FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 28, 2015

MICHAEL K. MCNARY, Complainant, v. ALCOA WORLD ALUMINA, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2015-279-DM SC-MD 14-05 Mine: Bayer Alumina Plant Mine ID: 41-00320

SUMMARY DECISION

Before: Judge Moran

This discrimination proceeding is before the Court under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2012) ("Mine Act"). Michael K. McNary ("Complainant" or "McNary") alleges that his employer, Alcoa World Alumina, Inc., ("Respondent" or "Alcoa") discriminated against him in response to his protected activities as a miner.

Respondent has filed a Motion for Summary Decision, providing two grounds on which the motion should be granted: first, that Complainant did not timely file his complaint; and second, that Complainant failed to identify an adverse action in response to any protected activity. Related to this second ground, Respondent also asserts that several of the claims in the complaint were not asserted in the original complaint to the Mine Safety and Health Administration ("MSHA"), nor were they investigated by MSHA. Therefore, those claims are not properly before the Court, and the remaining allegations are insufficient to survive the motion. For the reasons that follow, because McNary never established any adverse action cognizable under the Mine Act, the Court grants Respondent's Motion for Summary Decision.

I. Background

Michael K. McNary is a gland manager in the Digestion Department at Alcoa's Bayer Alumina Plant in Point Comfort, Texas. Resp't's Ex. E[1] at 1. He has also been a miners' representative since June 2013. *Id.* As the second lead plantwide representative, one of McNary's responsibilities is to accompany MSHA inspectors when the lead plantwide miners'

[1] Respondent's Exhibit E contains McNary's interview with MSHA Special Investigator Travis Shore.

representative is unavailable. Resp't's Ex. A at 19 ("McNary Dep."). [2] On January 8, 2014, McNary was going through his work route when he saw a valve on the 5L5 pump blowing out hot slurry, which can reach a temperature of 480 degrees. McNary Dep. at 52, 55. Other Alcoa employees were in the area, and Steve Emig, the Digestion supervisor, arrived and helped them put on special suits to protect them from the slurry so they could knock out (close) the pump, but they did not have tape to prevent slurry from getting under their gloves. McNary Dep. 55; Resp't's Ex. B at 10 ("Emig Dep."). Emig approached McNary, who was standing next to another miners' representative, Delton Luhn, and asked McNary to get tape from the tool room. McNary Dep. 56. McNary found none, and after leaving the tool room, he asked another miner to ask Kelly Grones, the health and safety manager, to go to the 5L5 pump. McNary Dep. 56-57. Before he could return to the 5L5 pump, however, McNary was asked by another supervisor, Miguel Gonzales, to check on another pump to see if it was blowing out. *Id.* at 57. McNary checked the other pump, which was not blowing out, on his way back to the 5L5 pump. *Id.* at 57-58.

Upon McNary's return, he saw that two employees had attempted to close the pump. *Id.* at 63. McNary did not see them enter the area with the hot slurry, but suspected that Emig had sent them in to attempt to close the pump. *Id.* at 62. McNary became concerned for the employees' safety and gestured to his supervisor, Emig, to come to the side. *Id.* at 59. McNary told Emig that Kelly Grones, the health and safety manager, was on her way over. *Id.* at 62. In McNary's deposition, he recounted Emig's reaction and the subsequent confrontation:

> [W]hen I told him that Kelly was on her way over there and he said, "You shouldn't have . . . called anyone, because this is my department and I direct the workforce," and I asked Steve [Emig], "Well, why did you direct . . . the operators into the hot slurry?" And Steve says, "I didn't direct them in there." I say[], "Well, you watched them go in there and you didn't stop them." And I asked him, "How did they get in there?" And Steve said, "They volunteered."
>
> . . . .
>
> When . . . Steve said they volunteered to go in there . . . I basically told Steve, "You watched them go in there. You didn't stop them."
>
> And Steve . . . said, "You shouldn't be involved in these matters." And I told him, "I'm an MSHA rep and I'm concerned for the safety of these operators. I should be. I should be concerned with these matters."
>
> And that's when Steve told me, "I will remove you as MSHA rep. I will remove you . . . from this department, and I will remove you from the plant."

