FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **LARRY GROVES**, Complainant, v. CON-AG, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. LAKE 2017-0117 NE-MD-2016-12 Mine: Con-Ag, Inc. Mine Mine ID: 33-03825

DECISION AND ORDER

Appearances: Stephanie Adams, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Complainant;

Timothy Cowans, Attorney, Columbus, Ohio, for Respondent.

Before: Judge Miller

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Larry Groves against Con-Ag, Inc., pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Act"). The Secretary alleges that Groves was discharged from his employment at the mine because of his participation in an MSHA investigation and because of safety complaints he made to MSHA. Con-Ag denies these allegations and states that Groves was instead discharged because he made threatening comments to a coworker and the mine owner. The parties presented testimony and documentary evidence at a hearing on June 21, 2017, in Findlay, Ohio. Based on the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the post-hearing briefs of the parties, I make the following findings and order.

I. FINDINGS OF FACT

The Con-Ag, Inc., Mine is a surface limestone mine located in St. Marys, Ohio. Jt. Stips. ¶ e. Con-Ag, Inc. ("Con-Ag"), is the operator of the mine and is subject to the jurisdiction of the Act. Jt. Stips. ¶¶ f, g. Larry Groves was an employee of Con-Ag from September 14, 2015, until August 2016. Jt. Stips. ¶ m. The termination of his employment at the mine is the subject of this case.

Larry Groves was hired to work at Con-Ag by the owner and manager, John Hirschfeld, on the recommendation of Wesley Mann, a friend of Groves who worked at Con-Ag. Groves worked as a heavy-equipment operator at the Con-Ag plant in St. Marys, which involved operating excavators, front-end loaders, and other equipment, and performing some maintenance. He typically worked the day shift with six or seven other employees. He had no disciplinary actions prior to his termination and got along well with his supervisor, Brian Henning, who notably did not testify. The mine owner, Hirschfeld, testified that Groves was a "middle-of-the-road" employee who did his job but was not a problem-solver, but agreed he had no issues with Grove's performance.

During his employment at Con-Ag, Groves reported a number of safety concerns to MSHA. The first complaint occurred in May 2016 during a regular inspection of the mine. An MSHA inspector observed Groves bringing loose material down from the high wall. Groves told the MSHA inspector that he was concerned because some of the material he was bringing down was larger than the excavator he was operating. He feared that the material could fall and crush the equipment. The high wall conditions are shown in photographs taken during the course of the inspection and introduced by the Secretary. Comp. Ex. 21. Groves, at the request of the inspector, wrote out a statement saying that Henning had asked him to work within a safe distance of the high wall, but Hirschfeld had later asked him to move closer and bring the high wall down. Comp. Ex. 1. The mine received a citation for the loose material on the high wall, and the citation refers to a miner working in an excavator near the wall at the direction of Hirschfeld. Comp. Ex. 13-B. Groves testified that Henning and Hirschfeld both observed him speaking to the inspector that day. Hirschfeld admitted that he had seen Groves talking to the inspector, but said that other employees spoke to him as well.

Groves' next interactions with MSHA occurred about a month later in June 2016. While working on the night shift from June 6 through June 17, Groves observed a coworker climbing into the crusher without shutting down the equipment and tagging out. Groves spoke to the employee, but he continued to climb into the crusher without shutting it down. Groves stated that the employee's conduct was common practice at the mine, and Hirschfeld and Henning had also observed it. *See* Comp. Ex. 21-C. Groves ultimately wrote out a statement for MSHA concerning the unsafe actions of the employee. Around the same time, Groves learned that there were problems with the brakes on a mixer truck at the mine. Groves testified that the mixer continued to be operated after the brake problem was discovered. The day after the issue was discovered, the brakes failed while an employee was using the mixer to water the road into the quarry, causing the truck to roll over. As a result, Groves drafted a statement addressing the issues of the mixer and the employee working in the crusher for MSHA and discussed the issues with an MSHA inspector. Comp. Ex. 2. The inspector typed a statement describing Groves' observations, which Groves then signed on or about July 19, 2016. Comp. Ex. 3. On July 7, 2016, the mine received citations for the mixer brakes and for access to the crusher while it was energized. Comp. Ex. 13-B, 13-C.

