FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 2, 2020

PETE TARTAGLIA, JR., Complainant, v. FREEPORT-MCMORAN BAGDAD INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2019-0382-DM MSHA Case No. RM-DM-2019-08 Mine ID: 02-00137 Mine: Freeport-McMoRan Bagdad Inc.

DECISION AND ORDER

Appearances: Pete Tartaglia, Jr., 8340 N. Thornydale Road #209, Suite 110, Tucson, AZ 85741

Laura E. Beverage, Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Karl F. Kumli, Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Before: Judge Simonton

This case is before me upon a complaint of discrimination filed by Pete Tartaglia, Jr. ("Tartaglia" or "Complainant") against Freeport-McMoRan Bagdad Inc. ("FMBI" or "Respondent"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c)(3).[1] Tartaglia complains of numerous occurrences in which he believes FMBI has improperly discriminated or retaliated against him. In particular, he asserts that FMBI violated a settlement agreement reached in WEST 2018-0362-DM, wrongfully took money from his paychecks, and disciplined him in April 2019 in response to his protected activity. FMBI denies these claims and asserts that it fulfilled its obligations under the settlement agreement, properly recouped a double payment made to Mr. Tartaglia, and disciplined him in April 2019 solely because of his refusal to complete assigned work.

A hearing was held on March 11, 2020 in Phoenix, Arizona. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observations of the demeanors of the witnesses, and the parties' post-hearing submissions, I find that neither party violated the settlement agreement reached in Tartaglia's prior section

[1] In this decision, the joint stipulations, transcript, the Complainant's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. C-#," and "Ex. R-#," respectively.

105(c) case. Further, I find that FMBI did not violate the Mine Act in recouping money erroneously paid twice to Tartaglia or in disciplining him on April 11, 2019.

I. STIPULATIONS

At hearing, the parties agreed to the following joint stipulations:

1. The Freeport-McMoRan Bagdad Inc. Mine, Mine I.D. No. 02-00137, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq*. (the "Mine Act").

2. Freeport-McMoRan Bagdad Inc. is an operator within the meaning of the Mine Act.

3. The Administrative Law Judge has jurisdiction of this matter.

4. Tartaglia was employed by Freeport-McMoRan Bagdad Inc. and was therefore a "miner" as defined by § 3(g) of the Act, at all times relevant to this proceeding.

5. Tartaglia filed a complaint under § 815(c) on or about March 20, 2019.

6. That complaint was investigated by MSHA and on or about May 20, 2019, MSHA indicated to Tartaglia that it would not pursue the claim. Tartaglia then initiated his Pro Se Discrimination Complaint on or around June 19, 2019.

7. Tartaglia filed a hotline complaint with MSHA on November 20, 2018.

Tr. 11–16.

II. ISSUES

Tartaglia's pleadings were unclear regarding the scope of the claims he would pursue at hearing. On December 30, 2019, FMBI filed a motion in limine to limit the scope of issues before the court, requesting that the issues to be tried be limited to those Tartaglia articulated in his March 20, 2019 complaint to the Mine Safety and Health Administration (MSHA) or that arose during the pendency of the investigation of that complaint. Following a conference call and a response submitted by Tartaglia, I enumerated the issues that would be entertained at hearing in a February 10, 2020 order. After further submissions and another conference call with the parties, some additions were made to that list. As announced and agreed to by the parties at hearing, the five issues before the court are:

1. Whether either party violated the settlement agreement entered into at hearing in WEST 2018-0362-DM.

2. Whether Tartaglia's allegation regarding FMBI's recovery of bonus money erroneously paid twice is time-barred under section 105(c)(2) of the Mine Act.

3. If not time-barred, whether the recovery of bonus money erroneously paid twice to Tartaglia is an adverse action motivated by protected activity.

4. Whether disciplinary action taken against Tartaglia on April 11, 2019, was an adverse action motivated by protected activity.

5. If a violation of section 105(c) is found, what remedies are available to Tartaglia.

Tr. 22–23.

III. FINDINGS OF FACT

A. Tartaglia's First MSHA Action and Settlement

The instant case is not Tartaglia's first action before this court. Tartaglia's prior section 105(c) case, assigned Docket No. WEST 2018-0362-DM, went to hearing before me on September 19–20, 2018. At that hearing, the parties reached a settlement and read the terms of the agreement into the record. The terms provided that (1) FMBI would make a cash payment to Tartaglia for housing costs, (2) FMBI would provide a neutral reference for Tartaglia from a Freeport-McMoRan employee outside of FMBI, (3) Tartaglia would maintain the confidentiality of the settlement terms, and (4) Tartaglia would release all pending and potential claims up to the time of hearing. Respondent's Post-Hearing Brief (Resp. Br.) at 3.

Following that hearing, FMBI produced a written version of the parties' agreement. The court held numerous conference calls to address concerns Tartaglia had with the details and language of the written version. After revisions were made, Tartaglia ultimately signed the written agreement, but later determined that he did not wish to adhere to its terms. FMBI elected not to submit the written agreement for review and approval. On January 14, 2019, I directed Tartaglia to either provide proof that he complied with the settlement terms reached orally at hearing or to notify the court that he wished to submit a post-hearing brief and pursue a decision on the merits. He failed to timely elect either option.

