

February 2022

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No review was granted or denied during the month of February 2022.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 10, 2022

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CONSOL PENNSYLVANIA
COAL COMPANY, LLC

Docket No. PENN 2019-0008

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY: Commissioner Rajkovich¹

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act” or “Act”) and concerns a citation issued by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”) to Consol Pennsylvania Coal Company, LLC (“Consol”). The citation alleges a violation of the mandatory safety standard at 30 C.F.R. § 75.517, which requires that “[p]ower wires and cables . . . shall be insulated adequately and fully protected.” The inspector designated the citation as significant and substantial (“S&S”),² and MSHA charged Consol with a moderate degree of negligence.

Consol contested the citation and the proposed civil penalty. The case proceeded to a hearing before a Commission Administrative Law Judge. On December 30, 2019, the Judge issued a decision affirming the citation and finding moderate negligence and an S&S violation. The Judge assessed a \$2,487 penalty. 41 FMSHRC 803 (Dec. 2019) (ALJ). Consol filed a petition for discretionary review, contending that the record evidence does not support findings in the Judge’s decision and that the decision contains errors of law. The Commission granted the petition for review.

The Commission affirms the findings of a violation and moderate negligence; however, we reverse and vacate the S&S designation. Finally, in the interest of judicial economy, the Commission assesses a penalty of \$1,000. Chair Traynor writes a separate opinion in which he dissents from the majority’s conclusion that the S&S designation should be reversed and from

¹ A majority of Commissioners joins in each section of Commissioner Rajkovich's opinion in result, and therefore it constitutes the Commission's decision in this case.

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

the majority's assessment of a \$1,000 penalty. In addition, Commissioner Althen includes a separate opinion in which he sets forth an alternative reason for concluding that the S&S designation should be overturned.

I.

Factual and Procedural Background

On August 26, 2018, MSHA inspector Bryan Yates arrived at Consol's Enlow Fork coal mine in Pennsylvania to conduct an inspection. Yates proceeded underground, accompanied by Daniel Colby, Consol's safety representative.

During the inspection, Yates and Colby walked along an entry in the No. 13 feeder location. As Yates walked along the entry, he observed the feeder cable hanging down from hooks secured to the roof or rib. Tr. 142, 144. The cable was energized during Yates' inspection, but the section was not working. Consol had conducted an electrical inspection of the cable the previous day and had not reported any deficiencies in the cable. The inspector did not issue any citations in connection with that inspection.

Yates did not take any photographs of the cable hanging on the hooks in the citation location. However, he did take two pictures of the cable hanging in a different area where testimony established the roof was lower than in the citation area.

Yates had testified that the cable was hung from a hook that he called a "J hook." Colby, at one point, also used the term "J hook." However, Colby then explained that the term "J hook" was incorrect and that the hooks upon which the cable hung were properly referred to as "cable hooks" or "locked hooks." Tr. 228-30. Colby illustrated the difference using two photographs taken by Yates, which show the subject cable further along the entry. Sec'y Ex. 13 (third and fourth photographs), Tr. 148.

Looking at the third picture (the word "pinch" appears), Colby pointed out that the cable hung on a locked hook that was completely closed and attached to the rib of the entry. He referred to the hook as a "cable hook" or "locked hook" attached to the rib. To show the difference between J-hooks and the cable hook upon which the cable hung, Colby circled a small open hook that he identified as a "J hook" at the edge of the picture. This small hook contrasted with the larger locked hooks supporting the cable.

Colby explained that, due to the way the cable was hung on the locked hooks, the only way for the cable to fall to the floor was to destroy the insulated and locked hooks. Tr. 227. Thus, according to Colby, the cable could not simply fall from the roof but could be dislodged only if some event destroyed the entire closed and attached hook.

Yates testified that, in looking at the cable, he thought he saw possible damage. Tr. 143. His belief was that coal would strike the cable as it passed underneath. Tr. 143. He did not provide details about the scope or location of damage at this stage—i.e., the bottom, side, or top of the cable. Colby testified that he could not see any damage to the cable at that time. Tr. 203. Thus, neither Yates nor Colby identified specific damage to the cable at that point. Tr. 171, 203,

217. Yates had the cable de-energized and locked-and-tagged out of service so that he could take it down to examine it hand-over-hand.

Yates and Colby varied somewhat on their estimate of the height of the entry. However, they agreed its removal required a team effort in which they reached above their heads, and Colby used a walking stick to grasp the cable to remove it from the hooks. Yates also said, “it was pretty hard” to get the hooks “out of those plates,” which enhanced the difficulty in removing the cable. Tr. 174-175. Colby explained that the purpose of the height of the cable was to allow materials to pass under the cable freely.

After Yates and Colby took the cable down, Yates proceeded with his hand-over-hand inspection. Colby testified that Yates said he felt a “couple [of] bumps,” which he showed to Colby. Tr. 204. Colby was standing four to five feet from Yates at the time. Yates did not identify the location of these bumps on the cable – top, bottom, or side. He also did not testify to the location in relation to the entry– right side, middle, left side, etc.

Colby testified that before Yates showed him any damage at this stage, Yates then picked at the area with a screwdriver to clean that area of the cable. Tr. 204. Yates initially denied such action. Later, however, he testified that he did carry a screwdriver and did use it to clean out cuts. When questioned whether he used it in this instance, Yates replied, “I don’t remember.” Tr. 165. Colby further testified that Yates twisted the cable, applying a strong torque. Tr. 219. Yates conceded that he twisted the cable. Tr. 173. Yates also stated that he tapped or hit the cable, though he could not remember what he used to hit it. Tr. 165.

Yates testified that he found two cuts in the cable. He described the first cut as three-quarters of an inch. He did not take a picture of this cut or describe it, but he did testify that the cut did not expose any energized wires. The parties presented no additional evidence regarding this cut.

Yates’s testimony focused on the second cut, three feet from the first cut along the cable. Yates described it as one and three-quarters inches long; he did not estimate a width. However, he said he could see the white lead and exposed copper. Colby also testified that he could see the lead and further testified that he had then agreed with Yates that the opening was a violation. Tr. 208, 220, 222.

After handling the cable as described above, Yates took pictures of the cut. Sec’y Ex. 13 (first two photographs). In taking the pictures, Yates used a zoom feature which greatly enlarged the depiction of the cut. When asked whether using the zoom feature would distort the appearance of the cuts, Yates replied, “I’m sure it would.” Tr. 186.

Consol’s General Maintenance Foreman Travis Stout testified that ground fault protection of 300 milliamps, 25 times more sensitive than the law requires, protected the cable. Consequently, if a lead wire were bare or compromised, it would trip the breaker. Tr. 242. In short, if the lead were damaged, the electricity would go to ground, and the cable would immediately de-energize. Stout testified that Yates’ photos showed damage to the outer jacket and what might be damage to the inner conductor but that he could not see any damage to a lead.

Tr. 238. Stout agreed that it would be possible that the electricity might go to ground by striking the person holding the cable. Tr. 244

Yates issued a section 104(a) citation citing moderate negligence and a significant and substantial violation. Regarding negligence, he opined that Consol should have found the cut. As the basis for the S&S designation, Yates believed the cable could be easily knocked off the locked hooks and fall to the floor. He assumed miners then would grasp an energized cable to reattach it to the hooks near the roof.

II.

The Judge's Decision

Consol's argument centered upon Yates' actions before he identified a violative cut. Consol argued there was not substantial evidence of the status of the cable before Yates' action picking, hitting, and twisting. In turn, according to Consol, without such evidence, there could not be substantial evidence of a violation, negligence, or an S&S violation because Yates' actions may have created the condition he cited.

The Judge found that:

This Court further recognizes that Yates' vigorous manipulations may have embellished the cable's opening. (*see* Colby's comments regarding such at R-D). However, this Court does not find that Yates' examination techniques, however unorthodox or embellishing, created the cited cable's inner damage.

The undersigned has practiced law for over 40 years and is not naive regarding the regrettable truth that witnesses sometimes lie on the stand. This Court further understands that Yates' personality and zealotry have raised antipathy and suspicion on the part of the Respondent. However, having considered all the evidence presented by the Secretary and Respondent, *in toto* this Court ultimately rejects Respondent's arguments, express or implied, that Yates had deliberately or recklessly damaged the cable so as to have self-created the violation and then had given perjured testimony in support of such.

41 FMSHRC at 818-19 (footnote omitted).

The Judge, therefore, concluded that the Secretary demonstrated that Consol violated the safety standard and was moderately negligent. He affirmed the S&S designation concluding that there was a reasonable likelihood of a miner grasping an inadequately insulated power conductor knocked from a hook and receiving a serious or fatal injury.

III.

Disposition

A. Substantial Evidence Supports the Judge's Finding of a Violation.

The record evidence supports the Judge's determination that Consol violated section 75.517.³ The Judge credited Yates' testimony that he observed possible damage to the cable when hanging in the entry, performed a hand-over-hand inspection, and identified two cuts. Tr. 143-45, 166-68; 41 FMSHRC at 819.

Colby did not get a close look at the cable until after Yates' manipulations. After those manipulations, he observed damage to the outer jacket and the inner conductor; he acknowledged that the cable did not meet the requirements of the standard. Tr. 208, 217-18, 222, R. Ex. D. General Maintenance Foreman Travis Stout agreed that the photograph in the record depicted damage to the outer jacket and perhaps showed the inner conductor. Tr. 238; Sec'y Ex. 13.

On review, Consol argues that it should not be held liable for the violation, because the inspector engaged in a series of manipulations on the cable, such as hitting it, picking at it with a screwdriver, and vigorously manipulating it. The Judge determined that Yates' manipulations embellished damage to the cable but did not create damage.⁴ 41 FMSHRC 818-19. The record is sufficient to sustain the Judge's finding of cuts in the cable so that it was not fully protected when Yates conducted his initial hand-over-hand inspection. Accordingly, we affirm the finding of a violation.

B. Substantial Evidence Supports the Judge's Negligence Determination.

The Judge found that the operator knew or should have known of the violative condition and affirmed the citation's moderate negligence designation. 41 FMSHRC at 823. We conclude that the record supports a determination of moderate negligence.

As noted in the Judge's decision, Yates had concerns that the cable could be damaged from coal passing beneath it. 41 FMSHRC at 815-17. That caused him to take it down for a closer look and conduct a hand-over-hand inspection, which ultimately disclosed damage on the

³ When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁴ Commissioner Althen notes that there is an important difference between creating a violation and embellishing a violation thereby worsening the condition of a cited area making it amenable to an S&S finding. Based upon Yates' established embellishments of the violation and the absence of evidence of the condition of a cut before the embellishment, Commissioner Althen finds substantial evidence does not support the Judge's S&S finding based upon the condition of the cable after Yates picked at, hit, and twisted the cable.

outer covering. We do not find any basis to reverse the Judge's determination that Consol's failure to detect the problem and take corrective action before Yates' identification constitutes moderate negligence.

C. Substantial Evidence Does Not Support the Judge's Significant and Substantial Designation.

A violation is deemed to be S&S if, based on the particular facts surrounding the violation, there is a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has refined the standard into four steps:

In order to establish that a violation of a mandatory safety standard is significant and substantial, the Secretary of Labor under *National Gypsum* must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020), citing *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016).

The hazard from a violation of section 75.517 is that it may cause an electrical shock to a miner resulting from contact with an inadequately insulated or not fully protected power cable.⁵ Thus, the *Newtown Energy* Step 2 issue is whether the violation was reasonably likely to expose a miner to an electrical current. The allegation of an S&S violation fails at this step.

Yates identified *one reason* for issuing the citation as S&S regarding the cable affixed to the mine roof. He opined that the cable might get hit or otherwise dislodged from the insulated hooks, causing it to fall to the mine floor. He believed miners might then grasp the cable and attempt to rehang it above their heads. The relevant testimony by Yates is:

Q. And why did you evaluate it [hazard of touching] as reasonably likely?

A. We take several things into consideration there. Exposure is definitely one big part of it, and it's reasonably likely that if a miner -- when a miner grabs that cable to hang it back up, *after becoming knocked down* with the shuttle car or a ram car, or scoop, that where it was at in that location, it's

⁵ Colby testified that Yates said he found a "couple bumps" when doing the hand-over-hand inspection. Tr. 204. A finding of mere "bumps" would not support the existence of a hazard. However, from the testimony, cuts did exist. As set forth above, we affirm the Judge's decision that the cuts constituted a violation.

reasonably likely that they would grab it in that area and become seriously injured or fatal.

Tr. 150 (emphasis added).

The Judge accepted this basis for finding a likelihood that a miner would come into contact with the damaged portion of the cable. 41 FMSHRC at 820. The difficulty with that reasoning is that there is no evidence that the cable could be easily knocked to the floor. To the contrary, the evidence demonstrates that it would be very unlikely for the cable to be dislodged unintentionally.

Yates stated that he believed the cable could be knocked down because he had seen cables knocked off J-hooks before. Tr. 150. However, he also testified that it was “pretty hard” to take down *this particular cable*, requiring the efforts of both Yates and Colby. Tr. 174-75.

More importantly, Colby testified that the cable at issue was held in place by cable hooks with locking mechanisms, *not* open J-hooks.⁶ Tr. 226-30. Yates’ own photographs of the subject cable in a nearby area support the locked attachment.⁷ Sec’y Ex. 13 (third and fourth photographs). These photographs show a cable locked in place with a closed loop, rather than an open J-hook. The third photograph provides a useful comparison between the two types of hooks discussed: a circled J-hook can be found at the edge of the picture, while the photographed cable is hung on a nearby locked hook. This locked hook is completely closed and attached to the rib of the entry. Colby testified that for a cable secured in this fashion to fall to the floor, “you would have to destroy [the] hooks.” Tr. 226-27. The Secretary presented no evidence, through Yates’ testimony or otherwise, to suggest any likelihood of the cable being dislodged from locked cable hooks or of such hooks being destroyed.

We review a Judge’s factual determinations under the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). A determination as to the substantiality of evidence supporting a challenged finding “must take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (quoted in *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997)). Here, the weight of testimony and exhibits does not show a likelihood of the cable being knocked to the floor by passing equipment, thus exposing miners to the theorized hazard of electric shock when attempting to replace the dislodged cable. Given the absence of evidence supporting Yates’ theory and the weight of

⁶ Colby does at one point state that the cable was hung from J-hooks (Tr. 202), however he explained that this was a misstatement (Tr. 228-30) and otherwise refers to them as cable hooks or insulated hooks. Colby notes that the cable at issue could not even fit inside a J-hook, as shown by Yates’ photographs. Tr. 228-30; Sec’y Ex. 13 (third photograph).

⁷ There is no testimony to suggest that the photographed portion of the cable was unusual with respect to the type of hooks used. Yates introduced these photographs in the context of discussing the cited damage. Tr. 147-48. Presumably, they would not have been introduced as evidence if they could not properly be considered relevant and comparable to the portion of the cable at issue.

evidence that detracts from it, we find that substantial evidence does not support the Judge's S&S determination under Yates' theory of the hazard.

The Judge's decision also suggests two other possible sources of exposure to the hazard. First, the Judge noted that a miner "could" reach overhead and grasp the cable. 41 FMSHRC at 821. However, there is no testimony as to why (or whether) a miner would be likely to do so. The Judge also noted that miners "might" be exposed to the hazard while handling the energized cable during feeder moves. *Id.* at 822. The testimony regarding feeder moves is extremely brief. *See* Tr. 161-62, 245. For example, the Secretary provided no information as to when the cable is energized and de-energized during this process or how miners would handle the cables, factors which affect likelihood of exposure to the shock hazard. As the Judge's own language indicates ("could" and "might"), the Secretary failed to present substantial evidence to support an S&S determination under either of these theories.

For the above reasons, substantial evidence does not support a likelihood of miners coming into contact with the cable (and thus being exposed to electric shock) under any of the theories presented above. The determination is reversed and vacated.⁸

D. The Penalty Assessment is Reduced to a Penalty of \$1,000.

MSHA applied its penalty point system to the violation and assessed a penalty of \$2,487. The Judge accepted the MSHA assessed penalty and imposed a penalty of \$2,487. A significant portion of the penalty assessed by MSHA resulted from the gravity finding accompanying the S&S designation – a reasonable likelihood of the hazard occurring. The Judge's assessment, likewise, turned substantially on the gravity designation. 41 FMSHRC at 823.

The Commission considers six factors in assessing monetary penalties, namely: the operator's history of previous violations, the appropriateness of the penalty to the size of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and efforts toward good faith compliance. 30 U.S.C. § 820(i). Our decision vacates the S&S designation and, effectively, finds it unlikely that the hazard upon which the inspector based the S&S designation could occur. Thus, the gravity of the violation is reduced. The Judge's findings concerning the other factors remain unchanged. *See* 41 FMSHRC at 823-24.

Given the relatively small penalty assessed by the Judge and in the interest of judicial economy, we deem it appropriate to conserve resources and complete this proceeding at this juncture by setting a penalty directly. *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 724 (Aug. 2008); *Capitol Cement Corp.*, 21 FMSHRC 883, 896 (Aug. 1999). Taking our findings of moderate negligence and the unlikelihood of exposure to electrical current into account, we assess a final penalty of \$1,000.

⁸ Because we find the absence of a likelihood of the occurrence of the hazard, we do not need to discuss the operator's argument regarding the issue of redundant safety measures.

IV.

Conclusion

Based upon the preceding analyses, the violation and finding of moderate negligence is affirmed. The significant and substantial designation is reversed and vacated. Finally, the Commission assesses a penalty of \$1,000.

/s/ Marco M. Rajkovich, Jr.

Marco M. Rajkovich, Jr., Commissioner

Commissioner Althen, concurring,

I join my colleague, Commissioner Rajkovich without qualification to form a majority decision that substantial evidence does not support a finding that the cable was reasonably likely to result in a reasonably serious injury to a miner. I also find that a penalty assessment of \$1,000 against Consol Pennsylvania Coal Company, LLC is appropriate. Commissioner Rajkovich clearly explains the error regarding the absence of any reasonable likelihood of a miner touching a live wire. I write separately only to explain an additional rationale as to why the Judge erred in finding the violation to be significant and substantial (“S&S”).

Commissioner Rajkovich explains the undisputed elements of a significant and substantial violation. Thus, there is no need to recite those elements here. Indeed, the S&S standard is not an issue in this case.¹ Moreover, we need not discuss the established S&S standard because this case should turn on the Inspector’s mishandling of the cable before examining the interior of the cable.

I would reverse the S&S finding because the Judge accepted deeply flawed and mishandled evidence as a basis for his decision. The Judge found the actions by Bryan Yates, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”), wrongful and that such actions embellished the damage. Nonetheless, he discounted the inspector’s action. That was error. Having found the inspector’s actions improper and affecting the evidence and his testimony overstated, the Judge should have dismissed the S&S claim. The inspector’s interactions with the cable before finding a tiny area of exposed wire in the interior irremediably tainted the evidence. Accordingly, I would find the inspector’s inspection technique in this specific case prevents a finding of an S&S violation.²

¹ Chair Traynor’s errant discourse on the S&S test is odd. The proper standard for an S&S violation is not at issue in this case. Commissioner Rajkovich identifies the standard that has been applied for forty years. *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The core issue in the accepted standard is whether the Secretary preponderates in proving a reasonable likelihood of a reasonably serious injury due to a hazard caused by the violation. The Secretary does not challenge that standard here. My additional objection does not involve the S&S standard but rather turns on the inspector’s inability to provide any meaningful testimony regarding the status of interior of the cable prior to his admitted mishandling of the cable. That failure vitiates the testimony of the condition of the inner area of the cable. No one can know whether any insulation was broken before the inspector’s picking at the cut, hitting it, and severely twisting it.

² I agree with the finding of a violation because there apparently was a small cut in the cable that had not been addressed. The Commission has not opined and most likely would find it impossible to opine on a specific degree of “damage” necessary for a cable to fall within the scope of 30 C.F.R. § 75.517. Because of the environment in underground mining and the thickness of cable jackets, it is certain that cables incur many nicks, scratches, bruises, or bumps that do not compromise the adequacy of insulation or protection. This case does not provide sufficient evidence in depth, specificity, or expertise to permit a definitive ruling on the quantum
(continued...)

The Secretary must prove the S&S elements of a violation by a preponderance of the evidence. Here, that determination depends upon whether substantial evidence supports a finding that the cable was S&S when found by Yates—that is before he admittedly inflicted additional damage to the cable.³

Yates did not identify any meaningful damage to the cable before he took several actions that, as the Judge found, certainly affected the condition of the cable. The evidence is that he first saw a small slit in the cable. Testimony regarding Yates’ actions in probing, striking, and twisting the cable undercut a finding of substantial evidence because the testimony compels a finding that Yates’ actions likely, or at least may well have, created the hazard of exposure to a live wire.

The Judge essentially found the inspector altered (“embellished”) the adverse condition of the cable. 41 FMSHRC 803, 818 (Dec. 2019) (ALJ). In turn, Yates based the S&S designation upon observations after those embellishments.

Yates testified his hand-over-hand examination disclosed two bumps on the surface of the jacket. He found or at least testified to nothing more at that point. Daniel Colby, Consol’s safety representative, testified that he did not see any damage at that point. Thus, the inspector did not testify to the exposure of any inner level of the cable beyond a surface bump. Colby’s notes refer to a “nick” in the cable. Tr. 216. Certainly, a “nick” does not portend access to a live wire underneath the thick jacket.

Such testimony does not constitute substantial evidence that there was damage to the inside of the cable, creating a hazard that a miner might contact a live wire at that point. Yates did not say he saw any damage to the interior of the cable while it was hanging or even after his hand-over-hand inspection. Tr. 171. Had he not taken the destructive actions but simply found a violation and required standard taping, there would not be any S&S question. However, Yates did not stop with his visual and manual cable inspection. He took three distinct actions intentionally designed to “open” the cable.

First, Yates used a screwdriver assertively to affect the bump on the cable. Colby testified that he saw Yates use the screwdriver to “dig” into the bump. Tr. 225. He characterized Yates’ conduct with the screwdriver to “pry” at the bump. *Id.* Yates initially denied such action. Later, however, he testified that he did carry a screwdriver and did use it most of the time. When

² (...continued)

of damage that must exist for the insulation to be inadequate on a cable or for the cable to be not fully protected for purposes of section 75.517. I accept Commissioner Rajkovich’s reasoning on this issue.

³ I do not suggest that the inspector intended to create an S&S violation. Indisputably, however, his actions were intended to affect the condition of the cable. It is this effect of the picking, hitting, and twisting upon the inside of the cable that is important.

questioned whether he used it in this instance, Yates replied, “I don’t remember.” Tr. 165.⁴ Thus, there is positive testimony that Yates dug into the cable jacket with a screwdriver, and Yates testified to a lack of memory but that he does normally use a screwdriver.⁵

Second, Yates affirmatively testified that he struck the bump with his screwdriver or walking stick. Tr. 165. Certainly, the purpose was to affect the area of the bump. Yates testified he was “cleaning” it. However, obviously, hitting a bump or cut on a cable jacket with a stick will tend to crack it or widen any existing crack and cause additional damage.

Finally, Yates twisted the cable and applied a strong torque to the bump area. Yates initially denied twisting the cable; however, during cross-examination, he recanted and conceded he twisted the cable so he could open it. Tr. 173.

Colby testified that he had never seen an inspector engage in such conduct in his time as a safety representative. Colby’s testimony was:

Q. When you say you have never seen an inspector do that before, what do you mean by that?

⁴ Yates testified:

[M]ost of the time, . . . I peck it with a small screwdriver. So, when the cable is damaged, I can move the outer jacket out to see if the inner conductors are exposed. That’s why they keep going to my screwdriver because I do pack a small screwdriver.

Tr. 165.

⁵ Chair Traynor fails to appreciate the difference between credibility issues and facts on the record. Therefore, he asserts the type of hook from which the cable was hanging is a matter for credibility even though indisputable evidence in the record shows it was hanging from a locked hook attached to the sidewall. Sec’y Ex. 13 (third and fourth photographs); Tr. 148-49. He asserts that the majority does not recognize the cable was hanging over an entry. Of course, he is incorrect. Commissioner Rajkovich’s opinion explains the position of the cable and that the inspector and Colby had to struggle with it above their heads (even using a walking stick) to unhook it from the locked hooks. Further, evidence showed that the cable was lengthy. The Secretary did not introduce any evidence to demonstrate any likelihood of a miner touching a cable in a place far removed from the feeder in moving the cable. We do not even know whether the nick was on the top, bottom, or side of the cable. The evidence establishes that the cable could not be knocked from the locked, secured hooks without a virtually catastrophic contact. The Secretary did not provide any evidence that a miner would have any reason, advertently or inadvertently, to grasp the cable at any location even in the vicinity of where the inspector found the nick during a move of the cable to meet the test of S&S.

A. I never saw one that actually rotated the cable and started really getting into it and torquing it to try to inspect it. I never saw that.

Q. What about with the screwdriver and digging into the hole, did you ever see that?

A. Never.

Tr. 205.

The Judge did not discredit Colby's testimony. Rather, he found Yates manipulative actions "unorthodox or embellishing." 41 FMSHRC at 819. Strangely, the Judge faulted Consol for not providing testimony about proper inspection techniques. *Id.* Thus, the Judge affirmed an S&S designation even while acknowledging the Inspector embellished or exacerbated the condition to an unknown extent through prying, striking, and physically manipulating the cable and requiring the operator to explain proper investigation techniques. He placed a duty on the operator to explain the obvious: picking at, hitting, and twisting a cable is unsuitable and may cause further damage.⁶

Finally, Yates' intended for his photographs to magnify the image of damage. A small crack is magnified many times over and, even then, does not show any metal. Whatever damage is discernible to an inner cable clearly may have resulted from opening a slit and then vigorously twisting the cable.⁷

⁶ In faulting Consol for not having provided evidence of proper investigation techniques the Judge stated, "Respondent presented little or no evidence as to what should be the proper or preferred techniques for examining and photographing damaged cables." 41 FMSHRC at 819. This analysis turns the Secretary's burden of proof on its head. It is MSHA's obligation to act in a demonstrably proper way. It is not incumbent upon a respondent to "prove" that proper inspection techniques do not include prying into a cable with a screwdriver, striking it with a walking stick or screwdriver, and vigorously twisting it thereby causing or opening any cut that may exist or may have been created by a probing screwdriver. One need not be an expert to understand that an intrusion into or initial widening of a slit would make the cable amenable to further widening by additional interaction with the cable such as a strong twist. Colby did not see any damage until after the manipulations. If the operator's and/or the miners' safety representatives are present, these representatives must be given an opportunity to see the alleged violation before an MSHA Inspector takes potentially damaging and prejudicial actions.

⁷ The Secretary introduced two pictures Inspector Yates took of the cable after his manipulations. In taking the pictures, Yates he used a zoom setting knowing that it could distort the image to make the cut appear larger. Tr. 186. Pictures magnifying a scene naturally may have a dramatic impact upon the perception of a viewer. Magnification may cause a small cut to appear as a gash with the predictable psychological results. The extent of magnification in Yates' pictures may be seen by comparing the opening to a small "0" on adjacent black tape. As a result, the photographs depict the cut as significantly lengthier and wider than the reality.

In summary, there is no evidence of any hazard created by the cable condition before Yates' actions. The Judge made no effort to determine the extent to which Yates' activities, which the Judge found exacerbating or embellishing, affected the condition of the cable. Thus, the record lacks substantial evidence regarding the hazard of an exposed live wire existing before Yates' manipulations that had an indeterminate effect upon the cable.

I must and do tread carefully when a violation alleges the danger of an electrical shock. However, in this case, we have: (1) no evidence of the condition of the cable before Yates' intervention, (2) multiple severe manipulations of the cable, (3) the use of locked, insulated cable hooks virtually immune from accidental dislodgement, and (4) the absence of evidence of actions during a move affecting the condition of the cable. Substantial evidence does not support a likelihood that the condition of the cable before the Inspector's mishandling caused any hazard of touching a live wire or an adverse effect upon any miner.

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

Chair Traynor concurring in result, in part, and dissenting,

I concur, in result, with the majority's decision to affirm the Judge's finding of a violation and a moderate level of negligence. I cannot, however, join their erroneous decision to vacate the Judge's decision that the violation below was "significant and substantial" ("S&S") – that is, of a nature that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. 30 U.S.C. § 814(d)(1). Unfortunately, my dissent will illustrate that my fellow Commissioners have taken an approach in this case that departs from basic norms of honest and principled appellate review.

The Judge concluded that the Secretary demonstrated it was reasonably likely that a miner would contact an inadequately insulated cable that provided power to a trammable coal feeder. 41 FMSHRC 803, 820 (Dec. 2019) (ALJ). He relied upon evidence that, *considered cumulatively*, demonstrates that the feeder's trailing cable was accessible and would be contacted by miners during continued normal mining operations. Specifically, the Judge relied on: (1) the position of the cable at the time of inspection – hanging off a hook on the ceiling and into the entry, (2) the potential for the cable to be knocked to the floor by a passing vehicle, (3) the frequency with which miners traveled through the entry, and (3) undisputed evidence of the miners' routine handling of the cable during moves of the trammable feeder. *Id.* at 820-822. Notably, the record below included the uncontroverted testimony of a witness from each party – the Secretary of Labor's inspector and the respondent company's master mechanic – that miners regularly handled the damaged cable while it carried 480 volts of electricity necessary to move the large machine.

The majority badly mischaracterizes the Judge's S&S decision by focusing exclusively on the likelihood of miners contacting the damaged cable after it is knocked from the hook by a passing vehicle. Slip op. at 4. But **undisputed record evidence offered by both parties** establishes that miners handled the energized cable regularly during powered moves of the feeder. To reverse the S&S determination, the majority ignores this critical evidence in favor of a *de novo* record, built by discarding credibility determinations without discussion.

In Part I of my dissent, I identify the majority's errors with more specificity. In Part II, I demonstrate that the Judge's S&S decision is supported by substantial evidence in the record.¹

PART I

A. The Majority Errs in Ignoring the Judge's Credibility Determinations

Inspector Bryan Yates was joined by Consol safety representative Daniel Colby during the inspection of the entry. Each testified as a witness at the hearing and although portions of their recollections were consistent, in certain instances their testimony materially differed. The Judge ultimately resolved the conflicts by crediting the testimony of Yates over Colby. 41 FMSHRC at 819 (finding "the inspector's testimony to be credible and reliable."); *id.* at 820

¹ Included within Part II are my thoughts upon the growing confusion in the Commission's S&S caselaw.

(rejecting “many of the Respondent’s suggested finding of fact in favor of those argued by the Secretary.”)² The majority’s fact section does not acknowledge the Judge’s credibility determination. Accordingly, they err. *See Consol Pennsylvania Coal Co.*, 43 FMSHRC 145, 151 (Apr. 2021) (citation omitted) (holding that a Judge’s credibility determination is entitled to great weight and may not be overturned lightly.).

Instead, my colleagues inappropriately recite the record evidence *de novo*. *See Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (finding that it was error for the Commission to “substitute a competing view of the facts for the view the ALJ reasonably reached”); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (“We see no basis for overturning the judge’s crediting of the first-hand observations of [the inspector] over the testimony of Harlan’s safety director.”).

It is well established that the Commission reviews a Judge’s credibility determinations under an abuse of discretion standard. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868, 1871 (Sept. 2015). There must be “compelling reasons” to take the “extraordinary step” of reversing a Judge’s credibility determination. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)) (internal quotations omitted).

In proceedings under the Mine Act, the Judge is the fact finder, empowered to make credibility determinations to resolve conflicting evidence. *See, e.g., Jim Walter Res., Inc.*, 37 FMSHRC at 1871; *see also* Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a). We have consistently held that:

[The Commission is] not a supervening fact-finding panel and may not reverse a Judge’s decision merely because evidence in the record could have supported a contrary outcome. [] If the Judge’s decision is one a reasonable fact finder could reach based upon the evidence, we must accept the Judge’s determination even though, were we the fact finder, we might have reached a different outcome.

Consolidation Coal Co., 39 FMSHRC 1737, 1743 (Sept. 2017).

The majority irresponsibly fails to offer even the barest explanation as to why they do not apply these well-settled standards requiring our deference to our Judges’ resolution of conflicting evidence. In their pursuit of a preferred outcome, they have abandoned their duty to deal

² Despite the Judge’s decision to credit the testimony of Yates over Colby in instances where their testimonies contradict, Commissioner Althen makes the plainly false statement that “the Judge did not discredit Colby’s testimony.” Slip op. at 13. And even though I note this for his attention in this dissent, he insists on maintaining this assertion. Commissioners can have a wide variety of differing views on questions of law and policy, but quality of the Commission’s decisions and the integrity of the Commission as an institution are diminished by deliberately dishonest statements.

squarely with the record. Below, I discuss two key facts the Judge found to support his S&S determination that were improperly disregarded by the majority. These two examples will illustrate how the majority has authored a statement of facts that, remarkably: (1) omits material findings of fact and (2) cites testimony that the Judge rejected without even passing reference to the standards that direct them to defer to our Judges' credibility determinations.

1. The cable was suspended from a J-hook.

The Judge found that the cable was suspended from the ceiling of the entry on a J-hook. 41 FMSHRC at 816 (citing Tr. 150, 153). The Judge specifically relied upon this factual finding when he determined that a passing ram car loaded high with coal might knock the cable to the floor. *Id.* at 821 (citing Tr. 152, 221 and Summary of Testimony *supra.*)

The majority does not mention that the Judge found that the cable hung from a J-hook. Instead, they cite conflicting testimony regarding the subject hook, including Colby's initial testimony that the cable was hanging from a J-hook and his later testimony that it was hanging from "cable hooks" or "locked hooks."³ Slip op. at 2. My colleagues state that:

Colby explained that, due to the way the cable was hung on the locked hooks, the only way for the cable to fall to the floor was to destroy the insulated and locked hooks. Thus, according to Colby, the cable could not simply fall from the roof but could be dislodged only if some event destroyed the entire closed and attached hook.

Slip op. at 2.⁴

Of course, the Judge resolved the conflict in the evidence in favor of the Secretary; the Judge credited Yates' consistent testimony and discredited Colby's inconsistent testimony. The Judge's resolution of the conflict in favor of Yates was material because it informed his subsequent conclusion that the cable could be knocked loose from the *J-hook* on the ceiling by a passing vehicle.

³ Colby testified that the cable was "hung along what we call insulated hooks, or J-hooks" (Tr. 202), before later testifying that his reference to "insulated hooks" in his notes (R. Ex. D) actually referred to a locking hook. Tr. 229-30.

⁴ My colleagues rely on Colby's testimony regarding a photograph that was taken in a *different* area of the mine, noting that Colby identified that in the photograph of this *different place* the cable hung from a locked hook. Slip op. at 2 (citing Sec'y Ex. 13 (third and fourth photographs)). As Commissioner Rajkovich acknowledges "Yates did not take any photographs of the cable hanging on the hooks in the cited location. However, he did take two pictures of the cable hanging in a *different area*" Slip op. at 2 (emphasis added). Photographs of **different** hooks in a **different** location do not contradict the Judge's decision to credit Inspector Yates' testimony regarding **the cited location** in the entry.

The majority errs in citing and relying upon Colby's inconsistent testimony that the Judge discredited.