Id. at 62-63.

[2] Mr. McNary and the digestion supervisor, Steve Emig, were each deposed on July 8, 2015. Alcoa has attached selections from those depositions to its motion as Exhibits A and B, respectively. The Court will cite to the original page numbers of the depositions.

McNary filed a complaint with MSHA on January 24, 2014, alleging discrimination in violation of section 105(c)(1) of the Mine Act. In his complaint, the only adverse action he identified was that he was verbally threatened by Emig. Resp't's Ex. D[3] at 2. During his interview with the MSHA Special Investigator, McNary identified three other adverse actions: Emig sent him to get tape to get him away from the scene; Miguel Gonzalez asked him to check another pump to get him away from the scene; and his overtime had been questioned in early December 2013, over a month before the January 8, 2014, incident. Resp't's Ex. E at 2.

MSHA sent a letter to McNary on May 2, 2014, informing him that MSHA would not be pursuing his case, and stating that McNary had thirty days to bring his own case before the Commission. McNary filed a Complaint with the Commission ten months later on March 2, 2015.

II. Respondent's Motion for Summary Decision

Alcoa first argues in its memorandum in support of its motion for summary decision that McNary's complaint is untimely because he filed it nine months after the statutory deadline. Resp't's Mem. Supp. Summ. Decision 9. In support of this position, Alcoa argues that McNary had thirty days to file his Complaint following receipt of MSHA's letter stating that MSHA would not be pursuing a discrimination case on his behalf, and McNary has shown no justifiable circumstances to excuse the late filing. *Id.*

Alcoa also argues that McNary has not alleged any adverse action in this case. Preliminarily, Alcoa asserts that the only adverse actions properly before the Court are those "which were included in McNary's original complaint to MSHA or those based on evidence developed during the Secretary's investigation of the Complaint." *Id.* at 11 (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991); *Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997)). McNary alleged several adverse actions in his amended complaint, but only four were investigated by MSHA: (1) a December 2013 overtime issue; (2) Emig's request to McNary to get tape; (3) Gonzalez's request to McNary to check another pump; and (4) Emig's threat to remove McNary. *Id.* Accordingly, Alcoa argues that those are the only four actions properly before the Court.

Alcoa then argues that none of those four actions constitutes an adverse action motivated by his protected activity. First, Alcoa asserts that McNary's allegation that he was denied overtime or had his overtime questioned in December 2013 fails for three reasons: he was not actually denied overtime, his overtime was questioned because he was not seeking pre-approval for overtime, and he has provided no evidence that "Alcoa took any adverse action against him related to overtime in response to his protected activity on January 8, 2014." *Id.* at 18. Additionally, McNary worked 48 hours of overtime for the seven weeks before January 8, 2014, 42 hours in the seven weeks after that date, and 44 hours in the seven weeks after that. *Id.* Because his overtime did not change dramatically after the January 8, 2014, incident, Alcoa asserts that there is no evidence that he was denied overtime due to that event. *Id.*

[3] Respondent's Exhibit D contains McNary's original discrimination complaint to MSHA.

As for the two requests from McNary's supervisors, Alcoa states that Emig's request to get tape was a reasonable one, and could not have been intended to subvert McNary's role as a miners' representative because Delton Luhn, the miners' representative for that department, remained at the scene of the pump blowout. *Id.* at 14. Gonzalez's request that McNary check another pump for a blowout on his way back to the scene was similarly not an adverse action. Even if it had been intended to interfere with McNary's miners' representative duties, Alcoa argues, McNary was able to "visually assess it *on his way back to an active emergency scene* at the [5L5] pump." *Id.* at 15.

