December 2023

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2023-0081 A.C. No. 40-02964-566985
DYNO NOBEL	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 18, 2023, the Commission received from Dyno Nobel a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 2, 2022, and became a final order of the Commission on January 2, 2023. Dyno Nobel asserts that it's failure to timely contest the proposed assessment arose from administrative error and inadvertent mistake. It claims that it received the assessment during the holiday period, but that personnel were absent, and their offices were closed. As a result of insufficient staffing, the assessment was

inadvertently not forwarded to Dyno Nobel's counsel for a timely filing of the contest. The citation was also mistaken for another, related citation that had been issued on the same date. According to the operator, the error was discovered after proactively checking MSHA's data retrieval system and finding that the final order was issued in its case. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Dyno Nobel's request and the Secretary's response, we find that the operator's failure arose from administrative error and inadvertent mistake due to the insufficient staffing, closures, and confusion from the other citation issued on the same date. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 4, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2023-0117 A.C. No. 04-01891-568592
ENTACT	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 6, 2023, the Commission received from Entact a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was returned undelivered on December 24, 2022, and became a final order of the Commission on January 23, 2023. Entact asserts that it did not receive the proposed assessment. Specifically, it claims that it could not find any copy of the assessment in any of its emails or hard copy files and that it checked with all their offices throughout the country, and nobody had received it. According to MSHA records, the assessment was sent to Entact's health and safety director in Latrobe, Pennsylvania. However, the current address of record and location of Entact's safety director is in Westmont, Illinois.

On January 31, 2023, the operator contacted MSHA to find out where the assessment was, and was informed that it had been sent, although the delivery confirmation from USPS appears to show that the mail was returned because the occupant had "moved, left no address." MSHA provided the operator with a copy of the proposed assessment on February 1, 2023, and the operator filed the contest with MSHA the same day. It received a letter via email informing it that the contest was sent too late. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Entact's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because Entact did

not receive the proposed assessment. *See* 29 C.F.R. § 2700.26 ("[a] person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment.")

Accordingly, Entact's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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December 6, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HEIDELBERG MATERIALS US CEMENT LLC,	Docket No. CENT 2023-0192 A.C. No. 13-00095-572679

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 17, 2023, the Commission received from Heidelberg Materials US Cement LLC ("Heidelberg") a motion to reopen a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the operator on March 13, 2023. On March 19, 2023, Heidelberg timely contested five of the 38 proposed penalties contained in the assessment. The remaining 33 uncontested penalties therefore became final

orders of the Commission 30 days later (April 12, 2023). On May 10, 2023, the Secretary of Labor filed a penalty petition for the five contested citations.

On May 17, 2023, the operator filed a motion to reopen three of the originally uncontested penalties.[1] Heidelberg alleges that it intended to contest those three citations, but failed to as a result of a mistake. As specified in an attached affidivt, the operator's Safety Manager states that she omitted the fourth page of the assessment when scanning the documents, which led to her failure to contest citations listed on that page when transmitting the contest form to MSHA. The Secretary opposes the operator's motion, alleging that Heidelberg does not provide a sufficent explanation of the mistake.

We find that the operator has established that it was acting in good faith. It timely filed a contest form, albeit incomplete, and then promptly filed the subject motion after receiving the penalty petition. The Secretary's penalty peititon was filed on May 10, 2023 and the operator's motion to reopen was filed one week later. The timing of that filing appears to indicate that the operator reviewed the penalty petition, recognized its error, and moved to reopen before receiving a notice of delinquency. The Commision has held that quick action after recognizing an error militates in favor of reopening. "Motions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co*., 31 FMSHRC 1313, 1316-17 (Nov. 2009). Further, Heidelberg affirms that it submitted a position statement to MSHA addressing the allegations in Citation No. 9628458 (one of the citatons subject to this motion), as part of a special investigation on March 16, 2023. The submission of this position statement is at least some circumstantial evidence of an intent to contest the citation.

Additionally, we find that the operator sufficiently explained the nature of the mistake, supported by a relevant affidavit. The Commission requires that "[a]t a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . ." *Lone Mountain,* 35 FMSHRC at 3345 (*citing Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010)). Here, the operator provided pertinent details including the party involved, relevant dates, and a clear explanation of procedures used to send contests. Accordingly, based upon the operator's explanation of its procedures, its attentiveness upon receiving the penalty petition and quick action thereafter, we find that its failure to timely contest the citations on the fourth page of the assessment was the result of a good faith mistake, and not the result of unreliable procedures.

[1] The operator requests to reopen Citation Nos. 9628458, 9628337, and 9628453.

We therefore conclude that the operator has established good cause for its failure to timely file in these circumstances. In the interest of justice, we hereby reopen Citation Nos. 9628458, 9628337, and 9628453 and remand the matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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December 6, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ST. MARYS CEMENT	Docket No. LAKE 2023-0116 A.C. No. 20-02434-568270

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On March 5, 2023, the Commission received from St. Marys Cement ("St. Marys") a motion to reopen a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the operator on December 19, 2022, and became a final order of the Commission on January 19, 2023. In its motion to reopen, the operator states that its failure to timely file was the result of a mistake. The operator asserts

that the proposed assessment was delivered to the mine just prior to Christmas, at a time when personnel were absent. At that time there also happened to be a change in safety leadership. The mine supervisor does not recall receiving the assessment. Furthermore, the operator believed that this citation was contested as part of a previous separate assessment. The operator discovered that this belief was mistaken on March 3, 2023, while reviewing MSHA's Mine Data Retrieval System ("MDRS"). The Secretary does not oppose the operator's request to reopen.

Having reviewed St. Marys request and the Secretary's response, we find that the operator has demonstrated that its failure to timely file to contest was the result of a mistake. The operator demonstrated that the mistake was made in good faith by pro-actively reviewing MSHA's MDRS and promptly moving to reopen upon their discovery of the error. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
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December 6, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. SELECT MATERIALS	Docket No. LAKE 2023-0148 A.C. No. 33-01355-564439

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 11, 2023, Select Materials filed a motion to reopen the captioned case which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Select Materials filed a *pro se* motion to reopen, contending that it did not receive the proposed assessment in the mail. The motion states that on March 14, 2023, the mine operator was first notified that it owed penalties when an MSHA inspector hand-delivered a delinquency letter to its mine site.[1]

The Secretary opposes reopening these final orders. The Secretary demonstrates the U.S. Postal Service ("USPS") originally attempted to deliver the proposed assessment via certified mail on October 8, 2022 to the operator's address of record in Howard, Ohio. Thereafter, the operator was sent multiple notices indicating that the USPS was attempting to deliver certified mail. Sec'y Ex. B. On October 31, 2022, USPS returned the item to its sender after it went uncollected.

On January 20, 2023, the Secretary claims she sent the operator a delinquency notice. The Secretary then later hand-delivered a letter warning the operator that the Secretary would take additional enforcement actions if the operator did not remit payment of the penalties within 30 days. On April 10, 2023, MSHA issued the operator a citation alleging a failure to pay the penalties.[2] On April 11, 2023, the operator filed the subject motion to reopen.

After considering the operator's motion and the Secretary's opposition to that motion, we conclude that the operator has failed to fulfill its burden to demonstrate that its failure to timely file to contest was the result of a mistake, excusable neglect, or some other good cause reason.

The Commission requires that:

> An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

[1] The operator states that the letter contained an unfamiliar address and person in Texas; it speculates that these errors may have contributed to its failure to receive the original proposed assessment. There, however, is no evidence that the proposed assessment was mailed to the Texas address. To the contrary, the Secretary has provided detailed postal records demonstrating that delivery of the proposed assessment was attempted to the operator's correct address in Howard, Ohio. Sec'y Ex. B.

[2] On April 25, 2023, after receiving the citation, the operator paid the civil penalties.

Higgins Stone Co., Inc., 32 FMSHRC 33, 34 (Jan. 2010). Select Materials motion does contain the aforementioned information. The operator does not account for its failure collect the certified mailings after receiving multiple notices, including a notice that indicated that MSHA was attempting to deliver a package.[3] Furthermore, the operator's motion completely lacks a description of its normal personnel and processes used to receive and contest proposed assessments. Accordingly, it does not demonstrate that the failure to contest was not due to its own inadequate or unreliable procedures.[4] Finally, the operator's motion does not explain its delay in seeking to reopen after receipt of the January delinquency letter.

Because we conclude that the operator's failure to contest was not the result of a good cause, its motion is DENIED with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[3] The Secretary notes that "[c]ertified Mail from MSHA almost certainly contains proposed penalty assessments." It is well recognized that a movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order. *See, e.g.*, *Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted).

[4] The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008)

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December 13, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BUZZI UNICEM USA	Docket No. CENT 2022-0189 A.C. No. 23-00188-556052

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On June 24, 2023, the Commission received from Buzzi Unicem USA ("Buzzi") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 17, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Buzzi's perceived failure to answer the Secretary of Labor's August 16, 2022, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on November 17, 2022, when it appeared that the operator had not filed an answer within 30 days.

Buzzi requests relief in order to state its reasons for why it disagrees with alleged violations alleged in the Secretary's petition. The Secretary opposes the request to reopen noting that the operator has failed to provide any explanation for its failure to file an answer to the Petition for Assessment of Penalty, respond to the Order to Show Cause and Order of Default, and for why it delayed responding to a delinquency letter issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on February 1, 2023.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall

be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Buzzi's request and the Secretary's response, we conclude that the operator has failed to provide sufficient information to determine whether good cause may exist to reopen the final order. We have held that a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest." *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008). However, Buzzi's motion to reopen provides no explanation for its failure to timely file a petition or respond to the Chief Judge's Order to Show Cause and Order of Default.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we also find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the operator attempted to reopen the case approximately four months after MSHA sent it a delinquency letter. No explanation is provided for this lengthy delay.

Accordingly, we deny Buzzi's request to reopen with prejudice. *See Southwest Rock Prod., Inc.*, 45 FMSHRC ___, No. WEST 2021-0275 (Aug. 30, 2023) (denying motion to reopen where operator provided insufficient information to determine whether good cause existed to reopen and operator failed to explain lengthy delay in filing motion).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 14, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2022-0097
GENEVA ROCK PRODUCTS, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY: Jordan, Chair; Althen and Baker, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018). Alleged violations at issue in this proceeding were referred to the Department of Justice ("DOJ") for potential indictments under section 110(c) and 110(d) of the Mine Act, 30 U.S.C. §§ 820(c), (d). On July 17, 2023, a Commission Administrative Law Judge issued an order staying the instant proceeding pending the completion of the DOJ's criminal investigation and any subsequent proceedings. On October 4, the Commission received the Secretary of Labor's petition for interlocutory review.

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

Upon consideration of the Secretary's petition, we hereby grant interlocutory review of the Judge's order of July 17, 2023. The issue on interlocutory review is whether the Judge abused his discretion when he ordered a stay of the case for an indefinite duration.

The Secretary shall file an opening brief with the Commission within 30 days of this order, and remaining briefs shall be filed in accordance with Commission Procedural Rule 75, 29 C.F.R. § 2700.75.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 29, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2023-0120
MORTON SALT, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018). On December 18, 2023, a Commission Administrative Law Judge issued an order granting the Secretary's motion for certification for interlocutory review and denying her motion to cancel the hearing scheduled for January 9-11, 2024.

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

Upon consideration by the Commission, the Judge's December 18, 2023, certification for interlocutory review is accepted. The Commission hereby grants interlocutory review of the following issue: whether the Commission has authority to review the Secretary's decision to issue a notice of pattern of violations. The hearing scheduled for January 9-11, 2024, is hereby suspended pending further order by the Commission. Both parties shall file opening briefs with the Commission within 20 days of the date of this order, and response briefs shall be filed within 10 days after service of the opening briefs.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2023

CECIL MATNEY, JR., Complainant	DISCRIMINATION PROCEEDING Docket No. WEVA 2023-0126
v.	
ROCKWELL MINING, LLC, Respondent	Mine: Gateway Eagle Mine Mine ID: 46-06618

DECISION

This matter involves a complaint of discrimination arising under Section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). For the reasons which follow, the Court finds that Respondent Rockwell Mining discriminated against Complainant Cecil Matney, Jr. by virtue of repeated violations of the requirements of Part 90 and that as a consequence the Secretary should consider seeking a civil penalty for those violations.

Apart from the Part 90 violations, the Court finds that Mr. Matney suffered no financial loss in connection with a short-lived and non-malevolent clerical error associated with a bonus. Further, the Court finds that Matney is not entitled to his claim of compensation for any supplemental income from Saturday work for two reasons: He is a salaried employee and has been paid in full per that salary, and assuming arguendo that he was entitled to Saturday pay while on the mine's decision to place him on paid leave of absence, he failed to meet his burden of proof to establish with any precision those Saturdays he would have worked had he not been on the extended leave of absence from his section foreman position.

Introduction: Cecil Matney's Discrimination Complaint

The Respondent has stipulated that Mr. Matney is a Part 90 miner. Tr. 6. Briefly stated, Matney's complaint began upon submitting his statement to MSHA on September 26, 2022. The

statement initially alleged[1] that he was not afforded the same pay raise as other similarly situated foremen, but it was later amplified to include allegations of exposure to excessive dust in violation of the protections afforded under Part 90. Complaint at 10. Thereafter, on October 10, 2022, he signed his statement. On November 23, 2022, MSHA issued a letter to Matney stating that it investigated his complaint but determined that there was not "sufficient evidence to establish by a preponderance of the evidence that a violation of Section 105(c) occurred. … However, [MSHA informed that Matney] continue[s] to have the right to file a discrimination case on [his] own behalf with the [Federal Mine Safety and Health Review] Commission." November 23rd letter at 1. Mr. Matney did just that, filing this Section 105(c)(3) claim presently before this Court.

On December 23, 2022, Matney, through his legal counsel, filed his formal 105(c)(3) complaint. That document tracked his 105(c) statement, as outlined above. Per the second element in his statement, the Complaint asserts that the mine "fail[ed] to maintain Mr. Matney at all times in a work environment that complies with the respirable dust standards for Part 90 miners." Complaint at 1. The relief sought in the Complaint is for the Mine Review Commission to

> find that the Respondents did violate Section 105(c)(1) of the Mine Act, 30 U.S.C. Section 815(c)(1) through their interference, discrimination, and retaliation in reference to his Part 90 rights, that MSHA issue an appropriate citation, and that the Commission enjoin Respondents from further discrimination and interference, and further relief as set forth herein.

Id.

Matney asserted in his complaint that

> when he is not being sampled, he does not receive comparable help. Consequently, he is required to perform excessively dusty job tasks that he is not required to perform while his dust [sampling] pumps are running [on him]. Matney just wants the same number of people assigned to him at all times, on the section, as when he is wearing the dust sampling pumps. Or alternately, he requests that he moved to an outby or outside location that complies with the applicable dust limits at all times.

[1] In its initial form Matney's Complaint expressed "On June 25, 2022, I elected to exercise my Part 90 transfer rights. I was classified as a foreman both before and after exercising my Part 90 rights. My employer customarily provides periodic across-the-board raises to all salaried employees. All foremen have always received the same raise in my experience there. On the week of August 4, 2022, all outby and section foreman received a raise of $4,000. However, my raise was only $2,000.00. The raises became effective on the next payday. On that payday, it would reflect one week of the new raise and one week of the old salary rate. Human Resources (Kent Varney) confirmed that all section foreman did receive the same raise. I am currently a move crew foreman, which has always been treated the same as a section foreman for purposes of raises. As a Part 90 miner, I seek an order affording me the same raise that all other similarly situated foremen received." As explained *infra*, the Court rejected the Respondent's claim that Matney's Complaint is limited to his initial statement.

Complaint at 4.

As will be discussed, ultimately Rockwell did take the appropriate action, as required by Part 90, by moving Mr. Matney to outside work at the mine.

The essence of Matney's complaint has two aspects:

First, Matney asserts that the company withheld a pay full raise from him that they afforded to all section foreman at the mine.

Second, he asserts that the company interfered with his Part 90 rights by failing to transfer him to a job that complies with the dust exposure limitations for Part 90 miners.

Matney asserts that his initial dust sampling was not representative of the work on his shift because he was told to refrain from his normal tasks when wearing a dust pump but that, when not being sampled, he is required to do the dusty jobs on his section.[2] He asserted that the mine provided the help he needed to do his job only when he was wearing a dust pump.

Findings of Fact

Cecil Matney Jr. is 49 years old. He has more than 24 years of employment with underground coal mining. His employment with Rockwell began with its Black Oak Mine. In late 2020, or early 2021, he began working where he is currently employed, at Rockwell's Gateway Eagle Mine. He was hired as a non-production move foreman on the mine's third shift. Tr. 34-36. In sum, his work consisted of fire bossing,[3] rock dusting and periodic roof bolting. Later, his job was changed to production foreman. Tr. 46. In March 2022, his health was deteriorating and he became eligible for Black Lung benefits. At that time he requested a return to his prior job on the third shift, that move was for the purpose of reducing the amount of dust he would be inhaling. Tr. 50. His supervisor, Shannon Dolin, tried to dissuade him from returning to his former position, but Matney told him his

[2] The term 'section' refers to the 'working face.' Tr. 244.

[3] Matney described his work as fire boss as follows: "A fire boss, in accordance [with] the State of West Virginia, [requires one] to walk across your faces every two hours. That means your headings. You have to check for methane. You have to check for airflow and any hazards that you find in that face, whether a ventilation curtain be tore down, you have to replace it and fix it." Tr. 38. At that time the mine had nine entries. His fire boss duties encompassed "try[ing] to spend at least five minutes in each entry to make sure that you're catching everything: Loose bolts, kettle bottoms, bad ribs, et cetera. … just anything that you can find that's a violation … [and this has to be done] every two hours." Tr. 39. The job is done on foot. Matney added that "three hours prior to the day shift starting, [one has] to do what's called a pre-shift that MSHA and the State of West Virginia requires to be done three hours prior to the shift starting. You're going across the section, you're getting air readings in your -- return air reading air forces to make sure you have enough air going down your returns. You're making sure that you've got plenty of air in your non-idle faces. And you're making sure the ventilation is correct. And you're saying that this section of this mine is safe for the day shift to come in to perform their duties on that shift for the day shift." *Id.*

> health is not going to get no better walking across the section. Being downwind of these miners every two hours, it's killing me. I literally could hardly breathe, and I was spitting up blood and coughing up -- I had to do -- I had to do something to make a difference.

