FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 20 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of GEORGE M. SCOLES, Complainant, v. HARRISON COUNTY COAL CO., Respondents	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-274-D MSHA Case No.: MORG-CD-2016-13 Mine: Harrison County Mine ID: 46-01318

DECISION

Appearances: Brian P. Krier, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Representing the Secretary of Labor

Philip K. Kontul, Esq., Ogletree, Deakins, Nash, Smoak & Steward, Pittsburgh, PA, Representing the Respondent

Before: Judge Andrews

This case is before me upon a complaint of discrimination brought by George M. Scoles ("Complainant"), a miner, against Harrison County Coal Company, ("Respondent"), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

The Secretary of Labor, on behalf of George M. Scoles, alleges that Scoles was discriminated against in violation of his statutory rights after engaging in protected activities. A hearing was held in Pittsburgh, PA, on February 28, 2017-March 01, 2017, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

STIPULATIONS

The parties submitted stipulations as a joint exhibit. The following joint stipulations represent those where there is agreement:

1. Respondent The Harrison County Coal Company is incorporated under the laws of the State of Delaware and it operates a portal located in Mannington, West Virginia.

2. Respondent The Harrison County Coal Company operates the Harrison County Mine.

3. Respondent is an "operator" as defined in Section 103(d) of the Federal Mine Health and Safety Act of 1977, as amended (hereinafter, "the Mine Act"), 30 U.S.C. § 802(d).

4. Respondent is a "person" subject to Section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

5. The United Mine Workers of America Local No. 1501 represents hourly production and maintenance employees at the Harrison County Mine.

6. Complainant, George M. Scoles, is currently employed as a Longwall Utility by Respondent The Harrison County Coal Company at the Harrison County Mine.

7. Complainant is a "miner" as defined in Section 3(g) of the Act, 30 U.S.C. § 802(g).

8. Complainant previously filed three § 105(c) discrimination complaints against the Respondent at case numbers 2015-19, 2015-05, and 2014-09.

9. George McCauley was not disciplined for any conduct occurring on September 3, 2015.

10. Complainant was not disciplined for any conduct occurring on September 3, 2015.

JX-1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Background:

At the time of hearing, George M. Scoles worked at the Harrison County Coal Mine in Mannington, West Virginia. Tr. 17. Scoles had worked as a coal miner for 11 years, as a belt

man, a block mason, a general inside laborer, and a longwall outby utility man. Tr. 17-18. Scoles became certified in West Virginia as a coal miner in 2006. Tr. 17.[1]

At the time of hearing, Scoles had been working as a longwall outby utility worker for 7.5 years, responsible for supporting the longwall, reporting to the longwall outby foreman, Corey Raad. Tr. 18-19, 26. His duties included getting supplies to the longwall face for belt setups, power moves, running of the scoop, and other assorted daily tasks. Tr. 18. Scoles had also served as a miners' representative for approximately 7 or 8 years. Tr. 20. In this capacity, he accompanied federal and state mine inspectors approximately twice per week. Tr. 20. Scoles was a member of the United Mine Workers of America, Local 1501, located in Shinnston, West Virginia. Tr. 19.

Scoles had raised safety concerns to many members of mine management, including his shift foreman, Jim Coles, foreman, Mike Allman, longwall coordinator, George McCauley, assistant superintendent, Brad Hibbs, and the superintendent, Scott Martin. Tr. 22-23, 25-27. He had raised safety issues ranging from bad rollers to excessive float dust in places that needed additional rock dusting. Tr. 23. He testified that some in management have taken his concerns seriously, but with others, "it falls on deaf ears." Tr. 24. He further testified that based on some safety matters not being attended to after he reported them, he believed that some in management think that he is "blowing smoke." Tr. 24-25.

George McCauley was the longwall coordinator and a member of mine management.[2] Tr. 25. He had worked in this position off and on since December 2013.[3] Tr. 370-371. In this position, McCauley was in charge of the production and maintenance of the longwall.[4] Tr. 371. McCauley oversaw safety aspects of the longwall, planned longwall moves, ordered supplies, and was generally in charge of the entire longwall department. Tr. 371. The longwall accounts for approximately 98% of the mine's total production. Tr. 371. McCauley described the longwall as "the life blood of our coal mine." Tr. 385, 418. Other miner witnesses described McCauley as being more concerned with production than with safety, testifying that "he's just there for the tonnage, and that's all he is worried about," and stating that "he seems to get irritated if there's any sort of safety concern that may halt production." Tr. 302, 353.

McCauley supervised and directed approximately 50 hourly employees and 12 salary employees. Tr. 372. He had three people at the mine who were ranked above him: Mine

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[1] The transcript incorrectly states Virginia, rather than West Virginia. *See* Tr. 17.

[2] McCauley testified at hearing.

[3] Prior to working at Harrison County Mine, McCauley worked at the Robinson Run Mine since January 2006. Tr. 370.

[4] McCauley is authorized to discipline employees by giving them verbal or written warnings. Tr. 373.

Foreman, Mike Allman, Assistant Superintendent, Brad Hibbs, and Superintendent, Scott Martin. Tr. 372.

Scoles worked under the authority of McCauley, and McCauley had the authority to issue orders to Scoles. Tr. 26. Scoles had known McCauley for approximately 7.5-8 years, and during that time Scoles had raised safety concerns and complaints to McCauley on at least 10 occasions. Tr. 25-27. Examples of such complaints include issues with the head gate, rock dust on the tail, walkways on the belt line, and issues with rollers. Tr. 27. Scoles testified that McCauley responded to his safety complaints by ignoring them and walking away from him. Tr. 27-28. Scoles did not believe that McCauley took his safety concerns seriously. Tr. 28. He testified about an example where there was a hot roller and a bad roller, and McCauley said on the radio, "if the roller is not on fire, don't turn the belt off." Tr. 28.

Eric Efaw had worked with McCauley for approximately six to eight months.[5] Tr. 296. During that time, he never personally raised safety concerns or complaints to McCauley, but he witnessed Scoles doing so on a number of occasions. Tr. 296-297. Efaw described Scoles as a "very safety conscious guy. He looks out for everybody." Tr. 297. At hearing, he described examples of this, such as making sure that the haulage where they drive their scoops were watered down, making sure that trash was picked up, making sure that rock dusting was performed, and the like. Tr. 297. Most of the time, McCauley responded by brushing off the concerns or saying that if Scoles wanted it done, he should do it. Tr. 297.

Efaw testified that he believed that McCauley needed to place a higher priority on safety. Tr. 300. He described how they went through a clay vein one time and the roof was falling, and McCauley ordered them to keep going and not worry about it. Tr. 300. The miners wanted to slow down and take their time, but McCauley ordered them to mine faster and go as fast as they could. Tr. 300. They were trying to keep the shields pulled in so the roof would not fall, but he told them not to worry and let it fall. Tr. 300-301. Efaw feared that the roof would fall and bounce off the shear and hit one of the miners or a hydraulic hose, but McCauley told them not to worry about it. Tr. 301.

The shear operators, Shawn Efaw and Ben Brummage, raised the safety concern to McCauley. Tr. 301. Efaw testified that he did not believe that McCauley took their concern seriously. Tr. 301. He testified that he believed that McCauley doesn't "look out for the miners. I feel that he's just there for the tonnage, and that's all he is worried about." Tr. 302.

In the five years that Tyler Hixenbaugh had worked with McCauley, he had raised numerous safety concerns.[6] Tr. 325. These included complaints about being told to run the

[5] At the time of hearing, Eric Efaw worked as a general inside laborer restricted at the Harrison County Coal Mine for two years and two months. Tr. 283-284, 302. Efaw is certified as a coal miner in West Virginia. Tr. 284. Efaw had worked for over 20 underground coal mines in his career. Tr. 284.

[6] Tyler Hixenbaugh testified at hearing. At the time of hearing, Tyler Hixenbaugh had worked as an underground coal miner for eight years, six of which were at the Harrison County Mine. Tr.

longwall, when the work on the drum remained unfinished. Tr. 325-326. Hixenbaugh feared that the drum would fall off on him, and McCauley responded by guaranteeing that it would not fall off. Tr. 326. Because Hixenbaugh felt it was unsafe, he refused to do the work. Tr. 326. Hixenbaugh did not get disciplined for his work refusal. Tr. 332-333.

William Hall had worked with McCauley for approximately three years, and testified that when others raised safety complaints with him they were not received well.[7] Tr. 353. McCauley would get irritated if there were any safety concerns that might halt production. Tr. 353.

Scoles and McCauley do not have a good working relationship.[8] Tr. 28. Scoles attributed the poor relationship to McCauley not liking him because Scoles raised safety concerns. Tr. 28-29. Scoles testified that McCauley often talked to him in a demeaning manner and tried to belittle him. Tr. 29. Further, Scoles testified that McCauley tried to harass him by repeatedly making him do jobs like picking up garbage by hand. Tr. 29-30. Usually such "detrashing" jobs are performed as a group, but McCauley would make Scoles do it alone. Tr. 30. Scoles believed that McCauley singled him out for specific tasks, testifying that "it's like he'll come down and hunt for me to give me something to keep me away from the crew or the normal day process." Tr. 31. Scoles testified that such treatment interfered with his ability to perform his job. Tr. 31.

In reference to questions about whether McCauley singled out or picked on miners, Efaw described McCauley as a "headhunter" and a "bully." Tr. 297-298. He described McCauley as going after individuals and trying to get under their skin. Tr. 298. "Pretty much if you question his authority, he will pretty much single you out the rest of the day." Tr. 298. Efaw witnessed this conduct on several occasions, directed at Scoles, Efaw's brother, Shawn Efaw, and others.

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315. He worked as a longwall face helper for six months, and previous to that worked as a longwall shear operator, mechanic, and shield man. Tr. 316. Hixenbaugh was an hourly employee and a member of the UMWA Local 1301. Tr. 316-317.

[7] William Hall III testified at hearing. At the time of hearing, William Hall had worked at the Harrison County Mine for approximately eight years as a classified mechanic. Tr. 337. He has also been a member of the UMWA. Tr. 337. He was certified as a coal miner in 2004 or 2005 and became a certified electrician in 2011. Tr. 337-338. Hall previously worked as a contractor in several smaller mines. Tr. 337.