Finally, regarding Emig's threat, Alcoa states that Emig had threatened to remove McNary from the scene because he attempted to take charge of a situation when he did not have the authority to do so. *Id.* at 15. Additionally, although Emig yelled during the emergency situation, McNary was never removed from the scene, "as a miners' representative or from the plant, or disciplined in any way, that day or any other." *Id.* Emig's threat did not subject McNary to any "discipline or detriment in his employment relationship." *Id.* (citing *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2540 (Dec. 1990)). Consequently, Alcoa argues that the threat was not an adverse action motivated by McNary's protected activity.

III. Complainant's Response to the Motion for Summary Decision

On September 9, 2015, Mr. McNary filed his response to Alcoa's motion for summary decision.[4] McNary first asserts that he filed a complaint with the Commission in June 2014, not in March 2015. Resp. to Def.'s Mot. Summ. Decision 2-3. In support, he provides emails between him and a member of the Commission's docket office from June 2014, and McNary further states that he was in contact with the Commission periodically, but was given no explanation for why his case was not docketed until March 2015. Resp. to Def.'s Mot. Summ. Decision 23-24.

Regarding the additional allegations in his amended complaint that were not investigated by MSHA, McNary states that, although "all were not mentioned in his original MSHA complaint or brought to MSHA's attention during the Secretary's investigation," they should not be discredited. *Id.* at 3. At the time he was interviewed by MSHA, he did not understand what "adverse actions" were and was not prepared for the investigation. *Id.* at 3-4. McNary lists several additional allegedly discriminatory actions that he did not bring up during the MSHA investigation, including: (1) after he threatened to call MSHA from the hospital after a workplace injury in December 2011, he was denied "return to work" privileges; (2) his activities as an MSHA Representative resulted in Alcoa denying him fair overtime; (3) he was harassed by his coworkers; (4) his coworkers tried to fight him under the direction of his supervisor; (5) his department supervisors created a hostile work environment; (6) his supervisor kicked him out of safety meetings; (7) he suffered humiliation, anguish, and a relapse of post-traumatic stress disorder; and (8) his character was at odds with the plant manager and the human resources

[4] McNary's response and supporting exhibits were filed by mail on September 9, 2015. A day before the Court received these, on September 8, 2015, McNary emailed the Court a corrected section of his response titled "Response to Defendents [sic] Proposed Findings of Fact and Motion for Summary Decision," which he submitted to correct typos in the original submission. The Court accepted the corrected version.

personnel. *Id.* at 4. McNary argues that he has been "under the fog of protected activity" after his hospital stay in December 2011 arising out of burns suffered at Alcoa. *Id.* at 27; *see also id.* at 18-19. Because he has almost continuously suffered adverse actions since his hospital stay, McNary appears to argue that all of the adverse actions he has complained of, not just those investigated by MSHA, are properly before the Court.

As for Emig's threat to McNary on January 8, 2014, McNary states that he intervened in an unsafe act by telling Emig that Kelly Grones, the Health and Safety Manager, was on her way to the scene, and this should not have resulted in adverse actions or threats of reprisal. *Id.* at 4. When McNary told Emig that, as a miners' representative, he should be involved when miners' lives are at risk, he should not have been discouraged from rendering his opinions, and, McNary asserts, the hostility and chilling effect on miners was apparent. *Id.* at 4. Finally, McNary argues that his complaint was not simply that Emig yelled at him. His complaint was that Emig said that McNary "should not have called anyone," that it was Emig's department, that McNary should not be involved in the matter, and the ultimate threat that he would be removed as a miners' representative, from the department, and from the plant. *Id.* at 4-5.

