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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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CORDERO MINING LLC,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

and

SECRETARY OF LABOR, on behalf of CINDY L. CLAPP,

Respondents.

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ON PETITION FOR REIVEW OF A FINAL DECISION OF  
THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
ADMINISTRATIVE LAW JUDGE THOMAS MCCARTHY

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BRIEF FOR THE SECRETARY OF LABOR

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**STATEMENT OF RELATED CASES**

The Secretary is aware of no related cases pending at this time.

## **JURISDICTIONAL STATEMENT**

The Secretary is satisfied with the Jurisdictional Statement in Cordero's opening brief.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the ALJ's finding that Cordero discriminatorily discharged Cindy Clapp in violation of § 105(c) of the Mine Act, 30 U.S.C. § 815(c).<sup>1</sup>
2. Whether the ALJ acted within his discretion in awarding full back pay because Clapp did not fail to mitigate her damages, and in assessing a penalty of \$40,000.<sup>2</sup>

### **STATEMENT OF THE CASE**

This is a discrimination case, brought by the Secretary of Labor ("Secretary") on behalf of Cindy Clapp, in which the Administrative Law Judge ("ALJ") found that Cordero discriminatorily discharged Clapp in violation of § 105(c) of the Federal Mine Safety and Health Act ("Mine Act" or "Act"), 30 U.S.C. § 815(c). ALJ Dec. 64.<sup>3</sup> Clapp was employed by Cordero from September of 1982 until her discharge on March 18, 2010. Tr. 46; R. Ex. 1. On May 4, 2010, Clapp

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<sup>1</sup> This issue was raised on page 1 of the Secretary's Complaint of Discrimination and ruled on at page 59 of the ALJ's Decision.

<sup>2</sup> This issue was raised on page 2 of the Secretary's Complaint of Discrimination and ruled on at pages 60 and 64 of the ALJ's Decision.

<sup>3</sup> The following abbreviations are used to refer to portions of the record: "ALJ Dec." for Decision and Order of the Administrative Law Judge (Dec. 5, 2011); "Tr." for Transcript of ALJ Hearing (Feb. 16-18, 2011); "G. Ex." for the Secretary's exhibits submitted at the ALJ hearing; and "R. Ex." for Cordero's exhibits submitted at the ALJ hearing.

filed a complaint with the Federal Mine Safety and Health Administration (“MSHA”) alleging that she was discharged because she raised safety concerns to mine management. Pet’r’s App. 9-10.

On June 7, 2010, the Secretary filed an Application for Temporary Reinstatement seeking Clapp’s reinstatement pending final disposition of her discrimination complaint. *Id.* at 1-3. On June 18, 2010, Cordero opposed the temporary reinstatement application, denying the allegations in Clapp’s complaint. *Id.* at 11-13. On June 24, 2010, Cordero and the Secretary reached a settlement agreement under which Clapp would be economically reinstated pending the completion of litigation. *Id.* at 14-18.

On September 7, 2010, the Secretary filed a discrimination complaint on Clapp’s behalf with the Federal Mine Safety and Health Review Commission (“Commission”). A hearing was held on February 16-18, 2011. On December 5, 2011, the ALJ issued his decision, finding that Clapp was discriminatorily discharged in violation of the Act and ordering Cordero to pay back pay and a civil penalty and to take other remedial measures. ALJ Dec. 64-66.

On December 30, 2011, Cordero filed a Petition for Discretionary Review with the Commission. The Commission denied Cordero’s petition on January 13, 2012. As a result, the ALJ’s decision became a final decision of the Commission pursuant to § 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1).

On January 17, 2012, Cordero filed a Petition for Review and Motion to Stay Enforcement of the ALJ's Order and Continue Economic Reinstatement pending review by this Court. Because the settlement agreement provided that economic reinstatement would continue pending the termination of all litigation, the Secretary did not oppose Cordero's Motion to Stay. The Motion to Stay was granted on February 10, 2012, pending a decision from this Court on the merits of the underlying Petition for Review.

## **STATEMENT OF FACTS<sup>4</sup>**

### **I. Overview**

Cindy Clapp worked at the Cordero Mine for nearly 28 years and was consistently recognized as an excellent equipment operator and a leader among her peers. Tr. 428, 481-82, 533-34, 567, 888, 1064-65. In 2008, Clapp began to experience conflicts with her supervisors for the first time after Gerald Fischer and Dave Robinson became her supervisors. G. Ex. 27; R. Ex. 7, Tr. 885-89, 732. Unlike previous supervisors, Fischer and Robinson were dismissive and hostile when crew members raised safety concerns. Tr. 410-11, 468-70, 517-19, 611-12. As her co-workers became afraid to voice safety concerns, they turned to Clapp. *Id.*, Tr. 112-14, 120-22, 156. Clapp, in turn, became more outspoken and became a target of her supervisors' hostility. Tr. 612, 145-49, 521.

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<sup>4</sup> Unless otherwise noted, all disputed facts are described as they were found by the ALJ below.

In March of 2010, Fischer and Robinson announced a new directive that 240-ton haul trucks loaded with coal would be turned around in the dark, narrow coal pit and dumped if they registered as overloaded. Tr. 159-60, 169, 740. Clapp believed that this practice was very unsafe and expressed her safety concerns to a number of individuals at the mine, including senior management. Tr. 181-82, 189, 233, 243-44, 254. This activity evoked further hostility from Fischer and Robinson, who admonished Clapp for going above their heads. Tr. 193; G. Ex. 17A, p. 2. On March 18, 2010, Clapp was discharged, purportedly for insubordination. R. Ex. 1.

## **II. The Cordero Mine and Clapp's Employment History**

The Cordero Mine is a large, open-pit, surface coal mine located near Gillette, Wyoming. Tr. 47. The mine uses a truck and shovel method to remove coal. Tr. 48, 635. Surface dirt is drilled, blasted, and then removed by drag lines to expose the coal seam. Tr. 49. Large excavating machines, known as shovels, are then used to dig out the coal and load it into 240-ton haul trucks that transport it to hoppers for processing. Tr. 48-61. The mine uses smaller support equipment such as track dozers, blades, scrapers, and rubber tire dozers ("RTDs") to build and maintain roads and ramps and to clean up loose material in working areas. Tr. 48, 451, 620.

Shovels operate in pits, known as coal slots or runs, where coal has been removed and the coal face is advanced by mining. Tr. 643, 649-50. Vehicles enter

and exit the slot via ramps from the main haulage roads. Tr. 57-58. The slot is bordered by a highwall and a low wall. Tr. 650. The highwall can reach up to 300 feet in height and is adjacent to the coal face where the haul trucks are loaded by the shovel. Tr. 57, 650. The grade of the terrain in the pit follows the coal seam and the floor can be uneven, steep, and soft. Tr. 167, 417, 419, 450-52, 541, 565, 620. The coal slots are often wet and narrow, with limited room for maneuver by the various vehicles that must access the slot. Tr. 52, 100, 503. During the night shift, the pit area is unlit and the sole illumination comes from the operating vehicles themselves. Tr. 167.

Shovel operators are responsible for coordinating the production process in their pit and are integral to ensuring safe operations. Tr. 69-70, 567. From their position at the coal face, the shovel operators continuously monitor changing conditions and safety hazards on the highwall and in the slot. Tr. 71-72. The main method of communication in the pit is by radio, and shovel operators are in constant radio communication with dispatchers, support equipment operators, haul truck drivers, and crew supervisors. Tr. 69-70.

Clapp began her career at Cordero in 1982 as a haul truck driver. Tr. 46. She then operated support equipment, including blades and dozers, before becoming a shovel operator in 1987. Tr. 46-47. Clapp was lauded by her co-workers and supervisors as an excellent shovel operator who set the standard for others to

follow. Tr. 428, 481-82, 533-34, 567, 888, 1064-65. At the request of management, Clapp served on various committees at the mine, including the Enhanced Shovel Training committee, which created a training book for shovel operators, and the Tritronics troubleshooting team, which helped to solve problems with the mine's first electronic data collection system. Tr. 77-80. Clapp had an exemplary attendance record, was never late to work, and never had a lost-time injury in her 28-year career at the mine. R. Exs. 7-9; Tr. 80-81.

The mine has four production crews, A through D. Tr. 68. Clapp was a member of the D crew. Tr. 67. The crews rotate between day shifts and night shifts, with time off in between. Day shifts begin at 7:00 a.m. and end at 7:30 p.m., and night shifts begin at 7:00 p.m. and end at 7:30 a.m. Each crew is supervised by a Lead and a Rotating Operations Supervisor ("ROS"). Tr. 67-68. Each ROS reports to Production Manager Kyle Colby, and Colby reports to Mine Manager Joe Vaccari. *Id*; Tr. 629, 1058. Gerald Fischer became the ROS on the D crew in 2006. Tr. 835. Dave Robinson became the Lead on the D crew in April 2008. Tr. 732.

### **III. Communication of Safety Concerns is Stifled under Supervisors Fischer and Robinson**

After Fischer and Robinson became a management team in 2008, members of the D crew became increasingly uncomfortable raising safety concerns. Tr. 410, 468-70. Unlike previous supervisors, Fischer and Robinson were dismissive and hostile when miners reported safety concerns. Tr. 153-56, 410, 468-70, 611-12. As

a leader on her crew, Clapp became more vocal as her co-workers became afraid to raise safety matters for fear of repercussions from Fischer and Robinson. Tr. 156, 517-19, 112-14. As a result, Clapp came to bear the brunt of her supervisors' hostility, as demonstrated by the following incidents.