In addition to the written complaints, Groves made a number of phone calls to MSHA reporting other safety hazards and spoke with the inspectors who came through the mine to conduct inspections. He was confident that both Henning and Hirschfeld had seen him talking to inspectors. Finally, Groves met with an MSHA special investigator outside of work to discuss

safety issues at the mine on August 5, 2016, five days before he was terminated. The meeting took place during Groves' lunch hour and lasted an hour and a half. Upon returning to the mine, Groves reported the meeting to his supervisor as an explanation for exceeding his 30 minute lunch break. Hirschfeld testified that he was unaware of the meeting.

The night before his termination, Groves was involved in an incident with his friend, Wesley Mann. Mann and Groves knew each other socially and worked together occasionally at Con-Ag, and Mann had recommended Groves for the job at Con-Ag. Mann visited Groves' home around 9:30 p.m. on August 9, 2016. Groves and his wife were sitting on the back porch when Mann arrived and both men had a beer. Shortly after, Groves' wife went inside and the two men were joined by a neighbor, Trey Huber. The conversation eventually turned to work, and Groves and Mann began discussing safety at Con-Ag. Mann claims that Groves made disparaging remarks about Hirschfeld, saying that Hirschfeld didn't know what he was doing and was going to run the company into the ground. Groves, on the other hand, credibly testified that he recalled discussing safety at the mine, and how it had improved with MSHA involvement. At some point, the discussion escalated into argument. Groves and Mann testified to differing versions of the incident, but I credit the testimony of Groves. Huber testified that both Groves and Mann were intoxicated at the time, but that Mann was more so. The two argued over which of them could run a piece of equipment better than the other. Groves testified that Mann became agitated, and Groves then asked him to leave. Groves and Huber agree that Mann was the aggressor and that Groves did not threaten Mann as he alleges.

On his drive home the night of the incident, Mann decided to report the encounter with Groves to the police. Respondent's Exhibit A is the dispatch log showing that Mann reported that Groves had threatened to beat him up. Mann recalls that he pulled over to make the call to the police, then continued home. He did not file a written report with the police and no further action was taken. When he arrived home, Mann called Con-Ag to leave the following message for Hirschfeld:

> Hello. Uh, this message is for John. Uh, this is Wesley Mann. Umm. This is, uh, in referral to, uh, Larry Groves. Uh, he's in some trouble tonight. I wanted to let you know you might want to ask him about it tomorrow. Uh, he threatened my life. Ah, he's starting a lot of trouble. You might want to ask him about it before you keep him employed, uh. He's crooked—crooked dude. He's going to lie about John. He wants to stab John in the back. Give this message to John. Thank you. M'bye.

Resp. Exs. B, C. At hearing, Mann clarified that Groves never threatened Hirschfeld, but Mann had the impression that Groves was "unappreciative of working for" Hirschfeld.

Hirschfield learned of the message from Mann when he arrived to work the next morning. He listened to it and was "taken aback, stunned." Tr. at 147. He felt that threatening to kill someone was a serious matter, and his understanding was that Groves had threatened him as well as Mann. He claims that he understood Mann's statement that Groves would "stab John in the back" as a literal threat of physical violence. Hirschfeld is responsible for personnel

decisions at the mine and decided it was best for Groves not to be on the work site. He thus sent Groves a text message telling him not to come in to work. Comp. Ex. 6. When Groves replied that he was already at work, Hirschfeld told him to go home. *Id.* Groves asked if he should come back tomorrow, and Hirschfeld replied, "I don't know yet." *Id.* Hirschfeld testified at hearing that after deciding that he didn't want Groves on site that day, he "needed a couple of days to really have time—to give myself enough time to make a decision, so I sent him another text that he didn't need to come in the next day either." Tr. at 149. A message saying "No work tomorrow" was sent approximately 25 minutes after the first set of messages. Comp. Ex. 6.