On January 25, 2019, FMBI submitted a motion to enforce the settlement agreement as stated on the record and to file that portion of the hearing transcript under seal. Tartaglia then submitted a brief response reiterating his intention not to comply with the settlement terms. On February 11, 2019, I issued a Decision Approving Settlement Under Seal and Order Enforcing Settlement Agreement finding that the agreement entered into at the hearing on September 20, 2018 was valid and enforceable. Tartaglia had not put forth any evidence that FMBI misrepresented or failed to comply with its responsibilities under the settlement agreement. Having received no valid legal justification to set aside the agreement and no request from Tartaglia stating he wished to pursue a decision on the merits, I granted Freeport's motion to enforce the settlement agreed to on the record at hearing.

In the present matter, Tartaglia alleges that FMBI violated the settlement agreement. Complainant's Complaint Letter received June 24, 2019. In particular, he asserts that FMBI stole money from his paychecks and then paid that money out to him in his settlement check. *Id.*; Tr. 210, 223–24.

FMBI proffered evidence of its attempt to provide Tartaglia with the settlement money. Following my February 11, 2019 decision upholding the settlement and dismissing the first action, FMBI sent a check via certified mail on March 5, 2019 for the agreed-upon amount. Tr. 327–28; Ex. R-I. The check was accompanied by a letter signed by FMBI's human resources

manager, Michelle Kessler, which referenced the docket number in that case and the confidential agreement the parties had entered. Ex. R-I; Tr. 327–28.

As he asserted at hearing in this case, Tartaglia had no interest in cashing the check because he believed the money was wrongfully taken out of his pay. Tr. 233. However, as explored in more detail below, the withdrawals made from his pay between November 11, 2018 and December 28, 2018 were unrelated to the settlement check. They were necessary due to an accounting error FMBI made when it economically reinstated Tartaglia pursuant to an arbitration decision issued in July 2018. The details of that error are discussed *infra*.

Following the March 11, 2020 hearing in this case, Tartaglia asked FMBI to send him a another check to replace the original one which he had not posted. Resp. Br. at 7, Attach. A. The replacement check was sent on March 25, 2020. Resp. Br. at 7, Attach. B. On April 11, 2020, after the replacement check had been sent but before Tartaglia had retrieved it, Tartaglia submitted a request to the court for a "Default Penalty Due to the Failure to Comply Accordingly." In the request, he asserted that FMBI had not paid him the settlement money. FMBI, through counsel, provided the court with the tracking information showing that the check had arrived at the post office on March 28, 2020. Having determined that Tartaglia's check had been available at the address he provided for over two weeks, I denied his request for a default penalty. Tartaglia then posted the check on April 16, 2020. Resp. Br. at 7, Attach. F.

B. Recovery of Tartaglia's Duplicate Bonus Payment

Prior to the September 2018 hearing, Tartaglia participated in FMBI's internal problem solving process which resulted in a July 6, 2018 arbitration decision. Resp. Br. at 2–3, 7. That decision required FMBI to reinstate Tartaglia to his former position and pay him for all lost wages and benefits, less interim earnings. *Id.* at 2–3. Tartaglia was economically reinstated effective July 29, 2018, and he returned to work on or about August 20, 2018. *Id.* at 3.

In economically reinstating Tartaglia, FMBI made a substantial error. Tartaglia was owed a $6,520.00 bonus, and the company mistakenly disbursed it to him twice. First, the bonus amount was added to an initial gross back pay calculation. Delbert Tso, a human resource specialist employed by Freeport-McMoRan in Phoenix, was responsible for calculating the back pay award owed to Tartaglia based on information provided to him "from various sources." Tr. 106–07; Resp. Br. at 4. Tso created a spreadsheet which showed the back pay owed to Tartaglia from October 2017 through his return to work in August 2018. Tr. 107–08; Ex. R-EE. The spreadsheet lists the regular earnings, overtime earnings, and $6,520.00 bonus Tartaglia was owed, as well as vacation and sick leave owed. Tr. 108; Ex. R-EE. Tso also incorporated into the spreadsheet a *deduction* of $6,240.00 for unemployment benefits Tartaglia received between his termination and his reinstatement. Tr. 108–09; Ex. R.-EE. Deducting unemployment in this way is a standard practice. Tr. 109, 129.

Per Tso's calculations as displayed on the spreadsheet, Tartaglia was owed $50,896.53. Ex. R-EE. After approval from the mine site, benefits department, and legal department, Tso emailed the corporate payroll office for payout of the back pay award. Tr. 111. Tso's involvement in the process ended once he sent that email. Tr. 111.

Payroll supervisor Christina Jordan testified about the payout from FMBI to Tartaglia. Tr. 167–70. She explained that the $50,896.53 amount arrived at in the spreadsheet was the

gross back pay award and did not reflect taxes or other deductions. Tr. 168–69. After $18,935.91 in taxes and $9,296.62 in other deductions, the $50,896.53 back pay award owed to Tartaglia totaled 22,663.80,[2] and that amount was paid to him via direct deposit on August 30, 2018. Ex. R-FF.