[8] It is common for miners to have nicknames, which they do not choose. Tr. 563. Scoles and other miners refer to McCauley as "Chicken George." Tr. 261-262, 478-479. There was a great deal of testimony about Scoles and other miners referring to McCauley as "Chicken George," much of which I find irrelevant to the issues at hand.

Outby foreman, Brian McKinney, testified at hearing concerning an alleged conversation he had with Scoles where Scoles allegedly said that he wanted to "fry the chicken." Tr. 488. I do not credit McKinney's hearsay testimony as it was vague, irrelevant, undeveloped, and uncorroborated.

Tr. 298-299. Efaw had witnessed McCauley pick on Scoles. Tr. 299. He described how, on several occasions, McCauley would walk around and ask where Scoles was, go after Scoles, and then proceed to argue with him. Tr. 299. Efaw never witnessed Scoles seeking out McCauley in a similar manner. Tr. 299.

Scoles has complained about McCauley's treatment of him to his shift foreman, the superintendent, and the HR supervisor. Tr. 33. Scoles testified that he did not believe that mine management took his concerns about McCauley seriously. Tr. 33-34.

In 2015, a short meeting was held with the union president, Chris Yanero, Scoles' mine committeeman, Matt Miller, HR representative, Chris Fazio, assistant superintendent, Brad Hibbs, and McCauley. Tr. 34. As a result of that meeting, Scoles was separated from working under McCauley for a short period, and he was removed from his position and assigned other duties throughout the mine. Tr. 34-35. Scoles was again separated from working under McCauley from January 2016 until the time of hearing. Tr. 35. At the time of hearing, Scoles was not working his bid job in longwall outby utility. Tr. 35.

Prior to bringing the discrimination complaint at issue in the instant case, Scoles had filed three other discrimination complaints against Harrison County Mine, several of which involved McCauley. Tr. 36-39, 120-123; JX-1. Ryan Besedich had worked with Scoles for approximately ten years, and knows of him raising safety concerns and complaints to numerous people in mine management, including the shift foreman, McCauley, and a lot of other foremen.[9] Tr. 246. Scoles had a reputation for being a miner who looked out for safety, and who brought it to management's attention. Tr. 246.

The Head-Butting Incident on September 3:

On September 3, 2015, Scoles worked the day shift from 8:00 a.m. to 4:00 p.m. on the 1E longwall section as the longwall outby utility man. Tr. 40. Corey Raad was his immediate foreman, Mike ("Ziggy") Zikafoose was the maintenance foreman, and Jason Tennant was the longwall face boss. Tr. 40.

For the first half of the shift on September 3, 2015, they followed their normal work schedules, which included belt setups, supplying the face, loading the duster, and other related activities. Tr. 41. Zikafoose did not issue any orders to Scoles before lunch.[10] Tr. 42. After lunch, Scoles took Raad on his fire boss run, and Raad told Scoles that when he returned he should help some other miners put the duster on the scoop. Tr. 42.

[9] Ryan Besedich testified at the hearing. Besedich had worked at the Harrison County Coal Mine for 12 years. Tr. 223-224. In September 2015, and at the time of the hearing, he worked as an underground mechanic and electrician. Tr. 224.

[10] The miners refer to lunch as dinner. Tr. 42.

When Scoles returned there was another scoop which had a belt structure on it that had fallen off. Tr. 42. Scoles encountered Zikafoose at the center of the entry at the No. 2 heading, and Zikafoose asked Scoles to go to the No. 3 heading to get the bucket scoop. Tr. 42-43, 226. Other miners, including Flint Leichliter, Ryan Besedich, and Bill Hall were present with Zikafoose when he issued the order. Tr. Tr. 43. Scoles responded, "Okay, sir. I'll go get it." Tr. 43, 340.

Scoles requested that Besedich help him by opening the doors so he could bring the scoop through.[11] Tr. 44, 227. Scoles and Besedich then proceeded to the No. 3 heading. Tr. 44. When they arrived at the scoop, it had gob in it. Tr. 45. Besedich stood at the No. 3 heading, while Scoles went down to the scoop to do his preoperational checks. Tr. 227-228. McCauley came up to Besedich and asked him about the charge of the scoop, and Besedich replied that McCauley would have to speak to Scoles who was at the scoop performing the preoperational checks. Tr. 228-229.

McCauley arrived a few seconds later, and asked what had happened. Tr. 340. Zikafoose replied that "some moron had him load the structure on a fork scoop," that it fell off, and that he had instructed Scoles to get a bucket scoop from the intake to help him load it. Tr. 340. McCauley appeared irritated, and then went through the double doors, and left Hall and Zikafoose standing at the scoop. Tr. 340, 343.

Soon thereafter, Scoles saw McCauley walking towards him, and Scoles asked whether it was okay to dump the gob from the scoop. Tr. 45, 229. McCauley began yelling at him and asking him why he was not shoveling the belt.[12] Tr. 45. Scoles responded by telling McCauley that no one had instructed him to work the belt line, and Zikafoose ordered him to come to the heading to get the bucket scoop. Tr. 46, 229. McCauley said that he would check to see if Scoles had been ordered to do so, and Scoles responded that he could check with whomever he wanted. Tr. 229.

McCauley continued to badger Scoles, telling him he needed to get a pick or shovel, and shovel the belt. Tr. 46. Scoles described McCauley's demeanor as "hostile," "mad," and "very demeaning." Tr. 46. Besedich described McCauley's demeanor as "aggressive," "mad," "upset," and "irritated." Tr. 230. Besedich had worked with McCauley for several years, and testified that McCauley's demeanor was different than usual. Tr. 231.

Scoles responded, "Sir, I have no problem shovel[ing] the belt, but those were not my orders." Tr. 46. As he continued up the No. 3 heading, McCauley continued to badger Scoles about why he was not shoveling the belt, and Scoles responded, "You're not going to talk to me

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[11] These were two sets of air lock doors that miners travel through from the No. 2 entry to No. 3, which are used to keep the air flowing. Tr. 44.

[12] Much of McCauley's testimony about this incident is discounted because I find it largely not credible. His descriptions of events were self-serving and wholly at odds with the other witnesses to the event.

in this manner, and I have no problem shoveling the belt. You're not going to intimidate me, and you're not going to harass me. I'll go shovel the belt like you asked." Tr. 47, 230, 341. Scoles testified that he did not raise his voice at McCauley during this exchange. Tr. 47-48.

Scoles was having this conversation as he was walking back to the air lock doors, with Besedich in front. Tr. 48, 231. Besedich opened the first set of air lock doors, and they all went through them.[13] Tr. 49. Scoles testified that McCauley's "badgering" of him continued in the air lock, and Scoles kept replying that McCauley wasn't going to harass or intimidate him. Tr. 49. Scoles judged McCauley's behavior as harassing and intimidating because of McCauley's tone of voice. Tr. 49-50.

Besedich opened the second set of air lock doors, and they were all approaching them.[14] Tr. 50. Scoles turned around, stopped, and said, "Sir, I have no problem going to shovel the belt line." Tr. 50-51. Scoles testified that at that point, McCauley "came towards me aggressively." Tr. 51. Scoles said, "Sir, you need to get out of my personal space." Tr. 51-52, 232, 341. McCauley stopped less than an arm's length from Scoles, took a step back, and then head-butted Scoles. Tr. 51-52, 233-234. McCauley made contact with the bill of Scoles' helmet and as a result, Scoles' helmet fell off his head. Tr. 51-52.

Scoles testified that the action was "a hostile and aggressive contact." Tr. 52. Besedich, who was standing approximately 15-20 feet away, testified that it was an "aggressive step motion forward, and their heads hit." Tr. 234. Besedich testified that it was not a light contact, and it did not appear to be accidental. Tr. 234. Besedich estimated that there were a couple feet of space to each side of Scoles, and that McCauley could have gone around him if he wanted. Tr. 235. Scoles described being "shocked" and "stunned" and felt that his "individual safety was jeopardized." Tr. 53. Though Scoles and McCauley had a long history of disagreement, this was the first time where there had been physical contact. Tr. 53-54.

Besedich testified that Scoles and McCauley were arguing when McCauley head-butted him, but there was no chance that McCauley accidentally head-butted Scoles from just being too close to him. Tr. 259. Besedich described the way that McCauley stepped forward as "an intimidation." Tr. 259. Scoles did not step towards McCauley. Tr. 279, 347.

Hall described the assault as Scoles, who was stopped at the time, told McCauley to get out of his personal space, and then "took one swift step forward and head-butt[ed] Mr. Scoles." Tr. 341, 346. Hall described it further as "one swift step, [and] a forward lunge leading with his head." Tr. 346-347. He described it as intentional, because it came from a full stop. Tr. 347. Scoles' head and shoulders went backwards from the contact. Tr. 348. Hall described being in shock from what he saw, because he had never before witnessed a physical altercation in the mines. Tr. 348-349. Besedich described being in shock because he had never seen anything like

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[13] The two sets of air doors are approximately 50 feet apart from each other. Tr. 254.

[14] In the area around the air lock doors, the surface is uneven, with the center part towards the heading being higher. Tr. 158. Scoles and McCauley were standing in the cross-cut. Tr. 158.

what he witnessed. Tr. 236. Besedich felt that McCauley's actions towards Scoles posed a safety issue. Tr. 236. He testified that if one had to work around someone who assaulted you, you could lose focus from your job. Tr. 236.

McCauley testified that there was no head-butt, but rather that his left arm merely touched Scoles' left arm. Tr. 391-393. McCauley testified that he then said, "don't touch me, man." Tr. 392. McCauley testified that at most the contact was "a light brush of the arms."[15] Tr. 395.

After McCauley made physical contact with Scoles, Scoles looked at McCauley and said, "I can't believe you did this. There's witnesses here," referring to Besedich and other members of the crew. Tr. 54, 235, 349. McCauley responded, "You need witnesses" or "I'm glad you have a witness." Tr. 54, 235-236, 349.

