinctions. Tr. 422-23.

Dwayne Ward, the Veris human resources manager, also testified about Varady's Facebook post. Ward first saw the post on November 8, 2013, having received it from Tia Monahan that morning. Tr. 453. Ward stated that Dickson came to his office and told him to fire Varady because of the post. Joe Stoddard was also present when this occurred. Tr. 458.

Speaking to the Veris employee handbook, Ward, noted that insubordination is defined there to include refusal to follow the reasonable direction of a supervisor and/or conduct demeaning the authority of the company or its supervisors, for which disciplinary action can be up to and including termination. Tr. 456-58. Ward was asked if there is a social media policy in the employee handbook, and he admitted there is none. He then agreed that employees have a right to have and use and post social media. Tr. 494. Over the objection from Veris' Counsel, Ward was asked about the provision in Veris' policy addressing off-duty misconduct. Ex. R-5. The objection was understandable, since that part of the policy does not address social media posting and focuses on crime, traffic tickets when using Veris vehicles, and the like. Further, it ties discipline for off-duty misconduct to "applicable law." Ward had a different interpretation of the policy, expressing his view that, as it referenced Veris' reputation, it included acts of insubordination. Ward believed that an employee who demeans a member of management hurts the company's reputation. However, Ward admitted that he arrived at that interpretation only *after* speaking with Dickson. Tr. 460.

The Circumstances Surrounding Varady's Termination

In the Court's view, Ward's recounting of the directions given when assigning the task of terminating Varady to Stoddard was not credible. Supposedly, Ward checked with Stoddard to see if he was "okay" with firing Varady and that Stoddard responded he was okay with it. Ward then was asked if he gave Stoddard instructions about the task. Ward responded that he did not remember testifying to that and that he did not give explicit instructions to terminate him for the Facebook post, as Stoddard had just heard the basis for the firing from Graham Dickson. The Court inquired further about this, with Ward confirming that Dickson only came in to the office and said to fire Varady. Ward agreed that both he and Stoddard assumed that the firing was due to the Facebook posting even though Dickson made no reference to it. This assumption was made because Dickson had the Facebook posting in his hand. Ward maintained that following that direction from Dickson, he only inquired of Stoddard if he was okay with that. When the Court asked why he asked that, as opposed to simply directing him to take care of it, Ward stated it was because Stoddard was a newer employee. Odder still, Ward maintained that while Stoddard had been in HR both at Veris and at other employment jobs, he kept telling Ward that he "would like to terminate someone." To say the least, this was a peculiar request from

someone working in HR, and Ward offered that Stoddard wanted the task in order to “build his resume.” Tr. 521.

According to Ward, he then learned the following Monday, having assigned Stoddard with the job of preparing the firing notice the previous Friday, that it was carried out but he maintained that their discussions were all verbal and apparently non-substantive, and that Stoddard did not show him the termination notice. However, Ward was vague about how the notice was issued, professing that he did not recall how communication of the notice was carried out. Then, Ward amended his answer, asserting that Stoddard told him he fired Varady for performance issues. Thus, Ward agreed that Varady was given a reason for his firing and that it was performance issues. The Court inquired of Ward if Stoddard advised what those performance issues were but Ward professed that he didn’t remember, and that he only remembered Stoddard stating that he terminated Varady for performance issues. Yet, upon further inquiry by the Court, Ward admitted that Varady was given a termination letter but that the letter did not contain a reason for his firing. Ward professed to have an issue immediately upon Stoddard stating that he fired Varady for performance issues. Ward then stated that he inquired what the performance issues were and that Stoddard advised that he had a conversation with Chris Jones about Varady’s performance and Stoddard went with that basis for the firing. Thus, Ward confirmed that Stoddard did not simply proceed to fire Varady, as directed, but instead first had a conversation with Jones. Tr. 523-26. The Court had to remind Ward to look at the Court when answering its questions. Adding to the peculiarity of this story, Ward confirmed that he was immediately unhappy that Varady was terminated for performance issues even though at that point in time Mr. Varady did not know the reason for his termination, as the termination letter did not provide a reason. When Ward was asked why Varady’s termination letter provided no basis for his firing, he answered: “That’s a good question. I’ll have to ask Mr. Stoddard.” Tr. 494. Pressed about this, as Ward is the human relations manager, he admitted it is *not* common for no reason to be stated. *Id.*

Ward expressed that, while Stoddard knew that Varady was to be fired for the Facebook post, he did not believe he could fire him for that reason because it was “a free speech matter.” Adding to the lack of credulity of this story, Ward then stated that there was no correction or paper issued or anything else generated to reflect that Varady was fired because of his Facebook post. In fact, Ward agreed that, *even now*, if one were to review Varady’s present employment records with Veris, there would still be no statement that Varady was fired for his Facebook post. Tr. 529.

