FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 2 9 2014

UNITED MINE WORKERS OF AMERICA (UMWA), on behalf of MARK A. FRANKS	:	
v.	:	PENN 2012-250-D
EMERALD COAL RESOURCES, LP	:	
UNITED MINE WORKERS OF AMERICA (UMWA), on behalf of RONALD M. HOY	:	
v.	:	PENN 2012-251-D
EMERALD COAL RESOURCES, LP	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

These proceedings are before the Commission based on complaints of discrimination filed by the United Mine Workers of America ("UMWA") on behalf of Mark A. Franks and Ronald M. Hoy pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act").

On June 3, 2013, an Administrative Law Judge issued a decision concluding that Franks and Hoy had demonstrated by a preponderance of the evidence that they were unlawfully discriminated against by Emerald Coal Resources, LP as a result of their participation in activities protected by section 105(c)(1) of the Mine Act.[1] 35 FMSHRC 1696 (June 2013)

[1] Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this [Act].

(ALJ).[2] The Judge further ordered Emerald to pay Mark Franks and Ronald Hoy back pay in the amounts specified in her order. *Id.* at 1707. Emerald filed a petition for discretionary review of the Judge's decision, which the Commission granted.

As set forth below, a majority of Commissioners affirms the Judge's decision that violations of section 105(c)(1) occurred. Commissioners Young and Cohen would affirm the decision based on the support of substantial evidence in the record. Chairman Jordan and Commissioner Nakamura would affirm the decision in result on the basis that the evidence supports a finding of interference with the miners' protected rights under the Act. Commissioner Althen concludes that the operator did not violate section 105(c)(1).

Opinion of Commissioners Young and Cohen, affirming the Judge's decision:

On review, Emerald argues that the Judge's decision contains errors of fact and law. Emerald's arguments primarily fall into two distinct categories. First, Emerald contends that the Judge erred in concluding that the activities of Franks and Hoy, taken as a whole, were protected by the Mine Act. Second, Emerald alleges that the Judge erred in determining that its asserted business reason was pretextual and not legitimate.

In response, Franks and Hoy contend that the Judge's decision was correct and that her findings are supported by substantial evidence in the record. For the reasons that follow, we agree with the complainants and would affirm the decision of the Judge.

I.

Factual and Procedural Background

A. Franks and Hoy complained of unsafe practices at the mine to their safety committeeman.

This decision concerns activities at Emerald's Mine No. 1 from July 2011 through November 2011. Mine No. 1 is an underground coal mine located in Greene County, Pennsylvania. Jt. Stip. 1. During this period, Franks and Hoy were each employed as beltmen at the mine. Jt. Stips. 3-7.

On two separate occasions in August 2011, Franks and Hoy complained of unsafe practices at the mine to David Moore, a representative of the UMWA safety committee. Tr. 24-25, 53, 55-56. Specifically, on or around August 17, 2011, and on or around August 29, 2011, the miners complained that they suspected that one or more firebosses had failed to walk the length of the beltline while they were performing a preshift examination. Tr. 24-25, 53, 55-56.

[2] On June 6, 2013, the Judge issued an amended decision to correct a clerical error.

Hoy testified that he complained about an examination conducted on July 15, 2011. Tr. 35; C. Ex. 1. Franks testified that he complained about an examination conducted on July 27, 2011. Tr. 61. Franks also testified that he identified a specific fireboss to Moore. Tr. 47, 49. The Judge concluded that Franks and Hoy testified credibly. 35 FMSHRC at 1699.

B. The MSHA Investigation

On or about September 22, 2011, an anonymous complaint was filed with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 103(g) of the Mine Act.[3] Jt. Stip. 12. The complaint contained six allegations, one of which was an allegation that firebosses were not conducting adequate inspections of the beltline.[4] 35 FMSHRC at 1697-98; Jt. Ex. 1. Inspectors from MSHA investigated the allegations in the complaint. In the process they took statements from approximately 34 miners and supervisory personnel, including Franks and Hoy. Jt. Stips. 13-15, 29, 31-33, 38.

On September 28, 2011, MSHA inspector Thomas Bochna arrived at the mine to continue the investigation into the section 103(g) complaint. Jt. Stip. 13. Inspector Bochna approached Franks and asked him if he had ever observed a fireboss "[fail to] perform[] proper preshift conveyor belt examinations." Jt. Stip. 14. Franks responded that he was aware of an incident, the fireboss responsible, and the date on which it occurred. *Id.*

On that same shift, Franks was called out of the mine and into a meeting which included: MSHA inspectors Bochna and David Severini; Emerald compliance manager, William Schifko; Emerald management trainee, Adam Strimer; the local UMWA president, Anthony Swetz; and a miner's representative, Bruce Plaski. Jt. Stips. 15, 16. At the meeting, inspector Severini informed the group that Franks had spoken to inspector Bochna earlier that day, and that Franks was aware of a specific incident of a failure to perform an adequate examination by a fireboss. Jt. Stips. 17, 19, 20. Franks refused his request to name the fireboss or the date on which the allegedly inadequate examination occurred. Jt. Stip. 22.

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[3] Section 103(g)(1) provides a miner the "right to obtain an immediate inspection by giving notice to the Secretary" if he "has reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists." 30 U.S.C. § 813(g)(1). Section 103(g)(1) further provides that "[t]he name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification."

[4] The Complaint specifically alleged: "(1) Emerald Mine not being inspected properly by State or MSHA; (2) Beltlines look like a powder keg; (3) C3 longwall belt, E-district belts very dirty with coal; (4) North Main belt is only 12 blocks long and fireboss wrote up 40 bad rollers and company did nothing; (5) Belt firebosses ride 4 wheelers and only stop at mandoors to check belts; (6) Slope belt dirty." Jt. Ex. 1.

Later that day, Franks was called back into a meeting with the MSHA inspectors, the UMWA local president, Emerald management, and a miner's representative. Jt. Stip. 24. Inspector Severini again asked Franks to name the fireboss; Franks again declined to disclose any details. *Id.*

On September 29, 2011, Franks met with inspector Bochna, compliance manager Schifko, and local president Swetz. Jt. Stip. 26, 27. Franks stated that he had written the name of the fireboss in his personal calendar, along with the date of the unperformed exam. Jt. Stip. 27. Franks stated that he would not produce these written records; he did not consider it "worth it" for him to do so. *Id.*

On October 4, 2011, Hoy was called into Schifko's office for a meeting. Jt. Stip. 29. The meeting included MSHA inspectors Severini and Anthony Setaro, Schifko, Strimer, UMWA member Donald Cogar, and UMWA committeeman Douglas Scott. Jt. Stip. 33. Hoy declined a request to provide the name of the fireboss who failed to conduct a proper preshift conveyor belt examination. Jt. Stip. 34. Hoy was asked to name the foreman who he had heard complaining about inadequate conveyor belt preshift examinations. Jt. Stip. 35. Hoy also refused to disclose this information. *Id.* Hoy was also asked to provide written records, contained in his personal calendar of the names of firebosses who had failed to conduct preshift conveyor belt examinations and the corresponding dates. Jt. Stip. 36. Hoy declined to disclose this information as well. *Id.*

On October 4, 2011, MSHA concluded its investigation into the allegations in the anonymous complaint. Jt. Stip. 37; Jt. Ex. 2. MSHA issued seven citations to Emerald, but did not find evidence that firebosses had failed to perform adequate examinations of the belt line. Jt. Stip. 38; Jt. Ex. 2. The citations were issued in response to three of the allegations contained in the section 103(g) complaint, specifically: "(2) Beltlines look like a powder kegs, (3) C3 longwall belt, E-district belts very dirty with coal," and "(6) Slope belt dirty." Jt. Ex. 2.

C. Emerald's Investigation

After MSHA completed its investigation, Emerald began its own investigation of the allegations that were made in the anonymous complaint. Jt. Stip. 39.

On October 20, 2011, Emerald human resources supervisor Christine Hayhurst, UMWA local president Swetz, and Committeeman Scott met with Franks and then with Hoy. Jt. Stips. 40; 42. The miners refused to provide any further details or produce written records. Jt. Stips. 40-42. On October 24, 2011, Franks met with Hayhurst, Schifko and Swetz and declined to provide any further information. Jt. Stip. 43.

On November 9, 2011, Franks and Hoy each met with Emerald's safety manager, Joseph Pervola, Hayhurst, and committeeman David Baer. Jt. Stips. 45, 48. Again, Franks and Hoy both declined to name a fireboss or give the date of the unperformed examination. Jt. Stips. 45,

48. Franks and Hoy were subsequently suspended from work without pay for seven days. Jt. Stips. 46, 49. Their suspension letters state that the suspensions were the result of a "failure to provide information [] concerning serious allegations of safety violations." Jt. Stip. 46; Jt. Exs. 3, 4.

Franks and Hoy contend that they refused to provide any information during the investigations for essentially two reasons: (1) they had previously provided the information to David Moore, the UMWA safety representative, pursuant to mine policy and (2) they believe that because MSHA was conducting an investigation pursuant to section 103(g), they were not required to disclose the names of miners to management. Tr. 18-22, 32-33, 38-39, 47, 50, 58.

D. Franks and Hoy's Complaint of Discrimination

On November 10, 2011, Franks and Hoy filed separate discrimination complaints with MSHA alleging that they had been "targeted by" Emerald and "singled out" "for participating and cooperating in a section 103(g) complaint investigation conducted by MSHA." 35 FMSHRC at 1697; Compl. of Discrim., Ex. A at 2, 4. MSHA investigated the allegations and concluded that the "facts disclosed during the investigation do not constitute a violation of Section 105(c)." Compl. of Discrim., Ex. B.

On April 23, 2012, pursuant to section 105(c)(3) of the Mine Act, the complainants, through the UMWA, filed a complaint of discrimination with the Commission alleging that Emerald interfered with their right to provide information to MSHA during the course of its investigation and discriminated against them for their exercise of that right.[5] Compl. of Discrim. at 8. The miners sought lost wages including regular, overtime, and holiday pay, and to have any reference to this matter removed from their personnel files. *Id.* at 10.

E. The Judge's Decision

On June 6, 2013, an Administrative Law Judge issued a decision concluding that Franks and Hoy had demonstrated a prima facie case of discrimination, which Emerald failed to rebut with a credible business reason. 35 FMSHRC at 1703-07. The Judge determined that Franks and Hoy engaged in protected activities when: (1) they made multiple safety complaints to a member of the safety committee; (2) they provided information to MSHA during the course of its investigation; and (3) they provided information to Emerald during the operator's follow-up investigation regarding the allegations in the section 103(g) complaint. *Id.* at 1703. The Judge held that the seven-day suspension was an adverse action. *Id.*

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[5] Section 105(c)(3) permits a miner to file a discrimination claim on his own once the Secretary of Labor decides that he will not pursue a case on the miner's behalf. *See* 30 U.S.C. § 815(c)(3).

Furthermore, the Judge concluded that the evidence demonstrated that Franks and Hoy were treated with hostility by Emerald as a result of their protected activities. *Id.* at 1704. In particular, Emerald management personnel repeatedly called both miners into the office and demanded that they name a fireboss, even though Franks and Hoy previously provided identifying information to a representative of the UMWA safety committee, pursuant to accepted mine policy. *Id.* The Judge concluded that because Moore investigated a complaint about a fireboss, and informed Schifko of the exact shift he had investigated, Emerald management was aware of the identity of an accused fireboss. *Id.* Despite Moore's involvement, the Judge found that Emerald never asked Moore for the name of a fireboss during its investigations. *Id.* In addition, the Judge noted that Hoy stated that a co-worker had warned him that he "had a big target on [his] back for talking to the inspectors," demonstrating hostility. *Id* (citing Tr. 33). The Judge stated that "[t]he miners utilized the avenue open to them, making a complaint through a safety representative, to avoid the very thing that happened to them, constant harassment and finally retaliation for expressing concern over what they believed to be a fireboss' failure to carry out his duties." *Id.* at 1704-05.

The Judge rejected Emerald's argument that it suspended the miners because they refused to name a fireboss responsible for an inadequate examination, stating that Emerald had presented no evidence of a policy that required personnel to report unsafe conditions or practices directly to mine management. *Id.* at 1705-06. Instead, it was accepted practice at the mine for miners to report safety hazards either to representatives of the union safety committee or to mine management. *Id.* at 1706. The Judge additionally found that compliance manager Schifko was aware of the identity of the fireboss who allegedly failed to perform a preshift examination. *Id.*

The Judge concluded that "[b]ased upon all of these facts, I cannot agree that Emerald has demonstrated a legitimate business purpose for the discipline." *Id.* Instead, the Judge determined that Emerald's stated business purpose was a pretext to punish Franks and Hoy for their protected activities. *Id.*

II.

Disposition

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, or the representative of the miners at the coal

> or other mine of an alleged danger or safety or health violation in a coal or other mine, or. . . because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. 815(c)(1).

A complainant alleging discrimination prohibited by the Mine Act establishes a prima facie case by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity, that there was an adverse action, and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may 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. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

A. Prima Facie Case

1. Protected Activity

a. Complaints to Moore and Participation in Investigations

The Judge found that Franks and Hoy each complained to David Moore, a representative of the UMWA safety committee, about inadequate preshift examinations of the beltline. 35 FMSHRC at 1699-1700. Complaints of an alleged safety or health violation to "the operator or the operator's agent, *or the representative of the miners* . . ." are protected by section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1) (emphasis added). We conclude that substantial evidence in the record supports the Judge's finding that Franks and Hoy engaged in protected activities.[6] Both Franks and Hoy testified that they met with Moore to complain about firebosses on

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[6] The Commission applies the substantial evidence test when reviewing a Judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

August 17, 2011, and August 29, 2011. Tr. 24-25, 53, 55-56. David Baer, a miner, corroborated their testimony, testifying that he observed both Franks and Hoy meet with Moore and overheard their conversations on both occasions. Tr. 63-65.

The Judge noted that Moore's testimony conflicted with Franks', Hoy's, and Baer's recollection. 35 FMSHRC at 1699. She found Moore's testimony to be "opaque and evasive." *Id.* Instead, the Judge credited the testimony of Franks and Hoy, corroborated by Baer. *Id.* She concluded that even if Franks and Hoy did not remember the exact date of the meetings correctly, it did not change her assessment. *Id.* at 1700. It is well settled that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Consol. Coal Co.*, 35 FMSHRC 2326, 2329 (Aug. 2013) (citations omitted).

Emerald contends that neither Franks nor Hoy provided Moore with enough information to discover the identity of a fireboss who had been responsible for the allegedly inadequate preshift examinations. E. Br. at 18-22. We find this contention to be without merit. In fact, Emerald's argument is directly contradicted by Moore's own testimony. Moore testified, "I knew who the fireboss was [Hoy] was talking about . . . [Hoy] gave a specific date. I knew the date he recalled because I already investigated it, so I knew who he was talking about." Tr. 129. Moore said he investigated the allegation that firebosses were signing the date board without conducting an adequate examination, by checking the date board to see if it had been signed. Tr. 123-25; 30 C.F.R. § 75.360(f).