Tartaglia was mistakenly paid the $6,520.00 bonus a second time the following week, on September 7, 2018. Tr. 170–71. That check was for $4,410.78, reflecting the bonus amount less taxes and other deductions. Ex. R-GG. In explaining the error, payroll supervisor Jordan stated that her department's standard practice is to issue reinstatement amounts separately from bonus checks. Tr. 170. Of course, in this instance, the bonus amount had already been incorporated into the reinstatement amount. Human resources manager Kessler informed Jordan of the error after it occurred. Tr. 171.

Kessler did not discover the error, but testified that she was notified by her supervisor in Phoenix that the bonus had been paid twice. Tr. 340–42. Apparently, the mistake happened because the original back pay spreadsheet included the bonus, and then the compensation department sent over a "separate ticket," which initiated the mistaken second payment. Tr. 343. After she was notified of the error, Kessler called Tartaglia to inform him of what had happened. Tr. 350. As Kessler recalls, Tartaglia hung up on her before she could explain everything, so she called back and left a voicemail. Tr. 350.

Following the phone communication, Kessler sent Tartaglia a letter explaining the error and the recoupment options. Tr. 258, 342, 350–51; Ex. R-HH. Notably, this letter informing Tartaglia of the payment error was sent on September 17, 2018, just a few days prior to the September 19–20, 2018 hearing in WEST 2018-0362-DM. Tr. 258; Ex. R-HH. In the letter, Kessler presented Tartaglia with two options for correcting the error. Ex. R-HH. He could either provide payment for the net amount of $4,410.78 by September 28, 2018 or the company could deduct the total net amount from four paychecks in approximately equal amounts. *Id.* The letter requested that Tartaglia respond by September 28, 2018 to inform Kessler if he disputed the overpayment, or, if not, to advise Kessler which option he wanted to elect for repayment of the extra bonus. *Id.*

Tartaglia failed to timely respond to Kessler's letter. Tr. 354. Accordingly, as specified in the letter, Kessler assumed that Tartaglia did not dispute the overpayment and that he would prefer to have the $4,410.78 deducted from four paychecks. Tr. 354. The money was then deducted from five of Tartaglia's paychecks as follows:

[2] The court recognizes that $50,896.53 minus $18,935.91 minus $9,296.62 equals $22,664.00, not $22,663.80. However, in the check stub testified to by Jordan, Ex. R-FF, it appears that the starting number was $50,896.33, $0.20 less than the number arrived at in Tso's spreadsheet, Ex. R-EE. This minor $0.20 discrepancy was neither explained by FMBI nor challenged by Tartaglia, so I accept that $22,663.80 is the correct amount owed to Tartaglia after taxes and other deductions.

Pay Date	Amount Withheld
11/02/2018	$1,304.00
11/16/2018	$1,304.00
11/30/2018	$1,304.00
12/14/2018	$800.63
12/28/2018	$1,807.37
TOTAL	**$6,520.00**

Ex. R-II; Tr. 173–74. The parties did not specifically address why five withdrawals were made instead of four, but Jordan testified that the fourth was for only $800.63 because Tartaglia did not have enough wages in that pay period to cover the full $1,304.00. Tr. 194–95. Jordan further testified that the gross bonus amount, $6,520.00, was deducted rather than the net amount because taxes "self-adjust." Tr. 174.

Prior to and at the hearing, Tartaglia disputed FMBI's assertion that the deductions were proper, maintaining instead that FMBI stole this money from his checks in order to pay his settlement. *See, e.g.*, Tr. 201, 224; Complainant's Post-Hearing Brief (Comp. Br.) at 3, 4. At Tartaglia's request, FMBI senior human resources generalist David Fendrich provided Tartaglia with requested copies of his check stubs and reviewed the back pay spreadsheet with him. Tr. 427–28, 436. Tartaglia remains unconvinced that the overpayment actually occurred and, thus, that the recoupment was proper. Tr. 339, 344; Comp. Br. at 3, 4; *see also* Tr. 261, 437. Tartaglia has put forth no evidence to support his assertion that he was not paid twice for the same bonus or that recoupment was improper. In fact, he acknowledged at hearing that he did receive two direct deposits in his bank account, one for $22,663.80 and a second for $4,410.78. Tr. 257; Ex. R-JJ. Though these numbers align with FMBI's position, Tartaglia seems to believe that the first disbursement was for wages only and the second was for a bonus. *See* Tr. 257.

On November 14, 2019, the parties returned to the arbitrator who issued the July 2018 reinstatement award to resolve this double payment issue and address the misunderstanding between the parties about the implementation of the award. Tr. 437–39; Resp. Br. at 5. On January 16, 2020, the arbitrator issued a decision upholding FMBI's calculated remedy and finding that Tartaglia was double-paid his bonus. Ex. R-DD; Tr. 439; Resp. Br. at 5.