Id.

Matney's Return to the Move Crew Foreman position.

Following a talk with the general mine foreman, Scott Thompson, Matney was reassigned to his former job as the move crew foreman.[4] However, the return to that third shift position still presented too much for him and consequently on June 25, 2022, he then exercised his Part 90 transfer rights. Tr. 51-52. At some point in early July 2022 the mine was notified that Matney had elected Part 90 status. Tr. 138. At the end of the first week of July, he was then deemed a Part 90 miner and was so informed of that status by the mine's safety director, Bill Hardin. Tr. 57.

The mine then ran test samples, also referred to as 'engineering samples'[5] on Matney; two were done on the section and one was outby. Tr. 138-140. Dolin, Matney agreed, told him that he [Matney] would remain on the section as the move crew boss, telling him to take care of himself. Tr. 140. Matney agreed that following that, the mine ran the regular quarterly samples on him in July 2022. *Id.*

However, the return to the move crew foreman position was not a panacea. Matney informed that he still had to conduct the fire boss run[6] every two hours. And, he still had to rock dust the section and he still had to operate the roof bolt machine periodically. Tr. 54. This prompted him to start a journal reflecting the tasks he had to perform though he was then a Part 90 miner.

[4] To avoid any confusion when dates are referenced about Matney's shift, on a given night he would start work near the end of a day, with the majority of his hours occurring after midnight. Therefore, references to dates will often reflect two days, but involve a single shift. For example, the reference *infra* to July 28th to July 29th, pertains to a single shift.

[5] The test or 'engineering' dust samples were conducted in mid-July 2022, and they were uploaded to MSHA. Tr. 326. These were done to help the mine determine the best location for Matney to work on the section. Tr. 327. One of those samples, which was outby, was over the exposure limit. Tr. 328. The mine did not keep those results. *Id.* Though the Court found it troublesome that the mine did not keep the results, it does not find that it was malicious. The mine reviewed the samples and went over them with Matney. *Id.*

[6] Holstein would later testify that there were times when he, Holstein, was doing his fire boss run and be downwind of the bolt crew when doing that, but he added that he had the right to tell his crew to shut off the bolting, and he stated that he has done that. Tr. 242. He then stated that he would tell the bolt crew to stop if downwind and close to them. *Id.* Holstein asserted that, when dusting the section, one side becomes clear within 15 minutes of dusting it. It was his contention that Matney could have told his crew not to bolt when he was fire bossing, especially if his practice was to do that task the same time each night. Tr. 246-248. Having observed Matney and Holstein closely during their testimony, the Court concluded that Matney was the more credible witness.

Complainant's Ex. 1 is a copy of Matney's Journal,[7] reflecting the tasks he had to perform after becoming a Part 90 miner.

Matney first wore a dust pump to measure his dust exposure on July 21, 2022. The mine's safety director, Bill Hardin, was with him then and Matney was told that the mine was going to keep him outby that night. While Matney was making belt splices and installing bottom rollers, Hardin told him that work was too dusty. Matney asserted that when wearing the pump he was told to "take care" of it and the mine only wanted him to walk across the faces. Tr. 59. Matney's interpretation of the "take care of the pump" remark was that it was made for the purpose of making sure the dust sample would show compliance, an interpretation supported by his claim that he "was even told on occasions to go to the intake and sit in fresh air." *Id*.

The Court finds Matney's claim about being directed to sit in fresh air to be credible. Matney contended that, when he was being dust sampled, management provided somebody else to perform the rock dusting duties for him or they wouldn't dust. Tr. 60. On that July 21st dust pump test, he was not working downwind of the roof bolting machine, nor did he spread rock dust, nor did they cut bottom. Thus, Matney contended that his work activities when wearing a dust pump were not representative of his dust exposure. Tr. 67.

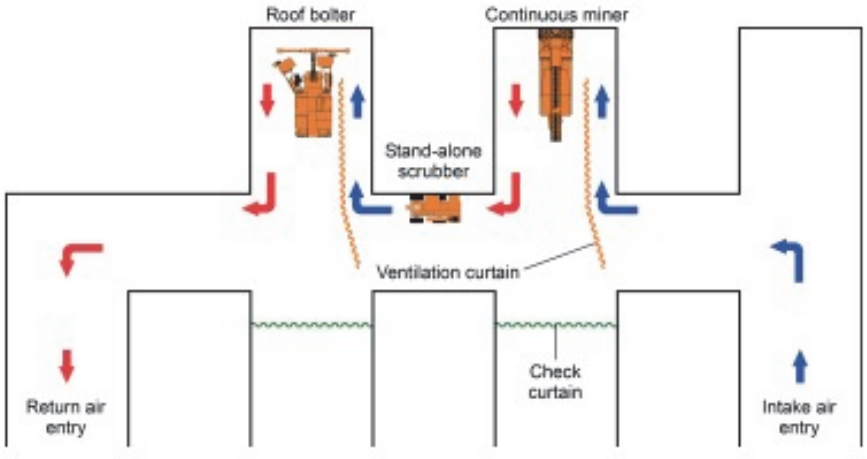
On July 28, 2022, Matney's exposure to respirable dust was measured at .667, an amount over the allowable limit. Tr. 84. According to Matney, his journal entry for July 28-29 recorded that Hardin was with him that evening when he moved belt, and that for the next night, July 29, Matney cleaned faces, worked on ventilation, and hung cables. *Id.* The dust pump failed that night when he was doing those tasks. Tr. 85.

In further support of his claim that things were different when being dust sampled from times when no sampling was being made, Matney asserted that there were instances when he was not wearing a dust pump and he refused to spread rock dust. His decision to refuse that task was based on how much dust he'd inhaled that night. There were also instances when he requested someone to rock dust, but no one was sent, and he would not rock dust. Matney asserted that there were several such occasions when management told him that he will rock dust. Thus, it was an order for him to rock dust. Matney stated that mine superintendent Shannon Dolin told him that,

[7] Though Respondent's Counsel attempted to have Matney endorse the idea that his journal was gospel, reflecting the entirety of a given day and from that premise that anything omitted from it did not occur, the Court does not agree. Tr. 143. The journal did not purport to be a compendium of each day's events. As Matney stated, he created the journal to help him remember events, an understandable and prudent practice, given his concerns about his duties post his Part 90 designation. The Court also asked Matney why he created a journal. He answered, "[t]o protect myself as a Part 90 miner." Tr. 199. By protect, he elaborated his purpose was "[t]o show that, if the company is not being compliant with the laws of a Part 90 miner, I have proof of it instead of word-of-mouth…. [he] figure[ed] if [he] could put dates and times down on paper, it's easier than . . . trying to remember, okay, on this date -- it's hard to remember exactly what you did or have done on that date." *Id*. He testified that the journal was his good faith effort to record what occurred and not an attempt to tell only his side of the events. Tr. 199-200. The Court concludes that the journal was not an exercise of fabrication, but rather a good faith attempt to note the events on a given day. Thus, overall, the Court finds that Matney's journal was credible and not a selective recounting.

emphatically. Tr. 60. According to Matney, Dolin "pointed his finger in [his] face and told [him] that [he] would rock dust every night and grabbed his hair and shook his head." Tr. 61. This instance of a command occurred after Matney had been designated as a Part 90 miner.[8] *Id.* The Court credits Matney's account.

Matney's stance was that, unless he had sufficient help, his job was incompatible with being a Part 90 miner. Tr. 62. This is because he would be downwind of many tasks such as roof bolting, drilling, cutting or trimming bottom, and rock dusting. *Id.* It is helpful to visualize the effect of being downwind:



Laboratory and Field Testing (Figure 2), *in Mobile Dry Scrubber Provides Cleaner Air for Downwind Roof Bolter*, THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, https://www.cdc.gov/niosh/mining/content/dryscrubber.html.

These dust-related obstacles meant that Matney was unable to complete all his tasks, and he asserted that management did not take well to that, inquiring why tasks were not done. Tr. 64. He maintained that this dust exposure problem was frequent, sometimes lasting all night. Tr. 65. Matney stated, and the Court notes that this is undisputed, that upon his return to the move crew foreman position, there were occasions when his crew was short. There was a difference between Matney and the mine management as to what that meant. To Matney, it meant that he had to do dusty jobs. Matney testified that on such occasions he would have to roof bolt, scoop, and flinger

[8] In a challenge to the completeness of Matney's journal, Matney agreed that some friction between him and Shannon Dolin was left out from it. The friction involved Dolin asking if Matney had rock dusted. Matney told him he had not, and according to Matney, Dolin "blowed off his handle and throwed his little temper tantrum, grabbed his head, and said, 'You will rock dust every night,' and pointed his finger at my -- towards my face … And I asked him, I said, 'Are you giving me a direct order to dust?' He walked off and come back and said, 'No, but you have to dust every night.' If I don't have somebody on the section to dust, how am I supposed to dust every night?" Tr. 179. In the Court's assessment of this dispute, Matney's omission from his journal certainly did not help the Respondent's perspective, as his disclosure about the incident reflected underlying irritation between management and Matney.

dust.[9] Challenging that claim, mine management contended that if things couldn't get done with the crew Matney had, and given his need to avoid excessive dust, then those tasks simply didn't get done. Matney told Shannon Dolin about the problem with the latter advising that the mine was working on the issue. Tr. 80.

Matney's Journal reflects that on August 12th and August 15th, he worked on the section, performing tasks such as cleaning and dusting, loading out the gob, and operating the bolter. *Id.* In contrast, the Journal for August 16th reflects that he wore a PDM [personal dust meter] 'dust pump,' but did not perform roof bolting that evening. Instead, a 'red hat' [i.e. a novice miner] did the bolting so that Matney could remain in fresh air. Tr. 80-81. The Court finds that this supports Matney's assertion that, when wearing a PDM, it was not business as usual, as accommodations were made for Matney's known and serious health condition.

Respondent's Counsel questioned Matney about his work as the move crew boss during September 2022. Matney agreed that there were three days in that month, September 22nd, 26th, and the 27th, that he was shorthanded or had to do tasks that were dusty. Tr. 150. Matney informed that on September 22nd, his crew consisted of himself, two roof bolters, and a scoop/utility man, but that the scoop man was needed outby. Matney had no idea why the scoop man was needed outby. *Id*. Regarding September 26th and 27th, Matney's crew consisted of two utility men and two roof bolters, but the utility men were taken outby. Tr. 151.

On redirect, speaking to his September 24th - 25th shift, his journal remarks that he had a work order to dust a section and that Chris Holstein advised that his two utility men would be outby at that time and Matney would have to dust the section. Tr. 189. Matney's journal stated that on September 26th maintenance chief Pete Green relayed Holstein's message that Matney had to dust. Tr. 189-190.

With regard to all those three dates, Respondent's Counsel asked Matney if the reason those miners were moved outby was important. Matney did not know why the miners were moved outby. *Id*. Still pressing on that issue, Respondent's Counsel asked if Matney knew if the reason was that a beltline had ripped and had to be replaced. Again, Matney stated he did not recall that. *Id*.

From the Court's perspective, those questions did not aid the Respondent's position, because they support Matney's claim that, despite his Part 90 status, he was shorthanded. That the mine, as suggested by Respondent's Counsel, had *important* matters to address does not excuse the conditions Matney then faced, shorthanded as he was. Though witnesses for the mine later testified that if Matney was unable to have tasks completed, they simply would not get done, the Court finds it difficult to accept that management would have such a cavalier view. This put Matney in an uncomfortable position, virtually a Hobson's choice,[10] as he would either have to

[9] A 'dust flinger' refers to a machine that dispenses rock dust, not a person literally flinging dust by hand. Tr. 198.

[10] It is interesting, at least to the Court, that the origin of the familiar term 'Hobson's choice,' is of 17th century origin, named after Thomas Hobson (1554–1631), a Cambridge carrier (continued…)

accept that tasks would not be done, or he would have to do them himself. The Court's assessment of Matney's character, through his credible testimony, was that he was not built to dismiss tasks.

Similarly, Matney's responses to questions from Respondent's Counsel concerning events during October 2022 support Matney's position. Matney agreed that, as with the September crew issues, there were three days that month, October 13th, 27th, and 31st, when he was shorthanded or had red hats and consequently that he personally had to do tasks that were dusty. Tr. 152. For example, on October 13th, Matney had only an electrician, a greaser, and a Joy representative on his section. His journal noted that everyone else was outby working on violations. Tr. 153. Matney disputed that no work involving cleaning, dusting or roof bolting occurred that night, stating that he might not have done flinger dusting but that he ran a scoop and cleaned. *Id.* He maintained that he did ventilation and cleaning on the 13th. *Id.* The Court credits Matney's account of his work that evening.[11] Matney agreed with Respondent's Counsel that MSHA sampled him for dust on October 24, 2022. Tr. 155.

Matney agreed that for November 2022, there were two days for which he was shorthanded and did tasks that were dusty. Those days were November 1st and 2nd. Tr. 157-158. On November 1st, there were only two roof bolters. Matney was unsure if the utility man was off work or needed outby, though he conceded that his journal would have noted such an absence. *Id.* He also agreed that on November 2nd, he had two red hats to clean and dust, a situation that Respondent's Counsel characterized as "not a lack of people." Tr. 158-159.

Respondent's Counsel then summed up Matney's position that "from the time [he] elected Part 90 as of July 6th or 7th through mid-November, roughly four and a half months, [he] identified eight occasions in [his] journal where [he] purport[ed] to either have been shorthanded or would have had to work in dusty conditions." Tr. 159. Matney also agreed that on some of those occasions the reason for being short-handed could've been employees were absent rather than being pulled off of his crew. *Id.*

On November 15, 2022, Matney's received an order from mine management directing him to stay at home. Tr. 85. According to Matney, this came about because it was time for the mine to conduct the quarterly escapeway walk and, as Matney was the move crew foreman, he had to do that. Tr. 90. The stay-at-home direction arose from Matney's inability to walk the airways out. Tr. 87. The stay-at-home order lasted until March 3, 2023. However, upon returning to work that March he did perform that walk along with Shannon Dolin on March 4, 2023. Tr. 90-91. It was Matney's view that walking the intake escapeway to the outside would be a dusty experience, with the dust created by the miners walking the route. Tr. 94.

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[10] (…continued)
who hired out horses, giving the customer the 'choice' of the one nearest the door or none at all. *Hobson's choice*, WIKIPEDIA, (Dec. 6, 2023), https://en.wikipedia.org/wiki/Hobson%27s_choice.

[11] Although Respondent's Counsel asserted that Matney in fact had only two days in October for which he asserted working in dusty conditions, Matney never agreed with that assertion. Tr. 156. To the Court, the claim is beside the point. The protection to be afforded to Part 90 miners is to be free of excessive dust on every shift. Put another way, excessive dust exposure is not waived if it only occurs on a few days during a given month.

Regarding the mine operator's decision to impose a paid leave of absence on Matney for the period of November 15, 2022, through March 3, 2023, an approximate leave of some three and half months, Matney agreed that escape drills are required for all miners and that he informed the mine that he could not perform the drill scheduled for November 2022. Tr. 160.

On direct examination of Respondent's witness, Christopher Holstein, who was the section boss at that time, about the circumstances prompting Matney's leave of absence, Holstein's related that Matney informed him that others would have to do the intake drill and in effect warned that if he had to do it, they would need an ambulance outside waiting for him. Tr. 236-237. The upshot was apparently that Holstein had his third shift fire boss[12] do the task. Tr. 237. Holstein agreed that he was referring to a fire drill and the weekly intake exam. *Id.* As for the intake examination, that is to be done once every seven days, with the purpose being to look for hazards. Agreeing with his Counsel's description, Holstein stated there was a misunderstanding of what was required by the work list. Tr. 238 and 279. In any event, in a subsequent talk that Holstein had with Shannon about Matney's reference to needing an ambulance, Shannon expressed he was "worried about the guys" as it's the section boss' job to get his crew outside. Tr. 239. While Matney was on his paid leave the mine had Johnny Wriston perform that task with the work crew. *Id.*

While Holstein asserted that all management wanted was to have one of the fire bosses conduct, i.e. 'boss,' the intake, Shannon Dolin's testimony contradicted this, with Dolin stating "[t]hey ended up not doing the fire drill." Tr. 280. Given his remarks, it would seem that in fact, management did want a fire drill, then backed off. Dolin did understand that Matney had conveyed that he would not be able to do such an escapeway drill and that it was based on his medical condition. *Id.*

In further support of the Court's finding that indeed, initially, management did want a fire drill to occur, was this exchange: "So, at that point, what are you -- what duty do you think you have towards Mr. Matney?" Dolin responded,

> Well, it kind of makes you -- it worries you, because, you know, if he's not able to do that exam -- or that walk, then once he expressed that and told us, as managers, like I said, I go to my bosses. And we had a meeting on it and we decided that is putting us in a lot of liability knowing that the man said he couldn't do it and we still sent him in there knowing that he said he couldn't walk the intake out. So they decided, as a group, that we needed to get him evaluated.

Id.

At that point, the group decided that it needed to have Matney take a physical to see if he was capable of doing *a fire drill*. Tr. 280-281. Matney was then told not to return to work, though he would continue receiving his pay. As it turned out, Matney never did have a physical exam before returning from his stay at home with pay suspension. Tr. 314.

When Matney returned to work, Holstein kept Wriston on the section to help Matney. *Id.* In the Court's estimation, Wriston's role was essentially an admission on the part of Rockwell that

[12] A point of clarification, a 'fire boss' is another term for 'outby foreman.' Tr. 263.

