APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert THOMAS, *Petitioner*, v. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; and CalPortland Company, *Respondents*.	No. 24-1442

Submitted September 15, 2025* San Francisco, California

FILED SEPTEMBER 16, 2025

On Petition for Review of an Order of the Federal Mine Safety and Health Review Commission, Agency Nos. WEST 2018-0402-DM, WEST 2019-0205

Attorneys and Law Firms

Colin McHugh, McHugh Law, PLLC, Vancouver, WA, Trevor Cartales, Navigate Law Group, Portland, WA,

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Alexander J. Higgins, Law Offices of Alex J. Higgins, Seattle, WA, for Petitioner.

Thaddeus Jason Riley, General Attorney, Federal Mine Safety & Health Review Commission, Washington, DC, for Respondent Federal Mine Safety and Health Review Commission.

Brian P. Lundgren, Jessica Cox, Jackson Lewis, PC, Seattle, WA, Dylan Bradley Carp, Jackson Lewis, PC, San Francisco, CA, Michael Christopher Moon, Jackson Lewis, Salt Lake City, UT, for Respondent CalPortland Company.

Before: McKEOWN, FORREST, and BUMATAY, Circuit Judges.

ORDER

The memorandum filed on May 7, 2025, is amended as follows: on page two, delete footnote one.

Judge Forrest votes to deny the Petition for Rehearing En Banc (Dkt. 38) and Judge McKeown so recommends. Judge Bumatay votes to grant the petition. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The petition is therefore DENIED, and no further petitions for rehearing will be accepted.

Dissent by Judge BUMATAY.

AMENDED MEMORANDUM**

Petitioner Robert Thomas seeks review of a decision of the Federal Mine Safety and Health Review Commission denying his retaliation claim brought

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

under the Mine Act, 30 U.S.C. § 815(c)(1), (3). We assume the parties' familiarity with the facts. For the second time, see *Thomas v. CalPortland Co. (Thomas I)*, 993 F.3d 1204 (9th Cir. 2021), and because the Commission misapplied the substantial evidence standard, we grant Thomas's petition and vacate and remand.

1. ***Standard of Review***. The Mine Act instructs that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 30 U.S.C. § 816(a)(1); *see also Miller Min. Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 713 F.2d 487, 490 (9th Cir. 1983) ("This court will uphold the factual findings of the administrative law judge if there is substantial evidence to support them."). It also defines the Commission's review authority over the decisions of its administrative law judges (ALJ). 30 U.S.C. § 823(d). As relevant here, the Commission may only review an ALJ's factual findings for substantial evidence, *id.* § 823(d)(2)(A) (ii)(I), (d)(2)(A)(iii), and it commits legal error if it does not apply this standard. *Thomas 1*, 993 F.3d at 1211 n.4; accord, e.g., *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91–92 (D.C. Cir. 1983); *Sec'y of Lab. v. Knight Hawk Coal, LLC*, 991 F.3d 1297, 1306 (D.C. Cir. 2021).

The dissent argues that because § 816(a)(1) only allows us to review *the Commission's* factual findings for substantial evidence, we cannot assess whether the Commission applied the correct standard when reviewing the ALJ's factfinding. We disagree. As the D.C. Circuit has explained, § 816(a)(1)'s reference to "Commission" refers to the agency generally —not just the Commission—because "in many cases the ALJ's

decision will become the decision of the Commission." *Donovan ex rel Chacon*, 709 F.2d at 91 n.7; *see also* 30 U.S.C. § 823(d)(1). But more crucially, the statute plainly provides that the Commission, in and of itself, has no fact finding authority when it reviews decisions of its ALJs. 30 U.S.C. § 823(d)(2)(A)(ii)(I), (iii). The Commission is to review an ALJ's factual findings for substantial evidence and Section 816(a)(1) "does not supersede the statutory limits on the Commission's own powers of discretionary review." *Donovan*, 709 F.2d at 91 n.7. Whether an administrative review body has complied with its statutory scope of review is a question of law that we review de novo. E.g., *Rodriguez v. Holder*, 683 F.3d 1164, 1169–70 (9th Cir. 2012); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 n.4 (2024).

Here, the Commission purported to review the ALJ's decision for substantial evidence. Thus, we must determine whether the Commission erred in concluding that the ALJ's decision did not meet this standard. Substantial evidence "means only [ ] 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Biestek v. Berryhill*, 587 U.S. 98, 103 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It requires "review of the whole record." *Kyung Park v. Holder*, 572 F.3d 619, 624 (9th Cir. 2009) (citation omitted). When "the evidence can reasonably support either affirming or reversing" the factfinder's conclusion, then the Commission, like a reviewing court, "may not substitute its judgment" for that of the factfinder. *See Flaten v. Sec'y of Health & Hum. Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995).

2. ***Retaliation***. A retaliation claim under § 815(c)(1) has three elements: (1) the claimant engaged in protected activity; (2) the employer discharged or discriminated against the claimant; and (3) a causal connection between the two.[1] The first two elements are not at issue here.

In *Thomas I*, we held that the third element requires a claimant to prove but-for causation. 993 F.3d at 1209–11. But-for causation requires courts "to change one thing at a time and see if the outcome changes. If it does, [the court has] found a but-for cause." *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020). And because causation for retaliation boils down to the employer's motivations, where direct evidence of retaliation is lacking, analogous cases have considered: (a) the employer's knowledge of the protected activity; (b) the timing of the discriminatory act relative to the protected activity; (c) the employer's hostility or animosity towards the claimant; (d) the employer's differential treatment of the claimant; and (e) the employer's explanation for the alleged discriminatory act, and whether that explanation is merely pretextual. *E.g., Maner v. Dignity Health*, 9 F.4th 1114, 1127–28 (9th Cir. 2021); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam); *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1285–86 (9th Cir. 2001); *Miller v. Fairchild*

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[1] The statute reads: "No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this chapter, including a complaint notifying the operator ... of an alleged danger or safety or health violation ...." 30 U.S.C. § 815(c)(1).

Indus., Inc., 885 F.2d 498, 506 (9th Cir. 1989); *Kama v. Mayorkas*, 107 F.4th 1054, 1059 (9th Cir. 2024).

The ALJ found four sets of protected activity and three adverse actions. After reviewing the decisions below and the entire factual record, we conclude that the Commission failed to limit its review to whether the ALJ's findings are supported by substantial evidence. Thus, regardless of whether the Commission's view of the facts might also be supported by substantial evidence, as the dissent contends, the Commission erred.

To demonstrate the validity of the ALJ's findings, we highlight some key pieces of evidence. Relevant to Thomas's suspension and termination, the ALJ found that Dean Demers—Thomas's supervisor—knew of Thomas's safety complaints and that the timing of the discharge was suspicious. The ALJ also credited testimony suggesting that Demers was happy to have suspended Thomas and that Demers himself engaged in similar safety violations to the one allegedly motivating the action taken against Thomas. This is particularly relevant because Demers drafted the initial termination letter that was "accidentally" sent to Thomas, which caused Thomas's eventual "voluntary resignation."

The ALJ also found that CalPortland's investigation was rushed, evidencing pretext. Although the Commission voiced some valid concerns with this and other evidence, they were insufficient to overcome the evidence cited by the ALJ. Instead, the Commission repeatedly substituted its view of certain evidence for that of the ALJ. That was error under 30 U.S.C. § 823(d)(2)(A)(iii).

We do not address Thomas's remaining arguments, as they would have no impact on our decision.

The petition for review is **GRANTED**, the Commission's decision is **VACATED**, and the matter is **REMANDED** to the Commission. The matter of the ALJ's supplemental order regarding the amount of damages remains to be conclusively resolved.

BUMATAY, Circuit Judge, dissenting:

Because the Federal Mine Safety & Health Commission's factual findings *must* be treated as "conclusive" if supported by substantial evidence, I respectfully dissent.

1. Robert Thomas challenges the Commission's finding that he failed to prove that CalPortland Company fired him in retaliation for his protected activity and the Commission's finding that the administrative law judge ("ALJ") in the case failed to consider all the evidence in ruling for Thomas. We should have denied the petition on both claims.

The Mine Act is crystal clear on our review of Commission decisions. As its title suggests, § 816 governs the "Judicial review of Commission orders." 30 U.S.C. § 816. It allows a person aggrieved by a Commission order to appeal to a federal court of appeals. *Id.* § 816(a)(1). Section 816 then prescribes a limited role for federal courts over fact findings. It instructs that "[t]he findings of the Commission with respect to questions of fact, if supposed by substantial evidence on the record considered as a whole, *shall be conclusive*." 30 U.S.C. § 816(a)(1) (emphasis added). So Congress's command is straightforward. When reviewing the Commission's findings of fact, we must review only for "substantial evidence." If the

Commission's factfinding clears that low bar, its findings are "conclusive." And the provision doesn't leave wiggle room for us to do anything otherwise. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (using the mandatory term *shall* "normally creates an obligation impervious to judicial discretion"); *Fejes v. FAA*, 98 F.4th 1156, 1161 (9th Cir. 2024) (" 'Shall' indicates mandatory action."). Thus, "the Commission's factual findings must be upheld if they are supported by substantial evidence." *D.H. Blattner & Sons, Inc. v. Sec. of Lab., Mine Safety and Health Admin.*, 152 F.3d 1102, 1108 (9th Cir. 1998).

Under this "highly deferential" standard of review, *G.C. v. Garland*, 109 F.4th 1230, 1239 (9th Cir. 2024), we should have easily denied Thomas's first and second claims. It is uncontested that, in January 2018, a government inspector alleges observing Robert Thomas working on a ladder on a barge over open water without a personal flotation device—in violation of government regulations. It is also uncontested that the government inspector issued a citation to CalPortland, Thomas's employer, for Thomas's failure to wear a safety device. The inspector viewed Thomas's actions as aggravated and a substantial violation that could reasonably likely result in a fatality. CalPortland then suspended Thomas and eventually discharged him.

Given these uncontested facts, substantial evidence supports the Commission's finding that Thomas failed to show a causal nexus between any protected activity and an adverse action. For example, while Thomas established that his supervisor, Dean Demers, had animus toward him, the Commission reasonably concluded that the animus resulted from Thomas's

perceived disrespectful behavior toward Demers rather than from Thomas's safety complaints, cooperation with the government inspector, or threats of legal action. Indeed, Thomas admitted hanging up on Demers during a heated phone call and that Demers made the comments allegedly showing animus toward Thomas the next morning. A reasonable mind could accept the Commission's conclusion considering the record. *See Biestek v. Berryhill*, 587 U.S. 97, 103 (2019).

The Commission also found that Thomas couldn't identify similarly situated employees not punished as Thomas was for his misconduct—thus, failing to show disparate treatment. While Thomas complained that another employee failed to wear a flotation device while *indoors* on a boat, he could not show that any employee was similarly *reported* for failing to wear a life jacket over open water who was not suspended.