After the physical altercation, McCauley went to the four-way intersection and instructed Zikafoose to come over to him, and he gave Scoles the orders again to shovel the belt line. Tr. 237, 341. McCauley said, "Mr. Scoles, will you please come over here and shovel the belt." Tr. 55, 341. Scoles responded, "Well, sir, like I said, I have no problem shoveling that belt. If those are my orders, that's what I'll do." Tr. 55, 237. McCauley then told Scoles, "I'm going to give you this tape measure. I need 77 inches of clearance at 74 block on the belt line. You do know how to read this, don't you?" Tr. 341. Scoles replied, "I do." McCauley then said, "I need 77 inches of clearance, so I need you to get a pick and get a shovel and wherever you don't have 77 inches, you pick and you shovel. Get on your knees and shovel if you have to, but I want 77 inches of clearance, so get to picking and get to shoveling." Tr. 341-342. Scoles then proceeded to grab a shovel and pick, and shoveled the belt. Tr. 56.

Usually Scoles finished his shift at 4 pm, but on that day he did not finish his work until 6 pm. Tr. 57-58. When Scoles arrived at the surface, he looked around for a union representative or a supervisor, but everyone had already left for the evening. Tr. 58. Scoles did not immediately call the police because he thought they may not have jurisdiction in the mine.[16] Tr. 164-165.

That evening, Besedich and Hall went outside to fill out the permissibility books and McCauley came down and asked Besedich and Hall if they felt comfortable being there. Tr. 238, 342. Besedich answered that he was fine. Tr. 238, 342. McCauley responded, "because I don't want to be accused of badgering the witness." Tr. 238, 342-343. Bill Hall was with Besedich when McCauley said this. Tr. 238. Besedich described McCauley as having a smirk when he said it as if he thought it was funny. Tr. 239.

When Scoles arrived home, he contacted his union president, Chris Yanero, and reported that he was assaulted by McCauley. Tr. 58-59.

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[15] I find much of McCauley's testimony to be not credible, contrary to reason, and contrary to all credible witnesses to the event.

[16] Criminal charges were filed in October. Tr. 402. The charges were eventually dismissed. Tr. 402.

The following morning, on September 4, Scoles reported the incident to Harrison County Mine management. Tr. 59. Scoles first went to find his union representatives, Matt Miller and Perry Hefflin. Tr. 59. Scoles told Assistant Superintendent Hibbs that he wanted to report an incident from the day before, but Hibbs did not want to hear it, saying, "you all don't tell me when we're going to have a meeting. I instruct when we're going to have a meeting."[17] Tr. 60, 544. During this encounter, Yanero called Hibbs. Tr. 60. Scoles tried to return to work, but Hibbs grabbed him by the arm and, as soon as he got off the phone, told Scoles that he would "check this out." Tr. 60-61, 545. Scoles told Hibbs the entire account of the incident, and Hibbs responded that he would check it out. Tr. 61. Scoles felt that his complaint "fell upon deaf ears." Tr. 62.

McCauley testified that he first became aware of the allegation that he head-butted Scoles several days later when Hibbs told him about it. Tr. 398-399, 455. McCauley testified that he was in disbelief, and that he responded to Hibbs, "you got to be kidding, right?" Tr. 399-400. McCauley denied the allegations to Hibbs. Tr. 399. Hibbs replied that he "would be checking into it." Tr. 400. McCauley was not aware of whether Hibbs conducted an investigation into the matter. Tr. 400. McCauley was not asked to write a statement. Tr. 456.

Hibbs did not suspend McCauley pending an investigation. Tr. 522, 567. Hibbs conducted a cursory investigation that included a single 30-second conversation with McCauley, vague conversations with Besedich and Hall 7-10 days after the incident, and conversations with Scoles and Zikafoose. Tr. 239, 350-352, 455-456, 545, 565; RX-R. Scoles, Besedich, and Hall described the contact that McCauley made with Scoles as severe. RX-R. Hall compared the head-butt to "deer tickling antlers," which he described at hearing as "pretty aggressive," and "a whitetail male deer hitting another deer's antlers." Tr. 352-353; RX-R. Hibbs' investigation was so cursory that he never asked Hall to elaborate on what the phrase meant, but simply assumed that it meant that it referred to "light contact" that was not severe. Tr. 548-549, 573-574; RX-R. Hibbs concluded that the contact Scoles complained of was "an incidental contact based on the activity." Tr. 547. McCauley, in his 30-second conversation concerning the incident, was the only individual who described the contact as "incidental." RX-R. Hibbs concluded that McCauley should not receive any discipline. Tr. 549-550. Every witness told Hibbs that there was physical contact, and some said the physical contact was more severe than others. Tr. 565-566.

Hall testified at arbitration about the incident and testified that, as a result of his arbitration testimony, McCauley treated him differently. Tr. 354. Prior to the head-butting incident, McCauley and Hall would talk or joke daily about hunting or fishing or work. Tr. 354. However, following Hall's arbitration testimony, McCauley did not talk to Hall for approximately 8 months, including not giving him work orders. Tr. 354. Hall testified that he was concerned that his testimony at the instant discrimination hearing would affect his

[17] Brad Hibbs testified at hearing. At the time of hearing, Brad Hibbs had worked for Harrison County Mine for over 13 years. Tr. 542. He had worked as the assistant mine superintendent for over two years. Tr. 542. His job duties include overseeing operations and mine plans, as well as assisting the superintendent. Tr. 542.

relationship with McCauley because he received the silent treatment from McCauley following the arbitration. Tr. 355. Hall has also heard that McCauley began denigrating Hall's abilities as a mechanic behind his back following the arbitration. Tr. 355.

McCauley testified that an act of violence or intimidation would be a safety issue at the mine. Tr. 435-436. He further stated that accusations of assault in the mine were very rare. Tr. 436. He testified that Harrison County Mine had a zero-tolerance policy for acts such as assault that doesn't distinguish between hourly employees and management. Tr. 436-437.

The Mantrip Incident on September 8:

Several days after the head-butting incident, on September 8, 2015, Scoles was working the day shift at the 1E longwall section at the Harrison County Mine. Tr. 62. Scoles and other miners would get from the surface to the 1E longwall section by taking an elevator to the bottom, and then walking to the track mantrips. Tr. 62-63. The mantrip was a 15-man personnel carrier that rode on tracks. Tr. 63. On this mantrip, there are two enclosed compartments, where five or more miners could sit, one on each end of the mantrip, and in the center was the driver's seat and jump-seat.[18] Tr. 63-64.

To enter the mantrip, one must first remove the safety chain before lowering oneself into the compartment by grabbing hold of a small handle on the ceiling. Tr. 65-66. The miners usually carry a good deal of equipment, including a PPE, a rescuer, a radio, a light, lunch buckets, and some detectors and a tool pouch. Tr. 66, 243.

Scoles was seated in the front of the mantrip, in the direction of travel, with his back toward the driver and the jump-seat. Tr. 64. There were five or six other miners seated in the compartment with Scoles. Tr. 66. The miners sitting in the compartment were staggered, with miners sitting across from Scoles, legs interlocked. Tr. 65. Tyler Hixenbaugh was seated directly across from Scoles, and had his legs interlocked with Scoles' legs. Tr. 65, 318. Besedich was sitting on the outby end of the mantrip, on the other end from Scoles. Tr. 242. The miners had their legs bent up, with little room for movement. Tr. 66. Besedich described it as "hard" to get out of a mantrip in the regular compartments, stating, "if there's a full crew of guys, it's tight." Tr. 243.

The jump-seat is laid out differently, so that a miner can step right into it. Tr. 67. The jump-seat and driver seat are easier to get out of because one's legs are not interlocked with another miner's legs, and because one does not have to step down into the seats. Tr. 68.

On September 8, 2015, the mantrip encountered a series of switches that had to be thrown or flipped over in order to change the travel of the track as the mantrip made its way to the 1E section. Tr. 69, 288-289. No one in particular is assigned to throw switches when riding the mantrip. Tr. 71.

[18] The seats in the mantrip are first-come-first-serve. Tr. 64.

Eric Efaw threw the first switch.[19] Tr. 289. Efaw testified that when they pulled up to the switch, he jumped out quickly and threw it because he was in a hurry to get to work that day. Tr. 289. At that time, Efaw did not know that McCauley was in the jump-seat, and only learned of the fact later. Tr. 289-290.

When the mantrip arrived at the second switch, they sat for a few seconds. Tr. 70. People began yelling from the back and front of the mantrip, "Get the switch. Get the switch." Tr. 70. Scoles recognized Jason Tennant's voice yelling, "Get the switch. Get the switch. Get the fucking switch."[20] Tr. 70. The yelling lasted for a couple of seconds, and Scoles described it as a game that everyone played in the morning.[21] Tr. 70-71.

Though it was not part of Scoles' official duties to throw the switch, Scoles voluntarily unhooked the chain, got out of the mantrip, and threw the second switch. Tr. 71, 290. When he did so, he saw that McCauley was sitting in the jump-seat. Tr. 72. This was the first time that Scoles saw McCauley at the 1E section. Tr. 73. Scoles thought it unusual that McCauley did not flip the switch, because it was "past practice and customary in the mines that the guy in the jump-seat throws the switch." Tr. 72. Scoles based this understanding on his ten plus years of experience at the mine at issue, as well has his experiences at five other mines that had track haulages. Tr. 72-73.

Besedich similarly testified that it was common practice at the mine that if there is someone in the jump-seat, that person throws the switches. Tr. 244. He testified that he had sat in the jump-seat on numerous occasions, and it is easier to get out of the jump-seat than from the compartment. Tr. 243-244. Hixenbaugh similarly testified that the person in the jump-seat typically throws the switches. Tr. 319. Besedich and Hixenbaugh each described it as an "unwritten rule" at Harrison County Mine and other mines they had worked at with track haulages. Tr. 244-245, 319-320, 323-324. Besedich testified that he has thrown the switch from the compartment when there is no one sitting in the jump-seat, but he has never done so when

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[19] Efaw rode on the mantrip on September 8, 2015, with Scoles and McCauley. Tr. 284. At that time, he was working as a general outside laborer, restricted. Tr. 302. Efaw was seated in the back of the mantrip, facing inby, in the direction of travel. Tr. 285. His nickname in the mine was "Red." Tr. 405.