C. Tartaglia's Complaints to MSHA

The parties agree that Tartaglia filed a discrimination complaint with MSHA on or about March 20, 2019. Jt. Stip. 5. The filing of that complaint marks the inception of this case. In that document, Tartaglia alleged that he was being discriminated against by FMBI because the company was "still blaming" him for an incident that took place in October 2017, the payroll department was "wrongfully taking monies" from him, and company housing was "wrongfully taking monies" from his payroll. Ex. R-A. The complaint also made generic references to "criminal activity" and "interference in the work place." *Id.*

The parties further stipulated at hearing that Tartaglia called MSHA's hotline on November 20, 2018, four months before he submitted the March 20, 2019 complaint. Jt. Stip. 7. Tartaglia produced the MSHA Escalation Report documenting this hotline call in order to show that "the complaint was filed in a timely manner." Tr. 497. The report states that the caller, Tartaglia, called to report retaliation for going to court regarding safety issues he reported to MSHA. Ex. C-3. It notes that Tartaglia stated that the case was closed with a settlement and that

FMBI was now taking money out of his paychecks and that he wanted an MSHA inspector to contact him. *Id.* No further evidence relating to this hotline complaint was introduced, so it remains unclear whether MSHA took any steps to investigate as Tartaglia requested on the call.

D. April 11, 2019 Disciplinary Action

At the time of his discharge by FMBI in October 2017, Tartaglia was classified as a Truck Driver I and had just successfully bid for the position of Shovel Operator I, though he had not yet started training for the shovel operator position. Tr. 235–37, 276; Ex. R-Y. Tartaglia was then reinstated pursuant to the July 2018 arbitration decision, and physically returned to work in August 2018. Tr. 410; Resp. Br. at 5.

Upon his return to work, Tartaglia resumed his previous position. He was retrained on a piece of equipment called a rubber tire dozer (RTD), which is one skill required for the Shovel Operator I position. Tr. 276, 370. Usually, miners progress from haul trucks to RTDs to shovels. Tr. 93, 414. Crucially, however, RTD is not a standalone position: RTDs support the shovel and are typically operated by haul truck drivers who have completed necessary RTD training. Tr. 92–93, 414–15; Ex. R-W. Tartaglia had operated an RTD prior to his termination, and completed task training in October 2018 to get requalified on it when he came back to work. Tr. 276.

Because RTD is not a standalone position, and since Tartaglia had bid successfully for the shovel position, he was then due to move on to shovel training after getting requalified on the RTD. Tr. 276, 373. He began Shovel Operator I training in December 2018, but quickly discontinued it because he felt there were too many ongoing issues with FMBI. Tr. 238, 276, 418–19. He was uncomfortable with continuing the training at that time. Tr. 203, 238.

Human resources generalist Fendrich, mine supervisor Steve Rusinski, and senior supervisor Tommy O'Neill all asked Tartaglia on various occasions whether he wanted to complete shovel operator training. Tr. 277, 417; Exs. R-K, R-L, R-M. Tartaglia testified that he wanted to continue operating a RTD, and he was surprised when the company told him that RTD operator was not a standalone position. Tr. 203, *see* Tr. 291–96. FMBI had another shovel coming online in 2019, and thus had a business need for more shovel operators. Tr. 412; Exs. R-J, R-K, R-L; Resp. Br. at 5–6.

On February 6, 2019, Rusinski had a conversation with Tartaglia about the shovel training. Ex. R-J. He told Tartaglia that the company needed to train someone on the shovel, so Tartaglia had to either begin training or give the company the go-ahead to train someone else. Tr. 277; Ex. R-J. Tartaglia told Rusinski that the company could go ahead with training someone else until he was done with his issues with FMBI. Tr. 279. Rusinski collected a written statement from Tartaglia to this effect. Ex. R-LL. Rusinski also asked Tartaglia to let him know if he wanted to run an RTD or a haul truck, and, according to Rusinski, Tartaglia communicated that he wanted to do both. Ex. R-J; Tr. 279–80.

On February 22, 2019, Fendrich and O'Neill had a conversation with Tartaglia during which O'Neill informed Tartaglia that the company needed a final answer from him regarding whether he wanted to move forward with his shovel operator bid or go back to his previous classification as a truck driver. Tr. 418–19; Exs. R-K, R-L. During that conversation, Tartaglia was presented with the two unambiguous options, but seemed unwilling to definitively select

one. *See* Ex. R-L. He told O'Neill, as he had previously told Rusinski, that the company could train someone else on the shovel because he "didn't have time for any training." Tr. 419; Exs. R-J, R-L. Tartaglia seemed to think that someone could be trained on the shovel without Tartaglia losing his successful bid, but O'Neill informed him that that was not an option. *See* Ex. R-K. O'Neill told Tartaglia that he would be requalified on a truck and classified as a Truck Driver I and that he could re-apply for future shovel positions. *Id.* Fendrich then stated his belief that the next truck training class was scheduled to begin on April 1, 2019. Ex. R-L.

