FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 10 2018

MICHAEL WILSON, Complainant,	DISCRIMINATION PROCEEDING
	Docket No. KENT 2016-0319-D MSHA Case No. MADI-CD-2016-02
v.	
ARMSTRONG COAL COMPANY, INC., Respondent.	Mine: Parkway Mine Mine ID: 15-19358

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding is properly before me upon a Complaint of Interference ("Complaint") filed by counsel for Michael Wilson ("Wilson" or "Complainant") on April 18, 2016, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act" or "Mine Act"). 30 U.S.C. § 815(c)(3). Armstrong Coal Company, Inc., ("Armstrong") is subject to the Act and to the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission"). The Administrative Law Judge ("ALJ") has the authority to review this case and issue a decision.

The Record

Attached as exhibits to the Complaint filed by Wilson's counsel on October 29, 2015, were copies of the original Discrimination Complaint, MSHA Form 2000-123, and Discrimination Report, MSHA Form 2000-124, (Exhibit A); A letter from MSHA to Wilson dated March 18, 2016, declining to file a discrimination case with the Commission, with distribution to Armstrong and to counsels Tony Oppegard and Wes Addington (Exhibit B); and Mine Citation No. 9045905, issued to Armstrong on October 21, 2015, under 30 CFR §§ 40.4, 40.3 for failure to post a listing of Miners' Representatives that included their addresses and telephone numbers (Exhibit C).

On July 26, 2017, Respondent Armstrong, by counsel, filed a Motion for Summary Disposition pursuant to Commission Procedural Rule 67, 29 CFR § 2700.67, requesting that the case be dismissed as a matter of law. ("Armstrong's Motion"). Attached were five exhibits:

Exhibit 1: Letter of October 29, 2015, from MSHA to Parkway mine personnel transmitting the discrimination complaint, with a copy of the Discrimination Report only, MSHA Form 2000-124;

Exhibit 2: Letter of February 17, 2016, from MSHA to Michael Wilson declining to file a discrimination case with the Commission with distribution of a copy only to Armstrong;

Exhibit 3: Emails between attorneys on March 15, 2017;

Exhibit 4: A copy of mine information from the MSHA Mine Data Retrieval System showing the status of the Parkway mine as abandoned as of April 4, 2017;

Exhibit 5: Affidavit of Steven James DeMoss dated July 24, 2017.

In early August 2017 the parties in the instant case, and representatives in several other discrimination cases scheduled for hearing in the same time frame, requested a continuance based on pending cross-motions for summary decision, the desirability of settlement discussions, and to complete discovery in two of the dockets. On August 8, 2017, the scheduled hearings were continued.

On August 19, 2017, Wilson's Response in Opposition to Armstrong Coal's Motion for Summary Decision ("Wilson's Opposition") was filed. Attached were eight exhibits:

Exhibit 1: Another copy of the Citation No. 9045905;

Exhibit 2: Responses of Michael Wilson to Armstrong Coal's 1st Request for Admissions, served via electronic mail on July 10, 2017;

Exhibit 3: Answers of Michael Wilson to Armstrong Coal's 1st set of Interrogatories, served via electronic mail on July 10, 2017;

Exhibit 4: Responses of Michael Wilson to Armstrong Coal's 1st request for Production of Documents, served via electronic mail on July 10, 2017;

Exhibit 5: Supplemental Response of Michael Wilson to Armstrong Coal's 1st Request for Production of Documents served via electronic mail on August 2, 2017;

Exhibit 6: Notice of Deposition of Michael Wilson;

Exhibit 7: Notice of Deposition of Steve DeMoss; and

Exhibit 8: Listing of Armstrong mines from MSHA's Mine Data Retrieval System as of August 19, 2017.

On August 21, 2017, Armstrong's Reply to Wilson's Response in Opposition to Armstrong's Motion for Summary Disposition ("Armstrong's Reply") was filed. This was followed on August 22, 2017, by the Sur-Reply of Michael Wilson ("Sur-Reply"). By email on September 20, 2017, counsel for Wilson announced the intention to file a cross-motion for summary decision.

