FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 14 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of THOMAS McGARY and RON BOWERSOX	:	
and	:	
	:	Docket No. WEVA 2015-583-D
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:	
v.	:	
THE MARSHALL COUNTY COAL CO., McELROY COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION[1]	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). For the reasons that follow, we hold that the Respondents[2] did not preserve for Commission review the issue of whether the Administrative Law Judge erred by ordering Robert Murray, the Chief Executive Officer of Murray Energy Corporation, to read a statement to miners as part of the relief the Judge ordered for Respondents' interference with miners' rights in violation of section 105(c) of the Act, 30 U.S.C.

[1] Additional captions are listed in Appendix A to this order.

[2] The Respondents are the Marshal County Coal Company, Ohio County Coal Company, Harrison County Coal Company, Monongalia County Coal Company, Marion County Coal Company, Consolidation Coal Company, McElroy Coal Company, Murray American Energy, Inc., and Murray Energy Corporation.

§ 815(c).[3] *See* 38 FMSHRC 2694, 2698-2701 (Oct. 2016) (ALJ); 37 FMSHRC 2597, 2608-09 (Nov. 2015) (ALJ).

I.

Factual and Procedural Background

This case originated with complaints of interference brought by the Department of Labor's Mine Safety and Health Administration ("MSHA") on behalf of six miners.[4] The Respondents are the operators of five underground coal mines in West Virginia and associated corporate entities, including the owner and controller of the five mines, Murray Energy Corporation. The interference allegations arose from meetings, which all miners at each of the mines were required to attend, where Respondents addressed, among other topics, miners contacting MSHA pursuant to section 103(g) of the Act, 30 U.S.C. § 813(g),[5] to alert the agency to perceived safety and health issues at the mines.

The successful interference claims were in large part based on PowerPoint slides shown during the presentations which stated that miners must inform management of the content of any section 103(g) complaints filed with MSHA. The Commission ruled that this requirement allowed the operators to readily learn the identity of any miner who makes an anonymous complaint to MSHA. 38 FMSHRC 2006, 2016 (Aug. 2016) ("*Marshall County I*"). We affirmed the Judge's opinion upholding against each of the five mines one count of interference with their miners' section 103(g) rights and dismissing a second count of such interference against the Marshall County Mine. *Id.* at 2011-22 (majority opinion), 2028 (Chairman Jordan and Commissioner Cohen, concurring).

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[3] 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].

[4] As shown in the five case captions, MSHA filed each of the cases on behalf of United Mine Workers of America ("UMWA") International Safety Representative Ron Bowersox and another individual. Each of these individuals is a local UMWA representative at his or her respective mine. 37 FMSHRC at 2599.

[5] Section 103(g)(1) provides that, if a miner or miner representative has reasonable grounds to believe that a violation of the Act or a mandatory standard exists, the miner or representative has a right to obtain an immediate inspection by MSHA. It further provides that the name of the person requesting an inspection shall not be revealed.

With respect to the remedy in the case, when the case was initially before the Judge the Secretary of Labor requested, among other things, that CEO Murray be personally required to read a statement to all miners. The Secretary argued that because CEO Murray had conducted each of the meetings, he should be personally required to dispel any erroneous impressions regarding the miners' section 103(g) rights left by the original presentations. The Judge agreed, requiring CEO Murray "to hold a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA." 37 FMSHRC at 2609.

On review, the Commission agreed with the Respondents that it was not clear from the Judge's decision who she intended would prepare the statement and who would approve the statement.[6] Consequently, the Commission requested that the Judge on remand clarify who would be involved in the preparation of the statement, and who would be involved in its approval. In so doing, the Commission specifically referred to the requirement as one that the Judge had imposed on CEO Murray personally. 38 FMSHRC at 2026 ("we will permit the Judge to further clarify what she meant in requiring CEO Murray to read the 'prepared and approved' statement.").

On remand, the Judge noted that pursuant to her original decision all the parties were to agree on the language of the statement to be read by CEO Murray, but they had been unable to do so. Consequently, the Judge mandated the language of the statement. She also again specified that CEO Murray was to read the statement, but explained that he could do so either in person or through video conferencing, as long as he delivered it without comment or elaboration at meetings at each mine within 40 days of the date of her remand decision. The statement was also to be posted at each of the mines. 38 FMSHRC at 2698-2701. The statement drafted by the Judge is attached hereto as Appendix B.

