

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

**JAN 22 2020**

MICHAEL K. McNARY

v.

ALCOA WORLD ALUMINA, LLC

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Docket No. CENT 2015-279-DM

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

**DECISION**

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), is before the Commission a second time. At issue is a complaint filed by Michael McNary alleging that Alcoa World Alumina, LLC (“Alcoa”) discriminated against him and interfered with the exercise of his statutory rights in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1).<sup>1</sup> The complaint arose from an incident between McNary and Alcoa Digestion Department Superintendent, Steve Emig.

During its first review, the Commission determined that the Administrative Law Judge erred in entering summary decision in favor of Alcoa and remanded the matter for further proceedings, including an evidentiary hearing. 39 FMSHRC 433, 440 (Mar. 2017). After the hearing, the Judge dismissed the complaint, holding that there was no cognizable Mine Act discrimination or interference by Alcoa against McNary. 39 FMSHRC 2083 (Dec. 2017) (ALJ). For the reasons that follow, we affirm the Judge’s dismissal.

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<sup>1</sup> Section 105(c)(1) of the Mine Act provides in relevant part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

## I.

### **Factual and Procedural Background**

Alcoa operated the Bayer Alumina Plant in Point Comfort, Texas, to produce alumina. Alumina was produced by a process that involved miners working in four departments: digestion, clarification, precipitation, and calcination.<sup>2</sup> In the digestion department, where the incident occurred, the material being treated was caustic, corrosive, and heated under pressure to temperatures of 400 to 450 degrees Fahrenheit.

In January 2014, McNary was a gland<sup>3</sup> manager in the digestion department. McNary's job as gland manager was to check the pumps, making daily rounds and troubleshooting. 39 FMSHRC at 2095.

McNary was also the No. 2 miners' representative ("miners' rep.").<sup>4</sup> Carlos Delgado was the lead miners' rep. at the plant. When Delgado was unavailable for any reason, McNary assumed the responsibilities of the lead miners' rep. for the plant.

On January 8, 2014, McNary was checking the pumps in the digestion area while performing his daily safety rounds. McNary saw hot slurry spewing out of a valve on a pump in the L-5 area and two employees walking toward him wiping off slurry. Miners were suiting up in clothes variably described as Tyvek suits, Tychem suits, paper suits, and raincoats.

While the miners were putting on their suits, Emig approached McNary and Delton Luhn, the miners' rep. for the digestion area. Emig asked them if they had any duct tape. Both men answered, "No." McNary asked why he needed tape, and Emig said that he wanted to put tape around the wrists of the employees who were suited up. Emig instructed that one of them should go to the tool room to get some tape. McNary went to the tool room but did not find tape.

McNary asked a miner to contact Health and Safety Manager Kelly Grones. McNary then went to a different area to see if another valve was blowing out. He determined that there were no problems in that area and returned to the L-5 area.

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<sup>2</sup> A description of the production process is set forth in the Commission's first decision. 39 FMSHRC at 434.

<sup>3</sup> A gland is two pieces of metal on a pump that hold packing in place. If the packing fails, the valve may blow out. *See* 39 FMSHRC 2095 n.12.

<sup>4</sup> A miners' representative has various rights and responsibilities under the Mine Act. Among them are the right to accompany an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") during inspections of a mine, to be involved in pre- or post- inspection conferences (30 U.S.C. § 813(f)), and to request an immediate inspection of a mine (30 U.S.C. § 813(g)).

While McNary was away, miners accessed the area of the blowing valve.<sup>5</sup> Tr. 70, 241. The miners were unsuccessful in resolving the problem.

When McNary returned to the L-5 area, he motioned for Emig, who was then managing the situation, to join him. McNary informed Emig that he had called Grones, who was coming to the area.

There is conflicting evidence as to what occurred next in this conversation. Although we recite both versions below, the Judge credited Emig's version.<sup>6</sup>

According to McNary, Emig replied that McNary should not have called anyone, that it was Emig's department, and that he directed the workforce. McNary asked why he had directed the miners into the hot slurry after sending him off to get tape. Emig replied that he did not send the miners in and that they had volunteered. McNary stated that Emig had watched the miners go into the area without stopping them and had helped them suit up. Emig replied that McNary should not be involved in these matters, to which he disagreed, stating that he was the miners' rep. and concerned for the miners' safety. McNary stated that Emig replied that he would remove him as miners' rep., from the department, and from the plant. Tr. 145-46.