At the end of the shift on November 1, 2008, Fischer and Robinson sent a flatbed pickup truck to retrieve the seven crew members who were working on Clapp's run. Tr. 279-80, 970-71. The pickup had only six seatbelts. Tr. 279-80. Rather than leave a crew member in the pit in November at shift's end, Clapp drove the truck at a slow speed and took responsibility for riding without a seatbelt. Tr. 279-82. On route, a lunchbox fell out of the pickup and was run over by a passing truck. Tr. 623-24.

Clapp spoke with Fischer and Robinson about the fact that they sent a pickup with insufficient seatbelts, and also asked for reimbursement for the lunchbox. Tr. 623-24, 1066. They declined to address the issue. Tr. 1066. The next shift, Clapp told D crew haul truck driver Fallon Halverson in the locker room that she was going to raise the incident with Vaccari. Tr. 612-13, 623-24.

Later that day, Halverson's truck broke down and she was told to wait in the lead pickup truck for a ride. Tr. 611. The lead pickup was parked outside Vaccari's office. Tr. 624. When Fischer and Robinson came out of the building, they were angry and Fischer said, "That bitch, we'll show her who's boss. How dare she go

over our heads. I can't believe she did this to us and said anything to Joe." Tr. 612, 625. Halverson felt very uncomfortable and assumed that Fischer was talking about Clapp because earlier in the day Clapp had told Halverson that she was going to talk to Vaccari about the seatbelt incident. *Id.*

Fischer issued Clapp a "last and final" warning for failing to wear a seatbelt, indicating that any future disciplinary incidents could result in termination. R. Ex. 4. Although the warning was purportedly necessary pursuant to existing mine policy, there was no written documentation of the policy and Fischer had not enforced the policy against another miner who was not wearing a seatbelt. Tr. 373, 1066-67, 276-79.

Clapp raised numerous other safety concerns. In early 2009, Clapp complained repeatedly to Fischer and Robinson that an unmanned RTD had been parked behind her shovel, a practice she believed was unsafe. Tr. 97-99. Fischer and Robinson responded that they did not care because they did not believe the practice was unsafe. Tr. 99.

Clapp and others had safety concerns about GPS monitor screens that were placed in the cabs of equipment beginning in early 2009. Shortly after the screens were installed in the RTDs, two operators complained to Clapp that the screens were impairing their vision. Tr. 116-22. Clapp and the other operators raised this

concern to Fischer, but Fischer responded that the screens would not be moved. Tr. 124.

Although Clapp normally ran the same shovel every day, in March of 2009 Clapp was assigned to run a different shovel. Clapp complained that the screen's placement impaired her vision and requested that the screen be moved. Tr. 133-38, G. Ex. 16. On July 13, 2009, Clapp was again assigned this shovel, but the screen had not been moved. Tr. 140, 794-95; G. Ex. 16. Clapp called Robinson and informed him that she was going to adjust the screen. Tr. 141. Clapp was unable, however, to move the screen without blocking the control panel. Tr. 141-42. Therefore, Clapp decided to do something she had done previously under a different supervisor: she left the screen plugged in and fully operational, but removed it from its bracket and placed it on a pad of clean flannel rags behind the shovel seat. Tr. 142. Clapp asked the utility person to inform Fischer and Robinson that she had moved the screen. Tr. 143.

Later that shift, Fischer and Robinson came into Clapp's shovel and Fischer began yelling at Clapp for moving the screen. Tr. 144-45. Fischer and Robinson then took Clapp back to the office, where Fischer yelled at Clapp that he did not care that Clapp had problems with the screen. Tr. 146-49. Fischer also threatened that he could make Clapp work in "uncomfortable" situations, such as placing her in a track dozer on top of a highwall, and that she would have to do that work even

if she felt it was unsafe. Tr. 148-49. Clapp told Fischer and Robinson that she needed to have full vision in her shovel for safety. Fischer and Robinson responded that there was nothing they could do about the monitors and she should get used to it. Tr. 149-50. At the end of this meeting, which lasted an hour, Clapp felt demeaned, shocked, and scared for the safety of her crew because her safety concerns were not being addressed. *Id.*

Fischer and Robinson were also unresponsive and hostile towards Clapp when she requested water to control dust that was impairing visibility in the run. Throughout 2009 and early 2010, Clapp's requests for water were repeatedly ignored. Tr. 107-09. Other employees on the crew called Clapp to ask her to call Fischer and Robinson to request water because their requests had been ignored and they did not want to risk angering Fischer and Robinson by continuing to call. Tr. 112-15. On one occasion, D crew member Cindy Miller was sitting in the back of Fischer and Robinson's pickup and heard Robinson say to Fischer in reference to Clapp, "I don't care how many times she calls she is not getting a water truck." Tr. 521.

On April 16, 2009, Clapp received a second "last and final" warning from Fischer after she pushed a stuck haul truck out from under the highwall. Tr. 267-68, R. Ex. 3. Before pushing the truck out, Clapp called Robinson to inform him that she was going to push the truck and Robinson gave her tacit approval to do so. Tr.

267. During the process, the mounting ladder on the truck broke, causing \$250 worth of damage. Tr. 267-68, 718. As a result, Clapp was suspended without pay for two days and lost quarterly performance pay. Tr. 268, R. Ex. 3. This discipline came on the heels of Clapp's complaints to Fischer and Robinson about monitors impairing visibility and the unmanned RTDs. In contrast, other miners who caused greater property damage were not given last and final warnings. *See* ALJ Dec. 12-16.

#### **IV. Clapp Raises Safety Concerns about Dumping Loaded Haul Trucks in the Coal Face and is Discharged**

Beginning in late 2008 and early 2009, Cordero added a Payload Monitoring ("PLM") system to the haul trucks. Tr. 636. The PLM is a scale that calculates the weight of the load. *Id.*, Tr. 157. The PLM does not register a weight reading until the truck has traveled 500 feet after being loaded. Tr. 636.

In the Spring of 2009, Fischer and Robinson told the D crew that eventually the haul trucks would be equipped with speed governors that would reduce a truck's speed to five miles per hour if it weighed overloaded. Tr. 157-58.

According to Clapp's testimony, the company was having problems with the accuracy of the scales, so Fischer and Robinson asked the crew to report any trucks with PLM systems that were registering inaccurate weights. Tr. 158. Thereafter, Clapp testified that shovel operators on the D crew called Fischer and Robinson over the radio whenever they had a truck that was reading inaccurately. Tr. 158-59.

Clapp testified that Fischer and Robinson subsequently told the shovel operators to stop reporting inaccuracies, so the misreading trucks were no longer reported even though the inaccuracies persisted. Tr. 159; G. Ex. 17A, p. 63.

The next time the D crew heard anything else about the governors was on March 2, 2010, during the five-minute pre-shift meeting before the start of a night shift. Tr. 159. At that meeting, Robinson told the crew that the governors had been installed and that if the governor was triggered after a truck left the loading area, the truck should be turned around and dumped back at the coal face. Tr. 159-60. Robinson also acknowledged that the PLM weight system was experiencing difficulties and told the crew to inform him of any trucks that were reading overloaded and then to light-load those trucks to avoid engaging the governor until the truck could be recalibrated. Tr. 159-60, 740. Robinson told the crew that if they had a problem with his instructions, they could “take it to Colin Marshall.” Tr. 160, 757. Colin Marshall is the CEO of Cloud Peak Energy, Cordero’s parent company. *Id.*

Later that night, the governor engaged on a haul truck driven by Vic Young. Young called Clapp and told her he did not know what to do. Tr. 168-71. At the time, two other coal shovels had recently broken down and seven empty trucks would soon be entering Clapp’s run. Tr. 173. Clapp told Young that she did not want the truck dumped at the face and that he should take it to the hopper. Tr. 170.

Halverson overheard the discussion and told Clapp and Young that the drivers had been directed in the pre-shift meeting to turn the trucks around and dump them if the governor engaged. Tr. 170-71. Clapp told Young to park his truck while she called Robinson over the mine-wide radio. Tr. 171-72.

When Robinson answered, Clapp told him that Young's truck was overloaded and that she did not want to dump it at the face. Clapp asked Robinson if she could let Young proceed to the hopper. Tr. 172. Turning loaded coal trucks around and dumping them in the pit instead of at the hopper was a new task for which miners had not been trained.<sup>5</sup> Tr. 164, 447, 549-52, 619-21; ALJ Dec. 23. Clapp believed that turning a loaded coal truck around in the slot and dumping it in the face was dangerous because the coal slot is a narrow, congested area that is dark on the night shift, and because the terrain at the coal face is uneven and steep with soft spots which could cause a truck to tip over. Tr. 169. Clapp's concerns

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<sup>5</sup> Although Cordero claims in its brief that turning and dumping at the face was a common practice, the evidence does not support its claim. The ALJ found that miners testified credibly and consistently that the practice had never been performed prior to March 2010. ALJ Dec. 23; Tr. 447, 549-52, 619-21. Moreover, other than general statements by management witnesses that the task was common, none of the evidence cited by Cordero demonstrates that the task was ever performed prior to March 2010. Instead, Cordero's evidence consists of staged photographs taken in preparation for litigation (R. Exs. 22, 23), training materials instructing operators how to dump dirt at a trash dump (R. Ex. 15), and a powerpoint presentation stating that trucks should be dumped at the face if they weigh over 270 tons (R. Ex. 17).

were echoed by numerous other miners. Tr. 417-19, 446, 449-453 (Artz); 503 (Stephens); 541, 552 (Miller); 565, 585-86 (Whitted); and 619-20 (Halverson).