Wilson's Cross-Motion for Summary Decision ("Cross-Motion") was filed on October 6, 2017. Attached were the depositions of Steven James DeMoss ("Dep. DeMoss") and Michael "Flip" Wilson ("Dep. Wilson"). Also attached were eleven exhibits; only the following had not been attached to other filings:

Exhibit 4: Statement of Interview, Michael "Flip" Wilson, dated November 2, 2015;

Exhibit 5: Armstrong's Response to Complainant's First Set of Interrogatories served electronically on July 13, 2017;

Exhibit 6: List of Miners Representatives designated by MSHA Form 2000-238 dated May 19, 2014;

Exhibit 8: List of Miners Representatives with handwritten notation "Per verification by MSHA 10/16/15";

Exhibit 9: Representation of Miners Designation Form of Mike Wilson, MSHA Form 2000-238;

Exhibit 10: Letter dated October 16, 2015, from MSHA District Manager to Armstrong listing the names of Miners Representatives for Armstrong Coal Company operations, including the Parkway Mine; and

Exhibit 11: Letter dated February 28, 2014, to Armstrong with the determination that Mike Wilson had been properly and lawfully designated as a miners' representative at the Parkway Mine.

Armstrong's Response to Wilson's Cross-Motion for Summary Decision ("Response to Cross-Motion") was served electronically on October 16, 2017. Wilson's Reply to Armstrong's Response to Cross-Motion for Summary Decision ("Wilson's Reply") was served via electronic mail on October 25, 2017.

Issues

The pleadings and evidence of record raise the following issues:

- Timeliness of responses to discovery requests for admissions;
- Timeliness of filing the Complaint of Interference;
- Whether the relief sought is moot;
- The legal test for interference; and
- Whether Respondent interfered with Complaint's statutory rights as a Miners' Representative.

Relief Sought

In the Discrimination Report of October 29, 2015, Complainant requested:

> I want Armstrong Coal to be fined for violating section 105(c); I want the FMSHRC to issue a cease and desist order requiring the company to stop interfering with my statutory rights as a representative of miners; and I want all management personnel at the Parkway mine to have to take training from MSHA on the statutory rights of miners' reps.

Complaint, Exhibit A, P. 2.

In the Complaint of April 18, 2016, filed by Wilson's counsel the relief requested was:

1. Find that the action of Armstrong Coal in removing the addresses and telephone numbers of the miners' reps at the Parkway mine, and the company's failure to correct this error when it was brought to its attention by Wilson, interfered with Wilson's statutory rights as miners' reps and violated the Mine Act's anti-discrimination provision.

2. Order Armstrong's mine management to keep current the contact information for all miners' reps at the Parkway mine, as required by 30 CFR §40.4.

3. Impose a civil money penalty against Armstrong for its act of interference found herein.

4. Order Armstrong Coal to reimburse Wilson for all expenses incurred in the institution and litigation of this case, including attorney fees.

5. Order Armstrong Coal to post the Commission's decision in this case at the Parkway mine – and at all of Armstrong's other mines in western Kentucky – in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 consecutive days.

6. Order any additional relief which may be necessary to make Wilson whole, and such other relief as the Commission deems just and proper.

Complaint, p. 5.

Subsequently, the Parkway mine was abandoned as of April 4, 2017. (Armstrong's Motion, pp. 1, 3-5; Exhibits 4, 5). The relief was then amended:

- That Armstrong post the Court's decision at all of its other mines and facilities;

- That DeMoss and other Armstrong management personnel be required to take training in the statutory rights of miner's reps;
- That Armstrong comply with the requirements of 30 CFR §40.4 at all of its mining entities (this could also be styled as a "cease and desist" order);
- That Armstrong reimburse Wilson for all expenses incurred in the institution and litigation of this case, including attorney fees; and
- That Armstrong pay a civil penalty for its violation of § 105(c)(1).

Wilson's Response, pp. 6, 7.

Applicable Law and Regulations

Section 105(c) of the Mine Act provides:

> 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, representative of miners* or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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 such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (*emphasis added*).

Part 40, Representative of Miners provides, in pertinent part:

> §40.4 Posting at mine.
>
> A copy of the information provided the operator pursuant to §40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.
>
> §40.3 Filing procedures.
>
> .

(1) The name, address and telephone number of the representative of miners.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

30 C.F.R. §§ 40.3 (a)(1)(5), 40.4.

Summary Decision Standard

Commission Procedural Rule 67 provides, in pertinent part:

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).