Respondents again filed a PDR with the Commission, and, among other things, objected to the Judge requiring that CEO Murray personally read the statement. In the second PDR, Respondents contend that the requirement for a personal reading makes the order not remedial

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[6] In their Petition for Discretionary Review ("PDR") to the Commission in response to the Judge's original decision, Respondents did not otherwise address that aspect of the ordered remedy. An accompanying motion for stay included a request that the statement reading requirement, along with a separate notice posting requirement, be stayed until Respondents had exhausted their appeal rights. The Commission denied the stay with respect to the notice posting requirement but granted a stay with respect to the statement reading requirement pending the Commission's decision on review because the latter stay had not been opposed by the Secretary and that aspect of the remedy was "uniquely personal [in] nature" in that it specified that CEO Murray was required to read the statement to miners. 38 FMSHRC 220, 222 (Feb. 2016). In their subsequent opening brief, Respondents argued that the Judge erred by admitting into evidence an allegedly unauthenticated recording of the meeting and by using allegedly vague, imprecise language concerning the penalty provisions. Resp'ts Br. I at 24-27. In one sentence, Respondents argued that the requirement for CEO Murray to read the statement personally was improper due to admission of the unauthenticated recording. *Id.* at 26. They did not raise the present argument that the requirement was punitive rather than remedial.

but rather punitive in nature, in that it would humiliate CEO Murray. Respondents maintain that this is impermissible under case law of the National Labor Relations Board ("NLRB"), the agency that developed the personal reading requirement, and of courts reviewing NLRB personal reading requirement decisions.[7]

The Secretary opposed the granting of the PDR as contrary to the terms of the Mine Act. According to the Secretary, Respondents have not properly preserved for review the issue of whether, as part of the remedy, CEO Murray can and should be required to personally read a statement to miners.

The Commission thereafter granted review "regarding the question of whether the Judge erred in requiring . . . Robert E. Murray[] to personally read a prepared statement at the mines." Unpublished Order dated Dec. 6, 2016.

II.

Disposition

The Secretary in his response brief renews his objection to the Commission's consideration of the personal reading requirement issue, arguing that Respondents' failure to preserve the issue establishes that the issue has been waived. The Secretary further contends that the failure to raise the issue that the reading requirement was punitive rather than remedial the first time the case was before the Commission means that the personal reading requirement then became "the law of the case," and thus cannot be disturbed at this point. Respondents reply that the issue was raised below and since then preserved because it is related to, and intertwined with, other issues Respondents have pursued before the Commission.

Section 113(d)(2)(A)(iii) of the Mine Act provides that on Commission review "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the [Judge] had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Mine Act's legislative history describes this requirement as one that is "consistent with sound procedure[,] . . . do[es] not deny essential due process," and is "consistent with [the Commission's] duty to resolve matters under dispute in an expeditious manner." S. Rep. No. 95-181, at 49 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978).

In deciding whether a party has properly preserved an issue for Commission review, we have noted that in order for a Judge to have been "afforded an opportunity to pass" on a matter, it "must have been presented below in such a manner as to obtain a ruling. . . . The matter must be raised with 'sufficient specificity and clarity [so] that the [Judge] is aware that [he] must decide

[7] The Commission has drawn on case law interpreting provisions of the National Labor Relations Act ("NLRA") for guidance in construing analogous Mine Act provisions, including in *Marshall County I*. *See* 38 FMSHRC at 2011 n.10 (noting analogous NLRA interference provision). The Commission has also recognized that "[t]he Mine Act's remedial provisions . . . are modeled on section 10(c) of the NLRA . . . ." *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (Apr. 1993).

the issue.'" *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (Aug. 1992) (quoting *Wallace v. Dep't of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989) (citations omitted and alterations in original); *Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (Aug. 1992) (following *Beech Fork*).