Hirschfeld testified that he talked to "quite a few" people at the site in making the decision whether to terminate Groves. Tr. at 123. He recalled speaking with Henning, the mine supervisor, on August 10, the day Hirschfeld received the message from Mann. He also recalled speaking with Mann the day prior to sending discharge papers to Groves, but could not remember what date that was. The papers are dated August 9, the day of Groves' altercation with Mann. Comp. Ex. 7. Hirschfeld learned through the conversations with Henning and Mann that Groves had had an altercation with someone else who was not associated with the mine. He believed that altercation alone was grounds for termination under the policies in the company employee handbook. Hirschfeld testified that he did not discharge Groves until he conducted a thorough investigation, and that he discussed the situation with several other people, including Sylvia, the company's bookkeeper, and Terri, Hirschfeld's sister and vice president of the company. However, only 45 minutes after his first text message to Groves, Hirschfeld sent a message saying "I'll mail you on [sic] paperwork today, don't come back in." Comp. Ex. 6. Hirschfeld asserts that he did not discharge Groves over text message, but the message suggests he had already decided to send the discharge paperwork to Groves. This leaves less than an hour in which Hirschfeld could have conducted his investigation. Hirschfeld did not speak to Groves prior to or following his termination.

Hirschfeld believes he was justified in terminating Groves because he has an obligation to protect the other employees on the work site. He noted that the mine has a non-harassment policy, which is outlined in the employee handbook provided to employees during orientation at the mine. Resp. Ex. G, at 8. The policy states in part that "making false, vicious or malicious statements concerning any employee, suppliers or customers[,] the company management, or its products or methods of manufacturing is not acceptable conduct." *Id.* The company promises to investigate any reports of harassment, and "[s]hould there be a determination that harassment has occurred, the offending party(s) will be disciplined appropriately, up to and including termination." *Id.* The handbook also includes a list of prohibited actions "that may result in immediate discharge, even for a first offense." Resp. Ex. G, at 21. One of the actions listed is "Threatening another employee, supervisor or manager." *Id.* Hirschfield stated that he views threats of violence as an offense that would lead to immediate termination. Hirschfeld has terminated employees in the past for issues such as poor attendance and unsafe work practices. There was no evidence introduced of previous terminations for bad conduct or for any conduct outside of work.

Groves received discharge paperwork in the mail four or five days after he was told to leave the mine site. Comp. Ex. 7. The document is dated August 9, 2016, and states that Groves was discharged for "threatening people." *Id.* It further states, "Employee was threatening people

at work to kill them. Co-workers. Threats were made after hours. I do not feel comfortable with him working here." *Id.* Groves has not had contact with Hirschfeld since his discharge except to return his uniform.

Groves was unemployed for several months after being discharged from Con-Ag. He received unemployment benefits during some of that time. Con-Ag contested the claim for unemployment benefits, saying that Groves had threatened employees at work. Groves disputed the allegation and ultimately received unemployment compensation. Groves contacted MSHA after his termination to complain of discrimination; MSHA conducted an investigation, concluding that discrimination had occurred.

II. ANALYSIS

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" or "because of the exercise by such miner ... of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must present evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). The operator may rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSRHC at 1064. The operator may also defend affirmatively by proving that "it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

a. Protected Activity

In order to sustain a complaint of discrimination, Groves must first demonstrate that he has engaged in activity protected by Section 105(c) of the Mine Act.

Between May and August 2016, Groves made a number of complaints to MSHA regarding working conditions at the Con-Ag Mine. In May 2016, he spoke to an inspector who was on site about being asked to bring down loose material from the high wall. Groves felt he was being asked to work too close to the high wall and to bring down material that was too large for the excavator he was operating. At the request of the inspector, he put his concerns in writing. He raised additional concerns with MSHA in July 2016. A few weeks earlier, he had observed a coworker climbing into the crusher to work without first shutting down the equipment and tagging out. He also learned that a mixer truck was being operated despite a problem with the brakes. Groves discussed these issues with an MSHA inspector in July and the mine was issued a number of citations related to the complaints. Finally, Groves met with an inspector on

his lunch hour to discuss safety issues at the mine on August 5, 2016, five days before his discharge.

