FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

July 13, 2026

CECIL MATNEY, JR.	
v.	Docket No. WEVA 2023-0126
ROCKWELL MINING, LLC	

BEFORE: Rajkovich, Chair; Jordan and Baker, Commissioners

DECISION

BY: Jordan and Baker, Commissioners

Cecil Matney, Jr., a miner, suffers from Black Lung disease. Pursuant to section 203(b) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), miners who develop evidence of pneumoconiosis have the right to transfer to a low-dust area of the mine without suffering a loss in pay. 30 U.S.C. §§ 843(b)(2), (3). The Act further requires operators to monitor the levels of respirable dust in the mine. Specifically, section 202(a) mandates that "[e]ach operator of a coal mine shall take *accurate* samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed." 30 U.S.C. § 842(a) (emphasis added). Regulations implementing these statutory provisions are located at 30 C.F.R. Part 90, and miners who are deemed eligible to transfer are often referred to as "Part 90 miners."

After screening positive for Black Lung, Matney decided to exercise the transfer right to which he was entitled. The manner in which Rockwell Mining, LLC ("Rockwell") responded to Matney's request is the basis of this proceeding. Matney maintains that Rockwell's actions were insufficient to ensure his work environment stayed within respirable dust limits. In addition, Matney contends that on days the requisite sampling of his work environment occurred, the operator manipulated his assignments so as to avoid dustier jobs, thereby violating the operator's obligation to take "accurate samples" of the amount of respirable dust to which Matney was being exposed.

Matney considered Rockwell's actions to violate the mandate in section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), that no person "discriminate against" or "otherwise interfere with the exercise of the statutory rights of any miner."[1] Matney sought relief by filing a complaint under

[1] Section 105(c)(1) of the Act provides in pertinent part that "[n]o 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

section 105(c)(2), 30 U.S.C. § 815(c)(2), with the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that Rockwell had discriminated against him and interfered with the exercise of his Part 90 rights.[2]

MSHA investigated but ultimately informed Matney that it had not found sufficient evidence to establish a violation of section 105(c)(1). Matney decided to proceed on his own behalf and filed a Complaint with the Commission in accordance with section 105(c)(3), 30 U.S.C. § 815(c)(3).[3]

A Commission Administrative Law Judge conducted a hearing on the merits and concluded that Rockwell's actions amounted to discrimination in violation of section 105(c) of the Mine Act. 45 FMSHRC 1027, 1055 (Dec. 2023) (ALJ). For the reasons which follow, we affirm the Judge in result and hold that the Judge's findings and conclusions establish that Rockwell unlawfully interfered with Matney's Part 90 rights.

I.

Factual Background

Matney started working for Rockwell in 2017 and was promoted to production foreman in early 2022. Around that same time, Matney sought medical attention after coughing-up blood and experiencing trouble breathing. On March 3, 2022, Matney was screened for Black Lung, and received a positive diagnosis for the disease. In April 2022, Matney transferred to his previous job as a non-production move-crew (third shift) foreman, because he believed that position would expose him to less respirable dust.[4] Tr. 36, 43, 50-52, 56, 136-37.

In June 2022, Matney submitted the necessary form for obtaining MSHA's Part 90 protections. On July 6 or 7, 2022, Matney was informed of his Part 90 designation by Bill Hardin, the safety director of the Gateway Eagle mine. Tr. 56, 57, 138. At that time, Matney

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exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

[2] Section 105(c)(2) of the Act provides in pertinent part that "[a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2).

[3] Section 105(c)(3) of the Act provides in part that "[i]f the Secretary [of Labor], upon investigation, determines that the provisions of [section 105(c)(1)] have not been violated, the [c]omplainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3).

[4] The move crew prepares a section for production that is carried out by miners on the day shift. The move-crew's prep work sometimes involved moving the belt and power, and generally making two roof bolt cuts a night. Tr. 47, 222-23.

became entitled to be transferred to a low dust environment and, from then on, if any one of Matney's dust samples exceeded 0.5 mg/m^3, Rockwell would be required to take corrective action under Part 90. Tr. 286, 345. Moreover, Rockwell could be cited for a violation of 30 C.F.R. § 90.207 if "two or more valid representative samples meet or exceed" the applicable limit or the "average for all valid representative samples meets or exceeds" the applicable limit. 30 C.F.R. §§ 90.207(d)(1), (2).

Rockwell conducted its own internal respirable dust sampling of Matney and, based on the results, decided to keep Matney at his position as foreman of the move-crew. Tr. 140, 272, 348. However, when Rockwell later submitted five dust samples to MSHA, the sample for July 28, 2022, indicated levels of respirable dust of 0.667 mg/m^3, which exceeded the 0.5 mg/m^3 limit. Tr. 83-84; M. Ex. 2. Rockwell took corrective action by informing Matney that he needed to remove himself when miners were rock-dusting. Tr. 353.

Matney testified that on the days he wore a dust pump to test his work environment, his activities were limited and therefore the dust samples did not represent his normal dust exposure levels. For example, when he was being sampled, he did not work downwind of active bolting, he did not spread rock dust, and his crew did not cut bottom. Tr. 66-67. These were the jobs or locations that tended to create a dustier environment.

However, on days when he wasn't being sampled, Matney often wound up doing those dustier jobs, particularly when his crew was shorthanded or included a trainee (referred to as a "red hat"). Tr. 81, 144. On those occasions, if a job had to be done, Matney felt he had to make sure it got done, even if he had to step in and do it himself. Matney began keeping a journal documenting those occasions. Matney's journal noted approximately eight shifts between August and November 2022 when the move-crew was short-handed, and Matney had to do work that he believed exposed him to higher levels of respirable dust. M. Ex. 1; Tr. 144, 150-52, 157-59.