2. The cable was hanging off its hooks, down into the entry and in the path of miners and their vehicles.

The Judge found that at the time of inspection the cable was hanging into the entry, within the grasp of miners working or traveling in the area. 41 FMSRHC at 820-21; Tr. 160, 188. The Judge credited Yates' testimony that the cable was easy to reach, hanging approximately six feet or less from the ground.⁵

Instead, the majority states that "Yates and Colby varied somewhat in their estimate in the height of the entry. However, they agreed [the cables] removal required a team effort in which they reached about their heads."⁶ Slip op. at 3. "Colby explained that the purpose of the height of the cable was to allow materials to pass under the cable freely." *Id.* at 3.

Of course, it is undisputed that the hook attached to the ceiling was above their heads. Instead, the height of the hanging *cable* was in dispute. The Judge resolved the dispute. He credited Yates, finding that the cable was in the path of miners. My colleagues refuse to acknowledge this credibility determination.

Presenting the evidentiary record without the context of the Judge's credibility determinations is an underhanded way to silently overturn those determinations. My colleagues are attempting to avoid providing the deference commonly afforded to a Judge's factual findings in order to reach their preferred result. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (A Judge's decision to credit the testimony of a witness is entitled to great weight and may not be overturned lightly.).

⁵ Specifically, Yates testified "in the area where [the cable] was hanging down, I could easily reach up and grab it." Tr. 160. Yates also testified:

Q: With the cable hanging on the J-hooks, could you easily reach the cable?

A: Where it was down in the entry, yes.

...

Q: The area of the cable that you cited, you could physically reach that cable?

A: Yes.

Q: *So it's not a matter of being able to take the cable down or put it back up, but you could reach the cable and touch it?*

A: Yes.

Tr. 188 (emphasis added).

⁶ Colby assisted Yates by retrieving the cable because inspectors are not permitted to conduct "work" in a mine. Tr. 188-89.

B. The Majority Further Errs in Dismissing Uncontroverted Testimony from Both Parties' Witnesses as Insufficient.

In other instances, in their analysis reversing the Judge, the majority at time dismisses the record evidence as somehow insufficient. Specifically, the majority dismisses the parties' witnesses' agreement that the cable would be contacted by miners during the move of the feeder as well as evidence that a miner would move the cable from a vehicle's path.

1. The trailing cable is energized and handled by miners during feeder moves.

Both Inspector Yates and Consol's Master Mechanic Travis Stout confirmed that the cable is energized and handled by miners during a move. Tr. 161, 244-45. The cable is hung upon hooks in the entry between moves. It is taken down again for the next move. It remains powered during normal operation of the feeder. The Judge concluded that these moves contributed to the likelihood of electrocution.

However, the majority finds that this conclusion lacks the support of substantial evidence because they erroneously conclude the Secretary provided no information as to when the cable is energized or de-energized. The majority is incorrect; **both** Inspector Yates and the operator's witness master mechanic Travis Stout confirmed that the cable is energized and handled by miners regularly *during* a powered move.

Q. So when they go to do a power move and move this feeder, will men be handling this cable?

[Yates] They can, yes.

Q. Would they be handling this cable with power on?

[Yates] You would have to, yes.

Tr. 161. No witness for the operator testified to the contrary. Stout confirmed Inspector Yates' testimony:

Q. What is the feeder cable -- how does the feeder cable exist in an underground coal mine?

...

[Scott] Feeder cable, it's highly insulated hangers all the way to the machine. Any slack would be put on top of the machine, but the

only time it's really handled is during a power move, which in this case, it would probably be once a week or once every two weeks.

Q. And what voltage is this cable?

[Scott] It's 480 volts.

Tr. 245. Of course, the fact that no testimony was elicited by the Secretary's counsel as to when, if ever, the cable is de-energized does not detract from the parties' witnesses' agreement that the cable *is powered and handled during moves*. What more than consistent testimony from both parties would the Commissioners in the majority need the Secretary to produce to satisfy their apparently arbitrary application of the substantial evidence rule?

The majority also states that the Secretary provided no information as to how miners would handle the cable. The majority is again incorrect. Yates testified that miners grasp the feeder cable as it trails behind the feeder. Tr. 161-62. Colby conceded that miners do not wear electrocution-protective gloves. Tr. 209-210. Yates also testified that miners are typically "hard[] on" cables during machine moves and will "bow" the trailing cable as it moves. Tr. 162. The cable is 480 volts and the surrounding area is wet. Tr. 151-53. Electricity can track through a pinhole. Tr. 191. Accordingly, there is ample evidence as to how miners handle the cable during moves.

Finally, the majority states that the Judge's use of the term "might" in finding that the move was an occasion when the miners "*might* be exposed to electrocution" indicates that the Judge was conveying that the probability of electrocution was below the threshold of "reasonable likelihood." Slip op. at 8 (emphasis added). The majority cites no precedent in support of this novel theory. Rather, their overly semantic focus is inconsistent with the Commission's guidance in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2039 (Aug. 2016) ("We recognize that 'reasonable likelihood' is not an exact standard. Obviously, a Judge cannot calculate the degree of risk of the occurrence of the hazard in precise percentage terms."). Here, obviously, the Judge's decision to cite the feeder move as one of the four factors in support of his Step 2 conclusion indicates that the Judge believed that the evidence was sufficient.

2. The low height of the cable increased the potential for contact.

As previously stated, the Judge found that the cable was hanging low and into the entry at the time of inspection. Yates observed the energized feeder cable hanging down into the entry, six feet from the floor; he could easily reach up and touch it. Tr. 150-52, 160, 188.

The majority states that the Judge's conclusion that it was likely that miners would come into contact with the low-hanging cable is not supported by substantial evidence. Slip op. at 7-8. More specifically, the majority states that there is no testimony regarding why a miner would touch the cable when it was hanging down into the entry. Slip op. at 7.

Again, the majority mischaracterizes the record. Inspector Yates testified that cars were loaded high with coal and he was concerned that the coal was coming into contact with the cable.

Tr. 152. Miners travel the entry in vehicles. Inspector Yates expected that a miner would move the cable to prevent it from becoming further damaged. Tr. 153-54.

C. My Colleagues Err by Ignoring the Mine Act’s Penalty Criteria.

Section 110(i) of the Mine Act provides that:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation

30 U.S.C. § 820(i). Under our case law and procedural rules, if the Commission reverses a Judge’s decision affirming a S&S designation, the Commission should remand the case to the Judge to reassess a new civil penalty. *See, e.g., Peabody Midwest Mining*, 42 FMSHRC 379, 389 (June 2020) (“vacat[ing] the S&S designation for the violation . . . [and] remand[ing] the case so that the Judge may reassess the penalty”); 29 C.F.R. § 2700.30(a) (“In assessing a penalty *the Judge* shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act, 30 U.S.C. 820(i), and incorporate such determination in a written decision. The decision shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.”) (emphasis added).

My colleagues ignore section 110(i) of the Mine Act, Commission case law and our Procedural Rules to independently assesses a penalty of \$1,000 without fully considering the statutory penalty criteria and in disregard for the appropriate division of roles between us – termed political appointees on the Commission tasked with reviewing the Judge’s application of the section 110(i) factors for errors of fact or law – and our long-tenured Judges tasked with applying the factors to *assess* a penalty. Unfortunately, my colleagues do not respect this boundary between the trial and appellate function, even though they did acknowledge its existence as recently as our decision in *Solar Sources Mining, LLC*, 43 FMSHRC 367, 372 (Aug. 2021).

In *Solar Sources*, I noted in dissent that my fellow Commissioners took the unusual step of re-assessing the penalty themselves in their majority decision rather than remanding to the Judge with instructions for him to reassess the penalty. My colleagues, in response, acknowledged that the “Commission typically leaves such determinations in the hands of our Judges” but explained the unique circumstances of that case compelled their departure from ordinary practice. *Id.* Not persuaded, I warned that their decision threatened to “usurp the discretionary role of our Judges in the assessment process, arrogating to themselves the power to set a penalty.” *Id.* at 381. Here, they attempt to do it again – usurping the Judge's penalty setting role – this time, without even a fig leaf claim of unique circumstances. If they are going to

transgress long-standing boundaries between our trial and appellate functions, they should at least do so squarely, transparently and with reasoned explanation. *See NBCUniversal Media, LLC v. N.L.R.B.*, 815 F.3d 821, 823 (D.C. Cir. 2016) (“When an agency’s decision lacks adequate justification because . . . it fails to offer a coherent explanation of agency precedent, the judgment under review is wanting for lack of reasoned decision-making.”)

PART II

A. The Commission’s “Significant and Substantial” Standard

A violation is S&S (30 U.S.C. § 814(b)), if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission’s *Mathies* standard had been used regularly in both Commission and federal court proceedings in its original form until it was altered by the Commission in *Newtown*, 38 FMSHRC at 2037-38.

In *Newtown*, the Commission added an additional burden to Step 2, requiring that instead of merely proving that the violation “contributed” to a hazard, the Secretary must prove a “reasonable likelihood of the occurrence of the hazard.” *Id.* The Commission’s *Newtown* decision was a reaction to the Fourth Circuit’s decision in *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F3d 148, 162 (4th Cir. 2016), in which the court stated that “for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.” Accordingly, in *Newtown* the Commission raised the Secretary’s Step 2 burden of proof.

In *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020)⁷ a different Commission majority again changed the S&S standard. According to *Peabody* under Step 2, the

⁷ This decision is not yet final, as the operator’s appeal of the Judge’s remand decision is currently pending before the Commission.

Secretary must now prove that “the violation was reasonably likely to cause the occurrence” of the hazard. Compared to the original requirement in *Mathies* that the Secretary must merely demonstrate that the violation “contributed” to the hazard, the new *Peabody* standard represents a major change in the law. The Secretary now faces a much higher burden of proof to demonstrate that a violation is S&S.⁸

Additionally, in *Peabody*, the Commission for the first time added the term “cause” to step 3 of the test as well. The Commission’s shifting interpretations of the term “significant and substantial” in section 104(d)(1) of the Mine Act demonstrates an institutional confusion at the Commission. Notably, my colleagues write separately on S&S, without a consensus opinion. The institutional confusion is the result of statutory ambiguity. The Secretary of Labor would be well-served to aid the Commission in resolving this confusion by proffering an authoritative interpretation of section 104(d)(1) of the Mine Act.⁹

B. The Judge’s Decision to Affirm the “Significant and Substantial” Designation is Supported by Substantial Evidence in the Record.¹⁰

When reviewing a Judge’s decision, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The “substantial evidence” standard is highly deferential. See *Cumberland Coal Res.*, 717 F.3d 1020, 1028 (D.C. Cir. 2013) (“we may not reject reasonable findings and conclusions, even if we would have weighed the evidence differently.”) (citing *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998)); *Consol Pennsylvania*, 43 FMSHRC at 155 (citations omitted). Under the substantial evidence test, the “possibility of drawing two

⁸ Turning back to the case at hand, the majority appears to be confused as to how to analyze the concept of a “hazard” in Step 2 as compared to the likelihood of injury in Step 3. For example, in their analysis section, the majority conflates Step 2 and Step 3 and finds that the Secretary failed to fulfill his Step 2 burden because a miner is not reasonably likely to be injured. Slip op. at 6 (“The hazard from a violation of section 75.517 is that it may cause an electrical shock to a miner resulting from contact with an inadequately insulated or not fully protected power cable. Thus, the *Newtown Energy* Step 2 issue is whether the violation was reasonably likely to expose a miner to an electrical current).

⁹ Of course, among the options available to the Secretary is to simply ask the Commission to defer to an interpretation of section 104(d)(1) which resembles the original *Mathies* test.

¹⁰ The substantial evidence analysis is at times redundant of the discussion of the errors within my colleagues’ joint fact section, but I present it again in the context of a full affirmative case in support of the Judge’s decision.

inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Sec’y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996).

The Judge found that the Secretary demonstrated it was reasonably likely that a miner would contact an inadequately insulated power conductor. 41 FMSHRC at 820-21 (undertaking a “step 2” analysis). The cable was accessible to miners because: (1) it was hanging off the hooks into the entry, (2) it could be knocked to the floor, (3) it is handled by miners during the feeder move and (4) because the area is frequently traveled.¹¹ 41 FMSHRC at 821-22. He also concluded that the occurrence of an electrical shock from the feeder cable was reasonably likely to result in a serious or fatal injury. *Id.* at 822 (undertaking a “step 3 & 4” analysis). The Judge’s S&S findings and conclusions are supported by the record, eminently reasonable, and thus must be affirmed by the Commission. *Keystone Coal*, 151 F.3d at 1104 (The “sensibly deferential standard of review does not allow us to reverse reasonable findings and conclusions, even if we would have weighed the evidence differently.”).

As previously stated, Yates observed the energized feeder cable hanging down into the entry, six feet from the floor; he could easily reach up and touch it.¹² Tr. 150-52; 160, 188. Yates believed that the cable had been hit by a high load of coal, which is regularly hauled through the entry. Tr. 143, 152, 172, 177. Miners frequently travel the entry on foot and in vehicles. Tr. 152-157. Yates was concerned that the low hanging cable would be knocked off the J-hooks from which it hung and a miner would attempt to rehang it. Tr. 150-151, 188. There were two cuts on the cable’s outer jacket, one of which was large and deep enough to damage the inner conductor.

The trailing cable for the trammable feeder was routinely taken down from the J-hooks and handled by miners during equipment moves. Miners grasp the feeder cable as it trails behind the feeder. Tr. 161. The cable is 480 volts and the surrounding area is wet. Tr. 151-53, 161. Yates testified that electricity can track through a pinhole.¹³ Tr. 191.

Citing Yates’ testimony, the Judge found that during continued normal mining operations “coal loaded on top of ram cars could contact the hanging energized cable and knock it to the floor.” 41 FMSHRC at 821; Tr. 143, 152-53. Whether the cable was “in a hanging position or knocked to the floor, [it] was accessible to miners traveling or working in the area.” 41 FMSHRC at 820; Tr. 150, 155. Furthermore, the Judge concluded that the evidence demonstrated that miners would physically handle the energized feeder cable during a powered

¹¹ The Judge considered these factual findings cumulatively when concluding that it was reasonably likely that a miner would be exposed to the damaged conductor.

¹² Yates estimated that the roof in the cited area was 7 to 7.5 feet in height. Tr. 160.

¹³ Colby conceded that miners do not wear electrocution-protective gloves. Tr. 209-210.

move. 41 FMSHRC at 821-22. Importantly, the Judge found that the damage to the cable was “sufficiently extensive so as to have created the hazard of electrocution.”¹⁴ *Id.* at 822.

A Judge is well within the bounds of his discretion to credit the opinion of an MSHA inspector and affirm a S&S designation. *See Consol Pennsylvania*, 43 FMSHRC at 151 (citing *Buck Creek*, 52 F.3d at 135 (“the ALJ certainly did not abuse his discretion here in crediting the opinion of [the] Inspector.”)).¹⁵

CONCLUSION

My colleagues and I affirm the Judge’s finding of a violation involving a moderate level of negligence. I would affirm the Judge’s S&S determination as thoroughly supported by substantial evidence and am disappointed in the quality of the majority’s decision to do otherwise.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

¹⁴ The Judge found that safety precautions instituted by the mine such as the sensitive ground fault protection are reductant safety features that are excluded from his S&S analysis. 41 FMSHRC at 821; *see also Consolidation Coal Co.*, 895 F.3d 113, 119 (D.C. Cir. 2018); *see Buck Creek Coal Co., Inc., v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff’d*, 717 F.3d 1020, 1029 (D.C. Cir. 2013).

¹⁵ The refusal to apply the same legal standard in this case as was applied in *Consol Pennsylvania* is arbitrary and capricious. *See NBCUniversal Media, LLC*, 815 F.3d at 823.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 7, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

P.W. GILLIBRAND OF TEXAS, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2021-0104
A.C. No. 41-03618-529109

Mine: Voca West

DECISION

Appearances: Maria C. Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100
Commerce Street, Room 462, Dallas, TX 75242

Meghan Neal, P.W. Gillibrand Co., Inc., 1000 Oglebay Norton Drive,
Brady, TX 76825

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against P.W. Gillibrand of Texas, Inc. (“PWG” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.¹ This case involves two Section 104(a) citations with a total proposed penalty of \$250.00. Respondent has withdrawn its contest of Citation No. 9516972, so only Citation No. 9516971 remains in dispute. Jt. Stip. 9.

The parties presented testimony and documentary evidence regarding the citation at issue at a virtual hearing held on September 23, 2021. MSHA mine safety and health specialist Ty Fisher testified for the Secretary. PWG environmental health and safety manager Jimmy Palacio testified for Respondent. After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I **AFFIRM** Citation No. 9516971, as modified herein.

¹ In this decision, the joint stipulations, transcript, Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. P.W. Gillibrand, at all times relevant to these proceedings, engaged in mining activities and operations at the Voca West (Mine I.D. 41-03618) (the “Voca West Mine”) in McCulloch County, Texas.
2. P.W. Gillibrand is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the “Mine Act”).
3. P.W. Gillibrand’s mining operations affect interstate commerce within the meaning and scope of § 4 of the Mine Act, 30 U.S.C. § 803.
4. Respondent is an “operator” as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.
6. The individual whose signature appears in Block 22 of the contested citations at issue in this proceeding is an authorized representative of the United States of America’s Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.
7. The citations at issue in this proceeding were properly served upon P.W. Gillibrand, as required by the Mine Act.
8. The penalties associated with the violations in this docket if imposed, will not affect the Mine’s ability to remain in business.
9. The Respondent agrees to withdraw contest of Citation No. 9516972 and agrees to pay the assessed penalty of \$125.00.

Tr. 7-8, 12.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

PWG operates the Voca West mine, a sand plant located in McCulloch County, Texas. Tr. 22, 82; Jt. Stip. 1. On October 7, 2020, MSHA mine safety and health specialist Ty Fisher² arrived at the mine to conduct a regular EO-1 inspection. Tr. 23. While inspecting the site, he was accompanied by three members of mine management: shift supervisor Mike Weeks, environmental health and safety manager Jimmy Palacio, and manager Tony Vargas. Tr. 26-27.

²Ty Fisher has worked for MSHA for two years and 10 months. Tr. 19. He has worked in the mining industry for many years, including as a safety director and as a firefighter. Tr. 20-21.

Fisher traveled throughout the mine and inspected the pit, tire plant, fuel island, shop, and offices. Tr. 28.

While inspecting the shop area, Fisher issued a citation when he discovered there were no readily visible warning signs prohibiting smoking or open flames at the grease station used to service equipment. Tr. 28-29, 76; Ex. S-1-1. Fisher explained at hearing that there were three barrels present at the grease station. Tr. 29. One 55-gallon barrel contained a red grease and was hooked up to a grease gun. Tr. 30, 38, 79, 111; Exs. S-1-2, S-2-1A, S-2-9. That barrel also had grease on the outside of it and was connected to an air pump located on top of the barrel. Tr. 38; Ex. S-2-9. A second 55-gallon barrel was mostly empty except for green grease residue along the inside of it. Tr. 30, 39, 79; Exs. S-1-2, S-2-1A, S-2-11. A third, 33-gallon barrel was located below the grease gun to catch drips, but also contained four inches of combustible trash inside. Tr. 30-31, 34-35, 79; Exs. S-1-2, S-2-1A, S-2-8A.

Fisher testified that he believed the grease barrels posed a fire hazard because the combustible materials stored in the open barrel could be easily ignited by a spark and potentially cause the grease to burn. Tr. 35, 40. Fisher noted that grease fires emit toxic fumes and are harder to extinguish than other types of fires. Tr. 40. To terminate the violation, the mine installed a warning sign at the grease station. Tr. 52, 85; Ex. S-2-12.

PWG's environmental health and safety manager, Jimmy Palacio,³ testified for Respondent. Examining the safety data sheet for the green grease, he explained that he did not believe the green grease posed a fire hazard. Tr. 94; Ex. R-E-4. Palacio did not believe a warning sign cautioning against smoking and open flame would be a reasonable precaution to implement for this material. Tr. 105-06.

IV. DISPOSITION

During his inspection on October 7, 2020, Fisher issued 104(a) Citation No. 9516971, which alleged:

The grease station area at the shop had no warning signs prohibiting no smoking or open flames readily visible. The combustible grease barrels (3) that are used to grease equipment if ignited are a fire hazard to miners working near them, exposing them to burn injuries and smoke inhalation. There was no ignition source observed in the immediate are. The maintenance shop has an available fully functional fire extinguisher nearby.

Ex. S-1-1; Tr. 28.

Fisher designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.4101 that was unlikely to cause an injury that could reasonably be expected to result in "lost

³ Jimmy Palacio has worked for PWG for 18 months, oversees three mines, and has over seven years of experience working in mine safety and health. Tr. 81.

workdays or restricted duty,” would affect one miner, and was caused by PWG’s moderate negligence. Ex. S-1-1.

A. Fact of Violation

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). For the reasons that follow, I find that the Secretary has presented sufficient evidence to show that PWG violated 30 C.F.R. § 56.4101.

30 C.F.R. § 56.4101 provides that “[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.” The Secretary asserts that the mine’s grease station posed a fire hazard. Sec’y Br. at 5-6. At the grease station, there were three barrels: one closed barrel containing a red grease, one closed barrel with residue of a green grease coating the inside, and one open barrel catching drips of the red grease with about four inches of trash inside it. Respondent presented testimony and documentary evidence regarding the flammability of the green grease but failed to meaningfully address the relevant properties of the red grease. The safety data sheet for the green grease conveys that that the grease is “not considered flammable or combustible, but this product will burn if involved in a fire.” Ex. R-E-1. The grease will also emit toxic fumes when burned. *Id.* Fisher testified that the grease at the grease station was a combustible liquid, and, while it did not pose an explosion hazard, it did present a fire hazard even though the grease was not flammable. Tr. 57-58.

As Fisher testified at hearing, the green grease at issue here “is not the only fire hazard.” Tr. 76. There were two greases present alongside paper and other trash. While the flammability of the red grease was not established, it is clear that the paper and rags present in the open barrel posed a fire hazard because they are undoubtedly flammable. Given the presence of that trash, and its proximity to grease that emits toxic fumes when burned, I find that the condition of the grease station at Voca West posed a fire hazard. 30 C.F.R. § 56.4101 requires signage to be posted where a fire or explosion hazard exists, and by failing to post signage at the grease station, PWG violated the standard.

B. Gravity

Fisher designated the citation as unlikely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty. Ex. S-1-1. At hearing, Fisher explained that there was no potential ignition source at the grease station, and that the area is only used to service equipment at certain times, so there was low exposure to the hazard. Tr. 41, 45. He marked “lost workdays or restricted duty” because, if a fire were to occur in the area, the most

likely injuries would be smoke inhalation or burns. Tr. 46. There were clear and open escape routes on three sides of the grease station, so someone affected by the hazard would be able to get away from it. Tr. 46. Because the citation is marked “unlikely,” it is not considered a significant and substantial violation. Tr. 46. Respondent did not contest the gravity designations for this violation, and I find the designations made by the inspector to be appropriate.

C. Negligence

Under the Mine Act, operators are held to a high standard of care, and “must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d). MSHA’s regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Fisher determined that the violation was a result of PWG’s moderate negligence, explaining at the hearing that “the operator should have known to put up warning signs prohibiting smoking and no open flames,” but there were mitigating circumstances. Tr. 47. The grease station had been put in only one or two months before the inspection, and supervisors were unaware that there was no signage posted. Tr. 47. Fisher also stated that there were numerous other signs prohibiting smoking and open flames throughout the mine site, which “showed that they do their due diligence and it was just an oversight.” Tr. 47.

PWG should have known to put up a warning sign at the grease station. However, given the considerable mitigating circumstances, I reduce PWG’s negligence from moderate to low for this citation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

- (1) the operator’s history of previous violations,
- (2) the appropriateness of such penalty to the size of the business of the operator charged,
- (3) whether the operator was negligent,
- (4) the effect on the operator’s ability to continue in business,
- (5) the gravity of the

violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9516971, the Secretary proposed a regularly assessed penalty of \$125.00. PWG has a minimal violation history and is a relatively small operator. Tr. 24-25, Ex. S-5. The parties stipulated that the penalty will not affect PWG's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this non-S&S violation was unlikely to result in an injury causing lost workdays or restricted duty and was the result of PWG's low negligence. Finally, PWG demonstrated good faith in quickly installing a sign to achieve compliance with the cited standard. In light of these considerations, I find that the proposed penalty of \$125.00 is appropriate.

For Citation No. 9516972, the Secretary has proposed a regularly assessed penalty of \$125.00. PWG has withdrawn its contest of this violation and agreed to pay the proposed penalty. Jt. Stip 9. As required by the Mine Act, I have considered the representations and documentation submitted and conclude that the proposed penalty is appropriate under the criteria set forth in Section 110(i) of the Act.

VI. ORDER

It is hereby **ORDERED** to pay the Secretary the total sum of **\$250.00** within 40 days of this order.⁴

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

⁴ Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Distribution: (Email⁵)

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⁵ 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 14, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of JUAN SMITHERMAN,
Complainant

v.

WARRIOR MET COAL MINING, LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. SE 2021-0153
MSHA Case No. SE-MD-2021-03

Mine I.D. No. 01-01247
Mine: Mine No. 4

DECISION ON LIABILITY

Appearances: C. Renita Hollins, Esq., for the Department of Labor, Timothy J. Baker, Esq., for the Complainant, and Brock Phillips Esq. and Allen B. “Josh” Bennett, Esq., for the Respondent

Before: Judge William B. Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (c)(1) (“Mine Act” or “Act”). At issue is whether Complainant Juan Smitherman (“Smitherman” or “Complainant”) was wrongfully terminated by Respondent Warrior Met Coal Mining, LLC., in retaliation for exercising his rights under the Act by raising safety issues with his supervisor.¹

For the reasons which follow, the Court finds that Mr. Smitherman was wrongfully terminated for exercising those rights; that Smitherman would not have been fired but for exercising those rights and that the Respondent failed to establish an affirmative defense.

¹ A virtual hearing was held on October 20 and 21, 2021. The Secretary, Complainant’s counsel, and the Respondent each filed a post-hearing brief and a response brief. All contentions were fully considered by the Court and are addressed in this Decision.

I. Findings of Fact² with Discussion

Testimony of Zachary Salyers, foreman of the No.4 section and Complainant's supervisor

Testimony began with the Secretary calling Zachary Salyers, section foreman and Complainant Juan Smitherman's supervisor on the No. 4 Section since January 2021, to the stand as a hostile witness. Vol. 1, Tr. 37. Foreman Salyers agreed that on February 2, 2021, he and Smitherman, a roof bolter, had a disagreement about whether it was safe to roof bolt without dust bags. Vol. 1, Tr. 44, 100. Salyers, though disagreeing with Smitherman's view about the requirement to use dust bags, stated that he told Smitherman he did not have to bolt if he did not have dust bags. Vol. 1, Tr. 45. He also maintained that Smitherman never made any other safety complaints to him. Vol. 1, Tr 48. Salyers stated that a month elapsed between the dust bag incident and a subsequent matter, which involved a ventilation fly pad. Vol. 1, Tr. 101. Fly pads control ventilation, as they serve as "ventilation controls to force the air to ventilate working areas, face areas, things of that nature." Vol. 1, Tr. 49.³

By his own admission, Salyers confirmed that, on March 1, 2021, during the owl shift (i.e., the night shift) from February 28-March 1, two roof bolters on his section, Jonathan Banks and Steven Volts, made a safety complaint to him – namely that fly pads had not been installed in an entry. Vol. 1, Tr. 49, 149. Of significance, Salyers admitted that as foreman *it is his responsibility* to ensure that curtains or fly pads are installed or in place before mining. Vol. 1, Tr. 52. Salyers claimed that he did not know that Complainant Smitherman had any involvement in Banks and Volts raising the fly pads issue with him, and denied suspecting Smitherman brought the matter to the attention of Banks and Volts. Vol. 1, Tr. 53. The Court does not find this assertion by Salyers credible – while there is no direct evidence of his knowledge, Salyers admitted that Smitherman was on the section the night the issue arose and, given the evidence in the record as a whole of the friction between the Complainant and him, it is ineluctable that Salyers made the logical connection between Smitherman and his fellow bolters' complaints. Smitherman was, after all, the senior bolter on the section, working with Banks and Volts.

² The Court's findings of fact are based on the record as a whole and on observation of the witnesses as they testified. The Court noted the witnesses' demeanor while testifying, whether they were forthcoming in answering questions or evasive. When witnesses' accounts differed, the Court considered the witnesses' interests, corroboration of their testimony or lack thereof, and consistency or inconsistency between the testimonies of the various witnesses. In reaching its findings and determinations, the Court considered the entire record, including the parties' post-hearing briefs and reply briefs. Omission of discussion of particular aspects of testimony as well as particular contentions made in the parties' post-hearing briefs does not mean that such aspects were ignored. Rather, the Court determined that such discussions were unnecessary, as they were deemed to be subsumed in the Court's findings of fact with discussion and/or in the analysis with further discussion sections of this decision.

³ Salyers elaborated that a fly pad is a piece of belt line, about a 4-foot-wide, and 7 to 9 feet in length. When installed, they need to touch or overlap and thereby create a wall so that when air hits the pad it will move in a certain direction. They are distinct from curtains because a piece of equipment can pass through pads, without ripping them down. Vol. 1, Tr. 50-51.

Following the fly pad matter, Salyers recounted that Smitherman came to him before the beginning of the following shift (March 1, for the March 1-2 shift) and informed Salyers that he did not want to continue to work on his section and wanted to be transferred to the other side of the mine. Vol. 1, Tr. 54. Salyers denied that Smitherman gave a reason for the request.⁴ Vol. 1, Tr. 54, 140-141. Salyers contacted his shift foreman, J.D. Earnest, about Smitherman's request to be moved, and Earnest told him to assign Smitherman to the Lo-Trac, which is a small, compact, diesel-powered forklift, about 5 feet wide and 12 to 15 feet long, and used to bring supplies to the section. Vol. 1, Tr. 55-56, 142.

At about 11:45 p.m. that evening, which was early in the shift, Salyers instructed Smitherman to bring supplies to the section. Vol. 1, Tr. 59. As noted above, Smitherman was the senior roof bolter on the shift at the time he was assigned to the Lo-Trac. Vol. 1, Tr. 57. Salyers stated that Smitherman got on the Lo-Trac, but that he did not see him again until 3 a.m., over three hours later. Vol. 1, Tr. 60-61. Pressed as to what Smitherman was doing between 11:45 p.m. and 3 a.m., Salyers admitted he had no information as to what Smitherman was doing during that time. Vol. 1, Tr. 63-64. Despite not seeing Smitherman during that time period, Salyers defended his conclusion that Smitherman did not bring up supplies because he did not see "all the water line that was supposed to [have been] brought up." Vol. 1, Tr. 60-61. Salyers added that around 6 or 6:30 a.m. when he next saw Smitherman "there was only 2 pounds of block and 1 pound of rock dust brought up." Vol. 1, Tr. 61-62, 65-66. When asked, Salyers admitted he did not tell Smitherman the exact number of supplies to bring up, but when he saw him at 3 a.m., he was not pleased at the speed with which Smitherman was bringing up supplies. Vol. 1, Tr. 65. However, Salyers did not tell Smitherman at the time that he was not pleased with his progress, testifying that he told Smitherman "we would get away from the water line since we can't get it done and we would work towards our block," Vol. 1, Tr. 65-66.

The Court has reason to doubt Salyers' version of the work Smitherman accomplished that evening. Salyers gave Smitherman instructions around 11:45 p.m., but did not see him again until 3 a.m. and after that did not see him until 6 or 6:30 a.m., the time of their encounter in the supply hole. Vol. 1, Tr. 59, 60-61, 66. With little personal contact, Salyers' judgment about Smitherman's efforts was based on deduction, not observation, which impeded his conclusion as to whether Smitherman was "loafing" or making an effort to complete his assigned tasks.

When asked about his instructions to Smitherman to bring a bundle⁵ of water pipes, Salyers agreed that he told Smitherman to look in different locations for the pipes. Vol. 1, Tr 80. Salyers also admitted that Smitherman later informed him that he could not find the pipes. Vol. 1, Tr. 80-81. Salyers never found the pipes either, informing the Court that he never looked for them. Vol. 1, Tr. 81. Salyers confirmed that after the shift had ended the pipes were found in the supply hole; Salyers did not say who found them, and counsel did not ask. Vol. 1, Tr. 81-82.

⁴ As Counsel for the Secretary pointed out during redirect examination of the Complainant, Salyers never asked Smitherman why he wanted to be transferred to the other side of the mine. Vol. 1, Tr. 298. The Court would note that such a question from Salyers would have been natural and expected, unless one already knew the reason.

⁵ A bundle consists of approximately 20 to 25 pipes. Vol. 1, Tr. 80.

However, when pressed by the Court to directly answer the question, Salyers revealed that he did not see the water pipes in the supply hole. Vol. 1, Tr. 83.

The Court notes that throughout his testimony Salyers exhibited reluctance to answer straightforward questions, on subjects including but not limited to his role in “writing up” employees, his instructions to Smitherman about bringing up supplies on the Lo-Trac, and his reasoning behind his conclusion that Smitherman had not brought up supplies, answering only when repeatedly pressed on the issue by opposing counsel or, sometimes, by the Court itself. Vol. 1, Tr. 60-61, 69-70, 82-83.

As noted above, Salyers testified that he next saw Smitherman sometime between 6 and 6:30 a.m., asserting that the Complainant was sleeping on the Lo-Trac at that time. Vol. 1, Tr. 67. According to Salyers, Smitherman was on the Lo-Trac in the supply hole, with the Lo-Trac’s lights and his miner’s cap light both turned off. *Id.* No one else was then present in the supply hole, aside from Salyers and Smitherman. Vol. 1, Tr. 97 Therefore, as discussed further, *infra*, there were only but two individuals involved in this encounter; Salyers and Smitherman, and they presented very different accounts of the event.

According to Salyers, Smitherman told him he was taking a break; Salyers conceded that taking a break would be permissible “if he had just performed some type of strenuous task and he wanted like, say, a water break or catch-his-breath break.” Vol. 1, Tr. 68, 79. Yet, when asked if he confronted Smitherman over this, Salyers answered that he “didn’t tell [Smitherman that] he was taking an unauthorized break.” Vol. 1, Tr. 67-68. Nor, when Salyers came upon Smitherman, did he use the word “sleeping” when speaking to him. Vol. 1, Tr. 71. Salyers denied that Smitherman told him he had just completed a strenuous task, namely loading a rock duster. Although Salyers agreed that Smitherman had put a crib under the track, he did not consider that task to be strenuous. Vol. 1, Tr. 69.

Salyers then informed Smitherman that he was going to write him up. Vol. 1, Tr. 69. Salyers clarified in his testimony that he does not actually do the write-up. Instead, he passed on his account of the event to those above him and those individuals create the write-up. To that end, Salyers called Pete Richardson, the Number 4 Section coordinator, and his direct supervisor, and informed him that he found Smitherman asleep on the Lo-Trac and that he should be written up or fired because of that. Vol. 1, Tr. 36, 97. After the end of the shift, Salyers met with Sherry Sterling, Human Resources manager, and Jason Lee, the general mine foreman. Vol. 1, Tr. 70-71. Salyers recalled telling Sterling and Lee that Smitherman was sleeping. Vol. 1, Tr. 71. Sterling instructed Salyers to make a written statement about the incident. Vol. 1, Tr. 72. The

statement, written on March 2, 2021, consists of one, handwritten, page.⁶ Ex P. 38, Vol. 1, Tr. 73.