Having provided the necessary identifying information to Moore, Franks and Hoy declined to restate the substance of their complaints during the course of MSHA's section 103(g) investigation, or during the mine's follow up investigation. However, Franks and Hoy did confirm during those investigations that they had observed inadequate examinations, they knew which fireboss was responsible, and they had reported this information to Moore. Jt. Stips. 14, 20, 22, 24, 26-27, 34, 36, 40, 42-43, 45; Tr. 18-21. The Judge concluded that to the extent that Franks and Hoy participated in these investigations, their activities were protected. 33 FMSHRC at 1703. Section 103(g)(1) specifically provides that the anonymity of the complaining miner and *the miners referred to in the anonymous complaint will be protected.* 30 U.S.C. § 813(g)(1) ("[t]he name of the person giving such notice [to MSHA] and the names of individual miners referred to therein shall not appear in such copy or notification") (emphasis added). Indeed, the statutory right of anonymity in complaints would be illusory, if miners could later be compelled to identify unnamed miners during the investigation of the complaint. Furthermore and most importantly, Franks and Hoy had previously provided the necessary identifying information to Moore, pursuant to mine policy.

b. Emerald's Policy

The Judge found that Emerald had a safety policy that permitted miners to bring safety concerns either to a representative of the UMWA safety committee or to mine management. 35 FMSHRC at 1700-01, 1706. If a miner chose to report a concern to the union, the safety committeeman would then investigate the allegation, and upon finding a valid safety concern, would report the unsafe condition or practice to management. *Id.* at 1701, 1706.

The Judge's finding is supported by substantial evidence in the record. Indeed, the testimony of Emerald's own witnesses demonstrates that the accepted practice at the mine was for miners to bring safety concerns either to their safety committeeman or to mine management. Schifko, the compliance manager, testified that miners "have the right to take [safety complaints] to management or their safety committee." Tr. 84-86. Swetz, the local union president, testified that a miner "can do it either way" and if a safety committeeman finds validity to a complaint "then he has to go to management with it." He stated that "[w]e tell everybody . . . Go to your mine committee. Go to your safety committee. If you are not satisfied with that, you can go to management." Tr. 145, 151.

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Federal Mine Safety and Health Act of 1977,* at 624 (1978).[7] We conclude that the Judge correctly concluded that Franks and Hoy engaged in protected activity.

2. Adverse Action

The Judge found that Franks and Hoy each suffered adverse action in the form of a seven-day suspension as a result of their involvement in the section 103(g) complaint. 35 FMSHRC at 1703. This finding is unchallenged on review.

3. Discriminatory Motive

To establish a prima facie case, Franks and Hoy must show a connection between the protected activity and the adverse action. Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391,

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[7] Under the previous Coal Act, the D.C. Circuit held that the reach of "protected activity" extends to even bad faith or frivolous complaints. *Munsey v. FMSHRC,* 595 F.2d 735, 742-43 (D.C. Cir. 1978).

1398-99 (June 1984). The Commission has determined that hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment may all be considered in determining the existence of a connection between the protected activity and the adverse action. *Chacon,* 3 FMSHRC at 2510-11.

The Judge concluded that Franks and Hoy triggered hostility as a result of their protected activity. 35 FMSHRC at 1704. She noted that mine management repeatedly called Franks and Hoy into the mine office, and demanded that they name the fireboss. *Id.* The Judge concluded that because Emerald's management was already aware of the identity of the accused fireboss(es), and because Moore, who had investigated the complaints, was not questioned as part of Emerald's investigation, "it is reasonable to infer that Emerald's continuing questioning and harassment of Franks and Hoy amounted to hostility toward them for making accusations against a fireboss."[8] *Id.*

Emerald maintains that the factual findings the Judge relied on to support her determination that Emerald had a discriminatory motive are not supported by substantial evidence in the record. E. Reply Br. at 6-11. More specifically, Emerald contends that the Judge erred in stating that Schifko was aware of the identity of the fireboss(es) who were accused of performing inadequate examinations.[9]

Substantial evidence in the record supports the Judge's conclusion that Schifko knew which firebosses had been accused. Schifko testified that Moore had told him that he had received a complaint about the adequacy of preshift examinations of the beltline. Tr. 95. Schifko also testified that Moore informed him that in response to the complaint he had investigated a specific date and time. Tr. 95-96. Schifko testified that he cross-referenced the examination books, and learned that two firebosses were responsible for the beltline on the date Moore mentioned. Tr. 95-96. Schifko also knew the identity of the fireboss who was alleged not to have properly performed the preshift examination because, as he told Hoy, he had obtained identifying information from Mark Cole, another beltman at the mine. Tr. 22, 81.

Therefore, Emerald management was aware of five critical facts at the time they demanded that Franks and Hoy provide the name of a fireboss: (1) an anonymous section 103(g) complaint had been filed with MSHA regarding examinations of the beltline; (2) an unnamed miner or miners had complained about the preshift examinations of the beltline to Moore; (3)

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[8] While Schifko testified that he did question Moore about the identity of the fireboss, Tr. 94-95, there is no evidence in the record suggesting that Moore was the subject of a pattern of continued questioning, harassment, and threatened disciplinary action.

[9] Emerald also argues that the Judge's finding that Franks and Hoy disclosed the identity of the accused firebosses to Moore is not supported by substantial evidence. We have addressed this argument in our analysis of protected activity and concluded that substantial evidence does indeed support the Judge's finding.

Moore had investigated whether an inadequate examination of the beltline had been performed on a specific date in response to the complaint; (4) the specific date and shift which Moore had investigated; and (5) Franks had spoken with a MSHA inspector and told him that he had information relating to the allegation in the section 103(g) complaint.

Emerald argues that its actions did not demonstrate a hostility toward Franks and Hoy based on the miners' protected activity because the operator may have also had the intent to build a record to substantiate a disciplinary action against an accused fireboss. E. Reply Br. at 7. We find the argument unpersuasive in light of Emerald management's knowledge of the specific facts set forth above and how they were acquired.

Emerald knew everything it needed to know to determine the identity of the allegedly-derelict fireboss(es). Furthermore, it gained some of that knowledge from Moore, a person Franks and Hoy were permitted to use as a conduit for their safety concerns. Mine management also knew that, consistent with practice at the mine, Moore had investigated complaints about a fireboss. Yet the record does not indicate that Emerald put any real pressure on Moore to provide support for a purported disciplinary action against a fireboss.[10]

Thus, Emerald's continued questioning of Franks and Hoy, after the MSHA investigation had been closed, supports the Judge's reasonable inference that Emerald demonstrated hostility toward miners who had complained about preshift examinations of the beltline. While other miners claimed to know the identity of the fireboss(es) at issue, only Franks and Hoy were pressured to cooperate and punished for failing to do so.

B. Emerald's Attempted Rebuttal

The operator may attempt to rebut a prima facie case by showing either (1) that the complainant did not engage in protected activity or (2) that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20.

1. Emerald's Loss of Protection Argument

On review, Emerald argues that the miners' refusal to identify a fireboss or a specific examination during the section 103(g) investigation and Emerald's internal investigation caused Franks and Hoy to lose the protection afforded by section 105(c). Franks' and Hoy's protected activities included the safety complaints made to their committeeman, as well as their

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[10] Additionally, the fact that Mark Cole made a similar complaint and was not punished at all after recanting his complaint would seem to be contrary to the interests of any disciplinary action. If mine management thought that Cole's complaint might be valid, allowing a witness to change his story would be harmful to the operator's investigation, while pressuring a witness to recant and rewarding him for doing so could only serve the interest of burying the issue. 35 FMSHRC at 1706.

participation in MSHA's section 103(g) investigation, and in Emerald's internal investigation into the substance of the anonymously filed complaint. 35 FMSHRC at 1703. Both the MSHA investigation and Emerald's internal investigation were in response to the filing of an anonymous section 103(g) complaint.[11]

Emerald contends that the Judge erred in finding that Franks and Hoy did not lose the protection of the Mine Act, and in holding that the Commission's decision in *Secretary of Labor on behalf of Pack v. Maynard Dredging Co.*, 11 FMSHRC 168, 172-73 (Feb. 1989) was distinguishable. In *Pack*, a mine security guard was discharged after he failed to report an unsafe condition to mine management prior to reporting the condition to MSHA. The Commission affirmed the Judge's decision that Maynard did not violate section 105(c) when it discharged the miner. *Id.* at 173. Pack was fired as a result of his failure to perform his job duties as a security guard, which included reporting unsafe conditions to management. *Id.*

The Judge correctly held *Pack* to be distinguishable. Company policy at Maynard Dredging required miners to report unsafe conditions directly to management. 35 FMSHRC at 1705-1706. Franks and Hoy, however, followed Emerald's accepted policy and reported an unsafe practice to a representative of their safety committee. Hence, Franks and Hoy were correctly found to have engaged in protected activities.[12] [13]

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[11] Commissioner Althen states that "the record does not reflect that the 103(g) complaint itself, including who may have filed it, was raised at any of the meetings . . . ." Slip op. at 43. This is incorrect. The substance of the anonymous complaint was the subject of discussion at each meeting between Emerald management and the miners. *See* Jt. Ex. 1.

[12] We note parenthetically that we find it very troublesome that MSHA and Emerald conducted meetings, both jointly and separately, in which they attempted to force Franks and Hoy to disclose the names of the miners who were the subject of the anonymous complaint. We find it even more troubling that inspector Severini informed Emerald management that Franks was aware of information relating to the unsafe practice that had been reported anonymously to MSHA pursuant to section 103(g). Jt. Stips. 17-20. We believe that by outing Franks as an informant to his employer, inspector Severini actively discouraged the filing of anonymous complaints by miners, irrespective of whether Franks was responsible for the filing of the complaint.

[13] Even our dissenting colleague does not agree with Emerald that Franks and Hoy lost the protection of the Mine Act. Instead, he would conclude that the complainants engaged in both protected and unprotected activities. Slip op. at 41.

2. Emerald's Legitimate Business Purpose Argument[14]

Even if the Commission finds that miners engaged in protected activity, an operator may rebut a prima facie case by proving that the adverse action was in no part motivated by the protected activity. *Robinette*, 3 FMSHRC at 818 n.20. The Commission has enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in questions. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

An asserted reason may be found to be pretextual "where 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). A complainant may establish that an operator's explanation is not credible by demonstrating: (1) that the proffered reason has no basis in fact; (2) that the proffered reason actually did not motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. *Turner*, 33 FMSHRC at 1073 (citations omitted).

The Judge found that Emerald's explanation for the suspensions – that Franks and Hoy were disciplined because of their failure to identify one or more firebosses who they alleged had failed to perform an adequate preshift examination of the beltline – was "without merit." 35 FMSHRC at 1706. The Judge concluded that the proffered reason did not motivate the suspensions, but was instead a pretext to punish the miners for making complaints about a fireboss. *Id.* In this regard, she concluded that it was clear that Emerald had previously permitted miners to report unsafe practices to a representative of their safety committee, and had not previously required the complaining miner to report the information directly to management. *Id.* at 1703, 1706. She concluded that Franks and Hoy not only alerted a representative of the safety committee that there was an issue, but also identified the fireboss.[15] *Id.* at 1706. The safety committee representative, Moore, informed management of the details of his investigation, including the date and shift that he investigated.[16] *Id.* at 1706-07. The Judge also concluded that based on information from Moore and Cole, mine management knew which fireboss was accused

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[14] Our affirming colleagues state that "substantial evidence does not support the Judge's finding that the operator's proffered motive was pretextual." Slip op. at 18. However, they do not identify findings of fact in the Judge's decision that are not supported by the record.

[15] Her finding is supported by substantial evidence in the record. *See* slip op. at 7-8; Tr. 24-25, 47, 53, 55-56, 63-65, 123-24; 129. Moore disputed the testimony of Franks and Hoy that they identified the fireboss to him, but the Judge found him not to be credible because "[h]is answers were opaque and evasive." 35 FMSHRC at 1699.

[16] Her finding is supported by substantial evidence. Slip op. at 10; Tr. 95-96.

of not having made a proper examination.[17] Therefore, the Judge determined that Emerald failed to prove that it had a legitimate business reason to suspend Franks and Hoy.[18] *Id.* at 1707.

Emerald argues, based on Schifko's testimony, that it was justified in its continued interrogation and ultimate suspension of Franks and Hoy because it did not have sufficient knowledge of the identity of any firebosses who allegedly did not properly perform their jobs. E. Br. at 27-29. In particular, Emerald challenges the Judge's conclusion that Schifko had knowledge based on the first interview of Mark Cole. E. Br. at 28. According to Schifko, in Cole's first interview – conducted by MSHA – he had identified a fireboss, but in a subsequent interview – conducted solely by Emerald – Cole had recanted. Tr. 77-78. Schifko said that Cole appeared "very confused and didn't have much understanding what was alleged" in the MSHA interview. Tr. 78. But when he was interviewed without the presence of MSHA, Cole changed his testimony "completely," said that he "wasn't even on that belt line," and "alluded to the fact that he was coerced into backing people up. . . coerced into what he said originally." Tr. 78-79.

Schifko's testimony about what Cole said in the two meetings must be viewed through the lens of his credibility. The Judge rejected Schifko's testimony, finding him "to be a polished but disingenuous witness." 35 FMSHRC at 1700-01. The Judge's characterization is supported by the record. For example, regarding Emerald's policy that a miner may report safety complaints either to management or to the UMWA safety committee, Schifko had to be asked the question five times before he would acknowledge that a miner may report a safety problem to the safety committee rather than to management. Tr. 84-86. Additionally, Schifko testified that when he first heard the dates and shifts of the fireboss runs from Cole, he could not determine the identity of the fireboss because that particular belt is split for purposes of fireboss runs, and Cole did not say whether it was inby or outby of the split. Tr. 81-82. But this testimony was inconsistent with Hoy's testimony (which the Judge found credible) that Schifko acknowledged to him that he knew who the fireboss was based on what Cole had said. Tr. 22. Hence, the Judge was justified in concluding that Schifko was able to determine – from Cole as well as Moore – the identity of firebosses whose work was being questioned.

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[17] This finding is also supported by substantial evidence. Slip op. at 10; Tr. 22, 81, 95-96.

[18] Furthermore, there is no indication in the record that Franks or Hoy had ever received a disciplinary action or had a poor work performance history. *Id.* at 1706.

We conclude that substantial evidence supports the Judge's conclusion that Emerald's asserted business justification was not credible.[19] Franks and Hoy reported unsafe practices to Emerald in a manner that was entirely consistent with the mine's policy and practice. The miners at Emerald were permitted to report unsafe practices to management through an intermediary on the safety committee *or* the miners could choose to report directly to management. Mine management had sufficient information to identify firebosses who had allegedly not properly performed their jobs. Yet, management continued to interrogate Franks and Hoy, and ultimately suspended them. In the context of retaliation cases under the National Labor Relations Act, it is recognized that a company's proffered "legitimate business reason" for the interrogation of an employee is pretextual when the company already knew the answers to the questions it was asking the employee. *United Serv. Auto. Ass'n v. NLRB,* 387 F.3d 908, 916 (D.C. Cir. 2004). Thus, Emerald failed to rebut the complainants' prima facie case by presenting a legitimate and credible business reason.

