FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

January 31, 2018

MARSHALL JUSTICE,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEVA 2018-48-D
	:	PINE-CD-2016-07
v.	:	
	:	
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle Mine
Respondent.	:	Mine ID 46-06618

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION TO DISMISS

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Chief Administrative Law Judge Robert J. Lesnick assigned me this matter on December 4, 2017. On November 22, 2017, Respondent filed a Motion to Dismiss Marshall Justice's Complaint.[1] Complainant filed a response on December 1, 2017. On December 11, 2017, the Secretary of Labor ("Secretary") filed both a motion to intervene and a response to the motion to dismiss. I hereby **GRANT** the Secretary's motion to intervene and consider his response.[2] On December 21, 2017, Respondent filed a motion for leave to file a reply, which I also hereby **GRANT** and consider the reply.

[1] Respondent incorrectly filed the motion in Docket No. WEVA 2018-10-D, which involves a section 105(c)(2) complaint filed by the Secretary on behalf of Justice. Likewise, Complainant also incorrectly filed his response to the motion in Docket No. WEVA 2018-10-D. On January 5, 2018, my law clerk emailed the parties for clarification, whereby the parties confirmed that Respondent's motion and Complainant's response should be withdrawn from Docket No. WEVA 2018-10-D and re-filed in Docket No. WEVA 2018-48-D.

[2] Under the Commission's Procedural Rules, motions for leave to intervene may be filed before the start of a hearing and shall set forth (1) the interest of the movant, (2) the reasons why such interest is not otherwise adequately represented by the parties already involved in the proceeding, and (3) a showing that intervention will not unduly delay or prejudice the adjudication of the issues. 29 C.F.R. § 2700.4(b)(2)(i). Such intervention is not a matter of right but of the sound discretion of the Judge. 29 C.F.R. § 2700.4(b)(2)(ii).

The Secretary states that he has an interest in ensuring the issues in the proceeding he initiated under section 105(c)(2) in Docket No. WEVA 2018-10-D are not litigated in the proceeding initiated by Complainant under section 105(c)(3) in Docket No. WEVA 2018-48-D. (Mot. to Intervene at 2.) The Secretary further argues that none of the other parties can represent the Secretary's interest and that intervention for the limited purpose of responding to

I. Factual and Procedural Background

A. Justice's Discrimination Complaint to MSHA

On July 20, 2016, Marshall Justice ("Complainant" or "Justice") filed a discrimination complaint with MSHA using the agency's standard form and naming Rockwell Mining, LLC ("Respondent" or "Rockwell").[3] (Compl., Ex. A.) The MSHA Form 2000-123 Discrimination Complaint ("MSHA Form 2000-123") alleges that Rockwell interfered with Justice's rights as a miner's representative by failing to provide him copies of documents with proposed changes to the mine's ventilation plan, which miners' representatives are entitled to receive notice of five days before the changes are submitted to MSHA. (*Id.* at 2.) In addition, the complaint alleges that Rockwell required Justice to operate a caged scoop, which Justice refused to operate because of safety concerns, claiming it greatly diminished his field of vision. (*Id.*) Justice's MSHA Form 2000-123 complaint sought an injunction to prevent Rockwell from interfering with his rights as a miners' representative and an injunction compelling Rockwell to recognize his valid refusal to operate the caged scoop. (*Id.*) In regard to the scoop, Justice demanded "to be made whole for any and all losses that arose due to [his] refusal" to operate the scoop. (*Id.*)

Justice also states that he provided MSHA a supplemental statement on August 10, 2016, in addition to his MSHA Form 2000-123 complaint. (*See* Compl. at 5, Ex. B; Justice Resp. at 3.) The supplemental statement provides a timeline of events related to Justice's allegations. (Compl. at 5, Ex. B.) According to the timeline, the mine ventilation plan was revised on or around June 7, 2016, and Justice was not provided a copy of the revisions in advance of the company submitting the revisions to MSHA. (*Id.* at 1.) On June 21, 2016, Justice purportedly filed a safety grievance about workers being ordered by foreman Rondale Gillespie to haul supplies over long distances using Scoop #874, which was enclosed and allegedly restricted an operator's view. (*Id.*) On June 28, mine management allegedly posted a list of miners who could work during vacation and did not include Justice on that list. (*Id.*) From late June to July 19, 2016, Justice described several instances where he worked with two enclosed scoops (#874 and #882) and expressed his concerns over the equipment's safety. (*Id.* 1–2.) On July 19, 2016, Justice claims that he also attempted to exercise his walk-around rights as a miners' representative, but was ordered by mine management to return to work. (*Id.* at 2–3.)

Respondent's motion to dismiss would not unduly delay or prejudice the adjudication of the issues. (*Id.*) The Secretary's motion states that Respondent does not object to the Secretary as intervenor but that Complainant does. (*Id.*) Yet Complainant did not file a response to the Secretary's motion explaining its objection. Considering all the above, I grant the Secretary's motion to intervene for the limited purpose of filing a response to Respondent's motion.

[3] Justice has previously alleged discrimination against Rockwell in another matter before the Commission. On August 10, 2015, Justice filed a complaint of discrimination under section 105(c)(3) against Gateway Eagle Coal Company ("Gateway Eagle"), Docket No. WEVA 2015-924-D, and later moved to add Rockwell as a party under a theory of successorship liability. In that proceeding, Administrative Law Judge David P. Simonton entered a default judgment against Gateway Eagle, but denied Justice's motion to amend his complaint to add Rockwell as a party. *Justice v. Gateway Eagle Coal Co.*, 38 FMSHRC 2341, 2345 (Aug. 2016) (ALJ). Judge Simonton dismissed the proceeding after Justice failed to submit a claim for personal relief against Gateway Eagle. Unpublished Order dated Sept. 15, 2016.

B. MSHA's Determination on Justice's Complaint and Section 105(c)(2) Proceeding

On September 14, 2017, MSHA notified Justice that the agency had investigated Justice's discrimination complaint and determined that a violation of section 105(c) of the Mine Act had occurred. (Compl., Ex. C.) On October 3, 2017, the Secretary filed a complaint with the Commission under section 105(c)(2), which is contained in Docket No. WEVA 2018-10-D. The Secretary's section 105(c)(2) complaint alleges that Rockwell interfered with the exercise of Justice's statutory rights as a miners' representative by failing to provide Justice with notice of revisions to the mine's ventilation plans. (Sec'y Compl. at 1–3.) However, the Secretary's section 105(c)(2) complaint does not pursue Justice's claim regarding his refusal to work in an allegedly unsafe scoop nor any other claims by Justice. (*See id.* at 1–5.)

C. Justice's Section 105(c)(3) Complaint

On October 30, 2017, Justice filed his own complaint of discrimination under section 105(c)(3) of the Mine Act. The complaint alleges that Respondent (1) interfered with Justice's rights as a miner's representative by not providing notice of changes to the mine's ventilation plans, (2) interfered with Justice's right to complain of unsafe mine equipment, and (3) imposed retaliatory discipline against Justice which was motivated by Justice's protected activity, including his refusal to operate the unsafe equipment and his attempt to exercise his walk-around rights as a miner's representative. (Compl. at 2–5.)

In regard to the third allegation, Justice's section 105(c)(3) complaint alleges that Rockwell retaliated against Justice by notifying him on or around November 3, 2016, that Justice would be subject to discipline if he were to leave early on Friday and arrive late on Saturday, in observance of the Sabbath, which Justice alleges mine management had previously accommodated. (Compl. at 3–4.) The complaint also claims that the mine attempted to "demote" Justice from his position as miners' representative after Justice tried to exercise his walk-around rights. (*Id.* at 4–5.)

Justice also attached to his section 105(c)(3) complaint copies of his MSHA Form 2000-123 complaint, his supplemental statement to MSHA with his timeline dated August 10, 2016, and MSHA's September 14, 2017, determination letter. (Compl., Exs. A, B, C.)

II. Respondent's Motion to Dismiss and Issues

On November 22, 2017, Respondent filed its Motion to Dismiss Marshall Justice's Complaint. Respondent argues that Justice's allegations of interference—with (1) his rights as a miners' representative and (2) his right to refuse unsafe work—both lack merit as a matter of law. (Mot. at 1–5.) First, Respondent notes that the Secretary filed a section 105(c)(2) complaint on behalf of Justice regarding the alleged interference with a miners' representative's rights and argues that Justice may not file a separate section 105(c)(3) complaint on that issue. (*Id.* at 3–4.) Second, Respondent argues that Complainant's work refusal allegation lacks merit because Complainant exercised his right to complain about the allegedly unsafe scoop and his belief that this equipment is unsafe is unreasonable. (*Id.* at 2–5, n.12; Reply at 3, n.8.) Respondent also argues that Complainant added several new issues to his complaint, including claims of retaliation, which are impermissible because they were not initially presented to the Secretary in MSHA's investigation. (Mot. at 3–6, n. 16; Reply at 3–4.)

Complainant filed his response on December 1, 2017. Complainant first asserts that he is permitted to intervene in the Secretary's section 105(c)(2) proceeding and would not oppose dismissal of his section 105(c)(3) claim insofar as it relates to the alleged interference with the rights of a miners' representative and would be duplicative. (Justice Resp. at 1.) Second, Complainant argues that he presented claims regarding unsafe work to the Secretary and submitted arguments to the Secretary regarding loss of vacation days, imposition of discipline, and other retaliatory measures. (*Id.* at 2–4.) Because the Secretary found that no violation occurred in regard to the alleged unsafe work, Complainant asserts that he may proceed under section 105(c)(3) on that claim. (*Id.*)

The Secretary in his December 11, 2017, response to the motion to dismiss argues that Justice's claim of interference with his rights as a miners' representative should be dismissed from this section 105(c)(3) proceeding because it duplicates the interference claim set forth in the Secretary's section 105(c)(2) proceeding, Docket No. WEVA 2018-10-D. (Sec'y Resp. at 3–4.) The Secretary further asserts that Justice should be permitted to pursue his interference claim regarding the unsafe scoop as this allegation was raised in his complaint to MSHA, but was not further pursued by the Secretary. (*Id.* at 4.) However, the Secretary argues that Justice's claims of retaliation should be dismissed because Justice did not raise any claim regarding retaliation in his initial complaint to MSHA. (*Id.* at 5–6.)

Accordingly, the following issues are before me—(1) whether Justice's interference claim regarding his right as miners' representative to receive notice of mine ventilation plan revisions should be dismissed; (2) whether Justice's interference claim regarding the unsafe mine equipment should be dismissed; and (3) whether Justice's other claims, including those alleging retaliation, should be dismissed.

III. Principles of Law

A. Initiating Section 105(c) Proceedings

The Mine Act provides that upon receipt of a discrimination complaint, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . ." 30 U.S.C. § 815(c)(2). Pursuant to section 105(c)(2), "[t]he complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing. . . ." *Id.*

Section 105(c)(3) of the Mine Act provides that if the Secretary determines that no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination occurred. *Hatfield v. Colquest Energy*, 13 FMSHRC 544, 545 (Apr. 1991).

In order for the statutory prerequisites for a section 105(c)(3) complaint to be met, the written discrimination complaint filed with MSHA must contain specific allegations that are

investigated by MSHA and considered in the Secretary's determination of whether the Mine Act has been violated. *See Hatfield*, 13 FMSHRC at 546 (vacating order denying dismissal and remanding for consideration of whether alleged protected activities were part of Secretary's investigation). However, the Commission has recognized that it is the scope of the Secretary's *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

B. Dismissal of a Discrimination Complaint

The Commission's Procedural Rules do not provide formal guidance on motions to dismiss. However, Commission Judges have treated such filings as motions for summary decision. *See, e.g.*, *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2405 (Aug. 2014) (ALJ) (denying motion to dismiss section 105(c)(3) complaint); *Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ) (denying motion to dismiss section 105(c)(2) complaint); *Sec'y on behalf of Brewer v. Monongalia Cnty. Coal Co.*, 38 FMSHRC 1876 (July 2016) (ALJ) (denying motion to dismiss 105(c)(3) complaint based on timeliness of filing). Commission Procedural Rule 67(b) provides that 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) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 20 C.F.R. § 2700.67(b). A "material fact" for the purposes of defeating summary decision can also be an inference, drawn from evidence on record, as to a factual element of a claim. *KenAmerican Res.*, 38 FMSHRC 1943, 1946 (Aug. 2016).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.[4] *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The Commission also noted that a party moving for summary judgment bears the initial burden of showing that there is no genuine dispute as to material facts. *KenAmerican Res.*, 38 FMSHRC at 1946 (citing *Celotex Corp.*, 477 U.S. at 323; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party carries its burden, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. *Id.* However, in determining whether facts are disputed, Commission Judges should not solely rely on the parties' claims, but should conduct an independent review of the record. *Id.*

[4] Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

C. Section 105(c): Tests for Discrimination and Interference

Section 105(c)(1) of the Mine Act states, in relevant part, that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [the Mine Act]." 30 U.S.C. § 815(c)(1).

Under the traditional *Pasula-Robinette* framework, a complainant establishes a *prima facie* case of section 105(c) discrimination if the preponderance of the evidence proves (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The mine 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. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

In regard to claims of interference, the Commission has not settled on a single framework. Two Commissioners have supported the two-prong *Franks* test advocated by the Secretary whereby a violation of interference 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. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs).

Several Commission Judges have applied the *Franks* test. *See, e.g.*, *McNary v. Alcoa World Alumina LLC*, 39 FMSHRC __, slip op. 44–46, No. CENT 2015-279-DM (Dec. 21, 2017) (applying *Franks* test in determining complainant did not prove interference), *appeal granted*, (Jan. 30, 2018); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ) (applying *Franks* test to determine that operator interfered with complainant's miners' representative rights); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ) (applying *Franks* test in granting complainant's motion for summary decision); *Sec'y of Labor on behalf of Greathouse v. Ohio County Coal*, 37 FMSHRC 2892 (Dec. 2015) (ALJ) (reasoning that the *Franks* test is consistent with Commission precedent and the Mine Act's legislative directive). Although a majority of the Commission has not formally adopted the *Franks* test as the single test for interference, it has confirmed that the test is consonant with Commission precedent. *Sec'y of Labor on behalf of McGary et al. v. Ohio Cnty. Coal*, 38 FMSHRC 2006, 2011–12 (Aug. 2016); *see Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985) (finding interference because conduct would "chill the exercise" of protected rights, but recognizing that an operator may have legitimate and substantial reasons for its conduct); *Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 9 (Jan. 2005) (analyzing whether conduct reasonably tended to interfere with the free exercise of protected rights).

Yet, the wording in section 105(c)(1) has also been interpreted to require the complainant to prove the interference alleged was *motivated* by the exercise of protected rights. *Sec'y of Labor on behalf of Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435, 1450–51, n.11 (June 2016) (ALJ); *see McGary*, 38 FMSHRC at 2012 n.11 (declining to adopt single interference test and noting that the elements of both the *Franks* and *Pepin* tests would be met under the facts of the case). Under this view, a motivational intent must be shown, thus altering the second part of the test to: (2) such actions were motivated by the exercise of protected rights. *Pepin*, 38 FMSHRC at 1453–54 (ALJ).

IV. Discussion and Analysis

A. Interference with Miners' Representative Right to Notice of Mine Ventilation Plans

Respondent argues that Complainant's claim that Rockwell interfered with his rights as a miners' representative by refusing to provide notice of mine ventilation plan revisions should be dismissed because the Secretary has initiated a section 105(c)(2) proceeding on the claim. (Mot. at 3–4.) The Secretary concurs that the claim should be dismissed from this section 105(c)(3) proceeding as the adjudication of the related issues would be duplicative of the proceeding contained in Docket No. WEVA 2018-10-D. (Sec'y Resp. at 2–4.) Complainant has expressed that he would not be opposed to the dismissal of his section 105(c)(3) claim insofar as it relates to interference with his right as a miners' representative to receive notice of mine ventilation plan revisions. (Justice Resp. at 1.)

Pursuant to section 105(c)(2), Complainant may present additional evidence regarding interference with his rights as a miners' representative[5] on his own behalf during the hearing in Docket No. WEVA 2018-10-D. 30 U.S.C. § 815(c)(2). Because of the parties' agreement on the issue, the on-going section 105(c)(2) case before me, and the lack of prejudice to Complainant in dismissing the duplicative interference claim, I therefore conclude that dismissal of Justice's interference claim regarding his right as a miners' representative to receive notice of mine ventilation plan revisions from Docket No. WEVA 2018-48-D is appropriate.

B. Interference with Right to Refuse Unsafe Work

Respondent asserts that Complainant's interference claim regarding the unsafe scoop fails as a matter of law because Justice did in fact complain about the scoop, and therefore Rockwell never interfered with his right to do so. (Mot. at 2, n.12; Reply at 3, n.8.) Respondent also argues that Complainant's work refusal allegation lacks merit due to Complainant's unreasonable belief that the caged scoop was unsafe. (Mot. at 4–5; Reply at 3, n. 8.) Complainant asserts that the caged scoop obscured the driver's field of vision and that operating

[5] I acknowledge that Complainant also "seeks to establish that the Respondent interfered with his right to refuse work in unsafe conditions" and therefore wishes to intervene in the section 105(c)(2) proceeding to present evidence related to this allegation. (Justice Resp. at 1.) However, the Secretary's section 105(c)(2) complaint in Docket No. WEVA 2018-10-D involves only Justice's claim of interference with his right as a miners' representative to receive notice of mine ventilation plan changes. (Sec'y Compl. at 1–5.) All other claims of discrimination or interference by Justice should therefore be litigated and addressed pursuant to section 105(c)(3) in Docket No. WEVA 2018-48-D.

the scoop over long distances had caused accidents. (Justice Resp. at 4.) Complainant claims that despite expressing his safety concerns, Rockwell continued to assign him to work in the caged scoop. (Compl. at 3.) The Secretary has no objection to Complainant pursuing this claim under section 105(c)(3) in Docket No. WEVA 2018-48-D. (Sec'y Resp. at 4.)

First, to prove interference, a claimant must demonstrate that a person's actions 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. *See Franks*, 36 FMSHRC at 2108; *Pepin*, 38 FMSHRC at 1453–54 (ALJ); *McGary*, 38 FMSHRC at 2011–12, n.11.[6] Because this first part of the test focuses on the *tendency* to interfere, actions that could reasonably chill the exercise of protected rights may qualify as acts of interference even if the miner has not been actually prevented or deterred from exercising his rights. *Pepin*, 38 FMSHRC at 1454 n.15 (ALJ).[7] I therefore reject Respondent's argument that because Justice exercised his right to refuse unsafe work, no interference could have occurred. Complainant states that he expressed safety concerns about the caged scoop to mine management, yet Rockwell continued to assign Justice to work in the caged scoop. (Compl. at 3.) Repeatedly assigning work that a miner reasonably believes to be unsafe despite the miner's objections could chill the exercise of protected rights by discouraging the miner from continuing to report the unsafe conditions, thus allowing an operator to ignore and eventually suppress legitimate safety concerns. I determine that such acts could form the basis of a plausible claim of interference.

In regard to Respondent's second argument, a miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463 (Dec. 1993); *Sec'y of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066 (July 1986); *Robinette*, 3 FMSHRC at 808–12. Here, Rockwell asserts that it is undisputed that the safety cage on the scoop was installed by the manufacturer, that MSHA approved the scoop's safety cage, that the scoop's safety cage was inspected and never cited, and that other miners who have operated the scoop have never complained about its safety cage. (Mot. at 5.)

Nevertheless, Complainant alleges that "[w]hile this type of scoop may be used safely for various maintenance tasks and heavy duty wench work," Respondent forced Justice "to operate [the scoop] in other, unsafe circumstances on a daily basis[,]" including operating the scoop alone in the mine during regular long distance coal haulage. (Compl. at 3.) Complainant asserts that he could be trapped inside the cage and could also run over obstructions because the scoop did not have a proximity detection system. (*Id.*)

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[6] Although it has not adopted a single interference test, the Commission appears to agree that to establish interference, a complainant must first prove: 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. This element is the first part of the *Franks* test, which two Commissioners supported. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). It is also the first part of the *Pepin* test, which another two Commissioners suggested may be an appropriate framework for finding interference. *Pepin*, 38 FMSHRC at 1453–54 (ALJ); *McGary*, 38 FMSHRC at n.11 (Young & Althen, Comm'rs).

[7] Although the Commission Judge's decision I cite herein is not binding precedent, *see* 29 C.F.R. § 2700.69(d), I find the decision's reasoning persuasive.

After review of the parties' submissions, I find that there remain genuine issues of material fact as to whether a miner could reasonably believe the circumstances under which Justice was assigned to operate the scoop were hazardous. Although Rockwell avers the safety scoop was inspected and approved by MSHA, Complainant has alleged facts that the scoop was being used for tasks other than its intended use. Rockwell has not presented undisputed evidence that the equipment had been inspected while being utilized for the purpose of hauling coal over long distances underground and is thus objectively safe under these conditions.

Viewing the facts in the light most favorable to Complainant, I conclude that Respondent has not established a right to summary decision as a matter of law. Therefore, I determine that dismissal of Justice's claim of interference with his right to refuse unsafe work is inappropriate.

C. Discriminatory Retaliation and Other Claims

Respondent lastly argues that Complainant has added several new issues to his section 105(c)(3) complaint including allegations of retaliation, which were not initially raised in his complaint to MSHA. (Mot. at 3–6, n.16; Reply at 3–4.) According to the Secretary, the allegations regarding retaliatory discipline was not considered or investigated by the agency because Justice did not raise such claims. (Sec'y Resp. at 4–6.) In contrast, Complainant argues that he alleged both protected activity and adverse action in his MSHA complaint and submitted arguments to the Secretary regarding loss of vacation days, imposition of discipline, and other retaliatory measures. (Justice Resp. at 2–4.)

In order to meet the statutory prerequisites for a section 105(c)(3) complaint, the written discrimination complaint filed with MSHA must contain specific allegations that are investigated and considered in the Secretary's determination. *Hatfield*, 13 FMSHRC at 546. Nevertheless, the scope of the Secretary's *investigation*, rather than the initiating complaint, governs the permissible ambit of the complaint file with the Commission. *Pontiki*, 19 FMSHRC at 1017. In *Hatfield*, the Commission vacated an order denying summary dismissal of a section 105(c)(3) complaint and remanded the matter to the judge, stating that a complainant should be afforded an opportunity to demonstrate that the allegations in his section 105(c)(3) complaint were investigated by the Secretary in connection with his initial discrimination complaint to MSHA. *Hatfield*, 13 FMSHRC at 546.

Here, Complainant attached to his section 105(c)(3) complaint a copy of his MSHA Form 2000-123 complaint, as well as a supplemental statement that Justice states he also submitted to MSHA. (Compl. at 5, Exs. A, B; Justice Resp. at 3.) Although his MSHA Form 2000-123 complaint only generally refers to "any and all losses that arose due to [his] refusal," his supplemental statement outlines specific dates of events concerning his allegations. (Compl., Exs. A, B.) Specifically, he provides several dates when he expressed his safety concerns about two caged scoops (#874 and #882). (Compl., Ex. B at 1–2.) He also provides the date he was not given an opportunity to work during vacation when other miners had been. (*Id.* at 1.) Lastly, he lists the date he allegedly attempted to exercise his walk-around rights, but was denied and ordered to return to work underground. (*Id.* at 2–3.) Furthermore, Justice's section 105(c)(3) complaint alleges that Justice suffered retaliation in the form of a threat that he would be disciplined for observing the Sabbath. (Compl. at 4.) This threat allegedly occurred on November 3, 2016, which was after Justice filed his July 20, 2016, MSHA Form 2000-123

complaint, but before MSHA concluded its investigation and notified Justice of its determination on September 14, 2017. (Compl. at 4, Exs. A, C.)

Complainant's timeline in his supplemental statement describes matters that could form the elements of a discrimination claim, which Justice's section 105(c)(3) complaint alleges: protected activity (work refusal), adverse action (loss of opportunity to work during vacation), and motivational nexus (proximity in time). Moreover, post-complaint adverse actions alleged to have been motivated by protected activity previously investigated by the Secretary may be proper subjects of a section 105(c)(3) proceeding. *Womack v. Graymont Western U.S. Inc.*, 25 FMSHRC 235, 248 (May 2003) (ALJ) (holding that because complainant's protected activity was investigated by the Secretary, any adverse action allegedly stemming from that protected activity come within the permissible ambit of a section 105(c) complaint) (citing *Pontiki*, 19 FMSHRC at 1017).[8] Although Justice did not mention that he was threatened with discipline for observing the Sabbath in his MSHA Form 2000-123 complaint, this alleged retaliation occurred during the period MSHA was conducting its investigation of the protected activity that Justice alleges motivated the retaliation. However, the supplemental statement and time frame do not conclusively establish that the Secretary investigated and considered these allegations as part of his determination of whether section 105(c) had been violated, especially considering the Secretary's denial that he was made aware of such claims. (Sec'y Resp. at 5.)

Nevertheless, in considering a motion to dismiss, I must view the facts in the light most favorable to the party opposing the motion. At this juncture, there remain genuine issues of material fact over whether the statutory prerequisites for a section 105(c)(3) complaint have been met in regard to Justice's other claims. Per the Commission's precedent in *Hatfield*, Complainant should be afforded the opportunity to demonstrate that such allegations were investigated by the Secretary and/or considered in the Secretary's determination. *Hatfield*, 13 FMSHRC at 546. I am cognizant that such evidence, including interviews, notes, or statements made during the investigation, may only become available to Complainant after engaging in discovery. But given that the Secretary has undertaken a section 105(c)(2) case in which Justice is a party, there should be ample opportunity to obtain information on the scope of the Secretary's investigation. Therefore, Complainant should have the opportunity to present additional evidence at hearing that such claims meet the statutory requirements for a section 105(c)(3) complaint.

Accordingly, I determine that Rockwell is not entitled to summary decision as a matter of law and that dismissal of Justice's other claims, including those alleging retaliatory discrimination, is inappropriate.

V. Order

Based on the preceding discussion, Respondent's motion to dismiss Justice's interference claim regarding his right as a miners' representative to receive notice of mine ventilation plan revisions is hereby **GRANTED**. It is hereby **ORDERED** that this claim be **DISMISSED** from Docket No. WEVA 2018-48-D, as such claim will be the subject of the upcoming hearing in

[8] Although the Commission Judge's decision I cite herein is not binding precedent, *see* 29 C.F.R. § 2700.69(d), I find the decision's reasoning persuasive.

Docket No. WEVA 2018-10-D. Respondent's motion to dismiss Justice's other claims is hereby **DENIED**.

Alan G. Paez
Administrative Law Judge

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