

**March and April 2019**

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**Review was granted in the following case during the months of March and April 2019:**

Secretary of Labor v. Northshore Mining Company, et al., Docket Nos. LAKE 2017-0224, et al.  
(Judge Miller, February 13, 2019)

**No case review was denied during the months of March and April 2019.**

# **COMMISSION ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

April 24, 2019

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

JONES BROTHERS, INC.

Docket Nos. SE 2016-218  
SE 2016-219  
SE 2016-246

BEFORE: Jordan, Young, Althen, and Traynor, Commissioners<sup>1</sup>

## ORDER

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). After nine citations and orders were issued to Jones Brothers, Inc. by the Department of Labor’s Mine Safety and Health Administration, a Judge found that the operations of the company were subject to the Mine Act. 39 FMSHRC 399 (Feb. 2017) (ALJ). The parties then moved for a final order so that an appeal on the jurisdiction issue could be pursued, whereupon the Judge granted the motion, affirmed the citations and orders, and assessed penalties. 39 FMSHRC 570 (Mar. 2017) (ALJ).

The Commission did not grant Jones Brothers’ petition for discretionary review, but subsequently the company successfully appealed to the United States Court of Appeals for the Sixth Circuit. That court vacated the decisions below, ruling that at the time of the Judge’s decisions, she was an inferior officer of the United States who had not been appointed in accordance with Article II, Section 2, Clause 2 of the Constitution.<sup>2</sup> *Jones Bros., Inc. v. Sec’y of Labor*, 898 F.3d 669, 679 (6th Cir. 2018) (following *Lucia v. SEC*, \_\_\_ U.S. \_\_\_, 138 S. Ct.

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<sup>1</sup> Chairman Marco M. Rajkovich, Jr. is recused in this matter.

<sup>2</sup> Known as “the Appointments Clause,” it reads:

[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2044, 2050 (2018). While recognizing that subsequent to her decisions the Commission had cured the defect in the Judge's appointment, the court nonetheless held:

Jones Brothers is entitled to a new hearing before a constitutionally appointed administrative law judge. And even if [the] Judge [here] has since received a constitutional appointment, that hearing must be before a new official. [The] Judge [here] "issued an initial decision on the merits [and] cannot be expected to consider the matter as though [she] had not adjudicated it before."

*Id.* (quoting *Lucia*, 138 S. Ct. at 2055). Accordingly we remand this matter to the Acting Chief Administrative Law Judge for assignment to a different Judge to conduct further proceedings consistent with the court's instructions.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III  
Arthur R. Traynor, III, Commissioner

# **ADMINISTRATIVE LAW JUDGE DECISIONS**





# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2019

GEORGE SCOLES,

Complainant,

v.

HARRISON COUNTY COAL CO.,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2017-0638-D

Mine: Harrison County Mine

Mine ID: 46-01318

## DECISION

This case is before me upon a discrimination proceeding filed by George Scoles, through counsel, against the Harrison County Coal Company (“HCC” or “Respondent”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).<sup>1</sup> Scoles contends that Harrison County violated the Mine Act when it discharged him for engaging in protected activity. Scoles also argues that his discharge interfered with the ability of himself and other HCC miners to exercise their protected rights. HCC denies these claims and maintains that Scoles’ discharge was solely motivated by his repeated failure to properly clock in and out in compliance with the mine’s Hand Scanner Policy.

A hearing was held on October 16-17, 2018 in Morgantown, West Virginia. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the parties’ post-hearing briefs, I find that HCC did not violate the Mine Act when it discharged Scoles.

## I. STIPULATIONS

At hearing, the parties entered the following stipulations:

1. During Scoles’ employment at Harrison County Mine, he was a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).
2. The Harrison County Mine is a mine as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

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<sup>1</sup> In this decision, the joint stipulations, transcript, the Complainant’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. C-#,” and “Ex. R-#,” respectively.

3. The Harrison County Coal Company is an operator as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
4. Products of the Harrison County Mine entered commerce, or the operator or products of the Harrison County Mine affected commerce within the meaning and the scope of section 4 of the Mine Act, 30 U.S.C. § 803.
5. From January 1, 2016, through the present, the United Mine Workers of America Local Union 1501 and the UMWA International Union have represented the hourly production and maintenance employees at the Harrison County Mine. Tr. 14-15.

## **II. FINDINGS OF FACT**

### **A. Background**

The Harrison County Mine is an underground coal mine located in Mannington, West Virginia. Harrison County Coal Company (HCC) - a subsidiary of Murray American Energy Inc. - owns and operates the Mine. The Mine employs approximately 315 hourly employees and has an approximate annual payroll of 25 million dollars. Tr. 335.

George Scoles worked at the Harrison County Mine from January 2007 until May 2017 as a Longwall Outby Utility Man. Tr. 28. He supplied the longwall face and performed a variety of tasks to facilitate advancement of the longwall at the mine. Tr. 28. He also served as a miner's representative and as a walkaround with MSHA inspectors up to two to three times a week until his discharge. Tr. 85. Scoles is a member of the United Mine Workers of America ("UMWA") Local Union 1501 at the Harrison County Mine. Tr. 86.

Scoles has a mine-wide reputation as a safety advocate. Tr. 235-36, 256-58, 275, 277-78, 303-05. Aside from his walkaround duties, Scoles made numerous safety complaints to mine management. HCC was not always receptive to these complaints. Miner Christopher Yanero<sup>2</sup> described episodes where Scoles reported safety issues and management did not cooperate or assigned him to perform less desirable tasks while other miners were told to watch. Tr. 256-58. Miner David Hollis<sup>3</sup> testified that he often heard Scoles make safety complaints or recommendations over the radio that went unacknowledged by management. Tr. 305. Hollis noted that management responded when he personally acknowledged Scoles' comments over the radio. Tr. 308.

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<sup>2</sup> Christopher Yanero is a Plant Prep Helper at HCC. Tr. 249. He has worked at Harrison County Mine for 48 years. Tr. 250. He formerly served as mine committeeman and President of the Local Union for multiple terms. Tr. 259-60.

<sup>3</sup> David Hollis is the day shift dispatcher for HCC. Tr. 292-93. He has worked at the Harrison County Mine for 18 years. Tr. 292. His duties include monitoring all atmospheric elements at the mine and dispatching miners to different areas of the mine via radio. Tr. 292-93. He estimated that he hears about 80-85% of the radio communications that take place at the mine. Tr. 293.

These types of incidents, among others, prompted Scoles to file five section 105(c) complaints against HCC from 2014 to 2017. Scoles settled two of these complaints with the Mine. MSHA issued negative findings on another two and Scoles opted not to pursue them further. One of Scoles' 2015 complaints proceeded to hearing before Commission Administrative Law Judge Andrews. *See Sec'y on behalf of Scoles v. Harrison County Coal Co.*, 40 FMSHRC 1393 (Sept. 2018) (ALJ). In that case, Judge Andrews found that HCC violated the Act when it discharged Scoles for subordination following an altercation with his supervisor. *Id.* at 1420-21. Scoles was reinstated and awarded backpay. *Id.* at 1421-23.

In May of 2017, Scoles ran for safety and mine committeeman positions within the local Union. Tr. 87. The safety committeeman is charged with serving as a walkaround or assigning other miners to do so, performing safety inspections, and discussing miners' safety concerns with management. Tr. 88. The mine committeeman is authorized to represent miners in grievance proceedings and address any collective bargaining issues or mine-management conflicts that may arise. Tr. 88. Scoles easily won both races, but he was discharged pursuant to HCC's Hand Scanner Policy before he could assume office. Tr. 87-88.

## **B. The Hand Scanner Policy**

HCC implemented the Hand Scanner Policy ("Policy") in January of 2016. The Policy serves as the primary time and payroll tracking mechanism for all hourly employees. Tr. 336-37. The Policy requires the mine's hourly employees to track their work hours by entering their employee number and scanning their fingerprint at designated kiosks at the beginning and end of each shift. Ex. C-1; Tr. 337-38. Miners can use either hand to scan, and the process takes about five seconds. Tr. 337-38. If the scan is rejected or if a miner has issues with a kiosk, they are instructed to notify management of the issue. Ex. C-1. In general, miners that experience scanning issues are instructed to return to the kiosk and try again or to try a different kiosk. Tr. 240, 272. Even miners experiencing issues are usually able to scan in after a number of attempts. Tr. 240, 272. Scanner issues appear to be infrequent and individualized. There is no record of a large-scale scanner malfunction affecting entire shifts or crews. Tr. 247, 400-01.

The Hand Scanner Policy outlines a four-step progressive discipline scheme to encourage miners to consistently scan in and out. Ex. C-1. Each time a miner fails to scan in or out, they are disciplined in accordance with the number of scans they previously missed. A miner will receive a verbal warning for their first missed scan, a written warning for their second, a two day suspension for their third, and a suspension with intent to discharge for their fourth. *Id.* The Policy allows miners to exonerate themselves; a miner moves back one step on the scale if they scan in and out without failure for 180 days. *Id.* Thus, a miner at Step 3 of the discipline program will move back to Step 2 if they scan in and out for 180 consecutive days, back to Step 1 after another 180 consecutive days, and so on. The Policy does not outline any factors aside from failures to scan that may result in discipline under the scheme. Ex. C-1.

Christopher Fazio<sup>4</sup> administers the Policy's progressive discipline program at Harrison County Mine. Tr. 334-35. He maintains a spreadsheet to track progressive discipline records for all of the miners. Ex. R-E; Tr. 340. When a miner misses a scan, he is notified by payroll via the timesheets and will check his spreadsheet to administer the proper discipline.<sup>5</sup> Tr. 340. The payroll records are sufficient to sustain a violation, and miners rarely dispute the missed scans. Tr. 415. When they do, Fazio pulls video footage collected by motion-activated cameras located near all of the kiosks to prove the missed scan. Tr. 345-47. The cameras record and store up to ten days' worth of activity. Tr. 345-46. If the miner does not dispute the scan, Fazio does not save the video footage. Tr. 347.

Fazio administers the first two steps of the Policy himself. He will hold a private meeting with miners to inform them of the missed scan and at Step 2 will issue the appropriate paperwork to the miner. Tr. 342. If a miner reaches Step 3, Harrison County Mine General Manager Scott Martin will also be present at the meeting. Tr. 342. Miners may file a grievance to dispute alleged missed scans under the policy; this is often where the video evidence will be shown to the miners. Tr. 193-94, 346. At Step 2, a local mine committee member and local management attend to try to resolve the dispute. Tr. 209. At Step 3, a district union representative will meet with a member of corporate management or Human Resources as well as the mine superintendent. Tr. 211.

### **C. Scoles' Discipline under the Policy**

Scoles was disciplined and eventually discharged following five alleged violations of HCC's Hand Scanner Policy between May 2016 and May 2016. Scoles maintained at hearing that he never failed to scan in or out. Tr. 31, 60, 63, 66, 92, 94-95, 109, 116.

Scoles was issued a verbal warning on May 31, 2016 for a missed scan on May 19.<sup>6</sup> Ex. R-B, p. 2. Scoles' time sheet and time card for that date corroborate that Scoles failed to scan out. Ex. R-B, pp. 3-4. Scoles denied missing the scan, though later claimed that he was unable to scan out due to a scanner malfunction. Tr. 31-32. Miner Perry Heflin<sup>7</sup> testified that Scoles discussed

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<sup>4</sup> Christopher Fazio is the Human Resources Supervisor at the Harrison County Mine. Tr. 333-34. He has worked for HCC since June 2010. Tr. 333. His duties include conducting hiring and staffing procedures, managing collective bargaining, compensation and benefits, disability, and discipline. Tr. 333-34.

<sup>5</sup> Fazio only administers the disciplinary aspect of the Policy. He does not edit the payroll sheets. When a miner misses a scan, front line foremen and supervisors are responsible for adjusting miners' work hours to properly reflect the time they work. Those edits are done by hand, and according to Fazio, nobody can edit the timesheets through the computer system. Tr. 407-08.

<sup>6</sup> The verbal warning record states that the HCC was unable to issue the verbal warning sooner because the mine was idle from May 20 to May 30. Ex. R-B, p. 2.

<sup>7</sup> Perry Heflin is an electrical mechanic at Harrison County Mine. Tr. 230. He has worked for HCC for 12 years. Tr. 230.

the issue with him and that Scoles notified shift foreman Jim Coles of the matter. Tr. 238. Coles allegedly told Scoles and Heflin that he would take care of it. Tr. 32, 239. Scoles alleges that Fazio later spoke to him about the missed scan and told him that he would not be disciplined. Tr. 32-33, 349. Scoles therefore believed that he was not given a verbal warning for this missed scan.<sup>8</sup> Even though he believed he would not be disciplined, Scoles claimed that he asked to see video of the missed scan but was refused. Tr. 32-33.

Fazio denied Scoles' account and did not recall speaking with Coles about an alleged scanner malfunction. Tr. 349. He testified that he issued Scoles a verbal warning in accordance with Step 1 of the Policy and did not save the video footage because Scoles admitted to missing the scan. Tr. 348, 350-51. The record of the verbal warning states that "employee admitted that he did not scan out." Ex. R-B, p. 2; Tr. 354.

Scoles received a written warning for his second alleged missed scan on June 9, 2016. Ex. R-B, p. 5. Scoles' time sheet and time card show a missed out-punch on that date. Ex. R-B, p. 6-7. Fazio issued the warning to Scoles and to the Mine Committee the following day. Tr. 355-56. Scoles again denied missing the scan and did not sign the written warning. Tr. 47, 53, 113, 417. He claimed that HCC denied his request to see video of the missed scan. Tr. 54. Fazio disputed his account and claimed that Scoles once again admitted to missing the scan and accepted his discipline. Tr. 417. He did not think much of Scoles' refusal to sign the written warning because miners often decline to sign management documents. Tr. 417.

Scoles was suspended for two days for an alleged missed scan on July 6, 2016. Ex. R-B, p. 8. His time sheet and time card corroborate the missed scan. Ex. R-B, pp. 9-10. Scoles denied missing the scan. Tr. 61, 359, 413. He again requested video evidence of the scan but was denied. Tr. 61. However, it is undisputed that Scoles' representative at his grievance hearing did see video footage of this missed scan. Tr. 198-99.

On September 16, 2016, Scoles filed a grievance disputing the first two missed scans. Scoles was at Step 3 at the time he filed the grievance. The parties met on January 6, 2017. UMWA International Region 1 Representative Michael Phillippi<sup>9</sup> appeared at the grievance meeting on behalf of Scoles. Phillippi testified that he asked to see video of the alleged missed scans, but that HCC management claimed not to have them. For the first time in Phillippi's experience handling grievances, HCC declined to reverse its decision to discipline a miner under the policy. Tr. 193-95. He noted that management would usually reverse its decision when it did not have video evidence of the missed scan. Tr. 195. Fazio testified that he did not have video footage because Scoles admitted to missing the scans and emphasized that video proof is not required to substantiate a missed scan. Tr. 346, 357. HCC declined to reverse the decision and noted on the

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<sup>8</sup> Miners do not receive a written record for a verbal warning, but management does produce a form for its own records. Tr. 354.

<sup>9</sup> Michael Phillippi is an International Representative for Region 1 of the United Mine Workers Association. Tr. 187. He is involved in organizing and safety matters, but most of his work centers around grievance and arbitration, labor charges, and various policy matters. Tr. 187-88.

grievance agreement that as of September 16, 2016, Scoles was at Step 2 of the disciplinary scheme. Ex. C-6.

Scoles also grieved his discipline for the July 6 scan. At the meeting, Fazio showed Phillippi video of Scoles entering and exiting the Foreman's room without scanning. Tr. 198-99, 218, 359-60, 413. Phillippi subsequently withdrew Scoles' grievance. Tr. 199. However, he testified that he later considered his decision to withdraw Scoles' grievance to be a mistake. Tr. 198-99. Although HCC showed him the video, he believed that there were other cameras that may have captured Scoles' out-punch at a different kiosk. Tr. 199. Phillippi testified that based on his knowledge today he would not have withdrawn Scoles' grievance. Tr. 199-200. Fazio testified that he showed Phillippi video from cameras located at each scanner. Tr. 360.

Scoles received a second two-day suspension on February 9, 2017 for missing a scan the previous day. Ex. R-B, p. 11. Scoles' time sheet and time card show a missed out-punch for the date in question. Ex. R-B, pp. 12-13. Scoles was uncertain whether he missed this scan but again asked to see the video footage. Tr. 64-65, 364-65, 413-14. He was allegedly refused, although he admitted that he testified to the contrary during his arbitration hearing. Tr. 119-120. Scoles filed another grievance that was subsequently withdrawn upon viewing the video footage. Tr. 365-66.

Scoles was suspended with intent to discharge on May 10, 2017 for an alleged missed scan on May 8. Ex. R-B, p. 14. Scoles' time sheet and time card show a missed in-punch. Ex. R-B, pp. 15-16. His time card also shows a handwritten time adjustment. *Id.* Scoles testified that he did not miss the scan, but later acknowledged that he was uncertain about whether he missed it. Tr. 66-67, 126. Scoles viewed the video footage of the missed scan at his "24-48 hour meeting."<sup>10</sup> Tr. 68-69, 366. However, Scoles claimed that the video froze—or "glitched"—before it showed him entering the elevator. Tr. 69.

Scoles filed a grievance regarding his discharge and the matter was referred to arbitration. Exs. C-10, R-C. At the arbitration Scoles admitted that he missed all five of the scans and instead argued that discharge was a disproportionately severe punishment in relation to the conduct cited. Ex. R-D. On June 17, 2017, the Arbitrator did not find evidence of arbitrary or discriminatory enforcement of the Policy and upheld Scoles' discharge. *Id.* Notably, the arbitrator found no material issues of fact; Scoles admitted at the arbitration hearing that he missed all five scans for which he was disciplined. *Id.*

On June 26, 2017, Scoles filed a section 105(c) complaint with MSHA alleging discrimination. Ex. C-17. MSHA issued a letter of negative finding on August 17, and Scoles filed his section 105(c)(3) complaint on September 25. Exs. R-L, R-M.

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<sup>10</sup> Pursuant to the terms of the collective bargaining agreement with the Union, miners are entitled to a "24/48 hour meeting" with mine management to discuss their imminent discharge. Tr. 367-68.

### III. DISPOSITION

Scoles alleges that HCC arbitrarily and discriminatorily enforced its Hand Scanner Policy against him to justify his discharge. Complainant's Post-Hearing Brief ("Comp. Br.") at 20. Scoles argues that, given his longstanding history of engaging in protected activity and of conflict with HCC management, he was subjected to strict discipline under the Policy where other miners were often granted leniency. *Id.* In addition, Scoles also contends that his discharge under the Policy constitutes illegal interference with the ability of himself and of miners to engage in protected activity at the Harrison County Mine. *Id.* at 36.

At the outset, HCC contends that Scoles' section 105(c)(3) complaint was not timely filed and should be dismissed. Respondent's Post-Hearing Brief ("Resp. Br.") at 14, n. 10. Respondent also challenges whether this Court was Constitutionally appointed under the Appointments Clause and thus has the authority to hear this case. *Id.* at 21. With regards to the merits of the case, Respondent denies all charges of discrimination and interference. *Id.* at 14, 19. It contends that Scoles was fired solely based on his repeated failure to comply with HCC's Hand Scanner Policy. *Id.*

#### A. Timeliness of Scoles' § 105(c)(3) Complaint

HCC contends that Scoles' complaint should be dismissed as untimely because he failed to file his complaint within 30 days of receiving MSHA's non-merit letter. Resp. Br. at 14, n. 10. Scoles contends that he timely filed his complaint, and that even if he did not, the alleged nine day delay was excusable and was not sufficiently egregious or prejudicial to merit dismissal. Complainant's Reply to Respondent's Post-Hearing Brief ("Comp. Rep.") at 18-19.

The Secretary is required to inform any miner that files a complaint of discrimination pursuant to section 105(c)(2) that he will or will not pursue that complaint before the Commission on the miner's behalf. 30 U.S.C. § 815(c)(3). If the Secretary declines, a complainant has the right to file an action on their own behalf with the Commission "within 30 days' notice of the Secretary's determination." *Id.* That 30-day window commences when the miner receives actual notice of the Secretary's determination. *Boswell v. Nat'l Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992).

The Commission has held that the filing periods for section 105(c) discrimination complaints are not jurisdictional in nature. *Boswell*, 14 FMSHRC at 257 (citing *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984)). Judges determine whether a delay in filing should be excused on a case-by-case basis. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). The Commission has excused delays based on justifiable circumstances, including but not limited to "ignorance, mistake, inadvertence, and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1921-22 (Nov. 1996) (citations omitted). Failure to meet the time limits in sections 105(c)(2) and (3) should not result in dismissal absent a showing of "material legal prejudice." *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994); *see also Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) (finding prejudice to the operator to be the primary consideration in cases involving late filing).

I find that dismissal of this case for untimely filing is inappropriate. The record is unclear as to when Scoles received actual notice of the Secretary's non-merit finding, but it likely did not amount to the entire 9-day period, if untimely at all. MSHA sent the letter to Scoles on August 17, 2017 and Scoles filed his complaint on September 25, nine days past the prescribed 30-day limit. Exs. R–L, R–M; Tr. 143, 145-48. Scoles' complaint acknowledges that he received the notice "on or around" that date, but he could not recall exactly when he received the letter. Tr. 143, 148. It is unlikely that Scoles received the letter on the same day that it was dated and sent. Scoles did not check his mail on a regular daily or weekly basis because he was often traveling for work and because his mailbox was located over a thousand yards from his house. Tr. 145, 161. Given these circumstances, I find it plausible that Scoles did not actually receive the Secretary's letter for up to or over nine days after it was sent, and that any delay was inadvertent or excusable.

Even assuming that Scoles' filing was untimely, the delay was *de minimis* and did not prejudice Respondent's ability to present its case. The 30-day filing window is not jurisdictional and does not merit dismissal absent a showing of prejudice. *Boswell*, 14 FMSHRC at 257 (accepting filing that was 12 days late where operator showed no evidence of prejudice); *Hale*, 8 FMSHRC at 908 (accepting filing that was 2 years late where operator showed no evidence of prejudice). Respondent offered no evidence that it was prejudiced by the delay. Accordingly, I reject HCC's contention.

## **B. Constitutional Appointments Clause Argument**

HCC also argues that the Federal Mine Safety and Health Review Commission's ALJ appointment process is invalid pursuant to the Appointments Clause of the United States Constitution because the Commission improperly delegated its appointment authority to the Chief Administrative Law Judge. Resp. Br. at 21. Further, Respondent contends that the Commission's April 3, 2018 Notice ratifying the appointment of its ALJs does not remedy the defect because the process by which the ALJs were presented to the Commission was too limited to constitute valid exercise of its appointment power. *Id.* at 22.

To the extent that I have the authority to do so, I reject Respondent's arguments. The relevant case on this matter is the Court of Appeals for the 6th Circuit's decision in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), which applied the Supreme Court's decision in *Lucia v. Sec. & Ex. Comm.*, 138 S. Ct. 2044 (2018), to the Administrative Law Judges of the Federal Mine Safety and Health Review Commission. In *Jones Brothers*, the Court held that Commission ALJs were invalidly appointed inferior officers at the time that the ALJ heard the case. *Jones Bros.*, at 679. The Court acknowledged the Commission's ratification notice, but found that the notice did not remedy the Constitutional defect because it was issued after the Judge heard the case on the merits. *Id.* at 677-79. The 6th Circuit vacated the decision and remanded the case to the Commission for fresh proceedings before a different ALJ. *Id.* at 679.

Unlike the circumstances in *Jones Brothers*, the instant case was heard on October 16-17, 2018; over six months after the Commission Chairman ratified the appointments of all of its Administrative Law Judges. Federal Mine Safety and Health Review Commission, *Commission Ratification Notice*, <http://www.fmsihrc.gov/about/news/commission-ratification-notice> (Apr. 3,



2018). The case at issue is therefore before a validly appointed ALJ. Nor do I find merit in HCC's argument that the Ratification Notice did not cure the invalid appointment of the Commission Judges. Respondent's argument finds no support in the 6th Circuit's decision in *Jones Brothers*, the Supreme Court's decision in *Lucia*, nor the language of the Appointments Clause. In fact, the Court's decision in *Jones Brothers* suggests that the Commission validly "acted to cure [the] alleged constitutional defect by having every Commissioner ratify the appointment of every administrative law judge." *Jones Bros.*, at 677, 679. The Court also remanded the case for fresh proceedings before another ALJ, implying that the Ratification cured the defect. *Id.* at 679. I therefore accept the Commission's ratification as valid and proceed to the merits.

### C. Discrimination

Section 105(c)(1) of the Mine Act provides:

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

30 U.S.C. § 815(c)(1). The complainant miner bears the initial burden to establish a *prima facie* case of discrimination. To establish a *prima facie* case of discrimination under section 105(c)(1), the complainant must prove by a preponderance of the evidence: (1) that he engaged in protected activity, and (2) that the adverse action he complains of was at least partially motivated by that activity. *Turner v. Nat'l cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981).

If a miner establishes a *prima facie* case, the operator may rebut that case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. The operator may also defend affirmatively by proving that "it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

#### 1. Prima Facie Case

The Mine Act's discrimination provisions provide miners with protections against adverse action for certain protected activities to encourage and enable miners to play an active role in the enforcement of the Act. A miner engages in protected activity if (1) they "ha[ve] filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation[;]" (2) they "[are] the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]" (3) they "ha[ve] 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) they “ha[ve] exercised on behalf of himself or others...any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1).

It is undisputed that Scoles engaged in multiple forms of protected activity when he worked for HCC. First, Scoles made numerous safety complaints to mine management when he believed working conditions were unsafe. Tr. 235, 256-57, 275, 277-78, 303-05. Miner witnesses recalled specific instances where Scoles made complaints to management including but not limited to overheated beltline rollers, inadequate rock dust, excessive float dust, unset parking brakes, and malfunctioning scoops and door latches. Tr. 236, 256, 304. Second, Scoles served as a miner representative and walkaround during safety inspections two to three times each week in the eight months prior to his termination. Tr. 235, 256, 303-04. Third, Scoles filed five section 105(c) complaints against HCC for alleged retaliation for his safety advocacy. One of those complaints proceeded before the Commission and was adjudicated in his favor. *See Sec’y of Labor on behalf of Scoles v. Harrison County Coal Co.*, 40 FMSHRC 1393 (Sept. 2018) (ALJ). Finally, Scoles was running for two Local Union offices that assign walkarounds and raise miners’ safety concerns prior to his discharge. Tr. 87, 237, 260-61, 278, 306. I find that Scoles engaged in protected activity as defined by section 105(c)(1).

The Commission has defined “adverse action” as “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec’y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer’s action qualifies as “adverse” is thus decided on a case by case basis. *Sec’y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1848 n. 2 (Aug. 1984).

There is no dispute that Scoles suffered an adverse action when HCC suspended him with the intent to discharge him on May 10, 2017 and discharged him on June 17, 2017, following his arbitration decision. Exs. R–D, R–F; Tr. 371-72. “Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act.” *Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998) (citing section 105(c)(1) of the Mine Act); *Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)). The crux of this case thus falls to whether Scoles can demonstrate a causal nexus between his protected activity and HCC’s decision to terminate his employment.

A miner need not provide direct evidence of an operator’s discriminatory motive, but may provide “circumstantial evidence...and reasonable inferences drawn therefrom. *Turner*, 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). Factors that may support such an inference include the operator’s knowledge of the protected activity, evidence of hostility or animus toward the complainant, the temporal relationship between the complainant’s protected activity and the operator’s alleged adverse action, and the disparate treatment of the complaining miner. *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I address each factor in turn.

