September and October 2021

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No Review was Granted or Denied During the Month of September 2021.

No Review was Granted or Denied During the Month of October 2021.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 8, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MONONGALIA COUNTY COAL CO.	Docket No. PENN 2020-0004 A.C. No. 46-01968-483591 Docket No. PENN 2020-0005 A.C. No. 46-01968-485001

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 15, 2019, the Commission received from Monongalia County Coal Company two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate Docket Nos. PENN 2020-0004 and PENN 2020-0005 involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on February 21, 2019, and March 15, 2019, and became final orders on March 23, 2019, and April 14, 2019, respectively. Monongalia states that in June 2019, its safety director informed MSHA's Civil Penalty Compliance Office that he was no longer receiving proposed penalty assessments at an address in Holbrook, Pennsylvania. The safety director later provided MSHA's Civil Penalty Compliance Office an address to use for future mailings. The operator further submits that on June 6, 2019, Monongalia sent payment for penalties associated with a total of six citations listed on the two proposed penalty assessment forms.

The Secretary does not oppose the requests to reopen, and notes that MSHA received payment for some of the citations listed on the proposed assessments on July 3, 2019, and on September 17, 2019. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

The operator does not explain when its change of address occurred, and the reasons for delay between the time that the proposed penalty assessments were delivered and its action in June 2019. It is unclear from the record whether MSHA mailed the proposed assessments to Monongalia's official address of record at the time of the assessments and whether Monongalia maintained its correct address with MSHA.

On the basis of the present record, we are unable to evaluate the merits of Monongalia's position. In the interest of justice, we remand the matter to the Chief Judge for assignment to a Judge to determine whether Monongalia has met the criteria for relief under Rule 60(b). If the Judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

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September 8, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLUE MOUNTAIN MINERALS	Docket No. WEST 2021-0182 A.C. No. 04-00099-525919

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 15, 2021, the Commission received from Blue Mountain Minerals ("Blue Mountain") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The Secretary for the Department of Labor's Mine Safety and Health Administration ("MSHA") initially filed a response to Blue Mountain's request on April 21, 2021, stating that he does not oppose the motion. On May 10, 2021, the Secretary filed a supplemental response conceding that the operator had in fact timely requested a hearing on December 23, 2020, but

that MSHA's mail processing had inadvertently delayed discovery of the timely contest. Upon its discovery, MSHA processed the contest, and a penalty petition was filed on April 20, 2021, and docketed as WEST 2021-0184.[1] The Secretary considers this motion to reopen as moot, as the underlying violations are under contest.

Because the Secretary has processed this case as timely contested, we conclude that Blue Mountain's motion to reopen is moot here. *See Olmos Contracting 1, LLC*, 39 FMSHRC 2015, 2019 (Nov. 2017) ("As this matter was timely contested and has now been resolved, the motion to reopen this case is moot."); *Kembel Sand & Gravel*, 33 FMSHRC 1153, 1153-54 (June 2011). Accordingly, this motion is dismissed.

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

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

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

[1] On July 19, 2021, The Chief Judge issued an Order to Show Cause for Blue Mountain's failure to file a response to the Secretary's Petition for Assessment of Civil Penalty in Docket No. WEST 2021-0184. To date, a response from the operator has not been received.

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September 8, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CHAMPLAIN STONE, LTD.	Docket No. YORK 2021-0048 A.C. No. 30-02803-529358

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 20, 2021, the Commission received from Champlain Stone, Limited ("Champlain") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on February 11, 2021. The assessment became a final order of the Commission on March 13, 2021.

Champlain asserts that it timely submitted its contest of the citations on February 25, 2021, but that it erroneously mailed the contest to MSHA's St. Louis office along with its payment for other uncontested violations. It claims that it learned of its mistake when it received the April 30, 2021 delinquency letter from MSHA on May 4, 2021. Champlain has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

Having reviewed Champlain's request and the Secretary's response, we find that the operator inadvertently mailed its contest form to MSHA's St. Louis office along with its uncontested penalty payments. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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September 9, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CACTUS CANYON QUARRIES, INC.	Docket No. CENT 2021-0090 A.C. No. 41-00009-527340

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). On August 30, 2021, Cactus Canyon Quarries, Inc. ("Cactus Canyon") filed with the Commission a petition for interlocutory review of an order issued by an Administrative Law Judge on August 13, 2021, denying Cactus Canyon's motion to certify for interlocutory review previous orders by the Judge. See 29 C.F.R. § 2700.76. In the earlier orders, the Judge denied requests by Cactus Canyon to compel discovery and a motion for summary judgment. See PIR at 1.

Upon consideration of the pleadings filed by Cactus Canyon, we have determined that the Judge's denial of Cactus Canyon's motions to compel discovery and motion for summary judgment do not involve a controlling question of law and that immediate review of those rulings would not materially advance the final disposition of this proceeding. See 29 C.F.R. §

2700.76(a)(2). Accordingly, we conclude that Cactus Canyon has failed to establish a basis for granting interlocutory review and, therefore, we deny the petition.

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

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

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

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September 28, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. UNITED TACONITE, LLC	Docket No. LAKE 2020-0014-M A.C. No. 21-03404-493313

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 29, 2019, the Commission received from United Taconite, LLC ("United Taconite") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*").

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

The proposed assessment was delivered to the operator on June 17, 2019 and became a final order on July 17, 2019. The total penalty for all the violations in the assessment was $27,380.[1]

The operator primarily seeks to reopen this matter on the basis that the employee who received the proposed assessment failed to deliver it to Bryan Baird, the safety director in charge of handling proposed assessments. The operator claims that Baird did not become aware of the proposed assessment until July 19, 2019, two days after the proposed assessment had become a final order. The operator mailed a contest notice later the same day for four citations: Citation Nos. 9385814, 9385817, 9385818 and 9385819. The contest notice was received by MSHA on July 22, five days after the proposed assessment had become a final order.[2]

MSHA sent a letter dated July 29, 2019 informing the operator that its contest was late and that the proposed assessment had become a final order. The letter was sent to the address of the operator's counsel. However, the operator's counsel allegedly moved to a new office in July 2019 and therefore claims not to have received the mailed letter. It is unclear why the mailed letter was not forwarded to counsel's new address.

Subsequently, on August 14, 2019, MSHA deposited the operator's check of $10,775. MSHA applied part of this check to Citation Nos. 9385817 and 9385819, which had been listed in the operator's untimely contest, while the remainder of the check was applied to Citation No. 9385812. In an email, the operator claimed that MSHA incorrectly applied this payment to the wrong citations. The operator maintains that the payment of $10,775 was intended to be applied to the remainder of the penalty assessment besides the citations listed in its contest (the remainder of the assessment was $10,775).

On September 12, 2019, the operator received a delinquency notice, dated September 3, and the operator's counsel immediately contacted MSHA. On that same day, MSHA sent the operator's counsel a copy of the July 29 letter via email. As set forth above, the operator's counsel claims that it became aware of the letter only after receiving the emailed copy on September 12.

The operator also claims that MSHA erred in determining that its contest was late. An operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment, and if the operator fails to do so, the proposed assessment becomes a final order of the Commission. 30 U.S.C. § 815(a). Despite this, the operator claims that 29 C.F.R. § 2700.8(b) extends the deadline for filing contests by

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[1] The operator's motion to reopen erroneously states that the proposed assessment was delivered on July 17, 2019, and erroneously lists the total penalty for the proposed assessment as $24,917.

[2] The total penalty for the four citations listed in the contest was $16,605. The total penalty for the remaining violations in the proposed assessment was $10,775 (27,380 - 16,605 = 10,775).

five days when MSHA serves an assessment by a method of delivery other than same day service.

However, the Commission has conclusively rejected the argument that 29 C.F.R. § 2700.8(b) applies to contests of proposed assessments. *Bucyrus Field Svcs. Inc.,* 31 FMSHRC 1029, 1030 at n.1 (Sept. 2009). Therefore, it is unnecessary to further consider this issue.

In this case, we must consider whether the operator demonstrated that it acted in good faith, and whether the Secretary opposes the motion or alleges that the operator acted in bad faith. *Noranda Alumina, LLC,* 39 FMSHRC 441, 444 (Mar. 2017). Here, the operator's good faith intent to timely contest the penalty is demonstrated by the fact that its contest was mailed on July 19, just two days after the assessment became a final order. Moreover, the Secretary does not oppose the motion or allege that the operator acted in bad faith.

Having reviewed United Taconite's request and the Secretary's response, we conclude that, in the interest of justice, the part of the assessment relating to Citation Nos. 9385814, 9385817, 9385818 and 9385819 should be reopened. The remainder of the assessment will remain as a final order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 24, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BARBARA E. CASSIDY, Complainant,	DISCRIMINATION PROCEEDING Docket No. PENN 2020-0101 MSHA Case No.: PITT-CD-2020-02
v.	
CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent	Mine: Enlow Fork Mine Mine ID: 36-07416

DECISION & ORDER

Appearances: Brian P. Krier, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

Nicholas J. Bell & Erin J. McLaughlin, Buchanan Ingersoll Rooney, Pittsburgh, PA, Representing the Respondent

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Barbara E. Cassidy ("Complainant"), a miner, against Consol Pennsylvania Coal Company LLC ("Respondent"), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

The Secretary of Labor, on behalf of Barbara E. Cassidy, alleges that Cassidy was discriminated against in violation of her statutory rights after engaging in protected activities. A hearing was held via Zoom Video Conferencing on February 03, 2021-February 04, 2021, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs and Reply Briefs, which have been fully considered.[1]

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

STIPULATIONS

The parties submitted stipulations as a joint exhibit. The following joint stipulations represent those where there is agreement:

1. Respondent is an "operator" as defined in Section 103(d) of the Federal Mine Health and Safety Act of 1977, as amended (hereinafter, "the Mine Act"), 30 U.S.C. § 802(d).

2. Respondent is a "person" subject to Section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

3. The operations of Respondent at the Enlow Fork Mine are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.

5. At all relevant times, Complainant Barbara E. Cassidy was a "miner" as defined in Section 3(g) of the Act, 30 U.S.C. § 802(g).

6. Complainant was employed as an Assistant Section Supervisor at Respondent's Enlow Fork Mine from June 18, 2007 to May 11, 2008, and a Section Supervisor from May 12, 2008 to August 31, 2020.

7. On December 19, 2019, Respondent suspended Complainant for ten (10) days without pay, effective January 2, 2020.

8. As a result of her ten-day suspension, Respondent reduced Complainant's pay by a total of $4,265.04.

9. Respondent paid Complainant a biweekly salary of $4,265.04 ($110,891.04 annually) at the time of her suspension.

10. Complainant Ms. Cassidy participated in the Company-sponsored health and welfare benefit plans, including medical/prescription, dental and vision, life insurance and disability. Other benefits included 401(k) company match (up to 6%).

11. As a result of her ten-day suspension, Respondent reduced the 401(k) company match contribution to Complainant by $255.90.

12. Payment of the total proposed penalty of $15,000.00 in this matter will not affect Respondent's ability to continue in business.

13. MSHA's Data Retrieval System, publicly available at http://www.msha.gov/drs/drshome.htm, accurately sets forth:

    a. the size of the Respondent in production tons or hours worked per year;

b. the size, in production tons or hours worked per year, of the mine;

c. the total number of assessed violations for the time period listed; and

d. the total number of inspection days for the time period listed therein.

14. MSHA's Penalty Assessment accurately sets forth:

a. the size of the Respondent in production tons or hours worked per year;

b. the size, in production tons or hours worked per year, of the mine;

c. the total number of assessed violations for the time period listed; and

d. the total number of inspection days for the time period listed therein.

Ex. J-1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness' testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail as to each witness' testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Background:

Barbara E. Cassidy worked for a total of 27 years in the mining industry at Matthews Mine, the Mapel Creek Mine, and with Consol Energy at the Enlow Fork Mine.[2] Tr. 19, 24-25. She worked at Enlow Fork for 13 years and 2 months as a section foreman, which is a salaried management position. Tr. 19. Her duties in this position varied from being assigned to a section to being assigned as belt foreman or in charge of transportation. Tr. 19-20. Cassidy's duties with regard to transportation involved her going underground 30 minutes before the official start of the shift and organizing the rides in order to transport crew to their respective sections. Tr. 20. In performing these tasks, she communicated with the shift foreman and assistant shift foreman from the previous shift. Tr. 20. It was her responsibility to ensure that new crews were at their areas before relieving the previous crews, as well as that the fire bosses and examiners were at their examination areas. Tr. 20-21.

[2] At the time of hearing, Barbara E. Cassidy was unemployed. Tr. 19.

As section foreman, Cassidy had numerous safety responsibilities, including answering safety questions from her crew and conducting pre-shift examinations.[3] Tr. 27-28. During a pre-shift examination, one examines the mine for gases, violations of mandatory safety standards, and other dangers to ensure safety where miners work and travel. Tr. 28. The pre-shift examiner then provides notice and warning to the upcoming shift of what they might encounter. Tr. 29.

Cassidy often raised safety concerns with management, including to her immediate supervisor, which at the time was Assistant Mine Foreman David Knipple, and the belt foreman.[4] Tr. 23, 29. There were certain issues that Knipple could not resolve for Cassidy, so she would take the matter to one of three assistant mine foremen. Tr. 33. Usually, she would take matters to Assistant Mine Foreman Don Blumetti, because he was the most accessible. Tr. 33. If Cassidy needed to raise an issue with the top person, she would bring the matter to Mine Foreman Michael Koffler. Tr. 32, 33. Cassidy was not aware of any company rules concerning how to raise safety concerns or rules against the use of emails to report such. Tr. 30.

Enlow Fork Mine, where Cassidy worked, is a very large mine, with six active sections, two longwalls, and two portals. The mine measured a distance of almost 20 miles from the Archer Portal to the Oak Springs bottom, and almost 15 miles to Pleasant Grove Portal. Tr. 25, 189-190. On average, it took the G2 crew one hour and 15 minutes to arrive to relieve the previous crew. Tr. 190. Until the fall of 2019, there were approximately 512 hourly employees and 275 salaried employees at the mine. Tr. 209. Since that time, the numbers have fluctuated significantly. Tr. 209. Cassidy was the first female foreman that Consol ever hired and the only one to work for the company at the time of hearing. Tr. 26. When Cassidy started working for Consol, there were six female hourly employees. Tr. 26.

The September 13, 2019 Email:

Cassidy was the only foreman in charge of transportation, and several fire bosses had come to her complaining that there were transportation issues with getting their crews to their sections. Tr. 34-35. Mine examiners and fire bosses reported to Cassidy that a lack of rides impacted their ability to conduct exams and correct violations observed during their exams. Tr. 189. Cassidy had emailed Koffler seven months prior in February about the lack of rides, and Koffler responded that they were looking into the matter. Tr. 50. However, after seven months, the problem had not been addressed. Tr. 195.

Therefore, at approximately 9:15 am on August 28, 2019, Cassidy went from the Archer to the Pleasant Grove Portal to Koffler's office to discuss the issue. Tr. 35. Koffler was not in his office, so Cassidy left and returned the following day. Tr. 35. When he was still not in his office,

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[3] Cassidy has mine foreman papers, which qualifies her to be a section or shift foreman in the Commonwealth of Pennsylvania, as well as to sign books when necessary and to conduct pre-shift and on-shift examinations. Tr. 21-22.

[4] At the time of hearing, Knipple had been the shift foreman for Consol for two years. Tr. 354. In this capacity, he set up the shift and crews and assigned foremen to specific job responsibilities. Tr. 355.

she left a note on his desk indicating that she wanted to talk to him about the ride situation at the Archer Portal, and that due to her work schedule the best way to get ahold of her was via email.[5] Tr. 35-36. After a week passed with no response from Koffler, Cassidy tried stopping at his office again, but again he was not there. Tr. 36. Therefore, Cassidy tried to call him by going to the top of the hill where the guard shack was located, because it was the only place where one could get cellular reception. Tr. 36. She could not reach him, so she left Koffler a voicemail. Tr. 36. In the voicemail, Cassidy stated that she was now on the afternoon shift and asked that he email her to tell her when they could meet to discuss the ride situation. Tr. 36. Another week passed and Koffler still had not responded, so Cassidy decided to send him an email. Tr. 36-37.