Robinson told Clapp to dump the truck at the face. Tr. 172. Clapp told Robinson that she believed it was “stupid and unsafe” to turn the truck around and dump it in the face because of the traffic in the slot, but she complied with his directive and instructed Young to dump his load. *Id.*, Tr. 618, R. Ex. 18. Clapp instructed Young to wait to dump until she had finished maintaining the highwall and cleared the other trucks from her run in order to minimize exposure to the highwall during the dump. Tr. 177-78.

After her shift, Clapp approached Mine Manager Vaccari in the hallway and told him her safety concerns about the truck dumping procedure. Tr. 181-82. Clapp told Vaccari that she thought it was unsafe to turn around and dump loaded coal trucks in the pit because of the uneven floor. Tr. 182-83, 1115. Vaccari told Clapp that he would look into the issue. Tr. 183-184. During the discussion, Clapp saw Robinson and then Fischer step out into the hallway and give her angry looks behind Vaccari’s back. Tr. 185-186.

After she returned home on March 3, Clapp decided to call ROS Terry Oistad, a long-tenured miner who was working the day shift, to discuss her concerns about the dumping procedure. Tr. 188-89. Clapp told Oistad that she was afraid to turn trucks around and have them raise their beds in the congested coal

slot. *Id.* Oistad told her that his crew did not always turn trucks around and dump them at the face when the governor engaged, particularly if conditions in the pit were not favorable for dumping. Tr. 189-90.

The D crew was off from March 5 until March 9, when they returned for day shifts. Tr. 765. Late into that shift, the governor engaged on driver Helen Clark's truck. Tr. 192. Clark called Clapp over the radio and asked what she should do. *Id.* Clapp told Clark that Clark would have to dump the truck at the face because Vaccari had not gotten back to Clapp and nothing had changed. Tr. 193. Clapp also suggested that Clark could call Fischer and Robinson, who had just entered the run. *Id.*

Upon hearing Clapp's comments, Fischer began yelling at Clapp over the radio. *Id.* Fischer said that he did not care what Vaccari had to say because this was Fischer's policy, not Vaccari's policy, and Clapp had better turn the truck around and dump it at the coal face. *Id.* Clapp followed Fischer's directive and backed her shovel up so that Clark could dump in a better spot. *Id.*

The next morning at the start of shift, Robinson asked Clapp to meet with him and Fischer. Tr. 196. Given her experience in July of 2009, when Robinson and Fischer took Clapp into a meeting in their office and yelled at and threatened

her, Clapp decided to surreptitiously record the meeting by placing a digital recorder in her pocket.<sup>6</sup> Tr. 200-04.

The meeting was long and heated. Robinson and Fischer began the meeting by telling Clapp that they were angry that she had gone to Vaccari and Oistad with her concerns about the dumping directive. G. Ex. 17A, pp. 2-4. Clapp explained that Robinson had told the crew that if they had a problem with the policy, they should take it to Colin Marshall, a statement Clapp interpreted to mean that Robinson did not want to talk about the policy. *Id.* at 3. Clapp explained that she felt that communication is one of the most important aspects of safety and that she raised concerns to Oistad and Vaccari to facilitate communication. *Id.* at 11-13.

After Clapp cited the July 2009 meeting as an example of her ongoing difficulty in communicating safety concerns, Fischer again said that he was not afraid to make Clapp work in an “uncomfortable situation” out in the mine. *Id.* at 13. Fischer also told Clapp that “You throw a lot of bullshit around” and said, “I don’t give a shit if you’ve got 28 years [of experience].” *Id.* at 14-15.

At Robinson’s request, HR Representative Kirk Babcock joined the meeting. *Id.* at 35. Babcock further admonished Clapp that questioning the policy over the radio and going outside the crew with her concerns was improper and undermined

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<sup>6</sup> Wyoming is a one-party consent state. *See* Wyo. Stat. § 7-3-702(b)(iv). Accordingly, the original recording and transcript of audible portions of the recording was received into evidence as G. Ex. 17 and 17A, respectively, after Cordero withdrew its objection to the transcript. Tr. 19-30, 210-15, 228.

her supervisors' authority. *Id.* at 60-61. Clapp expressed dismay that she was being reprimanded for communicating her safety concerns and noted that many others had been complaining about the policy and driving trucks to the hopper after the governor engaged, yet she was the only person being reprimanded. *Id.* at 62; *see also* ALJ Dec. 52 (other miners took trucks to the hopper after the governor engaged and were not disciplined).

At this point, Clapp took a restroom break. *Id.* at 67. When Clapp returned, she was told that Fischer, Robinson, and Babcock needed more time to talk privately. Tr. 230-31. While she waited, Clapp went to the Safety Department. Tr. 231-32. At the time, safety representative Josh Tompkins was meeting with D crew driver and safety training team member Michelle Whitted. Tr. 231. Clapp and Whitted spoke to Tompkins about the dumping procedure as well as a safety incentive game currently going on at the mine. Tr. 233.

When Clapp was called back to the meeting, Babcock told her that management was concerned about her ability to follow the chain of command and communicate her concerns to Fischer and Robinson. G. Ex. 17A, p. 67. Babcock said that because emotions were running high, they had decided to send her home for the day with pay. *Id.* Babcock said, "You can take the day. Think about it, and then come in tomorrow ready to go. We'll finish up the conversation tomorrow, and then, you know, and go from there. But the bottom line is that...any concerns

have to go through [Robinson and Fischer]. Okay?” *Id.* at 67-68. Clapp affirmatively acknowledged the need to communicate through Robinson and Fischer. *Id.* at 68. Clapp explained again that she had gone to Vaccari and Oistad only because of Robinson’s comment and that there had been no attempt to undermine her supervisors, only a breakdown in communication. *Id.*

After the meeting, Clapp returned to Tompkins’s office. Tr. 240. Clapp felt scared for the safety of her crew because Fischer and Robinson were attempting to stifle communication on safety issues. Tr. 239. Seeing Clapp very upset, Tompkins told her that she needed to talk to somebody and handed her a piece of paper with his number and the numbers for HR and Vaccari. Tr. 240.

Clapp could not sleep that night after the meeting with Robinson, Fischer, and Babcock because she was concerned that Robinson and Fischer made it impossible to discuss safety issues on the D crew. Tr. 242-43. At about 5:00 a.m. on March 11, Clapp called Vaccari at home. Tr. 243. Clapp told Vaccari that she had serious concerns about issues at the mine and made an appointment to speak with him at the beginning of her seven-day break on March 12. Tr. 244. Clapp also told Vaccari that she had been up all night because of her concerns and did not feel that she should come to work and was going to take a floating holiday (“floater”). Vaccari said, “I understand.” Tr. 244, 1091, 1120.

After calling Vaccari, Clapp called Robinson and told him that she was taking a “floater.” Tr. 247. Robinson asked her if she was sick, and Clapp responded, “No, I’m taking a floater.” Robinson handed the phone to Fischer. Clapp told Fischer that she was taking a floater. Fischer responded, “You can’t, we got meetings.” Tr. 247. Clapp responded that she did not know that they had meetings and she was taking a floater. Fischer then said, “Okay, fine,” and hung up. *Id.*

Fischer then went to HR Manager Amy Clemetson and told her that Clapp had not shown up for a meeting. Tr. 1135. Clemetson called Clapp’s home at 6:50 a.m. and left a message on Clapp’s answering machine directing Clapp to report to the mine site for a meeting by 9:00 a.m. Tr. 1136, 1143. After Clapp spoke with Fischer, she went to bed and slept the rest of the day. Tr. 247-48. Clapp checked her messages that day, but did not receive a call or message from Clemetson. *Id.*, Tr. 251.

Later on March 11, Fischer learned that Clapp had a meeting scheduled with Vaccari the next day. Tr. 786. Clemetson informed Vaccari that Clapp had missed the meeting scheduled for that morning. Tr. 1093. Vaccari told Fischer that Clapp had told Vaccari she was taking the day off and that Vaccari had said he understood. Tr. 1092.

That afternoon, Vaccari, Clemetson, Babcock, Colby, Fischer, and Robinson met to discuss Clapp. Tr. 1047-48. Vaccari decided that no disciplinary decision would be made until after he met with Clapp on March 12 and the group had a few days to think things over. Tr. 963, 1048, 1137.

Toward the end of the day on March 11, Clapp spoke with Whitted. Whitted agreed to go with Clapp to meet with Vaccari the next day. Tr. 249-50, 592. The two wanted to talk to Vaccari about the issues they raised with safety representative Tompkins. Tr. 250, 592.

On March 12, Clapp and Whitted met with Vaccari. Clapp reiterated her safety concerns about turning loaded coal trucks in the run and dumping them at the face. Tr. 254, R. Ex. 20. Clapp told Vaccari that Robinson and Fischer were angry with her for expressing her safety concerns to Vaccari and Oistad. Tr. 254, 256. Whitted and Clapp also complained about the safety incentive game, which they believed Fischer and Robinson were manipulating. Whitted and Clapp expressed their concern that Fischer and Robinson discouraged and intimidated employees who raised safety concerns. Tr. 254, 256, 577-79.

On March 17, Vaccari, Clemetson, Colby, Babcock, Fischer, and Robinson met and recommended that Clapp be discharged for insubordination. Tr. 679, 785, 959, 1050-51, 1105-06, 1138-39. Vaccari, HR, and Colby made the actual decision

to discharge Clapp, and the decision was reviewed by a corporate compliance committee. Tr. 1107-08, 1141-42.