### **a. Knowledge of Protected Activity**

HCC does not dispute that it was aware that Scoles engaged in protected activity. That Scoles had a mine-wide reputation as a safety advocate and served as a walkaround appeared to be common knowledge among miners and management alike. Multiple miners testified to specific complaints that Scoles made directly to members of management as well as complaints that Scoles made over the mine radio communication system. HCC management was also personally involved with Scoles' past section 105(c) complaints. HCC settled two section 105(c) cases with Scoles and went to hearing before a Commission Judge on a third case.

I find that HCC had knowledge of Scoles' protected activity.

### **b. Animus or Hostility Toward the Protected Activity**

Scoles argues that HCC repeatedly demonstrated hostility and animus toward his protected activity. Comp. Br. at 30. He contends that ALJ Andrews previously found that HCC was hostile toward Scoles in a prior section 105(c) case and that mine management ignored Scoles' safety complaints made over the dispatch. *Id.* at 31. More recently, Scoles contends that HCC demonstrated animus or hostility when HCC allegedly refused or delayed production of video evidence of his missed scans. *Id.* at 31-32. Finally, Scoles contends that HCC's introduction at hearing of Scoles' disciplinary documents under the mine's previous ownership constituted animus because they serve no basis for his discipline under the current Hand Scanner policy. Comp. Br. at 33.

Respondent argues that Scoles relies on protected activity and hostility that occurred long before his discharge and do not relate to his termination under the Hand Scanner Policy. Resp. Br. at 15. It also claims that Scoles or his representative viewed video footage of three scans and that Fazio was unable to show Scoles video evidence of the first two missed scans because Scoles admitted to missing them, prompting Fazio to delete the tapes. Fazio testified that miners were commonly unable to view the video promptly following notification of a violation of the Policy, and often were not shown the video until the grievance hearing. Tr. 413-15.

Given the history between Scoles and HCC there was ample opportunity for hostility or animus against Scoles' protected activity. The Court sees no reason to discredit Scoles' past interactions with HCC management that could and have been characterized as hostility in previous section 105(c) cases. These instances, however, were not shown at hearing to be connected to or to have played a role in Fazio and Martin's administration of the Hand Scanner Policy against Scoles.

I do not find merit in Scoles' assertion that HCC acted in a hostile manner when Fazio allegedly refused or intentionally delayed the production of video evidence of Scoles' alleged missed scans. At the outset, contrary to Scoles' testimony, Scoles or a representative on his behalf were able to see video footage of three of his five missed scans. Tr. 359-60, 364, 374, 412, 416-17. He was thus not categorically denied the ability to see video footage of his missed scans.

Although it is undisputed that Scoles was unable to view video footage of his first two missed scans, the parties disagree as to whether Scoles actually requested to see video evidence or whether he admitted to missing the scans, prompting Fazio to delete the videos. This conflict is more relevant to Scoles' allegation of disparate treatment under the Policy, and I will resolve the conflicts in detail in that analysis. Regardless of the testimonial dispute, the Policy does not require video footage of a missed scan to sustain a violation, nor does it require that management immediately show miners video footage of alleged missed scans. Ex. C-1. I accept Fazio's testimony that the payroll records were sufficient to establish a violation of the Policy. Tr. 346-47. Furthermore, even assuming that HCC refused to show Scoles video evidence of the first two scans upon his request, I find no evidence that the refusal was motivated by Scoles' protected activity rather than what appears to be confusion over whether Scoles admitted to the scans. Scoles cannot point to any comments or actions on the part of HCC that indicate hostility or animus based upon his prior complaints, his role as a walkaround, or the upcoming election. Scoles' violations occurred over the course of nearly an entire year. Over that period, none of HCC's comments or actions fail to align with the written policy or suggests abuse of the disciplinary scheme. Ex. C-1.

I likewise reject Scoles' contention that HCC demonstrated hostility when it unnecessarily delayed showing him or his miner representative the video footage of his other scans. Based on the record such a delay is not out of the ordinary in the context of enforcement of the Policy. Fazio testified that he generally waited until the grievance to show either the miner or his union representative video footage because miners so rarely disputed missed scans. Tr. 347,417, 423. He noted that these meetings could convene quite some time after the alleged missed scan occurred. Tr. 414. Indeed, Scoles' filed his grievance challenging his first two missed scans nearly three months after he was disciplined for them, and the hearing was held between seven and eight months after that discipline. Ex. C-6. Thus, the mine's failure to immediately show Scoles video footage in itself is not inconsistent with the general enforcement of the Policy or demonstrative of hostility toward the Complainant.

Finally, I reject Scoles' contention that HCC's introduction of Exhibit R-U, Scoles' disciplinary history for violating an attendance policy when the Harrison County Mine was under previous ownership, constituted animus. Scoles points to *Sec'y of Labor on behalf of Harrison v. Consolidation Coal. Co.*, 37 FMSHRC 1497, 1511 (July 2015) (ALJ), to argue that "introducing documents concerning the discipline of a miner when those documents should not rightfully have played any role in the disciplinary decision in question, is clear evidence of management hostility toward the miner and his exercise of Mine Act rights." Comp. Br. at 33.

The above noted temporary reinstatement decision is easily distinguishable from the instant case. In *Harrison*, the ALJ found evidence of animus where Respondent introduced at arbitration an old safety slip as evidence of past disciplinary issues despite the terms of a previous settlement ordering Respondent to remove the slip from the miner's file. *Harrison*, 37 FMSHRC at 1511. Here, there was no such express violation of a previous agreement between the two parties. Furthermore, HCC did not enter the exhibit as support for its decision to discharge Scoles but to raise credibility questions as to his testimony that he had never failed to scan in or out. Tr. 106-110. Introduction of Exhibit R-U was thus relevant to the instant case and did not constitute animus.

Accordingly, Scoles has not demonstrated that HCC's administration of the Policy constituted animus or hostility or that the alleged animus was in response to his protected activity at the mine.

### **c. Temporal Relationship between Protected Activity and Adverse Action**

Scoles argues that his discharge occurred close in time to his protected activity. Comp. Br. at 34. He contends that he commonly took part in protected activity and was terminated on the day of the Local Union elections, in which he was running for two positions. Respondent contends that the timing supports its defense because Scoles was terminated immediately after HCC became aware that Scoles reached Step 4 of the Hand Scanner Policy's disciplinary scale.<sup>11</sup> Resp. Br. at 15.

As discussed above, Scoles consistently engaged in protected activity up until his discharge. For the purposes of this decision, I find that a coincidence in time between the protected activity and the adverse action exists.

### **d. Disparate Treatment**

Scoles contends that he was the subject of disparate treatment under the Hand Scanner Policy because he was strictly disciplined for each alleged missed scan whereas other miners were granted leniency in similar situations. Comp. Br. at 24. Scoles also argues that he was singled out and disciplined for his first missed scan even though he informed his supervisor that the scanner malfunctioned. *Id.* at 28-29.

Respondent maintains that it disciplined all miners, including Scoles, strictly in accord with the Hand Scanner Policy. Resp. Br. at 17. It contends that neither Scoles nor his comparator witnesses could support their claims of disparate treatment under the Policy when scrutinized against HCC's time, payroll, and enforcement records. *Id.* at 15.

As an initial matter, I find that Scoles did in fact fail to scan in or out on the five occasions for which he was disciplined. Although Scoles claimed that he did not miss *any* scans, his testimony was inconsistent at the hearing and contradicted his testimony at previous hearings. In his testimony before this Court, Scoles' varied from outright denial that he missed any scans, to uncertainty regarding a couple of scans, to an eventual acknowledgment that he missed one scan because the kiosk malfunctioned. Tr. 31-32, 60, 63, 66, 92, 94-95, 109, 116. His assertion also contradicted his arbitration and unemployment compensation testimony, in which he admitted to missing all five scans. Exs. R-D, R-F, R-J; Tr. 94, 134-39, 140-41.

Scoles' account was similarly inconsistent regarding the video footage of his missed scans. He initially testified that he was only shown video for his final missed scan during his 24/48 hour meeting. Tr. 68-69. Although he testified that he could not remember seeing any video footage, he later admitted that either he or his representative was shown video evidence for three of the

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<sup>11</sup> Respondent's argument is fully addressed below in my analysis of its affirmative defense.

missed scans. Tr. 69, 119-20, 198-99, 366, 414. When crossed on these inconsistencies, Scoles was unable to produce a satisfactory explanation, and I therefore have grave doubts regarding Scoles' recollection of the facts surrounding the missed scans. *See* Tr. 134-144.

Meanwhile, Fazio provided a credible and consistent account of Scoles' disciplinary history that was supported by documentary evidence. HCC's time and payroll records and Fazio's disciplinary spreadsheet show that Scoles missed scans on each date alleged. *See generally* Exs. C-19, R-B; Tr. 351-53, 356-57, 358-60, 363-64, 365-67. The record also contains the verbal warning record, the written warning,<sup>12</sup> both 2-day suspension notices, and the suspension with intent to discharge notice, all of which support Fazio's account. Exs. C-18, R-B, p. 3. Furthermore, each of Scoles' grievances regarding missed scans were subsequently withdrawn or disposed of in the mine's favor. Tr. 198-99, 365, 374-75. The evidence supports that Scoles missed all five scans for which he was disciplined.

Having held that Scoles missed all five scans, I turn to his contention that he was subjected to harsher enforcement under the Policy compared to other miners. Scoles does not have a like-to-like comparator because no other HCC miners reached Step 4 of the disciplinary program. Rather, Scoles points to various instances in which miners avoided disciplinary action despite failing to scan in or out, whereas he was disciplined in strict accordance with the Policy on every occasion.

I find that Scoles was not treated differently than any other miner under the Policy. First, the comparators' accounts of disparate treatment consistently failed to match the dates in HCC's time and payroll records. Although every comparator expressed absolute certainty regarding the dates of unpunished missed scans HCC offered time and pay records that systematically refuted each miner's account. *See* Exs. R-AA, R-BB, R-CC, R-DD, R-EE, R-FF. Christopher Yanero testified that he missed a scan on February 13, 2018, but was not disciplined. Tr. 253. He also stated that miners Mark Heldreth and Jason Williams missed scans around the same time but that neither were disciplined. Tr. 254. Respondent provided time and pay records demonstrating that Yanero did in fact scan out on and around February 13 and that Heldreth and Williams scanned out on the days Yanero alleged they did not. Exs. R-V, R-BB, R-CC. Fay Ezelle claimed that he missed scans on February 27 and August 26 of 2018 and was not disciplined. Tr. 277. He also testified that he was only disciplined once under the Policy but then acknowledged that he had received a verbal warning, written warning, and 2-day suspension for missed scans. Tr. 276, 281. When asked about his Step 2 violation, he testified that he threw his written warning into the trash upon receipt. Tr. 286. Respondent again provided time sheets showing that Ezelle indeed reached Step 3 of the Policy and properly scanned in and out both on and around February 27 and on August 28. *See* Exs. C-19, R-V, R-W, R-X, R-Y; Ex. R-DD. David Hollis testified that co-worker Sam Marra missed two scans that were excused by management. Tr. 298-99.

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<sup>12</sup> Although Scoles did not sign the written warning, I find that it was nonetheless properly issued. Scoles testified at hearing that he did not sign it because a miner representative was not present. Tr. 53. I accept Fazio's testimony that he did not press the matter because it was commonplace for miners to refuse to sign records. This disregard for mine documents is supported by Ezelle's testimony that he threw his Step 2 written warning into the garbage upon receipt. Tr. 286.

Respondent's records again show that Marra was not working in the same part of the mine as Hollis during his alleged first missed scan and that Marra had accurately scanned on and around the date of the second alleged missed scan. Ex. R-EE. Not one of the comparators' accounts of missed scans could be substantiated by the business or payroll records or in any way corroborated.

Scoles nonetheless asserts that "the fact that miners could not remember exact dates or confused times does not detract from the fact that they testified forthrightly regarding their recollections." Comp. Rep. at 7. The Court acknowledges the miners' earnest testimony but cannot credit any of it for the purposes of establishing disparate treatment in light of HCC's business records clearly showing otherwise. Complainant has not provided any evidence that casts doubt on the veracity of those records or that suggests that the testimony of his comparator miners is entitled to more weight.<sup>13</sup>

Business records aside, the comparators also demonstrated misconceptions as to how the scanners worked and how HCC administered the Policy that casts further doubt on the accuracy of their testimony. Yanero testified that he believed that he was not disciplined when scanner errors occurred because the records showed attempted or failed scans. Tr. 252. Hollis testified that he believed that scans could be excused if a supervisor filled out an exculpatory form letter. Tr. 300-302. Both of these claims appear to be inaccurate. Fazio testified that neither he nor any foremen have access or authority to excuse or alter missed scans. Tr. 372-73, 380, 407-08. Indeed, foremen handwrite the adjusted time onto the time sheet when a miner fails to scan in or out rather than entering them into the electronic system. Tr. 407-08.

I cannot conclude that other miners were disciplined less stringently than Scoles under the Policy. The comparator's accounts either conflict with HCC's business records or have plausible explanations for the discipline administered or lack thereof. In fact, examples of the Comparators' own discipline demonstrates that the Policy was enforced upon them as written. The miners were disciplined when they forgot to scan but likewise not disciplined when they experienced a scanner error and informed a supervisor.

Scoles alleges a specific example of disparate treatment when he was disciplined for missing his first scan on May 19, 2016, even though he informed his supervisor that he was unable to scan in due to a malfunction. Tr. 32. Scoles testified he immediately informed his supervisor, Jim Coles, who told him he would "take care of it." Tr. 32. Miner Perry Heflin corroborated Scoles' conversation with Coles but could not recall the exact date it occurred. Tr. 238-39. Scoles noted that Fazio later spoke to him regarding the missed scan and told him that he would not be punished. Tr. 32-33. Scoles was nonetheless put at Step 1 for missing the scan. Tr. 32-33.

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<sup>13</sup> Scoles maintains that the Court should credit his comparators' accounts over HCC's time and pay records because the operator offered no support for its records aside from Fazio's "self-serving testimony." Comp. Br. at 27. Yet Complainant offers nothing of substance to convince the Court that the time and payroll records are invalid. That the time and pay records support Fazio's testimony and refute the comparators' testimony is not a valid reason to discredit them.

Fazio disputed Scoles' account. He denied telling Scoles that he would not be disciplined and did not recall Scoles mentioning any conversation with Coles about the scan. Tr. 354. Rather, Fazio testified that Scoles admitted to missing the scan, telling him that "he was a big boy" and that "he could take it." Tr. 351. HCC provided evidence of the verbal warning with written acknowledgment that Scoles admitted the miss and accepted the discipline. Ex. R-B, p. 2; Tr. 349-50. Fazio noted that he did not save the video recording of the first missed scan because Scoles admitted that he failed to scan out. Tr. 351-54.

I have already found that Scoles missed the scan, and I accept Fazio's testimony that Scoles admitted as much. Fazio's account is supported by the time and pay records, his spreadsheet, and the notes recorded on the verbal warning record. Ex. R-B p. 5, C-19; Tr. 354, 357. His account explains why Fazio did not save the video footage and was unable to show Phillippi the video months later during Scoles' grievance meeting.

Scoles argues that he reported a malfunction and that Fazio informed him he would not be disciplined for the missed scan. I do not credit this contention. As noted above, I found Scoles' testimony to be severely inconsistent and seriously question his recollection of the events surrounding each of his five missed scans. With regard to the May 19 scan at issue, Scoles wavered between outright denying that he missed the scan and acknowledging that he did not scan in because the scanner malfunctioned, in both cases claiming that Fazio told him he would not be disciplined. Tr. 31-32, 92-95, 109, 116. Nonetheless, Scoles testified that he demanded to see the video and was refused. Neither of these sequences of events explained why Scoles would demand to see the video if he admitted to missing the scan, acknowledged that he missed the scan due to a kiosk malfunction, or was told that he would not be disciplined.

Scoles points to his and Heflin's testimony that Scoles spoke with his supervisor about the scanner malfunction to argue that he was improperly disciplined for immediately reporting the issue. Heflin's testimony corroborated Scoles' account but did not provide sufficient detail to confirm that it pertained to the May 19 scan, or what exactly Coles meant when he said he would take care of the scanner malfunction. Tr. 238-239. Assuming Scoles experienced a scanning issue and that the conversation with Coles occurred on May 19, I find that Coles likely "took care" of the payroll aspect of the scanner issue but could not address the disciplinary side of the missed scan. This explanation reconciles Coles' statement with Fazio's testimony that front-line foreman and supervisors do not have the authority to excuse missed scans, only to annotate and validate time to ensure miners are paid according to hours work. Indeed, Scoles' time and pay for that date is handwritten and apparently initialed by Coles. Ex. R-B, p. 3. This finding also explains why Fazio had no recollection of speaking with Coles about the matter, as Fazio is not involved with the payroll side of the Policy.

However, even accepting Scoles sequence of events, it does not necessarily follow that he did not miss the scan in violation of the Policy. Although multiple miners testified that they were not disciplined when they immediately informed a supervisor that they were unable to scan in or out, none claimed that they were simply excused as Scoles believed to be. Tr. 239-40, 254, 276, 297. Rather, most of the miner witnesses explained that their supervisors instructed them to return to the kiosk and continue trying to scan in or out until it was finally accepted. Tr. 240, 272, 311. In situations where miners informed supervisors that personally came to address the machine issue,



the miners recalled attempting to scan in again after they reported the issue. Tr. 240, 272. Thus, I find it plausible that Scoles could have reported the issue and still missed the scan in violation of the Policy by not attempting to rescan.

In sum, I do not find that Scoles was treated differently than other miners when he was disciplined for missing the May 19 scan. Scoles' testimony was inconsistent and did not fully match his alleged sequence of events, while HCC provided business and disciplinary records consistent with Fazio's recollection of the missed scan, including the verbal warning that noted Scoles' acceptance of the discipline. Ex. R-B, p. 2; Tr. 351, 354. I therefore find that Scoles admitted to missing the May 19 scan and accepted the Step 1 discipline for it. Hence, his treatment was consistent with that of other miners that missed scans in accordance to the Policy.

Accordingly, I find that Complainant was not subject to disparate treatment under the Policy.

#### **e. Conclusion**

In light of the above, I conclude that Complainant did not establish a *prima facie* case of discrimination. The Complainant was unable to establish a nexus between his protected activity and his discharge under the Policy. Although HCC knew of Scoles' reputation as a safety advocate and had come into conflict with Scoles before regarding these matters, Scoles did not sufficiently show that HCC discharged him because of his protected activity. Most conclusively, Scoles was unable to establish that he was treated any differently than other miners for violating the Hand Scanner Policy. Scoles' own testimony regarding his scanning history lacked any semblance of credibility, and his comparators were unable to show examples of disparate treatment under the Policy. On the other hand, HCC provided business records supported by Mr. Fazio's credible testimony that showed a detailed and consistent enforcement of the policy. Accordingly, I find that Scoles failed to establish a *prima facie* case of discrimination.

### **2. Affirmative Defense**

An operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and that the operator would have taken said action based solely on the unprotected activity. *Pasula* at 2799-2800. In reviewing the defense, the judge should determine whether it is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The complainant may show that the alleged non-discriminatory reason is pretext for the adverse action by showing that the "asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Respondent contends that Scoles was terminated in accordance with the Mine's Hand Scanner Policy and would have been terminated for that reason alone. Resp. Br. at 16. Scoles was disciplined upon each violation and was terminated immediately once HCC management discovered that he reached Step 4. *Id.* HCC argues that it has a legitimate and important business interest in accurately maintaining the time and payroll records for its workforce. *Id.* Thus,

Scoles' discharge was consistent with the Policy and solely determined by his repeated failure to scan in and out. *Id.*

Scoles maintains that HCC used the Hand Scanner policy as pretext for his discharge. Comp. Rep. at 11. Scoles points to the other miners' testimony to argue that HCC enforced the Policy in an inconsistent and lenient manner and thus did not discharge Scoles solely for his failure to scan in and out. *Id.* Furthermore, Scoles argues that HCC inflated its purported business interest in maintaining accurate payroll records because the mine regularly used an alternative means of tracking time that was more reliable than the hand scanners. *Id.* at 12-13.

Assuming arguendo that Complainant established his *prima facie* case, I find that HCC established a valid affirmative defense. Scoles reached Step 4 of the Hand Scanner Policy due to his multiple failures to scan in and out over the course of a year. The designated punishment at Step 4 is suspension with the intent to discharge, and HCC immediately disciplined Scoles accordingly when he reached that step. The Hand Scanner Policy's language is singularly directed toward enforcing consistent compliance with HCC's time and attendance system and clearly outlines the repercussions for repeated failure to do so. Ex. C-1. Although they may not have agreed with the Policy itself, Scoles and the other miners were aware that failing to scan in or out constituted a violation and testified to their personal experiences with the progressive discipline scheme.

Fazio's testimony lends credibility to HCC's proffered reason for discharging Scoles. He described his interactions with Scoles at each disciplinary step and his process for administering the Policy throughout the mine in detail. His disciplinary spreadsheet and the mine's time and payroll records indicate that Fazio meticulously tracked missed scans and disciplined culpable miners in accordance with their status on the progressive discipline scheme. Ex. C-19. His testimony did not indicate that his disciplinary interactions with Scoles differed from those with other miners, were out of step with the Policy, or were motivated by factors other than Scoles' failure to scan in or out. Furthermore, his testimony and HCC's time and pay records systematically and consistently refuted the testimony of Scoles and his comparators' regarding inconsistent enforcement of the Policy. As discussed in detail above, none of the miners' testimony was sufficiently credible to cast doubt on the veracity of HCC's records or that HCC's implementation of the policy was implausible or out of line with normal business practices.

Complainant argues that HCC overstated its business interest in enforcing the Hand Scanner Policy because front-line foreman and supervisors regularly enter the time and pay accurately and without malfunction whenever miners missed a scan. Comp. Br. at 12-13. I reject this argument. The mere existence of a reliable backup system does not lessen HCC's business interest in ensuring accurate time and pay for its workforce or the legitimacy of the Hand Scanner Policy as a means to do so. Mines have a clear business interest in ensuring its employees are paid correctly, consistently, and without dispute. They thus have a clear interest in ensuring that miners use the system put in place. Computerizing those calculations serves to provide an objective means of doing so and eliminate suspicion that mine management may abuse their power in making those calculations themselves. Supervisors are only authorized to adjust time and pay when miners fail to use the Hand Scanners, and they must do so by hand on the time sheet. It is therefore clear that HCC implemented the Hand Scanner Policy and system

to minimize supervisors' involvement in calculating time and insulate the electronic system from their control. The Court finds this interest both reasonable and plausible.

I find that HCC's offered business justification was not pretextual. The Hand Scanners are a plausible means to accurately calculate time and pay of all 315 miners working at the Harrison County Mine and to hold miners accountable for scanning in and out. The system is designed to avoid disputes between employees and management regarding pay by using an objective electronic timekeeping system. It cannot be effective, however, unless miners regularly scan in and out, and the Policy is unequivocally intended to ensure that they do so. HCC's desire to implement a disciplinary scheme that effectively deters miners from failing to scan in and out is therefore reasonable. Scoles reached Step 4 of the Policy's progressive discipline scheme when he failed to scan in or out on five different occasions without being exonerated more than one time. While discharge was the harshest measure available, it was clearly outlined within the Policy, and the Court declines to substitute its view of what may be good business practice for that of the operator with an opinion as to whether the adverse action was "just" or "wise." *Sec'y of Labor on behalf of Silva v. Aggregate Indus. WRC, Inc.*, 40 FMSHRC 552, 572 (Apr. 2018) (ALJ) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981).

#### **D. Interference**

Scoles also contends that HCC's "action of disciplining Scoles to the point of discharge under the [Hand Scanner] Policy, while declining to discipline other similarly-situated miners each time management alleged them to have committed the exact same violation, is not only inherently likely to interfere with Scoles' exercise of Mine Act rights; it is completely destructive of that exercise, inasmuch as it ended his employment at the Mine." *Id.* at 37. Complainant also contends HCC's decision to terminate him interferes with the rights of other miners because it will chill their desire to make safety complaints at the mine. *Id.* Complainant urges the Court to adopt the *Franks* test, which finds an interference violation when:

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

*UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014).

HCC disagrees and contends that Scoles' discharge should not be analyzed under an interference framework. Resp. Br. at 20. Respondent argues that doing so would "create a 'perverse' incentive for miner complainants to plead interference claims in lieu of or in addition to discrimination claims to avoid the more rigorous *Pasula/Robinette* framework." *Id.*; see also *Sec'y of Labor on behalf of Pepin v. Empire Iron Mining P'ship*, 38 FMSHRC 1435, 1453 (June 2016) (ALJ). If the Court does consider Scoles' claim, HCC urges the adoption of an interference test for facially neutral company policies as outlined in *Feagins v. Decker Coal Co.*,

23 FMSHRC 47, 50 (2001) (ALJ) (holding that to constitute illegal interference a facially neutral policy must (1) overtly impose negative consequences to a person for the exercise of a Mine Act Right or (2) damage or deny rights assured under the Act even if there is no overt causal connection between the damage suffered and the exercise of the protected right). Resp. Br. at 19. Should the Court apply the *Franks* test to Scoles' claim, however, HCC argues that its decision to discharge Scoles cannot be reasonably viewed as tending to interfere with Mine Act rights, and was nonetheless justified by its legitimate interest in accurately tracking time and payroll that outweighs any harm caused to the exercise of said rights. *Id.* at 20-21.

Unlike discrimination cases, the Commission has accepted interference claims where a miner complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than an adverse employment action. See *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985). In these cases, the Commission focuses not on the employer's motive but on whether the conduct would "chill the exercise of protected rights," either by the directly affected miner or by others at the mine. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

A majority of the Commission has not endorsed a single analytical framework to apply when determining whether an operator interfered with the exercise of protected rights under section 105(c). See *Sec'y of Labor on behalf of Greathouse, et al. v. Monongalia County Coal Co. et al.*, 40 FMSHRC 679, 680 (June 2018). Two Commissioners in *Greathouse* and multiple Administrative Law Judges have applied the *Franks* test. The remaining two Commissioners held that the Complainant must also demonstrate that the alleged interference was motivated by animus to the exercise of protected rights. See *Greathouse*, 40 FMSHRC at 708. At this time, no Commissioner has explicitly endorsed Respondent's proposed interference test for facially-neutral policies as put forth in *Feagins*, while at least one Commission Judge has found that test to be out of line with Commission's current case law on interference. See *Sec'y of Labor on behalf of Greathouse*, 39 FMSHRC 941, 948 (May 2016) (ALJ) (holding that Commission precedent has de-emphasized proof of a miner's attempted exercise of a protected right and not required a showing of intent to interfere).

At the outset, the Court has grave reservations in accepting Complainant's alternative argument of interference and in applying the *Franks* test to a case that so obviously implicates protected activity and an adverse employment action. Cf. *Gray*, 27 FMSHRC at 8. To expand the use of interference claims to clear adverse actions such as discharge would allow complainants to sidestep the elements required to prove a *prima facie* case of discrimination under section 105(c). *Pepin*, 38 FMSHRC at 1452-53. In a case such as this one, where protected activity and adverse action are clearly present and where discriminatory motive has not been found, permitting an alternative pleading of interference runs the risk of rendering the *Pasula/Robinette* superfluous. If, upon failing to prove up its *prima facie* case of discrimination, a complainant may then resort to a claim of interference, there is little stopping a Complainant from avoiding *Pasula/Robinette* analysis altogether by alleging interference to prove its claim under the less stringent *Franks* test. See 38 FMSHRC at 1452-53.