Emerald also contends that irrespective of mine policy, Franks and Hoy were required to inform management of the details of the complaint that they previously made to their safety committeeman because management had subsequently become aware that they had complained. E. Br. at 17-18. This *ad hoc* revocation of an established policy is evidence that Emerald's asserted rationale is out-of-line with its normal business practices. *See Price,* 12 FMSHRC at 1534. Furthermore, Emerald failed to present any evidence that it had disciplined miners in the

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[19] It is well established that courts must usually rely upon circumstantial evidence and reasonable inferences to establish motivation in discrimination cases. *See Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99-100 (2003) (Utility of circumstantial evidence in discrimination cases has often been acknowledged; such evidence "may [] be more certain, satisfying and persuasive than direct evidence."); *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC,* 31 FMSHRC 1085, 1089 ("The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect.")

Thus, while our concurring and dissenting colleagues would reverse the Judge's conclusion that the operator's purported motivation was pretextual, allegedly due to a lack of substantial evidence, their opinions do not properly address the circumstantial evidence in context. The opinion of Chairman Jordan and Commissioner Nakamura does not analyze the issue. Commissioner Althen acknowledges the role of circumstantial evidence but then discusses the elements of the prima facie case and rebuttal in isolation, without considering the interrelationship of the facts respecting each element. Further, he rejects the Judge's finding that Emerald had knowledge of the identity of the firebosses without considering the information Schifko received. He also fails to consider disparate treatment shown by the lack of pressure put on Moore by Emerald. And he fails to recognize the Judge's credibility determinations, especially with regard to Schifko. These facts justify the Judge's finding of pretext. *See Jim Walter Res. Inc., 28 FMSHRC* 983, 991 n.10 (Dec. 2006) (Absence of direct evidence does not necessarily undercut reasonableness of inferences drawn "when it is difficult or impossible to obtain direct evidence on the fact to be inferred.")

past for reporting an unsafe practice to a safety committeeman and not mine management.[20] *See Bradley*, 4 FMSHRC at 993-94.

Finally, we find it relevant that Emerald's internal investigation concerned the same allegation that was reported anonymously to MSHA and resulted in a MSHA investigation and the questioning of 34 Emerald employees. Because of the overlap of the complaints of Franks and Hoy with the substance of the anonymous section 103(g) complaint, it is impossible to untangle their discipline from the filing of the section 103(g) complaint. For these reasons, we affirm the decision of the Judge that Emerald failed to establish that its asserted business justification was legitimate. Substantial evidence supports the Judge's finding that Emerald's rationale was a pretext. Accordingly, Emerald has not rebutted the complainants' prima facie case of discrimination.[21]

We are cognizant of a mine operator's responsibility to investigate misconduct in a mine. Miners who engage in a pattern of systemic unsafe practices, such as failing to walk the belt during a pre-shift examination, should face discipline. However, this is *not* a case in which the complainants were accused of unsafe behavior or practices; rather, it is a case regarding miners who reported possible misconduct through established channels of communication. As the Judge recognized, reporting possible misconduct to an intermediary allows a miner to make a complaint without fear of harassment or retaliation. 35 FMSHRC at 1704-05. Once that policy is established, a miner should be able to reasonably rely on its protection. To hold otherwise would have the effect of discouraging miners from reporting unsafe practices, to the detriment of the policy goals of the Mine Act.

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[20] Evidence that the operator has discharged employees, in the past, for failing to conduct adequate examinations does not establish that the discipline of Franks and Hoy was consistent with Emerald's policies. Franks and Hoy have not been accused of failing to perform adequate examinations.

[21] Having failed to rebut the prima facie case, an operator may still prevail by establishing an affirmative defense to the allegations. A mine operator may affirmatively defend against a prima facie case 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. *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800. This kind of situation is referred to as a "mixed motive" case. However, on review Emerald did not argue that it took the adverse action because of both protected and unprotected activity, and that the miners' unprotected activity, by itself, was sufficient justification for the adverse action. *See* E. Br. at 23-29. Accordingly, we need not address this issue.

III.

Conclusion

We conclude that the Judge below correctly applied the law to the facts and that her decision is supported by substantial evidence. We would therefore affirm the Judge's decision.[22]

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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[22] The Secretary did not participate in this case either before the Judge or before the Commission. However, after the oral argument, the Secretary, with the Commission's permission, filed an *amicus curiae* brief on the issue of interference with protected rights. Emerald has filed a response brief, and we have considered both briefs. The Secretary argues that Franks and Hoy have asserted colorable claims of interference with protected activity under section 105(c) of the Mine Act, and that these claims should be adjudicated. The Secretary's position is consistent with an argument by the UMWA on behalf of Franks and Hoy. Complainants Br. at 34-35 ("C. Br."); Oral Arg. Tr. 79-80.

We agree with the Secretary and the UMWA that the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula - Robinette* framework. This cause of action has been implicitly recognized by the Commission. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982); *Sec'y on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-8 (Jan. 2005). The interference cause of action is based on the language of section 105(c)(1) of the Mine Act: "No person shall discharge or in any way discriminate against . . . *or otherwise interfere with the exercise of the statutory rights* of any miner . . . . 30 U.S.C. § 815(c)(1) (emphasis added). Moreover section 105(c)(2) grants the right to file a complaint of discrimination with the Secretary to "[a]ny miner . . . who believes that he has been discharged, *interfered with,* or otherwise discriminated against . . . ." 30 U.S.C. § 815(c)(2) (emphasis added).

Although the complaints of Franks and Hoy may be colorable as interference claims, it is not necessary to reach this issue since we find that substantial evidence supports the Judge's determination of discrimination under the *Pasula - Robinette* framework. Moreover, consideration of this case as an interference claim would require the Commission to define the parameters of interference claims, and set forth what is required of a complainant in proving such a claim and what is required of an operator in defending against such a claim. The Judge here acknowledged the interference component of this case, but chose to analyze it within the *Pasula - Robinette* framework. We defer full Commission analysis of interference claims to an occasion when a Judge has actually considered a section 105(c) case as an interference claim.

Separate opinion of Chairman Jordan and Commissioner Nakamura:

I. Introduction

This discrimination proceeding involves two miners who confidentially complained to their elected union safety committeeman about firebosses conducting inadequate preshift examinations. After MSHA initiated an investigation pursuant to a section 103(g) safety complaint, during which the miners' confidentiality was breached, Mark Franks and Ronald Hoy were suspended for failing to divulge the names of the firebosses to mine management.

The Judge upheld the miners' complaints of discrimination under section 105(c)(3) of the Mine Act. 35 FMSHRC 1696 (June 2013) (ALJ). Although we determine that substantial evidence does not support the Judge's finding that the operator's proffered motive was pretextual, we nevertheless affirm the Judge's ruling that Emerald violated section 105(c) of the Mine Act. We do so because we conclude that the interrogations of the miners and the resulting suspensions amount to an unjustified interference with their ability to exercise their statutory rights.

This case requires us to confront the tension that can arise between the need to ensure that miners are not deterred from lodging safety complaints, and the need for mine managers to investigate safety issues at their mines. Although we acknowledge the critical importance of an operator's need to investigate all allegations of unsafe practices at its mine, that need must be balanced against the potential chilling effect such investigation may have on the miners' willingness to make safety complaints in the future. Ironically, if an investigation is conducted under circumstances and in a manner perceived by the miners as coercive, it may in the long-term result in a reduction in safety, because miners will be reluctant to speak up about safety issues.

Investigations in which miners are asked about alleged unsafe activities of their co-workers are especially delicate. Such questioning has the potential to squelch miners' initiative to report such safety problems in the future. Because many miners will be reluctant to criticize the actions of their fellow miners, any investigation with the potential of eliciting such information must be narrowly and carefully conducted, to avoid a chilling effect on safety complaints. The manner in which both MSHA and the operator carried out their investigations in the instant case could not be further from this description. Indeed, we conclude that in light of the particular record in this case, the procedures employed by Emerald to investigate the complaint regarding inadequate belt exams will so significantly deter miners from making any future safety complaints, that the operator cannot rely on Franks and Hoy's failure to publicly identify the belt examiners as justification for its disciplinary action.

II. Factual and Procedural Background

We adopt the "Factual and Procedural Background" portion of the opinion of Commissioners Young and Cohen.

III. Analysis

A. Discrimination claims under the interference clause of section 105(c)(1)

1. Statutory language and Commission case law

Because we are deciding this case under the interference prong of section 105(c), we first set out the law in this area. Section 105(c)(1) of the Mine Act states that "[n]o person shall discharge or in any manner discriminate against . . . *or otherwise interfere with* the exercise of the statutory rights of any miner." 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c) contains additional references to discrimination complaints based on interference with protected rights. For instance, section 105(c)(2) permits the filing of a discrimination complaint by a miner, applicant or representative of miners "who believes that he has been discharged, interfered with, or otherwise discriminated against." 30 U.S.C. § 815(c)(2). That subsection also refers to the Secretary's complaint to the Commission, which may allege "discrimination or interference." Section 105(c)(3) also permits an individual to file a complaint charging "discrimination or interference" in violation of section 105(c)(1).

The Senate Report states that "[i]t is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal." S. Rep. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 624 (1978).

In *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Commission relied on the "interference" prong of section 105(c) in ruling that an operator's interrogation and harassment violated that provision. *Id.* at 1478-79. Although Elias Moses had not engaged in protected activity, he was questioned by his foreman as to whether he had called MSHA after inspectors arrived at the mine to investigate a bulldozer accident. On two subsequent occasions, in front of the other employees, the foreman again accused Moses of reporting the accident to MSHA. *Id.* at 1476-77. Moses was subsequently laid off and never recalled to work.

In addition to concluding that the operator had discharged Moses in violation of section 105(c), the Commission also considered whether coercive conversations and harassment alone could constitute a violation of that statutory section. We determined that they could, finding them to be among the "more subtle forms of interference." *Id.* at 1478-79. We explained that:

> A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to

> avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act.

Id. (footnote omitted). Considering the persistence with which the subject of Moses' supposed reporting of the accident was raised and the accusatory manner in which it was done, the Commission determined that the conversations constituted prohibited interference under section 105(c)(1). *Id.*

We recognized, however, that:

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

4 FMSHRC at 1479, n.8.

In *Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), we stated that the issue of whether a management official's conduct constitutes interference proscribed by the Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Id.* at 8 (quoting *Moses* at 1479 n.8). *Gray* involved conversations between the assistant superintendent and two miners who had testified before a grand jury about smoking, ventilation and roof support violations at the mine. *Id.* at 2. Visited at his home and repeatedly asked about the grand jury proceeding, miner Mark Gray told assistant superintendent Brummett that he did not want hard feelings between them because of the testimony. Brummett replied, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you" and then laughed. *Id.* The next day, Brummett sought assurances from Gray that Ray Young, the second miner, had not testified against him. *Id.* at 3. Brummett told Gray that "if anyone had laid the screws to him that he would whip their ass." *Id.* Shortly thereafter, Gray left his job at North Star and went to work for another mining company.

The Judge dismissed Gray's discrimination complaint, finding that Brummett's statement to Gray at Gray's home was just an "exaggerated expression, commonly used between friends," and that his statement to Gray on the following day was directed at Young, not Gray. *Id.* at 5. In vacating the decision, the Commission held that the judge examined Brummett's statements too narrowly, focusing mostly on the supervisor's intent or motive. Moreover, the fact that Brummett's "whip ass" statement to Gray at the No. 6 mine was directed at Young, not Gray, was "not determinative of whether, under the circumstances, the statement may have tended to coerce Gray in the exercise of *his* Mine Act rights." *Id.* at 11, n.13. We pointed out that an interference analysis must "take into account the economic dependence of the employees on their

employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.* at 9 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Moreover, we explained that, unlike the analysis generally referred to as the *Pasula-Robinette* test, which is more commonly used in analyzing section 105(c) discrimination complaints, *see Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981), a miner's complaint of interference with protected rights does not require proof of an operative's motive to discriminate. *Gray*, 27 FMSHRC at 8, n.6. [1]

In addition, the Commission in *Gray*, in following the analysis set forth in *Moses* for evaluating an operator's statements in an interference case, explained that *Moses* drew on principles developed under the National Labor Relations Act.[2] We noted in *Gray* that the National Labor Relations Board had articulated the following test for determining whether a violation of section 8(a)(1) of the NLRA occurred (that section makes it unlawful for an employer "to interfere with, restrain, or coerce employee's" exercise of protected rights):

> [I]nterference, restraint, and coercion under Section 8(a)(1) of the [NLRA] does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA].

Gray, 27 FMSHRC at 9 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (Jul. 1959) (citing 29 U.S.C. § 158(a)(1))).[3]

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[1] We thus reject as inconsistent with our rulings in *Moses* and *Gray*, Emerald's assertion that there is no separate "interference" claim under section 105(c) of the Mine Act. Emerald Response to Amicus Br. at 12. Its efforts to distinguish these cases is unavailing. *Id.* at 13.

[2] The Commission has previously relied on case law interpreting analogous provisions of the NLRA for guidance in construing Mine Act provisions. *See Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite*, 23 FMSHRC 924, 934 n.8 (Sept. 2001); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1368-69, n.11 (Dec. 2000).

[3] Consistent with our decision in *Gray*, we reject the operator's contention, Emerald Response to Amicus Br. at 14-15, that section 8(a)(1) of the NLRA is not analogous to the Mine Act's discrimination provision in section 105(c).

2. The Secretary's proposed test for interference claims

In his amicus brief in this matter, the Secretary has proposed the following test for evaluating interference claims brought pursuant to section 105(c). He suggests that an interference violation occurs if:

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

Sec'y Amicus. Br. at 10.[4]

The Secretary suggests that when each of these interests are significant, the inquiry turns to whether the operator's actions were sufficiently tailored to advance its business justification without causing unnecessary harm to protected rights. *Id.* at 20.

The Secretary's proposed test is consistent with our prior precedent in this area, reflecting the standard we articulated in *Gray*, 27 FMSHRC at 9 (analyzing "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of [protected] rights") (citation omitted) and *Moses*, 4 FMSHRC at 1478-79 (concluding that conduct that would "chill the exercise of protected rights" violates section 105(c).[5] Accordingly, we adopt this standard as the "interference test" in appropriate section 105(c) cases, and apply it to the evidence in the record of this case.

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[4] Given that this standard incorporates action that can be "reasonably viewed from the perspective of members of the protected class," we are not persuaded by Emerald's contention that this is a subjective test based on the claimant's state of mind. Emerald Response to Amicus Br. at 17.