One month later, on March 22, 2019, Fendrich had another conversation with Tartaglia about truck training. Tr. 423. That day, Tartaglia was given a letter signed by O'Neill which memorialized the February 22, 2019 conversation and again presented Tartaglia with the two options. Ex. R-M. It communicated that the company "needs all employees in the Shovel Operator I position to complete their training promptly." *Id.* The letter clarified that it was Tartaglia's "final opportunity" to elect one of two options:

> (1) You will begin the shovel operator training no later than April 9, 2019 and complete such training within nine weeks. If you do not timely complete the training, you will receive a lateral transfer back to the position of Truck Driver I (no reduction in pay) and be required to take the next scheduled training necessary to requalify you on a truck and complete such training within six weeks of starting it.
>
> (2) You will receive a lateral transfer back to the position of Truck Driver I (with no reduction in pay) and be required to complete any training necessary to be requalified on a truck within six weeks of such transfer. Of course, as we discussed (assuming you're qualified), you may apply for any shovel operator bids that arise in the future.

Id. The letter directed Tartaglia to provide an "*unqualified* decision . . . *in writing*" to O'Neill or Fendrich by 5:00 p.m. on March 31, 2019. *Id.* It further notified Tartaglia that, if he failed to submit a decision on time, the company would assume that he selected the second option for a lateral transfer back to Truck Driver I. *Id.*

Tartaglia failed to submit a decision before the 5:00 p.m. deadline on March 31, 2019. At 6:39 p.m., he emailed Fendrich to declare that he was "not up for any training" and that he was "on the Rubber Tire Dozer and will stay there until everything is resolved . . . Final Response." Ex. R-N.

According to a letter from O'Neill, Tartaglia was instructed at the end of his shift on March 31, 2019 to attend haul truck training, and Tartaglia stated at the time that he would not attend the training. Ex. R-T. On April 1, 2019, Tartaglia reported to work and was again notified that he was scheduled to begin haul truck training that day. Tr. 280–81. Tartaglia then informed Rusinski that he was not going to attend the training because he had a lot going on with the company. Ex. R-Q. Rusinski understood Tartaglia's response to be a refusal to attend the training, and accordingly collected written statements from Tartaglia. Tr. 280; Exs. R-O, R-P. In one of the statements, Tartaglia stated that he had "made it clear to David Fendrich" that he was "not up for no training" because he had "hearing, deposition, investigations coming up." Ex. R-O. In the other, Tartaglia claimed that the actions FMBI was taking were retaliatory and noted that "[t]his will be reported as retaliation." Ex. R-P.

Based on his testimony at hearing, it appears that Tartaglia believes he did not need to attend the training because he had upcoming days off that had been approved by management. *See* Tr. 308–10. However, Tartaglia did not put forth any evidence to show that the training would have prevented him from taking his scheduled time off.

Following Tartaglia's refusal to go to the scheduled training, Rusinski placed Tartaglia on investigatory leave with pay (IWP). Tr. 285; Ex. R–R. On the top of the IWP form, Tartaglia wrote "This is under protest" and "This is not a refusal as well they are aware." Ex. R-R. Rusinski stated at hearing that Tartaglia "grabbed the paper and wrote that on there and gave it back to me." Tr. 285. Other than this statement, the evidence and testimony support that the haul truck training was a work assignment and that Tartaglia was unwilling to attend the training that day. *See* Tr. 280–82, 429; Exs. R-O, R-P, R-Q, R-T.

After an investigation, FMBI made a decision to issue a disciplinary action to Tartaglia. Tr. 432–33. On April 11, 2019, Tartaglia was issued a "final written warning" for his refusal to attend the April 1, 2019 training. Tr. 433; Ex. R-S. In both the written warning and in a letter issued by O'Neill the same day, the evolution of the problem was recounted. Exs. R-S, R-T. In the letter, O'Neill explained to Tartaglia that

> the Company has a business need for you, in your position of Truck Driver I, to complete your truck driver training and be certified to operate a Haul Truck. You will again be enrolled in the next available Truck Driver training class, to begin no later than May 20, 2019, and expected to attend this assigned work. Per the Company's Guiding Principles, for which you signed the most recent certification form on 12/19/2018, "Refusal to do assigned work . . ." is an action considered serious in nature and may result in discipline, up to and including termination.

Ex. R-T.

IV. DISPOSITION

Tartaglia alleges that FMBI violated the settlement agreement entered into in WEST 2018-0362-DM. He further asserts that FMBI violated the Mine Act when it recovered a duplicate bonus payment and when it disciplined him on April 11, 2019. FMBI contends that it did not violate the settlement agreement. Respondent also claims that the issue of whether the recovery of the duplicate bonus payment violated the Mine Act is time-barred. FMBI further maintains that neither the recovery of the duplicate payment nor the April 11, 2019 discipline were adverse actions motivated by protected activity under the Mine Act.

Below, I address the five issues enumerated and agreed to by the parties at hearing.

A. Neither party violated the settlement agreement reached in WEST 2018-0362-DM.

FMBI did not allege at any point in these proceedings that Tartaglia violated the settlement agreement. Accordingly, my analysis on this issue is limited to whether FMBI violated the agreement as alleged by Tartaglia in his filings and at hearing.