While Con-Ag emphasizes in its post-hearing brief that the record is unclear as to when Groves' communications occurred with respect to the July citations involving the crusher and the mixer truck, there is nevertheless substantial evidence that Groves gave safety-related information to MSHA. Groves' communications with MSHA constituted "complaint[s] under or related to" the Mine Act, which are a protected activity under Section 105(c)(1). Groves has proven that he engaged in protected activity.

b. Adverse Action

Hirschfeld sent Groves a text message on August 10, 2016, telling him not to come back to work. Groves received a formal letter of discharge from Con-Ag on or about August 12, 2016. Discharge is an adverse action under Section 105(c).

c. Discriminatory Motive

To establish a prima facie case, the complainant is not required to provide direct evidence of discriminatory motive; "circumstantial evidence ... and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner*, 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). Factors that may tend to prove a discriminatory motive for the adverse action include the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, the timing of the adverse action in relation to the protected activity, and disparate treatment as compared to other employees. *Turner*, 33 FMSRHC at 1066; *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In this case, the factors of knowledge and timing are most persuasive. Groves believed Hirschfeld had seen him speaking with inspectors. While Hirschfeld stated that he was aware that Groves had spoken to the MSHA inspectors, he did not specifically recall seeing it. Instead he recalled that the inspectors talked to everyone on site. In addition, Hirschfeld would know about Groves' conversations with inspectors based on citations issued to the mine, as well as the statements written by Groves and provided to MSHA. Notably, the high wall citation issued May 23, 2016, specifically refers to Groves' work in the excavator and his conversation with Hirschfeld about working closer to the wall, though it does not refer to Groves by name. The citation is an unwarrantable failure citation that singles out Hirschfeld's conduct, specifically his instructions to Groves. Hirschfeld would have been able to tell by reading the citation that Groves had told the inspector about Hirschfeld's instructions.

Further, it is fair to say that Hirschfeld was aware of Groves' meeting with an MSHA investigator in early August 2016, several days before his discharge. Groves testified that he was late returning from his lunch break because of the meeting and so told his supervisor, Henning, about it. While Hirschfeld denied knowing about the meeting, he mentioned in his testimony that Groves "was gone a lot for lunch." Even if Henning did not tell Hirschfeld about the meeting, Hirschfield consulted Henning in his decision to terminate Groves. Henning's

knowledge of the meeting is therefore imputed to Hirschfeld pursuant to Commission case law. *See Turner*, 33 FMSHRC at 1059 (finding that where a manager relied on a supervisor's recommendation in making a hiring decision, the supervisor's knowledge of an employee's protected activity was imputed to the manager). The timing of this incident days before Groves was discharged is particularly noteworthy.

Con-Ag notes in its post-hearing brief that there is little evidence that would have led Hirschfeld to connect Groves to the July citations involving the mixer and crusher. However, Groves spoke to the employee about his actions, and he not only wrote out a statement for MSHA but also spoke to the inspectors about it prior to the issuance of citations. Resp. Br. at 20. Moreover, even if Hirschfield did not directly link Groves to the citations, there is enough evidence regarding the May and August incidents to support an inference that Hirschfeld knew of Groves' interactions with MSHA. Given Groves' multiple safety complaints and the coincidence in time between the complaints and his termination, I find that there is sufficient evidence from which to conclude that Groves' termination was motivated at least in part by his protected activity. The Secretary has established a prima facie case.

d. Operator's Rebuttal

Con-Ag denies that Groves was terminated because of his protected activity, stating that the sole reason for his termination was his threatening remarks in the confrontation with Mann. I find that Con-Ag has failed to provide evidence sufficient to rebut the prima facie case.

The Commission considered an employer's claim that it had fired a miner for threats and profanity in *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (Aug. 2012). In that case, a miner with a long history of safety complaints was fired after he became angry and aggressive and used profanity in a meeting with a corporate HR manager. *Id.* at 1822-23. The Commission affirmed the ALJ's finding that the operator had rebutted the miner's prima facie case. *Id.* at 1828. The finding was based on the judge's credibility determination that the miner had acted inappropriately and used profane language at the meeting; evidence of the miner's history of angry and inappropriate behavior, including a warning in his personnel file and descriptions of his character from coworkers; and the fact that other employees had made similar safety complaints and not experienced retaliation. *Id.* at 1826-27.

In this case, Hirschfeld states that he fired Groves solely because Groves made threatening remarks to Mann and Hirschfeld outside of the workplace. By Hirschfeld's account, he heard the message from Mann on the morning of August 10 and decided that he needed to have Groves off of the work site. Within an hour, he had sent Groves text messages telling him not to come back to work and that he would send discharge paperwork. I find Hirschfeld's investigation of the matter with Mann to be unreasonably brief and therefore I do not find his account to be credible. Notably, Hirschfeld did not speak to Mann to clarify the message or learn what prompted the message before deciding to send Groves home. After that initial decision, he did little to nothing to investigate Mann's claims. Hirschfeld sent a text message to Groves referencing discharge papers within an hour of when he claims to have started his investigation, and he provided little information as to what the investigation uncovered. At no point did he discuss the matter with Groves in an effort to determine the facts surrounding the

incident. He made no attempt to ascertain the motive underlying Mann's phone message to him. He spoke to Groves' supervisor Henning , but indicated only that he learned that Groves had had "an altercation with somebody else" at some point, presumably the incident with a neighbor referred to by Mann. Tr. at 149. Hirschfeld suggested at hearing that the incident involving Groves' neighbor was on its own grounds for termination, yet at the same time he admitted that construction employees are a "rougher crowd," among whom physical altercations would likely not be unusual. In contrast with the investigation in the *Metz* case, Hirschfeld did not find that Groves had any history of aggressive or other unacceptable behavior at work, nor were there any records of disciplinary actions against Groves. Groves testified that he got along well with everyone at work up until his termination, and Con-Ag produced no evidence to the contrary.

Additionally, Hirschfield's reaction to Mann's message seems overblown. Hirschfeld testified that he interpreted Mann's statement that Groves would "stab John in the back" as a literal threat on his life. I find it highly unlikely that a person in Hirschfeld's position would be unfamiliar with the nonliteral usage of the phrase "stab him in the back." Further, when asked whether anyone else at the mine felt threatened by Groves, Hirschfeld claimed that his sister Terri did. However, Mann's message said nothing about Terri or any other employees at the mine, and Hirschfeld provided no other basis for why she would have felt that way.

Finally, Con-Ag emphasizes that it had a policy prohibiting "vicious or malicious statements concerning any employee" and "threatening or obscene language in addressing fellow workers." Resp. Ex. G, at 8, 20. However, it produced no evidence of workers being disciplined for such conduct in the past. The only evidence introduced at hearing regarding terminations of past employees involved attendance and workplace safety issues. There is no claim made by the mine that Groves was treated like other employees who may have been discharged or otherwise disciplined for alleged threats outside the workplace.

On the whole, I find Hirschfeld's explanation for his decision to fire Groves to have no credibility. The fact that he accepted Mann's account of the incident without speaking to Groves first especially stands out. When considered against the timing of Groves' safety complaints and the fact that the mine had recently received a large number of citations, I find it more likely than not that Hirschfeld fired Groves at least in part because of his safety complaints.

e. Affirmative Defense

Con-Ag argues that even if I find that Groves' safety complaints were a motivating factor in his termination, his termination was motivated in part by the incident with Mann, and Con-Ag would have fired him based on that incident alone.

The Commission has determined that "An operator may defend affirmatively by proving that the adverse action also was motivated by the miner's unprotected activity and the operator would have taken the adverse action against the miner for the unprotected activity alone." *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919 (Aug. 2016); *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing

affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

The essential inquiry in evaluating the affirmative defense is whether the operator's asserted reason for the adverse action was legitimate or whether it was merely pretext. The Commission has explained that pretext may be found "where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). In contrast, a legitimate non-discriminatory reason is more likely when there is evidence of "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

Here, there is no evidence that Groves had a record of discipline or unsatisfactory work at the company. Hirschfeld commented that Groves was a "middle-of-the-road" employee and took too much time for lunch, but no actions had been taken to address those issues prior to Groves' termination. There is no evidence that Groves had an unsatisfactory work record or had any past warnings or issues with the mine. Con-Ag also produced no evidence of similar discipline meted out to other employees. Hirschfeld discussed four other terminations at the company, but they involved workplace safety and attendance issues.