The individuals involved in the discharge decision gave varying explanations of the insubordination that purportedly formed the reason for Clapp's discharge. Colby, Fischer, and Robinson purportedly recommended discharge solely because Clapp had not shown up at work on March 11. Tr. 709, 728-29, 788, 967. Babcock, in contrast, purportedly recommended discharge because Clapp attempted to send overloaded trucks to the hopper, challenged Robinson over the radio regarding the dumping procedure, went to another supervisor with her concerns, failed to acknowledge that Fischer and Robinson were her supervisors on March 10, and failed to show up for the March 11 meeting. Tr. 1051. Clemetson purportedly supported the discharge recommendation because Clapp disregarded the instructions of her supervisor to dump at the face and failed to show up on March 11. Tr. 1139-40. Vaccari purportedly recommended discharge for insubordination based on Clapp's "full record" because Clapp allegedly refused to listen to her supervisor and failed to show up on March 11. Tr. 1106-07.

On March 18, Clemetson called Clapp and left a message on her answering machine. The message informed Clapp that Clemetson, Colby, and Fischer wanted to meet with her at 3:00 p.m. and asked Clapp to call back to confirm that she received the message. Tr. 258, 1141-42. Clemetson asked Clapp to call back on

March 18 because she heard that Clapp had not received Clemetson's March 11 message and wanted to ensure that Clapp received the March 18 message. Tr. 1144. Clapp received the message and called Clemetson to confirm. Tr. 258.

When Clapp arrived at the meeting, Clemetson handed her a discharge letter and told her she was terminated. Tr. 258-59. The discharge letter stated, "The reason for this termination is due to your insubordination towards leadership and for other legitimate business reasons." R. Ex. 1.

That evening, Clapp called Whitted and told her that she had been discharged. Tr. 580. On March 19, Whitted was pulled into a meeting with Fischer, Robinson, and a member of the utility department. Whitted was told that Cordero was revoking her crew training position, that they no longer had a working relationship, and that Whitted had lied to Vaccari about the safety incentive game. Tr. 580, 594. Whitted was in tears and told the others that she was thankful that she still had her job because she was scared they would discharge her too. Tr. 580.

## **V. Decision of the ALJ**

On December 5, 2011, the ALJ issued his decision finding that Clapp was discharged in retaliation for making protected safety complaints and that Cordero failed to demonstrate that Clapp would have been discharged if she had not made those complaints. ALJ Dec. 59. The ALJ awarded Clapp back pay from the date of her discharge until the start of her economic reinstatement on June 24, 2010. *Id.* at

60. The ALJ found that Cordero failed to meet its burden to show that Clapp failed to mitigate her damages because Clapp searched for work throughout the back pay period and did not limit her search to shovel operator positions. *Id.* The ALJ also assessed a civil penalty of \$40,000 and explained his basis for doing so by analyzing each of the statutory penalty criteria in § 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id.* at 60-64.

### **SUMMARY OF THE ARGUMENT**

The decision below should be affirmed because substantial evidence supports the ALJ's finding of discrimination and the ALJ acted within his discretion in awarding full back pay and assessing a civil penalty.

Substantial evidence supports the ALJ's finding that the Secretary established a strong *prima facie* case of discrimination. Clapp engaged in repeated protected activity when she raised safety concerns about the dumping directive between March 2 and March 12, 2010. Substantial evidence also supports the ALJ's finding that Clapp's discharge on March 18 was motivated by her safety complaints based on the timing of the discharge, management's knowledge of Clapp's complaints, Clapp's supervisors' ongoing hostility towards safety complaints, and Cordero's disparate treatment of Clapp as compared to miners who did not raise safety concerns.

Substantial evidence also supports the ALJ's finding that Clapp would not have been discharged in the absence of her protected activity. Although Clapp was purportedly discharged for insubordination, each of the purported instances of insubordination cited by Cordero was not credible, was not in fact relied upon, or was itself protected activity. Furthermore, the fact that Cordero has offered multiple, conflicting explanations for the discharge and is unable to justify the discharge decision without reference to Clapp's protected safety complaints fatally undermines its argument that Clapp would have been discharged in the absence of those complaints.

The ALJ acted within his discretion in awarding full back pay and assessing a penalty of \$40,000. Full back pay was appropriate because Cordero failed to meet its burden to show that Clapp failed to mitigate her damages. To the contrary, the ALJ found that Clapp searched for work during the back pay period and was simply unsuccessful under difficult circumstances. The ALJ's penalty assessment was also a proper exercise of discretion because the ALJ analyzed each of the statutory penalty criteria and found that a substantial increase in the penalty was warranted by the severe chilling effect that Clapp's discharge had on the willingness of other miners to raise safety concerns.

## ARGUMENT

### **I. Substantial Evidence Supports the ALJ's Finding That Cordero Discriminatorily Discharged Clapp in Violation of § 105(c)**

#### **A. Standard of Review**

The ALJ's findings of fact in this case are reviewed for substantial evidence. 30 U.S.C. § 816(a); *Olson v. FMSHRC*, 381 F.3d 1007, 1011 (10th Cir. 2004). Under the substantial evidence standard, factual findings are upheld so long as the record contains "such relevant evidence as a reasonable mind might accept as adequate to support" the agency's decision. *Laborers' Int'l Union, Local 578 v. NLRB*, 594 F.3d 732, 739 (10th Cir. 2010) (citations omitted). "The scope of review under the 'substantial evidence' standard is a limited one which does not involve a reweighing of the evidence or redetermination of the proper factual inferences to be drawn." *Interior Alterations, Inc. v. NLRB*, 738 F.2d 373, 376 (10th Cir. 1984). The reviewing court "may not displace the agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1194 (10th Cir. 2008) (citations omitted).

This Court has also explained that "[c]redibility determinations are particularly the province of the ALJ," and the Court does not "substitute [its] judgment on credibility of witnesses for that of the ALJ absent extraordinary

circumstances.” *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1551 (10th Cir. 1996) (citations omitted). “The ALJ’s credibility resolutions deserve great weight to the extent they are based on testimonial evidence of live witnesses and the hearing judge has had the opportunity to observe their demeanor.” *Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) (citations omitted). The finder of fact is entitled to credit or discredit any or all of one side’s testimony. *United States v. 121 Allen Place*, 75 F.3d 118, 121 (2d Cir. 1996).

The ALJ’s legal conclusions are reviewed de novo. *Olson*, 381 F.3d at 1011.

#### **B. Legal Standard for Establishing Discrimination Under § 105(c)**

In passing the Mine Act, Congress recognized that “[i]f our national mine safety and health program is to be truly effective, miners will have to play an active part in enforcement of the Act.” S. Rep. No. 95-181, at 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3435. Accordingly, Congress promulgated § 105(c) to encourage miners to be active in voicing concerns about mine safety by protecting them “against any possible discrimination which they might suffer as a result of their participation.” *Id.*

Section 105(c) broadly protects any complaint “under or related to” the Act, including a complaint notifying the employer of “an alleged danger or safety or health violation” at the mine. 30 U.S.C. § 815(c)(1). Congress intended this provision “to be construed expansively to assure that miners will not be inhibited

in any way in exercising any rights afforded by the legislation.” S. Rep. No. 95-181, at 35.

In light of the statutory language and history, Commission case law protects miners’ complaints to management so long as they are “related” to safety. *See Sec’y of Labor ex rel. Gabossi v. Western Fuels-Utah, Inc.*, 10 FMSHRC 953, 954 (1988); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1364-65 (2000); *Sec’y of Labor ex rel. Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (1997). The standard is generous, and “[t]here is no requirement that complaints must include explicit statements about specific safety or health hazards in order to be protected. So long as [the miner’s] complaints reasonably related to the safety and health of miners under the Act, they were protected.” *Pero*, 22 FMSHRC at 1373, n.6. Moreover, “[w]hether the conditions were objectively unsafe is not determinative of the protected status of the complaints.” *Sec’y of Labor ex rel. McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001). The Commission has also explained that in evaluating miners’ safety complaints, “We stress that our purpose is promoting safety, and we will evaluate communication issues in a common sense, not legalistic, manner.” *Sec’y of Labor ex rel. Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 134 (1982).

Under the analysis adopted by the Commission and approved by the courts, the Secretary establishes a *prima facie* case of discrimination by showing (1) that

the complaining miner engaged in protected activity, and (2) that the miner thereafter suffered adverse employment action that was motivated in any part by that protected activity. *Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (1980), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987). Motivation may be established through direct or circumstantial evidence. *Sec’y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Secretary’s burden is low, and a *prima facie* case is established so long as there is evidence in the record “from which a judge *could infer* retaliation.” *Turner v. Nat’l Cement Co.*, 33 FMSHRC 1059, 1066 (2011) (emphasis in original).

The operator may defend affirmatively by establishing that the adverse action was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2799-2800; *Eastern Associated Coal*, 813 F.2d at 642. This analysis is essentially identical to the analysis adopted by the National Labor Relations Board and approved by the Courts in discrimination cases under the National Labor Relations Act. *See, e.g. MJ Metal Prods., Inc. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2543 (1990) (“settled

cases decided under the NLRA – upon which much of the Mine Act’s anti-retaliation provisions are modeled – provide guidance on resolution of discrimination issues under the Mine Act”).