Substantial evidence also supports the Commission's finding that CalPortland's justifications for firing Thomas weren't mere pretext. First, evidence showed that CalPortland made several efforts to contact Thomas but that Thomas was unresponsive. Further, evidence showed that Thomas only offered to provide information in written statements and didn't fully cooperate with CalPortland's investigation. But even if CalPortland fired Thomas for the misconduct citation and following investigation, the Commission reasonably found the firing justifiable because, based on the mine's violation history, it "was by far the most serious violation the company had dealt with."

For the same reasons, substantial evidence also supports the Commission's finding that ALJ in the

case didn't consider the totality of the evidence in initially ruling for Thomas.

The majority doesn't disagree that substantial evidence supports the Commission's findings. Rather, the majority reasons that when § 816(a)(1) limits our review to the findings of fact of the "Commission" it does not mean the "Commission" at all, but instead "refers to the agency generally." Maj. Op. 3. But as judges, our job is to follow the statute's plain meaning and presume that Congress "says what it means and means what it says." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). Yet despite § 816(a)(1)'s clear command, the majority insists that we must go beyond the Commission's factfinding and also look at what the ALJ found in the case. And in analyzing the record, the majority picks the ALJ's version of the facts—which teeters close to de novo factfinding. But that's not what § 816(a)(1) requires.

Rather than relying on the Mine Act's provision governing *judicial* review, see 30 U.S.C. § 816, the majority seizes on a phrase in the Act's provision governing *administrative* review, *see id.* § 823(d)(2)(A)(ii)(I). The majority believes this administrative review provision gives our court plenary authority to overturn the Commission's factfinding. But that's not the congressional design. Under § 823(d), Congress gives broad powers to the Commission over ALJ decisions. Congress grants the Commission authority to "prescribe rules of procedure for its review of decisions of" ALJs and makes the Commission's review of ALJ decisions discretionary. *Id.* § 823(d)(2)(A)(i). Congress expressly authorizes the Commission to "affirm, set aside, or modify the decision or order of the administrative law judge in

conformity with the record." *Id.* § 823(d)(2)(C). Congress then limited the grounds for appeal of ALJ decisions to the Commission, including the ground that a "finding or conclusion of material fact is not supported by substantial evidence." *Id.* § 823(d)(2)(A)(ii)(i).

Based on the language of § 823(d)(2)(A)(ii)(i), the majority thinks that we can disregard the plain text of § 816(a) (1) and that we must pierce the Commission's factfinding even if it's supported by substantial evidence. But the language of § 823(d)(2)(A)(ii)(i) says no such thing. It only lists a ground of appeal of an ALJ decision—it says nothing about our review of Commission's factfinding. Further, even if the two statutory provisions conflict, "[i]t is a commonplace of statutory construction that the specific governs the general." *State v. Su*, 121 F.4th 1, 13 (9th Cir. 2024). So no matter the majority's broad interpretation of § 823(d)(2)(A)(ii)(i), Congress directly and expressly cabins our authority here. We should have followed the plain text of § 823(d)(2)(A)(ii)(i).

Contrary to supporting the majority, *Bumble Bee Seafoods v. Dir, Off. of Workers' Comp. Programs*, 629 F.2d 1327, 1329 (9th Cir. 1980), counsels that we follow the plain text of § 816(a)(1). In that case, the Longshoremen's and Harbor Workers' Compensation Act directed the Benefits Review Board to treat the "findings of fact in the decision under review" as "conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). So the Act mandated that the Board view the ALJ's factfinding as "conclusive"—unlike the Mine Act. And more importantly, Congress gave no instruction to federal appellate courts to treat the Board's

factfinding as "conclusive" as the Mine Act does. *See id.* § 921(c). So it's no wonder that the Mine Act's standard of review would differ from the Longshoremen's Act's.

Nor does *Miller Min. Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 713 F.2d 487 (9th Cir. 1983), help the majority. In that case, we said "we will uphold the factual findings of the administrative law judge if there is substantial evidence to support them." *Id.* at 490. But the Commission there "adopted the decision" of the ALJ, so the Commission's factual findings were the ALJ's factual findings. *Id.* at 489. When the Commission and ALJ fully agree on the facts, our substantial evidence review is the same no matter what. But when the Commission and the ALJ disagree, Congress said we must review the Commission's version.

2. Thomas also challenges the Commission's application of the but-for causation standard. "[A] but-for test directs us to change one thing at a time and see if the outcome changes." *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020). Though Thomas argues that the Commission misapplied but-for causation by "really looking for a 'sole cause' of adverse action," the record shows otherwise. The Commission found that "Thomas failed to prove that his discharge was *in any way* caused by any protected activity." It concluded that Thomas would have been suspended for his safety-device misconduct and considered resigned after his refusal to communicate with CalPortland even if Thomas had not engaged in protected activity. So rather than find that Thomas's protected activity wasn't the "sole cause" of his termination, the Commission found that his protected activity wasn't a

cause *at all*. Though Thomas may disagree with the Commission's findings, he cannot argue that it incorrectly applied but-for causation. We should have denied the petition on this claim as well.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert THOMAS, *Petitioner*, v. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; CalPortland Company, *Respondents*.	No. 24-1442

Submitted May 6, 2025* San Francisco, California

FILED MAY 7, 2025

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Attorneys and Law Firms

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Thaddeus Jason Riley, General Attorney, Federal Mine Safety & Health Review Commission, Washington, DC, for Respondent Federal Mine Safety and Health Review Commission.

Brian P. Lundgren, Jessica Cox, Jackson Lewis, PC, Seattle, WA, for Respondent CalPortland Company.

Before: McKEOWN, FORREST, and BUMATAY, Circuit Judges.

Dissent by Judge BUMATAY.

MEMORANDUM[**]

Petitioner Robert Thomas seeks review of a decision of the Federal Mine Safety and Health Review Commission denying his retaliation claim brought under the Mine Act, 30 U.S.C. § 815(c)(1), (3). We assume the parties' familiarity with the facts. For the second time, see *Thomas v. CalPortland Co. (Thomas I)*, 993 F.3d 1204 (9th Cir. 2021), and because the Commission misapplied the substantial evidence standard, we grant Thomas's petition and vacate and remand.

1. ***Standard of Review***. The Mine Act instructs that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 30 U.S.C. § 816(a)(1); see also *Miller Min. Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 713 F.2d 487, 490 (9th Cir. 1983) ("This court will uphold

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the factual findings of the administrative law judge if there is substantial evidence to support them."). It also defines the Commission's review authority over the decisions of its administrative law judges (ALJ). 30 U.S.C. § 823(d). As relevant here, the Commission may only review an ALJ's factual findings for substantial evidence, *id.* § 823(d)(2)(A) (ii)(I), (d)(2)(A)(iii), and it commits legal error if it does not apply this standard. *Thomas I*, 993 F.3d at 1211 n.4; accord, e.g., *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91–92 (D.C. Cir. 1983); *Sec'y of Lab. v. Knight Hawk Coal, LLC*, 991 F.3d 1297, 1306 (D.C. Cir. 2021).[1]

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[1] This is consistent with our opinions focusing on similar statutory regimes that specify an administrative tribunal is bound to apply a particular standard of review to ALJ decisions. *See Bumble Bee Seafoods v. Dir., Off. of Workers' Comp. Programs*, 629 F.2d 1327, 1329 (9th Cir. 1980) (relying on 33 U.S.C. § 921(b)(3) to conclude that because the Benefits Review Board reviews decisions of its ALJs for substantial evidence, "the Board may not substitute its views for those of the [ALJ] or engage in a de novo review of the evidence" and "[t]he only way we can ascertain whether the Board has adhered to this standard is to conduct an independent review of the administrative record"). And the inverse is true as well. Where a statute creating an administrative review tribunal does not mandate a particular standard of review, the tribunal may review the ALJ's findings de novo and rely on its own view of the facts. *See*, *e.g.*, *NLRB v. Int'l Bhd. of Elec. Workers, Loc. 77*, 895 F.2d 1570, 1573 (9th Cir. 1990); 29 U.S.C. § 160(c)–(e) (requiring the court to review findings of the NLRB for substantial evidence, but permitting the NLRB to modify or set aside decisions of its ALJs "at any time upon reasonable notice and in such manner as it shall deem proper").

In contrast to the statute governing the National Labor Relations Board, the Commission may only "affirm, set aside, or modify the decision or order of the [ALJ] *in conformity with the record*." 30 U.S.C. § 823(d)(2)(C) (emphasis added). We also observe that §

The dissent argues that because § 816(a)(1) only allows us to review *the Commission's* factual findings for substantial evidence, we cannot assess whether the Commission applied the correct standard when reviewing the ALJ's factfinding. We disagree. As the D.C. Circuit has explained, § 816(a)(1)'s reference to "Commission" refers to the agency generally —not just the Commission—because "in many cases the ALJ's decision will become the decision of the Commission." *Donovan ex rel. Chacon*, 709 F.2d at 91 n.7; *see also* 30 U.S.C. § 823(d)(1). But more crucially, the statute plainly provides that the Commission, in and of itself, has no fact-finding authority when it reviews decisions of its ALJs. 30 U.S.C. § 823(d)(2)(A)(ii)(I), (iii). The Commission is to review an ALJ's factual findings for substantial evidence and Section 816(a)(1) "does not supersede the statutory limits on the Commission's own powers of discretionary review." *Donovan*, 709 F.2d at 91 n.7. Whether an administrative review body has complied with its statutory scope of review is a question of law that we review de novo. E.g., *Rodriguez v. Holder*, 683 F.3d 1164, 1169–70 (9th Cir. 2012); see also *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 n.4 (2024).

Here, the Commission purported to review the ALJ's decision for substantial evidence. Thus, we must determine whether the Commission erred in concluding that the ALJ's decision did not meet this

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823 expressly rejects application of 5 U.S.C. § 557(b), which provides that "[o]n appeal from or review of the initial decision [by the ALJ], the agency has all the powers which it would have in making the initial decision." See 30 U.S.C. § 823(d)(2)(C). Therefore, the Mine Act creates an internal review process dissimilar from that governing other agencies.

standard. Substantial evidence "means only [ ] 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Biestek v. Berryhill*, 587 U.S. 98, 103 (2019) (quoting Consol. *Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It requires "review of the whole record." *Kyung Park v. Holder*, 572 F.3d 619, 624 (9th Cir. 2009) (citation omitted). When "the evidence can reasonably support either affirming or reversing" the factfinder's conclusion, then the Commission, like a reviewing court, "may not substitute its judgment" for that of the factfinder. *See Flaten v. Sec'y of Health & Hum. Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995).

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[2] The statute reads: "No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this chapter, including a complaint notifying the operator ... of an alleged danger or safety or health violation ...." 30 U.S.C. § 815(c)(1).

considered: (a) the employer's knowledge of the protected activity; (b) the timing of the discriminatory act relative to the protected activity; (c) the employer's hostility or animosity towards the claimant; (d) the employer's differential treatment of the claimant; and (e) the employer's explanation for the alleged discriminatory act, and whether that explanation is merely pretextual. E.g., *Maner v. Dignity Health*, 9 F.4th 1114, 1127¬28 (9th Cir. 2021); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam); *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1285-86 (9th Cir. 2001); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 506 (9th Cir. 1989); *Kama v. Mayorkas*, 107 F.4th 1054, 1059 (9th Cir. 2024).

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initial termination letter that was "accidentally" sent to Thomas, which caused Thomas's eventual "voluntary resignation."

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We do not address Thomas's remaining arguments, as they would have no impact on our decision.

The petition for review is **GRANTED**, the Commission's decision is **VACATED**, and the matter is **REMANDED** to the Commission. The matter of the ALJ's supplemental order regarding the amount of damages remains to be conclusively resolved.

BUMATAY, Circuit Judge, dissenting:

Because the Federal Mine Safety & Health Commission's factual findings must be treated as "conclusive" if supported by substantial evidence, I respectfully dissent.

1. Robert Thomas challenges the Commission's finding that he failed to prove that CalPortland Company fired him in retaliation for his protected activity and the Commission's finding that the administrative law judge ("ALJ") in the case failed to consider all the evidence in ruling for Thomas. We should have denied the petition on both claims.

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governs the "Judicial review of Commission orders." 30 U.S.C. § 816. It allows a person aggrieved by a Commission order to appeal to a federal court of appeals. *Id.* § 816(a)(1). Section 816 then prescribes a limited role for federal courts over fact findings. It instructs that "[t]he findings of the Commission with respect to questions of fact, if supposed by substantial evidence on the record considered as a whole, *shall be conclusive*." 30 U.S.C. § 816(a)(1) (emphasis added). So Congress's command is straightforward. When reviewing the Commission's findings of fact, we must review only for "substantial evidence." If the Commission's factfinding clears that low bar, its findings are "conclusive." And the provision doesn't leave wiggle room for us to do anything otherwise. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (using the mandatory term *shall* "normally creates an obligation impervious to judicial discretion"); *Fejes v. FAA*, 98 F.4th 1156, 1161 (9th Cir. 2024) (" 'Shall' indicates mandatory action."). Thus, "the Commission's factual findings must be upheld if they are supported by substantial evidence." *D.H. Blattner & Sons, Inc. v. Sec. of Lab., Mine Safety and Health Admin.*, 152 F.3d 1102, 1108 (9th Cir. 1998).

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Thomas's failure to wear a safety device. The inspector viewed Thomas's actions as aggravated and a substantial violation that could reasonably likely result in a fatality. CalPortland then suspended Thomas and eventually discharged him.

Given these uncontested facts, substantial evidence supports the Commission's finding that Thomas failed to show a causal nexus between any protected activity and an adverse action. For example, while Thomas established that his supervisor, Dean Demers, had animus toward him, the Commission reasonably concluded that the animus resulted from Thomas's perceived disrespectful behavior toward Demers rather than from Thomas's safety complaints, cooperation with the government inspector, or threats of legal action. Indeed, Thomas admitted hanging up on Demers during a heated phone call and that Demers made the comments allegedly showing animus toward Thomas the next morning. A reasonable mind could accept the Commission's conclusion considering the record. *See Biestek v. Berryhill*, 587 U.S. 97, 103 (2019).

The Commission also found that Thomas couldn't identify similarly situated employees not punished as Thomas was for his misconduct—thus, failing to show disparate treatment. While Thomas complained that another employee failed to wear a flotation device while *indoors* on a boat, he could not show that any employee was similarly *reported* for failing to wear a life jacket over open water who was not suspended.

Substantial evidence also supports the Commission's finding that CalPortland's justifications for firing Thomas weren't mere pretext. First, evidence

showed that CalPortland made several efforts to contact Thomas but that Thomas was unresponsive. Further, evidence showed that Thomas only offered to provide information in written statements and didn't fully cooperate with CalPortland's investigation. But even if CalPortland fired Thomas for the misconduct citation and following investigation, the Commission reasonably found the firing justifiable because, based on the mine's violation history, it "was by far the most serious violation the company had dealt with."

For the same reasons, substantial evidence also supports the Commission's finding that ALJ in the case didn't consider the totality of the evidence in initially ruling for Thomas.

The majority doesn't disagree that substantial evidence supports the Commission's findings. Rather, the majority reasons that when § 816(a)(1) limits our review to the findings of fact of the "Commission" it does not mean the "Commission" at all, but instead "refers to the agency generally." Maj. Op. 3. But as judges, our job is to follow the statute's plain meaning and presume that Congress "says what it means and means what it says." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). Yet despite § 816(a)(1)'s clear command, the majority insists that we must go beyond the Commission's factfinding and also look at what the ALJ found in the case. And in analyzing the record, the majority picks the ALJ's version of the facts—which teeters close to de novo factfinding. But that's not what § 816(a)(1) requires.

Rather than relying on the Mine Act's provision governing *judicial* review, see 30 U.S.C. § 816, the majority seizes on a phrase in the Act's provision

governing *administrative* review, *see id.* § 823(d)(2)(A)(ii)(I). The majority believes 2025 WL 1319429 this administrative review provision gives our court plenary authority to overturn the Commission's factfinding. But that's not the congressional design. Under § 823(d), Congress gives broad powers to the Commission over ALJ decisions. Congress grants the Commission authority to "prescribe rules of procedure for its review of decisions of" ALJs and makes the Commission's review of ALJ decisions discretionary. *Id.* § 823(d)(2)(A)(i). Congress expressly authorizes the Commission to "affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record." *Id.* § 823(d)(2)(C). Congress then limited the grounds for appeal of ALJ decisions to the Commission, including the ground that a "finding or conclusion of material fact is not supported by substantial evidence." *Id.* § 823(d)(2)(A)(ii)(i).

Based on the language of § 823(d)(2)(A)(ii)(i), the majority thinks that we can disregard the plain text of § 816(a) (1) and that we must pierce the Commission's factfinding even if it's supported by substantial evidence. But the language of § 823(d)(2)(A)(ii)(i) says no such thing. It only lists a ground of appeal of an ALJ decision—it says nothing about our review of Commission's factfinding. Further, even if the two statutory provisions conflict, "[i]t is a commonplace of statutory construction that the specific governs the general." *State v. Su*, 121 F.4th 1, 13 (9th Cir. 2024). So no matter the majority's broad interpretation of § 823(d)(2)(A)(ii)(i), Congress directly and expressly cabins our authority here. We should have followed the plain text of § 823(d)(2)(A)(ii)(i).

Contrary to supporting the majority, *Bumble Bee Seafoods v. Dir., Off. of Workers' Comp. Programs*, 629 F.2d 1327, 1329 (9th Cir. 1980), counsels that we follow the plain text of § 816(a)(1). In that case, the Longshoremen's and Harbor Workers' Compensation Act directed the Benefits Review Board to treat the "findings of fact in the decision under review" as "conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). So the Act mandated that the Board view the ALJ's factfinding as "conclusive"—unlike the Mine Act. And more importantly, Congress gave no instruction to federal appellate courts to treat the Board's factfinding as "conclusive" as the Mine Act does. *See id.* § 921(c). So it's no wonder that the Mine Act's standard of review would differ from the Longshoremen's Act's.

Nor does *Miller Min. Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 713 F.2d 487 (9th Cir. 1983), help the majority. In that case, we said "we will uphold the factual findings of the administrative law judge if there is substantial evidence to support them." *Id.* at 490. But the Commission there "adopted the decision" of the ALJ, so the Commission's factual findings were the ALJ's factual findings. *Id.* at 489. When the Commission and ALJ fully agree on the facts, our substantial evidence review is the same no matter what. But when the Commission and the ALJ disagree, Congress said we must review the Commission's version.

2. Thomas also challenges the Commission's application of the but-for causation standard. "[A] but-for test directs us to change one thing at a time and see if the outcome changes." *Bostock v. Clayton County*,

590 U.S. 644, 656 (2020). Though Thomas argues that the Commission misapplied but-for causation by "really looking for a 'sole cause' of adverse action," the record shows otherwise. The Commission found that "Thomas failed to prove that his discharge was in any way caused by any protected activity." It concluded that Thomas would have been suspended for his safety-device misconduct and considered resigned after his refusal to communicate with CalPortland even if Thomas had not engaged in protected activity. So rather than find that Thomas's protected activity wasn't the "sole cause" of his termination, the Commission found that his protected activity wasn't a cause *at all*. Though Thomas may disagree with the Commission's findings, he cannot argue that it incorrectly applied but-for causation. We should have denied the petition on this claim as well.

APPENDIX C

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

March 1, 2024

ROBERT THOMAS	:	Docket Nos. WEST 2018-0402-DM
v.	:	WEST 2019-0205
CALPORTLAND COMPANY	:	
	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY: THE COMMISSION

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), is on remand to the Commission pursuant to a decision of the United States Court of Appeals for the Ninth Circuit. *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021), *rev'g Thomas v. CalPortland*, 42 FMSHRC 43 (Jan. 2020) ("CalPortland I"). The Court rejected the Commission's application of the *Pasula-Robinette*

causation standard to section 105(c) cases.[1] The Ninth Circuit then remanded the case to the Commission to apply a "but-for" causation standard.

The Commission subsequently remanded the case to the Administrative Law Judge to reexamine the facts of this case consistent with the Ninth Circuit's instructions.

On remand, the Judge concluded, as she had prior to the remand, that CalPortland had discriminated against miner Robert Thomas in violation of the Mine Act. She again awarded Thomas back pay, lost benefits, interest, attorney's fees, and any additional fees incurred during the appeals process. *Thomas v. CalPortland*, 43 FMSHRC 531, 550 (Dec. 2021) (ALJ).

For the reasons discussed below, we hold that substantial evidence did not support the Judge's conclusion that Thomas was discharged for his

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[1]Section 105(c) of the Mine Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against. . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . .

30 U.S.C. § 815(c)(1). The Commission's *Pasula-Robinette* test is described *infra*. Slip op. at 3 n.3.

protected activity. In fact, the substantial evidence can only be fairly interpreted to indicate that Thomas was discharged for unprotected activity alone. Accordingly, we reverse the Judge's decision on remand and dismiss this case.

I.

Factual and Procedural Background

The background facts are fully set forth in *CalPortland I* and are summarized here. In the months leading up to Thomas's suspension and subsequent termination, Thomas complained to his Supervisor Dean Demers about working long hours and about substitute miners not being properly trained. In January 2018, an investigator from the Department of Labor's Mine Safety and Health Administration ("MSHA") saw Thomas not wearing his personal flotation device (PFD) while over open water on a dredge. Thomas's action resulted in the issuance of an unwarrantable failure citation for violating MSHA regulations.

CalPortland subsequently suspended Thomas pending an investigation into the incident. The company later determined that Thomas had voluntarily resigned from his position after Thomas refused to communicate with CalPortland during that investigation. Thomas filed a discrimination complaint with MSHA, but MSHA declined to pursue a complaint with the Commission on his behalf. Thomas proceeded to file this complaint with the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

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[2]30 U.S.C. § 815(c)(3) states that:

Following an evidentiary hearing on the merits, the Judge issued a decision finding that CalPortland had discriminated against Thomas in violation of the Mine Act. 40 FMSHRC 1503, 1517-18 (Dec. 2018) (ALJ). On review, the Commission unanimously determined that substantial evidence did not support the Judge's finding that Thomas had established a prima facie case of discrimination. The Commission reversed the Judge's decision and dismissed the case. *CalPortland I*, 42 FMSHRC at 54. Thomas appealed the Commission's decision to the Ninth Circuit.

On appeal, the Ninth Circuit rejected the application of the Commission's 40-year-old *Pasula-Robinette* framework to cases brought under section 105(c) of the Mine Act. *Thomas v. CalPortland Co.*, 993 F.3d at 1208-09.[3] Relying on Supreme Court

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> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

[3]The *Pasula-Robinette* framework is a burden shifting test that requires a complainant to prove a prima facie case of discrimination and then provides operators an opportunity to

precedent, the Court reasoned that the framework conflicts with the Supreme Court's instruction that the ordinary meaning of "because" requires application of a "but-for" test.[4] *CalPortland Co.*, 993 F.3d at 1208-11. It determined that the Mine Act's language is clear and contained no textual or contextual indication that "because" means anything other than "but-for." *Id.* The Court then remanded the case to the Commission for further proceedings consistent with its opinion. *Id.*

The Commission subsequently remanded the case to the Judge to first consider Thomas's claim under the newly imposed "but-for" causation test. Applying the new standard of review, the Judge again found that CalPortland had discriminated against Thomas in violation of the Mine Act. 43 FMSHRC at 550. The operator now seeks review of the Judge's determination.

II.

Disposition

In the Commission's initial consideration of this case, it carefully and extensively reviewed the facts. The Commission unanimously held:

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rebut that case or provide an affirmative defense. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom; Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981).

[4]*Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176-78 (2009); *Univ. of Sw. Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 347-48 (2013); *Burrage v. United States*, 571 U.S. 204, 212-17 (2014); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020).

> Thomas failed to introduce *any evidence that his suspension and eventual discharge were in any way motivated by protected activity.* In fact, the available evidence strongly suggests that the adverse actions he experienced were direct results of his own unprotected and dangerous activity of failing to wear a PFD and his walking away from the operator's necessary investigation.

CalPortland I, 42 FMSHRC at 5 (emphasis added).

No additional evidence was available on remand. Of course, if a claimant does not prove protected activity motivated adverse action in any way, the claimant has not demonstrated that the adverse action would not have occurred "but-for" protected activity. The Commission has again carefully reviewed the facts and the Judge's decision to determine if Thomas proved the operator discriminated under the but-for test. As set forth below, Thomas did not carry that burden.

APPLICABLE LAW

1. <u>But-for Causation</u>

According to the Ninth Circuit, the Supreme Court has instructed "that the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise." *Thomas*, 993 F.3d at 1211. The Supreme Court has explained that the ordinary meaning of "because of" is that the protected activity or class was the "reason" the employer decided to act. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). Under the but-for standard the plaintiff retains the burden of persuasion

and must prove by a preponderance of the evidence (which may be direct or circumstantial), that the protected activity was the "but-for" cause of the challenged employer decision. *Id.* at 176-78.[5]

2. Substantial Evidence

When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Sec'y of Labor on behalf of Price v. JWR*, 12 FMSHRC 2418, 2420 (Nov. 1990). The record as a whole must be considered, including evidence in the record that fairly detracts. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Black Castle Mining Co.*, 36 FMSHRC 323, 328 (Feb. 2014). Agency findings that are grounded upon conjecture or suspicion are unreasonable under substantial evidence review. *Bussen Quarries, Inc. v. Acosta*, 895 F.3d 1039, 1045 (8th Cir. Aug. 2018).

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[5]In this case, the Commission applies the but-for standard at the direction of the Ninth Circuit. *Pasula-Robinette* remains the standard in cases arising under other jurisdictions. *Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920 (Aug. 2016); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom; Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Robinette*, 3 FMSHRC at 817-18.

3. Abuse of Discretion

When reviewing a Judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *See In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1873-75 (Nov. 1995), *aff'd on other grounds sub nom Sec'y of Labor v. Keystone Coal Mining Corp.* 151 F.3d 1096 (D.C. Cir. 1998). Abuse of discretion may be found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997) (citing *Utah Power & Light Co.*, Mining Div., 13 FMSHRC 1617, 1623 n.6 (Oct. 1991)); *Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000).

4. Credibility Findings

It is well settled that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly except under exceptional circumstances. *Sec'y on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1924, (Aug. 2016) (citations omitted). However, the Commission will not affirm credibility determinations that ignore extensive record evidence that tends to call the Judge's findings into question. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1391–92 (Dec. 1999).

A. ANALYSIS

In *CalPortland I*, the Commission disagreed with the Judge's findings of animus and disparate treatment. 42 FMSHRC at 51- 53. After reviewing the record in its entirety, we conclude, for the second time, that substantial evidence does not support the

Judge's findings of animus or disparate treatment, and that Thomas has failed to produce any evidence to support unlawful discrimination under any causation standard.[6]

Where the Judge sought to ground her reasoning and inferences on the testimony of Thomas or his coworker Joel McMillan, she either fragmented the witnesses' testimonies or neglected to reconcile conflicting evidence elsewhere in the record. Several of the Judge's factual findings indicate that she failed to consider or weigh certain probative evidence that fairly detracted from her inferences. We will discuss the necessary instances as we address the Judge's remand findings below.[7]

1. Animus

a) Cooperation with MSHA Inspection

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[6]As a general evidentiary matter, a finding of discrimination under either "but-for" or *Pasula-Robinette* still turns on a finding of causation. Accordingly, many of the same *categories* of evidence, such as animus and disparate treatment, may remain relevant as circumstantial evidence of a causal nexus.

[7]We also note that the Judge made several highly questionable credibility determinations. Among them, she generally found that Demers and McAuley were not credible witnesses, describing Demers as "rehearsed and disingenuous in his statements." 43 FMSHRC at 545-48. However, there were very few instances where the witnesses' testimonies conflicted, and nearly all the witness testimony was consistent regarding the material facts. Additionally, much of Demers's and McAuley's testimony went undisputed. Nevertheless, because CalPortland's evidence consisted of more than the testimonies of Demers and McAuley, we need not disturb the Judge's credibility determinations.

Thomas initially claimed that the inspection by Inspector Johnson was the only activity that he believed motivated the adverse actions against him. Thomas Ex. 46 (Discrimination Complaint); Tr. 207-08. However, Thomas presented no evidence that CalPortland interfered in any way with his participation in the MSHA discussions surrounding his PFD violation or otherwise exhibited hostility towards his discussions with the inspector. In fact, Thomas admitted that the company did not display any animus regarding his participation in the inspection. Tr. 208. Beyond noting that Demers recommended Thomas's termination immediately after Thomas's PFD violation, the Judge failed to identify any signs of hostility displayed by CalPortland towards Thomas's protected activity in speaking with the MSHA inspector about the January 24 inspection. Therefore, substantial evidence does not support the Judge's finding that CalPortland was hostile toward Thomas's protected activity in speaking with MSHA.

b) Safety Complaints

There is no evidence of hostility regarding Thomas's safety complaints. In fact, Thomas provided evidence to the contrary. Thomas testified that when he complained to Demers about the long hours, Demers responded that he was "working on it." Tr. 120. According to the testimony at hearing, Thomas initially believed Demers was ignoring the miners' complaints. Tr. 120. However, Thomas went on to testify that he only believed that Demers was blowing them off because Thomas "knew [Demers] had a lot on his plate. . . . He was trying to man— take care of three

barges, shorthanded, and taking care of a new item, the dredge, Sanderling." Tr. 120-21. When asked if Demers did anything to alleviate his concerns about the hours, Thomas said: "Yes, he started bringing out the rock barge guys . . . ." Tr. 121. Thomas conceded that Demers's response to his request to work less hours was not one of animosity or hostility and that Demers's solution relieved the excessive hours issue for him. Tr. 208-11. That is, rather than demonstrate animus towards Thomas's protected activity, CalPortland took Thomas's safety complaints seriously and ameliorated the condition at issue.

There is also no evidence demonstrating that Demers resented Thomas's complaint about the lack of task training for the rock barge miners or his refusal to sign task training sheets. On the contrary, Thomas testified that he did not sense animus from Demers regarding his safety complaints, and he agreed that he did not believe anything MSHA-related motivated CalPortland to take an adverse action against him. Tr. 208-11. The Judge failed to consider this uncontradicted evidence. In order to affirm a Judge on substantial evidence, the record evidence "must do more than create a suspicion of the existence of the fact to be established." *Bussen Quarries, Inc. v. Acosta,* 895 F.3d 1039, 1045 (8th Cir. 2018), quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). We "must [also] take into account whatever in the record fairly detracts from the weight of the evidence that supports the finding." *Id.*, citing *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1194 (10th Cir. 2008) (internal citation omitted). It is also persuasive that McMillan too complained of long hours and refused to sign the task training sheets, yet

he did not suffer an adverse action. *See Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1827 (Aug. 2012) (finding operator lacked animus against complainant's safety-related complaints where other employees complained of the same safety issue and none of them experienced retaliation).

Finally, the Judge relies heavily on comments made by Demers during the relevant period to establish animus and timing. In particular, she notes that Thomas introduced evidence showing that, after he had complained of his hours and workload, Demers remarked to McMillan that "Rob Thomas was done, he was . . . done at CalPortland. Tr. 48." 43 FMSHRC at 544, 548. However, her finding not only takes Demers's statement out of context, but also mischaracterizes the witness' testimony. To begin, it suggests that Demers's statement directly followed and was the result of Thomas's safety complaints in November 2017. However, undisputed witness testimony clearly indicates that the statement was made the morning after a heated argument between Demers and Thomas about the latter's request for sick leave. During that conversation, Thomas hung up the phone on Demers (his supervisor), which Thomas admitted to doing at the hearing, and which was corroborated by McMillan. Tr. 47-48, 88, 123-24. McMillan stated that he heard about the conversation from both Thomas and Demers "and both of them told me the same thing." Tr. 47.

Additionally, the argument led to a meeting between Thomas, Demers, and Candy Strickland in CalPortland's Human Resources Department to resolve the incident, which included discussing protocol, the proper way to call out sick, and how to

communicate with one's manager and peers in a professional manner. Tr. 124, 445. Thomas's behavior during this phone call was not disputed. Tr. 47-48, 123-124. However, the Judge completely overlooks the evidence of Thomas's insubordinate conduct toward his manager during the relevant time period.

Next, the Judge repeatedly omits a material portion of McMillan's testimony in which he speaks directly to Demers's attitude towards Thomas. The testimony demonstrates that Demers was angered by the way Thomas talked to him on the phone rather than any protected activity. Specifically, McMillan testified that "*Dean told me that . . . after the way Rob talked to him on the phone* that Rob Thomas was done, he was . . . done at CalPortland." Tr. 48 (emphasis added). McMillan's full testimony here directly contradicts the conclusion drawn by the Judge. The Judge improperly omitted direct evidence of Demers's reason for wanting Thomas gone and then drew an improper inference that his reason was because of Thomas's protected activity. Her reliance on fragmented testimony as proof of animus towards Thomas's protected activity was an abuse of discretion.

The Judge also infers animus from Demers's remark to McMillan in March 2018 that he "got rid" of Thomas, which she believed indicated that Demers viewed Thomas as a problem that he jettisoned. 43 FMSHRC at 544, *citing* Tr. 71. However, she again failed to consider the context provided by McMillan. Specifically, McMillan testified that although Demers said that he "got rid" of Thomas for McMillan (insinuating that it was due to Thomas's alleged mistreatment of McMillan), McMillan believed that Thomas's exit from the company was because of the

way Thomas had talked to Demers on the phone months earlier. Tr. 88. Thomas failed to introduce any evidence demonstrating that Demers's comment was related to any of his safety complaints made four months prior or because he spoke with the MSHA inspector in January.

Finally, the Judge concluded that Woods's "aggressive and 'pointed' approach" with Thomas during the company investigative meeting was an indication of further hostility towards the Complainant.[8] 43 FMSHRC at 544–45, *citing* Tr. 385. While Demers testified that Woods's question regarding Thomas's normal PFD practices was "pointed," neither he nor Thomas testified that Woods was aggressive during the meeting. Tr. 144-45; 385-86.

c) The Threat of Legal Action

Contrary to the Judge's conclusion, substantial evidence does not support a finding that Thomas's discharge was caused by his notice that he was filing a discrimination claim regarding his suspension. Record evidence shows that CalPortland became aware of Thomas's discrimination claim on February 6, 2018, while two of the alleged discriminatory events

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[8] On remand, counsel for Thomas similarly described the investigative meeting as "coercive" and an "interrogation." Thomas Resp Br. on Remand 22-23. This conflicts with Thomas's previous argument that CalPortland's investigation was inadequate because CalPortland concluded the "alleged interview" after asking only "one question." Thomas Post-Hearing Br. at 11; Thomas 1st Resp. Br. at 33. The argument on remand is tenuous at best given that "one question" hardly equates to a "coercive interrogation."

occurred prior to the date (the January 25 suspension and January 30 accidental discharge email). Moreover, Thomas did not offer evidence that anyone in CalPortland management harbored animus towards him or terminated him due to his filing once they became aware of the claim. Thomas further conceded that he did not believe he was discriminated against because he testified in or was about to testify at an MSHA proceeding. Tr. 206-07.

We do agree with the Judge that there is sufficient evidence in the record to support a finding that Demers harbored animus towards Thomas. Contrary to the Judge's inferences, however, substantial evidence suggests that any animus was likely the result of Demers's dislike of Thomas due to what Demers saw as his insubordinate behavior during the relevant time, rather than any protected activity. There are several instances in the record where Thomas exhibited defiant conduct. For example, in November 2017, Thomas argued with Demers, refused to report to work, and hung up the phone on him. There was also Thomas's disagreement with Inspector Johnson in front of Demers about being on the ladder without his PFD, as well as his behavior during the investigative meeting.

We conclude that Thomas failed to introduce any evidence establishing a nexus between Demers's animus and Thomas's protected activity. Further, the Judge drew unnecessary and unsupported inferences of a causal nexus in the face of uncontradicted evidence that more than fairly detracted from her conclusions.

2. Disparate Treatment

A complainant alleging disparate treatment bears the burden of proof. *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995). To that end, the Commission has held that "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same or more serious offense escaped the disciplinary fate suffered by the complainant." *Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, *3 FMSHRC 2508, 2512 (Nov. 1981).*

Here, the Judge determined that Thomas introduced evidence that other CalPortland employees who had committed similar PFD misconduct had not been punished equivalently. In particular, she noted that McMillan testified that Demers would routinely unfasten his PFD and remove his hardhat while working aboard the Sanderling. 43 FMSHRC at 544, *citing* Tr. 50.

Several factors distinguish this from Thomas's situation. First, Thomas did not introduce evidence that Demers was ever reported for the one dredge incident described by McMillan or that upper management or HR was otherwise aware of it. The operator cannot be found to have disparately treated two miners when it was only actually aware of the actions of one of those miners. *See e.g. Pollock v. Kennecott Utah Copper Corp.*, 26 FMSHRC 52, 63 (Jan. 2004) (ALJ Manning). Further, and more importantly, the Judge overlooked key details of McMillan's testimony. Section 56.15020 of the Secretary's regulations states that "[l]ife jackets or belts shall be

worn *where there is danger from falling into water*." 30 C.F.R. § 56.15020 (emphasis added). McMillan testified that on the day Demers worked with him, Demers boarded the dredge, took his hard hat and life jacket off, threw them on the floor in the lever room, and sat down in the operating chair. Tr. 50; 89-90. "If [Demers] got up to leave the lever room, he put his life jacket back on, he'd just toss it back on real quick, but he didn't zip it up or buckle it or anything." Tr. 50-51.

In other words, this incident did not occur on the deck of the dredge while over open water. Demers only had his life jacket off while *inside* the lever room, where there is no danger of falling into the water. McMillan further indicated that it was not uncommon for the miners to remove their PFDs in certain circumstances, including when in the lever room. Tr. 72-73. Thomas did not introduce evidence that miners working *inside* the lever room without their PFDs normally faced discipline or were reported to management. Moreover, CalPortland indicated that it had never had a miner disciplined or cited for not wearing a PFD when required so it had no comparable circumstances showing how a miner would have been disciplined under similar facts. Tr. 72-73; 280, 376.

The Judge went on to find disparate treatment when Demers and McAuley referred the matter to HR after the investigative meeting. She found that the move was unusual at that stage of dealing with an employee. 43 FMSHRC at 544. Even though the Judge generally found McAuley not credible, she appeared to rely on McAuley's testimony that involving HR at that stage was unusual. However, the Judge ignored McAuley's explanation that it was unusual because CalPortland typically completes the

investigation before it starts discussing discipline and involving HR. But because of Thomas's refusal to answer questions and his behavior at the investigative meeting, they decided to get HR involved earlier than normal. Tr. 304-05. Thomas did not dispute McAuley's testimony.

The Judge next implied that Demers misrepresented Thomas's behavior as "not being cooperative" during the meeting (see 43 FMSHRC at 544) and later found "that both McAuley and Demers were not credible witnesses when it came to discussing the incidents with Thomas." *Id.* at 537. However, there is ample testimony in the record corroborating the accounts of Demers and McAuley, including the testimony of Thomas. For example, Woods asked Thomas if it was common practice to not wear his PFD. Tr. 145, 385-86. Thomas stated:

> I told him, I said I wasn't going to answer that question . . . [b]ecause it was obvious that they weren't going to listen to what I had to say, they had—only wanted to listen to what they wanted. I told them, I said I wasn't going to incriminate myself.

Tr. 145. Strickland similarly testified that after the January 29 safety investigation meeting, Woods contacted her due to "Thomas not being cooperating, refusing to answer questions."[9] Tr.438, 448. However, the Judge does not mention this other witness

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[9]Commission Procedural Rule 63(a) explicitly permits hearsay evidence "that is not unduly repetitious or cumulative." 29 C.F.R. § 2700.63(a); *Sec'y on behalf of Greathouse v. Monongalia County Coal Co.*, 40 FMSHRC 679, 703 (June 2018); *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135 (May 1984).

testimony, which supports Demers's and McAuley's description of Thomas's behavior. The Judge also relied on the distribution of Demers's termination email, which she described as another unusual practice by the operator. However, the record shows that Demers's email was a draft recommendation distributed by accident, a fact the Judge herself seemed to accept. *See* 43 FMSHRC at 543, 547.

Furthermore, CalPortland introduced its "Attendance and Reporting to Work" policy ("ARW Policy"), which states that if an employee is absent three or more consecutive days without calling, he or she "will be considered to have voluntarily resigned in the absence of a compelling excuse for having failed to do so." Calport. Ex. FF at 3. It then submitted four examples of former employees processed out of the company as having voluntarily resigned when the employees ceased communicating with CalPortland. Calport. Exhibit FF; Tr. 468-70. The Judge did not discuss this evidence.

Regarding disparate treatment, the Judge overlooked the lack of evidence offered by Thomas. Thomas failed to introduce evidence that would show that other miners cited for failure to wear a PFD escaped a suspension pending investigation, or that any miner under suspicion of similar violative conduct or a more serious offense did not receive any form of reprimand at all. He also failed to introduce evidence showing that an employee who refused to communicate with CalPortland for seven days escaped termination from the company by voluntary resignation. In contrast, CalPortland showed that Thomas received the same treatment as other employees who refused to communicate. As with

animus, based on the lack of evidence presented by Thomas, substantial evidence does not support the ALJ's conclusion that Thomas suffered disparate treatment. Accordingly, substantial evidence does not support the Judge's overall conclusion that Thomas's suspension and termination would not have occurred but for any protected activity.

3. Pretext

The ALJ's determination that CalPortland's justifications for Thomas's discharge were pretext is not supported by substantial evidence. Complainant failed to produce any substantial evidence that the legitimate, nondiscriminatory reasons for taking adverse action presented by CalPortland were pretextual.

The Judge determined that a preponderance of the evidence showed that CalPortland's explanations of events were pretextual. First, the Judge erroneously found that the only proven communications after February 1 were the "voluntary resignation" letters that were returned to CalPortland unopened. 43 FMSHRC at 546.

The Judge overlooks the operator's undisputed evidence in the form of contemporaneous notes (sent via internal email communications), which detailed the company's efforts to reach Mr. Thomas between January 31 and February 2. Ex. P. In particular, Strickland asked McAuley and Demers to provide her with information on their attempted communications so that she could include it in her January 5 letter to Thomas. Tr. 453-54; Ex. P at 3-4. According to McAuley's February 2 email to Strickland, he called Thomas three times and left two voice messages. Ex.

P at 2. Thomas also testified that he returned McAuley's call. Before hanging up on McAuley, Thomas told him that he had no business calling his personal cell and to contact his attorney. Tr. 156-57, 186, 318-19, 452; CalPort. Ex. P at 2; Ex. R.

According to Demers's email detailing his attempts to reach Thomas, he responded to Thomas's cancellation text asking him "[i]s there a time that is better?" Thomas did not respond. CalPort Ex. P at 4; Ex. R. In addition to several phone calls made by Demers, Strickland also sent Thomas a letter via standard mail and UPS on February 5 and 8 warning that if he did not contact human resources by Thursday, February 8, "he will be considered to have voluntarily resigned." Tr. 456-57; CalPort Ex. R at 2. Thomas refused receipt of both copies and did not forward them on to his attorney. Tr. 162, 189-91, 457-61; 40 FMSHRC at 1507-08; 43 FMSHRC at 536, n.1. Further contradicting the Judge's finding is an email sent to Demers by Thomas's own Counsel on February 13, 2018, stating that: "It is my understanding that since [February 2, 2018], you have continued to try to contact our client directly." CalPort Ex. W at 1. Although Thomas testified that he was not aware that CalPortland tried to reach him (Tr. 186), he did not dispute the attempts to reach him outlined above nor did he introduce contradictory evidence.