Moreover, accepting the notion that a miner's discharge interferes with that miner's ability to exercise protected activity would excise the burden of proof under the first prong of the *Franks* test. That a miner's discharge interferes with his or her own ability to engage in protected activity is a tautology. To hold that HCC's decision to discharge Scoles pursuant to the Hand Scanner Policy interfered with his rights would obfuscate the intended purpose of "interference" under the Act and open the door for any and every miner to challenge the mere fact of their termination with or without a demonstrated impact on protected activity. This could not have been Congress' intent when it identified two causes of action under section 105(c): "not only the common forms of discrimination, such as discharge, suspension, [and] demotion..., *but also* against the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982) (citing S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)); *see also Pepin*, 38 FMSHRC at 1452-53 (emphasis added).

Regardless, the Court need not dwell upon whether multiple tests are necessary for factually different interference claims or endorse a specific interference framework because Scoles' claim does not satisfy the *Franks* test, so far the least stringent interference test endorsed by the Commission.

***1. Whether HCC's decision to discharge Scoles pursuant to the Policy can be reasonably viewed as tending to interfere with the exercise of protected rights.***

The Hand Scanner Policy implemented a four-step progressive discipline system for each instance where a miner failed to use the hand scanner to start or end their shift. Ex. C-1. HCC discharged Scoles after his fifth missed scan in slightly less than a year. He was moved back one step in accordance with the policy after scanning in and out for 180 consecutive days during that period.

When compared to other programs or plans found to interfere with miner's protected rights, HCC's Hand Scanner Policy does not implicate the exercise of protected rights under the Act. In other cases, the policies at issue either directly chilled a miner's exercise of rights or provided an incentive for miner's not to exercise those rights. *See, e.g., Greathouse*, 40 FMSHRC 679 (June 2018) (addressing bonus plan that awarded miners for production and thus discouraged safety complaints); *Sec'y of Labor on Behalf of Thomas McGary et. al. v. The Marshall County Coal Co. et. al.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ) (policy requiring miners to report safety complaints to management before making the complaints to MSHA interfered with miners right to make anonymous complaints). Unlike those cases, the Hand Scanner Policy itself does not create any disincentive to refrain from engaging in protected activity. Miners cannot be disciplined for engaging in protected activity under the Policy and are not deterred from doing so based on any implication of the Policy's language. *See* Ex. C-1. A miner cannot be discharged under the Policy for anything other than repeatedly failing to scan in or out. In short, if a miner simply scans in and out every day, the Policy will not impact them or their actions whatsoever.

When considering the totality of the circumstances surrounding Scoles' discharge, however, I find that miners may reasonably view HCC's decision to discharge him in close proximity to his

election to the Union Safety Committee as tending to chill the exercise of protected rights. Hollis testified that he warned Scoles not to run for the Union positions and refused to vote for him for fear of adversely impacting his employment at the mine. Tr. 306-307. Given Scoles' reputation for safety advocacy, his pending candidacy for two Local Union positions, and his past conflicts with HCC management, miners could conceivably view HCC's decision to discharge Scoles under the Policy as a statement discouraging miners' exercise of protected activity for fear of being subject to stricter enforcement of the Policy.

For the purposes of this decision, I find that Scoles' discharge satisfies step 1 of the *Franks* test.

**2. Whether HCC's decision to discharge of Scoles' pursuant to the Hand Scanner Policy outweighs the harm caused to the exercise of protected rights.**

The second prong of the *Franks* test turns to whether the operator had a "legitimate and substantial" reason for the action "whose importance outweighs the harm caused to the exercise of protected rights." *Greathouse*, 40 FMSHRC 679, 702 (June 2018) (citations omitted). An operator's substantial business justification is most persuasive when it is narrowly tailored to promote the justification and the operator's interest is important and the impact on employee rights is minimal. *See Franks*, 36 FMSHRC 2088, 2118 (Aug. 2014); *Greathouse*, 38 FMSHRC 941, 954 (May 2016) (ALJ) (citations omitted).

Scoles contends that HCC cannot offer a legitimate and substantial reason for discharging him under the policy that outweighs its interference with miners' rights because it took the most severe action possible in discharging him.<sup>14</sup> Comp. Br. at 39. HCC contends that it has a legitimate and substantial interest in ensuring accurate timekeeping and the payment of correct wages to its employees and ensuring that miners consistently scan in and out. Resp. Br. at 21. It notes that the Hand Scanner Policy is narrowly tailored to minimally affect employees' rights by focusing solely on whether miners properly scan in and out of their shifts. *Id.*

I find that HCC's interest in enforcing the Policy outweighs the minimal and attenuated impact upon miners' exercise of their protected rights. The mine is large and must track the time and pay of 315 miners. It uses the hand scanners to quickly and effectively do so. Tr. 335-37. The system does not operate as effectively or efficiently as intended if miners do not use the scanners. The progressive discipline scheme is in place to ensure compliance. Scoles' termination was in accordance with the established Policy, and HCC had a legitimate and substantial interest in enforcing the Policy so that miners consistently use the hand scanners to track their hours.

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<sup>14</sup> Scoles contends that because HCC's enforcement of the Hand Scanner Policy was pretextual in that it treated Scoles differently than other miners, it is unnecessary to balance that purported reason against the resulting interference with miners' rights. Comp. Br. at 39. Since I have already found that HCC's enforcement of the policy was not pretextual, I need not address this argument or its implications for interference claims in general.

In contrast, Scoles' discharge under the Hand Scanner Policy caused minimal and attenuated harm to other miners' exercise of protected rights because he was solely responsible for remembering to scan in and out at the end of his shifts, especially as he progressed further along the disciplinary scheme. Scoles offers no evidence that he felt the Policy deterred him from exercising his rights or any evidence that the Policy was implemented as a threat against his exercise of those rights. Rather, Scoles demonstrated a flippancy toward the Policy, calling it "a joke," "piddly," and "heinous" during his deposition and reiterating that belief at hearing. Tr. 95-99. Any harm that HCC's decision to discharge Scoles may have caused to miners' exercise of protected rights is tempered by Scoles' failure to adhere to the Policy. While a reasonable miner may conceivably view HCC's decision to discharge Scoles as a warning not to engage in protected activity, I find it much more likely that a reasonable miner would view Scoles' discharge as a warning to remember to scan in and out each day.

Contrary to Scoles' claim, HCC's decision to discharge him was narrowly tailored to promote compliance with the Hand Scanner Policy. Although Complainant correctly characterizes HCC's decision to discharge him pursuant to the Policy as the most severe action possible, discharge for repeated failure to scan in and out is clearly stated in the Policy, and the Court will not impart judgment on the "fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Sec'y of Labor on behalf of Beckman v. Mettiki Coal (WV), LLC*, 33 FMSHRC 258, 274 (Jan. 2010) (ALJ) (citing *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990)). Here, the Policy does not directly or indirectly implicate miners' abilities to exercise their rights under the Act, and the act of scanning in or out does not impose any burdens on miners that might obstruct or deter them from making complaints. The Policy clearly notes that a miner will be suspended with the intent to discharge upon reaching Step 4 of the Policy. A miner can only reach Step 4 by failing to consistently scan in or out, and HCC discharged Scoles for this reason.

I therefore find that HCC's interest in ensuring that miners consistently use the hand scanners to track time outweighs the harm that Scoles' discharge caused to the exercise of protected rights at Harrison County Mine. Inconsistent or lenient enforcement of the Policy compromises its purpose of ensuring consistent, mine-wide use of the Hand Scanner system. Scoles continuously violated the Policy and was disciplined accordingly to deter him from doing so in the future.

I find that Scoles' discharge pursuant to the Hand Scanner Policy did not unlawfully interfere with miners' exercise of protected rights pursuant to section 105(c) of the Mine Act.

#### **IV. ORDER**

Accordingly, the complaint brought by George Scoles is **DENIED** and this proceeding is **DISMISSED**.

/s/ David P. Simonton  
David P. Simonton  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 19, 2019

GEORGE SCOLES,

Complainant,

v.

HARRISON COUNTY COAL CO.,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2017-0638-D

Mine: Harrison County Mine  
Mine ID: 46-01318

## CORRECTED DECISION

This case is before me upon a discrimination proceeding filed by George Scoles, through counsel, against the Harrison County Coal Company (“HCC” or “Respondent”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).<sup>1</sup> Scoles contends that Harrison County violated the Mine Act when it discharged him for engaging in protected activity. Scoles also argues that his discharge interfered with the ability of himself and other HCC miners to exercise their protected rights. HCC denies these claims and maintains that Scoles’ discharge was solely motivated by his repeated failure to properly clock in and out in compliance with the mine’s Hand Scanner Policy.

A hearing was held on October 16-17, 2018 in Morgantown, West Virginia. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the parties’ post-hearing briefs, I find that HCC did not violate the Mine Act when it discharged Scoles.

### I. STIPULATIONS

At hearing, the parties entered the following stipulations:

1. During Scoles’ employment at Harrison County Mine, he was a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).
2. The Harrison County Mine is a mine as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

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<sup>1</sup> In this decision, the joint stipulations, transcript, the Complainant’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. C-#,” and “Ex. R-#,” respectively.

3. The Harrison County Coal Company is an operator as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
4. Products of the Harrison County Mine entered commerce, or the operator or products of the Harrison County Mine affected commerce within the meaning and the scope of section 4 of the Mine Act, 30 U.S.C. § 803.
5. From January 1, 2016, through the present, the United Mine Workers of America Local Union 1501 and the UMWA International Union have represented the hourly production and maintenance employees at the Harrison County Mine. Tr. 14-15.

## **II. FINDINGS OF FACT**

### **A. Background**

The Harrison County Mine is an underground coal mine located in Mannington, West Virginia. Harrison County Coal Company (HCC) - a subsidiary of Murray American Energy Inc. - owns and operates the Mine. The Mine employs approximately 315 hourly employees and has an approximate annual payroll of 25 million dollars. Tr. 335.

George Scoles worked at the Harrison County Mine from January 2007 until May 2017 as a Longwall Outby Utility Man. Tr. 28. He supplied the longwall face and performed a variety of tasks to facilitate advancement of the longwall at the mine. Tr. 28. He also served as a miner's representative and as a walkaround with MSHA inspectors up to two to three times a week until his discharge. Tr. 85. Scoles is a member of the United Mine Workers of America ("UMWA") Local Union 1501 at the Harrison County Mine. Tr. 86.

Scoles has a mine-wide reputation as a safety advocate. Tr. 235-36, 256-58, 275, 277-78, 303-05. Aside from his walkaround duties, Scoles made numerous safety complaints to mine management. HCC was not always receptive to these complaints. Miner Christopher Yanero<sup>2</sup> described episodes where Scoles reported safety issues and management did not cooperate or assigned him to perform less desirable tasks while other miners were told to watch. Tr. 256-58. Miner David Hollis<sup>3</sup> testified that he often heard Scoles make safety complaints or recommendations over the radio that went unacknowledged by management. Tr. 305. Hollis noted that management responded when he personally acknowledged Scoles' comments over the radio. Tr. 308.

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<sup>2</sup> Christopher Yanero is a Plant Prep Helper at HCC. Tr. 249. He has worked at Harrison County Mine for 48 years. Tr. 250. He formerly served as mine committeeman and President of the Local Union for multiple terms. Tr. 259-60.

<sup>3</sup> David Hollis is the day shift dispatcher for HCC. Tr. 292-93. He has worked at the Harrison County Mine for 18 years. Tr. 292. His duties include monitoring all atmospheric elements at the mine and dispatching miners to different areas of the mine via radio. Tr. 292-93. He estimated that he hears about 80-85% of the radio communications that take place at the mine. Tr. 293.

These types of incidents, among others, prompted Scoles to file five section 105(c) complaints against HCC from 2014 to 2017. Scoles settled two of these complaints with the Mine. MSHA issued negative findings on another two and Scoles opted not to pursue them further. One of Scoles' 2015 complaints proceeded to hearing before Commission Administrative Law Judge Andrews. *See Sec'y on behalf of Scoles v. Harrison County Coal Co.*, 40 FMSHRC 1393 (Sept. 2018) (ALJ). In that case, Judge Andrews found that HCC violated the Act when it discharged Scoles for subordination following an altercation with his supervisor. *Id.* at 1420-21. Scoles was reinstated and awarded backpay. *Id.* at 1421-23.

In May of 2017, Scoles ran for safety and mine committeeman positions within the local Union. Tr. 87. The safety committeeman is charged with serving as a walkaround or assigning other miners to do so, performing safety inspections, and discussing miners' safety concerns with management. Tr. 88. The mine committeeman is authorized to represent miners in grievance proceedings and address any collective bargaining issues or mine-management conflicts that may arise. Tr. 88. Scoles easily won both races, but he was discharged pursuant to HCC's Hand Scanner Policy before he could assume office. Tr. 87-88.

## **B. The Hand Scanner Policy**

HCC implemented the Hand Scanner Policy ("Policy") in January of 2016. The Policy serves as the primary time and payroll tracking mechanism for all hourly employees. Tr. 336-37. The Policy requires the mine's hourly employees to track their work hours by entering their employee number and scanning their fingerprint at designated kiosks at the beginning and end of each shift. Ex. C-1; Tr. 337-38. Miners can use either hand to scan, and the process takes about five seconds. Tr. 337-38. If the scan is rejected or if a miner has issues with a kiosk, they are instructed to notify management of the issue. Ex. C-1. In general, miners that experience scanning issues are instructed to return to the kiosk and try again or to try a different kiosk. Tr. 240, 272. Even miners experiencing issues are usually able to scan in after a number of attempts. Tr. 240, 272. Scanner issues appear to be infrequent and individualized. There is no record of a large-scale scanner malfunction affecting entire shifts or crews. Tr. 247, 400-01.

The Hand Scanner Policy outlines a four-step progressive discipline scheme to encourage miners to consistently scan in and out. Ex. C-1. Each time a miner fails to scan in or out, they are disciplined in accordance with the number of scans they previously missed. A miner will receive a verbal warning for their first missed scan, a written warning for their second, a two day suspension for their third, and a suspension with intent to discharge for their fourth. *Id.* The Policy allows miners to exonerate themselves; a miner moves back one step on the scale if they scan in and out without failure for 180 days. *Id.* Thus, a miner at Step 3 of the discipline program will move back to Step 2 if they scan in and out for 180 consecutive days, back to Step 1 after another 180 consecutive days, and so on. The Policy does not outline any factors aside from failures to scan that may result in discipline under the scheme. Ex. C-1.

Christopher Fazio<sup>4</sup> administers the Policy's progressive discipline program at Harrison County Mine. Tr. 334-35. He maintains a spreadsheet to track progressive discipline records for all of the miners. Ex. R-E; Tr. 340. When a miner misses a scan, he is notified by payroll via the timesheets and will check his spreadsheet to administer the proper discipline.<sup>5</sup> Tr. 340. The payroll records are sufficient to sustain a violation, and miners rarely dispute the missed scans. Tr. 415. When they do, Fazio pulls video footage collected by motion-activated cameras located near all of the kiosks to prove the missed scan. Tr. 345-47. The cameras record and store up to ten days' worth of activity. Tr. 345-46. If the miner does not dispute the scan, Fazio does not save the video footage. Tr. 347.

Fazio administers the first two steps of the Policy himself. He will hold a private meeting with miners to inform them of the missed scan and at Step 2 will issue the appropriate paperwork to the miner. Tr. 342. If a miner reaches Step 3, Harrison County Mine General Manager Scott Martin will also be present at the meeting. Tr. 342. Miners may file a grievance to dispute alleged missed scans under the policy; this is often where the video evidence will be shown to the miners. Tr. 193-94, 346. At Step 2, a local mine committee member and local management attend to try to resolve the dispute. Tr. 209. At Step 3, a district union representative will meet with a member of corporate management or Human Resources as well as the mine superintendent. Tr. 211.

### **C. Scoles' Discipline under the Policy**

Scoles was disciplined and eventually discharged following five alleged violations of HCC's Hand Scanner Policy between May 2016 and May 2017<sup>6</sup>. Scoles maintained at hearing that he never failed to scan in or out. Tr. 31, 60, 63, 66, 92, 94-95, 109, 116.

Scoles was issued a verbal warning on May 31, 2016 for a missed scan on May 19.<sup>7</sup> Ex. R-B, p. 2. Scoles' time sheet and time card for that date corroborate that Scoles failed to scan out. Ex. R-B, pp. 3-4.

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<sup>4</sup> Christopher Fazio is the Human Resources Supervisor at the Harrison County Mine. Tr. 333-34. He has worked for HCC since June 2010. Tr. 333. His duties include conducting hiring and staffing procedures, managing collective bargaining, compensation and benefits, disability, and discipline. Tr. 333-34.

<sup>5</sup> Fazio only administers the disciplinary aspect of the Policy. He does not edit the payroll sheets. When a miner misses a scan, front line foremen and supervisors are responsible for adjusting miners' work hours to properly reflect the time they work. Those edits are done by hand, and according to Fazio, nobody can edit the timesheets through the computer system. Tr. 407-08.

<sup>6</sup> The dates have been corrected from "between May 2016 and May 2016" to "between May 2016 and May 2017".

<sup>7</sup> The verbal warning record states that the HCC was unable to issue the verbal warning sooner because the mine was idle from May 20 to May 30. Ex. R-B, p. 2.

Scoles denied missing the scan, though later claimed that he was unable to scan out due to a scanner malfunction. Tr. 31-32. Miner Perry Heflin<sup>8</sup> testified that Scoles discussed the issue with him and that Scoles notified shift foreman Jim Coles of the matter. Tr. 238. Coles allegedly told Scoles and Heflin that he would take care of it. Tr. 32, 239. Scoles alleges that Fazio later spoke to him about the missed scan and told him that he would not be disciplined. Tr. 32-33, 349. Scoles therefore believed that he was not given a verbal warning for this missed scan.<sup>9</sup> Even though he believed he would not be disciplined, Scoles claimed that he asked to see video of the missed scan but was refused. Tr. 32-33.

Fazio denied Scoles' account and did not recall speaking with Coles about an alleged scanner malfunction. Tr. 349. He testified that he issued Scoles a verbal warning in accordance with Step 1 of the Policy and did not save the video footage because Scoles admitted to missing the scan. Tr. 348, 350-51. The record of the verbal warning states that "employee admitted that he did not scan out." Ex. R-B, p. 2; Tr. 354.

Scoles received a written warning for his second alleged missed scan on June 9, 2016. Ex. R-B, p. 5. Scoles' time sheet and time card show a missed out-punch on that date. Ex. R-B, p. 6-7. Fazio issued the warning to Scoles and to the Mine Committee the following day. Tr. 355-56. Scoles again denied missing the scan and did not sign the written warning. Tr. 47, 53, 113, 417. He claimed that HCC denied his request to see video of the missed scan. Tr. 54. Fazio disputed his account and claimed that Scoles once again admitted to missing the scan and accepted his discipline. Tr. 417. He did not think much of Scoles' refusal to sign the written warning because miners often decline to sign management documents. Tr. 417.

Scoles was suspended for two days for an alleged missed scan on July 6, 2016. Ex. R-B, p. 8. His time sheet and time card corroborate the missed scan. Ex. R-B, pp. 9-10. Scoles denied missing the scan. Tr. 61, 359, 413. He again requested video evidence of the scan but was denied. Tr. 61. However, it is undisputed that Scoles' representative at his grievance hearing did see video footage of this missed scan. Tr. 198-99.

On September 16, 2016, Scoles filed a grievance disputing the first two missed scans. Scoles was at Step 3 at the time he filed the grievance. The parties met on January 6, 2017. UMWA International Region 1 Representative Michael Phillippi<sup>10</sup> appeared at the grievance meeting on behalf of Scoles. Phillippi testified that he asked to see video of the alleged missed scans, but that HCC management claimed not to have them.

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<sup>8</sup> Perry Heflin is an electrical mechanic at Harrison County Mine. Tr. 230. He has worked for HCC for 12 years. Tr. 230.

<sup>9</sup> Miners do not receive a written record for a verbal warning, but management does produce a form for its own records. Tr. 354.

<sup>10</sup> Michael Phillippi is an International Representative for Region 1 of the United Mine Workers Association. Tr. 187. He is involved in organizing and safety matters, but most of his work centers around grievance and arbitration, labor charges, and various policy matters. Tr. 187-88.

For the first time in Phillippi's experience handling grievances, HCC declined to reverse its decision to discipline a miner under the policy. Tr. 193-95. He noted that management would usually reverse its decision when it did not have video evidence of the missed scan. Tr. 195. Fazio testified that he did not have video footage because Scoles admitted to missing the scans and emphasized that video proof is not required to substantiate a missed scan. Tr. 346, 357. HCC declined to reverse the decision and noted on the grievance agreement that as of September 16, 2016, Scoles was at Step 2 of the disciplinary scheme. Ex. C-6.

Scoles also grieved his discipline for the July 6 scan. At the meeting, Fazio showed Phillippi video of Scoles entering and exiting the Foreman's room without scanning. Tr. 198-99, 218, 359-60, 413. Phillippi subsequently withdrew Scoles' grievance. Tr. 199. However, he testified that he later considered his decision to withdraw Scoles' grievance to be a mistake. Tr. 198-99. Although HCC showed him the video, he believed that there were other cameras that may have captured Scoles' out-punch at a different kiosk. Tr. 199. Phillippi testified that based on his knowledge today he would not have withdrawn Scoles' grievance. Tr. 199-200. Fazio testified that he showed Phillippi video from cameras located at each scanner. Tr. 360.

Scoles received a second two-day suspension on February 9, 2017 for missing a scan the previous day. Ex. R-B, p. 11. Scoles' time sheet and time card show a missed out-punch for the date in question. Ex. R-B, pp. 12-13. Scoles was uncertain whether he missed this scan but again asked to see the video footage. Tr. 64-65, 364-65, 413-14. He was allegedly refused, although he admitted that he testified to the contrary during his arbitration hearing. Tr. 119-120. Scoles filed another grievance that was subsequently withdrawn upon viewing the video footage. Tr. 365-66.

Scoles was suspended with intent to discharge on May 10, 2017 for an alleged missed scan on May 8. Ex. R-B, p. 14. Scoles' time sheet and time card show a missed in-punch. Ex. R-B, pp. 15-16. His time card also shows a handwritten time adjustment. *Id.* Scoles testified that he did not miss the scan, but later acknowledged that he was uncertain about whether he missed it. Tr. 66-67, 126. Scoles viewed the video footage of the missed scan at his "24-48 hour meeting."<sup>11</sup> Tr. 68-69, 366. However, Scoles claimed that the video froze—or "glitched"—before it showed him entering the elevator. Tr. 69.

Scoles filed a grievance regarding his discharge and the matter was referred to arbitration. Exs. C-10, R-C. At the arbitration Scoles admitted that he missed all five of the scans and instead argued that discharge was a disproportionately severe punishment in relation to the conduct cited. Ex. R-D. On June 17, 2017, the Arbitrator did not find evidence of arbitrary or discriminatory enforcement of the Policy and upheld Scoles' discharge. *Id.* Notably, the arbitrator found no material issues of fact; Scoles admitted at the arbitration hearing that he missed all five scans for which he was disciplined. *Id.*

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<sup>11</sup> Pursuant to the terms of the collective bargaining agreement with the Union, miners are entitled to a "24/48 hour meeting" with mine management to discuss their imminent discharge. Tr. 367-68.

On June 26, 2017, Scoles filed a section 105(c) complaint with MSHA alleging discrimination. Ex. C-17. MSHA issued a letter of negative finding on August 17, and Scoles filed his section 105(c)(3) complaint on September 25. Exs. R-L, R-M.

### III. DISPOSITION

Scoles alleges that HCC arbitrarily and discriminatorily enforced its Hand Scanner Policy against him to justify his discharge. Complainant's Post-Hearing Brief ("Comp. Br.") at 20. Scoles argues that, given his longstanding history of engaging in protected activity and of conflict with HCC management, he was subjected to strict discipline under the Policy where other miners were often granted leniency. *Id.* In addition, Scoles also contends that his discharge under the Policy constitutes illegal interference with the ability of himself and of miners to engage in protected activity at the Harrison County Mine. *Id.* at 36.

At the outset, HCC contends that Scoles' section 105(c)(3) complaint was not timely filed and should be dismissed. Respondent's Post-Hearing Brief ("Resp. Br.") at 14, n. 10. Respondent also challenges whether this Court was Constitutionally appointed under the Appointments Clause and thus has the authority to hear this case. *Id.* at 21. With regards to the merits of the case, Respondent denies all charges of discrimination and interference. *Id.* at 14, 19. It contends that Scoles was fired solely based on his repeated failure to comply with HCC's Hand Scanner Policy. *Id.*

#### A. Timeliness of Scoles' § 105(c)(3) Complaint

HCC contends that Scoles' complaint should be dismissed as untimely because he failed to file his complaint within 30 days of receiving MSHA's non-merit letter. Resp. Br. at 14, n. 10. Scoles contends that he timely filed his complaint, and that even if he did not, the alleged nine day delay was excusable and was not sufficiently egregious or prejudicial to merit dismissal. Complainant's Reply to Respondent's Post-Hearing Brief ("Comp. Rep.") at 18-19.

The Secretary is required to inform any miner that files a complaint of discrimination pursuant to section 105(c)(2) that he will or will not pursue that complaint before the Commission on the miner's behalf. 30 U.S.C. § 815(c)(3). If the Secretary declines, a complainant has the right to file an action on their own behalf with the Commission "within 30 days' notice of the Secretary's determination." *Id.* That 30-day window commences when the miner receives actual notice of the Secretary's determination. *Boswell v. Nat'l Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992).

The Commission has held that the filing periods for section 105(c) discrimination complaints are not jurisdictional in nature. *Boswell*, 14 FMSHRC at 257 (citing *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984)). Judges determine whether a delay in filing should be excused on a case-by-case basis. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). The Commission has excused delays based on justifiable circumstances, including but not limited to "ignorance, mistake, inadvertence, and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1921-22 (Nov. 1996) (citations omitted). Failure to meet the time limits in sections 105(c)(2) and (3) should not result in

dismissal absent a showing of “material legal prejudice.” *Sec’y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994); *see also Sec’y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) (finding prejudice to the operator to be the primary consideration in cases involving late filing).

I find that dismissal of this case for untimely filing is inappropriate. The record is unclear as to when Scoles received actual notice of the Secretary’s non-merit finding, but it likely did not amount to the entire 9-day period, if untimely at all. MSHA sent the letter to Scoles on August 17, 2017 and Scoles filed his complaint on September 25, nine days past the prescribed 30-day limit. Exs. R–L, R–M; Tr. 143, 145-48. Scoles’ complaint acknowledges that he received the notice “on or around” that date, but he could not recall exactly when he received the letter. Tr. 143, 148. It is unlikely that Scoles received the letter on the same day that it was dated and sent. Scoles did not check his mail on a regular daily or weekly basis because he was often traveling for work and because his mailbox was located over a thousand yards from his house. Tr. 145, 161. Given these circumstances, I find it plausible that Scoles did not actually receive the Secretary’s letter for up to or over nine days after it was sent, and that any delay was inadvertent or excusable.

Even assuming that Scoles’ filing was untimely, the delay was *de minimis* and did not prejudice Respondent’s ability to present its case. The 30-day filing window is not jurisdictional and does not merit dismissal absent a showing of prejudice. *Boswell*, 14 FMSHRC at 257 (accepting filing that was 12 days late where operator showed no evidence of prejudice); *Hale*, 8 FMSHRC at 908 (accepting filing that was 2 years late where operator showed no evidence of prejudice). Respondent offered no evidence that it was prejudiced by the delay. Accordingly, I reject HCC’s contention.