**C. Substantial Evidence Supports the ALJ’s Finding that Clapp Established a *Prima Facie* Case of Discrimination Because She Made Protected Safety Complaints About the Dumping Procedure and Her Discharge Was Motivated by Those Complaints**

*1. Protected activity*

Substantial evidence supports the ALJ’s findings that each of Clapp’s complaints about the dumping procedure was related to safety.<sup>7</sup> On March 2, 2010, Clapp called the procedure “stupid and unsafe” before complying with Supervisor Robinson’s directive and dumping driver Young’s truck.<sup>8</sup> Tr. 172, 751. Clapp also

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<sup>7</sup> The ALJ also found that Clapp engaged in extensive protected activity between November of 2008 and January of 2010. ALJ Dec. 42-45. Because the ALJ ultimately found that Clapp’s discharge was motivated by her protected safety complaints in March of 2010, discussion of these earlier incidents is not necessary to support the finding that Clapp’s discharge was unlawful. *Id.* at 54-56. It should be noted, however, that Cordero is incorrect in asserting that the ALJ committed legal error by considering the 2008 and 2009 incidents as evidence of protected activity because that evidence is “time-barred” by § 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Pet’r’s Br. 31-34. Although § 105(c)(2) requires a miner to file a complaint within 60 days of the alleged discrimination (in this case, Clapp’s discharge), nothing in the statute precludes the ALJ from considering evidence of protected activity or animus that occurred more than 60 days prior to the filing of the complaint. 30 U.S.C. § 815(c)(2).

<sup>8</sup> Cordero argues that the ALJ erred in finding that Clapp told Robinson *why* she felt the procedure was unsafe. Pet’r’s Br. 49-50. To the contrary, the ALJ’s finding is supported by truck driver Halverson’s testimony, as corroborated by Supervisor Robinson’s own notes of the incident, which contradicted Robinson’s testimony at

made a safety-related complaint at the end of the March 2-3 shift when she told Mine Manager Vaccari that she thought it was unsafe to turn around and dump loaded coal trucks in the uneven pit. Tr. 182-183, 1115. Clapp made a safety-related complaint again on March 3 when she called Supervisor Oistad and expressed her safety concerns about the dumping procedure. Tr. 189, 1016, 1023-24. Clapp made additional safety-related complaints during the heated meeting on March 10 when she told Fischer, Robinson, and Babcock that she had the right to call Oistad, Vaccari, and the safety department with her safety concerns about the dumping procedure and reiterated her concerns that the procedure was dangerous. G. Ex. 17A pp. 3-6, 24-27, 29-40, 46-47.

Finally, Clapp made protected safety complaints when she and driver Whitted met with Vaccari on March 12. Both Clapp and Whitted testified that Clapp raised safety concerns about dumping at the face and that Clapp and Whitted complained that Fischer and Robinson discouraged and intimidated employees who raised safety concerns. Tr. 254-256, 577-79. This testimony is corroborated by Vaccari's own notes, taken contemporaneously during the meeting, which mention the dumping policy and state that Fischer intimidated Clapp and accused her of using safety to get her way. R. Ex. 20. When asked what his notes meant, Vaccari

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the hearing that Clapp did not tell him why she believed the practice was unsafe. Tr. 618; R. Ex. 18. In any event, as discussed below, Clapp's comments were protected regardless of whether she explained why she believed the practice was unsafe. *See infra* pp. 33-34.

first said that he could not recall, but then stated that they reflected comments made by Clapp. Tr. 1098. The ALJ credited the mutually corroborative testimony of Clapp and Whitted, as further corroborated by Vaccari's notes, in finding that Clapp made safety complaints during the March 12 meeting. ALJ Dec. 37, n.42.

Cordero's counterargument applies the wrong legal standard. Cordero argues that the ALJ failed to establish that Clapp "reasonably and in good faith believe[d] that she would be required to work in hazardous conditions." Pet'r's Br. 22, citing *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The "reasonable, good faith" requirement is only applicable, however, when the miner has refused to perform work she believes to be unsafe. *See Sec'y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (1981) (establishing the "good faith and reasonableness" standard for a protected work refusal); *Carmichael v. Jim Walter Resources, Inc.*, 20 FMSHRC 479, at \*5, n.14 (1998) (explaining that the work refusal doctrine is not an appropriate analytical framework when there was no work refusal).

Clapp never refused to dump a truck at the face. Although Clapp questioned the practice on March 2 and stated that she did not want to dump driver Young's truck, she complied with the directive after Robinson instructed her to dump the truck. Tr. 172, 177. Similarly, when the governor engaged on driver Clark's truck on March 9, Clapp told Clark that she would have to dump because Vaccari had

not gotten back to Clapp and that, alternately, Clark could call Robinson to ask him what to do. Tr. 193. Because Clapp never refused to perform the dumping procedure, her complaints were protected so long as they were “related” to safety. *Pero*, 22 FMSHRC at 1373, n.6; *Gabossi*, 10 FMSHRC at 954; *Knotts*, 19 FMSHRC at 837; *Carmichael*, 20 FMSHRC at \*5, n.14.

Cordero makes a number of other arguments as to why Clapp’s complaints about the dumping procedure were unprotected. First, Cordero argues that Clapp’s complaints were unprotected because Clapp was motivated by concerns about productivity, or by personality conflicts with her supervisors, rather than by concerns about safety. Pet’r’s Br. 22-30.<sup>9</sup> That argument should be rejected because the fact that Clapp’s concerns about the practice related both to safety and to productivity or other concerns does not make them unprotected; the test is simply whether the complaints are “related” to safety. *See Knotts*, 19 FMSHRC at 837 (miner’s statements protected because they included complaints about unsafe equipment at the mine, even though miner also raised production and morale concerns during the same conversation); *Gabossi*, 10 FMSHRC 958 (miner’s

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<sup>9</sup> Cordero asserts that Clapp’s statements that the trucks were not actually overloaded is inconsistent with a concern for safety. Pet’r’s Br. 30. To the contrary, the fact that Clapp may have believed it was safe to drive the trucks to the hopper because they were not overloaded is in no way inconsistent with her belief that the dumping process itself was unsafe because of the dark, narrow, and uneven conditions in the coal pit. Certainly that fact does not support a conclusion that Clapp’s complaints were not “related” to safety.

complaints about lack of coordination between production and maintenance departments protected because miner was concerned that lack of communication jeopardized safety).

Cordero also argues that Clapp's complaints were unprotected because Clapp had the ability to ensure that any hazards were addressed and the trucks were eventually dumped safely; thus, Cordero argues, the practice was not objectively dangerous. Pet'r's Br. 28-29. However, "[w]hether the conditions were objectively unsafe is not determinative of the protected status of the complaints." *McGill*, 23 FMSHRC at 986. Rather, the complaints are protected so long as they are "related" to safety.

Cordero makes a series of arguments to the effect that Clapp's complaints were unprotected because she failed to consistently and adequately articulate why she believed the practice to be unsafe.<sup>10</sup> Pet'r's Br. 23, 27. Those arguments fail because the Act does not require that complaints contain "explicit statements about

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<sup>10</sup> Related to this argument, Cordero argues that the ALJ erred in finding that Clapp raised safety concerns regarding the dumping procedure to the Safety Department. Pet'r's Br. 50. However, because the ALJ's legal analysis does not list Clapp's complaints to the Safety Department among the evidence of her protected activity, it is not necessary to determine whether the ALJ's finding that Clapp raised such complaints is supported by substantial evidence. ALJ Dec. 46. For the same reason, Cordero's argument that the ALJ erred in not resolving why Clapp asked Whitted why Whitted was not in the meeting with her on March 10 is not relevant. Pet'r's Br. 52.

specific safety or health hazards in order to be protected,” so long as the complaints are “reasonably related to safety.” *Pero*, 22 FMSHRC at 1373, n.6.

Finally, Cordero suggests that Clapp’s comment that the practice was “stupid and unsafe” was “an unacceptable way to question the [directive]” and was therefore unprotected. Pet’r’s Br. 24. Yet as Cordero’s brief explains, the rights granted under § 105(c) “may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” *Id.*, citing *Sec’y of Labor ex rel. Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 306 (2000).

Clapp’s statement that the policy was “stupid and unsafe” simply does not rise to the level required to take such impulsive behavior outside the protection of the Act. For example, in *Bernardyn*, the case cited by Cordero, the Commission found that the employer failed to establish that it was justified in terminating a miner who referred to his supervisor as a “little f\*\*\*er” over the company radio because the comment was made in the context of a safety complaint. *Sec’y of Labor ex rel. Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 939 (2001). Applying the same rule, this Court upheld an NLRB decision that an employer violated the NLRA when it terminated an employee for calling a company security guard a “mother f\*\*\*er” after the security guard attempted to confiscate the employee’s pro-union placard. *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288

(10th Cir. 1980). In comparison to those outbursts, neither of which was found to forfeit the statute's protection, Clapp's statement that the policy was "stupid and unsafe" was mild indeed.

In sum, substantial evidence supports the ALJ's finding that Clapp made repeated complaints about the dumping policy between March 2 and March 12, and that these complaints were protected because they were "related" to safety.

## 2. *Motivation*

Overwhelming evidence also supports the ALJ's finding that the Secretary established the second element of the *prima facie* case: that Clapp's discharge was motivated "in any part" by her protected activity. *Pasula*, 2 FMSHRC at 2799-2800. Recognizing that "[d]irect evidence of motivation is rarely encountered," the Commission has identified four primary indicia of discriminatory intent: (1) knowledge of the protected activity; (2) coincidence in time between the protected activity and the adverse action; (3) hostility or animus toward the protected activity; and 4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510. The ALJ properly found discrimination on the basis of each of the four indicia.

First, it is undisputed that the supervisors, managers, and HR personnel involved in Clapp's discharge decision had direct knowledge of her safety complaints about the dumping directive on March 2, 3, 9, 10 and 12. ALJ Dec. 47-

48. Second, the temporal proximity between Clapp's protected safety complaints on March 2-12 and her discharge on March 18 provides additional evidence of improper motivation. *See, e.g. Stafford Constr.*, 732 F.2d 954, 960 (two weeks between protected activity and miner's discharge is "itself evidence of illicit motive.").