The Judge failed to provide any explanation as to why this undisputed evidence is not credible nor does she even acknowledge the evidence substantively in her analysis. It is reversible error for an ALJ to reject uncontradicted evidence. *Jim Walter Res. v. Sec'y of Labor*, 103 F.3d 1020, 1027 (D.C. Cir. 1997).

Next, the Judge concluded that after Thomas's suspension, he "continued to participate fully in CalPortland's investigation, . . . even submit[ing] a more-detailed written statement, as requested by the company, following the heated interview." 43 FMSHRC at 546. The Judge found that Thomas only stopped participating in the investigation because he reasonably believed that his employment was terminated. *Id.*

We find that the record cannot support these conclusions. As previously discussed, Thomas admitted that he refused to answer questions regarding his PFD practices and testified that he called the investigatory meeting "a sham" and the MSHA Inspector's statement "completely false." Tr. 145. He refused to answer questions about key details and safety practices likely not discussed in those statements for fear that he would "incriminate [him]self." *Id.* A willingness to offer only written statements that do not respond to important management questions does not constitute cooperation with an investigation. On this record, it is difficult to find that Thomas fully participated in the company's investigation solely based on his willingness to write statements.

As for the reasonableness of Thomas's belief that he had been terminated, the Judge did not consider the inconsistent nature of Thomas's evidence. She failed to reconcile Thomas's deposition admission that he received Demers's follow-up email (entitled "Please delete last email, it was sent by mistake") with his subsequent denial at trial of receiving it at all. Decl. of Laiho, Ex. A, Thomas Depo. at 175-77; Tr. 201-02. In addition, CalPortland attempted to introduce

evidence at the hearing of a screenshot taken by CalPortland's Information Technology department showing that Thomas did in fact receive and open the "sent by mistake" email. This evidence spoke directly to the reasonableness of Thomas's "belief" that he had been terminated. However, the Judge excluded the evidence on the grounds that Demers testified that he sent it, and she did not believe it to be a "big deal." Tr. 477-479. This was an abuse of discretion given that the Judge relied on the reasonableness of Thomas's belief to reach her conclusion here.[10]

Additionally, during his deposition, Thomas stated that after receiving the second email, "[t]he damage ha[d] already been done," and he conceded that after that, he refused to communicate with CalPortland.[11] Thomas Depo. at 175-77. On cross-examination, CalPortland's counsel questioned McMillan about his

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[10]Judges are granted broad discretion to decide what is, and is not, relevant to their deliberations regarding a case. *Shamokin Filler Co., Inc.*, 34 FMSHRC 1897, 1906-08 (upholding Judge's exclusion of evidence that was of "limited probative value" and would have "consum[ed] an inordinate amount of time."). However, the Judge acts unreasonably and unfairly when she precludes a party from presenting evidence because it is irrelevant and then makes a substantial finding that is predicated on the lack of such evidence. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819 (Nov. 1995), *citing Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 344 (8th Cir. 1979) (An ALJ's decision to include or exclude evidence "will usually not be disturbed unless it results in undue prejudice or fundamental unfairness").

[11]Although the Judge refused to admit Thomas's deposition at hearing, which showed his inconsistent testimony, the relevant evidence entered the record prior to hearing. *See* Decl. of Laiho, Ex. A, Thomas Depo. at 175-77.

deposition where he stated that he spoke to Thomas once after Thomas was suspended, and that Thomas was upset because he saw an email that he was not supposed to see. Tr. 84-85. If Thomas believed that he was not supposed to see the email, one could infer that he understood the communication was intended for management only and not yet a final action. In *Morgan v. Arch of Illinois*, the Commission held that before a Judge credits any testimony, he or she must reconcile all record evidence that is inconsistent with that conclusion. 21 FMSHRC at 1391–92. There is no indication that the Judge considered any of this evidence before she credited Thomas's "belief" that he was fired.[12]

The Judge went on to scrutinize the company's "threadbare investigation" into the PFD incident, which did not include statements or interviews of certain potential eyewitnesses like the tugboat captain Roger Ison. 43 FMSHRC at 547. She concluded that CalPortland failed to explain its limited investigation. *Id.* at 545-47. However, the record shows that Thomas did not list Ison as a potential eyewitness on his Report of Incident Form. He only listed McMillan. Thomas Ex. 20. Additionally, as discussed above, CalPortland acknowledged and explained the incomplete nature of its investigation, which resulted

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[12] In reviewing a Judge's credibility determination, we may "'refuse to follow [it] where it conflicts with well supported and obvious inferences from the rest of the record. Such refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives.'" *Arch of Illinois*, 21 FMSHRC at 1391, *citing NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 425-26 (6th Cir. 1964) (quoting *NLRB v. Pyne Molding Corp.*, 226 F.2d 818, 819 (2nd Cir. 1955)).

from the fall-out at the investigative meeting with Thomas and his subsequent refusal to communicate. *Slip op* at 9; Tr. 303-04.

The Judge also spends much time discussing the apparently inconsistent justifications offered by CalPortland for why Thomas was terminated and why Thomas's PFD misconduct was insufficient to justify his termination. 43 FMSHRC at 545- 548. However, these discussions are based on a misunderstanding of the operator's arguments. The company never argued that Thomas's PFD misconduct directly caused his discharge. CalPortland has made it clear that Thomas's PFD misconduct resulted in the first adverse act of his suspension. It has consistently maintained that Thomas was discharged based on his own failure to communicate with the company, which it construed as job abandonment. See CalPort. PDR at 3; CalPort. PH Br. at 34, 17; CalPort. Op. Br. at 19-21; CalPort. Reply Br. at 4-5; CalPort. PDR on Remand at 15, 21. Neither party offered evidence, such as a corrective action form or change of status form, supporting the notion that CalPortland terminated Thomas based on his PFD misconduct.

However, even if the company had fired Thomas for his PFD conduct, there is sufficient evidence in the record that supports CalPortland's decision as a legitimate business justification. In fact, contrary to the Judge's summary of McMillan's testimony in this regard (see 43 FMSHRC at 546–47), McMillan testified that Inspector Johnson told Thomas that he could be fined for the violation and that "*it could be a fireable offense*," although unlikely given Thomas's good safety record. Tr. 62 (emphasis added). Additionally, based on a review of the mine's violation

history, this was by far the most serious violation the company had dealt with up to that point. Finally, Demers testified that based on Thomas's comments during the investigation, he believed that Thomas was not taking his unsafe conduct seriously and did not think it was important.[13] Tr. 398; *see also* Tr. 176-77 (Thomas testifying that working without his PFD was "not a big deal.").

The Judge also stated that Thomas had a 16-year career at CalPortland with a clean safety record and without indication of previous violations of this kind. 43 FMSHRC at 548. However, this finding is contrary to record evidence demonstrating prior disciplinary problems. In particular, the record reflects that Thomas had been involved in a disciplinary incident in 2012, where he received a verbal warning, as well as a three-day suspension for violating company work rules after it was determined that he lied to government and CalPortland officials during an investigation involving his prior misconduct. Decl. of Laiho, Ex. L; CalPort. Mot. in Lim. at 2-3; Tr. 203-04. While evidence of this prior disciplinary incident was introduced into the record via pleadings prior to hearing, the Judge refused to allow any testimony about the matter on the grounds that it had occurred six years prior and was "not relevant and highly prejudicial." Tr. 203-04, 311-13, 397-98.

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[13]According to CalPortland's Disciplinary Policy, Sec. 2.4: "Non-compliance and/or disregard of the Company safety programs, policies, and provisions set [forth] may result in disciplinary action based on the Company disciplinary policy." CalPort. Ex. CC at 18.

The Judge's exclusion of this evidence was an abuse of discretion. Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). A finding of pretext is even more unlikely where there is evidence of "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley*, 4 FMSHRC at 993.

A miner's behavior during a post-violation investigation is just as relevant as the behavior that led to the investigation, particularly in the context of analyzing whether the company had justifiable reasons for terminating his employment. In the prior incident, not only was Thomas disciplined for making false statements to government investigators and failing to cooperate with an investigation, which was also a violation of company policy, he was specifically warned that such behavior could lead to termination in the future.[14] Decl. of Laiho – CalPort. Ex. L at 1.

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[14]On the Corrective Action Form suspending Thomas for three days for failing to fully cooperate with an investigation and for lying in 2012, under "Supervisor Comments," it states:

> The company has the right to require the full cooperation from all employees during an investigation. Refusal to cooperate, false answers or misrepresentations is grounds for disciplinary action including terminations. Dishonesty is a

Therefore, because Thomas's conduct surrounding the investigation was a significant factor in this case of alleged discrimination, it was improper for the Judge to exclude evidence of prior disciplinary problems and limit the universe of relevant conduct to safety related violations only.

Finally, the Judge found CalPortland's claim that Thomas voluntarily resigned to "be feeble." 43 FMSHRC at 546. We, again, do not agree. Thomas went a total of seven days refusing to communicate with his employer and failing to provide a compelling excuse for his absence. CalPortland introduced evidence that its HR department processed Thomas's exit from the company as a voluntary resignation – consistent with its "personnel rules [and] practices" forbidding employees from being absent for three or more consecutive workdays. *Bradley*, 4 FMSHRC at 993; CalPort. Exs. FF at 3, R, U. Thomas on the other hand did not introduce evidence that CalPortland's Attendance Policy was not enforced against other employees who refused to communicate or that the policy was not enforced in general. *See Ritenour v. Tennessee Dep't of Hum. Servs.*, 497 Fed. App'x 521, 533 (6th Cir. 2012).

In summary, record evidence demonstrates that CalPortland responded to Thomas's failure to wear a PFD, which resulted in an unwarrantable failure

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> serious violation of company work rules.

Decl. of Laiho, Ex. L at 105, 111. Thomas also testified that he was aware that CalPortland required employees to participate in company investigations and that he had been warned previously that lying would not be tolerated in the future. Tr. 203-04.

citation, by suspending him pending an investigation. When Thomas refused to communicate, despite CalPortland's repeated attempts to reach him, the operator terminated him as a voluntary resignation under its attendance policy. Thomas failed to present any evidence that this rationale for his termination was not legitimate. Therefore, the Complainant failed to meet his burden of establishing pretext.

III.

Conclusion

If Thomas had not made safety complaints to Demers, if he had not spoken with Inspector Johnson regarding his PFD violation, and if he had not filed a discrimination claim on February 13, the record demonstrates that Thomas still would have been suspended for his PFD misconduct and later processed out as a voluntary resignation for his refusal to communicate with his employer after January 31. CalPortland has also produced evidence articulating a legitimate, nondiscriminatory reason for the adverse actions, and Thomas is unable to show pretext.