On September 13, 2019, Cassidy sent an email concerning the availability of rides to Koffler. Tr. 34. Cassidy spent three days drafting the email, including getting input from another section foreman, Justin Elliot. Tr. 36-39. Cassidy did not receive a response from Koffler, so after three days of waiting, she sent the email to Superintendent Josh Koontz[6] and Assistant Superintendent Scott Watson. Tr. 37, 53. She did so because she felt it was "a very important issue, the emergency ride situation," and she was concerned that Koffler had not received the email. Tr. 53-54. Cassidy did not believe that it was a violation of any rule or policy to send the email to any of these individuals. Tr. 54.

In the email, Cassidy raised several safety concerns. Tr. 40-45. She wrote, "I am trying to get through to anyone and everyone that our ride situation is a serious one. We cannot get crews into their sections. We cannot get outby guys to their places of work." Ex. R-I, Tr. 40-41. She explained in the letter, "Exams are not being done to the standard that they should be done because of [the lack of rides]. Also, violations cannot be corrected because these guys spend most of their time being the uber for anyone who needs to get from point A to point B. (More than ever before, the violations are not being addressed until the fireboss has gone through." Ex. R-I. Cassidy concluded the email by pleading, "WE NEED TO RECTIFY THIS. WE NEED HELP!! HELP!! HELP!! PLEASE!!" Ex. R-I.

Cassidy testified that her complaint concerning fire boss rides was a safety concern because if the fire bosses cannot get to a violation, then it cannot be corrected. Tr. 43. She provided the example of fire bosses needing to note the existence of float dust, which can easily ignite if there is not enough rock dust. Tr. 43. As a result of the lack of rides, workers are

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[5] Cassidy had email access underground in the mine in the last six to eight months that she was at the Archer Portal. Tr. 31-32.

[6] At the time of hearing, Josh Koontz had been the general superintendent at Enlow Fork Mine since August 2018. Tr. 207. This is the chief health and safety official at the coal mine. Tr. 207. Prior to this position, he was the assistant superintendent at Enlow Fork since 2017, and assistant superintendent at Consol's Harvey Mine from 2015-2017. Tr. 208. From 2000-2015, Koontz worked for Consol and then Murray Energy. Tr. 208.

Koontz's responsibilities as general superintendent included the safety of the coal mine for all the hourly and salaried employees and contractors, as well as state and federal legal compliance. Tr. 208. He was also responsible for productivity and cost issues. Tr. 208-209.

correcting violations and fire bosses cannot perform their duties. Tr. 44-45. Cassidy testified that fire bosses were telling her, "I am not even looking. I am just running. I put the dates where they need to go and get the heck out of there because I know I only have a ride to get out." Tr. 45.

In addition to the regular rides, there were supposed to be emergency rides—also called "e-rides"—at the end of each track. Tr. 42, 46. The purpose of an emergency ride was to get an injured or sick individual out of the mine as quickly as possible. Tr. 47. Since there were two crews that worked in Two South, company policy required that there should have been two emergency rides. Tr. 46-47. However, there was only one emergency ride. Tr. 46. Cassidy testified that the emergency rides were not available on her shift or on other shifts. Tr. 42.

Previously, Cassidy had contacted Blumetti to ask for a second emergency ride, and the response was that they could deal with only one for the time being, and that when the track extended further, they would consider supplying a second ride. Tr. 46. This concerned Cassidy, because it was not uncommon for multiple miners to be injured and need rides within an hour of one another. Tr. 47. Prior to the September 13 email being written, they had proceeded five blocks—or approximately 1,500 feet—further into the section, which meant that there would have been between 12-40 people working in the area. Tr. 48.

Cassidy testified that she sent the email "to help rectify the emergency ride situation—actually, the mantrip situation all the way around." Tr. 49, 184. It was not her intent to go over anyone's head or embarrass anyone in sending the email. Tr. 49-50. Cassidy had emailed Koffler previously, in February of 2019, concerning the ride shortage and problems with using water instead of antifreeze, because water evaporates more quickly. Tr. 50. Koffler replied to her February email by stating that he had placed Randy Powers in charge of the matter and that they would have antifreeze. Tr. 50. Though Koffler had replied that he was looking into the matter, the situation had not improved by the time that Cassidy sent the September 2019 email. Tr. 195. Cassidy felt that after seven months they should have seen some improvement, but instead the situation became worse. Tr. 195. She had also emailed Koffler and spoken to him about other safety issues, including a bad route in Three North and issues with high voltage cables. Tr. 178. The issues were never fixed, but Cassidy was not suspended or written up for raising safety concerns. Tr. 178-179.

The email was addressed only to Koffler, but Koffler forwarded it to Enlow Fork Human Resources Supervisor Tina Hilk[7] and Watson. Tr. 304-305. There was no rule or policy prohibiting an employee from emailing a superior about anything, including safety concerns. Tr. 308.

[7] Tina Hilk was a human resources supervisor at Enlow Fork Mine, where her responsibilities included hiring, training, and employee relations. Tr. 265. Prior to working for Enlow Fork, Hilk was an educator. Tr. 266.

The September 17, 2019 Meeting:

On September 17, 2019, Cassidy was called into a meeting with Hilk, Watson, and Koffler. Tr. 56-59. Hilk acknowledged that Cassidy raised safety concerns in her email and said that "the whole thing is alarming."[8] Tr. 59. Hilk called the meeting after the September email because she considered the issue to be both a safety and a personnel matter. Tr. 306. Hilk saw her role in the meeting as counseling Cassidy. Tr. 307. Hilk also testified that she wanted to make sure Cassidy understood Watson's response to the issue, but admitted that it was outside the scope of her expertise and responsibilities since she knew little of mining or mine safety. Tr. 303, 307.

Watson tried to explain away the situation as the fire bosses all wanting their own rides, but Cassidy disagreed with that interpretation. Tr. 59-60. Watson did most of the talking at the meeting and told Cassidy that she was undermining management. Tr. 60. Cassidy responded by asking how she was undermining management when she was management. Tr. 60. Watson was concerned about how Cassidy was portraying the issue to the men. Tr. 62. Watson asked Cassidy how she was communicating the issue to the other miners, and she relayed the message that she was taking care of the problem. Tr. 61-62. He also told her that it was important that she provide assurances to the miners beneath her that it was a safe mine. Tr. 288.

Cassidy testified that she sent the email in order "to bring to the forefront the seriousness of the rides. We were getting fewer and fewer rides…So, I was not undermining management at all." Tr. 64. Cassidy testified that she did not have any other recourse to address this situation. Tr. 64. She could not write it in the examination book, because the rides were required by company policy rather than by law.[9] Tr. 64, 171-172. Consol was not following its own policy concerning the emergency rides, and she was told to always abide by the most stringent requirements, whether they were state law, federal law, or company policy. Tr. 197.

In her email, Cassidy included proposed solutions, such as using rides that were parked at 22 Headgate and Tailgate. Tr. 65. Watson explained to Cassidy that there was a transmission and gear box issue, and that they were addressing it. Tr. 65. Cassidy's email also asked if they could just use other rides from Bailey or Harvey Mine, and he responded that it was something they were addressing. Tr. 65-66. At the meeting, Koffler said that he was aware of the situation and was working on it. Tr. 66. Cassidy was not convinced that Koffler understood the seriousness of

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[8] Hilk described safety as Consol's "core value" and testified that miners were "empowered" to report anything that is unsafe. Tr. 268-269. She testified that employees could report safety concerns without fear of reprisals. Tr. 269. Hilk testified that she was not a safety expert and was unable to distinguish between what was and what was not a safety violation. Tr. 285.

[9] The legal requirements for a pre-shift examination are to examine the mine three hours before the next coal-producing shift for gases and other dangers, including MSHA and state mandatory safety standards. Tr. 187, 190. There is no law that encompassed this sort of ride shortage, so it would not be something that would be included in the pre-shift report. Tr. 187-188.

the situation because he did not go underground often. Tr. 66-67. She was surprised to learn they were aware of the situation, yet nothing had been done for so long. Tr. 67. Cassidy also reminded Koffler that she had tried to call him, leave him a voicemail, and come to his office, before sending the email. Tr. 67.

Cassidy was told that the email implied that the mine was unsafe. Tr. 68-69. She was also told that several lines in her email were unprofessional, including the last line that pleaded for help. Tr. 184-185; Ex. S-2. During the meeting, Hilk said that Cassidy could bring her concerns to management and that their doors are open. Tr. 69. Watson reiterated this statement at the end of the meeting. Tr. 69-70, 287.

Hilk testified that there was no required reporting structure at the mine, but there was a general hierarchy above Cassidy. Tr. 279-280. She stated that Cassidy could have first reported to the shift supervisor and then the assistant mine foreman, then the assistant superintendent, and then the superintendent. Tr. 280. Hilk testified that this chain of command was important in order to get immediate results or feedback. Tr. 280.

Hilk felt that the email concerning the rides was unprofessional because of the use of capital letters and the repeated use of the word "help." Tr. 286. Hilk had never worked as a coal miner and had little knowledge of underground mine safety. Tr. 303. She had no responsibility for mantrips or roof control issues. Tr. 303. Hilk testified that the only way that she was able to determine that Cassidy's September 13 email raised safety concerns was due to the last sentence of the email. Tr. 303-304. She testified that she could not tell if the email was safety related by its general contents because, "I've read the email, but to be honest, I had no idea what requirements we had in place for rides." Tr. 304.

<u>The Rib and Roof Bolting Concerns and the November 15, 2019 Email:</u>

Enlow Fork Mine has rib and roof control issues. Tr. 72. In 2019, there had been several serious accidents in the mine, including a serious injury in May 2019 and a fatality on August 29, 2019. Tr. 70. The fatality occurred when a foreman named Tanner McFarland was leaving the longwall face at the end of his on-shift exam and an enormous piece of coal broke loose and crushed him.[10] Tr. 70-72.

Cassidy was told there would be a training session on bolting and was instructed to attend. Tr. 74-79. Knipple told Cassidy before the training, "This is serious. Make sure your guys take it serious and you, too." Tr. 74. Section Coordinator Frank Panepinto similarly told Cassidy, "this is a big deal. Make sure you take it seriously." Tr. 75. However, the session was run by a sales representative who knew little about bolting issues. Tr. 74-79. Several of the miners on Cassidy's crew asked the representative questions about which length of bolt was better, and questions about the glue they used, but the representative could not answer them. Tr. 75-80. Cassidy wrote down the questions in detail; confirmed with several roof bolters and a maintenance foreman named Mac Meadows that the questions were accurate; and on November

[10] The piece of coal was 20x7x4 feet large. Tr. 70-72.

19, 2019, she emailed the questions to Koffler, Watson, and Koontz. Tr. 80-81, 83-84, 86; Ex. S-5. Cassidy CC'd the email to the people who were with her, including the Section Coordinators Justin Drew and Panepinto, and Assistant Mine Foremen Steve Barr and Blumetti.[11] Tr. 85-86. Cassidy wrote in the first line of the email "I'm not sure who I address about this information. That is why I am addressing all of you…" Tr. 86-87; Ex. S-5.

In the email, Cassidy relayed the question of why they were not using six-foot bolts, since they already had those bolts on the section for the center and rib bolters and they were stronger than five-foot bolts. Tr. 88; Ex. S-5. She raised issues of the 60-second glue and the color-coding of stickers when many of the miners stated that they could not recognize the differences in color. Tr. 88-89; Ex. S-5. She also raised issues regarding the bolt sled and how bolts were stored, as well as the possible effectiveness of alternate bolting patterns. Tr. 90. Cassidy believed that the email implicated mine safety because there was a recent fatality caused by being crushed by coal, and she was raising questions concerning more effective bolts and bolting. Tr. 92-93. Cassidy did not think that this email would be a problem because at the September meeting, she was told that she could email them anytime and their doors were always open. Tr. 94. Cassidy never recorded the issue of five-foot bolts being used instead of six-foot bolts because she was not aware of it violating any laws. Tr. 173. Only safety violations that violated the law would be recorded in a pre-shift book.[12] Tr. 174. Questions about a training at the mine would not be included in a pre-shift examination. Tr. 188. A pre-shift examination record is not the appropriate place to ask questions. Tr. 188.

Barr and Blumetti were sitting at the foreman's table at approximately 6 pm on the day they received the email, when Barr talked to Cassidy, asking her why she didn't talk to him or Blumetti about the roof bolt matter.[13] Tr. 95, 97. Blumetti repeatedly questioned why she had email access underground. Tr. 95. Barr addressed the issue of the six-foot versus the five-foot bolts, explaining that they preferred the five-foot bolts because they were less likely to result in a

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[11] There were no hourly miners included in the email concerning bolts. Tr. 314.

[12] Cassidy was never suspended for writing in the pre-shift books, but she was disciplined in other ways, including receiving, "a lot of flak, even harassment from some of the other guys including, you know, Don Blumetti or Ron Houchins, who is the assistant mine foreman over at Pleasant Grove. They don't like what I put in the book." Tr. 191-192. On one occasion, Cassidy wrote that the lights were not working at a belt transfer, and Koffler questioned the shift foreman on the next shift if it was really a violation. Tr. 192. On other occasions, Cassidy wrote up wobbly steps, insufficient dust, stuck doors, and a corner falling on a belt line. Tr. 192-195. The harassment that Cassidy received as a result of making entries in the pre-shift examiner reports sometimes discouraged her from making such entries. Tr. 203. Instead, she would sometimes just fix the problems herself. Tr. 203-204.

[13] The foreman's table is where pre-shift and on-shift books were kept, and where Cassidy would have to go at the end of her shift. Tr. 97. She described it as "the obvious place that they would wait for me, anyone would wait for me, if they want to see me at the end of a shift." Tr. 97.

spinner.[14] Tr. 95-96. Barr also emailed Cassidy a reply, where he acknowledged that the six-foot bolts were stronger, but addressed the issue of spinners with six-foot bolts. Tr. 98; Ex. S-6. No one said that anything in Cassidy's email was inappropriate. Tr. 100.

The November 18, 2019 Meeting:

Three days after Cassidy sent the email, on November 18, 2019, Cassidy arrived to work and asked Knipple if she could leave on time that day for an emergency root canal, and he replied affirmatively. Tr. 101. When she was leaving work at approximately 8 am, the computers were down and she could not enter the shift's final numbers. Tr. 101. Cassidy tried six different computers before Assistant Shift Foreman Adam DeVault told her that none of them were working. Tr. 101. She wrote the numbers down on paper and as she was handing them to DeVault, Watson approached her and said that he needed to see her before she left. Tr. 102. On her way up to Watson's office, Cassidy passed Hilk's office, and Hilk said that Watson needed to see her. Tr. 102. Cassidy asked Hilk if she could postpone her meeting with Watson because of her emergency dentist appointment, and Hilk left for 20 minutes to inquire. Tr. 102-103.

Cassidy was led to a large conference room with Hilk and Watson. Tr. 104-105. Hilk sat across the table, and Watson sat very close to Cassidy. Tr. 105. Hilk was taking notes throughout the meeting and said little. Tr. 112. Watson had a thick file, with Cassidy's email on top, which was highlighted and annotated. Tr. 106. He referred to the file and when Cassidy tried to look at it, he said that she was not permitted to see it. Tr. 106. Cassidy described Watson's demeaner as, "absolutely irritated. He was beyond irritated. He was very, very upset. He was shaking. His voice was cracking. He was…loud." Tr. 106. Cassidy described Watson as "demeaning…condescending…He seemed—he had had enough. He had way more than enough." Tr. 106. During the meeting, Watson was yelling at Cassidy.[15] Tr 107. Cassidy indicated that this was quite out of character for Watson. Tr. 106. She felt that his sitting so close to her, his anger, and his condescension were intimidation tactics. Tr. 107.