Matney could not do his job and still be Part 90 compliant. Holstein then agreed with Respondent's Counsel's words that Matney then made the faces and managed the workforce. Tr. 240. He also agreed that, not long after that, Matney left the third shift. *Id*. Once that occurred Holstein had no more supervisory role over Matney. *Id.* Holstein flatly denied that he had a conversation with someone in which he asserted that he wouldn't have given Matney a ride, nor pick him up somewhere. Tr. 240-241.

It is reasonable to conclude that Matney's Part 90 status produced some resentment with management. Matney's journal for May 17th reflects that Chris Holstein, then the mine's shift foreman, made a remark to others when Matney requested a ride out of the mine, allegedly stating that he [Holstein] "[s]hould have left his [Matney's] sick old ass walk out." Tr. 118. While Matney heard about this remark second-hand, the Court finds the claim to be credible. However, the Court does not have to resolve whether Holstein made either of the hostile remarks since, taking the testimony as a whole, it is reasonable to conclude that Rockwell management could not have been pleased with Matney. It's clear the job wasn't working out as management had hoped, and as it ultimately realized, as demonstrated by the Respondent's late-arrived decision to place Matney outside.

Upon the mine's direction that Matney return to work in March 2023, he agreed that he was required to make the escapeway drill. This occurred on March 6, 2023, when he walked the escapeway with Shannon Dolin. Tr. 163. During Matney's absence Johnny Wriston was on Matney's section and when Matney returned to work Wriston remained on the section. *Id.*

When back at work Matney's tasks consisted of making the required checks, doing the fire boss run of the faces and to pre-shift and make any ventilation changes. Tr. 163-164. Further, Matney agreed that at that time Wriston had largely taken over the other duties on the section. These included moving belt and power and cleaning and dusting, though Matney qualified the latter tasks as "if [Wriston] had people available."[13] Tr. 164.

Matney was dust sampled by MSHA on March 13, 2023, with MSHA's Bill Meddings traveling with him that day. No mine representative traveled with them that day. Tr. 165. Later in March, (March 23rd) the mine ran PDM's on Matney. *Id.* Referring to Respondent's Ex. B, a 19-page compilation of Dust Data Cards, page 9 of that exhibit, reflects that the sample was over the maximum dust level, coming in at .745. Matney agreed that the exceedance was because the mine was cutting bottom on that date. Tr. 166. Matney discussed with Bill Hardin, from the mine's safety department, as to the reason for the exceedance. There was a spike in the dust during that shift and the two tried to determine what Matney was doing at the time that occurred. Tr. 167. Further regarding the dust sample exceedance, Bill Hardin advised Matney as to how he should position himself regarding curtain and ventilation control. Tr. 170.

[13] Respondent's Counsel asked Matney about certain dates in March and April 2023, but the Court considered the following aspects to be inconsequential to this matter. For March 11th, Matney asserted that he wa exposed to rock dust from the flinger duster, but he acknowledged that he resolved the issue with Wriston and that the problem did not arise again. Tr. 164. For March 28th and April 3rd, his journal reflects that he operated the flinger duster, but he agreed that his journal did not assert that he was shorthanded on the section on those dates. *Id.*

Matney stated that upon returning to work, the mine's first dust sample of him occurred on March 20, 2023. While the dust sample for that day did not exceed the allowable limit, Matney stated that the pump shut off three hours early that day, and therefore the result did not reflect a full-shift exposure. Tr. 96-98. As mentioned, Matney's dust sampling for March 23, 2023, recorded at .745, did exceed the limit, a significant exceedance over the .5 limit. Tr. 99-101. It was Matney's testimony that on March 23rd he still continued to be required to spread rock dust as move crew foreman and was required to do roof bolting and to perform his fire boss runs. Tr. 106.

A square peg in a round hole

In the Court's view, the larger point is that Mr. Matney was again exposed to a dust exposure above the maximum allowable level. The evidence does not show, nor does the Court believe that the mine was purposely exposing Matney to excessive dust levels in any of the instances of exceedances, but rather that the mine was not facing up to the fact that, by continuing to have Matney work as move crew foreman on the non-production shift, it was attempting to fit a square peg in a round hole. Motives aside, the mine was still not achieving the required level of protection for Matney's status as a Part 90 miner. As discussed later, eventually, the mine realized this when it reassigned Matney to outside work. It is fair to conclude that Matney's discrimination complaint eventually brought about the mine's recognition of the true remedy required.

On April 4, 2023, Matney's job duties changed from foreman to fire boss.[14] Summing up his new arrangement, Matney agreed that his tasks initially were to fire boss the belts, roadways, and the return pumps, and that prior to the mine's corrective action on May 10th, it had removed his duty to check the return pumps. Matney elaborated that Scott Thompson stated that he (i.e. Matney) didn't need to be in the return air course. That left him with the duties of fire bossing the belts and roadways and the weekly airways. Tr. 172.

Following those job duties' change, he was next tested for dust exposure on May 8, 2023. On that date he fire bossed the belts, and roadways, while wearing a company PDM dust pump. At the shift's end the pump read .46 on that occasion. Tr. 109 and Ex.2. The following day, MSHA's Bill Meddings traveled with Matney on his shift. Matney fire bossed the roadways and belts that night. His dust inhalation that evening exceeded the maximum exposure, the result coming in at .65. Tr. 110. Thus, for his May 9th sample, he was over the .5 standard. The mine took corrective action the next day. Tr. 172-173. That exceedance resulted in reducing Matney's fire bossing duties to roadways. This corrective action involved removing his fire boss runs on the belts and also changing the route of travel to fire boss the roadways. The latter involved taking a different travel route in order to minimize dust. Tr. 173. This corrective action is reflected in Respondent's Ex. C. *Id.* With his fire bossing duties removed, Doug Lamb, a shift foreman took over that task. Following that change, Matney wore a dust pump on May 15, 2023, and he fire bossed the roadways during that shift.

[14] It is noted that MSHA issued citations associated with these dates, but they did not involve dust exceedances. Citation No. 9592733 was issued for the mine not submitting five valid representative dust samples. Tr. 111. Complainant's Ex. 5. Another citation, No. 9591268, was issued for records regarding the length of each shift worked for the Part 90 miner [Matney] not being maintained as required. Tr. 111-112.

May 24, 2023: A significant change occurs for Matney's work duties

A significant change in Matney's duties occurred starting on May 24, 2023, as he then began greasing the stacker belt, checking splices in the 1 belt and fueling rides outside.[15] Tr. 120. By Matney's account, the belt splice checking duty still exposed him to excessive dust. He conceded however that the mine had since been watering the roadways heavily, to reduce dust. Tr. 126. Matney had the same view regarding greasing the stacker,[16] stating that during that task he is hit on his head with loose coal and stuff coming off the belt while he is greasing it. Tr. 123. The stacker task is done once a week and performed completely outside. Fueling up rides is done entirely outside too and the office position is on the surface. Tr. 175.

As for the task of checking a belt for splicing, Matney was assigned to check the No. 1 belt. That belt sticks out of the portal. Tr. 176. This task of checking the belt takes about 30 minutes at most. Per his journal, Matney agreed that being exposed to dust while checking the splices occurred on one occasion, not other times. *Id*. Matney concurred that as of May 10th, the vast majority of his work has been either outside or the mine's office, which is also outside. Tr. 177.

The nature of Matney's duties from Respondent's perspective.

Respondent's first witness, Christopher Holstein, nicknamed 'Oz,' was the section foreman[17] at the time Matney began working on the third shift. Tr. 220. After Holstein was informed that Matney was a Part 90 miner, mine superintendent Shannon Dolin met with Holstein and others[18] in the mine office about having Matney "staying out of the dust" and that "[a]nytime the [flinger] duster starts up, [Matney] should be in the intake." Tr. 225. Thus, Holstein stated that anytime the dust flinger was running, Matney would go to the intake to be in fresh air. *Id*.

According to Holstein, when Matney would advise that he "had to do this or had to do that" Shannon would tell him "[a]bsolutely not," and further that this issue "got to the point that he told [Matney] if he heard of it again, he'd write him [Matney] up." *Id*. Holstein stated that he expected

[15] Matney remarked that Respondent's Counsel's description of his new work duties left out his work on Saturdays, such as on May 20th, when he did the roadways' on-shift, and the belts and fire run belts. Tr. 174. They ran coal on that day, Matney stated. *Id*.

[16] As its name implies, the stacker moves fresh or raw crushed coal into a pile. Tr. 122. As Matney described it, the stacker "hauls the coal -- it dumps the coal out into the stockpile in the yard where they load coal trucks." *Id*. When greasing it, Matney is beside the stacker belt all the way up to the top. *Id.* During that task he is hit on his head with loose coal and stuff coming off the belt while he is greasing it. Tr. 123. Though he complained about the dust exposure from those tasks, Matney stated that neither Doug Lamb nor Shannon Dolin did anything about it. *Id.* However, he conceded that the next time a splicing was required, the day shift did it and he has not had to do a splice since his complaint. *Id.*

[17] The term 'section foreman' is used interchangeably as 'move foreman.' Tr. 254.

[18] The 'others' were not identified by Mr. Holstein.

Matney to "[m]ake sure his faces are fire bossed." Tr. 226. He added that Matney had supervisory authority over anyone on the section. *Id*.

Holstein informed that when he worked as a shift foreman, in fact he did pull employees from the move crew to work outby. *Id.* This was for "anything that might not have the mines ready to run the next morning." He agreed with Respondent's Counsel description of these as "bigger tasks that had to be taken care of." *Id*. He described these events as infrequent, "[t]wo, three times a month." Tr. 227. When such events occurred, Holstein described what he expected Matney to do: "he has to be in the face every two hours; [i.e. fire bossing, making his runs]… have [the] day shift ready to run. … I mean, you know, have, you know -- 'cause usually always the bolt men was up there. Have them move the equipment and have it set up in a new cut or, you know, whatever it has to be." *Id.*

In the Court's view, Holstein's testimony demonstrates that the mine would have "bigger tasks" that had to be done. The effect was that Matney's ability to do his tasks would on occasion take a back seat to those bigger tasks. Also undercutting the relaxed tone presented about Matney being unable to perform all his tasks on some nights, Holstein's remark that Matney was to have the "day shift ready to run" put Matney in an impossible position – perform his tasks and be exposed to dust or let them slide. Rockwell was not facing up to the fact that the requirements for Matney's Part 90 status and his move crew foreman position were in conflict.

Holstein maintained that he did not expect Matney to do the other actual tasks and he asserted that his approach with Matney was the same whether he was wearing a dust mask or not. Tr. 227-228. It was Holstein's view that if a miner was pulled off a section, Matney still had other people, such as bolt men, or a utility man, on the section to do dusty tasks. Tr. 228. Yet, in his next remark, when asked what happened if Matney couldn't get a task done, Holstein remarked "He didn't get it done. Multiple times I didn't get it done."

In the Court's view, this was a contradiction with Holstein's earlier remark that Matney had others on the section who could do such tasks. In what seemed to the Court as an odd, and impractical state of affairs for Matney's job, Holstein agreed with his attorney's characterization that it was "fairly regular" that tasks that needed to be done, couldn't be done. *Id.* In fact, Holstein remarked that situation occurred "[s]eventy-five percent of the time." *Id.* Respondent's Counsel then received Holstein's agreement that the mine's 'task list' was "more aspirational." Tr. 229. To the Court, such an arrangement seemed to constitute an odd 'to do' list.

Asked about the night shifts of September 25th-26th and the following night, September 26th-27th, Holstein recalled those occasions. While he confirmed that the mine needed two utility men to perform a big task, putting up a thousand feet of belt and that the task would take all night, his account differed from Matney's. Holstein agreed that rock dusting needed to be done, but that he spoke with Matney about the rock dusting task, telling him that he had two roof bolters to do that and that Matney was not to personally do the dusting. The same situation existed the following night with Holstein taking Matney's utility men from the section.

The Court notes that Holstein agreed that the rock dusting *had* to be done and to that end he had bags of rock dust delivered to Matney's section and further that the belt line work was

essential or the mine would not be operational. In the Court's view, apart from determining whether to credit Matney's version or Holstein's, the problem highlights that Matney was ill-suited as the move crew foreman, restricted as he was due to his Black Lung disease. If the roof bolters were diverted from rock dusting, that meant other tasks would not be completed. Roof bolting is not optional, it too must be done for mining to continue. The 'aspirational' view of the tasks to be completed for those on the section can only be taken so far. Both roof bolting and dusting had to be done.

Matters were much the same for October 13, 2022. Holstein did not dispute that Matney's journal referenced that "everyone was working outby on violations, except for Matney, a Joy (mining equipment) representative, and a greaser." Holstein agreed that the mine was addressing violations at that time. Tr. 232. For October 27, 2022, Matney wrote that he moved power with three red hats. Holstein did not dispute Matney's journal about this either, but stated that such work was not particularly dusty. *Id.* Holstein asserted that there would not have been any rock dusting performed that night, "not if you only had three red hats." *Id.*

October 31, 2022 was addressed next. Matney's journal stated that he cleaned and dusted the section with one black hat and one red hat, but this question was of little value because Holstein did not recall that night. Despite that absence of recollection, Holstein agreed that Matney should have been able to clean and rock dust that night with one black hat and one red hat. Tr. 232.

Holstein was then asked about November 1, 2022, a date for which Matney's journal recorded that he cleaned and rock dusted the faces and that there were only two roof bolter operators on the section with him. Tr. 234. Asked why the utility man was not present, Holstein remarked that he may have had the man outby or he could've been absent. The Court notes that the larger point is that he couldn't recall. *Id*. However, Holstein still maintained that Matney still had two miners bolting and he could've used them "however he need[ed] them." Tr. 235.[19]

It is fair to observe that Holstein agreed with the accuracy of Matney's journal for the dates just mentioned. The other work was in fact being done, subtracting from Matney's available help on the section. The dispute boiled down to whether, as Holstein contended, there was still sufficient help for Matney and, alternatively, whether it mattered to Holstein if tasks could not be completed. The Court finds, crediting Matney, that there was not sufficient help and that it did matter to the mine that tasks were not completed.

[19] Continuing with his testimony that was not particularly helpful to the Respondent's case, Holstein was next asked about November 2, 2022, for which Matney's journal recorded, as described by Respondent's Counsel, that the "left return at the No. 3 head flooded and that you [Holstein] and Shannon wanted him to clean and dust the section, plaster stoppings, clean the tail, pull slack on the 450 roof bolter [and that Matney] claim[ed] that he had two roof bolter operators and two red hats." Tr. 235. However, Holstein stated that he didn't recall that there was flooding at the No. 3 that particular night, yet he added "But I mean, sure." *Id.* Despite that lack of recollection, he denied telling Matney to do any of those tasks. *Id.* Holstein asserted that the tasks would just be listed on the work clipboard. Tr. 235-236. As for whom Matney had working for him that night, Holstein stated that Matney said he had two bolt men on the section. As to whether a utility man had been pulled to work outby that night, Holstein also could not recall. Tr. 236.

Shannon Ray Dolin, the mine superintendent at Gateway, also testified. Dolin learned of Matney's Part 90 status in July 2022. Tr. 270. Respondent's Ex. Tab A, letter from MSHA, informing the mine of Matney's exercise of the option to work in a low dust area. As mentioned, to meet that requirement, the mine conducted engineering samples for the purpose of determining the location on the section with the least amount of dust, with the goal of finding out where the mine would be in compliance. Tr. 272. The mine ran three samples, two outby and one on the section. The sample on the section came back less dusty than the outby sections, and that led the mine to leaving Matney on the section, as the section foreman. *Id*. Matney was shown the sample results.

In line with the testimony of other witnesses for the Respondent, Dolin stated that management had discussions with Matney. As he put it "we did have several meetings with Cecil on his -- how he had to change his culture and mindset of getting things done. Dolin contended that by 'mindset,' he was asserting that foremen tend to think they can do tasks better, so they have a tendency to take over tasks. Tr. 273.

Dolin's description of Matney's duties in that role as the move crew foreman made it sound as if they were very easy to achieve: "[Matney] ha[d] to put his DTIs [dates, times and initials] up. He ha[d]to examine the section every two hours and manage the people, manage the men." Tr. 274. By 'managing the people,' Dolin stated that meant "[Matney] has a list of things that's left for him to try to get done. And he just has to manage the people that he has at that time to get -- try his best to get it done." Tr. 275.

Dolin stated that Matney "voiced several times that "[he] just can't handle not getting it done [adding that Matney was] used to getting everything done." *Id*. Dolin's emphasis was that Matney "ha[d] to manage the people. And if he don't have the people and if he don't get it done, then he just don't get it done." Tr. 276.

To the Court, the mine's asserted very forgiving approach to work not getting done and Dolin's testimony that work not getting done happened regularly on every shift and further that miners were never reprimanded for not getting things done, is difficult to accept as an accurate depiction of the mine's attitude.

Dolin agreed that people were pulled from the move crew to work outby to deal with things "more pressing than things on the section to get done." However, he asserted that management continued to tell Matney to stay out of the dust. Tr. 277. Dolin maintained that Matney's work was the same, whether or not he was wearing a PDM. *Id.* In describing the instance when Matney was tested for dust exposure by the mine, and Bill Hardin, the mine's safety director, was with him, Dolin asserted that Hardin was there "[t]o train him. Train him where to -- how to do his job and staying out of the dust, how to manage the people." Tr. 278. The Court also finds this assertion as difficult to accept, given the mine's high regard for Matney, that he would need 'training' on how to keep out of the dust.