We conclude that Thomas has failed to meet the burden of proof set forth in the 9th Circuit's remand decision. That is, he was unable to show that, but for his protected activity, he would not have been suspended or terminated. In fact, Thomas failed to prove that his discharge was in any way caused by any protected activity. Thus, the Judge's finding of discrimination is not supported by substantial evidence. For the reasons set forth above, we again reverse the Judge's finding of discrimination and dismiss this case.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

APPENDIX D

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 2, 2021

ROBERT THOMAS, Complainant, v. CALPORTLAND COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2018-0402 DM Mine: Sanderling Dredge Mine ID: 45-03687
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. CALPORTLAND COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2019-0205 MSHA Case No. WE-MD-2018-06

Mine: Sanderling Dredge
Mine ID: 45-03687

- **DECISION AND ORDER**

Appearances: Colin F. McHugh, Navigate Law Group, Vancouver, WA, for Complainant;

Brian P. Lundgren & Erik M. Laiho, Davis Grimm Payne & Marra, Seattle, WA, for Respondent.

Before: Judge Miller

These cases are before me on an order of remand issued by the Commission on June 11, 2021. The cases arise out of a complaint of discrimination brought by Robert Thomas against CalPortland Company ("CalPortland"), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Mine Act" or the "Act"). Thomas alleges that he was discharged from his employment at the mine because of his participation in an MSHA investigation and because of safety and task-training complaints he made to his immediate supervisor. In the initial decision, I found that Calportland discriminated against Thomas in violation of Section 105(c) of the Act. The case was appealed to the Commission and subsequently to the Ninth Circuit. The Commission then remanded this case with directions to apply the updated standard of review outlined by the Ninth Circuit in *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208-09 (9th Cir.

2021). Considering all the evidence and testimony under this new standard, I find that Thomas was discharged in violation of the Act and is entitled to back pay and other relief.

♦ I. FACTUAL FINDINGS

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony should not be deemed a failure to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

CalPortland is the owner and operator of the Sanderling Dredge, a 220-foot dredge that operates on the Columbia River near Vancouver, Washington. The Sanderling—which extracts sand and other minerals from the riverbed and transports it to a separate, landbound facility—is classified as a surface mine and is regulated as such under the Mine Act. 30 U.S.C. § 803. Robert Thomas was an employee of CalPortland from March 7, 2002, through the beginning of 2018, and he worked as a dredge operator for the company in Oregon and Washington. Jt. Stips. ¶¶ 1.1 and 2.1.

His discharge from employment at the mine is the subject of this case.

Thomas worked at CalPortland without any safety incident for sixteen years. He first worked as a deck hand before becoming a dredge operator in 2015. In the latter role, he routinely operated the Sanderling Dredge. The Sanderling is typically operated by two persons on the barge: a dredge operator and a deck hand. The Sanderling is aided in its movement by a towboat, the Johnny Peterson, which was manned by a captain and sometimes a deck hand that are both employed by a contractor. The captain and deck hands connect the towboat to the dredge each day to transport the dredge up and down the Columbia River. For the most part, the Sanderling dredge is docked in Vancouver, Washington. A usual run for the dredge includes a four-hour journey in one direction on the river, and then several hours retrieving sand from the river bottom and unloading the sand before returning to port. Repairs and maintenance are done on the dredge often while it is traveling on the river.

The miners who work on the Sanderling dredge typically arrive in the early morning around 5 a.m. to do maintenance work to prepare for the day. The captain of the towboat arrives shortly thereafter to connect the towboat to the dredge and begin the day's trip on the river. Typically, the Sanderling does one load during the day and returns to the dock around 5 p.m. Occasionally, when the dredge travels farther on the river, it returns around 8 p.m. It is not unusual for the miners to work 12 hours per day and sometimes as much as 80 hours per week. During January 2018, Thomas was the dredge operator, and he worked on the Sanderling with Joel McMillan, an experienced

deck hand. Roger Ison captained the towboat, the Johnny Peterson.

A. Understaffing and Thomas's complaint to management

In the months leading up to the events at issue here, Thomas, McMillan, and other CalPortland employees were required to work long hours, working 16-hour days and sometimes around 80 hours per week. These long hours began in January 2017, when the operation of the dredge changed from two daily shifts (day and night) to a single day shift.

The long hours eventually started to wear on the miners. Both Thomas and McMillan testified that understaffing and excessive hours affected their sleep and diminished their performance on the job. Tr. 39-42, 119. Thomas was concerned that his lack of sleep was impacting his ability to remain responsive and alert at work. Working on the dredge presented its own unique challenges and safety issues, and Thomas became concerned that the job "was getting to be a hazard with not having enough sleep." Tr. 119.

Thomas conveyed his concerns to marine manager Dean Demers on two occasions. First, he contacted Demers in October 2017 and relayed his discomfort with the long hours. Tr. 120. Then, in November 2017, both Thomas and McMillan confronted Demers in person and asked for additional help on the Sanderling to avoid the long days and subsequent unsafe conditions. Tr. 42-43, 120-121. Demers responded to these complaints by saying that he "was working on it," but that he had a lot on his plate at the time. Tr. 120-21.

Over time, Demers, who was relatively new to the Sanderling, attempted to address the miners' concerns by bringing in personnel from CalPortland's other operations to fill shifts on the Sanderling. However, the practice resulted in an exchange of one problem for another. Many of the transferees were previously rock barge workers, who did not have experience with the tasks performed on the dredge and who were unfamiliar with MSHA regulations. Tr. 121, 363. Despite their lack of familiarity with the dredge, Demers did not assign the transferees to shadow the more-experienced crew members. Instead, crew members like Thomas were expected to operate the dredge single-handedly while simultaneously training the transferees on deckhand duties. Tr. 44, 122. Thomas and McMillan were not satisfied with this arrangement. In essence, the experienced dredge employees were being asked to perform additional duties (training the transferees) on top of their already-exacting jobs, and the transferees were not receiving adequate training because Thomas and McMillan were overstretched. So, when Demers asked Thomas to certify that the transferees had received sufficient task training, Thomas refused to sign off. Tr. 122. For the most part, Demers was the one who signed off on the task training, even though he did not conduct the training himself and was not present when the training occurred.

Thomas and McMillan agreed at hearing that in the year leading up to Thomas's termination, the Sanderling dredge was understaffed. Demers stepped in to help occasionally when they were shorthanded or when one of the crew members was out on leave. While no testimony was presented as to how Demers

felt about stepping in to help, he did have a disagreement with Thomas about sick time in November 2017. Thomas had requested a sick day and received push-back from Demers. McMillan testified at hearing that, immediately following that disagreement, Demers indicated to him that "Rob Thomas was done, he was fucking done at CalPortland." Tr. 48.

B. The events of January 24, 2018

On the afternoon of January 24, 2018, the Sanderling Dredge had completed a run to CalPortland's Blue Lake facility and was headed back downstream on the Columbia River to return to port in Vancouver, Washington. Thomas and McMillan manned the Sanderling that day, and Roger Ison captained the Jonny Peterson towboat.

As the dredge approached Vancouver, Thomas and McMillan were working to replace a malfunctioning valve. They used air wrenches to remove the bolts and extracted the valve from in between the pipes to lower the valve onto the deck. *See* Compl. Ex. 14 (showing the bow of the Sanderling dredge, where the valve was changed out). Thomas stood on the ladder to help lower the valve down from its position. Thomas and McMillan testified that they were both wearing their personal flotation devices (PFDs) during the change out. Tr. 55, 125. Thomas then used an acetylene torch to work on a part needed for the valve replacement. Tr. 131. Hoping to avoid heat damage to his personal flotation device, Thomas removed his PFD "for seven to nine minutes" while using the torch. Tr. 131; *see also* tr. 24, 62.

As the two miners worked to replace the valve, Roger Ison noticed that the transmission on the Johnny Peterson's portside motor was malfunctioning, which drastically hampered the towboat's steering capability. Ison radioed the workers on the Sanderling and notified them that the transmission had gone out. Thomas had just finished his work with the acetylene torch, and he quickly put on his PFD before going to assist McMillan in addressing the transmission issue. Tr. 57-58, 134. It was at this juncture that the miners noticed the MSHA inspector standing up on the dock, about 200 or 300 yards upriver. Tr. 57.

From the dock, Inspector Johnson called out and asked if it was company policy to not wear a PFD. Thomas responded that CalPortland's policy requires miners to wear PFDs. Once in port, Thomas admitted to Inspector Johnson that he had not worn his PFD for a short period while operating the cutting torch at the welding table in the middle of the deck. Tr. 136-38. McMillan testified that he corroborated this with the inspector during their January 24 conversation and told the inspector that he had only seen Thomas without his PFD while Thomas was at the center of the ship (far from the edges) using the cutting torch. Tr. 62. Thomas also indicated that he and McMillan had been on the ladder while working that day, and that they had been on the ladder up to the third rung. Tr. 137.

Following his conversation with the miners, Inspector Johnson asked to speak to a supervisor, so Thomas called Demers, who was working at a different location. Tr. 137-38. After some discussion with Demers, Thomas handed the phone to the inspector. Demers was aware that Thomas had provided

information to the inspector prior to handing over the phone. Tr. 138. After hanging up, Inspector Johnson completed his inspection of the barge with Thomas, finding no additional violations. Tr. 138. The inspector then issued a Section 104(d) citation to CalPortland for a miner failing to wear a safety device or be tied off while working on the open portion of a dredge. *See* Resp. Ex. I. Inspector Johnson told the miners that he probably would not have issued the citation if the workbench was more than twenty feet from the edge of the barge (instead of eighteen) and that he did not expect Thomas to be fired for this infraction given his track record of safety. Tr. 62-63.

Thomas returned to work around 6 a.m. the next morning and began to repair the transmission on the dredge. Dean Demers arrived shortly after 7:30 a.m. Demers accompanied Thomas and McMillan to the dredge's engine room and conducted a refresher PFD training to terminate the citation. Following the training, Thomas explained to Demers that he was not on the ladder without his PFD and that no one on board had witnessed him on the ladder without his PFD. Tr. 139-40. McMillan agreed with Thomas's statement, adding that he was the one who had used the ladder to return the valve. Tr. 66. At around 8:30 a.m., Inspector Johnson returned to the dock area and met with Demers to discuss the previous day's violation. Thomas joined the meeting so that he could respond to further questioning by Inspector Johnson. Once the inspector left the dock, Thomas returned to work.

C. CalPortland begins an investigation into the violation

Later in the morning on January 25, Demers met with Dave McAuley, CalPortland's regional operations manager, and the two men decided to suspend Thomas without pay pending further investigation into the incident. Tr. 295-96. Following that decision, Demers called McMillan to tell him he was coming down to the dredge to "get rid of" Thomas. Tr. 67. At about 10:30 a.m., Demers pulled up to the dock and suspended Thomas. Thomas asked Demers if he was being fired, and Demers said no. Tr. 142. Thomas then gathered his things and punched out for the day.