[5] The second prong of the proposed test is also consistent with our case precedent, as we acknowledged in *Moses* that not all questioning by an operator about a miner's exercise of a protected right necessarily violations section 105(c). *See* page 20 *infra.*

B. Interference claims of Franks and Hoy[6]

1. Franks and Hoy's expectation that they could make a confidential safety complaint

In order to assess the interference claim, it is critical to understand the need of the miners to make a confidential complaint. After reviewing the record, it is difficult to overstate how important confidentiality was to Franks and Hoy when they chose to make their complaint about inadequate preshift exams to their union safety committeeman. When asked about going to his safety committeeman rather than going directly to the company with a safety complaint, Hoy explained "I thought it would be confidential more with Dave Moore and he would look into the matter deeper." Tr. 43. Franks testified that he complained to Dave Moore, the safety committeeman, because he had a "fear of retaliation from the company" and that he expected to be protected from that retaliation if he went through Moore. Tr. 52. Franks also indicated that by going to Moore he was trying to avoid getting flack from his fellow miners. Tr. 48. Franks testified that by going to Moore, he "assumed he [Moore] would approach the company with the information that I gave him." Tr. 47. Hoy also testified that he expected Moore to "check into the matter," (Tr. 19) and that when he gave the names to Moore "[h]e should have done something about it." Tr. 39.

Given the implications of their complaints, it is not surprising that Franks and Hoy sought confidentiality. The complaints they made about the firebosses were serious charges. A preshift examiner is required under law to make thorough examinations of certain areas of the mine and certify in writing that he conducted the exam and noted any hazardous conditions found. As local union president Anthony Swetz testified, a fireboss who does not conduct an adequate exam yet certifies that he did so, is not only subject to discipline by his employer, but also subject to criminal charges brought by government authorities. Tr. 142-43. The firebosses at the Emerald Mine were hourly union employees. Tr. 39.

Franks and Hoy, in choosing to go to their union safety committeeman - not once, but twice - were taking the initiative in trying to correct what they viewed as a significant safety problem, while at the same time ensuring that their complaint would remain confidential. Again

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[6] Emerald argues that the Commission's consideration of a separate interference claim will require the development of new record evidence. Emerald Response to Amicus Br. at 4. However, the operator was on notice well before trial that the miners had raised this cause of action and consequently, it had the opportunity to defend against this claim at trial. Compl. of Discrim. at 9 ("Emerald, by and through its agents, has interfered with both Complainants and other miners' right under Section 103(g) of the Mine Act to make a complaint about an alleged danger or safety and health violation without disclosing to Emerald the names of individual miners referenced in the complaint by interrogating both Complainants about the identity of individual miners referenced in such a complaint. Such interference violates Section 105(c)(1) of the Mine Act)."

and again the record shows that confidentiality was uppermost in their minds. This puts into stark perspective the potential impact of the very public interrogations that ensued.

Such concerns about confidentiality because of fear of retaliation are very real and have been recognized by both the courts and Congress. The Seventh Circuit's discussion of the informer's privilege in *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989), is in many respects applicable to miners cooperating in mine safety investigations:

> The doctrine of the informer's privilege is not a recent phenomenon, having its roots in the English common law. . . . The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation. . . . The privilege recognizes the responsibility of citizens to cooperate with law enforcement officials and, by providing anonymity, encourages them to assume this responsibility. With the threat of reprisal real and unprotected against, well-intentioned citizens may hesitate or decline to assist the government in tracking down wrongdoers. The threatened reprisal may be physical, but the privilege also recognizes the subtler forms of retaliation such as blacklisting, economic duress and social ostracism. . . . The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance.

Id. at 372.

Congress has been motivated by such concerns in enacting "whistleblower" statutes. Aware of these kinds of issues in the mining industry, Congress included section 103(g) in its enactment of the Mine Act. Section 103(g) allows a miner to make complaints to the Secretary about violations of the Mine Act or any mandatory health or safety standard, or an imminent danger. 30 U.S.C. § 813(a). The legislative history of the Act emphasized that this provision, which was carried over from the Coal Act, was based on the firm belief "that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977), *reprinted in Legis. Hist.* at 618.[7] To protect the reporting miner from

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[7] MSHA's *Program Policy Manual* has recognized the need to protect the identity of miners who make safety complaints to MSHA. The PPM provides that "[i]nformation received

retaliation, section 103(g) provides that the notice of the complaint provided to the mine operator by the Secretary is not to include the name of the reporting miner nor the names of the individual miners involved in the alleged violations. The importance of maintaining confidentiality was emphasized in the legislative history:

> The Committee is aware of the need to protect miners against possible discrimination because they file complaints, and accordingly, the Section requires that the name of the person filing the complaint and the names of any miners referred to in the compliant not appear on the copy of the complaint which is served on the mine operator. While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.

Id. at 617.

This review of the importance of protecting the confidentiality of miners making complaints of others violating the Mine Act provides the backdrop to our analysis of whether a reasonable miner in Franks and Hoy's position would be reluctant to lodge future safety complaints at the mine, given the actions of the operator. The interrogations that resulted in the suspensions of Franks and Hoy were in fact triggered by a person or persons filing a 103(g) complaint. The complaint alleged, among other things, that the firebosses "only stop at the mandoors to check belts," that the beltlines "look like a powder keg" and that the mine was "not being inspected properly by State or MSHA." Jt. Ex. 1.

As part of his investigation into the section 103(g) complaint, MSHA inspector Thomas Bochna came to the mine, approached Franks, and asked him if he had ever seen a fireboss fail to perform a proper belt examination. Jt. Stip. 14. Franks told him that he knew of an incident, the fireboss responsible, and the date on which it happened. *Id.*

Given the importance of confidentiality surrounding a 103(g) complaint, it is astounding that in conducting its interviews, MSHA so publicly revealed Franks and Hoy to both company and union representatives as persons who could identify firebosses who had performed

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about violations or hazardous conditions should be brought to the attention of the mine operator without disclosing the identity of the person(s) providing the information." III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 43, at 8 (2003). It further provides that "[i]f a special inspection is conducted, the MSHA inspector will notify the operator of the complaint pursuant to 30 C.F.R. 43.4(c), but the inspector must not divulge to the operator the name of the complainant or the names of any individuals referred to in the complaint." *Id.*

inadequate preshift exams. Our dissenting colleague states that any error MSHA might have made in its handling of the section 103(g) investigation by bringing Franks and Hoy into an interview attended by management cannot be a basis for finding interference by the operator. Slip op. at 52. We reiterate that we are not imputing any discriminatory intent (to MSHA or Emerald) in this analysis; nor do the miners need to prove intent under the interference prong of section 105(c). Rather, as *Gray* instructs, we must consider the "totality of the circumstances" in ascertaining whether the operator's conduct interfered with the exercise of statutory rights. 27 FMSHRC at 10. In this case, for better or worse, the circumstances included the fact that MSHA had conducted an investigation in which it made public that Franks and Hoy had knowledge supporting the allegations of inadequate preshift exams.

Franks and Hoy's desire for confidentiality was also grounded in their concern about retaliation from fellow miners if it became public that they had accused the examiners of unsafe practices. The firebosses about whom they complained were also union members, (Tr. 42) and this influenced Franks and Hoy's decision to go their union safety representative. *Id.* Hoy testified that he expected to receive some protection by going through Moore. Tr. 43.

Franks and Hoy's desire for confidentiality was justified, given their description of the reactions of their fellow employees. After Franks was questioned as part of MSHA's investigation, he explained that when he came back to work he "was receiving a lot of flack from the other workers: they told me not to give the name of the individual." Tr. 48.

This incident makes clear that others at the mine knew that Franks had spoken with the MSHA inspectors. This is not surprising, given that the MSHA and management interviews with Franks and Hoy were not conducted in private, but were attended by many other individuals. Slip op. at 3-4.

Hoy, for his part, was so troubled that he telephoned MSHA Inspector Severini on October 5, the day after he had been summoned to a meeting with management and MSHA officials. Hoy testified that he called MSHA because "I was in the lamp room, and a gentleman came up to me and told me I had a big target on my back for talking to the inspectors." Tr. 33. Hoy confirmed that this gentleman was an hourly employee. Tr. 34.[8]

Franks and Hoy's wish for confidentiality seemed to be thwarted at every turn,[9] beginning with Franks being called out of the mine to meet with MSHA, Jt. Stips. 15, 16. Given their

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[8] Hoy also testified that after he talked to Dave Moore he was moved to the opposite side of the coal mine. A transfer he attributed to complaining about the firebosses. Tr. 37. Frank testified that he also was moved to the opposite end of the mine from where Dave Moore worked. Tr. 59-60.

[9] Indeed, Hoy ultimately concluded "[a]pparently there is no confidentiality at all, I found out." Tr. 44

preference to report their allegations of safety violations through the private channels offered by their union safety committeeman, it is not surprising that they would perceive the repeated interrogations by management (set forth in detail by our colleagues, slip op. at 3-4) as coercive. The constant questioning was additionally problematic to them because Franks and Hoy believed that they did not have to provide the information, due to the existence of the 103(g) complaint. Tr. 19, 20, 39. Indeed, Franks stated explicitly that "I thought I was protected under the 103(g).[10] Tr. 58.

Unfortunately, the presence of the local union president probably did nothing to assuage their concerns. Although Anthony Swetz gave lip service to his job as looking out for "everybody at the local" (Tr. 150), he specifically testified: "There was a blanket allegation made against 18 firebosses, no specifics, no names, no anything. Several of these firebosses were very concerned: Am I the focus of this investigation? That's why I was there [at the meetings with MSHA and Hoy and Franks]." Tr. 149-50.[11]

It is against this singular backdrop – of MSHA's very public 103(g) investigation, the seven citations MSHA subsequently issued to Emerald, the additional fifteen interviews that management conducted with other miners after the end of the MSHA investigation (after MSHA interviewed 34 miners), perceived pressure from fellow union employees, local union officials representing the interests of the firebosses during the interrogations, and the unwavering expectations of Franks and Hoy that they could make a safety complaint confidentially – that we will examine whether Emerald's interrogations and suspensions of these miners were coercive. Slip op. at 3-5, 23, 25-26. We emphasize again that for the miners to prevail on their interference claim, proof of the operator's intent to interfere with the miners' statutory rights is not required.

2. Whether the operator's actions can be reasonably viewed to interfere with protected activity

We now turn to the specific discrimination claims of Franks and Hoy under the interference prong of section 105(c). As we discuss below, under the unique circumstances of this case, we conclude that Emerald interfered with the protected right of Franks and Hoy to lodge a safety complaint with their union safety committeeman. The events occurring at this mine coalesced in such a way so that, from the perspective of a miner employed at this mine, the ability to make such a safety complaint without reprisals was compromised.

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[10] The record does not establish the identity of the individual who made the 103(g) complaint. Moreover, even if Franks and/or Hoy had made the 103(g) complaint, their views on the confidentiality rights afforded to them are not necessarily correct. Nonetheless, their statements demonstrate their views about the importance of 103(g) to miners who make safety-related complaints and their on-going wish to maintain the confidentiality of their complaints.

[11] We note that if disciplinary action were taken against the firebosses and grievances were filed by the union, Swetz and the local union would have represented them.

The presence of numerous Emerald managers when Franks and Hoy were questioned during the MSHA investigation and later during Emerald's investigation, undoubtedly created a coercive environment to the meetings. *See Stoody Company*, 320 NLRB 18, 18-19 (Dec. 1995) (interrogation found coercive when high level supervisor conducted the questioning in his office ("the core of management authority")) (citation omitted). More than one manager attended most of these sessions. William Schifko, the Emerald Compliance Manager, and Christine Hayhurst, a high-ranking official in the human resources division, attended all of these meetings. The final meeting with Franks and Hoy also included Joseph Pervola, Emerald's safety manager. Jt. Stips. 46, 49. Although our dissenting colleague notes Hoy's statement during the October 4 meeting with MSHA that he was comfortable with having everyone in the room, slip op. at 42, Hoy explained in his testimony that he had never been part of a safety hazard investigation before and that he did not know he had the right to object to some of the participants at the meeting. Tr. 41.

Franks testified that in his first interview with MSHA, the inspector told him everything would be confidential, that he would not be discriminated against and there would be no retaliation from the company. Although Franks acknowledged that he told the inspector he was comfortable with everyone in the room, he testified that "I never participated in a federal investigation before. I figured this was his investigation," and that he did not know he had any right to object. Tr. 49.[12]

The persistence of the managers' questioning, in the face of the miners' repeated refusal to provide the names of the firebosses, also added to the coercive quality of the questioning. *See Moses*, 4 FMSHRC at 1479. Emerald's inquiries continued despite the miners' prior refusal to provide the names to the MSHA inspectors and the information to management. Franks was interviewed by MSHA and management a total of six times; Hoy was interviewed at least three times. Emerald's numerous demands that Franks and Hoy reveal the names of the firebosses, when the miners had clearly made their complaints via what they believed was a confidential process, highlights the coercion the miners perceived when repeatedly asked a question they had refused to answer. In fact, Hoy explicitly told Schifko that his questions constituted harassment and that he would be filing a complaint of discrimination under section 105(c). 35 FMSHRC at 1699.

The consistent responses that Franks and Hoy gave over the course of the nine total interrogations they endured made it obvious that confidentiality was their foremost concern. At no time did they retract their complaints that inadequate preshifts had been conducted. Instead they continued to point out that they had given the requested names and dates to their union

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[12] The stipulations also suggest that Franks was brought out of the mine during the middle of his shift and upon entering the meeting room was asked whether he was comfortable with everyone in the room. It was only after he had answered "yes," that he was identified by the inspector as someone who had admitted to having information regarding the inadequate examinations. Jt. Stips. 18, 19.

safety committeeman. In short, for fear of retaliation, they did not want to be made to publicly "finger" offending union firebosses.

It is also relevant that the Emerald managers did not try to dispel the coercive effect of their questioning by telling Franks and Hoy why they needed them to reveal the identities of the firebosses and guaranteeing that no adverse action would be taken based on the answers. These are practices the NLRB takes into account when evaluating whether the questioning of an employee is coercive. *Johnnie's Poultry Co.*, 146 NLRB. 770, 775 (Apr. 1964), *enforcement denied on other grounds*, 344 F.2d 617, 619 (8th Cir. 1965).

Considering the totality of the circumstances in the case, we conclude that the suspensions of Franks and Hoy undoubtedly will have a profound impact on many, if not most, of the miners' willingness to make safety complaints in the future. Emerald suspended Franks and Hoy for seven days without pay for the "[f]ailure to provide information you have concerning serious allegations of safety violations." Jt. Exs. 3 and 4. It would be the brave miner, indeed, who would voluntarily allege safety violations in the future, knowing that he or she might risk suspension (or perhaps discharge) if the information provided was deemed insufficient by the operator. As counsel for Franks and Hoy correctly pointed out, a "reasonable miner . . . would be disinclined to risk such consequences by reporting future [safety problems]." C. Post-Hearing Br. at 27.

In *Multi-Ad Services, Inc., v. National Labor Relations Board,* 255 F.3d 363 (7th Cir. 2001), the Seventh Circuit ruled that substantial evidence supported the conclusion that management violated the NLRA by coercively interrogating an employee in a closed-door meeting about interest in forming a union. The Court set forth the following test to determine whether an employee would perceives an employer's actions as coercive:

> Factors that ought to be considered in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union. We also consider whether questions about protected activity are accompanied by assurances against reprisal and whether the interrogated worker feels constrained to lie or give noncommittal answers rather than answering truthfully.