## **B. Constitutional Appointments Clause Argument**

HCC also argues that the Federal Mine Safety and Health Review Commission’s ALJ appointment process is invalid pursuant to the Appointments Clause of the United States Constitution because the Commission improperly delegated its appointment authority to the Chief Administrative Law Judge. Resp. Br. at 21. Further, Respondent contends that the Commission’s April 3, 2018 Notice ratifying the appointment of its ALJs does not remedy the defect because the process by which the ALJs were presented to the Commission was too limited to constitute valid exercise of its appointment power. *Id.* at 22.

To the extent that I have the authority to do so, I reject Respondent’s arguments. The relevant case on this matter is the Court of Appeals for the 6th Circuit’s decision in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), which applied the Supreme Court’s decision in *Lucia v. Sec. & Ex. Comm.*, 138 S. Ct. 2044 (2018), to the Administrative Law Judges of the Federal Mine Safety and Health Review Commission. In *Jones Brothers*, the Court held that Commission ALJs were invalidly appointed inferior officers at the time that the ALJ heard the case. *Jones Bros.*, at 679. The Court acknowledged the Commission’s ratification notice, but found that the notice did not remedy the Constitutional defect because it was issued after the Judge heard the case on the merits. *Id.* at 677-79. The 6th Circuit vacated the decision and remanded the case to the Commission for fresh proceedings before a different ALJ. *Id.* at 679.



Unlike the circumstances in *Jones Brothers*, the instant case was heard on October 16-17, 2018; over six months after the Commission Chairman ratified the appointments of all of its Administrative Law Judges. Federal Mine Safety and Health Review Commission, *Commission Ratification Notice*, <http://www.fmshrc.gov/about/news/commission-ratification-notice> (Apr. 3, 2018). The case at issue is therefore before a validly appointed ALJ. Nor do I find merit in HCC's argument that the Ratification Notice did not cure the invalid appointment of the Commission Judges. Respondent's argument finds no support in the 6th Circuit's decision in *Jones Brothers*, the Supreme Court's decision in *Lucia*, nor the language of the Appointments Clause. In fact, the Court's decision in *Jones Brothers* suggests that the Commission validly "acted to cure [the] alleged constitutional defect by having every Commissioner ratify the appointment of every administrative law judge." *Jones Bros.*, at 677, 679. The Court also remanded the case for fresh proceedings before another ALJ, implying that the Ratification cured the defect. *Id.* at 679. I therefore accept the Commission's ratification as valid and proceed to the merits.

### C. Discrimination

Section 105(c)(1) of the Mine Act provides:

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

30 U.S.C. § 815(c)(1). The complainant miner bears the initial burden to establish a *prima facie* case of discrimination. To establish a *prima facie* case of discrimination under section 105(c)(1), the complainant must prove by a preponderance of the evidence: (1) that he engaged in protected activity, and (2) that the adverse action he complains of was at least partially motivated by that activity. *Turner v. Nat'l cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981).

If a miner establishes a *prima facie* case, the operator may rebut that case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. The operator may also defend affirmatively by proving that "it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

#### 1. Prima Facie Case

The Mine Act's discrimination provisions provide miners with protections against adverse action for certain protected activities to encourage and enable miners to play an active role in the

enforcement of the Act. A miner engages in protected activity if (1) they “ha[ve] filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation[;]” (2) they “[are] the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]” (3) they “ha[ve] 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) they “ha[ve] exercised on behalf of himself or others...any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1).

It is undisputed that Scoles engaged in multiple forms of protected activity when he worked for HCC. First, Scoles made numerous safety complaints to mine management when he believed working conditions were unsafe. Tr. 235, 256-57, 275, 277-78, 303-05. Miner witnesses recalled specific instances where Scoles made complaints to management including but not limited to overheated beltline rollers, inadequate rock dust, excessive float dust, unset parking brakes, and malfunctioning scoops and door latches. Tr. 236, 256, 304. Second, Scoles served as a miner representative and walkaround during safety inspections two to three times each week in the eight months prior to his termination. Tr. 235, 256, 303-04. Third, Scoles filed five section 105(c) complaints against HCC for alleged retaliation for his safety advocacy. One of those complaints proceeded before the Commission and was adjudicated in his favor. *See Sec’y of Labor on behalf of Scoles v. Harrison County Coal Co.*, 40 FMSHRC 1393 (Sept. 2018) (ALJ). Finally, Scoles was running for two Local Union offices that assign walkarounds and raise miners’ safety concerns prior to his discharge. Tr. 87, 237, 260-61, 278, 306. I find that Scoles engaged in protected activity as defined by section 105(c)(1).

The Commission has defined “adverse action” as “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec’y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer’s action qualifies as “adverse” is thus decided on a case by case basis. *Sec’y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1848 n. 2 (Aug. 1984).

There is no dispute that Scoles suffered an adverse action when HCC suspended him with the intent to discharge him on May 10, 2017 and discharged him on June 17, 2017, following his arbitration decision. Exs. R–D, R–F; Tr. 371-72. “Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act.” *Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998) (citing section 105(c)(1) of the Mine Act); *Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)). The crux of this case thus falls to whether Scoles can demonstrate a causal nexus between his protected activity and HCC’s decision to terminate his employment.

A miner need not provide direct evidence of an operator’s discriminatory motive, but may provide “circumstantial evidence...and reasonable inferences drawn therefrom. *Turner*, 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). Factors that may support such an inference include the operator’s knowledge of the protected activity, evidence of hostility or animus toward the complainant, the temporal relationship between the complainant’s protected activity and the operator’s alleged adverse action, and the disparate treatment of the complaining miner. *Sec’y of Labor on behalf of Chacon v. Phelps*

*Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I address each factor in turn.

**a. Knowledge of Protected Activity**

HCC does not dispute that it was aware that Scoles engaged in protected activity. That Scoles had a mine-wide reputation as a safety advocate and served as a walkaround appeared to be common knowledge among miners and management alike. Multiple miners testified to specific complaints that Scoles made directly to members of management as well as complaints that Scoles made over the mine radio communication system. HCC management was also personally involved with Scoles' past section 105(c) complaints. HCC settled two section 105(c) cases with Scoles and went to hearing before a Commission Judge on a third case.

I find that HCC had knowledge of Scoles' protected activity.

**b. Animus or Hostility Toward the Protected Activity**

Scoles argues that HCC repeatedly demonstrated hostility and animus toward his protected activity. Comp. Br. at 30. He contends that ALJ Andrews previously found that HCC was hostile toward Scoles in a prior section 105(c) case and that mine management ignored Scoles' safety complaints made over the dispatch. *Id.* at 31. More recently, Scoles contends that HCC demonstrated animus or hostility when HCC allegedly refused or delayed production of video evidence of his missed scans. *Id.* at 31-32. Finally, Scoles contends that HCC's introduction at hearing of Scoles' disciplinary documents under the mine's previous ownership constituted animus because they serve no basis for his discipline under the current Hand Scanner policy. Comp. Br. at 33.

Respondent argues that Scoles relies on protected activity and hostility that occurred long before his discharge and do not relate to his termination under the Hand Scanner Policy. Resp. Br. at 15. It also claims that Scoles or his representative viewed video footage of three scans and that Fazio was unable to show Scoles video evidence of the first two missed scans because Scoles admitted to missing them, prompting Fazio to delete the tapes. Fazio testified that miners were commonly unable to view the video promptly following notification of a violation of the Policy, and often were not shown the video until the grievance hearing. Tr. 413-15.

Given the history between Scoles and HCC there was ample opportunity for hostility or animus against Scoles' protected activity. The Court sees no reason to discredit Scoles' past interactions with HCC management that could and have been characterized as hostility in previous section 105(c) cases. These instances, however, were not shown at hearing to be connected to or to have played a role in Fazio and Martin's administration of the Hand Scanner Policy against Scoles.

I do not find merit in Scoles' assertion that HCC acted in a hostile manner when Fazio allegedly refused or intentionally delayed the production of video evidence of Scoles' alleged missed scans. At the outset, contrary to Scoles' testimony, Scoles or a representative on his

behalf were able to see video footage of three of his five missed scans. Tr. 359-60, 364, 374, 412, 416-17. He was thus not categorically denied the ability to see video footage of his missed scans.

Although it is undisputed that Scoles was unable to view video footage of his first two missed scans, the parties disagree as to whether Scoles actually requested to see video evidence or whether he admitted to missing the scans, prompting Fazio to delete the videos. This conflict is more relevant to Scoles' allegation of disparate treatment under the Policy, and I will resolve the conflicts in detail in that analysis. Regardless of the testimonial dispute, the Policy does not require video footage of a missed scan to sustain a violation, nor does it require that management immediately show miners video footage of alleged missed scans. Ex. C-1. I accept Fazio's testimony that the payroll records were sufficient to establish a violation of the Policy. Tr. 346-47. Furthermore, even assuming that HCC refused to show Scoles video evidence of the first two scans upon his request, I find no evidence that the refusal was motivated by Scoles' protected activity rather than what appears to be confusion over whether Scoles admitted to the scans. Scoles cannot point to any comments or actions on the part of HCC that indicate hostility or animus based upon his prior complaints, his role as a walkaround, or the upcoming election. Scoles' violations occurred over the course of nearly an entire year. Over that period, none of HCC's comments or actions fail to align with the written policy or suggests abuse of the disciplinary scheme. Ex. C-1.

I likewise reject Scoles' contention that HCC demonstrated hostility when it unnecessarily delayed showing him or his miner representative the video footage of his other scans. Based on the record such a delay is not out of the ordinary in the context of enforcement of the Policy. Fazio testified that he generally waited until the grievance to show either the miner or his union representative video footage because miners so rarely disputed missed scans. Tr. 347,417, 423. He noted that these meetings could convene quite some time after the alleged missed scan occurred. Tr. 414. Indeed, Scoles' filed his grievance challenging his first two missed scans nearly three months after he was disciplined for them, and the hearing was held between seven and eight months after that discipline. Ex. C-6. Thus, the mine's failure to immediately show Scoles video footage in itself is not inconsistent with the general enforcement of the Policy or demonstrative of hostility toward the Complainant.

Finally, I reject Scoles' contention that HCC's introduction of Exhibit R-U, Scoles' disciplinary history for violating an attendance policy when the Harrison County Mine was under previous ownership, constituted animus. Scoles points to *Sec'y of Labor on behalf of Harrison v. Consolidation Coal. Co.*, 37 FMSHRC 1497, 1511 (July 2015) (ALJ), to argue that "introducing documents concerning the discipline of a miner when those documents should not rightfully have played any role in the disciplinary decision in question, is clear evidence of management hostility toward the miner and his exercise of Mine Act rights." Comp. Br. at 33.

The above noted temporary reinstatement decision is easily distinguishable from the instant case. In *Harrison*, the ALJ found evidence of animus where Respondent introduced at arbitration an old safety slip as evidence of past disciplinary issues despite the terms of a previous settlement ordering Respondent to remove the slip from the miner's file. *Harrison*, 37 FMSHRC at 1511. Here, there was no such express violation of a previous agreement between the two parties. Furthermore, HCC did not enter the exhibit as support for its decision to discharge

Scoles but to raise credibility questions as to his testimony that he had never failed to scan in or out. Tr. 106-110. Introduction of Exhibit R–U was thus relevant to the instant case and did not constitute animus.

Accordingly, Scoles has not demonstrated that HCC’s administration of the Policy constituted animus or hostility or that the alleged animus was in response to his protected activity at the mine.

### **c. Temporal Relationship between Protected Activity and Adverse Action**

Scoles argues that his discharge occurred close in time to his protected activity. Comp. Br. at 34. He contends that he commonly took part in protected activity and was terminated on the day of the Local Union elections, in which he was running for two positions. Respondent contends that the timing supports its defense because Scoles was terminated immediately after HCC became aware that Scoles reached Step 4 of the Hand Scanner Policy’s disciplinary scale.<sup>12</sup> Resp. Br. at 15.

As discussed above, Scoles consistently engaged in protected activity up until his discharge. For the purposes of this decision, I find that a coincidence in time between the protected activity and the adverse action exists.

### **d. Disparate Treatment**

Scoles contends that he was the subject of disparate treatment under the Hand Scanner Policy because he was strictly disciplined for each alleged missed scan whereas other miners were granted leniency in similar situations. Comp. Br. at 24. Scoles also argues that he was singled out and disciplined for his first missed scan even though he informed his supervisor that the scanner malfunctioned. *Id.* at 28-29.

Respondent maintains that it disciplined all miners, including Scoles, strictly in accord with the Hand Scanner Policy. Resp. Br. at 17. It contends that neither Scoles nor his comparator witnesses could support their claims of disparate treatment under the Policy when scrutinized against HCC’s time, payroll, and enforcement records. *Id.* at 15.

As an initial matter, I find that Scoles did in fact fail to scan in or out on the five occasions for which he was disciplined. Although Scoles claimed that he did not miss *any* scans, his testimony was inconsistent at the hearing and contradicted his testimony at previous hearings. In his testimony before this Court, Scoles’ varied from outright denial that he missed any scans, to uncertainty regarding a couple of scans, to an eventual acknowledgment that he missed one scan because the kiosk malfunctioned. Tr. 31-32, 60, 63, 66, 92, 94-95, 109, 116. His assertion also contradicted his arbitration and unemployment compensation testimony, in which he admitted to missing all five scans. Exs. R–D, R–F, R–J; Tr. 94, 134-39, 140-41.

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<sup>12</sup> Respondent’s argument is fully addressed below in my analysis of its affirmative defense.

Scoles' account was similarly inconsistent regarding the video footage of his missed scans. He initially testified that he was only shown video for his final missed scan during his 24/48 hour meeting. Tr. 68-69. Although he testified that he could not remember seeing any video footage, he later admitted that either he or his representative was shown video evidence for three of the missed scans. Tr. 69, 119-20, 198-99, 366, 414. When crossed on these inconsistencies, Scoles was unable to produce a satisfactory explanation, and I therefore have grave doubts regarding Scoles' recollection of the facts surrounding the missed scans. *See* Tr. 134-144.

Meanwhile, Fazio provided a credible and consistent account of Scoles' disciplinary history that was supported by documentary evidence. HCC's time and payroll records and Fazio's disciplinary spreadsheet show that Scoles missed scans on each date alleged. *See generally* Exs. C-19, R-B; Tr. 351-53, 356-57, 358-60, 363-64, 365-67. The record also contains the verbal warning record, the written warning,<sup>13</sup> both 2-day suspension notices, and the suspension with intent to discharge notice, all of which support Fazio's account. Exs. C-18, R-B, p. 3. Furthermore, each of Scoles' grievances regarding missed scans were subsequently withdrawn or disposed of in the mine's favor. Tr. 198-99, 365, 374-75. The evidence supports that Scoles missed all five scans for which he was disciplined.

Having held that Scoles missed all five scans, I turn to his contention that he was subjected to harsher enforcement under the Policy compared to other miners. Scoles does not have a like-to-like comparator because no other HCC miners reached Step 4 of the disciplinary program. Rather, Scoles points to various instances in which miners avoided disciplinary action despite failing to scan in or out, whereas he was disciplined in strict accordance with the Policy on every occasion.

I find that Scoles was not treated differently than any other miner under the Policy. First, the comparators' accounts of disparate treatment consistently failed to match the dates in HCC's time and payroll records. Although every comparator expressed absolute certainty regarding the dates of unpunished missed scans HCC offered time and pay records that systematically refuted each miner's account. *See* Exs. R-AA, R-BB, R-CC, R-DD, R-EE, R-FF. Christopher Yanero testified that he missed a scan on February 13, 2018, but was not disciplined. Tr. 253. He also stated that miners Mark Heldreth and Jason Williams missed scans around the same time but that neither were disciplined. Tr. 254. Respondent provided time and pay records demonstrating that Yanero did in fact scan out on and around February 13 and that Heldreth and Williams scanned out on the days Yanero alleged they did not. Exs. R-V, R-BB, R-CC.

Fay Ezelle claimed that he missed scans on February 27 and August 26 of 2018 and was not disciplined. Tr. 277. He also testified that he was only disciplined once under the Policy but then acknowledged that he had received a verbal warning, written warning, and 2-day suspension for

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<sup>13</sup> Although Scoles did not sign the written warning, I find that it was nonetheless properly issued. Scoles testified at hearing that he did not sign it because a miner representative was not present. Tr. 53. I accept Fazio's testimony that he did not press the matter because it was commonplace for miners to refuse to sign records. This disregard for mine documents is supported by Ezelle's testimony that he threw his Step 2 written warning into the garbage upon receipt. Tr. 286.

missed scans. Tr. 276, 281. When asked about his Step 2 violation, he testified that he threw his written warning into the trash upon receipt. Tr. 286. Respondent again provided time sheets showing that Ezelle indeed reached Step 3 of the Policy and properly scanned in and out both on and around February 27 and on August 28. *See* Exs. C-19, R-V, R-W, R-X, R-Y; Ex. R-DD. David Hollis testified that co-worker Sam Marra missed two scans that were excused by management. Tr. 298-99. Respondent's records again show that Marra was not working in the same part of the mine as Hollis during his alleged first missed scan and that Marra had accurately scanned on and around the date of the second alleged missed scan. Ex. R-EE. Not one of the comparators' accounts of missed scans could be substantiated by the business or payroll records or in any way corroborated.

Scoles nonetheless asserts that "the fact that miners could not remember exact dates or confused times does not detract from the fact that they testified forthrightly regarding their recollections." Comp. Rep. at 7. The Court acknowledges the miners' earnest testimony but cannot credit any of it for the purposes of establishing disparate treatment in light of HCC's business records clearly showing otherwise. Complainant has not provided any evidence that casts doubt on the veracity of those records or that suggests that the testimony of his comparator miners is entitled to more weight.<sup>14</sup>

Business records aside, the comparators also demonstrated misconceptions as to how the scanners worked and how HCC administered the Policy that casts further doubt on the accuracy of their testimony. Yanero testified that he believed that he was not disciplined when scanner errors occurred because the records showed attempted or failed scans. Tr. 252. Hollis testified that he believed that scans could be excused if a supervisor filled out an exculpatory form letter. Tr. 300-302. Both of these claims appear to be inaccurate. Fazio testified that neither he nor any foremen have access or authority to excuse or alter missed scans. Tr. 372-73, 380, 407-08. Indeed, foremen handwrite the adjusted time onto the time sheet when a miner fails to scan in or out rather than entering them into the electronic system. Tr. 407-08.

I cannot conclude that other miners were disciplined less stringently than Scoles under the Policy. The comparator's accounts either conflict with HCC's business records or have plausible explanations for the discipline administered or lack thereof. In fact, examples of the Comparators' own discipline demonstrates that the Policy was enforced upon them as written. The miners were disciplined when they forgot to scan but likewise not disciplined when they experienced a scanner error and informed a supervisor.

Scoles alleges a specific example of disparate treatment when he was disciplined for missing his first scan on May 19, 2016, even though he informed his supervisor that he was unable to scan in due to a malfunction. Tr. 32. Scoles testified he immediately informed his supervisor, Jim

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<sup>14</sup> Scoles maintains that the Court should credit his comparators' accounts over HCC's time and pay records because the operator offered no support for its records aside from Fazio's "self-serving testimony." Comp. Br. at 27. Yet Complainant offers nothing of substance to convince the Court that the time and payroll records are invalid. That the time and pay records support Fazio's testimony and refute the comparators' testimony is not a valid reason to discredit them.

Coles, who told him he would “take care of it.” Tr. 32. Miner Perry Heflin corroborated Scoles’ conversation with Coles but could not recall the exact date it occurred. Tr. 238-39. Scoles noted that Fazio later spoke to him regarding the missed scan and told him that he would not be punished. Tr. 32-33. Scoles was nonetheless put at Step 1 for missing the scan. Tr. 32-33.

Fazio disputed Scoles’ account. He denied telling Scoles that he would not be disciplined and did not recall Scoles mentioning any conversation with Coles about the scan. Tr. 354. Rather, Fazio testified that Scoles admitted to missing the scan, telling him that “he was a big boy” and that “he could take it.” Tr. 351. HCC provided evidence of the verbal warning with written acknowledgment that Scoles admitted the miss and accepted the discipline. Ex. R–B, p. 2; Tr. 349-50. Fazio noted that he did not save the video recording of the first missed scan because Scoles admitted that he failed to scan out. Tr. 351-54.

I have already found that Scoles missed the scan, and I accept Fazio’s testimony that Scoles admitted as much. Fazio’s account is supported by the time and pay records, his spreadsheet, and the notes recorded on the verbal warning record. Ex. R–B p. 5, C–19; Tr. 354, 357. His account explains why Fazio did not save the video footage and was unable to show Phillippi the video months later during Scoles’ grievance meeting.

Scoles argues that he reported a malfunction and that Fazio informed him he would not be disciplined for the missed scan. I do not credit this contention. As noted above, I found Scoles’ testimony to be severely inconsistent and seriously question his recollection of the events surrounding each of his five missed scans. With regard to the May 19 scan at issue, Scoles wavered between outright denying that he missed the scan and acknowledging that he did not scan in because the scanner malfunctioned, in both cases claiming that Fazio told him he would not be disciplined. Tr. 31-32, 92-95, 109, 116. Nonetheless, Scoles testified that he demanded to see the video and was refused. Neither of these sequences of events explained why Scoles would demand to see the video if he admitted to missing the scan, acknowledged that he missed the scan due to a kiosk malfunction, or was told that he would not be disciplined.

Scoles points to his and Heflin’s testimony that Scoles spoke with his supervisor about the scanner malfunction to argue that he was improperly disciplined for immediately reporting the issue. Heflin’s testimony corroborated Scoles’ account but did not provide sufficient detail to confirm that it pertained to the May 19 scan, or what exactly Coles meant when he said he would take care of the scanner malfunction. Tr. 238-239. Assuming Scoles experienced a scanning issue and that the conversation with Coles occurred on May 19, I find that Coles likely “took care” of the payroll aspect of the scanner issue but could not address the disciplinary side of the missed scan. This explanation reconciles Coles’ statement with Fazio’s testimony that front-line foreman and supervisors do not have the authority to excuse missed scans, only to annotate and validate time to ensure miners are paid according to hours work. Indeed, Scoles’ time and pay for that date is handwritten and apparently initialed by Coles. Ex. R–B, p. 3. This finding also explains why Fazio had no recollection of speaking with Coles about the matter, as Fazio is not involved with the payroll side of the Policy.

However, even accepting Scoles sequence of events, it does not necessarily follow that he did not miss the scan in violation of the Policy. Although multiple miners testified that they were not



disciplined when they immediately informed a supervisor that they were unable to scan in or out, none claimed that they were simply excused as Scoles believed to be. Tr. 239-40, 254, 276, 297. Rather, most of the miner witnesses explained that their supervisors instructed them to return to the kiosk and continue trying to scan in or out until it was finally accepted. Tr. 240, 272, 311. In situations where miners informed supervisors that personally came to address the machine issue, the miners recalled attempting to scan in again after they reported the issue. Tr. 240, 272. Thus, I find it plausible that Scoles could have reported the issue and still missed the scan in violation of the Policy by not attempting to rescan.

In sum, I do not find that Scoles was treated differently than other miners when he was disciplined for missing the May 19 scan. Scoles' testimony was inconsistent and did not fully match his alleged sequence of events, while HCC provided business and disciplinary records consistent with Fazio's recollection of the missed scan, including the verbal warning that noted Scoles' acceptance of the discipline. Ex. R-B, p. 2; Tr. 351, 354. I therefore find that Scoles admitted to missing the May 19 scan and accepted the Step 1 discipline for it. Hence, his treatment was consistent with that of other miners that missed scans in accordance to the Policy.

Accordingly, I find that Complainant was not subject to disparate treatment under the Policy.

#### **e. Conclusion**

In light of the above, I conclude that Complainant did not establish a *prima facie* case of discrimination. The Complainant was unable to establish a nexus between his protected activity and his discharge under the Policy. Although HCC knew of Scoles' reputation as a safety advocate and had come into conflict with Scoles before regarding these matters, Scoles did not sufficiently show that HCC discharged him because of his protected activity. Most conclusively, Scoles was unable to establish that he was treated any differently than other miners for violating the Hand Scanner Policy. Scoles' own testimony regarding his scanning history lacked any semblance of credibility, and his comparators were unable to show examples of disparate treatment under the Policy. On the other hand, HCC provided business records supported by Mr. Fazio's credible testimony that showed a detailed and consistent enforcement of the policy. Accordingly, I find that Scoles failed to establish a *prima facie* case of discrimination.

## **2. Affirmative Defense**

An operator may establish an affirmative defense by proving that the adverse action was motivated by unprotected activity and that the operator would have taken said action based solely on the unprotected activity. *Pasula* at 2799-2800. In reviewing the defense, the judge should determine whether it is credible and, if so, whether the operator would have been motivated as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The complainant may show that the alleged non-discriminatory reason is pretext for the adverse action by showing that the "asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Respondent contends that Scoles was terminated in accordance with the Mine's Hand Scanner Policy and would have been terminated for that reason alone. Resp. Br. at 16. Scoles was disciplined upon each violation and was terminated immediately once HCC management discovered that he reached Step 4. *Id.* HCC argues that it has a legitimate and important business interest in accurately maintaining the time and payroll records for its workforce. *Id.* Thus, Scoles' discharge was consistent with the Policy and solely determined by his repeated failure to scan in and out. *Id.*

Scoles maintains that HCC used the Hand Scanner policy as pretext for his discharge. Comp. Rep. at 11. Scoles points to the other miners' testimony to argue that HCC enforced the Policy in an inconsistent and lenient manner and thus did not discharge Scoles solely for his failure to scan in and out. *Id.* Furthermore, Scoles argues that HCC inflated its purported business interest in maintaining accurate payroll records because the mine regularly used an alternative means of tracking time that was more reliable than the hand scanners. *Id.* at 12-13.

Assuming arguendo that Complainant established his *prima facie* case, I find that HCC established a valid affirmative defense. Scoles reached Step 4 of the Hand Scanner Policy due to his multiple failures to scan in and out over the course of a year. The designated punishment at Step 4 is suspension with the intent to discharge, and HCC immediately disciplined Scoles accordingly when he reached that step. The Hand Scanner Policy's language is singularly directed toward enforcing consistent compliance with HCC's time and attendance system and clearly outlines the repercussions for repeated failure to do so. Ex. C-1. Although they may not have agreed with the Policy itself, Scoles and the other miners were aware that failing to scan in or out constituted a violation and testified to their personal experiences with the progressive discipline scheme.

Fazio's testimony lends credibility to HCC's proffered reason for discharging Scoles. He described his interactions with Scoles at each disciplinary step and his process for administering the Policy throughout the mine in detail. His disciplinary spreadsheet and the mine's time and payroll records indicate that Fazio meticulously tracked missed scans and disciplined culpable miners in accordance with their status on the progressive discipline scheme. Ex. C-19. His testimony did not indicate that his disciplinary interactions with Scoles differed from those with other miners, were out of step with the Policy, or were motivated by factors other than Scoles' failure to scan in or out. Furthermore, his testimony and HCC's time and pay records systematically and consistently refuted the testimony of Scoles and his comparators' regarding inconsistent enforcement of the Policy. As discussed in detail above, none of the miners' testimony was sufficiently credible to cast doubt on the veracity of HCC's records or that HCC's implementation of the policy was implausible or out of line with normal business practices.