In support of the Court's skepticism, was Dolin's testimony when asked about Matney's remarks in his journal for November 2, 2022. That entry referred to the left return at 3 head being flooded, and Matney's assertion that Dolin and Holstein wanted him to clean and dust the section,

plaster stoppings, clean the tail, and pull slack on the 450-roof bolter. The journal also stated that Matney had only two roof bolters and two red hats that night. Dolin asserted that he did not recall that instance. Tr. 278. Despite the lack of recollection, Dolin expressed that the work Matney described in his journal for that date was not a big task. *Id*. As to whether he, Dolin, personally told Matney to do any of those tasks, again Dolin's memory failed him, stating he "[didn't] recall telling Matney to do it." *Id.*

Upon Matney's return to work in March 2023, his job duties had changed, as the mine decided that Johnny Wriston, who had taken over Matney's work during his absence, would remain on the section. Under this new arrangement, Wriston was to do the 'dead work,' the term Dolin used to mean the "cleaning and dusting and ventilating, the maintenance of the section." Tr. 282. Matney would fire boss the section. *Id*. In March MSHA sampled Matney, but Dolin said he did not know exactly the results. *Id.*

In late March, Matney was tested for dust exposure again, this time by the mine. *Id.* Dolin conceded that one of those samples taken by the mine exceeded the .5 limit.[20] *Id.* That resulted in the mine learning that the overage was from the roof bolter and once again they instituted a corrective action, making sure Matney was not downwind from the bolter and further that the bolter was shut off before he went downwind to date the faces.[21] Tr. 283.

The Court construes the unified responses from the Respondent's witnesses as expressing their view that the problem with the instances of non-compliance with the dust exposure level was Matney's fault. The Court finds otherwise – the source of the problem with exceedances was the nature of Matney's position. In the Court's view, it simply didn't work – the efforts to contort Matney's duties and locations during the shift were impractical and the realities of performing that job exposed him to the documented dust exceedances.

In questioning by the Court, Dolin repeated that he had many meetings with Matney on the issue of getting his tasks done. In sum, his testimony had two themes: that Matney had to 'manage' his people, implicitly meaning manage his people better. With that, and in the Court's view, contradicting his remark was that "that's what you normally want, to get everything done" on the list, if you "don't get the list done, then you just don't get it done." Tr. 336-337. The Court finds it hard to accept Dolin's assertion that "we got to where we thought we was going to have to reprimand, I guess you would say, as far as writing it down and write him up to make sure he didn't do it." Tr. 336-337. Yet, Dolin asserted that the meetings were initiated by Matney, not by the mine. Tr. 337.

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[20] Dolin stated that the mine did not receive any dust sample compliance violation for March 2023, informing that there have to be two or more exceedances. Tr. 283-284.

[21] The record is unclear whether the Respondent actually meant 2023. The transcript reflects 2022, but as Respondent's Counsel remarked, "Was there another time -- and I think we might be confused as to dates now. I apologize. I just want to refresh your recollection as to referring to a roof bolter corrective action. Was there a corrective action in July of 2022? Tr. 283. Dolin responded "[t]here was one on adjusting curtains." *Id*. Asked if that was in March 2022, Dolin answered it could have been and that he and Scott Thompson undertook the corrective action. *Id*. 2023 makes sense as the correct year.

Rockwell makes a major change in Matney's work duties

Dolin was asked about the spring of 2023. He affirmed that Matney then became an outby foreman, also described as a fire boss. Dolin stated that the mine was not required to move him to the new position. He thought the change occurred in April 2023. The offer to the new position as fire boss consisted of fire bossing the belts and roadways and some pumps but not the return pumps. Tr. 285. Matney was then sampled in his new role but again one of the samples was non-compliant, exceeding the .5 limit. Tr. 285-286. The mine then took corrective action by removing Matney from fire bossing the belts. *Id.* Respondent's Ex. C. The mine determined that the belts were the source for Matney coming out of compliance. Tr. 286. Thereafter, Matney fire bossed only the roadways. *Id.* He was then sampled again and this time was below the .5 limit. Tr. 287. MSHA was present during that new sample. The mine did not receive a citation in connection with this event. *Id.*

Dolin described Matney's new March 2023 duties as follows:

> Most of his duties, or all of them, are outside. He does some paperwork outside for Doug Lamb. He fills up the diesel rides when they're sitting outside. And he checks belt splices on No. 1 belt, which is outside. Or it comes outside. He can check it outside. And he greases the stacker belt once a week outside.

Tr. 289. Respondent's Ex. K.

At that point, the only genuine issue in terms of dust exposure, would be associated with checking splices in the No. 1 belt. That task is performed outside. This is done to determine if there are defects with the belt in need of repair, such as a splice. *Id.* Dolin stated that task takes less than five minutes, the time it takes for the belt to make a complete revolution. Tr. 291.

At the request of Respondent's Counsel, the mine conducted an engineering dust sample for the belt check task. Tr. 292. That sample result was below the .5 level. *Id*. and Respondent's Ex. L. Regarding the task of greasing the stacker belt, it is done outside once a week and it takes about an hour to do it. Tr. 293. A dust sample was performed for this task too and it also came back below the .5 level. In addition, MSHA sampled Matney under his new work tasks. This was done on August 25, 2023, and that sample was below the .5 level. Tr. 296. Ex. N at Tab 9, Ex. 0.

The Respondent then called Billy Hardin, a safety technician at the mine. Hardin's testimony was in line with other witnesses for the Respondent in that in their view the burden was on Matney to avoid the dust on his section, stating, "[y]ou know, [Matney] has to assess the situation, look for dust." Tr. 346. He stated that he was 'training' Matney how to stay out of the dust. Yet, while 'training' him, Matney exceeded the dust limit. Tr. 348. The dust sample on Matney for July 28, 2022 exceeded the .5 level.

Based on the entirety of the evidence, the Court finds 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. Hardin's various reasons – a belt crew making a splice, the crew performing rock dusting, the process of moving a belt, and Matney passing through some fly

pads and curtains that had dust on them[22] – for Matney's exposure to dust demonstrate the unsuitability of keeping him on the section. Tr. 348-353, 357. While additional examples to demonstrate the inappropriateness of having Matney continue to work on the section are not necessary, Hardin testimony about the May 9th dust sample, which sample was above the exposure limit, is revealing of the insolubility of having Matney remain on the section. Though Hardin stated that the mine investigated this, he didn't remember what happened, nor did he know about any corrective action. Tr. 358. Hardin acknowledged that the dust sample for May 9th was above the limit.

Douglas Lamb, the mine's evening shift foreman was the final witness for the Respondent. Tr. 376. He only began working with Matney in March 2023. *Id.* At that time Matney's job was to fire boss and check belts. Tr. 377. Initially, Matney fire bossed everything, meaning roadways, beltlines and pumps. Tr. 377-378. Later, they removed checking the pumps from Matney's tasks. Lamb agreed that one sample was above the limit, at .65. He added that an MSHA inspector was with Matney on that occasion. It was his belief that the inspector had Matney do more than he normally would, expressing "that inspector, he wanted him to go in and do an on-shift on the belts and then they come back out, and then they had to go back in and fire boss." Tr. 379. This, Lamb stated, increased Matney's dust exposure that day. Tr. 380. Nevertheless, Lamb took corrective action, removing fire bossing of the belts and the weekly air flows from Matney's duties. *Id*.

As for the roadway fire bossing, Lamb informed they had Matney "fire boss his way *in* ***and let it clear up****, and then he could come back down the roadways*." *Id*. (emphasis added). The Court takes note that this is yet another example that Matney's job on the section simply was inconsistent with avoiding dust exceedances.

Referring to the mine's May quarterly samples, Lamb stated that the mine exceeded the .5 limit with an exceedance at .65. *Id.* The 'corrective action' for that was for Matney to only fire boss the roadways. Tr. 381. This was when Wriston came on to do those former tasks of Matney. Thus, after that, Matney's duties became "do[ing] paperwork, fill[ing] up the diesel rides, a weekly greasing of the stacker belt, and then, Lamb's recollection was that a few weeks later, the mine decided that Matney could be outside and check splices on 1 belt." *Id*.

The Court inquired of Matney what his job title has been since May 16, 2023, to which he replied "outby foreman." The Court also asked Matney if it is correct that the only remaining issue with dust exposure since May 2023 now stems from splicing belts, an issue about which Matney stated that the mine had now started watering down the area. Matney essentially agreed that the dust exposure issue for him is now limited to the belts. Tr. 131-132. But, he added that there is some dust exposure when he is on the stacker belt too. Tr. 132. The stacker belt task is performed once a week and is done entirely outside. Tr. 175. The Court tried to have Matney describe the extent of his present dust exposure from those sources, and he responded that it was 20 percent of the workday. Tr. 132. To state the obverse, Matney tacitly agreed that presently his job duties do not expose him to excessive dust for 80% of his workday. Tr. 133.

[22] The last example, simply passing through some fly pads and curtains, exemplifies the error of having Matney continue to work in the section and the 'corrective action' serves to underscore the error with Hardin advising Matney to "watch where you position yourself walking through curtains." Tr. 357.

The Court inquired further about Matney's present work environment, asking if he still had Part 90 issues going forward with his present work duties or whether looking ahead, if his present job duties still present Part 90 issues or if they are now resolved. Tr. 196. Matney responded that he couldn't answer the question because he has not yet been sampled for dust by the company under his new tasks. *Id*. He elaborated that for checking belt splices, fueling up rides and greasing the stacker belt, and when the roads are dusty, without having a dust pump sampling, he couldn't know if those tasks were above the .5 dust limit. Tr. 197. Yet, Matney agreed that those dust concerns constituted about 20% of his day, with 80% not presenting a dust exposure issue, as he is in an office or otherwise outside apart from the dust exposure sources he just mentioned. *Id.* The Respondent's dust testing at the belt splice location and the greasing task evidence that one performing those tasks would not be exposed to dust levels over the maximum. As noted *supra,* the mine conducted an engineering dust sample for the belt check task and for the stacker belt greasing task and both came back below the .5 level. Tr. 292, and Respondent's Ex. L. Neither task requires much time in Matney's current position, with the stacker task involving an hour once a week and the splice check task taking less than five minutes, the time it takes for the belt to make a complete revolution.

ANALYSIS

Subpart B – Dust Standards, Rights of Part 90 Miners; provides:

> After the 20th calendar day following receipt of notification from MSHA that a part 90 miner is employed at the mine, the operator shall *continuously maintain* the average concentration of respirable dust in the mine atmosphere during each shift to which the part 90 miner in the active workings of the mine is exposed, as measured with an approved sampling device and expressed in terms of an equivalent concentration, at or below: (a) 1.0 milligrams of respirable dust per cubic meter of air (mg/m 3). (b) 0.5 mg/m 3 as of August 1, 2016.

30 C.F.R. § 90.100; 79 Fed. Reg. 24989, (2014).

There is no dispute that for the time periods in issue in this matter Cecil Matney was a Part 90 Miner, nor is there a dispute that, on more than one occasion of dust sampling, the sampling revealed exceedances of the maximum dust exposure. As discussed above, the demonstrated exceedances were on July 28, 2022, March 23, 2023, and May 9, 2023.

As noted in *Mullins v Beth-Elkhorn Coal Corp*., 9 FMSHRC 891, 897 (May 1987), ("*Mullins*"),

> [t]he Part 90 transfer option encompasses three basic rights: (1) to be assigned work in "an area of a mine" where the required Part 90 dust concentration levels are continuously maintained (30 C.F.R. §§ 90.3(a), 90.100 & 90.101); (2) in "an existing position" at the same mine on the same shift or shift rotation or, if the miner agrees in writing, in "a different coal mine, a newly-created position or a position on a different shift or shift rotation" (30 C.F.R. § 90.102(a)); and (3) at no less than the regular rate of pay earned by the miner immediately before exercise of the

> transfer option (30 C.F.R. § 90.103). It is the duty of operators to effectuate these rights as applicable with respect to their Part 90 miners.

Id. at 897.

Mr. Matney had it right when, during cross-examination, he was asked about the MSHA dust standard, correctly expressing that the dust standard for a miner who is not [covered by] Part 90 is 1.50 whereas for one who is under Part 90, it is .50. And that if one is above the .50 level, the operator has "to do a corrective action and they have to remove you from that job or figure out a way to keep you in fresh air, keep you out of the dust." Tr. 181.

And that is the central deficiency on the part of Rockwell – it failed to keep Matney out of the excessive dust. Rockwell's noncompliance with Part 90 vis-à-vis Mr. Matney continued until May 24, 2023.

DISCRIMINATION DECISIONS UNDER THE MINE ACT BASED ON PART 90 CLAIMS[23]

While Part 90 involves particular rights, the analysis of a claim stemming from those rights has been routinely assumed to be no different from any discrimination case under the Mine Act. The Court believes that, at least in this instance, the atypical violation of Mr. Matney's right to be protected from excessive dust does not fit the one-size-fits-all formula presented in the Commission's *Pasula–Robinette* test.

In the Part 90 discrimination case noted above of *Mullins v. Beth-Elkhorn Coal Corp*., 9 FMSHRC 891, 895-896 (May 1987), the Commission stated:

> The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2797–2800 (October 1980) rev'd on other grounds sub. nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); *Secretary on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817–18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639,

[23] The Court read and considered the parties' post-hearing briefs and all contentions raised within them. Either directly or implicitly in this decision, such contentions were addressed, including for example, Respondent's assertions regarding the elements of an interference claim. R's Br. at 20-21.

642 (4th Cir.1987); *Donovan v. Stafford Construction Co*., 732 F.2d 954, 958–59 (D.C.Cir.1984); *Boich v. FMSHRC*, 719 F.2d 194, 195–96 (6th Cir.1983) (specifically approving the Commission's Pasula–Robinette test).

Id.

In this Matney v. Rockwell matter, the Court examined all the pertinent Commission cases for Part 90. It also reviewed the lone Part 90 decision issued by the United States Courts of Appeals. The Commission has issued 11 decisions involving Part 90. Two of the 11 are related to the D.C. Circuit's reversal of the Commission decision in *Sec'y of Labor ex rel. Bushnell v Cannelton Indust.,* 867 F.2d 1432, (D.C. Cir.1989) ("*Bushnell*") and therefore they are not discussed.

Bushnell involved Secretary's interpretations of 30 C.F.R. § 90.103 and section 101(a) of the Mine Act. The Commission "held that the regulations and the Mine Act protect a miner against pay reductions only upon his transfer to a low-dust work area after exhibiting evidence of pneumoconiosis (black lung disease), and not upon subsequent transfers for other reasons." *Id*. at 1433. The D.C. Circuit reversed the Commission's holding. While the focus of the case was the rate of pay for a Part 90 miner who is transferred, the Court of Appeals made some important remarks which are useful to this matter, Matney v. Rockwell.

That Court noted that Section 101(a)(7) of the Mine Act, specifically provides:

> Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, **that miner shall be removed from such exposure and reassigned.** Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. *Id*. § 811(a)(7).

Id. at 1433, quoting 30 U.S.C. § 811(a)(7). (emphasis added).

The Court believes that only one of the Commission's Part 90 decisions, *Goff v. Youghiogheny & Ohio Coal Co.,* 8 FMSHRC 1860, (Dec. 1986) ("*Goff*"), is useful to the analysis of the matter at hand. For the sake of completeness, a brief recap of the other Commission Part 90 decisions are footnoted here.[24]

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[24] *Mullins v Beth-Elkhorn Coal*, 9 FMSHRC 891 (May 1987).

The Commission's own introduction for this decision shows that it is of no value to the issues in this matter:

> This proceeding involves a discrimination complaint filed by Jimmy R. Mullins pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The complaint alleges that Mullins' removal from a dispatcher's job pursuant to an arbitration award resolving a seniority grievance violated section 105(c)(1) of the Mine Act by contravening his rights under 30 C.F.R. Part 90 ("Part 90").1 Former Commission Administrative Law Judge Richard C. Steffey *892 found that the removal of Mullins from the dispatcher's job constituted unlawful discrimination, ordered that Mullins be reinstated to that position, and awarded back pay, expenses, and attorney's fees. 7 FMSHRC 1819 (November 1985) (ALJ). … Because we conclude that miners' Part 90 rights do not entitle miners to particular transfer positions, we reverse.

Id.

Perando v. Mettiki Coal Corporation, 10 FMSHRC 491 (April 1988).

This decision is similarly not instructive. There, the miner's work refusal "would not have been protected under the Mine Act. Such an action by Perando would have to be interpreted as a refusal by a miner (not suffering from pneumoconiosis) to report to work unless and until assigned to a dust-free area. Such a right is not granted by the Mine Act. Section 101(a)(7) of the Act, 30 U.S.C. § 811(a)(7), authorizes the Secretary to develop improved mandatory health or safety standards providing that miners whose health has been impaired by exposure to a designated hazard "shall be removed from such exposure and reassigned" and that such transfer shall be without loss of pay. To date, the Secretary has implemented this statutory mandate by providing under 30 C.F.R. Part 90 that a miner who has been determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis shall be afforded the option to transfer without loss of pay to a mine area where the average concentration of respirable dust is at or below 1.0 mg/m3. 30 C.F.R. §§ 90.3, 90.100, & 90.103; See generally *Jimmy R. Mullins v. Beth–Elkhorn Coal Corp*., et al., 9 FMSHRC 891, 896–98 (May 1987). As the Secretary emphasizes in her amicus brief on review, the Department of Labor has not promulgated any similar transfer-pay retention standards applicable to miners with industrial bronchitis, the illness suffered by Perando. Also, even a miner who falls within the protections of Part 90 does not have the right to refuse to

(continued…)

Goff involved a discrimination complaint in which the Commission, upon finding that Goff's complaint did state a cause of action, remanded the matter to the judge to determine whether the miner was discriminatorily discharged. The judge then found that the miner's discharge was not made in in violation of section 105(c)(1), a determination upheld by the Commission.

Although *Goff* did not shed light on the particular issue in this matter, the underlying *decision*, in which the Commission determined that the miner did state a cause of action, is of value. There, it held that:

> a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based on the miner's being 'the subject of medical evaluations and potential transfer' under 30 C.F.R. Part 90 [as] [those] provisions contain mandatory health standards governing transfer of miners evidencing the development of pneumoconiosis.