McNary argues that the threat constituted harassment, tacitly recognized by the Commission in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982). Resp. to Def.'s Mot. for Summ. Decision 29. McNary states that hostility to protected activity alone is an adverse action, and that he was not concerned about being asked to get tape so much as he was concerned about the *reason* he was asked to do so, which he states was to get him out of the area so Emig could send miners into harm's way, with inadequate protection, knowing that the remaining miners' representative, Delton Luhn, was "inexperienced at recognizing the potential hazard in its entirety." *Id.* Similarly, McNary argues that the other supervisor, Gonzalez, conspired with Emig prior to asking McNary to check another pump on his way back to the 5L5 pump. *Id.*

IV. Additional Filings

On September 8, 2015, Alcoa filed a reply to McNary's response, addressing two points. First, Alcoa concedes that the Court is likely to excuse McNary's late filing of his complaint given McNary's June 2014 communications with the Commission, even if those, too, were initiated more than thirty days after McNary's receipt of MSHA's May 2, 2014, letter. Resp't's Reply to Pet'r's Resp. to Alcoa's Mot. for Summ. Decision 2. Alcoa then argues that McNary's evidence that he contacted the Commission in June 2014 provides further reason to restrict his current action to the adverse actions investigated by the Secretary, because even at the time of the emails, McNary did not mention that he was denied overtime or any of his other claims arising between 2011 and 2013, prior to the January 8, 2014, incident. *Id.* Alcoa also addresses the claim that McNary received less overtime than another miner, *Id.* at 2-3, which, as discussed below, is not properly before this Court.

McNary filed two additional responses after Alcoa's reply. In the first, filed on Monday, September 14, 2015, he renews his argument that "the court should take all claims, accusations and complaints into consideration despite Alcoa's argument that it was not raised within the MSHA investigation." Pet'r's Rebuttal to Resp't's Reply to Pet'r Reply of Summ. Decision 2. In support, McNary states that the actions taken by Alcoa amount to one to two years of

continuous harassment and discrimination. *Id.* The remainder of his rebuttal, and the entirety of his additional response, filed on Monday, September 21, 2015, address matters that are not germane to this proceeding. *See generally* Add'l Resp. to Def.'s Mot. Summ. Decision.

V. Discussion

This discrimination complaint is brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c). In order to establish a prima facie violation of section 105(c)(1) of the Mine Act, a complainant must show "(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). In order to rebut a prima facie case, the operator must either show that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

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

As this case is before the Court on a Motion for Summary Decision, Commission Procedural Rule 67(b) governs, providing the grounds upon which a motion for summary decision shall be granted:

> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long analogized Rule 67(b) to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Accordingly, the Court must draw all inferences in the light most favorable to the nonmoving party. *Id.* (citations omitted). A genuine issue of material fact exists when the non-moving party produces evidence that would allow a reasonable fact-finder to return a verdict in its favor. *Greenberg v. Bellsouth Telecomm., Inc.*, 498 F.3d 1258 (11th Cir. 2007). If Alcoa prevails on either of the grounds asserted in its motion, that McNary's complaint is untimely or that he did not identify any adverse action motivated by his protected activity, Alcoa is entitled to summary decision.

A. McNary's Complaint Is Not Untimely

McNary's Complaint was filed nine months after the original due date following MSHA's decision not to proceed with his case, but circumstances exist in this case to excuse McNary's failure to file a claim within 30 days of his receipt of MSHA's letter. Commission Procedural Rule 41(b) states that a "discrimination complaint may be filed by a complaining miner . . . within 30 days after receipt of a written determination by the Secretary that no violation has occurred." 29 C.F.R. § 2700.41(b). Section 105(c)(3) has this same 30 day requirement. *See* 30 U.S.C. § 815(c)(3).

The legislative history of the 30 day requirement states that this "limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement." S. Rep. No. 95-181, at 37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3437. The Commission has stated that those circumstances "could include situations where a miner is misinformed or misled as to his compensation rights and procedural responsibilities, *or has taken some timely, although incorrect, action to vindicate those rights*, or presents some other potentially justifiable excuse for late filing." *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230 (May 1991) (emphasis added). However, where serious delay "prejudice[s] the respondent's right to due process in an adversarial proceeding . . . [that] may override the opportunity for vindication of the complainant's rights." *Id.* at 1230-31.