Rockwell's witnesses agreed that miners are sometimes pulled from the move-crew to perform tasks in other areas of the mine. Foreman Christopher Holstein acknowledged that he needs to remove a utility man from the move-crew two to three times a month. Tr. 226-27. He maintained, however, that although he expected Matney to continue to do the fire boss runs because Matney was certified to perform that task and the section needed to be ready for the day shift, he did not expect Matney to do the other tasks. Tr. 227. Likewise, Superintendent Shannon Dolin testified that although Matney received a list of work to do every shift, Dolin recognized that it would not always be possible to get the work done. Tr. 279.

Matney was on a paid leave of absence from November 2022 until March 2023. During that time, Rockwell moved another certified miner, Johnny Wriston, into the section to take over for Matney. When Matney returned to work in March, he was assigned to do the fire boss runs of the faces, conduct pre-shift exams, and to make any ventilation changes. Rockwell left Wriston on the section to help Matney, and Wriston largely took over Matney's other duties on the section. Tr. 163-64, 239-40.

These adjustments did not achieve the necessary results. When Rockwell sampled Matney for respirable dust from March 19 through March 27, 2023, the sample for March 23, 2023, showed a respirable dust exposure of 0.745 mg/m^3, which exceeded the required .5 mg/m^3 limit. M. Ex. 2.

In April 2023, Rockwell offered Matney the evening fire boss position, which he accepted. Tr. 171. His initial tasks were to fire boss the belts, roadways and returns. Rockwell subsequently removed the task of checking the returns upon further consideration. Tr. 172.

From May 8 through 15, 2023, Rockwell performed dust sampling on Matney, and an MSHA employee accompanied Matney during that sampling. Tr. 172. The sample for May 9, 2023, showed an excessive dust concentration of 0.653 mg/m^3. M. Ex. 2. On May 10, 2023, Rockwell took the corrective action of removing Matney's task of fire bossing the belts. Tr. 172-73, 286. Matney continued to fire boss the roadways for about two weeks until Rockwell transferred Wriston to the evening shift. Tr. 119, 174, 287.

On May 23, 2023, Matney's job changed significantly. 45 FMSHRC at 1038. Matney began fueling vehicles outside and doing paperwork in an office. Tr. 119, 175. On May 24, he was informed that he would have to start greasing the stacker belt and checking belt splices. Tr. 119. Greasing the stacker belt occurred outside, and the belt that he checked was partially outside of the portal. Tr. 175-76.

The Judge held that Rockwell discriminated against Matney in violation of section 105(c) "by virtue of repeated violations of the requirements of Part 90." 45 FMSHRC at 1027. He reasoned that Matney engaged in protected activity by exercising his right to transfer, and that Rockwell engaged in adverse action by keeping Matney in the position of section foreman despite dust samples showing exposure to dust above the required limit in that position. *Id.* at 1050. The Judge found a violation of section 105(c), despite concluding that the operator's adverse actions were not motivated by Matney's protected activity. *Id.*

On appeal, Rockwell argues that the Judge's discrimination determination should be reversed. It claims the Judge erred by holding that Matney did not need to prove that Rockwell's adverse action was motivated by Matney's protected activity. PDR at 19-26. It asserts that the Judge also erred in holding that Rockwell violated Part 90's requirements. *Id.* at 26-29. Finally, the operator argues that portions of Matney's claim were beyond the Judge's jurisdiction because Matney did not raise those allegations in his initial complaint to MSHA.[5] *Id.* at 30-33.

Matney responds that the Judge correctly concluded that Rockwell interfered with Matney's Part 90 rights by failing to transfer him to a job that complied with the dust exposure limitations of Part 90 and by failing to take accurate samples of the respirable dust amounts in Matney's work environment. M. Res. Br. at 1-2, 8-9. Finally, Matney contends that the Judge appropriately determined that his complaint was not limited to its four corners and that it included his interference claim. *Id.* at 12-13.

The Secretary filed an amicus brief with the Commission. He supports Matney's position that the Judge could consider all of Matney's arguments, because the Commission has subject matter jurisdiction over claims reasonably related to a miner's initial complaint or MSHA's subsequent investigation. S. Amicus Br. at 5-9. The Secretary did not weigh in on the merits of Rockwell's other claims regarding the Judge's decision.

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[5] Matney's initial filing with MSHA claimed of a loss of income in violation of Part 90. The Judge held that the inadequate raise received by Matney during his paid absence was due to a clerical error which was rectified, and that Matney did not establish that he was entitled to any lost income. 45 FMSHRC at 1051-53. Matney did not contest this finding on appeal.

II.

Disposition

There are two issues before us: 1) whether the Judge's determination that Rockwell violated section 105(c)(1) should be affirmed because Matney established that the operator interfered with his rights and 2) whether the Judge exceeded the scope of Matney's complaint by considering claims not raised in his initial MSHA filing. We will address each of these issues in turn.

A. Whether the Judge's determination that Rockwell violated section 105(c)(1) should be affirmed because Matney established violative interference with protected rights?

Section 105(c)(1) of the Mine Act prohibits any person from, *inter alia*, "interfer[ing] 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." 30 U.S.C. § 815(c)(1). Interference with a miner's exercise of his or her statutory right to a transfer arising from a medical evaluation (*e.g.*, a Part 90 transfer) is specifically included in this prohibition. *See* 30 U.S.C. § 815(c)(1) ("No person shall . . . interfere with the exercise of the statutory rights of any miner . . . because such miner . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101.").

