# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 18-1320** **September Term, 2019**

FILED ON: OCTOBER 4, 2019

THE HARRISON COUNTY COAL CO.,
PETITIONER

v.

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, ET AL.,
RESPONDENT

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On Petition for Review from a Decision of
The Federal Mine Safety and Health Commission

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Before: HENDERSON, MILLETT and WILKINS, *Circuit Judges*.

## JUDGMENT

This petition for review of agency action of the Federal Mine Safety and Health Commission was presented to the Court and briefed and argued by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is hereby

**ORDERED and ADJUDGED** that the petition for review be **DENIED** as to all findings except the amount of backpay awarded, and that the petition be **GRANTED** and **REMANDED** as to the calculation of the amount of backpay owed.

In 1977, Congress passed the Federal Mine Safety and Health Act ("Mine Act"), establishing comprehensive protections for the health and safety of miners. *See* 30 U.S.C. § 801. Section 105(c), the Mine Act's antidiscrimination provision, prohibits (among other things) any person from discriminating against a miner because that miner has engaged in certain protected activities under the Mine Act, including making safety-related complaints. *Id.* § 815(c)(1). Since the participation of miners in reporting unsafe working conditions is essential to the effectiveness of the Mine Act, Congress explained miners "must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977).

This case concerns whether Petitioner Harrison County Coal Company ("Harrison") violated Section 105(c) by disciplining George Scoles, a coal miner, by suspending him with intent to discharge in 2015 after several incidents between Scoles and mine supervisor George McCauley.

After the Secretary of Labor ("Secretary") filed a complaint with the Federal Mine Safety and Health Commission, Administrative Law Judge Kenneth Andrews ("ALJ") found that Scoles' suspension in fact violated Section 105(c). *Sec'y of Labor v. Harrison County Coal Company*, 40 FMSHRC 1393, 1424–25 (2018) (ALJ). The ALJ found that the insubordination Harrison alleged as the reason for Scoles' discharge was merely a pretext and that Scoles was actually suspended in retaliation for protected, safety-related activities. *Id.* The ALJ (among other things) awarded Scoles backpay of $16,324.80 plus interest, assessed Harrison a civil penalty of $40,000, and ordered Harrison to make management personnel and supervisors available for training about miners' rights. *Id.* The Commission then denied review of the ALJ's decision, making the order final. J.A. 160; 30 U.S.C. § 823(d)(1). Because substantial evidence supports the factual findings underlying the ALJ's determinations, we deny Harrison's petition for review as to all findings except the amount of backpay awarded. Based on the record before us, we find there is not substantial evidence to support the ALJ's award of $16,324.80 in backpay to Scoles and remand for a finding as to the appropriate amount of backpay to be awarded.

We review the Commission's factual findings to determine whether they are supported by "substantial evidence on the record considered as a whole." 30 U.S.C. § 816(a)(1); *American Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 23 (D.C. Cir. 2015). Under substantial evidence review we "determine whether there is such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion." *American Coal Co.*, 796 F.3d at 23 (quoting *Jim Walter Res., Inc. v. Sec'y of Labor*, 103 F.3d 1020, 1023–24 (D.C. Cir. 1997)). An ALJ's credibility determinations, in particular, "are entitled to great deference" and may only be overturned under "extraordinary" circumstances. *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1107 (D.C. Cir. 1998). We review the Commission's legal conclusions *de novo*, *id.* at 1099, affording "great deference" to the Secretary's interpretation of his regulations unless it is clearly erroneous. *See Tilden Mining Co. v. Sec'y of Labor*, 832 F.3d 317, 322 (D.C. Cir. 2016); *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 84 (D.C. Cir. 2005); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). We review discretionary agency decisions, such as penalty amounts, for abuse of discretion. *Jim Walter*, 18 FMSHRC at 556; *Cordero Mining LLC v. Sec'y of Labor*, 699 F.3d 1232, 1238 (10th Cir. 2012); *B.L. Anderson, Inc. v. FMSHRC*, 668 F.2d 442, 444 (8th Cir. 1982). To establish a prima facie case of discrimination under Section 105(c), the Secretary must prove that a miner engaged in protected activity and suffered an adverse action, and that the adverse action was motivated at least in part by the miner's protected activity. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86, 88 (D.C. Cir. 1983).