[20] Scoles used the word "f'ing" at hearing, but it was clear that the actual swear words were used. Tr. 70. Jason Tennant testified at hearing. At the time of hearing, Tennant worked as the assistant shift foreman on the midnight shift at Harrison County Mine. Tr. 589-590. His duties include lining up the shift, fire bossing, and visiting areas in the coal mine that are his responsibility. Tr. 590. Tennant has previously worked as the fill-in section foreman, outby compliance, and longwall face foreman on the day and midnight shifts. Tr. 590. On September 8, 2015, Tennant was working as the day shift face boss. Tr. 590. He was present during the derail incident. Tr. 590. Tennant was driving the mantrip on the day of the incident. Tr. 591.

[21] The mantrip had a diesel engine, which was fairly loud, so people had to yell. Tr. 75.

there is someone in the jump-seat and there is a full crew in the mantrip as there was on September 8. Tr. 268-269.

Hixenbaugh had worked with McCauley for approximately five years, and had traveled in the mantrip with McCauley approximately 30 times. Tr. 323. Hixenbaugh testified that when McCauley has sat in the jump-seat, he recalled McCauley throwing the d-rail switch. Tr. 323-325.

McCauley testified that the unwritten rule in the mine was that the "person closest and [with] easiest access would be the one that would get out and throw a switch or throw a d-rail." Tr. 462. He repeated that it would be a combination of closeness and easiest access, and not just closeness. Tr. 462.

The mantrip next arrived and stopped at the d-rail after it left the 1E switch.[22] Tr. 74, 290. When it stopped, everyone began yelling, "Get the d-rail. Get the d-rail." Tr. 74-75, 290-291. Tennant said, again, "Get the fucking d-rail" to no one in particular. Tr. 74-75, 241, 417, 604. Scoles testified that he believes that McCauley yelled, "Get the d-rail," to which Scoles responded that it was the responsibility of the person in the jump-seat to get the d-rail. Tr. 74-75.

Everyone continued to yell to get the d-rail, and Scoles repeated that the person in the jump-seat should get the d-rail. Tr. 75. Efaw grew tired of waiting, so he got out to get the switch. Tr. 290-291. When Efaw got to the jump-seat, McCauley leaned forward and put his hand on Efaw's chest and told him "I got it. Go sit back down." Tr. 291. So Efaw turned around and went back to his seat. Tr. 291. This was the first instance that Efaw saw that McCauley was sitting in the jump-seat.[23] Tr. 292. Efaw testified that there is "an unspoken rule of coal miners" that dictates that if there's somebody sitting in the jump-seat, that person throws switches. Tr. 292. This is because it is easiest for that person to get out of the ride. Tr. 292. Efaw based his understanding of this rule on his time at Harrison County Mine, as well as the twenty or so other mines that he has worked at. Tr. 293.

McCauley then exited the mantrip toward the direction of travel, shined his lights directly in Scoles' face, and said, "You need to throw the d-rail."[24] Tr. 77, 418. McCauley was standing right next to Hixenbaugh, facing opposite the direction of travel. Tr. 77. McCauley had his arm up on the mantrip, standing above Scoles, with his light was shining into Scoles' face.[25] Tr. 77-

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[22] The d-rail or derail is a device that derails the mantrip if it gets out of control, rather than allowing it to proceed into the main haulage. Tr. 73-74. The d-rail has a handle that must be flipped over in order to proceed towards the section. Tr. 74.

[23] When Efaw previously threw the switch on that day, he did not know someone was sitting in the jump-seat. Tr. 292.

[24] After reviewing his deposition testimony, McCauley testified that Hixenbaugh was the closest to the d-rail. Tr. 467-470.

[25] McCauley testified that he did not purposefully shine the light from his helmet into Scoles'

78. Scoles felt it was significant because in the mines, one is not supposed to shine one's light in another miner's eyes because it blinds them. Tr. 78. Scoles did not have a lamp on that day. Tr. 78.

McCauley then said, "Scoles, get the d-rail." Tr. 75. Scoles responded, "Sir, the man in the jump-seat, that is his responsibility." Tr. 75. Scoles responded in this way because in his experience in the mines, it was always the responsibility of the man in the jump-seat to flip switches. Tr. 75-76. McCauley responded by again telling Scoles specifically to get the d-rail. Tr. 76. Scoles responded, "Sir, I feel like you're just singling me out and harassing me." Tr. 76. Scoles said this because of the September 3 head-butting incident, and because he felt that McCauley did not like him. Tr. 76. McCauley responded by saying again, "Get the d-rail." Tr. 76. Scoles again explained to McCauley that he felt McCauley was harassing him. Tr. 79, 419. Scoles testified that he felt intimidated because McCauley had physically assaulted him four days prior, and now was standing above him blinding him with a light in his eyes. Tr. 79.

McCauley called Tennant to come to the opening of the mantrip, saying "back me up." Tr. 79, 293. Tennant got out of the mantrip, and Efaw heard Tennant say, "somebody just get the damn d-rail." Tr. 293. McCauley once again ordered Scoles to get the d-rail, and said, "Do you understand what I'm telling you?" Tr. 79. Scoles responded, "Sir, you are harassing me and singling me out." Tr. 79. McCauley then ordered Scoles to exit the mantrip. Tr. 79. Scoles started exiting the mantrip, and said to McCauley, "Sir, I don't have a Solaris on me. Do you understand that?"[26] Tr. 80. McCauley responded, "Don't worry, somebody will be by here directly to pick you up." Tr. 80, 294.

McCauley then went to the front of the vehicle and threw the d-rail. Tr. 421. The mantrip proceeded through, McCauley threw the d-rail back, returned to his seat, and the mantrip continued toward the section. Tr. 421.

McCauley, Tennant, and Hixenbaugh were all closer to the d-rail than Scoles. Tr. 80. Efaw testified that it would take approximately 15-20 seconds to get out of the compartment of the mantrip, throw the d-rail, and get back in. Tr. 294. He estimated that it would take 10 seconds or less from the jump-seat. Tr. 295. He estimated that they were stopped at the d-rail that day for at least five minutes. Tr. 295.

McCauley did not take any measures at that time to ensure that Scoles was escorted out of the mine. Tr. 421. When they were halfway to the section, McCauley had Tennant stop the mantrip so McCauley could use the phone. Tr. 421. McCauley called Hibbs and told him that Scoles was being insubordinate by refusing to throw the d-rail. Tr. 422. He told Hibbs that he left Scoles along the tracks and that someone would be along to talk with him. Tr. 422.

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face. Tr. 418.

[26] A Solaris is a three-gas detector that detects CO, Oxygen, and Methane. Tr. 80. Scoles did not have a Solaris on him because he was working on a crew where the outby foreman had one. Tr. 81. Under federal and West Virginia law, a miner is required to have a three-gas detector if he is by himself. Tr. 81, 477.

After speaking with Hibbs, McCauley spoke with the day shift foreman, Jim Coles. Tr. 423. McCauley told Coles that he "had a situation" with Scoles, that Scoles refused to throw the d-rail and was being insubordinate, and that Hibbs wanted McCauley to contact Coles to bring Scoles outside. Tr. 423. Coles responded that he would get Scoles out of the mine. Tr. 423.

Scoles was left alone for an hour and a half to an hour and forty minutes without a multi-gas detector, after the mantrip went to the section without him. Tr. 82. Scoles' shift foreman, Jim Coles, eventually picked him up. Tr. 82. Scoles was sent home on September 8, and not permitted to return to work the following day. Tr. 86-87. He was suspended from work pending an investigation. Tr. 504.

Scoles did not believe that McCauley's order concerning the d-rail was valid because he felt that McCauley was harassing him and singling him out, as well as trying to cover up what McCauley did several days prior. Tr. 83.

During lunch that day, Efaw asked Bill Hall what happened with Scoles, and Hall replied that they took him outside and sent him home. Tr. 295.

Later in the evening, McCauley spoke with Hibbs again. Tr. 425. Hibbs met with Scoles and union president Chris Yanero later in the day. Tr. 550-551. Hibbs testified that Scoles admitted that the order he received was a direct and safe order, but that he didn't follow it "because it was dumb." Tr. 551.

Hibbs testified that insubordination was a serious offense because "it disrupts whatever activity is taking place. No matter what it is, it's a disruption, and it stops the flow of work, and in this case, travel." Tr. 554.

McCauley then spoke and with Chris Fazio in Human Resources the following day. Tr. 425. He spoke with Superintendent Scott Martin some time later. Tr. 425. McCauley testified that he did not have any role in deciding whether Scoles would be disciplined. Tr. 425. When Scoles was suspended pending investigation, Fazio was not aware that Scoles had accused McCauley of assaulting him days earlier. Tr. 522. However, Hibbs was investigating both the head-butting and mantrip incidents at around the same time. Tr. 570.

Brad Hibbs informed Fazio of the September 8, 2015 incident in the mantrip between Scoles and McCauley the day after it occurred.[27] Tr. 503-504. Hibbs told Fazio that Scoles was

[27] Christopher Fazio testified at the hearing. Fazio was not sequestered during the hearing, and was present for other witness' testimonies. Tr. 496-498. Fazio had worked as the supervisor of human resources at the Harrison County Coal Mine since June 2010. Tr. 498. Prior to that, he was the supervisor at the Monongalia County Mine from November 2007 until June 2010. Tr. 498. He had a total of 11 years' experience, with 10 of those years being a human resource supervisor. Tr. 498.

directed to throw the d-rail and refused to do so, and that Scoles admitted that it was a safe and legal order. Tr. 504. Fazio proceeded to investigate the incident, interviewing both management and union employees. Tr. 296, 504-507. Hibbs interviewed several of the witnesses to the mantrip incident, and sent his notes to Fazio. Tr. 568-569. No one interviewed Hixenbaugh, even though Hixenbaugh was seated closest to Scoles. Tr. 569.

Fazio summarized his investigation by saying that "it was consistent that George Scoles was given a work order, and he refused to throw the d-rail. It was legal. It was safe." Tr. 506.