We will begin our analysis by reviewing the Commission's history of interpreting section 105(c)'s interference provision. In doing so, we will clarify the law as it stands now. Then we will turn to applying the Commission's test to the facts at issue here.

1. Review of the Commission's Interference Case Law

In *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, the Commission considered how to evaluate a claim of interference under section 105(c). 36 FMSHRC 2088 (Aug. 2014). The case involved two miners who made confidential complaints to their union safety representative, about inadequate pre-shift examinations. The complaining miners were suspended for refusing to provide mine management with the names of the employees who failed to carry out the required safety exams. *Id.* at 2089-92. Although a majority of the Commissioners upheld the Judge's finding of a section 105(c) violation, their analysis differed.

Two Commissioners adopted the test that had been proposed by the Secretary for evaluating interference claims brought pursuant to section 105(c)(1). *Id.* at 2108 (sep. op. of Chair Jordan and Comm'r Nakamura). Under that test, 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.

Id. These Commissioners also held that a miner may prevail on an interference claim under the test, without proof of the operator's specific intent to interfere with the miners' statutory rights.[6] [7] *Id.* at 2113. This interference analysis came to be known as the "*Franks* test." Applying that test, the two Commissioners concluded that the coercive investigation method used by the operator, and the resulting suspensions, would significantly deter miners from making any future safety complaints. In light of that and even allowing for the importance of an operator's need to investigate allegations of unsafe practices, the suspensions constituted prohibited interference under section 105(c). *Id.* at 2113-19.

In *Secretary of Labor on behalf of McGary v. Marshall County Coal Co.*, the Commission affirmed a Judge's application of the *Franks* test to a company policy that required any miner who made a confidential safety complaint to MSHA pursuant to section 103(g)(1) of the Act to report the same complaint to mine management and agreed that such a policy interfered with miners' rights.[8] 38 FMSHRC 2006, 2012, 2013-19 (Aug. 2016), *appeal denied*, 923 F.3d 192 (D.C. Cir. 2019); *id.* at 2028 (Chair Jordan and Comm'r Cohen, concurring in

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[6] By interpreting section 105(c)'s prohibition against "interference" to have different elements than its prohibition against "discrimination," the Commission ensures that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citation omitted). Statutory terms should not be treated as mere surplusage. *See id*. The *Franks* test ensures it is not.

[7] Two other Commissioners held that a retaliatory motive was a necessary element in any section 105(c) claim, and upheld the Judge's finding of violation because, in their view, the miners had submitted evidence sufficient to infer such motive. *UMWA on behalf of Franks and Hoy v. Emerald Coal Re., LP*, 36 FMSHRC 2088, 2096-98 (Aug. 2014) (sep. op. of Comm'rs Young and Cohen). The dissenting Commissioner concluded that a violation of section 105(c) had not been proven. *Id.* at 2125 (Comm'r Althen, dissenting).

[8] Section 103(g)(1) provides that:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger . . . . The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification.

30 U.S.C. § 813(g)(1).

part). The D.C. Circuit affirmed the Commission's application of the *Franks* test without reaching the issue of whether the *Franks* test is the proper test for an interference claim. 923 F.3d at 204-05.[9]

In 2018, Commissioners were evenly divided regarding the correct analytical framework to apply to an interference claim. *Sec'y of Labor on behalf of Greathouse v. Monongalia Cnty. Coal Co.*, 40 FMSHRC 679, 680 (June 2018), *appeal dismissed*, No. 18-1196, 2020 WL 282907 (D.C. Cir. Jan. 17, 2020) ("*Greathouse*"). The case arose when the mine operator implemented a bonus plan at six of its mines. Under the plan, miners temporarily lost their eligibility for bonuses if an MSHA inspector issued a significant and substantial (S&S) citation or a withdrawal order under section 104 of the Act.[10] Additionally, if any crew member suffered a lost-time accident during a shift the entire production crew became ineligible for a bonus for the duration of that shift. The Secretary presented witnesses who described numerous instances in which miners were deterred from engaging in safety related activity, such as reporting violations or accidents, in order to avoid negatively impacting a bonus. The Secretary maintained that the resulting chilling effect of the bonus plans on the exercise of protected rights amounted to prohibited interference with the exercise of those rights, and that the legitimate business purposes intended to be served by the bonus plan did not offset the interference. 40 FMSHRC at 681-82.

The operator maintained that the purpose of the bonus plan was to improve production and safety, and that an absence of evidence showing that the plans were implemented "because of" the exercise of protected rights defeats a section 105(c) claim which, in their view, requires a finding of motive or intent. *Id.* at 682.

Two Commissioners indicated they would apply the *Franks* test and conclude that substantial evidence supported the Judge's determination that the operators violated section

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[9] The fractured nature of the *McGary* decision has led to confusion, with the D.C. Circuit noting in *Wilson v. Fed. Mine Safety & Health Rev. Comm'n*, that the "Commission has not settled upon a test for interference." 863 F.3d 876, 879 (D.C. Cir. 2017).

[10] Section 104(a) provides that:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a).

105(c) by implementing bonus plans which interfered with the miner's protected rights under the Mine Act. *Id.* at 685 (sep. op. of Comm'rs Jordan and Cohen). The other two Commissioners indicated they would find that section 105(c) requires proof of motivation related to protected activity to establish a claim of interference. They would conclude that the Secretary had failed to provide such proof and would therefore reverse the Judge's finding of interference. *Id.* at 708, 729 (sep. op. of Acting Chair Althen and Comm'r Young).