Tartaglia does not believe that FMBI erroneously disbursed the same bonus to him twice. Tr. 204, 225, 256, 257, 266. Rather, he believes that money was taken out of his paychecks in

order to source the money for the settlement check FMBI owed him. *See* Tr. 201, 224. This assertion is without support. FMBI has shown that it did in fact pay Tartaglia twice for a bonus and that the amount withdrawn from Tartaglia's pay was equal to the amount mistakenly paid. Moreover, FMBI sent the notice regarding the erroneous double payment and Tartaglia's options for returning the excess money to him on September 17, 2018, *before* the hearing in the first case and thus *before* the settlement was reached. Ex. R-HH; Tr. 258. Though the timing may be suspect to Tartaglia, the evidence makes clear that the recovery of the duplicate bonus is unrelated to the settlement.

Per the terms of the settlement reached orally at hearing in Tartaglia's prior case, FMBI was obligated to pay Tartaglia a cash payment for housing expenses and to provide a neutral reference from a Freeport-McMoRan employee outside of FMBI. As explained above, FMBI sent a settlement check to Tartaglia on March 5, 2019. Ex. R-I. After refusing to cash that check for over a year, Tartaglia requested a replacement check following the hearing in this case. Resp. Br. at 7, Attach. A. One was provided to him, and he posted it on April 16, 2020. Resp. Br. at 7, Attach. B, Attach. F. Tartaglia made no allegations and put forth no evidence concerning FMBI's other obligation under the settlement—to provide him a neutral reference. Human resources manager Kessler testified that to her knowledge Tartaglia has not requested a reference from the company. Tr. 329.

FMBI has not claimed that Tartaglia violated the settlement agreement, and Tartaglia has put forth no evidence to suggest that FMBI failed to fulfill its obligations. Accordingly, based upon the evidence and testimony presented at hearing, I find that neither party violated the settlement reached in WEST 2018-0362-DM.

B. The issue regarding recovery of bonus money erroneously paid twice to Tartaglia is not time-barred.

Section 105(c)(2) of the Mine Act provides an avenue through which miners who believe they have been discriminated against may file a complaint with the Secretary alleging such discrimination. 30 U.S.C. § 815(c)(2). Complaints are to be filed "within 60 days after such violation occurs." *Id.* In this case, Tartaglia filed his section 105(c) complaint with MSHA on March 20, 2019. Jt. Stip. 5. This was some six months after FMBI's September 17, 2018 notice informing him that he had been erroneously paid twice for a bonus. Ex. R-HH. It was also more than 60 days after December 28, 2018, which was the date FMBI completed its recoupment of the erroneous payment. Ex. R-II. Thus, FMBI argues that the double bonus recovery issue is time-barred under the Mine Act. Resp. Br. at 16–19.

The 60-day time limit is intended to avoid stale claims, but the Commission has held that "a miner's late filing may be excused on the basis of 'justifiable circumstances.'" *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984) (citation omitted). In urging the court to find that this claim is time-barred, Respondent draws comparisons to the Commission's decision in *Hollis v. Consolidation Coal Co.* Resp. Br. at 17–18. In that case, the complainant, Hollis, waited more than four months after his discharge to file a complaint with the Secretary. *Hollis*, 6 FMSHRC at 24. The judge did not find Hollis' claimed ignorance of his rights to be credible, since Hollis was chairman of his union's safety committee, had filed numerous safety complaints in the past, and had deliberately chosen to seek other avenues of relief during the 60-day period following his discharge. *Id.*

The upshot of *Hollis* is that "[t]imeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation." *Id.* While Tartaglia has previously filed a discrimination complaint under section 105(c), the facts of this case do not warrant a comparison to *Hollis*. Undoubtedly, Tartaglia missed the 60-day filing window by a substantial margin when considering he filed his complaint on March 20, 2019. However, Tartaglia made a call to the MSHA hotline on November 20, 2018, approximately 60 days after he was notified of the duplicate payment. Jt. Stip. 7; Ex. C-3. MSHA's documentation of that call states that Tartaglia called to "report retaliation" and assert that "the Mine is taking money out of his paychecks." Ex. C-3. It also notes that Tartaglia requested that an inspector get in contact with him. *Id.*

At hearing, in response to the court's admission of the MSHA hotline call, FMBI pointed to its Freedom of Information Act request response from MSHA, which indicates that Tartaglia's complaint was received by MSHA on March 27, 2019 and does not mention any investigation arising out of the November call. Tr. 496–97; Ex. R-KK. Respondent argues that the hotline call did not properly conform to the section 105(c) discrimination complaint process. *See* Resp. Br. at 16–19. I am unwilling to hold Tartaglia to the strict standard Respondent seems to urge given the absence of evidence regarding MSHA's actions in processing the hotline complaint. While Tartaglia has some experience with filing section 105(c) complaints, his familiarity with the process does not rise to the level shown in *Hollis*. FMBI has failed to establish that Tartaglia knew that a hotline call was an insufficient way to lodge a discrimination complaint with MSHA, and the court will not assume this fact. This is especially true with regard to both the time requirements for perfecting his discrimination complaint and his misunderstanding that his hotline complaint met minimum filing requirements.