Id. at 372 (citation omitted).

The Court based its finding of coercion on the following: a closed-door meeting was conducted in a manager's office by two people who had authority to fire the worker being interrogated; they questioned him regarding why he would want to bring a union into the company; they asked about the worker's own career advancement; they did not assure him that

reprisals would not be taken against him, and the meeting was conducted after company managers had expressed uneasiness over union activity. *Id.*

As this case illustrates, the inquiry regarding whether interrogations are coercive involves many factors, several of which are present here. To summarize, we find that the operator's actions (questioning Franks and Hoy and then suspending them) would be viewed by a reasonable miner, under the totality of the circumstances, as tending to interfere with the exercise of protected rights because: repeated interviews took place where numerous workers were questioned; upper level management conducted the interviews; the managers questioning the miners gave no assurances against reprisal, and Franks and Hoy were suspended.

3. The operator's need for the requested information

Under the next step of the Secretary's suggested interference test, Emerald must justify its actions "with a legitimate and substantial reason." Its rationale, adamantly and consistently presented both to the judge and to us, is its right – indeed, its responsibility – to investigate safety complaints at the mine.

We recognize, of course, the right and essential responsibility of mine owners to investigate safety complaints. The Mine Act itself states that "operators of [coal or other] mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." 30 U.S.C. § 801(e). This bedrock principle is vital to miner safety.

Our decision in *Secretary of Labor on behalf of Pack v. Maynard Branch Dredging Company and Roger Kirk*, 11 FMSHRC 168 (Feb. 1989), emphasized the need of an operator to require miners to report dangerous conditions. In that case, the Secretary argued that when a miner reports a dangerous condition to MSHA, this "insulates [the miner] from being discharged for failing to also report that condition to his foreman or co-workers." *Id.* at 172. We stated that this position failed to consider the operator's right to require the reporting of dangerous conditions:

> While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA.

Id. at 173.

William Schifko, the Emerald compliance manager, explained why he needed the miners to provide the names: "[I]f you are going to make an accusation against somebody, you have got

to be able to know the facts, and, I mean, you can't accuse somebody of something without having some concrete evidence." Tr. 74. As Christine Hayhurst, Emerald's human resources supervisor testified, in actions against individuals for violating safety rules "[w]e need facts. We need witnesses to stand up against the facts." Tr. 107.

4. Balancing the miners' need for confidentiality with the operator's need for the requested information

With both of these core concepts in mind – the need for miners to make safety complaints with no fear of reprisal, and the need for mine operators to fully investigate safety complaints – we now turn to a balancing of these important interests.

To determine whether Emerald interfered with Franks' and Hoy's protected rights, we balance the operator's right to obtain information about an important safety matter with the rights of Franks and Hoy to make confidential safety complaints. The Secretary articulates this process in his proposed test by suggesting that, for the operator to prevail, its actions must present a "reason whose importance outweighs the harm caused to the exercise of protected rights."[13] Sec'y Amicus Br. at 10.

We conclude that the operator's need to obtain the names of the firebosses and other pertinent information from Franks and Hoy in the circumstances of this case does not outweigh the harm to the miners' protected rights. We fear that other miners at Emerald's No. 1 Mine, like Franks, will decide that reporting violations of the Mine Act "[isn't] worth it." We are convinced that the manner in which MSHA conducted the section 103(g) interviews, along with the multiple interrogations and the resulting suspensions, created an atmosphere where miners will be extraordinarily reluctant to complain to a safety committeeman or file a section 103(g) complaint with MSHA. This will work to the detriment of the miners' safety, because some of the most important safety mechanisms created by Congress will have been brought to a halt at this mine.

We articulated a similar concern in our decision in *Secretary of Labor on behalf of Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012). Although we applied the traditional *Pasula-Robinette* standard in that case, we recognized that some acts by operators are materially adverse to miners when they are "'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 1932 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). We emphasized that the Mine Act "recognizes that retaliatory action does not only affect the targeted

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[13] Counsel for the miners appears to agree with this general approach, stating at oral argument that "it's important to allow . . . the operator to collect enough information to take action on a safety hazard while still balancing the protection for miners." Oral Ar. Tr. 77.

miner, but other miners on whom it could have a chilling effect regarding the reporting of safety hazards." *Id.*

In weighing the concerns at stake here, we must examine what information the operator had already obtained and what additional information it needed to conduct an adequate investigation into the allegations of unsafe practices at the mine. Obviously the identity of the firebosses was critical to this inquiry. In evaluating Emerald's need to extract this information from Franks and Hoy, however, we are mindful that the operator was not completely handcuffed by their refusal to reveal the firebosses' identity. Management, by speaking with safety committeeman Dave Moore, could have determined the specific date and shift which Moore had investigated, and thus discovered the identities of the firebosses working those shifts. Furthermore, Shifko testified that Moore told him that he had received a "generic" complaint about inadequate preshift exams and had investigated and found no merit to the complaint. Tr. 94-95. At that stage of its investigation, the operator could have reviewed the particulars of Moore's investigation to determine if there was any merit to the allegations. Thus, although Emerald's investigation was admittedly made more complicated by Franks' and Hoy's refusal to name the examiners, the inquiry was not rendered impossible by their reluctance to accuse a fellow miner during the operator's investigation. Emerald had other avenues for obtaining this information, and this is an important consideration as we compare its need to make Franks and Hoy reveal the names with the long-term ramifications such a demand would have on miners' safety complaints in the future.

Thus, although the operator has raised a serious concern, and on a different factual record the operator's need for information might tip the scales in its favor, here we find that Emerald's desire to make Franks and Hoy reveal the firebosses' names did not outweigh the harm caused by the chilling effects of its efforts. In other circumstances, where, for example, the inquiries were held in private, one-on-one meetings, the union protection was undiluted, and there was no background of an MSHA investigation gone awry by being conducted in such a public fashion, an operator might prevail.[14] But that is not the record in this case, nor the circumstances under

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[14] In balancing these two important interests, we also ask whether the operator's actions were narrowly tailored enough to promote its business justification without undue interference to the rights of the miners. In the context of the NLRA, for example, it has been held that a company rule must be "narrowly tailored to achieve the employer's purpose without chilling protected activity." *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-376 (D.C. Cir. 2007) (quoting *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.2d 1079, 1088 (D.C. Cir. 2003)). Given Franks and Hoy's reaction to the MSHA interviews, it should have been clear to the operator that the way it conducted its subsequent investigation would hardly foster an atmosphere conducive to Franks and Hoy providing the names of the offending firebosses. In addition to safety manager Shifko, also present for Emerald at these meetings was human resources representative Catherine Hayhurst. As before, union officers were present, but Swetz testified, they were there to protect the interests of the accused firebosses. Tr. 149-50.

which Franks and Hoy were forced to navigate after attempting to make a confidential safety complaint.

Given the particular context in which the events at the Emerald mine unfolded, we conclude that the operator's actions, if allowed to stand, would have a chilling effect on the miners there, who, we believe, will think carefully before voicing a safety concern to MSHA or a safety committeeman in the future. We believe that the operator's need to obtain the information was, in this case, outweighed by the potentially chilling effect of the investigations and suspensions that occurred. Consequently, we would affirm the Judge's decision finding a violation of section 105(c) of the Mine Act.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

Commissioner Althen, dissenting:

The willful refusal of miners to cooperate with a safety investigation is contrary to the fundamental principle of miner participation and assistance in achieving a safe and healthful mining environment. Such conduct imperils rather than empowers miners and is properly subject to discipline.

I.

Governing Legal Principles

A. Framework for Analysis

The National Labor Relations Act (NLRA) and the Mine Act protect miners against discrimination by management because of activities protected by the respective laws. They also protect miners against interference with the statutory rights provided by the respective statutes. Therefore, it is appropriate that the National Labor Relations Board and Federal Mine Safety and Health Review Commission should look to one another's enforcement of such rights for legal principles related to the protection of miners. *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 9 (Jan. 2005); *see also Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). It is equally important to understand that different concepts animate the relationship between management and miners in labor matters versus safety matters.

The premise of the NLRA is that miners and management are adversaries with respect to wages, hours, and terms and conditions of employment. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) ("Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the [NLRA] also contemplated resort to economic weapons should more peaceful measures not avail."); *Tearing Down the Wall: The Need for Revision of NLRA § 8(A)(2) to Permit Management-Labor Participation Committees to Function in the Workplace*, 26 Tex. Tech L. Rev. 1391, 1398 (1995) ("The NLRA is structured on an adversarial model of labor relations that views the interests of management and labor as mutually exclusive."); David Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 Colum. L. Rev. 1775, 1778 (1989) ("Labor relations and labor law in the United States have been shaped by underlying assumptions about organizational hierarchies and adversarial relationships between management and labor in the industrial work place. The . . . [NLRA] posits a fundamental dividing line between labor and management.").

The Mine Act is based upon a wholly different vision of the relationship between miners and mine management regarding the safety and health of the workforce. Congress foresaw the desirability of, and need for, cooperation between management and miners on safety and health.

It provided for an active role for miners in assisting in the achievement of safe and healthful work environments.

Section 2(e) of the Mine Act provides that "the operators of such mines ***with the assistance of miners*** have the primary responsibility to prevent the existence of such [unsafe and unhealthful] conditions and practices in such mines . . . ." 30 U.S.C. § 801(e) (emphasis added). Miner participation in safety and health matters was of such concern that the Senate report on the Mine Act explicitly recognized the importance of active participation by miners in the "joint" task of providing a safe and healthful workplace.

> [T]he Committee recognizes that creation and maintenance of a safe and healthful working environment is not the task of the operator alone. If the purposes of this legislation are to be achieved, the effort must be a joint one, involving the miner and his representatives as well as the operator.

S. Rep. No. 95-181, at 18 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 606 (1978).

Indeed, the Senate Committee recognized the need for, and explicitly endorsed, disciplinary actions as appropriate to effectuate the safety purposes of the Act:

> Operators have the final responsibilities for affording safe and healthful workplaces for miners, and therefore, have the responsibility ***for developing and enforcing through appropriate disciplinary measures***, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

Id. (emphasis added).

In construing the protections afforded miners under section 105(c), the Commission has emphasized that participation of miners in safety is a goal of the Mine Act, finding the "Mine Act was drafted to encourage miners to assist in and participate in its enforcement." *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981).

The Commission has not merely endorsed cooperation and participation by miners. It has accepted the directive of the Senate Report and made disciplining miners an integral part of operators' duties under the Mine Act. For example, to comply with 30 C.F.R. § 77.1710(g) regarding fall protection, an operator not only must provide fall protection and train employees to wear safety belts but also must show that it has "engaged in sufficiently specific and diligent enforcement of the safety belt requirement to discharge its obligation under the standard."

Sw. Ill. Coal Corp., 7 FMSHRC 610, 612 (May 1985); *Austin Power, Inc.*, 9 FMSHRC 2015, 2020 (Dec. 1987) ("the Commission concluded that section 77.1710(g) mandates that an operator establish a program requiring the wearing of safety belts and lines where dangers of falling exist and enforce the requirement diligently.").

Thus, the Commission has demanded that operators discipline employees for choosing not to protect themselves. It would be odd if management is required to discipline miners for choosing not to protect themselves but must allow miners to decide not to protect fellow miners by choosing not to participate fully and honestly in a safety investigation.

Enforcement of discipline in the context of a refusal to answer questions in a safety investigation accords not only with the purposes of the Mine Act but also clear and commanding Commission case law. *Secretary on behalf of Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168 (Feb. 1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990), is on point. In *Pack*, the Commission upheld the discharge of a security guard who failed (as opposed to refused) to inform the operator of a safety violation during his shift and then reported it directly to MSHA. The Commission spoke broadly about the duty of employees to the safety of themselves and other workers, holding:

> It is beyond dispute that a mine operator has the right to hire individuals whose job duties include the reporting of dangerous conditions. The Mine Act itself recognizes the importance of such an arrangement. While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA. . . . [I]t would prohibit an operator from disciplining a pre-shift examiner who, rather than reporting dangerous conditions to the operator, chose instead to report to MSHA, while the miners on the incoming shift entered the mine unaware of the dangers. We do not believe this is what anti-discrimination provisions of the Mine Act contemplated.

Id. at 173.[1]

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[1] The Judge attempts to "distinguish" *Pack* on the grounds that, in *Pack*, the operator had a written policy requiring the reporting of dangerous conditions. The real distinction between this case and *Pack*, which makes this case even more compelling, is that here the miners voluntarily reported through MSHA a dangerous practice and then refused to cooperate in the investigation and correction of such ostensible danger. It is untenably inconsistent with section 2(e)'s reference to the assistance of miners to suggest a written policy is the difference between a

Obviously, if a safety investigation is a pretense for interference with statutory rights or a means to discriminate against a miner because of protected activity the action is unlawful. However, in situations where an investigation is warranted and legitimate, the assistance of miners in reporting unsafe conditions or practices and responding to questions about reports of unsafe working conditions fulfills the basic tenet of Congress that miners assist and participate in achieving a safe and healthful workplace. Perforce, if miners may be required to report dangerous conditions, they may be required to provide information to management about the conditions once they have reported them.

2. Proof of Unlawful Discrimination

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799; *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18 (citing *Pasula*, 2 FMSHRC at 2799-800); *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Of course, circumstantial evidence may support a claimed violation of section 105(c). In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510. Further, the Commission may find the proffered reason may be a pretext provided the claimant establishes "(1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the discipline], or (3) that they were *insufficient* to motivate discharge." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1073 (May 2011) (emphasis in original).

Regarding inferences, the Commission has emphasized that inferences drawn by the Judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *accord Garden Creek Pocahontas Co.*, 11 FMSHRC

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miner cooperating in safety investigations and choosing to permit perpetuation of a danger through a deliberate refusal to cooperate.

2148, 2153 (Nov. 1989). Black's Law Dictionary defines "inference" as "a conclusion reached by considering other facts and deducing a *logical* consequence from them." Black's Law Dictionary 897 (10th ed. 2014) (emphasis added). Inferences must be based upon findings of fact followed by a logical and rational conclusion and may not be spun out of speculation or be piled one on another to an inferred result that collapses under the weight of its own insubstantial structure.

3. Proof of Unlawful Interference with Statutory Rights

A causal connection also must be proven to sustain a violation of section 105(c) of the Mine Act for interference with a statutory right. In that respect, section 105(c)(1) provides:

> No person shall . . . interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation, ...

Consequently, in an interference claim, the Commission asks a question similar to a discrimination case. Has the operator interfered with the exercise of a statutory right to make a complaint and, if so, was such interference caused by the miner having engaged in protected activity? However, a somewhat different standard is applied. The Commission stated in *Moses*, 4 FMSHRC at 1478-79, that:

> We find that among the "more subtle forms of interference" are coercive interrogation and harassment over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act.