The Judge in *Greathouse* had applied the *Franks* test to conclude that the operator had interfered with miners' rights in violation of section 105(c)(1). 38 FMSHRC 941, 946-48 (May 2016) (ALJ). The effect of the split Commission decision in *Greathouse* was to "affirm the Judge's decision below." 40 FMSHRC at 684.

The Commission decides legal issues, such as the proper test for analysis of a claim, *de novo*. *See American Coal Co.*, 34 FMSHRC 1963, 1972 (Aug. 2012). We conclude that the *Franks* test is the proper analytical framework for an interference claim, and we further conclude that the case before us is most appropriately analyzed as an interference claim.

Interpreting the phrase "because of" in section 105(c) as denoting simple causation is consistent with Congress' goal to encourage miners to "be active in matters of safety and health" and to "play an active part in the enforcement of the Act" so as to increase the effectiveness of the Act. S. Rep. 95-181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978) ("*Legis. Hist.*"). This is also consistent with Congress' express desire for the interference protections of the Act to be broadly construed. *Legis. Hist.* at 624 (noting that the Act's discrimination provision should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation"). It was Congress' goal to protect miners from actions that would prevent them from active engagement with health and safety enforcement, including actions that might prevent miners from ever engaging in protected activity in the first place.

Accordingly, section 105(c) must be construed to prohibit operator conduct or policies which have the effect of discouraging miners from exercising their protected rights in the absence of a compelling justification by the operator. *See* 30 U.S.C. § 815(c)(1) (prohibiting interference "with the exercise of the statutory rights of any miner . . . because such miner . . . is the subject of . . . potential transfer under a standard published pursuant to section 101"). This prohibition applies regardless of the operator's intent in implementing the challenged policy or engaging in the challenged behavior.

Alternatively, interpreting section 105(c) as exclusively prohibiting operator conduct or policies that are *intended* to discourage miners from exercising a protected right or in retaliation for protected activity, instead of focusing on the effect of the conduct or policy, would not fully protect miners from "the more subtle forms of interference" as Congress intended.[11] *Legis. Hist.* at 624.

[11] We note that the use of the phrase "because of" does not imply that interference under section 105(c) requires a finding that the operator intended to interfere with protected rights. Merriam-Webster defines "because" as "1: for the reason that . . . 2: the fact that."

Although the Judge below did not apply the *Franks* test, we conclude that remanding to a Judge for application of the test is unnecessary under the facts of this case. *See, e.g.*, *Northshore Mining Co. v. Sec'y of Labor*, 46 F.4th 718, 735 n.9 (8th Cir. 2022) (citation omitted) (holding that remand was unnecessary where application of the correct legal standard could only lead to one conclusion). As discussed in detail below, the Judge's findings and credibility determinations that are relevant to an interference claim are supported by substantial evidence, and those findings and determinations allow for only one conclusion: that Rockwell interfered with Matney's protected rights in violation of the Act.

Notably, Matney's complaint alleged that Rockwell unlawfully interfered with his statutory rights. Complaint at 4 (alleging that Rockwell interfered with Matney's right to work in a low dust environment).

2. Application of the *Franks* test to Matney's Claim

a. <u>Whether a reasonable miner could view the operator's actions as tending to interfere with their protected rights</u>

The first prong of the *Franks* test requires a complainant to prove that "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." 36 FMSHRC at 2108. In *Wilson v. Fed. Mine Safety & Health Rev. Comm'n*, the Court recognized that "the Secretary's 'interference' test is objective, and the Commission has instructed that 'the relevant perspective on the issue is that of the reasonable miner,' not the subjective perspective of the complainant." 863 F.3d at 882 (citations omitted).

Matney alleges that Rockwell unlawfully interfered with his right to be assigned work in an area of the mine where the dust concentration levels are continuously maintained below the maximum level permitted for a Part 90 miner. *See* 30 U.S.C. § 815(c)(1) ("No person shall . . . interfere with the exercise of the statutory rights of any miner, . . . because such miner . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101").

More specifically, Matney contends that Rockwell interfered with his right by taking respirable dust samples that were not representative of his normal working environment (non-representative sampling) and by failing to provide him with sufficient help so that he could do his job while avoiding exposure to dustier environments (insufficient staffing). *See* M Ex. E at 2, 5-6; Tr. I:192.

<u>https://www.merriam-webster.com/dictionary/because (last accessed June 25, 2026)</u>. In short, "because" denotes causation rather than the intent behind the causation. Adding the word "of" does not change that analysis. *See* Noah D. Zatz, *The Many Meanings of "Because Of": A Comment on Inclusive Communities Project.* 68 Stan. L. Rev. Online 68 (2015) (noting that a narrow, intent-laden interpretation of the phrase "because of" is inconsistent with plain language and defied by ordinary examples).

i. Non-representative sampling

At hearing, Rockwell disputed Matney's allegation that it engaged in non-representative sampling. Supervisor Holstein testified that he did not treat Matney any differently when he was wearing a dust pump. Tr. 227-28. Superintendent Dolin similarly testified that it's "the same every night," whether or not Matney was wearing a dust pump. Tr. 277.

In contrast, Matney presented evidence to support the allegation of non-representative sampling, evidence which was credited by the Judge. Tr. 59-60, 66-67, 80-81, 171; 45 FMSHRC at 1031, 1033. Matney testified that there were significant differences when he wore a dust pump. Tr. 59. During the first two weeks of July, when he was not wearing the dust pump, he rock dusted, moved power, moved the belt, and cleaned the section. M. Ex. 1 at 3. He testified that during that period, he regularly performed fire boss runs downwind of active bolting. Tr. 187. In contrast, when Matney was sampled on July 21, he did not spread rock dust, was not working downwind of the roof bolting machine, and the crew did not cut bottom. Tr. 66-67. Moreover, on that date, Matney was accompanied by Hardin (the mine's safety director), which Matney found unusual because Hardin did not work the third shift. Tr. 57. During that shift, Matney was limited to making belt splices and installing bottom rollers. Tr. 57.