Complainant argues that HCC overstated its business interest in enforcing the Hand Scanner Policy because front-line foreman and supervisors regularly enter the time and pay accurately and without malfunction whenever miners missed a scan. Comp. Br. at 12-13. I reject this argument. The mere existence of a reliable backup system does not lessen HCC's business interest in ensuring accurate time and pay for its workforce or the legitimacy of the Hand Scanner Policy as a means to do so. Mines have a clear business interest in ensuring its employees are paid correctly, consistently, and without dispute. They thus have a clear interest in

ensuring that miners use the system put in place. Computerizing those calculations serves to provide an objective means of doing so and eliminate suspicion that mine management may abuse their power in making those calculations themselves. Supervisors are only authorized to adjust time and pay when miners fail to use the Hand Scanners, and they must do so by hand on the time sheet. It is therefore clear that HCC implemented the Hand Scanner Policy and system to minimize supervisors' involvement in calculating time and insulate the electronic system from their control. The Court finds this interest both reasonable and plausible.

I find that HCC's offered business justification was not pretextual. The Hand Scanners are a plausible means to accurately calculate time and pay of all 315 miners working at the Harrison County Mine and to hold miners accountable for scanning in and out. The system is designed to avoid disputes between employees and management regarding pay by using an objective electronic timekeeping system. It cannot be effective, however, unless miners regularly scan in and out, and the Policy is unequivocally intended to ensure that they do so. HCC's desire to implement a disciplinary scheme that effectively deters miners from failing to scan in and out is therefore reasonable. Scoles reached Step 4 of the Policy's progressive discipline scheme when he failed to scan in or out on five different occasions without being exonerated more than one time. While discharge was the harshest measure available, it was clearly outlined within the Policy, and the Court declines to substitute its view of what may be good business practice for that of the operator with an opinion as to whether the adverse action was "just" or "wise." *Sec'y of Labor on behalf of Silva v. Aggregate Indus. WRC, Inc.*, 40 FMSHRC 552, 572 (Apr. 2018) (ALJ) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2517 (Nov. 1981)).

#### **D. Interference**

Scoles also contends that HCC's "action of disciplining Scoles to the point of discharge under the [Hand Scanner] Policy, while declining to discipline other similarly-situated miners each time management alleged them to have committed the exact same violation, is not only inherently likely to interfere with Scoles' exercise of Mine Act rights; it is completely destructive of that exercise, inasmuch as it ended his employment at the Mine." *Id.* at 37. Complainant also contends HCC's decision to terminate him interferes with the rights of other miners because it will chill their desire to make safety complaints at the mine. *Id.* Complainant urges the Court to adopt the *Franks* test, which finds an interference violation when:

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

*UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014).

HCC disagrees and contends that Scoles' discharge should not be analyzed under an interference framework. Resp. Br. at 20. Respondent argues that doing so would "create a

‘perverse’ incentive for miner complainants to plead interference claims in lieu of or in addition to discrimination claims to avoid the more rigorous *Pasula/Robinette* framework.” *Id.*; see also *Sec’y of Labor on behalf of Pepin v. Empire Iron Mining P’ship*, 38 FMSHRC 1435, 1453 (June 2016) (ALJ). If the Court does consider Scoles’ claim, HCC urges the adoption of an interference test for facially neutral company policies as outlined in *Feagins v. Decker Coal Co.*, 23 FMSHRC 47, 50 (2001) (ALJ) (holding that to constitute illegal interference a facially neutral policy must (1) overtly impose negative consequences to a person for the exercise of a Mine Act Right or (2) damage or deny rights assured under the Act even if there is no overt causal connection between the damage suffered and the exercise of the protected right). Resp. Br. at 19. Should the Court apply the *Franks* test to Scoles’ claim, however, HCC argues that its decision to discharge Scoles cannot be reasonably viewed as tending to interfere with Mine Act rights, and was nonetheless justified by its legitimate interest in accurately tracking time and payroll that outweighs any harm caused to the exercise of said rights. *Id.* at 20-21.

Unlike discrimination cases, the Commission has accepted interference claims where a miner complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than an adverse employment action. See *Sec’y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff’d* 770 F.2d 168 (6th Cir. 1985). In these cases, the Commission focuses not on the employer’s motive but on whether the conduct would “chill the exercise of protected rights,” either by the directly affected miner or by others at the mine. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

A majority of the Commission has not endorsed a single analytical framework to apply when determining whether an operator interfered with the exercise of protected rights under section 105(c). *Sec’y of Labor on behalf of Greathouse, et al. v. Monongalia County Coal Co. et al.*, 40 FMSHRC 679, 680 (June 2018). Two Commissioners in *Greathouse* and multiple Administrative Law Judges have applied the *Franks* test. The remaining two Commissioners held that the Complainant must also demonstrate that the alleged interference was motivated by animus to the exercise of protected rights. See *Greathouse*, 40 FMSHRC at 708. At this time, no Commissioner has explicitly endorsed Respondent’s proposed interference test for facially-neutral policies as put forth in *Feagins*, while at least one Commission Judge has found that test to be out of line with Commission’s current case law on interference. See *Sec’y of Labor on behalf of Greathouse*, 39 FMSHRC 941, 948 (May 2016) (ALJ) (holding that Commission precedent has de-emphasized proof of a miner’s attempted exercise of a protected right and not required a showing of intent to interfere).

At the outset, the Court has grave reservations in accepting Complainant’s alternative argument of interference and in applying the *Franks* test to a case that so obviously implicates protected activity and an adverse employment action. *Cf. Gray*, 27 FMSHRC at 8. To expand the use of interference claims to clear adverse actions such as discharge would allow complainants to sidestep the elements required to prove a *prima facie* case of discrimination under section 105(c). *Pepin*, 38 FMSHRC at 1452-53. In a case such as this one, where protected activity and adverse action are clearly present and where discriminatory motive has not been found, permitting an alternative pleading of interference runs the risk of rendering the *Pasula/Robinette* superfluous. If, upon failing to prove up its *prima facie* case of discrimination, a complainant may then resort

to a claim of interference, there is little stopping a Complainant from avoiding *Pasula/Robinette* analysis altogether by alleging interference to prove its claim under the less stringent *Franks* test. See 38 FMSHRC at 1452-53.

Moreover, accepting the notion that a miner's discharge interferes with that miner's ability to exercise protected activity would excise the burden of proof under the first prong of the *Franks* test. That a miner's discharge interferes with his or her own ability to engage in protected activity is a tautology. To hold that HCC's decision to discharge Scoles pursuant to the Hand Scanner Policy interfered with his rights would obfuscate the intended purpose of "interference" under the Act and open the door for any and every miner to challenge the mere fact of their termination with or without a demonstrated impact on protected activity. This could not have been Congress' intent when it identified two causes of action under section 105(c): "not only the common forms of discrimination, such as discharge, suspension, [and] demotion..., *but also* against the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982) (citing S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)); see also *Pepin*, 38 FMSHRC at 1452-53 (emphasis added).

Regardless, the Court need not dwell upon whether multiple tests are necessary for factually different interference claims or endorse a specific interference framework because Scoles' claim does not satisfy the *Franks* test, so far the least stringent interference test endorsed by the Commission.

***1. Whether HCC's decision to discharge Scoles pursuant to the Policy can be reasonably viewed as tending to interfere with the exercise of protected rights.***

The Hand Scanner Policy implemented a four-step progressive discipline system for each instance where a miner failed to use the hand scanner to start or end their shift. Ex. C-1. HCC discharged Scoles after his fifth missed scan in slightly less than a year. He was moved back one step in accordance with the policy after scanning in and out for 180 consecutive days during that period.

When compared to other programs or plans found to interfere with miner's protected rights, HCC's Hand Scanner Policy does not implicate the exercise of protected rights under the Act. In other cases, the policies at issue either directly chilled a miner's exercise of rights or provided an incentive for miner's not to exercise those rights. See, e.g., *Greathouse*, 40 FMSHRC 679 (June 2018) (addressing bonus plan that awarded miners for production and thus discouraged safety complaints); *Sec'y of Labor on Behalf of Thomas McGary et. al. v. The Marshall County Coal Co. et. al.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ) (policy requiring miners to report safety complaints to management before making the complaints to MSHA interfered with miners right to make anonymous complaints). Unlike those cases, the Hand Scanner Policy itself does not create any disincentive to refrain from engaging in protected activity. Miners cannot be disciplined for engaging in protected activity under the Policy and are not deterred from doing so based on any implication of the Policy's language. See Ex. C-1. A miner cannot be discharged

under the Policy for anything other than repeatedly failing to scan in or out. In short, if a miner simply scans in and out every day, the Policy will not impact them or their actions whatsoever.

When considering the totality of the circumstances surrounding Scoles' discharge, however, I find that miners may reasonably view HCC's decision to discharge him in close proximity to his election to the Union Safety Committee as tending to chill the exercise of protected rights. Hollis testified that he warned Scoles not to run for the Union positions and refused to vote for him for fear of adversely impacting his employment at the mine. Tr. 306-307. Given Scoles' reputation for safety advocacy, his pending candidacy for two Local Union positions, and his past conflicts with HCC management, miners could conceivably view HCC's decision to discharge Scoles under the Policy as a statement discouraging miners' exercise of protected activity for fear of being subject to stricter enforcement of the Policy.

For the purposes of this decision, I find that Scoles' discharge satisfies step 1 of the *Franks* test.

**2. Whether HCC's decision to discharge of Scoles' pursuant to the Hand Scanner Policy outweighs the harm caused to the exercise of protected rights.**

The second prong of the *Franks* test turns to whether the operator had a "legitimate and substantial" reason for the action "whose importance outweighs the harm caused to the exercise of protected rights." *Greathouse*, 40 FMSHRC 679, 702 (June 2018) (citations omitted). An operator's substantial business justification is most persuasive when it is narrowly tailored to promote the justification and the operator's interest is important and the impact on employee rights is minimal. *See Franks*, 36 FMSHRC 2088, 2118 (Aug. 2014); *Greathouse*, 38 FMSHRC 941, 954 (May 2016) (ALJ) (citations omitted).

Scoles contends that HCC cannot offer a legitimate and substantial reason for discharging him under the policy that outweighs its interference with miners' rights because it took the most severe action possible in discharging him.<sup>15</sup> Comp. Br. at 39. HCC contends that it has a legitimate and substantial interest in ensuring accurate timekeeping and the payment of correct wages to its employees and ensuring that miners consistently scan in and out. Resp. Br. at 21. It notes that the Hand Scanner Policy is narrowly tailored to minimally affect employees' rights by focusing solely on whether miners properly scan in and out of their shifts. *Id.*

I find that HCC's interest in enforcing the Policy outweighs the minimal and attenuated impact upon miners' exercise of their protected rights. The mine is large and must track the time and pay of 315 miners. It uses the hand scanners to quickly and effectively do so. Tr. 335-37. The system does not operate as effectively or efficiently as intended if miners do not use the scanners. The progressive discipline scheme is in place to ensure compliance. Scoles'

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<sup>15</sup> Scoles contends that because HCC's enforcement of the Hand Scanner Policy was pretextual in that it treated Scoles differently than other miners, it is unnecessary to balance that purported reason against the resulting interference with miners' rights. Comp. Br. at 39. Since I have already found that HCC's enforcement of the policy was not pretextual, I need not address this argument or its implications for interference claims in general.

termination was in accordance with the established Policy, and HCC had a legitimate and substantial interest in enforcing the Policy so that miners consistently use the hand scanners to track their hours.

In contrast, Scoles' discharge under the Hand Scanner Policy caused minimal and attenuated harm to other miners' exercise of protected rights because he was solely responsible for remembering to scan in and out at the end of his shifts, especially as he progressed further along the disciplinary scheme. Scoles offers no evidence that he felt the Policy deterred him from exercising his rights or any evidence that the Policy was implemented as a threat against his exercise of those rights. Rather, Scoles demonstrated a flippancy toward the Policy, calling it "a joke," "piddly," and "heinous" during his deposition and reiterating that belief at hearing. Tr. 95-99. Any harm that HCC's decision to discharge Scoles may have caused to miners' exercise of protected rights is tempered by Scoles' failure to adhere to the Policy. While a reasonable miner may conceivably view HCC's decision to discharge Scoles as a warning not to engage in protected activity, I find it much more likely that a reasonable miner would view Scoles' discharge as a warning to remember to scan in and out each day.

Contrary to Scoles' claim, HCC's decision to discharge him was narrowly tailored to promote compliance with the Hand Scanner Policy. Although Complainant correctly characterizes HCC's decision to discharge him pursuant to the Policy as the most severe action possible, discharge for repeated failure to scan in and out is clearly stated in the Policy, and the Court will not impart judgment on the "fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Sec'y of Labor on behalf of Beckman v. Mettiki Coal (WV), LLC*, 33 FMSHRC 258, 274 (Jan. 2010) (ALJ) (citing *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990)). Here, the Policy does not directly or indirectly implicate miners' abilities to exercise their rights under the Act, and the act of scanning in or out does not impose any burdens on miners that might obstruct or deter them from making complaints. The Policy clearly notes that a miner will be suspended with the intent to discharge upon reaching Step 4 of the Policy. A miner can only reach Step 4 by failing to consistently scan in or out, and HCC discharged Scoles for this reason.

I therefore find that HCC's interest in ensuring that miners consistently use the hand scanners to track time outweighs the harm that Scoles' discharge caused to the exercise of protected rights at Harrison County Mine. Inconsistent or lenient enforcement of the Policy compromises its purpose of ensuring consistent, mine-wide use of the Hand Scanner system. Scoles continuously violated the Policy and was disciplined accordingly to deter him from doing so in the future.

I find that Scoles' discharge pursuant to the Hand Scanner Policy did not unlawfully interfere with miners' exercise of protected rights pursuant to section 105(c) of the Mine Act.

#### **IV. ORDER**

Accordingly, the complaint brought by George Scoles is **DENIED** and this proceeding is **DISMISSED**.

/s/ David P. Simonton  
David P. Simonton  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 16, 2019

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

PENNSY SUPPLY, INC.,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. YORK 2018-0004  
A.C. No. 07-00059-449176

Mine: Bay Road Plant #7

**DECISION AND ORDER**

Appearances: M. del Pilar Castillo, Esq., Office of the Solicitor, United States  
Department of Labor, Philadelphia, Pennsylvania, for the Petitioner,

David M. Toolan, Esq., CRH Americas, Inc., Atlanta, Georgia, for the  
Respondent.

Before: Judge Rae

This case is before me upon a petition for assessment of civil penalties filed by the Secretary of Labor (“the Secretary”) pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act” or the “Act”), 30 U.S.C. § 815(d). At issue are three section 104(a) and two section 104(d) citations issued to Pennsy Supply, Inc. (“Pennsy”) as a result of an inspection conducted by an authorized representative for the Department of Labor’s Mine Safety and Health Administration (MSHA).

A hearing was held in Dover, Delaware, at which time testimony was taken and documentary evidence submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness.

After considering the evidence, and observing the witnesses and assessing their credibility, for the reasons set forth below, I vacate all five citations.

## I. STIPULATIONS

The parties have entered into the following stipulations:

1. The Respondent was an “operator” as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the citations at issue in this proceeding were issued.
2. Operations of Respondent at the mine at which the citations were issued are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.
4. The individual whose name appears in Block 22 of the Citations was acting in her official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
5. The proposed penalty for the citations at issue in this proceeding will not affect the Respondent's ability to continue in business.
6. The citations contained in Exhibit “A” attached to the Secretary’s Petition is an authentic copy with all appropriate modifications or abatements, if any.

Joint Ex. 1.<sup>1</sup>

## II. FACTUAL BACKGROUND

Bay Road Plant #7, operated by Pennsy, is a small construction sand and gravel plant located near Dover, Delaware. Tr. 14-15. This case had its origins in a complaint filed by a former Pennsy employee, Steven Horn, with the Occupational Safety and Health Administration (OSHA). Tr. 76. Horn started working for Pennsy sometime in 2016 (the record is unclear as to exactly when) as a plant operator assigned to separate rock and sand into piles of various grades. Tr. 71-72. Horn testified that in his complaint to OSHA (which is not in the record), he alleged that he had been exposed to dangerous levels of lead during a winter maintenance task performed at the plant in mid-February 2017. Tr. 77. OSHA conducted a preliminary investigation but determined it lacked jurisdiction over Pennsy. OSHA referred the complaint to MSHA, which assigned an inspector, Michele Santos-Cranford, to investigate it. Tr. 138. Santos-Cranford, who had been employed at MSHA for nine years and had mining experience dating to 1986, interviewed Horn and, on July 11, 2017, inspected the plant premises.

The task which Horn alleged exposed him to lead poisoning was winter maintenance of a sand screw. *See* Ex. R-1 (a photograph of a sand screw, though not the one on which maintenance was being performed in February 2017). This involved the removal of shoes held onto the screw by bolts, nuts, and washers. Daniel Washburn, a former Pennsy employee who

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<sup>1</sup> In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered Ex. S-1 through S-18, Respondent’s Ex. R-1 through R-7.

testified at the hearing, was the lead man in charge of this winter maintenance. Tr. 14. Washburn testified that he removed the shoes, which were secured by two bolts, by grinding through one half of each bolt using a grinder with a cutting wheel. Once the bolts were cut in half, Washburn would strike the bolt with a hammer thereby removing the bolt from the shoe. Tr. 18, 21. Washburn stated he had previously performed this task two or three times a year. Typically, he stated, this task entailed removal of 20 to 30 shoes. On this particular occasion, however, all the shoes were being removed and ones in good condition were being set aside for use on a new sand screw. This meant that an unusually large number of shoes had to be removed. According to Washburn, “well over 100 [shoes] on each side” were removed; Horn stated that “400 to maybe 450 bolts” were removed. Tr. 18, 108. Both Washburn and Horn removed the shoes individually, then handed them to a third employee, Jeff Darling (who did not testify at the hearing), who would sort them according to whether they could be reused or should be disposed of. Tr. 21.

Horn testified he had told Washburn about his prior welding and burning experience, and that Washburn told him, “Steve, if you can help us, we are going to be burning these bolts off...” Tr. 79. Horn stated he had never done this particular task at Pennsy. Tr. 88. Rather than grinding the bolts as Washburn had done in the past and was doing then, Horn opted to use an alternative approach to the task: burning the back end of the bolt, where there was a nut and washer that held the shoe in place, with an acetylene torch. As the metal started to melt from the flame, he would cut close to the back of the bolt so it could fall away from the shoe, thereby releasing the shoe from the sand screw. Tr. 85-86. Horn testified he switched to using a torch because it was “the most feasible and quickest way” to remove his the bolts securing the shoes to the sand screw. Tr. 108. Washburn testified that his supervisor, Jay Clendaniel, stated Horn’s torch method took too long, and Clendaniel suggested Horn use the grinder as Washburn was doing. Tr. 42. Clendaniel was not called to testify at the hearing.

Both Horn and Washburn testified that shortly after they began their work on the sand screw, Horn voiced concerns about what he believed to be lead washers behind the bolts they were removing. Tr. 29, 87. Washburn stated he observed Horn’s burning with the torch produced “a real white smoke” that had a foul odor. Tr. 28. Horn stated the smoke was “normal for that type of work.” Tr. 87. He stated the washers burned and melted into a gray liquid, which splashed onto the floor and produced “a little bit of black smoke,” though he did not mention any odor. Tr. 87. Horn subsequently told Washburn that there were lead washers in between the nuts and bolts, and asked whether they should be concerned. Tr. 88. Washburn testified that Horn also asked whether they needed additional personal protective equipment (“PPE”). Tr. 30. Washburn testified he called Clendaniel to relay Horn’s concerns, and to suggest that additional breathing protection was necessary. According to Washburn, Clendaniel said no additional PPE was required because the work was being done outside in breezy conditions. Tr. 30. Washburn claimed he called Clendaniel again later that day, and that Clendaniel suggested they wear paper respiratory masks. Tr. 31. Though both men apparently attempted to use paper masks, Washburn testified that “they kept steaming up our safety glasses,” and they stopped using them. Tr. 32.

Horn contradicted Washburn’s claim that he contacted Clendaniel at all. Horn testified that Washburn told him, “We do this all the time, and nobody ever got sick from it.” Tr. 77. Thereafter, according to Horn, the men “just continued with the job until completion.” Tr. 88-89. Horn also testified that he worked with Washburn every hour during the winter maintenance

work but never saw Washburn call Clendaniel. Tr. 109, 124-25. Jeff Dawson, the mine's General Manager and Clendaniel's immediate supervisor, testified that "[a]fter the [MSHA] investigation started ... I asked if [Clendaniel] has been notified by anyone about any hazards associated with lead on this job. He said he had not been notified by anyone." Tr. 266. On this issue, upon observing his demeanor, I found Dawson's testimony particularly credible.

Notably, Washburn did not testify that he relayed to Clendaniel Horn's specific concerns about the presence of lead despite his testimony that "I know from past experience, there was lead, definitely lead washers in that." Tr. 24. He stated he knew this because he had helped install the shoes in the past, and had been responsible for ordering replacement washers. Tr. 25, 48. He claimed that, when new replacement washers were installed, "everyone over the years" would ask why lead washers were being used. Tr. 26. However, despite this testimony, Washburn admitted he never raised the issue in regular safety training, did not report any concerns to a confidential mine safety hotline, and never discussed the use of lead washers with mine management. Tr. 41. On this point, Washburn further contradicted himself, testifying that, before this particular task in winter 2017, no one had ever before voiced any concerns about lead washers: "Until this came about, we didn't realize there was an issue, because over the years no one ever said anything [about] it." Tr. 60.

Inspector Santos-Cranford's inspection notes indicate that Clendaniel informed her that he did not know that lead washers were being used in the sand screw, and that he told Horn to stop using the torch because it was generating too much smoke. Ex. S-14 at MSHA047 and MSHA049. She also noted that Dawson told her he did not know lead washers were being used in the sand screw, and that he looked in the sand screw manual to see whether lead washers were listed as a component and found no such indication. Ex. S-14 at MSHA045.

Horn and Washburn disagreed on whether Clendaniel visited site where they were performing the winter maintenance. Washburn first testified that Clendaniel never came by the task site. Tr. 31. But he then testified that Clendaniel suggested Horn switch from using the torch, which he believed was taking too long, to the grinder. Tr. 42. Horn, on the other hand, testified that Clendaniel "always came by because he was following progress in two yards," and would have observed him using the torch. "Once he seen we were working, everyone was moving forward, he would go to the other yard and check progress over there." Tr. 89. Horn also testified, however, that the reason Clendaniel came through was because MSHA was onsite but that they stayed away because work was being done. He then stated that he had "no idea" MSHA was onsite and only heard about it later. Tr. 120.

Horn testified he was offered a position with a car battery manufacturer on Friday, March 31, 2017 at 3:00 PM. He immediately told Washburn that he was leaving Pennsy "as of this moment." Tr. 72. As part of his pre-employment screening for the new employer, Horn's blood lead level was tested. Horn was scheduled to complete paperwork at the new employer on Monday, April 3, 2017, and begin work the following Thursday. Tr. 73. However, on the way to sign the paperwork, the new employer called him and told him that he had a high blood lead level, and that on account of that, it had to revoke its employment offer. Battery manufacturing involves exposure to lead. Tr. 74. Horn called Pennsy's human resources department soon thereafter and spoke with a representative named Jeff Brown. He asked, "based on leaving my

job on Friday at three in the afternoon, that it [is] now one o'clock Monday, what were the opportunities, possibilities of getting my job back[?]" Tr. 74. Horn stated that Brown responded, "no, we have decided to move forward. That is not going to happen." Tr. 74. Horn then asked about whether he could receive worker's compensation based on the results of his lead test, claiming "I was employed by [Pennsy] with the initial contact of lead." Brown asked in response how the company could know he was not exposed to lead "outside of being employed with Pennsy." Horn answered by ending the call, stating "this conversation is over." Tr. 76.

Horn testified he consulted with his doctor and obtained a second lead test. The results were the same. At the hearing, Horn gave one example of what he believed to be memory impairment caused by his heightened lead level in his blood. He recalled that he was driving with his wife down a rural road near his home and became confused. He asked his wife, "if we go this way, is it going to take us to the main road." Horn said she replied, "my God, Steve, you have been down this road 100 times, you know that." Tr. 75. Horn testified he had not received any treatment for the high level of lead in his system. Instead, he stated he had his blood lead level checked once a month and that the levels had decreased over time. Tr. 76.

At some point thereafter, Horn filed a complaint with OSHA, which in turn was referred to MSHA. As previously noted, Santos-Cranford inspected the Bay Road Plant #7 on July 11, 2017. As a result of this inspection, Santos-Cranford issued five section 104(a) citations to Pennsy charging violations arising from Horn's alleged exposure to and poisoning by lead. Pennsy contested the alleged violations and argues that they should all be dismissed. Pennsy also argues that MSHA lacked any basis for modifying two of the citations to allege that Pennsy was highly negligent, and that the two violations resulted from the company's unwarrantable failure to comply with a mandatory safety standard.<sup>2</sup>

The two modified citations, Nos. 8802227 and 8802228, were originally issued pursuant to section 104(a) of the Act, and the degree of negligence for each was designated as moderate. On May 21, 2018, the Secretary filed a Motion to Amend the Petition for Assessment of Penalty requesting that both of these citations be amended to section 104(d) citations with high negligence, which would add unwarrantable failure designations to both citations. In support of the motion, the Secretary alleged that "newly-discovered evidence warrants the amendment of the citations." Mot. to Amend at 3 (May 21, 2018). The Secretary further explained that: "During discovery, the Secretary has learned that the operator had a heightened awareness that its employees were grinding and burning lead. Instead of implementing the required protections required under the Mine Act, the operator trivialized employees' concerns." *Id.* I granted the motion in an order dated May 31, 2018. At the hearing, although Pennsy's counsel repeatedly attempted to elicit from Santos-Cranford testimony providing the bases for the Secretary's unwarrantable failure allegations, the Secretary's counsel repeatedly objected, stating, "I am the one that wrote the amendment. What Mrs. Santos-Cranford thinks about negligence is not really relevant." Tr. 234. When counsel for the operator asked the inspector how long Clendaniel had been aware of the alleged safety condition, again counsel for the Secretary objected again stating, "[s]he doesn't know." The evidence supporting the unwarrantable failure allegations were

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<sup>2</sup> The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

based upon Washburn's testimony, which was already on the record and which the Secretary argued satisfied his burden as to unwarrantable failure. Tr. 236-238. In the post-hearing brief, the Secretary argued that the violations in question were unwarrantable failures because the Respondent showed "a plain indifference to worker safety" and did not offer mitigating circumstances.<sup>3</sup> Sec. Br. 22-23.

### III. CREDIBILITY FINDINGS

Reviewing the record of these proceedings compels me to address and make findings on the credibility of several of the witnesses, particularly Horn and Washburn. I have already noted several instances in the record where Horn and Washburn contradict each other. Neither could agree on the number of shoes removed or the number of days it took to perform the winter maintenance. Neither could agree on whether Clendaniel visited the job site. Neither could agree on the color or smell of the alleged lead fumes. Neither could agree on whether Washburn called Clendaniel to voice Horn's concerns about lead. And, if he did in fact call Clendaniel, Washburn did not actually testify that he told Clendaniel that Horn had an issue with the "lead." Instead, he testified he reported Horn had a problem with generic dust and fumes.

In addition, Washburn testified that, on the one hand, "everyone over the years" would ask why lead washers were being used, yet on the other hand, testified later that, "[u]ntil this came about, we didn't realize there was an issue, because over the years no one ever said anything [about] it." Tr. 26, 60. In contrast to this contradictory testimony, Santos-Cranford's noted indicate that neither Dawson, who I found quite credible, nor Clendaniel knew lead washers were being used in the sand screw.