When Fazio completed his investigation, he took his finding to Superintendent Scott Martin.[28] Tr. 507. They went over the findings in general, and Martin ordered Fazio to put together a suspension with intent to discharge letter. Tr. 507-508, 532. Martin testified that he did not discuss the details with Fazio, but understood that Scoles was given a clear work order to throw a d-rail and he refused. Tr. 534. Martin testified that "after reviewing everything and stuff, I felt that insubordination was feasible for discharge." Tr. 534. The only materials he reviewed prior to making the decisions were the materials provided by Fazio. Tr. 537. He testified that similar to sleeping, drugs, and alcohol, insubordination was "a choice," which makes it especially egregious. Tr. 534. He testified that insubordination was a problem, because "if orders and stuff are not followed, you cannot effectively manage the mine." Tr. 535. Martin testified that there are no circumstances where insubordination would not result in suspension with intent to discharge, stating that there are never mitigating circumstances that would be considered. Tr. 538. Martin testified that in his view the alleged assault by McCauley and the insubordination issues were "separate issues." Tr. 539.

Fazio testified that the 11 Employee Conduct Rules are "the most serious rules in our industry...[and] at our coal mine." Tr. 500. Scoles was suspended with intent to discharge for a violation of Rule Number 4. Tr. 85; P-5. Fazio testified that there is a policy of "first time every time" when it comes to insubordination. Tr. 508. This means that there are no situations where there are mitigating circumstances such that someone would not be suspended with intent to discharge. Tr. 526.

Following the mantrip incident, there were a series of meetings—including the 24-48 meeting and the Step 3 meeting—and then Scoles was suspended with intent to discharge.[29] Tr.

Fazio's job duties consisted of handling compensation benefits, the collective bargaining agreement, disciplinary matters, investigations, policies, procedures, employee conduct rules, and the like. Tr. 499-500.

[28] Scott Martin testified at hearing. Martin worked as General Superintendent at the Harrison County Coal Company starting in January 2014. Tr. 531. His job duties included serving as the chief health and safety officer, as well as overseeing all expenditures, budgets, hiring, maintenance, production, and coordination. Tr. 531.

[29] According to the collective bargaining agreement, management must first meet with the employee prior to suspending with intent to discharge. Tr. 502. A mine committeeman may be present at the meeting. Tr. 502. During the meeting, management goes over the suspension letter

84. On September 15, 2015, Scoles received a letter from Harrison County management that they were suspending him with intent to discharge. Tr. 84-85; P-5. The letter was written by Scott Martin, and stated that Scoles was being suspended with intent to discharge due to "violation of Employee Conduct Rule No. 4 Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction..." Tr. 85; P-5. Scoles did not believe that he was insubordinate on September 8, 2015, because of the events leading up to that point. Tr. 85. Scoles testified that he believed that his suspension was due to his participation in safety activities, being an advocate for safety, and for reporting McCauley for the head-butting incident. Tr. 106.

At hearing, Fazio reviewed the Employee Conduct Rules, and noted that insubordination was listed as "a serious rule." Tr. 500; RX-M. He testified that this was because "if employees are insubordinate, it creates mass chaos in the operation. If employees are doing whatever they want to do, maybe not what they're assigned to do, it could be unsafe." Tr. 500. He testified that the mine could not function if work orders were not followed.[30] Tr. 501.

In the 13-plus years that Hibbs worked at the mine, he had never heard of anyone else being suspended with intent to terminate for insubordination. Tr. 571.

Scoles filed a grievance over his suspension with intent to discharge, and took the matter to arbitration. Tr. 87; P-5. Following an arbitration hearing, Scoles was reinstated and received a 40-day suspension. Tr. 87; P-6. He was out of work for a total of 61 days. Tr. 88. The Respondent told Scoles that the mine was idle for most of the 21 days difference. Tr. 88.

In September of 2015, Scoles was earning $28.64 per hour, and paid time and a half for overtime hours, at $42.96. Tr. 92, 94; P-1. Scoles estimated that he worked approximately 7.5 hours of overtime per week.[31] Tr. 95. Scoles calculated his lost income from his suspension at $16, 324.80. Tr. 99-102. In addition to lost pay, Scoles was also seeking expungement of his record, and a cessation of all harassment. Tr. 102.

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Secretary argues that this Court should admit and

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with the employee. Tr. 502. The employee can then elect to have a 24-48 hour meeting with management and the union, which occurs after 24 hours of the suspension, but before 48 hours. Tr. 502. Martin was unable to attend the suspension with intent to discharge meeting, so Hibbs was present. Tr. 511. At the meeting, Fazio read the letter to Scoles and informed him of his right to a 24-48 meeting. Tr. 512.

[30] At hearing, Fazio named four employees that were discharged for insubordination. Tr. 517-518.

[31] This estimate depended on the season. Tr. 95.

consider the arbitration decision, not for the arbitrator's factual or credibility findings, but rather for the following reasons:

> to show that Scoles appealed his suspension to arbitration, that an arbitrator heard testimony from live witnesses, that an arbitrator issued a decision based on this evidence, that this decision reinstated Scoles to his job and his suspension was reduced to forty days, and the dates of the arbitration and award.

Sec. Brief, 14.

The Secretary further argues that Scoles engaged in protected activity when he reported McCauley's assault to assistant superintendent Brad Hibbs and when he made previous safety and discrimination complaints. Scoles then suffered an adverse employment action when he was suspended pending investigation and eventually discharged, which was subsequently changed to a 40-day suspension without pay. The Secretary argued that the circumstantial indicia surrounding the incident show that Respondent's adverse employment actions were motivated at least in part by Scoles' protected activities. Lastly, the Secretary argues that Respondent has failed to rebut the *prima facie* case by proving that it was in no way motivated by Scoles' protected activities. As remedy, the Secretary seeks back wages for Scoles' entire suspension without pay plus interest, which is equivalent to $16,324.00 plus pre-judgment interest. Further, the Secretary seeks a civil penalty in the amount of $30,000.

The Respondent argues first that the arbitrator's decision should not be admitted into evidence because it constitutes hearsay, the prejudicial value of the decision outweighs the probative value, and there is a danger that the arbitrator's judgement will substitute the fact-finder's judgment. It further argues that the statutory issue at stake in the instant matter was not at issue in the arbitration.

With regards to the discrimination claims at issue, the Respondent argues that the Secretary failed to prove a *prima facie* case of discrimination. The Respondent argues that Scoles' complaints of being assaulted by McCauley are not protected under the Mine Act. The Respondent characterizes the alleged assault as a "personal dispute...based upon nothing more than mutual animus," and argues that complaints surrounding such matters are not protected. Resp. Brief. At 17-18.

The Respondent further argues that the Secretary failed to prove the existence of a nexus between Scoles' purported protected activity and his suspension with intent to discharge. It argues that Martin, who made the final decision to suspend with intent to discharge, had no knowledge of the head-butting incident. It also argues that the dispute between Scoles and McCauley, and presumably any animus emanating from it, was personal and not directed towards any protected activities. It further argues that Harrison County Mine uniformly applies its policy regarding insubordination, and therefore there was no disparate treatment. The Respondent urges this Court to find that even if Scoles did engage in protected activities, it should still find his suspension permissible due to Scoles' alleged insubordination.

The Respondent argues that if the Court does find for Scoles, it should not award him the amount he is seeking. Rather, it maintains that the estimate provided in an attached affidavit of Fazio is more appropriate.

ANALYSIS

The Arbitration is Admitted Into Evidence

At hearing, the Secretary sought to admit into evidence the November 08, 2015 arbitrator's decision that reinstated Scoles and modified the discipline to a 40-day suspension. The Secretary did not seek to introduce any of the arbitrator's factual or credibility findings, but rather for the following reasons:

> to show that Scoles appealed his suspension to arbitration, that an arbitrator heard testimony from live witnesses, that an arbitrator issued a decision based on this evidence, that this decision reinstated Scoles to his job and his suspension was reduced to forty days, and the dates of the arbitration and award.

Sec. Brief, 14.

The Respondent does not object to the admission of these facts into the record, but maintains its objection to the admission of the arbitrator's decision in fear that it would constitute an "improper introduction of credibility and factual findings of that proceeding into this matter." Resp. Reply Brief, at 10-11.

The Commission has addressed the propriety of admitting an arbitrator's findings in a FMSHRC proceeding, stating:

> there are several factors that must be considered in determining the weight to be accorded to arbitral findings: the congruence of the statutory and contractual provisions; the degree of procedural fairness in the arbitral forum; the adequacy of the record; and the special competence of the particular arbitrator. Arbitral findings may be entitled to great weight if the arbitrator gave full consideration to the employee's statutory rights; the issue before the judge is solely one of fact; the issue was specifically addressed by the parties when the case was before the arbitrator; and the issue was decided by the arbitrator on the basis of an adequate record.

Secretary o/b/o Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2795 (October 1980).

In the instant case, there appears to be little actual difference between the parties' positions.[32] The Secretary's request for admission of the arbitrator's decision for the limited purposes stated above is appropriate. The Respondent's fear that this Court will accidentally

[32] Indeed, the parties likely could have worked better together prior to hearing to introduce these facts as joint stipulations, and thereby avoided this unnecessary controversy.

consider the arbitrator's credibility and factual findings are misplaced. The arbitrator's decision is admitted as Exhibit P-6 for the limited reasons stated above.

1) Discrimination:

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise 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 or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine," or "because 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), the Secretary on behalf of a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *See Turner v. Nat 7 Cement Co. of California,* 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981).

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. *Driessen v. Nev. Goldfields, Inc.,* 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette,* 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen,* 20 FMSHRC at 328-29 (citing *Robinette,* 3 FMSHRC at 817; *Pasula,* 2 FMSHRC at 2799-2800). The operator bears the burden of proof for the affirmative defense. *Pasula,* 2 FMSHRC at 2800.