7 FMSHRC 1776, 1776-1777 (Nov. 1985).

The Court notes that the Commission, examining the updated discrimination provision under the Mine Act, stated that it "*granted miners broader protection and relief for a wider range of discriminatory actions* ***and was intended by Congress to be interpreted expansively***." *Id*. at 1780-1781. (emphasis added). Further, the Commission observed that "where it is determined as a result of a physical examination that a miner may suffer material impairment of health or

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[24] (…continued)
work pending transfer to a job in a mine atmosphere totally free of respirable dust. *Gary Goff v. Youghiogheny & Ohio Coal Co*., 8 FMSHRC 1860, 1865 (Dec. 1986). Exposure to some amount of respirable dust is inherent in virtually all underground coal mining. Thus, even if the Secretary had included miners suffering from industrial bronchitis within the scheme of the present Part 90 transfer-pay retention regulations, Perando would not have had a right under those provisions to transfer with pay retention to a less dusty position since her underground work areas at Mettiki were consistently below the required Part 90 respirable dust level of 1.0 mg/m 3. M. Exh. R–2, Tr. 74–77, 100–102 (May 1, 1986). To accord Perando the right asserted in this case would confer upon her greater transfer-pay retention protection than that enjoyed by Part 90 miners, an anomalous result. *Id*. at 495-496.

Canterbury Coal Co., 20 FMSHRC 718 (July 1998)., involving a citation issued by MSHA charging Canterbury with violating 30 C.F.R. § 90.102(a)1 "when it transferred a Part 90 miner without his written consent, to a position on a different shift rotation in a low dust area of the mine," similarly is not useful to this matter. The Commission upheld the administrative law judge's determination that the operator violated the provision by so acting. *Id.* at 723.

Rochester & Pittsburgh Coal Corp., 12 FMSHRC 189 (Feb. 1990), is also inapplicable. There the Commission upheld the administrative law judge's determination that R&P failed "to compensate a Part 90 miner at not less than the regular rate of pay received by that miner immediately before his exercise of the Part 90 option." *Id*. at 193.

functional capacity by reason of his exposure to a hazard covered by a standard, **the miner shall be moved from such exposure and reassigned**." *Id.* at 1781. (emphasis added).

Based on the decisions cited above, it seems clear that the operative Part 90 provisions apply to Mr. Matney. Indeed, the operator has agreed that Matney is a Part 90 miner. Per the Court of Appeals decision in *Bushnell,* the applicable mandatory standards required that Matney should have been "removed from such exposure and reassigned." *Bushnell* at 1433.

The Commission's decision in *Goff* is completely in line with *Bushnell*, with its statement that "where [as with Matney's condition] it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, **the miner shall be moved from such exposure and reassigned**." *Goff* at 1781. (emphasis added). In applying that requirement, the Commission noted that the Mine Act discrimination provision "*granted miners broader protection and relief for a wider range of discriminatory actions* ***and was intended by Congress to be interpreted expansively***." *Id*. at 1780-1781. (emphasis added).

In the Court's view, a strict application of the Commission's *Pasula–Robinette* test does not work well in this unusual set of facts. Yes, per the first part of that test, Matney certainly engaged in protected activity, but to say that the adverse action – keeping Matney in the section foreman position despite several dust samples showing that he was exposed to levels above the maximum allowed – was motivated by Matney's engaging in the protected activity, would be a stretch. While Rockwell attempted to invent a contorted, and demonstrated to be unworkable, section foreman role for Matney, the Court cannot conclude that its motivation was due to Matney's protected activity.

Instead, Rockwell's motivation was exposed by Rockwell itself. Shannon Dolin, Matney's supervisor, gave Rockwell's motivation away, when he expressed that with Matney's background and experience he was more valuable to the mine in the section position.[25] Tr. 339. To the Court, that explains why the mine did not take the action it eventually did, transferring Matney to the outside – he was more valuable in his move crew foreman position.

ROCKWELL'S ATTEMPT TO LIMIT MATNEY'S COMPLAINT TO THE INITIAL BASIS ASSERTED.

Though Respondent has attempted to make much of the one-issue basis for Matney's first filing, his Discrimination Report, that argument fails. This is because the Commission has long held that a miner is not limited to the initial basis stated in a discrimination complaint.

As stated in *Sec. obo Callahan v. Hubb Corp*., 20 FMSHRC 832, 837 (Aug. 1998)

[25] Dolin's candid remark came with his acknowledging that Matney had asked about whether he could take the dispatcher job. Dolin admitted "we talked about it. But, you know, with Cecil's knowledge and his ability and certified, you know, we tried to utilize him better for the mines and make sure that he was in a safe location." Tr. 339.

> Section 105(c)(2) both authorizes the Secretary to bring discrimination complaints under the Mine Act and governs that complaint process. According to the language of section 105(c)(2), the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint to her, and not merely on the initiating complaint itself. *See also Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.,* 19 FMSHRC 1009, 1016-18 (June 1997) (scope of complaint Secretary may pursue before Commission not circumscribed by matters addressed in original complaint filed with her, but by subject matter of investigation conducted by Secretary in response to that complaint). Section 105(c)(2) also clearly states that the hearing held and the order subsequently issued by the Commission are on *the Secretary's complaint and proposed order for relief.* The provision in section 105(c)(2) that a complainant miner "may present additional evidence on his own behalf" is a further indication that *the Secretary's* case may be separate and independent from the complainant's.

Id. at 837.

See also, *Sec. v. Hopkins County Coal*, 38 FMSHRC 1317 (June 2016) at n.15, wherein the Commission noted that:

> if the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

Id. at n. 15.

Accordingly, Respondent's effort to limit Matney's action to his pay disparity issue fails.

COMPLAINANT MATNEY'S CLAIM THAT HE WAS GIVEN A LESSER RAISE BECAUSE HE WAS A PART 90 MINER

Matney's "Discrimination Report," dated September 13, 2022, addressed one issue only: his assertion that he received a smaller raise than others in the same position because he had declared Part 90 status on June 25, 2022. Complainant's Ex. 3, designated as PINE CD 2022-04. It is undisputed that section foremen received a $5,000 raise and outby foremen received $4,000. The problem arose in the context of what may be described as a conflict or confusion over the raise due Matney.

The testimony is undisputed that Mr. Matney did not receive the appropriate pay raise he was due for his position. Matney was a section foreman, but his raise was the amount for an outby foreman. Tr. 67-68. Thus, he did not receive the same pay amount as the rest of the foremen in his classification.

The Respondent called Michael Gosnell, the general manager of the Rockwell complex on the subject of these raises. Tr. 212. The raises went into effect on August 1st. *Id*. The raises were not equal. For example, the pay for a section foreman was more than an outby foreman.[26] Tr. 213. Gosnell believed that Matney came to the mine as an outby foreman; however the computer showed him as a section foreman. Tr. 214. Later, after Matney told Varney that he did not receive the correct raise, Varney told Gosnell about the problem and Gosnell stated that the pay would need to corrected, if Matney was in fact employed in the role of section foreman. Tr. 215.

Aaron Kent Varney, the regional HR manager for Rockwell, testified about the pay issues in this matter. Varney had Matney listed as an outby foreman, which is the role Matney was listed as having on the mine's staffing sheet when Matney began working at Gateway. Tr. 251. No one advised Varney otherwise about Matney's position description. *Id*. The amount of the raise, which was the initial basis for Matney's complaint in this matter, was to be effective as of August 1, 2022. *Id*. Varney affirmed that the employees' raises varied; however every section foreman or outby foreman got the same dollar amount of a raise. Tr. 252. Matney's raise was at the outby foreman rate, at 2.4%. Subsequently, Matney came to Varney's office about the raise issue, and it was then that he informed Varney that he was a section foreman. Varney advised that his list showed him as an outby foreman. Tr. 254. Varney said it wasn't until that conversation with Matney that he learned he was a Part 90 miner. Subsequent to that conversation, Dolin confirmed that Matney was indeed a move foreman/section foreman. *Id*.

The error was corrected promptly. Tr. 256. In less than a month, Matney's received the full raise he was due. Tr. 141. Though Matney believed that his insufficient raise stemmed from his new status as a Part 90 miner, he had no evidence to support that view, other than it made sense to him, as every other foreman got the full raise. Tr. 142.

However, based on the credible testimony of Varney and Gosnell on this issue, it is clear to the Court that not only was the error quickly corrected but also that it was brought about by a misunderstanding of Matney's true position. The Court finds that the error was accidental, without malice, and not brought about by any animus over Matney's Part 90 miner status.

COMPLAINANT MATNEY'S CLAIM THAT THE MINE DEPRIVED HIM OF INCOME FROM HIS WEEKEND WORK.

Part of Matney's damages arise from his claim of the "every other weekend" pay he would often receive. Tr. 86. More particularly, Matney asserts that during the time he was on paid leave absence, from November 15, 2022, through March 3, 2023, he would often work on Saturdays every other weekend, and was paid $400.00 for each such weekend work. Pay stubs support that Matney was indeed paid for extra shifts. See, for example, Ex. 7, November 2022, at stamped page 87.

In his attempt to show that he lost such income during his paid absence, Matney relied upon a letter from Kent Varney, the human resources manager at Rockwell. That letter included the statement "[a]s of today, 9/14/2022, year-to-date pay, out of the above bonuses are retention

[26] As noted earlier, the terms 'outby foreman' and 'fire boss' are used interchangeably. Tr. 263.

bonus 5,700 [and the remark that] Mr. Matney is required to work weekends, which are scheduled for every other weekend, but it does depend, and the pay is $400 per shift." Tr. 77-78.

However, to be fair, and for the purpose of limiting the apparent concession that Matney was paid for Saturday work every other weekend, the letter was created essentially as a favor because Matney was applying for a home loan. Varney was directed to Tab 4 from Complainant's exhibit notebook. That exhibit reflects Matney's request for Varney to issue the letter reflected in that exhibit. Matney was purchasing a house and the bank wanted specific information in connection with the loan application. Dated 9/14/2022, the letter, which was for the bank, reflected Matney's salary at that time. Tr. 258. The last paragraph of that letter for the bank states "Mr. Matney is required to work weekends which are scheduled for every other weekend, but it does depend, and the pay is $400 per shift." Tr. 259. This amount referred to "extra shifts" and Varney stated that the mine tries to project two Saturdays every month, but he added that, in fact, sometimes it's more, sometimes less. *Id.* Thus, he maintained that the shifts are not guaranteed, though they usually do happen. *Id.*

Matney confirmed that he did work every other weekend. This was in connection with his role as a certified EMT. On such weekends when he worked, the mine called it an extra shift and he would be paid $400 for that work. Thus, he worked two of the Saturday shifts each month in that capacity, unless the mine was idle. Tr. 78-79. This practice began when he started working for Gateway Eagle. *Id*. Matney acknowledged that there were times he would have a Saturday off. Such days off would be especially true in November and December as well as during January through March. Tr. 160-161.

As Matney expressed it, though paid his full salary during the four months he was told to stay home,[27] he did not believe that he had been made whole because he "did not get [his] extra shift paid that [he] would have received if [he'd] normally been at work working, …[he contended this amount would be] somewheres between $2400 and $3200." Tr. 127.

While Matney undoubtedly would have worked some, indeterminate number, of those every other weekend times, earning the extra income from that, Counsel for Matney failed to identify the particular weekends when such work, as Matney often performed, was performed by someone else during November 2022 through March 2023. At the hearing the Court directed Counsel for Matney to calculate the sums asserted to be due during this time period. Tr. 130. This did not occur. The Court would also point out that Mr. Matney was a salaried employee and that he received his full compensation during his stay-at-home period. Tr. 377.

Accordingly, because Matney was paid his full salary while on paid leave of absence and because the Saturday work was 'extra' work and not guaranteed to occur every other weekend, by not establishing the specific work that was done by someone else and the specific Saturdays such work occurred, he failed to meet his burden of proof.

[27] Matney agreed that during his leave of absence he was paid everything due him; his regular pay, and all bonuses. Tr. 163. Matney is not an hourly employee. Tr. 314.

ROCKWELL'S ATTEMPT TO LIMIT MATNEY'S COMPLAINT TO THE INITIAL BASIS ASSERTED.

Though Respondent has attempted to make much of the one-issue basis for Matney's first submission, his Discrimination Report, that argument fails. This is because the Commission has long held that a miner is not limited to the initial basis stated in a discrimination complaint.

As stated in *Sec. obo Callahan v. Hubb Corp*., 20 FMSHRC 832, (Aug. 1998)

> Section 105(c)(2) both authorizes the Secretary to bring **discrimination** complaints under the Mine Act and governs that complaint process. According to the language of section 105(c)(2), the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint to her, and not merely on the initiating complaint itself. *See also Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.,* 19 FMSHRC 1009, 1016-18 (June 1997) (**scope of complaint** Secretary may pursue before Commission not circumscribed by matters addressed in original complaint filed with her, but by subject matter of investigation conducted by Secretary in response to that complaint). Section 105(c)(2) also clearly states that the hearing held and the order subsequently issued by the Commission are on *the Secretary's complaint and proposed order for relief.* The provision in section 105(c)(2) that a complainant miner "may present additional evidence on his own behalf" is a further indication that *the Secretary's* case may be separate and independent from the complainant's.

Id. at 837

The Court also takes note of *Sec. v. Hopkins County Coal*, 38 FMSHRC 1317 (June 2016) wherein the Commission noted that:

> if the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

Id. at n.15

Accordingly, the Respondent's attempt to limit Matney's Complaint to the initial basis asserted is rejected.

Conclusions

Based on the foregoing, and the Court's assessment of the credible testimony, the Court finds that Rockwell exposed Complainant Cecil Matney to excessive dust by keeping him in the position of move crew foreman. This violated Part 90. Instead of complying with the Part 90

exposure requirements, Rockwell attempted to contort Matney's position putting him in an impossible position – as a practical matter Matney could not perform his job without being exposed to excessive dust and Rockwell had to know this. Its recalcitrance in properly placing Matney in a Part 90 compliant position was admitted by Respondent's own witness who admitted that Matney's value to the mine was best served by keeping him as the move crew foreman. As noted above, as of **May 24, 2023**, Rockwell finally came into compliance with Part 90 by placing Cecil Matney Jr. in a position which stopped exposing him to excessive dust.

For the many reasons discussed above in support of the Court's findings, and in accordance with Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Court is notifying the Secretary of this decision, sustaining the discrimination complaint brought by miner Cecil Matney pursuant to section 105(c)(3) of the Act, so that the Secretary may file a petition for assessment of a civil penalty with the Commission.

As discussed above, the Court concludes that Complainant Cecil Matney's temporary inadequate raise was a clerical error, unrelated to his Part 90 status. Apart from the brief error relating to the raise due Matney, all aspects of his salary and benefits were paid in full.

Further, for a failure of proof, Matney did not establish that he was entitled to the indefinitely identified Saturday work, which potential work was unrelated to his salary.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JORDAN KELSER Complainant, v. PEABODY SOUTHEAST MINING LLC, and COMPLIANCE STAFFING AGENCY LLC d/b/a/ JENNMAR SERVICES Respondent.	TEMPORARY REINSTATEMENT Docket No. SE 2024-0025 MSHA Case No.: SE-MD-2023-10 Mine: Shoal Creek Mine Mine ID: 01-02901

ORDER GRANTING TEMPORARY REINSTATEMENT OF JORDAN KELSER

Before: Judge Young

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") seeks an order temporary reinstating miner Jordan Kelser ("Complainant") to his former position with Respondents Peabody SE Mining, LLC ("Peabody"), and Compliance Staffing Agency LLC, d/b/a Jennmar Services ("Jennmar"), pending the final hearing and disposition of his Discrimination Complaint brought under section 105(c) of the Act.

On September 6, 2023, Kelser executed a Discrimination Complaint with MSHA. The Secretary has found that the Complaint was not frivolously brought and filed an Application for Temporary Reinstatement on November 7, 2023. The Application for Temporary Reinstatement alleges that the Respondents discharged Kelser or otherwise relieved him of his job duties in violation of section 105(c) of the Act because Kelser reported an accident in which he was injured.

On November 15, Peabody timely filed a Request for Hearing on the Secretary's Application. On November 16, Jennmar also filed a timely Request for Hearing. The hearing was held via Zoom for Government on November 29, 2023. Consistent with Section 105(c)(2) of the Act, the Secretary's Application for Temporary Reinstatement is granted.

Summary of Testimony

The witness testimony and evidence presented at hearing provides facts in support of the Secretary's conclusion that the Complaint was not frivolously brought.[1] Credibility determinations are not made as to facts presented below. The facts provided at the hearing include the following:

Kelser was employed in several mining positions contracted through Jennmar beginning in March 2023. Tr. at 21.[2] Jennmar is a staffing agency that hires and trains individuals to work as miners and then contracts with mine operators including Peabody to provide labor support on an as-needed basis. Tr. at 127-28.

From March to approximately June 2023, Jennmar assigned Kelser to work on special projects where he would be continually reassigned between multiple mines for temporary durations. Tr. at 22. Starting around June, Kelser started working for Peabody through his employment at Jennmar. Tr. at 22. For Peabody, Kelser performed work as part of a belt crew at Shoal Creek Mine. Tr. at 23.

Kelser testified that on September 1, 2023, he, Colton Harper (Peabody's belt foreman), Dakota House (an hourly Peabody miner), Demarcus Tucker (an employee of contractor GMS), Shawn Clements (Peabody's evening shift mine foreman), and Toby Howell (another Peabody hourly employee) were working together to repair a conveyor belt that had stopped tracking correctly. Tr. at 24-28. According to Kelser, Harper instructed Kelser or Tucker to get on top of the belt to tighten a J bolt. Tr. at 26-27.

Kelser climbed up a fence and onto the conveyor belt, which was 8 to 10 feet off the ground, to tighten the bolt. Tr. at 58. Harper and Clements watched Kelser climb the fence onto the belt and did not stop him. Tr. at 27, 30-32. While Kelser was on the conveyor belt, Howell started the belt motor, and the belt began to move. Tr. at 38. Kelser heard the conveyer belt start and Tucker told him to jump off. Tr. at 32. Kelser grabbed a chain to pull himself off the belt, injuring his ankle and lower back. Tr. at 32-33.