Third, the record contains ample evidence of strong and ongoing hostility toward Clapp's protected safety complaints, beginning in 2008 when Fischer and Robinson became a management team on the D crew. In November of 2008, Fischer referred to Clapp as a "bitch" for complaining to Vaccari about insufficient seatbelts in a pickup truck. Tr. 612, 625. Thereafter, Clapp was given a "last and final" warning for riding without a seatbelt despite the fact that the purported seat belt policy was not enforced against another miner. Tr. 374, 1066-67, 276-79.<sup>11</sup>

In early 2009, Clapp and two other miners raised safety concerns about the placement of monitor screens in RTDs and these concerns were dismissed by Fischer and Robinson. Tr. 124, 127, 132. Although Robinson testified that no other miners raised concerns about the screen placement in the RTDs, the ALJ discredited that testimony based on "demeanor, the generality of Robinson's

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<sup>11</sup> Cordero argues that the ALJ erred in not resolving why Clapp purportedly could not explain how she was the one not wearing a seatbelt when she was the driver. Pet'r's Br. 52. To the contrary, the ALJ explained that Clapp "took responsibility for failing to wear a seatbelt" so that no other miner would receive discipline. ALJ Dec. 6-7.

testimony, and the specificity of Clapp’s testimony” to the contrary. Tr. 797, ALJ Dec. 9. *See Webco Indus.*, 217 F.3d at 1311 (“The ALJ’s credibility resolutions deserve great weight to the extent they are based on testimonial evidence of live witnesses and the hearing judge has had the opportunity to observe their demeanor.”).

On July 13, 2009, after Clapp moved the screen that was blocking her vision in the shovel, Fischer began yelling at her and later threatened that he could make her work in an “uncomfortable” situation. Tr. 144-45, 148-50. Robinson also chastised Clapp for making safety complaints to other managers by telling her that she made her direct supervisors look stupid by going behind their backs and by using the “safety trump” to get her way. Tr. 149. The ALJ found that these threats constituted unlawful interference with Clapp’s right to make safety-related complaints and that such interference constituted background evidence of animus. ALJ Dec. 49; *see also Buckeye Elec. Co.*, 339 NLRB 334, 334 n.2 (2003) (threat of more onerous working conditions is evidence of animus). Cordero argues that the finding of interference was inappropriate because the incidents were time-barred, but the ALJ’s decision makes clear that he did not consider the threats as substantive acts of discrimination and instead merely considered them as background evidence of animus. Pet’r’s Br. 34, ALJ Dec. 49.

A further expression of animus occurred in the Summer of 2009 when Clapp called for water because of dusty conditions and Robinson said, “I don’t care how many times she calls she is not getting a water truck.” Tr. 521. In addition, throughout 2009 and early 2010, Fischer and Robinson repeatedly ignored Clapp’s requests for water, forcing Clapp to shut down the run in order to get water. Tr. 109-111. Although Robinson could not recall Clapp ever shutting down a run because it was too dusty, the ALJ credited Clapp’s specific recollection, confirmed on cross-examination, over Robinson’s purported lack of recollection. ALJ Dec. 20, n.27; Tr. 738, 301. The ALJ drew a further inference of animus from the events of January 2010 when Fischer and Robinson continued to dismiss Clapp’s ongoing safety concerns about unmanned RTDs parked behind her shovel. Tr. 97-99.

Finally, Fischer and Robinson demonstrated strong hostility towards Clapp’s safety complaints about the dumping policy in March of 2010. When Clapp raised her concerns to Vaccari in the hallway after the March 2-3 shift, Fischer and Robinson gave her angry looks behind Vaccari’s back. Tr. 185-186. On March 9, when Clapp told Clark that Vaccari had not gotten back to Clapp about her concerns, Fischer began yelling at Clapp over the radio. Tr. 193, 321, 529. During the March 10 meeting, Fischer and Robinson told Clapp that they were angry with her for going to Vaccari and Oistad with her concerns about the dumping policy and for questioning the dumping policy over the radio. G. Ex. 17A, pp. 2-4.

Fischer again told Clapp that he was not afraid to put her in an “uncomfortable situation.” *Id.* at 13. He further told her, “You throw a lot of bullshit around” and “I don’t give a shit if you’ve got 28 years [of experience].” *Id.* at 14-15. When Babcock joined the meeting, he also reprimanded Clapp for raising her concerns over the radio and to Vaccari and Oistad. *Id.* at 60-61.

Finally, the ALJ found several instances of disparate treatment of Clapp. With regard to the statements by Babcock and Clemetson that Clapp was discharged for questioning the dumping directive and attempting to send a truck to the hopper, the ALJ found that D crew drivers Artz and Young actually drove trucks to the hopper after the governor engaged and that management was aware of their actions, yet neither driver received any discipline. ALJ Dec. 52; Tr. 422-23, 581-83, 805-807.

With regard to Clapp’s discharge for alleged insubordination, the ALJ noted that D crew operator Bob Eisenhower told Robinson over the radio on June 13, 2009, “Don’t tell me what to do” after Robinson told him to be careful and watch what he was doing to avoid equipment damage. Tr. 262, 402. Eisenhower did not receive any discipline for insubordination. Cordero argues that the ALJ erred in finding disparate treatment here because Eisenhower’s insubordination cannot be compared to that of Clapp, who purportedly took a “floater” without permission. Pet’r’s Br. 47. However, to the extent that one of the purported reasons for Clapp’s

discharge was her criticizing the dumping directive over the radio, Cordero's failure to discipline Eisenhauer for showing disregard for his supervisor's instructions over the radio is an example of another miner committing the "same, or more serious, offense" and yet escaping discipline. *Chacon*, 3 FMSHRC at 2512.

The ALJ also found evidence that Clapp was treated more harshly than other miners when she was issued a "last and final" warning for causing \$250 of property damage in April of 2009. The ALJ found that Doug Christiansen received a mere verbal warning for damaging a very expensive electrical cable and that Eisenhauer received a single warning for two incidents of property damage. Tr. 270-71, 693; G. Ex. 18; Tr. 261-65, 698-99; G. Exs. 21 and 22. Cordero asserts that Christiansen's lesser discipline was appropriate because it was his first disciplinary infraction at the mine, but that assertion is belied by a subsequent incident report which indicates that Christiansen had two to three incidents per year. Pet'r's Br. 48; G. Ex. 19. Cordero also asserts that Eisenhauer was actually disciplined more harshly than Clapp because he was demoted from pay level 5 to level 3, but Cordero fails to note that that demotion did not occur until Eisenhauer had a third safety incident. The fact remains that Eisenhauer received a mere written warning for his first two incidents of property damage. G. Exs. 21-23.

Cordero further asserts neither Christiansen nor Eisenhauer was similarly situated to Clapp because neither had achieved Clapp's level of seniority. Pet'r's

Br. 49. However, Cordero introduced no evidence of any company policy that less experienced miners are afforded greater leniency for property damage and insubordination. Indeed the fact that Clapp was a skilled and experienced operator could just as easily make her purported misconduct – questioning the safety of a practice and using her discretion as to the best means to dislodge a stuck truck – *more* appropriate than it would be from a less senior employee. *See* Tr. 633 (testimony of Colby that Level 6 shovel operators are trusted by their supervisors to lead and take control of their runs).

In sum, the record contains ample evidence “from which a judge *could infer* retaliation.” *Turner*, 33 FMSHRC at 1066 (emphasis in original).

**D. Substantial Evidence Supports the ALJ’s Finding that Clapp’s Discharge Was Motivated by Her Protected Safety Complaints and that Cordero Would Not Have Discharged Her if She Had Not Made Those Complaints**

As noted above, the operator may establish an affirmative defense by showing that it would have taken the adverse action based on unprotected activity alone. *Pasula*, 2 FMSHRC at 2799-2800; *Eastern Associated Coal*, 813 F.2d at 642. In evaluating the employer’s affirmative defense, the question is not whether the employer *could* have taken the adverse action for a legitimate business reason, but whether it *did* take the adverse action for a legitimate business reason and *would* have taken the adverse action for that reason alone. *Pasula*, 2 FMSHRC at 2800; *Interstate Builders, Inc. v. NLRB*, 351 F.3d 1020, 1035 (10th Cir. 2003).

Thus, the employer's defense should not be examined superficially or approved automatically once proffered. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (1982). Rather, the judge's job is to determine whether the defense is credible and, if so, whether it would have motivated the operator in question as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (1982).

Where the operator's asserted justification is weak, implausible, or out of line with normal business practices, a finding of pretext may be appropriate. *Chacon*, 3 FMSHRC at 2516; *see also Interstate Builders*, 351 F.3d at 1034. Pretext may be established by showing that the proffered justification had no basis in fact or that the proffered justification did not actually motivate the discharge because the circumstantial evidence tends to prove that an unlawful motivation was more likely than that offered by the employer. *Turner*, 33 FMSHRC at 1073.

Here, the ALJ found that each of Cordero's proffered justifications either was actually false or was not in fact relied upon because the circumstantial evidence of discrimination made it more likely than not that Cordero's insubordination defense was a pretext. ALJ Dec. 56-57. Accordingly, the ALJ concluded that Cordero failed to establish that it would have discharged Clapp for insubordination in the absence of her protected activity. *Id.* at 59.