Aspects about Salyers' statement are disconcerting. Agreeing that his statement was written close in time to the event in issue, he admitted that the word "sleeping" is not in it. Vol. 1, Tr. 77. At odds with the foreman's claim, his statement includes that Smitherman told Salyers he was taking a break. Vol. 1, Tr. 78. Given that, one would expect Salyers' statement to have included his contradictory claim. It is noted that after giving his statement to human resources, no one from Warrior Met spoke to Salyers about the incident again. Vol. 1, Tr. 98.

In response to questions from counsel for the Complainant, Salyers acknowledged that as section foreman it is his goal to produce as much coal as possible. Vol. 1, Tr. 89-90. Salyers informed that he receives bonuses based on his job performance, which are based on production and safety statistics. Tr. 90-91. However, when asked, Salyers outright denied receiving any information or statistics from Warrior Met about the amount of production done on his shift. Vol. 1, Tr. 90.

Testimony of Complainant Juan Smitherman

The Court notes that Complainant's original MSHA Complaint erroneously reported that the events in question occurred on the March 7-8, 2021 owl shift, when in fact they occurred on the March 1-2, 2021 shift. Both parties agree March 1-2, 2021 is the correct date, and the matter is not disputed. Vol. 1, Tr. 189-90, 201.

⁶ The following is the text of Salyers' statement: "at Section arrival (11:45 p.m.), I gave Juan Smitherman orders to operate Sec. Lo Trac and that his Job would consist of moving up supplies. The supplies that I ordered Juan to move up were block and 2" water line. I also gave Juan specific orders where to place these supplies. Neither the water line nor the block was placed where I asked for it to be placed by the end of the shift. When I seen Juan at his dinner break he told me he had just unloaded the flat car and I asked him where the 2 "water line was that I had asked for + he said there was 11 joints 2 crosscuts outby, I told him there is a whole pile and asked him if he looked in every long block along our travelway and he replied yes. I told him then, that now that our block had arrived and been unloaded from the flat car make it priority to get it to the sec. + stock out the night return stopping, he said okay. Later in the shift around 6:00 a.m. I walked towards the supply hole at break 6 and found Juan slumped down in the operating deck of the Lo Trac with his hat off his head + his light turned off. I asked Juan what he was doing and he said he was taking a break. I told him he had a lunch break and that I couldn't see that he had moved anything up. He said he hauled block to the sec. across from the charger. He said he had to unload the flat car today, I told him he shouldn't have even taken an hour. Then he said he was having trouble passing a place by the track. I told him the other Lo Trac men have no trouble. I asked him why he didn't seem to care if we got any work done on this section, he replied that he did not want to work on 4 sec. and I told him I couldn't help him because that is not my decision. I then told Juan I was writing him up when I got outside and that I did not want to catch him again. He replied do what you got to do and I walked back to the sec.*at 600 a.m. 3 loads had been moved up, 1 bulk bag of dust 2 pallets of block (neither pallet at right return) *The Lo Trac was not running when I found Juan and a pallet of block was on the forks. 3 - 2- 21 -Zachary Salyers" Ex. P 38, Ex. R 5.

The Secretary then called the Complainant, Juan Smitherman.⁷ The Complainant has over 19 years of experience as a miner. Vol. 1, Tr. 8. At the time of his termination, Smitherman was the senior roof bolter at the Number 4 Mine in Brookwood, Alabama, working on the Number 4 section under the direct supervision of Zachary Salyers. Vol. 1, Tr. 16, 57. Smitherman and Salyers work the owl shift at the mine, which begins at 10:30 p.m. and ends when the next shift arrives, at about 7:30 a.m. Vol. 1, Tr 153. Smitherman had worked as a roof bolter for several years before his employment with Warrior Met Coal, working for Jim Walters mining before it was bought out by Respondent. Vol. 1, Tr. 113.

Warrior Met Number 4 mine is a very gassy mine, meaning it emits large quantities of methane and there are ignitions at the mine. Vol. 1, Tr. 118. The gassy nature of the mine is not in dispute, as Salyers, too, concurred with that description and, as noted *infra*, Section 103(i) of the Mine Act requires the Secretary to provide one spot inspection every five days for mines that liberate “excessive quantities” of methane, which is more than one million cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i). Vol. 1, Tr. 36-37. Smitherman knows of such ignitions at the mine and experienced two of them himself. Vol. 1, Tr. 118-119. Relating one such incident, he noted an event when a spark from roof bolting set the “whole ceiling . . . on fire in a matter of a split second.” Vol. 1, Tr. 119. Fire extinguishers were required to put the fire out. Vol. 1, Tr. 120.

Mr. Smitherman acknowledged that he was suspended for sleeping on the job some three years earlier, on February 2, 2018. He spoke of the incident, noting that at that time, it was during the last hour of the shift, around 6 a.m., when he and his partner “were finishing up for the day, and we put our tools up and sat at the little break table and waited until the shift was

⁷ Complainant’s MSHA Discrimination claim, admitted as Ex. P 2, is dated March 31, 2021 and sets forth under the “Summary of Discriminatory Action,” section, the following: “On 3-7-21 I was working on four section. I walked across from 3 entry to 2 entry. I noticed that the roof bolter was in #2 entry in front of the slant that had just been cut, it was the second cut in. Their was no slider or line curtain up in the slant. They were in the process of putting the drop board across #2 entry. At this point no air was being forced into the slant. I assisted in putting up the drop board. I went to lunch when I got back to the bolter it was in the slant. Their was no ventilation because the fly pads had not ben hung on the drop board. I told the bolters that I would not bolt the slant until the fly pads were hung and that the shouldn’t either. At this point the slant had been unventilated for at least 40 minutes. The other roof bolters found Zack and told him what I said about 30 min later the fly pads were hung. On 3-8-21 I got to work about 15 min early and told Zack that I didn’t want to be a part of 4 section any more because of the incident the day before. He said that he would work on it. When we got to the section he told me that I wouldn’t be working on the roof bolter and that I would be working out by. At the end of the shift he asked me how many pallets I have moved and I told him. He started harassing me saying what a sorry job I had done and threatened me with a write up. On the way out of the mine he told me to go to the manager’s office. They gave me 5 days off with the intent to fire me. I told them that had happened and that this was retaliation and they said that they would investigate. After the 5 days they said that they were going ahead with termination. I am seeking back pay and reinstatement.”

over with. And we were just talking, and it got quiet, and we both dozed off.” Vol. 1, Tr. 122, 128. Smitherman and the fellow miner were suspended for 30 days. Ex. P 14, Vol. 1, Tr 124. The record of disciplinary action was admitted as Exhibit P 14. Vol. 1, Tr. 126. Smitherman stated that he has never slept on the job since that event. Vol. 1, Tr. 127.

Salyers became Smitherman’s supervisor around January 2021; and the Complainant had already been working on the section prior to Salyers’ arrival. Vol. 1, Tr. 129. Smitherman described having “several disagreements” with Salyers “as far as how safety goes in the section.” *Id.* The Court finds this accounting by the Complainant was credible and as such it is informative about the atmosphere between the two men prior to the incident in issue. Smitherman characterized the issues between him and Salyers as “generally, [Salyers] didn’t make sure that the ventilation was correct when people were doing different jobs on the section, and he didn’t put out the adequate amount of rock dust in the returns to keep the – in case of an explosion to keep the – the—the intensity of an explosion down.” Vol. 1, Tr. 129-130.

Smitherman recalled his disagreement with Salyers about using dust bags on the roof bolter differently.⁸ Vol. 1, Tr. 130. His recollection was telling Salyers “the roof bolter didn’t have any dust bags and that there wasn’t any on the section, and I told him that I wasn’t going to run it without the dust bags because, you know, it’s against company policy.” Vol. 1, Tr. 131. Smitherman’s basis for the company policy claim was that he was aware of Warrior Met receiving a citation from MSHA about dust on the section and dust behind the roof bolter filters. *Id.* Smitherman recounted that to rectify the violation, “they had us sign a form saying that we’re going to change that filter at the beginning of each shift and we’re not to run the roof bolter without the filter.” *Id.* The dust bags prevent dust from getting behind the filter and contain the dust in the dust box, to prevent it from becoming airborne when the box is emptied.⁹ *Id.* Salyers disagreed, believing Smitherman could run the bolter without the dust bags. Smitherman took issue with Salyers’ view, stating “[a]nd I told him, No, you’re wrong. I said, I’m not supposed to run that without a dust bag.” Vol. 1, Tr. 133. Salyers then left to consult his supervisor. When he returned, according to Smitherman, “[Salyers] didn’t say anything else to me, but he got the other two roof bolters and talked to them and see if they were willing to run it without the dust bag, and they did run it without the dust bag.” *Id.* Smitherman asserted that he customarily used dust bags before Salyers became his supervisor. Vol. 1, Tr. 136. After the end of his shift, Smitherman went to the safety department and talked with the union safety representative and the company safety foreman, “and they told me that – that I was right and I shouldn’t operate it without the dust bag. They asked me who told – who told me to run it, and I told them I wasn’t

⁸ Smitherman initially gave the date as February 5; upon cross-examination, he freely conceded he was not certain of the exact date and that it may have been February 2. Vol. 1, Tr. 130, 247.

⁹ Explaining the significance of dust bags on a roof bolter, Smitherman explained “It’s a – it’s a – like a vacuum cleaner bag. If you ever changed a vacuum cleaner bag, that’s pretty much what it looks like.” Tr. 132. The dust bag sits in the dust box on the roof bolter. Tr. 133. Without the bag, the dust goes into the box and one would later need to shovel that dust out of the box. Tr. 134. That process, shoveling it out, creates a lot of dust. *Id.* Smitherman cared about this because use of the bag keeps respirable dust down in the mine. *Id.* He also asserted that the roof bolter he was using normally had dust bags. *Id.*

trying to get anybody in trouble. And then they said, the man I told him – and I told him [Salyers] told [me] to do it. And he said that he'd have a talk with [Salyers]" Vol. 1, Tr. 136-137.

Complainant Smitherman recounted some other safety issues that he raised to Salyers before February 28, 2021. Vol. 1, Tr. 137. In one incident, the Complainant found a miner working, cutting at the face, with no slider curtain. He brought the issue to Salyers' attention and, by his account, Salyers became upset with him, asking "why [Smitherman] got a problem with everything." Vol. 1, Tr. 139. Smitherman continued, "we just exchanged words, and it got loud. And then it calmed down after a little while." *Id.* The Complainant also testified to a second safety issue instance, when he found a slider curtain down on the ground when it was supposed to be hung up; he also brought the issue to Salyers. Vol. 1, Tr. 140-141.

A third safety disagreement was recounted by the Complainant. It involved Smitherman's assertion that insufficient rock dust was being laid down in the returns. Smitherman explained that five bags of rock dust are supposed to be applied to reduce both the risk of an explosion occurring and the extent of any explosion that may occur. Vol. 1, Tr. 141. Salyers, Smitherman recounted, was "supposed to put five bags down – bags of it down to make sure there's enough coal-to-dust ratio. And sometimes [Salyers] would put one bag out, or sometimes he wouldn't put any bags down, and he'd take – he'd get the service team to bring . . . the scoop back there and hand dust it with a bantam duster. I mean, he would just – regularly didn't do what he was supposed to do." Vol. 1, Tr. 142. When Smitherman raised the issue with him, Salyers responded "there was enough dust back there." Vol. 1, Tr. 143. Smitherman related these instances to others in the section, but did not convey those concerns beyond those miners. *Id.*

Regarding the February 28, 2021 fly pad incident, Smitherman recalled on that day, while on his way to lunch, noticing a face where, following a cut, "there was no drop board up, there were no fly pads on the drop board, there was no curtain line established, and there was no slider. And this was the second cut into the slant."¹⁰ Vol. 1, Tr 145.

Smitherman informed:

[T]his was the second cut, so they were about 40 feet in. And so they're supposed to establish that curtain line from . . . the drop board all the way to within 10 foot of that face when they start to cut. And none of that was done; none of it.

¹⁰ Explaining the role of fly pads and the drop board, Smitherman testified that "The drop board is the – it's a long piece of wood about 20 – a little less than 20 feet long, and it – it's mounted to the ceiling – the roof bolter mounts it to the ceiling, and that's to hold the fly pads. If you ever walked in – seen like an industrial freezer and they have those plastic pads that they go in – that the forklift goes in and out of, that's what – that's what – what a fly pad does. But it still – it allows people to go through it, but it still directs air. Okay? That's what the fly pads are. And then the curtain line is supposed to start at the end of that fly pad, and it extends out until you cut. And then like I said, this was the second cut in. So the first cut, normally, you don't put one because you can go in 10 feet without putting one up." Vol. 1, Tr. 145-146.

And then you're supposed to hang up – as the miner advances, he – into the coal cuts it deeper and deeper, he's supposed to have a slide up there that extends out with him so he can constantly stay within 10 foot of that face when he slides the curtain out. That wasn't out. It was on the foot – it was on the ground.”

And I saw that . . . they were backing the roof bolter out of number 1, which was the next entry, and they were backing it out to put this – the drop board up, which should've been done before they even made the cut. They made the cut out of turn. Normally, you do all that before you make that second cut. All that should've already been established.

But [Salyers] wanted to go ahead and get to cutting so – to run his numbers up, so they went ahead and cut without following the procedures that we normally do.

Vol. 1, Tr. 146-147.

Thinking that the deficiencies would be corrected, Smitherman went to lunch, but upon his return he discovered that the fly pads had not been installed. Vol. 1, Tr. 148. With the roof bolters about to start their job, Smitherman intervened, pointing out that there was no air coming through the slant. *Id.* He then informed that he would not be bolting and advised the other bolters that they should not bolt, either. In a gassy mine without the air moving as it should, Smitherman worried that bolting under such conditions “could blow this mine up, you know.” Vol. 1, Tr. 149. His fellow bolters advised they would seek out Salyers as to what to do. *Id.* Smitherman continued that the other bolters found Salyers “[a]nd they said they told him what I said and that I was going to tell on them if they run that roof bolter . . . in that cut or whatever.” Vol. 1, Tr. 150. He reiterated this recounting from the bolters to him, stating “[t]hey said that they told [Salyers] what I said and that I wasn't going – I wasn't going to bolt it and that . . . they did not bolt it either. They . . . said that they told him that I might – that they was scared I was going to tell on them.” Vol. 1, Tr. 151. According to Smitherman, after the corrections were completed, he resumed his roof bolting duties. Vol. 1, Tr. 152.

The Court notes that throughout his testimony, Smitherman was able to recall and describe the instances of his safety concerns in detail and with particularity, a consideration leading the Court to find his recollection credible. For his part, Salyers did not challenge Smitherman's claims of several safety disputes in early 2021 beyond merely denying them and reiterating generally his commitment to safety. Vol. 2, Tr. 127-128. Salyers did recall a conversation with Smitherman about dust bags on February 2, 2021, but denied that he became upset with Smitherman in the course of that conversation. Vol. 2, Tr. 129-132. Aside from the dust bag issue, Salyers denied Smitherman ever complaining to him about any practices or condition underground. Vol. 2, Tr. 132. Salyers maintained that Banks and Volts were the ones to inform him of the fly pad issue. Vol. 2, Tr. 137-138.

Based upon its assessment of the Complainant's testimony, the Court finds that Smitherman had real and substantial disagreements on safety issues with his supervisor, Salyers, and that these disagreements likely damaged the relationship between the two men and gave Smitherman a reputation as a nuisance in the eyes of his supervisor. Accordingly, the Court finds

Smitherman's safety concerns credible and reasonable, and particularly so given the gassy nature of the Number 4 mine. Apart from this determination, it should not be overlooked that a finding of discrimination does not rest on a miner's safety concerns being correct. *Marshall Cty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 923 F.3d 192, 204 (D.C. Cir. 2019). Thus, Smitherman's concerns did not have to be accurate to be protected activity.

At the beginning of the next owl shift, around 10:30 p.m. on March 1, 2021, Smitherman told Salyers that he did not want to continue working on his section.¹¹ Vol. 1, Tr. 153. He informed that he couldn't work that section anymore "with them doing what they did the day before." Tr. 154. Smitherman expressed that his desire to move was because he believed Salyers' section was dangerous "because of what was going on up there." Vol. 1, Tr. 156. Thus, he made it clear that his desire to move was because of his safety concerns with Salyers' section. Vol. 1, Tr. 157. Smitherman recalled that he had also spoken with the shift foreman, James Earnest, about his desire to move to another section on the other side of the mine a few days earlier, but Earnest informed him he had to wait until another miner moved from a section. Vol. 1, Tr. 155.

The Court notes that Salyers in his earlier testimony, *supra*, claimed not to know why Smitherman wanted to be transferred from his section. Given the events of the previous shift and the history between the two men, the Court finds that Salyers knew exactly what Smitherman was referring to when he expressed a desire to move "because of what was going on up there."

In the wake of that exchange, Smitherman was then directed to run the Lo-Trac, a task that involved bringing up supplies. Smitherman was the senior roof bolter on the section that day, and an assignment of that nature, bringing up supplies, would usually go to the least senior person. Vol. 1, Tr. 158-159. Smitherman had brought up supplies before, but he had not done it in years and never in his time working on the Number 4 section. Vol. 1, Tr. 160. Smitherman interpreted the work assignment from Salyers as intended to keep him off the faces and thereby prevent Smitherman from slowing coal production on the section. Vol. 1, Tr. 161-162.

Salyers told Smitherman to bring up some water line, advising him where he believed it was located. Vol. 1, Tr. 162-163. However, Smitherman went to that location and did not see the water line. Vol. 1, Tr. 163. Next, according to the Complainant, supply cars arrived and it took him all the way to lunchtime to unload those three full cars of supplies. *Id.* On his way to lunch, Smitherman saw Salyers, who asked him how many supplies he had brought up. *Id.* The Complainant informed his foreman that he "took two pallets" of supplies because he had to unload the supply car. Salyers responded to Smitherman, "Oh, okay" and then instructed Smitherman to bring up block and the dust as well. *Id.*

Smitherman encountered obstacles in fulfilling his assigned tasks. In the course of repairing the mine track, that crew installed ties, akin to railroad ties, some 6 to 8 feet in length, under the track, making the passage too narrow for the Complainant to pass through on the Lo-Trac. Smitherman testified that he had to remove all the ties out by himself and then let the track

¹¹ As noted, the Complaint and other records in this case erroneously listed the dates of the shift at issue as March 7 and 8, rather than March 1 and 2, 2021. Both parties agree that the latter dates reflect the correct days. Vol. 1, Tr. 189-90, 199-201.

back down in order to pass. Vol. 1, Tr. 165. As he passed, a pallet on the Lo-Trac tipped over, requiring him to restack the blocks and he had to fill in a hole where the ties had been placed. Smitherman stated that he got out a few more pallets but the maintenance foreman then asked him to bring up the rock duster from the millie track.¹² Vol. 1, Tr. 165-166. Smitherman then resumed bringing up pallets. Vol. 1, Tr. 166. In summary, the Court finds that Smitherman provided a detailed account of obstacles hindering the tasks he was initially assigned to accomplish and of the additional tasks he was assigned while trying to complete the tasks Salyers assigned him.

At that point, according to Smitherman's account of the events that day, he felt he needed a break from his exertions, so he drove the Lo-Trac into a supply hole and turned the machine off. Vol. 1, Tr. 168. Because there is little air circulation in the supply hole, it was necessary for him to turn off the machine so that diesel fumes and heat from the running machine would not accumulate. *Id.* It was at this point, during his break, that Salyers came to Smitherman's rest location. Smitherman recounted telling Salyers that he was taking a break, and the supervisor responding that Smitherman had not finished the work he assigned him.¹³ *Id.* Smitherman informed Salyers he was not finished yet. *Id.* According to Smitherman, Salyers then yelled at him, stating that he "ought to write him [Smitherman] up." *Id.* Smitherman disputed Salyers' claim in his testimony that he had only brought up two pallets in eight hours, asserting that he had done several tasks and that Salyers saw him several times before lunch and knew Smitherman had been working. The Complainant also contended that Salyers knew that the pipes he assigned him to get were not in the three locations he directed him to go. Vol. 1, Tr. 168-173. Smitherman also asserted that, by the end of the shift, he had brought up the remaining pallets that Salyers wanted. Vol. 1, Tr. 175. Smitherman felt that Salyers was trying to provoke him. Vol. 1, Tr. 169. Having considered the entirety of the testimony of Salyers and Smitherman, the Court finds the Complainant's characterization credible.

Smitherman gave additional details, beyond those recounted here, in his testimony as to his work activities during the shift and the obstacles he encountered in trying to complete his work assignments. The Court, having heard Smitherman's additional recounting, finds Smitherman's further testimony involving his activities on that day to be detailed and credible. *See*, generally Tr. 168-179.

The Complainant also contested Salyers' claim regarding the circumstances when he came upon him in the supply hole, asserting instead that when he was taking a break in the supply hole, his headlamp and light *were not off*. Vol. 1, Tr. 179. Smitherman further denied that

¹² This was a task requiring some exertion on Smitherman's part. His testimony was uncontradicted that the rock duster is used to pull dust. It is about 4 feet long and 2 feet wide, and all metal. It has a big hopper on top of it, and a hydraulic pump. He described it as "real heavy, weigh[ing] about 150 pounds." Vol 1, Tr. 166.

¹³ Later, on redirect by the Secretary, Smitherman affirmed he had moved up all the block and the rock dust by the end of the shift. Vol. 1, Tr. 299-300.

he was asleep. Vol. 1, Tr. 180. Asked why his claim to not being asleep should be believed, he stated that after his previous discipline and suspension for sleeping at work, he learned from his mistake and did not want to have that happen again. Vol. 1, Tr. 181. Smitherman stated that when Salyers approached him, the supervisor made no claim that he was sleeping. *Id.* After Salyers' remark that he was going to write him up and Smitherman responding "to do what he had to do," Salyers then asked him if he had found the pipe. Vol. 1, Tr. 181-182. Smitherman told Salyers he had not, and Salyers instructed him where to look for the pipe. Vol. 1, Tr. 182. However, Smitherman did not find the pipe at the location Salyers gave him. *Id.* Smitherman also attested that by the end of his shift he had moved all of the supplies, save the pipes, to where they were to be delivered. *Id.*

At the end of his shift, Salyers told Smitherman to go to the office of Jason Lee, the general mine foreman; Smitherman did so, but was redirected to the office of Sherry Sterling, the mine's Human Resources Manager. Vol. 1, Tr. 183. At the meeting in Sterling's office, Lee was present, along with Roscoe Boyd, a representative from the union. Vol. 1, Tr. 184. Smitherman recounted Boyd asking him, before Sterling and Lee walked into the room, why Smitherman was there; Smitherman told him he did not know. Upon entering the room, Sterling and Lee asked him if he knew why he had been called into the office; Smitherman told them he did not know the reason. *Id.* Smitherman was then asked to tell them what happened on the section. Upon hearing his recounting of the prior safety-related events, Sterling and Lee asked him why he had not raised those safety concerns earlier. Smitherman testified that his response to them was that Warrior Met put production over safety, but he added that Lee did not agree with that claim. Vol. 1, Tr. 184-185. Smitherman was then informed that he was going to get "five days off with intent" (i.e., suspended) while the matter was investigated. Vol. 1, Tr. 185.

Subsequent to his meeting with Sterling and Lee, Smitherman called Sterling and left a voice message, advising her that "they need to go to the return on this section and do a dust sample. I told them that they're going to find out that [Salyers was] not putting out rock dust in the returns, and I told her to . . . check on that. And I never got a response back from her." Vol. 1, Tr. 186. Smitherman never received any other information from Sterling about the investigation, never learned who investigated the matter, and was never asked to give a written statement. Vol. 1, Tr. 187. To the Court, these uncontested failings evince a lack of objectivity on the part of Warrior Met in their investigation of this matter, of which more will be said later.

Smitherman also recalled providing the names of individuals who saw him on the shift at issue, Chris Walls and Wesley Koots. He believed those two men saw him shortly before his encounter with Salyers in the supply hole. Vol. 1, Tr. 188-90.

After his five-day suspension, Smitherman met with management – Sterling and Chris Thielen were there, and possibly also Lee, along with "four or five other union officials." Vol. 1, Tr. 191. At the meeting Smitherman was informed that the investigation had been completed and he would be terminated. Vol. 1, Tr. 191-192. Smitherman recalled that Thielen stated that he did not know which side to believe on the sleeping allegations, instead asserting that Smitherman would be terminated because he turned "the Lo-Trac off and stopped working, and [Thielen] said [Smitherman is] not allowed to stop working without an – that's an unauthorized break, and that's what he was firing me over." Vol. 1, Tr. 192. Smitherman testified that he had never heard

of an “unauthorized break.” *Id.* In contrast, Smitherman recalled it being normal for miners to occasionally take breaks for water or just to collect themselves, and that he had never requested prior permission before taking a break. Vol. 1, Tr. 193. Thielen did not explain why Smitherman’s break was unauthorized. Instead, he moved from that conclusion to relying upon Smitherman’s 2018 signed agreement wherein the Complainant agreed that any future infraction would result in termination. Vol. 1, Tr. 194.

The complainant also stated that, during the meeting announcing his termination, both he and the union representatives asserted that they believed Salyers’ claim was in retaliation for Smitherman’s ventilation complaint, but that neither Thielen, nor Sterling, responded to that claim. Vol. 1, Tr. 195. Smitherman never receive a written copy of the investigation report and was never informed with whom management spoke in the investigation. *Id.*

The Secretary introduced “Employee work location, Mine 4. Clock number, 1307,” entitled “Warrior Met Coal Record of Disciplinary Action,” admitted into evidence as Exhibit P4. Vol. 1, Tr. 204. That exhibit provides under the topic of Reason for Disciplinary Action “Violation of work rule No. 1.” Tr. 199. Smitherman characterized the exhibit as the “premise they used to fire me on for breaking work rule 1: wasting time, loafing, and loitering.” Vol. 1, Tr. 204-205.

Upon cross-examination, Respondent’s counsel turned to that Warrior Met work rule 1, which prohibits “insubordination.” Vol. 1, Tr 231. That rule gives examples, including “wasting time, loafing, loitering on the job, neglect of job duties and responsibilities.” Vol. 1, Tr. 232. The Court, while surprised that the Respondent’s use of the term “insubordination” applies to behavior such as wasting time, and neglecting job duties, takes the mine’s construction of the word on its own terms. However, such an application does not excuse the Respondent from establishing that such behavior occurred. On the basis of the record as a whole, which includes credibility determinations, the Court does *not* find that the Complainant was insubordinate.

Regarding the dust bag dispute with Salyers, Respondent’s counsel challenged Smitherman’s reference to the MSHA citation he referred to earlier in his testimony, contending that the citation actually regarded an air filter; and in that context Smitherman agreed that the citation did involve an air filter and that an air filter is different from a dust bag.¹⁴ Vol. 1, Tr. 233-234. The Court notes again that, in order to be protected activity, a miner need only have a good-faith belief in the safety concern; whether Smitherman was correct about dust bag use is not determinative. Additionally, while distinct, an air filter and a dust bag both involve dust issues for the same piece of equipment, making the distinction more of nuance.

Respondent’s counsel also noted that the text of Smitherman’s discrimination complaint makes no mention of the three or four other safety issues he described in his testimony, other than the dust bag issue and the fly pad ventilation issue. Vol. 1, Tr. 237, 239. Smitherman agreed and he also agreed that he did not raise those three or four other safety concerns to anyone at the mine beyond Salyers. Vol. 1, Tr. 234-235. Smitherman explained his reasoning for not bringing the issues to others: “As long as – I’ve been underground for 19 years, and we normally handle

¹⁴ Respondent’s Counsel only alluded to the citation. It was not offered in evidence.

underground underground. We don't normally take stuff outside, because you have to have the trust of the guys around you in case you're in a fire or any – get a rock on you, or – you got to depend on that next man to get you out. The people outside can't get you out.” Vol. 1, Tr. 236.

Respondent's counsel then asked Smitherman “[t]hese three or four other safety issues that you mentioned, those aren't an issue in this proceeding, are they?” to which Smitherman disagreed, responding “Yeah, they are issues because they – they happened.” Vol. 1, Tr. 237.

The Court notes that the Complaint does not address those other safety issues, but the Complaint need not be a compendium of all the safety related concerns associated with it; rather it represents the core charges. There is no bar to a complainant amplifying the background and context for those core allegations, as Smitherman did in his testimony on direct. Thus, the complaint represents the basic claims and does not foreclose admission of additional relevant information in support of it. Further, the Court notes that its decision in this matter does not rest heavily on Smitherman's alleged prior safety complaints, and that it stated as much during the hearing itself. Vol. 1, Tr. 245-246.

Returning to the dust bag dispute of February 2, 2021, Smitherman agreed with Respondent's counsel that not all roof bolting machines are required to have dust bags; asserting that primarily the newer ones are so equipped. Vol. 1, Tr. 247-248. He also agreed that after raising the dust bag issue, more dust bags were provided on the next shift and he was never disciplined for bringing up the issue. Vol. 1, Tr. 252. The Complainant also agreed that Derrick Wade, another roof bolter working with Smitherman that day, also had an issue with the lack of dust bags, and was not disciplined for complaining about the dust bag issue either. Vol. 1, Tr. 253.

However, the Court would note that, cumulatively, Smitherman's repeated safety-related complaints, placed in the context of the events that led to his suspension and subsequent termination, cannot be ignored. Considering the testimony surrounding those events, and the Court's evaluation of the witnesses' credibility in their recounting of those events, it is hard to dismiss those prior instances as merely disconnected events which played no role in Smitherman's firing.

Turning to the ventilation issue on the owl shift which began on February 28, 2021, and continued through the next morning, March 1, Smitherman agreed that bolters Banks and Volts were bolting without proper ventilation on those dates, and that Smitherman told them they should not be bolting under those conditions and that they should approach Salyers in order to have the proper ventilation installed. Vol. 1, Tr. 254-255. Smitherman agreed that he had no evidence that Salyers knew that the bolters were bolting without proper ventilation and he acknowledged that the ventilation issue was corrected during the shift when the issue was raised. Vol. 1, Tr. 255, 258.

Respondent's counsel, revisiting the March 1-2 owl shift, at which time the events leading to the Complainant's suspension, and later his termination, occurred, Smitherman agreed that before the beginning of the shift, he told Salyers that he wanted to be transferred to the other side of the mine. Smitherman again stated that he told Salyers he wanted to be transferred

because of the events of the prior night. Vol. 1, Tr. 261-262, 298. Though Salyers himself testified that he did not know why Smitherman wanted to be transferred, when Respondent's counsel attempted to suggest Salyers may not have known because Smitherman did not specify why he wanted the transfer, Smitherman flatly rejected the claimed ignorance, responding, "Yes, [Salyers] knew. There wasn't any other incident happened the night before . . ." Vol. 1, Tr. 262.

Given the proximity in time to the ventilation issue, the Court finds that Salyers' claim defies common sense, especially when viewed in the context of the history of conflicts between the two. Clearly, Salyers would have known why Smitherman wanted the transfer and the Court commented to that effect during the hearing. Vol. 1, Tr. 265-266.

Regarding whether he was earnestly performing the work assigned that day, Smitherman stated that after lunch he did not see Salyers again until the incident, referring to their confrontation in the supply hole. Smitherman added that Salyers "didn't give me time to tell him what went on. He just started yelling and – and talking about other stuff." Vol. 1, Tr. 270. Smitherman informed that the need to unload the car supply and the belt crew activity prevented him from bringing supplies up. Vol. 1, Tr. 271. He did admit to taking a break around 6 a.m. that day, and that he did not seek Salyers' permission to do that, nor did he tell him that he needed a break. Vol. 1, Tr. 273. Subsequently, on redirect, Counsel for the Secretary asked if it would have been reasonable for him to ask Salyers for a break, to which the Complainant explained that it would have taken him a long time just to find Salyers, and that it was not common practice to seek out the supervisor for permission to take a break. Vol. 1, Tr. 301. At least in this context the Court agrees that seeking such prior approval would have been impracticable, especially given that it was very near the end of the shift.

Despite much questioning over exactly what Smitherman did during the shift when he was assigned to the Lo-Trac, Smitherman responded, convincingly in the Court's estimation, to those questions. In one such exchange, Smitherman responded that Salyers "knew he told me to go load the roof bolter, and he knew that I had unloaded the supply car, and he knew that I had went to look for pipe. So he knew I had five and a half hours to do all of those things." Vol. 1, Tr. 281. When asked if he had moved the pipe by 6 a.m., Smitherman responded, consistently with his prior testimony during the hearing, that he had not accomplished that, "because [he] had never found the pipe [Salyers] asked for." *Id.* As another example, when Respondent's counsel asked the Complainant if Salyers expressed surprise that he had only moved two pallets in eight hours, Smitherman answered that Salyers' claim "was nonsense because he told me to do all of those other things." Vol. 1, Tr. 282.

Respondent's counsel then referred to Smitherman's Record of Disciplinary Action,¹⁵ which, at least by the Respondent's account, played an important role in his termination. Vol. 1,

¹⁵ The exhibit, P 4, has some oddities to it. A single page, it is dated effective 3-8-2020 but signed 3-8-2021. Under the reason for the disciplinary action, it recites aspects of Work Rule 1, and then it adds "violation of work rule #5 with no elaboration. One might have expected more detail for such a "record" of disciplinary action and that it would have had consistent dates. To the Court, its summary nature reflects that it was merely assertions on a piece of paper which were singularly unilluminating.

Tr. 288, Ex. P 4. Within that exhibit, Respondent's counsel drew attention to the alleged violation of Work Rule 1, which he summarized as "prohibit[ing] wasting time and loafing" and "unacceptable work performance." Complainant agreed with this characterization. Vol. 1, Tr. 288-289. Additionally noted by Respondent's counsel, the Complainant's disciplinary record also cites Smitherman as having violated Work Rule 5, which Respondent's counsel characterized as "prohibit[ing] sleeping on the premises." Complainant agreed with this characterization too, though those words are nowhere in the exhibit. Vol. 1, Tr. 289, Ex. P 4.

The fundamental problem with citing to those work rules – sleeping and loafing – is that *before* applying them the Court must find that those prohibited behaviors occurred in the matters at hand. The Court does not find that the credible evidence supports a finding that any of those prohibited behaviors occurred in this instance.

Although Smitherman agreed that Salyers did not make the decision to terminate him, he made the salient observation that "[Salyers] recommended it." Vol. 1, Tr. 289. And while Counsel for the Respondent then asserted that "[s]o someone else made an independent judgment to terminate [Complainant's] employment," Smitherman agreed that the actual decision to terminate was made by Chris Thielen, but he added, significantly in the Court's view, that it was "[b]ased off of what [Salyers] said." Vol. 1, Tr. 289-290. The Court, in consideration of the entirety of the record, finds that the Complainant's point is well-taken and the fact.

Testimony of Thomas O'Donnell, MSHA Special Investigator and MSHA Conference Litigation Representative

The Secretary called Thomas O'Donnell, MSHA employee since 2005 and conference litigation representative since 2012, to the stand. Tr 311,315. O'Donnell investigated Smitherman's discrimination complaint. Tr. 325. He confirmed that the Number 4 Mine is a gassy mine, and that the mine has been on a five-day spot inspection at least since he was hired with MSHA. Tr 322-323. It is a matter of great significance for a mine to be designated for such inspection frequency. The Mine Act speaks to this, providing, pursuant to Mine Act section 103(i), that there is to be a spot inspection every five days for mines liberating for excessive quantities of methane of more than one million cubic feet of methane or other explosive gases during a 24-hour period.