Watson told Cassidy that she "did it again," in sending the email. Tr. 109. He asked Cassidy if she realized what she had done with her email, and stated that he was tired of cleaning up her messes. Tr. 107. When she tried to answer him, Watson refused to let her talk. Tr. 107. Watson said that her email was on the G drive and that it was "very damning to us." Tr. 108. He said that the email went to the lawyers, the gas operations, corporate, the engineers, and the surveyors.[16] Tr. 110. He asked her if she was an advocate for the production and maintenance men and she felt that he needed her to respond that she wasn't. Tr. 108. Watson mentioned the fatality and asked her if she thought that they were doing something to prevent it from happening

[14] A spinner is when the expander on the bolt doesn't "catch," or the glue didn't do its job and the machine keeps spinning the bolt. Tr. 96. When that happens, an employee should put in another bolt right next to it, but not everyone does so. Tr. 96-97.

[15] Hilk described Watson as raising his voice at Cassidy, but not yelling at her. Tr. 291.

[16] Cassidy had not sent the email to any of these people. Tr. 80-86.

again. Tr. 108. Watson said that Cassidy was undermining management, and she replied she did not understand that accusation since she was a member of management. Tr. 109.

Hilk testified that she found the November email unprofessional because it was sent to numerous people and because of the timing after the fatality. Tr. 289-290, 312-314, 318. She also felt that the email was unprofessional because it did not include Knipple, even though Knipple did not have control over the roof control plan at Enlow Fork, and because it was not a productive way to get an answer, even though Cassidy received a prompt answer from Barr and Blumetti. Tr. 311. Hilk also testified that Cassidy was not disciplined as a result of the email. Tr. 293.

Cassidy estimated that the meeting lasted for approximately 30 minutes. Tr. 111. At the end of the meeting, Watson said, "now you can talk." Tr. 111. Cassidy explained that people had questions and they did not know to whom they should ask these questions. Tr. 111. At the end of the meeting, Watson asked Cassidy, "you know what I want to hear, right?" Tr. 113. Cassidy responded that she would tell him what he wants to hear, that she would "never send an email to any of you as long as I live ever again." Tr. 113. He responded that "that's exactly what I want to hear." Tr. 113. After the meeting, Cassidy felt embarrassed because she did not feel that she had done anything wrong. Tr. 113. She also felt that she was not undermining management because she was management and was just asking questions. Tr. 114.

The December 12, 2019 Incident:

Knipple was Cassidy's shift foreman, which is usually her immediate supervisor. Tr. 115. He served in this capacity since March 2018. Tr. 115. She recalled that the first time she met him was during a typical Tuesday afternoon group meeting. Tr. 115. She noticed someone that she did not know among the 16-18 people gathered so she attempted to introduce herself. Tr. 116. Knipple did not respond to Cassidy. Tr. 115-116. He got close to the table and leaned in more, so Cassidy tried again, saying, "Hello, who are you?" Tr. 116. Knipple again did not respond, so Cassy tried a third time, saying, "Hello, what is your name?" Tr. 116. At that point, Knipple "spun around to his right, which is where I was standing and he didn't even have eye contact, and said, 'I don't talk to women,' and went back." Tr. 116. The room erupted in laughter at this response to her.[17] Tr. 116. Cassidy was the only woman in the room, which in her experience was quite common. Tr. 117.

On the midnight shift on December 12, 2019, Cassidy was sitting at the foreman's table with six other foremen filling out her examination paperwork when she saw Tim Domico go into the shift foreman's office. Tr. 118. When Knipple came out of the office, Cassidy asked him where Domico was, and he responded that Domico was in his office. Tr. 119. Cassidy asked why he was there, and Knipple responded that Domico would be construction foreman. Tr. 119. Cassidy inquired why he was construction foreman and not her. Tr. 119. Knipple responded that she was going to G2 because she was good on section. Tr. 119. Cassidy replied that she was good at everything she does, and Knipple responded that he needed her on section. Tr. 119.

[17] Knipple testified at hearing and this evidence was unrebutted.

The construction foreman serves as the second person in charge of the shift, and Cassidy felt she should have been chosen based on her experience. Tr. 123. Domico had not been to the Archer Portal for several months, and that portal had gone through a lot of construction, and Cassidy had more coal mining and foreman experience than Domico, so Cassidy believed that she knew the job better than Domico. Tr. 123-124. Cassidy testified that it appeared that Knipple "went out of his way to pull Domico from Pleasant Grove Portal to bring him over to Archer when he already had someone that could do that, and that definitely would have been me." Tr. 124. Cassidy also had safety concerns about Domico being assigned to the Archer Portal because it had approximately 40 people spread out working on it, and Domico was less experienced. Tr. 124-125.

Cassidy asked for a further explanation of why she was again not chosen to be construction foreman. Tr. 119. Cassidy testified that Knipple never allowed her to be in a construction or shift foreman position, even though other shift foremen assigned her to those positions. Tr. 122. She had asked him seven previous times in private about this issue, and he never provided her a reason. Tr. 122. Cassidy described the conversation as loud, but testified that she did not use any obscene language, call him any names, make any physical gestures at him, or slam her hand on the table. Tr. 120-121. At the time, she needed surgery on her left shoulder and she was holding a pen in her right hand, so many of these things would have been impossible. Tr. 121. Cassidy remained seated throughout the entire conversation. Tr. 121. However, Cassidy admitted at hearing that her yelling at Knipple was unprofessional. Tr. 155. Following the conversation, Cassidy went to the G2 section on that shift, where she did the work that was assigned to her. Tr. 127.

Knipple testified that Cassidy had screamed at him concerning his selection of foremen, and that she would not calm down. Tr. 355-356. He described the incident as "humiliating." Tr. 356. Knipple testified that he had never been spoken to in that manner by any of his foremen. Tr. 357-358. Knipple wrote up the incident to Koffler and Koffler took it to Human Resources. Tr. 358. Knipple said that a year after the incident, miners beneath him are still making fun of him and making comments about it. Tr. 358.

Cassidy described such altercations at the mine as "a regular occurrence." Tr. 127-128, 167. In her years of experience at Enlow Fork, other miners have had similar altercations with foremen and supervisors and she was not aware of any being suspended or disciplined as a result. Tr. 128, 130. She described the mine as having a lot of "screaming and yelling." Tr. 128. Cassidy testified that it was common from management to let incidents like this go without further discipline. Tr. 129. She recalled an instance when she was at the Sparta Portal and Blumetti, who was section coordinator, would "pounce on me on day shift when I came outside." Tr. 129. She was not aware of Blumetti ever being disciplined for these actions.[18] Tr. 129. In one of her first experiences at the mine, she heard a door slam down the hallway and a desk and chair going

[18] Cassidy had heard from other miners that Blumetti was told that if he yelled at a miner one more time, he would be gone. Tr. 187. However, there were several instances of him yelling after the supposed warning, and nothing ever happened. Tr. 187.

across the room. Tr. 130. She described the stresses of production and constant demands leading to this environment. Tr. 131. Hilk described the mine as a stressful environment because of the conditions, long hours, and safety concerns. Tr. 266.

Cassidy denied that she was trying to embarrass Knipple in front of his peers. Tr. 168, 186. During the hearing, Respondent's counsel repeatedly asked Cassidy if she had "emasculated" Knipple, which Cassidy denied. Tr. 198. Respondent's counsel further suggested that "even though it is your perspective you didn't do that, you would agree that it had that effect on him in the mine, didn't it?" Tr. 198.

The December 19, 2019 Meeting and Cassidy's Suspension:

Koontz testified that he first heard about the incident when a foreman named Bill Bentz[19] approached him and told him about it. Tr. 214-215, 233. Koontz testified that Bentz had described it as the worst that he had ever seen someone talk to a superior at Consol, and relayed what he had witnessed to him. Tr. 214-216. Koontz asked Bentz to write down the details of the incident and he would address it. Tr. 216. Koontz then went to Hilk and said he wanted to start an investigation into the incident and wanted everything documented. Tr. 216-217. He told her to interview everyone who was present. Tr. 235.

Hilk testified that she first heard about the incident between Cassidy and Knipple when Koontz told her about it. Tr. 295, 324. Shortly after, Bentz came and told Hilk about the incident. Tr. 296. Bentz told her that Cassidy started screaming at Knipple about the fact that he had assigned another supervisor to a role for which she felt she was more qualified. Tr. 296. Hilk testified that Bentz told her that Cassidy was yelling and pointing at Knipple. Tr. 296.

After Hilk recorded Bentz's account, she went to speak to Knipple. Tr. 297. Knipple said, "that's Barb being Barb," and Hilk told him that it was unacceptable. Tr. 297. Hilk asked Knipple for his firsthand account and he relayed it to her. Tr. 297. During the course of her investigation, Hilk only included one written statement in the investigative file, and it was from Knipple. Tr. 324. She also received a verbal account from Bentz. Tr. 324. Hilk asked Bentz to provide her a record of what occurred and he turned in a typed copy. Tr. 324. Hilk asked Bentz to hand write the statement, and she does not recall ever receiving it back. Tr. 324. Knipple submitted a typed statement because he was concerned about his handwriting. Tr. 324-325.

Koontz testified that he was not certain how many statements were actually collected, because he never reviewed them. Tr. 236. He testified that he "actually talked to some of the other people that were in the room, that were down the hallway, and there were some hourly people that I remember that came to talk to me that asked me what was going on that week." Tr. 236. However, he did not document any of those conversations. Tr. 236-237. He was uncertain if there were any statements beyond Knipple's. Tr. 237. Koontz never spoke to Cassidy about the incident. Tr. 238. He testified that he believed that Human Resources talked to Cassidy, but did

[19] The transcript alternates between the name Bill Bentz and Bill Binns. For consistency, the name Bill Bentz will be used throughout.

not know if that was included in the file. Tr. 238. Hilk testified that she did not speak to Cassidy about the incident until the December 19th meeting when they had the suspension letter in hand because Cassidy was on vacation. Tr. 297. Hilk contacted Cassidy twice during her vacation, but it was in reference to signing an ethics form. Tr. 329. During those conversations, she did not mention the investigation. Tr. 330.

Koontz testified that he never read any statements, and relied only on his verbal conversation with Bentz and discussions with the Human Resources group. Tr. 239. Based on what Bentz and others reported, there was no physical contact between Knipple and Cassidy. Tr. 234. There were no allegations that Cassidy used profanities or called Knipple any names. Tr. 234.

A few days after the incident, Koontz went to talk with Knipple because "some of the guys underground were saying that Dave got profanity slapped by Barb, like using that terminology."[20] Tr. 218. Koontz had heard that Knipple was very embarrassed and was struggling with what had happened. Tr. 218.

There were four people involved in the decision to suspend Cassidy: Superintendent Josh Koontz, Vice President of Operations Eric Schubel, Human Resources Supervisor Tina Hilk, and Director of Human Resources Erica Fisher. Tr. 221-222, 253. Koontz had a series of conversations with Schubel, with Schubel telling Koontz to gather all the facts and details related to the Knipple incident. Tr. 254. Koontz in turn delegated that responsibility to Hilk. Tr. 254. Hilk sent to Schubel or Fisher all the information, but Koontz was not certain what was included. Tr. 255. Koontz couldn't recall if anyone spoke to Cassidy, but said that "all stories aligned. It was the same story that I heard from that morning and, you know, that is the direction we went." Tr. 255. When Koontz first heard what happened, he wanted to terminate Cassidy, but since she had never been suspended before, it was decided instead that she would receive a 10-day suspension. Tr. 222.

After the incident with Knipple, Cassidy worked one more shift and then went on vacation for 19 days, until January 2, 2020. Tr. 133. In the days after the incident, no one from management told Cassidy that there was an investigation. Tr. 131. Hilk called Cassidy at home the following Monday and told her to report to work for day shift on January 2. Tr. 132. Cassidy was scheduled to go in at midnight that night and asked why she was being switched. Tr. 132. Hilk responded that there would be a meeting about what happened with Knipple. Tr. 132. Cassidy asked if she would still be working the midnight shift that evening, and Hilk replied that she would and told her to be dressed and ready for work. Tr. 132.

The following day, Hilk called Cassidy and told her that she had not filled out the code of ethics form that is required by every foreman. Tr. 132. Cassidy explained that she had tried to do so on the computer, but no one had been able to download the document. Tr. 132. Hilk told her that she needed her to come in to fill out a hard copy, and Cassidy replied that she would be there

[20] In his testimony, Koontz inserted the word "profanity" in place of the profanity that miners were using to mock Knipple.

on Thursday to pick up the Christmas ham that Consol distributed to employees. Tr. 132. Hilk responded that that would be alright. Tr. 133. Hilk never stated that there would be any discipline. Tr. 134.

Cassidy returned to the mine on December 20, 2019, to pick up her Christmas ham and fill out the ethics form. Tr. 135. Cassidy went to the warehouse, and Hilk told her to go upstairs to fill out the ethics form. Tr. 136. After Cassidy signed the form, Hilk left the room and said that she would be right back with Koontz. Tr. 136. Cassidy replied that she thought that meeting would not be happening until January 2, but Hilk insisted that they would be having the meeting at that moment. Tr. 136. Cassidy stated that she was not prepared for the meeting and that she had somewhere else she had to be very soon. Tr. 136-137.

Hilk returned with Koontz and Watson. Tr. 137. Koontz read Cassidy the suspension letter, which first discussed the September email and subsequent meeting, then discussed the November email and subsequent meeting, and then the December incident with Knipple. Tr. 137, 145; Ex. S-9. When Cassidy arrived at the meeting on December 19, 2019, the decision to suspend her had already been made. Tr. 330.

Cassidy described being in shock that she was being suspended for the two emails and for yelling at Knipple. Tr. 137; Ex. S-9. Koontz stated that he had things going on at home, things at the mine, and the fatality to deal with, and that he did not have to deal with Cassidy. Tr. 137-138. He also told Cassidy that he knew that she was calling the state or MSHA about situations at the mine, and Cassidy replied that she had never done that. Tr. 138. He replied that "I know it's you, I just can't prove it."[21] Tr. 138. He said that his boss wanted him to terminate Cassidy, but that he wanted to give her one more chance. Tr. 138.

The suspension letter stated in full:

> Dear Mrs. Cassidy,
>
> On September 27, 2019, you met with Scott Watson, Assistant Superintendent, Mike Koffler, General Mine Foreman, and Tina Hilk, Human Resources Supervisor regarding an email you sent members on our management team regarding the ride situations underground. During that conversation you were told the appropriate means of which to address any concerns and professionalism was discussed.
>
> On November 18, 2019 you again met with Scott Watson and Tina Hilk regarding another email you had sent to various extended members of the management team. You were again told of the appropriate means of which to address any concerns and expectations were clearly defined as to your role on the management team.

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[21] Hilk's contemporaneous notes of the meeting corroborates that Koontz made this accusation, stating, "Josh said she has gone to the state…" Ex. R-X.

> On December 12, 2019, you behaved in a disrespectful and disruptive manner towards your shift foreman while he was attempting to explain to you your work assignment. Specifically, you slammed your hand on the table, pointed your finger and screamed at him. He cautioned you to calm down, yet you continued to scream so loudly that it was disruptive to everyone in the area.
>
> By this letter, I will also clarify my expectations of you. First, as a member of management, you are expected to abide by the same standards that we hold our hourly employees. Second, you must present any justified criticisms or comments in a sensitive, courteous and respectful manner. This means focusing on becoming a more professional team player. Professionalism is an essential component of your position in all aspects of your work with others.
>
> In summary, I always expect you to act professionally, to work well with your coworkers, your supervisor and myself and to appropriately represent mine management.
>
> Your disrespectful and disruptive conduct will not be tolerated. To impress on you the seriousness of your misconduct, you are being placed on a ten (10) day unpaid suspension, effective January 2, 2020. You are to report back to work on January 16, 2020, for your regularly scheduled shift. Your pay will be reduced by $2132.52 on your paychecks dated January 17, 2020 and January 31, 2020. Be advised that any further misconduct will result in disciplinary action up to and including discharge.
>
> Regards,
> Josh Koontz
> General Superintendent

Ex. S-9.

