

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of the Chief Administrative Law Judge  
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May 30, 2025

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2024-0114
on behalf of BREK PINKERTON,	:	MSHA No. RM-MD-2024-01
Complainant,	:	
	:	
v.	:	
	:	
RMC MINING DEVELOPMENT, LLC, a	:	
corporation, RUSS MYERS, an	:	
individual, AMERICAN MINING	:	
PROPERTIES, LLC, a corporation, and	:	
MATTHEW WAYN HEAD, an individual,	:	
Respondents.	:	Mine: Harquahala Mine

**DEFAULT DECISION**  
**& ORDER ON RELIEF**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (the “Secretary”) on behalf Brek Pinkerton against RMC Mining Development, LLC (“RMC”), American Mining Properties, LLC (“AMP”), Russ Myers, and Matthew Wayn Head (collectively, the “Respondents”)<sup>1</sup>, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On April 25, 2025, the Secretary filed a Motion for Default Judgement (the “Motion”). For reasons set forth below, the Secretary’s Motion is **GRANTED** and the Respondents are **ORDERED** to comply with the terms of relief discussed herein.

The Secretary, in her Motion, asserts that the Respondents, despite contesting the alleged 105(c) violation, have refused to participate in this litigation. Specifically, the Secretary avers that Respondent RMC has not responded to discovery propounded in July 2024 and has twice failed to appear for deposition testimony for which subpoenas were issued by this court. Further, the remaining Respondents, i.e., AMP, Myers and Head, have refused to file an Answer to the Secretary’s Second Amended Discrimination Complaint or respond to this court’s March 20, 2025, Order to Show Cause for failing to timely file an Answer. Accordingly, the Secretary moves the court to enter an order of default judgement requiring the Respondents to pay back pay plus interest, consequential damages, compensatory damages, and a civil monetary penalty. Further, the Motion moves the court to order other non-monetary relief.

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<sup>1</sup> RMC was originally the only respondent in this matter. On November 21, 2024, I granted the Secretary’s Motion to Amend the Complaint to add AMP, Myers and Head as respondents.

The Respondents did not file an opposition to the Secretary's Motion.

This case presents the court with an unusual situation where the Respondents have failed to meaningfully participate in the litigation<sup>2</sup> despite being given several opportunities to do so. Although the Respondents' failures are many, for the purposes of this order I focus on their failures to respond to two orders to show cause.

On August 21, 2024, prior to the addition of AMP, Myers and Head as respondents, I issued an order in which I stated my expectation that RMC would respond directly and promptly to any communications initiated by the Secretary. RMC failed to do so. Moreover, RMC repeatedly failed to respond to communications from the court. Consequently, on October 2, 2024, I issued an Order to Show Cause requiring RMC to demonstrate why sanctions up to and including a default order should not be entered. RMC did not respond to the Order to Show Cause.

Subsequently, after AMP, Myers and Head were added to this matter, the Respondents failed to file an Answer to the Secretary's Second Amended Discrimination Complaint. As a result, on March 6, 2025, I issued an Order to Show Cause requiring the Respondents to provide an explanation for their failure to file an Answer and informing them that not doing so may result in sanctions up to and including default judgement. The Respondents again failed to respond to the Order to Show Cause.

The Commission's procedural rules state that "[w]hen a party fails to comply with an order of an ALJ or these rules . . . an order to show cause shall be directed to the party before the entry of any order of default[.]" 29 C.F.R. § 2700.66. The Commission has "observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted." *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995)

Here, the Respondents failed to comply with court orders, did not respond to multiple orders to show cause, and did not respond to the Secretary's Motion for Default Judgement. Accordingly, I find that RMC, AMP, Myers and Head are in **DEFAULT** and the allegations included in the Secretary's Second Amended Discrimination Complaint filed with the court on November 26, 2024, are deemed to be true and are incorporated as findings of fact in this decision.<sup>3</sup> As a result, I find that the Respondents violated Section 105(c) as alleged. I now turn my attention to the question of relief.

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<sup>2</sup> Among other things, in addition to the various failures discussed herein, Respondent RMC was late to file the original answer in this matter, and late in filing its response to an order to show cause issued on March 26, 2024. Moreover, Respondent Myers failed to appear at a scheduled deposition and failed to appear on a conference call ordered by the court.