Matney testified that he was told to "take care of the pump and myself." Tr. 140. Matney understood this comment to mean that he needed to make sure that his dust sampling measurements came into compliance. Tr. 59. Matney testified that, when he was wearing a pump, Rockwell wanted him to do nothing but walk the faces. Tr. 59. If a ventilation curtain needed to be hung, someone would hang it for him. Tr. 59. If he had a dust pump on, there was someone to do the rock dusting or his crew did not rock dust. Tr. 60. Matney was also told, on occasions when he was wearing a pump, to "go outside" or "to go in the intake and sit in fresh air." Tr. 58, 59. The Judge found these assertions credible. 45 FMSHRC at 1031.

The Judge also found that Matney's journal entries on August 12, 15, and 16, 2022, supported Matney's assertion that when wearing a pump, "it was not business as usual, as accommodations were made for Matney's known and serious health condition." *Id.* at 1033. Matney's journal reflected that on August 12, Matney performed tasks on the working section such as cleaning and dusting, loading out the gob, and operating the roof bolter. Tr. 80. On August 15, Matney cleaned faces, roof bolted faces, and pumped water. Tr. 80. On August 16, when MSHA ran a dust sample on Matney, Matney cleaned the faces and pumped water, but a red hat miner performed roof bolting so that Matney could remain in fresh air. Tr. 80-81, 147; 45 FMSHRC at 1033.

When reviewing a 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)); *Sec'y of Labor on behalf of Price v. JWR*, 12 FMSHRC 2418, 2420 (Nov. 1990). The whole record 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); *Black Castle Mining Co.*, 36 FMSHRC 323, 328 (Feb. 2014).

When the Commission "reviews a Judge's factual findings, 'credibility determinations are entitled to great weight and may not be overturned lightly.'" *Sec'y of Labor on behalf of Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC 523, 529 (Aug. 2024) (citation omitted). The Commission may not reject "reasonable findings and conclusions, even if [the Commission] would have weighed the evidence differently." *Sec'y of Labor v. Knight Hawk Coal, LLC*, 991 F.3d 1297, 1308 (D.C. Cir. 2021) (citation omitted). Rockwell has not presented adequate reasons for overturning the Judge's crediting of Matney's testimony. Moreover, such testimony amounts to substantial evidence in the record supporting the Judge's determination that when Matney was wearing a dust pump, accommodations were made for his condition, unlike when he was not being sampled. 45 FMSHRC at 1033.

ii. Insufficient staffing

Matney testified that he thought his position as move crew foreman would comply with dust exposure requirements if there were adequate crew members on the section to do the work. *Id.* at 1032; Tr. 62. From the time he became a Part 90 miner, on July 6 or 7, 2022, until mid-November, there were approximately eight instances noted in Matney's journal in which the move crew was short-handed, or Matney had to do work that he thought exposed him to excessive respirable dust. 45 FMSHRC at 1032; Tr. 159. As the Judge found, the evidence is undisputed that there were occasions when the move crew was short. 45 FMSHRC at 1032.

Rockwell's position appears to be that Matney himself should be responsible for making choices that would keep him from getting exposed to too much respirable dust. Although Supervisor Holstein expected Matney to have the section ready for day shift, he told Matney not to do the work personally. Tr. 225. Holstein testified that Matney could have turned off the power or told miners to stop bolting. Tr. 245. He maintained that there were many times when the third shift failed to bolt all of the areas they were supposed to, and that the day shift followed up behind them. Tr. 243. Superintendent Dolin testified that he told Matney he "had to change his mindset" about doing work himself. Tr. 273. He told Matney that if work could not get done, then it could not get done. Tr. 275. Dolin explained that Matney should shut off the bolter any time he had to fire boss, and if miners were rock dusting, Matney should go into fresh air. Tr. 277. Dolin testified that if the utility man was needed outby, Matney just should not get that work done. Tr. 277-78. Dolin acknowledged that he liked to get work lists completed but that was not always possible, and that he has never reprimanded Matney for not getting all of the tasks done. Tr. 279.

In contrast, Matney testified that on a given night, it might be him and one roof bolter operator on the section. Tr. 79. Matney testified that if he asked someone to come to the section to rock dust for him, and no one was sent to the section, Matney did the rock dusting himself. Tr. 60. Matney testified that Superintendent Dolin told him several times that he, Matney, "will rock dust." Tr. 60. On one occasion, when Matney refused, Dolin pointed his finger in Matney's face and told him that he "would rock dust every night," and then Dolin grabbed his own hair and shook his head. Tr. 60. The Judge credited Matney's account of this incident. 45 FMSHRC at 1032.

Matney testified that in September 2022, there were three days when he was either shorthanded or had to perform tasks that he believed overexposed him to respirable dust. Tr. 150. On September 22, the utility man was needed outby, leaving the crew one man short. Tr.

150-51. On September 26 and 27, two utility men were removed and Matney testified that he was told that Holstein wanted Matney to rock dust. Tr. 151, 189-90.

Holstein agreed that he had pulled two utility men off of the crew on September 26 and 27. Tr. 229. However, Holstein testified that Matney still had two roof bolters who could rock dust and that he did not expect Matney to rock dust. Tr. 230-31. The Judge found the September entries about being short-staffed supported Matney's position that "despite his Part 90 status, he was shorthanded." 45 FMSHRC at 1033.