Accordingly, I find the November 20, 2018 MSHA hotline call to be a "justifiable circumstance" and excuse Tartaglia's late filing. The merits of the issue of the duplicate bonus recovery are analyzed below.

C. The recovery of the duplicate bonus payment was not an adverse action motivated by protected activity under the Mine Act.

Tartaglia asserts that FMBI did not pay him twice for the same bonus. Tr. 204, 225, 256, 257, 266. As discussed above, he believes that the withdrawals made from his paychecks were utilized to pay his settlement. *See* Tr. 201, 224. The evidence put forth by FMBI clearly shows that this is not the case, and that he was erroneously paid the same bonus twice. Exs. R-EE, R-FF, R-GG, R-HH.

Having established that the duplicate payment *occurred*, the issue here is whether FMBI violated the Mine Act in *recovering* the erroneous payment. For the reasons set forth below, I find that FMBI did not violate the Mine Act in recovering the money.

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). Under the traditional *Pasula-Robinette* framework, the Commission has held that a miner alleging discrimination establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC

1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981).

If a miner establishes a prima facie case, the operator may rebut that case "by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving by a preponderance of the evidence that, although part of its motivation was unlawful, the adverse action was also motivated by the miner's unprotected activity *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id.*; *Pasula*, 2 FMSHRC at 2799–2800.

1. Protected Activity

Complainants bear the burden of establishing protected activity. *Pasula*, 2 FMSHRC at 2799–2800; *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920–21 (2016). A miner has engaged in protected activity if they (1) have "filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) have "instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) have "exercised on behalf of himself or others . . .any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

Tartaglia has engaged in numerous instances of protected activity. In WEST 2018-0362-DM, he filed a complaint which initiated proceedings under the Mine Act and culminated in a hearing on September 19–20, 2018 with a settlement reached at that hearing. In further proceedings in that case, the matter was remanded back to me by the Commission. I issued a decision upholding the settlement on February 11, 2019. Tartaglia's November 20, 2018 hotline call and his March 20, 2019 MSHA complaint filed in this matter also constitute protected activity. Accordingly, Tartaglia has satisfied this element of the prima facie case.

2. Adverse Action Motivated by Protected Activity

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012) (citations omitted). The question of whether an employer's action qualifies as "adverse" is thus decided on a case by case basis. *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984).

Tartaglia has failed to show how the recovery of a bonus payment FMBI erroneously disbursed to him twice is an adverse action motivated by his protected activity. He proffered no evidence suggesting that the bonus payment subjected him to detriment in his employment relationship. For its part, FMBI has shown precisely how the error was made and how it went about correcting the error.

Imprudent as it was, I find that the double payment was simply an accounting error, a mistake made by the people in charge of Tartaglia's economic reinstatement. It does not rise to the level of an adverse employment action motivated in any part by Tartaglia's protected activity. Consequently, Tartaglia is unable to meet the elements of a prima facie claim of discrimination on the bonus recovery issue.

D. The April 11, 2019 discipline was not an adverse action motivated by protected activity under the Mine Act.

Tartaglia's second claim of discrimination involves the final written warning he was issued on April 11, 2019 for his refusal to attend truck training on April 1, 2019. Though this warning was issued several weeks after Tartaglia submitted his March 20, 2019 complaint to MSHA, it arose during the pendency of MSHA's investigation and was accepted as an issue in these proceedings. For the reasons that follow, I find that FMBI did not violate the Mine Act in issuing Tartaglia a final written warning.

1. Prima Facie Case

It bears repeating that to make out a prima facie case of discrimination, a complainant need only present "evidence *sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Driessen*, 20 FMSHRC at 328 (emphasis added). "This burden is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner*, 33 FMSHRC at 1065. For the reasons that follow, I find that Tartaglia has met this initial, low burden and established a prima facie case of discrimination.

a. Protected Activity

FMBI argues that this claim does not involve protected activity and insists that Tartaglia's refusal to do the training is not protected under the Mine Act. Resp. Br. at 20. However, as noted above, Tartaglia engaged in numerous instances of protected activity between September 2018 and March 2019, including a call and complaint to MSHA and the engagement in the 105(c) process before this court. He has satisfied the protected activity element of the prima facie discrimination case.

b. Adverse Action Motivated by Protected Activity

Regarding this issue, Tartaglia has also shown that he was subject to an adverse action. The discipline he received on April 11, 2019 fits plainly within the Commission's definition of adverse action as "an action of commission or omission by the operator subjecting the affected minor to discipline or a detriment in his employment relationship." *Pendley*, 34 FMSHRC at 1930 (citations omitted).

In addition to protected activity and an adverse action, the prima facie case requires the Complainant to demonstrate that there is evidence sufficient to support an inference of a causal nexus—that is, that the protected activity motivated Respondent to take the adverse action.