Though Koontz signed the suspension letter, he did not write it. Rather, Hilk and the human resources team wrote it. Tr. 211-212, 241-242; Ex. S-9. Koontz testified that he suspended her because of the outburst she had with Knipple, including “the mannerisms and things that happened that night.” Tr. 212. Koontz explained in testimony that her behavior was in violation of Employee Conduct Rule Number 4, which covers insubordination.[22] Tr. 213; Ex. R-H. However, nowhere in the suspension letter does it state that Cassidy violated employee conduct rule 4 or anything about insubordination. Tr. 250. Hilk testified that the reason for the suspension was not based on Cassidy allegedly slamming her hand, but only the way she had spoken to her supervisor. Tr. 328-329.

[22] Rule 4 states in full, “Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company.” Ex. R-H.

Koontz testified he was aware of the bolt email, but not of the other one concerning rides. Tr. 242. However, in the suspension letter that Koontz signed, read to Cassidy, and presented to her, it referred to this email. Tr. 243. When Koontz read Cassidy's email concerning the ride situation, he did not think it was unprofessional. Tr. 247. Similarly, he did not believe that the roof bolt email was unprofessional. Tr. 247. Koontz acknowledged that the suspension letter referenced the emails as unprofessional, but Koontz said that Human Resources decided to include references to the emails. Tr. 249. There is no rule preventing someone from emailing a superior about these issues. Tr. 247.

Koontz testified that the reason for the suspension was reflected in the contents of the letter, but insisted that it was only because of what had transpired between Cassidy and Knipple. Tr. 219-220. He further testified that the two meetings referenced in the letter were in no way connected to the suspension. Tr. 220-221. Hilk also testified that Cassidy's suspension was only because of the incident with Knipple, and not because of her September or November emails. Tr. 298-301. She testified that she included the references to the two meetings that Cassidy had concerning the emails because she felt that "it was important to show that Barbara had had [sic] recently been counseled on unprofessionalism by sending the emails." Tr. 301.

Hilk testified that she based the 10-day suspension on past discipline for an incident similar to Cassidy's. Tr. 302. Cassidy was originally going to receive a three-day suspension, but Hilk testified that she changed it based on a single disciplinary letter that she found in another file. Tr. 338-339. Hilk wrote to Erica Fisher that she happened to come across a 10-day suspension from 2014 for another employee in the personnel files, and that Cassidy should receive a similar suspension. Tr. 332-333; Ex. R-R. However, at hearing, Hilk stated that she did not find it by chance, but knew it existed and searched for it. Tr. 332-333. The 2014 incident was prior to Hilk working at Enlow Fork and she had no personal knowledge of the incident. Tr. 333-334. The 2014 letter states that the employee violated Employee Conduct Rule Number 4. Tr. 334; Ex. R-R.

Koontz asked Cassidy if she had anything to say, and Cassidy hung her head and shook it to indicate that she did not. Tr. 138. Hilk encouraged Cassidy to respond, and Cassidy said, "you know I am not a slug. You know I give you 150 percent every day. I am an employee who cares." Tr. 139. Koontz replied that no one was questioning her abilities, but how she went about her work. Tr. 139. Cassidy tried to explain why Domico should not have been in charge and the reasons that she yelled at Knipple, but Koontz responded, "there you go undermining management again." Tr. 140. After being told twice to "just sign" the letter, Cassidy signed it. Tr. 139-140.

After Koontz left the room, Cassidy attempted to correct some of the errors in the letter with Hilk. Tr. 139. Among the errors was an incorrect date of the September meeting, which stated that the email meeting took place on September 27, however it actually took place on September 17. Tr. 143-144; Ex. S-9. Additionally, Cassidy stated that she did not slam her hand or point her finger at Knipple. Tr. 139. Hilk responded that "we have witnesses." Tr. 139. Cassidy replied again that she did not do those things, but she was not aware that she needed witnesses at that moment. Tr. 139. Cassidy also testified that while she may have raised her

voice so that it was yelling, she was not screaming. Tr. 146. She also stated that there were few people around and that her voice was not disruptive. Tr. 146-147. The letter stated that Cassidy was not professional. Tr. 147.

Neither Koontz nor anyone else in the investigation ever interviewed Cassidy about the incident, but testified that Cassidy had an opportunity to present her side during the suspension meeting after the letter had been printed and read to her. Tr. 240-241, 325. Hilk told Cassidy that if she had anything to say, now was the time, but testified that Cassidy did not defend herself. Tr. 325. However, Hilk's contemporaneous notes of the meeting state that Cassidy "disputed the fact that she slammed her hand and pointed at him." Tr. 325-327; Ex. R-X. Hilk testified that she disregarded the statement because she had two eyewitnesses that said Cassidy did those things. Tr. 327.

After the meeting, Cassidy was embarrassed and ashamed and described having suicidal thoughts. Tr. 150. The suspension was described as being for 10 days, but Cassidy said that it was actually for 14 days. Tr. 151. When Cassidy told Hilk about this discrepancy, Hilk responded that the 10 days was not inclusive of weekends. Tr. 151. Cassidy replied that she worked weekends, and that as a foreman she was only entitled to one weekend off per month. Tr. 151. Cassidy was not paid for the 14 days that she was suspended. Tr. 151-152.

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Secretary argues that Cassidy engaged in protected activity when she emailed safety concerns to upper management, and that Respondent discriminated against Cassidy when it counseled her after each of the emails and then suspended her for ten days without pay. The Secretary argues that the meetings were not to address the concerns in the emails, but rather were disciplinary counseling session, which is why the meetings were referenced in the suspension letter. *Sec'y Brief* at 20.

The Secretary further argues that all the indicia of discriminatory motivation were present. Much of upper management was aware of Cassidy's emails either from when she sent the emails to them or by reading the suspension letter. The Respondent showed animus toward the protected activity by referencing the emails in the suspension letter, by counseling her after each email, by conducting a "sham investigation of the Knipple incident," and by holding a surprise suspension meeting. *Id.* at 21-25. Respondent further showed animus when the mine superintendent accused Cassidy of contacting state or federal authorities about safety issues. *Sec'y Reply Brief* at 7-8. The Secretary argues that there was a close proximity in time between Cassidy's protected activities and the suspension, with the emails being sent in September and November, and the suspension in December. Cassidy further suffered disparate treatment since verbal altercations at the mine were not uncommon and rarely led to disciplinary action. Lastly, Secretary argues that the Respondent failed to rebut the *prima facie* case by proving that its adverse actions were in no way motivated by Cassidy's protected activity.

As remedy, the Secretary argues that this Court should award back-pay wages for the ten-day suspension, plus interest, as well as lost employer contributions to Cassidy's 401(k) account. Furthermore, the Secretary has proposed a civil penalty of $15,000 for the violations in this case.

The Respondent argues that Cassidy did not engage in any protected activity and suffered no discrimination. In its brief, it argues that Cassidy "screamed at and emasculated her supervisor in front of her co-workers," which amounted to a "verbal assault," and was suspended as a result. *Resp. Brief* at 1-2. Respondent argues that the ride and bolt issues that Cassidy included in her emails were not safety issues because they were not violations of law. It described Cassidy's request for help in her September email as her "frantically shouting," and that she had an "unhinged tone" in the November email. *Resp. Reply Brief* at 1-2. Furthermore, issues that Cassidy raised only involved miner convenience, and never implicated a safety concern. Respondent contends that it suspended Cassidy solely as the result of the incident with Assistant Mine Foreman Knipple.

ANALYSIS

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of her statutory rights because she "has filed or made a complaint under or related to this Act, 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 of the exercise by such miner…of any statutory right afforded by this Act." 30 U.S.C. 815(c)(1).

In order to establish a *prima facie* case of discrimination under Section 105(c)(1), the Secretary on behalf of a complaining miner must produce evidence sufficient to support a conclusion that the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *See Turner v. Nat 7 Cement Co. of California,* 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen v. Nev. Goldfields, Inc.,* 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette,* 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen,* 20 FMSHRC at 328-29 (citing *Robinette,* 3 FMSHRC at 817; *Pasula,* 2 FMSHRC at 2799-2800). The operator bears the burden of proof for the affirmative defense. *Pasula,* 2 FMSHRC at 2800.

I. <u>Protected Activity:</u>

The evidence presented in this case shows that Barbara Cassidy engaged in multiple protected activities. As will be discussed below, both of Cassidy's emails constituted safety

complaints, which the Commission has described as "paradigmatic 'protected activity' within the meaning of section 105(c)" *Sec'y of Labor obo Jeremy Jones v. Kingston Mining, Inc*., 37 FMSHRC 2519, n. 3 (Nov. 2015). Additionally, the accusations that Cassidy made reports to MSHA or the state—whether or not those complaints were actually made—constitute protected activity. Lastly, the interaction with Knipple, though loud and perhaps tinged with anger or hurt, involved safety concerns and therefore also constitutes a protected activity.

On September 13, 2019, Cassidy sent an email concerning the availability of rides to Mine Foreman Michael Koffler.[23] Tr. 34. She sent the email after several fire bosses had come to her and complained that the lack of rides impacted their ability to conduct exams and correct violations observed during their exams. Tr. 189. Furthermore, the ride shortage meant that the Two South Section had only one emergency ride for two separate working crews, which would pose a significant problem if the need arose to quickly evacuate sick or injured miners in an emergency. Tr. 40-42, 46-47. These shortages violated Consol's internal policies. Tr. 64-65. In the email, Cassidy referred to the ride shortage as a "serious" problem, and explained that as a result, "exams are not being done to the standard that they should be done." Ex. R-1. Cassidy believed the email raised safety concerns because if the fire bosses could not get to a violation, the violation could not be corrected. Tr. 43. Indeed, the final line of the email, which stated, "WE NEED TO RECTIFY THIS. WE NEED HELP!! HELP!! HELP!! PLEASE!!" was a plea for help due to an ongoing safety issue. Ex. R-1.

Others in management viewed the September email as one that raised safety issues. Though Human Resources Supervisor Tina Hilk testified that she felt the last line that plead for help was "unprofessional," she also stated that due to her lack of knowledge of mine safety, the only reason she knew Cassidy's email concerned safety was precisely because of the last line. Tr. 286, 303-304. In the meeting following the email, Hilk acknowledged the safety issues raised in the email and called the situation "alarming." Tr. 59. Assistant Superintendent Watson also viewed Cassidy's email as encompassing safety and said as much when he told Cassidy that he viewed her email as implying that the mine was unsafe. Tr. 69.

Consol repeatedly told Cassidy that it had an "open door policy," but this appeared to be little more than an empty slogan. Tr. 69, 94, 230, 287. Cassidy tried multiple ways of relaying the problems associated with the ride shortages. She had sent an email seven months earlier making the same safety complaint, but upper management did nothing except provide Cassidy assurances that they were looking into the matter. Tr. 50, 195. After the problem persisted and Cassidy continued to receive safety complaints from the fire bosses, she went to Koffler's office to discuss the issue on August 28, 2019. Tr. 35. Koffler was not in his office, so Cassidy returned the following day. Tr. 35. He was not there again, so she left a note stating that she wanted to talk to him about the ride situation and asked that he email her. Tr. 35-36. After a week of not receiving a response, Cassidy tried stopping by his office again, but to no avail. Tr. 36. So, Cassidy went to the only spot at the mine where she could get cell phone reception and called Koffler and left him a voicemail indicating that she needed to talk to him about the ride situation.

[23] This Court found Cassidy to be an honest and forthright witness, even when admitting her own shortcomings. The testimony was consistent and credible.

Tr. 36. After a week without response, Cassidy sent the email at issue to Koffler. Tr. 36-37. Then, after waiting three days without any response, she forwarded the email to Superintendent Koontz and Assistant Superintendent Watson. Tr. 37, 53.

Respondent argues that the "availability of rides is a matter of convenience and was not a safety or legal issue." *Resp. Brief* at 4. In support of this position, Respondent significantly misstates the record.[24] Respondent cites to page 42 of the transcript in stating that it was simply a matter of convenience, but this page states nothing of the sort. In fact, Cassidy's testimony captured on page 42 concerned the necessity for emergency rides, stating, "I asked them what about the guy that gets hurt, how do you get them out of there. That is always a concern of mine because I've been in a lot of emergency situations." Tr. 42. This testimony is a paradigmatic

[24] At hearing, Respondent's counsel repeatedly questioned Cassidy about the shortage of rides and whether it was a matter of convenience, and in each answer she stated that it was not. Counsel cannot cite to this page in the transcript for the affirmative proposition that the rides were a matter of convenience when the witness' answers state the exact opposite.

> Q. Okay. In fact, the availability of rides was a matter of convenience for you, correct?
> A. No, sir.
> Q. It was more convenient for you to do your job and for others to do their job in the mine if there were more rides available; isn't that right?
> A. It would be necessity when it takes three hours to walk to their job site carrying tools. That is not convenience. That is a necessity.

Tr. 174.

> Q. Having a ride just helps you to do your job more quickly, correct?
> A. No, not necessarily.
> Q. Well, it gives you the convenience of getting a ride as opposed to walking a pre-shift exam?
> A. Is that a question?
> Q. That is a question. Isn't that correct? It gives you the convenience of getting a ride as opposed to having to walk your entire pre-shift exam?
> A. No, sir. Again, that's not true.
> Q. Having more rides available allows you to -- allows you additional time to be able to perform your pre-shift exam, correct?
> A. No, sir. I wouldn't say that either. Most of what we do is walking. The belt lines, you can't do that with a ride. So, to be dropped off so you are there when your exam starts, yes. To have a ride for that, it doesn't -- a ride doesn't help me. [It] hurts me. I don't need the ride.

Tr. 175.

safety concern.[25] Similarly, Respondent misstates the meaning of Cassidy's testimony on page 69, by saying she "admitted that she was not communicating that the mine was 'unsafe;' rather, she used her email to get their attention." *Resp. Brief* at 5. Cassidy's testimony captured on page 69, as well as the pages that preceded it and the email itself, explicitly stated that she viewed the ride shortage as a safety concern. Tr. 34-35, 40-41, 44-48, 53-54, 189, 195; Ex. R-1. On page 69, Cassidy was simply stating that she denied Watson's statement that the email implied that the mine was unsafe. There is a vast difference between stating that the email did not imply that the mine was unsafe and concluding that there were no safety concerns raised. Furthermore, Cassidy did not testify that "she used her email to get their attention," *Resp. Brief* at 5, but rather to get their attention about "what is going on." Tr. 69. Respondent selectively quotes Cassidy to portray her as an attention-seeker, when in fact she was trying to bring attention to a safety problem, which is in the nature of a safety complaint.

Respondent also attempts to argue that Cassidy's email was not professional because the final line pleading for help was in all capital letters, which Respondent characterizes as her "yell[ing] at the recipients," *Resp. Brief* at 5, or that she "frantically shouted." *Resp. Reply Brief* at 2. However, capital letters do not constitute a "yell" and this Court is not going to hold that a miner's plea for help in addressing a serious safety problem is nullified because they used too many capital letters.

Ultimately, Respondent misunderstands the law governing miner health and safety when it repeatedly argues that because the ride shortage did not violate the Mine Act or regulations, then it cannot constitute a safety complaint. *Resp. Brief* at 8. The law does not require that a health or safety complaint involve a violation of a mandatory safety standard or other law, and the Commission has never required such a narrow reading.[26] The Commission has made it clear

[25] This Court gives Respondent the benefit of the doubt that it did not purposely misstate the record and instead took Cassidy's testimony concerning the section of her email with proposed solutions out of context. In this specific context, Cassidy stated, "I wasn't looking for an answer. I was just trying to spark some interest, maybe." Tr. 41-42.