*First*, we consider whether substantial evidence supported the ALJ's findings that Scoles engaged in protected activity under Section 105(c), that there was a motivational nexus between the protected activity and the adverse action, and that Scoles' "insubordination" was a pretext for firing him. While there is conflicting witness testimony on several accounts, given the testimony of those present during the altercations at issue and the ALJ's credibility determinations, the findings marshal enough "relevant evidence" that a "reasonable mind might accept as adequate to support the [ALJ's] conclusion" that Scoles engaged in protected activity under Section 105(c). *Jim Walter Res.*, 103 F.3d at 1023–24. The record supports the ALJ's finding that Scoles engaged

in multiple activities protected under the Mine Act, including 1) filing three discrimination complaints over several years, 2) making a series of health and safety complaints to supervisors, 3) complaining to McCauley on September 3 that he felt harassed, 4) reporting to Harrison management the September 3 "head-butt" of him by McCauley, 5) stating to McCauley on September 8 that he felt singled out and harassed, and 6) stating that he was being left in the mine without a gas detector in violation of state and federal safety laws. J.A. 115–17.

Additionally, we ask whether there is substantial evidence to support the finding of a motivational nexus between the protected activity and the adverse action, asking whether the adverse action was motivated *at least in part* by the miner's protected activity. *Donovan*, 709 F.2d at 88 (emphasis added); *see also Turner v. Nat* 7 *Cement Co. of California,* 33 FMSHRC 1059, 1064 (May 2011) (asking if the adverse action was "motivated in any part by that activity") (citations omitted). Since there is infrequently direct evidence of a discriminatory motive, the ALJ properly considered the following common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant, with knowledge of the protected activity often being the most important factor. J.A. 117; *see Sec'y of Labor v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). We find there was substantial evidence to support the ALJ's findings that Harrison's anti-union animus was a motivating factor in its discipline of Scoles.

Next, we ask whether substantial evidence supported the ALJ's finding that Harrison's stated reason for the suspension with intent to discharge – insubordination – was pretextual. Although a mine operator may establish an affirmative defense by proving that it would have disciplined a miner for unprotected activity alone, *see Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984); *Sec'y of Labor v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1925 (2016), pretext may be found, for example, where the asserted justification is "weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (1990). Despite Petitioner's insistence that violating the Employee Conduct Rule banning insubordination was a serious infraction, Brad Hibbs, Assistant Mine Superintendent, testified that in his 13 years in the mine, he had never seen an employee discharged as punishment for insubordination. J.A. 509. Although the ALJ listed a number of other factors he believed also showed pretext, J.A. 28–29, the fact that there was no credible evidence that any other miners had ever been discharged for insubordination is substantial enough evidence to support the ALJ's finding that Harrison's stated reason for the discharge was pretextual. J.A. 123–24.

*Second*, we ask whether there is substantial evidence to support the ALJ's award of $16,324.80 plus interest in backpay to Scoles. The Court reviews the factual findings underlying the award for substantial evidence and the award amount itself for abuse of discretion. *See Sec'y of Labor v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 556 (1996) (reviewing the ALJ's factual findings in support of a discretionary civil penalty under the substantial evidence standard); *Kapche v. Holder*,