As noted above, at the hearing, Cordero managers offered multiple, conflicting explanations as to why Clapp was purportedly discharged for

insubordination. *See supra* p. 21. In its brief to this Court, Cordero again gives conflicting explanations of the act(s) of insubordination that purportedly resulted in Clapp's discharge. Cordero asserts that regardless of any protected activity, "Clapp would have been terminated for her behavior on March 11, 2010, alone when she disregarded orders to attend an important meeting." Pet'r's Br. 36. Yet Cordero's ensuing explanation of the insubordination that purportedly led to Clapp's discharge encompasses much more than the March 11 incident. Cordero begins its defense of the discharge by discussing Clapp's allegedly inappropriate behavior on March 10, when Fischer and Robinson called a meeting to reprimand her for bringing her safety complaints to Vaccari. *Id.* at 36-37. Several pages later, Cordero asserts, "Clapp's actions in the days leading up to the meeting on March 10, 2010 also provide ample examples of her insubordination," and then goes on to discuss Clapp's alleged light-loading of trucks, the fact that Clapp was allegedly making truck drivers feel uncomfortable, and the fact that Clapp was allegedly "using the radio to undermine her supervisor's authority in a very unprofessional manner." *Id.* at 40. It should be emphasized that, before the ALJ, Cordero did not argue that Clapp's discharge was based either on light-loading or on making drivers feel uncomfortable.<sup>12</sup> ALJ Dec. 22, n.29 and 26. Those afterthought

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<sup>12</sup> In any event, the behavior that allegedly made drivers feel uncomfortable – Clapp's public voicing of her safety-related concerns about the dumping directive – was protected activity and thus not a lawful basis for discharge.

arguments therefore not only underscore the still-shifting nature of Cordero's defense, but are improperly before the Court. 30 U.S.C. § 816(a).

As a preliminary matter, as the ALJ noted, where an employer provides an inconsistent or shifting rationale for its actions, a reasonable inference can be drawn that the reason proffered is a pretext designed to mask an unlawful motive. *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 994 (10th Cir. 2005); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), *enforced*, 160 F.3d 353 (7th Cir. 1998). Moreover, the fact that Cordero is still unable, even in its brief to the Court, to explain the discharge decision consistently and without reference to Clapp's protected activity severely undermines its argument that it would have discharged her regardless of that activity. Rather, in continually attempting to justify the discharge by referring to Clapp's safety-related activity, Cordero demonstrates that the discharge decision was inextricably linked to its managers' animus towards her protected safety complaints.

With regard to the alleged instances of insubordination themselves, the ALJ first noted that Clapp did not send trucks to the hopper or otherwise disregard the dumping directive. Rather, as the ALJ explained, Clapp challenged the directive as unsafe, but then complied with the directive and took her safety concerns to Vaccari and Oistad. ALJ Dec. 57. Furthermore, other miners had taken trucks to the hopper after the governor engaged and received no discipline. ALJ Dec. 52.

With regard to Babcock's assertion that Clapp was insubordinate in "going to another supervisor" with her concerns, the ALJ found that this action was clearly protected activity and thus was an unlawful basis for discharge. ALJ Dec. 57. With regard to the claim that Clapp was insubordinate because she failed to acknowledge that Fischer and Robinson were her supervisors during the March 10 meeting, the ALJ found that Clapp clearly acknowledged her supervisors' authority at the end of the March 10 meeting and acknowledged the need to follow the chain of command. *Id.*

To the extent that Cordero relied on Clapp's comments during the March 10 meeting as a basis for her discharge, the ALJ found that these comments were provoked by Fischer's intemperate language and his anger that Clapp had gone to Vaccari and Oistad with her safety concerns. ALJ Dec. 57-58 (citing *Bernardyn*, 22 FMSHRC at 306; *Vought Corp.*, 273 NLRB 1290, 1295 n.31 (1984), *enforced*, 788 F.2d 1378 (8th Cir. 1986); *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977); *NLRB v. M & B Headwear*, 349 F.2d 170, 174 (4th Cir. 1965)). Accordingly, the ALJ properly found that Clapp's remarks were not a lawful basis for discipline. *Id.*

The ALJ found that Cordero's argument that Clapp was discharged for failing to attend a meeting on March 11 was not credible for four reasons. First, the ALJ found that no specific meeting was scheduled for March 11. ALJ Dec. 54.

Rather, the ALJ found that Babcock's statement was ambiguous when he told Clapp to, "come in tomorrow ready to go" and that "[w]e'll finish up the conversation tomorrow."<sup>13</sup> G. Ex. 17A, pp. 67-68. Essentially, Babcock simply told Clapp to report for work at the normal time. Tr. 1054.

Second, the ALJ found that Clapp had the approval of both Fischer and Vaccari to take the day off. The ALJ credited Clapp's testimony that after Clapp reiterated to Fischer that she needed to take a floater, Fischer said, "Okay, fine," and hung up. Tr. 247. Vaccari's own notes from his March 12 meeting with Clapp and Whitted confirm that Clapp told Vaccari that Fischer had not told Clapp she could not take a floater, but instead ended the conversation by saying, "Okay, goodbye." R. Ex. 20. The ALJ also observed that based on Clapp's exemplary attendance record during her 28 years at the mine, she was not the type of employee who would deliberately fail to show up for a scheduled meeting. ALJ Dec. 55.

Although Fischer and Robinson testified that Fischer did not say "okay," but rather ended the conversation by telling Clapp that he would have HR call her, the ALJ's credibility determination was based his observation of the witnesses'

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<sup>13</sup> Cordero argues that the ALJ erred in finding that Clapp did not hear Babcock's statement. Pet'r's Br. 52. To the contrary, the ALJ *discredited* that testimony from Clapp. ALJ Dec. 34-35. It is both common and acceptable for a factfinder to credit some parts of a witness's testimony and to discredit other parts. *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007).

demeanor and the inherent probability of their testimony in light of other evidence in the record, and is thus entitled to great deference. ALJ Dec. 2, n.1; *Webco Indus.*, 217 F.3d at 1311; *Plateau Mining*, 519 F.3d at 1194 (“we may not displace the agency’s choice between two fairly conflicting views”).

Furthermore, the ALJ found that Clapp had Vaccari’s tacit approval to take the day off and that Fischer was aware of this. In their phone call on March 11, Clapp told Vaccari that she had been up all night because of her concerns and did not feel that she should come to work, and Vaccari said, “I understand.” Tr. 244, 1091, 1120. On examination by the ALJ, Vaccari acknowledged that he knew that Clapp might assume he had given her tacit approval to take the day off. Tr. 1121. When he arrived at the mine, Vaccari told Fischer that Clapp had told him of her need to take a floater and that Vaccari had told her that he understood. Tr. 1092.

Third, the ALJ found that Clapp did not receive Clemetson’s message asking her to report to the mine and that Clemetson was aware that her message was never received. ALJ Dec. 55. The ALJ credited Clapp’s testimony that Clapp checked her messages that day and did not receive a call or message from anyone at the mine.<sup>14</sup> Tr. 248-49, 251. The ALJ noted that, unlike on March 18, Clemetson did

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<sup>14</sup> Cordero asserts that Clapp’s credibility on this issue was compromised because she testified both that she slept all day and that Whitted came to her home that day, which Whitted denied. Pet’r’s Br. 38-39. There is nothing inconsistent about Clapp or Whitted’s testimony. Clapp spoke with Fischer sometime before 7:00 a.m. and

not ask Clapp to confirm receipt of the message and did not call Clapp later in the day to ask whether she had received the message. ALJ Dec. 55. The ALJ further noted Clapp's excellent attendance record and the corresponding unlikelihood that she would ignore a message to attend a meeting, and the fact that Clapp responded to the March 18 voicemail immediately upon receipt. *Id.* Like the ALJ's decision to credit Clapp's testimony regarding her conversation with Fischer, the ALJ's decision to credit Clapp's testimony regarding Clemetson's message is entitled to a high degree of deference. *See Laborers' Local 578*, 594 F.3d at 740 (where the ALJ heard live testimony from various competing witnesses, found one witness credible, explained his bases for doing so, and other record evidence tended to confirm that finding, "[u]navoidably, we must conclude substantial evidence exists to support the ALJ's finding").

Fourth, the ALJ found that management knew at the time of the discharge that Clapp had not received Clemetson's message and that Vaccari had given tacit approval for Clapp to take the day off. ALJ Dec. 54-55, n. 49. These facts further undermine Cordero's position that it would have discharged Clapp for failing to show up to work on March 11 even in the absence of its animus towards her based on her protected safety complaints.

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then spoke to Whitted "at the end of the day." Tr. 248-49. Whitted testified that she could not recall *whether* she went to Clapp's home on March 11. Tr. 590-91.

Cordero argues that the ALJ impermissibly substituted his own business judgment for the “legitimate business reason proffered by Cordero.” Pet’r’s Br. 42-46. To the contrary, the ALJ determined that the reasons offered by Cordero were not credible and did not constitute the true motivation for Clapp’s discharge. This is precisely the role of the ALJ under the case law cited by Cordero. *E.g. Bradley*, 4 FMSHRC at 993 (ALJ’s role is “to determine whether [employer’s reasons] are credible and, if so, whether they would have motivated the particular operator as claimed.”).

Finally, Cordero argues that the ALJ improperly considered Cordero’s retaliation against Whitted in finding that Clapp’s discharge was motivated by unlawful animus. Pet’r’s Br. 46, n.5. To the contrary, the fact that Whitted also suffered retaliation after both she and Clapp met with Vaccari to discuss safety concerns is relevant to establishing that Cordero was motivated by unlawful animus when it discharged Clapp. The ALJ’s finding that Cordero retaliated against Whitted is supported by substantial evidence: Whitted’s testimony that her supervisors told her they no longer had a working relationship and accused her of lying when she and Clapp met with Vaccari is more than adequate to support a finding of retaliation and animus. Tr. 580.

In sum, substantial evidence, including a host of permissible credibility determinations, supports the ALJ's finding that Cordero would not have discharged Clapp in the absence of Clapp's protected safety complaints.