A. Protected Activity:

George Scoles engaged in multiple activities protected under the Mine Act. Scoles' service as a miner's representative during federal inspections is a protected activity. *Consolidation Coal Co.*, 19 FMSHRC 1529, 1534-35 (Sept. 1997). The three discrimination complaints that Scoles filed with MSHA constitute protected activities. *See Savage Services Corp.*, 37 FMSHRC 936, 946 (April 2015) (ALJ). Furthermore, he had been an avid safety advocate, making numerous complaints to mine management about health and safety issues. Tr. 22-23, 25-27, 33. Such frequent safety complaints to a supervisor constitute protected activities. *Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 (Nov. 2015).

Scoles also engaged in protected activity on September 3, 2015, when he repeatedly complained to McCauley that he was harassing him and was in his personal space. McCauley was a member of mine management and was the longwall coordinator. Tr. 25. Complaints about being harassed and feeling unsafe to a supervisor are protected under the Mine Act.

On September 3, 2015, McCauley asked Scoles why he was not shoveling the belt, and Scoles replied that he had not been ordered do so, but that he would shovel the belt. Tr. 45-46. McCauley began badgering Scoles in a manner that Scoles and others described as demeaning, hostile, and aggressive. Tr. 230. McCauley continued to badger Scoles about shoveling the belt, and Scoles complained to McCauley that he was trying to intimidate and harass him. Tr. 47, 230, 341. McCauley did not cease badgering Scoles and Scoles continued to complain to McCauley that he was harassing him and trying to intimidate him. Tr. 49-50. When McCauley approached Scoles in an aggressive fashion, Scoles told him to get out of his personal space. Tr. 51-52, 232, 341.

These complaints to McCauley of him acting in a harassing, intimidating, and aggressive manner, while he entered Scoles' personal space, constitute health and safety complaints protected by the Mine Act. Respondent attempts to argue that McCauley's actions towards Scoles were part of a "personal dispute," and "mutual animus," and seems to argue that actions arising out of such feelings somehow are not covered by the Mine Act. Resp. Brief, at 18. Whatever mutual animus that may have existed between Scoles and McCauley, harassment, intimidation, and aggressive behavior in the mine raises serious health and safety concerns. If a supervisor orders a miner to perform an unsafe action, it does not matter whether that order was borne of unilateral animus, mutual animus, or a desire to reach production goals. There is no safe harbor under the mine act for activities that compromise a miner's health or safety if they arise out of personal dislike for the miner. The effect of a miner's health and safety in the mine—an effect that that Mine Act seeks to mitigate—is the same.

It is especially odd that Respondent would make this argument, given that McCauley, its main witness who engaged in the assault, disagrees with Respondent's position. McCauley admitted in cross-examination that an act of violence or intimidation in the mine would constitute a safety issue. Tr. 435-436. He further testified that an accusation of an employee assaulting another employee at the mine should be treated as a safety issue and would be a serious allegation. Tr. 435-436.

In this instance, Scoles was right in being concerned about his safety, as McCauley soon showed that his aggressive and intimidating behavior was no hollow threat. Moments after Scoles made his complaints to McCauley, McCauley proceeded to physically assault him.[33]

Scoles' next protected activity was when, on the day after the assault, Scoles reported the incident to Assistant Superintendent, Brad Hibbs. Tr. 60, 544. Such a complaint is protected activity under the Mine Act. *See Cordero Mining, LLC,* 36 FMSHRC 963, fn. 5 (April 2014) (ALJ) (Reporting workplace violence or abuse that implicates concerns for safe performance of work tasks may rise to the level of protected activity under section 105(c) of the Mine Act.); *see*

[33] I credit Scoles', Besedich's, and Hall's testimonies on what they witnessed concerning McCauley's actions. Each of these witnesses appeared forthright, honest, and displayed no evasion. Furthermore, each of their accounts significantly corroborates the others. On the other hand, I do not credit McCauley's testimony. Throughout the hearing, his account of events was self-serving, contrary to other witnesses, and not believable.

also Kingston Mining, Inc., 37 FMSHRC 2519, fn. 3 (Nov. 2015) ("Raising safety concerns is...paradigmatic 'protected activity' within the meaning of section 105(c)"); *Durango Gravel*, 20 FMSHRC 59, 62 (Jan. 1998) (ALJ), *aff'd* 21 FMSHRC 953 (Sept. 1999) (a safety-related conversation was protected activity).

Following this report, Scoles engaged in protected activity on September 8, 2015, when in response to McCauley ordering Scoles to switch the d-rail, Scoles complained that McCauley was singling him out and harassing him and that he felt unsafe. Tr. 79. In that same interaction, when McCauley ordered Scoles out of the mantrip, Scoles complained that he was being left in the mine without a Solaris multi-gas detector, in violation of state and federal health and safety laws. Tr. 80. This complaint was similarly protected.

B. Adverse Action:

The Respondent does not contest that Scoles suffered an adverse employment action. On September 8, 2015, Scoles was suspended pending an investigation of the mantrip incident. Tr. 504. On September 15, 2015, Scoles received a letter that suspended him with intent to discharge. Tr. 84-85; P-5. Following an arbitration hearing, Scoles' discipline was modified to a 40-day suspension. Tr. 87; P-6. "Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act." *Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (April 1998) (citing Section 105(c)(1) of the Mine Act; *Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)).

C. Discriminatory Motive:

The Commission has acknowledged that it is often difficult to establish a motivational nexus between protected activity and the adverse action that is the subject of the complaint. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept.1999). To establish the nexus, the Commission has identified the following indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor 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). It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec'y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 2012 WL 7659706, *4 (ALJ)(Dec. 2012).

1. Animus Towards Protected Activity

"Hostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2

FMSHRC 2508, 2511 (Nov. 1981)(citations omitted). In the instant case, there is ample evidence of hostility or animus towards the protected activity.

Following Scoles' multiple safety complaints to McCauley, McCauley responded by ignoring him and walking away. Tr. 27-28. When Scoles complained about the dangers of a hot roller, McCauley responded, "if the roller is not on fire, don't turn the belt off." Tr. 28. These responses were consistent with how other miners described McCauley's approach to safety complaints. Eric Efaw testified that McCauley regularly disregarded his complaints about roof falls. Tr. 300-301. Similarly, Hixenbaugh and Hall testified that their safety complaints to McCauley were disregarded in order to increase production. Tr. 325-326, 333, 353.

Scoles further testified that in response to his advocacy for safety in the mine, McCauley talked to him in a demeaning manner and tried to belittle him. Tr. 29. McCauley would single Scoles out to do jobs such as picking up garbage by hand. Tr. 29-30. Efaw corroborated this and described how McCauley would walk around asking where Scoles was, and then proceed to argue with him. Tr. 299.

In one of the primary incidents at issue in this case, Scoles complained to McCauley that he felt McCauley was harassing him, trying to intimidate him, and entering his personal space in a manner that made Scoles feel unsafe. Tr. 46-49, 51-52, 230, 232, 341. McCauley responded by physically assaulting Scoles in a manner that was so extreme that every witness was shocked and surprised by his actions. Tr. 236, 348-349. From a complete stop, McCauley took a step back, and then head-butted Scoles. Tr. 51-52, 233. As a result of the severity of the contact, Scoles' helmet fell off his head. Tr. 51-52. Scoles described the action as "a hostile and aggressive contact," and felt that his "individual safety was jeopardized." Tr. 52-53. Besedich described McCauley's actions as "an intimidation," and made it clear that there was no chance that it was accidental. Tr. 259. He felt that it posed a safety issue in the mine. Tr. 236. Hall similarly testified that the assault was intentional and shocking. Tr. 347-349.

Following the assault, McCauley called Zikafoose over to serve as a witness as he demeaned Scoles. Tr. 237, 341. McCauley told Scoles to shovel the belt, and when Scoles agreed to do so, McCauley responded by saying, "I'm going to give you this tape measure. I need 77 inches of clearance at 74 block on the belt line. You do know how to read this, don't you?" Tr. 341. Scoles replied, "I do." McCauley then said, "I need 77 inches of clearance, so I need you to get a pick and get a shovel and wherever you don't have 77 inches, you pick and you shovel. Get on your knees and shovel if you have to, but I want 77 inches of clearance, so get to picking and get to shoveling." Tr. 341-342.

That evening, McCauley evinced animus towards Scoles' protected activity when he approached Besedich and Hall and asked them if they were comfortable being out of the mine filling out the books. Tr. 238, 342. When Hall replied that he was fine, McCauley responded, "because I don't want to be accused of badgering the witness." Tr. 238, 342-343. Besedich described McCauley as having a smirk when he said the statement as if he thought it was funny. Tr. 239. McCauley's open mocking of his recent assault of another miner, to the other miner witnesses, illustrates that he was not trying to hide the intent of his assault. Indeed, McCauley's

conduct on the mantrip several days later indicates that McCauley felt free to single out and harass Scoles in front of other miners.

Upper management also showed animus towards Scoles' protected activity in the manner in which they responded to his complaint of an assault in the mine. When Scoles complained on September 4, to Assistant Superintendent Hibbs about McCauley assaulting him, that complaint constituted a protected activity. Hibbs responded to Scoles' request for a meeting by saying, "you all don't tell me when we're going to have a meeting. I instruct when we're going to have a meeting."[34] Tr. 60, 544. This response shows that in the first instance, he did not regard this complaint of a violent assault as seriously. Hibbs eventually said that he would "check it out," but he neither suspended McCauley pending an investigation nor did he separate McCauley from Scoles pending an investigation. Tr. 522, 567.

The cursory and inattentive approach to the investigation also evinces animus towards Scoles' protected activity. Assault in the mine is a rare and serious event, and management should have taken proper and immediate steps to investigate and address the complaint. Instead, Hibbs waited 7-10 days to talk to the other two witnesses, Besedich and Hall, and conducted a 30-second conversation with McCauley. Tr. 239, 350-352, 455-456, 545, 565; RX-R. The investigative report stated that Scoles described being head-butted. RX-R. It further stated that Besedich described it as severe. RX-R. It reported that Hall described it as "two deer tickling antlers," which Hall explained at hearing as "pretty aggressive," and "a whitetail male deer hitting another deer's antlers." Tr. 352-353. Hibbs did not ask Hall to explain what he meant by the phrase, but simply concluded that it meant that the contact was not severe. Tr. 548-549, 573. That Hibbs simply assumed that the description of deer tickling antlers referred to "light contact" that was not severe is an indication of how cursory the investigation was. Tr. 548-549, 573.