Con-Ag relies on evidence of the company's Non-Harassment Policy, which prohibits making "vicious or malicious statements concerning any employee, suppliers or customers [or] the company management." Resp. Ex. G, at 8. The policy states that the company will "immediately conduct a thorough and complete investigation" of any reports of harassment, and if it determines that harassment occurred, "the offending party(s) will be disciplined appropriately, up to and including termination." *Id.* The company's employee handbook also includes a list of actions that may result in immediate discharge, which includes "Threatening another employee, supervisor or manager." *Id.* at 21. It is clear from these policies that termination is within the range of possible outcomes for an employee who uses threatening language with a co-worker or supervisor. However, Hirschfeld did not conduct a "thorough and complete investigation" of the incident with Groves as outlined in the handbook. His investigation lasted less than an hour and did not include a conversation with Groves. Nor is there any credible evidence that Groves engaged in any conduct that would meet the requirements of the company policy. Therefore, I am not persuaded that Groves would have been fired for any reason listed in the company policy. I find instead that the operator's stated reason for terminating Groves was pretext.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the

Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission Judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The history of assessed violations has been admitted into evidence and shows no prior history of discrimination violations. Respondent is a small operator and has raised no defense of inability to pay. The violation is the result of intentional conduct by the operator and is serious, as it could affect miners' willingness to report safety hazards in the future. While the Secretary proposed a penalty of $15,000.00, I find that a penalty of $10,000.00 is appropriate given the size of the mine, along with its previous history.

IV. DAMAGES

The Mine Act gives the Commission the authority in proceedings under Section 105(c)(2) "to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). The Commission has explained that back pay "is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package." *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993).

The parties were given the opportunity to submit calculations of back pay and other damages potentially owed to Groves prior to hearing. The Secretary submitted proposed relief including back pay calculations on May 1, 2016. Con-Ag did not submit back pay calculations after several requests from the court. Con-Ag was also given another opportunity to object to the Secretary's calculations at hearing but raised no objection. I therefore base my assessment of damages on the Secretary's submissions. The parties stipulated that Groves earned $15.45 per

hour plus $23.18 per hour for overtime at the time of his termination. Jt. Stips. ¶¶ m, n. The Secretary seeks the following amounts in back pay for Groves:

1. Back pay: $31,776.47
    a. $12,925 while unemployed from August 10, 2016, through November 13, 2016
    b. $8,163.87 while employed earning $11 per hour from November 14, 2016, through March 7, 2017
    c. $10,687.60 while employed earning $12 per hour from March 8, 2017, through August 9, 2017
2. Lost vacation pay: $618.00
3. Lost medical benefits: $6,100.00
    a. $1,000.00 fine imposed for loss of medical insurance
    b. $4,500.00 lost medical insurance for self and family September 2016 through June 2017
    c. $600 lost medical coverage for family July 2017 through August 2017
4. Late fees incurred due to loss of income: $20.00
    a. $20.00 late fee for car payment

The Secretary's calculations amount to a total of $38,514.47, with a weekly rate of approximately $955.00 while Groves was employed with Con-Ag and $475.00 when the current wages are deducted. I find that the requests for back pay, lost vacation pay, lost medical benefits, and consequential damages are appropriate. I further find that Groves is entitled to an additional sum of $1,900.00 in back pay for the days between August 9, 2017, and the date of this decision. Under Commission case law, Groves is also entitled to interest until the amount is paid at the short-term federal underpayment rate, which is currently four percent. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-05 (Nov. 1988).

V. ORDER

Respondent is hereby **ORDERED** to reinstate Larry Groves to his former position with Con-Ag, Inc. with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove any mention of his termination from his employment file, provide a neutral reference, and post a notice at the mine, in a conspicuous location for 30 days indicating that the mine has been found in violation of the Mine Act and restating the rights of miners as found in section 105(c) of the Act.

Respondent is further **ORDERED** to pay back pay to Groves in the amount of $33,676.47 and an additional $6,738.00 in lost benefits and fees for a total payment to Groves in the amount of $40,414.47. Respondent is **ORDERED** to pay Groves interest on these amounts through the date of payment at the federal underpayment rate using the calculation method outlined in *Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2051-54 (Dec. 1983).

Respondent is **ORDERED** to pay the Secretary a civil penalty of $10,000.00. All

payments shall be made within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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