## **II. The ALJ Acted Within His Discretion in Awarding Back Pay and in Assessing a Civil Penalty of \$40,000**

### **A. Standard of Review**

The ALJ's remedial award is reviewed for abuse of discretion. *Secretary ex rel. Noakes v. Gabel Stone Co.*, 23 FMSHRC 1222, 1224 (2001), *aff'd*, 307 F.3d 691 (8th Cir. 2002); *Sec'y of Labor v. Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (2000); *Anderson v. FMSHRC*, 668 F.2d 442, 444 (8th Cir. 1982). "A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (citations omitted).

### **B. The ALJ Acted Within His Discretion in Awarding Full Back Pay Because Clapp Did Not Fail to Mitigate Her Damages**

In light of the Mine Act's objective of offering the broadest possible protection against discrimination, Congress intended the Commission to order "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct." S. Rep. No. 95-181, at 37. Accordingly, the Commission endeavors "to restore discriminatees, as nearly as

[it] can, to the enjoyment of the wages and benefits they lost as a result of their terminations,” and “[u]nless compelling reasons point to the contrary, the full measure of relief should be granted.” *Sec’y of Labor ex rel. Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 284 (1999), *aff’d*, 230 F.3d 1358 (6th Cir. 2000) (unpublished).

Back pay is normally equal to the amount the miner would have earned but for the discrimination, but may be reduced where the miner incurs a “willful loss of earnings.” *Noakes*, 23 FMSHRC at 1224 (citations omitted). To be entitled to full back pay, the miner must make “reasonable efforts” to find new employment, but the miner is held “only to reasonable exertions” and “not the highest standard of diligence.” *Id.* at 1224-25; *see also Spulak v. K Mart Corp.*, 894 F.2d 1150, 1158 (10th Cir. 1990). Mitigation does not require success, but requires only an “honest, good faith effort,” which is determined on the facts of each case. *Noakes*, 23 FMSHRC at 1225. Failure to mitigate damages is an affirmative defense, and the employer bears the burden of proof. *Id.*; *Spulak*, 894 F.2d at 1158.

The ALJ found that Cordero failed to meet its burden to show Clapp failed to mitigate damages, and ordered full back pay for the period from her discharge on March 18, 2010, until her economic reinstatement on June 24, 2010. ALJ Dec. 59-60. The ALJ noted that Clapp testified that she searched for work during the back pay period, but was unsuccessful. *Id.*; Tr. 377-78. Clapp sought the assistance

of the local Workforce office to search for jobs, and did not limit her search to shovel operator positions. Tr. 382, 396-97. Through her search, Clapp identified one opening, submitted an application, and was called for an interview. Clapp testified that the interview was difficult because she had to explain that she had been discharged. Tr. 382-83. Clapp testified that she then looked for other positions but submitted no additional applications. Tr. 377-78.

The ALJ rejected Cordero's argument that Clapp's failure to apply for more than one position constituted a failure make "reasonable efforts" to find new employment. Rather, the ALJ credited Clapp's testimony that she continued to search for work during the fourteen-week period and did not limit her search to shovel operator positions, and found that this effort constituted a reasonable search. ALJ Dec. 60. On appeal, Cordero merely repeats its argument that Clapp's failure to apply for more than one job constituted a failure to make reasonable efforts. Pet'r's Br. 53-54. Because Cordero fails to identify any "clear error of judgment" by the ALJ, the back pay award constituted an appropriate exercise of discretion and should be upheld. *Eastman*, 493 F.3d at 1156.

**C. The ALJ Acted Within His Discretion in Assessing a Civil Penalty of \$40,000 Based on the Gravity of the Violation, Cordero's Negligence and Lack of Good Faith in Attempting to Achieve Rapid Compliance, and the Size of Cordero's Business**

Judges have broad discretion in assessing penalties under the Mine Act. *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1086 (10th Cir. 1998). In

assessing the penalty, an ALJ is required to address six statutory criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) any demonstrated good faith in attempting to achieve rapid compliance. *Id.* at 1085-86. Once the ALJ makes findings of fact on each of the statutory criteria, the ALJ's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Sec'y of Labor v. Sellersburg Stone Co.*, 5 FMSHRC 287, 292-294 (1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). There is no requirement that equal weight be assigned to each of the criteria. *Sec'y of Labor v. Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (1997).

Under existing case law, the ALJ assesses the penalty *de novo* and is not bound by the Secretary's proposed penalty. However, when the ALJ's assessment substantially diverges from that proposed by the Secretary, the ALJ must provide a sufficient explanation of the bases underlying the penalty assessed. *Sellersburg*, 5 FMSHRC at 293.

Here, ALJ acted properly because he made findings with regard to each of the six criteria and explained his basis for increasing the Secretary's proposed penalty. ALJ Dec. 61-64. With regard to the first criterion, the ALJ found no

history of § 105(c) violations. *Id.* at 62. With regard to the second and fourth criteria, the ALJ found that Cordero is a large mine and introduced no evidence that its ability to continue in business would be impaired by the penalty. *Id.* at 63-64.

With regard to negligence, the ALJ found that Cordero's negligence was high because management knew or should have known that Clapp's discharge was unlawful based on the strength of the prima facie case and the pretextual nature of the alleged insubordination. *Id.* at 62. The ALJ also found that the gravity of the violation was severe, particularly in light of the purpose of the Act and the severe chilling effect of Clapp's termination on the willingness of other miners to raise safety concerns. *Id.* at 62-63. Finally, the ALJ found that Cordero did not demonstrate good faith in attempting to achieve compliance because Cordero contested Clapp's temporary reinstatement to her position at the mine and failed to respond to certain discovery requests during the proceedings on the merits *Id.* at 63.

The ALJ explained that he found the Secretary's proposed penalty of \$20,000 to be inadequate because of the severe chilling effect of Clapp's discharge on other miners. The ALJ based his finding on the testimony of the miner witnesses at the hearing, who not only spoke of their fear of raising safety concerns in light of Cordero's treatment of Clapp, but also expressed fear of retaliation simply for testifying about the events surrounding Clapp's discharge. In light of

this testimony, and given the overarching purpose of the Act to encourage miners to raise safety concerns, the ALJ doubled the penalty to \$40,000. ALJ Dec. 62-64.

Cordero argues that the ALJ erred in considering the chilling effect on other miners because the Secretary's complaint was brought on behalf of Clapp alone. Pet'r's Br. 55-56. To the contrary, the Commission has properly held that the chilling effect on other miners is a legitimate consideration in determining the gravity of a § 105(c) violation. *Sec'y of Labor ex rel. Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 558 (1996) (Commission considers both subjective and objective evidence in determining chilling effect).

Cordero also argues that the ALJ erred because he "disregarded evidence of Cordero's safety history and previous lack of § 105(c) complaints" and focused instead on the chilling effect. This argument should be rejected because the ALJ complied with his obligation to make findings on each of the six criteria, and was free thereafter to weigh the criteria as he saw fit. *Thunder Basin Coal Co.*, 19 FMSHRC at 1503.

Finally, Cordero contests the ALJ's findings with regard to whether Cordero demonstrated good faith in attempting to achieve rapid compliance. Pet'r's Br. 56-57. To the contrary, the ALJ's findings are supported by substantial evidence and the ALJ's reliance on them was a proper exercise of discretion. The ALJ correctly noted that, although the Mine Act requires full temporary reinstatement (i.e.,

compliance) upon an appropriate finding by the Secretary, Cordero contested reinstatement when notified by the Secretary that Clapp was entitled to temporary reinstatement and instead agreed only to economic reinstatement. ALJ Dec. 63. Cordero's position that it had no reason to consider reinstating Clapp until the Secretary's request for temporary reinstatement on June 7, 2010, is also incorrect because Cordero was forwarded a copy of Clapp's complaint when it was filed. 30 U.S.C. § 815(c)(2). Finally, the ALJ correctly noted that Cordero failed to respond to certain discovery requests during the proceeding on the merits, and acted within his discretion in finding that in the circumstances – i.e., in light of the fact that Cordero's entire defense was pretextual – that failure, which only served to prolong Cordero's reinstatement of Clapp, demonstrated a lack of good faith in attempting to achieve rapid compliance.<sup>15</sup>

## **CONCLUSION**

For the foregoing reasons, the Secretary respectfully requests that the Court deny Cordero's petition for review and affirm the decision of the ALJ.

## **STATEMENT REGARDING ORAL ARGUMENT**

Given that the ALJ's conclusions are adequately supported by substantial evidence in the record, including permissible credibility determinations, and the

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<sup>15</sup> As the "rapid compliance" penalty criterion indicates, the Mine Act is an abate-now-litigate-later statute. *See generally Thunder Basin Coal*, 19 FMSHRC at 1504-05. An operator has a right to litigate an alleged violation – but before it exercises that right, it has a duty to abate the violation.

case raises no significant legal questions, the Secretary believes that oral argument is not necessary.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Date: May 29, 2012

/s/ Nancy E. Steffan  
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I hereby certify that a copy of the foregoing Brief of Respondent Secretary of Labor, as submitted in digital form via the Court's ECF system, is an exact copy of the hard copies filed with the Clerk and has been scanned for viruses with McAfee VirusScan Enterprise + Antispyware Enterprise 8.8 and according to the program, is free of viruses. I also certify that all required privacy redactions have been made.

Date: May 29, 2012

/s/ Nancy E. Steffan  
Attorney  
U.S. Department of Labor

## CERTIFICATE OF SERVICE

I, Nancy E. Steffan, electronically filed the foregoing Brief of the Secretary of Labor with the Court on May 29, 2012, by using the Court's ECF Electronic Filing System, which will send notice to:

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