In his amicus brief, the Secretary states that his test for interference "echoes" *Moses* but is drawn from cases by the National Labor Relations Board for violations of section 8(a)(1) of the NLRA. Asserting entitlement to deference, the Secretary contends that the test for an "interference" violation should be whether:

> (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.

Sec'y Amicus Br. at 10.

Because the Commission frequently emphasizes the need to look to the totality of the evidence, there appears to be no, or only a virtually indecipherable, difference between the test for interference established by the Commission and the first step of the Secretary's test. The Secretary's test does contain a second articulated step of a justification that requires weighing any harm caused to protected rights against a legitimate and substantial reason for the inquiry. However, the Commission certainly did not intend in *Moses* to dismiss the possibility of finding an overarching purpose from the imposition of discipline as compared to any chilling effect.

The Secretary correctly emphasized the need for the Commission's Judges and the Commission itself to review the totality of the evidence lest we be tempted to apply the four indicia of discrimination articulated in *Chacon* without considering that, looking at the totality of the evidence, facts may cut against discrimination. Therefore, in cases under section 105(c), the Judges and Commission must review the totality of the evidence.

4. Substantial Evidence

In considering the presence of substantial evidence, we review the totality of the evidence. We must affirm a Judge's finding of fact if it is supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Consolidation Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison*, 305 U.S. at 229).

II.

Appropriate Disposition of this Case

A. Substantial Evidence Does Not Support a Finding that the Operator Discriminated Against Franks and Hoy Because of Protected Activity.

Review of the Judge's discussion of the *Chacon* factors and the totality of the record demonstrates substantial evidence does not support the Judge's decision that protected activity

motivated the one week suspensions of Franks and Hoy.[2] Moreover, if it were possible to find such motivation, the operator successfully asserted an affirmative defense.

1. The Judge's Decision

The Judge does not find that a willful refusal to answer questions in a safety investigation is protected. Instead, apparently assuming that such a refusal would warrant discipline, the Judge finds the operator's assertion that it disciplined the miners for their refusal to respond was a pretext. The Judge finds that the real reason for the discipline was "for making a safety complaint and participating in the 103(g) investigation." 35 FMSHRC at 1705.[3]

There is no dispute that Franks and Hoy willfully refused to identify the firebosses with respect to whom they claimed to have direct evidence of dangerous malfeasance. Further, there is no direct evidence that the operator discriminated against Franks or Hoy on the basis of protected activity. Therefore, as the Judge realized, a case against the operator could only be built upon reasonable inferences drawn from circumstances showing the asserted reason for discipline was a pretext.

Consequently, the operator may be found to have violated section 105(c) only if substantial evidence supports a finding that circumstantial evidence permits an inherently reasonable inference that the discipline was at least partly motivated by protected activity – that is, protected activity rather than Franks and Hoy's outright and repeated refusal to identify wrongdoers. *See Turner*, 33 FMSHRC at 1073.[4] Further, there must be a logical and rational connection between evidentiary facts and that ultimate inferred fact. *Mid-Continent*, 6 FMSHRC

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[2] Commissioners Young and Cohen essentially adopt and re-state the Judge's decision. Little need be said with specific reference to their opinion

[3] Notably, the Judge did not find that the operator discriminated against Franks and Hoy because the operator suspected that Franks and Hoy filed the section 103(g) complaint. Commissioners Young and Cohen state: "Both the MSHA investigation and Emerald's internal investigation were in response to the filing of an anonymous section 103(g) complaint." Slip op. at 12. As will be noted below, there is no evidence that the operator asked any question or sought any information related to the filing of the 103(g) complaint.

[4] Because substantial evidence does not support a finding that protected activity partly motivated the disciplinary action, it is not necessary to discuss the operator's affirmative defense. If there were, the consideration would be whether the operator would have been motivated to impose discipline based upon an insubordinate refusal to cooperate with a safety investigation of a complaint of substantial safety hazards. On these facts, the operator certainly would not and should not have permitted miners to walk away from their obligation to cooperate with a safety investigation.

at 1138. The Judge below considered the four *Chacon* factors before ultimately basing an inference of pretext upon one finding of disputed fact.

a. Timing

The Judge correctly finds the suspension was close in time to protected activity – namely, volunteering information to the inspector conducting the 103(g) inspection and complaining that belt inspections had not been conducted. However, the timing factor obviously is insignificant in this case because the protected activity and unprotected activity occurred virtually simultaneously.

In their first meetings with MSHA, Franks and Hoy engaged in protected activity by vocalizing their complaint. Immediately thereafter, in the same meeting, they engaged in unprotected activity by refusing to name the firebosses with respect to whom they claimed actual knowledge of malfeasance.

There is no significance to the fact that the discipline was close in time to the protected discussions with MSHA because the reason asserted for the discipline occurred essentially at the very same moment. Thus, from a timing perspective, the discipline makes sense for the unprotected refusal to provide names of the alleged malefactors.[5] In the same meeting, Franks and Hoy crossed a line between protected and unprotected activity. They were then disciplined for the unprotected activity. *See Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981), *rvg. Pasula*, 2 FMSHRC 2786 (Oct. 1980). The timing of the discipline does not support a finding of a violation.

b. Hostility and Harassment

The Judge found the operator showed "hostility" towards Franks and Hoy by interviewing them on several occasions and "harassing" them. The Judge does not cite any evidence in support of that conclusion, except by finding hostility and harassment in management meetings twice with Hoy and three times with Franks.

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[5] Typically, in a pretext case, there is protected activity and then a subsequent entirely distinct incident close in time for which the operator takes adverse action. For example, in *Moses*, 4 FMSHRC at 1475, a bulldozer overturned on June 19 and an MSHA inspection occurred the next day. Thereafter, an operator representative told Moses that he suspected Moses had informed MSHA of the bulldozer overturning. Near the end of June, Moses was laid off due to a shutdown dozer. When Moses went to the operation on July 3 to see if he still had a job, he was offered a job other than his normal work. After an argument, he was discharged. In that case, time is a factor because an entirely separate and distinct incident was blamed for the discipline.

Hoy was first interviewed by MSHA, not the operator, on October 4. Jt. Stip. 31. Operator and union representatives were present. MSHA asked Hoy if he was comfortable with having everyone in the room, and he responded affirmatively. Tr. 31. Hoy did not recall whether the MSHA representative told him that he could talk to him confidentially. However, Hoy did recall that the MSHA representative gave him his office and cell telephone numbers – numbers that Hoy later used. Tr. 31, 41. There is no evidence in the record that a management representative spoke during that meeting.

MSHA asked Hoy to name the firebosses with respect to whom he claimed to have personal knowledge and documentary evidence of malfeasance. Hoy refused to name any firebosses and refused to produce any records. Jt. Stip. 35.

The operator interviewed Hoy twice – on October 20 and November 9.[6] On October 20, he was interviewed by William Schifko, Emerald's compliance manager, and Christine Hayhurst, a human resources supervisor. Hoy was accompanied by two union representatives – Messrs. Swetz and Scott. Thus, there were two management representatives and two union representatives present. Jt. Stip. 42. On November 9, Hoy again met with operator representatives and was again accompanied by a union representative. Jt. Stip. 48.

The record does not reflect the length of these meetings or much of what was actually said. The record does show that, just as Hoy had refused to provide the names of the firebosses to MSHA, he refused to provide their names to the operator and refused to give a date of any unperformed belt examination. Jt. Stips. 42, 48.

The record does not reflect any harassing or hostile statements by any manager in the meetings. Nor does the record contain testimony by Hoy that he felt hostility or harassment at the meetings. Obviously, a finding that the mere fact of a safety investigation is per se hostile or harassing would be wholly at odds with the Mine Act's presumption of participation and assistance by miners in safety and health matters.[7]

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[6] At the hearing, Hoy testified that he might have been interviewed on another occasion in late October, but he could not, or at least did not, provide any date or otherwise testify about such a possible interview. Tr. 20.

[7] The Judge mentions that Hoy testified that another miner told him that "he had a target on his back after making the complaint." 35 FMSHRC at 1704. The Judge also noted in the Background section of the decision that the miners had alleged that they were "targeted" in their complaint. *Id.* at 1697. Regarding the "targeting" testimony, it is notable that firebosses at this operation are hourly employees represented by the union. From Hoy's testimony, it is obvious that if there was a "target on his back" it was from fellow hourly employees. Hoy testified that he complained to MSHA about the remark based upon assurances that he would not face retaliation from anyone for meeting with MSHA. Tr. 40-42. However, MSHA did not respond to his call. It is not conceivable that, if MSHA thought management had placed a "target on his

The same pattern applies to the interviews of Franks, except he was interviewed three times. He also was interviewed by compliance manager Schifko and human resources supervisor Hayhurst and was assisted by union representatives at every meeting. Indeed, in his complaint, Franks expressly notes that, with respect to the October 24 meeting, union representative "Scott attended at Franks'[] request." Compl. of Discrim., Ex. A, at 5, ¶ 16. Like Hoy, Franks did not testify that he ever expressed any discomfort with the meetings. Again, there is no evidence in the record of hostility or harassment or insulting statements by a manager.[8]

Although Franks and Hoy voluntarily complained of malfeasant firebosses and the same complaint had been made in the 103(g) complaint, the record does not reflect that the 103(g) complaint itself, including who may have filed it, was raised at any of the meetings, including the MSHA interview. Thus, there is no evidence that Franks or Hoy were "grilled" by management, threatened by them, yelled at, or in any other way harassed or treated with hostility.

Going further, the record does not reveal that Franks or Hoy provided management with a reason for refusing to give the names. At the hearing, after they had obtained first-rate professional representation, they asserted the reason they refused to answer was they thought they were protected by 103(g). However, there is no evidence that they ever asserted such a reason during their meetings with MSHA or the operator.

Summed up, the Judge found hostility and harassment but there is no evidence, none, of any hostile statements or actions other than the Judge's conclusory finding of harassment from two and three brief interviews, respectively, by appropriate managers with Franks and Hoy accompanied by their union representatives. From the record, therefore, it is only possible to discern a professional approach towards seeking important safety cooperation needed by the operator. There quite simply is no record evidence of hostility, let alone substantial evidence, of such treatment.

c. Disparate Treatment

The Judge found that Franks and Hoy suffered disparate treatment as compared to other miners. The theory is that Franks and Hoy, who complained about firebosses were disciplined, whereas other miners who did not complain about firebosses were not disciplined.

No weight may be placed on this patently irrelevant observation. There is no allegation by Franks or Hoy or other evidence that any other miner refused to cooperate with the investigation. Thus, the record does not suggest any refusal to answer questions by those

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back," it would have ignored Hoy's complaint. Other testimony in the record demonstrates Franks and Hoy were concerned about retaliation from other hourly employees. Tr. 38, 41, 48.

[8] The record does reflect minor sarcasm by Franks. Tr. 48, 54.

employees. There is no evidence the other miners were uncooperative in any way or refused to answer any question.

Because the other miners did not engage in conduct similar to the refusals of Franks and Hoy, there was no basis for disciplining cooperating miners. The Judge engages in wholly unsupported speculation that the reason for different treatment was that Franks and Hoy said they had evidence of misconduct by firebosses when the logical reason is that the others cooperated whereas Franks and Hoy refused. Different treatment of miners who conduct themselves in different ways – some cooperating with the investigation and others not cooperating – does not support an inference of discrimination. If anything, it supports an inference that the disciplining of Franks and Hoy was based upon their refusal of cooperation.

d. Knowledge of the Protected Activity

Knowledge, the last of the four indicia of *Chacon*, is usually considered in the context of knowledge of the protected activity. If an operator does not know of the protected activity, it could not have been discriminating against the miner on the basis of that activity.[9] In this respect, such knowledge is as irrelevant to this case as timing. The operator gained knowledge of the protected activity and unprotected refusal to cooperate at virtually the same moment.

Here, the entire weight of the decision rests upon the Judge's conclusion that the operator knew or could/should have known the identities of the allegedly malfeasant firebosses. Without explaining her view, the Judge summarily concludes it was not necessary to insist that Franks and Hoy provide the identities. Thus, the Judge finds two or three interviews by the operator to be inherently hostile, harassing, and discriminatory. Essentially, the Judge's entire finding of discrimination is based upon this one unexplained finding.

Assuming the Judge is correct that the names were or should have been known by the operator, simply knowing the names of the firebosses is not sufficient to permit an authoritative response by the operator to the misconduct by the firebosses. It is vitally important that the only witnesses claiming actual, direct knowledge of the malfeasance step up to the plate. Disciplinary

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[9] The "knowledge" factor may be satisfied even if a claimant did not actually engage in a protected activity if the operator actually suspected the claimant of protected activity and took adverse action toward the miner because of that suspicion. *Moses*, 4 FMSHRC at 1480 ("[t]he complainant establishes a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion). Here, suspicion of protected activity did not play a role in the Judge's decision as the decision is based upon the protected activity of talking with an inspector during the 103(g) investigation and operator's own investigation. The Judge's decision is not based upon speculation that the operator might have suspected Franks and Hoy of having filed the 103(g) complaint. There is no evidence in the record that the 103(g) complaint, its genesis, or any other aspect was discussed in the interviews with the operator or, for that matter, with MSHA.

action could not be taken against any fireboss without the cooperation of Franks and Hoy – that is, without their willingness to name the firebosses.

The testimony is indisputable that the operator disciplines miners for failing to make proper examinations.[10] The operator discharged a foreman and an hourly employee for not making proper examinations. Tr. 82, 141. Indeed, the discharge of the foreman for an insufficient examination arose out of a complaint by an hourly worker. Tr. 82. Additionally, as the Judge surely understands and as the local union president testified, hearsay evidence would not support a disciplinary action against firebosses, especially when they would be represented by the union in a grievance proceeding. Tr. 140. Thus, more than sufficient evidence was produced showing a legitimate reason for the direct witnesses to identify malfeasant firebosses. The Judge erroneously failed to consider or discuss that evidence and simply dismissed any need for Franks and Hoy to cooperate.

Finally, the Judge also found the operator failed to acknowledge the "right" of Franks and Hoy to make their complaint through their union representative rather than directly to management. 35 FMSHRC at 1704. Again, the Judge is incorrect. The operator agreed that safety complaints may be made directly to management or through a union representative. So far as it goes, that was fine. However, the initial expression of a complaint had little or nothing to do with the safety investigation that necessarily follows such a complaint.

Even presuming Franks and Hoy complained to the union representative, gave him the names, and he gave the names to management, a follow-up investigation was inevitably necessary, after MSHA brought Franks and Hoy to the attention of the operator. The Commission has instructed MSHA to examine for failures of the operator's supervision, training, or ***disciplining*** of miners. *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("[W]here a rank-and-file employee has violated the Act, the operator's supervision, training, and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct.").