A material fact is defined as "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). The record herein must be considered "in the light most favorable to...the party opposing the motion." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan.2007) (citations omitted). Any inferences drawn from the facts contained in the record must also be viewed in the light most favorable to the party opposing the motion. *Id.* "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted).

I. Timeliness of Response to Discovery Request for Admissions

On June 13, 2016, Respondent served discovery requests upon attorneys for Complainant, which included requests for admissions. One request was: "Request No. 2: Admit that you and/or your attorney(s) received a letter from MSHA dated February 17, 2016 regarding MSHA's investigation of your Complaint." (Armstrong's Motion, p. 2).

On February 27, 2017, Respondent' counsel notified, via electronic mail, Complainant's counsel that the discovery responses were not received. (*Id.*). After receiving no response, Respondent's counsel again inquired on March 15, 2017, and Counsel for Complainant responded: "Sorry for the delay in getting back with you...Somehow your discovery got misplaced (and forgotten), but I have them now...I will get our answers/responses to you next week." (*Id;* Exhibit. 3).

Complainant responded to Respondent's discovery requests, including the 1st Request for Admissions, on July 10, 2017. (Wilson's Opposition, Exhibit 2; Armstrong's Motion, p. 2). The

response to Request No. 2 was: "Wilson is without sufficient knowledge to admit or deny this request for admission. Therefore, it is denied." (Wilson's Opposition, p. 4; Exhibit 2.).

Contentions

Respondent contends that Complainant failed to timely respond to the requests for admission of June 13, 2016, about the date the first MSHA denial letter was received, and thus receipt of the February 17, 2016, letter must be deemed admitted as of July 8, 2016, under 29 CFR § 2700.58(b) and Rule 36(a)(3) of the Federal Rules of Civil Procedure. (Armstrong's Motion, p. 3; Armstrong's Reply).

Complainant argues that while its discovery request answers were untimely, they were served more than two weeks before Respondent filed its motion for summary decision, that Respondent never filed a motion to compel, that Respondent was not prejudiced by the delay, and that depositions were taken after Armstrong's Motion for Summary Disposition was filed. (Wilson's Opposition, p. 4, 5). Complainant also argues the late discovery response is not an admission under the Commission's Procedural Rule 58(b), since the Rule also provides that the Judge may order a shorter or longer time period for responding. (Sur-Reply, pp. 1, 2).

Analysis

The Commission has held that summary decision is an extraordinary procedure, and the judge should view the record in the light most favorable to the non-moving party. *Energy West Mining* Co., 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

Commission Procedural Rule 58(b) governs requests for admission in §105(c) proceedings. 29 C.F.R. § 2700.58(b). Rule 58(b) does not state that requests for admission are deemed admitted if there is not a timely response. In fact, Rule 58(b) provides that a judge may order a shorter or longer period of time for response. Thus, it is within the judge's discretion to determine when a party may respond. *Id.* This provision of the Rule gives Commission ALJs flexibility in making determinations on the basis of fairness; the Commission's Procedural Rule is adequate on its own. Here, neither party requested leave of the court to shorten or lengthen the time for this discovery. Instead, after the Complainant's response, Respondent moved for summary disposition, depositions were taken, and the above-listed pleadings were filed. It is unnecessary to look to the Federal Rules of Civil Procedure to fill in a perceived "gap" in Commission Rule 58(b). Since either party may petition the Court for a shorter or longer time for a response, and as a result a date certain could be established by an order of the Court, there is no need for a "deemed" admitted provision in the Rule. Accordingly, no admission regarding receipt of the letter of February 17, 2016, will be deemed by Complainant's late response to the request for admissions.

II. Timeliness of Filing the Complaint of Interference

The Discrimination Complaint of October 29, 2015, MSHA Form 2000-123, Section E, contained this instruction:

> If you desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. Union representative, attorney, etc.) please give his/her name and address to the right.

To the right of this instruction were listed the names, addresses and telephone numbers of Wilson's co-counsel, Tony Oppegard, Esq., and Wes Addington, Esq. (Complaint, Exhibit A, p. 1).