Matney also noted three days in October when he was shorthanded, or had to rely on inexperienced red hats, and as a result had to personally perform tasks that he thought overexposed him to dust. Tr. 152. On October 13, he was the only one on the section except for an electrician, a greaser, and a representative from Joy Mining Machinery. Tr. 152. Matney testified that he worked on ventilation and cleaning. Tr. 154. The Judge credited Matney's account of events that night. 45 FMSHRC at 1034. On October 27, he had to move power with three red hats. Tr. 155. On October 31, 2022, he cleaned and dusted with one red hat and one other miner. Tr. 156.

Holstein agreed that on October 13, 2022, everyone was pulled from the crew except Matney, a greaser, and a Joy representative. Tr. 232. Regarding October 27, Holstein testified that moving power is not particularly dusty and that rock dusting would not have occurred that night if there were only three red hats. Tr. 232. With respect to October 31, 2022, Holstein testified that one red hat and another miner should have been able to clean and rock dust the section by themselves. Tr. 232.

Matney noted two days in November when he was still move-crew foreman and was shorthanded and partially performed tasks that he thought were dusty. Tr. 157. On November 1, there were only two roof bolters, and Matney was short a utility man. Tr. 158. On November 2, he had only two red hats to clean and dust. Tr. 158-59; *see also* 45 FMSHRC at 1034.

The Judge credited Matney's testimony regarding insufficient help and, contrary to Rockwell's professed indifference, concluded that it did matter to Rockwell that tasks were not completed. 45 FMSHRC at 1040; *see also id.* at 1030 ("Having observed Matney and Holstein closely during their testimony, the Court concluded that Matney was the more credible witness."). Rockwell has not presented adequate reasons to overturn the Judge's credibility determinations, and substantial evidence supports the Judge's findings that Rockwell's sampling of Matney was not always representative of his normal working conditions and that it did, in fact, matter to management whether work was completed by the crew. *Id.* at 1033, 1040. Given these findings, we conclude that the first prong of the *Franks* test has been established. A reasonable miner would believe that the right to work in an environment where the dust limit must be continuously maintained below a certain level is interfered with when the operator submits samples that are not representative of normal working conditions or does not ensure that sufficient help is provided on the section to allow the Part 90 miner to complete the assigned work without exposure to excessive dust.

Moreover, as detailed above, Rockwell repeatedly placed the burden of compliance on Matney by instructing him to complete the work in a way that lessened his exposure to dust. Part 90 is unequivocal in its requirement that the operator offer the Part 90 miner the option of working in a part of the mine that complies with the standard. 30 C.F.R. § 90.3(a). Here, Rockwell clearly failed to offer Matney that option, even though Rockwell had several ways to comply with Part 90's requirements, whether by transferring Matney to a qualifying position in a less dusty area or bringing his work area into compliance. *See Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 897 (May. 1987). A reasonable miner would also believe that the operator's actions in requiring that the miner bring his own job assignment into compliance with Part 90 constituted unlawful interference with the right to work in an environment where the dust limit was continuously maintained below a certain level.

b. Whether the operator's justifications for its actions outweighs the resulting interference with Matney's rights

The Judge concluded that the "essential problem was the mine's effort to keep Matney in the section though the job really could not be done without exposing Matney to excessive dust." 45 FMSHRC at 1043. He found that Rockwell's reason for doing so was that "with Matney's background and experience he was more valuable to the mine in the section position." *Id.* at 1050. In addition, the Judge concluded that Matney's ability to do his tasks would take a back seat to bigger tasks that needed to be done at the mine, which resulted in the removal of miners from Matney's crew. *Id.* at 1039.

Substantial evidence supports the Judge's finding that Matney was kept in his position because he was more valuable to the mine in the move crew foreman position. Matney testified that he asked by Rockwell's Safety Director Rex Osborne if there were any available jobs in safety but was told that there were none at the time. Tr. 188-89. He testified that he also asked management for work outside in order to be away from the dust but that he never received a response. Tr. 189. Superintendent Dolin testified that Matney asked a few times about a dispatcher job, but that with Matney's "knowledge and his ability and [being] certified . . . we tried to utilize him better." Tr. 338-39. Dolin also testified that Rockwell wanted Matney to do the fire boss runs because he was certified, and fire boss runs must be done by a certified person. Tr. 227, 274-75.

The evidence is undisputed that Wriston was a certified miner who could, and did, take over Matney's tasks during Matney's paid leave and after Matney returned to work. Tr. 163. The Judge found that "Wriston's role was essentially an admission on the part of Rockwell that Matney could not do his job and still be Part 90 compliant." 45 FMSHRC at 1035-36. Besides using Wriston to cover Matney's position, Rockwell had the option of bringing the dust level on the section into compliance with the 0.5 mg/m^3 standard.

Thus, Rockwell had options available that could have protected Matney's Part 90 rights, but the operator chose not to utilize those options. The Judge's findings, supported by substantial evidence, demonstrate that Rockwell failed to justify leaving Matney in his role as move crew foreman in a way that outweighed its interference with Matney's protected rights. Thus, the second prong of the *Franks* test has been satisfied.

Accordingly, we conclude that Rockwell interfered with Matney's protected Part 90 rights and affirm, in result, the Judge's determination that Rockwell violated section 105(c)(1).

B. Whether the Judge Exceeded the Scope of the Complaint?

Rockwell contends that the Judge erred by exceeding the Commission's jurisdiction and considering allegations made by Matney in his section 105(c)(3) complaint filed with the Commission, that were not made in either his initial September 13, 2022 complaint to MSHA, or his September 26, 2022 statement to MSHA. We find no such error.