As to Washburn's claims of having contacted Clendaniel twice by phone in one day about fumes and the need for additional PPE while he and Horn were performing winter maintenance on the sand screw, I have already stated that I credit Dawson's testimony that no such contacts occurred. I find, however, that, contrary to Washburn's testimony, Clendaniel visited the work site and instructed Horn to stop using a torch to remove the bolts, and to instead use a grinder.

Both Horn and Washburn alleged that medical tests established that they had suffered from lead poisoning, allegations upon which the Secretary based much of the case against Pennsy. Yet the record is utterly devoid of *any* credible evidence, either documentary or testimonial, from a credible medical source that supports any claim of lead poisoning, much less establishes by a preponderance that such poisoning occurred or may have been caused by lead exposure at the Pennsy work site. I find unconvincing Horn's single example of apparent

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<sup>3</sup> The Commission has stated that factors such as the length of time the violation has existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation are all to be considered in determining whether conduct is aggravated in the context of unwarrantable failure. See *Consolidation Coal Co.*, 19 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

memory loss, especially in the absence of any credible medical opinion linking such a symptom to lead poisoning. I also find it curious, at least, why if Horn was poisoned by lead he would call to get his job back immediately after being turned down by the battery company. If Horn did, in fact, suffer from lead poisoning, it beggars comprehension why the Secretary failed to place in the record more than anecdotal evidence of such a serious diagnosis. The Secretary's failure to do so leads me to draw a negative inference as to this essential evidentiary lacuna.

As to the Secretary's case in general, the evidence presented at the hearing was all too often vague and cursory, and not supported by any expertise. The most glaring example of this is that, although samples were taken at the Pennsy plant and tested for lead, and although the test results (some of which were positive) were placed in the record (Ex. S-16), the Secretary presented no evidence interpreting those results. There is no indication as to whether the positive test results were high, medium, or low in the context of occupational exposure to lead in some form. Nor was there any testimony linking the presence of the lead found to possible exposure to it in the workplace. Lead washers were found but even the Secretary's primary witness, Santos-Cranford, admitted that "there would be no way for me to prove one way or the other whether these washers [i.e., those collected during sampling] had anything to do with exposure or not." Tr. 171. Although Santos-Cranford testified that this was "[t]he reason why there was no citation issued for exposure," Tr. 171, as I review the citations she did issue, the underlying assumption buttressing them is that Horn was exposed to and poisoned by lead in the workplace.

The Secretary's allegations rest upon there being lead in the workplace at Pennsy, which is accused of failing to have an MSDS for *lead* or to train its employees as to the hazards associated with *lead* or to provide adequate protection to its employees against *lead* exposure or to have in place a system to monitor workplace exposure to *lead* – and all of these allegations are based on an employee allegedly suffering from *lead poisoning*. Exposure to lead is at the very core of the Secretary's case, yet when asked how she relied on the sampling results when issuing the citations at issue, Santos-Cranford was not able to respond in any meaningful way. Tr. 170.

As a result, I am left with a record lacking any specific evidence that when Pennsy employees worked on sand screw, they could have been exposed to impermissible lead levels, and in what form that lead might have entered the working environment such as dust or fumes.

In this regard, Santos-Cranford's statement that "lead content is lead content" is stunningly inapposite. Tr. 162. To establish the need for heightened safety precautions, the Secretary would have to first provide a background level for lead in the environment. Lead is ubiquitous, and "can be found in all parts of our environment – the air, the soil, the water, and even inside our homes." *Learn about Lead*, [www.epa.gov/lead/learn-about-lead](http://www.epa.gov/lead/learn-about-lead). Then the Secretary would have to show that, at Pennsy, workers were exposed to lead in the work they performed at levels exceeding (or far exceeding) background exposure. I infer from the lack of any positive test results from common areas at the Pennsy plant that the background lead level there was likely negligible. I also infer that workers were not carrying lead dust particles on their work clothes, hands or persons from work areas to common areas, therefore negating any claims that miners were exposed to lead dust.

I am struck by the lack of effort the Secretary made to prove this case. There are so many questions left unanswered. I cannot *assume* that something happened at Pennsy that should not have, and that it might have made persons sick. My role is not to give credence to assumptions. Instead, I must look at the evidence and determine if it proves by a preponderance the matters asserted by the Secretary.

Overall, I find that the testimony of both Horn and Washburn was confusing, often disingenuous and self-serving, and, ultimately, lacking in credibility. The Secretary's case I find plagued with inadequately supported assumptions. My findings below on each of the violations reflect this.

#### **IV. LEGAL PRINCIPLES**

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

#### **V. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### **A. Citation No. 8802224**

Citation No. 8802224 was issued by Santos-Cranford on August 1, 2017 after she consulted with Horn and inspected the Bay Road Plant #7. Santos-Cranford relied on Horn's statements and documents in issuing this citation. Tr. 175. The narrative section of Citation No. 8802224 states that Respondent failed to complete and submit a MSHA #7000-1 form in violation of 30 C.F.R. § 50.20(a)<sup>4</sup> after a former employee (i.e., Horn) reported to the company that he had been diagnosed with lead poisoning. The citation alleges moderate negligence. The Secretary proposed a penalty of \$116.00. Ex. S-2; Ex. A.

The Secretary argues that Horn reported his alleged diagnosis of lead poisoning to Pennsy's human resources department on April 3, 2017, and that Pennsy then failed to report that alleged diagnosis within the 10-day reporting window designated in section 50.20(a). The Secretary states that Pennsy did not report the alleged lead poisoning until August 1, 2017, well outside the reporting window. Sec. Br. 24.

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<sup>4</sup> Section 50.20(a) states in relevant part: "Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. ... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. ..." 30 C.F.R. § 50.20(a).



Pennsy argues it did not violate the standard because it never received any evidence that Horn was diagnosed with an occupational illness, aside from Horn's statements to that effect. Pennsy claims Horn refused to cooperate with its investigation of his alleged illness. Resp. Br. 8-9.

Section 50.20(a) requires operators to submit an MSHA #7000-1 form reporting each accident, occupational injury, and occupational illness occurring at the mine. 30 C.F.R. § 50.20(a). An occupational illness is defined as "an illness or disease which may have resulted from work at a mine or for which an award of compensation is made." 30 C.F.R. § 50.2(e). Notably, section 50.20(a) provides: "If an occupational illness is *diagnosed* as being one of those listed in section 50.20-6(b)(7), the operator must report it under this part." 30 C.F.R. § 50.20(a) (emphasis added). Poisoning by lead is listed in section 50.20-6(b)(7)(iv).

As highlighted above, the plain language of section 50.20(a) requires in the case of an occupational illness an actual diagnosis of such an illness. However, here, Pennsy never had any bona fide diagnosis of lead poisoning, and thus, as is further explained below, was under no obligation to provide MSHA a report of any such alleged poisoning.

On March 31, 2017 at 3:00 PM, Horn received an offer of employment at another company. He immediately quit his job at Pennsy. Tr. 72. However, his new employer revoked the offer of employment after Horn reported that the level of lead in his blood was higher than they would accept for a new employee. When Horn called Pennsy's human resources department to ask for his job back, a request that Pennsy denied, Horn asked about eligibility for worker's compensation on account of lead poisoning. But the Pennsy representative to whom Horn spoke asked how the company could be sure he was exposed to lead at its plant. This led Horn to abruptly terminate the conversation. Tr. 74, 76. He thereafter refused to give Pennsy any other information on his lead test results, never signed a medical release form for Pennsy to retrieve those results, and had not received any medical treatment for the heightened lead level in his blood. Tr. 76, 116, 179. Similarly, although Washburn testified he also tested positive for lead, he never provided any test results to Pennsy, either orally or in any printouts of laboratory tests, nor did he ever sign a medical release form which Pennsy provided him. Tr. 61-62.

At the hearing, the Secretary did not produce any medical records that could have established that Horn and Washburn had been diagnosed with lead poisoning. Nor did the Secretary provide any such documentation to Pennsy. To the contrary, Santos-Cranford testified that she did not provide the company any documentation because "[i]t's not our job." Tr. 179.

I find this particularly curious insofar as, had Horn or Washburn provided medical documentation of a diagnosis of lead poisoning, section 50.20(a) has a low threshold triggering the necessity of reporting an occupational illness, i.e., only that a diagnosed illness *may* have resulted from work at a mine.

The failure to produce the alleged blood tests by Horn or Washburn or the Secretary after being asked to do so left Pennsy with no confirmation of a diagnosed mining-related illness which would give rise to the reporting requirement of section 50.20(a). I note in particular that Pennsy made all reasonable efforts to obtain and confirm the allegations Horn made, but was

never provided the information necessary to make any report. Moreover, the record before me is devoid of any evidence that Pennsy ever had any such information. I thus conclude that, under these circumstances, the standard simply did not apply.

Moreover, even if I were to accept as true the unsubstantiated and anecdotal evidence that Horn or Washburn had lead poisoning, I find what evidence that is in the record inconsistent with OSHA guidance on the toxicity of lead. 29 C.F.R. § 1910.1025, App. A, Substance Data Sheet for Occupational Exposure to Lead. I take judicial notice of this OSHA guidance. *Union Oil Co.*, 11 FMSHRC 289, 300 n.8 (Mar. 1989) (official notice may be taken of the existence of extra record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true). Although this OSHA guidance states that a short term dose of lead can cause acute encephalopathy of the brain, which develops quickly to seizures, coma, and death from cardiorespiratory arrest, “[s]hort term occupational exposures of this magnitude are highly unusual.” It is chronic, long-term exposure that results in lead levels in highly toxic ranges. Short term exposure would have to be extremely heavy and concentrated to obtain acutely toxic results. Here, though, Horn was outside in the breeze, had protective clothing on, did the work for a just few days, and was told to stop using a torch to remove the bolts. Tr. 23, 28-30, 43, 78, 80. There is no evidence that either Horn or Washburn suffered any *serious* symptoms consistent with lead poisoning, acute or otherwise. Nor did the Secretary introduce any evidence of how many of the washers that Horn torched were actually lead. Especially in light of the OSHA guidance on lead, I find that the record in no way supports the Secretary’s argument that Horn suffered from an occupational illness Pennsy was obligated to report to MSHA.

For these reasons, I find that the Secretary failed to prove that Pennsy had any duty to report Horn’s alleged occupational illness pursuant to section 55.20(a), 30 C.F.R. § 55.20(a). Given that I have found no violation, I need not address any other issues related to Citation No. 8802224, including gravity, negligence, and the proposed penalty assessment.

#### **B. Citation No. 8802225**

Citation No. 8802225 was issued by Inspector Santos-Cranford on July 31, 2017 following an inspection of the Bay Road Plant #7. This inspection arose out of the same circumstances as the preceding citation. Tr. 137, 182. The citation alleges that Pennsy had no Material Safety Data Sheet (“MSDS”) for lead washers available at the mine as allegedly required by 30 C.F.R. § 47.51.<sup>5</sup> The citation alleges moderate negligence. The Secretary proposed a penalty of \$116.00. Ex. S-4; Ex. A.

Before conducting her inspection, Santos-Cranford consulted with an MSHA toxicologist (who was not called to testify at the hearing) regarding measuring the alleged existence of lead at the mine. Tr. 141-42. During her inspection of the mine on July 11, 2017, Santos-Cranford collected several wipe and bulk samples after she explained her methodology to Washburn, supervisor Jay Clendaniel, and General Manager Jeff Dawson. Tr. 141. Santos-Cranford used two sample collection methods: wipe sampling of various surfaces in common areas at the mine

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<sup>5</sup> Section 47.51 states in relevant part: “Operators must have an MSDS for each hazardous chemical which they produce or use.” 30 C.F.R. § 47.51.

(such as the kitchen) and work areas, and the collection of bulk samples (e.g., bolts, nuts, washers, etc.). Tr. 150, 153.

No evidence of lead contamination in common areas was introduced at the hearing. Santos-Cranford obtained bulk samples from a drain near where the winter maintenance task had been performed. Tr. 145. These bulk samples were not proven to have come from the sand screw on which work was actually performed, and were intact, not ground, cut, or melted. Tr. 156-57. Some of these samples, specifically some washers and wipes taken from a sand screw, tested positive for the presence of lead. Tr. 162-63; Ex. S-16 at MSHA 071; Ex. S-17. As I have already noted, Santos-Cranford, admitted that “there would be no way for me to prove one way or the other whether these washers [i.e., those collected during sampling] had anything to do with exposure or not.” Tr. 171.

Subsequently, Santos-Cranford requested an MSDS for the washers found onsite. Tr. 187. Santos-Cranford testified that an MSDS identifies hazards associated with a specific material and remedies associated with those hazards. Tr. 183. However, when asked to retrieve an MSDS for the washers, Dawson and Clendaniel were unable to do so. Tr. 187. When Santos-Cranford returned to the mine on August 1, 2017, a book containing MSDS documents, including one for lead washers, had been placed in the scale house for employee use. Tr. 189. The MSDS for lead washers originated from a Canadian supplier which had not manufactured or supplied the lead washers to Pennsy. Ex. S-5 at MSHA 006; Tr. 48, 232.

As a result of finding lead washers on the premises and the identification of traces of lead on the sand screw, as well as the inability of mine employees to provide an MSDS for lead washers on July 11, 2017, Santos-Cranford issued Citation No. 8802225.

I find that, as a matter of law, the Secretary has not established a violation of the cited standard. The requirement in section 47.51 regarding the availability of MSDSs at mines extends to *hazardous chemicals* mine operators produce or use. Elsewhere in Part 47, the term “article” is defined as: “A manufactured item, other than a fluid or particle, that — (1) Is formed to a specific shape or design during manufacture, and (2) Has end-use functions dependent on its shape or design.” 30 C.F.R. § 47.11. Under section 47.91, an “article” is generally exempt from the MSDS requirement. 30 C.F.R. § 47.91. I conclude that a washer is by definition an “article” under section 47.11, and thus exempt from the MSDS requirement, because it is neither fluid nor particle, is formed during manufacture into the specific shape of a flat disc, and its end-use function is being “placed beneath a nut or at an axle bearing or a joint to relieve friction, prevent leakage, or distribute pressure.” The American Heritage Dictionary of the English Language 1941 (4th ed. 2009).

Notably, under section 47.91, an “article” may not be exempt if, under “normal conditions of use,” it releases more than insignificant amounts of a hazardous chemical and poses a physical or health risk to exposed miners. 30 C.F.R. § 47.91. The “normal conditions of use” here was removal of washer to release shoes from a sand screw. Tr. 88-89. This was done through the grinding of the adjacent bolt and striking the bolt with a hammer, which Washburn testified was the routine practice of removal during winter maintenance, and which produced only sparks from the metal, not fumes or dust. Tr. 17-18, 21, 26, 48-49. Burning the washers as

Horn did using an acetylene torch was not common practice at the operation; rather, it was an anomaly. Horn took it upon himself to use a torch directly on the washers – and was directed to cease doing so because it was generating too much smoke. Ex. S-14 at MSHA047 and MSHA049. Clearly, Horn’s work on the washers was not a “normal condition of use.” Tr. 88. Nor did the Secretary prove that Horn’s anomalous approach to removing the washers released any specific hazardous chemical that caused lead poisoning. It is insufficient proof to suggest that correlation between Horn’s unsupported allegations of lead poisoning and his anomalous use of a torch on the washers establishes either the existence of lead exposure or that any such exposure caused lead poisoning. Moreover, the Secretary offered no proof that Washburn’s method of removal caused the release of any specific hazardous chemical, or that Washburn’s method of removal (i.e., grinding the bolt) posed any physical or health risk to exposed miners. Tr. 43, 86-87, 89, 203.

The Secretary has thus failed to establish that, as a matter of law, section 47.51 applies to lead washers. Nor did the Secretary prove that the lead washers were subject to the MSDS requirement under section 47.91 on account of the “normal conditions of use” to which the washers were subjected. I therefore vacate Citation No. 8802225. Given that I have found no violation, I need not address any other issues related to Citation No. 8802225, including gravity, negligence, and the proposed penalty assessment.

### **C. Citation No. 8802226**

Santos-Cranford issued Citation No. 8802226 on August 1, 2019 following her inspection of the Bay Road Plant #7. This citation arose out of the same circumstances as the preceding citations. Tr. 194-95. The narrative section of Citation No. 8802226 states that Pennsy failed to train miners on the specific hazards associated with cutting and grinding connecting bolts and nuts separated by lead washers, in violation of 30 C.F.R. § 47.2(b).<sup>6</sup> The citation alleges moderate negligence, and is designated as significant and substantial (S&S).<sup>7</sup> The Secretary proposed a penalty of \$330.00. Ex. S-6; Ex. A.

During her July 11, 2017 inspection of the mine, Santos-Cranford asked two miners whether they had been trained on the specific hazards of cutting and grinding bolts and nuts separated by lead washers. Tr. 195, 197. When asked, Washburn, a member of his crew, and a third unidentified employee stated they had not received any such training. When asked at another time and place, Horn answered likewise. Tr. 197-98.

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<sup>6</sup> Section 47.2 states in relevant part: “(a) This part applies to any operator producing or using a hazardous chemical to which a miner can be exposed under normal conditions of use or in a foreseeable emergency. ... (b) Operators ... must instruct each miner with information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program.” 30 C.F.R. § 47.2.

<sup>7</sup> The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard.” 30 U.S.C. § 814(d)(1).

Section 47.2(b) requires operators to instruct miners about the physical and health hazards of *chemicals* the operator produces or uses, and the protective measures a miner can take against such hazards. Section 47.11 defines a chemical as any element, chemical compound, or mixture of these. A lead washer is not an element, a chemical compound, or a mixture of these. Instead, as I have already found in connection with Citation No. 8802225, lead washers are “articles” as defined in section 47.11, and are thus by definition exempt from section 47.2(b). Under section 47.91, an article may not be exempt if, under normal conditions of use, it releases more than insignificant amounts of a hazardous chemical and poses a physical or health risk to exposed miners. 30 C.F.R. § 47.91. Again, as I have already found, the Secretary failed to prove that the lead washers, in their normal conditions of use, failed to meet this criteria for exemption from the standard. Additionally, as I have previously noted, there is no evidence that management knew that any of the replacement washers were made of lead. I thus conclude that Pennsy was not required under section 47.2(b) to train its miners on hazards associated with lead washers.

For these reasons, I vacate Citation No. 8802226. Further analysis of other issues related to Citation No. 8802226, including gravity, S&S, negligence, and the proposed penalty assessment, is unnecessary.

#### **D. Citation No. 8802227**

Santos-Cranford issued Citation No. 8802227 on August 1, 2019 following her inspection of the Bay Road Plant #7. This citation arose out of the same circumstances as the preceding citations. Tr. 202. The narrative section of Citation No. 8802227 states that Pennsy failed to provide special personal protective equipment (“PPE”) to protect against hazards associated with lead washers, in violation of 30 C.F.R. § 56.15006.<sup>8</sup> The citation, as modified, alleges that the violation was S&S, highly negligent, and an unwarrantable failure. Ex. S-8; Ex. A.

The key elements in the cited standard, section 56.15006, as applied here, are that an operator must provide special PPE when miners encounter “chemical hazards ... capable of causing injury or impairment.” 30 C.F.R. § 56.15006. To prove a violation of this standard, the Secretary needed to present credible evidence demonstrating a hazard was present, i.e., working in such a way that created a hazard associated with exposure to lead, that the hazard could (or did) cause injury or impairment, and that PPE was not provided.

The record clearly establishes that special PPE was readily available to miners at Pennsy. Dawson, whose testimony I found credible, stated that appropriate PPE was always provided for miners, and that respiratory protection was provided if it was required for a specific job. Clendaniel had the responsibility for submitting requests for specific PPE to Dawson. When asked whether he would have approved such a request for respiratory protection, Dawson testified any such request “[w]ould have been approved immediately.” However, Dawson also testified that no such request was made with regard to the task at issue here. Tr. 249-50. As to the

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<sup>8</sup> Section 56.15006 states: “Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.” 30 C.F.R. § 56.15006.

need for any specific protection against exposure to lead, as I have previously noted, there is no evidence that Dawson or Clendaniel knew that any of the washers on which Horn and Washburn were working were made of lead. To the contrary, Santos-Cranford's inspection notes indicate that neither of them had any idea that any lead was present at the work site. Ex. S-14. In a telling admission, Santos-Cranford conceded that a requirement for enhanced PPE does not exist where there is no awareness of exposure. When asked "[y]ou still have to be aware there is exposure for [enhanced PPE requirements] to kick in," she replied: "Right." Tr. 244.

Furthermore, the Secretary has not proven that any chemical hazard existed. There is evidence that some lead was present at the Pennsy plant, but no credible testimony or documentary evidence was adduced at the hearing that established that any specific chemical hazards were either present or could have been present where Horn and Washburn were working. Rather the Secretary *assumed* that Horn's unsubstantiated claim of lead poisoning was sufficient to prove that lead fumes were released from washers that may or may not have been lead during the winter maintenance task as not all of the washers were the lead replacement parts. The evidence of an "injury or impairment" is as insubstantial as that pertaining to the chemical hazard that supposedly led to an actual injury. As I have already noted above, Horn's allegations of lead poisoning were utterly lacking in corroboration by medical testimony or documentation. The ease with which such documentation could have been procured, and which may even have been in the Secretary's possession, has already led me to the negative inference that Horn's allegations were less than credible.

For these reasons, I find that the Secretary failed to prove that Pennsy violated section 56.15006 as alleged. Therefore, I vacate Citation No. 8802227. Further analysis of other issues related to Citation No. 880222, including gravity, S&S, negligence, unwarrantable failure, and proposed penalty assessment, is unnecessary.

#### **E. Citation No. 8802228**

Citation No. 8802228 was issued by Santos-Cranford on August 1, 2019, and arose out of the same circumstances as the preceding citations. Tr. 208. The narrative section of Citation No. 8802228 states that Pennsy failed to provide a system of exposure monitoring when three miners were allegedly exposed to lead fumes and dust, in violation of 30 C.F.R. § 56.5002.<sup>9</sup> The citation alleges high negligence, S&S, and unwarrantable failure. Ex. S-8; Ex. A.

Section 56.5002 is broadly worded and requires operators to conduct "surveys," a term that is not defined, "as frequently as necessary" when work generates dust, gas, mist, or fumes, and "to determine the adequacy of control measures." 30 C.F.R. § 56.5002. Generally, an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192–93 (10th Cir. 2008) (finding that Secretary's interpretation of his own regulation is entitled to deference), *quoting Auer v. Robbins*, 519 U.S. 452, 451 (1997). At the hearing, counsel for the Secretary asked Santos-Cranford, who was acting in her official capacity and as an authorized representative of the Secretary of Labor when the citations were issued, what type of "surveys"

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<sup>9</sup> Section 56.5002 states: "Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." 30 C.F.R. § 56.5002.

or “control measures” would have satisfied the requirement of section 56.5002. Santos-Cranford stated:

[Section 56.]5002 ... would mean on a regular day when just the sand plant is running they could control their dust, let's say, by looking to make sure all their sprayers were running. That is a survey in itself, just by looking out to make sure everything is running fine, or by making sure that the water truck is running on a dusty day. So that control is in place. ... This is a little bit more technical, now you are talking about something that is a fumes [sic] or dust. ... So in itself that is telling you something was wrong, something needs to stop. We need to step back and take a look in itself would be a survey.

You had people who said that they were concerned, just stopping and looking at the situation in itself would have been enough.

Tr. 211. When asked whether any sampling would be required to satisfy the standard in this situation, Santos-Cranford answered, “[s]ampling is not required, only surveying.” Tr. 212.

Under this interpretation of the standard by the authorized representative of the Secretary, all that was required for Pennsy to comply with section 56.5002 when Horn’s use of an acetylene torch produced excessive smoke was to stop work, look at the situation, and determine the adequacy of control measures. The Secretary’s own evidence demonstrates that Clendaniel did *just that* when he told Horn to stop using the torch because it was generating too much smoke. Ex. S-14 at MSHA049. Horn thereafter discontinued using the torch altogether, and work progressed to remove the shoes exclusively with grinders. This approach eliminated the smoke problem. As Washburn testified, when the grinders were used, there “wasn't a lot of dust. There was a little bit, but it was more sparks coming from the grinding of the nuts, sparks from it.” Tr. 28. Moreover, grinding the bolts, as Washburn was doing, avoided all contact with any washers, lead or otherwise, because the grinders were only coming into contact with the front end of the bolt, not any washers. Tr. 18, 21. Clendaniel’s order to stop using the torch eliminated any alleged hazard along with any excessive smoke, and thus, Pennsy satisfied the requirements of the cited standard as defined by the Secretary.

Far from proving a violation of section 56.5002, the Secretary essentially established that Pennsy complied with that section. I thus find no violation occurred and therefore, vacate Citation No. 8802228. Further analysis of other issues related to Citation No. 8802228, including gravity, S&S, negligence, unwarrantable failure, and the proposed penalty, is unnecessary.

**ORDER**

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 8802224, 8802225, 8802226, 8802227, and 8802228 are **VACATED**. Accordingly, these proceedings are **DISMISSED**.

/s/ Priscilla M. Rae  
Priscilla M. Rae  
Administrative Law Judge

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# **ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710  
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March 26, 2019

KNIGHT HAWK COAL, LLC,  
Contestant  
v.

SECRETARY OF LABOR, MINE  
SAFETY & HEALTH  
ADMINISTRATION (MSHA)  
Respondent

CONTEST PROCEEDING

Docket No. LAKE 2019-0087-R  
Citation No. 9035600; 11/14/2018

Mine: Prairie Eagle Underground  
Mine ID: 11-03147

## **ORDER DENYING THE SECRETARY OF LABOR'S MOTION IN LIMINE**

Before: Judge McCarthy

### **I. STATEMENT OF THE CASE**

This proceeding is before the undersigned on a Notice of Contest and separate Motion to Expedite filed November 15, 2018, by Knight Hawk Coal, LLC, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) ("Mine Act") and Commission Procedural Rule 20(b). The contest challenges technical Citation No. 9035600-01, as modified, issued to Contestant on November 14, 2018 for operating without an approved ventilation plan under 30 C.F.R. § 75.370(a)(1).<sup>1</sup>

Contestant's existing ventilation plan for the Prairie Eagle Underground Mine ("Mine") was revoked by MSHA's District 8 manager on November 14, 2018, after months of negotiations resulted in alleged impasse over various previously-approved ventilation plan provisions. The Citation alleged that in numerous discussions, and by letters dated April 12, May 3, June 7, and October 22, 2018, MSHA advised Contestant of concerns and of certain issues required to be addressed in its ventilation plan." The Citation, in more specific detail set forth therein, identified the following five deficiencies: (1) The designs of the typical bleeder system does not control the air direction through all individual "blocks", including the air direction in the pillared area within each "block". [30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9)] . . . (2) The method to control air movement to ventilate the unbolted extended-depth perimeter cuts within the pillared area is not provided. The extended cuts are part of the pillared area within the worked-out area, and the air must be controlled to ensure effective ventilation of the extended-depth cuts. [30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and

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<sup>1</sup> The contest alleges that the citation was invalidly issued under the Act and applicable regulations, the inspector's evaluation lacks foundation in fact or law, and the revocation of the previously-approved ventilation plan involving perimeter mining was arbitrary, capricious, and unreasonable.