<sup>3</sup> The first set of numbered paragraphs of the Secretary's Second Amended Discrimination Complaint, i.e., paragraphs 1 through 12, address, among other things, the Commission's jurisdiction over this matter, the authority upon which the action was brought, the relationship of

Section 105(c)(2) of the Act sets forth the relief available to victims of discrimination as follows:

The Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

30 U.S.C. § 815(c)(2). The Secretary seeks several forms of relief in this matter. I address each below.

### ***Back Pay***

The Mine Act explicitly contemplates an award of back pay and interest when a violation of Section 105(c) occurs. 30 U.S.C. § 815(c)(2). Here, the Secretary asserts that Pinkerton is owed \$5,168.00 in back pay and interest for the period between September 25, 2023 and October 13, 2023 when miners were withdrawn under a 104(g) order, \$4,579.20<sup>4</sup> in back pay and interest for the period after he was terminated until he started his new job, and \$31,353.48 in back pay and interest for the difference in wages earned at his new job and what he would have earned at RMC had he not been unlawfully terminated. Sec’y Mot. 5-6, 9-11. The Secretary provided the declaration of Lee Hughes, an MSHA Special Investigator, as support for how the amounts were calculated. Hughes Decl. ¶¶ 3 and 5, Exs. A and C. I incorporate Hughes’s calculations in this decision. The Respondents, having been found in default and not opposing the Secretary’s Motion, are **ORDERED** to pay Pinkerton a total of \$41,100.68 in back pay and interest.<sup>5</sup>

### ***Consequential Damages***

The Commission and its judges have awarded relief in the form of consequential damages for losses stemming from unlawful discrimination. *E.g., Amos Hicks v. Cobra Mining*, 14 FMSHRC 50 (Jan. 1992) and *Sec’y of Labor on behalf of Groves v. Con-ag, Inc.*, 39 FMSHRC 1811 (Sept. 2017) (ALJ). The Secretary seeks damages for costs associated with mileage Pinkerton would not have incurred but for his unlawful termination. Sec’y Mot. 5, 12.

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the Respondents to this matter, the protected activity Pinkerton engaged in, and the adverse action Pinkerton would not have suffered but for his protected activities.

<sup>4</sup> The amount in the Secretary’s Motion differs from the amount calculated by Hughes and included in Exhibit A of his declaration. I rely on the amount calculated by Hughes and included in his declaration.

<sup>5</sup> The amount of back pay and interest sought by the Secretary in her Motion differs from the amount calculated by Hughes and included in his declaration. In arriving at the total amount ordered here, I rely on the amounts calculated by Hughes and included in Exhibits A and C of his declaration.

Special Investigator Hughes’s declaration explains how the Secretary calculated a consequential damages award of \$13,497.00. Hughes Decl. ¶ 4, Ex. B. I incorporate Hughes’s calculations in this decision. The Respondents, having been found in default and not opposing the Secretary’s Motion, are **ORDERED** to pay Pinkerton a total of \$13,497.00 in consequential damages stemming from mileage that otherwise would not have been incurred but for the unlawful discrimination.

### ***Compensatory Damages***

The Secretary asserts that, although “the Commission has never specifically decided whether emotional distress damages may be awarded[.]” the Act’s language empowers the agency to award such. Sec’y Mot. 12-13.

The Secretary is correct that the Commission has never directly addressed the issue of compensatory damages.<sup>6</sup> However, and as noted by the Secretary, Commission judges have approved settlement agreements in which the parties agreed to compensatory damages,<sup>7</sup> and at least one judge has acknowledged the potential for damages “for ‘pain and suffering and inconvenience.’” See *Justice v. Rockwell Mining, LLC*, 40 FMSHRC 1582 (Dec. 2018) (ALJ) (noting the Commission’s broad remedial authority to craft relief “suitable to the facts of each [105(c)] case[.]” and not ruling out the “possibility of another appropriate remedy[.]”).

Although compensatory damages are not explicitly mentioned in the Act, Section 105(c)(2), under which this proceeding was brought, grants the court authority “to take such

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<sup>6</sup> Multiple Commission judges, citing a lack of authority, have declined to award compensatory damages for emotional distress/pain and suffering in discrimination cases. *E.g.*, *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485 (Feb. 1984) (ALJ) (“[A]ll I can say is that life is unfair but that I find no warrant in the statute or precedent for an award of damages for pain and suffering.”); *Bewak v. Alaska Mechanical, Inc.*, 33 FMSHRC 2337 (Sept. 2011) (ALJ) (“There is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering.”); *Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ) and *Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ) in both of which the ALJ stated that “[s]ome damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering”; See *Sec’y of Labor on behalf of Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435 (June 2016) (ALJ) (stating that “[t]he court expresses no opinion as to whether emotional distress damages may ever be awarded under the Act, absent any concrete injury or financial loss[.]” while at the same time finding that the facts of the case were not of “the sort of exceptional circumstances that might merit such an award.”). However, I am not bound by the decisions of other Commission ALJs.

<sup>7</sup> *E.g.*, *Sec’y of Labor on behalf of Young v. F&E Erection Co.*, 16 FMSHRC 2122 (Oct. 1994) (ALJ) (Granting a motion to approve settlement and directing payment of damages for “pain and suffering and emotional distress.”); *Sec’y of Labor on behalf of Delong v. Bruce Young d/b/a BNA Trucking and Yogo, Inc.*, 18 FMSHRC 31 (Jan. 1996) (ALJ); *Sec’y of Labor on behalf of Howard v. Bruce Young and Yogo, Inc.*, 18 FMSHRC 1054 (June 1996) (ALJ).

affirmative action to abate the violation *as the Commission deems appropriate, including, but not limited to*, the rehiring or reinstatement of the miner to his former position with back pay and interest.” 30 U.S.C. § 815(c)(2) (emphasis added).<sup>8</sup> This “broad remedial charge” grants Commission judges ““considerable discretion in fashioning remedies appropriate to varied and diverse circumstances.”” *Sec’y of Labor on behalf of Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1257-1258 (July 1997) (quoting *Sec’y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982)). Indeed, the Commission has stated that, unless there are compelling reasons to not do so, ““the full measure of relief should be granted”” to victims of discrimination. *Sec’y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (Dec. 1983) (quoting *Sec’y of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982)).