Regarding the incident of Jones’ sleeping in his truck and to Exhibit R-2, that exhibit was first brought to Jones’ attention by Joe Stoddard, who handed the document to Jones. Stoddard told Jones that Varady was the source. Tr. 617. Jones placed the document on a table in his office. He then stated that Dickson saw the Facebook post, took it, and left. Jones claimed he had no discussion with Dickson about it and that he merely laughed about it. Tr. 618. According to Jones, Dickson said *nothing* to him about it. Tr. 619.

Based on the foregoing, the Court concludes that Mr. Varady made safety and health complaints prior to and on the day that he became so ill that medical attention was directed. Veris took adverse action in reaction to that event, issuing two bogus write-ups to Varady. Thereafter, using the pretext of Varady's Facebook posting, Veris latched onto that posting to terminate him. However, Veris did not establish that the Facebook posting was an independent and justified basis for Varady's firing.

Other Evidence Supporting the Court's Conclusion that the Culture at Veris Put Production over Safety

In addition to the core issues discussed above, other evidence of record supports the Court's conclusions that the culture at Veris put production over safety and further informs its conclusions that Veris took the action against Varady because of his safety complaints.

As noted, Cheryl Garcia also testified. She was the industrial hygiene coordinator at Veris. Tr. 172. Her employment ended in February 2014. She was not fired, but the circumstances of her departure were not pleasant either. She asserted that she was being discriminated against and harassed by Chris Jones and others at Veris and that she could not take those problems any longer. Tr. 174. Garcia investigated the cyanide alarms in the CIL circuit, an investigation that was prompted by Varady appearing at her office, complaining of various health problems. On that day, MSHA was on site and she found an "abundance" of hydrogen cyanide gas. Tr. 175. She stated that, even when the gas alarm sounded at levels of concern, some of the workers told her they were forced to stay in the areas to finish what they were doing because, a reflection in her view, of Veris' exalting production over safety. These workers, she asserted, told her that if they left their circuit for any duration they would be disciplined or terminated, and that Chris Jones was typically the person who made such threats. Tr. 176. Ms. Garcia also had a negative view of Chris Jones, expressing that he intimidated people, was rude and would yell at employees, a fact that COO Dickson implicitly admitted. Tr. 177. Garcia also stated that "often" personal protection equipment ("PPE") was not available to the miners. Tr. 178. She believed that Dickson did not provide a safe environment for employees. Tr. 179.

Danny Lowe stated that the investigation into Varady's illness began before they knew his exposure had been to ammonia, with a working assumption that he had cyanide gas exposure. Tr. 232-33. Although Veris' Counsel attempted to show that Veris otherwise conducted an extensive investigation, apart from the efforts of the safety department, Lowe's take was that it was an attempt to stifle the inquiry, citing as an example the safety department's learning that a number of times the cyanide alarms went off and that there was no ammonia monitor. Tr. 240-41. Lowe confirmed Mark Butterfield's account that his safety investigation of the Varady overexposure was terminated by Chris Jones. Jones, in the presence of Dwayne Ward, told Lowe that the investigation was over and that it was an HR matter, not a safety and health issue. Tr. 219.

Shawn Rose, who was employed with the safety department as a training coordinator in September 2013, testified that Mr. Kim was present in Dwayne Ward's office during a conversation between Rose and Ward. Tr. 263-64. According to Rose, Kim became increasingly upset as the conversation continued. He told Ward that someone needed to be fired. Tr. 265. No express reference to Varady was made by Kim, but Rose deduced that was the person being referenced and about whom Kim expressed a wish to "beat somebody to death with a hockey stick." Tr. 266. Rose also stated that he was told by Chris Jones to stop an investigation involving safety or health matters. Tr. 268-69. The Court viewed the testimony of Rose as consistent with that of other witnesses and as probative of Jones' aggressive, confrontational attitude towards those who raised safety issues.