Proper lockout-tagout procedures were not followed to prevent the conveyor belt from being energized. Tr. at 36-37. Kelser said that he was not offered the opportunity to lock and tag the belt motor to prevent its operation while he was working on the belt. Tr. at 36-37. No other mine worker or foreman took any steps to ensure that the belt was not energized while he was on top of it. Tr. at 59.

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[1] At the hearing, the Secretary presented as a witness Jordan Kesler, the complainant. Respondents each presented one witness. Peabody presented Jamie Mincey, who is a continuous improvement manager for Shoal Creek Mine and Peabody, and Jennmar presented Greg Neil, who is a regional manager and regional safety manager for Jennmar. Additionally, the parties admitted documents into evidence.

[2] There was no evidence introduced to establish whether Kelser was an employee or an independent contractor, and the nature of that relationship is not relevant to these proceedings.

Other safety measures were also neglected that might have prevented the injury. Mincey testified that the J-bolt could be safely accessed from the ground by using a ladder or by standing on a bucket or concrete blocks. Tr. at 109-10. Kelser testified, however, that nobody told him to use a ladder, and there was not one readily available. Tr. at 65. Peabody also suggested that Kelser should have been aware of the need to use fall protection while he was working atop the belt, but Kelser said nobody provided him with fall protection, either. Tr. at 15, 98.

Kelser testified that, later during the same shift, he sought to make a report related to his injury. Tr. at 39. According to Kelser, Harper told him he should not tell anyone what really happened and that he should misrepresent how the injury occurred, because Harper and Clements would get in trouble. Tr. at 37, 38. Kelser informed Harper that he wanted to file a truthful accident report. Tr. at 42. Harper then told him that he would have to take a drug test and asked if he was sure if filing a report is what he wanted to do. Tr. at 41. Kelser proceeded to fill out an accident report. Tr. at 42.

Peabody then placed Harper, the belt foreman who had directed the work and then, according to Kelser, watched as it was performed unsafely, in charge of collecting statements from witnesses and conducting the accident report. Tr. at 86, 104-06. After the investigation, Peabody then told Jennmar it did not want Kelser to work at the mine and said it was because Complainant had acted unsafely and violated its safety policies. Tr. at 89.

On September 2, 2023, Kelser emailed a statement to Greg Neil describing the events that resulted in Kelser's accident and injury. Tr. at 45. On September 5, 2023, Neil informed Kelser not to go back to Peabody's mine. Tr. at 46. Neil also informed Kelser that no other work was available through Jennmar at the time, and that Greg Neil needed to finish investigating Kelser's accident. Tr. at 46. On September 11, 2023, Peabody informed Neil that Kelser would not be allowed back to the Shoal Creek Mine to work. Tr. at 142.

From the date of injury through the date of this hearing, Kelser has not been capable of returning to work, because his injuries prevented him from performing the tasks necessary to work as a miner. Tr. at 76. Kelser testified that he believes he is now physically able to work. Tr. at 53. Kelser subsequently submitted documentation of a physician clearing him medically to return to work without restrictions, as of December 2.[3]

Standards Governing Temporary Reinstatement

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. §815(c)(1-2). The plain language of the Act provides that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. §815(c)(2) (emphasis added).

[3] At hearing, the record was left open for subsequent evidence pertaining to Kelser's medical examination scheduled for December 2, 2023.

The scope of temporary reinstatement proceedings is narrow and limited to determining whether the evidence establishes that the complaint is nonfrivolous, not whether the complainant can establish a prima facie case of discrimination. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 46 FMSHRC , slip op. at 4 No. WEST 21-178 (Nov. 28, 2023); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987). The Commission has held that the Secretary can establish that the complaint is non-frivolous when the complainant's evidence shows that the complainant engaged in activity protected by the Act and suffered adverse action as a result of the protected activity. *Sec'y of Labor on behalf of Cook v. Rockwell Mining*, 43 FMSHRC 157, 161 (Apr 2021). Protected activities include a miner's reporting of injuries to an operator, even if there is no safety complaint associated with the report. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

The causal nexus between the protected activity and the adverse action can be demonstrated by the operator's knowledge of the protected activity and its temporal proximity to the adverse action. *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000).

During a temporary reinstatement proceeding, a judge does not make credibility determinations, resolve testimonial conflicts, or weigh the operator's evidence against the Secretary's evidence. *Rockwell Mining*, 43 FMSHRC at 162. Rather, the judge simply evaluates the Secretary's evidence and determine whether the miner's complaint appears to have merit. *Id.* at 161 (citing *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009)).

Disposition

The Secretary has provided sufficient evidence to show that the Complaint in this matter was not frivolously brought. The facts provided by the Secretary, if true, would establish that the Complainant engaged in a protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus.

First, the Secretary has sufficiently demonstrated that Kelser engaged in a protected activity. Kelser's reporting the accident that injured him to the mine operator, by itself, constitutes a protected activity, even if there is no safety complaint associated with the report. *Swift,* 16 FMSHRC at 205.

However, the protected activity goes further, as his report implicates other mine workers, supervisors, and the operator in safety violations at Shoal Creek Mine. As Kelser climbed onto the belt representatives of mine management and other miners observed him, without attempting to stop him. Further, he said that he was not offered the opportunity to lock and tag the belt motor to prevent its operation while he was working on the belt. Nor did anybody in mine management – representatives of which were at the scene – take any steps to ensure that the belt was not energized while he was on top of it.

This evidence must be taken as true under the law, but it was essentially unrebutted. Peabody produced no witness who was at the scene when Kelser was injured. The uncontradicted record evidence is that Kelser was assigned a task but was not provided with the tools or training to perform it safely.

Mr. Mincey testified that the J-bolt could be safely accessed from the ground by using a ladder or by standing on a bucket or concrete blocks. But nobody told Kelser to use a ladder, and there was not one readily available. Instead, the uncontradicted testimony of the only witness who was at the scene was that representatives of mine management and other miners then watched as he climbed on top of the belt without locking or tagging it out – an action all parties characterized as unsafe.

Peabody also suggested, on cross-examination, that Kelser should have been aware of the need to use fall protection while he was working atop the belt, but nobody provided him with fall protection, either.

Additionally, Kelser says his supervisor tried to dissuade him from filing a true report of the nature and cause of his injuries. Peabody then assigned the investigation of Kelser's incident to Harper, the belt foreman who had directed the work and then, according to Complainant, watched as it was performed unsafely. After the investigation, Peabody then told Jennmar that it did not want Kelser to work at the mine and said it was because Complainant had acted unsafely and violated its safety policies.

The causal nexus between Kelser's reporting his injury and his discharge is also supported by the temporary proximity. On September 5, four days after the reported incident, Jennmar's regional manager, Greg Neil, first told Kelser not to return to the Shoal Creek Mine. On September 11, Greg Neil told Kelser that he would not be allowed to return to work for Peabody at Shoal Creek Mine permanently. The justification that Respondent's provide for the discharge is closely tied to the incident which Kelser reported, although Respondent's contend that Kelser was discharged because of his own unsafe conduct.

At this stage of the proceedings, the evidence establishes none of this conclusively. In a full proceeding on the Complaint, Respondents will doubtless provide witnesses and other evidence that could affect the outcome. But at this stage, the Secretary has provided facts, which must be accepted as true, and which establish a close causal nexus between the protected activity and the adverse action Kelser suffered.

I therefore find that a non-frivolous claim has been made that on September 11, Peabody discharged Kelser's from his work at the Shoal Creek Mine and the decision was based on the underlying incident which Kelser reported. Additionally, Jennmar is contemplating further adverse action against Kelser upon his return to work when he has medically recovered. This, too, is based entirely on the incident which resulted in the Complainant's injury and Peabody's response to it.

Respondents have argued that Kelser was not terminated. But there is no difference between a miner being discharged as a direct employee and a miner being told, through an

employment agency, that the contract employer no longer wishes to have the miner work at the mine. On September 1, Kelser had regular employment of 48 hours per week at the Shoal Creek Mine. After Kelser was injured and reported his injury, that was no longer the case. Thus, there has been an adverse action, whether or not Kelser was "terminated" in any narrow sense of the term.

Prior to the hearing, Peabody and Jennmar moved to dismiss the application, claiming that there was no relief available because complainant's injury makes him unavailable for work, and claimed he was receiving workers' compensation benefits. The motions were denied because they rested on evidentiary matters that were not presented prior to the hearing. At hearing, Respondents did not renew the motions, and the evidence introduced showed that Complainant was receiving benefits to pay for his medical care, not compensation for lost wages, injury, or disability.

While the Commission has found that certain circumstances affecting the availability of work may justify tolling of temporary reinstatement, Kelser has been cleared by a physician to resume working without restrictions and therefore circumstances no longer are present that affect the availability of work. *Sec'y on behalf of Gatlin v. Ken American Res., Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009). In any event, Complainant is now available to return to work, and any such argument would be moot.

Conclusion

For the foregoing reasons, I find that the Complaint for discrimination has not been frivolously brought, and that Complainant Jordan Kelser is entitled to Temporary Reinstatement under Section 105(c)(2) of the Act.

Order

It is hereby **ORDERED** that **Jordan Kelser** be **immediately TEMPORARILY REINSTATED** to his former job at Peabody's Shoal Creek Mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his discharge.[4] Thereby, Jennmar is **ORDERED** to place Kelser on available status and assign him to his former contracted position at the Shoal Creek Mine or to a substantially equivalent position. Peabody is **ORDERED** to reinstate Kelser to his former work at Shoal Creek Mine, unless or until Jennmar reassigns Kelser to a substantially equivalent position, providing him with the pay and benefits he would have received but for the termination of his employment relationship with Respondents.[5]

[4] Kelser, according to Exhibit B to the Secretary's Application for Temporary Reinstatement, worked 48 hours per week on average, prior to his discharge, at $25.00 an hour regular pay and $37.50 for overtime. This calculates to $1,300.00 per week.

[5] Temporary reinstatement is designed to maintain the status quo while miners proceed with their discrimination claims. *Sec'y on behalf of Jeffrey Pappas c. Calportland Company*, 38 FMSHRC 137, 144 (Feb. 2016).

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Peabody or Jennmar, did not violate Section 105(c) of the Act.

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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December 12, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of SAMUEL COLEMAN, Complainant v. WARRIOR MET COAL MINING, LLC, Respondent	TEMPORARY REINSTATEMENT Docket No. SE 2024-0060 MSHA Case No. SE-MD-24-03 Mine: No. 7 Mine Mine ID: 01-01401

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Sullivan

This case is before me upon an Application for Temporary Reinstatement filed by the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and 29 C.F.R. § 2700.45. On December 1, 2023, the Secretary filed the Application on behalf of miner and designated Miners' Representative Samuel Coleman ("Complainant") seeking his reinstatement to his former positions of Underground Belt Repairman and Miners' Representative at the No. 7 Mine of Warrior Met Coal, LLC ("Respondent"). The certificate of service states that the Application was served on Respondents by e-mail that same day. The Application also satisfies the other procedural requirements of Commission Rule 45(b) as it timely "states the Secretary's finding that the miner's discrimination complaint was not frivolously brought[,] accompanied by an affidavit setting forth the Secretary's reasons supporting his finding[,] and includes a copy of the miner's complaint to the Secretary . . . ." 29 C.F.R. § 2700.45(b).[1]

Commission Procedural Rule 45(d) provided Respondent with the right to, within 10 days of receipt of the Application, request an expedited hearing on the Application. *See* 29 C.F.R. § 2700.45(d). Respondent elected not to do so.

Section 105(c)(1) of the Mine Act provides that "[n]o person shall discharge . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . . ." 30 U.S.C. § 815(c)(1). In the Application, as supported by her investigator's sworn declaration (Exhibit A thereto), the following unrebutted allegations of the

[1] The Discrimination Complaint ("Complaint") filed with the Secretary's Mine Safety and Health Administration by the Complainant is dated October 31, 2023, thus well within 60 days of the Complainant's October 30 termination of employment. *See* 30 U.S.C. § 815(c)(2).

Secretary establish the Complaint to her as having been not frivolously brought under sections 105(c)(1) and (2):

(1) Before his employment was terminated on October 30, 2023, Complainant had worked for Respondent as an underground coal miner for over four years.

(2) In May 2023, the miners at the No. 7 Mine, pursuant to 30 C.F.R. § 40, designated Complainant as their Miner's Representative for purposes of the Mine Act.

(3) On October 17, 2023, Zachiah Mann, an underground miner at the No. 7 Mine, reported to Complainant that Mann's supervisor, Neil Almacen, had removed danger tape where timbers were down and had instructed Mann to remove rocks underneath a moving belt. Mann informed Complainant that he refused to do so and alleged that he was terminated for complaining to Almacen about those safety issues.

(4) Complainant, in his role as designated Miners' Representative, questioned Almacen about Mann's account of events. Almacen responded that "Mann walked off the job and I fired his ass." Complainant informed Almacen that he would inspect the area that Mann had complained about, and that if the problems had not been corrected, there would be a safety issue.

(5) Complainant also told Almacen that he had seen him traveling through the mine without required reflective clothing.

(6) The following day, October 18, Complainant was suspended by Respondent's Human Resources Representative, Sally Brown, on Almacen's allegation to upper management that Complainant had told Almacen that "someone was going to beat [his] ass." On October 30, Respondent terminated Complainant, on the purported ground of insubordination.

There being no opposition to the Application, I agree with the Secretary that it establishes the Complaint to have been "not frivolously brought." *See Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (relying upon Mine Act legislative history and the Supreme Court's treatment of a similar whistleblower protection provision to conclude that the "not frivolously brought" standard is the equivalent of a "reasonable cause to believe" standard and is met when a miner's "complaint appears to have merit"). Accordingly, the Application is granted. I reach no conclusion beyond that regarding the merits of the Complaint.

ORDER

It is hereby **ORDERED** that **SAMUEL COLEMAN** be **immediately TEMPORARILY REINSTATED** to his former positions at the No. 7 Mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **no later than January 29, 2024**.[2] Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that the Respondent did not violate Section 105(c) of the Act.

WHEREFORE, the Application is **GRANTED**, and it is **ORDERED** that reinstatement shall remain in effect until such time that the Secretary provides notification that he will not be bringing a discrimination case in chief on behalf of the Complainant, or such a case is brought and there is a final determination on it by decision, approval of settlement, or other order of this court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding for such purposes as are necessary, as provided by 29 C.F.R. § 2700.45(e)(4).

WHEREFORE, the Secretary is further **ORDERED** to provide an update regarding the status of the Secretary's investigation of the Complaint no later than January 29, 2024.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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[2] Section 105(c)(3) of the Act directs the Secretary to notify a complainant whether a section 105(c) violation occurred within 90 days of the filing of a complaint. 30 U.S.C. § 815(c)(3).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 13, 2023

SECRETARY OF LABOR, on behalf of JIMMY LEE HOOVER, Complainant, v. MOSENECAMANUFACTURER LIMITED LIABILITY COMPANY d/b/a AMERICAN TRIPOLI, Respondent.	TEMPORARY REINSTATEMENT Docket No. CENT 2024-0024 MSHA No. MADI-CD-2023-05 Mine ID: 23-00504 Mine: MOSenecaMfr LLC dba American Tr

ORDER GRANTING TEMPORARY REINSTATEMENT OF JIMMY LEE HOOVER

Before: Judge Simonton

I. INTRODUCTION

This case is before me on application for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against MoSeneca Manufacturer LLC doing business as American Tripoli, pursuant to section 105(c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) ("Act" or "Mine Act"). On November 21, 2023, pursuant to 29 C.F.R. § 2700.45(c), Respondent requested a hearing on these matters. A virtual hearing was conducted on December 6, 2023, via the Zoom platform after the parties agreed to extend the required time period due to the Court's hearing travel schedule.[1]

II. ANALYSIS AND FINDINGS

Background

The parties stipulated to the following facts:

MoSeneca Manufacturer LLC doing business as American Tripoli ("Respondent") is organized under the laws of the state of Missouri. The Respondent is an "operator" as defined in Section 3(d) of the Mine Act. The Respondent's operations affect interstate commerce. At all relevant times, the Complainant was employed by the Respondent. As such, the Respondent is

[1] In this decision the transcript, Secretary's (Government) exhibits and Respondent's exhibits, are abbreviated as: "Tr.", "GEX - #", "REX - letters", respectively.

subject to the jurisdiction of the Mine Act, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding this case.

Summary of Testimony

Each party offered two witnesses. A summary of each witness's testimony follows.

Jimmy Lee Hoover

At hearing, Jimmy Lee Hoover ("Complainant") testified that at the time he was terminated, he was employed by the Respondent as a mill operator/mill associate. Tr. 25. His job duties involved mill operations, including routine maintenance and loading trucks, and he worked forty hours per week. Tr. 25-26. His rate of pay was twenty dollars an hour. Tr. 27.

On September 13, 2023, the Complainant was beginning the process to start the mill when he discovered that machinery at the mill was not operating as it should. Tr. 27-29. He checked the breaker box located on the wall and found that the circuit breaker had tripped. Tr. 29. Attempts to reset the breaker box by pressing the external reset button were unsuccessful. *Id.*

This breaker box was known to previously cause this issue. Tr. 30. On those instances, the Complainant would request assistance from a maintenance worker to open the box to fix the issue because he was unqualified to do so. *Id.* On September 13, however, no maintenance workers were present at the site. Tr. 31. Instead, the Complainant notified his supervisor, Don Hale, that the breaker box needed to be reset manually. Tr. 32. The Complainant and Hale then discussed the issue with Operations Manager John Spears, who supervised both Hale and the Complainant. Tr. 32-33. According to the Complainant's testimony, Spears allegedly responded to this information by saying "We got to run, we got to make Russ money." Tr. 33. While there were no explicit instructions given to the Complainant to open the breaker box and insert his hand, the Complainant interpreted Spears' alleged statements as implied instructions to do those activities because that was the only way to get the mill running. Tr. 57, 81, 104. The Complainant testified that he stated that he did not want to open the breaker box or put his hand inside because he felt it was an unsafe act. Tr. 81, 91.