Hibbs never followed up with Scoles or McCauley. Instead, after three of the witnesses to the assault told Hibbs that a severe assault took place, Hibbs concluded that the contact Scoles complained of was "an incidental contact based on the activity." Tr. 547. Hibbs concluded that McCauley should not receive any discipline. Tr. 549-550.

Hibbs' investigation following the assault stands in complete contrast to his investigation following the incident on the mantrip, which at worst was a minor act of insubordination. *See* RX-R; RX-Q. These investigations were conducted concurrently, and the difference between the two investigations shows the animus with which mine management held towards Scoles' complaints. As opposed to the almost complete lack of description of the actual assault of the September 3 incident, Hibbs described in great detail the alleged insubordination on September 8. See RX-R; RX-Q.

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[34] Brad Hibbs testified at hearing. At the time of hearing, Brad Hibbs had worked for Harrison County Mine for over 13 years. Tr. 542. He had worked as the assistant mine superintendent for over two years. Tr. 542. His job duties include overseeing operations and mine plans, as well as assisting the superintendent. Tr. 542.

The next instance of animus occurred on September 8, 2015. Four days after Scoles complained about McCauley's assault, McCauley engaged in animus towards the protected activity by singling Scoles out with an arbitrary order that ran contrary to unwritten work rules in the mines.

There was a great deal of testimony in this case concerning the exact nature of the unwritten rule in the mine, as well as whose responsibility or duty it is to throw switches and d-rails. Importantly, no one denied that there was an unwritten rule or custom governing which miner was required to throw switches. There was a consensus among all witnesses with knowledge of the issue that there were unwritten and established norms concerning whose responsibility it was to throw switches. Tr. 67-68, 72, 244, 319-320, 323-324, 462. Scoles, Hixenbaugh, and Besedich each testified that if someone was sitting in the jump-seat then that person was responsible for throwing switches and d-rails. Tr. 72, 244, 319-320, 323-324. This rule was based on the fact that the jump-seat was easier to get in and out of. Tr. 67, 68. McCauley testified that the "person closest and [with] easiest access would be the one that would get out and throw a switch or throw a d-rail." Tr. 462.

Though the weight of the evidence would lead to a finding that there is an unwritten rule in the mine that the person in the jump-seat is responsible for throwing switches and d-rails, I need not resolve the contradictory testimony here, because under either version of the rule, Scoles was not responsible for throwing the d-rail. If one accepts that it was the responsibility of the person in the jump-seat to throw the d-rail, then it was McCauley's responsibility, as he was seated in the jump-seat. If one accepts McCauley's formulation of the rule, that it is the responsibility of the person who is both closest and with easiest access, then that responsibility shifted at various times as the event unfolded, but it was never Scoles'.

When the mantrip arrived at the d-rail, Efaw jumped out to throw the d-rail. Tr. 290-291. At that point, Efaw was the person who had easiest access, as he was outside of the mantrip and was proceeding towards the d-rail. However, McCauley stopped Efaw and told him to sit back down. Tr. 291. Then, before McCauley verbalized any order to Scoles, McCauley got out of the mantrip and stood beside Scoles. Tr. 77, 418. At that moment, before any direct orders were given, McCauley was both closer and had easier access. McCauley's order, while perhaps safe, were unreasonable and were intended to harass and single out Scoles.[35] The order was akin to a supervisor purposefully dropping something on the floor and then ordering a miner to bend over to pick it up. No one would mistake such an order as being legitimately work related, rather than intended to demean and disrespect a subordinate in front of fellow miners.

Furthermore, McCauley's act of stopping Efaw from throwing the d-rail and ordering Scoles to do so, belies any argument that McCauley's primary concern was to get to the section quickly. Instead, it is in line with ample testimony in this case that McCauley's response to safety complaints was to single people out.

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[35] Coming only 5 days after McCauley's physical assault of Scoles, with McCauley shining a light in Scoles' eyes, it would be reasonable for Scoles to fear for his safety in exiting the mantrip with McCauley standing beside him. Therefore, it is indeed questionable whether McCauley's order can be described as safe.

McCauley's response to Scoles' refusal to switch the d-rail further evinced animus. McCauley ordered Scoles to exit the mantrip and left him in the mine for over an hour and a half without a Solaris multigas detector. Tr. 80. Under federal and West Virginia law, a miner is required to have a three-gas detector if he is by himself. Tr. 81, 477. McCauley displayed indifference to placing Scoles in danger by leaving him without a Solaris. When Scoles mentioned that he did not have a Solaris on him, McCauley displayed indifference, stating, "Don't worry, somebody will be by here directly to pick you up. Tr. 80, 294.

Fazio's investigation of the mantrip incident and his subsequent actions further evince animus. The investigation report does not mention the allegations of assault against McCauley, even though they were highly relevant to the mantrip incident. RX-R. The report similarly omits the important fact that Efaw attempted to throw the d-rail, but was stopped by McCauley. RX-R. Fazio neglected to interview Hixenbaugh, who was seated beside Scoles. RX-R. Lastly, the suspension pending an investigation for a minor form of alleged insubordination displayed animus.

2. Knowledge

Respondent argues that Scott Martin, the individual who made the decision to suspend Scoles with intent to discharge, had no knowledge of Scoles' protected activities. Resp. Brief, at 18; Tr. 536-537. Similarly, Fazio claims that he did not know about the allegations of assault while he was investigating the mantrip incident. Tr. 522. These claims of ignorance concerning McCauley's assault of Scoles are at best not credible, and at worse, due to willful ignorance.

The Commission has held that "An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.* 6 FMSHRC 226, 230 n.4 (Feb. 1984), *aff'd sub nom. Brock ex rel. Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *see also Nat'l Cement Co. of Cal.*, 33 FMSHRC at 1068. In the instant case, Scoles reported the assault to Assistant Superintendent Hibbs on September 4. Tr. 60. McCauley told Hibbs about the mantrip incident shortly after it occurred. Tr. 422. Hibbs testified that he told Fazio about the mantrip incident on September 8, and Fazio began the formal investigation. Tr. 503-504. It defies logic that Hibbs would not have told Fazio about the allegations of assault that he was actively investigating and which involved the same two miners. If, somehow, Hibbs did not actually inform Fazio about the allegations of assault, such willful ignorance cannot provide a safe harbor for the operator. I find that mine management knew or should have known about the protected activity of Scoles' complaint of assault.

3. Coincidence in Time

With respect to coincidence in time between the protected activity and the adverse action, the Commission has noted, "[a] three week span can be sufficiently close in time", especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC,* 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Sec'y of Labor on behalf of Hyles v. All*

American Asphalt, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

In the instant case, Scoles was suspended pending an investigation within four days of Scoles' complaint about being assaulted by McCauley. He was then suspended with intent to discharge within 11 days of his complaint. As the courts have noted, the "fact that the Company's adverse action against [a miner] so closely followed the protected activity is itself evidence of an illicit motive." *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). I find that this proximity in time is strong evidence of discriminatory motive behind Scoles' discipline.

4. Disparate Treatment

There was little discussion in this case concerning disparate treatment. Without any development, Fazio testified that four employees had been discharged for insubordination. Tr. 517-518. He never described who these individuals were, what form of insubordination they engaged in, or when they were discharged. Hibbs testified that in the 13-plus years that he worked at the mine, he had never heard of anyone else being suspended with intent to terminate for insubordination. Tr. 571. Therefore, there is no credible evidence that any other miners have ever been legitimately discharged for insubordination.

This Court does not need to delve deep into the operator's disciplinary history to find that there was disparate treatment in this case. The Respondent has argued that it discharged Scoles for his insubordinate conduct on September 8, 2015 on the mantrip because he violated Employee Conduct Rule Number 4. RX-M; GX-5. Fazio testified that the 11 Employee Conduct Rules are "the most serious rules in our industry...[and] at our coal mine." Tr. 500. It has further described the rule as being enforced "first time every time." Tr. 508. However, in the facts of the instant case, there are two instances where another miner violated Rule Number 4, and was not subsequently disciplined in any fashion.

The full text of Employee Conduct Rule Number 4 states:

> Observance of work rules is a requirement for good labor-management relations. In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including: Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or official of the company.

RX-M.

First, on September 3, 2015, McCauley violated Rule Number 4's prohibition against abusive or threatening conduct when he harassed and then assaulted Scoles. The Respondent's cursory investigation and lack of any disciplinary or follow-up action towards McCauley illustrates that the rule was not applied evenly.

Another instance that arose in this case involved someone else on the mantrip violating Employee Conduct Rule Number 4 on September 8, 2015, within minutes of Scoles doing so, and that miner receiving no discipline as a result. Everyone who witnessed the mantrip incident testified that Tennant repeatedly yelled the word "fucking" when demanding that someone throw a switch or d-rail. Tr. 70, 74-75, 241, 417, 604. The word, "fucking," is undeniably an example of profane or obscene language. While this Court takes no position as to the propriety of using profanity in the mine, it is clearly forbidden under Rule Number 4.[36] Tennant was not disciplined in any manner following his use of profanity.

D. Affirmative Defense

Having found that the miner engaged in protected activities, suffered an adverse employment action, and that there was a nexus between the two, the operator may still avoid liability if it can show that it would have disciplined him for unprotected activity alone. *See MSHA obo Riordan v. Knox Creek Coal*, 38 FMSHRC 1914 (Aug. 2016). In the instant case, the Respondent argues that even if this Court finds discrimination, it was permitted to discipline Scoles due to the alleged insubordination. Resp. Brief, at 19. The Commission has explained:

> that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982); *see Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 320 (6th Cir. 2013). In reviewing 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 Commission has held 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) (citing *Haro*, 4 FMSHRC at 1937-38).

Id. at 1925.