The permissible ambit of the complaint filed with the Commission "is the scope of the Secretary's *investigation*, rather than the initiating complaint." *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) (emphasis in original). Thus, the Commission has jurisdiction over matters contained in a section 105(c)(3) complaint that were investigated by MSHA. *Id.* at 1017-18; *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991) ("If the Secretary's . . . investigation did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to section 105(c)(3) have not been met."). A Judge is permitted to consider additional evidence so long as it relates to the allegations raised to, or investigated by, MSHA.

We find that Matney made essentially the same claims to the Judge on his own behalf that he presented to MSHA. In both instances Matney alleged that he failed to receive a pay raise, and that the operator failed to maintain his working environment in a manner that was consistent with his rights under Part 90. *Compare* Complaint at 1 *with* M. Ex. E at 2. Although Matney presented evidence at the hearing of subsequently occurring events, those incidents were reasonably related to claims made in his original claim and statement. Matney also consistently sought the same relief. *Compare* Complaint at 5 *with* M. Ex. E at 6.

We further find it significant that Rockwell received notice of Matney's allegations relating to events that occurred after September 26 through the discovery process and that Rockwell had an opportunity to defend against those allegations at the hearing. *See* PDR at 33 (taking issue with "anything that happened after September 26, 2022 . . . ."). The Commission has recognized that the "fundamental requirement of procedural due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The primary purpose of the Secretary's section 105(c)(2) investigation is to review the miner's claim to determine if the Secretary will file a complaint on behalf of the miner. *See* 30 U.S.C. §§ 815(c)(2), (3). It is not the method by which Rockwell receives constitutionally required notice, which occurs later. Rockwell had notice of Matney's arguments during discovery, and defended against the evidence of the post-September 26 incidents at the hearing, in its post-hearing brief, and in its briefs before us. *See, e.g.*, Tr. 231-33; R. Post-Hr'g Br. at 27-30; PDR at 10-17. Thus, Rockwell has not suffered prejudice and has received due process. Accordingly, we affirm in result the Judge's determination that Matney's claims relating to incidents that occurred after September 26 are appropriately considered within Matney's complaint before the Commission.

III.

Conclusion

For the reasons above, we affirm, in result, the Judge's determination that Rockwell violated section 105(c)(1) of the Mine Act by interfering with the miner's protected rights. The Secretary shall file a petition for assessment of civil penalty against Rockwell in accordance with the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 27.[12]

Mary Lu Jordan, Commissioner

Timothy J. Baker, Commissioner

[12] On April 1, 2025, the Commission issued an order holding in abeyance the portion of the Judge's decision ordering the Secretary to file a civil penalty against the operator. We hereby lift the hold and direct the Secretary to file a petition for assessment of civil penalty against the operator with the Commission.

Chair Rajkovich, concurring:

I ultimately agree that Rockwell violated section 105(c)(1) of the Mine Act.[1] However, I would find a violation under the discrimination clause of the provision, and therefore find it unnecessary to reach the issue of interference.[2] 30 U.S.C. § 815(c)(1) ("No person shall . . . in any manner discriminate against or otherwise interfere with" a miner's exercise of statutory rights).

To establish a *prima facie* case of discrimination under the Commission's traditional *Pasula-Robinette* framework, Matney must show that Rockwell took an adverse action that was at least partly motivated by Matney's exercise of a protected activity.[3] *See, e.g.*, *Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011). Here, the Judge found that Matney engaged in protected activity by becoming a Part 90 miner and Rockwell took adverse action by keeping Matney in his position despite exposure to dust above permissible levels. However, he found that Rockwell's actions were motivated by a desire to keep a valued employee in his position.

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[1] I join the majority's conclusion regarding the scope of the complaint. *See* Section II.B, *supra.* Additionally, I would find harmless error in the Judge's conclusion that the operator violated Part 90. PDR at 26-29; 45 FMSHRC at 1054-55. Part 90 violations are outside the scope of this discrimination matter. The question is not whether Matney was exposed to high enough dust concentrations to violate Part 90, but whether Rockwell took adverse action because of Matney's protected status as a Part 90 miner. Nevertheless, the Judge's statement that Rockwell violated Part 90 was effectively dicta with no bearing on the outcome of the proceeding.

[2] Both the Judge's Decision and the Petition for Discretionary Review discuss this matter in the context of discriminatory adverse action rather than interference. *See* 45 FMSHRC at 1046-50; PDR at 18-19. As addressed herein, the record ultimately supports the Judge's finding of discrimination. Accordingly, I find it unnecessary to conduct a *de novo* review under the interference framework.

I also note that, while the *Franks* test has been applied by the Commission in certain instances, it has not been explicitly endorsed as the proper test for interference claims by either a majority of Commissioners or any circuit court. *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP,* 36 FMSHRC 2088, 2089 (Aug. 2014); *Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.,* 40 FMSHRC 679, 680-81 (June 2018); *Sec'y of Labor on behalf of McGar*y *v Marshall County Coal Co. et al.*, 38 FMSHRC 2006, 2012 n.11, 2028 n.22 (Aug. 2016), *aff'd* 923 F.3d 192, 204-05 (D.C. Cir. 2019) (declining to address whether *Franks* is the appropriate test for interference).