Another witness, Tia Monahan, was employed at Veris for three years, with Dwayne Ward as her direct supervisor. Tr. 273-75. Monahan then left Veris on her own accord because of the poor environment there, which included Chris Jones behaving inappropriately toward her by making unwanted sexual talk. Tr. 282-85. Monahan related that several employees told her they were afraid to talk to the safety department or to HR for fear of being terminated or having some other adverse employment action result. Based on her experience, she concluded that Ward could not be relied upon to follow through on complaints made to HR and safety. Tr. 275.

Yet another witness was Nicholas Garcia. He worked for Veris at different times for a total of about 3 years, including work at the CIL circuit. Garcia stated that one would receive little to no training for chemicals one would encounter for that job. He did have a trainer, but described that person as "just another incompetent operator trying to teach me how to run the CIL, pretty much." Tr. 288-90. He affirmed that there were times when PPE was not available for him. Tr. 292. He also stated there were times when he was asked to do unsafe acts, as directed by Todd Peterson, Cecil Pranke, and Chris Jones.¹⁸ Tr. 293. In terms of his training, Garcia explained that, while there was training on the CIL *operation*, he had no training regarding chemicals. Tr. 313; Ex. R-9.5. Even for the training that was given, however, Garcia disparaged it, explaining that a new operator was simply told to hang out with an experienced operator for a few days, and even at that, his training occurred when the circuit wasn't even running. Tr. 314. The Court finds that overall Garcia's testimony supports the expression of other witnesses that the Veris operation was run sloppily and safety issues were not received favorably by management. *See, e.g.*, Tr. 319-321 (providing one, of many examples). Garcia's opinion of Chris Jones fit with those expressed by most of the other witnesses. Tr. 296.

¹⁸ Garcia offered an example of an unsafe act, stating that he was required to climb inside to clean the quench pit at a time when the mercury levels were so high that the Jerome meter read "high level." This task was still required so that production could keep running. He refused at first, waiting until he acquired a full face mask, but as he could not wear his glasses under the mask, he couldn't see well. Still, he was told to perform the job or to go home. Tr. 294. In another incident Garcia was told by Cecil Pranke to falsify a document, the subject of which involved removing a safety device off some machinery. The report noted that Todd Peterson tried to incorrectly fix a problem but Garcia was told to remove the reference to Peterson. Again, not complying with the directive would mean Garcia would be fired. Tr. 298-99.

Dwayne Ward stated that he learned of Varady's ammonia exposure in mid-September 2013 being informed by the safety department's Mr. Lowe. Tr. 471. Ward stated that the safety department and the mill did an investigation about this. Tr. 472. Ward was asked if he saw any of the results of these investigations. His response was revealing, as he advised that he only quickly reviewed them. Tr. 473. Yet, he said it was part of his job to learn about things such as CIL operators becoming sick due to working in the CIL circuit. Tr. 474. Also instructive about Veris' overall lack of concern for such health and safety matters, when Ward was asked if he knew whether any proactive steps were taken in the CIL circuit to make any improvements or to change anything, he admitted he did not. Tr. 474.

In the Court's estimation, the fact so many employees had safety and other issues with Veris is indicative that there was a genuine systemic problem at the mine. Based on the credible testimony of record, from various witnesses, the Court concludes that there was a callous attitude towards safety and health issues at Veris. Tr. 203-206.

Veris' Questionable Activities Regarding the Investigation of Varady's Ammonia Overexposure

Mark Butterfield, who was then employed as a health and safety supervisor at the mine, was initially directed to investigate Varady's exposure to ammonia, but then was told to stop, an order that came from Chris Jones. Tr. 154. Initially, he refused Jones' order to stop his investigation, but then human resources officer Dwayne Ward told him to stop the investigation, which he obeyed. Tr. 158.

Chris Jones and Veris' Culture of Employee Intimidation

Testimony from both sides revealed that Chris Jones was a central figure on the subject of the work atmosphere at Veris. COO Dickson admitted that in dealing with subordinates, Jones was "rough and direct." Tr. 357. In fact, Dickson acknowledged that he has discussed with Jones the approach he employed in dealing with subordinates, suggesting that he be more diplomatic. Tr. 357. He also directed that Jones discuss this issue with Dr. Goodfield. Dickson believes Jones is *now* a very different person today as a result of this, but this subsequent action also informs as to Jones' behavior at the earlier point in time when the Varady issues arose.