After discussing the issue with Spears, the Complainant took a longer lunch break than usual, for approximately forty-five minutes. Tr. 33-34. During his lunch, the Complainant contacted a former maintenance worker for guidance on how to fix the breaker box. Tr. 34-35. When he returned from lunch, Spears asked the Complainant to show him the breaker box. Tr. 35. The Complainant took Spears to the breaker box, where Spears opened it and inserted his finger into the box. Tr. 36. The Complainant did not remove the cover or put his hand in the box. Tr. 37, 55-56. The Complainant did not believe Spears would be the person to fix the breaker box. Tr. 103. His understanding of Spear's job at the mill was to direct maintenance, not that Spears would be the employee to act as a maintenance person in the absence of a dedicated maintenance worker. Tr. 95, 103.

The Complainant worked as normal for the rest of the day. Tr. 37. He was never notified that there might be any disciplinary issues regarding his conduct that day prior to his termination. *Id*. The next day, September 14, 2023, the Complainant received a termination letter which was given to him by Spears. Tr. 38. At the time of his termination, the Complainant did not know exactly why he was being fired. Tr. 39, 77-78. Aside from the rationale provided in the letter,

there was no further discussion surrounding the reasons for his termination and no one explained specifically why he was being terminated. Tr. 40, 78. The Complainant testified that it was his belief that his refusal to perform the maintenance tasks associated with resetting the breaker box led to his termination. Tr. 40-41.

Michael Dillingham

The special investigator who conducted the investigation into the Complainant's 105(c) discrimination complaint testified to his findings and conclusions. Through his investigation, Dillingham determined that it was "the norm for maintenance or anyone that worked in the mill" to go inside the box and hold the reset button internally when the external reset would not work. Tr. 124-26. As such, it was expected of the Complainant to stick his hand inside the breaker box because it was his job to get the mill running. Tr. 155. Accordingly, he concluded that the Complainant's refusal to put his hand into the breaker box constituted a withdrawal from an unsafe act. *Id*.

Dillingham further testified that Spears allegedly responded to the Complainant's withdrawal by saying, "Is this how you're going to play it, really?" Tr. 121, 152. As part of the investigation, Dillingham contacted Respondent to conduct an interview regarding the events leading to the Complainant's termination, to which the Respondent submitted a position statement in lieu of an interview. Tr. 129.

Based on the results of his investigation, Dillingham found that there was a nexus between the protected activity, the Complainant's withdrawal, and the adverse action, the termination. Tr. 130-31, 149. He concluded that the discrimination complaint was therefore legitimate, and that discrimination had occurred. *Id*.

Russell Tidaback

Russell Tidaback, the mill's owner, gave extensive testimony as to Complainant's employment history, which documented multiple instances of poor attitude, issues with other employees, absenteeism, and safety concerns. Tr. 185-96; REX G. Throughout the Complainant's employment, Tidaback spent significant time mentoring and counseling the Complainant to improve performance. Tr. 166-168; REX G. He also testified to the mill's termination policy, citing the employee handbook, which states that termination is a three-step process involving: (1) a verbal warning; (2) a written warning letter; and (3) a termination letter. Tr. 174; REX E. While Tidaback stated that these steps are not obligatory and serve more as a guide, this termination process was followed during the Complainant's termination and the Complainant had been warned numerous times regarding his performance, both verbal and written. Tr. 215-16.

Despite these numerous disciplinary incidents, however, the Complainant was not fired until September 14, 2023, the day after the incident involving the faulty breaker box. Tr. 216-17. Tidaback testified that he was unaware of the breaker box issue when he ultimately made the decision to terminate the Complainant and the decision was motivated by the Complainant's tardy return from lunch and poor attitude the previous day. Tr 171-72, 217. While Tidaback is the final decision maker, other members of management, including supervisors, provide input and play a role in the decision to terminate an employee. Tr. 207-210.

In the termination letter provided to the Complainant, which was written by Tidaback, there was no explicit reference to a specific event triggering termination. Tr. 177; GEX 2. There was also no explicit statement contained within the letter that cited specific safety concerns or specific instances of absenteeism as reasons for termination. Tr 182; GEX 2. Tidaback explained its implied because this was a termination letter, not an improvement counseling letter. *Id.* He acknowledged that the exact reasons for termination would not be entirely clear to an outside reader based on the termination letter alone and additional information regarding the Complainant's employment history is necessary to fully understand the termination decision. Tr. 181-83.

Don Hale

During the time period at issue, Don Hale was employed as the assistant manager/mill lead and was Complainant's immediate supervisor. Tr. 226. On September 13, 2023, Hale was aware that the breaker box was not functioning properly, which had been a recurring problem at the mill. Tr. 220-21. The Complainant informed him that did not want to put his finger on the box's switch for fear of being shocked. *Id.* Hale and the Complainant then went to speak with John Spears about the faulty switch, after which the switch was eventually fixed. *Id.* Hale testified that Spears also knew that the Complainant did not wish to stick his hand in the breaker box. Tr. 230.

Concerning general practices at the mill, Hale stated that he would inform Spears about problems at the mill and that Spears would then instruct him what to do, including recruiting other employees to assist him. Tr. 224. He also stated that Spears's job duties included maintenance work, especially when there was not a designated maintenance person. Tr. 225. However, there was not always an expectation that Spears would be the person to perform maintenance work in the absence of a maintenance person. Tr. 229.

As part of his job duties, Hale was responsible for tracking employees' comings and goings, including lunch breaks. Tr. 227, 235. He stated that the mill does not have a clock-in clock-out system or other formal tracking system to monitor employees, and that he would make note of when employees left for lunch. *Id.* On September 13, 2023, the Complainant took a lunch break that exceeded the typical half-hour that is permitted. Tr. 219, 228, 235-36. Hale told Complainant he was gone for an hour. Tr. 219, 221, 235-36. Hale testified Complainant's response was, "I don't care, write me up." *Id.* After the conclusion of the workday, Hale contacted the mill's owner regarding the Complainant's conduct that day, including the Complainant's late return from lunch and his attitude, and that the Complainant allegedly told Hale to write him up. Tr. 221; REX H. Hale had encountered problems with the Complainant on the job before, including getting "lippy" and occasionally arriving late to work. Tr. 222-23. However, he generally did not have a problem with the Complainant despite these issues. Tr. 223.

Standards Governing Temporary Reinstatement

Section 105(c)(1) of the Mine Act provides that no person shall discharge or otherwise discriminate against a miner for exercising rights under the Act.

It states in pertinent part:

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

30 U.S.C. § 815(c)(1)(Emphasis provided by the *Commission in Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982)).

Pursuant to 105(c)(1), if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint. 30 U.S.C. § 815(c)(1). The Commission has noted that the parameters of a temporary reinstatement hearing are narrow, being limited to a determination with respect to whether a miner's discrimination complaint has been frivolously brought. *See Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd.*, 920 F. 2d 738 (11th Cir. 1990). Accordingly, it is only necessary to determine whether the Applicants' complaints *appear* to have merit. (Emphasis added). *See* S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978). In *Jim Walter Resources, Inc. v. FMSHRC*, the Eleventh Circuit found the "not frivolously brought" standard comparable to a "reasonable cause to believe" standard. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Eleventh Circuit concluded that the low burden imposed by the "not frivolously brought" standard reflects clear Congressional intent to make temporary reinstatement relatively easy to obtain. *Id*. at 748.

The Commission has consistently and historically found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) *citing Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited *in any way* in exercising any rights afforded by the legislation."')(quoting S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978) (emphasis added).

Although the Secretary is not required to present a prima facie case in a temporary reinstatement proceeding the Commission has determined it useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). In order to establish a prima facie case under Section 105(c), a miner must show: (1) that he engaged in a protected activity; and (2) that his termination was motivated, at least in part, by the protected activity. *See Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980).

The Commission has held that evidence of motivation may be shown by circumstantial evidence. *See, e.g., Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom., *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) (holding that illegal motive may be established if the facts support a reasonable inference of discriminatory

intent); *Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (Jan. 1984). Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include: (1) knowledge by the operator of the protected activity, (2) hostility toward the miner because of his protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complaining miner. *Jungers v. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).

Disposition

The Secretary has sufficiently demonstrated that the Application for Temporary Reinstatement was not frivolously brought. As stated above, a miner must raise a nonfrivolous claim that he engaged in a protected activity that has an arguable connection to an adverse employment action. The facts presented by the Secretary in this matter are sufficient to establish that there was reasonable cause to believe that there was such a causal nexus.

I find that the Secretary has sufficiently demonstrated that the Complainant engaged in a protected activity. Even if there was no direct order from a supervisor to open the breaker box and insert a finger inside, there is circumstantial evidence that it is management's expectation that a miner do whatever is necessary, when maintenance is not available, to get the mill up and running. Thus, the Complainant's withdrawal from these actions constitutes a protected activity.

I also find that the Secretary has sufficiently demonstrated that the Complainant suffered an adverse employment action when he was terminated. It is well established precedent that termination is an adverse employment action. It is also undisputed that the Complainant was terminated the day after the protected activity occurred. As such, the Complainant has suffered an adverse employment action.

Although Respondent claims he had no knowledge of the protected activity when the decision to terminate was made, the Secretary does not need to prove that the operator has actual knowledge of a complainant's protected activity in a temporary reinstatement proceeding, only that there is a nonfrivolous issue as to knowledge. *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 718 (July 1999). The Complainant's termination letter contains only a vague explanation as to why he was discharged, citing his failure to "meet the standards and expectations set forth by the company" and concerns related to "conduct and performance" as reasoning for the decision. GEX 2. The termination letter also lists actions such as leaving the workstation without authorization, leaving company property without notice, and neglecting planned maintenance tasks. *Id.* Notably, it does not explicitly reference other specific disciplinary measures that were taken against the Complainant previously to support the termination. No other justifications were provided to the Complainant as to why he was being terminated. The absence of specific events noted in the termination latter raise nonfrivolous issues regarding the Respondent's knowledge of Complainant's protected activity and the potential that it played a role, at least in part, in Complainant's termination.

"Hostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Phelps Dodge Corporation*, 3 FMSHRC at 2511 (citations omitted). In this matter, there was undisputed testimony that Spears allegedly commented, "Is this how you want to play this, really?" in response to the Complainant's refusal to perform an activity that he viewed as unsafe.

Tr. 152. Although Tidaback, the person who made the ultimate decision to terminate, presented evidence that he was unaware of the protected activity, he testified that he takes into consideration the opinions and observations of supervisors when making termination decisions. Because mine management, including supervisors such as Hale and Spears, are aware of their opportunity to provide input in termination decisions, Complainant's protected activity which they indisputably were aware of, could have influenced their recommendations to terminate the Complainant. This is sufficient to establish a nonfrivolous issue with regard to Respondent's knowledge of Complainant's protected activity as well as potential animus in this matter which may have influenced the input Tidaback received from his management officials, Hale and Spears on site.

The temporal proximity between the protected activity and the adverse employment action strongly supports the causal nexus. The Complainant engaged in the protected activity on September 13, 2023, and was then terminated on September 14, 2023. This is an extremely short period of time and easily meets the threshold to establish that the timing is sufficient to support the nexus.

A temporary reinstatement hearing must be a full evidentiary process that permits all relevant evidence relating to the adverse employment action. *Sec'y of Labor o/b/o Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 165-66 (Apr. 2021). In response to the Complainant's discrimination complaint, the Respondent claimed that the Complainant was terminated for reasons "strictly related to safety and operational efficiency in the mine." GEX 5. Accordingly, the Respondent was permitted to present evidence and testimony throughout the hearing in support of this position. "[R]esolving conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's prima facie case" are simply not appropriate "at this stage in the proceeding." *CAM Mining, LLC*, 31 FMSHRC at 1089 (citing *Chicopee Coal Co.* at 719). While the Respondent's evidence may be relevant or dispositive in a later discrimination proceeding, the only purpose it serves in this proceeding is as an alternative theory as to why the Respondent discharged the Complainant. *See Sec'y of Labor o/b/o Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). There is no obligation to adopt this theory at this stage in the proceeding, and it does not demonstrate that the Complainant brought forth a frivolous complaint.

III. DECISION AND ORDER

For all of the reasons articulated above I find that the Complainant presented sufficient evidence at hearing to render his discrimination complaint non-frivolous. Accordingly, **IT IS ORDERED** that Respondent Moseneca Manufacturer LLC d/b/a American Tripoli, immediately reinstate Complainant Jimmy Lee Hoover to the position he held immediately prior to the September 14, 2023 termination or to a similar position at the same rate of pay and benefits and with the same or equivalent duties assigned.

The Court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.

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

Distribution: (Electronic and Certified mail)

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December 18, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. AMERICAN TRIPOLI, Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0196 A.C. No. 23-00504-577169 Mine: MOSenecaMfr LLC dba American tr

ORDER ON MOTION TO EXPEDITE

Before the Court is Respondent, American Tripoli's "Motion to expedite proceedings with respect to certain enforcement actions." ("Motion"). Pursuant to 29 C.F.R. §§ 2700.10 and 2700.52, American Tripoli ("Tripoli") "specifically requests that a hearing on Citation Nos. 9539786 and 9539787 and Order Nos. 9539789 and 9539790 be heard on an expedited basis," and it adds that because of "its factual similarity in allegations, Citation No. 9539788 should also be included in the expedited proceeding." Motion at 1. Thereafter, the Secretary filed its Opposition to the Motion. ("Opposition"). The Court held a conference call on December 7, 2023, to better understand the controversy. ("Conference Call")

For the reasons which follow, the Court **GRANTS** the Motion for an **EXPEDITED PROCEEDING** for the purpose of a hearing on the citations and orders identified above. The Court notes that there is the related Secretary's Motion to Compel Discovery, which was filed on November 30, 2023. A ruling on that discovery motion will be forthcoming. Because the Court is issuing its Order for Docket Reallocation today, that discovery issue will be limited to Citation Nos. 9539786, 9539787 and 9539788 to the new docket, along with all related actions such as the (b) orders and the numerous modifications to them. Following its ruling on the Secretary's Motion to Compel Discovery, the Court will be promptly arranging a conference call to establish a date for the commencement of a hearing regarding these matters.

Background

Briefly stated, first there is **Citation No. 9539786**, which alleges a violation of 30 C.F.R. § 56.5001(a) and 30 C.F. R. 56.5005.[1] The former standard speaks to the requirement that

[1] The full text of these provisions appears here: 30 C.F.R. § 56.5001(a), titled, "Exposure limits for airborne contaminants," provides "Except as permitted by § 56.5005 - (a) Except as (continued…)

"exposure to airborne contaminants … shall not exceed the TLV's established by the American Conference of Governmental Industrial Hygienists." *Aluminum Company of America*, 15 FMSHRC 1821, n.6. The latter standard requires the use of respirators "which are applicable and suitable for the purpose intended." *Couer-Rochester* 1995 WL 502650, (Aug. 1995) (ALJ).

As mentioned, Tripoli's Motion also seeks to include Citation No. 9539788 in its motion. That citation cites 30 C.F.R. §56.5002. That standard is brief. Titled, "Exposure monitoring," it provides "Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures."

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[1] (…continued)
provided in paragraph (b) of this section, the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental industrial Hygienists by writing to 1330 Kemper Meadow Drive, Attn: Customer Service, Cincinnati, OH 45240; *http://www.acgih.org"*, or may be examined in any Metal and Nonmetal Mine Safety and Health District Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference."

30 C.F.R. § 56.5005, titled "Control of exposure to airborne contaminants," provides "Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted, engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Respirators approved by NIOSH under 42 CFR part 84 which are applicable and suitable for the purpose intended shall be furnished and miners shall use the protective equipment in accordance with training and instruction.

(b) A respirator program consistent with the requirements of ANSI Z88.2–1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2–1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 25 W. 43rd Street, 4th Floor, New York, NY 10036; http://www.ansi.org", or may be examined in any Metal and Nonmetal Mine Safety and Health District Office of the Mine Safety and Health Administration.

(c) When respiratory protection is used in atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment."

The full text of the alleged violation contained in the section 104(a) Citation No. 9539786, stated:

> The Mill Associates were exposed to a shift-weighted averages of 1.64 mg/m3, [**'mg/m3'** stands for one-thousandth of a gram per cubic meter of air] 1.33 mg/m3, and 1.77 mg/m3 respirable silica-bearing dust on 03/21/2023. This exceeded the Threshold Limit Value (TLV) of 0.15 mg/m3 times the error factor (1.20 for respirable free silica dust sampling and analysis). A Respiratory Protection Program (RPP) meeting the requirements of ANSI Z88.2 - 1969 was not in place. The operator's RPP was deficient in that; the mine operator had not conducted their own sampling as required, there was no-one administering the program (the program states that it will be administered by the Safety Manager, a position that is currently open at the mine), the miners have not been medically evaluated to be able to wear a respirator, the respirators listed in the plan were not approved at the miner's exposure level, and the miners had not been fit tested. The abatement date has been set to allow the operator time to: correct their RPP to be compliant with ANSI Z88.2-1969, have all affected miners medically evaluated to be able to wear a respirator, and to provide approved, fit tested, respiratory protection for all affected miners (Any powered air-purifying respirator with a high-efficiency particulate filter (PAPR), or Any supplied-air respirator operated in continuous-flow mode). The mine operator must establish engineering controls to reduce the silica-bearing dust exposure to less than the TLV.

Petition at 85.

The 104(a) citation listed the injury or illness as "highly likely" and "permanently disabling," and consequently as "significant and substantial." The negligence was listed as "high."