In support of its argument, the Respondent cites *Kahn v. Sec'y of Labor*, 64 F.3d 271 (7th Cir. 1995) and *Sec'y of Labor obo Pollock v. Kennecot Barney's Mining Co.*, 22 FMSHRC 419 (2000)(ALJ) for the legal proposition that an operator may discharge a miner who engaged in protected activity if there is an allegation of insubordination. However, the Respondent's reliance

[36] Indeed, this Court is reminded of Judge Harner's important reminder concerning the propriety of using profanity in the mine: "this is a mine, not a nursery." *Sec'y of Labor obo Harrison v. Consolidation Coal Co.*, 37 FMSHRC 1497, 1507 (ALJ)(July 2015).

on these cases is inapposite. In *Kahn*, the discharged employee had a long history of being abusive and engaging in improper contact with other employees. The employee in *Kahn* was discharged for these improper acts. In *Pollock*, the miner had made a threat, and the judge found that it constituted reason enough for the termination.

In the instant case, Scoles was the victim of abuse, harassment, and assault. He did refuse an order from McCauley on September 8 in the mantrip, but to describe his conduct as insubordination that warranted immediate suspension and eventual termination is not reasonable. One must consider the context of the situation—described in detail *supra*—when reviewing Scoles' refusal to get out of the mantrip to throw the d-rail. McCauley had a history of being abusive and singling out Scoles. Five days before the mantrip incident, McCauley had physically assaulted Scoles in front of other miners. McCauley had not been reprimanded or separated from Scoles; instead, McCauley continued to single him out for harassment. McCauley stood above Scoles, shining a light in his face, and gave him an arbitrary order that was against established norms in the mine. A supervisor absolutely has the authority to direct subordinates, but he does not have absolute authority to issue arbitrary and demeaning orders in an attempt to provoke insubordination and punishment. See eg. *Cordero Mining, LLC*, 33 FMSHRC 3029 (Dec. 2011) (ALJ) (citing *Vought Corp.*, 273 NLRB 1290, 1295 n.31 (1984), *enfd.* 788 F.2d 1378 (8th Cir. 1986); *Reading Anthracite Co.*, 22 FMSHRC 298, 306 (Mar. 2000)) ("Generally, an employer may not provoke an employee to a point where the employee commits an act of insubordination and then rely on that insubordination to discipline the employee."). McCauley's conduct described in detail in this case from September 3-8, was of a supervisor abusing his authority in multiple ways that directly and indirectly compromised the safety of miners, in a public attempt to put a safety advocate in his place.

Scoles' conduct was at best a minor act of insubordination stemming from a provocation of an abusive supervisor who singled out safety advocates. I find that the proffered reason for Scoles' termination was pretextual. The Respondent cannot point to McCauley's act of animus towards Scoles' protected activity and somehow argue that it was the basis for its affirmative defense.

Remedies and Penalties

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274,District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988)(" *Local 2274").* The Commission has recognized that certain events, such as a bona fide reduction in force, can toll a miner's right to back pay, the burden to show that work is no longer available for the complainant lies squarely with the employer. *KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054-55 (Oct. 2009) (citing *Kenta Energy, Inc.*, 11 FMSHRC 1638 (Sept. 1989)). The operator must make this showing by a preponderance of the evidence. *Id.*; *C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, 1188 (2013). In the absence of evidence identifying any basis for tolling or other restrictions on lost wages, Complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988).

Having found that Respondent discriminated against Scoles in violation of the Mine Act, the next issues are the proper remedies and civil penalties. With respect to remedies, the Secretary argues that Scoles should be awarded $16,324.80 in estimated back wages, plus pre-judgment interest. Sec'y Brief, at 29-30. In support of this estimate, the Secretary provides several exhibits and testimonial evidence that show that Scoles' regular rate of pay was $28.64/hour, his overtime rate of pay was $42.96/hour, and his Saturday rate of pay was $42.96/hour. Tr. 87-88, 90, 92-94; PX-1, PX-10. The Secretary argues that Scoles was not at work for 61 days due to the discrimination, but that since the mine was idled during a portion of that time, the estimate was reduced accordingly. Sec'y Brief, at 29-30. The evidence presented shows that Scoles worked 8 hours of regular time and two hours of overtime each weekday, as well as every Saturday. An accompanying chart submitted by the Secretary breaks down the amounts by day. PX-10.

In addition to backpay, the Secretary requests that the Respondent be ordered to expunge any documentation, records or references to the September 3, 2015 and the September 8, 2015 incidents from Scoles' personnel file. Sec'y Brief, at 30.

The Respondent argues that the Complainant's estimates contain errors and that it cannot be the basis of any award. Resp. Brief, at 20-21. In support of its argument, it submits a signed affidavit by Christopher Fazio that stated that Scoles should only be paid for the 40-day suspension period, that the mine was idled on 10 days, and that the overtime hours would have been fewer than those submitted by the Secretary. Resp. Brief, Exhibit A. Neither the affidavit nor the brief provide an estimate of Scoles' backpay during the period that he was out of work.

The Secretary has credibly shown that Scoles is entitled to $16,324.80 in estimated back wages, plus pre-judgment interest. [37] Presumably, Fazio's affidavit was intended to serve as evidence in support of a tolling argument. However, it falls short. I found Fazio to be a less than credible witness at hearing, and his assertions in the affidavit do not make a sufficient showing that Scoles' backpay should be reduced due to days the mine may have been idled. It should be noted that if the mine was idled as Respondent claims, and if Scoles' backpay should have been reduced, the Respondent would have been the party in possession of ample evidence to prove such. Its submission of a short, inconclusive, affidavit by a less than credible witness does not meet the evidence requirements.

The Secretary further proposes a civil penalty of $30,000. The Respondent argues that its level of negligence and its following a standard investigative procedure should lead to a lower civil 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

[37] The interest should be calculated using the method described in *Secretary on Behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988), *aff'd*, 895 F.2d 773 (D.C. Cir. 1990).

Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The court's assessment here is independent, and the Secretary's proposal "is not a baseline or starting point," that the court has used in its assessment. *Sec'y of Labor, MSHA v. The American Coal Co.*, LAKE 2011-701. 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 instant case is an extremely egregious case that warrants a civil penalty of $40,000. At the time of the discrimination in this matter, the Mine had a history of three prior 105(c) violations, and its controller had a history of twelve prior 105(c) violations, justifying a more substantial penalty. Furthermore, the mine was in the largest category of mines, and the controlling entity in the largest category under MSHA's tables in Part 100.3. Complaint, Exhibit B. There is no evidence in the record that the penalty will affect the operator's ability to continue in business.

The gravity of the Respondent's conduct in this case was extremely severe. A miner made a safety complain to his supervisor and his supervisor proceeded to physically assault him in front of other miners. The operator then found a pretextual reason to fire the miner who suffered and complained about the assault.

The history of coal mining in this country is one marked by violence and tragedy. The Mine Act was passed by Congress to mitigate as much as possible the significant health and safety risks associated with the inherently dangerous activity of mining. Section 105(c) of the Mine Act, which protects miners in making health and safety complaints is central to the proper functioning of the Mine Act. Congress stated that:

> If our national mine safety and health program is to be truly effective, miners will have toplay an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181, at 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). Section 105(c) was intended to ensure that miners' rights to make complaints or refuse work were not chilled by any company action. Indeed, the Senate Committee stated that it "intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any

way in exercising any rights afforded by the legislation." *Id.* This Court can imagine few things that would chill a miner's ability to speak up over safety complaints more than a physical assault by a supervisor followed by a provocation followed by a termination.

The level of negligence in this case was also extremely high, bordering on reckless disregard. Scoles promptly brought the assault to mine management's attention, and the response was open contempt for the complaint, followed by a process that this court almost hesitates to label an investigation due to its slipshod approach and unreasonable conclusion. When Scoles initially brought his complaint of the assault to Assistant Superintendent Hibbs and asked for a meeting, Hibbs responded, "you all don't tell me when we're going to have a meeting. I instruct when we're going to have a meeting." Tr. 60, 544. The Respondent then did not separate McCauley from Scoles, or suspend him pending an investigation. It interviewed a few people briefly, and reached a conclusion that is contrary to all the evidence presented. The investigation was so cursory that McCauley testified that he was never even aware that an investigation had been held. Tr. 400.

The Respondent's complete disregard for Scoles' safety can clearly be seen when comparing the Respondent's actions following the assault, where a miner's health and safety was actually put at risk, to their actions following what can at worst be described as a minor act of insubordination. Following the mantrip incident, Scoles was suspended pending an investigation, an investigation was quickly held, where almost every detail of the encounter was laid out,[38] and Scoles was promptly suspended with intent to discharge.

The Respondent made no effort to abate or address the health and safety issues complained of by Scoles. It has continued to cast the issue as stemming from two individuals not liking each other, without any regard for the power dynamic of the supervisor-subordinate relationship. The Respondent's attitude towards these matters of health and safety, as being permissible so long as they stem from a supervisor's dislike of a miner, is quite troubling. If a supervisor puts a miner's health or safety at risk, the company cannot ignore it simply because there is unilateral or mutual dislike between the individuals. I independently assess a civil penalty of $40,000.

CONCLUSION AND ORDER

Based on the foregoing, I find that Respondent violated §105(c) of the Act by discriminating against Scoles for engaging in protected activity.

Respondent is **ORDERED** to pay Scoles backpay in the amount of at $16,324.80, plus pre-judgment interest. Further, Respondent shall expunge all disciplinary and other records of the September 2, 2015 and September 8, 2015 incidents from his personnel file.

[38] It should be noted that one detail that was curiously absent was the assault that occurred several days prior.

It is **ORDERED** that Respondent post this decision at the Harrison County Mine in a conspicuous unobstructed place where notices to employees are customarily posted, for a period of 60 days. It is **ORDERED** that Harrison County Coal management personnel and supervisors undergo comprehensive specialized training by MSHA personnel in the statutory rights of miners under Section 105(c) of the Act.

It is **FURTHER ORDERED** that Respondent pay a civil penalty of $40,000.00 within 40 days of this decision to the Secretary of Labor.[39]

Kenneth R. Andrews
Administrative Law Judge

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George M. Scoles, 70 Bloomfield Street, Rachel, WV 26587

Michael Phillippi, Union Representative, 310 Gaston Avenue, Fairmont, WV 26554

[39] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390