75.372(b)(9)] . . . (3) The air direction through all individual "blocks", including the air direction in the pillared area within each "block", is not shown in the ventilation plan drawings or on the ventilation map. [30 C.F.R. §§ 75.364(a)(2)(iii) and 75.372(b)(9)] . . . (4) The air direction at EP locations is not shown in the ventilation plan drawings or on the ventilation map. [30 C.F.R. §§ 75.364(a)(2)(iii), 75.371(y), 75.371(z), and 75.372(b)(9)] . . . (5) The specified means of evaluation of the worked-out area does not provide sufficient information to determine the effectiveness of the bleeder system, including (a) whether air was moving in the proper direction through all "blocks," including the bleeder entries and pillared areas in each "block"; (b) the means to reasonably assure ventilation of the extended-depth portions of the pillared areas; or (c) the effectiveness of ventilation through the worked-out area. [30 C.F.R. §§ 75.334, 75.364(a)(2)(iii), 75.364(a)(2)(iv), 75.371(y), and 75.371(z)].

On November 20, 2018, Respondent filed its Answer to Notice of Contest and admitted that the citation was issued after Respondent determined that Contestant was mining without an approved ventilation plan under conditions alleged to be a violation of the cited mandatory standard. On November 26, 2018, this case was assigned to the undersigned. Thereafter, on November 27, 2018, Respondent filed an Opposition to Contestant's Motion to Expedite.

In its Motion to Expedite, Contestant alleges that revocation of the approved ventilation plan permitting perimeter mining was arbitrary, capricious, and unreasonable. Contestant argues that eleven years of mining history shows that perimeter mining is a safe and acceptable method of mining that results in lower exposure to respirable dust, noise, and red or danger zones; a lower citation and injury rate; elimination of all hazards associated with roof bolting; superior overall ventilation of the entire perimeter panel, as compared to longwall gob and pillared areas; and adequate ventilation to ensure that methane-air mixtures and other gases, dusts, and fumes from worked-out areas are continuously diluted and routed away from active workings into a return air course or to the surface. Further, Contestant alleges that the previously-approved ventilation plan is consistent with MSHA Program Policy Letter No. P13-V-12, which addresses evaluation of bleeder systems and states, "[i]t is anticipated that District Managers would not suggest changes to relevant portions of existing approved ventilations plans absent conditions affecting the safety or health of miners that arise following the issuance and effective date of this PPL." Finally, Contestant requested an expedited hearing by the end of January 2019 to promote judicial economy and to ameliorate claimed irreparable harm to Contestant's method of production and miners.

In its Opposition, Respondent argues that Contestant has failed to show "extraordinary or unique circumstances resulting in continuing harm or hardship," and that this complex case will require extensive discovery and expert testimony about air sampling data and ventilation controls, thereby making an expedited hearing inappropriate.

After various conference calls and email exchanges with the undersigned, the parties eventually agreed to hearing dates on March 28-29 and April 1, 2019 in St. Louis, Missouri.<sup>2</sup>

On February 5, 2019, the Secretary of Labor filed a Motion in Limine (“Motion”) to exclude three types of evidence at the hearing: (1) the introduction of any evidence concerning MSHA’s approval, rejection, or revocation of ventilation plans other than the Prairie Eagle Underground Mine; (2) all evidence and testimony, including expert testimony, that was not part of the record available to MSHA District 8 Manager, Ronald Burns, when he decided to revoke the Mine’s ventilation plan; and (3) and testimony from former MSHA ventilation supervisor, Mark Eslinger. The Secretary argues that under the arbitrary and capricious standard of review adopted by the Commission in *Prairie State Generating Co., LLC*, 35 FMSHRC 1985 (July 2013) (*Prairie State I*), *aff’d* 792 F.3d 82 (D.C. Cir. 2015) (*Prairie State II*) and *Mach Mining, LLC*, 32 FMSHRC 149 (Jan. 2010) (*Mach Mining I*), *aff’d* 728 F.3d 643 (7th Cir. 2013) (*Mach Mining II*), MSHA’s approval or rejection of ventilation plans at other mines is irrelevant to whether MSHA’s revocation of the Mine’s ventilation plan was arbitrary and capricious. Rather, the Commission need only determine whether District Manager Burns “[made] a full appraisal of the relevant and available facts, and [was] reasonable in his conclusions.” Motion at 4. The Secretary also argues that information that was not presented to District Manager Burns during the parties’ negotiations is irrelevant to the threshold question of whether the parties engaged in good-faith negotiations for a reasonable period of time regarding the disputed ventilation plan. *See Twentymile Coal Company*, 30 FMSHRC 736, 748 (Aug. 2008); *Prairie State II*, 792 F.3d at 93. Finally, the Secretary argues that Eslinger should not be permitted to testify because his opinions regarding perimeter mining are irrelevant under the arbitrary and capricious standard, and were not presented to District Manager Burns during negotiations over the ventilation plan.

On February 13, 2019, Contestant filed a Response (“Response”) in Opposition and argues that the Secretary’s Motion should be denied. Alternatively, Contestant requests an opportunity to present excluded evidence by offer of proof to generate a full record for Commission review. Response at 14.<sup>3</sup> Contestant argues that the Secretary bears the burden of proving that the operator’s proposed ventilation plan is “unsuitable” for the Mine under Commission precedent in *C.W. Mining Co.*, 18 FMSHRC 1740 (Oct. 1996), *Peabody Coal Co.*, 18 FMSHRC 686 (May 1996), *Peabody Coal Co.*, 15 FMSHRC 381 (Mar. 1993), and *Carbon Cty. Coal Co.*, 7 FMSHRC 1367 (Sept. 1985). Response at 2. The Contestant further argues that the Commission’s *Prairie State I* decision contradicts such prior Commission precedent, without

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<sup>2</sup> The schedule for the hearing reflects an agreement resolving a misunderstanding between the parties about testimony to be taken from Contestant’s expert. Specifically, on January 16, 2019, Contestant filed a motion to keep the record open after the hearing to take expert testimony due to a scheduling conflict. Contestant styled the motion as “unopposed,” but the Secretary did oppose the motion, as written. During a subsequent conference call with the undersigned, the parties agreed to set aside an additional day – April 1, 2019 – to take testimony that could not be taken on March 28-29, 2019.

<sup>3</sup> During a February 28, 2019 conference call, Contestant indicated that should the undersigned grant the Secretary’s Motion, Contestant would seek to make its offer of proof in question and answer format.

explicitly overruling it. Response at 2-3. Although the Commission applied the arbitrary and capricious standard of review to the district manager's revocation of a ventilation plan in *Prairie State I*, Contestant observes that the Commission cited to *C.W. Mining*, 18 FMSHRC at 1746, which requires the Secretary to show that the plan is unsuitable for the conditions of the mine. Response at 3, citing *Prairie State I*, 35 FMSHRC at 1989-90. *See also, Prairie State I*, 35 FMSHRC at 2002 (Young, C., dissenting). Finally, Contestant emphasizes that the operator is charged with developing the ventilation plan, not the Secretary. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976). Contestant concludes that the arbitrary and capricious standard of review grants the district manager too much latitude to approve or reject a ventilation plan, and de facto transfers the responsibility for formulating the plan to the district manager. Response at 9-10.

## II. LEGAL PRINCIPLES AND ANALYSIS

Section 303(o) of the Mine Act provides:

(o) A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The cited regulation at issue in this case is 30 C.F.R. § 75.370(a)(1), which provides:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1).

The prehearing issues raised by the Secretary's motion in limine concern what evidence should be excluded at the hearing. Commission Procedural Rule 63(a) states that relevant evidence, including hearsay, which is not unduly repetitious or cumulative, is admissible. Determinations as to admissibility of evidence at hearing are left to the sound discretion of the trial judge. *Marfork Coal Co.*, 29 FMSHRC 626, 634 (Aug. 2007) (noting that an abuse of discretion standard is consistent with the discretion accorded the trial judge managing the hearing).

The Secretary contends that the undersigned should evaluate District Manager Burns' decision to revoke Contestant's previously-approved ventilation plan under an arbitrary and capricious standard of review and only consider evidence actually presented during plan negotiations. Contestant argues that the statutory and regulatory phrase "suitable to the conditions and mining system at the mine" supports consideration of all evidence related to the suitability of the disputed ventilation plan when deciding whether the district manager's revocation of the ventilation plan was erroneous, even under the arbitrary and capricious standard. In my view, it is premature and imprudent in this case to decide disputed evidentiary issues in a vacuum decoupled from the crucible of trial.

Commission case law regarding the standard of review applicable to determining whether a district manager's rejection of a ventilation plan is erroneous appears to be in a state of flux. In *Signal Peak Energy*, 40 FMSHRC 1059 (Aug. 2018), *appeal docketed*, No. 18-72837 (9th Cir. Oct. 19, 2018), the Commission recently split 2-2 on what standard of review applies when considering an MSHA district manager's revocation of a ventilation plan.<sup>4</sup> Then Chairman Jordan and Commissioner Cohen affirmed the judge's application of the "arbitrary and capricious" standard of review of the district manager's decision to reject a ventilation plan submitted by the operator. *Signal Peak Energy*, 40 FMSHRC at 1064.<sup>5</sup> They relied on *Mach Mining II*, 728 F.3d at 657-58, where the Seventh Circuit found that that a Commission majority correctly determined that a district manager's refusal to approve a ventilation plan should be reviewed deferentially under an arbitrary and capricious standard, and on *Prairie State II*, 792 F.3d at 91-92, where the D.C. Circuit held that the arbitrary and capricious standard of review applied by the Commission majority to the Secretary's plan-suitability determination "was at least a permissible one." *Id.* at 93.

By contrast, Commissioners Young and Althen found that the judge applied the wrong legal standard and that substantial evidence did not support a finding that the operator's plan was unsuitable to provide safe and healthful ventilation at the specific mine. *Signal Peak Energy*, 40 FMSHRC at 1074. They opined that *Mach Mining I* and *Prairie State I* were wrongly decided, but found that those Commission decisions were upheld by the circuit courts as permissible interpretations, making it unnecessary to reject such circuit court precedent because substantial evidence did not support rejection of the operator's proposed ventilation plan when analyzed

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<sup>4</sup> Accordingly, the judge's decision to apply the arbitrary and capricious standard of review was affirmed under *Pennsylvania Elec. Co.*, 12 FMSHRC 1652 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

<sup>5</sup> Generally, under the arbitrary and capricious standard of review, a district manager's decision would be set aside only where MSHA "relied on factors which Congress [had] not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Signal Peak Energy*, 40 FMSHRC at 1065, citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

under the safety standard at issue. *Id.* at n.10.<sup>6</sup> They observed that the Commission has taken conflicting positions on the Secretary’s burden of proof, comparing the *Peabody Coal* and *C.W. Mining* cases cited by Contestant in his Response, with both the *Mach Mining I* and *Prairie State I* cases cited by the Secretary in his Motion. *Signal Peak Energy*, 40 FMSHRC at 1075-76.<sup>7</sup>

Commissioners Young and Althen relied on *Canyon Fuel Co., LLC*, 39 FMSHRC 1578 (Aug. 2017), *aff’d in part and vacated in part*, 894 F.3d 1279, 1296-1300 (10th Cir. 2018), where the Tenth Circuit reversed another 2-2 split Commission decision and found that that the Secretary failed to establish a violation of 30 C.F.R. § 75.380(d)(5), which provides that “[e]ach escapeway shall be ... [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners.”<sup>8</sup> Relying on Commission precedent, the Tenth Circuit stated:

To establish a violation of § 75.380(d)(5), however, “[i]t is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation.” *S. Ohio Coal*, 14 FMSHRC at 1785. Rather, “it is the Secretary’s burden to prove that, as compared to the designated route, there is at least one other escapeway route that [he] has determined more closely complies with the standard’s requirement.”

894 F.3d at 1295-96.

Acting Chairman Althen and Commissioner Young concluded that the phrase “suitable to the conditions and mining system at the mine” set forth in 30 C.F.R. § 75.370(a)(1) is

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<sup>6</sup> Commissioners Young and Althen declined to characterize their view on the Secretary’s burden of proof as a “standard of review,” stating that “the outcome of a suitability determination in this case does not depend upon a didactic characterization of the standard of review as beyond a preponderance of the evidence or abuse of discretion.” *Id.* at 1079.

<sup>7</sup> *But see Mach Mining II*, 728 F.3d at 658 n.21, noting that further explanation regarding departure from precedent by the Commission was unnecessary given the court’s conclusion that the statute’s regulatory scheme requires a more deferential standard of review.

<sup>8</sup> The deadlocked Commission left standing the judge’s finding that the escapeway used by the operator was not the most direct, safe and practical route to the nearest mine opening “suitable” for the safe evacuation of miners.



sufficiently analogous to the “suitable for the safe evacuation of miners” in 30 C.F.R. § 75.380(d)(5) such that the Tenth Circuit’s analysis was persuasive.<sup>9</sup> They stated:

Thus, section 303(o) [of the Mine Act] does not call for MSHA to develop a plan of its own and impose such plan upon the operator. Suitability is the standard. If the operator’s plan is suitable – this is, is appropriate for maintaining adequate ventilation and respirable dust control, then it meets the requirements of section 303(o).

*Signal Peak Energy*, 40 FMSHRC at 1079.<sup>10</sup>

Given apparent evolving Commission precedent concerning the appropriate standard of review for evaluating a district manager’s revocation of a mine’s ventilation control plan, the recent change in Commission composition,<sup>11</sup> and the prerogative of the new Commission to rationally explain reversal of existing precedent,<sup>12</sup> even in light of appellate court or Supreme

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<sup>9</sup> Commissioners Young and Althen recognized the unusual suitability provision in section 75.380(d)(5), which may require comparison of alternative “suitable” escapeways to determine whether the one designated by the operator is “the most direct, safe and practical route,” unlike section 303(o), which mandates only that the ventilation plan be suitable. 40 FMSHRC at 1077 n.7. They emphasized, however, that the Tenth Circuit required an initial determination of whether the escapeway developed by the operator was suitable, and only then was the comparison aspect of the specific regulation triggered. *Id.* at 1078. Commissioners Young and Althen fundamentally concluded that “the test of suitability is not which plan MSHA might prefer, but instead whether the plan (i.e., route in *Canyon Fuel*) proffered by the operator is suitable. In other words, the suitability determination is not an opportunity for MSHA to design a route or develop a plan for the operator. In their view, MSHA’s duty is to review the plan submitted by the operator and determine whether it achieves the requisite safety and health requirements at the specific mine.” 40 FMSHRC at 1077. They faulted MSHA in both *Signal Peak* and *Canyon Fuel*, for failing to analyze the operator’s plan in terms of its suitability for achieving the safety and health requirements at the specific mine. 40 FMSHRC at 1077 n.7.

<sup>10</sup> The Commission’s split decision in *Signal Peak Energy* is pending with briefs filed in the United States Court of Appeals for the Ninth Circuit.

<sup>11</sup> Chairman Marco M. Rajkovich, Jr. and Commissioners William I. Althen and Arthur R. Traynor, III were sworn into office on Monday, March 25, 2019. They join Commissioners Mary Lu Jordan and Michael G. Young to form a new five-member Commission.

<sup>12</sup> See e.g., *Mach Mining II*, 728 F.3d at 658 n.21, citing *Lone Mountain Processing, Inc. v. Sec’y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (“[a]s we have long held, an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”) (internal citations omitted).

Court affirmation of existing precedent,<sup>13</sup> the undersigned concludes that Contestant's proffered evidence may be sufficiently relevant under either a de novo review of proof of suitability based on a preponderance of substantial evidence or an arbitrary and capricious standard of review, such that denial of Respondent's motion in limine is warranted.

Contestant seeks to offer evidence concerning the rejection of ventilation plans involving perimeter mining at other mines to support its contention that District Manager Burns' course of conduct resulted in an arbitrary and capricious decision in this case. Response at 10-11. Contestant argues that starting in 2017, District Manager Burns "engaged in a systematic program of seeking to eliminate perimeter mining in District 8 despite its long use and approval. It involved revocation of plans at Arch Coal's Viper Mine, denial of a perimeter mining plan at Peabody Midwest's Gateway North Mine, the evaluation of perimeter mining at Peabody Midwest's Gateway Mine and the revocation of Knight Hawk's plan." *Id.* at 10. Contestant argues that "[t]he District Manager was fully aware of this history during discussions with Knight Hawk of this history. Further, it was clear throughout the process of discussions with MSHA that the safety aspects of perimeter mining [were] presented to the District Manager." *Id.* at 11. If, as the Secretary states in his Motion at 5 that "[t]he initial question in ventilation plan cases is whether MSHA and the operator engaged in good-faith negotiations for a reasonable period of time regarding the proposed plan," evidence that the District Manager has embarked on a pattern of rejecting or revoking perimeter mining ventilation plans, arguably without demonstrating adverse risks to miner safety and health under the previously-approved plan, is relevant to whether MSHA engaged in good-faith negotiations or arbitrary and capricious decision-making.

The undersigned finds little risk of prejudice to the Secretary should Contestant's evidence be considered at hearing. There are no jury trials at the Commission. Therefore, the risk of confusing or misleading the trier of fact as to the appropriate burden of proof or standard of review is greatly diminished. Moreover, a Commission judge is capable of distinguishing information that was actually presented to the district manager during discussions over the Mine's ventilation plan from information that was not presented, but arguably may have influenced the district manager's decision making, and such judge can parse through a complete and thorough record when issuing findings of fact.

By contrast, excluding the Contestant's evidence at this stage would prevent the Contestant from developing a complete and thorough record should either party seek further review of the trial decision, which could significantly delay the resolution of this case should the undersigned be required on remand to further develop the record or consider evidence that could have been fully developed or considered in the first instance. Furthermore, Contestant's counsel represented during the parties' February 28, 2019 conference call that the form of the offer of proof that he would seek should the undersigned grant Respondent's motion in limine would be

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<sup>13</sup> See, e.g., *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local 3 v. NLRB*, 843 F.2d 770, 780-81 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988) (overruling previous Board interpretation of section 8(f) of the National Labor Relations Act despite the Supreme Court's affirmance of the Board's previous interpretation in *NLRB v. Iron Workers*, 434 U.S. 35 (1978)).

by question and answer format of excluded testimony. While the undersigned has discretion to deny the requested form of such proffer based on my statutory and regulatory authority to control and manage the hearing,<sup>14</sup> granting the Secretary's Motion and allowing the Contestant to submit its offer of proof to fully develop the record for Commission review is unlikely to save much additional time or resources at hearing. Therefore, in the undersigned's view, a balancing of interests weighs in favor of giving Contestant a full and fair opportunity to present all "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative" or privileged, at hearing. *See* Commission Procedural Rule 63(a).

The Secretary relies on the Commission's decision in *Prairie State I* to argue that the undersigned should not consider any evidence that was not previously submitted to District Manager Burns in the course of discussions over the ventilation plan. While the Secretary does cite language in *Prairie State I* where the Commission affirmed the decision of the judge to exclude evidence that had not been presented to MSHA prior to the district manager's final decision on the proposed plan, the Commission affirmed that decision as one within the judge's discretion and not an absolute legal requirement. *Prairie State I*, 35 FMSHRC at 1996. ("Accordingly, we conclude that the Judge did not abuse her discretion in excluding specific evidence that had not been presented to MSHA for consideration prior to the district manager's final determination.") As explained above, Contestant's yet-proffered evidence regarding an alleged policy or practice to preclude or marginalize perimeter mining within District 8 appears to be relevant to whether the operator's previously-approved ventilation plan was no longer suitable to achieve the safety and health ventilation requirements at the Mine, or whether District Manager Burns acted in an arbitrary and capricious manner by revoking the plan now deemed deficient under certain mandatory standards. Furthermore, based on an alleged deposition admission, Contestant asserts that District Manager Burns relied on Program Policy Letter No. P13-V-12, applicable to Examination, Evaluation and Effectiveness of Bleeder Systems, and that Contestant was subjected to evaluation of extended cuts in the worked out area of perimeter mining under Procedure Instruction Letter I12-V-11, each time it added a mining unit. Accordingly, such documents appear to be relevant.

Finally, the undersigned concludes that the testimony of Mark Eslinger, former MSHA ventilation specialist for District 8, appears to be relevant to the issues presented for hearing. Contestant asserts that Eslinger would testify to the history of approval and safety of perimeter mining plans in District 8, including Knight Hawk's revoked ventilation plan. Response at 11. In his deposition, provided by the Secretary, Eslinger testified to an understanding that District Manager Burns wanted to eliminate perimeter mining in District 8. Eslinger Deposition, Tr. 27:19-29:23. Under the Young/Althen suitability approach, whether the district manager failed to consider whether perimeter mining under the previously-approved ventilation plan was suitable to achieve the safety and health ventilation requirements at the Mine is relevant to the undersigned's review of the District Manager's decision and whether the Secretary sustains his burden of proof. Under the arbitrary and capricious standard of review adopted by then Chairman Jordan and Commissioner Cohen in *Signal Peak Energy*, whether District Manager Burns revoked the Mine's ventilation plan due to pre-established conclusions or policy about

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<sup>14</sup> See Administrative Procedure Act, 5 U.S.C. § 556(c)(3) and (5) and Commission Procedural Rules 55(c)(3) and (5).

perimeter mining, without regard to whether the evidence submitted by Knight Hawk showed that its plan remained suitable under section 303(o) of the Mine Act and 30 C.F.R. § 75.370(a)(1), is relevant to whether MSHA relied on inappropriate factors to guide its decision making, failed to consider an important aspect of the problem, or offered an explanation counter to the evidence, or that is implausible or inconsistent with agency expertise. Since Contestant avers that Eslinger was part of the MSHA committee that revised the ventilation standards in 1988, 1992 and 1996 (see Response at 12), his opinion testimony may be germane to compliance or non-compliance with cited mandatory standards in the technical citation. Therefore, under either approach articulated by the Commissioners' separate opinions in *Signal Peak Energy*, the testimony of Eslinger appears sufficiently relevant to warrant consideration at hearing.

The Secretary argues that Eslinger's opinions should have been presented to the District Manager prior to issuance of the subject citation. But the Mine Act contemplates situations where a party may need to submit evidence to a reviewing body that was not heard by the initial decision maker. For example, as the Seventh Circuit recognized in *Mach Mining II*, while judicial review is usually based on the record created by the Commission, a party may obtain permission to supplement the record if the additional evidence is material and there are reasonable grounds for failure to adduce such evidence below. *Mach Mining II*, 728 F.3d at 653, citing section 106(a)(1) of the Mine Act. Here, Eslinger's deposition testimony states that he was told by industry and MSHA representatives that District Manager Burns wants to get rid of perimeter mining. Eslinger Deposition, Tr. 28-32. Such testimony, if credible, may be relevant and material to my disposition of this matter, and it arguably would have been futile to present such evidence during the negotiation process to the same district manager alleged to be hostile toward perimeter mining.

### III. CONCLUSION

For the foregoing reasons, the Secretary's Motion in Limine is **DENIED**.

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 27, 2019

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

JAMES C. SCOTT, employed by MILL  
BRANCH COAL CORP.,

and

DONNIE B. THOMAS, employed by  
MILL BRANCH COAL CORP.,  
Respondents.

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2018-0103  
A.C. No. 44-07087-462566 A

Docket No. VA 2018-0104  
A.C. No. 44-07087-462567 A

Mine: D-6 North Fork

**ORDER TO SHOW CAUSE**

Before: Judge Feldman

As discussed herein, the threshold issue is whether the approximate 36-month interim period, between the April 8, 2015, issuance of underlying Order No. 8178613 to Mill Branch Coal Corporation<sup>1</sup> (“Mill Branch”) and the April 12, 2018, personal liability notification by the Secretary’s Office of Assessments to James Scott and Donnie Thomas (“Respondents”)<sup>2</sup> satisfies

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<sup>1</sup> Mill Branch’s liability for Order No. 8178613 was disposed of in an unpublished Decision Approving Settlement issued on August 3, 2016.

<sup>2</sup> Section 110(c) of the Act provides, in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to the same [liability for] civil penalties . . . that may be imposed [on a mine operator] . . .under subsections (a) and (d) of this section.

30 U.S.C. § 820(c).

the timeliness provisions of section 105(a) of the of the Federal Mine Safety and Health Act of 1977 (the “Act”), 30 U.S.C. § 815(a). The timeliness provisions of section 105(a) provide, in pertinent part:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, *within a reasonable time* after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation . . . .

*Id.* (emphasis added).

Although the statutory notification provisions apply to contests of civil penalties by operators, Commission judges have repeatedly applied the timeliness provisions of section 105(a) to cases of personal liability brought pursuant to section 110(c) of the Act. *Sec’y of Labor v. Brinson, employed by Kentucky-Tennessee Clay Co.*, 35 FMSHRC 1463, 1465 (May 2013) (ALJ) (citing *Reasor*, 34 FMSHRC 943 (April 2012) (ALJ); *Wayne Jones*, 20 FMSHRC 1267 (Nov. 1998) (ALJ); *James Lee Hancock*, 17 FMSHRC 1671 (Sept. 1995) (ALJ)).

The seminal case addressing the application of the timeliness provisions of section 105(a) is *Sec’y of Labor v. Twentymile Coal Company*, 411 F.3d 256 (D.C. Cir. 2005) (“*Twentymile*”). In *Twentymile*, the Court deferred to the Secretary’s interpretation that the operable period for assessing timeliness is the time period between the completion of the Secretary’s investigation and the notification of penalty assessment. *Id.* at 262. In concluding that the termination of an investigation, rather than the date of issuance of a citation, is the operative event for determining timeliness as contemplated by section 105(a), the Court relied on the abatement provisions of section 105(b)(1)(B) of the Act that provide that an operator is required to “achieve rapid compliance *after notification of a violation.*” *Id.*; 30 U.S.C. § 815(b)(1)(B) (emphasis added). In this regard, the Court reasoned:

[g]iven that Congress included *the* [abatement] *response to the investigation* among the relevant criteria [for assessing a penalty contained in 30 U.S.C. § 815(b)(1)(B)], we cannot deem it plausible that Congress contemplated that any determination of the reasonableness of the time could begin before the determination could be made, that is, before the mine had an opportunity to respond to the order.

*Twentymile*, 411 F.3d at 262 (emphasis added).

The Commission has subsequently considered the effect of the *Twentymile* Court’s reliance on the statutory provisions of section 105(b)(1)(B) in interpreting the timeliness provisions of section 105(a). See *Sec’y of Labor v. Sedgman*, 28 FMSHRC 322, 339-41 (June 2006) (“*Sedgman*”). The Commission noted that section 105(b)(1)(B) “clearly refers not to investigation reports, but rather to citations and orders, as it is the citation or order that supplies

an operator with ‘notification of a violation,’” and should therefore be the starting point for assessing timeliness. *Id.* at n. 20 (Commissioners Suboleski and Young) (quoting 30 U.S.C. § 815(b)(1)(B)).

Consistent with *Sedgman*, the Secretary’s Program Policy Manual (“PPM”) recognizes that the issuance of the underlying citation or order is the starting point for determining whether the assessment of civil penalties in section 110(c) cases are timely. Specifically, the PPM states:

Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, *such assessments will be issued within 18 months from the date of issuance [to the operator] of the subject citation or order.* However, if the 18 month timeframe is exceeded, TCIO [the Compliance and Investigation Office] will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Special Assessments will be signed by the Administrator.

MSHA, U.S. Dep’t of Labor, PPM, Vol. I, at 42 (2012) (emphasis added).