A review of the record indicates that, as discussed below, Respondents had not one but two opportunities to object specifically and clearly before the Judge that requiring CEO Murray to read a statement to the miners was punitive rather than remedial. It took advantage of neither opportunity. Consequently, we decline to review this issue. *See Black Beauty Coal Co.*, 37 FMSHRC 687, 694-95 (Apr. 2015) (refusing to consider on review theory of violation that Secretary had not presented below, despite there being multiple opportunities).[8]

First, the Secretary's complaint requested that, should the Judge conclude that interference had been established, "a Murray Energy corporate officer" be ordered to read a notice to all miners regarding the section 105(c) violations. Sec'y's First Amended Compl. at 19, ¶60. At the subsequent hearing, the Secretary moved to amend the complaint to specify that CEO Murray be ordered to read the statement. The Secretary maintained that because the CEO was the presenter at the meetings with miners, a repudiation of his earlier statements would be more effective coming from him. Invited by the Judge to state a position at the hearing, Respondents objected to the amendment on the ground that it was "over the top," and stated that they would "deal with the amendment." Tr. 30.

Importantly, Respondents never followed up on their counsel's statement at the hearing that they would "deal" with the Secretary's "over the top" amendment to the complaint to specify that CEO Murray should be required to personally read the remedial statement. Respondents thus never proffered an actual basis for the objection they made at the hearing to the Secretary's amendment. They did not hint at, let alone make, an argument to the Judge that they now make in their second PDR — that under applicable law CEO Murray cannot be required to personally read the statement because it is punitive rather than remedial.

Second, in his post-hearing brief, the Secretary further explained why he believed an oral statement to miners was necessary, and why it should be delivered by CEO Murray. Secy's Post-H'rg Br. at 3, 26-28. Respondents did not address the issue. Instead, in their post-hearing brief, Respondents limited their arguments to whether interference had been established, and thus were entirely silent on any issue regarding remedies, including whether a statement should be read to miners by CEO Murray or any official of the Respondents.

In her initial decision, the Judge drew upon the broad remedial language of section 105(c)(2) of the Mine Act and NLRB case law[9] to conclude that a high-level corporate official

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[8] Having found that Respondents never sufficiently preserved the personal reading requirement issue, we do not reach the Secretary's "law of the case" arguments.

[9] The Judge relied on *Conair Corp. v. NLRB*, 721 F.2d 1355, 1385-87 (D.C. Cir. 1983). 37 FMSHRC at 2608. In that case, the Court upheld an NLRB order that a company president personally read a statement to employees after he held captive audience meetings where he made threats to employees about closing a plant if it were unionized and expressed his personal animus

should be required to read a remedial notice to miners in this instance. She went on to order that CEO Murray was to hold "a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA." 37 FMSHRC at 2609.

It was entirely understandable that the Judge in her first decision did not address the cursory objection Respondents had made at the hearing because that generalized objection was not even repeated, much less adequately explained or supported by Respondents in their post-hearing brief. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (internal citations omitted). The Commission has held that if a Judge is unaware of a legal theory of a party, she is not obligated to address it in her decision. *Oak Grove Res., LLC*, 33 FMSHRC 2657, 2665 (Nov. 2011); *Beech Fork*, 14 FMSHRC at 1321; *Shamrock Coal*, 14 FMSHRC at 1304. Here the Judge clearly was not apprised by Respondents of the legal basis for their opposition to a reading requirement asserted in the current PDR. *See Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 324 (Mar. 2000) (holding that references by counsel during hearing to delays in initiating proceedings insufficient to preserve laches argument for review when argument was never otherwise laid out for Judge).

Respondents, as part of their second appeal, argue at some length that any reading requirement should be tailored to the circumstances of the case. However,

> [t]he Mine Act establishes an orderly, two-tiered litigation system consisting of trial before a Commission judge and appellate review by the Commission. This system provides for the creation of the factual record before the trier of fact. The rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court's expertise or discretion.

Beech Fork, 14 FMSHRC at 1321 (citations omitted). Consequently, any "tailoring" of the remedy to the facts in this case was better done by the Judge, and the appropriate time for it was when the issue was first before the Judge. Respondents passed on that opportunity in this case.