In contrast, according to Emig, McNary stated that he had contacted some people to come down, assess the situation, and instruct him on what to do. Emig informed McNary that they were in a "full stand-down mode," he also had contacted Grones, he was directing the group, and McNary could be involved. McNary responded that as a miners' rep. he did not have to listen to Emig. Emig replied that he did have to listen to him, as the department superintendent and as an employee of the department. Emig stated that McNary's behavior ultimately became unsuitable and irate and he told him that he (Emig) could or would have him removed. They had a brief argument about whether Emig had the right to do that. Tr. 246-48.

At that point, Lead Miners' Rep. Carlos Delgado and an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), Brett Barrick, arrived. Delgado and Barrick started to discuss the situation with Emig. McNary had stepped aside momentarily but then interrupted the discussion to complain that Emig had sent him on a wild goose chase and directed miners into danger. Emig denied both accusations. Then, McNary challenged Emig, "Oh, you're through with me for good?" Emig stated, "No, just right now." Tr. 149, 253. Emig made no effort to remove McNary and McNary remained on the scene with Delgado, Barrick, and Emig until the emergency was over. There were no further acrimonious interactions between McNary and Delgado.

Health and Safety Manager Grones arrived at the scene. Grones, Delgado, Emig, and Barrick discussed how to resolve the emergency. McNary continued to remain with that group considering the situation. After Grones left the scene to speak with engineers and gather more

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<sup>5</sup> Miners had also accessed the area before Emig had arrived at the scene. Tr. 239.

<sup>6</sup> In discussing the interaction between McNary and Emig, the Judge opined, "To be specific, for this moment, which involves an important credibility determination, and having heard Emig's and McNary's versions of their interaction, the Court finds Emig's recounting to be the more credible telling." 39 FMSHRC at 2112.

information, the emergency resolved itself when the valve pressure died out without further intervention.

After these events, McNary continued as an employee of Alcoa and a miner's representative. He did not claim that he suffered any discipline, loss of wages or any other form of retribution after and/or because of his actions toward Emig on the day of these events.

McNary filed a complaint with MSHA under section 105(c)(2) of the Mine Act alleging that Alcoa had violated section 105(c)(1) of the Mine Act. After investigation, MSHA declined to pursue any charges. McNary then filed a claim on his own behalf under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).

After discovery, the Judge granted a motion for summary decision filed by Alcoa and dismissed the proceeding. The Commission later granted McNary's petition for review of the summary decision, vacated the decision, and remanded the matter to the Judge for further proceedings, including an evidentiary hearing. The matter then proceeded to hearing, and the Judge issued this decision currently under review.

As noted above, after the hearing, the Judge credited the testimony of Emig and discredited the testimony of McNary. 39 FMSHRC at 2112, 2118. The Judge held that there had been no cognizable Mine Act discrimination or interference in violation of section 105(c) against McNary. *Id.* at 2083, 2118.<sup>7</sup>

McNary filed a petition seeking review of the Judge's decision. The Commission granted the petition and heard oral argument.

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<sup>7</sup> The Judge summed up the evidence:

[T]he Court concludes that, under the totality of the circumstances, *it was McNary's own conduct* which brought about the exchange with Emig.

The Court would note again that, in its view, it is a mischaracterization to label McNary's actions and statements with the words used by his Counsel, as *discussing* a safety situation. McNary was not discussing a safety situation. Rather, he was making assertions about Emig's conduct and attempting to orchestrate which management official would control the event.

39 FMSHRC at 2100 (emphasis in original).

## II.

### Disposition

Section 105(c)(1) states in relevant part 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 [or] representative of miners . . . because of the exercise by such miner [or] representative of miners . . . of any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1). Section 105(c)(3) permits an individual to file a complaint charging “discrimination or interference” in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3). McNary’s claim was that Emig’s conduct could chill his exercise of his miner’s rights.

Commission case law is clear that unless McNary can provide sufficient evidence that Emig’s statements would dissuade a reasonable miner from engaging in protected activity, McNary’s claims must fail. *Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012) (citing *Burlington No. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 57 (2006)). Thus, McNary needed to prove, as a threshold matter,<sup>8</sup> that his interaction with Emig would dissuade a reasonable worker from exercising his protected rights. We conclude that substantial evidence in the record supports the Judge’s determination that McNary failed to establish that the incident with Emig would deter a reasonable miner from engaging in activity protected under the Mine Act.<sup>9</sup>

The sole basis of McNary’s claim is his allegation that Emig threatened him during the brief heated conversation during the emergency. The Judge applied the factors set forth in *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001) in evaluating the brief encounter between McNary and Emig. These include the tone and setting of the encounter; the relative positions of the employees; the duration of the conduct; and whether the subject was brought up repeatedly.