In addressing the timeliness issue, it is noteworthy that the Commission has opined, “the Secretary is not free to ignore . . . time constraints . . . for any mere caprice, as that would . . . deny fair play to [respondents]” by exposing respondents to stale claims. *Sec’y of Labor v. Long Branch Energy*, 34 FMSHRC 1984, 1989 (Aug. 2012) (“*Long Branch*”) (citing *Sec’y of Labor v. Salt Lake Cnty. Road Dep’t*, 3 FMSHRC 1714, 1716 (July 1981)). However, the Commission noted that it “must balance concerns for procedural irregularity against the severe impact of dismissal on the Mine Act’s penalty scheme.” *Long Branch*, 34 FMSHRC at 1991. In this regard, the Commission stated:

In order to achieve this balance, we clarify that “adequate cause” may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary's excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from “mere caprice” or through willful delay, intentional misconduct, or bad faith.

*Id.* (footnote omitted).

## **ORDER**

Consistent with the above, the Secretary **IS ORDERED TO SHOW CAUSE** why the captioned 110(c) proceedings should not be dismissed because the April 12, 2018, issuance of the subject notifications of personal liability for proposed civil penalties, approximately 36 months after issuance of underlying Order No. 8178613, failed to comply with the reasonable

time provisions of section 105(a). Consistent with *Long Branch*, the Secretary should demonstrate “adequate cause” by providing a “non-frivolous explanation” for the 36-month delay. Specifically, the Secretary should address the following:

1. Underlying Order No. 8178613, issued on April 8, 2015, for an alleged violation of the accident notification provisions in section 50.10(d) which require an operator to immediately contact MSHA within 15 minutes after the operator knows, or should know, that a water inundation has occurred.<sup>3</sup> 30 C.F.R. § 50.10. Settlement of Mill Branch’s liability for Order No. 8178613 was approved on August 3, 2016. *See* n. 1, *supra*. If the Secretary had sufficient information concerning the facts surrounding the cited violation to determine that settlement was appropriate in August 2016, the Secretary should provide a justification for why it took an additional 20 months to issue the subject notices of proposed penalties notifying the Respondents of their alleged personal liability under section 110(c).
2. The Respondents’ personal liability for the proposed civil penalties is based on their alleged “knowing” violation of the accident reporting requirements contained in section 50.10(d). The propriety of personal liability requires determining: whether the Respondents were primarily responsible for notifying MSHA of the inundation within 15 minutes; the extent of the alleged delay; and whether there were any aggravating or mitigating circumstances. The Secretary should provide justification for why the investigation into these apparently non-complex questions of fact required approximately 36 months to complete.
3. The Secretary should provide the date of referral to the Office of Special Assessments for the personal liability penalty proposals in issue. If the date of referral is beyond the 18-month investigative time frame contained in the Secretary’s PPM, the Secretary should explain the reason for the delay.

The Secretary may provide any additional information he deems relevant. **IT IS FURTHER ORDERED** that the Secretary shall provide responses to the above-requested information within 21 days of the date of this Order. The Respondents’ may provide a response to the Secretary’s submission within 14 days thereafter. Any procedural questions should be directed to my Law Clerk, Noah Meyer, at [nmeyer@fmshrc.gov](mailto:nmeyer@fmshrc.gov).

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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<sup>3</sup> An “accident” is defined to include “[a]n unplanned inundation of a mine by a liquid or gas.” 30 C.F.R. § 50.2(4).



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/nm

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 9, 2019

MICHAEL DEUSO  
Complainant

v.

SHELBURNE LIMESTONE CORP.,  
Respondent

DISCRIMINATION PROCEEDING

Docket No. YORK 2019-0015-DM

Mine: SLC Swanton Div.  
Mine ID: 43-00030

## **ORDER DISMISSING SECTION 105(c) DISCRIMINATION COMPLAINT**

Before: Judge McCarthy

This matter is before the undersigned on a Complaint of Discrimination filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended (“Mine Act”) and 29 C.F.R. 2700.42. Respondent seeks an Order Dismissing the Complaint for untimely filing and lack of jurisdiction. For the reasons set forth below, the undersigned finds that Complainant’s untimely filing of his action with the Commission was justifiable because of ignorance, misunderstanding, or mistake, and because of the absence of any material prejudice to Respondent. The undersigned further finds, however, that such action should be dismissed because Complainant’s new allegations, which raised arguable protected activity for the first time before the Commission, were not investigated by the Secretary under extant controlling precedent set forth in *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991).

### **I. STATEMENT OF THE CASE**

On April 21, 2017, Complainant was terminated from his position at SLC Swanton (“Mine”). Complainant contacted the Mine Safety and Health Administration (“MSHA”) via email on May 22, 2017. In that email, sent at 7:06 a.m., Complainant asserted that he had been terminated because of his age. He further asserted that immediately after he was fired, a physical altercation ensued with Mine owners Dennis and Trampas Demers. As described by Complainant in his email to MSHA:

I was texted to go to main office in Colchester VT for a meeting which I thought was going to be about plant modifications, but it was about terminating me from [sic] being 57 yrs old.

I sat and listened to them for 5 min. I got up said I heard enough and stormed out of there [sic] office when I reached outside door Dennis Demers grabbed me, as Trampas Demers was shouting at me you did this to yourself & I told you dad he is a f\*\*king loser, he is nothing. I went to grab Trampas and Dennis tackled me

on to the asphalt where Trampas had his arm on my throat choking me while I was on my back, and Dennis was kneeling his whole body on my chest area between my head holding my head with his hands, I went to take a swipe at Trampas to get him off my throat so could breath [sic], Dennis took my head and picked it up and slammed it on the asphalt 3 times almost knocked me out. After 5 min or so Dennis let me up I grabbed my glasses from the ground Dennis asked for the keys I gave him the plant keys & company truck keys I asked if he would unlock my truck so I could grab some personal things he did. I cleaned it out while Trampas hollered we were going to give you a severance but your to [sic] f\*\*king stupid.

Email from Michael Deuso, Complainant, to the Albany, New York MSHA Field Office (May 22, 2017, 07:06 EDT). Complainant also provided his phone number to the MSHA Field Office.

At 11:01 a.m. on May 22, 2017, an Albany, New York MSHA Field Office supervisor responded to Complainant's email. He stated that the company's main office where the altercation allegedly occurred is "not under MSHA jurisdiction," and that "age discrimination is not a protected act under the Mine Act." MSHA concluded that "there is nothing that MSHA can do to assist in the matter."

After MSHA declined to investigate any further, Complainant filed an unlawful termination claim with the Office of Administrative Hearings at the Vermont Department of Labor. Complainant's claim was active through at least October 30, 2018 in the Vermont state adjudicative system.<sup>1</sup>

On December 12, 2018, Complainant filed a pro se action with the Commission under section 105(c)(3) of the Mine Act. His Commission filing recounts the incident at Respondent's corporate office. It further alleges for the first time that, during the week of April 17, 2017, the Mine owners came to the mine and "made adjustments on the primary and secondary feeders" to run the system at 100% capacity. Complainant states that he "adjusted the feeder knob" to reduce the speed at which the feeders were operating, against the wishes of Respondent. Complainant further asserts that he adjusted the feeder knob because "the belt amps were starting to run past the amp setting that they had the feeders set at so I tweaked the setting on the cone crusher to maintain the belt amperage." With his Commission filing, Complainant submitted a news article recounting a conveyor belt fire at the Mine in 2015.<sup>2</sup> Complainant claims that he reduced the speed of the feeders out of concern for the possibility of another fire on the belts.

On January 8, 2019, the Respondent filed a Motion to Dismiss ("Motion"). The Motion argues that Complainant's email communication with MSHA on May 22, 2017 constituted a "complaint" within the meaning of section 105(c)(1) of the Mine Act. The Respondent further argues that section 105(c)(3) requires Complainant to file his action with the Commission within

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<sup>1</sup> As of this writing, Complainant has a suit against Respondent active in the United States District Court for the District of Vermont. *Deuso v. Shelburne Limestone Corp.*, No. 2:18-CV-131-CR (D. Vt. Aug. 13, 2018).

<sup>2</sup> Elodie Reed, *SWANTON: Stone elevator catches on fire*, ST. ALBANS MESSENGER (Sep. 22, 2015), <https://www.samessenger.com/swanton-stone-elevator-catches-on-fire/>.

30 days after the Secretary of Labor declines to prosecute his complaint under section 105(c)(2) of the Act. Given that Complainant's filing with the Commission was received on December 17, 2018, approximately 19 months after the Secretary determined that there was nothing that MSHA could do to assist in this matter, the Respondent argues that the action should be dismissed as untimely filed.

On January 31, 2019, the undersigned conducted a conference call with the parties and deferred ruling on Respondent's Motion to Dismiss pending an opportunity for Complainant to show cause why his action should not be dismissed as untimely filed, or dismissed because his allegations were not investigated by the Secretary under Commission precedent set forth in *Hatfield*, 13 FMSHRC at 546. On February 6, 2019, the undersigned issued such Order to Show Cause.

On February 15, 2019, Complainant submitted his Response to the Order to Show Cause, recounting the circumstances surrounding his termination and quoting from Chapter 2 of MSHA's Special Investigations Handbook,<sup>3</sup> which outlines the procedures for investigating discrimination complaints. Complainant avers that MSHA's Albany Field Office Supervisor did not follow MSHA procedures regarding investigation of discrimination complaints, and "if you decide to allow an investigation you will find multiply [sic] violations of the Section 105(c) of the miners act [sic]. I sincerely hope you decide to allow an investigation into this case so future miners will have a safer place to work." Response at 3.

On February 27, 2019, Respondent submitted its Reply to Complainant's Response ("Reply Memorandum"). Respondent argues that Vermont state investigators found insufficient evidence to prove age discrimination and that neither age discrimination nor acts that occur at the Mine's corporate headquarters fall under MSHA jurisdiction. Further, Respondent argues that Complainant was terminated for insubordination after his failure to comply with the operator's directives to refrain from adjusting the dial settings on the belt feeders. Finally, Respondent argues that the Complainant's active engagement in the state law proceedings indicates that he is sophisticated enough to understand his legal rights, and that he should not be excused from filing his section 105(c)(3) action with the Commission approximately 19 months after MSHA informed him that it was declining to take any action on his behalf.

## II. LEGAL PRINCIPLES AND ANALYSIS

In cases involving a pro se litigant, the Commission has stated that "motions to dismiss for failure to state a claim should rarely be granted. Instead, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996), citing *Heckler v. Campbell*, 461 U.S. 458, 470-73 (1983) (Brennan, J., concurring). The filings of a pro se litigant are to be construed liberally. *Marin v. Asarco, Inc.*, 13 FMSHRC 1269, 1273 (Aug. 1992), citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

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<sup>3</sup> U.S. Dep't of Labor, Handbook Number PH05-I-4, Special Investigations Procedures (2005).

Section 105(c)(1) of the Mine Act provides, in pertinent part, that:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(2) of the Mine Act provides, in pertinent part, that:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . .

Section 105(c)(3) of the Mine Act provides, in pertinent part, that:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1) . . . .

Under section 105(c)(3) of the Mine Act, Complainant had 30 days to file his section 105(c)(3) action with the Commission after receipt of MSHA's May 22, 2107 email communication advising him that there was nothing that MSHA could do on his behalf. As noted, Complainant filed with the Commission almost 19 months later. The Commission has held, however, that a claim may be considered despite untimely filing due to "justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996), citing *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-13 (Jan. 1984); *Farmer v. Island Creek Coal Co.*, 13 FMSHRC

1226, 1230-31 (Aug. 1991).<sup>4</sup> In *Perry*, the Commission noted that “[even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal.” See *Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 9 FMSHRC 905, 908 (June 1986).” The Commission concluded that “[i]n general, “timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.” See *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984) aff’d mem., 750 F.2d 1093 (D.C. Cir. 1984).

Although this case arises under section 105(c)(3), the undersigned finds that Commission precedent addressing the Mine Act’s legislative history regarding the filing time limit under section 105(c)(2) is instructive here. The Commission has found that the 60-day filing period for discrimination claims is not a jurisdictional bar and that timeliness questions must be examined on a case-by-case basis. *Hollis*, 6 FMSHRC at 24, aff’d mem., 750 F.2d 1093 (D.C. Cir. 1984). The relevant legislative history of the Mine Act supports this case-by-case approach when stating:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner

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<sup>4</sup> In *Perry*, complainant Perry filed his discrimination complaint with MSHA pursuant to section 105(c) on September 14, 1995. On November 6, 1995, MSHA notified Perry and Phelps Dodge after investigation that it had concluded that a violation of section 105(c) had not occurred. Perry filed his section 105(c)(3) action with the Commission on November 17, 1996. A Commission Administrative Law Judge issued an Order dated April 26, 1996, dismissing Perry’s complaint for failure to state a claim upon which relief may be granted. The Commission vacated the judge’s Order. Emphasizing the complainant’s pro se status, the Commission found that Perry had met his burden of alleging discrimination actionable under Section 105(c), and remanded the case for further evidentiary proceedings and a determination of whether the facts warranted a waiver of the time requirements for filing a complaint.

On remand, a different Commission Administrative Law Judge found that Perry filed his discrimination complaint 223 days after he was discharged and 38 days after the issuance of an arbitration decision upholding his discharge. Considering Perry’s pro se status, his hearing testimony, and the absence of any allegation of discrimination throughout the Phelps Dodge appeal process, the judge found that Perry formed the belief that he was discharged for having a lost-time accident and raising a related safety complaint only after he had lost in arbitration. Accordingly, she found that Perry’s filing 163 days in excess of the 60-day time limit set forth in section 105(c) was excusable and without prejudice to Phelps Dodge, and concluded that Perry timely filed his complaint within 60 days of exhausting Phelps Dodge’s appeal process. *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1664, 1665 n.3 (Oct. 1997) (ALJ).

fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978); *see also Herman v. IMCO Services*, 4 FMSHRC 2135, 2138 (Dec. 1982).

Although Complainant's section 105(c)(3) action was filed nearly 19 months after Complainant was notified that MSHA could do nothing on his behalf, the Commission and its judges have waived the untimely filing of a section 105(c) complaint on numerous occasions, even when the delay in filing was extensive, particularly where there is no showing of prejudice to respondent. *See, e.g., 4-A Coal Co.*, 9 FMSHRC at 908 (reversing judge's dismissal of section 105(c)(2) complaint filed by the Secretary two years after the incident where the respondent did not demonstrate prejudice due to the delay); *cf., Keim v. Cordero Mining LLC*, 36 FMSHRC 963 (April 2014) (ALJ) (excusing the untimeliness of pro se section complaint filed with MSHA, but dismissing timely filed section 105(c)(3) action for failure to establish any genuine issue of material fact that adverse discipline was motivated, at least in part, by any protected activity, or that respondent harbored any animus toward such activity); *Jack v. Mid-Continent Resources, Inc.*, 6 FMSHRC 1059, 1061 (April 1984) (ALJ) (excusing the untimeliness of pro se complaint filed more than nine months after discharge where complainant misunderstood his rights under the Act and was confused about the proper manner in which to proceed, and respondent did not demonstrate prejudice due to the delay, but dismissing section 105(c)(3) action because discharge was not motivated in any part by protected activity).

In this case, it appears that Complainant misunderstood or was ignorant of the rights he had under the Mine Act to file an action on his own behalf after MSHA declined to further investigate the matter. When the Secretary declines to bring a discrimination case before the Commission, the Secretary typically provides an insufficient evidence letter to the complainant advising of the Secretary's decision and the right to file a discrimination action under section 105(c)(3) with the Commission. *See, e.g., Farmer v. Spartan Mining Co., LLC*, 389 FMSHRC 1301, 1303 (June 2017) (ALJ). In this case, the email sent by MSHA to the Complainant makes no reference to his section 105(c)(3) right to file an action with the Commission. In the undersigned's view, it was reasonable for Complainant to conclude that he had no remedy under the Mine Act based on statements made by MSHA in their initial intake of his Complaint. The Albany MSHA Field Office supervisor informed Complainant that there was nothing that MSHA could do to assist in this matter. Complainant may have mistakenly inferred from this statement that he had no additional rights under the Mine Act. Considering the totality of circumstances, including Complainant's pro se status and the lack of any notification from MSHA about the Complainant's right to pursue an action under section 105(c)(3) with the Commission, the undersigned concludes there were justifiable circumstances that excuse the untimely filing of his section 105(c)(3) action with the Commission.

Additionally, the Respondent failed to demonstrate material prejudice should the undersigned excuse the Complainant's untimeliness. In both its motion to dismiss and its Reply to the Order to Show Cause, Respondent fails to articulate why, much less demonstrate how, its legal interests would be prejudiced by Complainant's delay in filing with the Commission.

Although Respondent cites *Perry* to support the proposition that the 19-month delay is too long to qualify as “excusable neglect,” Respondent does not address any of the cases or the legislative history cited above, which favor processing a claim despite untimely filing where no prejudice has been shown. Nor does Respondent’s Reply Memorandum address the other circumstances outlined in *Perry* that might give rise to a waiver of untimely filing, such as ignorance or mistake. Additionally, as noted, Respondent does not offer any reason why its legal interests would be adversely affected by waiving the untimely filing. Although the pro se Complainant was dilatory in pursuing his legal action under section 105(c)(3), Complainant contested his discharge with the Vermont Department of Labor and the Vermont judicial system shortly after contacting MSHA. As the parties’ filings indicate, the Respondent has been on notice of Complainant’s claims and has vigorously defended the validity of Complainant’s discharge since Complainant initiated legal actions against Respondent. Furthermore, there has been no showing by Respondent that essential witnesses are no longer available or that essential evidence no longer exists. Therefore, the undersigned concludes that the Respondent has not demonstrated material prejudice caused by waiving the untimely filing of the section 105(c)(3) action that Complainant filed with the Commission.

Nevertheless, the undersigned concludes that Complainant’s section 105(c)(3) action should be dismissed under extant Commission precedent set forth in *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991). In *Hatfield*, the complainant sought to amend his complaint under section 105(c)(3) after a Commission judge dismissed his initial complaint for failure to allege any protected activity. The judge denied the respondent’s motion to dismiss the amended complaint. The Commission reversed and remanded on interlocutory review, holding that the complainant could not amend his complaint to include allegations that the Secretary had not previously investigated. The Commission reasoned that section 105(c)(2) gave the Secretary the prerogative to investigate violations of section 105(c), not the Commission. The Commission concluded:

The written discrimination complaint filed by Hatfield with MSHA is general in nature and alleges no specific protected activities. The present record contains no indication that the matters alleged in the amended complaint were part of the case reported to and investigated by MSHA. Nor is there evidence in the record that the Secretary's determination that the Act had not been violated was based on matters contained in the amended complaint. If the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

13 FMSHRC at 546.

The Mine Act provides that an aggrieved miner must file a “complaint with the Secretary” to commence the investigatory process under section 105(c)(2). The initial complaint must contain some allegations of protected activity that the Secretary can investigate. If the Complainant does not allege protected activity in its initial communication with MSHA, a complainant cannot subsequently amend his pleading before the Commission to allege new protected activity that was not investigated by MSHA. *Hatfield*, 13 FMSHRC at 545.



*Hatfield* is controlling here. Complainant's initial complaint filed with MSHA does not appear to allege any protected activity. Complainant's May 22, 2017 email communication with MSHA makes no reference to the alleged belt feeder incident. The closest that Complainant comes to describing the alleged belt feeder incident in his initial communication with MSHA is his general statement that he was called into Respondent's offices to discuss "plant modifications." There is no reference to health or safety concerns. Even given the liberal construction that the Commission accords pro se pleadings, Complainant's email is simply too indefinite to satisfy *Hatfield*.

By comparison, in *DeRossett v. Martin County Coal Corp.*, 15 FMSHRC 883 (May 1993) (ALJ), the judge found that complainant had apparently complied with *Hatfield*, but dismissed the complaint as untimely filed. *Id.* at 885 and n.2. In *DeRossett*, complainant's initial complaint to MSHA stated:

I was discharged by Martin County Coal Corp., MTR Surface Mine No. 1, in November 1989, for complaining about safety hazards. I am requesting reinstatement to my original job, receive backpay plus interest, have all benefits reinstated and to have all records pertaining to the discharge removed from my personnel file.

*Id.* at 884. The judge found that complainant submitted a supplemental statement to MSHA detailing allegations of transfer to the evening shift and efforts to seek reinstatement after layoff. Accordingly, the judge found it apparent that complainant had complied with the administrative prerequisites set forth in *Hatfield*. *Id.* at 885 n.2. Complainant sought to file an amended complaint with the Commission to include additional violations of section 105(c)(1). Assuming arguendo that DeRossett's complaint to MSHA incorporated the allegations of discrimination contained in the amended complaint filed with the Commission,<sup>5</sup> and even assuming that such allegations were investigated by MSHA, the judge concluded that the complaint was filed untimely and that the untimely filing could not be excused. *Id.* at 885. More specifically, the judge reasonably inferred, under the totality of circumstances, that DeRossett received sufficient information during his period of employment with respondent from which he knew, or should have known, of his right to file complaints with MSHA under Section 105(c) of the Act for retaliation against him for making safety complaints. *Id.* at 887.

By contrast, in this case, Complainant did not provide any additional explanation to MSHA about what "plant modifications" meant in his initial email to MSHA. He simply alleges that Respondent unlawfully discharged him due to his age and thereafter physically assaulted

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<sup>5</sup> Specifically, the amended complaint filed with this Commission alleged the following two allegations: 1) complainant made numerous complaints to supervisory personnel about unsafe working conditions, which complaints were a substantial factor in motivating respondent to move complainant to second shift during a reduction in force, despite the retention on the first shift of a position that complainant was qualified and entitled to fill; and 2) complainant sought reinstatement to his former position on numerous occasions following his discharge, but respondent refused to rehire him, despite the recall of less senior individuals following the reduction in force, because of complainant's safety complaints.

him at company headquarters.<sup>6</sup> Also, there is no evidence in the record that MSHA’s determination that there was nothing it could do—i.e., there was insufficient evidence that the Act had been violated in customary parlance—was based on matters contained in the new allegations filed under section 105(c)(3).

On the contrary, Complainant’s section 105(c)(3) action filed with the Commission on December 13, 2018 sets forth the alleged belt feeder incident for the first time. Under *Hatfield*, the December 13, 2018 filing does not cure the deficiency of the earlier filing because MSHA’s insufficient evidence determination was based upon an investigation that did not include consideration of the matters contained in the section 105(c)(3) filing.<sup>7</sup> Under section 105(c)(2),

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<sup>6</sup> While alleged age discrimination and physical assault are serious matters, the Mine Act is not the remedy for every workplace dispute simply because it occurs in or around a mine. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (“[T]he Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator’s employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.”) (internal citations omitted). Although the Commission has never addressed the issue to the undersigned’s knowledge, it is conceivable that under the particular facts and circumstances of a given case, reporting workplace violence or abuse because of protected activity or because it implicates concerns for safe performance of work tasks could rise to the level of protected activity under section 105(c) of the Mine Act. *Cf. Harris v. Duane Thomas Marine Contr., LLC*, No. 2:13-cv-00076-SPC-DNF (M.D. Fla. Feb. 5, 2013) (the Secretary brought a complaint under section 11(c) of the OSH Act of 1970 alleging that internal complaints to owner and/or external complaints to OSHA concerning workplace violence and verbal abuse constitute protected activity related to the OSH Act). *See Keim v. Cordero Mining LLC*, 36 FMSHRC at 972 n. 5. However, the Secretary’s 11(c) theory in *Harris* was never tested by dispositive motion before the case settled in 2014, and there is a clear distinction between reporting workplace violence motivated by alleged protected activity or which implicates concern for the safe performance of work tasks, and engaging in a physical altercation with mine management in reaction to being terminated. In either instance, it is incumbent on the Complainant, pursuant to *Hatfield*, to provide sufficient information to enable MSHA to initiate an investigation into the matter.

<sup>7</sup> As recounted in the statement of facts, Complainant did describe the altercation in his email to MSHA. However, Complainant merely told MSHA that he initially believed the meeting was going to be about “plant modifications,” which is not sufficiently descriptive of any protected activity or any nexus between the workplace altercation and protected activity to compel MSHA to investigate. Furthermore, the Supreme Court of Vermont, when hearing Complainant’s state law wrongful termination claim, made no reference to a physical fight following Complainant’s realization that he was to be terminated. *See Deuso v. Vermont Department of Labor*, No. 2017-425, 2018 WL 2100366 (Vt. May 4, 2018) (unpub. mem.), which states:

Before the president or vice president had the opportunity to raise their specific concerns, claimant asked if the meeting was about the quarry or about him. When

(continued...)

the Secretary is entitled to “cause such investigation to be made as he deems appropriate.” Here, the Secretary’s designee apparently deemed no investigation appropriate other than an initial reading of Complainant’s May 22, 2017 email. Consequently, despite the liberal manner in which the Commission construes pro se complaints, under the Commission’s precedent in *Hatfield*, Complainant’s December 13, 2018 filing is deficient as a matter of law and must be dismissed.

Nevertheless, the undersigned is compelled to comment on the cursory nature of MSHA’s investigation of this matter. Complainant contacted the MSHA Albany Field Office supervisor at 7:06 a.m. on May 22, 2017. He informed MSHA that he had been terminated from his position at a mine for allegedly improper reasons and that a physical altercation occurred between Complainant and owners of Respondent immediately after he was fired.<sup>8</sup> He also provided his phone number. One brief follow-up phone conversation between MSHA and Complainant might have uncovered the belt feeder incident, which could have prompted an investigation into whether the Complaint appeared to have merit. Such an investigation would have been timely under the Mine Act and would have preserved Complainant’s ability to bring his allegations under section 105(c)(3), if the Secretary determined, after investigation, that he would not prosecute the Complaint on Complainant’s behalf.

Furthermore, in subsequent proceedings brought before the Vermont Department of Labor and this Commission, the Respondent acknowledged that Complainant was terminated for refusing to obey an order to keep the belt feeder running at full capacity.

[Complainant] was specifically instructed not to adjust any of the settings and if any issues arose or if he felt needed [sic] to reset, he was to contact either Dennis Demers or Trampas Demers before making any adjustments. There is no question that he disobeyed and disregarded that direct order. That is the reason he was terminated.

Reply Memorandum at 2. If Complainant reasonably believed that the operator’s order was unsafe or hazardous, firing him for refusing to follow that order arguably violates section 105(c) of the Mine Act. *See Secretary of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1071 (July 1986) (“A miner has the right under section 105(c) of the Mine Act

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<sup>7</sup> (...continued)

told that the meeting was about him, claimant ‘jumped to the conclusion he was being fired and stormed out of the meeting.’ He used profanity on the way out of the building.

*Id.* at \*1. Taken together, the undersigned concludes that Complainant’s description of the alleged termination to MSHA was insufficient to plead protected activity as articulated in *Hatfield*.

<sup>8</sup> The MSHA Field Office’s response to the Complainant’s initial filing states, in part, that Respondent’s main office does not fall under MSHA jurisdiction. It would appear to be wholly inconsistent with the purposes of section 105(c)(1) if an operator could avoid MSHA jurisdiction simply by bringing miners to the operator’s corporate offices before retaliating against them because of the exercise of any alleged protected rights at the mine site.

to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition.”), citing *Miller v. Federal Mine Safety and Health Review Comm’n*, 687 F.2d 194, 195 (7th Cir. 1982); *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

In short, a more thorough investigation by MSHA likely would have shed light on the validity of pro se Complainant Deuso’s allegations before the Commission. Instead, MSHA summarily dismissed the matter less than four hours after it was initially brought to the Albany Field Office’s attention, resulting in dismissal of whatever potential claims to relief Complainant might have had after full investigation by MSHA under extant Commission precedent set forth in *Hatfield*.

### III. ORDER

For the foregoing reasons, it is **ORDERED** that the section 105(c)(3) Complaint filed on December 13, 2018, be **DISMISSED**.

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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