The same day, MSHA by letter notified Legal Counsel at the Parkway Mine of Discrimination Complaint Case Number MADI-CD-2016-02. (Armstrong's Motion, Exhibit 1, p. 1). Attached to this letter was Form 2000-124, the Complaint Report signed by attorney Tony Oppegard on behalf of Michael Wilson. (*Id.*, p.2).

On February 17, 2016, MSHA sent a form letter to Wilson that contained the following notices:

> Based on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish by a preponderance of the evidence that a violation of Section 105(c) occurred. For that reason, the Secretary of Labor will not file a discrimination case with the Federal Mine Safety and Health Review Commission ("Commission") in this matter.
>
> However, you continue to have the right to file a discrimination case on your own behalf with the Commission. If you decide to file your own case, you must do so within 30 days of this letter by sending a discrimination complaint to the Commission...

A copy of this letter was sent to Armstrong Coal Company. (Armstrong's Motion, Exhibit 2). Wilson was without sufficient knowledge to admit or deny whether he or his attorney(s) received the February 17, 2016, letter. (Wilson's Opposition, Exhibit 2, p.1).

On March 18, 2016, a second form letter was sent to Wilson containing the same information as the letter of February 17, 2016, as set forth above. Copies of this letter were sent to Armstrong Coal Company, Tony Oppegard, Esq., and Wes Addington, Esq. (Complaint, Exhibit B). This letter was received by Wilson's attorney on March 21, 2016. (Wilson's Opposition, Exhibit 3, p. 4).

On April 18, 2016, Wilson, through counsel, filed his Complaint of Interference. (Complaint, pp. 1-5.).

Contentions

Respondent contends Wilson's complaint was untimely filed on April 18, 2016, approximately 60 days after the MSHA letter of February 17, 2016, declining to prosecute this case. (Armstrong's Motion, pp. 1-2).

Complainant argues his filing was timely because a second MSHA negative determination letter was sent dated March 18, 2016, and this letter was received by his attorney on March 21, 2016. (Wilson's Opposition, p. 4; Exhibit 3, p. 4).

Analysis

The failure of MSHA to provide proper notice of the Secretary's negative Section 105(c) determination to Wilson's attorney by the February letter was a mistake. This was most likely an inadvertent administrative error, since the Discrimination Complaint of October 29, 2015, clearly listed Wilson's co-counsel in Section E of the form as the attorneys to receive a copy of "all correspondence addressed to you from MSHA". Wilson's attorney was first notified of MSHA's negative 105(c) determination when he received the March 18, 2016 letter on March 21, 2016. Responding to this notice, the Complaint of Interference was filed on April 18, 2016. This is within the 30 day time limit for filing under Section105(c)(3). Thus, in viewing the facts in a light most favorable to Complainant, the complaint was timely filed.

Assuming *arguendo* that the first, February 17, 2016, letter controls as the date of notice, the factual circumstances nevertheless establish that the 30 day delay in filing was excusable. The Act's legislative history instructs that the time limits are not jurisdictional. S. Rep. No. 95-181, 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. On Human Res., *Legis. Hist. of the Fed. Mine Safety and Health Act of 1977* at 37 (1978). The Commission interprets the 105(c) time limitations as non-jurisdictional and subject to equitable tolling, and this interpretation has been upheld by the Tenth Circuit Court of Appeals. *Olson v. Fed. Mine Safety & Health Review Comm'n,* 381 F.3d 1007, 1012 (10th Cir. 2004). A failure to meet these filing time limitations does not result in a dismissal absent material legal prejudice. *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994) citing *Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). The decision to permit or reject an untimely 105(c) filing is determined on a case-by-case basis, "taking into account the unique circumstances of each situation." *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999) citing *Hollis v. Consolidation Coal Co.,* 6 FMSHRC 21, 24 (Jan. 1984).

The Section 105(c)(3) filing period can be equitably tolled when there are "justifiable circumstances" for a late filing that do not cause prejudice. *Morgan*, at 1386. Justifiable circumstances have been found in instances of "ignorance, mistake, inadvertence, and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996). However, if even if there is an adequate excuse for late filing, material legal prejudice may require dismissal. *Perry*, 18 FMSHRC at 1921-22 citing *Hale,* at 908. Material legal prejudice must "affect issues necessary to a meaningful opportunity to defend," and can include "tangible evidence that has since disappeared, faded memories, or missing witnesses." *Farmer v. Island*

Creek Coal Co., 13 FMSHRC 1226, 1231 (May 1991); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

Since the claimed filing delay was due to an administrative error, even if the letter of February 17, 2016, controls the date of notice, there were justifiable circumstances for such late filing. MSHA's administrative error was a circumstance that did justify the delay in filing the discrimination complaint. While Wilson did not know whether his attorney received the February letter, the fact remains that MSHA did not send notice of the negative determination to Wilson's attorney until the second letter was sent in March. If the February letter had been distributed as required by the names and addresses entered in the complaint form, then the 30 day limit would have been tolled as Respondent contends. But there was a failure of proper, written notice to Wilson's legal representative until the second, March letter was sent, apparently to correct the error of omission of the first, February letter. If the 30 day limit were considered tolled, a delay of only 30 days is nevertheless considered negligible. And, material legal prejudice by this short delay has not been established by Respondent. No facts have been alleged showing that witnesses cannot appear, evidence no longer exists, or that this short delay has prejudiced Respondent's meaningful opportunity to defend.

I find dismissal of the Complaint of Interference on the basis of untimely filing is not warranted.

III. Whether the relief sought is moot

The status of the Parkway Mine was changed to abandoned on April 4, 2017. (Armstrong's Motion, Exhibit 4). After that date, there were no Miners' Representatives for that mine, and no regulatory postings on the bulletin board. (*Id.*, Exhibit 5).

Contentions

Respondent contends that this matter is moot because the Parkway mine has been abandoned, there is no bulletin board, Complainant is no longer a Miners' Representative at the mine, Complainant and a number of former Parkway employees are no longer employed by Armstrong, and the non-S&S citation has been paid. (Armstrong's Motion, p. 4; Exhibits 1, 4, 5).

Complainant argues that Armstrong Coal is still in operation, and Steve DeMoss ("DeMoss") who was named in Wilson's original complaint is still employed as Manager of Safety at Armstrong's Kronos mine. (Wilson's Opposition, p.6; Complaint, Exhibit A). Armstrong has five active operations, and the relief sought can still be ordered. (Wilson's Opposition, pp. 6, 7; Exhibit 8). Further, upon a finding of interference, the case must be referred to the Secretary of Labor for imposition of a civil penalty. *(Id.,* p. 7).

Analysis

So long as *any* relief could potentially be granted, this matter will not be considered moot. Armstrong has other active coal operations, including the Kronos mine where DeMoss is employed as Safety Manager. There is no evidence that postings could not be accomplished at

the active coal sites. Costs and attorney fees are capable of being determined. Indeed, Respondent admits that the *possibility* of a civil penalty and attorney's fees remains in this matter. (Armstrong's Reply, p. 2). Dismissal on the basis that no relief could be granted is not warranted.

IV. Test for Interference

The Commission has not settled on a single test for interference violations. However, a two-part test was endorsed by two Commissioners. Under this test an interference violation occurs if:

1) A person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

United Mine Workers of America obo Mark A. Franks and Ronald M. Hoy v. Emerald Coal Resources, LP, 36 FMSHRC 2088, 2108 (Aug. 2014). This *Franks* test has been applied by the undersigned and other Commission judges in interference cases. *Lawrence Pendley v. Highland Mining Co. & James Creighton,* 37 FMSHRC 301 (Feb. 12, 2015)(ALJ Andrews); *Scott D. McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (Jun. 11, 2015)(ALJ); *Sec'y of Labor obo Greathouse et. al. v. Ohio County Coal,* 37 FMSHRC 2892 (Dec. 30, 2015)(ALJ).

One Commission judge has found that the word *because* in section 105(c)(1) of the Act requires the complainant to prove the interference alleged was *motivated* by the exercise of protected rights. *Sec'y of Labor obo Mindy S. Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435, 1450-51, n. 11 (Jun. 6, 2016)(ALJ). Since under this view a motivational intent must be shown, the second part of the test was changed to:

2) Such actions were motivated by the exercise of protected rights.

Id. at 1453-54.

Contentions

Respondent contends that the factual issue turns on both what was done and why it was done, and there are no facts established about the motive behind the removal of the phone numbers and addresses of the Miners' Representatives. (Armstrong's Response, pp. 1-3). Also, since neither DeMoss nor Wilson was told why the contact information was removed, Complainant has not identified a factual intent or motivation on the part of anyone at Armstrong. (*Id.*, pp.2, 3). Further, to prove interference in this case, the *Pepin* test must also be used. (Armstrong's Response, pp. 6, 7).

Complainant argues a Miners' Representative need not prove a company's motivation for interfering with his statutory rights in order to prevail in an interference proceeding under the Mine Act, citing *Secretary of Labor o/b/o Gray v. North Star Mining & Brummett,* 27 FMSHRC 1 (Jan. 2005). Complainant, in effect, argues for application of the *Franks* test. (Wilson's Reply, pp. 5, 6).

Analysis

In his cogent analysis of the two tests, Judge Lewis explained that the motivational requirement was in conflict with the first prong of both the *Franks* test and the *Pepin* test:

> The phrase "tending to interfere" indicates that the employer's conduct is inclined to interfere with future miner conduct. However, the second prong in *Pepin* requires a predicate exercise of protected rights that the conduct be in reaction to. *If a mine operator is interfering with a miner's statutory rights, why should the Complainant who is in a worse position to make a showing of the operator's motivations be required to show why the operator is acting in such a manner?* Instead, the operator should be required to show why the interference with a miner's statutory rights was due to "a legitimate and substantial reason whose importance outweighs the harm cause[d] to the exercise of protected rights," as required by the *Franks* test. If it cannot, then the conduct should be prohibited under Section 105(c).

Wilson, Greenwell & Shemwell v. Armstrong Coal Company, Inc., 39 FMSHRC 1072, 1093 (May 9, 2017)(ALJ Lewis)(*emphasis added*)[1].

I agree with this analysis. Further, the Commission has held that the totality of circumstances must be analyzed, not just the intent or motive in the alleged violative behavior. Interference under the Act in this case does not turn on the operator's motive, but whether its conduct reasonably tended to interfere with the statutory rights of the Miner's Representatives. *Sec'y of Labor o/b/o Gray v. North Star Mining & Brummett,* 27 FMSHRC 1, 9, 10 (Jan. 2005) citing *American Freightways Co.*, 124 NLRB 146, 147 (1959). The future miner conduct under the facts and circumstances in this case is the ability to easily make a telephone contact, in private, with a Miners' Representative. In order to interfere with the right of a miner to communicate with one of the Miners' Representatives, the burden is properly on the operator to justify making a discussion between a miner and one of the representatives, like Wilson, more difficult. I find that under all of the facts and circumstances in the instant case, it is the operator's conduct that is important. The operator's *motive* for the conduct is relevant only in so far as there is a claim of a legitimate and substantial reason whose importance outweighs the harm caused to the protected rights of the Miners' Representatives, as contemplated by step two of *Franks*. No argument of a reason meeting this test is advanced here; and, the person most

[1] Currently on review before the Commission.

likely to have knowledge of intent, Safety Director Rick Brothers ("Brothers"), DeMoss's boss, was not deposed.[2]

I will again apply the *Franks* test.

V. Interference

Prior to October 16, 2015, a list dated May 19, 2014, in the upper right hand corner and entitled "Miners Representatives designated by MSHA Form 2008-238", that included the names, addresses and telephone numbers of each Miners' Representative was posted behind glass on the bulletin board in the bathhouse at the Parkway mine. (Cross-Motion, Exhibit 6; Dep. DeMoss, pp. 29-33; Dep. Wilson, pp. 25-28). DeMoss took a photo of this list. (Dep. DeMoss, pp. 24, 25).

The name, address and telephone number of Mike Wilson, Complainant, was included in the list dated May 19, 2014. (Cross-Motion, Exhibit 6). Wilson had been properly designated a Miners' Representative at the Parkway mine. (Cross-Motion, Exhibits 4, 6, 9, 10, 11; Dep. DeMoss, pp. 58, 59, 67). He was a non-employee Miners' Representative until the Parkway mine closed. (Dep. Wilson, pp. 11-13, 53).

On October 16, 2015, a modified list of Miners' Representatives was posted behind glass in the bathhouse by DeMoss on the instruction of Brothers; this new list had no addresses or telephone numbers for any of the Miners' Representatives, including Wilson.[3] (Cross-Motion, Exhibit 5, Response to No. 8; Dep. DeMoss, pp. 13, 14, 21, 32, 36, 43, 45-47, 49).

The new list with no addresses or telephone numbers was posted for about 6 days, from October 16, 2015 to October 21, 2015. (Dep. DeMoss, pp. 36, 44-47, 49-51).

On or about October 20, 2015 Wilson noticed that the list behind glass in the bathhouse had been replaced with a list with all the Miners' Representatives' names, except the addresses and telephone numbers were gone. (Dep. Wilson, pp. 27, 28). Wilson called the MSHA hotline and reported that the addresses and phone numbers were off the paper. (Dep. Wilson, pp. 33, 34).

Wilson testified he remembered telling Chad Baldwin that as many as five people working at the mines had been calling him early in the morning and at night before the list was changed. (Dep. Wilson, pp. 35-37). Wilson had also told Brothers that miners at the mine called him and reported safety and health issues to him. (*Id.,* pp. 57-59; Complaint, p. 4, No.15). Wilson believed Brothers made the decision to put up the new list because of what Wilson had told him about people calling. (*Id.,* pp. 60-62).

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[2] Brothers was not deposed because in another case scheduled to be heard in the same time frame as the instant case, Brothers claimed an unspecified medical condition resulting in virtually no recollection of his employment with Armstrong. (Cross-Motion, pp. 2, 3).
[3] A photocopy or photograph of this list is not of record. (Dep. DeMoss, p. 49; *but see* Dep. Wilson, p. 43).

On October 21, 2015, Citation No. 9045905 was issued at 1510 hours for a violation of 30 CFR §§ 40.4, 40.3 since the listing of Miners' Representatives posted on the mine bulletin board did not include the addresses and telephone numbers of the Miners' Representatives. (Complaint, Exhibit C; Armstrong's Motion, Exhibit 5, No. 4; Wilson's Response, Exhibit 1). The Citation was abated at 1520 hours by DeMoss when he updated and reposted the prior list with the addresses and telephone numbers of the representatives. (*Id.;* Dep. DeMoss, pp. 39, 53-56; Dep. Wilson, pp. 43, 44; Cross-Motion, Exhibits 7, 8).

The updated list was no longer dated May 19, 2014; in the upper right hand corner was handwritten "Per verification by MSHA 10/16/15". (Cross-Motion, Exhibit 8; Dep. DeMoss, pp. 53-56).

Armstrong has five active coal operations in the state of Kentucky. (Wilson's Response, Exhibit 8). Since January 2017 DeMoss has been Safety Manager at Armstrong's Kronos mine. (Armstrong's Motion, Exhibit 5, No. 1; Dep. DeMoss, p. 15).

Contentions

Respondent contends the primary factual issue turns on what was done and why it was done. Therefore, both tests for interference must be considered, or the legal analysis would be incomplete and Complainant would not be entitled to summary decision as a matter of law. (Armstrong's Response, pp. 1, 5).

Complainant argues operators are required to post contact information of Miners' Representatives so other miners will know how to contact a representative about matters that affect their health and safety. Therefore, the removal of the contact information tended to interfere with the Complainant's statutory rights as a Miners' Representative. Also, the company has not and cannot justify its removal action with a legitimate and substantial reason whose importance outweighs the harm caused to Complainant's protected rights. (Cross-Motion, pp. 14, 15). Further, a Miners' Representative need not prove a company's motive for interfering with his statutory rights to prevail under Section 105(c)(1). (Wilson's Reply, p. 3).

Analysis

It was Brothers who provided the new list of Miners' Representatives to DeMoss and instructed DeMoss to post this list with the names of the representatives but with none of their addresses or telephone numbers. The list that had been on the bulletin board behind glass in the bathhouse did have the address and telephone number for each of the representatives. The actions of Brothers and DeMoss constituted the removal of contact information important to the health and safety of miners. Viewed from the perspective of both the Miners' Representatives and other miners the absence of this information, in particular the telephone numbers, did tend to interfere with the exercise of their protected right to report safety and health concerns freely and confidentially.

Consider, for example, the alternative presented to a miner who wished to report a safety concern. This miner would need to find a Miners' Representative, most likely at the mine site,

and personally convey the concern. This might, or might not, take place out of "earshot" of other miners or supervisory personnel. Another alternative would be for a miner to find and approach Wilson or another representative at their address. Either alternative would place an unreasonable burden on the miner with a safety concern to report, and potentially expose the miner to risk of reprisal. Even to require a miner to search for an address or telephone number in order to be able to privately report a safety concern imposes a burden. When compared with simply noting a telephone number and making a call at any time and in confidence to a Miners' Representative, it becomes clear that removing the contact information was an act of interference under the first prong of the *Franks* test.

Respondent has not established an important reason justifying the removal of the contact information. Any such reason must be "legitimate and substantial" and outweigh the burden imposed on miners with safety and health concerns but with no readily available, private and confidential method of making a report to a Miners' Representative. The one person who could shed light on the removal reason, Brothers, was not deposed; therefore, the reason why the violative action was taken remains unknown, and is perhaps not ascertainable.

I find that by removing the contact information for the Miners' Representatives, including Wilson's, Respondent did interfere with the statutory rights of Wilson and the other Miners' Representatives.

Respondent relies on the second prong of the *Pepin* test to require proof of the motivation of the operator in removing the contact information. If the motivation for the removal of the contact information was the exercise of protected rights, such as presented here in the potential expression of safety and health concerns by a miner to a Miners' Representative, then the second prong of the *Pepin* test could be satisfied and interference established. However, Complainant Wilson is in a much worse position to discover motivation on the part of the operator, especially where the management official who most likely knows the reason for the removal apparently could not be deposed. This would mean, as Judge Lewis pointed out, the requirement of a predicate exercise of protected rights that was reacted to by removing the addresses and telephone numbers of the Miners' Representatives. See, *Wilson, et. al., v. Armstrong*, Supra.

It is noteworthy that Wilson testified before the list was changed he told Baldwin people had been calling him at night and early in the morning; he also told Brothers miners had been calling him. Wilson testified to his belief Brothers took the phone numbers and addresses down because of what he had told Brothers. DeMoss testified he did not know why the list was changed, he was just following instructions. Brothers would be the person able to contradict Wilson's testimony, but he was not deposed, reportedly due to a memory deficit. Wilson's testimony that he told Brothers and Baldwin about the calls he was receiving and Wilson's belief that Brothers removed the contact information on purpose because people had been calling him is evidence that protected rights were responded to by the violative act of removing the contact information for all listed Miners' Representatives at the Parkway mine. While I have applied the *Franks* test in this case, there is evidence that the second prong of the *Pepin* test is also satisfied.

Based on review of the entire record and the applicable law, I find there is no dispute of material fact and that Armstrong violated Section 105(c) of the Mine Act by interfering with

Wilson's statutory rights as a Miners' Representative. I further find relief can be granted and this matter is not moot, the delay in discovery responses is not cause for dismissal, and the Complaint of Interference was timely filed. Therefore, Complainant is entitled to summary decision as a matter of law.

ORDER

Respondent's Motion for Summary Disposition is **DENIED** and Wilson's Cross-Motion for Summary Decision is **GRANTED**.

It is further **ORDERED** that Armstrong will immediately:

1) Post the Court's decision at all of its active coal operations and facilities, at places where notices to employees are customarily posted for a period of 30 days;

2) Require Armstrong management personnel at its active operations and facilities to take training in the statutory rights of Miners' Representatives; and

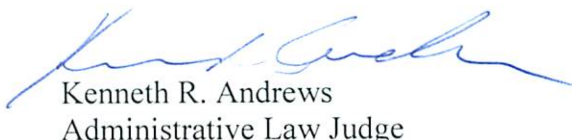
3) Comply with the requirements of 30 CFR §§ 40.4 and 40.3 at all of its active coal operations and facilities.

The undersigned ALJ retains jurisdiction of this matter until all of the specific remedies to which Wilson is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting any further specific relief, including costs and attorney's fees, as well as any civil penalty to be assessed, has been entered.

Accordingly, the parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas of further, specific relief and any penalty amount on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

Pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision will be sent to the Office of the Regional Solicitor having responsibility for the area in which the Parkway Mine was located so that the Secretary may take the actions required by the rule.



Kenneth R. Andrews
Administrative Law Judge

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