An operator cannot let allegations of failures to conduct belt examinations go uninvestigated and unpunished. Yet, it could not discipline the firebosses without direct evidence of the malfeasance. It was necessary for the operator to have direct evidence of the

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[10] Commissioners Young and Cohen remark that there was no evidence that, before this incident, the operator had disciplined employees for refusal to cooperate. Slip op. at 16. This remark does not counter the evidence that the operator discharged a foreman and an hourly employee for failed examinations. Tr. 82. Surely, the Commissioners are not suggesting that the operator later discharged a foreman and, separately, an hourly employee for failing to make examinations as a means of defending this case. The evidence of the seriousness with which the operator treats such failures to examine is probative regarding the rationality of inferring discrimination entirely on the basis that the operator had indirect and unusable allegations of malfeasant firebosses.

malfeasance to take action and the only persons claiming to have such evidence were Franks and Hoy. It cannot rationally be inferred that the necessary follow-up investigation by management to a claim of serious malfeasance, conducted in an appropriate manner through two and three interviews, respectively, by appropriate personnel with union representatives present is hostile, harassing, and discriminatory.

It is apparent, therefore, that even without considering the totality of the evidence, there is insufficient evidence that an inference of discrimination is inherently reasonable through a logical and rational connection between the evidentiary facts and the ultimate facts inferred. When considered in the context of the totality of the evidence, the Judge's finding of discrimination completely collapses.

2. The Totality of the Evidence

The Judge ignored a host of factors cutting against an inference of discrimination. The entirety of the record undercuts the brief and conclusory basis cited by the Judge for inferring discrimination.

It is true that MSHA was conducting its investigation pursuant to a section 103(g) complaint. However, miners Franks and Hoy voluntarily told MSHA of their complaint. Whether they did not request anonymity or were not offered that opportunity by MSHA, the fact is that MSHA informed the operator of their identities and complaint. There is no evidence that the operator sought them out. Nor is there any evidence that, after the meeting called by MSHA, the operator made any inquiry of Franks or Hoy relating to the 103(g) complaint.

Further, upon Franks and Hoy saying they were comfortable with the presence of operator representatives, it was MSHA that permitted the operator to attend its interviews of the miners. The operator took no action whatsoever to discover the identity of any complaining miners. They were presented by MSHA with the names of Franks and Hoy. That disclosure by MSHA and MSHA's handling of the meeting cannot be held against the operator as evidence of a discriminatory motive or improper action by the operator.[11]

Although MSHA could not or, in any event, did not act upon Franks and Hoy's complaint after they refused to identify any offending firebosses, the operator had a right, or even a duty, to

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[11] It should be obvious that failures by MSHA cannot be held against the operator. However, in footnote 12, Commissioners Young and Cohen appear to link actions by MSHA and the operator. Again, they cite no evidence; they just cite MSHA's actions as "troublesome" and link MSHA to the operator. This irrelevant side-remark is as misleading as the clearly erroneous suggestion that Hoy's call to MSHA about a target on his back might refer to the operator when all the evidence demonstrates that the only rational understanding was that, as the firebosses are hourly employees and fellow union members, it was co-workers, if anyone, who were "targeting" him. *See supra* n.7.

continue the investigation. If an operator failed to investigate miners' allegations to MSHA of neglect by a fireboss and, subsequently, a belt fire caused serious or fatal injuries to miners, a regulatory typhoon properly would engulf the operator. An investigation conducted by the operator into voluntary charges of serious safety misconduct was necessary and does not comport with the Judge's finding that the actions of the operator were a pretext to disciplining Franks and Hoy.

Certainly, when Franks and Hoy complained of their concern about firebosses to a union committeeman, MSHA, or the operator, they were engaged in protected activity. Further, as MSHA and the operator interviewed them about their complaints they were protected. However, they crossed an important, outcome determinative line from protected to unprotected activity when they refused to assist in the operator's investigation by refusing to name malfeasant firebosses. This crossing is demonstrated, albeit in different circumstances, in *Consolidation Coal Co. v. Marshall.* There, the United States Court of Appeals for the Third Circuit reversed a Commission decision. The miner had crossed the line from protected to unprotected activity when he decided to turn off a mining machine and announce that no one was going to operate the machine. The court found "[t]he 'real' reason for his dismissal was that he turned off the continuous miner machine. This activity was not protected by the Mine Act." 663 F.2d at 1221.

Similarly, here, the totality of the evidence demonstrates that the real reason Franks and Hoy were suspended was that they refused to identify non-performing firebosses. In the Third Circuit case, the miner arbitrarily decided to attempt to shut down the operation; Franks and Hoy decided that they would arbitrarily refuse to provide the critically important information to support their complaint. Just as the miner in the Third Circuit case crossed the line from protected to unprotected activity when he attempted to shut down the operation, Franks and Hoy crossed the line from protected to unprotected activity when, having volunteered safety information, they refused to protect themselves and their fellow miners by cooperating with the operator's investigation.

MSHA interviewed approximately 35 miners in its 103(g) investigation. Tr. 73. In addition to attending many of those interviews, the operator interviewed an additional 15 or so miners with respect to Franks and Hoy's allegations after MSHA abandoned the investigation upon Franks and Hoy's refusal to cooperate. Tr. 76. Such extensive interviews simply do not comport with the notion of using Franks and Hoy's refusal to answer as a pretext to impose discipline.

Further, contrary to the Judge's statement about hostility, the evidence regarding the interviews, such as it exists, is that they were conducted by appropriate personnel (the compliance manager and a senior human resources manager) without acrimony and in the presence of the miners' union representatives. In other words, the interviews were conducted in a wholly appropriate manner with the miners' rights to representation observed. Those actions are also inconsistent with hostility, harassment, or discrimination.

Additionally, the evidence demonstrates that the decision whether to impose discipline and what discipline to impose was made in a professional and dispassionate manner. When asked how the decision was reached, the senior human resource professional described a meeting of senior managers to consider discipline (Tr. 104) and then explained how they arrived at a seven-day suspension:

> Well, been doing this for about 24 years. The [other meeting participants] probably a lot longer. We took into the consideration what the infraction was, that, you know, a message has to be sent that safety is very serious, so we didn't feel we could sweep it under the rug when allegations of that nature were made. Through talking with everyone, we were at three days to termination, and we came up with seven days.

Tr. 104-105.

Finally, and most telling of all, at every point in the investigation, Franks and Hoy could have avoided discipline by disclosing the names of firebosses whom they said were failing to perform the important belt inspections. Franks and Hoy brought themselves into the investigation by voluntarily and openly making the complaints to MSHA. They were willing, they claimed, to give the names of the firebosses to the union and for the union to disclose the names of the firebosses to the operator. MSHA brought them to the attention of management and then walked away when Franks and Hoy refused to cooperate. It is incredibly far-fetched to find that the operator somehow seized upon Franks and Hoy's refusal to cooperate as a pretext to "set up" discipline. MSHA brought them to the attention of the operator and at any moment, Franks and Hoy could have given the name of the firebosses to MSHA or the operator and avoided discipline.

Indeed, it appears that Franks and Hoy never even gave MSHA or the operator a reason for refusing to do so. Their complaint refers to Franks' initial meeting with MSHA Supervisor Severin and states: "Schifko asked Franks why he would not provide a name or date and Franks responded that he could not do so at that time." Compl. of Discrim., Ex. A, at 4, ¶ 10.

The pertinent question here is: if Franks and Hoy had already provided the names and knew the operator had the names, why did they refuse to give the names thereby avoiding discipline? Their refusal to provide the names amounts to no more than saying "we don't want to." They gave management virtually nothing to work with in terms of justifying or excusing their lack of cooperation.

For all these reasons, the totality of the evidence leads to the conclusion that the miners were suspended for, and only for, their willful refusal to cooperate in a necessary safety investigation – that is, they refused to identify to management one or more firebosses whom they said they personally observed failing to perform his/her/their duties. When they refused to

cooperate with a safety investigation with respect to which they claimed to be the only witnesses with actual knowledge of the offenses, they crossed an important, outcome determinative line between protected activity and unprotected activity.[12]

B. The Evidence Does Not Support a Finding of, or Remand for Consideration of, Interference with Statutory Rights.

The Judge below did not enter any finding regarding Franks and Hoy's claims of interference with statutory rights in violation of section 105(c) and, thus, did not adjudicate that claim. For that reason, the parties paid little attention to the issue of interference in their briefs. However, Franks and Hoy did reserve the issue in their brief to the Commission and asked for a remand to permit the Judge to consider the issue. C. Br. at 34.

Thereafter, the Secretary appeared before the Commission via a late-filed, lengthy amicus brief to take the position that Franks and Hoy had advanced colorable claims of interference that should be adjudicated (Sec'y Mot. at 5) and to set forth the Secretary's view of the basic elements of a cause of action for unjustified interference. Sec'y Mot. for Leave to File an Amicus Curiae Br. at 3 ¶¶ 5-6. The Secretary supported a remand for a review of "colorable" claims of interference.[13]

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[12] Regarding an affirmative defense, if one were to somehow conclude that discrimination played some part in the imposition of discipline on Franks and Hoy, an affirmative defense succeeds. Their refusal to provide critical information in an important and ongoing safety investigation warranted discipline. The Commission has held that "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." *Chacon*, 3 FMSHRC at 2516. The Judge was not entitled to substitute her personal business judgment for the business judgment of the operator. The operator is entitled to prevail on an affirmative defense. However, given the totality of the evidence, it is more appropriate to find that protected activity did not motivate the discipline.

[13] Commissioners Young and Cohen find the actions of MSHA "troublesome." Slip op. at 12 n.12. The participation by MSHA and the Secretary in this case has indeed been curious. Initially, MSHA investigated a 103(g) complaint and found a number of violations. It was during that investigation that Franks and Hoy voluntarily came forward to MSHA. MSHA informed the operator of their identities and brought them into meetings that included the operator. In light of the refusal of Franks and Hoy to cooperate, MSHA took no action on their volunteered fireboss complaint. During the course of the meeting with Hoy, MSHA assured him that no one would be permitted to retaliate against him. Yet, when Hoy informed MSHA that a fellow hourly worker told him he had a "target on his back," MSHA took no action to investigate the workers threatening or otherwise harassing Hoy. Subsequently, MSHA investigated and dismissed Franks and Hoy's 105(c) complaint as meritless. However, two months after oral argument and the Commission meeting on the case, the Secretary filed an amicus brief asserting a desire for the first time since passage of the Mine Act to provide the Commission his interpretation of

The Secretary also asserted that the appropriate test of interference with statutory rights under section 105(c) should be borrowed from the NLRB and provides that the Commission should find impermissible interference if:

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

Sec'y Amicus Br. at 10. Despite the failure of the Judge to rule upon the issue, the record demonstrates that a reasonable Judge could not find substantial evidence supporting interference with statutory rights because of Franks and Hoy's refusal to cooperate.

The first step in analysis is identification of the rights with which the operator assertedly interfered. Although Franks and Hoy and the Secretary naturally word their designation of rights slightly differently, they essentially identify the same alleged rights with respect to which they assert the operator may have interfered. These are:

1. The right to file 103(g) safety complaints and/or other anonymous safety complaints and maintain anonymity throughout the investigation process. Sec'y Amicus Br. at 32; C. Br. at 34.

2. The right to be protected from coercive questioning by advance notice of rights, identifying specifically the rights applied by the NLRB in *Johnnie's Poultry*, 146 NLRB 770, 775 (Apr. 1964), such as voluntariness. Sec'y Amicus Br. at 33-34; C. Br. at 34-35.

At the outset it is notable there is a high, perhaps insuperable, barrier to the Secretary's and Franks and Hoy's argument that rights of the workforce might have been wrongfully chilled. Anthony Swetz, President of United Mine Workers of America, Local Union representing the miners at the operation, testified at the hearing as the representative of the miners at the operation. Tr. 6.

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interference with statutory rights under section 105(c). The Secretary also provided, at greater length, a list of insubstantial reasons why the Secretary thought Franks and Hoy had presented colorable interference claims. The Secretary's amicus brief does not explain whether the Secretary contacted or conferred with the MSHA personnel who had found Franks and Hoy's interference claims meritless. The Secretary does not explain the basis for the change in position. Finally, while the Secretary must have re-examined the case in deciding to file an amicus brief, the Secretary's brief did not address MSHA's finding that Franks and Hoy's discrimination claims are meritless.

Testifying in his capacity as the official representative of the miners at the operation, Swetz stated:

> Q. And let me ask you -- we will sort of cut to chase. These two individuals were suspended for seven days?
>
> A. Correct.
>
> Q. Do you disagree with that action by the company?
>
> A. No.
>
> Q. Why not?
>
> A. I look at it, it's everyone there's responsibility is for everybody's safety in that mine. During this very serious allegation, we take this very seriously. Our local, myself, and the safety committee have zero tolerance for any type of unsafe activity, especially of this nature.

Tr. 138.

Swetz emphasized the danger of unexamined belts and the lack of any tolerance for failures in that area. Tr. 138-40. From the local union's testimony, it appears the miners recognized their most important right is the right to a safe and healthful workplace and that assistance and cooperation by miners is vital to assuring that right. Obviously, however, as the Judge, the Secretary, and Chairman Jordan and Commissioner Nakamura ignore this testimony, they do not accept the union's testimony.

Therefore, it is necessary to consider fully the Secretary and Franks and Hoy's arguments for a remand and my colleagues' decision to affirm the Judge in result. The Secretary's arguments, which capture Franks and Hoy's arguments, are fully described in the Secretary's amicus brief. The Secretary's first assertion is "the background of how the company's internal investigation came about could have created a coercive setting that would deter miners from making future Section 103(g) complaints." Sec'y Amicus Br. at 32. This appears intended to support a notion that any investigation by the operator may have chilled the miners' willingness to make anonymous complaints via section 103(g) or by speaking directly with MSHA.

The obvious error is that the operator had nothing whatsoever to do with "how the company's internal investigation came about." MSHA brought Franks and Hoy into the investigation and brought them to the operator. The operator's colloquies with Franks and Hoy did not begin with an operator investigation. Franks and Hoy voluntarily complained to MSHA outside the presence of the operator that they had personal knowledge of firebosses not

performing necessary examinations. It was MSHA that then brought the operator into the investigation through meetings with Franks and Hoy. Jt. Stips. 15, 16, 33.

There is no evidence that the operator sought to find out the identity of the 103(g) complainant(s). Indeed, no evidence whatsoever has been produced suggesting inquiries by the operator at any time on that topic. No evidence is cited in the record that the operator directly or indirectly, explicitly or implicitly, expressed or had a suspicion that Franks and Hoy had filed the 103(g) complaint. No evidence in the record is cited to show that the 103(g) complaint played any role in the operator's interviews – no evidence of any kind about a mention of 103(g) or that any miner utilized his or her 103(g) right. The operator's interviews sprang entirely out of the voluntary statements of Franks and Hoy at meetings convened by MSHA.