MSHA sent a letter dated May 2, 2014, to McNary informing him that MSHA would not be filing a discrimination case with the Commission on his behalf. Resp't Ex. F at 1. In June 2014, McNary engaged in an email conversation with a member of the Commission's docket office, although, from the emails actually received by the Commission and provided by McNary, it is unclear what relief he was requesting. *See generally* Compl't's Ex. 9. McNary first attempted to email the Commission on Thursday, June 12, 2014, stating clearly that he had been threatened in response to "representing miners['] safety," and that MSHA had not found discrimination. *Id.* at 3. Unfortunately, he emailed the wrong address, and he made the same mistake the following day. *Id.* at 4. Although it is unclear from the evidence provided how McNary eventually contacted the Commission, the Commission's docket office sent McNary a responsive email on June 16, 2014, requesting additional information from him. *Id.* at 5. On August 14, 2014, he emailed the Commission again, *Id.* at 8, and McNary contends that he contacted the Commission multiple times by phone, but was "always informed it is in the Judge's hands." Resp. to Def.'s Mot. Summ. Decision 24.

If McNary's first communication with the Commission in June 2014 was late, it was excusably so, and McNary subsequently attempted to vindicate his rights several times, which the Court finds is a justifiable excuse for the late filing. As Alcoa has alleged no prejudice due to the delay, there are no competing interests of fairness to balance. Accordingly, the Court excuses the late filing of McNary's complaint with the Commission.

B. McNary Has Alleged No Adverse Action in Response to His Protected Activity of January 8, 2014

McNary alleged four adverse actions in his original complaint to MSHA and associated MSHA interview: his supervisor, Steve Emig, threatened him; Emig sent him away from the broken pump to get tape; another supervisor, Miguel Gonzalez, asked him to check another pump to get him away from the scene; and his overtime was questioned in early December 2013.

As stated earlier, a miner can establish a prima facie violation of section 105(c)(1) of the Mine Act if he can show that he engaged in protected activity and suffered an adverse action, and the adverse action taken against him by the mine operator was motivated in any part by that protected activity. Alcoa concedes that McNary "engaged in protected activity in his role as a miner's representative on January 8, 2014." Mem. Supp. Summ. Decision 13. Therefore, the Court is left with two issues: Did McNary suffer an adverse action, and, if so, was that adverse action motivated in any part by his protected activity?

When considering allegations made in a 105(c)(3) complaint, the Court may only consider those matters included in the Secretary's investigation of the miner's prior complaint to MSHA: "If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the . . . complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met." *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991). Consequently, all matters listed in McNary's Amended Complaint *not investigated by the Secretary in this case* are not properly before the Court. The Court has jurisdiction to review only the instances of alleged discrimination identified by McNary in his original discrimination complaint to MSHA and his MSHA interview, as those are the only matters that MSHA investigated.

The Commission states that "an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). The Commission has also recognized that, although "discrimination may manifest itself in subtle or indirect forms of adverse action . . . an adverse action 'does not mean any action which an employee does not like.'" *Id.* at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *See Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

The Supreme Court in *Burlington Northern* articulated the following standard for finding an adverse action: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which [in the context of Title VII retaliation claims] means

it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 428 F.3d 1211, 1219 (D.C. Cir. 2006)). Material adversity is required because "it is important to separate significant from trivial harms." *Id.* In the context of the present case, Alcoa's actions will be found to be adverse actions if they would dissuade a reasonable miner from engaging in protected activity.

The adverse actions before the Court, taken separately or together, do not rise to the level of being "materially adverse." The first two adverse actions that McNary alleges are that Emig and Gonzales procured his absence by sending him away from the area of the broken pump so that they could send miners into harm's way. McNary has not provided any evidence that he was sent away because he was a representative. In fact, if Emig and Gonzales had wished to remove McNary from the area because he was a miners' representative, they would have done the same to Delton Luhn, the other miners' representative at the 5L5 pump at that time. Instead, Luhn, the miners' representative *for that section*, stayed in the area with the broken pump, although McNary asserts that this was to take advantage of Luhn's inexperience. *See* Resp. to Def.'s Mot. for Summ. Decision 29. Regardless, asking McNary to get tape for the protective suits and to check the status of another pump do not amount to materially adverse employment actions because they would not dissuade a reasonable miner from engaging in protected activity.