677 F.3d 454, 464 (D.C. Cir. 2012); *Sec'y of Labor v. Mountain Top Trucking Co., et al.*, 23 FMSHRC 1230, 1233 (2001) (applying the abuse of discretion standard to the Mine Act). In the record before us, the only evidence entered by the Secretary to support the award of backpay was Scoles' representations of what he believed he would earn over the time period he was suspended, which the ALJ characterized several times as an "estimate,' a description that the ALJ noted the Secretary shared. *See* J.A. 236-39; *id***.** at 237 (ALJ explaining that "[the Secretary and Scoles] have characterized it as an estimate.")**."** Scoles provided the following information: his regular rate of pay, his rate of overtime pay, his rate of Saturday pay, an assertion that he worked 7.5 hours of regular time and two hours of overtime each weekday as well as every Saturday typically in the post-Labor Day period, and the Secretary provided a chart that broke down these amounts by day. *See J.A.* 125, 228–32. Scoles also explained that, to the best of his knowledge about when the mine was idle, he could have worked 42 days during his 61-day suspension. J.A. 235. On cross-examination, however, Scoles admitted he did not know how many days the mine was operational during his suspension. J.A. 284–85. Although the ALJ had been explicit that it was accepting Scoles' evidence "only on the basis that it's an estimate," J.A. 237, the Secretary never offered any supplemental evidence regarding Scoles' figures. J.A. 61–62, 236–37. During the trial, the ALJ stated "there may come a point in time in this proceeding where there will need to be a calculation of relief or what relief is to be granted. That's not at this point." J.A. 237–38. Not at the court's invitation, but to counter the numbers provided by Scoles at the trial, Harrison enclosed an affidavit from the Mine's Human Resources Supervisor Christopher Fazio with its post-hearing brief. J.A. 92–94. The affidavit explained that Scoles "only served forty (40) days of suspension time" and "was paid for any additional time off due to the delay in receiving the arbitrator's decision," that the mine was idle for 10 days during the timeframe at issue, and that Scoles had overestimated the amount of overtime based on the average amount of overtime worked by longwall utility employees during the period. *Id.* In weighing the evidence before him, the ALJ stated that he "found Fazio to be a less than credible witness at hearing" and that Harrison did not make "a sufficient showing that Scoles' backpay should be reduced due to days the mine may have been idled," especially since Harrison "would have been the party in possession of ample evidence to prove such." J.A. 125. The ALJ found that the submission of a "short, inconclusive[] affidavit by a less than credible witness" did not meet the evidence requirements. *Id.*

Although it is well-established that it is within an ALJ's discretion to make credibility determinations based on witness testimony and to weigh competing evidence, *see Keystone Coal*, 151 F.3d at 1107 (stating an ALJ's credibility determinations "are entitled to great deference" and may only be overturned under "extraordinary" circumstances), given the minimal information in the record, Scoles' acknowledgement that his numbers were only "estimates" and that he did not know when the mine was idled, the ALJ's own statement that "should this matter go to the point of a need to determine relief in this case, a more precise calculation is going to be needed," J.A. 237, and that more precise calculations were never requested or provided, we find that there was not substantial evidence in the record to support the ALJ's calculation of backpay. While a suspended miner is not necessarily required to adduce evidence regarding when the mine was idle, the somewhat unusual circumstances surrounding the parties' presentation of backpay evidence below and the ALJ's insistence that the evidence was just an estimate and that "a more precise

calculation is going to be needed," J.A. 237—a calculation that never came—severely undermines the evidentiary sufficiency of the ALJ's backpay calculation. As such, we grant the petition as to backpay and remand for evaluation of the appropriate amount of backpay that should be awarded.

*Third*, we ask whether the ALJ abused his discretion in awarding a $40,000 civil penalty. The Court reviews the factual findings underlying the penalties for substantial evidence and the penalty amount for abuse of discretion. *Jim Walter Res., Inc.*, 18 FMSHRC at 556. As long as a penalty assessment is "bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme," it should be affirmed. *Jim Walter Res., Inc.*, 18 FMSHRC at 556. Although the Secretary makes an initial recommendation, the ALJ is required to make an independent assessment of all the statutory factors, and if there is a "substantial deviation" from the penalty proposed, the ALJ must "adequately [explain the deviation] using the section 110(i) criteria" and "'provide an adequate explanation of how the findings contributed to his penalty assessments,'" but does not have to "'make exhaustive findings . . . .'" *Sec'y of Labor v. Performance Coal Co.*, 35 FMSHRC 2321, 2322–23 (2013) (quoting *Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (2011)).