[3] The Ninth Circuit has rejected the *Pasula-Robinette* standard in favor of a "but-for" causation standard. *Thomas v. Calportland Co.*, 993 F.3d 1204 (9th Cir. 2021). This matter falls in the Fourth Circuit, where *Pasula-Robinette* remains the standard. *Thomas v. Calportland Co.*, 46 FMSHRC 119, 122 n.5 (Mar. 2024). Regardless, both standards require a causal connection between protected activity and adverse action. Because I would find a causal nexus between Matney's protected activity and Rockwell's adverse action, I would find discrimination under either approach.

rather than by Matney's protected activity. Nevertheless, he concluded that "a strict application of the Commission's *Pasula-Robinette* test does not work well" in the Part 90 context and went on to find discrimination despite the absence of a causal nexus. 45 FMSHRC at 1050. For the reasons below, I would affirm *in result* the Judge's finding of discrimination.

The Judge erred in finding discrimination in the absence of a causal connection between the protected activity and adverse action. *See* 30 U.S.C. § 815(c)(1) (stating that no person shall discriminate "because of" a miner's exercise of statutory rights). However, he also erred in *finding no causal connection*. The Judge's determination that Rockwell's actions were not motivated by Matney's protected status is inconsistent with the Judge's own factual findings.

In the absence of direct evidence of motivation, the Commission looks to indirect indicia such as hostility toward the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *E.g.*, *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). Here, the Judge made (then failed to consider) two factual findings that strongly indicate a motivational nexus.

First, the Judge credited Matney's testimony that he was ordered to rock dust on several occasions after being designated a Part 90 miner, including one instance where the mine superintendent "pointed his finger in [Matney's] face and told [him] that [he] would rock dust every night and grabbed his hair and shook his head." 45 FMSHRC at 1031-32; Tr. 60-61. This indicates both an intent to circumvent, and hostility towards, Matney's Part 90 status.

Second, the Judge implicitly found that Rockwell engaged in non-representative dust sampling. Matney testified that when he was wearing a personal dust meter ("PDM") on July 21, 2022, he was told that his work was too dusty and to "take care" and only walk across the faces, which he interpreted as an instruction to ensure that the dust samples would show as compliant. Matney also testified that he was occasionally told to go sit in fresh intake air, and that his rock dusting duties would be reassigned when he was being dust sampled. Tr. 57-60. The Judge credited Matney's interpretation of the July 21 conversation and his testimony that he was directed to sit in fresh air. 45 FMSHRC at 1031. The Judge also noted journal entries showing that when Matney was wearing his PDM, he did not perform his usual roof bolting duties so that he could remain in fresh air. The Judge accepted Matney's assertion that *when Matney was wearing a PDM*, Rockwell treated him differently and made accommodations for his condition. *Id.* at 1032-33 ("when wearing a PDM, it was not business as usual"). These extra efforts to reduce Matney's exposure when wearing a PDM meant that dust sample readings would not reflect normal exposure levels for Matney's position.

These efforts to arrange non-representative sampling strongly indicate an intent to circumvent Matney's Part 90 rights and retain him in a position with potentially impermissible dust levels. They also establish both coincidence in time and disparate treatment. The mine was notified of Matney's Part 90 status in early July 2022. Tr. 270. The conversation in which Matney was told to "take care" occurred on July 21, 2022, the *first time* Matney wore a PDM after becoming a Part 90 miner. 45 FMSHRC at 1030, 1031. Within a month of learning that Matney had become entitled to reduced dust exposure, Rockwell had taken steps to keep him in his position irrespective of dust levels. And while there is no evidence that Matney was treated differently from *other miners*, the Judge found that Matney was treated differently (given different tasks) when his dust levels were being monitored.

I acknowledge that Rockwell appears to have acted out of a desire to keep Matney in a position where he was valued, rather than any desire to punish him for protected activity. *Id.* at 1049-50, 1050 n.25, 1055. However, discrimination does not require an intent to *punish* miners for engaging in protected activity, only that the operator take an adverse action *because of* a miner's protected activity. *See, e.g.*, *Hargis v. Vulcan Construction Materials, LLC*, 46 FMSHRC 523, 532 (Aug. 2024) ("Animus towards a protected activity does not require that the operator display anger or unkindness towards the miner."). Here, the Judge concedes that Rockwell attempted to invent a "contorted" and "unworkable" role to keep Matney in his position despite impermissible dust levels. 45 FMSHRC at 1050. The motive behind Rockwell's actions was not merely to keep Matney in his position, but to keep Matney in his position *despite its conflict with his new Part 90 status*. Rockwell only took actions such as arranging for non-representative sampling *because* Matney had become a Part 90 miner. Rockwell effectively *could not* have acted to circumvent Matney's Part 90 protections (potentially exposing him to impermissible levels of dust) if Matney had not applied for Part 90 protections. The causal connection between Matney's protected activity and Rockwell's adverse action is unavoidable. A *prima facie* case of discrimination has been established.

An operator may defend against a *prima facie* case of discrimination by proving that it would have taken the relevant adverse action for unprotected activity alone. *See, e.g., Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987). Here, the Judge found that Rockwell was motivated by a desire to keep a valuable employee in his position, which suggests the operator was at least partially motivated by a legitimate business interest. 45 FMSHRC at 1050; Tr. 339. However, that interest *alone* cannot justify the adverse actions here: an operator would not engage in non-representative dust sampling to keep a miner in his current position if that miner was *not* Part 90. In this case, Rockwell's actions are inextricably linked to Matney's protected activity. Accordingly, I would not find it necessary to remand this matter to the Judge for an affirmative defense analysis.

I would find that Rockwell discriminated against Matney even under a "strict application" of the Commission's *Pasula-Robinette* test. Accordingly, I would affirm the Judge's finding of discrimination in result.

Marco M. Rajkovich, Jr., Chair

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