It is ironic that the Secretary cites actions attributable to MSHA as grounds for finding interference by the operator with statutory rights. Disclosure by MSHA of Franks' and Hoy's identities is the sole genesis of the operator's necessary investigation. If MSHA erred in its handling of its investigation by bringing Franks and Hoy into an interview also attended by management personnel, such error rests with MSHA. MSHA simply walked away from the investigation when Franks and Hoy refused to name wrongdoers. The operator, charged by law with preserving safety compliant mining conditions, simply could not ignore the complaints. This was not a "business" decision by the operator to continue the investigation but instead recognition of its obligation to provide a workplace compliant with standards of safety.[14]

Second, the Secretary suggests that elements of coercion may have been present in two ways, asserting:

(1) "Emerald Coal managers asked miners directly whether they had information about the firebossing allegation contained in the anonymous hazard complaint." Sec'y Amicus Br. at 33. A complaint about firebossing was made in a 103(g) complaint. However, the operator's questions to the miners were about the information the miners volunteered to MSHA that they had personal knowledge and documentary evidence of misconduct – the information that MSHA turned over to the operator. No one knows who filed the 103(g) complaint but everyone knows

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[14] The Secretary interprets the second step of the NLRB standard for interference as requiring a "business justification." Sec'y Amicus Br. at 20. This demonstrates the danger of simply accepting NLRB case law for Mine Act cases without refinement for the different underlying purposes of the labor and mine safety laws. In the narrow sense that everything a business does is a business decision, an operator's duty to maintain a safety compliant work environment is a "business" decision. However, it is not simply a decision; it is an obligation imposed by law and ethical standards of today's workplace. For a mine operator, the duty to investigate a safety complaint is not a matter of a "dollars and cents" business decision. It is a duty. Even if it were properly characterized as a "business" decision, there would be no more pressing business obligation than maintaining a safety compliant workplace.

that the operator's interaction with Franks and Hoy began with MSHA introduction of them to the operator as part of the MSHA investigation.

At the risk of repetition, the transcript does not contain any evidence that the operator ever said anything about the 103(g) complaint to the miners. The Commission has found: "[i]t would make little sense to assert that an operator may not receive [cooperation regarding a safety hazard] because a miner elects instead to report such a condition only to MSHA." *Pack*, 11 FMSHRC at 173. A finding that the operator's investigation of a condition reported in a 103(g) complaint is interference with the rights of miners effectively would bar operators from undertaking potentially life-saving investigations, and is at odds with the purpose of the Mine Act and an operator's duties under it.

Of course, such an investigation cannot be used by an operator in an effort to discover the identity of a 103(g) complainant, but no evidence of such purpose has been cited here. When MSHA presented the operator with witnesses claiming direct knowledge of potential lethal misconduct, the operator could not ignore it.

(2) Because 45 other miners did not provide any evidence of failures by firebosses, the Secretary argues: "the responses that miners gave during the company interviews could suggest that a coercive dynamic was at play." Sec'y Amicus Br. at 33. The Secretary conjures a "suggestion" of coercion out of an investigation that included interviews by MSHA of approximately 30 to 35 miners and operator interviews with 14 additional miners. One can easily imagine what the Secretary's argument would have been if the operator had not interviewed other miners – the Secretary would contend that interference (and perhaps even discrimination) was proven by the "focus" on Franks and Hoy – that is, other potential witnesses were not interviewed.

A finding of interference cannot be premised upon a chain of unsupported speculation including an implication by the Secretary that other miners lied during the interviews.[15] Here, the Secretary unacceptably speculates that (a) because two miners say they saw firebosses skip inspections, (b) it must be true, so (c) other miners must also have witnessed it, and so (d) other miners lied during their interviews, and (e) such lying must have been coerced by someone and, (f) that someone must be the operator notwithstanding the Secretary's voicing of suspicion that the local union supported the firebosses. Findings of violations must be based upon a preponderance of the evidence, not rank and unsupported speculation.

Third, Franks and Hoy, with the support of the Secretary assert that the interviews of them should be deemed coercive because they were not advised of, or given by, the operator a

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[15] The Secretary goes so far as to say that one witness' praise of the firebosses could be taken as showing that the miners were being "untruthful" and, hence, were being coerced. The Secretary does not suggest whether the coercion was coming from the operator or, as implied by his claim that it was representing the firebosses, the union. Sec'y Amicus Br. at 24-25, 34.

"right" to choose not to be interviewed. Hinging their argument on labor law, they apparently argue that the interrogation of a miner about a critical danger to safety is inherently coercive and that such coercion may be avoided only by advising miners that cooperation with the operator on an important safety matters is discretionary. Incredibly, the Secretary charged with securing mine safety actually supports Franks and Hoy's argument, essentially suggesting a per se rule that reporting of safety hazards and participation in safety interviews must be voluntary and the operator must advise the miner of such voluntariness in advance:

> [I]t does not appear from the record that Emerald Coal took steps to minimize the potential chilling effect of its questioning on hazard reporting to MSHA. It did not inform miners that cooperation with the company investigation was voluntary, nor did it appear to provide a way for miners to anonymously provide feedback regarding the firebossing allegations contained in the hazard complaint.

Sec'y Amicus Br. at 34.

In support of his position, the Secretary cites a decision of the Sixth Circuit approving a decision of the NLRB finding an employer committed an unfair labor practice by instituting a rule the effect of which would be to require employees to cooperate in management's investigation of unfair labor practice charges against it. *Beverly Health & Rehab. Servs. v. NLRB,* 297 F.3d 468, 478 (6th Cir. 2002), *enforcing* 332 NLRB 347, 349 (2000). The Secretary ignores Commission case law and, even more importantly, the profound differences between the animating spirit of the NLRA and the Mine Act.

In *Pack*, the Commission rejected an argument by the Secretary that a rule requiring miners to report unsafe conditions "chilled" their statutory rights. The Commission upheld the discharge of a miner even though the miner had reported the danger to MSHA. Concurring in part and dissenting in part, Commissioner Backley strongly remonstrated:

> Elsewhere the Secretary states, "even where a miner believes that an imminent danger exists Section 103(g) does not require the miner to report that condition to the operator . . . ." Sec. Br. at 7.
>
> I find the Secretary's position on this issue to be perverse. The Secretary apparently condones the manner in which Mr. Pack acquitted himself – leaving the mine knowing that a dangerous condition existed, yet failing to warn oncoming fellow workers. In her zeal to find a way to prevail in this case, the Secretary seems to be willing to turn a blind eye toward the fundamental goal of the

> Act – to ensure that every miner does all that he can to make the work environment safe.

Pack, 11 FMSHRC at 174.

In *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (Feb. 1994), the Commission considered whether a safety program requiring the reporting of injuries was unlawful. The Commission found the reporting of injuries was a protected activity. But, it also held that requiring the reporting of injuries did not interfere with miners' rights. Finding the program lawful, the Commission hearkened back to Commissioner Backley's opinion in *Pack*, and held:

> In *Secretary on behalf of Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168, 172 (February 1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990), the Commission rejected a similar argument as to the chilling of reporting, raised against a company policy that required employees to report dangerous conditions to the company. The Secretary asserted that such a policy would intimidate miners from exercising their rights under sections 103(g) or 105(c) of the Act. *Id.* at 172-73. The Commission held that the operator was entitled to initiate such a policy that called for miner participation in the maintenance of safety. *Id.* As Commissioner Backley stated in *Pack*, a "fundamental goal of the Act [is] to ensure that every miner does all that he can to make the work environment safe." *Id.* at 174 (concurring in part and dissenting in part).

Id. at 208.[16]

Apparently in the same spirit of zealousness, the Secretary again fails to appreciate the fundamental difference between the NLRA and the Mine Act. The NLRA protects the right of employees to take concerted action for their benefit against an inferentially adverse employer. In *Beverly Health*, cited by the Secretary, the Sixth Circuit upheld an NLRB order against an employer rule requiring an employee to answer the employer's questions related to unfair labor practice charges against that very employer. There is no semblance of applicability of such a

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[16] Without doubt, reporting of injuries is a protected activity. Therefore, also without doubt, requiring miners to report injuries and, as a result, face suspension or discharge is far more likely to inhibit miners from engaging in protected activity than requiring that, when miners make a safety complaint, they provide details permitting the operator to address the complaint properly. Regarding the requirement for reporting injuries, the Commission found the benefit of having miners do all they could to ensure safety resulted in the policy not being facially invalid. If miners' statements must only be made on the basis of voluntariness, then it would appear all mandatory reporting programs, regardless whether stated in a written policy, would be facially violative of section 105(c). Congress cannot have intended such a result.

principle under the NLRA to requiring a miner under the Mine Act to report safety hazards or to aid in an investigation into claims of acts of malfeasance that could result in a mine explosion. It remains perverse for the Secretary to assert what would amount to a per se rule that miners' cooperation in reporting safety hazards and cooperating with safety investigations must be voluntary.

Having rejected the Secretary's arguments, it is imperative to discuss the thoughtful opinion of Chairman Jordan and Commissioner Nakamura. It appears they find three "interferers" in this case – the local union or workforce, MSHA, and the operator. Reading their opinion, one may feel some sympathy for Franks and Hoy whom Chairman Jordan and Commissioner Nakamura find were classically put between a rock and hard place – that is, between intimidation by fellow miners and the demand for cooperation by management. Moreover, Chairman Jordan and Commissioner Nakamura appear to find the operator least culpable of the three interferers – the actions by MSHA were neglectful and actions by the union or workforce were intentional. Chairman Jordan and Commissioner Nakamura reiterate that they do not impute any discriminatory intent to the operator or MSHA. Slip op. at 26.

Their opinion premises operator interference upon a duty to understand and accept the difficult position of Franks and Hoy. They essentially find that the operator interfered with the miners' rights by failing to realize and accommodate that, if Franks and Hoy were required to do their duty and cooperate on safety, other members of the local union, fearing they also might someday have to do their duty, would not make confidential safety complaints. I have some differences with a few specific points in their opinion.[17] But, their basic position gives reason to

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[17] Particularly troublesome are my colleagues' characterization of the managers' questioning as persistent. Slip op. at 28. In my opinion, two and three interviews, respectively, of the miners does not fit the definition of "persistent." This case likely would be before us even if the two had been disciplined following the first interview. Secondly, my colleagues object to the interviews being conducted by the compliance manager and a human resource representative they call "high-ranking." Slip op. at 28. The compliance manager was overseeing an important safety investigation, and thus his participation was appropriate, and it was beneficial to have a human resources professional present to assure proper practices. My colleagues would also have the interviewers attempt to dispel coercion, by informing the miners of the purpose of their questions. Slip op. at 29. My reading of the record is that Franks and Hoy were intelligent persons who understood that management was attempting to determine which firebosses were not performing their jobs so the situation could be addressed. Of particular concern is my colleagues asking whether "the operator's actions were narrowly tailored enough to promote its business justification." Slip op. at 32 n.14. In my opinion, to describe the operator's interest in a necessary safety investigation, aimed at fulfilling an operator's duty to comply with the law, as a mere "business justification," downplays what was at issue in the investigation. Moreover, it is hard to see how an interview consisting of one question – who are the malfeasant firebosses? – could be more narrowly tailored. Finally, I take issue with the relevancy of NLRB cases cited in my colleagues' opinion for support. *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363 (7th Cir.

pause. Expression by miners of safety concerns are an important part of their duty to assist and participate in achieving compliance with the Mine Act. Therefore, as my colleagues correctly observe, actions by management that chill the willingness of miners to present safety concerns raise issues under section 105(c), even if such result is not intended.

However, on the basis on the totality of the evidence and especially given the seriousness of the allegations against firebosses, I would find that the operator's investigation did not violate section 105(c) under either prior Commission case law or the test espoused by the Secretary. Thus, I would not find a section 105(c) violation.

First, errors by MSHA and naked intimidation by co-workers is an unsuitable basis to find the operator chilled the reporting of safety complaints at the mine. To do so would be capitulation to thuggish behavior that seriously endangers miners and, unchecked, will continue to inevitable tragic results – an unacceptable public policy.

Second, such a finding would place operators whose workers adopt clannish characteristics in a legally untenable position. They cannot effectively investigate and take action upon safety complaints, anonymous or volunteered, directed at individuals if they do not have and cannot obtain admissible evidence on the culpability of the allegedly malfeasant miner. But, unlike MSHA, they should not and cannot ignore or just walk away from such claims risking a tragic consequence for the workforce.

Further, I do not find the operator's action could or will significantly chill the atmosphere for safety complaints aimed at other workers beyond its apparently nearly frozen state. Because Franks and Hoy's fears, and consequent desire for confidentiality, arose from the possible need to identify other union workers, the operator's action only could affect complaints involving allegations of specific misconduct by other hourly employees.

Regarding that narrow subset of complaints, it is clear there was and will be, until the culture of the mine changes, a desire for anonymity regarding such complaints. The operator's actions in this matter, however, will not increase the desire for anonymity but only may heighten somewhat the care a miner may take in protecting that anonymity. On the other hand, this case involves claims that deliberate misconduct by firebosses endangered the very lives of miners. Weighing any slight increase in vigilance for their anonymity by complaining miners against a vitally important effort to get information that could prevent a mine disaster, I cannot find a case of interference. This is not a "business justification" defense; it is a business and moral imperative.

2001), involved actually coercive questioning (including a suggestion that the employee quit) regarding concerted, protected labor matters, while *Stoody Co.*, 320 NLRB 18 (1995), arose out of wholly different facts that are irrelevant to this Mine Act case.

Congress recognized that operators need the cooperation of miners to fulfill the operators' duty to provide safe and healthful working conditions. Such cooperation is an integral part of protecting the lives of miners. Although liability rests with the operator, safety is a "joint" task.

We must understand that, for operators to fulfill their primary obligation to safety and health, they need from time-to-time to demand cooperation from miners through reporting unsafe conditions and assisting with discovering unsafe working conditions and those responsible for them. When a miner with expressed knowledge of unsafe conditions or practices, especially when the alleged practice threatens a tragic disaster, arbitrarily refuses to identify those responsible for the practices in response to management questioning, the miner should be disciplined.

CONCLUSION

I am in the unenviable position of a one-person minority. Nonetheless, I find some solace in the opinions of the Commission issued today.

The majority of the Commission has rejected the Judge's finding of discrimination. Given the lack of substantial evidence of a motive to discriminate on the basis of protected activities that is an appropriate result.

Chairman Jordan and Commissioner Nakamura's opinion appears to be based upon the unique and specific facts of this case. Therefore, I do not see disturbance to management policies related to reporting safety or health hazards or injuries. Nor should it affect the necessary cooperation between miners and management on matters of safety and health.

Third, the postulate that a coercive dynamic began with a misplaced loyalty to, or a fear of, other miners (individually or through the local union) to protect malfeasant firebosses is a call to action. The mining community will benefit if the entire community (MSHA, management, unions, training programs, and schools) recognizes and acts on the need to train current and prospective miners that solidarity is shown through performing jobs safely and through willingly reporting those few miners who endanger the safety and health of their brothers and sisters. Miners must not fear retaliation from their co-workers for reporting safety failures of other miners any more than fearing retaliation by an operator.

Perhaps, therefore, this case may spur action to increase miners' awareness of their duties to one another and, through that awareness, increase the joint efforts of labor and management to achieve safe and healthful working conditions — a goal sought by Congress and all persons interested in the welfare of our nation's miners.

William I. Althen

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