Even assuming that the difference between the ALJ's penalty amount and the Secretary's proposal was the type of deviation that needed to be explained, the ALJ ticked through each of the six relevant statutory criteria, finding this to be an "extremely egregious case" warranting a civil penalty of $40,000. J.A. 126; *see* 30 U.S.C. § 820(i). Walking through the factors, the ALJ focused on the following: the mine's three prior Section 105(c) violations and its controller's twelve, both the mine and the controlling entity are in the largest mine size category, that the penalty would not affect the ability for operations to continue, the gravity of the context coupled with the pretextual reasons offered by the mine for the discipline, the level of negligence in how management handled the complaint as extremely high, "even bordering on reckless disregard," and the lack of action to abate or address the health and safety issues complained of, for example by not separating the two individuals after Scoles' September 4 complaint. J.A. 126–27. Although Petitioner disputes each of the findings and argues mitigating factors were not considered, as discussed above, an ALJ's credibility determinations "are entitled to great deference" and may only be overturned under "extraordinary" circumstances. *Keystone Coal*, 151 F.3d at 1107. The petitioner does not clear the high bar to overturn any of the factual findings under substantial evidence review, especially on the relevant credibility determinations. As such, the factual findings for each factor are supported by substantial evidence and the penalty assessed, although more than the Secretary proposed, was not an abuse of discretion. *See American Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 933 F.3d 723, 728 (D.C. Cir. 2019).

*Fourth*, we ask whether substantial evidence supports the ALJ's finding that Scoles justifiably filed his complaint with Mine Safety and Health Administration ("MSHA") 20 days late. The Mine Act requires miners who believe they have suffered discrimination to file a complaint with MSHA within 60 days of the discrimination. 30 U.S.C. § 815(c)(2). This time limit is not jurisdictional, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (1999), and "a miner's late filing may be excused on the basis of 'justifiable circumstances.'" *Hollis v. Consolidation Coal*

*Co.*, 6 FMSHRC 21, 24 (1984) (quoting *Herman v. IMCO Servs.*, 4 FMSHRC 2135, 2138 (1982)). Justifiable circumstances include a miner's "bring[ing] the complaint to the attention of another agency or to his employer" and "misunderstand[ing] his rights under the Act." S. Rep. No. 95-181, at 36. The events in question largely occurred between September 3-8, Scoles was suspended on September 8, he received a ruling from the arbitrator on November 8, J.A. 556, and filed his complaint with MSHA 26 days later on December 4, J.A. 3, 9, 30, 540, 542, 20 days after the 60-day window outlined in Section 105(c)(2) of the Mine Act. The ALJ found convincing Scoles' assertion that even though he had filed previous discrimination complaints with MSHA, he believed he had to grieve his claim through internal arbitration before he could file a MSHA complaint. J.A. 32; *see also Morgan,* 21 FMSHRC at 1381 (affirming the acceptance of a complaint made 10 months after the adverse action given the miner's lack of counsel and pursuance of the internal grievance process). Given the short window of the delay, the fact that Scoles was pursuing the internal grievance process during that period, and the fact that Harrison suffered no prejudice by the 20-day delay since it was aware of the grievance, we find that there is substantial evidence to support a finding that justifiable circumstances existed for Scoles' late filing.

*Finally*, although the Petitioner also challenged whether the ALJ's order requiring Harrison's supervisors be trained in miners' rights under Section 105(c) was clear enough for Harrison to comply, both parties conceded at oral argument that the training had in fact been completed, rendering the issue moot. As such, we need not reach the question of the order's clarity.

For the foregoing reasons, we deny the petition on all accounts except the award of backpay and remand for findings on that issue alone.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk