

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 19, 2008

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on	:	Docket No. KENT 2006-506-D
behalf of LAWRENCE L. PENDLEY,	:	MADI CD 2006-02
Complainant	:	
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC;	:	Mine ID 15-02709
Respondent	:	Highland No. 9 Mine
	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on	:	Docket No. KENT 2007-383-D
behalf of LAWRENCE L. PENDLEY,	:	MADI CD 2007-05
Complainant	:	
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC;	:	Mine ID 15-02709
DAVID WEBB, LARRY MILLBURG and	:	Highland No. 9 Mine
SCOTT MAYNARD as AGENTS,	:	
Respondents	:	

INTERIM DECISION ON LIABILITY

Before: Judge Barbour

These consolidated cases are before me on discrimination complaints brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Lawrence Pendley. The Secretary filed the complaints against Highland Mining Company, LLC (Highland) and its alleged agents, David Webb, Larry Millburg, and Scott Maynard, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 815(c) (“Mine Act or Act”). Pendley is a miner who works in

maintenance and parts supply at the Highland No. 9 Mine.¹ Tr. 60. On December 21, 2005, Pendley was suspended from work for three days without pay (Docket No. KENT 2006-506-D). After the suspension had run its course, he returned to the mine and continued to work until March 21, 2007, when he again was suspended. He was discharged on March 24, 2007 (KENT 2007-383-D). In her complaints, the Secretary charges Pendley was suspended and discharged because of numerous safety complaints he made to mine management and to MSHA. The Secretary seeks, *inter alia*, the expungement of Pendley's employment records; Pendley's permanent reinstatement to the same position he held prior to his discharge or to a comparable position; payment to Pendley of the back wages, benefits, and expenses lost due to his discharge; payment of interest; and the assessment of an aggregate civil penalty of \$60,000 against Highland.²

Following Pendley's discharge, the Secretary petitioned for his temporary reinstatement, which I granted. *Secretary on behalf of Lawrence Pendley v. Highland Mining Company, LLC*, 29 FMSHRC 424 (May- June 2007). Pendley has since worked at the mine. However, the Secretary alleges the company has continued to violate section 105(c) by subjecting him to ongoing harassment and disparate treatment (Docket No. KENT 2007-383-D). The Secretary requests an order directing the company to cease its unlawful actions. She also requests any agent found to have committed violations of section 105(c) be ordered to cease the same. Sec. Br. 57-60.

For its part, Highland admits Millburg and Maynard are its agents, but denies Webb is.³ Highland acknowledges it was aware Pendley filed complaints with MSHA about various

¹Prior to March 2007, Pendley worked for 25 years in the mining industry, the last four years at the Highland No. 9 Mine, where he started as a roof bolter. After six months, he switched to the maintenance and supply position he has held since. Tr. 61. Pendley's position is commonly referred to as "maintenance parts runner." Tr. 62.

²The Secretary requests \$20,000 be allocated to any violation of section 105(c) found in Docket No. KENT 2006-506-D and \$40,000 be allocated to any violation found in Docket No. KENT 2007-383-D. Sec. Br. 59-60.

³At relevant times Larry Millburg was the superintendent of the mine and Scott Maynard was the assistant superintendent. During part of those times, David Webb was the operations manager of the mine. As such, he was the mine's highest ranking officer and the person in charge of approving disciplinary actions, although he usually "delegate[ed] out" implementation of the discipline. Tr. 605. However, after May 2006, Webb became director of Kentucky operations for Peabody Energy Company. As the director, Webb is in charge of three deep mines Peabody controls in Kentucky, one of which is the Highland Mine. With the change in jobs has come a change in duties. Since May 2006, Webb has not been involved directly in disciplinary actions at the Highland Mine, although he has been made aware of "anything . . . other than standard normal disciplines." Tr. 607-608.

conditions and incidents at the mine. It also agrees Pendley was suspended on December 21, 2005, and on March 21, 2007, and was discharged on March 24, 2007. However, it denies Pendley was suspended and discharged because he made safety-related complaints or otherwise exercised his section 105(c) rights. Rather, the company asserts it acted for legitimate business reasons.

The cases were heard in Evansville, Indiana. For the reasons set forth below, I find the Secretary has established Highland and David Webb discriminated against Pendley when they suspended him for three days on December 21, 2005 (Docket No. KENT 2006-506-D), but I also find that Pendley was properly suspended on March 21, 2007, and that his subsequent discharge did not violate the Act (Docket No. KENT 2007-383). In addition, I find the Secretary did not establish Pendley has been discriminated against since his discharge (Docket No. KENT 2007-383-D).

BACKGROUND

As indicated, the cases arise from a series of complaints filed by Pendley with the Secretary and by the Secretary with the Commission. The Secretary's first complaint, Docket No. KENT 2006-506-D, was filed on September 22, 2006. Subsequently, it was settled, and I approved the settlement and dismissed the case. However, on April 3, 2007, the Commission vacated my actions because Pendley was not a party to the settlement. The Commission returned the case to me. In the meantime, Pendley had been discharged, and the Secretary filed the application for Pendley's temporary reinstatement, which was docketed as KENT 2007-265-D. After a hearing on the merits of the temporary reinstatement proceeding. The Secretary filed the second discrimination complaint, KENT 2007-383-D. A hearing then was convened on the merits of Docket No. KENT 2006-506-D and KENT 2006-383-D. The hearing also involved the temporary reinstatement proceeding, in that the parties agreed the written record of the temporary reinstatement proceeding would be considered part of the record of the hearing on the Secretary's discrimination complaints.⁴ Tr. 8-9.

Subsequent to Pendley's reinstatement and prior to the hearing on the merits of the complaints, the Secretary supplemented her allegations of discrimination in Docket No. KENT 2007-383-D by filing an amended complaint asserting Highland continued to discriminate against Pendley by shifting his work assignments, by assigning work he could not complete, by applying different overtime rules to him, and by failing to reinstate his full benefits. Not surprisingly, Highland disagreed with the Secretary's allegations.

⁴In this decision the transcript of the hearing on the temporary reinstatement application is designated as "TRH Tr." and the transcript of the hearing on the discrimination complaints is designated as "Tr."

THE DECISION'S ANALYTICAL FRAMEWORK

The Secretary's complaints are based on various incidents, most of which involve Pendley and a fellow miner, Jack Creighton⁵; and Pendley and mine office personnel. Numerous witnesses testified about the incidents. Some of the testimony overlapped. A lot of it conflicted. The chronology of events frequently was not specific and – to my mind at least – Pendley's and the Secretary's allegations were not always clear, making it difficult to get a "handle" on the case.

This stated, a reasonable way to sort through the conflicting and overlapping record is chronologically to describe the incidents and the responses of the company and MSHA, to review the legal principles governing the resolution of discrimination allegations, to summarize the parties' arguments, to apply the principles and arguments to the record, and to determine if the record supports finding the company's reactions to the incidents violated the Act.

THE INCIDENCES OF ALLEGED DISCRIMINATION

AND

THE COMPANY'S AND MSHA'S RESPONSES THERETO

I. THE PARTS DELIVERY INCIDENT

As a maintenance and parts runner at the mine, Pendley was responsible for stocking the underground maintenance shack with needed parts and supplies. According to Pendley, trouble with Creighton began in May 2005, when Creighton used "foul language" to tell Pendley management, not Pendley, was responsible for selecting the materials to be delivered to the underground supply shack. Tr.66. Pendley believed Creighton was angry because Creighton felt Pendley was making work for him. *Id.* Creighton maintained Pendley wanted him to load boxes of Pendley's food (cookies, potato chips and popcorn) and to send the boxes into the mine. Creighton refused. ("[I]f I send . . . [Pendley's] food in, I'd have to send 200 mens['] food in." Tr. 761.) Creighton testified he asked Pendley, "[D]o you want me to supply coal mines or do you want me to supply a snack bar?" Tr. 761.

Pendley reported the incident to supervisor Rodney Baker and to other management officials. Baker said he would talk to Creighton. Tr. 67. As Pendley recalled, the management officials emphasized it was Pendley's job to order parts and supplies, and it was Creighton's job to deliver and send them. Tr. 66-67. A few days later, Baker told Pendley he had spoken with

⁵According to Steven Tramel, a maintenance worker who worked with both Pendley and Creighton, Creighton was "a little different." Tr. 505. Tramel described Creighton as having "a smart attitude." *Id.* He also was given to playing practical jokes on other miners – things like tying miners' boots together. Tr. 506. In addition, Bernard Alvey, who went to high school with Creighton, described him as having a "sharp tongue." Tr. 525.

Creighton.

II. THE TRUCK INCIDENT

Pendley maintained shortly after the May 2005 incident Pendley's truck was damaged in the mine parking lot. Pendley reported the incident to Highland shift foreman Steve Bockhorn and to operations' manager Scott Maynard. Tr. 74, 80. Pendley testified the truck exhibited a "very large" dent. Tr. 262. The estimated repair cost was \$900. Tr. 262. Pendley recalled Maynard telling him the damage appeared to be the result of vandalism.⁶ *Id.* According to Pendley, after he reported the incident, Webb told him not to take anything into his own hands and to report further incidents.

Webb testified he first met Pendley when Pendley came into Webb's office and told him about the truck. Webb asked Pendley if Pendley had any thoughts about who might have damaged it. Pendley responded he did, but he did not want to state names because he did not know for sure. Pendley just wanted Webb to be aware of what happened on mine property. Tr. 609. Webb told Pendley mine employees would "keep a lookout," and if the damage continued, the company would consider putting a security camera in the parking lot. Tr. 609-610.

III. THE BLEACH INCIDENT

Pendley testified around the same time someone opened his locker in the bathhouse and poured bleach on his clothing. Tr. 68. Pendley thought it was Creighton, a charge Creighton denied. *Id.*, 807; *see also* Tr. 261-262. Pendley testified he again complained to Baker. Creighton told fellow miners Pendley was "crying," and, according to Pendley, Creighton said, "I'll give you something to cry about." *Id.*

The incident was known to Scott Maynard, the assistant superintendent, who testified Pendley spoke with him about someone "put[ting] bleach on his clothes." Tr. 933. Maynard discussed the incident with Creighton, who told Maynard he had no idea what Maynard was talking about. Tr. 934; *see also* Tr. 955. Maynard asserted he "never could find . . . anyone to confirm the story." Tr. 934.

IV. THE DIRT INCIDENT

Subsequently, another incident occurred in the bathhouse. James Allen, the mine safety manager, testified Pendley told him dirt was swept intentionally in front of his locker. Allen believed the incident could have been safety-related if the dirt was "enough that . . . [Pendley]

⁶There was a dispute over the extent of the "damage." Maynard testified the "damage" looked like rose bush scratches, and other witnesses supported this view. *See* Tr. 263, 932-933; *see also* Tr. 513-514, 704.

could have tripped and stumbled.” Tr. 704.

According to Creighton, it was not dirt, but rather muck that was left in front of Pendley’s locker. Although Creighton usually hosed down the bathhouse floor, he was sure he did not leave the muck, because on the day of the incident someone else hosed the floor. Tr. 766.

V. THE HOSE INCIDENT

Another incident followed. Steve Storm, a belt splicer, was in the bathhouse with Pendley when Creighton was hosing down the floor. According to Storm, Creighton was moving toward Pendley when Pendley walked between Creighton and a row of lockers and “got his feet and probably pants legs sprayed a little bit.” Tr. 743. (In Creighton’s version, Pendley had “a little [water] splashed on his boots.” Tr. 762.) Creighton maintained Pendley walked toward him even though he could have gone another way.⁷ Tr. 765.

VI. THE “GUN” INCIDENT

The “gun” incident came next. Creighton testified he knew Pendley had gone to Creighton’s supervisor and complained. “So” said Creighton, one day in the bathhouse “after I heard [about] him complaining, I walked halfway back [to Pendley’s locker] . . . thr[ew] a piece of paper towel on the floor and told him there is something to cry about . . . [and] that’s when he reached up in his locker in his hard hat and pulled out what I perceived to be a weapon.” Tr. 767. Creighton continued, “I told him . . . * * * * I [will] shove it down . . . [your] throat or make . . . [you] eat it, something on that order.” Tr. 769. Creighton maintained Pendley “started mouthing” at him, but Creighton walked away. *Id.*

Creighton did not complain to Webb about the incident until two or three weeks after it happened. Tr. 818. When he ultimately spoke with Webb about it, Webb remembered him saying Pendley either threatened he had a gun or acted as though he had a gun in his locker. Tr. 612, 616.

VII. THE CAP LAMP INCIDENTS

Throughout the summer of 2005, Pendley testified he experienced more incidents of what

⁷Pendley was not the only one who sometimes got wet when Creighton hosed the floor. Storm also was sprayed on occasion. He testified Creighton did not stop for anyone. Tr. 746. As Creighton saw it, if others got wet, it was because he had “a quitting time and . . . [he] want[ed] to get out.” Tr. 809. Creighton denied the way he hosed down the floor lead to altercations with others, although he admitted when miners got wet, they “bark[ed] a little bit.” *Id.*

he believed might be Creighton inspired harassment. Pendley had trouble with his cap lamp. At times he felt “bad” bulbs purposely were put in his lamp. Tr 72. He testified it was “very uncommon” to have as much trouble with a lamp. Tr. 230. At one point, he stored his lamp and locked it in place. Later that night or during the following day, someone cut the lock and took the lamp. Tr. 231.

VIII. THE NONSPECIFIC HOIST INCIDENTS

At the mine, men and supplies were lowered underground via the hoist. The miners rode in and out on man load cars, which usually were coupled in a series. One of the cars (the brake car) contained the brakes for the man load cars. One group of controls for the hoist was located on a control panel which was in a shed (the “slope shack”) on the surface. The slope shack was some distance from the portal. Tr. 70-71. Another group was located in the hoist house, which was uphill from the slope shack and further from the portal.

Among the controls at the slope shack and the hoist house was an “E-stop” button (an emergency stop button), which, if pushed, brought the man load cars to an abrupt halt. Tr. 70. There were other E-stop buttons in the front compartment of some man load cars and underground at the bottom of the slope. *See* Tr. 938.

Pendley maintained when Creighton was at the controls of the hoist and Pendley was waiting to board the man load to ride into the mine, Creighton sometimes would send in the cars without Pendley. Or, sometimes Creighton would stop the man load, and Pendley would have to get out and restart it. Tr. 70. Pendley did not identify the specific dates and/or times when the incidents happened; rather, he referred them as a “continuous thing.” Tr. 81. Maynard confirmed Pendley spoke with him about “numerous incidents [of] the slope car being stopped and started.” Tr. 933.

IX. THE MOTORIZED EQUIPMENT INCIDENTS

Pendley further asserted there were occasions when Creighton traveled close to him on a motorized cart (a “golf cart”). Pendley testified Creighton told him to watch out or he would be run over. Tr. 74; *see also* 78-79. Pendley stated he was “on guard pretty well continuously” when around Creighton. *Id.*; *see also* Tr. 78. Pendley added, once when Creighton “ran right past me real close at a pretty good speed,” another miner, Lap Lewis, saw the incident and said he did not understand why management failed to do something about Creighton’s “close calls.” Tr. 78-79.

Maynard testified Pendley spoke with him about Creighton trying to run him over. Tr. 933. According to Maynard, he checked the complaints, but “never could find any witnesses to anything or anyone to confirm the stor[ies].” Tr. 934

X. THE FORKLIFT INCIDENT

Pendley also asserted there was a specific incident when Creighton threatened to run him over with a fork lift. The incident occurred when Creighton was operating a fork lift on the surface. There was a pallet of materials on the fork lift which had to be loaded onto one of the man load cars. Pendley stated Creighton pulled the fork lift up to the man load, and Lap Lewis stood in front of the fork lift and loaded the materials directly off the fork lift onto the man load car. Then, according to Creighton, Pendley, who was waiting to board the man load car to go underground, noticed Lewis loading the materials on one of the cars. Rather than wait at the man load area to board the man car, Pendley decided to “just . . . walk up [to where the car was being loaded] and sit down on . . . [the car] until they released [it] to go in the [mine].” Tr. 1064-65.

In Pendley’s version of the incident, he “just walked up there and stopped at the edge [where Lewis] was . . . unloading [supplies from the fork lift]. When [Lewis] got done unloading . . . [Lewis] walked back up towards [Creighton],” and Pendley then walked behind Lewis. Tr. 1067-68. Pendley was adamant he only walked where Lewis walked. Tr. 290, 1087. Although he agreed he could have walked around the fork lift and entered the car from the other side, he believed it would have involved stepping over the hoist rope, something he maintained was a safety hazard. Tr. 1086-87. In any event, he “felt like either way they would have accuse[d him] . . . of going the wrong way.” Tr.1090. As Pendley remembered, when he “walked through where . . . Lewis had been standing,” Creighton threatened to run him over. Tr. 209.

Creighton remembered the incident differently. Creighton testified he pulled up to within a foot or two of the car and “all of a sudden here appears Pendley . . . where he ha[d] no business being.” (Tr. 777), between the car and fork lift. Creighton maintained he said to Pendley, “[H]ey, get the hell out of the way before you get run over.” *Id.* Pendley backed out and then again “placed himself between the forklift and . . . [another] car.” *Id.* Creighton testified Pendley called him “yellow” and then “called [him] out.” Tr. 777-778. Creighton stated he, “just grinned and flipped . . . [Pendley] off . . . [and] then . . . left.” Tr. 778.

Creighton was certain Pendley walked between the fork lift and the car. In Creighton’s view, by placing himself between the fork lift and the car, Pendley risked serious injury in the event the fork lift’s brakes failed or its throttle stuck. Tr. 822; *see also* Tr. 208.

For his part, Pendley was sure Creighton said a lot more than he testified to. Pendley recalled Creighton’s “open[ing] the door [of the fork lift] and . . . yelling and cussing.” Tr. 1068. Pendley avoided making eye contact with Creighton. *Id.* He was “absolutely” concerned for his safety, because “whenever someone tells you . . . that would be a good way to get run over or I’m going to run over you, with all that had went on concerning the statements that he made against me in the past, it’s . . . a continuous concern.” Tr. 1069.

Maynard learned of the forklift incident and discussed it with Creighton, who told Maynard he had no idea what Maynard was talking about. Tr. 934; *see also* Tr. 955. Webb, then

the operations manager, also learned of the incident, although he could not recall who told him. Tr. 664. James Allen, the mine safety manager, also remembered hearing about it and speaking with Creighton and another miner, perhaps Lewis. Tr. 704, 721-722. Allen determined Pendley had passed between the forklift and the man load car. He also determined Pendley did not have to walk where he did. He could have sat in another seat in the man load and avoided passing between the forklift and the man car. Tr. 704-705. Allen remembered Creighton stating he never came “dangerously close” to Pendley. Tr. 723.

XI. HIGHLAND’S INITIAL RESPONSE

As a result of Pendley’s complaints (primarily about Creighton), and Creighton’s complaints about the “gun incident,” management officials held a meeting at which both men were present.⁸ Pendley remembered the meeting as occurring around the late summer or early fall of 2005, as did Webb. Tr. 78, 613. Maynard was present, as was Jesse O’Rourke, who was the mine superintendent before Larry Millburg took the position. The union was represented by Ron Shaffner, the president of the union local; and “Shug” Dyer, the union safety committee chairman. Tr. 76.

According to Creighton, he and Pendley were talked to separately and then were brought together. Webb testified both men were asked what was going on between them and what their problems were. The “gun incident” and others were discussed, including Pendley’s assertion Creighton was trying to run him over.⁹ Tr. 615, 770, 772-773.

Management officials told Pendley they would look into his complaints. They also asked Pendley if they could check his locker for a gun.¹⁰ Tr. 76, 1206. At the close of the meeting, Webb told Pendley and Creighton he was giving each of them a written warning. Tr. 177; 199.

Webb testified, after Pendley and Creighton left, management and union officials agreed the warning should be strong and it should put Pendley and Creighton on notice that future incidents would not be tolerated and future altercations were not acceptable. Tr. 617. As a

⁸It was not only mine management officials who knew of the conflicts involving Pendley and Creighton, mine mechanic Clarence Powell testified “everyone” at the mine knew about them. Tr. 491.

⁹According to Pendley, at some point during the discussion of the gun incident, Creighton again said he was going to “shove a gun down . . . [Pendley’s] throat.” Tr. 77; 205. Pendley said to Webb, “[N]ow, do you see what I’m dealing with.” *Id.*

¹⁰Pendley’s locker was checked, as was Creighton’s, and no guns were found. Tr. 77, 207, 612..

result, the warning letters were issued. The letters, which were dated October 7, 2005, were identical. They stated “verbal abuse, disregard for safety rules and threatened violent behavior to a co-miner” would not be tolerated. Tr. 621; Resp. Exhs. 9 and 10. The letters also stated they were a “last and final written warning” and “[a]ny further abuse, altercations or violations of Company Safety and Work Rules may lead to . . . suspension with intent to discharge.” Resp. Exhs. 9 and 10.

Pendley testified, after leaving the meeting, he went to Jesse O’Rourke’s and Dave Webb’s offices, shook hands with each and told them “I don’t feel like I deserve this . . . warning but if that’s what it takes to solve this problem I’ll accept it.” Tr. 201. Webb believed Pendley “just wanted to kind of reaffirm . . . that things had . . . gotten out of proportion and he just wanted everything to settle down.” Tr. 618. Webb stated he told Pendley, “that’s all we want, too.” Tr. 618.

Creighton took a different and more pragmatic course. On October 10, Creighton met with Webb and requested his letter have a “sunset date.” Tr. 623-624. Webb agreed if Creighton did not engage in any of the conduct mentioned in the letter for six months, the letter would be removed from Creighton’s personnel file. *Id.*, Tr. 785; *see also* Tr. 625. Pendley made no such request of Webb, or of anyone else.

XII. THE MAN LOAD INCIDENT OF NOVEMBER 29

After the October meeting and letters, more than a month came and went without another incident, but the lull was broken on November 29, 2005. On that date, a man load car was sitting on a side track waiting to have a supply car attached before being sent into the mine. Once the cars were coupled, they were brought to the man load area, the point where miners usually got on. Tr. 83-84. Pendley, who was waiting to go underground, proceeded to the area. The cars arrived and Pendley climbed aboard. To send the cars into the mine, someone had to pull a cord adjacent to the cars. Pendley was the only miner aboard. He pulled the cord, the hoist started, and the man load cars moved down the slope into the mine. Pendley was sitting in the front seat of the middle car. Tr.1072.

Creighton was working in the yard. He had dropped a load of supplies at the slope shack. Creighton saw Pendley get onboard and go underground. Tr. 786. Asked what he did after Pendley went underground, Creighton responded, “I might have went in and ate. I might have went to the supply house. . . . I probably got on a forklift.” Tr. 787. Asked if he went to the hoist house where a hoist control panel was located, Creighton said “No.” *Id.* Asked if he went to the slope shack, the site of another control panel, Creighton replied, “Not that I recall.” *Id.*

The particular car on which Pendley was riding did not have a radio to communicate with the surface. Tr. 1072. Therefore, when the cars came to a lurching stop a third to a half of the way down the slope, Pendley could not call for help. Tr. 210. As the cars halted, Pendley was thrown forward. He leaned to his right in order not to fall out of the car. He testified he felt

his back muscles and neck muscles “pull.” Tr. 86. Then, he “gathered [himself] together” and waited. *Id.* He stated, “I didn’t know when . . . [the cars] would start again or if . . . [the hoist] was broke[n] or what happened . . . so . . . I just stayed in the car.” Tr. 86-87. He estimated five or ten minutes passed as he “held on in case something else . . . happen[ed].” Tr. 1075. Pendley did not leave the car. Tr. 87, 98, 211. Then, the cars resumed their descent, and at the bottom they came to a slow and normal stop. Tr. 87, 218, 1074.

Pendley asked Brian Phillips, who was working at the bottom, if he stopped the cars. Phillips said, “no.” Tr. 87, 318, 1074; *see also* Tr. 310. Phillips told Pendley no one at the bottom had stopped them. *Id.*, Tr. 287-288.

Whether or not the cars stopped as Pendley claimed was a subject of much conjecture. Pendley suspected Creighton caused the cars to stop by pushing an E-stop button, but Creighton denied it. In fact, Creighton did not believe the cars stopped suddenly. He thought the brakes on the brake car would have set if the cars stopped and, according to Pendley, they had not set. Tr. 788; *see also* Tr. 793.

Scott Maynard was more specific in expressing his doubts. While he conceded “[s]omeone could [have] stop[ed] the brake car from the hoist house and restart[ed] it without setting the brakes on the . . . [brake]car” (Tr. 964), he maintained there was a “roll back mechanism” on the man load cars and if the man load stopped abruptly, the hoist cable would stretch and then contract causing the cars to “spring back.” Tr. 975. He maintained, “[a]ny change in direction when the car[s are] in motion will automatically set your emergency brakes. It’s called a roll back safety device.” Tr. 975-976. Once the brakes set, a person had to get out of the man load and release the brakes on the brake car. Like Creighton, Maynard noted Pendley stated he did not leave the car. Tr. 976.

Michael Moore, the MSHA inspector who conducted quarterly inspections of the hoist and man load mechanisms, questioned Maynard’s opinion that a roll back would set the brakes on the brake car. He testified “the ability of a roll back to set the brakes on the brake car was taken out [of the system] in the early 1980s.” Tr. 1045. If Pendley was traveling down the slope and someone pushed an E-stop button in the hoist house or at the slope shed, the cars would halt suddenly, but the brakes on the brake car would not necessarily be affected. Tr. 323-324; *see also* Tr. 336, 1042. Thus, Moore believed Pendley might well have been able to remain in the car after the man load came to an abrupt stop.

Moore also explained why Pendley was thrown forward. In Moore’s opinion, when the cars came to a sudden stop, “it would give you a jolt . . . and your body would try to move.” Tr. 324-325. Moreover, if, as was the case, the man load contained a car carrying supplies, the added weight on the supplies would make the “jolt” even stronger. Tr. 325-326. Moore believed a stop such as that described by Pendley easily could injure a miner. Tr. 324.

After Phillips assured Pendley no one on the bottom pushed the E-stop, Pendley went to

work. Tr. 91. However, his back bothered him. Greg Moody was Pendley's supervisor that day. Pendley told Moody what happened, and he described the problem with his back. Moody said Pendley "ought to have it checked." *Id.* Pendley then noticed his left arm was "tingling." *Id.* Moody asked Pendley to help him complete an accident report, and Moody took Pendley to the surface, to the commons area room adjacent to the mine offices. Pendley again told Moody about the man load stopping abruptly, about being thrown forward and to the right, and about the subsequent pain in his back and the tingling in his arm. After Moody transcribed what Pendley said, he asked Pendley to read and sign the report if he agreed with it, which Pendley did.¹¹ Tr. 91-92.

Other miners were in the area when Pendley and Moody were working on the report, including Creighton and Randy Wolfe. Wolfe worked in Highland's safety department. Tr. 92-93. According to Pendley, Creighton said of Pendley, "[A]in't nothing wrong with him. He ain't hurt or nothing."¹² Tr. 93. At that point, Wolfe suggested Pendley move to the safety department, which Pendley did. Others came to the safety department and inquired how Pendley felt. Wolfe, too, asked Pendley how he felt. Tr. 93-94. Pendley maintained he told Wolfe he "pulled" his back when he was thrown forward and to the right, but he first felt back pain when he reached over to retrieve items from the car floor once the car reached the bottom of the slope.¹³ Tr. 216.

A short while later Pendley was taken by ambulance to a hospital, where x-rays were taken and pain medication was administered. At the hospital, Pendley was told he should see a doctor at a specific clinic in Henderson, Kentucky. Tr. 95. Pendley did as directed. The doctor told him to take a few days off work and then go back. He also instructed Pendley to come back to the clinic if he had more back trouble. Tr. 98-99.

As a result of this advice, Pendley stayed off work for several days. Tr. 99. When he returned he asked Lap Lewis if Lewis was in the man load control area on November 29. Lewis said he was not, but that Creighton was in the area. Lewis thought Creighton sent Pendley underground. Pendley responded, "no . . . I sent myself underground." Tr. 100. Pendley knew of no reason why Creighton was in the control area.

¹¹Pendley testified, when he later asked for a copy of the report, the mine safety manager, Jim Allen, told him the report was "company material" and Pendley could not have a copy. Tr. 96, 224. In addition, Pendley maintained Allen said more than once what Pendley said had happened could not be accurate. *Id.* Pendley stated Allen told him the hoist was checked out by "the hoist people," who concluded the accident "hadn't happened." Tr. 218, 222. According to Pendley, Allen added cryptically, "[W]e've all got good jobs here." Tr. 222, 224.

¹²Creighton did not recall saying anything. Tr. 824.

¹³He denied he told Wolfe the car "didn't rapidly stop." Tr. 216.

Webb heard about the incident the next morning. As he recalled, “one of the theories . . . being kicked around” was someone hit the E-stop button causing the incident. Tr. 628. Webb and the company decided to have the hoist inspected by contract electricians to ascertain if the hoist and its safety features had worked properly. Tr. 629, 669. The electricians tried, but were unable to find out whether an E-stop had been pushed, causing the man load cars to stop. Tr. 629. However, they found all of the hoist system’s safety and other features were functioning as they should. Tr. 966. The electricians reported to mine safety manager Allen the host had not malfunctioned and, in fact, could not have malfunctioned as Pendley claimed. Tr. 692.

After the electricians reported their findings, Webb learned there was an allegation Creighton had pushed an E-stop button. Tr. 628; *see also* Tr. 669-670. He stated if he had been sure Creighton had caused the hoist to stop he would have considered Creighton’s action to be a “bad safety offense” and he would “probably [have] taken very strong disciplinary action.” *Id.* Webb could not recall whether or not he spoke with Creighton about it. Tr. 669-670. However, based on the electricians’ report, he doubted an E-stop button had been pushed. He took no action against Creighton.

XIII. PENDLEY’S DECEMBER 2005 COMPLAINT TO MSHA

Following the incident, Pendley filed a complaint with MSHA. Kirby Smith, an MSHA senior special investigator, was assigned to investigate the complaint. Smith testified, when Pendley came to MSHA on December 15, he spoke with Smith and others about “a whole list of things.”¹⁴ Tr. 45. According to Smith, Pendley expressed concern about “the operation of the . . . hoist and . . . an accident that occurred to him on . . . [November 29].” Tr. 27. He also complained of “harassment . . . at the [mine] that he had been reporting to management with no effect.” *Id.* Pendley asked for a copy of Highland’s report of the November 29 incident, but MSHA officials had not received a report.¹⁵ Tr. 47.

MSHA then sent Inspector Michael Moore to inspect the hoist. Tr. 326. Like the electricians hired by Highland, Moore found nothing wrong with it. He also found nothing wrong with the brake car. *Id.* Unlike the electricians, Moore concluded “the incident could have occurred just as . . . Pendley described.” Tr. 32.

Smith, who accompanied the inspector, believed it was “common knowledge” that

¹⁴Five months prior to that, Pendley started keeping detailed notes about what happened at the mine. Tr.196. He did so because of problems he was having with Creighton. Tr.198.

¹⁵Webb stated the company had not filed a report because Highland officials were not sure the hoist stopped suddenly and an accident “actually occurred.” Tr. 629. Allen maintained the company was not neglecting its reporting duties. Rather, it was in the process of investigating the incident in order to complete the report if one was required. Tr. 684.

Pendley had gone to MSHA and, thus, had initiated Moore's inspection.¹⁶ Tr. 48, *see also* Tr. 28, 47. However, when Pendley was asked by a miner if he had spoken with MSHA about the hoist, Pendley said he had not. He was afraid if he said he talked to MSHA, the information would be conveyed promptly to mine management. Tr. 102-103.

During the inspection, Moore asked about the November 29 incident and whether or not Highland filed an accident report. Allen produced an intra-company memo which stated the company had not yet determined if the incident was an accident. Tr. 684. Nonetheless, on December 20, MSHA cited Highland for a Part 50 violation. The citation alleged Highland failed to report the November 29 incident within 10 days of its occurrence.¹⁷ Tr. 28; Gov't Exh.1. MSHA was concerned Highland was not reporting all accidents as required. So, the agency conducted an audit of the company's compliance with the Part 50 requirements and issued four more citations, each charging instances where accidents were not reported.

XIV. THE SIGN-IN INCIDENT
AND
THE SECRETARY'S FIRST DISCRIMINATION COMPLAINT

No sooner had Pendley complained to MSHA than another incident occurred, one which lead directly to Pendley's first suspension from work. Pendley testified in the latter part of 2005, he regularly worked 12-hour days, his usual eight-hour shift, plus four hours of overtime (two hours before his shift and two hours at its end). Tr. 108-109. On December 21, his shift started at 3:00 p.m, but Pendley got to the mine at approximately 12:30 p.m. because he intended to go to work at 1:00 p.m. The sign-in book was kept in the commons area room. Pendley signed in between 12:50 p.m. and 12:55 p.m., went to the bathhouse, got some materials and headed for the man load boarding area. He intended to go underground. Tr. 108, 111-112. When he signed in, Pendley indicated the time was 1:00 p.m.¹⁸

On the way to the man load area, Pendley saw Lap Lewis, who told Pendley the cars were underground and it would be "a few minutes" before they returned. Tr. 113-114. It was cold, and Pendley did not want to wait outside. He and Lewis walked into the commons area room to

¹⁶Pendley testified a fellow miner overheard Shug Dyer and Ron Shaffner saying he had "gone to the federal about the hoist situation." Tr. 101.

¹⁷Mandatory reporting regulations at 30 C.F.R. Part 50 require an operator to report certain accidents within a prescribed period.

¹⁸The chairman of the union safety committee, Shug Dyer, explained under the company/union contract, a miner's pay began once he or she signed in. Tr. 446. According to Pendley, almost everyone rounded his or her sign-in time to the nearest hour.

wait.¹⁹ Tr.114. Miner Joe Adamson came into the room and signed in. According to Adamson, it was around 1:00 p.m. Pendley had signed in immediately before Adamson. Tr. 368.

Prior to signing in, Adamson saw Webb walking up and down a hallway outside the room. He testified Webb “looked weird.” Tr. 369. Pendley testified Adamson asked if he, Pendley, was getting ready to go underground. When Pendley stated he was, Adamson said he wanted to go underground with Pendley. Adamson left the commons area room, went to the supply area, and then returned. *Id.* Pendley was sitting in a chair against the wall, and Lewis and Adamson were in front of him, about six to eight feet away. Tr. 116. According to Adamson, if the weather was cold, miners usually waited inside the commons area room, where they could see the man load cars through a window.²⁰ Tr. 377. However, Pendley was sitting in such a way he could not see through the window. Tr. 243.

Pendley testified, Webb walked into the room and asked Pendley if he was paying Pendley “to sit there.”²¹ Tr. 245; *see also* Tr. 1062. Adamson stated he and Lewis did not speak to Webb, but Pendley testified he told Webb he was waiting for the man load so he could go underground. *Id.*, 244, 245, 374, 1062. According to Pendley, Webb responded, “Not on my time[,] you’re not.” Tr. 117. Then, Webb turned and walked away. *Id.*

Pendley, Lewis and Adamson left the commons area room and walked outside to the man load area. Pendley estimated the cars came up at about 1:30 p.m. Pendley and Adamson boarded, and they road underground. Tr. 117-118.

Webb had a different version of events. He testified between 1:15 p.m. and 1:30 p.m., he waked through the commons area room and saw Pendley sitting on a chair against the wall. Pendley was four or five feet away from Webb, and Webb did not recall anyone else in the room.²² Tr. 631-632, 639; *See Resp. Exh.11.* Webb intended to go to the mine manager’s office

¹⁹Pendley described the commons area room as “wide open.” He estimated it measured 20 feet by 30 feet. Tr. 115-116.

²⁰Shug Dyer termed it “standard practice” for miners to sign in and wait in the room. Tr. 446.

²¹Adamson’s description of what Webb said was somewhat different. He testified Webb told Pendley “he didn’t pay . . . him to sit and drink coffee and all like that.” Tr. 370. Adamson claimed he was “stunned” by Webb’s remarks because Pendley was doing a normal thing by waiting in the commons area room. *Id.*

²²As previously noted, the sign-in incident ultimately lead to Pendley’s suspension by Webb. After Pendley was suspended, Webb was reminded by Ron Shaffner that other miners were in the room with Pendley. Webb told Shaffner he did not see the others, but if Shaffner would give him their names, he would suspend them too. Tr. 645. Not surprisingly, neither

to check maps, but when he saw Pendley, Webb decided to look at the sign-in book because he “wanted to see what Pendley was doing sitting there.” Tr. 636. Webb maintained, it was “kind of odd to see a guy sitting there at that time of day.” *Id.*

Webb testified he asked Pendley why he was sitting in the room. He said to Pendley, “I don’t think you should be sitting here on my time. I think you ought to be heading towards the hoist, toward the underground.” Tr. 637. Webb maintained Pendley did not respond.²³ Rather, Pendley got up and walked to the sign-in book and leaned over it. Webb assumed Pendley was changing his time. Tr. 638. At that point, Webb turned and left the room to go to his office. *Id.*

Webb stayed in his office for about an hour. Then, he walked back to the commons area room where he checked the sign-in book to determine if Pendley had in fact changed his time. The book still showed Pendley signed in at 1:00 p.m. In Webb’s opinion, by not changing his time, Pendley was being insubordinate. Tr. 639. He had falsified a company record. Webb called underground, and told a management official he wanted to see Pendley in his office.²⁴ Tr. 640.

After working up to two hours, Pendley was notified to return to the surface, where he was directed to report to Webb’s office. At the office, Pendley found Webb; Shug Dyer, the safety committee chairman; Ron Shaffner, the union local president; and Scott Maynard, the assistant superintendent.

As Dyer remembered the meeting, Webb spoke with Pendley about why Pendley had not caught the man load cars to go underground. Then, he asked Pendley for his side of the story. Pendley looked at Dyer and Shaffner and told Webb he had “nothing further to say until . . . [he got] better representation.” Tr. 444.

As Pendley recalled the meeting, Webb also said Pendley would be suspended for three

Shaffner, nor anyone else, gave the names. Tr. 647. Webb admitted the room was “an open area . . . [with] no obstructions.” Tr. 651. He did not know why he saw only Pendley. Tr. 650-652.

²³On cross-examination Webb agreed Pendley might have said he was waiting for the man load cars. In any event, Webb was adamant he “told [Pendley] he need[ed] to be out . . . [at the man load area] . . . not inside the room.” Tr. 655; *see also* Tr. 656.

²⁴Webb agreed, as a general rule, if a miner signed in at 1:00 p.m. and waited outside for the hoist to come up, the miner would be paid for the time he waited. Tr. 653. Webb stated he “had an objection with . . . Pendley [on December 21] . . . because after he signed the book, he should have been out at the hoist. There’s a shelter there to wait for the hoist . . . that’s where he should have been waiting . . . not inside the building . . . especially after 20 minutes.” Tr. 654-655.

days for falsifying a company record (i.e., the sign-in book). Tr. 247. Webb then handed Pendley a suspension letter.²⁵ *Id.* Pendley testified far from remaining silent, he told Webb he denied the charges and that he did not falsify the sign-in book. Tr.119, 244. Dyer told Pendley he should tell Webb more. Tr. 120, 456. So, according to Pendley, he stated again he did not falsify anything and he felt he needed representation. Tr.120. Shaffner told Pendley he and Dyer were all the representation Pendley had, and Pendley responded, “I feel . . . I need better because I’ve denied what I’ve been accused of.” Tr. 122.

Webb’s version of the meeting was not too different from Pendley’s. Webb remembered telling the group why he felt Pendley was insubordinate, and asking Pendley if he had a “different version.” Tr. 641. Pendley responded, “I’m not going to talk to you or say anything until I get better representation.” Tr. 641, *see also* Tr. 642. Webb explained to Pendley, under the union contract, the union representatives had to be there and had to represent him. Tr. 642-643. Webb then read to Pendley Webb’s version of the events of the day and explained he was suspending Pendley because of insubordination. He added, he asked Pendley, “Am I wrong in my decision? Tell me where I’m off.” Tr. 643. Pendley did not reply.

Webb then issued Pendley the suspension letter he had prepared before the meeting. Tr. 643-644; Resp. Exh. 13. Even though the letter was written before the meeting, Webb maintained Pendley “absolutely had a last chance [I]f he had any objections to . . . [the letter] he needed to respond . . . we could have either modified . . . [the] letter or thrown it away.” Tr. 657. However, Pendley’s only response was he wanted to know the dates when the suspension would take effect. Tr. 644.

After the meeting concluded, the union officials and Pendley left Webb’s office. Dyer urged Pendley to return to return and speak with Webb about the suspension, but Pendley would not.²⁶ Tr. 247-248. Rather than explain why he had not, as Webb thought, falsified his time, Pendley went home. He then saw a doctor, who suggested he take a full week off. Pendley returned to work during the first week in January. Tr. 124.

²⁵As far as Pendley knew, no one had ever been suspended for waiting for the man load cars in the commons area room. Tr. 195. Pendley maintained the “real” reason he was suspended was because Webb thought he complained to MSHA about Highland’s failure to report the November 29 incident. In fact, Pendley claimed a miner named Troy Cowan told him he heard Webb say he knew Pendley was the one who complained to MSHA about Highland’s failure to file an accident report and that MSHA came to the mine and cited the company because of Pendley. Tr. 237-239; 283. However, Cowan, the second shift production supervisor, denied he told Pendley any such thing or said the company was going to “get” Pendley because he complained. Tr. 848.

²⁶Dyer testified that Shaffner also urged Pendley to go back and speak with Webb (“[L]et’s go back in there and . . . get it straightened out right now.” Tr. 456).

Once back, Pendley maintained he was given different and increased duties. Tr.126. In fact, he testified, by the end of 2006, he had been assigned almost entirely different duties than those he held prior to being suspended. Tr. 136. For instance, he was asked to hand load a pallet and move it, rather than to use a fork lift. Tr. 131-132. Although he admitted moving the pallet did not create a safety issue, he felt there were “a lot of things that could have been shared with other employees that were being put on me.” Tr. 132.

Pendley again went to MSHA and complained he was suspended because he requested a copy of the company’s accident report. Pendley also said he intended to have the union file a grievance for him. According to Pendley, Shaffner told Pendley he would file it, but never did. Tr. 248-239. Rather, Pendley quoted Shaffner as stating Webb threatened to suspend the other miners who were in the commons area room with Pendley if Shaffner filed a grievance. Tr. 250.

On September 25, 2006, the Secretary, after having investigated Pendley’s allegations, filed her first discrimination complaint on Pendley’s behalf (Docket No. KENT 2006-506). The Secretary asserted Pendley was suspended “for making safety complaints.” Compl. 2.

XV. THE OFFICE EMPLOYEES INCIDENT

While Docket No. KENT 2006-506-D was pending before the Commission, two incidents occurred that lead to the company’s subsequent decision to suspend and discharge Pendley. One of the incidents was triggered by yet another problem with overtime.

On or just before March 19, 2007, Pendley learned Fay Hubbert, who was in charge of payroll at the mine, questioned overtime pay Pendley believed he was owed. Pendley was upset. He went to the office of Sheila Gaines, Hubbert’s supervisor. Pendley and Gaines discussed the situation. Gaines described Pendley as agitated and “very upset” because of what he perceived to be Faye Hubbert’s unauthorized questioning of his pay.²⁷ TRH Tr. 232. As it turned out, Hubbert was doing her job. Gaines, Hubbert’s supervisor, explained, among Hubbert’s duties was a requirement to review all claims for overtime and make sure they were accurate. TRH Tr. 232-233, 246. According to Gaines, Pendley argued Hubbert had no such right. TRH Tr. 234. He told Gaines, Hubbert was doing things that were not “right,” that Gaines would be held accountable. *Id.*; *see also* TRH Tr. 235. Gaines remembered Pendley saying, “You’re going to take the fall.” TRH Tr. 235. What Pendley said and the way he said it made Gaines feel “very nervous.” TRH Tr. 235. An employee who worked down the hall told Gaines she was ready to bring in another miner because Pendley was “getting so loud” the employee thought Gaines “might need some help.” TRH Tr. 236. Pendley left, but Gaines “felt like [the discussion] wasn’t over.” TRH 235. Gaines was right.

Two days later Pendley returned to continue the discussion. Gaines heard “loud voices,

²⁷Pendley was, in fact, subsequently paid for the subject overtime. Tr. 235.

in the payroll office.” TRH Tr. 239. She heard Hubbert tell Pendley he needed to speak with Millburg. Millburg now was handling all questions regarding overtime pay.²⁸ Tr. 239. She described the conversation as “heated.” Id. It was just before 1:00 p.m., and Pendley had not yet signed in. Tr. 144. Pendley then appeared at the door of Gaines’s office. He wanted to speak with her, but Gaines explained she was busy. TRH Tr. 239-240. Pendley entered the office anyway. He was carrying a copy of a mine sign-in sheet and his pay stub. Pendley told Gaines he was not being paid properly. Gaines told him if he would leave the sheet and stub she would look into the matter, but Pendley kept insisting his pay was inaccurate. He finally left when Gaines received a telephone call. TRH Tr. 240.

Pendley then looked for Millburg. Millburg was unavailable, and Pendley headed for the bathhouse to get ready to go to work. Pendley got dressed, donned his hard hat and light, and traveled toward the man load area. The man load cars were moving toward the area, and Pendley waited for them. However, instead of stopping for Pendley, the cars continued past him into the mine. Tr. 150-151. Lewis explained the cars did not stop because “the federal people have been called to go . . . in the [mine]” for a section 103(g) inspection.²⁹ Tr. 152.

Pendley noticed an MSHA inspector, as well as union and company personnel, sitting in one of the cars.³⁰ Tr. 152. Pendley maintained Lewis told him he would have to wait for the next

²⁸Millburg testified, after he began working at the mine in March 2006, he limited miners to one hour of overtime at the beginning of the shift and one hour at the end of the shift. He did so because miners were coming and going at all hours and the company needed to keep better track of the hours worked. Millburg described the situation at the mine as one in which overtime was “being abused,” and “everybody was doing whatever they wanted.” Tr. 1025.

²⁹Under section 103(g) of the Act, a miner who believes a particular condition at a mine violates the Act or regulations may request an inspection, and the inspector is required to keep confidential the miner’s name. 30 U.S.C. § 813(g).

³⁰The MSHA inspector was Anthony Fazzolare. Tr. 344. He testified the section 103(g) complaint that triggered the inspection concerned allegedly hazardous accumulations of combustible materials along a belt line. Tr. 344. Fazzolare learned of the complaint after he completed a regular inspection of the mine. He notified mine safety supervisor Randy Duncan and union safety committee chairman Shug Dyer, and he went to the man load area with Duncan and Dyer. Tr. 2 347. It was around 1:00 p.m. Tr. 355; *see also* Tr. 458. Dyer did not recall anyone being around when Fazzolare told him about the complaint. Tr. 459. Nor did Fazzolare recall seeing Pendley near the man load area, although Dyer did. Tr. 459. Dyer thought Pendley could have gotten on their man car if he had wanted to. Certainly, no one told Pendley not to board the car. Tr. 460-461. Lap Lewis lowered the inspection party underground, and the three men traveled to the subject belt line, where Fazzolare found what he believed were prohibited accumulations of combustible coal and coal dust. He orally issued a citation to the company for

man load. Tr.1050. Rather than wait, Pendley walked to the office area to again look for Millburg. Tr. 152; 1053. (Pendley knew it would be 15 to 20 minutes before the man load returned and he could board a car. *Id.*)

In the meantime, Gaines had called Hubbert and asked her to come to Gaines's office. TRH Tr. 140. Hubbert arrived, and a short time later so did mine office employee Roger Wise. TRH Tr. 240-241. Suddenly, Pendley reappeared, and began discussing the company's rules for overtime pay and how they should be applied. TRH Tr. 241, 264. Gaines described Pendley as "agitated" and "very loud." Tr. 241. Hubbert agreed he was "loud." TRH Tr. 264. Wise testified Pendley "kept getting louder and louder and louder." TRH Tr. 278. Hubbert stated she, Gaines and Wise "kept trying to explain [the overtime rules] to [Pendley] . . . and he . . . questioned it. And of course, he was told we didn't make the rules, that Larry Millburg [did] – [and] he needed to go to see Larry Millburg." TRH Tr. 264-265. But, according to Gaines, Pendley insisted over and over the rules were "illegal." TRH Tr. 242. As the situation continued, everyone began speaking at once. TRH Tr. 281. According to Hubbert, Pendley "just kept on and on." TRH Tr. 265; *see also* TRH Tr. 278. Gaines stated, "it just didn't appear like we were getting through to him, and I thought it was going to go on forever . . . it was just out of control." *Id.* Wise described Pendley as not being able to "listen to reason." TRH Tr. 278. Pendley came over to Wise and "got in [Wise's] face." TRH Tr. 279. Hubbert felt very uncomfortable. TRH Tr. 265. Gaines finally said, "that's enough. We don't have time for this conversation anymore. You need to talk to Larry [Millburg] if you've got a problem . . . [T]his is over." TRH Tr. 242; *see also* TRH Tr. 265. Hubbert then left the office. Pendley pressed the discussion with Wise, who told Pendley he was not "going to stand . . . and listen to [it]." TRH Tr. 242. Then, Wise left. His intention was to find Millburg and have him handle the situation. TRH Tr. 280. As Wise explained, "Normally, we don't have that type of aggression . . . in the office." *Id.*

Left alone with Pendley, Gaines testified, although she did not believe he would hit her, she felt intimidated. Pendley was "mad" and "upset." TRH Tr. 243. He continued to talk to her about his pay situation, and Gaines continued to tell him he should speak with Millburg. She then turned her back on Pendley, and he finally left. *Id.*

Wise and Hubbert returned to Gaines' office, and they locked the doors. Hubbert stated, "[W]e didn't want him coming back." TRH Tr. 266. Wise told the others he would get Millburg and have Millburg "take control of the situation." TRH Tr. 244. However, Millburg was underground. *Id.* Later that afternoon Gaines reported the incident to Millburg. TRH Tr. 280.

a violation of 30 C.F.R. § 75.400, which prohibits accumulations of combustible materials.

XVI. THE FINAL RUN-IN WITH CREIGHTON

After the incident, Pendley returned to the man load area to go underground. Lap Lewis was waiting to “hook a car up.” Tr. 156. The man load in which Pendley was supposed to ride was located at the charger, above the spot where Pendley was waiting. Creighton was sitting on a golf cart in the slope shack where controls to the man load were located on an electrical control panel.³¹ The cart was parked very close to the controls. Rather than walk up to where Creighton was, Pendley testified he “just stood there waiting for . . . [Creighton] to bring the car[s] down.” Tr. 156.

Pendley waited for “quite a period of time.” Tr. 157. When the cars didn’t come, Pendley walked toward Creighton. Pendley intended to use the controls to send the cars to the man load area because he believed Creighton had no intention of sending them to him. *Id.*

Pendley testified, as he walked toward the slope shack, he had one hand up. Tr. 1054. Pendley reached the shack and leaned into the narrow space between the cart and the controls. He intended to push the man load button and send the cars to the man load. Pendley stated, “I leaned over . . . to where the control panel was . . . and there was no alarm on it . . . or no tag or anything, so . . . I punched the man load [button]. . . [and] Creighton . . . put his arm against me pushing my [right] arm away from . . . where I had punched [the button].”³² Tr. 159-160; *see also* Tr. 1054-55, 1070. Pendley stated, “When he put his arm against me, I just took my arm and raised his arm up away from me.” Tr. 160. Pendley added, Creighton “started hollering. . . for [foreman] Rodney Baker.” Tr. 160-161; *see also* Tr. 1055. Pendley maintained he did not contact Creighton except to touch his arm. He did not “even make eye contact” with him. Tr. 160. Pendley also testified, after he punched the man load button, Creighton said to him there

³¹The slope shack was open-ended. The hoist control panel contained about 15 buttons, including an E-stop button and call buttons that could send the cars to the charger or to the man load area. Tr. 556, 579. The control panel was on the wall closest to the mine opening and adjacent to the shack opening furthest from the hoist house. Tr. 556. To push the man load call button, a person had to be in front of the control panel. Tr. 556-557. In addition to the control panel, the shack usually contained a golf cart, which was primarily used to transport supplies. Tr. 554, 572. There was a man load call button outside the slope shack and a person did not have to go inside the shack to hit the call button unless the man load cars were at the charger, which they were when Pendley was waiting for them. Tr. 571, 586-587.

³²By looking for an alarm indicator or a tag, Pendley maintained he was checking to see if a test of the hoist was underway. Tr. 1093. There was conflicting testimony as to whether these indicators always were used to indicate a test. Outside maintenance man Joseph Courtney testified, normally they were. Tr. 295. MSHA Inspector Michael Moore testified he had conducted an examination of the hoist system with Courtney when they were not. Tr. 329; *see also* Tr. 330.

was a hoist test going on. Tr. 1055.

Creighton offered a different version of the events. He testified he was in the slope shack looking at the control panel. The cab of the golf cart was aligned with the panel. Tr. 796. There was a distance of approximately two feet between the cart and the wall of the shack. According to Creighton, the man load was underground when the surface foreman and the outside mechanic came to the slope shack to tell him they were on their way to the hoist house. They added when the man load came out of the mine, they would conduct a safety test of the hoist. Tr. 797. After they left, the only other miner in the area was Lap Lewis. Lewis was at the switch about 30 to 35 feet from Creighton. Upon completion of the hoist test, Lewis, who, according to Creighton, knew about the test, was going to hook up another man load to drop supplies into the mine. Tr. 798-799. Creighton's role in the test was to monitor the slope shack control pannel.

The man load came out from underground and the test commenced. Creighton waited for a call from the hoist house to tell him the test was completed. Tr. 801-802, 829. Creighton described what happened next: "Here comes Pendley . . . I'm at the controls. The test is going on. . . . I'm leaning against the golf cart." Tr. 803. According to Creighton, Pendley stood five to eight feet from him, Pendley waited a minute and twenty seconds, then he "charge[d] in . . . and shoved me out of the way."³³ Tr. 804. Creighton maintained Pendley used both arms.

Creighton testified he yelled, "[H]ey, G_d damn it. They're doing a test at the hoist house. They're doing a test." Tr. 805. Pendley, having pushed Creighton beyond the end of the golf cart, did not respond. He just stood in front of the control box. Creighton stated he could tell Pendley was not going to let him back in front of the controls, so Creighton went to the telephone next to the control box and called the surface foreman and reported what had happened. *Id.*, Tr. 806.

Rodney Barker, the foreman, came in his truck. As Creighton described it, Barker stopped, got out and tried to reason with Pendley, but Pendley, in Creighton's opinion was "not going to listen to anybody." Tr. 806. Barker asked the men to separate. *Id.*

Lewis confirmed Creighton's assertion a hoist test was underway when the confrontation occurred. Tr. 543. "[T]he test . . . was still in process . . . then Pendley turned around and shoved [Creighton] out of the way and scootched his self in there where Jack couldn't get to the controls. So Jack started hollering for Barker . . . and Barker . . . [came] over there and talked to [them]." *Id.*; *see also* Tr. 552, 580.³⁴

³³Creighton knew exactly how long Pendley waited, because Creighton reviewed Highland's surveillance tape. Tr. 804.

³⁴Lewis's version of events also was informed by watching the video surveillance tape. He did so at Millburg's direction and with Millburg. Tr. 494; *see also* Tr. 495. Lewis stated he

After Barker arrived, Pendley testified, he told Barker his version of what happened. Creighton told Barker that Pendley interfered with the hoist and put miners in danger. Tr. 163; *see also* Tr.174. According to Pendley, several times Creighton put his finger in Pendley's face. Pendley asked Barker to tell him to stop. Tr. 163-164.

Meanwhile, the man load cars had come down to the man load area. Creighton continued to point at Pendley, and Pendley again asked Barker to instruct him not to. Barker said Pendley should get on a car and Creighton should move away. He also again instructed both to stay away from one another. Tr. 166. Pendley boarded a car as directed and proceeded underground. Tr. 166.

Millburg, who had been underground, came out of the mine. It was 2:01 p.m. (Millburg knew the time from viewing the surveillance tape.) Tr. 1004-05, 1013. As soon as he was on the surface, Creighton saw him and motioned to him. Millburg asked Creighton what he wanted. Creighton was "upset," according to Millburg. Tr.1005. Creighton told Millburg "they [were] making a safety check on the hoist and [Pendley came] out . . . and just pushed me out of the way . . . He just shoved me out of the way and tried to take control of the hoist." Tr. 1005-06.

To Millburg, the important thing was Pendley shoved Creighton and interfered with the test. Tr. 1007. Millburg then spoke with Lap Lewis, who confirmed what Creighton said. *Id.* Millburg also spoke with Barker, who told him the test was just finishing when the incident happened. Tr.1029-30. Millburg went to his office. There, Sheila Gaines told him about the incident with the office employees. Millburg drafted a letter suspending Pendley, subject to discharge. Tr. 1010, Resp. Exh. 26.

While this was happening on the surface, Pendley was working underground. Shortly after beginning work, he received a call from Steve Bockhorn, his foreman, instructing him to come out of the mine and report to Millburg's office. It was between 3:00 p.m. and 4:00 p.m., Pendley met Shaffner and Dyer who told him they were going with him.³⁵ Tr. 170.

and Millburg reviewed the tape "a week or two" after the incident. Tr. 563. The pertinent portion of the video was played in the courtroom as Lewis watched. Lewis described the scene depicted on the video. It showed Pendley standing some distance from the shack and then advancing toward the slope shack. Although Lewis maintained the video showed Pendley pushing Creighton, I found it to be inconclusive as to who pushed first. Tr. 561.

³⁵Prior to this, Millburg consulted with Webb and explained to Webb what he believed Pendley had done. Because of the argument with the office staff, because of the altercation with Creighton and because Pendley interfered with the hoist test, Millburg told Webb "he was going to discharge [Pendley]." Tr. 674. Webb agreed discharge was an appropriate discipline. *Id.*

When the three reached the office, in addition to Millburg, they found assistant superintendent Scott Maynard and union safety committee member David Acker. According to Pendley, Millburg told him he would be given a letter of suspension with intent to discharge, and then Millburg handed him the letter. Tr. 171; Gov't Exh. 4. Pendley testified he responded by denying the accusations. Tr. 172; *see also* Tr. 3.

However, Millburg testified Pendley did not say anything.

Q.: [W]hen you saw . . . Pendley at 3:45 [p.m.] and gave him the letter, you didn't talk to him about what happened, did you?

A: No. I read him exactly what the charges [were] on the letter, and then . . . I gave him a copy of the letter and then I sat there and waited for him to make his statement and anything he wanted to say. He got up and walked out of the room.

Tr. 1015.

Millburg also testified that at the close of the meeting Shaffner asked Pendley if he had anything to say, and Pendley did not respond. After Pendley walked out, Acker asked if Pendley could come back and say something later. (Acker speculated Pendley had gone to call his lawyer.) Millburg said Pendley could return.

Once Pendley, Shaffner, and Dyer left Millburg's office, they headed for the bathhouse. Shaffner told Pendley he should go back and speak with Millburg, which Pendley did. Tr.176-177. Pendley maintained he fully discussed the "accusations" with Millburg and Maynard. (Maynard was still in the office.) With regard to harassing the office staff, he emphasized the meeting in the mine office earlier in the day involved a discussion of his pay. With regard to interfering with the hoist safety check, he emphasized he looked for indicators a test was in progress and there were none. With regard to assaulting Creighton, he denied it happened. Tr.177; *see also* Tr. 1032-33. Pendley left Millburg's office, changed his clothes, and went home. Tr. 178.

Prior to and during all of this, Fazzolare had conducted the section 103(g) inspection and found conditions he believed violated section 75.400.³⁶ Fazzolare did not come up from

Webb told Millburg, "You do what you need to do . . . I'm leaving it up to you." Tr. 1029.

³⁶Contrary to MSHA's usual practice, before going underground Fazzolare did not give Highland management officials a copy of the section 103(g) complaint. Smith explained Fazzolare had inadvertently written the complainant's name on the complaint, and he did not

underground until 2:40 p.m (Tr. 1013), after which he reduced the orally issued citation to writing. Millburg gave Pendley the letter stating he was suspended, with intent to discharge, at about 3:45 p.m. or 3:50 p.m. Tr. 1014; Gov't Exh. 4. Millburg stated he was given the citation Fazzolare had written around 4:45 p.m. *Id.* Thus, at the time he decided to suspend and discharge Pendley, he did not know Fazzolare had issued a citation to Highland. However, MSHA investigator Smith believed the section 103(g) complaint, inspection, and subsequent citation of Highland were a reason for Pendley's suspension and subsequent discharge, because the "time line of events" were "just too close to be coincidental." Tr. 39.

The day following his suspension, Pendley filed a complaint with MSHA. As previously mentioned, the complaint lead to MSHA's filing of a second complaint of discrimination (KENT 2007-265-D). Pendley's suspension and discharge also lead to the Secretary's successful petition to temporarily reinstate Pendley (KENT 2007-383-D). However, far from putting an end to Pendley's and the Secretary's complaints, Pendley's reinstatement triggered more Secretarial allegations of discrimination.

XVII. THE EVENTS SUBSEQUENT TO REINSTATEMENT

_____ According to Smith, following his reinstatement Pendley complained to the Secretary about numerous incidences of discrimination. He charged his supervisors were "bird-dogging" him, in that he was being "supervised real close . . . to see that he [was] actually doing what . . . [mine management] told him to do." Tr. 40. He also charged he was given work assignments that differed from those he held before he was suspended and discharged and that his workload had increased to the point he could not complete his assigned tasks.³⁷ Tr. 184. He further complained his job duties were posted on a mine bulletin board for all to see. *See* Tr. 189-190.

Mechanic Clarence Powell agreed Pendley was closely supervised. He stated, "[A] lot of times when you . . . see . . . Pendley pull in for parts or deliver us parts, it wouldn't be just a few minutes, mine foreman would come in . . . and that didn't happen . . . like that before." Tr. 486. According to Powell, the "bird-dogging" was carried out mainly by Steve Bockhorn, the foreman on Pendley's shift. Tr. 487.

Bockhorn, however, maintained it was his job to ensure everyone on the shift did his or her job so the mine operated smoothly. Tr. 855. Prior to Pendley's suspension, Bockhorn testified Pendley "did his job well." Tr. 858. But, according to Bockhorn, Pendley did not feel he was getting support from anyone at the mine concerning his problems with Creighton. Bockhorn and Pendley discussed "everything that was supposedly happening to . . . [Pendley

want to breach the complainant's confidentiality. Tr. 37-38, 52, 53-54

³⁷Smith maintained, "if you want to fire somebody, you give them more than they can do and watch them close." Tr. 40.

because of] . . . Creighton,” but Bockhorn could not substantiate any of the incidents. Tr. 860. Therefore, he tried to keep Pendley focused on his job. *Id.*

With regard to his job assignments, Pendley pointed out he was assigned to wash equipment and to take oil to each unit. Tr. 184. Prior to his reinstatement he only occasionally had to wash equipment. After, it was a daily task. Tr. 258. He admitted, however, that Steve Bockhorn “possibly could have” told him if he didn’t have time to do his washing duties it was “okay.” Tr. 259-260. James Baxter, Pendley’s maintenance supervisor, noted “a lot” of other miners also had to wash equipment. *Id.*

Pendley also maintained the duty to supply oil “absolutely” affected his ability to fulfill his other responsibilities. Tr. 186. When a miner asked Pendley why he was not getting supplies delivered, Pendley replied, “I’ve got an oil ride and I’ve got a parts ride. I’ve got two vehicles. When I’m gone on an oil ride, then I cannot be delivering parts.” Tr. 255.

Pendley believed the “added” duties were outside those allowed by the union contract. He testified he complained to union president Ron Shaffner about it, and Shaffner told him there “ought to be at least two people doing what you’re doing.” Tr. 1082. However, Pendley agreed the duties are not written in the contract and that all were within his job classification. He also agreed management could tell a miner what he or she should do within a job classification “as long as they do it in an appropriate way and everybody is treated the same.” Tr. 1083.

Bockhorn testified Pendley never complained to him about being overloaded with work. Tr. 875. Bockhorn also noted that prior to being suspended and discharged, Pendley regularly chose to work overtime hours (10 to 12 hour days). *See* Tr. 291. Consequently, he had more time to accomplish his tasks. After he was reinstated, Pendley chose not to work overtime.³⁸ *Id.*

Bockhorn also maintained, after Pendley was reinstated he did not do his job as he had prior to his discharge. He was much slower. *See* Tr. 887. Assistant superintendent Scott Maynard testified he had complaints from all of the shift managers about the slow nature of Pendley’s work. Tr. 931. Maynard stated he told the managers to just have Pendley do his job. He never gave orders for them to be tough on Pendley. Tr. 931-932.

Bockhorn’s assessment of Pendley’s post-reinstatement work ethic was shared by David Howell, a shift foreman who worked with Pendley before and after his discharge. Howell described Pendley after his reinstatement as “a completely different employee as far as work habits.” Tr. 899. He offered to help Pendley, but Pendley did not accept the offer. For example,

³⁸Pendley testified he was afraid if he worked overtime, he would be assigned even more duties. Tr. 291.

Howell, after referencing his contemporaneous notes (*see* Resp. Exh. 20), cited an instance on June 14, 2007, when needed parts were not delivered by Pendley. Tr. 901. Howell described a discussion that ensued the following day:

I called [Pendley] to come down to the fuel station. I was down there, and I had a discussion with him I just wanted to say . . . hey, are you having any problems Well, as soon as I started to say something . . . he got kind of excited with me. I said, now hold it just a minute I want to have a professional conversation here because if you have an issue, I want to help you out I want to try to help get these parts delivered. What are the problems we're having. And he stated to me he didn't have time to do all the jobs that he had been assigned to do. And I told him . . . if you don't have time at the end of the shift to get something done . . . let me know . . . so I have an idea of what . . . the problem is so we don't have to have a discussion on it. I can get someone else to do it . . . but we've still go to get the work done, and to this day, he never called me.

Tr. 902-903.

Howell also observed, since his reinstatement Pendley drove his equipment "extremely slow like he's got no urgency whatsoever to get anything delivered." Tr. 906. Howell believed Pendley needed to better manage his time. "He [did] it in the past. And that's what I requested [he] do." Tr. 908. Howell added, "I was . . . try[ing] to help him . . . get the job done." Tr. 918. Howell noted those who performed Pendley's job between his discharge and reinstatement completed their assignments. Tr. 916.

With regard to the posting of his job duties on the bulletin board, Pendley maintained he never had a list of duties given to him before; nor had his duties been posted previously. *See* Tr. 189-190, Gov't Exh. 5. The bulletin board was located where everyone coming in and out of the commons area room could see the list. Tr.190.

Bockhorn believed the job duties letter was put up because on the first day Pendley was back at work Pendley questioned a task he was assigned to do. Millburg testified Maynard told him there was confusion about Pendley's exact duties and Maynard felt he needed "to just lay it out exactly what [Pendley's] duties [were] so there [would] be no questions." Tr. 992. Therefore, Pendley and the other parts runners who did jobs the same or similar to Pendley's were given letters describing their duties. Tr. 871-872. Pendley's letter was the only one posted

on the bulletin board. Bockhorn had no idea who put the letter on the board. Tr. 876. However, when Pendley complained to Bockhorn, Bockhorn immediately took it down. Tr. 877; *see also* Tr. 191. (“I felt if it was supposed to be posted, it would have been on the inside of the board, not taped . . . outside.” Tr. 877.)³⁹

THE LAW

In part because it recognized cases arising under the discrimination provisions of the Mine Act often involve conflicting allegations of discriminatory conduct based on disputed facts and inferences, the Commission long ago set out principles and guidelines to help parties and judges analyze whether there has been compliance with section 105(c)(1). It began by noting section 105(c)(1) provides a miner, or representative of miners, cannot be discharged, discriminated against or interfered with in the exercise of his or her statutory rights because: the miner or miners representative (1) “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) “is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101;” (3) “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 (4) has exercised “on behalf of himself or others . . . any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1). The Commission then set forth in detail what the complainant must do to establish a *prima facie* case of discrimination under section 105(c)(1). The miner or miner’s representative must show: (1) he or she engaged in a protected activity; and (2) the adverse action of which he or she complains was motivated in any part by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (April 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev’d on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-818; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission also recognized the complainant might not be able to offer direct evidence adverse action taken against him or her was motivated in any part by protected activity. In *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev’d on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), it stated “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is

³⁹James Baxter, Pendley’s maintenance foreman, testified, “[A]s soon as . . . [Bockhorn] saw it, he took it down realizing . . . that it wasn’t supposed to be there.” Tr. 434.

indirect.” The Commission then articulated circumstantial items from which discriminatory intent might be inferred: for example, knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. *Id.*

Finally, the Commission cautioned its judges that their analysis of an operator’s business justification for adverse action should be restrained, stating: “Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. . . . [J]udges should not substitute for the operator’s business judgement [their] views on ‘good’ business practice or on whether a particular adverse action was ‘just’ or ‘wise.’” *Cf. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979). The proper focus . . . is whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner’s protected activities. . . . [T]he question is whether the reason was enough to have legitimately moved [the] operator to have disciplined the miner.” *Cf. R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard). *Chacon* at 2516-17.

Applying these principles and instructions in a straightforward manner can help to organize, simplify and (hopefully) make intelligible this record, which is rife with numerous charges, testimonial conflict, and innuendo. In sorting through the record, it helps to keep in mind the case arises directly out of: (1) personal animosity between Creighton, a work-yard bully; and Pendley, his passive-aggressive nemesis; (2) Highland’s managerial failure to put an effective end to the miners’ clashes; and (3) Pendley’s and Creighton’s aggressive oral and physical posturing.⁴⁰ It also helps to remember, although Highland’s failure at conflict resolution fell seriously short of managerial “best practices,” it did not necessarily violate the Mine Act. Rather, and as previously stated, the question of whether violations of section 105(c) of the Act occurred must be answered within the context of the analytical structure set forth by the Commission.

⁴⁰The Secretary, not surprisingly, places all blame for the various conflicts on Creighton’s “provocative and oftentimes dangerous behaviors.” Sec. Br. 6. The Secretary overreaches. As the saying goes, “it takes two,” and the record amply demonstrates that while not always the actual initiator of the incidents, Pendley often played the role of provocateur, by voluntarily placing himself in situations where he knew his presence was likely to provoke trouble.

THE SECRETARY'S ARGUMENTS

Counsel for the Secretary argues Pendley engaged in protected behavior by complaining to management and MSHA “about a number of things.” Tr.1097. Counsel cites complaints about the hoist stopping repeatedly, Pendley’s cap lamp being tampered with, and physical threats. Counsel also maintains Pendley “clearly communicated these complaints to management, not once, not twice, but a number of times.” *Id.* Counsel asserts management was aware of the complaints and knew Pendley might continue complaining to MSHA in the future. *Id.*

Counsel argues the first adverse action Pendley suffered due to his protected activity was his three-day suspension from work in December 2005. According to counsel, he was suspended because MSHA issued a citation to Highland the day before (the Part 50 citation) based on what Webb believed to be Pendley’s complaint. Tr. 1098.

Counsel also makes general allegations regarding “a long line of harassing conduct against Pendley” that became worse after each complaint he filed. Tr.1098. Counsel cites continual harassments and physical threats from Creighton and terms it, “a pattern of behavior which . . . [Highland] at least implicitly encouraged by its inaction and which certainly constitute[d] a safety hazard or safety concern.” *Id.* Counsel implies Pendley was subject to disparate treatment because Creighton never was “substantially disciplined.” *Id.*

The second adverse actions suffered by Pendley were his suspension and discharge. Counsel states the reasons given for the actions – the incident in the office and the altercation with Creighton while an alleged hoist test was ongoing – were “just an excuse.” Tr. 1098. Counsel argues they were not “enough to give mine management a reason to fire . . . Pendley.” Tr. 1098. Counsel asserts other miners had “issues” with Fay Hubbert, and the run-in with Creighton was not solely caused by Pendley. Tr. 1098-99.

In counsel’s opinion, if the company had really investigated the incident involving Creighton and Pendley at the slope shack, it would have found “a portioning of the fault was not simple . . . and . . . Pendley alone was . . . not responsible for the incident. Tr. 1099. Yet, “he alone was discharged and he alone was punished.” *Id.* The company’s quick decision to suspend and fire Pendley – a decision made shortly after finding out about the two incidents -- did not leave time for even a minimal investigation. Tr. 1099. Moreover, the company did not consider disciplining Creighton even though Creighton had a history of conflicts with Pendley and even though Creighton “didn’t seem . . . completely innocent.” Tr. 1100.

Counsel further asserts, prior to deciding to suspend and discharge Pendley, Millburg knew about the citation issued that day as a result of the section 103(g) complaint and inspection. Tr. 1098.

Finally, counsel argues, following Pendley’s reinstatement, management has engaged in

continuing adverse action against Pendley by changing his job assignments and “bird-dogging” him. Tr. 1100. In sum, counsel states Pendley “was discriminated against and . . . retaliated against and . . . was treated disparately . . . because he made safety concerns known to management [I]f . . . Pendley had not made his complaints to MSHA, he wouldn’t have been suspended in December of 2005 and he would not have been discharged in March of 2007.” Tr. 1101. In other words, “Highland officials suspended and fired Pendley because of his participation in protected activity.” Tr. 1101.

HIGHLAND’S COUNTER ARGUMENTS

Counsel for Highland counters the Secretary has the burden of proof regarding Pendley’s three- day suspension, and she has presented no evidence Webb, the person who decided to suspend Pendley, had any knowledge Pendley complained to MSHA. Rather, counsel maintains Webb had a “legitimate business reason” for the suspension, in that Pendley refused to explain why he was waiting in the commons area room, and Webb, therefore, made his decision to suspend on the knowledge he had at the time. Tr. 1102.

As for harassment by Creighton, counsel argues the claim is not cognizable under the Mine Act. In any event, the company did not treat Pendley and Creighton the same, because it had insufficient proof to discharge or suspend Creighton for actions he allegedly took against Pendley. In the instance where it had proof, the company issued a written warning to Creighton (as well as to Pendley). Tr. 1103.

As for Pendley’s suspension and discharge, there were numerous witnesses to the incidents of March 19 and March 21. The witnesses confirmed Pendley was abusive to the office personnel, shoved Creighton and potentially interfered with the hoist test. These episodes of unacceptable behavior constituted sufficient business reasons to suspend and discharge Pendley. Tr. 1104. Counsel further notes there was no evidence Millburg knew of the section 103(g) complaint when he made his decision to suspend and discharge Pendley. Moreover, while Millburg knew of Pendley’s prior discrimination complaints, the Secretary did not show they played a role in Millburg’s decision. Tr. 1104.

As for alleged adverse action taken against Pendley since his reinstatement, counsel argues the company is permitted to direct its work force as it sees fit, and there is no evidence Pendley’s job assignments were given in a discriminatory manner. Tr. 1105.

THE RECORD AND ANALYSIS

KENT 2006-506-D

The essence of the Secretary’s complaint is that Pendley was suspended for three days “for making safety complaints to MSHA.” Sec’s Discrim. Compl’t 2; *see also* Sec. Br. 27. I agree, with the caveat I also conclude he was suspended for making protected complaints to

management.

On December 20, 2005, Pendley's regular shift began at 3:00 p.m. As was then the custom at the mine, his pay began when he signed in. Tr. 446. On December 20, 2005, Pendley signed in at 1:00 p.m. (Pendley testified the actual time he signed the book was between 12:50 p.m. and 12:55 p.m., but, as was common, he rounded the time to the nearest hour. Tr. 108.) Pendley, like other miners, regularly worked 12-hour days – his eight-hour shift, plus two hours of overtime before the shift and two hours after. Tr. 108-109. Because the man load cars were underground and it was cold, Pendley and Lewis waited in the commons area room for the cars to come up. Tr. 114. (Adamson and safety committee chairman Shug Dyer credibly testified it was a usual practice for miners to wait in the room. Tr. 337, 446.) They were soon joined by Adamson, who signed in shortly after Pendley, and who also indicated his starting time was 1:00 p.m. Tr. 369

Having evaluated the testimony, I conclude Webb had to know why Pendley was waiting in the room. As the mine's operations manager, it is reasonable to conclude he was aware of the practice of miners to wait there for the man load, especially when it was cold. He also had to be aware it was common for miners to work two hours of overtime before the start of their shifts and to round the time when they signed in. Even though Pendley was sitting where he could not see the man load cars when they came up, there were at least two other miners in the room who could, one of whom (Adamson) also signed in at 1:00 p.m. Webb's testimony he did not see Lewis and/or Adamson simply defies belief. The room was open. There as nothing to obstruct Webb's view.

Webb's assertion that he concluded Pendley was trying to be paid for time he did not work also is not credible. Nor is Webb's assertion Pendley falsified a company record. There was no basis for Webb to assume Pendley changed the time he signed in. While I credit Webb's testimony that Pendley walked over to the sign-in book and leaned over it after Webb spoke with him, Webb's assumption Pendley changed his time when he returned to the book was not a reasonable one to make. Tr. 638. As Webb well knew, Pendley had signed in the way he usually did when he worked overtime. Since on the afternoon of December 20, Pendley had done nothing out of the ordinary, there was no reason for him to change anything. Rather than change his time, it was more likely Pendley was checking to make sure he signed in as usual and/or to see when Adamson signed in. Thus, Webb's assertion Pendley was suspended for falsifying a company record rings hollow.

Moreover, the fact no others were disciplined, especially Adamson, who signed in shortly after Pendley, strongly suggests Pendley was treated differently than the other miners. While Pendley initially was not forthcoming at the subsequent meeting he had with Webb, Dyer, and Shaffner, I credit his testimony that he at least denied Webb's charges. Tr. 119, 244. I further find Pendley's obvious unhappiness with his union representatives is beside the point. Tr. 122, 641-642. The issue is not Pendley's differences with the union (which apparently were considerable), but whether Webb's business justification for suspending Pendley was legitimate.

Given the lack of any credible business reason for Pendley's suspension, I conclude the record supports inferring some incidences of protected activity in fact motivated Webb and the justification Highland offered was a pretext.

This is not to say, however, all of the incidents the Secretary alludes to or offered testimony about rise to the level of protected activity. Several do not involve complaints about alleged dangers or about safety or health violations. Rather, they reflect work allocation disputes, unexplained property damage, ongoing animosity between Pendley and Creighton, or a combination of two of the three. In this regard, the parts delivery dispute was clearly a confrontation about job duties. The truck incident, while obviously upsetting to Pendley, was, as Maynard properly observed, vandalism (Tr. 262) with no connection to a safety complaint or to an alleged regulatory violation. The dirt incident was a case of petty harassment, as were the bleaching and hose incidents. (Allen's observation the dirt incident could have been safety-related if the dirt was "swept up enough that . . . [Pendley] could have tripped and stumbled" is totally speculative, and even if the dirt or muck by Pendley's locker was enough to have tripped him, finding the incident to be safety related would stretch the meaning of protected activity beyond reasonable boundaries (Tr. 704), and the same is true of the hose incident, which, while annoying to Pendley, hardly can be found to have posed a hazard.

I also conclude the cap lamp incidents were not related to protected activity. In the first place, Pendley's testimony was very vague regarding specific incidents involving his cap lamps; and although he testified about a specific incident when his cap lamp apparently was stolen, he did not (and presumably could not) testify he ever lacked a functioning lamp when he traveled and worked underground. Tr. 390-392; *see* Tr. 230. The evidence supports finding Highland's miners checked their lights before proceeding underground and needed replacements or repairs always were made then and there. Tr. 50.

Other incidents raised by the Secretary were safety related. The gun incident was a serious incident and one that certainly had safety ramifications. However, it cannot be found to have played a part in Webb's motivation. Rather, the record fully supports finding management recognized the serious safety issues it posed and dealt with them when it addressed the incident (and others), by meeting with both men and issuing written warnings to both. Tr. 177, 199; Resp's Exhs. 9 and 10. Moreover, it was Creighton, not Pendley, who reported the incident, and, thus, it was Creighton, not Pendley, who engaged in protected activity.

Complaints involving the abrupt halting of man load cars were protected. Abruptly stopping the cars on their descent into the mine endangered the safety of anyone aboard, as the incident of November 29, 2005, showed. Mine management was aware of Pendley's complaints in this regard. *See, e.g.*, Tr. 933. Given the discrediting of Webb's ostensible reason for suspending Pendley, it is reasonable to infer these safety complaints played a part in Webb's decision.

I find the same is true regarding the motorized equipment incidents. The operation of

motorized equipment in dangerous proximity to a miner is an obvious safety hazard. Complaints about such incidents were protected. Management knew of Pendley's concerns (Tr. 933), and I do not credit Maynard's assertion he "never could find any witnesses or anything or anyone to confirm the stor[ies]." Tr. 934. The record does not reflect he discussed the matters with Lap Lewis, an employee Maynard knew, and an employee who, according to Pendley, was an eyewitness to at least one such incident. Tr. 78-79. In the face of the company's failure to establish a legitimate business reason to suspend Pendley, it is reasonable to infer Pendley's complaints in this regard were a motivational factor.

I also find Pendley's complaints regarding the specific fork lift incident were protected. Creighton maintained Pendley purposely placed himself in a possible pinch point (Tr. 777), and I find this was so. Although Pendley testified walking over the hoist cable to get to the other side of the man load car was a safety hazard, he could have walked a longer way around and safely reached the other side, or he could have waited and sat in another car. Tr. 1086-87. Pendley claimed he only walked where Lewis had (*see* Tr. 290,1087); but, even if true, it was no excuse for Pendley to enter the dangerous area. Pendley was wrong to be there, but his conduct was perfectly in keeping with his propensity to voluntarily go where an incident with Creighton was likely to occur.

Nonetheless, Creighton was wrong as well; for I find Creighton threatened to run Pendley over. Creighton's claim he told Pendley "get the hell out of the way before you get run over" (Tr. 777) was not as consistent with Creighton's character as the more direct threat alleged by Pendley. Moreover, Pendley's response as described by Creighton – calling Creighton "yellow" and "calling [him] out" – is a response that has the ring of truth if Pendley's version of Creighton's threat is credited. I find it reasonable to infer Pendley's complaints about Creighton's threat played a role in Webb's decision to suspend Pendley. It was a way to punish Pendley for continually complaining about Creighton's unsafe practices.

Pendley's testimony regarding the specific hoist incident was compelling and credible, and I find on November 29, 2005, the man load cars came to an abrupt halt while Pendley proceeded underground and that Pendley was thrown forward. Pendley suspected it was Creighton who punched the E-stop, causing the cars to come to halt. Creighton denied it (Tr. 791); and because the brakes on the brake car did not set and because a post-event evaluation of the hoist revealed nothing wrong with the system, Highland's management doubted Pendley's story. I find the doubts were genuine. The testimony revealed a lack of full understanding by Highland's employees concerning whether brakes on the brake car locked if the E-stop button was pushed and the man load cars came to a sudden halt. (If the brakes locked, the man load cars could not have continued to the bottom of the slope without some one – presumably Pendley – releasing the brakes on the brake car, which he did not do.) Both Highland's management employees and its rank-and-file employees believed activation of the E-stop would cause the brakes to lock, as Lap Lewis testified, "most of the time." Tr. 566-568; *see, e.g.*, Tr. 301 (Joseph Courtney); 453-454 (Bob Perry); 960-961; 964; 975-976 (Scott Maynard) 418. However, Inspector Michael Moore's explanation of the hoist's braking and stopping mechanisms was

more persuasive, and I find, as he testified, pushing the E-stop could have caused the man load cars to come to a sudden stop without locking the brakes on the brake car. Tr. 323-324; 1042, 1044-46. In other words, I find it reasonable to conclude the accident occurred as Pendley explained and management's legitimate doubts do not undermine Pendley's credibility.⁴¹

Thus, Pendley's complaints about the incident were protected. Highland's business justification for subsequently suspending Pendley was not credible and, lacking any other reasonable explanation, I find Pendley's protected complaints about the incident played a motivational role in Webb's decision to suspend Pendley.

Finally, there is no doubt Pendley's complaints to MSHA caused Highland to receive five citations for violations of the mandatory Part 50 reporting requirements. The first citation related to the November 29 hoist incident. The incident involved Pendley. Pendley already had asked Highland for, and been denied, a copy of the accident report he filled out. Tr. 96, 224. Suddenly, MSHA also was asking for a report of the incident and then was auditing the company for Part 50 compliance. Webb must have been at least annoyed, if not more. He also must certainly have put "two and two together" and concluded Pendley had gone to MSHA about the report. There being no credible business justification or other reasonable explanation for Pendley's suspension, I conclude Pendley's protected complaints to MSHA over the report played a role in Webb's decision.⁴²

For these reasons, I conclude Webb and the company discriminated against Pendley when Highland suspended him for three days on December 21, 2005. I also conclude at the time he suspended Pendley, Webb was an agent of Highland. Webb took part in the decision to

⁴¹There is no question that the sudden stopping of the hoist car endangered Pendley. There also is no question given Pendley's suspicion Creighton caused the stoppage, Highland failed to deal effectively with the situation. From an employee relations standpoint, Webb's response was wanting, to say the least. He knew Pendley suspected Creighton, but Webb did not remember speaking to Creighton about the incident, and I infer he did not. Tr. 669-670. Webb stated he only would take "very strong disciplinary action" against Creighton if he was certain Creighton caused the incident. Tr. 628. Since certainty was virtually impossible to establish, it meant Webb effectively did nothing with regard to the Creighton. However, while Highland was guilty of bad management, its failure did not violate the Act. Section 105(c) was not designed to remedy work-force disputes and smooth employee relations. As the Commission long ago recognized, the Act is not an employment statute. *See, e.g., Chacon v. Phelps Dodge*, 3 FMSHRC at 2517.

⁴²The Secretary also offered testimony about two incidents whose relevance and import totally escapes me and about which I make no findings – a nighttime inquiry to Pendley from an unidentified person regarding a storage trailer (Tr. 272-274) and Pendley's alleged discovery of a dummy with a noose around its neck. Tr. 194; *see also* Tr. 849.

implement the suspension and Webb carried out the decision. He was then the operations manager of the mine. He was the mine's highest ranking officer. He was in charge of approving disciplinary actions. Tr. 605. These factors establish Webb was acting on behalf of the company and as its agent.

KENT 2007-265-D

The Secretary maintains Highland suspended and discharged Pendley after Pendley pursued and litigated his earlier complaint before the Commission. She also points out March 21 – the day he was suspended with intent to discharge – Fazzolare investigated the section 103(g) complaint and issued the citation for accumulations of combustible material. In addition, by March 21, Highland management knew Pendley had moved the Commission to reopen KENT 2006-506-D, which I had dismissed, believing it settled. *See* Sec. Br. 2-3. Knowledge of these factors, plus knowledge of Pendley's many complaints, motivated Highland to act adversely against Pendley. I disagree.

Pendley's confrontations with members of the mine office staff on March 19 and March 21 were credibly (and vividly) described by Gaines, Hubbert and Wise. The picture that emerged from their description is of an emotional employee utterly lacking in self control, to the point of disrupting their work and making them nervous for their own well being. Gaines credibly described Pendley on March 19 as "very upset" because of what he perceived to be Faye Hubbert's unauthorized questioning of his pay. TRH Tr. 232. Although she explained Hubbert was only doing what her job required, Pendley would not accept the answer. TRH 234. He suggested Gaines, Hubbert's supervisor, would be held accountable for Hubbert's "misdeeds," and he did so in such a loud voice another employee who worked some distance from Gaines thought she might need help. TRH Tr. 236. Gaines described Pendley as making her feel "very nervous," and I believed her. Pendley's raised voice, his observations regarding Hubbert and his threatening of Gaines by innuendo were not acceptable office behavior. Gaines's apprehension was a reasonable reaction.

All of this was bad enough, but worse followed. Two days later, Pendley again confronted the staff about his overtime pay. He began by again raising his voice with Hubbert. TRH 239. Later he continued in the same vein with Gaines, Hubbert, and Wise. According to the highly credible Gaines, he was "agitated" and "very loud." TRH Tr. 278. Wise and Hubbert agreed. TRH Tr. 264, 278. Gaines described Pendley's participation as "out of control." TRH Tr. 242. He was "mad" and "upset." TRH Tr. 243. Hubbert was very uncomfortable, and Wise felt Pendley's behavior to be aggressive and unusual. TRH Tr. 280. To prevent another incident, the employees locked the office. TRH Tr. 266.

The office incidents of March 19 and March 21 played critical roles in Millburg's decision to suspend Pendley with an intent to discharge, and well they should. Pendley was disruptive, irrational, and orally aggressive. An employer need not tolerate an employee raising his or her voice to other employees and totally disrupting their work. Nor should an employer

brook a situation where a group of employees rationally believe they need to lock their doors against an unreasonable fellow employee. After the incident of March 19, Pendley knew Hubbert and Gaines did not have the authority to resolve overtime pay issues. He knew he needed to speak with Millburg. Yet, on March 21, he persisted in raising the matter again and again in a loud, agitated and irrational way.

On October 7, 2005, Pendley was warned in writing “verbal abuse” on his part might lead to his suspension with intent to discharge. Resp. Exh. 10. Although he was on notice of the consequences, he persisted in the very behavior about which he was warned. Perhaps he just could not help himself, but he certainly knew his behavior could lead to the discipline he ultimately received. Pendley acted at his peril, and it was proper for Millburg to consider Pendley’s office confrontations as a basis for suspension with intent to discharge.

Of course, Millburg had another compelling reason to act, because fresh from the confrontation with Gaines, Hubbert, and Wise, Pendley had yet another run-in with his long-time antagonist, Creighton. Pendley maintained, after he rushed up and into the slope shack, he did not shove Creighton, that Creighton first touched him. Tr. 160. However, Lap Lewis testified it was Pendley who pushed Creighton, a contention Creighton echoed. Tr. 543, 580, 804. While the testimony is in conflict as to who first pushed whom, there is no doubt the altercation would have been avoided if Pendley had not chosen to place himself in a situation where he was toe to toe with Creighton. Pendley did not have to charge the slope shack. He could have waited and asked a supervisor to instruct Creighton to send the man load to him. Given his past history with Creighton, he had to know by entering the shack he was putting himself in a situation where an altercation was all but certain to occur. He entered anyway, and with predictable results. He also entered despite the fact he had been warned further altercations could lead to his suspension with an intent to discharge. Resp. Exh. 10.

Regardless of who “started it,” the fact Millburg knew Pendley facilitated the altercation by advancing upon Creighton, coupled with the fact Millburg knew of Pendley’s oral confrontation with Hubbert, Gaines, and Wise was enough to institute the discipline about which Pendley had been warned. Pendley already had been given a “last and final . . . warning.” Resp. Exh. 10. Another was not required.⁴³

In upholding Pendley’s suspension and termination, I also find the Secretary failed to

⁴³Although Millburg also based his decision to suspend and discharge Pendley in part on Pendley’s interference with a hoist test, I do not find this reason crucial to the validity of the disciplinary action. It was enough, in my view, that Pendley was involved in the oral altercation with the office employees and the physical altercation with Creighton. Moreover, I credit Pendley’s testimony there was no alarm indicator or tag to indicate a hoist test was underway. Tr. 159, 162, 1054-55, 1070, 1093. Also, Creighton did not advise Pendley of the test until after they were in physical contact. Tr. 804-805.

establish the 103(g) inspection taking place on March 21 had anything to do with management's decision. As Highland accurately points out, Millburg did not know about the section 103(g) inspection and the resulting citation until after he made the decision to suspend Pendley. *See* Resp. Br. 26-29. Moreover, the Secretary did not show Millburg knew who actually requested the inspection and, with approximately 70 miners working underground, there are too many "suspects" for knowledge to be implied. *See* Resp. Br. 27 n. 15. When I reinstated Pendley, I noted the Secretary's evidence regarding Highland's alleged section 103(g) motivation could "charitably be described as 'weak.'" 29 FMSHRC at 428. Time did not improve the Secretary's case.

POST-REINSTATEMENT COMPLAINTS

The Secretary amended her last filed discrimination complaint (Docket No. KENT 2007-265-D) to charge more discrimination, interference and disparate treatment as a result of Pendley's reinstatement.⁴⁴

The Secretary alleged Pendley was assigned additional duties, was "bird-dogged" by management officials, and had his job assignments posted on the mine bulletin board. Sec. Br. 4. She argued the additional assignments made it difficult for him to complete all of his duties, and his treatment was disparate in that "no other miners were treated in this manner, with the exception of other miners who also had complained about safety issues at the mine." *Id.*

Highland responded the Secretary failed to offer any evidence of adverse action. Resp. Br. 32-33. According to Highland, Pendley did not suffer any disciplinary action as a result of his post-reinstatement job performance. *Id.* 33. Rather, Pendley was treated with "kid gloves" after his return. *Id.* I agree with Highland, and find the Secretary has not established any actionable adverse action against Pendley since his reinstatement.

Inspector Smith testified following reinstatement, Pendley complained about his workload. The essence of Pendley's complaints, like those made by the Secretary, was he had too many work assignments to complete his duties and he was being followed and closely supervised ("bird-dogged"). Tr. 40. However, the record reveals, after Pendley was reassigned Highland only did what it was entitled to do when assigning him work and when supervising

⁴⁴Highland objected to taking evidence on what it correctly characterized as "new acts of discrimination after the temporary reinstatement." Tr. 20. Counsel noted the complaints had not been investigated by the Secretary, and the Secretary had not filed a formal complaint with the Commission as the Act requires. Tr. 20-21. I overruled the objection and allowed the evidence. I stated, "It seems to me . . . from a pragmatic standpoint, all of us . . . are facing . . . a never-ending stream of allegations and . . . this is one way to put an end to it . . . I would like to hear as much of the evidence as I can . . . with regard to the allegations and hopefully issue a decision that will bring this matter to a close." Tr. 22-23.

him. An operator can direct its work force as it sees fit within the terms of the Act and its labor contracts. Here, none of the duties assigned Pendley upon his return were outside the Act, the company/union contract or Pendley's job classification. Some of the tasks may have been different from those he had before his suspension and termination, but, as even Pendley agreed, they were proper duties to assign him.⁴⁵ Tr. 1081.

While an assignment of duties outside the labor agreement or an assignment of more tasks than can be accomplished in a normal work period conceivably can constitute adverse actions, in this instance the Secretary has not been able to overcome two problems. First, as noted, the evidence establishes the tasks Pendley was assigned fit squarely within the labor agreement. Second, the record does not support finding Pendley was assigned more tasks than he reasonably could accomplish in an eight-hour work day.⁴⁶ Even if this was not the case, the evidence offers no support for finding Pendley's job assignments were designed to punish him for seeking reinstatement or for other protected activity. Nor was he ever punished for failing to complete the assignments. On the contrary, the evidence suggests no adverse consequence attached to his unfilled duties. *See, e.g.*, Tr. 255, 259-260.

As for being "bird-dogged," the allegations seem to involve the supervision of the pace of Pendley's work. There was a significant amount of testimony offered concerning management's concerns about the time it took Pendley to do this work after he was reinstated, and it is fair to conclude Pendley worked at a slower pace when he returned to the mine. Tr. 867-869, 906. On the whole, the testimony supports finding the company's concerns about the Pendley's work pace were legitimate and, therefore, Pendley's post-reinstatement supervision was not improper.

Finally, although the posting of Pendley's job duties on the mine bulletin board was unprecedented, the "duties letter" was removed as soon as Pendley complained to his supervisor, Steve Bockhorn. Tr. 190, 261. It would be a stretch indeed to find this mistake, which was quickly and fully rectified, constituted adverse action.

⁴⁵Actually, more than the assignment of specific tasks, Pendley seemed to believe the jobs were not evenly distributed between him and other mechanics. ("[T]here was no reason it all should have been put on me." Tr. 1081). The proper balance of job distributions is a matter for union and management to debate and, if need be, to resolve. It is not a matter for the Commission and its judges.

⁴⁶One basis for finding what reasonably could be accomplished in a standard workday would have been to compare Pendley's pre-reinstatement work with his work following reinstatement. However, such a comparison is not possible given the fact Pendley was assigned different tasks and, more importantly, given the fact Pendley regularly worked overtime prior to his reinstatement and chose not to work overtime following his reinstatement. Tr. 291.

For these reasons, I find the Secretary did not establish Pendley was discriminated against following his reinstatement.

ORDER

Based on my conclusion Highland and Webb discriminated against Pendley when he was suspended from work on December 20, 2005, the discrimination complaint docketed as KENT 2006-506-D **IS GRANTED**. Within ten days of the date of this decision counsel for the Secretary **IS ORDERED** to confer with counsel for Highland to determine the appropriate back pay and interest to be awarded Pendley for the days he missed work as a result of his illegal suspension. The parties shall also confer and agree regarding any other relief required to make Pendley whole for the time he was illegally suspended. Within 15 days of the date of this decision counsels shall report the results of their discussions to me jointly in writing, and I will issue a decision and order awarding the agreed-upon relief. If counsels are unable to agree, they shall jointly advise me in writing within 15 days of the date of this decision, and I will issue an order regarding the taking of additional evidence on the issue of relief.

Within 30 days of this decision becoming final, Highland **IS ORDERED** to pay a civil penalty of \$5,000 for its violation of section 105(c) (Docket No. KENT 2006-506-D). In assessing this civil penalty, I find Highland is large in size and the penalty will not affect Highland's ability to continue in business.⁴⁷ While I find the violation was serious, I do not agree with the Secretary that Highland's "actions . . . should . . . support the highest finding of gravity." Sec. Br. 60. There is no evidence Pendley's suspension affected the safety of other miners or "chilled" the exercise of the statutory rights by other miners, as claimed by the Secretary. *Id.* I also find, while Webb's decision to suspend Pendley was based on his failure to take full regard of Pendley's section 105(c) rights, it was not an action whose sole motivation was to punish Pendley for his protected activity. Rather, while Pendley's continuing protected complaints were a factor in Webb's overall motivation, I conclude Webb also was genuinely annoyed by what he perceived to be Pendley's "sitting on company time." *See* Tr. 370. Finally, I do not find the Secretary's assertion regarding the company's history of previous violations ("According to MSHA records, since December 2005, Highland has four outstanding [s]ection 105(c) complaints pending against it in addition to . . . [the subject] complaints relating to . . . Pendley" (Sec. Br. 60)) warrants increasing the penalty to more than \$5,000.

⁴⁷On March 6, 2006, I denied Highland's motion to strike Quarterly Mine Employment and Coal Production Reports the Secretary submitted with her brief. Order Denying Highland's Mot'n to Strike. The Secretary argued the reports were submitted merely to assist in determining the size of the operator as appropriate for civil penalty assessment purposes. I advised Highland it would have an opportunity to comment on the relevance of the reports if I held the company violated the Act. In assessing this civil penalty I have not sought Highland's comments because the record, even without the reports, establishes Highland is large in size. The mine has an underground workforce of approximately 70. More importantly, the mine is controlled by Peabody Energy. Thus, Highland's large size cannot be seriously questioned. Tr. 607.

Further, and effective immediately, David Webb **IS ORDERED** to cease and desist from interfering with the section 105(c) rights of Pendley while he remains in Highland's employ, and to desist from interfering with the same rights of all other miners employed by Highland.

Finally, based on my conclusion Highland and its agents did not discriminate against Pendley when he was suspended on March 21, 2007, and when he subsequently was discharged, the discrimination complaint docketed as KENT 2007-383-D **IS DENIED AND DISMISSED**. The Secretary's allegations of post-reinstatement discrimination lodged in connection with Docket No. KENT 2007-383-D **ARE FOUND TO BE TOTALLY LACKING IN MERIT**.

Pendley's reinstatement **WILL REMAIN IN EFFECT** until this decision **BECOMES FINAL**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

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