In conducting his investigation, O'Donnell interviewed Smitherman, Salyers, Volts, Banks, Koots, Walls, and Sterling; he attempted to interview Earnest but ran out of time. Vol. 1, Tr. 330. However, of the interviewees, only Smitherman was able to review O'Donnell's memorandum of the interview, comment upon it, and vouch for its accuracy. Vol. 2, Tr. 12. As such, with the other interviewees not afforded the opportunity to review the memorandum O'Donnell created of their respective interviews, it would be fundamentally unfair for the Court to consider those unreviewed interviews.

Accordingly, in making its determinations in this matter, the Court has not considered any of the testimony presented by special investigator O'Donnell as it pertains to his remarks regarding the information he ostensibly obtained in his interviews of Volts, Banks, Walls, Sterling, or Koots, nor has it considered the statements themselves. This determination does not

infer that the statements obtained by Investigator O'Donnell, were manipulated or otherwise inaccurate recountings of his interviews. Rather, the determination is simply that it would be inconsistent with fundamental fairness to consider them, given the lack of an opportunity for those individuals to have reviewed them. Instead, in making its decision in this matter, the Court relies upon the firsthand testimony of the principal actors: Smitherman, Salyers, Sterling, and Thielen.

Subsequent Testimony of Zachary Salyers

Respondent's counsel recalled Mr. Salyers for direct examination. Initially, it will be remembered, Salyers was called by the Secretary and denominated as an adverse witness. Salyers revisited his dispute with Smitherman about the necessity of using dust bags on the roof bolter. Vol. 2, Tr. 130. The Court finds that whether Salyers or Smitherman was correct in their view about dust bags is not important, but rather that the encounter goes toward establishing that Smitherman and Salyers had a history of clashing about safety issues. It was from this history of conflict, and the testimony of the two, that the Court concluded that Salyers viewed Smitherman as a thorn, giving rise to animus towards him.

On the February 28-March 1 owl shift, Salyers admitted that Banks and Volts were in the dinner hole after Salyers "came back from the return," and that at that time Banks and Volts informed him that they needed to get the fly pads up in the slant. Vol. 2, Tr. 137-138.

Asked about the following shift, March 1-2, Salyers recounted that Smitherman told him he did not want to work for him and wanted to be transferred. Vol. 2, Tr. 140-141. Salyers claimed Smitherman said nothing about safety, fly pads, ventilation, or dust bags during that exchange and that he did not get upset with Smitherman then either. Vol. 2, Tr. 141. Instead, Salyers told Smitherman he would speak with the shift foreman, Earnest, about the matter. When asked if he had "any notion at all why Juan [Smitherman] wanted to be moved?" he answered "No." Vol. 2, Tr. 142. Given the testimony from Smitherman and Salyers as a whole, the Court does not find Salyers' assertion to be credible.

In furtherance of the claim that the Complainant was loafing, Salyers characterized the work assignments he gave Smitherman as much less burdensome than Smitherman's recounting. Salyers added that the distance one would have to travel using the Lo-Trac to get supplies was only five crosscuts, or 1500 feet, and doing so would only involve a 15-minute roundtrip and that during a shift, a Lo-Trac operator will move about 9 to 11 loads. Vol. 2, Tr. 146-147. Salyers also characterized using the Lo-Trac as "definitely the easiest job on the – as far as section work goes." Vol. 2, Tr. 148.

If Salyers' version were accepted by the Court, it would be reasonable to conclude that the Complainant had a light workday. However, when asked for an accounting of the times he "interacted" with Smitherman, Salyers gave only the following: "Once at arrival, once at his dinner break, and once at 6:00 to 6:30, and then again as we were getting on the man trips [to leave for the surface]." Vol. 2, Tr. 154.

A similar conflict in their recounting of events was presented with Salyers' assertion that he found Smitherman asleep within an hour of the end of the shift. Salyers stated that, when coming upon him, he asked him "why he hadn't got anything accomplished that night." Vol. 2, Tr. 158. Salyers' accounting was that Smitherman response to him was "I told you I didn't want to work for you." Vol. 2, Tr. 158. Such irreconcilable versions required the Court to make another credibility determination. In that regard, it finds it highly unlikely that Smitherman would respond to his supervisor with an answer that would effectively be an admission that he had not done the work assigned that day. Smitherman was already aware that such a response would result in his termination because of his prior suspension. Accordingly, the Court finds the Complainant's version to be more credible as it is highly improbable that the Complainant would make such a harmful admission to Salyers of all people. Further, Salyers' remark that *during that same exchange* Smitherman told him he "was having trouble passing a spot on the track and that he had to put a crib under it," is incongruous with the supervisor's retelling of the event. Simply put, Salyers' remark that Smitherman told him he "was having trouble passing a spot on the track and that he had to put a crib under it," does not fit with his claim that the Complainant asserted he did not want to work for him. Vol. 2, Tr. 159.

Salyers stated that, following that event, which he dubbed a "conversation," he then phoned Pete Richardson, informing that he "had just found Juan [Smitherman] asleep in the Lo-Trac and asked if [Richardson] could stay outside to handle it." Vol. 2, Tr. 162. Richardson was otherwise occupied and advised Salyers that "Jason Lee would handle the matter." Vol. 2, Tr. 162-163.

When asked by Respondent's counsel "by the end of the shift, how much of what you had assigned [Smitherman] that night had he accomplished?" Salyers answered "Nothing." Vol. 2, Tr. 163. He then repeated the word, "Nothing." *Id.* The Court, surprised at Salyers' assertion, then asked "[b]y the end of the shift, [Smitherman] had accomplished nothing?" Salyers then qualified his response, stating "Nothing that I had asked him at the beginning of the shift to do, no." Vol. 2, Tr. 163-164. This was a distinctly different answer from his twice-repeated claim a moment earlier.

When the shift concluded and Salyers was on the surface, either Richardson or Lee flagged him and told him that they needed to meet in Sterling's office. Vol. 2, Tr. 165. At that meeting, they asked Salyers what had happened, and then he was directed to give a written statement about it. Vol. 2, Tr. 165. Salyers stated that he was not present for any interviews conducted by Sterling or Thielen.

Salyers agreed that his written statement and his oral statement combined were the basis for the decision to suspend Smitherman. Vol. 2, Tr. 171. Again, Salyers denied that Smitherman told him that he didn't want to work for him because of the previous night's events. Yet, Salyers again admitted that he did not ask the Complainant why he didn't want to work on his section anymore. Vol. 2, Tr. 172.

Testimony of Sherry Sterling, Human Resources Manager

Respondent then called Sherry Sterling, Human Resources Manager at Warrior Met Coal, Mine Number 4. Vol. 2, Tr. 176. Her duties include overseeing disciplinary investigations. She

described the termination process as follows: “After the investigation is complete and the company decides that they want to move forward with a termination, we will suspend the employee with intent to discharge.” Vol. 2, Tr. 179. Following that, the UMWA “would contact us to let us know whether they want to have a 24- or 48-hour meeting, which is a meeting between the union, that employee that's being disciplined, and the mine manager, and myself. And from there, the mine manager makes the determination, whether he wants to retain that employee or whether he wants to uphold the discharge.” Vol. 2, Tr. 179-180.

Sterling agreed that the investigation is “something that falls within [her] purview of responsibility,” however she informed that Chris Thielen, the mine’s manager, is the ultimate decisionmaker when it comes to discharge. Vol. 2, Tr. 180, 184. Sterling testified that she does not take written statements in all instances, nor does she “normally issue any kind of report to either the person who raised the concern or the person about whom the concern is raised.” She agreed that conflicting accounts about events occur frequently. Vol. 2, Tr. 182. To resolve such conflicts, Sterling stated “we follow where the evidence takes us. And we have to decide who is the more credible witness. And that’s – that’s not easy, but . . . It is – it is part of my job.” Vol. 2, Tr. 182-183.

Referencing Warrior Met’s work rules 1 and 5, Ex. R18, Sterling confirmed that other employees have been fired for violating those rules. Vol. 2, Tr. 187.

On the morning of the incident at issue Thielen told Sterling that Salyers “was bringing someone from underground *for sleeping*,” telling her to speak to Salyers and to the employee because Thielen had to go underground. Vol. 2, Tr. 188 (emphasis added).

Sterling first spoke with Complainant Smitherman, who told her he did not know why he had been brought out. Smitherman, Sterling testified, also told her that “he did not like working for Zach [Salyers], and he didn’t like the way Zach operates, and he wanted to be removed from this section.” *Id.* Asked if Smitherman told her that he had reported safety concerns to Salyers, she responded “No, not that day, he did not to me.” *Id.* As to whether Smitherman said anything about ventilation issues or fly pads, Sterling responded in a like fashion, “No, not that I can recall. Not that day.” Vol. 2, Tr. 188-189. At the meeting with her, Smitherman said that “he was not sleeping. He said that that was untrue.” Vol. 2, Tr. 189. Sterling stated that, when asked, Smitherman did admit that he did not complete the work that night. Vol. 2, Tr. 189.

Beyond those statements, Sterling testified to not recalling anything else the Complainant said in that meeting, “not anything that stands out. I mean, we didn’t speak for a long time.” Vol. 2, Tr. 189. The Court finds this information-gathering process at odds with the professed goal of conducting a neutral investigation. Sterling did not believe a written statement from Smitherman was needed, because his version of events “was simple. He said, no, he wasn’t sleeping; no, he didn’t complete the assignments that Zach gave him.” Vol. 2, Tr. 190. The Court notes with dismay that Sterling apparently felt no need for elaboration or further questions.

After the meeting with Smitherman, Sterling met with Salyers. Salyers, in Sterling’s recollection, “told me that he walked up on Juan, and Juan was slumped over with his lights off, and he was asleep, and that he didn’t complete the assignments that he had given him.” Vol. 2,

Tr. 189-190. Sterling recounted that Smitherman was then suspended, pending the investigation, allowing the mine “to investigate what happened.” Vol. 2, Tr. 192.

Sterling agreed that sometime after their initial meeting, Smitherman telephoned her. Vol. 2, Tr. 192. It was during that conversation, Sterling recalled, that Smitherman told her that Salyers “had been letting people cut without curtains, and he [Smitherman] had an issue with that. And that he was being unsafe.” *Id.* However, Sterling, the investigator, could not remember “if [the call] was that day or the next day. He called me and we had a conversation about that.” Vol. 2, Tr. 192-193.

Sterling recalled that in their in-person meeting on March 2, Smitherman mentioned Chris Walls and Wesley Koots “came by.” Vol. 2, Tr. 193. Sterling does not explicitly state what she understood that remark to mean but, in context and given that it came from Smitherman, it is apparent that he meant the two men “came by” and saw him working. For that reason, Sterling explained that “[w]e” spoke with those two men and with people on the crew, and particularly with Banks about the ventilation issue Smitherman raised with her. *Id.* Walls and Koots *both said they did not see Smitherman working or sleeping* that night – that they did not see him at all that night. *Id.* Walls also stated that he did not give Smitherman an assignment that night. *Id.* Thus, significantly in the Court’s estimation, it is again noted that the only person Sterling identified in her investigation who claimed Smitherman was sleeping was Salyers. Vol. 2, Tr. 194.

Sterling acknowledged that Banks informed her that he had been cutting without a curtain and that Smitherman confronted him about the issue.¹⁶ Banks reportedly told her that Salyers had no knowledge of it. Vol. 2, Tr. 196. Thielen also spoke to Banks about safety and had him written up, with the write-up entered into Banks’ file. Vol. 2, Tr. 196-197. Thus, the upshot of curtain issue was that discipline was meted out, but only to the roof bolter, not to Salyers.

As part of her ‘investigation,’ a term the Court believes is a stretch to use in this matter, Sterling revealed that she “pulled [Smitherman’s] file from my office to look through his previous disciplinary actions, to see if there was anything in there.” Vol. 2, Tr. 197. This, it seems to the Court, was nothing more than a plain attempt to dig up dirt regarding the Complainant, and cannot be construed as any part of an objective investigation. That search bore fruit, as Sterling found Smitherman’s 2018 citation for sleeping. *Id.* Sterling testified that this past infraction “was a big factor” in her analysis “because it said any further infractions of any kind – which means it could be big or small. Whatever it is could result in immediate discharge.” Vol. 2, Tr. 198. Though Sterling stated that she spoke to other miners, aside from Volts, she could not recall their names – and none had anything negative to say about Salyers’ safety

¹⁶ At first, Sterling testified about Banks cutting coal, and then when reminded by Respondent’s counsel corrected herself, that she “believe[d] he was a roof bolter,” then adding “Yeah, bolting without a curtain.” Tr. 196. When next asked if “Mr. Smitherman’s report to [her was] that there was bolting without curtain or cutting without curtain,” Sterling responded that she didn’t “remember the verbiage. I assumed it would be bolting because that was what their job assignment was.” *Id.*

practices. Vol. 2, Tr. 201-202. She claimed her inability to recall their names stemmed from the conversations occurring “so long ago.” Vol. 2, Tr. 202. The Court does not share Ms. Sterling’s view that it was “so long ago,” and further, such a vague recounting strikes the Court as inconsistent with her evidence gathering role. Sterling claimed that she had no idea of a safety grievance, save the curtain issue Smitherman raised with her after his suspension, until the day before Smitherman’s arbitration when the union contacted them. Vol. 2, Tr. 202-203.

When asked during cross-examination how she knew Salyers claimed Smitherman was sleeping, when she met with Smitherman before meeting with Salyers, Sterling responded that she knew this information from the mine manager, “because [he] told me to go over there because [Salyers] was bringing someone from underground that he had caught sleeping.” Vol. 2, Tr. 204.

The Court finds a pattern in Sterling’s testimony of not recalling important facts relating to the conduct of her investigation. The Court further observes Sterling’s tendency to avoid probing further in the investigation for additional details. When asked about Smitherman telling her that he did not like working for Salyers, and whether she followed up by asking Smitherman why he had that view, Sterling responded only, “I think I did ask him why.” She recounted that Smitherman “said he didn’t like the way that [Salyers] operates.” Vol. 2, Tr. 213. A natural follow-up, the Secretary’s counsel then asked, “Did you ask him what he meant by that?” To which Sterling answered she could not “remember if [she] asked him that.” *Id.* Surprised, counsel for the Secretary then asked, “You can’t remember if you asked him what he meant by he didn’t like the way [Salyers]¹⁷ operated?” Sterling answered, “No, ma’am. I can’t speculate because I just don’t remember if I asked him that or not.”¹⁸ *Id.*

And there is more demonstrating the inadequacies of Sterling’s ‘investigation,’ as reflected with these exchanges:

The Secretary, asking Sterling if Jason Lee, in the meeting with Smitherman, asked him why he did not like the way Salyers operated, Sterling answered, “I don’t remember.” Vol. 2, Tr. 214. And then, asked if she remembered “whether or not Mr. Lee asked [the Complainant] why he did not want to work for Zach [Salyers],” again, she answered “I don’t remember.” *Id.* This lack of recall persisted; when Sterling was asked, in speaking with Salyers, if she recalled “whether or not [she] asked [Salyers] if he knew why [the Complainant] might want to be removed from his shift, from his section,” again her answer was “I don’t remember.” Vol. 2, Tr.

¹⁷ From context in the transcript it is clear that counsel for the Secretary and Sterling briefly confused Smitherman and Salyers, using Smitherman’s name when she clearly meant Salyers. Vol 2, Tr. 213.

¹⁸ The Court’s view that Sterling’s ‘investigation’ was a conclusion first, followed by a half-hearted inquiry, is also reflected by her remark that “Juan *kept saying* that he did not like the way Zach [Salyers] operated and he didn’t want to work for him.” Tr. 212 (emphasis added). Yet, while the Complainant *kept saying* he had an issue with the way Salyers operated, she did not inquire further.

215. Nor, Sterling admitted, after she completed her ‘investigation,’ did she have any follow-up questions for either Salyers or the Complainant. Vol. 2, Tr. 216.

Sterling also admitted that while she stated that both the Complainant and Salyers told her that not all of the work assigned to the Complainant had been completed, she had “*no idea*” what that meant, as she agreed that it could have been 10 percent or 50 percent that wasn’t done. Vol. 2, Tr. 223 (emphasis added).

It is of note that although Sterling asserted that Warrior Met does not permit employees to take unauthorized breaks, she was unable to articulate what constitutes Warrior Met’s definition of an “unauthorized break,” offering only the tautology that it is break that your supervisor did not authorize. Vol. 2, Tr. 228. Inconsistently, Sterling stated that the company would not consider it a violation of that company policy if a miner stopped for water or used the restroom, though without a supervisor’s permission. *Id.* Although it was her understanding that a miner seeking a break following strenuous activity should ask their supervisor for permission, she could not point to any company policy addressing that issue or specifying precisely what sort of break requires explicit supervisor permission, other than the Collective Bargaining Agreement that grants a 30-minute break. Vol. 2, Tr. 231-232.

That Sterling’s investigation was one-sided and superficial is demonstrated by this exchange with the Secretary’s Counsel: “Would you agree that the statement of – that the report from Zach Salyers was what led to everything that we’re here about today?” Sterling’s answer was “[h]is written and his verbal statement, yes, ma’am.” Vol. 2, Tr. 233-234.

Sterling, in response to questions from the Court, stated that before she went to meet with Mr. Thielen, the mine manager, she had *not* formed an opinion as to which version, Salyers or the Complainant’s version, was more credible. Vol. 2, Tr. 240. However, she then modified that response, stating that “it was not until after I spoke with Chris Walls and Wesley Koots that I determined which version was credible.” Vol. 2, Tr. 243. It should be noted that her view from speaking with the two miners related only to the sleeping allegation. Vol. 2, Tr. 244. Yet, neither Walls nor Koots asserted seeing Smitherman sleeping; rather their remarks to Sterling pertained to Smitherman’s claim that Walls had given him an assignment, with Walls stating that was not true. Although the Complainant stated to Sterling that both Walls and Koots came by and saw him working, Walls and Koots, the latter an hourly employee, both said that that was not true. Vol. 2, Tr. 244. The Court notes that neither Walls nor Koots testified at the hearing and that Sterling did not present a statement from either one. Neither one asserted seeing Smitherman sleeping either. Vol. 2, Tr. 246. Again, in the Court’s view, it is revealing that the only statement Sterling took was from Salyers.

In trying to determine the bases for Sterling’s determination, the Court asked what she was “left with that led [her] to conclude that Mr. Salyers' version was more credible than Mr. Smitherman's version?” Her answer was damning and revealed her lack of objectivity, stating: “[Salyers] is a supervisor. We have to have faith in the supervisors that we hire. ... I didn't find anything that [Salyers] said was untrue.” Vol. 2, Tr. 249-250 (emphasis added). Sterling concluded her remark on this issue by stating that her determination was based on the sleeping

issue and the issue of “whether Smitherman was being insubordinate by not completing his work tasks. It was two separate situations.” Vol. 2, Tr. 250. The Court finds that Sterling’s conclusion was clearly a predetermined result.

Testimony of Chris Thielen, Manager of the Number 4 Mine

Chris Thielen, manager of the mine, testified as the final witness for the Respondent. Respondent’s counsel drew his attention to a time study, dated February 5, 2021, conducted by Warrior Met on 4 Section from February 1-4, 2021. Vol. 2, Tr. 265, Ex. R30. Thielen was questioned about the time study; though he denied it as being used directly against Smitherman or any miner in particular, the time study findings were critical of the right side bolter crew on owl shift, claiming a “lack of urgency or motivation on the right side bolter crew on owl shift.” Vol. 2, Tr. 267. Thielen described the purpose of the time study as to “ensure [that] the foreman is informing [the] crew of standards and expectations on a section.” Vol. 2, Tr. 270-271. When asked, Thielen affirmed that he assumed Salyers would have seen the time study. Vol. 2, Tr. 296, Ex. R 30. Thus, it is obvious that Salyers knew at least about the results of the time study and that it did not reflect well upon him.

The Court notes further that the summary sheet on the time study, lists as one of the “observed deficiencies,” that “[o]n owl shift 2/2, right side bolters refused to bolt due to lack of dust bags for bolter on section.” Ex. R30. Furthermore, the time study summary sheet specifies, as the remedial action to remedy the observed deficiency of the “lack of urgency/motivation displayed by right side bolter crew on Owl shift,” to “[e]nsure that the foreman is informing bolt crew of performance standards on section.” Ex. R 30. The time study summary sheet, which is in e-mail format, is addressed to Chris Thielen, Jason Lee, and Pete Richardson, among others. Ex. R30.

Salyers under cross-examination, *supra*, flatly denied ever receiving information or statistics about production on his section. Vol. 1, Tr. 90. The Court finds this claim not credible, as the time study summary, sent to Salyers’ direct supervisor Pete Richardson, directs that foremen be made aware of the owl shift right side bolter crew’s “lack of urgency/motivation” and refusal to bolt due to lack of dust bags, and to take remedial action. Ex. R 30.

Regarding the investigation, Thielen testified that at first he delegated the issue to Jason Lee. Vol. 2, Tr. 271. Later, with Sterling, he spoke with Chris Walls, electrician Wesley Koots, and Jonathan Banks. Vol. 2, Tr. 274, 275. Thielen corroborated that Banks and the other bolter were bolting without proper ventilation. Vol. 2, Tr. 275. Banks was reprimanded for this but, the Court would again note, *not* Salyers. Vol. 2, Tr. 274.

With respect to the issue of Smitherman’s work on the day which led to his suspension and subsequent termination, Thielen recalled that Volts saw or thought they saw Smitherman on a Lo-Trac. Vol. 2, Tr. 275-276, 294-295. He later stated that Koots and Walls told him that they “could see the Lo-Trac operating.” Vol. 2, Tr. 280. Asked to clarify, Thielen affirmed that Koots and Walls both said they saw someone on the Lo-Trac – that is, they saw lights, but could not see who was operating the Lo-Trac. Vol. 2, Tr. 295. The Court would note that there was no testimony during the hearing that anyone other than Smitherman operated the Lo-Trac on that

day. Thus, at least to that extent, Koots' and Walls' statements did not advance Salyers' claim that Mr. Smitherman did nothing on the day in issue.

Thielen stated that, in assessing the issue, he looked at Salyers' statement and Smitherman's record. From the latter, he deemed the "most important" aspect to be the write-up for Smitherman's prior sleeping incident. Tr. 276. Noting that any further infraction or violation would mean Smitherman's discharge, he concluded Smitherman was "engaged in unsatisfactory work performance. He was found not attempting to complete the tasks that he was assigned to do. His Lo-Trac was off, and he was slumped over or asleep in his Lo-Trac." Vol. 2, Tr. 277-278.

Under cross-examination, Thielen stated what amounted to, in the Court's view, a fall-back position: whether Smitherman asleep or not, when Salyers approached him, he was "not attempting to complete the tasks he was assigned to do." Vol. 2, Tr. 281. An indication that he was not about making an objective determination of the facts, Thielen admitted that he did not speak with Smitherman until the union meeting. Vol. 2, Tr. 281 and Tr. 289-290. In fact, Thielen did not even ask Smitherman if he was sleeping. Only Sterling asked Smitherman about that. Vol. 2, Tr. 282.

Thus, by his testimony, Thielen came to the conclusion that Smitherman had been asleep, but with that conclusion being based on Sterling's view and Salyers' statement. Vol. 2, Tr. 285. As Sterling was never underground at the time of the alleged incident, it should not be lost that the information distills into but one statement – that of Salyers, alone, with Thielen giving weight to Smitherman's prior sleeping incident. Thielen also admitted that, regarding the separate issue of the work accomplished by Smitherman on the day in issue, he never spoke with Smitherman to consider his account of what work he completed that night, relying instead upon Sterling's recounting. Vol. 2, Tr. 289. When asked by Respondent's counsel "So everything that you have about what Mr. Smitherman said comes from what Sherry told you; is that right?" Thielen responded, "And Zach [Salyers]. Yes." Vol. 2, Tr. 294. The Court would note that Thielen's remarkable admission was of the same order as Sterling's – both individuals had a predetermined conclusion about the matter.

II. Additional Analysis and Discussion

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to

section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

It is noted that Congress adopted the Mine Act “to protect the health and safety of the Nation’s coal or other miners.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202 (1994). Further, as noted in the legislative history for that Act, Congress intended for Section 105(c) “to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.” S. REP. No. 95-181, 36 (1977).

Decisional Law in Discrimination Matters under the Mine Act

For over forty years the Commission decisions of *Sec’y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), and *Sec’y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981) have been the touchstone for evaluating discrimination claims under the Mine Act. Under those decisions, the standard for making a prima facie case of discrimination under Section 105(c)(1) of the Mine Act, has been expressed as follows:

Under *Pasula-Robinette*, a miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. 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. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that the adverse action also was motivated by the miner's unprotected activity and the operator would have taken the adverse action against the miner for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Sec. obo Riordan v Knox Creek Coal, 38 FMSHRC 1914, 1919 (Aug. 2016). *See, also, Thomas v CalPortland Co.*, 42 FMSHRC 43 (Jan. 2020).

Recently, the Court of Appeals for the Ninth Circuit took issue with the *Pasula-Robinette* framework, holding that, because the language of Section 105 (c) of the Mine Act provides, in relevant part that “[n]o person shall discharge or in any manner discriminate against ... the exercise of the statutory rights of any miner ... in any coal or other mine subject to this chapter

because such miner ... has filed or made a complaint under or related to this chapter,” that language “requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation.” *Thomas v. Calportland*, 993 F.3d 1204, 1209-1211, (April 14, 2021) (emphasis added).

Because the Warrior Met mine in this matter is located in Alabama, and therefore outside of the states within the purview of the Ninth Circuit, its decision is not binding on the Commission. However, for the reasons articulated in this decision, the Court, separately applying both the *Pasula-Robinette* test and the Ninth Circuit’s *but for* test, finds that Mr. Smitherman meets both tests.

Accordingly, as set forth in the findings of fact, Juan Smitherman engaged in protected activity by raising safety concerns; he suffered adverse action as was terminated because of that activity, and the Respondent failed to rebut the established prima facie case. Further, because the Court rejected the asserted affirmative defense that the Complainant was sleeping and/or loafing, finding that neither was established by credible evidence, no unprotected activity was proven.

Additionally, to be plain, applying the stricter standard set forth in *CalPortland*, the Court separately finds that Respondent Warrior Met would not have terminated Juan Smitherman’s employment *but for* his invoking his protected activity under the Mine Act and to put it differently, Warrior Met’s action in terminating would not have occurred *but for* Complainant Smitherman’s protected activity of raising safety concerns and that the putative reasons advanced by the Respondent mine were little more than a ruse, as neither the claim that the Complainant was sleeping, nor that he was loafing, was credibly established.¹⁹

III. Summary Remarks

As set forth above, Complainant Juan Smitherman established a prima facie case. He engaged in protected activity, primarily by raising the safety complaint about insufficient ventilation on the February 28-March 1 owl shift. This issue made up the core of Smitherman’s complaint, but he also testified to a series of other safety disputes he had with section foreman Salyers, such as the early February 2021 dispute about bolting without dust bags. Though it is true that Smitherman did not include every safety issue he raised with Salyers in his complaint, that is not a prerequisite to receiving testimony about such issues, as the Complaint represents

¹⁹ It is noted that the prima facie case remains unchanged, even within the Ninth Circuit, at least in terms of the preponderance of the evidence standard. As before, in the absence of direct evidence of discrimination, the miner may bring forward indirect evidence of discrimination, such as the operator’s knowledge of the protected activity, the operator’s hostility towards the protected activity, the coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Sec’y of Labor on behalf of Johnny Chacon v. Phelps Dodge Corp.*, 3 FMSHRC at 2510.

the broad outline of its basis.²⁰ Further, the Court's decision is based on the core charges. Those core charges were established and by themselves were sufficient to find for the Complainant. While the other safety issues were part of the record, they were not determinative of the outcome, but they did provide useful context for the two days directly involved in the Complainant's termination. *Sec'y of Labor, MSHA v. Hopkins Cty Coal, LLC*, 38 FMSHRC 1317, 1323 n. 9 (June 2016).

Obviously, by his suspension and termination, Mr. Smitherman suffered adverse action. Further, as described above, the Court rejects the claim that Salyers was oblivious to the core protected activity involving the fly pads and that Smitherman was the source behind it. Salyers and Smitherman had a history together and certainly the former, as the Complainant's supervisor, was able to put two and two together.

As set forth above, in multiple ways, and founded upon the Court's credibility determinations, Salyers demonstrated his hostility towards the Complainant's protected activity. Regarding the core events, assigning Mr. Smitherman, though the senior roof bolter, to run the Lo-Trac was itself indicative of such hostility. That, in the course of the same day as that assignment, Salyers would find that Smitherman was *both* loafing, not doing work and sleeping is telling. Such events meet, *writ large*, the adverse action 'close in time' consideration.²¹

²⁰ The Court has observed that Smitherman's action is not limited only to those matters specifically addressed in his initial MSHA complaint, but rather to any issue arising in the MSHA investigation. *See Carmichael v. Jim Walters Res., Inc.*, 20 FMSHRC 479, 484 n.9 (May 1998) (“[w]hatever its value as evidence, the complaint to the Commission, much like a complaint in a court proceeding, *is a basic pleading* that serves to frame the issues to be tried.”) (emphasis added). The Commission, in *Thomas v. CalPortland Co.*, held that the miners' claim need not be limited to the protected activities he alleged in his initial section 105(c)(2) complaint, but rather could include any matter investigated by MSHA in response to the section 105 claim. *Thomas v. CalPortland Co.*, 42 FMSHRC 43, (Jan. 2020), citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 545-46 (Apr. 1991). The Commission remarked that Hatfield “only precludes a miner from broadening his complaint to request relief for an *adverse action* that was neither pled in the initial administrative complaint or investigated by the Secretary after receipt of such complaint.” *Id.* at *11, (Commissioners Jordan and Traynor, concurring). This is important, because “miners are comparatively less likely to specifically reference in their initial complaint other allegations critical to the evidentiary burden of establishing a discrimination case, such as protected activity and unlawful motivation, because their importance is only apparent to those familiar with the legal requirements of our *Pasula-Robinette* framework.” *Id.* at 57.

²¹ The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and *temporal proximity* between the protected activity and the adverse action. *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.* 22 FMSHRC 323, 325-26. (March 2000). That case involved eight days. This matter came about in less than 48 hours.

The Respondent's attempted rebuttal, as discussed above, asserting that its suspension and termination of the Complainant were not motivated by protected activity have been rejected by the Court as pretextual. A pretext may be found where Respondent's justification is "weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug 1990). Furthermore, cursory, superficial investigation into alleged employee behavior undermines the credibility of the investigation. *Con-Ag, Inc. v. Sec'y of Lab.*, 897 F.3d 693, 704 (6th Cir. 2018). Warrior Met's investigation was not only superficial and cursory, but also biased.²² Sterling took a written statement from Salyers, but not from Smitherman. She asked few follow-up questions when meeting with Smitherman, appearing uninterested in understanding his side of the story. When Smitherman called Sterling to inform her of his safety concerns with Salyers, Sterling and Thielen's response was to conduct casual, informal, superficial questioning of miners on Smitherman's section. At the hearing Sterling frequently admitted to not recalling basic facts about her investigation process, which either indicates an investigation done carelessly or an attempt to obfuscate the facts. The investigation was biased in that Sterling and Thielen, upon realizing there were no other witnesses to the supply hole confrontation other than Salyers and Smitherman themselves, opted to believe Salyers because he is a supervisor. Vol. 2, Tr. 249-250

In a real sense, Thielen and Sterling could not quite get their dance duet together as to whether it was insubordination or sleeping that was the basis for Mr. Smitherman's termination.²³ For that matter, Salyers' himself was inconsistent as to which claim applied.

Last, as also discussed above, the Court finds that the Complainant's protected activity was the genesis for his termination. Put in the parlance of the Ninth Circuit, *but for* Mr. Smitherman's protected activity, he would not have been terminated.

²² That the 'investigation' had the aroma of conviction followed by investigation is plain with Sterling's examination of Smitherman's personnel file. Such an examination would not yield any information as to whether the assertion that the Complainant was loafing or sleeping was true. It points only to a search for potential assistance to a predetermined outcome.

²³ Tellingly, as discussed above, Warrior Met Coal's management could not even consistently define an "unauthorized break." At first, they insisted it is simply when a miner takes a break without asking their supervisor first, but then they conceded that miners may take breaks for water or to use the restroom without consulting their supervisor. Tr. 192, Day 2 228-232 When pressed, Sterling could not define the threshold at which a miner would require supervisor permission for a break, except to insist that Smitherman was on the wrong side of it. Tr. Day 2 228-232 The Commission has held that "an operator does not establish a *Pasula-Robinette* affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug 1990).

CONCLUSION AND ORDER

Based on the foregoing, the Court finds that the Respondent violated Section 105(c) of the Act by discriminating against Complainant Juan Smitherman for engaging in protected activity. Respondent is hereby **ORDERED** to reinstate Juan Smitherman to his former position with Warrior Met Coal with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove from Juan Smitherman's personnel file all mention of any employment action stemming from this incident.

Other Terms of Relief

Counsels are Ordered to confer during the next fifteen (15) days in order to determine if there can be agreement as to the terms of relief for Complainant Juan Smitherman and to notify the Court as to the results of these discussions. Section 105(c)(3) of the Act provides, in pertinent part: Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner ... for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

Counsels are Further Ordered at that time to state their specific areas of disagreement, if any, and if they believe that a further hearing may be required on the remedial aspects of this matter, to so state that, identifying the grounds for their positions.²⁴

Typically, reinstatement to the Complainant's former position, back pay with an appropriate interest rate, medical expenses, if any, benefits, such as pension contributions, if any, and lost overtime, are among the remedial matters that may be present. The parties are also directed to address the impact of the strike against the Respondent's mine as it affects the remedies due. In addition, the remedies typically also include: expungement from Juan Smitherman's personnel file of all references to the unlawful disciplinary action taken against him, including any such references to the events and circumstances associated with his wrongful termination, from any other records maintained by the company; and a posting of this decision at all of its mining properties where Respondent operates, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Warrior Met at its mining properties that it will not violate the Mine Act. The issue of MSHA's civil penalty also is to be addressed including, if possible, a settlement on the amount.

The Court retains jurisdiction in this matter until the specific remedies to which Mr. Smitherman is entitled are resolved and finalized. Accordingly, this decision will not become

²⁴ While not addressing all aspects of the relief sought, at the hearing the Secretary identified that he is seeking permanent reinstatement for Smitherman, back pay from the day of suspension up to the date of temporary reinstatement, out-of-pocket medical and dental expenses incurred during the period of termination, and damages and penalties calculated by the Secretary, seeking \$20,000.00. Vol. 1 Tr. 10-11.

final, and therefore not appealable, until an order granting specific relief and awarding monetary damages has been entered. Per the above, Counsels are directed to discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order.

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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February 16, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

CIVIL PENALTY PROCEEDING

Docket No. PENN 2021-0074
A.C. No. 36-07416-532307

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Ryan Kooi, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the Petitioner

Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh,
Pennsylvania, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 9203910, 30 C.F.R. § 75.904: Failure to properly identify a high-voltage (995-volt) circuit breaker. Two continuous miner machines were plugged into adjacent circuit breakers, each marked with the same number.

Facts		p. 4 (Slip Op.)
Fact of violation	Affirmed	p. 5
S&S	Affirmed	p. 6
Negligence	Moderate	p. 10
Penalty	\$700	p. 10

Citation No. 9204098, 30 C.F.R. § 75.370(a)(1): Failure to maintain bleeders safe for travel due to standing water, violating the approved Ventilation Plan. Deep water was allowed to accumulate in travelway used to examine the bleeders.

Facts		p. 11
Fact of violation	Affirmed	p. 13
S&S	Affirmed	p. 14
Negligence	None	p. 16
Penalty	\$150	p. 17

I. INTRODUCTION

This case is before me upon petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act” or “Act”), 30 U.S.C. § 815(d). At issue are two citations under section 104(a), issued to Respondent, Consol Pennsylvania Coal Company, LLC (“Consol” or “Respondent”).¹ The parties presented testimony and documentary evidence at a video conference hearing on September 28–29, 2021, and filed post-hearing briefs.

Consol owns and operates the Enlow Fork Mine, located in Greene and Washington counties, Pennsylvania. Jt. Stips. 1, 2, 5; S. Post-Hearing Br. at 3 (Jan. 7, 2022) (“S. Br.”). The mine is an underground coal mine and is subject to the jurisdiction of the Mine Act and the Commission. Jt. Stips. 3, 4; S. Br. at 3. Citation No. 9203910 alleged that Respondent failed to properly identify a 995-volt circuit breaker, posing a risk of miners inadvertently removing power from the wrong equipment. Citation No. 9204098 alleged that Respondent failed to comply with its approved Ventilation Plan (“Plan”) by permitting the accumulation of standing water that prevented safe travel. For reasons set forth below, I **AFFIRM** both citations with their assessed gravity, but I **MODIFY** the degree of negligence for Citation No. 9204098 from “moderate” to “none.”

II. STANDARDS

A. Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

The requirements of a MSHA-approved ventilation plan are enforceable in the same manner as mandatory safety standards. *See Prairie State Generating Co. v. Sec’y of Lab.*, 792 F.3d 82, 93 (D.C. Cir. 2015) (citing *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)) (“*Zeigler* recognizes, as do we, both the regulatory character of mine-specific plans, and the Secretary’s paramount control over the responsibility for mine-specific plans, which ‘must also be approved by the Secretary.’”). Mine operators are generally strictly liable for mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011).

B. Gravity

The “likelihood” contemplated within the assessment of gravity is that of the resulting injury. A severity assessment of “lost workdays or restricted duty” is defined as “[a]ny injury or illness which would cause the injured or ill person to lose one full day of work or more after the

¹ This docket included ten section 104(a) citations. Eight were settled by the parties and approved prior to hearing. *See Decision Approving Partial Settlement* at 3 (Oct. 26, 2021).

day of the injury or illness, or which would cause one full day or more of restricted duty.” 30 C.F.R. § 100.3(e) (2022).

Specifically, a gravity evaluation is different from S&S analysis because it assumes the occurrence of the hazard. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard *if it occurs*”) (emphasis added).

C. Significant and Substantial (“S&S”)

A violation is properly designated as S&S if, “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). The four elements required for an S&S finding are expressed as follows:

(1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) (“A determination of ‘significant and substantial’ must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.”).

D. Negligence

Judges may use a traditional negligence analysis, rather than relying upon Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–02 (Aug. 2015) (citing *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (“*JWR*”); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984)) (Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way on Commission proceedings.”). The reasonable prudent person standard should be that of one “familiar with the mining industry, the relevant facts, and the protective purposes of the regulation.” *Id.* at 1702.

E. Penalty

The Commission considers the following factors, from Section 110(i) of the Act, in assessing penalties under the Act:

[T]he operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i) (2006).

III. CITATION NO. 9203910

A. Factual Findings

This citation was issued by Inspector Robert Hutchison on February 17, 2021. Ex. P-1. He assessed the gravity as “reasonably likely,” “lost workdays or restricted duty,” “S&S,” and one person affected. *Id.* He assessed negligence as “moderate.” *Id.* The inspector stated:

The 995 volt circuit breaker servicing the Co. # 25 continuous miner is improperly identified as the Co. # 43 continuous miner. This condition could cause a miner to inadvertently remove power from the wrong machine which would cause lost work day injuries including electrical shock or burns. Both cables are plugged into the power center between the #4 and #3 entries at 36 crosscut of 2 South Left section (MMU#050-0).

Id. Two of the circuit breakers were marked as the #43 continuous miner—one was #43, and the other was actually #25. *See* Tr. Volume I at 59, 131 (Sept. 28, 2021) (“Tr. I”). Mr. Heffelfinger, Consol’s safety inspector, acknowledged that the #25 continuous miner was not identified properly at the top of the breaker. *Id.* at 146. He did state, however, that there was a brass tag affixed to the cable, where it was plugged into the breaker, that properly identified the cable as that of the #25. *Id.*

In his testimony, the inspector acknowledged this tag, but he also stated that it was difficult to find or read because it was a “half-inch thick diameter brass tag that did have mud and debris on it” and was located under the plug instead of on top. *Id.* at 62, 131, 142. Mr. Heffelfinger acknowledged that the breaker marking and cable tag should match. *Id.* at 148.

The #25 had been brought into the mine between three and four days prior to the inspection. *Id.* at 86, 132. The #25 was not in operation, and there was no testimony as to whether it was fully assembled or whether the cable was plugged into the continuous miner itself. *Id.* at 99–100, 133. The #25 breaker was not switched on at the time of inspection. *Id.* at 71. The #43 was in operation. *Id.* at 77. The breakers were located next to one another. *Id.* at 87. Neither machine was within sight of the load center. *Id.* at 65.

The inspector did not observe damage to cables. *Id.* at 90. However, he described the likely need to fix cables damaged in the course of continued normal mining operations by making a splice or reentering the cable—both of which require handling exposed conductors. *Id.* at 65–68. He stated that cables often get damaged by mobile equipment, shuttle cars, or scoops, when they are over roadways, and that he generally finds damaged cables about once per month. *Id.* at 65, 104. These cables carry 995 volts. *Id.* at 69. While the inspector acknowledged that people have been killed by such voltage, *id.*, he believed the most likely injury would be severe burns or shock. *Id.* at 75.

Mr. Heffelfinger testified that he brought the #25 into the mine a few days prior. *Id.* at 132. He stated that it had not yet been examined. *Id.* at 135, 138. He noted, and the inspector acknowledged, the existence of “lockout, tagout, tryout” procedures, that the cable would be “blocked” before maintenance, and that an exam would be conducted before using the #25. *Id.* at 93–94, 138, 139. Further, he stated that permissibility exams are done in the normal course of mining. *Id.* at 149. Section foremen inspect the load center twice per day. *Id.* at 76, 96.

B. Disposition

1. Violation

The cited standard states, “Circuit breakers shall be marked for identification.” 30 C.F.R. § 75.904 (2022). The Secretary argues that the standard requires *proper* labeling. S. Br. at 12. I find that this is a reasonable interpretation of the regulation.

The Secretary’s interpretation is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *Gen. Elec. Co v. U.S. Env’t Protection Agency*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Here, the Secretary has interpreted this regulation “without the aid or constraint” of rulemaking procedures, so he is entitled to deference to the extent that it has the “power to persuade.” *See Knox Creek Coal Corp. v. Sec’y of Lab.*, 811 F.3d 148, 160 (4th Cir. 2016) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). I therefore weigh its thoroughness, validity, and consistency. *See id.*

The Secretary provided credible testimony that a miner intending to deenergize one piece of equipment might deenergize another because another circuit breaker was marked with the correct equipment’s identification. *See* Tr. I at 72. First, this interpretation is consistent with the language because the regulation requires the breakers to be marked *for identification*. Plain meaning dictates that breakers should be identified. The only logical reason for such a requirement is to enable the control of power to the specific equipment that a miner intends to operate or maintain.

Second, this interpretation serves a permissible regulatory function. The Secretary’s reasoning is valid because the regulation is intended to protect miners—in this case, from the danger of electrocution or serious injury.

I find that the Secretary proved the violation by a preponderance of the evidence. There were two breakers marked as #43. One connected to the #43, but the other was for the #25.

Therefore, the breaker for the #25 was improperly identified. This is sufficient to establish a violation under the strict liability applied to mandatory safety standards.

2. Gravity

a. Likelihood

The Secretary asserts that the injury is reasonably likely. If the hazard—attempting to repair a cable that had not been properly deenergized—occurred, it is reasonably likely to result in electrocution or serious injury if a miner contacts bare conductors. I have found that a miner may contact bare conductors while repairing cables. I therefore affirm the assessed likelihood.

b. Severity

The Secretary provided credible testimony that contact with uninsulated conductors while repairing an energized cable could result in severe burns or shock, or even death. I find that electric shock or burns could reasonably result in a miner missing at least a full day of work. I affirm the assessed severity.

c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I agree that, logically, one miner would be repairing the cable to contact exposed conductors. Further, I find it reasonable that another miner would not contact the cable after finding that the other miner was injured during that activity. I affirm the assessed number of persons affected.

3. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The Violation has Been Established.

An improperly marked circuit breaker is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section III.B.1.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—a miner deenergizing the wrong equipment.

Mathies Step 2 is a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on “the particular facts surrounding the violation.” *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016).

Here, the standard requires proper identification of circuit breakers to inform miners which equipment they are powering or deenergizing. Thus, the hazard is the deenergizing of the wrong equipment prior to conducting maintenance on the equipment or cable.

The Secretary provided testimony that two breakers at the power station were labeled as continuous miner #43 (though one was in fact the #25), that cables are often damaged during normal mining operations, and that repair requires handling bare conductors. The Secretary argues that the Commission acknowledges danger even when there are no exposed copper conductors. S. Br. at 14–15; see *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284–86 (Dec. 1998); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984).

The Secretary's reliance on these decisions is misplaced because both cases involved exposure to *damaged* cables and different regulatory standards.²

Nonetheless, I find that the violation was reasonably likely to result in a miner deenergizing the wrong equipment, risking electric shock. The inspector described the methods of cable repair requiring contact with bare wires. He credibly stated that cable damage and subsequent repair are common.

The fact that another breaker was labeled #43 is sufficient for me to conclude that a miner might reasonably deenergize the wrong cable before conducting a repair. A miner who finds what he is looking for might stop looking and would fail to notice that there was another breaker marked with the same number. A miner might not look for or see the mismatched tag, especially if it was below the cable and obscured by mud. Therefore, the violation—failure to properly identify a breaker—is reasonably likely to result in the discrete safety hazard against which the regulation is directed—deenergizing the wrong equipment before repair.

Respondent cites two ALJ cases to assert that Step 2 requires actual—not just theoretical—potential of the proffered event. These decisions do not control my decision here. As ALJ decisions, they are non-precedential. Further, neither case involved an S&S evaluation. Both cases instead dealt with imminent danger orders. *Jim Walter Res., Inc.*, 29 FMSHRC 1043,

² The operator in *U.S. Steel Mining Co.* failed to fully cover a gash in a cable, but the wires inside still had insulation apparently intact. 6 FMSHRC at 1573. The Commission affirmed the judge's S&S finding because the lack of both layers was sufficient to put miners at risk of electric shock. *Id.* at 1575.

The Commission in *Harlan Cumberland Coal Co.* affirmed a judge's S&S finding where a splice was not completely insulated. 20 FMSHRC at 1285, 1286. The Commission rejected the argument that reasonable likelihood of injury could not be established where there were not exposed copper leads. *Id.* at 1286. Both cases are inapposite to my evaluation here. There is no cable damage alleged for me to apply the Commission's finding that danger exists because of the protection degradation and lack of knowledge about the integrity of the internal wire insulation.

1043 (Nov. 2007) (ALJ); *Consol of Ky., Inc.*, 30 FMSHRC 1, 1 (Jan. 2008) (ALJ).³ Here, the dangerous condition would be created by deenergizing the wrong equipment before conducting repairs. The #43 miner was operating at the time. If a miner needed to repair the cable on the #43 miner—a fairly common occurrence—it is reasonably foreseeable that he could deenergize the mislabeled #25 instead—creating the contemplated hazard.

Respondent argues that the Secretary failed to demonstrate that the #25 was energized or would be without an examination, or that miners would be exposed to an energized, damaged cable in normal mining operations. Resp't Post-Hearing Br. at 8 (Jan. 7, 2021) ("Resp't Br."). In support, it states: the #25 was brought underground only recently; the #25 breaker was not powered; no cables were damaged; the #43 was identified correctly; and it would have conducted an examination before use. *Id.*

The recent installation may support a modification in negligence, but it does not negate the fact that the #25 is plugged into a breaker marked #43. The proper identification of the #43 adds nothing because the danger is the possibility that a miner wanting to deenergize the #43 will deenergize the #25 because it is improperly marked as #43. That Respondent would conduct an exam first relies on miner precaution, which is irrelevant to an S&S analysis. *See Sec'y of Lab. v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018)

The contentions that the violative breaker was not powered, and that no cables were damaged at the time of inspection, are overcome by the requirement to assume the continuation of normal mining operations. The #25 was already plugged in, and the cables were running to the

³ Imminent danger orders presume that if normal mining continues, there will be a danger of severe injury or death from a known hazard it can be abated. Here, we must determine whether a hazard not yet present may develop, and we presume that it will not be discovered or abated if so. But even if I applied the standard suggested by respondent, the case here is distinguishable.

The inspector in *Jim Walter Resources, Inc.* improperly assumed a possible roof fall as a potential ignition source. 29 FMSHRC at 1045 (failing to note any indications of imminent roof fall or other roof hazards). This was, therefore, pure conjecture. *Id.* at 1048. Where it is incorrect to assume a roof fall, the standard here is logically aimed at ensuring equipment can be properly deenergized, which is necessary for movement or maintenance of the equipment or cables. I have found the reasonable likelihood of damage to the cables, and the necessity for deenergizing them for repair, to be supported by credible testimony about the conditions and practices in the mine environment.

A withdrawal order was issued in *Consol of Kentucky, Inc.* because of speculation that electrical equipment and cables *could* be left in the area as an ignition source. 30 FMSHRC at 1, 6, 7 (noting no credible evidence that such equipment was left in the area, making ignition, at best, a theoretical possibility). A judge cannot assume the presence of an ignition source that is not established as present or imminent when reviewing an imminent danger order, but may find that conditions arising in the continuance of normal mining operations may result in the emergence of a hazard in the future.

machine. Therefore, I assume, in normal operations, that the improperly marked #25 would be energized, and that the cables would require eventual repair from common mining operation damage. See *U.S. Steel Mining Co.*, 6 FMSHRC at 1574 (holding that, in the *Mathies* analysis, one “cannot ignore the relevant dynamics of the mining environment or processes”).

c. Step 3: It is reasonably likely that a failure to deenergize the correct equipment would cause an injury—electrocution.

Mathies Step 3 asks whether the hazard, not the violation itself, is reasonably likely to cause an injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. See *Newtown Energy, Inc.*, 38 FMSHRC at 2037.

I assume the occurrence of the hazard—a miner conducting repairs on an energized cable because he deenergized the wrong [improperly marked] continuous miner at the breaker. The Secretary provided undisputed testimony that contact with a live cable during repairs could result in electrocution. I therefore find that the hazard is reasonably likely to result in an injury.

Respondent correctly notes that the Commission has held it insufficient that a violation “could” result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010) (remanding for more precise discussion of potential injuries). However, I do not find only that an injury *could* occur. I find that one is reasonably likely to occur during normal mining operations because of the improperly identified breaker.

I reject Respondent’s contentions:

a) That the #43 was identified properly. Resp’t Br. at 10. While true, the hazard of injury results from the improper marking of the #25 breaker as #43.

b) That the breakers at issue were next to each other, so that a miner could see both and would deenergize both or look at the cable tag to be safe. *Id.* This all relies on miner precaution—irrelevant to *Mathies* Step 3. *Consolidation Coal*, 895 F.3d at 118.

c) That the #25 was recently brought in and was not energized. Resp’t Br. at 10. The machine would be energized during continued normal mining operations because it was brought into the mine to be used in those operations. See *supra* Section III.B.3.b.

d) That the #25 would have been properly identified prior to use. Resp’t Br. at 11. This again assumes miner precaution.

e) Finally, that there were no issues with any of the equipment. *Id.* I assume the necessity of repairs based on credible inspector testimony and the “relevant dynamics of the mining environment or processes.” See *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature—severe burns or shock.

An inspector’s conclusion that a possible injury is of a reasonably serious nature has been held sufficient for *Mathies* Step 4. See *Consol Pa. Coal Co.*, 43 FMSHRC 145, 149 (Aug. 2021) (finding it sufficient that the inspector characterized the potential injury as “serious” and noted

potential injuries). The Commission also does not require a specific type of injury for it to be considered serious. *See S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013).

Here, the Secretary provided credible, undisputed testimony that that the hazard could result in severe burns or shock, or even death. Respondent only addressed the *likelihood* of injury, *see* Resp't Br. at 9–11, making no assertions about the severity of the injury if it occurred. I find it is reasonably likely that an injury that could include electrocution would be a reasonably serious injury.

4. Negligence

I find that negligence was properly assessed as “moderate.” The foremen charged with inspecting the load center are familiar with the mining industry and relevant facts. They should have been familiar with the protective purpose of labeling the breaker properly to identify which equipment it powers. Therefore, I find that a reasonable prudent person in their position should have known about the violative condition and acted to remedy it.

Respondent clearly could have known of the condition because it provided no rebuttal to the inspector’s contention that the foreman inspects the load center twice per day.⁴ While it is possible that the #25 miner was only brought into the mine within the last inspection cycle, it was plugged into a breaker with the wrong marking, the same as another breaker in that load center, and nobody noticed it during the installation or subsequent examinations. Further, the existence of a small tag on the cable with the correct marking does not negate the obvious violative condition of the more apparent, improper identification on the breaker.

5. Penalty

The Secretary has entered Respondent’s violation history [MSHA Directorate of Assessments, Assessed Violation History Report] into evidence. *See* Ex. P-6. I have reviewed Respondent’s general and repeat violations, and I find that the Secretary has properly considered Respondent’s minimal violation history in his calculation. I agree that the Secretary has properly evaluated the size of the mine in his calculation. The parties have stipulated that payment of the penalty will not affect Respondent’s ability to continue in business. *Jt. Stip. 6; S. Br. at 2.*

The proposed penalty was based, in part, on the negligence [moderate] and gravity [reasonably likely] assessed in the citation. While I affirm the negligence and gravity as assessed, I do find that the operator’s negligence here was at the low end of the moderate scale due to its proactive adoption of a program, not required by the regulations, to “lock-out, tag-out, try-out” equipment. The inspector acknowledged that he was aware of the program. One cannot rely on

⁴ It is somewhat ironic that the operator asserts that a miner would have noted and avoided the hazard, yet a foreman charged under the Act with the responsibility of identifying hazardous conditions failed to do so in this case. This is not a criticism of the foreman, but an observation on the dangers of confirmation or other biases and the possible effect of time and other pressures and distractions on miners working in a challenging, dynamic underground environment.

this program, and the miner cooperation and precaution upon which it depends, as an absolute protection against injury. But it seems logical that the program would reduce the likelihood of injury in these circumstances, and I find that the operator should be credited for that.

The citation was terminated almost immediately by properly marking the breaker as #25, so the operator rapidly complied upon notification. Thus, Respondent demonstrated good faith in achieving rapid compliance following citation. Taking into account both the gravity of the violation—particularly, the S&S finding—and the mitigation of that gravity by the “lock-out, tag-out, try-out” initiative, I assess a penalty of \$700.

C. Conclusion

For the above reasons, I affirm the citation as written and assess a penalty of \$700.

IV. CITATION NO. 9204098

A. Factual Findings

This citation was issued by Inspector Walter Young on February 8, 2021. Ex. P-3. He assessed gravity as “reasonably likely,” “lost workdays or restricted duty,” “S&S,” and one person affected. *Id.* He assessed negligence as “moderate.” *Id.* The description read, in part:

The Mine Operator failed to comply with their approved mine Ventilation Plan . . . in that, the perimeter of the Bleeder system was not maintained safe for travel. Accumulations of dark, orange, murky, standing water were permitted to accumulate . . . at various locations[]. These areas contain tripping hazards in the form of yellow air lines, slick lines, suction hoses, rocks, coal sloughage, crib blocks, rocks and other debris which could not be seen under the surface of the colored water.

Id. Respondent’s Plan was approved by MSHA on February 26, 2020. Ex. P-5, MSHA0065. Section AA is the provision Respondent is alleged to have violated, and reads in part:

The means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter bleeder system. . . . Standing water shall be pumped and or drained down below the top of elevated walkways to assure for safe passage around the perimeter of the bleeder system.

Ex. P-5, MSHA0067.

In bleeder systems measuring several miles, the inspector was only able to enter approximately 40 feet before having to stop because of “murky,” “dirty dark orange water” that came above his 16-inch boot. Tr. I at 206, 208, 214, 228; Tr. Volume II at 45–46 (Sept. 29, 2021) (“Tr. II”); Ex. P-4, MSHA0018. The inspector took depth measurements of 1.6 and 1.8

feet by reaching as far into the bleeder as he could, noting that he also observed fresh water stains up to three feet high. Tr. I at 208, 211, 217.

The inspector testified that he could not see below the surface of the water in the two inspection areas. *Id.* at 214. Mr. Verbosky, Consol's safety inspector, acknowledged that he could not see through the water and would not be able to see obstacles underneath, *see* Tr. II at 52–53, 65, though Mr. Houchins, Consol's assistant mine foreman, stated that a lot of the water was clear, *id.* at 168.

The inspector said that the bleeders were not maintained to be safe for travel. Tr. I at 170. Tripping hazards associated with the presence of standing water include rip sloughage, rocks, loose crib blocks, suction lines, discharge lines, air lines, slick lines, and generally uneven terrain. *Id.* at 170, 197. Possible injuries include slip and fall injuries, strains, sprains, concussions, contusions, and broken bones. *Id.* at 198, 208. He also noted the possibility of cellulitis from skin or wound contact with contaminated water. *Id.* at 208, 288–91.

While acknowledging that it was possible to drown in an inch of water, *see id.* at 234, the inspector assessed the most likely severity of the injury to be “lost workdays or restricted duty” from a slip and fall injury. He also noted that examiners normally travel in pairs, but that the practice would not prevent one person from tripping. *Id.* at 235.

The standing water had no effect on the ventilation. Tr. II at 23, 141; Ex. R-5. The bleeder is not a place where miners regularly work—it is only traveled by examiners, and nobody was conducting exams at the time of the inspection. *Id.* at 32, 86. Mr. Baker, Consol's mine examiner, stated that miners, including examiners, are supposed to walk carefully while doing their work. *Id.* at 115. Similarly, Mr. Houchins stated that the presence of standing water makes you walk more carefully. *Id.* at 158, 183.

Multiple bleeders had standing water, at different levels, for six weeks. *See* Tr. I at 188, 190–94; Ex. P-4, MSHA0027, 0030–34. Consol continuously pumped the water and added equipment—pumps, compressors, discharge lines, sumps—as necessary. Tr. II at 35, 63–64, 89, 112, 136, 164. Mr. Verbosky testified that water had been pumped down below the cited levels at dates prior to the inspection. *Id.* at 40. Mr. Baker testified that water had previously been pumped down to ankle depth or lower (calling it a “minimum level”), but that unforeseen circumstances and problems with pumps contributed to the cited standing water. *Id.* at 104, 121; *see also* Tr. I at 265–68; Ex. P-4, MSHA0027–30.

Respondent expended significant effort to remove water. Messrs. Verbosky and Houchins testified about installing multiple compressors on the surface. *Id.* at 63, 136, 161. They each also noted the creation of sumps to move water. *Id.* at 72–73, 136, 137, 176–77. Mr. Tajc, Consol's ventilation engineer, and Mr. Houchins each described carrying new or repaired pumps several miles to abate the accumulation. *Id.* at 93, 146, 151, 152–53, 154.

Witnesses also described compounding problems. First, the inspector acknowledged that the bleeders in this mine were predominantly very wet, and that there is water in the bleeders all the time that is impossible to remove. *See* Tr. I at 170, 270. There were continuous equipment

failures, but Respondent replaced, repaired, and installed additional pumps. *See id.* at 229–31, 255–567; Ex. P-4, MSHA0007–08. Finally, a water pipe broke around the time of the citation, and Mr. Houchins attested to previously changing broken pipes. *See Tr. II* at 114, 146.

B. Disposition

1. Violation

The cited standard requires development of and compliance with an approved ventilation plan. 30 C.F.R. § 75.370(a)(1) (2022). Required contents include the means of maintaining bleeders free of standing water. *See id.* § 75.371(aa) (2014).

The requirements of a MSHA-approved ventilation plan are treated as mandatory safety standards for the purposes of inspection. The cited standard requires the operator to follow the contents of the approved plan. The approved plan required pumping to remove standing water specifically to make travel safe. *See supra* Section IV.A.; Ex. P-5, MSHA0067.

Respondent asserts that there is no violation because it complied with the Plan, stating, “[N]owhere in the mine’s ventilation plan does it state that the mere presence of standing water [of] any depth or color is a violation.” Resp’t Br. at 23. Respondent argues that because the Plan “does not establish any criteria for when a certain depth or color of water constitutes a violation,” it lacked notice of the criteria the inspector used to assess the violation. *Id.* at 27.

The Plan requirements are enforceable as mandatory safety standards. Respondent was not without notice of the applicable standard. First, precedent provides that such a violation and corresponding S&S designation have been affirmed against this operator. *See Consol Pa. Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017) (“Consol does not contest the finding that the accumulations of water violated the ventilation plan’s requirement that bleeders be maintained safe for travel, thus satisfying the first element of the *Mathies* test.”).

Second, per the *Skidmore* standards, I am persuaded that the Secretary’s interpretation of the regulation—that a violation occurs when standing water is at a depth and darkness that obscures possible obstacles—is reasonable. First, this interpretation is consistent with the regulation’s language requiring the removal of standing water to ensure safe travel. *See Ex. P-5, MSHA0067.* Plain language dictates that safe travel is hindered by the presence of standing water. This is due to the presence of obstacles obscured from view.

Second, this interpretation serves a permissible regulatory function. The Secretary’s reasoning is valid because the regulation is intended to protect miners—in this case, from slip and fall hazards.

I find that the Secretary proved the violation by a preponderance of the evidence. Standing water existed in the violative bleeders. The water went above the inspector’s boots even before deeper points in the water. Testimony from the inspector *and* Consol employees demonstrated that the water was “murky” and darkly colored to the point that they could not see

obstacles under the water. This is sufficient for a violation under the strict liability for mandatory safety standards.

2. Gravity

a. Likelihood

The Secretary asserts that the injury is reasonably likely. If the hazard—inability to see obstacles while traveling through standing water—occurred, it is reasonably likely to result in tripping and falling. I affirm the assessed likelihood.

b. Severity

The Secretary provided credible testimony that tripping over an obscured obstacle would result in a sprain, broken bone, or head injury. I find that such an injury would reasonably result in a miner missing at least a full day of work. I affirm the assessed severity.

c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I find this reasonable because only examiners and inspectors travel the bleeder systems. Further, while examiners usually do this in pairs, it is likely that one would see the other fall and avoid the hazard. I affirm the assessed number of persons affected.

3. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The violation has been established.

The failure to keep a bleeder clear of standing water that obscures fall hazards is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section IV.B.1.

The Commission has affirmed a judge's S&S finding against this operator in sufficiently similar circumstances. *See Consol Pa. Coal Co.*, 39 FMSHRC at 1901. The facts in that case are almost identical to those here. In that case, the same inspector cited Consol for a violation of section 75.370(a)(1) because water was taller than his 18-inch boot, extended over a large area, was discolored, and contained tripping hazards. *Id.* at 1897. I find that the remaining *Mathies* factors were also established by a preponderance of the evidence.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—inability to travel safely because of obscured obstacles.

Unsafe travel is the discrete safety hazard against which the Plan's violated provision intended to protect. I find the inspector's description of the depth and color of the water credible. Even accepting Mr. Houchins' statement that a lot of clear water existed, that fact could not negate the presence, in other locations, of deep and "dark, orange, murky, standing water" as cited.

Further, the description mirrors the violative conditions already held to be sufficient for Step 2. In the previous similar Consol case, the Commission accepted the inspector's explanation that there were uneven floors and debris, that some water was so murky that a miner could not see his feet, and that it was reasonably likely that a miner would trip and fall walking through that hazard. *Consol Pa. Coal Co.*, 39 FMSHRC at 1899.

The Commission also expressly found that "[t]he requirement of a safe travelway is inextricably intertwined with the ventilation plan requirements of section 75.370." *Id.* at 1900 (acknowledging that examiners are required to travel bleeders). This negates a defense that miners do not work in the area, because examiners are required to walk the bleeders in the course of their work, and it is the operator's duty to ensure that they may travel there safely.

It is reasonably likely that a miner working in the area would not be able to see obstacles while traveling through the violative bleeders. Logic dictates that a person might reasonably trip over such an obstacle or unknown terrain and fall, or that the miner might step on or into an unseen obstacle, leading to a foot or leg injury. This possibility is sufficient to meet the requirement for Step 2. Therefore, the violation—failure to maintain bleeders free of standing water—is reasonably likely to result in the discrete safety hazard against which the regulation is directed.

c. Step 3: It is reasonably likely that inability to see obstacles in the standing water would result in an injury.

At this stage, the hazard caused by the inability to see obstacles in standing water has been established. For the reasons below, I find that the evidence establishes a trip, stumble, or fall due to obscured obstacles is reasonably likely to result in an injury.

Based on similar facts, the Commission has credited competent testimony that a miner who trips and falls is, "at a minimum, reasonably likely to suffer reasonably serious injuries such as broken bones." *Consol Pa. Coal Co.*, 39 FMSHRC at 1900. It is sufficient here that the inspector credibly testified that individuals could trip over many hidden obstacles in the murky, standing water, resulting in sprains, broken bones, or concussions. This testimony was bolstered by the fact that Mr. Verbosky acknowledged that there were places at which he could not see beneath the water's surface and would not be able to see obstacles.

I reject Respondent's assertions to the contrary. First, the operator contends that water in the bleeders never impeded or affected the ventilation. Resp't Br. at 34. This is irrelevant to the particular provision of the Plan that requires removal of standing water to permit safe travel.

Second, the operator argues that examiners are trained to walk through water in a bleeder cautiously. *Id.* at 34–35. Mr. Baker and Mr. Houchins testified to the caution employed in

traveling the bleeders to take ventilation readings and facilitate water removal. This testimony is irrelevant, however, because the Commission has stated that miner precaution is not a defense in a Step 3 analysis. *See Consol Pa. Coal Co.*, 39 FMSHRC at 1900–01 (quoting *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992)) (“[T]he exercise of caution is not an element in determining the likelihood of injury once the reasonable likelihood of the occurrence of the hazard is established, because ‘[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe working conditions.’”).

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature—broken bones, sprains, or concussions.

An inspector’s assessment of an injury as reasonably serious has generally been accepted. *See supra* Section III.B.3.d. Here, the Secretary has provided credible testimony that falling over obscured obstacles in standing water can result in strains, sprains, concussions, contusions, broken bones, and even death from drowning.

Respondent mostly addresses the *likelihood* of injury. *See Resp’t Br.* at 34–36. Most relevant, Respondent contests the inspector’s basis for his testimony that there are also hazards associated with the presence of contaminants that could cause cellulitis if the water contacted existing skin wounds. I need not address this, however, because it is sufficient for Step 4 that a trip, stumble, or fall over obstacles obscured by standing water would lead to the reasonably serious injuries cited by the inspector, and by the Commission and its judges in similar cases.

4. Negligence

I find that negligence was improperly assessed as “moderate.” This is supported under a reasonable prudent person standard specific to mine operators. Respondent is familiar with the mining industry and relevant facts, and it has explicit familiarity with the protective purpose of this particular regulation. *See supra* Section IV.B.3.a. (noting that Respondent’s similar violation has been affirmed as S&S by the Commission within the last five years). Therefore, I find that a reasonable prudent person in Respondent’s position should have known about the violative condition.

The operator knew of the violative condition, but I find that the operator conducted every reasonably expected action to abate the standing water condition, even in the face of compounding problems. The Commission has affirmed a finding of no negligence where the Secretary failed to describe any actions not taken to meet the standard of care. *See JWR*, 36 FMSHRC at 1977. There, the Commission found no failure to act, noting that the inspector explained the citation was issued because “MSHA believed there was negligence and JWR ‘did not do everything [it] could’ to see that the contractor was following regulations.” *Id.*

Here, the inspector acknowledged that Respondent implemented all means of removing water, noting that so long as all the equipment continued to run, those methods would have been sufficient. *Tr. I* at 274. He stated that the measures were clearly insufficient because everything should not have been failing at once. *Id.* at 238.

This is similar to *JWR* because no specific failed actions were described. As with the broad failure to “do everything [it] could,” the Secretary here asserts that the failure of the measures taken equals negligence. I disagree.

While the presence of standing water existed for six weeks, the evidence demonstrates that considerable work was done to pump the water, that the number and severity of violative areas decreased over time, and that water was often pumped to acceptable levels before recurrence.

This was no small feat under the circumstances. Employees hand-carried replacement water pumps miles to remove water. Respondent installed more compressors when the existing were insufficient, and it built sumps to facilitate removal in steps. I find it noteworthy that Mr. Houchins, the assistant mine foreman, was personally involved in extraordinary efforts to correct the problem. *See* Tr. II at 146–54; Ex. R-6, CONSOL 022.

Numerous compounding problems also existed. Respondent dealt with constant wet conditions, broken pumps, and broken water pipes adding to the natural accumulation. It was reasonable to progressively address the problem as attempts proved inadequate, and there was no evidence that the operator was insufficiently focused on the problem. *See* Tr. I at 254–57; Tr. II at 101–06, 115–16, 135–37, 146; Ex. P-4, MSHA0037–40; Ex. R-5, 6; *see also* Resp’t Br. at 38. Indeed, the inspector conceded that every corrective measure used to lower the water to acceptable levels had already been implemented by the operator before the inspection. *See* Tr. I at 200–01, 241–42, 274; *see also* Resp’t Br. at 38.

The Secretary argues that grossly inadequate actions should not be considered mitigating circumstances. *See* S. Br. at 18; *Maple Creek Mining, Inc.*, 26 FMSHRC 539, 553 (June 2004) (ALJ), *aff’d in part & rev’d in part on other grounds*, 27 FMSHRC 555 (Aug. 2005). There, the judge affirmed the negligence finding because she found that the pumping conducted was “grossly inadequate.” 26 FMSHRC at 553. The Commission affirmed her negligence finding, agreeing that the testimony indicated a “lack of seriousness” on the operator’s part with respect to water accumulation in an escapeway. 27 FMSHRC at 566.

Accepting the Secretary’s contention, I find that the record in this case does not support a lack of seriousness on Respondent’s part. While previously inadequate, the measures employed made bleeder travel safe intermittently, and Respondent made continuous efforts, including the addition of a surface pump, before the inspection cited the violation. A senior mine manager was personally involved in these extensive efforts. The facts here are thus clearly distinguishable. For the above reasons, I reduce the negligence finding from “moderate” to “none.”

5. Penalty

I have previously recognized the Secretary’s proper consideration of the operator’s business size and ability to continue in business. *See supra* Section III.B.5. These Section 110(i) considerations remain the same here.

Respondent's history of violations is reflected in Exhibit P-6. Its history consists of six repeat violations during the inspection period. Accordingly, this factor has already been properly considered and is of no consequence in my decision to modify this assessed penalty.

I affirm the violation's gravity as assessed. I found that injury is reasonably likely, is likely to result in lost workdays or restricted duty, is S&S, and would affect one person. Accordingly, this factor did not affect my decision to reduce the penalty.

Following the citation, Respondent pumped the accumulations of water down and made the area safe for travel within nine days. Considering this fact with its demonstrated continuous mitigation, I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification.

The proposed penalty was based, in part, on the negligence assessed in the citation. Because I find that a reduction in negligence is warranted, *see supra* Section IV.B.4., I also find that a penalty reduction is appropriate. The proposed penalty was \$674.00, based in part on the Secretary's finding of moderate negligence. Because I find that the operator was not negligent, I assess a penalty of \$150.00.

C. Conclusion

I affirm the citation and gravity. I find a reduction in negligence from "moderate" to "none." I therefore assess a penalty of \$150.00 in accordance with the modification.

V. CONCLUSION

It is **ORDERED** that Citation No. 9203910 be **AFFIRMED** as issued.

It is also **ORDERED** that Citation No. 9204098 be **AFFIRMED** with the assessed gravity, and that the level of negligence be **MODIFIED** from "moderate" to "none."

Finally, it is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of **\$850.00** within 30 days of the date of this decision.⁵

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

⁵ Please pay penalties electronically at [Pay.Gov](https://www.pay.gov), a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 28, 2022

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), obo
TARA OTTEN

Complainant

v.

CONTINENTAL CEMENT COMPANY,
LLC,

Respondent

DISCRIMINATION PROCEEDING

Docket No. CENT 2021-0013

Mine: Hannibal Underground
Mine ID: 23-02434

DECISION AND ORDER

Appearances: Megan J. McGinnis, Esq., for the Secretary of Labor, R. Lance Witcher, Esq., and Thomas R. Chibnall, Esq., for the Respondent

Before: Judge William B. Moran

In this discrimination matter brought under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., (“Mine Act” or “Act”), the issue is whether a miner walkaround representative, when accompanying an MSHA inspector during an inspection, is entitled only to the miner’s regular rate of pay or to the upgraded pay that miner would have received, per the mine’s employment agreement, but for the miner’s participation in the walkaround.

The walkaround provision is set forth at 30 U.S.C. 813(f). Titled “Participation of representatives of operators and miners in inspections,” in relevant part, it provides “Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer *no loss of pay* during the period of his participation in the inspection made under this subsection” (emphasis added).

For the reasons which follow, the Court finds that when Congress provided in 30 U.S.C. 813(f) that such representative of miners who is also an employee of the operator *shall suffer no loss of pay* during the period of his participation in the inspection made under this subsection, *it meant what it said: the representative shall suffer no loss of pay*. As Complainant Ms. Tara Otten

did suffer such a loss of pay, Continental Cement Co. LLC, violated the Act's discrimination provision, 30 U.S.C. §815(c) .

FINDINGS OF FACT

Although the Court here includes its findings of fact from the hearing testimony, it does so only for the sake of completeness.¹ It makes this point at the outset because, in its estimation, the record does not reflect conflicting facts. There being no genuine facts in dispute for the Court to resolve, this case devolves into a legal interpretation of the no loss in pay provision for miners' accompanying an inspector during an inspection. Though not apparent to the parties, and not realized by the Court until the hearing testimony was well underway, this matter could've been resolved through cross-motions for summary judgment. With that observation noted, the findings of are now presented.

The Secretary's presentation began by calling MSHA Special Investigator Charles Lee Jones. Tr. 54-55. (Hereinafter, "Investigator Jones," "Investigator" or "Jones"). He works out of the MSHA Madisonville, Kentucky District Office. In 2020 he conducted such an investigation regarding a discrimination complaint made by Ms. Tara Otten. MSHA received the complaint from Ms. Otten, Complainant, on April 28, 2020. The essence of her claim, as related by the Investigator, was that Ms. Otten "informed [him] that she was the most senior laborer in the pool and that she would have been entitled to operate the equipment, to be upgraded. But because she chose to participate in the MSHA inspection, she was -- that pay was removed from her." Tr. 58. Joint Ex 1, J-1. , Ms. Otten's Complaint.² The Complaint named Terry Powell, Stacy Fujarski and Heather Ames as the persons who discriminated against her. Complainant alleged that she was entitled to the upgraded rate of pay as a mobile equipment operator during "the weeks of 3/21, 3/28, and 3/29, 4/4." Tr. 60.

The Court would note that there is no dispute that Ms. Otten is a miner and that acting as a miners' representative is protected activity. Only the third element is in dispute: did she suffer "some sort of discriminatory act, ... in this case, loss of pay?" Tr. 61. Thus, Complainant seeks her backpay and direction that the Respondent will not so reduce her pay in the future when so acting as the miners' representative.

As part of his investigation, Investigator Jones sought statements from the individuals named in Ms. Otten's complaint.³ However, he only received one response, that from the mine operator. Tr. 62. Ex. J 3 is the Respondent Operator's position statement, which was prepared by Ms. Heather Ames. Tr. 64. Jones particularly pointed out from that position statement the Respondent's contention that "Miss Otten was correctly paid the upgraded hourly wage while performing work using mobile equipment as outlined in the Hannibal hourly CBA, but she did

¹ This approach also spares the Commission from scouring the transcript record to locate testimony.

² Per the parties' agreement, all the Joint Exhibits were admitted. Tr. 59.

³ Due to the COVID-19 pandemic, Jones did not do in person interviews. Tr.62.

not receive an upgrade hourly wage for acting as a miners' rep as per the current CBA.” J 3 and Tr. 65.

From that statement, Jones deduced that the Respondent was acknowledging that Ms. Otten would have been “entitled to that upgraded pay if the MSHA inspector was not there. In other words, if the MSHA inspector did not show up, or she did not participate in the inspection, there was no question she was entitled to it. They would have paid it without question, the upgraded pay. But because that she participated with MSHA, in the inspection, that was the sole reason for retracting the pay.” Tr. 65-66.

Investigator Jones did interview the Complainant, Ms. Otten, on May 7, 2020. Tr.68, Ex. J 2. This was done over the telephone. Jones informed that, during that interview, the Complainant provided additional information, consisting of “e-mail exchanges between Heather Ames and LaRay Mundell,⁴ or Stacy Fujarski was on some of them.” *Id.* Ex. J3, at pages 5-6.

Ms. Otten provided additional information to Investigator Jones during the interview, beyond the walkaround pay issue.⁵ Tr. 70-71. J 2 at page 3. Jones related that Otten informed that in connection with that “particular inspection cycle, ... the Company had received several citations. And she made the statement that she felt like that there was a target on her back because that she participated in these inspections.”⁶ Tr. 71.

On cross-examination, Jones stated that he did send individual letters to Mr. Powell, Miss Fujarski, and Miss Ames, but those were general letters, which did not request position statements. He also sent an inquiry to Mr. Gutierrez, the plant manager at Continental Cement. Tr. 79-81.⁷

⁴ Jones learned during his investigation that LaRay Mundell was Ms. Otten’s supervisor at the time of her complaint. Tr. 69. Though unimportant to the outcome of this case, it is noted as an aside, that Mr. Mundell also happens to be Ms. Otten’s father. Tr. 95. Similarly, Jones learned that Ms. Fujarski was the payroll specialist and Ms. Ames was the HR person. Tr. 69-70.

⁵ The Court commented with regard to these other matters raised by Ms. Otten, that such other matters are not essential to her establishing her 105(c) complaint. Tr. 76-77. The Court stands by that observation. While those other issues may provide background to this case, they are not essential at all to this matter’s determination.

⁶ Jones added a comment to his remark, to which the Court sustained an objection, and the comment was stricken.

⁷ The Court considers the following to be inconsequential but again for the sake of completeness it is included here. It is noted that were it not for COVID, Jones would have done in-person interviews with Respondent’s personnel. Tr. 83. Jones admitted that though Otten listed three individuals as responsible for the discrimination, he did not interview any of them. Tr. 85. Even though Ms. Ames submitted the company’s position statement, Jones did not follow-up with her about that statement. Tr. 86-87.

Respondent's Counsel remarked that the Complainant did not reference any other, earlier, dates of alleged discrimination beyond those stated in her complaint. Tr.88. In connection with that observation, Counsel noted that there is a time limit within which a complaint is to be filed; namely 60 days. Tr. 89. Pointing to Exhibit J 1, the Investigator agreed that April 25, 2020 is the date on that exhibit and further noting that 60 days before that would be February 28th. From that, Respondent's Counsel asserted that alleged acts of discrimination before February 28th would be too late to assert as acts of discrimination. Jones did not agree however, maintaining that dates earlier than February 28th "go to show history of activity that [Ms. Otten] was subjected to." Tr. 89-90. Jones did concede that Ms. Otten's claim is over loss of pay, but countered with his view that the earlier events may be used to show "that she was being harassed, discriminated against, because of her involvement in these MSHA inspections." Tr. 91.

This decision rests upon the specific issue of the rate of pay Ms. Otten was entitled to during specific dates when she was accompanying an MSHA inspector during an inspection. As such, Ms. Otten's background allegations are not determinative of the issue in this case. However, those alleged preceding events provide useful context in making the penalty determination.⁸

Still referring to Ms. Otten's remarks about prior workplace harassment, Respondent's Counsel, called attention to Ex. J 2 at page 3, wherein it reflects the Complainant's remark that "[d]uring that time [she] called in on the MSHA hotline about November 5th or 6th, because [she] felt [she] was being harassed, not to the point any money was being withheld from me, but it seemed like they were trying to push me out of the miners' rep position and to get me not to walk around with the inspectors." Tr. 93. Respondent's Counsel noted that the Complainant makes no claim that she was losing money as a result of those actions nor does she claim she was disciplined because of them, and Investigator Jones agreed. *Id.* As best as the Inspector could recall, when Otten made her hotline call to MSHA on November 5, 2019, she made no mention

⁸ It is also worth noting that had the other, preceding, events, that Ms. Otten alluded to, been part of the core allegations, the 60 day time limitation for filing a complaint is not jurisdictional in any event. As noted in *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 24 (Jan. 1984), "the purpose of the 60 day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." *Joseph W. Herman v. IMCO Services*, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

or claim that “she had accompanied MSHA all day that day and was only paid her laborer rate.” Tr. 94. However, *regarding the time when she made the complaint in this matter*, Jones stated that Otten did complain that she had accompanied MSHA all day but was only paid a laborer's rate while other laborers were performing mobile equipment operations. Jones remarked that was the essence of her complaint – that “on days that she would have been entitled to that upgraded pay, a laborer with less senior time would run that piece of equipment, but then she was not paid that pay.” Tr. 95. The investigator added that, at first, Otten was paid the upgraded pay but that it was later retracted.⁹ *Id.*

Also referring to page 3 of that exhibit, Respondent’s Counsel directed Investigator Jones to the Complainant’s remark that in February 2020, at which time she was part of the safety focus group, she stated that Mr. Powell, “had to go to what [Powell] called MSHA court on February 5th and 6th. When he got back, he put me on a crappy shift.” Tr.96. Concerning that remark, Respondent’s Counsel asked Inspector Jones whether Otten explained why she considered that to be harassment? Jones answered that Otten “talked [to him] about the inspection where she participated with the MSHA inspector and [the mine] received ... several D orders, or a couple of D orders.” Tr. 96. Jones reaffirmed that Otten’s complaints relating to those D orders were made to him at a point in time beyond the 60-day period for her to file a complaint of discrimination. Tr. 98. The Court notes that, aside from providing useful contextual information, this issue is not relevant to the core issue in this case.

This is an appropriate point to highlight the core issue in this case. The Court believes that it may be simply stated:

The Respondent believes that the Collective Bargaining Agreement (“CBA”) carries the day. As applied here, that stance means that because the CBA does not provide that an employee is entitled to an upgrade or any higher pay classification if that employee *does not actually perform that work*, that employee is not entitled to such a pay increase. Period. Full stop.

That the Respondent may ardently believe this to be the case, does not make its position stronger. Accordingly, the Respondent’s approach to present several witnesses affirming their belief that the CBA controls this matter does not make it so. In short, repetition of the viewpoint does not bolster the Respondent’s position.¹⁰

⁹ As mentioned earlier, a quirk in this case is that before the upgraded pay was retracted, originally it was paid by her supervisor, Mr. Mundell, who is her father. Tr. 95. This quirk, while interesting, has no bearing on this case.

¹⁰ In a record replete with information that is immaterial to the core issue, another example from the Respondent involved, Investigator Jones, who upon being referred to Ex J 2 at pages 5 and 6, agreed that he received some emails from Ms. Otten in connection with his investigation and that her name was not on those emails as a sender or recipient. Tr. 102. Jones did not know how Otten acquired those emails. *Id.* Apart from suggesting that Otten inappropriately acquired the emails, the point attempted to be made by Respondent’s counsel was that Miss Ames was responding to Mr. Mundell regarding employees Otten, Matson and

(continued...)

Respondent's Counsel then turned to Ex J 4, which contains the collective bargaining agreement, and specifically to pages 37-49, the wage rate schedule. Tr. 107-108. Jones agreed he reviewed this to compare Otten's labor pay rate with the mobile equipment rate and he conceded that, within the mobile equipment operator rates and the wage rate schedule overall, there is no mention of a wage rate for miners' representatives.¹¹ Tr. 108-109. Nor, the Court would observe, is there a need to have such a provision, as the Mine Act speaks to the issue.

Investigator Jones also agreed that in the CBA there is "a defined provision in the contract that governed when an employee would receive an upgraded wage rate for performing higher classification work." *Id.* Ex. J 4, Section 9 of Article 6 in that exhibit, page 16 of 49. Tr. 110. That section is titled, "Rate of pay for temporary transfers." *Id.*

Accepting that the provision was "negotiated and mutually agreed upon by the Union and the Company," Jones agreed that there is nothing in that document providing that "employees [are] entitled to a higher classification wage simply because another employee who's junior gets that upgrade." *Id.* All of this continues the Respondent's theme that the CBA addresses the issue of upgrades in pay and therefore that it controls the rate of pay when a miner is engaged in a walkaround. This theme is repeated over and over in the Respondent's case.

Jones agreed that the CBA provides "[w]hen work of a higher paid classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours," and that this means "if an employee works less than four -- a minimum of four hours at a higher wage classification that they're going to get an upgrade for at least those four hours." Tr. 110-111. And so too, if an employee works more than four hours, that employee's pay will be upgraded for the whole day. Tr. 111.

Respondent's counsel, building on those admissions from Investigator Jones, then noted that the provision speaks to "[w]hen *work* ... of a higher paid classification it required an employee," emphasizing that the term "work" is used. Tr. 111. However, the Court considers this to be a fatuous argument. Jones was asked if Otten is performing miners' representative duties by accompanying MSHA on an inspection, if she was required to operate mobile equipment at that time. Tr. 111-112. Naturally, the investigator responded that Otten was not required to operate

¹⁰ (...continued)

Lucas and that they were ineligible for pay upgrades. However, it should not be lost that the latter two were *not* miners' representatives. Counsel's is pointing out that Ames was responding that, *per the CBA*, none of them were entitled to pay upgrades and that her response was consistent with the company's position regarding pay upgrades. Jones agreed that, to his recollection, the mobile equipment upgrade is defined in the contract as is the zipper clause. Tr. 103-104. Jones also agreed that the zipper clause eliminates all past practices. Tr. 104. This information does nothing to resolve the core issue. It is only part of the repeated assertions that Respondent's witnesses believed the CBA answers the issue as to the pay Ms. Otten was entitled to receive.

¹¹ Another example of matters that are distractions, as they do not help resolve the issue in this case, the Respondent tried to wrap into the discussion that the CBA has no rate schedule for carpenters. Raising this is an attempt to bootstrap the dispute by pointing to wage rates for carpenters. Carpenters' pay is *not* a relevant part of this case. Tr. 108-109.

mobile equipment at those times, explaining that she was exercising her rights as the designated miners' rep to travel with the inspector. Tr. 112.

Thus, the argument made by Respondent's Counsel is that "in order to get that paid a higher pay classification upgrade, *work* had to be performed at that higher paid classification upgrade." Tr. 113. (emphasis added). Ex. J 3 was raised to make the same argument: that "a laborer [is] [] eligible for upgraded hourly wage *when running a piece of equipment* classified as mobile equipment." Tr. 123. (emphasis added). With *actually running the equipment* being a prerequisite in the Respondent's eyes, that would be impossible when Ms. Otten was acting as a miners' rep during MSHA inspections. Tr. 123-124.

Investigator Jones did not agree with the Respondent's assertion that that the issue in this case is simply a matter of contract interpretation, restricted to how each side sees the CBA. Tr. 142. The Court agrees with the investigator's perspective.

The Secretary then called, Norris Laray Mundell who has been employed at the Continental Cement Plant at Hannibal, Missouri for 28 years. Presently, his job title is "laborer" in the yard department. During those many years of employment he held other positions in the yard; advising that "for seven years [he] was acting foreman of the yard department," and for many years before that, he was a 'knockout' foreman, meaning if the foreman was absent, he would assume those duties. In short, Mundell had many years working in the capacity as a supervisor at the mine. As noted, Mr. Mundell is the father of the Complainant, Ms. Otten.

Speaking to the events in issue, Mundell explained the job assignment process at the mine. That process takes into account seniority. The yard department, he informed, is a big cleanup crew for the entire plant. Thus, he stated, "Any place on the plant that spills stuff onto the ground, or makes messes, piles, shuts down stuff, the yard department is called in to clean up all this mess so that they can keep operating." Tr. 154-155. The yard department has its own physical location, that is to say, its own building, from which everyone in the yard works out of." Tr. 155. Miners in the yard report in the morning and are given the day's assignments.

At the time in issue here, Mundell had four mobile equipment operators, with everyone else in the position of laborer. *Id.* A key factor in this matter, it is the practice that when there are insufficient mobile equipment operators, laborers are assigned to operate those pieces of equipment. Tr. 156.

The Court here takes note that the mine's seniority process is *not* in dispute in this case. In his role as yard supervisor, Mundell gives out work assignments each day. Critical to this matter, Mundell explained that "if there was more work to be done on mobile equipment, than they had mobile equipment operators, he would assign laborers to run such equipment by seniority." Tr. 155, 167.

Several types of mobile equipment are listed in the CBA and many are pieces of equipment that laborers may be needed to operate. Tr. 160-167 and Ex. J 4 at page 39. When there are insufficient operators, laborers are upgraded to run such equipment. If there is a need for a mobile equipment operator, Mundell stated "when a job comes up for bid, it's always the senior person that gets it if they're qualified." Tr. 167.

Referring to Ex. J 7, that exhibit lists the names of the laborers Mundell supervised in the yard for the week of March 22, 2020. Tr. 170. Speaking to March 24 through March 26 of that week, Mundell agreed Ms. Otten participated in an MSHA inspection on March 24th.

It is worth noting again, because it is important, that there is no dispute between the parties as to the days during this week that Ms. Otten participated in MSHA inspections.¹²

¹² Though unnecessary to recount these details, because there is no dispute about them, for the sake of completeness regarding the days in issue, Mundell stated, without contradiction, that laborer William “Enoch,” Matson was operating a Bobcat on March 2020. Tr.172-173. Charles, “Bub,” Lucas, another laborer also ran a different Bobcat, also referred to as the ‘baby’ Bobcat and a skid steer, on that day. Reid Pullman, another laborer, also ran the ‘baby’ Bobcat on that day, after Lucas moved to another task. Tr. 173-174. Jason Stewart’s name is also listed for that date. He too operated a Bobcat on part of that day. Tr.175. Mundell confirmed that for March 24th, when considering employees Matson, Lucas, Pulliam and Stewart, Ms. Otten had seniority over all of them. *Id.*

In response to an inquiry from the Court to Mundell, and referring to Ex. J 7, he confirmed that “on these days, there were insufficient numbers of mobile equipment operators and that's why th[o]se individuals[,] Otten, Matson, Lucas, Pulliam, Stewart, were called in to operate mobile equipment because the number of people you have to operate the mobile equipment were insufficient on those days, and therefore, these people had to take over these mobile equipment tasks.” *Id.* All four of them operated mobile equipment on that day. Tr. 176.

Turning to March 25, 2020, Mundell confirmed his email notes “MSHA all day” meaning that Ms. Otten was called to walk around with the MSHA inspector all that day. Tr. 176. He believed that each of the other four laborers operated mobile equipment on that day, March 25th. *Id.* Mundell’s notes for March 26 reflect that Ms. Otten was with MSHA all that day too and that Matson was assigned to operate mobile equipment that day. Tr. 177. Lucas too on that date operated mobile equipment and Pulliam as well as Stewart did also. Tr. 178. So too, in his recounting of Ms. Otten’s work during the week of March 23 – March 27, Mundell informed that Otten was operating a skid steer all day on March 23 and March 27th. For the remaining days of that week, she was acting as the miners’ rep with MSHA. Tr. 183. Turning to the following week, March 30th, that email reflects the work the laborers performed that week. Tr. 184. Ex. J 7, M.

Speaking to the work performed by the yard laborers during the week of March 30, 2020. Mundell stated that Ms. Otten was with MSHA during a walkaround on March 31st, April 1st and 2nd. Referring to the other laborers, Mr. Matson, Mr. Lucas, Mr. Pulliam, and Mr. Stewart, he reaffirmed that each of those men were junior laborers to Ms. Otten, and that Enoch, Lucas and Reid were on mobile equipment all that day. *None of this is in dispute.* For April 2nd, Lucas and Matson were on mobile equipment. Tr. 198. Ms. Otten operated mobile equipment on March 30th and on March 31 she spent 2 ½ hours on a skid steer. On April 1st she was on a forklift after 10:00 in the morning and on the next day, the 2nd, she was on a loader after 9:00 a.m. On the 3rd Ms. Otten was on vacation. Tr.199. Though unsure if he marked upgraded pay for Ms. Otten on

(continued...)

The case, very simply, devolves down to whether Ms. Otten was entitled to a pay upgrade as a mobile equipment operator during those times she was accompanying the MSHA inspector as the walkaround representative. In fact, there are no significant factual disputes between the parties on these issues. Accordingly, in retrospect, the Court believes that the parties could have stipulated to all of these facts, leaving only a motion for summary judgment, as important as that issue is, for the Court to resolve.

The Court also takes note that there is no dispute regarding Otten's seniority status vis-à-vis the other laborers. She had the most seniority on the dates in issue. Tr. 181 and Ex. J 5. This again highlights that the only genuine dispute in this case is whether, when acting as the miners' walkaround representative during an inspection Ms. Otten was entitled to the upgraded pay of a mobile equipment operator during the days identified in her complaint.

Upon cross-examination, Respondent's Counsel again raised the carpentry work theme, a contention the Court has noted to be non-starter because it is not involved in this dispute and is otherwise inapplicable, as set forth in the following footnote.¹³

¹² (...continued)

the 3rd, he stated that, if he had done that, it was in error, as she would not be entitled to a pay upgrade on a vacation day. Tr. 199-200. Mundell affirmed that Ms. Otten would've been entitled to operate the Bobcat on March 24th, but for the fact she was accompanying an MSHA inspector as a walkaround rep on that day. Tr. 201. The same applied to March 25th; Ms. Otten would've been offered the mobile equipment job that day too. Tr. 201. In fact, she would have been the first one offered that job. *Id.*

Addressing March 26th, the same applied, with several other laborers operating mobile equipment that day, but for her walkaround duty, Ms. Otten would've been offered the mobile equipment operator job, as Matson, Lucas, Pulliam and Stewart all operated such equipment on that day. *Id.* Mundell confirmed that, other than Ms. Otten being with MSHA on that day, she would've been operating a Bobcat. He also confirmed that she is well qualified to operate a Bobcat and had done so on many prior occasions. Tr. 202. Last, referring to Ex. J-7 (n), at page 2, Mundell agreed that he spoke to personnel upon learning that Ms. Otten's pay upgrade had been retracted. Tr. 204.

¹³ In an attempt to support the Respondent's position, Counsel for the Respondent asked, and Mundell agreed, that per a gentleman's agreement it had been the case that when a laborer performed *carpentry* work, the individual would be upgraded to mobile equipment operator pay. Tr. 207. Mundell agreed that for March 24th, one of the days in issue in Ms. Otten's Complaint, Enoch Matson received such an upgrade on that day and on that day he operated a skid steer loader for a time and then in the afternoon, Matson did office remodeling work. Tr. 207-208. Ex. J 7, tab p. The Court would comment that the obvious point by Respondent's Counsel is that if Ms. Otten were given carpentry work on a day when she was accompanying an MSHA inspector, she would not be given a pay upgrade to mobile equipment pay. But this is a classic straw man argument because the CBA impacted the pay rate for carpentry work. Whereas before that agreement, per a longstanding gentleman's agreement, carpentry work was considered

(continued...)

Mundell agreed that under the CBA there is no provision “that sets a wage rate or offers a pay upgrade for miners' rep duties.” Tr. 212. Apart from past practices at the mine and the gentleman’s agreement in the past, it was Mundell’s position that Ms. Otten should not be penalized because she was with an MSHA inspection as the miners’ rep and that view was apart from those prior arrangements. Tr. 218-219. Respondent’s Counsel noted that Mundell could not point to a provision *within the CBA* that miners are entitled to a pay upgrade when they voluntarily choose to serve as a miners’ representative. Tr. 220-221. Along the same theme – that the CBA controls the issue in this case, Respondent asserts that its position is enhanced because the CBA’s “zipper clause” eliminated past practices.¹⁴ Tr. 222. However, whatever Mr. Mundell’s position happens to be on that issue, it is necessary to point out that it is a matter for the Court decide as a legal question under the facts as determined by the Court.

Respectfully, the Court finds that Respondent’s Counsel continued to pursue hypotheticals which were off the mark and, as such, they are mentioned only in footnotes.¹⁵

¹³ (...continued)

upgrade pay work, the CBA changed that so that the pay increase no longer applied. What the hypothetical, and the question behind it, miss is that carpentry work was no longer eligible for a pay upgrade. As a consequence, after the CBA, no employee performing carpentry work was thereafter ever eligible for a pay upgrade. Accordingly, if the only work beyond laborer, on a given day, was carpentry work, that pay would be at the same rate as the laborer position. Thus, the question misses the mark because on the days in issue in Ms. Otten’s complaint, *she was eligible* to perform mobile equipment operator work, *which work does provide for a pay upgrade under the CBA*.

¹⁴ Other tangential issues ensued, such as whether “*new*” *past practices*, (an interesting turn of phrase), can be created post the CBA. Subjects such as these are all connected with the Respondent’s theme that the CBA controls the outcome of the issue in this case. There were several permutations of these theme advanced by the Respondent during the hearing, such as whether another supervisor, other than Mundell, had ever given a pay upgrade to a miners’ rep on a shift when they never actually operated a piece of equipment during that shift. Tr. 224-225.

¹⁵ These include the uncontested points that a miner would not be able to claim an upgrade to mobile equipment operator if he was not trained for the type of mobile equipment to be used. Tr. 241-242. Unfortunately, other off the mark observations continued. They included remarks that a senior laborer with a broken leg, who can't operate the equipment, would not be entitled to an upgrade just because a junior laborer operated the mobile equipment. Tr. 243. Other arguments of the same ilk were presented, with Respondent’s Counsel asking Mundell, “[i]f a senior laborer is attending annual refresher training, they're at the mine, they're there to work, but they're attending annual refresher training, they wouldn't be entitled to an upgrade just because a junior laborer gets a mobile equipment upgrade while they're unavailable?” Tr. 244. Mundell agreed no upgrade would be due. *Id.* In the same vein, when then asked if things like “vacation, FMLA, jury duty, parent-teacher conference, voting, bereavement leave,” were involved, if he agreed that such miners “wouldn't be available to operate mobile equipment ...

(continued...)

For purposes of clarification, the Court then asked of Mundell if it correctly understood the types of work performed in the yard, inquiring if those categories consisted of laborers, operators of mobile equipment, and carpentry. He agreed that was, for the most part,

accurate.¹⁶ Tr. 246-247. Mundell also confirmed that a laborer who is bumped up from that work to operate mobile equipment is paid at a higher rate. Tr. 247-248. There is no dispute about this. He further confirmed that a laborer who is given a carpentry assignment used to be paid at a higher rate, but that this is no longer the case, as there is no longer any carpentry classification under the current CBA. Tr. 248.

This last point, that there is no carpentry classification *now*, pursuant to the CBA, is part of the Respondent's contention, as the CBA was in effect at the time of the events Ms. Otten cites in her complaint. Thus, Respondent's Counsel asserts that is the effect of the 'zipper clause,' which refers to the elimination of past practices including things like upgrades for carpentry work. From that change, through the CBA, Respondent contends that clause dictates the same result, controlling the issue of walkaround pay. Whatever might have been the past practice for walkaround pay, the zipper clause of the CBA put it to an end, so says the Respondent.

The Secretary then called Terry G. Powell. He is the quarry and auto garage supervisor at the Hannibal plant and Hannibal Mine and from April of 2016 to February 2020, he was the yard supervisor. Tr. 271. His testimony was consistent with the witnesses who preceded him.

He confirmed that if he did not have sufficient mobile equipment operators to do jobs, he "would assign laborers to run mobile equipment." Tr. 272. The yard supervisor determines if it's necessary to assign a laborer to operate mobile equipment. If needed mobile equipment work was needed there would be an upgrade in pay and the work would be assigned based on seniority. Tr. 277. If that was not followed, and the work was assigned to a miner with lesser seniority, the more senior laborer employee would still be paid the upgrade rate, though he did not operate the mobile equipment. This was in line with the contract, meaning the Collective Bargaining Agreement. Tr. 280-281. The provision, he admitted, keeps one from giving the money to a junior person because maybe he didn't like the senior person, or whatever. It's a

¹⁵ (...continued)

even if they were the senior laborer," and that "they wouldn't get the upgrade just because a junior laborer was operating the equipment," Mundell noted that under such circumstances those miners would not even be at work and therefore they would not be getting such pay. Tr. 245.

The Court recognizes that the many examples presented by the Respondent's Counsel simply represent energetic advocacy, that is, trying to make the best case one can. The problem, as the Court sees it, is that none of these analogies advance the Respondent's case.

¹⁶ Mundell explained that there are infrequent occasions when miners from the yard perform other duties, but most of the work involves those three categories. Tr. 246-247.

provision in there to guarantee equality in pay and opportunity.”¹⁷ Tr. 278. As noted in footnote 16, the Court finds that Mr. Powell was not exactly a fan of Ms. Otten. It is also of

¹⁷ As an aside, it is noteworthy that Mr. Powell had an instance when he assigned a less senior laborer to run mobile equipment and this resulted in his having to pay the more senior laborer the upgraded pay, even though that more senior laborer never operated mobile equipment on that day. This result was brought about under the terms of the CBA. Powell violated the terms of the CBA by assigning the mobile equipment operator job to a less senior laborer. *And who was that more senior employee that Powell bypassed, you may ask? None other than Ms. Otten.* The circumstances when this occurred involved Powell assigning mobile equipment work to Mr. Matson, bypassing Ms. Otten, though she had seniority over Matson. Tr. 279. Powell’s excuse for bypassing Ms. Otten was not persuasive to the Court. He stated: “for whatever reason, Tara wasn't -- I -- I didn't either go across the plant, or Enoch [Matson] was handy, he was right there, I just assigned him to do it because it was -- I don't know that it was an emergency, but it was something that needed to be done right away, so I had Enoch do it and -- and just paid 'em both. I mean, that's -- that's -- do I -- I don't remember the reason why I didn't go get Tara [Otten], but -- so I just paid 'em both.” Tr. 279. Powell later added that the decision to bypass Otten “wasn't a mistake. It was a decision I made 'cause -- because Enoch was available, okay? And although Tara may have been available, at the time, I had to have somebody on it right now. So rather than run her down, or go look for her, I made the decision to put him on it. So therefore, by contract, I have to pay her.” Tr. 281-282.

Thus, Powell knew he was bypassing the terms of the CBA; his decision was, as he put it, “was done right -- right out the gate. That was done right as soon as I paid him [Matson], I would have to pay her. Then there is no dispute on pay or anything. Tr. 282. Powell then attempted to justify his action, describing that “[i]t was an *emergency call*, so that's how -- that's just how I have to handle it, how I had to handle it.” Tr. 283 (emphasis added). When the subject was revisited, in which he gave a job to a less senior miner, bypassing Ms. Otten, he reiterated that “the circumstances around that, whether she was available, *it was an emergency, you know.*” Tr. 296 (emphasis added). On cross-examination by Counsel for the Respondent, and pertaining to the event when he assigned mobile equipment work to a junior employee, sidestepping the Complainant, Powell again affirmed that it was an emergency that prompted that action, although he edged back from that description when asked again, stating “[t]hat I remember, yes.” Tr. 306. Though unsure, he believed the event was “sometime in 2019.” *Id.* When Counsel for the Respondent asked the question yet again, asking if Powell’s “concern was that some activity needed to be performed on [the manlift, which was called the], JLG in an emergency fashion,” he modified his response further, answering this time “[i]n a *timely fashion, yes.*” Tr. 307. Uncertain what Powell meant, Counsel for Respondent noted that “timely fashion” could be in a week, or in a day, or in a matter of hours.” Powell then answered “Well, I -- then I guess I should say, yes, it was an emergency, if you look at timely and that. Timely, to me, means right now. So it's a difference in -- in description of what timely means. So timely, to me, means it has to be done right now.” *Id.* His definition of an emergency included “if somebody had an appointment or something that I wasn't made aware of, whether it be USDA to deal with birds, we have vultures, or Reliable Pests to deal with pigeons or whatever, nuisance things, and they were
(continued...)

concern to the Court that his testimony was equivocal at times and that he had an unusual definition of an “emergency.” Adding to these concerns, the Court notes that when Powell was asked if he spoke with Heather Ames about, ...[his] experience in supervising Tara Otten while she was on MSHA inspections, he could not recall but added that he was “not going to say it didn't happen, but we're talking quite some time ago, so no. I -- I don't think we had any particular conversation about that, but I can't be certain.” Tr. 287. When then asked about Exhibit J-7, an email from Ms. Ames to Mr. Robert Pickering, the HR Manager, on April 9, 2020, Powell changed his previous answer stating, it appeared that he did have such a conversation. Tr. 288.

Powell also adopted the Respondent’s perspective about the controlling effect of the CBA. Thus, he did not take issue with the accuracy of Ms. Ames’s email including his remark to her that “[i]f Tara is unavailable for a job, she is not available.” To him, it was “[n]o *different than if she was on vacation, or in the storehouse filling in.*” Tr. 289 (emphasis added). When asked if Ms. Otten is ‘unavailable’ while working with MSHA, whether that it is no different

¹⁷ (...continued)

scheduled there at a certain time to be taken to do their thing at a certain time, then we can't just – you can't just turn them away and say no, come back an hour later, or tomorrow, or whatever. They've scheduled that time.” Tr. 308.

The Secretary’s Attorney later returned to the subject of Powell paying two employees the upgraded pay, which event, as noted, involved Ms. Otten. Powell reiterated that the incident “was an emergency, but she's not available.” Vol II, Tr. 12-13. He then confirmed again that it was an emergency situation. Vol. II, Tr. 13. This time, Powell offered the reason he had Matson operate the JLG instead of Ms. Otten, stating “I didn’t want to go down that rabbit hole, but I will. So there was an incident involving a JLG with her father. He had injured himself previous to that. There was quite some time that had went by, but Tara had made numerous complaints about the equipment, that it was unsafe. We had had numerous mechanics in to work on that. And every time she operated that, we would have to call a mechanic in to look at it. That the safety equipment wasn't working, that -- that there was a problem with it. She would leave the piece of equipment set somewhere, we would have to retrieve it. We do not work on this equipment. United Rentals does. They bring in their mechanic to work on it. They would come in and they think would find nothing wrong with it. So it was easier to, rather than deal with that, was to put someone else on it that had no issue operating it, found no safety issues with it. So that's what the issue was. I tried to be tender when speaking about that, but that -- that's how it is.” Vol. II, Tr. 13-14. Powell stated that Ms. Otten had made numerous prior complaints about the piece of equipment, again referring to the JLG, and to avoid having her complain again about it, he assigned the task of running the equipment to Matson. Vol. II, Tr. 16-18. To be plain, in the Court’s view, Powell’s claim that the incident was an “emergency” was false. As the Court alluded to earlier in this decision, while this event does not impact the legal question, it is, in the Court’s view, reflective that at least some in management were not big fans of Ms. Otten and her active stance on safety matters. It therefore can be taken into account in determining an appropriate penalty applying a *Pasula-Robinette* analysis, or under a straight violation of section 103(f) analysis.

than if she was on vacation, Powell reaffirmed that is his view, stating “It's -- it's no different. If she's unavailable to do the physical work, she's unavailable to do the physical work.” *Id.*

Very simply, Powell’s position on the issue of the pay upgrade was that employees “have to be able to work the job. You can't run mobile equipment if you're not available to do it. If you can't sit in the seat and operate it, then by the Collective Bargaining Unit Agreement, you -- you don't get the pay. I mean, that's pretty much the way it is with every job at Continental. If you cannot do the job, you do not get the pay.” Tr. 295-296.

Powell’s testimony for the day concluded with a reference to Joint Ex 4, the CBA, at page 28 of 49, wherein that document provides “[a]ll hours worked in connection with the work of the committee by a Union representative, including all time spent in pre or post inspection conferences and walk-around time spent in relation to Federal MSHA inspections and investigations as provided above, shall be compensated according to the provisions of this agreement.” Tr. 317. The Court notes that, though asserted in different ways, the Respondent’s position still boils down to whether the CBA controls the walkaround pay due a miner when accompanying an inspector during an inspection.

At the outset of the second day of testimony, the Court notified the parties that “[f]or the dates that are mentioned in the complaint, and just those dates,” they were directed “to present their proposed findings of fact as to whether the Complainant, Tara Otten, would have worked on those days in question, and what that job would have been, and the hours that that would have been. It would either be a mobile equipment operator, or none of the above, or potentially carpentry, if that was the only thing available. ... [and that more was required than simply asserting them as findings of fact because for each proposed finding they were to supply] the record support, through testimony or exhibits, ... for those assertions.” Vol II Tr. 7.

With Powell’s testimony resuming on the second day of the hearing, Respondent’s Counsel tried to create a distinction, namely that when an employee is acting as the miners’ representative during a walk-around, that person is then with the safety department, not with the yard. Powell concurred, expressing, “[i]f [Ms. Otten’s] called out by the safety department to walk with MSHA, *she's with the safety department* until she is released to come back to yard. Then when she would come back to the yard, she would be assigned her duties that day, whether it be laborer work or an upgrade to mobile equipment once she returned to the yard department.” Vol II, Tr. 23-24. Powell thus claimed that during the time Ms. Otten was with MSHA, “she’s not working for the yard department at that time because she's unavailable to do the duties. Yes, she is working basically for the safety department.” Vol II, Tr. 24.

While creative, the Court holds that these attempts to create new administrative labels do not change the analysis. This is because if Ms. Otten accompanied an MSHA inspector on a given day and on that day, but for that walkaround role, she would have been in the yard and assuming there was a need for a mobile equipment operator on that day, she would be entitled to the pay upgrade, regardless of the purely semantic attempt to claim that she was then in the employ of the safety department when accompanying the inspector. To the Court, this argument amounts to an admission that the CBA theory may not carry the day, and for that reason the pretense that she became part of the safety department was nothing more than an invention.

Further, as Powell then conceded, while claiming that Ms. Otten was working “basically for the safety department, [s]he’s actually working on behalf -- she’s representing miners.” Vol II Tr. 24. Yet, Powell believed that the Mine Act provision providing that a representative of miners shall suffer no loss in pay, means no loss in pay but that doesn’t mean they would be upgraded in pay. *Id.* at Tr. 25.

The flaw in the analysis, as the Court sees it, is that Ms. Otten’s pay is to be measured by the pay she would have received during the time she was serving as a miners’ rep. If she would’ve been working as a laborer during those times, she would receive the laborer pay rate, but if she would’ve been working as a mobile equipment operator during those times, that is the pay rate she would’ve received and to pay her the labor rate under those circumstances would certainly be a loss of pay by any definition.

Still another angle presented by the Respondent arose from Ex. J-4, at page 11, wherein it states that “[p]lant seniority shall be in effect at this location.” Powell agreed that the provision says nothing else about seniority. From that, Respondent’s Counsel asked if the provision provides that “just because someone’s seniority they get an upgrade for a particular day.” Vol II Tr. 41. Unsurprisingly, Powell answered it does not so provide. This led Counsel to ask how seniority works, which fed into Powell’s, repeated response that seniority “is for bidding processes. It is for upgrading in pay, *as long as they’re available for that*. And it’s also for if two people put in for the same vacation, then the senior person would get first choice.” *Id.* But the Court notes that this amounts to yet another run at the Respondent’s claim that one must be *available* to perform the work and, if the person is engaged in a walk-around role, they are perforce not available. Vol II, Tr. 44-45 and Ex. J-4 at page 16.

Thus, the Respondent tried “Six ways from Sunday”¹⁸ in its attempt to show that Ms. Otten was not entitled to the pay upgrade when acting as the miners’ walkaround representative. Tr. 50-52 Accordingly, all of their attempted analogies, for example, bereavement leave, work in the storehouse, jury duty, etc., and their contention that one must in fact actually performing the higher classification work, fail, because the Mine Act specifically addresses the issue and provides that there is to be no loss of pay.

The Secretary then called Miss Heather Ames. She is presently the human resource and labor relations manager, but at the times in issue in this litigation she was the HR labor relations specialist, a position she held during March and April of 2020. Vol II, Tr. 56. In that role, she was involved in the decision to retract the Complainant’s pay upgrade for the days named in the complaint. *Id.* at Tr. 58. Ames was aware that Ms. Otten had participated in an MSHA inspection during the week of March 23rd. *Id.* at Tr. 60. She also admitted that the Complainant Otten was

¹⁸ The idiom “six ways from Sunday” means in every way possible, having done something completely, having addressed every alternative. Six ways from Sunday seems to have its origins in the middle eighteenth century as the phrases both ways from Sunday and two ways from Sunday. These earlier phrases referred to the eye condition known as strabismus, where someone’s eyes do not focus in unison, giving the appearance of looking in two different directions. From there, the terms both ways from Sunday and two ways from Sunday gained the figurative meaning of looking at something askew. . . . the idiom carries the same meaning, which is in all ways possible.” <https://grammarist.com/idiom/six-ways-from-sunday/>

the most senior laborer on duty at the times in issue in this matter. Vol II, Tr. 65-66. In retracting Ms. Otten's pay upgrade, that decision was based on one factor only, namely she determined that Ms. Otten was "unavailable." *Id.* at Tr. 63. She determined that Ms. Otten "was unavailable to perform the mobile equipment upgrade." *Id.* at Tr. 66. By using that term, Ames meant Otten "was not present ... [meaning] [n]ot physically present in the department to be able to get on to that piece of mobile equipment." *Id.* However, Ames was fully aware of the reason Ms. Otten was not "available," stating "[b]ecause she was accompanying the MSHA [inspector] during an inspection." *Id.* at Tr. 67. And Ames stated that was the only reason she found Ms. Otten to be unavailable. *Id.* at Tr. 67-68. In making that decision, Ames instructed Miss Fujarski that Ms. Otten was not available to receive the upgrade in pay because she "was not eligible according to the contract," by which she meant the collective bargaining agreement. Vol II at Tr.68-69. Ames discussed the issue with several other personnel at the plant including Scott Allen, Terry Powell, Jose Gutierrez and Bob Pickering. Tr. 70-71. In retracting the pay rate, removing the upgrade, Otten's pay was reduced from \$28.21 per hour to \$25.05 per hour. Tr. 75.

Thus, Ames agreed with Powell that upgrading Otten for MSHA work is no different than her being on vacation or in the storehouse. Tr. 78. Ames also agreed that she told Mr. Pickering that Ms. Otten "chooses to work with MSHA." *Id.* She then added "I mean, she doesn't have to be a miners' rep. That's an elected position by the Union, but she -- she's not forced to be miners' rep, is what I mean." *Id.* Ames agreed that Ms. Otten was with MSHA all day on March 25, 2020. Tr. 80, Ex. J-7 (p). The same was true for March 26th. Tr. 81. Ames informed that she was relying upon the CBA , Article 6, Section 9, right of pay for temporary transfer and Article 14, Section 3, under health and safety. Tr. 82. Ames was the person who wrote the mine's position statement regarding Otten's complaint.¹⁹ *Id.*

Ms. Ames did not acquit herself well in her remark regarding pay for miners accompanying an MSHA inspector, when she commented that "[n]o employees have been upgraded to higher hourly rate for being a miners' rep under the current CBA." Tr. 87-88 and Ex. J-3 at page 5. She affirmed that by that remark she "meant that none of those employees listed as miners' reps received upgrades or special rate for acting as a miners' rep under this current Collective Bargaining Agreement." Tr. 88. But a closer look at her remark reveals, in the Court's estimation, that it was disingenuous. This is because among the list of six miners who were miners' reps, which number included Ms. Otten, *not one* of the other five miners were yard personnel. *Id.* Further, she conceded that not one of the other five employees would even have been eligible for a mobile equipment upgrade. *Id.* As if that were not bad enough, Ames conceded that it was true that those "other five employees, a welder, an electrician, a maintenance electrical welding, and a crush operator, they are paid a higher rate than the laborer throughout the time that they were with MSHA. They were always paid a higher rate on the wage scale than a laborer." Tr. 88-89 and Ex P-7.

¹⁹ A side note, ultimately of no consequence, Ames agreed that, initially, and when speaking with Darin Douglas, the Union President in April 2020, about the pay issue with Ms. Otten in this case, she admitted that she found no provision in the CBA that spoke to the situation where a miner, acting as a walk-around with an MSHA inspector, was not entitled to an upgrade. Tr. 85-87.

The Court may be naïve but considers it possible that some mine operators, rather than having an implicitly negative view towards miners' representatives, could embrace the practice, as such informed personnel might observe hazards to miners that might otherwise be overlooked and thereby make their operations safer, to their benefit and to the miners.

As with other employees called by the Respondent, Ames' position was in line with those management employees of the Respondent, that if Ms. Otten is with MSHA as a walkaround representative, she is deemed "not available." Vol II Tr. 92. Turning to Ex. J-4 at page 5, under Article 2, general, Section 1, the non-discrimination provision, Counsel for the Secretary noted that it provides that: "[a]ll provisions of this agreement shall be applied to all employees without regard to race, color, sex, religious creed, ancestry, disability, age or national origin, *or other status protected by applicable law.*" Tr. 94. (emphasis added). Ames agreed that the designated miners' representative is a status protected by the Mine Act. *Id.*

The Secretary's questioning then turned to an investigation made by Mr. Pickering regarding potential harassment against Ms. Otten. Vol II Tr. 100 and Ex. P-9(a) through (i). In November 2019, Pickering was the HR manager and the exhibit just noted above reflects his notes regarding a meeting he held with Miss Otten, Mr. Clayton, the Union representative and a plant manager, Matt Helms. Vol II Tr. 99. Ames was present at the meeting too. The Court, employing a landscape and trees analogy, commented that the exhibit would not be outcome determinative to the core issue, but that it could have relevance to the broader picture. Vol II, Tr. 103.

Continuing with the theme of the defense, Counsel for the Respondent asked if Ames had ever reinstated any upgrades after they had been retracted. Ames answered that she had done that and that such changes were all based on the terms of the CBA.²⁰ Tr. 107. In what the reader will recognize as more of the same contention, Ames affirmed her view that seniority does *not* mean that a senior employee is entitled to a wage upgrade that a junior employee receives if that senior employee is *not available* to do the work of that higher classification. Tr. 118. Ames believed that paying Otten the upgrades while acting as the walkaround representative violated the CBA and that such an upgrade was no different than the inappropriate upgrades paid to Matson and Lucas when they were replacing ceiling tiles, which was considered to be carpentry work. Vol II Tr. 129-141. She maintained that the decision to retract the upgrades for all three was based solely on the Collective Bargaining Agreement. Vol II Tr.140.

Again, the Court must note its view that the Respondent's many revisitations of the same contention does not advance the persuasiveness of that contention. Numerosity, at least in terms of counting the number of times witnesses affirmed that the provisions of the

²⁰ It should be noted that the Court finds that many issues raised by the parties were immaterial to the resolution of this case. One example involves whether Mr. Mundell improperly coded payroll matters. Tr. 109-110,129. This is a distraction from the issue before the Court. If the CBA and provisions within it, such as the zipper clause, rule the day, then Mundell, or anyone who coded a pay upgrade when the CBA did not allow such an upgrade would have made a coding error. However, if as the Court finds in this case, the walkaround, *no loss in pay*, provision encompasses pay one would have received but for that person accompanying an inspector during a walkaround, then the CBA takes a back seat to the statutory provision.

CBA control the issue of the pay due, does not translate into prevailing on the issue. This is because of two fundamental things – the facts attendant to the work Ms. Otten would have performed on the days in issue in her complaint are not in dispute and the question, given those undisputed facts, is a legal determination of the no loss in pay provision when a miner is engaged in a walkaround with an MSHA inspector. Attempted analogies such as entitlement to pay upgrades when a miner is on jury duty, required MSHA training, bereavement and the like are off the mark, because the walkaround right is in a class by itself.

And though it could not be clearer from all the foregoing testimony from the Respondent, Ames affirmed that her response to the MSHA special investigator Jones, was made on behalf of the mine operator and it was “based on the language of the Collective Bargaining Agreement.” Tr. 177. Amplifying its view, Ames expressed that Ms. Otten’s pay upgrades were retracted not because she was with MSHA for inspections, but rather because the upgrades “didn’t comply with the Collective Bargaining Agreement.”²¹ Tr. 179.

The Court then made a few comments about the conduct of the hearing through that point of the proceeding. First it noted that the procedural rules allow it to control unduly repetitious and cumulative evidence. It remarked that it had not invoked that authority up to that point, but that it had heard much repetitious testimony. Tr. 189. The Court then noted that, as there was testimony of pay being retracted from Ms. Otten which pay was then reinstated, those specific times would then be moot. In those instances, the parties’ briefs should take note of these corrections. Tr. 190.

The Court also expressed that certain issues were, effectively, dead-ends. These included items such as Mr. Mundell’s coding errors regarding pay, talk of jury duty, MSHA required training and bereavement leave, with the Court advising the parties that none of those were material to the issues in this case. The Court expressed that the labor grievance process is of the same non-material ilk. Vol II, Tr.191-192. Instead, the Court expressed that, at that point in the hearing, the critical issue is whether the CBA “reign[s] supreme vis-à-vis the Mine Act walk-around provision. Vol. II, Tr. 192.

Following the Court’s remarks, testimony resumed. In an attempt to repair the adverse inferences raised earlier in the testimony, regarding whether she harbored a negative view of Ms. Otten, Ames agreed that in connection with her email references to Ms. Otten having so many

²¹ In support of its position, Respondent pointed to Ms. Otten’s filing of a grievance in connection with her pay upgrade issue. Tr. 181. Ex. R 4. The complainant filed her grievance on April 20, 2020. This was at a time before she made her complaint to MSHA. In her grievance, Otten asserted that removing her mobile equipment upgrades violated the CBA on the basis that the upgrades were a past practice. Tr. 182. It is recognized by the Court that past practices were eliminated under the CBA by virtue of the zipper clause. Tr. 183. Following a “second step” denial of the grievance, there was no third step or arbitration requested by the union. Tr. 187-188. The Court commented that, while Ex R 4 was admitted, that action did not imply that the Court was suggesting that it would be material to this decision. For the reasons within this decision, the Court finds that, like the CBA, the outcome of the grievance action also has no bearing on this decision.

issues with Terry Powell, she then conceded that Ms. Otten, as the Union steward, would be expected to have such issues because she represented fellow employees in such matters. Vol II Tr. 196-197. Further, Ames acknowledged that when she contacted Powell on the pay upgrade issue in this case, she knew that Powell did not get along with Ms. Otten. Vol II, Tr. 197. The Court, reflecting on this additional testimony, reconsidered its earlier view, and advised that further testimony on the matter could be of value. During this revisitation of the issue, Ames acknowledged that there was “turmoil” within the labor department and this was a factor in Powell’s decision to leave that department. Vol II Tr. 210-211. Ames then admitted that the Powell’s decision to leave that department was based mostly on his interactions with Ms. Otten. Tr. 211.

Ms. Stacy Fujarski then testified.²² She is a payroll specialist at Continental Cement Company. Vol II Tr.219. Part of her job involves entering the proper coding for payroll processing. In performing that task, she endeavors to have the timecards correspond with the contract. Tr. 221. If she sees a possible error, she contacts a member of management to resolve such questions. Tr. 222. Though Ms. Fujarski was a pleasant person, who explained her role in ensuring that timecards are correct, the Court finds that none of her testimony is of any value to the issues before this Court.²³ Tr. 224-233.

²² Though out of the anticipated order of testimony, an accommodation was made between the parties so that the Respondent could call Ms. Stacy Fujarski to testify. Vol II Tr. 218.

²³ Worn out, figuratively speaking, from witnesses uttering the same contention, the Court inquired of Respondent’s Counsel: “So what’s your point, counsel? And you’re going back to ... adhering to the Respondent’s view of what the CBA required, and through this payroll process you are correcting it to reduce the pay from what was originally incorrectly listed as an enhanced pay. Am I -- am I correct about that? Vol. II, Tr. 233.

Counsel for Respondent, Attorney Chibnall, responded: “*You’re correct*, Your Honor. This was mostly for ... explanatory purposes, ... to explain how the process worked and what it looked like for Your Honor’s convenience, so that when you looked at these documents, or if you did, you’d understand what they meant.” Vol II, Tr. 234. (emphasis added).

The Court then expressed about the lack of value to this testimony, stating: “So isn’t this surplusage? I mean, ...no one is really challenging that there were mistakes from the Company’s perspective in terms of Miss Otten being paid too much. And apparently some instances when there was a correction made and pay was to be increased because she was available; that is, she was not working for an MSHA inspector doing a walk-around. These records just show how the Company corrected it one way or the other, right? But it doesn’t change the philosophy. The [Respondent’s] philosophy is you’re not available, you don’t get the enhanced pay because you’re not available to operate mobile equipment at that time. Why? Because you were with an MSHA inspector.” Vol II Tr. 235-236.

(continued...)

The Secretary, then called the Complainant, Ms. Tara Lynn Otten. Tr. 246. At the time of the events in issue, March and April 2020, Otten was a laborer at the mine, but around February 2021 she became a mobile equipment operator.²⁴ *Id.* She has been a miners' representative since May 2018. Tr. 247. Otten capsulized the essence of her complaint: "The discriminatory action was that my money was retracted. I suffered a loss of wages, loss of pay, for performing my protected act of walking with MSHA." Tr. 253. As she expressed in her complaint, she "would like to have the backpay and continue to receive the upgrade as I always have when acting as a miners' rep." By the term "backpay," Otten meant the difference between labor rate and the mobile equipment upgrade that was retracted. Tr. 254-255. It was also Otten's belief that "this entire thing is an attempt to get [her] to step down as a miners' rep."²⁵ Tr. 256.

²³ (...continued)

Attorney Chibnall responded: "And that's correct, Your Honor. And the purpose of Miss Fujarski's testimony here was mostly explanatory for the exhibit itself. It's already been admitted. But I also had questions regarding the -- the technical piece of it and how to actually perform that operation, which I think is somewhat relevant here."

The Court responded that it will "be interested to hear how it's relevant, but go ahead." Tr. 236. However, upon review of Transcript pages 236-244, with the last page being the end of Ms. Fujarski's testimony, the Court concludes that the testimony did not add anything of value to the issues in this case.

²⁴ This change in Ms. Otten's job classification, from laborer to mobile equipment operator, does not moot the issue of whether she was entitled to the upgraded pay level for the dates identified in this case, as they were before her job change. Further, the broader issue before the Court has not become moot as a consequence of Ms. Otten's new job classification, because the mine would still take the same position regarding pay upgrades for any laborer who would find himself in a similar situation. Thus, the Respondent, through Ames, stated that it would still deny a pay upgrade to anyone else in a situation similar to Otten's in this litigation. Vol II Tr. 206-207.

²⁵ While not critical to the Court's determination of the walkaround issue in this matter, there is some useful background which at least Ms. Otten believed precipitated this dispute. According to her, before she filed the complaint in issue, "going back to November of 2019, we had started an inspection that ... actually started in October. It was a terrible inspection. I mean, it was one of our worst. And at that time, I had filed a complaint with MSHA, and it was against Crystal Hudak at that time. And I had overheard her -- I had given focus notes, which was our safety -- at joint safety committee in their Focus safety meetings. I had given notes to the MSHA inspectors." Vol. II, Tr. 256. The notes were made by Otten whenever an employee would raise a safety issue to her, but other miners in the focus group made notes when such issues were brought to them. Otten informed that many of these issues involved things she had personally witnessed. Tr. 266. All of these notes were given by Otten to MSHA. Tr. 265. They had asked [her] for [the] notes. ... [a]nd then [she] had found out that [Ms. Crystal Hudak] was going around having secret meetings, or closed-door meetings with supervisors regarding the fact that [she, Ms. Otten] gave these notes to MSHA." Tr. 256-257. Otten knew about the "secret" meetings because she overheard Hudak speaking with another supervisor, Dean Welder. At that
(continued...)

At the time of her complaint, when Ms. Otten worked as a laborer in the yard, she informed that generally she operated mobile equipment nearly every day, most often running a Bobcat or skid steer. Tr. 268. Otten identified Ex. P 11 as the document “representing the times and the hours, the dates that [she] walked with MSHA, and where [she] was not given the mobile upgrade, that a junior laborer was on a piece of mobile equipment.” Tr. 269. Working with Counsel for the Secretary, Otten prepared the document, which is a summary of dates and times she was denied the mobile equipment operator pay level because she was accompanying an MSHA inspector as the miners’ rep. For example, per that exhibit, Otten stated that for March 24, 2020, she contends that \$44.24 was due her that day but was instead paid at the labor rate. Tr.

²⁵ (...continued)

time Otten heard Hudak speaking, saying, “So Tara is giving focus notes to MSHA.” Tr. 257. Having overheard that, Otten “immediately felt as if [her] rights were being violated as a miners’ rep.” *Id.* Though she felt constrained not to open the door of the closed meeting, not knowing what else to do, she did speak from outside the door, informing “Crystal [Hudak], I can hear everything you’re saying.” Tr. 257. Following that event, Otten filed a complaint to MSHA about it. She did this by calling the MSHA hotline. This complaint was made *prior* to the event in issue. This event, occurring on November 4, 2019, was not in the distant past to the matter in this case. Tr. 258. Otten also brought the incident to the attention of her Union representative, Wil Clayton and also to Heather Ames. Tr. 259. Ex. J 2. For this earlier incident, Otten was also interviewed by Investigator Jones. During that interview, Otten informed that she told the investigator of other incidents, all preceding the event in this case. Tr. 262. Otten believed that the operator was frustrated after the MSHA inspection, because, as one example, Terry Powell kept mentioning the D orders that MSHA issued with his name on the orders. Tr. 262-263. Powell also referenced having “to go to MSHA court” about the D orders. Tr. 263. One of those orders emanated out of messes in the yard department, the department where Otten then worked as a laborer. Tr. 264. Subsequently, Otten left the safety focus group. This occurred on February 11, 2020 when she was informed by Tim Schlosser, with corporate safety, that in the future all such notes would have to be turned over to corporate. Tr. 267. As that didn’t sit well with Otten, she left the focus group in March or April of that year. *Id.* As Otten put it, upon being told about the requirement to turn over the notes, at the end of the meeting she “thanked everyone for the opportunity, I folded up my notebook, I handed it to Crystal Hudak. I told them that I did not think that our safety program was working as they intended and I stepped down from Focus. But I still remained a miners’ rep.” *Id.*

Although, the incidents recited above are not critical to, nor a necessary predicate to Ms. Otten’s discrimination claim, the Court concludes that, contextually, they are important to a fuller understanding of this matter. Clearly, based on Ms. Otten’s credible testimony, Continental was not pleased with her proactive approach to mine safety including her courage to inform MSHA of her safety concerns. It is also noted that Ms. Hudak was disciplined as a result of Ms. Otten’s complaint regarding that incident. Vol II, Tr. 300. Otten did not agree with the suggestion by Counsel for the Respondent that the incident with Hudak had no connection with the Complaint in this matter. It was her view that at the time involving the Hudak matter she was unaware of “all of [Bob Pickering’s] investigation” and therefore did not know at that time that Hudak had “talked to all of these supervisors, had given them names, had insinuated [that Otten] was throwing people under the bus.” Vol. II, Tr. 301.

270-277. It should be noted that there is no genuine dispute about the mobile equipment operator pay rates on the days in issue, nor that Ms. Otten was accompanying an MSHA inspector during the days and times identified in Ex P 11.

*Again, the only genuine dispute in this matter is whether Ms. Otten should've been paid at the mobile equipment operator rate or the laborer rate.*²⁶ In response to the Court's inquiry, Otten stated that Ex. P 11 reflects the entirety of her monetary damages. Tr. 278. To be clear, Otten is not and has not contended that she was entitled to the mobile equipment operator pay rate *every time* she accompanied an MSHA inspector. Rather, her claimed damages were limited to "entitle[ment] to the upgrades when [she] walked with MSHA if a junior laborer was on a piece of mobile equipment. It was not every time. It wasn't every time I got called out. It was only if a junior employee was on a piece of mobile equipment, then I was entitled."²⁷ Vol II, Tr. 279-280.

The third day of testimony began with the Respondent calling Darin Douglas. He is employed by Continental Cement and is presently the yard supervisor, a position he has been in for the previous nine months. Vol III, Tr. 15. He then stated how upgrades work for temporary work performed by laborers, including as in this dispute, the pay a laborer receives when assigned to operate mobile equipment. With no disrespect by the Court, Douglas' testimony was cumulative, an attempt at reinforcing the Respondent's position as to the procedure for laborer pay upgrades when such individuals operate mobile equipment.²⁸ Vol III, Tr. 16-18.

²⁶ The amount calculated by Ms. Otten, per Ex. P 11, also reflects her 401K match. Under that when miners like her "contribute 4 percent into [the mine's] 401K, the Company will match 100 percent of that 4 percent. And [she does] contribute that amount. And so that is the 4 percent of the total amount that [she] feels [she] was owed. That \$14.94 is 4 percent of all of that." Tr. 277, and Ex. P 11.

²⁷ To avoid potential confusion for those reviewing this record and Ex. P 11, the miners received a pay raise and the difference between the two rates is also reflected in that exhibit. Again, there is no genuine dispute about the figures in this case; the dispute is over the pay rate due to miners' representatives under the circumstances identified in Otten's Complaint.

²⁸ For example, referring to the CBA, Douglas, who informed that he was involved in the negotiation of that agreement, expressed his view that "[t]he miner that walks around for the safety of the Union should be paid their normal wage rate. In this case, Miss Otten was at JC1, which is [the] labor rate. I've been there 26 years and I have never heard of anybody being upgraded when they walked around with MSHA." Vol. III, Tr. 21. Upon cross-examination, Douglas expressed that Ms. Otten had no case. In support of his view, he pointed to page 26 of the contract, asserting that it states "that there should not be an upgrade to walk around with MSHA." Vol III Tr. 27. Joint Exhibit 4 at page 28.

Analysis

Case law regarding the Mine Act's Walkaround Provision

The Court endeavored to research relevant cases construing the walkaround provisions under the Mine Act. Those holdings are referenced here.

In *Magma Copper*, 1 FMSHRC 1948, (Dec. 1979), *aff'd* 645 F.2d 694 (9th Cir., May 18, 1981), the Commission held that “one miners’ representative *in each* inspection party must be paid for time spent accompanying an inspector who is engaged in an inspection of the mine ‘in its entirety’ under 103(a) of the Federal Mine Safety and Health Act of 1977.” *Id.* The language employed by the Commission is instructive, as it remarked that “[w]alkaround pay was designed to improve the thoroughness of mine inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states that the purpose of the right to accompany inspectors is to aid the inspection. The Senate committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a ‘full’ inspection, and ‘enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness.’” S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-617 (1978) [“1977 Legis. Hist.”]. The purpose of the right to walkaround pay granted by section 103(f) is also clear: *to encourage miners to exercise their right to accompany inspectors.*” *Id.* at 1951-1952, (emphasis added).

It was Congress’ judgment that a failure to pay miners’ representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. If only one of the inspectors would be assured of receiving the assistance of a miners’ representative when conducting a 103(a) inspection of the mine, only a part of the mine would be likely to receive the kind of inspection that Congress expected the walkaround pay right to help assure. *Id.* at 1952. (emphasis added).

The Court considers the language, as italicized above, to be useful in this matter, because if the Respondent’s view were adopted, reducing the pay of the walkaround representative from the amount of pay that representative would have received during that time accompanying the inspector “*would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners.*”

In *Quarto Mining*, 12 FMSHRC 932 (May 1990), the Commission upheld the right to walkaround pay where a mine operator’s employee accompanied an inspector, even though the focus of the inspection arose as a result of safety hazards associated with activity of an independent contractor at the site. As instructive here, the Commission noted the 9th Circuit’s decision affirming its holding in *Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), referencing that Court’s remark that “[t]he walkaround pay provision and the participation right are both aimed at the protection of the health and safety of miners - the single overriding purpose of the legislation.” *Id.* at 698.

The Commission then continued “[a]s the Senate Committee that by-and-large drafted the Mine Act stated, paid participation in inspections by the miners’ representative ‘will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness.’ Senate Committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 616-17 (1978). In addition, Congress recognized that paid participation by representatives of miners would, because of the representatives’ particular knowledge of the conditions at the mine, make the inspection ‘much more thorough.’ Thus, the right of paid participation by the miners’ representative provides MSHA’s inspectors needed familiarity with the specific working conditions in a particular mine.” *Quarto Mining* at 937.

The Commission’s decision in *Secretary of Labor on behalf of Greathouse v. Monongalia Coal Co.*, 40 FMSHRC 679 (June 2018), is also believed to be of value. Though it involved bonus plans at the mine, there was testimony from miners’ representatives describing “how the bonus plans negatively affected miners’ willingness to exercise their protected rights (such as the right to report injuries to management, to report safety hazards to management and MSHA, *and to exercise their walkaround rights*.” *Id.* at 703. (emphasis added). The point being that actions by a mine operator, in *Monongalia*, a bonus plan, and by comparison in this instance, denial of the pay that a miner would have received on a particular day, can impact participation in protected rights, here the walkaround right.

Consolidation Coal, 19 FMSHRC 1529, (Sept. 1997), was a discrimination proceeding under the Mine Act, wherein the issue was whether the administrative law judge properly found that the mine operator violated section 105(c)(1) of the Mine Act when it transferred two mine representatives from their positions as “scooter barn” mechanics to positions as underground mechanics. Both miners were told that their transfer, ostensibly brought about because of inadequate transportation and mantrip availability and the decision to have the repair barn operating on a 24-hour basis, could be avoided if they stopped their walkaround activities. The Commission affirmed the violation, noting that a link had been established between the miners’ exercise of their walkaround rights and the decision to transfer them, and rejecting the claim that their absences from the repair barn was the motivating reason for the action. The Commission also took note that, in another case, it had recognized a link between walkaround rights and absenteeism, expressing that “in enacting the walkaround right, Congress recognized ‘that an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights.’” *Id.* at 1536, citing *Secretary obo of Labor on behalf of Truex v. Consolidation Coal.*, 8 FMSHRC 1293 (September 1986).

An earlier *Consolidation Coal* case, 16 FMSHRC 713 (April 1994), held that, even where an operator has a good faith, reasonable belief that the area to be inspected is too dangerous to permit a miner from accompanying the inspector during a walkaround, the operator may not restrict the walkaround right. As enlightening here, the Commission, in recounting the history of the walkaround right, noted “that the walkaround right provided in section 103(f) existed under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) (“Coal Act”). That provision stated: At the commencement of *any* inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the

authorized representative of the Secretary on such inspection. 30 U.S.C. § 813(h) (1976) (amended 1977) *Id.* at 717, (underscoring in original).

The Commission went on to state that “[i]n enacting the Mine Act, Congress continued the Coal Act’s broad application of the walkaround right and expanded rights incident to it. The Conference Report on S.717, the Senate’s version of the bill, explained: The conference substitute expands the concept of miners’ participation in inspections by authorizing miners’ representatives to participate not only in the actual inspection of a mine, but also in any pre- or post-inspection conferences held at that mine. H.R. Conf. Rep. on S. 717, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1361 (1978). In addition to adding a right of the miners’ representative to participate in inspection conferences, the Mine Act added a compensation provision in section 103(f). The Mine Act did not restrict the types of inspections to which the walkaround right applies.

The only qualification to the walkaround right in section 103(f) is that it is subject to regulations issued by the Secretary. The Secretary’s regulations have not limited the walkaround right in the manner urged by Consol. Moreover, although Congress recognized that a walkaround representative could be exposed to danger, (the inspections enumerated in section 103(a) include inspections to determine whether an imminent danger exists as well as inspections of especially hazardous conditions), it did not curtail the walkaround right in dangerous situations. Thus, upon ‘employing traditional tools of statutory construction, including text, structure and legislative history,’ Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989); Chevron at 842-43, we conclude that Congressional intent is clear on this issue. Accordingly, we hold that section 103(f) precludes denying the walkaround right on the basis of an operator’s good faith, reasonable belief that the area to be inspected is too dangerous to be entered.

The right of a miners’ representative to accompany the inspector on all section 103 inspections has been consistently recognized by the Commission and the courts. It has been uniformly held that the walkaround right includes the right to accompany the inspector during section 103(i) “spot inspections” which, significantly, occur in mines that liberate excessive quantities of explosive gases or that present some other especially hazardous condition. ...” 16 FMSHRC 713, 717-719.

The question for the Commission in *Magma Copper Co*, 1 FMSHRC 1948 (1979), was “whether a mine operator [was] required to pay only one representative of miners for time spent accompanying an inspector when the inspection is divided into two or more parties to simultaneously inspect different parts of a mine,” with the Commission reversing the administrative law judge’s determination that only one representative could be paid, holding instead that “one miners’ representative in each inspection party must be paid for time spent accompanying an inspector who is engaged in an inspection of the mine “in its entirety” under 103(a) of the Federal Mine Safety and Health Act of 1977.” *Id.*

Employing words that this Court considers to be of value in this proceeding, the Commission informed “[w]e do not think it is enough to rely, as the administrative law judge did, only upon the literal language of section 103(f). The literal words of a statute may not be the

best guide to the legislative purpose when they appear to conflict with the congressional purpose for creating a right or produce a result that is illogical.” *Id.* at 1950.