The third adverse action McNary alleges, the questioning of his overtime in early December 2013, fails because that also does not rise to the level of a materially adverse action, nor is it traceable to his protected activity on January 8, 2014. McNary had been taking overtime and was questioned about who had approved it: He admitted that no one had. McNary Dep. at 44. He complained to the MSHA inspector that "it was because [he] was a miner's rep. that they were trying to cut [his] hours," and that he had never had to get permission for overtime in the past. Resp't Ex. E at 2. McNary never alleged to MSHA that he was being denied fair overtime either before or after the January 8th event, and there is no indication that MSHA investigated such allegations. Consequently, those issues are not before the Court. As for questioning McNary's overtime in early December 2013, that incident is not traceable to McNary's protected activity on January 8, 2014, nor can Alcoa's requiring McNary to seek approval for his overtime be considered an adverse action under these circumstances.

The Court now turns to McNary's fourth alleged adverse action, Emig's threat on January 8, 2014, which McNary has equated to harassment. In *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Commission stated that "harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act." Harassment can "not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights." *Id.* at 1478. The Commission stated, however, that

> [t]his is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.

Id. at 1479 n.8.

Looking at the circumstances in this case, it is clear that Emig's threat to McNary does not amount to prohibited harassment under the Mine Act. Emig's vague threat, not clearly directed at protected activity, occurred during an emergency situation. McNary, in his deposition, recalled the exchange that immediately followed the threat:

> A. And the MSHA . . . inspector, Brett Barrett, was walking up a couple of steps behind . . . Carlos Delgado, and I informed Carlos and Brett that Steve had just threatened me. And Carlos said, "Yeah, I heard it."
>
> Q. And then what happened?
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> A. Steve [Emig] started . . . explaining something to . . . Carlos and Brett that actually didn't happen that way. And, yes, I butted in.
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> . . . .
>
> A. Well, actually, he was telling Carlos and Brett that he didn't threaten me, which I know he did threaten me. And I said, you know, "it didn't happen that way." And Steve says, "I'm done with you."
>
> Q. And then what happened?
>
> A. And I asked Steve . . . , "Are you done with me? Are you done with me for good?" Because the threat was still there. He had threatened me prior. And when I asked him, "Are you done for good", I'm asking him, are you carrying out your threat? And he says, "No, I'm not done for good."

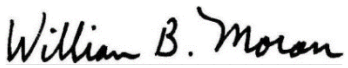
McNary Dep. at 64. As McNary stated in his deposition, when he asked Emig if he would be carrying out his threat, Emig assured McNary that he would not. *Id.* McNary, in his response to Alcoa's motion for summary decision, recharacterized this exchange, stating that by saying that he was "not done for good," Emig was instead keeping the threat of reprisal alive. Resp. to Def.'s Mot. Summ. Decision 8. However, even inferring that Emig's threat remained live in that moment, subsequent events quickly showed that McNary was in no danger of retribution. McNary was not removed in any way that day, he is still employed at Alcoa in the same position, he remains a miners' representative, he was never disciplined for the incident, and Emig has not threatened him at any point in the year and a half between that day and the taking of McNary's deposition. McNary Dep. at 76-78. Quite simply, McNary never suffered adverse action from any of his protected activity.

VI. Conclusion

Respondent's Motion for Summary Decision is **GRANTED**. There is no dispute of material fact in this case, and Respondent is entitled to summary decision as a matter of law. Making all inferences in favor of the nonmoving party, Complainant has not presented evidence of any adverse action properly before the Court that would dissuade a reasonable miner from engaging in protected activity.

Should Mr. McNary wish to appeal the Court's determination, pursuant to Commission Procedural Rule 70(a), 29 C.F.R. § 2700.70(a), he may file a petition for discretionary review, which should be received by the Commission within 30 days of the issuance of this decision.

This discrimination proceeding is hereby **DISMISSED WITH PREJUDICE**.



William B. Moran
Administrative Law Judge

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