[26] Commission ALJs routinely find safety complaints concerning issues that do not violate the Mine Act or regulations to constitute protected activity. *See e.g. SOL obo George M Scoles v. Harrison County Coal Co.,* 40 FMSHRC 1393 (Sept. 20, 2018); *aff'd Harrison County Coal Co. v. FMSHRC,*790 Fed. Appx. 210 (D.C. Cir. 2019) (miner's complaint to supervisor about harassment and complaint to management about assault constituted safety complaints.); *SOL obo Aaron Lee Anderson v. A&G Coal Corp. and Chestnut Land Holdings, LLC*, 39 FMSHRC 165, 173 (Jan. 19, 2017) (truck driver's comments over radio about dust in pit and request for water truck constituted protected activity.) *remanded on other grounds*, 39 FMSHRC 315 (Feb. 2017); *SOL obo Charles Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1922 (Aug. 2016) (Commission rejected Respondent's argument that miner's ventilation concerns were not protected because the "comments were nothing more than discussions between mine managers trying to address problems and were motivated by a desire to improve production, not to ensure safe working conditions."); *MSHA obo Richard B. Harrison v. Consolidation Coal Co.*,
(continued…)

that "the Mine Act grants miners the right to complain of a safety or health danger or violation." *Bryce Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 177 (Feb. 2000). In discussing whether a work refusal based upon a safety concern—a right not explicitly mentioned in Section 105—is protected activity under the Mine Act, the Commission and Courts have explained that there must be a subjective good faith belief by the miner of a hazardous condition. *See Secretary of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 812 (April 1981); *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). It would be contrary to the purpose of the Mine Act to circumscribe a miner's right to make a safety complaint more than a miner's right to engage in a work refusal. (*See e.g. MSHA obo Sean Miller v. Savage Services Corporation*, 37 FMSHRC 936, 946 (April 30, 2015). (The Court cited *Robinette* to find "that each of Miller's six safety complaints constituted protected activity because they were based on Miller's "good faith, reasonable belief in a hazardous condition.") This is consistent with Congress' intent that the scope of protected activity be broadly interpreted to "assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (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 623-24 (1978).

For similar reasons, Cassidy's November 15, 2019 email constituted protected activity. Enlow Fork Mine had rib and roof control issues, which led to the death of a miner several months earlier when an enormous piece of coal crushed miner Tanner McFarland. Tr. 70-72. Cassidy described the mood among miners as them feeling that such an accident "could happen—that could happen to anyone…All of us felt that. It could happen to anyone at any time. And it was horrible. It was absolutely horrible." Tr. 72. Multiple witnesses testified that, even several months after the death, it was a very sensitive and "very difficult time for everybody."[27] Tr. 224-225, 316, 318. It was in this context that the operator was preparing a number of changes to its roof and rib control plan to allow it to resume mining. Tr. 72-73, 224.

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[26] (…continued)
37 FMSHRC 1497, 1506-1507 (July 2, 2015) (miner's complaint about bonus plan that he feared would diminish safety at the mine found to constitute protected activity.); *Ronald E. Keim, III v. Cordero Mining LLC*, 36 FMSHRC 963, 971 (April 16, 2014) (complaint about co-worker creating a hostile work environment that made it difficult for miner's crew to safely perform their jobs was protected activity.); *SOL obo Regald Robbins v. Alden Resources, LLC*, 36 FMSHRC 1927 (July 29, 2014) (miner's comments about the need for 5-foot roof bolts constituted protected activity).

[27] This Court found all parties to be quite sincere in expressing their sorrow over the loss of Tanner McFarland. Miners belong to an ancient brotherhood of grief, their history steeped in disability, death, and disaster. This Court well recognizes that the death of a miner anywhere affects miners everywhere.

However, the very circumstances of this real grief at Enlow Fork would have made and did make Cassidy's safety complaints all the more distressing and aggravating to the operator's management team.

During this time, Cassidy and her crew were instructed to attend a training by the mine's roof and rib bolt supplier and Cassidy was told by numerous supervisors that she and her crew must take the training seriously. Tr. 74-75. During the training, several of the miners on Cassidy's crew asked questions about bolting, which the training representative was unable to answer. Tr. 75-80. Cassidy hoped to get answers to these questions concerning the safest type of bolts for the mine, but she did not know to whom she should direct them. Tr. 80-86; Ex. S-5. Therefore, she emailed them to several members of management. *Id.*

Cassidy's November 15, 2019 email clearly concerns safety issues. First, Cassidy references the training that she and her crew attended, and stated clearly that there were some concerns and questions that came up. Ex. S-5. These questions included asking why six-foot bolts were not going to be used instead of five-foot bolts, remarking that the six-foot bolts are stronger. Ex. S-5. Cassidy also mentioned that the new bolts have a different time requirement for setting in place, and that the stickers on the boxes distinguishing the different glues were too close in color and that miners had trouble telling them apart. Ex. S-5. Cassidy also raised questions and concerns regarding how the bolts were stored and whether a different bolting pattern would be more effective. Ex. S-5. Cassidy testified that she believed that the email concerned mine safety because a miner had recently died from being crushed by a chunk of coal and she was raising issues concerning stronger and more effective bolting. Tr. 92-93. This Court fully agrees.

Respondent's Counsel's argument that "Cassidy's challenges to the use of five inch bolts as compared to six inch bolts had nothing to do with safety and everything to do with convenience for her subordinate employees who wanted to avoid the hassle of using the five inch bolts" is not based in any evidence and shows a complete lack of understanding for the work that miners perform.[28] *Resp. Brief* at 8. As discussed *supra*, Respondent's counsel asked repeatedly at hearing whether the issue was more a matter of convenience, and Cassidy repeatedly explained the important safety reasons for which she had raised the issue.

Respondent also raises, once again, the argument that Cassidy "never recorded a condition or violation related to the use of six-foot bolts as compared to five-foot bolts as part of her pre-shift responsibilities, because she did not consider it to be and, in fact it was not, a safety issue." *Resp. Brief* at 9. This argument both misconstrues the legal requirements for protected activities and misunderstands what exam books are used for in the mine.[29] Questions about a training at the mine would not be included in a pre-shift examination because a pre-shift examination record is not the appropriate place to ask questions. Tr. 188. The regulations have very specific requirements for what must be examined during a pre-shift exam and what must be

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[28] The Respondent's counsel incorrectly stated that the bolts in question were five inches long, rather than five feet long.

[29] With regard to Respondent's narrow understanding of what constitutes safety complaints, see the discussion *supra* related to the September email.

recorded. *See* 30 CFR 75.360. If a miner has safety questions, it would be wholly inappropriate to record those questions in the examination book.[30]

In addition to the two emails, Koontz's accusations in the December 19, 2019 meeting that Cassidy had contacted the state or MSHA constituted a protected activity. Tr. 138; Ex. R-X. Cassidy denied that she had contacted MSHA, but Koontz replied "I know it's you, I just can't prove it." Tr. 138. Whether Cassidy actually contacted MSHA is immaterial; if management believed that she had done so, then it constitutes protected activity under Section 105(c). *MSHA Ex Rel. Stephen Smith, Donald Hansen, Thomas Smith and Patricia Anderson v. Stafford Construction Co*., 5 FMSHRC 618, 621 (April 1983) ("discrimination against a miner based on a mistaken belief that he has engaged in protected activity also violates section 105(c)(1) of the Act."); *Elias Moses v. Whitley Development Corporation*, 4 FMSHRC 1475, 1480 (Aug. 1982) ("Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator's mistaken belief that a miner had exercised a protected right. Indeed, the adverse effect of such action might be even more debilitating than discrimination over actual protected activity."); *MSHA obo Chad Alex Green & William Donnie Smith v. D & C Mining Corp*., 33 FMSHRC 243, 250 (Jan. 20, 2011) ("Although the Complainants may not have engaged in protected activity, it cannot be denied that the Respondent believed they did so…").

Lastly, Cassidy's argument with Knipple concerning the choice of who would be the construction foreman on the shift included safety concerns and therefore was a protected activity. Cassidy testified that Tim Domico was less qualified to serve as construction foreman at the Archer Portal because he had less experience than her, and that there was a lot of construction since the last time he was at the Archer Portal, which meant that he may not be as familiar with the area. Tr. 123-125. Cassidy had more coal mining and foreman experience than Domico, and she believed he was being chosen for illegitimate reasons. Tr. 123-124. Cassidy testified that she was concerned about Domico's abilities supervising 40 miners at that Portal. Tr. 124-125. The manner in which Cassidy raised these issues to Knipple is discussed below, but for purposes of this analysis, this Court finds that asking one's supervisor why a less experienced foreman is being chosen implicates safety issues sufficiently to be considered protected activity under Section 105(c).

II. <u>Adverse Action:</u>

The Respondent does not contest that Cassidy suffered an adverse employment action. Cassidy was suspended without pay from January 02, 2020, until January 16, 2020. Ex. R-A. "Under the Mine Act the Commission has defined 'adverse action' to constitute 'an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment

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[30] This Court presumes that the Respondent's counsel is not purposefully misstating the record, but instead is simply not fully knowledgeable about the nature of mining and mine safety, which leads it to state in its brief that the proof that Cassidy did not consider her questions safety-related was because she did not record them in the pre-shift examination book. *Resp. Brief* at 9.

in his employment relationship.'" *MSHA obo Lawrence L. Pendley v. Highland Mining Company*, 34 FMSHRC 1919, 1930 (Aug. 2012).

The Secretary further argues that each of the meetings following the emails also constituted adverse employment actions. This Court agrees. Hilk described the meetings as disciplinary counseling sessions that were part of progressive discipline. Tr. 301, 306-307, 322; Ex. R-X. The meetings were then included in the suspension letter because Hilk "thought it was important to show that [Cassidy] had been recently counseled on unprofessionalism by sending the emails." Tr. 301, 322.

III. **Discriminatory Motive:**

The Commission has acknowledged that it is often difficult to establish a motivational nexus between protected activity and the adverse action that is the subject of the complaint. *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). To establish the nexus, the Commission has identified the following indicia of discriminatory intent: (1) hostility or animus toward the protected activity, (2) knowledge of the protected activity, and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec'y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 34 FMSHRC 3304 (Dec. 2012).

Though the Commission has noted that "direct evidence of actual discriminatory motive is rare," this case constitutes one of those rare cases. *See United Mine Workers of America obo Mark A. Franks & Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2096 (Aug. 2014). Direct evidence of such discriminatory motive here is contained in several important documents submitted into evidence. First, the suspension letter lists three incidents—the September 27 email, the November 18 email, and the December 12 argument—before imposing a suspension for lack of professionalism and misconduct. Ex. S-9. Therefore, in the very document that provided justification for the suspension, Respondent included and focused on Cassidy's safety emails.

Superintendent Koontz testified that the reason for the suspension was contained in the contents of the letter, but insisted that the first half of the letter should be ignored and that it was only because of the Knipple incident. Tr. 219-220. This Court found Koontz to be a less than credible witness, with much of his testimony being self-serving and contradicting Respondent's own documents. Though Koontz did not author the suspension letter, he signed it and read it to Cassidy during the December 19, 2019 suspension meeting. Tr. 137, 145; Ex. S-9. In addition to discussing the two emails that Cassidy sent, Koontz also accused Cassidy of reporting safety issues to MSHA, stating, "I know it's you, I just can't prove it." Tr. 138. This fact is corroborated by Hilk's contemporaneous notes, which state, "Josh [Koontz] said she has gone to

the state." Ex. R-X. Koontz was an experienced manager, having worked as an assistant superintendent and general superintendent for over four years at the time of this meeting with Cassidy, and it defies logic and belief that he did not understand that the inclusion in the suspension letter of these incidents indicates that they served as reasons for the suspension. Tr. 207-208.

Furthermore, Koontz had no first-hand knowledge of the Knipple incident and he neither conducted nor relied on anything that could be considered an investigation. Koontz described first hearing about the incident when Bentz approached him and told him what he witnessed. Tr. 214-216, 233. Koontz then delegated to Hilk to conduct an investigation, interview everyone who was present, and document everything. Tr. 216-217, 235. However, Koontz testified that he never reviewed any of the statements collected and that he just talked with some of the people who witnessed the events, though he did not name any and documented nothing. Tr. 236-237, 239. Koontz never spoke to Cassidy about the incident. Tr. 238.

Koontz testified that the suspension was due to Cassidy violating Employee Conduct Rule Number 4, which covers insubordination. Tr. 213. However, neither this rule nor the word "insubordination" appears anywhere in the suspension letter. *See* Ex. S-9. Rule 4 defines "insubordination" as "refusal or failure to perform work assigned or to comply with supervisory direction," however there was no allegation or evidence that Cassidy refused to perform work or comply with supervisory direction. In fact, following the argument with Knipple, Cassidy went to the G2 section as she was instructed to do and followed direction. Tr. 127.

Though not under the definition of insubordination, Rule 4 also lists other conduct that is prohibited, including "use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company." Ex. R-H. However, there were no allegations or evidence that Cassidy used any profanity or called Knipple any names or engaged in any of the conduct listed in Rule 4. Tr. 234. The only use of profanity in this case involved Koontz hearing that some of the other men in the mine were saying that Knipple "got profanity slapped by Barb." Tr. 218. There is no evidence that any of these men were disciplined for engaging in profanity in violation of Rule 4.

Hilk authored the suspension letter and similarly testified that the reason for the suspension was only because of the incident with Knipple and not the two emails she discussed in the letter. Tr. 273, 298-301. This Court found Hilk to be an evasive witness who repeatedly contradicted herself and the other evidence—much of which she authored—and used buzzwords like "professionalism" to distract from the explicit reasons she wrote for Cassidy's suspension. She knew little to nothing about mining or mine safety and, despite having substantive involvement in making decisions concerning the discipline of miners, she seemed to be wholly ignorant of miners' rights.

Hilk was present at both meetings following Cassidy's sending of the safety emails, as well as the suspension meeting, and she took contemporaneous notes at each, which were admitted into evidence. Tr. 112, 326. Hilk testified that Cassidy was in no way disciplined for raising safety concerns in her November email. Tr. 293. Hilk stated that what occurred in this meeting was Watson educating Cassidy about the bolts. Tr. 293. This testimony was in direct

contradiction to Hilk's own contemporaneous notes. In her notes, Hilk wrote nothing about Watson educating Cassidy about the bolts. *See* Ex. R-X. Rather, she wrote, "The first meeting was a warning regarding the unprofessionalism. Scott [Watson] was very clear this was the last time we would meet on this subject and that the next time would not have the same outcome." Ex. R-X. Hilk was a supervisor in Human Resources and clearly documented that the September meeting was the first verbal warning, the November meeting was the second verbal warning, and that the next incident would result in adverse employment action. Hilk provided no alternative explanation for these notes nor is it likely that one is possible. Indeed, the suspension letter that Hilk authored clearly places these actions in the same disciplinary chain. Hilk testified that she only included discussions of the emails in the suspension letter because she felt "it was important to show that Barbara had had [sic] recently been counseled on unprofessionalism by sending the emails." Tr. 301. However, in her own notes, Hilk stated that those meetings were disciplinary warnings, and the inclusion of them in the letter is clearly describing strikes one and two of a progressive discipline regime.

Hilk was in charge of conducting an investigation and recommending the level of discipline, but this Court cannot find that either action was performed in good faith. In addition to Cassidy and Knipple, there were at least six other people present for the December 12, 2019 incident. Tr. 118. Hilk only collected one written statement and one oral statement of the incident. Tr. 297, 324-325. Despite calling Cassidy twice at home during Cassidy's vacation, Hilk never discussed the incident with Cassidy or asked her for her explanation of events, and then testified that the reason she did not interview Cassidy was due to her vacation. Tr. 297, 330. In determining the type of discipline that Cassidy should receive, Hilk sent Fisher a previous suspension of another employee and wrote, "In looking through a personnel file, I by chance came across the attached. In being consistent with past practice for the same violation, we would like to make Barb Cassidy's suspension 10 days." Ex. R-R. However, at hearing, Hilk testified that she did not find it "by chance," but rather knew it existed and searched for it. Tr. 332-333. The letter that Hilk sent was from before Hilk began working for Consol. Hilk further testified that at the December disciplinary meeting, Cassidy was given an opportunity to defend herself, but chose not to do so. Tr. 325. This testimony is belied by Hilk's contemporaneous notes, where she wrote that Cassidy did defend herself, when she wrote, "After Josh left, she disputed the fact that she slammed her hand and pointed at him." Ex. R-X.