Respondents passed as well on the opportunity to raise the issue before the Judge on remand. In their remand submissions to the Judge, the parties resumed their dispute over the substance of the statement. The Secretary urged that the Judge adopt, as the statement to be read to miners, the notice that the Secretary had originally proposed be posted in compliance with the Judge's order. Respondents maintained that a different notice, the one that was eventually posted, would suffice as the statement to be read to the miners.

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against unions. Similarly, in this case, the record is clear that the interference charges directly involved CEO Murray, as he had traveled from mine to mine, giving a prepared PowerPoint presentation at each shift that included statements regarding miners' rights protected under section 103(g). *Marshall County I*, 38 FMSHRC at 2008, 2015-16.

Focusing on the content of the statement, Respondents thus once again entirely failed to specify before the Judge that they were objecting to CEO Murray having to personally read the statement. Respondents did not identify the identity of the speaker as being the basis for their continuing objection to the statement reading requirement. Indeed, on remand they identified the issue as "the content of a statement to be read by Mr. Robert Murray at meetings to be held at Respondents' mines . . ." Resp'ts Suppl. Br. on Remand at 7. Thus, they implicitly accepted CEO Murray as the reader of the statement. Apart from a footnote suggesting there are potential constitutional concerns with "an individual" having to read a statement in the case,[10] Respondents limited their arguments to the Judge to whether the Secretary's recommended statement addressed matters that went beyond the scope of the Judge's original order.

Now, before the Commission for a second time, Respondents for the first time specifically object to CEO Murray having to read the statement to miners on the ground that such requirement is punitive rather than remedial. They argue that their initial objection to the Secretary's amendment to the complaint sufficiently raised the issue for purposes of review under 30 U.S.C. § 823(d)(2)(A)(iii) and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). They contend that because they raised a broad objection against the reading requirement earlier in the case, they should be permitted to resurrect at this latest stage of the case an argument that was not pursued until now. Respondents maintain that this is consistent with cases in which the Commission agreed to hear on appeal issues that were intertwined with

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[10] In that footnote Respondents stated that they

> wish to note for the record that compelling a reading of a statement by an individual implicates First Amendment protections, and that if the Secretary seeks to include further material or content, such content could potentially constitute compelled speech, if the reading of a statement authored solely by the government and ordered to be read by an individual does not already implicate such concerns.

Resp'ts Suppl. Br. on Remand at 9 n.6. Respondents thus obliquely suggested that, at some point in the process, the combination of (1) an individual being required to read a statement; and (2) the Secretary's involvement in the drafting of the statement, would give rise to First Amendment issues.

The Judge's rejection of the Secretary's proposed statement in favor of her own eliminates the second issue. As for the Respondents' "note for the record" and suggestion of the "potential[]" for there being compelled speech if "an individual" was required to read a statement, the reading requirement was decided upon and imposed by the Judge the first time the case was before her. It was not challenged by Respondents when this case was originally before the Commission on review. Respondents' footnoted statement during remand thus fell well short of what was required to put the Judge on notice that Respondents were now challenging the requirement that Mr. Murray personally read the statement on the basis asserted in the second PDR. "A 'passing reference to [a] claim . . . is insufficient to prevent . . . waiver.'" *Poree v. Collins*, 866 F.3d 235, 250 (5th Cir. 2017) (footnotes omitted) (alteration in original).

or related to issues that were tried before the Judge but not directly addressed in the decision on review.[11]

Specifically, Respondents contend that the personal statement reading requirement issue is intertwined with, or related to, their argument in the first appeal to the Commission that the Judge's decision and penalty in the case infringed upon their First Amendment rights. Resp'ts Reply Br. II at 11; Resp'ts Br. I at 27. However, Respondents made that argument only with regard to the Judge's consideration of a federal district court suit many of the Respondents had filed against the complainants. That issue was decided by a Commission majority in the Respondents' favor, but not on constitutional grounds.[12] The Commission had no reason to decide any First Amendment issues with respect to the statement reading requirement because those issues had not been raised in a meaningful manner by the Respondents and were in no way "intertwined" with the First Amendment issues implicated by the Judge's consideration of the federal court suit filing.[13]

Respondents also maintain that the issue of CEO Murray personally reading the remedial statement remained preserved through the multiple stages of this proceeding because of Respondents' continued objection to the Judge's admission into evidence of an audio recording of one of CEO Murray's presentations to miners. We decided that we did not need to reach Respondents' objection to that evidentiary ruling in the first appeal because there is sufficient evidence to establish interference with miners' rights without considering the tape recording. *Marshall County I*, 38 FMSHRC at 2019.