Given the broad language of Section 105(c)(2), the Commission’s recognition of its judges’ considerable discretion to fashion appropriate relief, and the Respondents’ failure to participate in this litigation or in any way object to the Secretary’s requested relief, I find that compensatory damages are appropriate. Here, the Secretary seeks \$75,000.00 in emotional distress damages stemming from severe trauma Pinkerton suffered due to the “nature of the discrimination.” *Sec’y Mot.* 13. The Respondents, having been found in default and not opposing the Secretary’s Motion, are **ORDERED** to pay Pinkerton a total of \$75,000.00 in compensatory damages due to emotional distress he suffered as a result of the discrimination.

### ***Non-Monetary Relief***

The Secretary moves for several forms of non-monetary relief. *Sec’y Mot.* 14-16. Given that the Respondents have been found in default and have not opposed the Secretary’s Motion, I enter the following orders:

- The Respondents are **ORDERED** to immediately expunge Pinkerton’s employment record of all references to the circumstances involved in this matter, including that he was terminated.
- The Respondents are **ORDERED** to immediately provide a neutral job reference to Pinkerton’s potential employers, if requested, stating his job title, job responsibilities, period of employment, and salary.
- It is **ORDERED** that, within 30 calendar days of commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents and their officers, managers, supervisors, human resources staff, and forepersons are to receive comprehensive Miners’ Rights and Responsibilities training under the Federal Mine Safety and Health Act of 1977, and provide this training to all miners on an annual basis.
- It is **ORDERED** that, immediately upon commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents must announce at any safety meeting that any Respondent holds that all of its employees

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<sup>8</sup> The Secretary argues that federal district courts regularly award compensatory damages under the Occupational Safety and Health Act, 29 U.S.C. § 660(c), which contains language similar to that of the Mine Act’s anti-retaliation provisions. *Sec’y Mot.* 12-13.

can raise any safety issue with MSHA by calling 1-800-746-1553 in addition to the company's normal reporting procedures

- It is **ORDERED** that, immediately upon commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents must include in any employee handbook, safety manual, and/or orientation material the following statement, which must be provided to all employees, including management officials and executive leadership:

You have a right to:

1. File or make a complaint of an alleged danger or safety or health violation to a Federal or State agency, a mine operator, an operator's agent or a miner's representative.
  2. Participate in proceedings under the Act such as: testifying, assisting, or participating in any proceeding instituted under the Act, or filing a complaint with the Federal Mine Safety and Health Review Commission.
  3. Refuse to work if you have not been provided with the required health and safety training, including all relevant site-specific training.
  4. Object and refuse to work if you have a good faith, reasonable belief that a specific working condition is unsafe.
  5. This includes a supervisor's instruction to engage in or work under conditions that you have a good faith, reasonable belief to be unsafe.  
NOTE: You must notify the operator of the condition and give them an opportunity to address the situation.
  6. Exercise any statutory rights afforded by the Act.
- It is **ORDERED** that, immediately upon commencing any business subject to the MSH Act or employing any employee subject to the MSH Act, the Respondents must publish on any website or other public-facing recruitment and onboarding materials created language that encourages miners to raise safety concerns within the company to MSHA without fear of retaliation.

### ***Civil Penalty***

The Secretary seeks a \$30,000.00 civil penalty from the Respondents. 29 C.F.R. § 2700.44. Special Investigator Hughes's declaration states that the penalty amount was arrived at "using criteria required by regulation and based on additional information" possessed by MSHA's office of Assessment. Hughes Decl. ¶ 6. The Respondents, having been found in default and not opposing the Secretary's Motion, are **ORDERED** to pay the Secretary a civil penalty of \$30,000.00.

## ORDER

For the reasons set forth above, I find that the Respondents are in **DEFAULT**. The Secretary's Motion for Default Judgment is **GRANTED**. The Respondents are **ORDERED** to pay Brek Pinkerton a sum of \$129,597.68<sup>9</sup> for back pay and interest, consequential damages and compensatory damages. Further, the Respondents are **ORDERED** to comply with the non-monetary relief items discussed above. Finally, the Respondents are **ORDERED** to pay the Secretary a civil penalty of \$30,000.00. The Respondents are **ORDERED** to make the payments to Pinkerton and the Secretary within 30 days of the date of this decision.



David P. Simonton  
Administrative Law Judge

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<sup>9</sup> \$41,100.68 (back pay and interest) + \$13,497.00 (consequential damages) + \$75,000.00 (compensatory damages) = \$129,597.68