A miner need not provide direct evidence of an operator's discriminatory motive, but may provide "circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner*, 33 FMSHRC at 1066–67 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors in turn.

i. Knowledge of Protected Activity

Tartaglia's engagement of the 105(c) process in his prior case before this court, his call to MSHA in November 2018, and his March 2019 complaint are all sufficient to establish that he engaged in protected activity. FMBI does not dispute these instances of protected activity. While I acknowledge that FMBI was unaware of the November 2018 MSHA hotline call for some time, I find that, all told, Respondent had knowledge of Tartaglia's protected activity.

ii. Animus or Hostility Toward the Protected Activity

Throughout the hearing, Tartaglia suggested that FMBI scheduled him for truck training in order to interfere with his upcoming, approved days off which he was taking in order to engage in depositions and other protected activity related to his claims against FMBI. *See, e.g.* Tr. 465, 474. However, Tartaglia did not put forth any evidence to demonstrate that the training schedule would interfere with his planned activities outside of work. Tartaglia's wholly unsupported allegations are insufficient to support an inference that FMBI had any animus or hostility toward his protected activity as it relates to his scheduled truck driver training.

iii. Timing

Tartaglia was disciplined on April 11, 2019, just a few weeks after he submitted his March 20, 2019 complaint to MSHA. Ex. R-S; Jt. Stip. 5. The Commission does not apply "hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Given the objectively short amount of time between this instance of protected activity and the adverse action, I find that a coincidence in time exists in Tartaglia's case.

iv. Disparate Treatment

Tartaglia has not shown that he was subject to disparate treatment. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. It is unclear whether any other miners employed by FMBI have failed to attend training like Tartaglia. However, the evidence overwhelmingly shows that Tartaglia was given numerous opportunities to not only complete his required training but to choose which position he desired to hold and be trained for. Tr. 277, 417–19, 423; Exs. R-J, R-

K, R-L, R-M, R-LL. Tartaglia's refusal to attend assigned training constitutes a "refusal to do assigned work," which under Freeport-McMoRan's "Guiding Principles" is a serious action which "may result in immediate discharge." Ex. R-Z, p. 23–24; Tr. 39, 408–09. The final written warning was less severe than the termination expressly permitted by the Guiding Principles for this type of infraction. I find that Tartaglia was not subject to disparate treatment.

v. Conclusion

Because the facts and evidence put forth in this case satisfy the knowledge and timing factors, and bearing in mind that the prima facie burden is minimal, I find that Tartaglia has put forth evidence that "*could* support an inference" that the adverse action was motivated, at least in part, by his protected activity. *Turner*, 33 FMSHRC at 1066 (citation omitted). As discussed below, however, I find that FMBI has successfully rebutted Tartaglia's prima facie case.

2. Rebuttal

The operator may rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Id.* at 1064. Having already rejected FMBI's argument that no protected activity occurred, I turn to its motivation behind the adverse action.

The evidence in this case is clear. FMBI had a legitimate business need for a shovel operator, Tartaglia had an outstanding bid for that position, and Tartaglia was notified numerous times of the company's need for him to be trained on the equipment. Tr. 418, 236–37; Exs. R-M, R-T. Tartaglia started shovel training, discontinued it, and was asked several times whether he would be availing himself of his bid. Tr. 238, Exs. R-L, R-K, R-M. Tartaglia wished to continue operating the RTD, and was surprised to learn it was not a standalone position. *See* Tr. 203, 292. Tartaglia was then given a choice between Truck Driver I and Shovel Operator I. Ex. R-M. Both positions required Tartaglia to attend training and both paid the same amount. *Id.*

FMBI went to great lengths to allow Tartaglia the choice of which position he wanted to hold at the mine, and eventually presented the ultimatum with a deadline. *Id.* Tartaglia was informed that failure to make a timely decision would result in FMBI proceeding under the assumption that he wished to give up his bid and return to the truck driver position he had previously held. *Id.* He failed to make a selection by the deadline, and thus it should have been no surprise to Tartaglia that FMBI enrolled him in the next scheduled truck driver training.

Though he has shown coincidence in time between the protected activity and adverse action and FMBI's knowledge of his protected activity, Tartaglia has failed to sustain the ultimate burden of persuasion as to whether section 105(c) has been violated. FMBI has thoroughly established that Tartaglia's discipline was issued because of his refusal to do assigned work. The final warning was issued after Tartaglia was instructed numerous times over several months that he needed to attend training, either for the shovel operator position or for his return to a truck driver role. Because Tartaglia failed to proffer any evidence that the decision to discipline him was motivated by his protected activity, I find that FMBI has successfully rebutted Tartaglia's prima facie case.

E. FMBI has not violated section 105(c), so no remedies are available to Tartaglia.

The final issue enumerated for decision in this case is what remedies are available to Tartaglia if a violation of section 105(c) were found. Because Tartaglia has failed to establish that FMBI either breached the settlement agreement or improperly discriminated against him, I need not reach the remedy issue.

V. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by Peter Tartaglia, Jr. is hereby **DISMISSED**.

David P. Simonton
Administrative Law Judge

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[3] For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.