Safety supervisor Mark Butterfield, consistent with Dickson's description of Jones, expressed that Chris Jones conducted himself in a very unprofessional manner. Tr. 159. He alleged that several times he caught Jones doing "unsafe acts" but that Jones just shrugged it off. When he would come in and tell him about safety problems, he didn't want to hear about it. Numerous times Jones told Butterfield, "F that, I don't have time for this." Tr. 161. Significantly, Butterfield expressed that he was not able to perform the complete scope of his safety duties under the management of Mr. Jones, Mr. Dickson, and Mr. Kim. Tr. 160.

Witness Danny Lowe, a certified mine safety professional, was employed by Veris for about a year and a half.¹⁹ Lowe also had a very negative view of Chris Jones. Tr. 207-12. Lowe denied that he had a contentious relationship with Jones. Instead, he stated that the issue was one of insubordination, as Jones was caught going through a window when he was specifically told how to correctly and safely enter a building. Lowe maintained that Jones reacted aggressively upon being caught entering the building inappropriately. Lowe took the matter about Jones' act to the general manager. Tr. 246-48.

It did not come as a surprise that Veris human resources manager Ward contradicted the COO's testimony and ultimately his own about Chris Jones, stating at first that "[h]e [Jones] treats everybody the same." Tr. 486. Yet, he admitted that he has had disagreements with Jones himself and in fact that most people that interact with Jones have had disagreements with him. Tr. 486. Ward then added that Jones behavior has improved, but not until 2014. Tr. 487.

Chris Jones also testified.²⁰ He is presently the process mill manager at Veris. At the time in issue, he was the assistant mill manager and Kiedock Kim was the mill manager. Jones stated that at that time his job was focused more on maintenance of the mill, as opposed to its actual operation. Tr. 588. While there were also others in the chain of authority over Varady, Jones was within that chain. He described his interactions with Varady as contentious, asserting that Varady was "constantly complaining" about his supervisors. Tr. 591-92. The Court notes that by that testimony Jones was unwittingly conceding that Varady was making safety complaints. Jones brought Varady to Pranke regarding these complaints but, as Jones put it, "it just went downhill from there." Tr. 592.

There is no doubt about Jones' view of Varady. When asked if any of Varady's supervisors ever told him that Varady had poor work performance, Jones' non-answer was that he never heard anything good about Matt Varady. Tr. 627. However, Jones' assertion that Varady was simply a chronic complainer was not credible, as he offered no detail about the subjects of Varady's complaints, making only making general statements.²¹ Tr. 593. When Jones was asked if Varady ever made any safety complaints to him, Jones' indirect response was that "Mr. Varady was, was very vocal about a lot of things, if I recall." Tr. 628. The Court, perplexed by the lack of responsiveness, noted that this was not a complicated question and required a simple yes or no answer, which could then be explained further, or the witness could

¹⁹ Lowe was later fired on November 21, 2013, although he stated that he did not learn of the reason for his termination until after he filed his own MSHA discrimination case. Tr. 256.

²⁰ Jones' testimony began on a very odd note, as Veris' attorney requested that certain witnesses, all of whom had completed their testimony, be removed from the courtroom on the basis that Jones felt "uncomfortable" with those witnesses being present during his testimony. The request was denied. Tr. 583-84.

²¹ Jones' take on Mr. Lowe was also negative, stating that Lowe's approach towards MSHA was to fight them. This was an odd assertion, as COO Dickson stated that Lowe was hired as part of Veris' effort to have the safety department become effective. Tr. 404.

assert that he did not understand the question. Jones then responded to the question, asserting that Varady never made any safety complaints to him.²² Tr. 628-29.

Jones admitted that he was getting a lot of citations from MSHA and though he first asserted that his emphasis was on the maintenance side of operations, not safety, he later stated that his responsibility did include the safety of the mill. Tr. 607.

The Lunchroom Incident

In terms of Jones' involvement with the lunchroom incident, when he observed employees sleeping just before a shift change, Jones' memory was surprisingly poor. Despite insisting that he considered it a safety issue due to insufficient employees being at their work posts, Jones' version was dubious because when the Court inquired of Jones what happened after he saw all the employees in the lunchroom, he responded, "Well, nothing. I left. I exited." Perplexed by the odd response, the Court then inquired if Jones waited to see if the miners went back to work but his answer was that he did not wait and went out to check on the mill instead. Nor could he recall if any of the miners he spoke to about sleeping responded to him. These answers were hard to accept and therefore the Court inquired further, asking, "You mean you asked them why they were all there, and you can't recall anything that was said in response to your question?" Jones continued with his stance, asserting, "No, sir. I don't know – no, sir. I didn't stay there that long. I went out to check the mill. . . . So I left and went out to the mill and started walking the mill." The Court expressed surprise over Jones' answer, stating:

²² When asked about the details of his interaction with Varady in his office, Jones stated, "I remember that it was a lot of complaints about his supervisor." Tr. 629. However, when questioned about the nature of those complaints, Jones answered, "I don't recall that." *Id.* Pressed further, Jones was asked if Varady's complaint involved Todd Peterson charging a pressured line and the line rupturing, resulting in fragmented metal being discharged at Varady. Jones responded that he didn't recall that at all. Yet, he admitted that he took Varady up to Peterson's office, where Pranke and other Veris employees worked. Despite the admission that the event happened, when Jones was asked to then concede that Varady did make a safety complaint about the line rupture event, Jones stated that the complaint was not made *to him*. Tr. 630. Pursuing the issue further, when asked if Varady asked that the pipe be fixed properly, and not simply with a weld patch, Jones again could not recall. Jones denied that the line issue was the reason Varady was brought to Peterson and Pranke, contending that he was brought there because "Mr. Varady was always complaining about his supervisors." *Id.* When asked if Varady's complaint involved safety, again Jones' answer was that he could not recall. Tr. 630. The Court concluded that Jones' answers lacked credibility because Jones' contention was that Varady was constantly complaining about his supervisors, but that Jones didn't know what the complaints were about. Jones affirmed, upon questioning by the Court, that he is a meticulous person who pays attention to details. This was asked because many of Jones' answers seemed to contradict his admitted attention to details, and the Court then asked if Jones had any problems with his memory. Jones responded that he did not have any medical issues with his memory. Tr. 645.

[Y]ou tell me that you asked your — you were a supervisor, in effect, of these people. You asked them a question. You didn't ask them a question just for the sake of asking, you were expecting an answer, and yet you either didn't get an answer or you didn't stay around to hear an answer. . . . Is that what you're telling me?

Jones replied, “You're right, Your Honor.” The Court observed that normally when it asks a question of someone, it is looking for a response. 609-12.

Jones' Involvement with Varady's Firing

When Jones was asked if he ever asked anyone to discipline or fire Varady, his response was “Not that I, not that I can remember, no.” Tr. 619. Contrary to his testimony at the hearing, Jones told the MSHA investigator that he could hire and fire employees. Tr. 626-27. In terms of Jones' apparent conflict about his ability to fire employees, Veris' attorney tried to have him explain that away, and Jones accommodated that effort by then stating that he has to go through human resources to fire someone. Tr. 658. Thus, he claimed he could not direct that an employee be fired, but he could set such a procedure in motion. Given Jones' position at Veris, one can reasonably conclude there would likely be an outcome consistent with his wishes.

The Incident of Jones Sleeping in His Truck

The Court inquired of Jones about this incident. Jones agreed that he was at the site and was concerned about the proper installation of a piece of equipment and that he wanted to be sure that everything was completed before he left the mine site. Jones stated that this involved the replacing of an underflow pump in the north thickener, a task which he stated involved “probably six employees.” He agreed that he fell asleep before that installation was completed. When asked about the time of night this occurred, Jones initially stated that he did not know, then he stated that it could have been at two or three in the morning. He could not recall if he then went home, but that generally he would stay and work into the next day to make sure everything was well and then leave. He then stated that he saw that the pump was installed. Although Jones stated that before he went to his truck there were just details to be completed, such as installing belts, the Court noted that he had said he would remain until the job was completely done and Jones confirmed that was the case. However, when asked if, after he awoke, he then assessed the situation to be sure the task was fully completed, Jones responded that he couldn't exactly remember. Yet he maintained that the tasks were completed before he fell asleep. Jones then stated that he was satisfied with what he saw when he awoke. On redirect Jones attempted to distinguish his sleeping on the job from the Veris policy that one may not sleep while on duty on the basis that he was not willfully sleeping. He had no intention to sleep while on duty. The Court pointed out that the policy does not distinguish between willfully sleeping on the job and simply sleeping on the job. Tr. 651-53.

Conclusion

The foregoing establishes that Matthew Varady established by a preponderance of the evidence, that he engaged in protected activity; that he was fired from Veris and that his firing was motivated by that protected activity. Veris failed to establish that no protected activity occurred and similarly failed to show that the adverse action was in no part motivated by the protected activity. Further, Veris, which presented only an affirmative, mixed-motive defense, failed to show that it was also motivated by the miner's unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone.