Though there is ample direct evidence of discriminatory motive, this Court will still examine the traditional motivational nexus below.

A. <u>Animus Towards Protected Activity</u>

"Hostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted). In the instant case, there is abundant evidence of hostility or animus towards the protected activity.

Immediately following each of Cassidy's emails where she raised safety issues, Cassidy was called into meetings with upper management and a member of Human Resources. In the September 17, 2019 meeting, Watson accused Cassidy of undermining management in raising safety issues and gave her a warning "regarding the unprofessionalism." Tr. 60; Ex. R-X. In the November 18, 2019 meeting, Watson sat very close and yelled at Cassidy. Tr. 105-106. Watson told Cassidy that she "did it again," in sending the email, and that he was "tired of cleaning up [her] messes." Tr. 107-109. Watson warned Cassidy that this was her second warning and that next time she would face more severe consequences. Ex. R-X. At the end of the email, Watson required Cassidy to state affirmatively that she would "never send an email to any of you as long as I live ever again." Tr. 113. Respondent's further inclusion of references to these emails in the suspension letter also constituted animus towards Cassidy's protected activities of raising safety complaints via email. Ex. S-1.

Following Cassidy's protected activity of complaining of a less qualified construction foreman—albeit in a loud manner—Respondent engaged in a farce of an investigation. Respondent never interviewed most of the witnesses to the argument, including Cassidy. Respondent ambushed Cassidy with a disciplinary meeting, without providing her any time or warning to bring forward witnesses or present her side of the events. Tr. 135-137. This Court is not implying here that the Mine Act generally requires an employer to afford due process prior to discipline, but only that the manner in which the investigation and meeting were conducted here is evidence of animus towards the protected activity.

B. Knowledge

"Knowledge of protected activity is one of the most important factors in a circumstantial case for discrimination." *KenAmerican Resources, Inc.* 37 FMSHRC 2767, 2780 (Dec. 2015) (citing *Sherwin Alumina, LLC,* 36 FMSHRC 730, 736 (March 2014)). In the instant case, there is no question that key decisionmakers knew of Cassidy's protected activities, even if all of them may not have been fully aware of all the protected activities.

According to testimony at hearing, there were four people involved in the decision to suspend Cassidy: Joshua Koontz, Eric Schubel, Tina Hilk, and Erica Fisher. Tr. 221-222, 253. Hilk was present for each of the meetings; she recommended the 10-day unpaid suspension; and she drafted the suspension letter. Therefore, Hilk had knowledge of the full extent of Cassidy's protected activity. Koontz testified that he was not aware of the September email, but was sent the November email. Tr. 242; Ex. R-J. However, even if Koontz had not known about the September email at one point, he was certainly made aware of it when he signed the suspension letter, which discusses that email in the first paragraph. Ex. S-1. Fisher and Schubel did not testify at hearing, and it is not clear what knowledge they had. Koontz and Hilk were responsible for the suspension letter and the suspension meeting, and their knowledge can by imputed to the other decisionmakers. *See See Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1068 (May 2011).

C. Coincidence in Time

With respect to coincidence in time between the protected activity and the adverse action, the Commission has noted, "[a] three week span can be sufficiently close in time," especially

when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC,* 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time."' *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

The series of protected activities that occurred in the instant case took place on September 13, November 15, and December 12, 2019. The meetings and suspension then occurred on September 17, November 18, and December 19, 2019. The time periods between each protected activity and the Respondent's reaction were always within a few days, and the time difference from the first protected activity until the ultimate suspension was approximately three months. The "fact that the Company's adverse action against [a miner] so closely followed the protected activity is itself evidence of an illicit motive." *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). I find that this proximity in time is strong evidence of discriminatory motive behind Cassidy's discipline.

D. Disparate Treatment

Respondent argues that Cassidy was suspended for her "unprofessional" behavior in violation of Employee Conduct Rule 4. *Resp. Reply Brief* at 6; Tr. 212-214, 221. This rule prohibits insubordination, or refusal to perform work, as well as the use "of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company." Ex. R-H. In the instant case, evidence was presented of miners yelling and screaming at each other, miners ridiculing each other, and miners engaging in profanity, and yet most of the conduct was not by Cassidy and most resulted in no discipline. There is little evidence that Rule 4 was taken seriously at the mine, except as an *ex post facto* excuse for justifying discipline.

Though Cassidy readily conceded and the evidence shows that she yelled at Knipple concerning the choice of a construction foreman, yelling between miners was common at the mine. Tr. 127-128, 167. Section Coordinator Don Blumetti regularly yelled at Cassidy and suffered no discipline as a result. Tr. 129-131. In the November meeting, Watson sat close to Cassidy and yelled at her to the point where his voice was cracking, and yet no discipline resulted from his treatment of her. Tr. 104-106. Koontz testified that miners were ridiculing Knipple based on what occurred between him and Cassidy, with some even engaging in profanity, yet there is no indication that any of them were disciplined. Tr. 218.

Respondent argued that the 10-day suspension was consistent with other discipline meted out at Enlow Fork. To support this position, Respondent introduced a short letter from over five years earlier of a miner that was suspended for 10 days. Ex. R-R. This letter provided few details that could lead this Court to conclude that there was any similarity in the conduct or the context between Cassidy's case and the miner referenced in the old letter. By all accounts, Enlow Fork was a stressful work environment, made more stressful due to a recent fatality, and yelling was common. The fact that the only disciplinary letter that Hilk was able to find was from more than five years prior and involved a situation about which she had no firsthand knowledge, shows just how rarely yelling between miners results in discipline.

IV. Affirmative Defense

Having found that the miner engaged in protected activities, suffered an adverse employment action, and that there was a nexus between the two, the operator may still avoid liability if it can show that it would have disciplined her for unprotected activity alone. *See MSHA obo Riordan v. Knox Creek Coal*, 38 FMSHRC 1914 (Aug. 2016). The Commission has explained:

> that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982); *see Cumberland River Coal Co. v. FMSHRC,* 712 F.3d 311, 320 (6th Cir. 2013). In reviewing defenses, the Judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found … where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

Id. at 1925.

In the instant case, the Respondent argues that even if this Court finds discrimination, it would have disciplined Cassidy based solely on her yelling at Knipple. *Resp. Brief* at 10. Aside from the letter concerning another miner from five years earlier discussed *supra*, Respondent offers little convincing support for this argument. In lieu of such evidence-based support, Respondent's counsel employs exaggerated descriptives, such as "verbal assault" to liken Cassidy's action to criminal or tortious conduct. *Resp. Brief* at 1, 7, 9, 10. This language is wholly inappropriate to describe what occurred.[31] The term "assault" is a term of art, meaning,

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[31] This Court found much of the language employed by Respondent's counsel inappropriate. Cassidy has worked for decades in mines as one of only a handful of women. She described various indignities and hurdles she had to face as a result, including when upon meeting Knipple, when he refused to talk to her and embarrassed her in a room full of her (continued…)

"The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery." *ASSAULT*, Black's Law Dictionary (11th ed. 2019). "Verbal assault[s]," as defined by various statutes and court decisions, are "designed to instill serious fear." Frederick M. Lawrence, *The Collision of Rights in Violence-Conducive Speech*, 19 Cardozo L. Rev. 1333, 1348 (1998). There is no evidence that Knipple felt any of these things during the argument with Cassidy.

In the instant case, Respondent has provided little credible evidence or arguments that it would have disciplined Cassidy regardless of her protected activity.

REMEDIES AND PENALTIES

A successful complainant is entitled to be made whole for the entire period of her unemployment, plus interest. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988). The Commission has recognized that certain events, such as a bona fide reduction in force, can toll a miner's right to back pay, the burden to show that work is no longer available for the complainant lies squarely with the employer. *KenAmerican Resources, Inc*., 31 FMSHRC 1050, 1054-55 (Oct. 2009) (citing *Kenta Energy, Inc*., 11 FMSHRC 1638 (Sept. 1989)). The operator must make this showing by a preponderance of the evidence. *Id.*; *C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, 1188 (2013). In the absence of evidence identifying any basis for tolling or other restrictions on lost wages, Complainant is entitled to be made whole for the entire period of her unemployment, plus interest. *See Clinchfield Coal Co*., 10 FMSHRC 1493 (Nov. 1988).

Having found that Respondent discriminated against Cassidy in violation of the Mine Act, the next issues are the proper remedies and civil penalties.[32] With respect to remedies, the

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[31] (…continued)
colleagues by stating, "I don't talk to women." Tr. 116. Cassidy should not have to face such gendered misrepresentations of her actions in a court of law.

Respondent's counsel repeatedly used language that was misogynistic and ableist, whether consciously or subconsciously. This included their repeated attempts to describe Cassidy's argument with Knipple as a form of "emasculation" Tr. 198; *Resp. Brief* at 1. They even went so far as to ask Cassidy whether she was responsible for emasculating Knipple, even if it was not her intent. Tr. 198. Such questions imply that a woman who yells at a man is guilty of emasculating him no matter what the content of her speech or her intent. Respondent's counsel further described Cassidy's safety emails as "frantic," *Resp. Brief* at 6, also stating that she "frantically shouted in her email," and saying that they had an "unhinged tone." *Resp. Reply Brief* at 2. These descriptions are inaccurate, and this Court is troubled by Respondent's counsel's use of them.

[32] Respondent made no arguments concerning remedies or penalties in its post-hearing briefs.

parties have stipulated that Cassidy's lost earnings due to her unpaid suspension amounted to $4,265.04 in lost wages and $255.90 in lost employer contributions to Cassidy's 401(k). Jt. Stip. 8, 11. This Court finds it appropriate to award this full back pay and lost employer contribution, plus interest. *See GMS Mine Repair & Maintenance*, 38 FMSHRC 2664, 2683 (Oct. 2016) (citing *Local 2274, District 28, UMWA*, 10 FMSHRC 1493, 1505 (Nov. 1988)). In addition to backpay, the Secretary requests that the Respondent be ordered to expunge from Cassidy's personnel file any documentation, records, or other references to her suspension. *Sec'y Brief* at 30.

The Secretary further proposes a civil penalty of $15,000. *Sec'y Brief* at 30. The principles governing the authority of Commission Administrative Law Judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Court's assessment here is independent, and the Secretary's proposal "is not a baseline or starting point," that the Court has used in its assessment. *Sec'y of Labor, MSHA v. The American Coal Co.*, 38 FMSHRC 1987 (Aug. 2016). The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent. the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The instant case is an egregious case that warrants a civil penalty of $20,000. At the time of the discrimination in this matter, the Mine had a history of five prior 105(c) violations. *Discrimination Complaint* Ex-B. Furthermore, the mine was in the largest category of mines, and the controlling entity in the largest category under MSHA's tables in Part 100.3. *Id.* The parties have stipulated that the Secretary's proposed penalty of $15,000 will not affect Respondent's ability to continue in business, and there is nothing in evidence that suggests that an increased penalty of $20,000 would affect Respondent's ability to continue in business. Jt. Stip. 12. Respondent's actions displayed a sustained series of discriminatory conduct following multiple safety complaints, which exhibit a high degree of culpability. The gravity of the violation was significant in that it caused Cassidy to lose 10 days of pay, silenced a safety advocate, and sent a message in the mine that safety complaints would lead to discipline. Such conduct has the effect of chilling the speech of miners. Lastly, Respondent made no good faith effort to rectify its repeated violations of Cassidy's rights. A $20,000 civil penalty is appropriate to effectuate the purposes of the Mine Act and its core anti-discrimination provisions.

CONCLUSION AND ORDER

Based on the foregoing, I find that Respondent violated Section 105(c) of the Act by discriminating against Cassidy for engaging in protected activity.

Respondent is **ORDERED** to pay Cassidy $4,265.04 in lost wages and $255.90 in lost employer contributions to her 401(k), plus pre-judgment interest.[33] Further, Respondent shall expunge from Cassidy's personnel file any documentation, records, or other references to her suspension.

It is **ORDERED** that Respondent post this decision at the Enlow Fork Mine in a conspicuous unobstructed place where notices to employees are customarily posted, for a period of 60 days.

It is **FURTHER ORDERED** that Respondent pay a civil penalty of $20,000.00 within 30 days of this Decision to the Secretary of Labor.[34]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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[33] The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method, which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.,* 5 FMSHRC 2042, 2052 (Dec. 1983), *as modified by Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

[34] Payment should be paid 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.

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ADMINISTRATIVE LAW JUDGE ORDERS

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July 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES MCGAUGHRAN, Complainant,	DISCRIMINATION PROCEEDING Docket No. PENN 2020-0015-DM
v.	
LEHIGH CEMENT COMPANY, LLC, Respondent.	Mine: Nazareth Plant I Mine ID: 36-00190

ORDER DENYING MOTION TO ENFORCE ORDER

Before: Judge Rae

This matter comes before the Court upon the Secretary of Labor's ("Secretary") Motion to Enforce Order ("Motion"). For the reasons set forth below, the Secretary's Motion is denied.

I. BACKGROUND

On August 20, 2019, I issued an Order Granting Temporary Economic Reinstatement ("Order") ordering Lehigh Cement Company, LLC ("Respondent") to economically reinstate James McGaughran in accordance with all terms set forth in the parties' Joint Motion to Approve Settlement Regarding Temporary Reinstatement. I issued the Order in the temporary reinstatement proceeding, Docket No. PENN 2019-0144. Subsequently, I was assigned this discrimination proceeding—Docket No. PENN 2020-0015—which concerns the merits of McGaughran's discrimination complaint. I set a hearing date of June 2-4, 2020 for the discrimination proceeding. Subsequently, I postponed the hearing until October 27-30, 2020 due to COVID-19.

On May 11, 2020, Respondent filed a Motion for Tolling of Economic Temporary Reinstatement. On May 22, 2020, I issued the Order Tolling Temporary Reinstatement under the temporary reinstatement docket, Docket No. PENN 2019-0144. The Secretary filed a Petition for Discretionary Review of my Order Tolling Temporary Reinstatement, which the Commission granted on July 1, 2020. The matter is currently pending before the Commission.

II. DISCUSSION

The Secretary's Motion alleges that Respondent is not honoring the Order. Specifically, the Secretary alleges that Respondent failed to pay McGaughran the entire amount he is owed under Respondent's Annual Incentive Plan ("Incentive Plan"). The Incentive Plan provides Respondent's eligible employees with "an incentive compensation opportunity for improving

operating performance within their areas of responsibility during the 'plan year.'" Mot. to Enforce Order Ex. 1, at 1. The Secretary seeks an order requiring Respondent to pay McGaughran $12,000.00, which the Secretary claims represents the remainder of the Incentive Plan payment that Respondent has withheld from McGaughran.[1]

Conversely, Respondent claims it is in full compliance with the Order. Respondent argues that payments under the Incentive Plan are a discretionary "bonus," not a "benefit" that McGaughran is entitled to under the Order. Resp't's Opp'n to Mot. to Enforce Order, at 3-5. Although Respondent made a partial Incentive Plan payment to McGaughran, Respondent now maintains that the Order does not require Respondent to make *any* Incentive Plan payment to McGaughran. *Id.* at 6-7. For that reason, Respondent seeks an order requiring McGaughran to return the partial Incentive Plan payment to Respondent.

Ultimately, I cannot resolve the issues raised by the Secretary's Motion at the present time because the Motion is not properly before me and because I lack jurisdiction over the temporary reinstatement proceeding. The Secretary filed the instant Motion under the incorrect docket. The instant discrimination proceeding solely concerns *the merits* of McGaughran's discrimination claim, not issues addressing compliance with the Order. Rather, the matter of enforcing compliance with the Order would be properly filed under Docket No. PENN 2019-0144, the temporary reinstatement proceeding.