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<sup>8</sup> In *Secretary of Labor on behalf of Greathouse v. Monongalia Coal Co.*, 40 FMSHRC 679 (June 2018), a four-member Commission divided evenly regarding the proper analytical framework for interference claims. Two Commissioners stated that they would apply a test developed by two Commissioners in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), in which protected activity need not cause the operator action giving rise to an interference claim. The other two Commissioners concluded they would apply *Secretary of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 14, 1980), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981), and its progeny to claims of interference. *Id.* at 681, 708-16. Because the outcome of this case does not depend on which standard should be applied, it is not necessary for the Commission to consider this issue. No inference should be drawn from our decision not to address it herein.

<sup>9</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

After a thorough review of the entire record, the Judge discredited McNary's account of the event and found the incident involved a single, isolated event of quite brief duration precipitated by heated accusations by McNary toward Emig and a refusal to accept Emig's supervisory authority. 39 FMSHRC at 2126-27. The Judge further found that McNary initiated the incident by calling Emig away from direct handling of the emergency to tell him that he called others asking to replace him, accusing him of misconduct, and asserting that he did not have to take instructions from his supervisor.<sup>10</sup> Indeed, Lead Miners' Rep. Delgado agreed that, if McNary had told Emig that he could not tell him what to do, this would have been a reason for Emig to have been upset with McNary. Tr. 93-94

As noted above, the evidence is also undisputed that the brief, one-time conversation initiated by McNary occurred during a stressful situation involving a significant valve failure in Emig's department, while Emig was responsible for dealing with the situation and needed to focus his attention and concentration upon the emergency. At the time of the confrontation, the valve was still "blowing out pretty good." Tr. 53. The testimony demonstrated to the Judge that McNary was upset and angry when he interrupted Emig's handling of the event and informed him that he, McNary, was initiating action and disregarding Emig's authority. Considering the exchange between McNary and Emig from the perspective of a reasonable miner, it is significant that robust, heated discussions about safety between miners' reps. and management were not uncommon at the mine. Tr. 75-77, 100-02.

Moreover, even if one could view Emig's initial response to McNary's refusal to accept his authority as intemperate, Emig quickly walked back any negative aspect, and McNary continued within the same event to participate without restraint or hindrance. A reasonable miner would not see interference with his protected rights under these circumstances. Further, Delgado, the lead miners' rep., arrived at the scene near the end of Emig and McNary's conversation and heard the end of that conversation. The Judge found that when Delgado then made complaints to Emig about the handling of the actual situation rather than about his authority or lack thereof, Emig responded in a calm and professional manner.

When McNary questioned Emig regarding whether he was done with him, Emig replied that he was just done with McNary for "right now" and the follow-up indicated, as the Judge found, that Emig had no further concern with the incident. Tr. 53, 149, 184, 253; 39 FMSHRC at 2114. Importantly, McNary never left the scene with the group of management, union, and MSHA personnel discussing solutions. He continued to be present with the group discussing the handling of the emergency throughout the duration of the emergency.

The Judge's opinion turns in part on his credibility determinations. The Commission has recognized the Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1196-97 n.8 (Oct. 2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). McNary has not provided a basis for overturning the Judge's credibility determinations.

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<sup>10</sup> A complainant's demeanor and tone as he approaches a supervisor, standing alone, do not necessarily prove that his statements are unprotected. But, as here, they are appropriately considered by the Judge along with other evidence as part of the "totality of the circumstances."

In summary, therefore, the incident involved a brief, spontaneous event arising from a provocative challenge by McNary to Emig's supervisory authority and accusations made by McNary against Emig in an extremely stressful situation. Emig did not take any action to remove or dissuade McNary's continued participation. 39 FMSHRC at 2126-27; Tr. 53, 79-80, 93, 165, 214.

We conclude that substantial evidence supports the Judge's determination that, in light of the totality of the circumstances, Emig's words did not chill nor would they tend to chill a reasonable miners' rep. from making safety complaints in the future nor would they have chilled the exercise of protected rights by those miners who may have witnessed the encounter. Accordingly, we affirm the Judge's dismissal of the interference complaint.

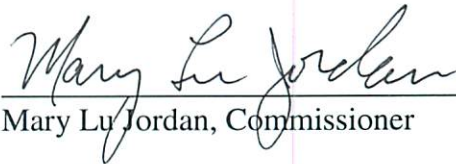
### III.

#### Conclusion

For the foregoing reasons, we affirm the Judge's dismissal of McNary's complaints alleging discrimination and interference under section 105(c) of the Mine Act.



Marco M. Rajkovich, Jr., Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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