That evidence consisted of the PowerPoint slides from the presentations. The presentations were given, in each instance, by CEO Murray. There was no disputing that he discussed the slides, including those addressing miners' section 103(g) rights. Thus, there was much more evidence tying CEO Murray to the interference than just the disputed tape recording. *See id.* at 2015-17.

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[11] *See, e.g., BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (concluding that points made by Secretary to Commission, while not identical to those made to the Judge, were sufficiently related to those below to permit the Commission to consider them under 30 U.S.C. § 823(d)(A)(iii)); *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007) (considering on appeal unwarrantable failure factors not specifically argued by party or analyzed by Judge because they were so intertwined with evidence relating to factors that were addressed); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11 n.7 (Jan. 1994) (accepting argument as sufficiently related to one made below because it enlarged the one made below).

[12] As a result, the penalties assessed by the Judge were vacated as having been improperly increased. *Marshall County I*, 38 FMSHRC at 2024-26.

[13] The First Amendment issue raised by Respondents in their first appeal was that the Judge's consideration of their lawsuit against some of the individual complainants in setting penalties constituted "a prior restraint upon Respondents' First Amendment Rights to seek redress in federal courts." Resp'ts Br. I at 23. Obviously, this is a totally different First Amendment issue than the present claim that the requirement that CEO Murray read the statement "could be viewed as compelled speech." PDR at 16.

In light of Respondents' multiple failures to make plain to the Judge any objection to CEO Murray being required to personally read a statement as part of the remedy, we affirm in result the Judge's decision on remand. The issues of whether, and the circumstances under which, a reading requirement can be ordered by a Judge as a remedy in a Mine Act discrimination or interference case are important ones, and would merit Commission consideration. However, fundamental issue preservation procedures were not adhered to by Respondents in this proceeding. Consequently, we cannot reach the issue of whether the Judge erred in her order with respect to CEO Murray.

III.

Conclusion

For the foregoing reasons, the Judge's decision is affirmed in result.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Appendix A

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RICK BAKER and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	Docket Nos. WEVA 2015-584-D WEVA 2015-585-D WEVA 2015-586-D WEVA 2015-587-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ANN MARTIN and RON BOWERSOX and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RAYMOND COPELAND and RON BOWERSOX	:
and	:
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:
v.	:
MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of MICHAEL PAYTON and RON BOWERSOX	:
and	:
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:
v.	:
MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:

Appendix B

The Federal Mine Safety and Health Review Commission has found that the Murray Energy Corporation and its West Virginia subsidiaries have violated the Federal Mine Safety and Health Act and has ordered me to read and abide by this notice. In an awareness meeting between April and July 2014, I outlined a policy requiring that any safety complaint made to MSHA also be made to management. That policy is rescinded. You have every right to make a complaint to MSHA without notifying any person at the mine.

Section 103(g) of the Federal Mine Act gives you the right to request that the Mine Safety and Health Administration conduct an immediate inspection of a condition or practice that you reasonably believe is an imminent danger or a violation of the Mine Act or its standards. Murray does not, and will not, require that you make the same safety or health complaints to management when you make complaints or reports to MSHA. You have a right, under section 103(g) of the Mine Act, to make those reports anonymously and confidentially.

Murray and its mines will not retaliate against or take any adverse action against any miner or other person because they have made an anonymous or confidential complaint to MSHA. All miners have a right to make a complaint to MSHA and all miners are protected from retaliation or adverse action for making a Section 103(g) complaint.

Section 105(c) of the Federal Mine Safety and Health Act prohibits Murray and any other mine operator from discriminating against its miners and from interfering with their rights under the Act, including the right to make anonymous complaints to MSHA. If any interference or discrimination or adverse action occurs related to your right to make an anonymous complaint, or any other action protected by the Mine Act, you have the right to immediately file a discrimination or interference complaint with MSHA.

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