Expounding on the importance of this, *the Commission continued*, “[i]t was Congress’ judgment that a failure to pay miners’ representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. If only one of the inspectors would be assured of receiving the assistance of a miners’ representative when conducting a 103(a) inspection of the mine, only a part of the mine would be likely to receive the kind of inspection that Congress expected the walkaround pay right to help assure.” *Id.* at 1952. (emphasis added).

Utilizing those words, in this Court’s judgment, given that the Mine Act is a remedial statute, and taking into account the Commission’s remarks, as italicized above, it would make sense that, as a matter of construction, the Commission’s remarks be read as “it was Congress’ judgment that a failure to *fully* pay miners’ representatives to accompany inspectors would discourage miners from exercising their walkaround rights.” The logic of this interpretation, at least to this Court, is inescapable, as paying less than the miner would have received would discourage miners from exercising their walkaround rights.

Perhaps the most instructive words regarding the ‘no loss in pay’ provision appears in *Monterey Coal Co.*, 743 F.2d 589 (Seventh Cir. Sept. 1984). There, the Court of Appeals for the Seventh Circuit remarked that “[i]n describing the changes of the new Act, the Senate and conference reports on the 1977 Act pointed out the new walkaround pay provisions and stressed the importance of those pay provisions in ensuring miner participation in safety matters. S. Rep. No. 181, 95th Cong., 1st Sess. 28–29, 1977 U.S. Code Cong. & Admin. News 3401, *reprinted in* Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 616–17 (Comm. Print 1978) [hereinafter “Legislative History”]; S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Legislative History at 1323.” *Id.* at 593. And “[t]he floor debate in the Senate on a proposed floor amendment to eliminate the walkaround pay provisions also emphasized the need for walkaround pay to provide for effective miner participation in inspections. 123 Cong. Rec. 20019–20 (1977) (remarks of Senators Javits and Helms), *reprinted in* Legislative History at 1053–56. *Id.* Thus, the mine operator sought to “bifurcate the participation rights and the walkaround pay rights granted by section 103(f).” *Id.* at 594.

The Seventh Circuit noted that the conference committee expressed that “the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-conferences, **at no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety**, including pre- and post-inspection conferences.” *Id.* (*italics in original, bold added*). *Id.*

Of significance in the Seventh Circuit’s analysis, it pointed to “[t]he Senate committee report [which] stressed the importance of involving miners in the inspection process in order both to improve the quality of inspections and to enhance miners’ safety and health awareness. S.Rep. No. 181, 95th Cong., 1st Sess. 28–29 (1977), *reprinted in* Legislative History at 616–17.

The committee said the bill provided for walkaround pay to encourage miner participation. “[t]o provide **for other than full compensation** would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.” *Id.* at 596-597 (emphasis added).

Finally, it is noted that an administrative law judge faced with a similar issue regarding the compensation due during a walkaround, observed “[i]n commenting on the provisions of section 103(f), the Senate Human Resources Committee in its report on Senate Bill 717, the bill which was the basis for the 1977 Act, stated that: “to encourage such miner participation, [in walkaround activities] it is the committee’s intention that the miner that participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.” Senate Report No. 181, 95th Congress, 1st Session reprinted in U.S. Code Congressional and Administrative News 3428-3429 (1977). Within this framework it is clear that if [the Complainant] suffered a loss of pay as a result of his statutorily protected walkaround activities then he suffered discrimination under section 105(c)(1).” *Sec. obo Scott v. Consolidation Coal*, 2 FMSHRC 1056, 1057 (May 5, 1980).

There, as in this case, the mine operator was contending that, per a wage agreement, the walkaround representative was due less than the pay grade one would receive for performing overburden removal work.

The judge held that “[i]n order to assure that [the miners’ representative] is not unfairly penalized for having performed his duties as a representative of miners, I find that he must be compensated in an amount equivalent to the grade 5 rate for the maximum time worked in that mine by any other single employee in the capacity of a grade 5 scraper operator during the time [the Complainant] was engaged in his walkaround activities. To provide him anything less would discourage his participation in these important functions, contrary to law and the clear intent of Congress. Since the evidence indicates that at least one other scraper operator employed at this mine performed the grade 5 work during the entire 21-1/4-hour period at issue, [the miners’ representative] is entitled to the grade 5 pay differential for the entire period.” *Id.* at 1058.

Thus, at least to this Court, given the many broad interpretations by the Commission and the federal courts of the 103(f) walkaround provision, it would be inconsistent to find that a miners’ representative could be, literally, shortchanged by being paid less than the representative would have received but for being engaged in the walkaround.

Must a 103(f) walkaround, ‘no loss of pay,’ violation only be established through application of the *Pasula-Robinette* framework?

The Court believes that while a 103(f) walkaround, no loss of pay, violation may often be established through application of the *Pasula-Robinette* framework, it is not the only avenue for such relief, especially where a slavish application of that framework would work an illogical result, at odds with the statute. Thus, because *Pasula-Robinette* is not a one-size-fits-all formula, it should not be viewed as the sole means for achieving relief from discrimination. In this

instance, the Court applies an alternative analysis approach to this discrimination action, with the view that both are appropriate to employ.

It is true that the argument section of the Secretary's Post-hearing brief, after first noting the text of Section 105(c), begins with a discussion of the *Pasula-Robinette* framework, wherein it is noted that the Secretary establishes a *prima facie* case of discrimination when he proves by a preponderance of the evidence that the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by that protected activity.

Insisting on this 3rd element in *all* discrimination claims would ignore the broader statutory language of Section 105(c) addressing discrimination, which language permits an action upon showing the first two elements.

Nevertheless, if the analysis of an alleged section 103(f) no loss of pay violation must be wedded to *Pasula-Robinette*, the Court still finds that the Secretary established such a case. And this remains true upon application of both the rebuttal and affirmative defense features of *Pasula-Robinette*.

An alternative avenue to provide relief from discrimination where a statutory right is involved

However, the Court believes that making *Pasula-Robinette* the only avenue for redress against discrimination results in a cramped reading of discrimination claims, insisting as it were that a square peg must be inserted into a round hole, and ignores a significant and distinct part of Section 105(c) of the Mine Act. Read, without distorting the words in that section, but focusing on a separate feature within that provision, the Court believes such a reading demonstrates that *Pasula-Robinette* need not be the exclusive analysis for discrimination claims.

The following, **bold text added**, text of Section 105(c) shows this to be true.

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against **or otherwise interfere with the exercise of the statutory rights of any miner**, representative of miners ... in any coal or other mine subject to this chapter ... **because of the exercise by such miner**, representative of miners ... on behalf of himself or others **of any statutory right afforded by this chapter.**

30 U.S.C. §815 (c)

Another, perhaps clearer, way to express this, as particularly apt to the discrimination claim here would thus be expressed as:

No person shall in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner because of the exercise by such miner of any statutory right afforded by this chapter.

This focus on particular words within the provision does not work any distortion of it. And, so read, the Court finds that the Respondent violated Ms. Otten's *statutory right* to accompany the MSHA inspector as the miners' representative by *interfering* with the exercise of that right by imposing a loss of pay upon her.

And while it is true that the Commission has applied the *Pasula-Robinette* framework in Section 103(f) walkaround cases, it has not invoked it each time. For example, in *Quarto Mining*, 12 FMSHRC 932 (May 1990), referred to above, the judge, in finding that the operator denied the miners' rep the opportunity to participate in an inspection of the mine without a loss of pay, made no reference to *Pasula* in his decision, 11 FMSHRC 523 (April 6, 1989), nor did the Commission's in affirming it.

When this focus on language within Section 105(c) is applied to the walkaround right, per Section 103(f), the applicable language within that provision, establishing the statutory right, plainly provides that the right is to be exercised so that the walkaround representative *does not suffer any loss of pay*. Undeniably, Ms. Otten suffered a loss of pay per the dates identified in her Complaint.

Thus, the Court finds as fact, that "Otten was entitled to the mobile equipment hourly wage upgrade while she performed walkaround duties on March 24-26 and March 31, 2020, because she would have operated mobile equipment if not for the MSHA inspection." Sec. Brief at 26. Accordingly, the Court also finds that "to be fully compensated on March 24, 25, 26 and 31, Otten needed to receive the mobile equipment hourly rate of \$28.21, not the laborer hourly rate of \$25.05." *Id* at 27. Further, as set forth below, Ms. Otten is also entitled to reimbursement for the other dates, as established by the Secretary and through the joint stipulations, when she incurred additional losses of pay. Equally important, and speaking to Congress' clearly expressed intention in establishing the Section 103(f) right, the Court finds that "Continental discouraged [Ms. Otten's] participation in MSHA inspections and unfairly penalized her for protected activity, contrary to Congressional intent." *Id*.

The Court also finds that "[b]y refusing to pay Otten the mobile equipment upgrades, Continental took an action that could dissuade a reasonable employee from participating in an MSHA inspection [and that] [w]hen faced with the choice of accompanying MSHA on an inspection of unpredictable duration or receiving \$3.16 more per hour (the difference between the laborer and mobile equipment rates), a reasonable miners' representative could be dissuaded from exercising the[] statutory walk-around rights. The Act does not require a miners' representative to have to make this choice." *Id*. at 28.

Given the above analysis, the Court does not believe that the Secretary *must* show, per the *Pasula-Robinette* framework, that Continental's refusal to pay Otten the wage upgrades was motivated by Otten's walkaround activities. That is to say, *Pasula-Robinette* is not the exclusive means to establish discrimination because Section 105(c) is not so restricted. Simply stated, showing an unjustified loss of pay, and thereby violating the statutory command of Section 103(f) is sufficient under the plain language of Section 105(c) to establish discrimination.

Application of the Pasula-Robinette framework

Under the *Pasula-Robinette* framework the Court has found direct evidence, through the testimony of Respondent's witnesses, Ames, and Powell, that the adverse action, loss of pay, was motivated by Ms. Otten's protected activity as miners' representative, to the end of having her forego her salutary participation, providing keen eyes when accompanying MSHA inspectors, and making her choose between such participation or suffer a loss of pay. Clearly, the record establishes that the adverse action was motivated by safety-advocate Otten's protected activity.

In terms of any claimed affirmative defense, the Respondent presented no unprotected activity to justify that the loss of pay was motivated by unprotected activity. This is because the Court has determined that the CBA does not override Congress' walkaround no loss of pay provision.²⁹ Relying upon the CBA could conceivably amount to unprotected activity, but not when paired with a deprivation of the walkaround no loss of pay provision, as happened here. Since there was no cognizable unprotected activity, one does not proceed to the second step of the affirmative defense – that the operator would have taken the adverse action against the miner based on the unprotected activity alone.³⁰

²⁹ Because the Court has determined that the CBA does not override the statutory protection and command that miners' representatives are not to incur a loss of pay when serving in that capacity, the Court will not engage with the claim that the CBA prevents the Respondent from paying the mobile equipment operator rate in this instance, nor, because it is unnecessary to do so, as it would elevate the stature of the CBA, will it delve into the Secretary's assertion that the Respondent's interpretation of the CBA conflicts with that agreement's terms.

³⁰ Thus the Court agrees with the Secretary that the "mixed motive defense does not apply because Otten did not engage in any unprotected activity that would justify the adverse action." Sec. Br. at 36. Ames admitted that the denial of the pay upgrade was based on the theory that Ms. Otten was 'unavailable' to run the mobile equipment, but her 'unavailability' was solely attributable to her serving as the miners' representative and the foundation for all of that was that the CBA dictated the loss of pay provision. In short, the Court agrees with the Secretary's remark that "Continental cannot use the CBA to take away a right provided to miners under the Act." *Id.* at 37 (italics omitted). As the Secretary has noted, the Commission held in *Sec'y v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, (July 1997) ("*Akzo*") that "the judge should not have looked to the collective bargaining agreement in fashioning his relief under section 105(c). The Commission has stated that it does not 'decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights.' *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 899 (May 1987) (citing *Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp.*, 3 FMSHRC 1175, 1179 (May 1981))." *Akzo* at 1259 and Sec's Br. at 37-38.

Comments Regarding the Parties' Post-Hearing Briefs³¹

The Respondent contends that no adverse action was established. This argument lacks merit. If this were merely a pay dispute involving only the CBA, then arguably the Respondent could be correct. However it is not such a matter; Ms. Otten's pay was inextricably tied to the exercise of the walkaround provision. As the designated walkaround representative, the Court has determined that, as a matter of law, she was entitled to perform that valuable safety related function *with no loss of pay*. This is what the statutory provision expressly provides. Such a deprivation of pay constitutes an adverse action. Whether the Respondent was motivated to take the adverse action because Ms. Otten was acting as the miners' representative, does not matter in a case such as this because she was exercising the statutory right to perform such assistance and she suffered a loss of pay by the Respondent's actions.

To be clear, *in addition to and separate from* the previous remark, the Court also finds that in fact the Respondent was motivated in part by Ms. Otten's exercise of that right, because she was a safety nuisance in the eyes of the Respondent. Because the walkaround right is in a class by itself, the claim that the CBA negates that clear right and with it the provision that the right applies with no loss of pay attendant to it, the idea that the CBA can, *Zombie* fashion, be resurrected as an affirmative defense is likewise a non-starter.³²

³¹ Although the Court read and considered the entirety of the parties' post-hearing briefs, this section comments upon particular contentions raised in those briefs, with the Court concluding that other contentions were implicitly addressed in the findings of fact and/or in the case law discussion. As one example, the Respondent's assertion that any suggestion of animus towards Ms. Otten was negated by Ms. Ames' "independent investigation," needs no further comment, as the issue was addressed earlier by the Court. Respondent's Reply at 9.

³² Respondent cites *St. Joe Zinc Company*, 2 FMSHRC 3594, 3600 (Oct. 28, 1980) for the proposition that the "Mine Act only requires miners receive their regular rate of pay." R's Br. at 10. As a decision by an administrative law judge, it has no precedential impact but, beyond that, the case is inapt. Further, Respondent misreads that decision because, in fact, it supports the Court's determination in this matter. In *St. Joe Zinc*, the miners' representative, who was an oiler-tool nipper, cleaned toilets as part of that job. When he accompanied an MSHA inspector as a miners' representative, the mine operator did not pay him for the toilet cleaner part of his job because he did not clean toilets during that week. The operator maintained that it would be unfair to require it to pay the miner for housekeeping duties he not actually perform.

The judge in *St. Joe Zinc*, explicitly stated that "[a]t issue in this litigation is the proper construction of the requirement contained in section 103(f), 30 U.S.C. § 813(f), of the Act that a designated walkaround representative "shall suffer no loss of pay during the period of his participation in the inspection." *Id.* at 3597. The operator in *St. Joe Zinc* looked to *another* decision, *Consolidation Coal*, 2 FMSHRC 1056 (May 5, 1980), which decision has been discussed above, for the proposition that, *per a wage agreement, the higher rate need only be awarded when the specified work is actually performed*. That argument should sound familiar to the reader. The judge in *Consolidation Coal* found that the miner was unfairly penalized for

(continued...)

The Secretary's Reply Brief

The Court takes note of and agrees with the Secretary's remark that "Continental concedes, in its Proposed Findings of Fact 1, that Otten would have been presented the opportunity to operate mobile equipment for 8 hours on the[] days [in issue]" and that "[i]t was established at trial [that] Otten would have performed mobile equipment operator work if she had not spent time on walkaround activities."³³ Sec. Reply at 2.

As expressed by the Court in this decision, the *Pasula-Robinette* framework³⁴ need not be applied slavishly in every discrimination case. The walkaround provision of Section 103(f) is such an instance because demanding its use could lead to irrational results.³⁵ Thus, the Court

³² (...continued)

exercising his walkaround rights, and that the failure to compensate him at the rate applicable to the duties he would otherwise have performed was an act of discrimination within the meaning of section 105(c) of the Act.

Because the *St. Joe Zinc* decision referred to *Consolidation Coal*, this could be confusing to the reader, and therefore it is important to understand that the judge in *St. Joe Zinc* rejected the operator's claim, reasoning that the miner's toilet cleaning duties "were performed as part of that [miner's] regular 40-hour work week" and, construing the provision in issue, the judge in *St. Joe Zinc* stated "[t]hat the requirement of section 103(f) that miners exercising their walkaround rights 'shall suffer no loss of pay' means they are to receive their customary and usual compensation [as] made abundantly clear in the legislative history." *Id.* at 3600. Thus, the judge in *St. Joe Zinc* held that "[i]f nonperformance of [the miner's] maintenance duties is excused by the walkaround provision, then nonperformance of his sanitation duties must likewise be excused." *Id.* 3599-3600. The Court applies the same logic. There is no dispute that but for serving her fellow miners as the miners' representative, Ms. Otten would have been operating mobile equipment on the dates she identified in this litigation and the parties have agreed to the amounts she would have been entitled to receive on those dates, subject to this Court's determination of the proper construction of the no loss in pay provision for walkaround representatives.

³³ Though a matter of semantics, while it is undisputed that Ms. Otten would have been paid as a mobile equipment operator on the days in issue, the Court is reluctant to employ the phrase "regular rate of pay," the key is that Otten suffered a "loss of pay" on those dates.

³⁴ *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 (3rd Cir. 1981).

³⁵ "The Commission has adhered to the principle that when interpreting the Mine Act and safety standards, constructions that lead to absurd results must be avoided. [citing, as one example] *Central Sand and Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001)," *Secretary of Labor on behalf of Greathouse v. Monongalia Coal Co.*, 40 FMSHRC 679, 689 (June 2018). Constructions which lead to absurd results are rejected. *Consolidation Coal*, 15 FMSHRC 1555, 1557 (Aug. 1993).

agrees with the Secretary's observation that "direct evidence of discrimination [was established] by Continental's failure to pay Otten the wage she would have received on the days of the walkaround because she participated in the walkaround." Sec. Reply at 5. As the Secretary concisely expressed it, "[w]hat this boils down to is, the only reason Continental deemed Otten ineligible was because she accompanied MSHA instead of operating mobile equipment; this was a plainly impermissible and discriminatory reason to deny wage upgrades."³⁶ *Id.*

The Court agrees that concepts like "mixed motives" are also inapt in this instance.³⁷ Thus, the Court subscribes to the view that Continental violated section 103(f) because it allowed its interpretation of the CBA to govern whether Otten should be paid the upgraded wage. When the CBA contradicts the Mine Act's statutory walkaround provision, the Mine Act must prevail.

The Respondent's Reply Brief

As discussed above, the Court does not buy into the Respondent's argument that, beyond the *Pasula-Robinette* test applied in many discrimination claims, the Ninth Circuit's "but-for" test should be used. Respondent's Reply at 1-2. The jurisdiction of the Ninth Circuit does not apply to actions arising in Missouri, the location of the Respondent's mine. End of argument. Full stop. That said, the Court finds that the loss of pay to Ms. Otten would not have occurred *but for* her engaging as a miners' representative during a walkaround inspection.

The Respondent's contention that Ms. Ames acted neutrally, free of any discriminatory animus, and that Ames' statements reflect "only that performing walkaround duties did not independently qualify Otten for a mobile equipment operator upgrade under the terms of the CBA," is rejected for several reasons. *Id.* at 4. First, it reaffirms the Respondent's core challenge that the CBA takes precedence over the statutory walkaround "no loss of pay" provision. Second, such discriminatory animus need not be shown to establish a violation of that provision – it is sufficient to show that the miner suffered a loss of pay. Third, assuming for the sake of argument that such animus must be shown, Ames, through her actions and testimony, clearly showed such animus, as demonstrated *supra*.

As to the Respondent's contention that it rebutted the Secretary's *prima facie* case by "establish[ing] [that] it relied on the terms of the CBA in making its decision to retract [Ms.

³⁶ Although the Secretary asserts that Ms. Ames acted *intentionally* in denying Ms. Otten's upgrades, the Court believes that, whatever her intent, misguided or malevolent, it does not matter; the loss of pay Ms. Otten incurred in these circumstances violated Section 103(f), constituting cognizable discrimination under Section 105(c) of the Mine Act.

³⁷ The Court agrees that many of the arguments advanced by the Respondent are simply not on point. As one example, that Matson and Lucas had pay upgrades retracted is of no moment because neither was acting as a miners' representative. The Court views many of the other arguments raised by the Respondent as distractions which do not warrant individualized discussion. For example, the claim that Ms. Otten was *not required* to perform work of a higher classification is of that ilk because it diverts the analysis from the core, and undisputed, fact. On the days in issue, Ms. Otten would have been first in line to operate mobile equipment and, as the designated walkaround representative, she would have done so but for the fact that she was accompanying the MSHA inspector at those times. Respondent's Reply at 17.

Otten's] pay," that only reinforces the Court's point – the terms of the CBA do not control the determination of whether Ms. Otten incurred a loss of pay. *Id.* at 5. And, as to the idea that the Secretary must establish that the Respondent's pay determination was pretextual, if one assumes for the moment that there was no pretext whatsoever, the outcome would be the same. Under the facts of this case, Ms. Otten suffered a loss of pay within the meaning of section 103(f). And this is not simply a matter of math. Congress made it clear that the purpose served by the walkaround provision is to aid the inspection. Miners' representatives who incur a loss of pay would have the effect of "discourag[ing] miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners." *Magma Copper*, 1 FMSHRC 1948, 152 (Dec. 1979), *supra*. Accordingly, pretext is not an essential element in 103(f) matters. Imposing a loss of pay, for whatever reason, is essential and has been established.

Similarly, the Respondent's contention that it proved its affirmative defense by showing that Heather Ames relied upon the terms of the CBA has no merit, as it is founded upon the premise that the CBA may override Congress's expressed intent of the no loss of pay provision.

Further Discussion: Relief due Ms. Otten and the Appropriate Civil Penalty

Relief due Ms. Otten

As forewarned at the start of this decision, the Court determined during the course of the hearing that this dispute could have been submitted via cross-motions for summary judgment. This is because it has concluded that there are no genuine issues of material fact to be resolved. That being the case, the matter strictly involves a legal determination. The Court, recognizing that there were no genuine factual disputes, directed by email to Counsels that they:

confer with one another and advise me, either through a joint email or in a statement in the post-hearing briefs, or both, regarding the pay dates in issue. Per Exhibit P 11, there does not seem to be a **genuine** dispute about the figures identified in that exhibit. This includes the 401 K contributions, and a pay raise affecting all miners, all as identified in that exhibit and through testimony from Ms. Otten about these issues, including Ms. Otten's remark that she was mistaken about a date when she believed she was underpaid, but then realized she had not been short-changed. See Tr. pages 270-283.

Rather, the dispute is over the pay rate due to miners' representatives under the circumstances identified in Otten's Complaint – pay at the laborers' rate or the mobile equipment operator rate. Therefore, **absent a genuine dispute**, I am directing that the parties stipulate as to the amounts Ms. Otten would have received **on each** of the days identified in her complaint. These figures are obviously apart

from and distinct from the controlling issue I must decide – whether Ms. Otten was entitled to the mobile equipment operator rate or the laborer rate.

E-mail from the Court, December 27, 2021. (emphasis in original)

Shortly thereafter the parties responded, providing the following:

Counsel for Respondent and Counsel for the Secretary met and conferred regarding your emails, particularly your email concerning Exhibit P-11 and the figures identified in that exhibit. You asked for the parties to stipulate to the amounts Ms. Otten would have received on the days identified in her complaint. As Ms. Otten is not contesting her pay on April 1st and April 2nd, the only days identified in the complaint are March 24-26, and 31st.

Without admitting Ms. Otten was entitled to such amounts, the parties can stipulate that Ms. Otten would have received a total of \$116.67 for the days identified in her complaint.

For a more specific breakdown, the parties stipulate to the following figures by day:

- March 24, 2020 – the parties stipulate that Ms. Otten would have received \$44.24 more if she had operated mobile equipment for the entire 8 hour shift;
- March 25, 2020 – the parties stipulate that Ms. Otten would have received \$25.28 more if she had operated mobile equipment for the entire 8 hour shift
- March 26, 2020 - the parties stipulate that Ms. Otten would have received \$27.65 more if she had operated mobile equipment for the entire 8 hour shift
- March 31, 2020 - the parties stipulate that Ms. Otten would have received \$15.01 more if she had operated mobile equipment for the entire 8 hour shift
- Wage Total = \$112.18
- 401K contribution (4%) = \$4.49
- Combined Total = \$116.67

Email from Counsels to the Court, December 29, 2021.

The stipulation does not encompass all the compensation due Ms. Otten because the Court notes that the Secretary also asserts that:

[a]dditionally, in the interests of justice, Otten should receive the full compensation she would have earned but for continuing discriminatory action on eight more days: June 9, 2020; July 8, 2020; July 14, 2020; July 15, 2020; July 21, 2020; July 22, 2020; January 28, 2021; and January 29, 2021. ... Continental had notice of the continuing violations. Potential future losses of pay were alleged in Otten's discrimination complaint filed with MSHA in April 2020. See, for example, Otten's discrimination complaint asserting, "many hours, by me, will be spent acting as a miner's rep and this action by my Company has the potential to cost me a lot of money through the years." Ex. J-1 at 2. Otten also requested in her complaint that

she continue to receive the upgrade. Joint Stip. ¶ 72; 11/10/21 Tr. 255; Ex. J-1 at 2. Similarly, in the complaint filed with the Commission, the Secretary alleged Continental was continuing to refuse to pay Otten the wage rate she was entitled to and would have received if she had not been performing duties as a miners' representative. Compl. at 2 ¶ 8. Finally, there is a clear basis for awarding further relief because of the continuing violations. Evidence shows that on these eight additional days, Otten engaged in walkaround activities with MSHA and received the laborer wage rate, there was a need to operate mobile equipment and junior laborers operated mobile equipment for wage upgrades, and when Otten would have operated mobile equipment had it not been for her walkaround duties. Joint Stip. ¶¶ 30, 59, 60, 66; 11/10/21 Tr. 276-77; Ex. J-13 at 24-25, 31-32; Ex. J-14 at 5; Ex. J-15 at 19, 25; Ex. J-19 at 3-4; Ex. J-20 at 78, 83-84, 110; Ex. J-27. **Therefore, the Court should also award Otten \$261.27 in lost wages and \$10.45 in lost employer contributions for the period from June 9, 2020, to January 29, 2021; for a total monetary award of \$388.39.** Ex. P-11. Continental should pay pre-judgment interest on this amount.

Sec.Br. at 41-42 (**bold** text added).

The Court, examining Ms. Otten's complaint again, notes that the dates identified in it are "4/9/2020 and 4/16/2020" and in the accompanying "Discrimination Report," the dates are identified as "3/21/- 3/28/20 and 3/29/20 – 4/4/20." Joint Ex. 1. The Secretary's Complaint does not identify additional specific dates for the alleged discrimination involving loss of pay, nor was the Complaint amended. Joint Stipulation 30, while mentioning dates in June and July in 2020 and in January 2021, does not tie those dates with loss of pay. However, Joint Stipulations 59 and 60 do mention those dates and that, per those stipulations, she "performed her role as the designated miner's [sic] representative by accompanying MSHA on an inspection for the entirety of her shift and did not operate mobile equipment. Further, for those same dates, June 9, July 8, July 14, July 15, July 21, and January 28 and 29, 2021, "Otten received her regular rate of pay *as a laborer.*" Joint Stipulations 59 and 60, *italics* added. The other documents cited by the Secretary, as listed above, confirm that, by virtue of those Joint Exhibits, that the Secretary is correct and that the Court should also award Ms. Otten \$261.27 in lost wages and \$10.45 in lost employer contributions for the period from June 9, 2020, to January 29, 2021; for a total monetary award of **\$388.39, plus pre-judgment interest on this amount.**

Appropriate Civil Penalty

Under section 110(i) of the Act, the Commission has independent authority to assess civil penalties for violations. 30 U.S.C. § 820(i); *Sec'y v. Lehigh Anthracite Coal*, 40 FMSHRC 273, 278 (Apr. 2018). Per that provision, the Commission is to consider six statutory factors in its penalty assessment: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Parties' views on the appropriate civil penalty

Secretary of Labor's position

The Secretary states that “[b]ased on the six statutory factors and the evidence presented in this case, a penalty of \$17,500 is appropriate. First, the violation was serious considering Otten played a critical role in ensuring miner participation safety and health inspections and Continental’s actions unfairly penalized her for serving in that role. *See Highland Mining Co.*, 37 FMSHRC 2436, 2438 (Oct. 2015) (ALJ) (finding mine operator’s interference with a miners’ representative’s rights was serious considering the important function that miners’ reps serve in ensuring a safe and healthy environment for miners). Second, Continental exhibited negligence in violating Otten’s rights. When considering the negligence factor, the proper inquiry is whether the operator engaged in intentional conduct in committing the violation, rather than whether it intended to discriminate. *See Sec’y obo Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1319 (Aug. 1996) (Commissioners Marks and Riley). On April 2, 2020, when Ames directed the payroll specialist Fujarski to remove the wage upgrades and let the miners “fight it later,” she clearly intended to not pay Otten at the mobile equipment rate for time spent with MSHA on the April 9, and subsequently the April 16, paycheck. 11/10/21 Tr. 75; Ex. J-7f at 1.

Third, Continental did not demonstrate any good faith attempt to achieve compliance. In April 2020, Temporary Supervisor Mundell warned Continental’s actions would unfairly penalize Otten for traveling with MSHA, but Ames remained obstinate in her decision to retract Otten’s wage upgrades and, consequently, Otten suffered a loss in pay. 11/09/21 Tr. 205; 11/10/21 Tr. 269-70; Ex. J-7k at 1; Ex. P-11. Between April 2020 and January 2021, Continental continued to take the position that Otten was ineligible for an upgrade when she exercised her statutory walkaround rights, resulting in more lost pay for Otten. 11/10/21 Tr. 95, 276-77; Ex. P-11. The violations would have continued if Otten had not bid for and received a job as a mobile equipment operator in February 2021, considering Ames testified that she would make the same decision if another laborer were to fill the miners’ representative role today. Joint Stip. ¶¶ 8-9; 11/10/21 Tr. 206-07, 277-78.

Fourth, although Continental has no previous discrimination violations, it does have a history of safety and health violations and these past violations must be considered as part of the penalty assessment. Ex. P-5, P-6. As to the final two statutory factors, the record establishes Continental is a medium-sized operator that could remain in business if a civil penalty of \$17,500 were imposed. Ex. P-6 (Continental had 255,694 hours worked in 2019); Joint Stip. ¶ 82. Therefore, the Court should assess a civil penalty of \$17,500 against Continental. A penalty of this amount would encourage future compliance with section 103(f) and section 105(c).” Sec. Br. at 42-44.

Respondent's view of the appropriate civil penalty

Regarding any civil penalty, in its post-hearing brief, the Respondent asserts that no civil penalty should be imposed, expressing the following:

“Without conceding that a civil penalty is warranted or justified, assuming *arguendo* that a penalty should be assessed, the Secretary has failed to establish the six statutorily-required penalty criteria to establish the proposed civil monetary penalty amount ...[reciting the criteria] *Sherwin Aluminum Company, LLC v. MSHA*, 37 FMSHRC 2153, 2186 (Sept. 25, 2015) (citing

Douglas R. Rushford Trucking, 22 FMSHRC 598, 600 (May 2000)). “The Commission is not required to give equal weight to each of the criteria ...” *Id.* (citing *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008)).

Respondent has no history of any discrimination findings or 105(c) violations. (Exhibit P-5; Exhibit P-6). Respondent’s proposed negligence in this case is non-existent, as its actions show it was not negligent in any way as it thoroughly and painstakingly evaluated and vetted its reasons for retracting improper mobile equipment operator upgrades not just from Otten, but also from two laborers who did not engage in any protected activity. The gravity of the alleged violation is low, as evidenced by the uniqueness of this situation and the fact that it is not capable of occurring again as there are no designated miners’ representatives who would be eligible for upgraded work. Lastly, all actions taken by Respondent in this matter were done with the sole intention and purpose of complying with the terms of the CBA, to which Respondent is contractually bound.” Respondent’s Brief at 25-26.

The Court’s Penalty Determination

Having considered both arguments on the civil penalty issue, the Court cannot abide by the Respondent’s assertions. From the Court’s perspective the gravity of the violation and the Respondent’s negligence associated with it were significant. The negligence and gravity evaluations, while distinct evaluations, go hand in hand.

In the face of the explicit language in Section 103(f) directing that the miners’ representative suffer no loss of pay, it was not reasonable for the Respondent to conclude otherwise. No fair reading of the statute supports the Respondent’s view and the Respondent was seriously in error by concluding that the CBA would trump Congress’ express command to the contrary that there be no loss of pay.

And this conclusion makes sense when considering gravity as well, because Congress wanted miner participation in the inspection process, bringing their personal knowledge of the mine to bear in that process. This determination was coupled with the Court’s finding that in fact Continental wanted to discourage Ms. Otten, who was very proactive in safety matters at the mine. Miss Ames’ testimony made the Respondent’s intent clear. As the Respondent put it, Ms. Otten didn’t *have to* participate in the inspections; she could’ve opted to run the mobile equipment instead on those days.

When considering the history of violations, that term is not limited to violations of section 103(f). As noted in *Jim Walters*, 18 FMSHRC 552, (April 1996), “Section 110(i) provides in part that, in assessing civil penalties, “the Commission shall consider the operator’s history of previous violations” 30 U.S.C. § 820(i). Thus, the language of section 110(i) does not limit the scope of history of previous violations to similar cases. The Commission has explained that “section 110(i) requires the judge to consider the operator’s general history of previous violations as a separate component when assessing a civil penalty. Past violations of all safety and health standards are considered for his component.” *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). The appropriate weight, if any, to be attached by the judge to older violations should be based on relevancy.” *Id.* at 557. *See also, Cantera Green*, 22 FMSHRC 616, 623, (May 2000).

Accordingly, the Court considered the Respondent's violation history, per Ex. P-5, P-6. With 115 violations over a 15-month period, and the violations per inspection at 0.97, the mine falls within the mid-range for that category. Similarly, the size of the mine falls within the mid-range, and the controlling entity is likewise in the moderate range. Taking the penalty criteria into consideration as applied to this matter, the Court concludes that the appropriate civil penalty is \$17,500.00.

ORDER

WHEREFORE, Respondent is **ORDERED** to pay Ms. Tara Otten the amounts, as identified above, constituting the loss of pay she incurred, in the total amount of **\$388.39, plus pre-judgment interest on this amount**. The loss of pay amounts are to be calculated to include the interest accrued on those amounts for each date, per *Sec'y of Labor on behalf of Bailey v. Ark-Carbona Co.*, 5 FMSHRC 2042, (Dec. 1983). Such payment shall be made within 30 days of the date of this decision.

Upon consideration of the six statutory criteria, as discussed above, Respondent is **ORDERED** to pay the Secretary a civil penalty of **\$17,500.00, (seventeen thousand five hundred dollars)**. All payments shall be made within 30 days of the date of this decision, following the exhaustion of its appeal rights in this case.

FURTHER, the mine is **ORDERED** to remove from Tara Otten's personnel file any mention of this incident unless the Respondent wishes to admit in that file that it improperly denied Ms. Otten the pay she was entitled to receive during the walkaround events identified in the Complaint. Further, for a period of 30 (thirty) days, Continental Cement Company, LLC shall post a notice at the office of the Hannibal Underground Mine and, if different, also post the notice in a conspicuous location where employees of the mine can readily see it, with both notices on hard stock paper of at least 8 x 14 size, in at least 14 point font, setting forth the rights of miners protected by 105(c) of the Mine Act.

SO ORDERED.

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

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