ORDER

The concept of damages is to “make whole” a person who has been unlawfully discharged. Because Mr. Varady is not an attorney, the Court offers the following general guidance as to allowable damages. At the hearing, Varady stated that he is no longer seeking reinstatement, but is seeking, among other items, reimbursement for expenses in seeking reemployment. Tr. 19. Such expenses are recoverable. Lost wages plus interest²³ are also part of the recognizable damages and would cover the period between the date of Complainant’s discharge and the time when he again became employed. Because the “make whole” concept of relief does not contemplate a windfall to such individuals, any unemployment benefits received for the period between the unlawful discharge and the date of new employment are offsets to the damages that may be awarded. Litigation-related expenses are awardable. As examples, these would include copying expenses; any costs related to subpoenaing witnesses; medical expenses, including premiums, that would have been covered by Complainant's medical insurance, if applicable; and lost vacation pay, if applicable. Mileage, telephone calls, and postage are other examples of awardable damages. These are examples only. The guiding principle is for a complainant to recover the financial reimbursement for items he would have received had his employment continued and the expenses in pursuing this litigation, minus benefits received such as unemployment compensation.

²³ In *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988), the Commission directed that in discrimination cases it would use the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest for periods commencing after December 31, 1986.

Some damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering. *Bewak v. Alaska Mech., Inc.*, 33 FMSHRC 2337, 2338 (Sept. 2011) (ALJ); *Peterson v. Sunshine Precious Metals, Inc.*, 24 FMSHRC 810, 811-12 (Aug. 2002) (ALJ); *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485, 503 (Feb. 1984) (ALJ).

Complainant Matthew Varady is directed to provide his itemized and documented damages within 30 days of this decision.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act.²⁴ Consequently, the Secretary shall be provided with a copy of this decision so that he may file a petition for assessment of civil penalty with this Commission. The Secretary of Labor is directed to commence a civil penalty proceeding against Veris for this matter.

This case has now become complicated by the fact that Veris sought and received bankruptcy protection. The hearing in this matter concluded June 10, 2015. As this decision reflects, the hearing did not go well for Respondent, Veris Gold. No doubt, counsel for Respondent recognized this. A harbinger of this, the day after the hearing ended, counsel for Veris requested a conference call “to discuss a procedural issue that [he] believe[d] affect[ed] both the Varady and Lowe cases.” Therefore, it did not come as a surprise to the Court that two days after the hearing concluded, Respondent’s attorney advised, via email on June 12, 2015, that he was requesting withdrawal from his representation of Respondent.

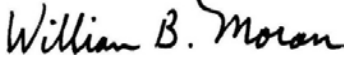
²⁴ The provision, 29 C.F.R. § 2700.44, “Petition for assessment of penalty in discrimination cases,” states, in relevant part:

(b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

Based on news reports, it is the Court's understanding that the mine resumed operations immediately following the ownership change and that most of the same personnel continue to work at the mine.²⁵ It is hoped that, rather than attempt to hide behind successorship barriers, the new entity, which literally mines gold, will accept responsibility and pay Mr. Varady such damages as the Court may award, which are expected to be modest.

This Court retains jurisdiction of this proceeding pending the issuance of a final order granting relief.

So Ordered.


William B. Moran
Administrative Law Judge

²⁵ The *Elko Daily Free Press* reported on June 25, 2015, that Veris Gold Corp. “sold its Elko County gold mines Thursday to Jerritt Canyon Gold LLC, but most of the miners will remain on the job. The assets sold include the Jerritt Canyon facilities. . . . Jerritt Canyon Gold President and CEO Greg Gibson said the majority of the 250 Veris Gold employees at the site were hired. . . . Jerritt Canyon Gold is a subsidiary of Sprott Mining which is controlled by Canadian billionaire Eric Sprott. Jerritt Canyon Gold owns 80 percent of Veris Gold’s assets and the other 20 percent is owned by Whitebox Asset Management, Gibson said. ‘Mining was not suspended. Mining will be increased,’ Gibson said. . . . He said the site is on track to produce 185,000 to 200,000 ounces of gold this year. The sale of the site happened after a Canadian bankruptcy court ordered Veris Gold to sell its assets. Veris Gold had filed under Companies’ Creditors Arrangement Act in Canada, which is a type of bankruptcy protection, in June of last year. It was operating under the protection of the CCAA and the U.S. Bankruptcy Code since June 9, 2014.”

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