Then there is **Citation No. 9539787**, another 104(a) citation. It alleged the same standards alleged to have been violated in Citation No. 9539786 – 30 C.F.R. § 56.5001(a) and 30 C.F.R. 56.5005. The full text of the alleged violation contained in that section 104(a) citation stated:

> Standard 56.5001(a)/56.5005 was cited 1 time in two years at mine 2300504 (1 to the operator, Oto a contractor). The Operations Manager was exposed to a shift-weighted average of 0.5 mg/m3 of respirable silica-bearing dust on 03/21/2023. This exceeded the Threshold Limit Value (TLV) of 0.15 mg/m3 times the error factor (1.20 for respirable free silica dust sampling and analysis). A Respiratory Protection Program (RPP) meeting the requirements of ANSI Z88.2-1969 was not in place. The operator's RPP was deficient in that; the mine operator had not conducted their own sampling as required, there was no-one administering the program (the program states that it will be administered by the Safety Manager, a position that is currently open at the mine), the miner had not been medically evaluated to be able to wear a respirator, the respirators listed in the plan were not being fit tested each time they were donned, and the miner had not been fit tested. The abatement date has been set to allow the operator time to: correct their RPP to be compliant with ANSI Z88.2-1969, have the miner medically evaluated to be able to wear a respirator, and to provide approved, fit tested, respiratory protection for the affected miner (Any particulate respirator equipped with an N95, R95, P95,

> N99, R99, P99, Nl00, Rl00, or Pl00 filter). The mine operator must establish engineering controls to reduce the silica-bearing dust exposure to less than the TLV.

Petition at 87.

The issuing inspector evaluated the gravity, and negligence the same as he had for Citation No. 9539786, similarly marking alleged violation as "significant and substantial."

Last there is Citation No. 9539788, which is of a piece with the two citations identified above. Recall that the operator requested that standard's inclusion in its motion. Citing 30 C.F.R. §56.5002, as pertinent here, that standard requires dust surveys to be conducted as frequently as necessary to determine the adequacy of control measures. That citation, at least as alleged on its face, made out a violation as it asserted no dust surveys were being conducted:

> The mine operator was not conducting dust surveys in the mill building to ensure the provided dust collection and ventilation controls were adequate to prevent overexposure to silica-bearing dust. Elevated dust levels above the TLV were present in the mill building on 03/21/2023 (citations#: 9539786 and 9539787). The initial abatement date has been set to allow the mine operator time to survey their current dust collection and ventilation systems and to make arrangements for dust sampling and analysis.

Petition at 89.

All three citations were issued on the same day, April 30, 2023, and within an hour of one another and they all involved the mill building. All provided the same abatement date, April 7, 2023.

Respondent's Motion

Respondent's Motion states that, as a consequence of the above-described citations, and more particularly as a result of the issuance on April 12, 2023, of section 104(b) orders, Order Nos. 9539789 and 9539790,[2] issued in the wake of and associated with Citation Nos. 9539786 and 9539787 for the alleged lack of any effort to correct the defects identified in those citations, the mine is unable to continue to operate. That the mine cannot operate in any meaningful production capacity is not contested by either side; the orders have effectively shut the operation down. Conference Call at 4.

Both Orders were subsequently modified 12 times. Subsequent Action Nos. 9539789-02 through 9539789-13 and Subsequent Action Nos. 9539790-02 through 9539790-13. That these modifications occurred are also uncontested.

[2] The texts of the 104(b) orders are reflected here: Order No. 9539789 stated in relevant part: "No apparent effort was made by the operator to; correct their Respiratory Protection Program (RPP) to be compliant with ANSI Z88.2-1969, have all affected miners medically evaluated to be able to wear a respirator, to provide approved, fit tested, respiratory protection for all affected miners, or to establish engineering controls to reduce the silica-bearing dust exposure." Order No. 9539790, essentially declared the same thing. Motion at 3-4.

Respondent asserts that it "provided miners with medical evaluations and respiratory protection, performed troubleshooting on the Mill Building, performed remedial work and implemented controls, which MSHA recognized," citing Respondent's Exhibit C at 2-4; and Exhibit D at 2-4. Respondent also states that "[o]n April 27, 2023, MSHA modified both Order Nos. 9539789 and 9539790 to allow production to resume by issuing Subsequent Action Nos. 9539789-05 and 9539790-05," citing Exhibit C at 5; Exhibit D at 5. Motion at 5.

Respondent then states that "[o]n October 11, 2023, MSHA reversed course and issued Subsequent Action Nos. 9539789-08, -09 and -10 and 9539790-08, -09 and -10, which modified Order Nos. 9539789 and 9539790, respectively, and prohibited any production activities in the Mill Building. …[and that] [a]s a result, since that time, production at American Tripoli has ceased." *Id*., citing Exhibit C at 8-10; Exhibit D at 8-10.

It is Respondent's contention that the civil penalty docket is the appropriate venue for challenging Order Nos. 9539789 and 9539790 and the subsequent actions for each and that MSHA's "subsequent action modifications prohibiting production activities, are invalid, unreasonable and contrary to law and fact." *Id*.

Respondent reports that the parties have attempted to negotiate a plan by which American Tripoli would be able to operate pending termination of Citation Nos. 9539786 and 9539787 (and, correlatively, Order Nos. 9539789 and 9539790) but such negotiations have not yielded a resolution. Id. at 6.

In sum, Respondent declares that "expedition of the proceeding relative to Citation Nos. 9539786 and 9539787 and Order Nos. 9539789 and 9539790 is necessary. Given that American Tripoli is presently prohibited from engaging in production, if an expedited hearing is not granted, American Tripoli will be irreparably harmed," and therefore it requests a hearing on those matters. *Id*. at 6.

The Secretary's Opposition to the Motion to Expedite

The Secretary's Opposition to the Motion to Expedite ("Opposition") raises three contentions: the Respondent's window of time to challenge the 104(b) orders expired; it would be premature to have a hearing on Citation Nos. 9539786 and 9539787 because necessary discovery, including a pending motion to compel, is ongoing; and it would be wasteful to have a hearing on only some of the citations/orders in this docket. Opposition at 1.

All of this came about in the connection with the Secretary's issuance of the two citations referenced above (i.e. Citation Nos. 9539786 and 9539787) and the orders which followed in the wake of those citations. The citations and orders emanate from the allegations that the Respondent failed to have a compliant respiratory protection program. The Court agrees with the Respondent that Citation No. 9539788 should be included in this motion to expedite, as it is closely related to those other two citations. Certainly, the allegations and the orders pertain to very serious health matters, involving respirable silica dust.[3]

[3] It is noted that silica dust is particularly harmful. "Silica dust is 20 times more toxic than coal dust and causes severe forms of black lung disease even after a few years of exposure." (continued…)

As the Secretary notes, the two citations assert that the Respondent's operations manager was exposed to dust levels three times the threshold limit value ("TLV") and that mill associates were exposed to dust levels ten times the TLV. Opposition at 1-2. The 104(b) Orders were issued about two weeks after the citations. Those two Orders asserted that

> [n]o apparent effort [had been] made by the operator to correct their Respiratory Protection Program (RPP) to be compliant with ANSI Z88.2-1969, have all affected miners medically evaluated to be able to wear a respirator, to provide approved, fit tested, respiratory protection for all affected miners, or to establish engineering controls to reduce the silica-bearing dust exposure.

Order No. 9539789. (Order No. 9539790 uses the same language and therefore not repeated.)

The Orders *did not* remain static. Both were modified fourteen (14) times.[4] The Secretary states that it afforded the Respondent "nearly six months" to correct the dust exceedance issues but that the Respondent failed to act in "good faith or take reasonable steps to repair its dust collection system during this time period." *Id*. at 2. By the Secretary's account, it was then "left with no choice but to issue a modification to the 104(b) Orders that prohibited all dust producing activity in the mill building until engineering controls were established and the miners' respirable silica dust exposure had been reduced to below the threshold limit value." *Id.*

The Secretary asserts that the Respondent's real objective is to have the orders modified so that it can resume its mining operation. As mentioned, the Secretary contends the Respondent failed to challenge the orders within the time allowed. The Secretary maintains that it has been more than reasonable in this matter as it made several modifications to the orders in April and July 2023 but that its patience ran out because the Respondent

> failed to take any measurable steps to control respirable dust and install engineering controls in an attempt to terminate the citations … [and] "also failed to consistently require miners to use respiratory protection exposing them to unacceptable levels of silica dust and serious health risks.

Id. at 4.

That asserted inaction left MSHA with no choice but to

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[3] (…continued)
Leah Willingham and Matthew Daly, *After decades of delays and broken promises, coal miners hail rule to slow rise of black lung,* AP, Aug. 5, 2023, https://apnews.com/article/black-lung-silica-dust-coal-mining-west-virginia-be722098fcf2a20b16bd73ca12c06c7e.

On July 13, 2023, MSHA issued a proposed rule to reduce the permissible exposure limit to respirable crystalline silica. https://www.federalregister.gov/documents/2023/07/13/2023-14199/lowering-miners-exposure-to-respirable-crystalline-silica-and-improving-respiratory-protection

[4] *See, for example,* Order No. 9539790-14, issued 12/05/2023.

> prohibit 'all dust producing activity in and around the Mill Building until all feasible engineering controls have been installed or repaired and personal respirable dust sampling by MSHA has shown that the engineering controls were effective and miners' respirator silica dust exposure is below the [threshold value limit].'

Id. (bracket in original).

> The Court notes the serious contention made by the Secretary that
>
> [t]o date, *over seven months after the 104(b) Orders were first issued*, no consultant or expert has observed the mill running and therefore has not had the opportunity to fully address what engineering controls are necessary to correct the silica dust exposure.

Id. (emphasis in Opposition).

As noted, the Secretary contends that the Respondent failed to timely contest the 104(b) orders in this matter and that failing to timely contest is a jurisdictional bar to review. The Secretary also asserts that an expedited hearing on the citations should wait until discovery is completed. While the Secretary asserts that the Respondent's reliance on the Commission's decision in *Maple Creek*, 29 FMSHRC 583 (July 2007) ("*Maple* Creek") is inapplicable to this matter, the Secretary's fallback position is that if the case does support the proposition that the Commission has jurisdiction over orders not contested, then the Commission's decision was wrongly decided and the Commission must defer to the Secretary's view. *Id.* at 8.

Analysis

The challenge to jurisdiction over the 104(b) withdrawal orders

The Court does not agree with the Secretary's position that the Respondent's failure to challenge the 104(b) withdrawal orders within 30 days of their initial issuance, April 12, 2023, removes Commission jurisdiction over those orders. The Court relies upon the language of Sections 104(b) and 105(d) and the reasoning of the Commission in its *Maple Creek* decision. Once the Secretary launches actions under those provisions, the matters are then in the Commission's hands. As noted in *Maple Creek*,

> The Commission is clearly charged with administering the provisions of sections 105(a) and 105(d) of the Mine Act, which address the challenge of enforcement actions of the Secretary, the initiation of cases before the Commission, and the Commission's administration of hearings concerning the validity of those enforcement actions. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53, 56-59 (D.C. Cir. 1988) (where language of Mine Act was indecisive, court deferred to Commission's interpretation of section 104(d) regarding the issuance of withdrawal orders). As the Supreme Court stated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), the Commission was established as an independent review body to "develop a uniform and comprehensive interpretation" of the Mine Act (citing Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n before the Senate Comm. on Human Res., 95th Cong. 1 (1978)). Moreover, the question of how the procedures set forth in sections 105(a) and

105(d) are to mesh and how the Commission will conduct hearings involves a major policy component, which the Commission is uniquely qualified to establish.

Id. at *6.

Accordingly, per that decision, "a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d)." *Id*.

The Secretary's claim that it would be premature to have a hearing because necessary discovery must occur first.

The Secretary has filed a Motion to Compel Discovery. Although the Court's decision on the discovery motion is addressed in a separate issuance, a few remarks are in order. This is not a typical case. The orders issued by MSHA have shut down production at the mine and that status is not disputed. Given the seriousness of the action taken by virtue of the MSHA orders, a production shut down of the mine product, it is the Court's view that the Secretary should be prepared to defend both the citations and the ensuing orders from the time they were issued. The assertion that the Secretary needs to first conduct "necessary discovery" is questionable, at least under circumstances when a mine is shut down.

Further, even presently, the Secretary's ability to have the citations and the orders upheld should not be difficult, assuming that it can establish the facts alleged in the citations and that those facts make out violations of the cited standards and then establish that, upon a follow-up inspection, the violations described in such citations have not been totally abated within the period of time allowed, and that the bases establishing that the period of time for the abatement should not be further extended, all by a preponderance of the evidence, the withdrawal orders would be upheld.

The contentions in the citations and the orders emanating from those citations, if established, represent serious health violations. That said, shutting down a mine from production is a serious action in its own right.

The Court has the authority to expedite proceedings before it. 29 C.F.R. § 2700.52. The decision to expedite is left to the Court's discretion.

Accordingly, based upon the reasons articulated above, the Court has determined that expedition of these proceedings is appropriate in this instance. To that end, the Court will be promptly arranging a conference to establish a date for the commencement of a hearing for these matters.

The Secretary's claim that it would be wasteful to have a hearing on only some of the citations/orders in this docket.

This claim is the weakest of the bases sought by the Secretary to avoid an expedited hearing and may be disposed of easily. While, ideally, hearing all citations within a given docket is preferred, the reality here is that the citations and orders sought for expedited review have a profound effect on the mine's operation by preventing production. The need for expedited review of those limited but profound matters clearly outweighs postponement of the hearing.

Conclusion

Accordingly, based on the foregoing discussion, the Respondent's Motion to Expedite is **GRANTED**. As noted, upon issuance of the Court's Order on the Motion to Compel Discovery, a conference call will be scheduled to set a date and location for the expedited hearing.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 21, 2023

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR obo JIMMY LEE HOOVER, Complainant, v. MOSENECAMANUFACTURER LIMITED LIABILITY COMPANY d/b/a AMERICAN TRIPOLI, Respondent.	TEMPORARY REINSTATEMENT Docket No. CENT 2024-0024 MSHA No. MADI-CD-2023-05 Mine: MOSenecaMfr LLC dba American Tr Mine ID: 23-00504

ADDENDUM TO ORDER OF REINSTATEMENT

This case is before me on application for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against MoSeneca Manufacturer LLC doing business as American Tripoli, pursuant to section 105(c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) ("Act" or "Mine Act"). On December 18, 2023, the Secretary filed a Motion stating that the Respondent has refused to comply with the Court's Order for Temporary Reinstatement, dated December 13, 2023, and requested that this Court compel the Respondent to comply with the Court's directives.

In this motion, the Secretary contends that the Respondent has refused to comply with the Court's order because the Complainant's MSHA training has expired, and that the Complainant needs to complete this training on his own time before he can return to work. The Secretary asserts that the Respondent bears the burden to demonstrate that the tolling of the Complainant's temporary reinstatement is justified, and that the Respondent has not met this burden and has not moved for a tolling of the temporary reinstatement order.

On December 20, 2023, the Respondent filed a Response to the Secretary's Motion, where he argued that because the Complainant had not received his Annual Refresher Training and was not in compliance with MSHA's training requirements, he could not return to work. The Respondent claims that this training cannot be offered until March 2024, thus delaying the Complainant's return to work in accordance with the Order. The Respondent also requested a stay of the Order for Temporary Reinstatement because the Complainant's position was in a laid-off status due to regulatory actions that had shut down the mine which affected the Complainant's ability to return to work.

The Secretary filed a reply to the Respondent's Response where it was demonstrated that the Respondent is an approved MSHA instructor and could provide the necessary training to the Complainant and had in fact provided this training to other employees on November 1, 2023.

The Secretary asserts that this is disparate treatment of the Complainant, and in addition to their request that the Respondent be compelled to comply with the Order for Temporary Reinstatement, also requests that the Complainant receive back wages for the time he otherwise would have been working.

In a separate filing, Respondent simultaneously filed a Notice of Contest and Motion for an Expedited Hearing in relation to a 104(a) citation and a 104(b) order issued to the Respondent by MSHA as a result of the Respondent's failure to put the Complainant back to work. Due to the issuance of this citation and this order, MSHA shut down the entire mine and has prevented the Respondent from engaging in any operations. The Respondent requested an expedited hearing on this matter and that the citation and order be vacated. The Motion for an Expedited Hearing shall remain in the file relating to this Temporary Reinstatement proceeding, while the Notice of Contest shall be refiled with the Commission's docket office.

A conference call was held on December 21, 2023, whereby the Secretary acknowledged that it is not necessary for the Court to rule on the Motion to Comply with my December 13, 2023, Order for Temporary Reinstatement at this time because Respondent confirmed that Complainant has been returned to its payroll. Further, the parties intend to negotiate a written economic reinstatement agreement. Respondent also acknowledged the Motion for an Expedited Hearing does not require a ruling as MSHA has, since the filing of the motion, lifted the 104(b) order. The corresponding Notice of Contest will be forwarded to the Commission's docket office to be processed.

The parties have agreed to work towards a settlement for economic reinstatement. If the parties cannot come to an agreement regarding the terms of economic reinstatement that addresses all concerns raised in these motions, the parties may renew their motions at that time.

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

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December 22, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of SAMUEL COLEMAN, Complainant v. WARRIOR MET COAL MINING, LLC, Respondent	TEMPORARY REINSTATEMENT Docket No. SE 2024-0060 MSHA Case No. SE-MD-24-03 Mine: No. 7 Mine Mine ID: 01-01401

ORDER GRANTING JOINT MOTION FOR ECONOMIC TEMPORARY REINSTATEMENT

Before: Judge Sullivan

On December 12, 2023, I granted the Secretary of Labor's unopposed Application for Temporary Reinstatement of Complainant Samuel Coleman. Pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and 29 C.F.R. § 2700.45, I ordered Complainant's immediate temporary reinstatement to positions at the No. 7 Mine of Warrior Met Coal Mining, LLC.

On December 21, 2023, the parties jointly moved for an order approving their agreement to economically temporarily reinstate the Complainant in lieu of the actual temporary reinstatement ordered on December 12. Their motion details the terms of the economic reinstatement agreement reached by the parties, retroactive to the date of my original order.

Because nothing in the motion's description of the terms of the agreement appears to reduce Complainant's rights under section 105(c)(2), the motion is granted, and my December 12 order is converted to an order of temporary economic reinstatement retroactive to that date. All other provisions of that order remain in effect.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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