However, this Court would lack jurisdiction to address the substance of the Secretary's Motion even if it were filed under the temporary reinstatement docket. Per Commission Rule 45(e), "[a] Judge's order temporarily reinstating a miner is not a final decision within the meaning of [Section] 2700.69, and[,] *except during appellate review of such order by the Commission or courts*, the Judge shall retain jurisdiction over the temporary reinstatement proceeding." 29 C.F.R. §2700.45(e)(4) (emphasis added); *see also BR&D Enters., Inc.*, 23 FMSHRC 386, 389 (Apr. 2001). During the Commission's review of the Order, the Court does not retain jurisdiction over the temporary reinstatement proceeding.[2] 29 C.F.R. § 2700.45(e)(4).

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[1] From 2016 through 2019, Respondent paid McGaughran an incentive payment that ranged from 15% to 17% of his annual salary. McGaughran Decl. ¶ 5. The Incentive Payment Respondent paid McGaughran in April 2020 represented approximately 7% of his annual salary. *Id.* ¶¶ 6, 7.

[2] Even if I had jurisdiction, I would find that payments under the Incentive Plan are not a "benefit" that McGaughran is entitled to under the Order. Payments under the Incentive Plan are solely at the discretion of Respondent to award. Further, Section VI.D of the Incentive Plan states that "incentive payments . . . shall not be deemed a part of a participant's regular, recurring compensation for purposes of calculating payments or benefits from any Company benefit plan or severance program." Mot. to Enforce Order Ex. 1, at 7.

Therefore, I deny the Secretary's Motion to Enforce Order because the Motion is not properly before me and because I lack jurisdiction over the temporary reinstatement proceeding pending review by the Commission.

ORDER

The Secretary's Motion to Enforce Order is **DENIED**.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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July 25, 2020

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of WILLIAM R. WHITMORE, Complainant v. YAGER MATERIALS CORP., Respondent	TEMPORARY REINSTATEMENT Docket No. KENT 2020-0116-DM Mine: Riverside Stone Mine Mine ID: 15-00081 Docket No. KENT 2020-0117-DM Mine: Riverside Stone Mine Mine ID: 15-18549

ORDER ON RESPONDENT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Respondent, Yager Materials Corp., through Counsel, filed, on July 21, 2020, a Motion to Compel Production of Documents. ("Motion"). The Court held a conference call with the parties on July 23, 2020 to discuss the Motion. During that call the also Court issued its rulings on the subjects identified in the Motion. This Order memorializes the Court's rulings.

The Motion requested the following documents: Copies of the statement or memorandum of interview of any interview of Mr. Whitmore; Copies of the statements or memoranda of interviews of any management witness; Copies of all exhibits the Secretary intends to introduce at hearing on the Secretary's Application for Temporary Reinstatement in this matter; Copies of any documents Mr. Fugate relied upon in preparing his Declaration. Motion at 2-3.

The Secretary responded to the Motion via an email, objecting to it on the basis that it ran afoul of several of the Commission's Procedural Rules, including claims that the response to the Motion would not be due until the day of the temporary reinstatement hearing or later and that discovery was not expressly contemplated for a hearing on a temporary reinstatement application. The full text of the Secretary's email response is footnoted here.[1]

[1] The Secretary's Attorney stated in his email that he "request[ed] oral argument on this matter [asking that the Court] [p]lease permit [him] a brief, if unorthodox, rejoinder: As the parties are aware, by Rule, a response to the Respondent's Motion is not due for eight days from service, which would be July 29, 2020, the day of the hearing. 29 C.F.R. 2700.10(d). Any discovery served under the Rules would not be due for 25 days from service. 29 C.F.R. 2700.57(c). If we call what [Respondent's Attorney] served on July 17, 2020 "Document Requests," the responses from the Secretary would not be due until August 11, 2020. The Rules also clearly state that discovery must be completed at least 20 days before a hearing. 29 C.F.R. 2700.56(e). We are within 20 days of hearing and were when the requests were served. Even [the Respondent's attorney's] arbitrary deadline of this Friday [July 24, 2020] (after he conceded his initial arbitrary deadline of tomorrow) has not passed for the Secretary's responses. So, to have any discussion of what the Rules permit, we must ignore the plain language of the foregoing rules, and the deadline that the Respondent, itself, set. The Respondent and the Secretary agree on one thing: the Commission Rules do not expressly contemplate discovery commencing after a request for a hearing on an Application for Temporary Reinstatement: (d) Initiation of discovery. Discovery may be initiated after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 821. 29 C.F.R. 2700.56(d). Absent from this list is the request for a Temporary Reinstatement hearing. This absence is intentional in light of the unique scope of such a hearing and the speed at which it must be completed. If the rules contemplated discovery prior to a Temporary Reinstatement hearing, they would necessarily have set forth things like the scope of such discovery in light of the limited scope of the hearing, alternate time frames for service of requests and responses, and a blanket exemption from Rule 2700.56(e). Initial disclosures, rather than discovery, would be more appropriate given the tight deadlines between the request for a hearing and the hearing itself, but the Rules contain no such provisions. As I explained to [the Respondent's Attorney]: he wants discovery, the complainant (I am sure) wants discovery, and the Secretary wants discovery. Why does the Respondent get discovery and not the Secretary or the Complainant? The time frame for a Temporary Reinstatement hearing does not allow the parties the opportunity to serve discovery and to lodge good-faith objections to such requests. As we have here, we are essentially preparing for the hearing at the same time we are having a discovery dispute. If all of the parties, as the Respondent argues, are allow[ed] to serve discovery, the week before the hearing will be filled with constant expedited discovery battles for which the Rules set forth no time frames. This current issue only came to a head because the Secretary's counsel affirmatively stated that discovery was not permitted. Had the undersigned waited until this Friday to do so, the issue would not be before the Tribunal until three days before the hearing. Had the Secretary served discovery responses with objections, the same problem would have arisen. Finally, since the Rules set forth no limit on discovery for [a]Temporary Reinstatement proceeding, who is to decide the scope of what is permissible for such requests and how many requests can be served? There is simply no guidance available on

(continued…)

At the outset of the July 23, 2020 conference call with the parties to discuss the Motion, the Court informed that it considered the Secretary's Counsel's procedural objections to have been waived by virtue of his email response.

The Court's rulings on the Motion were also informed by the Commission's procedural rules on the subject of Temporary reinstatement Proceedings at 29 CFR 2700.45. It is noted that subsection (d) of that section provides that "[t]he scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. **In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant.** The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought." *Id.* (emphasis added). In that regard, the Court notes that there is no reference to the MSHA investigator's declaration. Rather, the focus is upon the testimony of the complainant and that the Secretary's presentation can rely solely upon that.[2]

1. **The Respondent's request for copies of the statement or memorandum of interview of any interview of Mr. Whitmore**

Apart from the Court's ruling that the Secretary had waived issues regarding the due date for a response to the motion, the Court informed the parties that it did not view the Respondent's request for copies of the statement or memorandum of interview of any interview of Mr. Whitmore to be properly denominated as "discovery," at least in the classic sense of that term. The Court explained its reasoning for this determination, noting that all the Respondent had, and all that the Court had as well, was the Complainant's signed, but *unfairly uninformative* May 18, 2020, "Discrimination Report." That document contained a typed "Summary of Discriminatory Action," which stated *in its entirety* the following:

> I was suspended on April 23, 2020, then discharged on April 29, 2020, from my job as the Maintenance Manager at Riverside Stone underground and surface mines because of numerous protected safety activities that I engaged in.

Discrimination Report, May 18, 2020.

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[1] (…continued)
what the permissible scope of discovery is in light of the 'not frivolously brought' standard. It is inconsistent that a party would be burdened with a broader scope of discovery than its burden of proof at an expedited hearing. The Rules contain no guidance on these issues because discovery was not completed, and was specifically excluded, for Temporary Reinstatement hearings." July 21, 2020 email from the Secretary to the Court.

[2] As explained *infra* with regard to the Respondent's request for copies of the statement or memorandum of interview of any interview of Mr. Whitmore, the Court considered the Respondent's discovery request to actually be a request for a complete statement of the Complaint from the Complainant Whitmore.

The "Discrimination Complaint" document itself was no more enlightening. At its heart, it informed of the Complainant's name, rate of pay, job title and the address of the Respondent's mine and the names of four individuals employed by the Respondent alleged to be responsible for the discriminatory action.[3] Discrimination Complaint, May 19, 2020.

Importantly, the Discrimination Complaint added nothing, that is to say it provided no additional information whatsoever regarding any particulars about the alleged protective activity.

It was *only* through the vehicle of the Secretary's "Declaration of Freddie Fugate," identified as a "senior special investigator" employed by MSHA, that some particulars about the nature of the Complainant's discrimination complaint were first revealed. Of course, Mr. Fugate has no more first-hand knowledge about the Complainant's allegations than the Court.

Accordingly, the Fugate Declaration serves as a mere conduit, recounting the allegations made by the Complainant and nothing more than that. Thus, the Court does not consider it far-fetched to analogize the Fugate Declaration as akin to an individual relating a story over a fence to a neighbor. And it is that serious shortcoming that formed the basis of the Court's problem with the inadequacy of the declaration. The story may be an accurate retelling, or it may not, but for purposes of defending a discrimination complaint under due process, a respondent has a right to more. The Respondent is entitled to the Complainant's first-hand accounting of the basis for his discrimination complaint. Fundamental fairness demands this. *See*, *e.g.*, *Sec. v. Cumberland Coal Resources*, 32 FMSHRC 442 (May 2010), wherein the Commission stated that the "concepts of fundamental fairness [ ] require that every litigant receive adequate notice of charges made against it." *Id.* at 449.

Accordingly, during the conference call, the Court ordered that copies of the statement or memorandum of interview of any interview of Mr. Whitmore be provided.

2. Copies of the statements or memoranda of interviews of any management witness

The Court ruled during the conference call that this request was denied. The basis for that ruling was that such statements, if they exist, are not necessary in the context of the Secretary's burden in an application for temporary reinstatement. If the Secretary did intend to introduce such documents, the Court's order for the parties' prehearing exchange would cover those.[4] As an aside, the Court opined that it would be highly unusual for any management witness to have made a statement without receiving a copy of it.

[3] Four individuals are named in Complaint itself as those responsible for the discriminatory action: Bryan Ory, Rick Voyles, Tammy Wimsatt, and Lisa Weldman, but *there is no information tying those individuals to Whitmore's Discrimination Report*.

[4] The Court had previously ordered that the parties conduct their prehearing exchange by Friday, July 24, 2020. The parties submitted those exchanges pursuant to that order.

3. **Copies of all exhibits the Secretary intends to introduce at hearing on the Secretary's Application for Temporary Reinstatement in this matter**

This request, as alluded to above, was covered by the Court's prehearing exchange order.

4. **Copies of any documents Mr. Fugate relied upon in preparing his Declaration.**

As the Court ruled that Mr. Fugate's declaration could not serve as a substitute for copies of the statement or memorandum of interview of any interview of Mr. Whitmore, this request was denied. The Court considered that such other documents, if they exist, would more appropriately be the subject for possible discovery in a full hearing on the merits in the complainant's discrimination complaint, but not in the context of a temporary reinstatement application. It is noted that such a request could run afoul of attorney-client or deliberative process claims.

Accordingly, having ruled on the four aspects of the Respondent's Motion, this matter has been disposed of and will now proceed to the hearing on the application for temporary reinstatement set to commence on Wednesday, July 29, 2020 at 9:00 a.m. EDT.

SO ORDERED.

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

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September 9, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MIGUEL PUGMIRE, Complainant,	DISCRIMINATION PROCEEDING Docket No. WEST 2021-0148-DM MSHA CASE NO: WE-MD-2021-03
v.	
NEVADA GOLD MINES, LLC, Respondent	Mine: Turquoise Ridge Mine ID: 26-02286

ORDER GRANTING THE SECRETARY'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

This proceeding was brought by the Secretary of Labor on behalf of Miguel Pugmire against Nevada Gold Mines ("NGM") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq*. ("Mine Act") and 29 C.F.R.§ 2700.40 *et seq*. On August 19, 2021, the Secretary filed a Motion for Leave to File First Amended Complaint ("Mot."). Respondent filed an opposition to the Secretary's motion ("Opp."). For reasons that follow, I **GRANT** the Secretary's motion.

The complaint in this matter, as originally filed, contended that Pugmire, an underground mine engineer, was summarily terminated from his position after removing four active headings from service due to low airflow readings on his monthly secondary air ventilation survey.[1] The Secretary asserts that, during discovery, Respondent produced a document showing that Pugmire engaged in additional protected activity. As a result, the Secretary now seeks leave to amend the complaint to include the additional protected activity. Specifically, the Secretary asks that the complaint be amended to allege that "around early August 2020, Mr. Pugmire also raised various concerns about the Mine's ventilation at a meeting attended by Benjamin Gunn, the manager who eventually terminated Mr. Pugmire's employment." Mot. 3. The Secretary avers that the

[1] The complaint, as originally filed, alleged that Pugmire removed four active headings from service on September 2, 2020. The following day, September 3, 2020, Pugmire requested time off due to a family emergency. The complaint further alleged that the request was initially approved and Pugmire did not attend work that day, but that NGM later repealed approval and labeled Pugmire's absence as "unexcused." On September 9, 2020, NGM suspended Pugmire and ultimately terminated his employment on September 11, 2020. Among other defenses in its answer to the original complaint, Respondent states that Pugmire failed to take all the required steps when he first discovered the insufficient airflow such as barricading the affected areas to keep miners out.

proposed amendment "will not significantly affect the scope of the case or unduly prejudice Respondent." Mot. 3.

NGM, in its opposition, argues that the motion should be denied because the alleged additional protected activity was known to the Secretary at the time the discrimination complaint was originally filed and, further, that the claims made in the motion are "duplicative" and the motion to amend is "futile." Opp. 1-2, 5-6.

The Commission's procedural rules do not address amendments to pleadings. Nevertheless, the Commission, using the Federal Rules of Civil Procedure as guidance, has taken the view that leave to amend discrimination complaints should be "freely granted" in the interest of justice. *Sec'y of Labor obo Hannah et al. v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1303 n. 10 (Dec. 1998); Fed. R. Civ. P. 15); *Cyprus Empire Corp.*, 12 FMSHRC 911,916 (May 1990); *see also Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (9th Circuit stating that the policy of granting leave to amend should be "applied with extreme liberality."). This is especially true when such amendments "do not prejudice a party in preparing its defenses." *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (Sept. 2009) (ALJ).

Here, the Secretary seeks to amend the complaint to include the additional alleged protected activity of Pugmire raising ventilation concerns at an August 2020 meeting attended by the individual who ultimately terminated him. I find that the proposed amendment does not amount to a new count of discrimination, i.e., it does not allege a new reason for the termination, but it provides potentially important context for the complaint by alleging that Pugmire raised substantially similar concerns in August. By amending the complaint, the Secretary properly seeks to conform the pleadings with evidence that will be adduced at hearing. *See Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997).

Administrative pleadings are to be broadly construed and easily amended if adequate notice is provided and there is no prejudice to the opposing party. Respondent seemingly argues that the Secretary should be barred from amending the complaint to include information that was known at the time, but not included in the complaint as originally filed. I disagree. The Secretary only learned of the details of the meeting after Respondent provided its responses to written discovery. Moreover, I find that the motion provides ample notice of the proposed amendment. As the Secretary correctly points out, although written discovery has commenced, "there is currently no deadline set for written discovery, depositions have not been scheduled, and there is currently no hearing date." Mot. 6. Further, to avoid additional discovery and possibly resolve this matter without the need for a hearing, the parties recently agreed to participate in mediation

facilitated by court appointed settlement counsel. Given the early stage of this proceeding, I find that Respondent has adequate notice of the proposed amendment.[2]

While Respondent does not allege that it will suffer prejudice, it asserts that the motion should nevertheless be denied because the claims made in the Secretary's motion are "duplicative" and, in turn, "futile." I disagree. Even if the concerns raised during the August 2020 meeting are substantially like those raised when Pugmire removed the headings from service, the events took place on two separate occasions. Again, as mentioned above, I find that the proposed amendment provides potentially important context for the claim. As a result, I find that the two alleged protected activities are not duplicative and, in turn, that the proposed amendment is not futile for purposes of this discrimination complaint.

For the reasons set forth above, the Secretary's Motion for Leave to File First Amended Complaint is **GRANTED**.[3]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Until further notice, case issuances of the Federal Mine Safety and Health Review Commission (FMSHRC), including notices, decisions, and orders, will be sent only through electronic mail. This includes notices, decisions, and orders described in 29 CFR 2700.4(b)(1), 2700.24(f)(1), 2700.45(e)(3), 2700.54, and 2700.66(a). Further, FMSHRC will not be monitoring incoming physical mail or facsimile described in Procedural Rule 2700.5(c)(2). If possible, all filings should be e-filed as described in 29 CFR 2700(c)(1).

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[2] In *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (Sept. 2009) (ALJ) Former Commission Judge Barbour granted a motion to amend a discrimination complaint to include additional protected activity even though the proceeding was much further along, i.e., a hearing date had been set and depositions had already occurred. In granting the motion he stated that "the company may feel compelled to amend its answer, conduct additional discovery, amend its pending motion and supplement its brief in support of the motion, the expenses inherent in such activities are the necessary consequences of litigation, costs the company (and any litigant) must be prepared to bear." *Id*.

[3] By granting the motion, the court is not passing judgement on whether the additional allegations amount to protected activity. Complainant bears the burden of proof and must present credible evidence on this point at hearing.

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September 24, 2021

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of DARCY WHITE, Complainant, v. PRAIRIE STATE GENERATING CO., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2021-0158 MSHA Case No. VINC-CD-2021-03 Mine: Lively Grove Mine Mine ID: 11-03193

ORDER DENYING RESPONDENT'S MOTION TO DISSOLVE TEMPORARY ECONOMIC REINSTATEMENT

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on September 27, 2017, filed an Application for Temporary Reinstatement of miner Darcy White ("Darcy" or "Complainant") to her former position with Respondent Prairie State Generating Co., ("Prairie State" or "Respondent") at the Lively Grove Mine pending final hearing and disposition of the case.

PROCEDURAL HISTORY AND PARTY CONTENTIONS

On June 30, 2021, the Respondent filed a timely request for hearing, as well as a Motion to Dismiss Application for Temporary Reinstatement for Failure to Join Required Party or to Join Required Party. In its motion, Respondent stated that Complainant was employed by Custom Staffing, a staffing agency through which Respondent sourced temporary contract workers, as needed. Accordingly, Respondent argued that Custom Staffing was a required party under Fed.R.Civ.P. 19(b), because Custom Staffing was necessary to effect a remedy.

The Secretary opposed Respondent's motion. The Secretary argued that preliminary investigation revealed no evidence that Custom Staffing engaged in any discriminatory conduct, and that the complete relief sought required only Prairie State as Respondent.

The undersigned deferred ruling on Respondent's motion prior to hearing, which convened via Zoom videoconference on July 20, 2021. After the hearing opened, the parties requested to meet in breakout rooms to engage in settlement discussions. Following several attempts, the parties reached agreement on material terms of settlement. On July 27, 2021, the parties filed a Joint Motion to Approve Economic Reinstatement. On July 29, 2021, this administrative tribunal approved the Joint Motion and ordered that within 30 days the Secretary

either complete his investigation and make a determination on the complaint, or provide a detailed explanation why he could not do so.

On August 25, 2021, the Secretary filed a motion stating that the Secretary would not be able to complete his investigation within 30 days of the undersigned's Order due to new developments in the case. Specifically, the Complainant filed an Addendum on August 18, 2021, naming Custom Staffing as an additional Respondent in her discrimination complaint.

On August 31, 2021, the Respondent filed a Motion to Dissolve Order Granting Joint Motion to Approve Temporary Economic Reinstatement Motion and Agreement. In this motion, Respondent argued by analogy to the Commission's decision in *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2021), that this tribunal should adopt a test that would balance the Secretary's need to proceed beyond the deadline with the prejudice the operator would face to determine that the Temporary Economic Reinstatement should be dissolved for failure to complete the investigation of this expedited matter within the statutory 90-day period referenced in section 105(c)(3), or the additional 30-day period encouraged by the undersigned.

With respect to the first step of Respondent's proposed test—the Secretary's burden of establishing adequate cause—Respondent argues that the Secretary has failed to establish adequate cause for not completing its investigation into the merits of Complainant's case. Specifically, Respondent argues that Complainant is late in filing any Addendum and that any additional investigation into an additional respondent should not impact the completion of the Secretary's investigation of Prairie State. Furthermore, Respondent argues that the Secretary and Complainant "disclaimed that Custom Staffing was a proper respondent when that issue was pending before the Court." *Resp. Mot.* at ¶25. Respondent also alleges that the Complainant's Addendum amounts to a "willful delay" and is the result of "bad faith." *Resp. Mot.* at ¶26, 27.

With respect to the second step of Respondent's proposed test—the operator's burden of showing actual prejudice arising from the delay—Respondent argues (1) that the continuation of its requirement to pay Complainant is "manifestly prejudicial," and (2) that because the Secretary has provided no end date for the investigation, he has unduly delayed the matter such that it constitutes prejudice against Respondent.

In a brief footnote, Respondent suggested in the alternative that if the undersigned was disinclined to dissolve the Order Granting Temporary Economic Reinstatement, it should toll the Order during the period of investigation.

On September 7, 2021, prior to the Secretary or Complainant submitting their responses to the Respondent's motion, the undersigned convened a conference call, wherein the undersigned noted certain strengths in Respondent's motion and asked why it should not be granted.

On September 13, 2021, the Secretary filed its Opposition to Respondent's Motion for Dissolution, wherein it argued that Respondent "asks for a severe and extraordinary remedy without citing any case law in support of its request." *Sec'y Resp.* at ¶7. The Secretary argued that the only grounds recognized by the Commission to dissolve a Temporary Reinstatement are if the Secretary's involvement in the case ends, and it can be tolled only if there is no longer

work at the mine for the Complainant. Neither of these circumstances apply to the instant case, so therefore it may not be tolled or dissolved.

The Secretary further argues that the Respondent's proposed test based on *Long Branch Energy*, 34 FMSHRC 1984, is inappropriate because civil penalty cases are different from Temporary Reinstatement cases in crucial ways. Congress made clear its intention that employers should bear the greater burden of risk in a Temporary Reinstatement proceeding. As a result, the Commission has never applied *Long Branch* to a Temporary Reinstatement case.

The Secretary also argued that even if this tribunal were to adopt Respondent's proposed balancing test, Respondent has not shown either undue delay or actual prejudice. Contrary to the Respondent's assertions, the Secretary states that there was no "bad faith" in the instant case. Complainant was not represented by counsel when she filed her initial complaint, and it is entirely reasonable that she would amend her complaint after retaining and consulting with counsel. Furthermore, the Secretary's earlier position opposing Custom Staffing as a necessary party only stated that it was not necessary to effectuate the desired remedy. However, the issue presented by Complainant's Addendum is that Custom Staffing was part of the discrimination alleged. The Secretary contends that Respondent improperly conflates these two issues in order to arrive at its conclusion of undue delay.

The Secretary further argues that Respondent has not made any showing of actual prejudice. The requirement to pay a miner under Temporary Reinstatement is not prejudice; it "is the nature of temporary reinstatement." *Sec'y Resp.* at ¶13. Citing the Commission's decision in *Secretary ex rel. Hale v. 4-A Coal Co., Inc*., the Secretary argues that the Respondent's reliance on inconvenience or cost is misplaced, because prejudice means a "deprivation of a meaningful opportunity to defend against the claim." 8 FMSHRC 905, 908 (June 1986). The Secretary argues that the inconvenience that Respondent relies on is entirely speculative because it rests on what may occur if the investigation proceeds indefinitely. Furthermore, he argues that the decision to choose temporary economic reinstatement in lieu of actual reinstatement was the Respondent's, and it cannot claim prejudice due to its agreement to forgo the value of Complainant's labor.

On September 13, 2021, the Complainant, through counsel, similarly submitted a Response to Respondent's Motion, which incorporated the arguments made by the Secretary. Additionally, Complainant's counsel cavils that the September 7, 2021 conference call was inappropriate because it was essentially an off-the-record surprise oral argument that may inform the undersigned's decision prior to Complainant or the Secretary having submitted written responses.

The Complainant's counsel strenuously objected to Respondent's accusations of "willful delay" and "bad faith" in filing the "eleventh-hour" Addendum to White's discrimination complaint. He explained that the timing of the filing of the addendum was due to the heavy caseload that Complainant's counsel is currently handling, as well as research on the "cat's paw" theory of liability.

On September 20, 2021, the Respondent filed a Reply to the Complainant's and Secretary's Responses, wherein it argued that the Secretary did not establish or show adequate

cause for the delay. Respondent questioned the timing of the Secretary's inclusion of Custom Staffing, and ultimately why adding this party impacts the conclusion of the investigation of Prairie State.

DISPOSITION

While the undersigned is sympathetic to Respondent's frustration with the Secretary's continued inability to conclude its investigation within the timeframe stated in the Act, the Motion to Dissolve or Toll the Temporary Economic Reinstatement must be denied.

Congress viewed the discrimination provision of the Mine Act as having a central place in ensuring the health and safety of miners. In the Senate Report accompanying the 1977 Mine Act, the Committee stated this sentiment clearly:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181 at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-624 (1978). Indeed, it was for this reason that Congress explained that the scope of protected activities should be "broadly" interpreted and that the Section be "construed expansively." *Id.* However, Congress understood that a right with a delayed remedy would be hollow, so it included a provision for temporary reinstatement of the miner. ("The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 35.) Though Congress included short timeframes for the investigation and complaint, it was abundantly clear that no miner should suffer as a result of delay, stating, "[i]t should be emphasized, however, that these time frames are not intended to be jurisdictional. *The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations*." *Id.* at 36 (emphasis added). Based on the Act and congressional intent, neither a judge nor the Commission can lightly dissolve or toll a temporary reinstatement.

While the law gives the Secretary a great deal of flexibility in meeting its deadlines, it does not allow for an investigation to proceed indefinitely. By its very nature, a temporary reinstatement was intended to be temporary, and evidence of undue delay by the Secretary, along with actual prejudice to the Respondent, may be grounds for a court to take extraordinary action. Such an inquiry must closely examine the facts of the case to determine if extraordinary action in warranted. In this case at this time, even accepting Respondent's proposed *Long Branch* test, which balances the Secretary's need to proceed against the prejudice faced by the Respondent, a dissolution or tolling of the Order Granting Temporary Economic Reinstatement is not yet warranted.

The Secretary justified its need for additional time in this case by informing this tribunal that on August 18, 2021, Complainant filed an Addendum to her discrimination complaint naming Custom Staffing as an additional Respondent to her complaint. *Sec'y Response to TR Order* at ¶5. Complainant had not received legal advice when she filed her initial complaint and did not understand the legal distinctions between Prairie State and Custom Staffing. *Sec'y Opposition to Resp. Motion* at ¶3. The Secretary has confirmed that within a week of receiving this Addendum, it began requesting documents and interviews from Custom Staffing and is diligently investigating the allegations. *Id.* at ¶6.

The Secretary should have concluded his investigation into this expedited case in a more timely manner, but the employment relationship in this case is more complicated than in most instances. This has led to disagreements over whether the Complainant's employment was actually terminated because she remained employed for Custom Staffing, even after being removed from the Prairie State assignment. *Resp. Mot. To Dismiss* at ¶3-11. There were disagreements on whether a remedy could be effectuated by Prairie State alone, because the contract between Prairie State and Custom Staffing appeared to be silent on whether Prairie State could recall someone for a temporary work assignment. *Resp. Reply to Sec'y Opposition*. These are not issues that arise in most discrimination cases. And while Respondent is free to structure its business and employment relationships in whatever manner it chooses, its complaint about delay is less convincing when a complicated employment relationship takes longer to investigate.

With regards to question of prejudice, Respondent argues that it is prejudiced in two ways. The first is that it must continue to pay Complainant during the course of the investigation, and the second is "the potentially infinite delay proposed by the Secretary." *Resp. Motion to Dissolve TR* at ¶21, 28. Both of these reasons fail to demonstrate actual prejudice. In considering whether a delay by the Secretary in making a discrimination determination has resulted in prejudice such that a dismissal may be appropriate, the Commission has held that the Respondent must show that "such delay prejudicially deprives a respondent of a meaningful opportunity to defend the claim." *Sec'y ex rel. Hale v. 4-A Coal Co. Inc.*, 8 FMSHRC 905, 908 (June 1986).

The first reason that Respondent invokes to establish prejudice is true in every temporary reinstatement case and cannot constitute actual prejudice. As the Commission recently stated:

> Under the Mine Act, if a mine operator has a duty to reinstate a miner, the operator must continue to fulfill that obligation during the period prior to a reinstatement hearing. Temporary reinstatement is an essential protection for miners, and Congress intended employers to bear the proportionately greater burden of risk in temporary reinstatement proceedings.

Sec'y of Labor obo James McGoughran v. Lehigh Cement Co., LLC, 42 FMSHRC 467, 471 (July 2020). Insofar as Respondent is arguing that it is prejudiced because it is paying Complainant while not receiving any labor in return, this too cannot constitute prejudice

because Respondent chose temporary economic reinstatement in lieu of temporary reinstatement.[1]

The second reason that Respondent advances to establish prejudice must also fail as it is too speculative at this time. The Secretary's inability to provide at present a date for the end of its investigation is not proof that it will proceed indefinitely. Indeed, if the Secretary's investigation drags on for too long without good reason, and the Respondent can show actual prejudice at that time, the undersigned will consider a renewal of this Motion with updated facts and arguments However, that moment has not yet arrived.

The Respondent further suggests that the undersigned toll the Temporary Economic Reinstatement pending completion of the investigation. This option is simply not permissible under existing Commission caselaw, although the undersigned is sympathetic to this alternative. In a recent decision, the Commission held that a judge abused her discretion when she tolled a temporary reinstatement due to technical difficulties that led to delays in the hearing. *Lehigh Cement,* 42 FMSHRC 467. In reversing the judge, the Commission succinctly outlined the parameters of when a judge should toll temporary reinstatement:

> The Commission has recognized that the occurrence of certain events may toll an operator's temporary reinstatement obligation. The types of "events" which may justify tolling are those which would affect the availability of relevant work at the mine for the miner at issue, such as a layoff due to business contraction. *See Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009) (finding the Judge erred in failing to consider "changes that occur at the mine" and explaining that the operator must show that work was unavailable for the discriminatee); *Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315, 319-20 (Feb. 2017) (finding tolling inappropriate where the miner may not have properly been included in the layoff). The purpose of temporary reinstatement is to provide the miner with an income through a return to work until the complaint is resolved. *North Fork*, 33 FMSHRC at 592. The obligation to temporarily reinstate may logically be tolled when work at the mine is no longer available for the relevant miner.

Id. at 470. The Commission explicitly rejected respondent's arguments that tolling was justified by factors other than availability of work at the mine, and also rejected the Judge's justification for tolling due to economic harm to the operator and unjust enrichment of the miner. *Id.* at n. 4, 5.

WHEREFORE, the Respondent's Motion to Dissolve Order Granting Joint Motion to Approve Temporary Economic Reinstatement Motion and Agreement is **DENIED, WITHOUT PREJUDICE**.

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[1] The Respondent is free to move for temporary economic reinstatement in lieu of economic reinstatement. *See Sec'y of Labor obo Dustin Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 813-814 (April 2013) ("The economic cost it bears … can be mitigated by making use of [the miner's] services.")

It is **FURTHER ORDERED** that the Secretary shall provide to the undersigned a detailed status update on the investigation and when it is expected to be completed every 21 days until a determination has been made or a new motion filed by Respondent Prairie State.

/s/ Thomas McCarthy
Thomas McCarthy
Administrative Law Judge

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