On the morning of January 26, Demers contacted Thomas and asked him to provide a written statement about the incident that led to the citation. Thomas prepared and emailed his statement to Demers on January 28. *See* Compl. Ex. 19. Demers also requested that Thomas come into the CalPortland offices on Monday, January 29 at 8 a.m. When Thomas arrived on Monday morning, he met with Demers and Jeff Woods, the safety manager. Demers proceeded to read the narrative portion of the MSHA citation aloud to Thomas. After hearing what the inspector had written, Thomas asserted that the inspector's statement was not correct. Woods followed up with aggressive questioning regarding Thomas's PFD usage. Tr. 145. Demers admitted at hearing that these questions were "pointed." Tr. 385. Thomas tried to explain further but, at some point, felt it was not productive to respond to Woods' follow-up questions. Woods left the meeting, and Demers asked Thomas to fill out an employee incident report. Thomas complied and submitted an additional, lengthier statement

later that day at CalPortland's request. *See* Compl. Ex. 22. At some time that same day, McMillan was also asked to complete an employee incident report. *See* Compl. Ex. 5.

Later, the same day, Demers and McAuley met with Candy Strickland, a human resources manager, in order to seek advice on next steps. In their view, Thomas had become uncooperative with the investigation when he failed to respond to the last questions Woods had asked. McAuley noted at hearing that it was unusual to involve Strickland at this point, but he insisted that no disciplinary decisions had been made at that time. Tr. 304-05. However, shortly after the meeting ended, Demers sent Strickland a corrective action form that contained Demers' recommendation that Thomas be fired from his employment for violating the PFD rule and for his lack of cooperation with the company investigation. *See* Resp. Ex. N.

D. Demers sends an email containing a corrective action form

Early in the morning on January 31, Robert Thomas received a call from his colleague, Roger Ison. Ison told Thomas to check his email. Upon opening his CalPortland email, Thomas saw a message from Dean Demers—addressed to all of Thomas's coworkers and other contractors—with an attached corrective action form. The form included Thomas's name, underscored, at the top. Directly under his personal information was a section titled Record of Counseling with a tick mark next to word "TERMINATION." Resp. Ex. N 4-6.

Thomas believed that the email was sent as a notice of termination. Tr. 149, 154. He had awoken with the intent to attend a meeting that Demers had scheduled, but after seeing the email he sent Demers a text message indicating that he would not be in attendance for the meeting. Tr. 155. Later that day, Thomas hired an attorney. Tr. 155.

The next morning, February 1, Thomas received a call on his personal phone from McAuley. Thomas did not recognize the number, but he asked his stepdaughter to return the call on his behalf to determine who had called. She hung up when McAuley identified himself on speaker phone. With his stepdaughter in the room, Thomas called McAuley back and said, "[y]ou have no business calling me on my personal phone, I don't know how you got it, you need to contact my attorney." Tr. 157. McAuley denied at hearing that Thomas mentioned an attorney during the February 1 phone call, but Thomas and his stepdaughter remember it being a part of the conversation. Tr. 97-98. Immediately following the phone call with Thomas, McAuley contacted Strickland to discuss the matter. Together they determined that the issue of Thomas' employment was now one for human resources to address.

E. CalPortland initiates the "voluntary resignation" process

On February 2, human resource manager Candy Strickland spoke with a CalPortland HR supervisor about Robert Thomas's employment. Tr. 454. She was advised to begin the process of "voluntary resignation" based on a violation of the company's attendance policy. Tr. 454-55. At this point, Thomas remained on

suspension and believed he had been terminated based upon the email he received from Demers. He had not been asked to return to work. Nevertheless, Strickland initiated the voluntary resignation process and drafted a letter to Thomas indicating that, if he did not contact company representatives by February 8, CalPortland will consider Thomas as "voluntarily resigned."[1] Resp. Ex. R. at 2.

Meanwhile, Robert Thomas had directed his attorney to notify Demers and CalPortland about Thomas's intent to file a claim of discrimination against the company. The letter was dated February 2, 2018. At hearing, Demers asserted that he did not receive the letter from Thomas's attorney until February 13, 2018. He did not, however, indicate when he first learned that Thomas had hired an attorney.

MSHA special investigator Diane Watson contacted Dean Demers on February 5, 2018. She told Demers that MSHA would not be opening a separate investigation against Thomas, that she understood he had been fired, and that he may be pursuing a legal claim against the company. Demers noted at the time that Thomas had hired an attorney and that he intended to file a "discrimination lawsuit." Compl. Ex. 61. Nevertheless, it seems that CalPortland did not make any attempts to contact Thomas's attorney before the February 8 "voluntary resignation" deadline.

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[1] Thomas was sent two copies of this letter and refused to accept delivery on both copies.

Strickland did not hear back from Thomas, and she sent him a second letter, dated February 9, to notify him of his voluntary resignation. CalPortland asserts that Thomas abandoned his employment and voluntarily resigned effective February 8, 2018. Thomas filed his written discrimination complaint with MSHA on February 13, 2018. Joel McMillan testified that, at a later point in time, Dean Demers told McMillan, "I got rid of Rob." Tr. 71.

♦ II. PROCEDURAL POSTURE

Robert Thomas's discrimination case began nearly four years ago when he filed a complaint of discrimination with MSHA on February 13, 2018. MSHA declined to prosecute Thomas's discrimination claim after the agency's investigation, and so Thomas retained independent counsel and initiated his own complaint of discrimination against CalPortland before the Commission on May 23, 2018, pursuant to section 105(c)(3) of the Mine Act. *See* 30 U.S.C. § 815(c)(3).

The parties presented testimony and documentary evidence at a hearing commencing on September 4, 2018, in Portland, Oregon. After considering the parties' evidence and arguments, I issued a decision on December 10, 2018, sustaining Thomas's charge of discrimination and ordering reinstatement and other relief for Thomas. 40 FMSHRC 1503 (Dec. 2018). My analysis was conducted under the Commission's well-established *Pasula-Robinette* framework for discrimination cases. *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). I found

that Thomas had successfully established his prima facie case of discrimination by a preponderance of the evidence by showing that he engaged in protected activity and that the adverse action complained of was motivated at least in part by that activity. *See* 40 FMSHRC at 1513. I also found that both McAuley and Demers were not credible witnesses when it came to discussing the incidents with Thomas. Further, CalPortland failed to rebut Thomas's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by that activity. *Id*. at 1512. Finally, CalPortland failed to establish an affirmative defense that its adverse action was also motivated by the miner's unprotected activity and that the company would have taken the action for the unprotected activity alone. *Id*. at 1513.

CalPortland filed a petition for discretionary review with the Commission, and the Commission granted review on January 17, 2019. After oral argument, the Commission reversed the original decision and dismissed the case on January 29, 2020. *Thomas v. CalPortland Co.*, 42 FMSHRC 43 (Jan. 2020). Dismissal was proper, according to the Commission, because the substantial evidence did not sustain Thomas's prima facie case of discrimination. *Id*. To reach that conclusion, the Commission performed an extensive reevaluation of the facts of the case and departed from the factual findings and credibility determinations in the original decision.

Thomas then filed a petition for review with the United States Court of Appeals for the Ninth Circuit. Thomas argued on appeal that the Commission improperly disregarded the ALJ's findings. CalPortland countered that the *Pasula-Robinette*

standard of review should no longer apply to 105(c) discrimination cases because it is out-of-step with current Supreme Court case law. On April 14, 2021, the Ninth Circuit granted review and rejected the *Pasula-Robinette* framework. *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021). The Ninth Circuit determined that, not only did the Commission improperly ignore the facts found by the ALJ, but that the Mine Act's prohibition of discrimination against a miner "because" of protected activity denotes that the miner must prove discrimination based on a "but-for" causation standard. *Id.* at 15. The Ninth Circuit remanded the case to the Commission for further proceedings consistent with the new standard of review. *Id.*

The Commission, in turn, remanded the case to my docket on June 11, 2021 "for reconsideration of Mr. Thomas' claim of discrimination under the 'but-for' causation standard consistent with the Ninth Circuit's decision." Order of Remand, *Thomas v. CalPortland Co.*, 43 FMSHRC ___, slip op. at 2, No. WEST 2018-0402-DM (June 11, 2021). The parties were given the opportunity to submit additional post-remand briefing on the new legal issues at play.

♦ III. ANALYSIS

Section 105(c)(1) of the Mine Act prohibits a mine operator from discharging a miner, discriminating against him, or interfering with the exercise of his statutory rights "because . . . he has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation" or "because of the exercise of such miner . . . of any statutory right

afforded by this Act." 30 U.S.C. § 815(c)(1). Congress intended for the protections of section 105(c) "to be construed expansively to ensure that miners will not be inhibited in any way in exercising any rights afforded" by the Mine Act. S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legis. History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (hereinafter LEG. HIST.).

A. The Ninth Circuit's decision

For nearly four decades, a claim of discrimination under the Mine Act was proven using the *Pasula-Robinette* burden-shifting framework. First, the complainant was tasked with establishing a prima facie case of discrimination by proving that he engaged in protected activity and that an adverse action was motivated, at least in part, by that activity. Then, once the prima facie case had been established, the burden shifted to the operator to show either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If unable to rebut the prima facie case in this manner, the operator was still able to offer an affirmative defense that the adverse action was also motivated by the miner's unprotected activity and that the operator would have taken the adverse action against the miner for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18, 818 n.20.

Recently, the Ninth Circuit turned this longstanding precedent on its head. The Court decided that the text of the Mine Act requires a judge to apply a "but-for" causation standard to a claim of discrimination under the Act, rather than the

"motivated in part" standard previously adopted by the Commission. *Thomas*, 993 F.3d 1204, 1210 (9th Cir. 2021).

A three-judge panel relied on a line of recent U.S. Supreme Court decisions interpreting various federal laws that prohibit discrimination "*because of*" a protected status or activity. In *Gross v. FBL Financial Services*, the Supreme Court announced, for the first time, that this statutory language ("because of") requires a judge to ask whether the protected status or activity was a but-for cause of the alleged adverse action. 557 U.S. 167, 174-80 (2009). Later cases helped flesh out the standard of proof under this but-for test. A plaintiff must "show that the harm would not have occurred in the absence of . . . the defendant's conduct." *Univ. of Tex. Sw. Medical Center v. Nassar*, 570 U.S. 338, 346-47 (2013). An outcome can have "multiple but-for causes," and "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision" once a plaintiff shows that the defendant's illicit motive was indeed one cause of the outcome. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020).

Based on this precedent, the Ninth Circuit held that the plain language of the Mine Act—barring discrimination "because" a miner has engaged in protected activity—similarly requires a court to apply a but-for test. The Ninth Circuit determined that this interpretation is unambiguous, and therefore the Court did not consider the agency's view [2] under

[2] The Court erroneously mentioned that it had no duty to "consider the Commission's interpretation," when it is the Secretary of Labor whose interpretation is relevant here.

Chevron v. National Resources Defense Counsel. *Id*. at 1211 (citing *Chevron*, 467 U.S. 837 (1984) (holding that a court must only defer to an agency's interpretation of statutory text when the ordinary meaning of the text is ambiguous)). The application of this new but-for test was left to the Commission and its courts.

B. The prima facie case and burden shifting

It is clear that the Ninth Circuit has announced a new substantive standard for discrimination under section 105(c) of the Mine Act. Less clear, however, is how this new standard interacts with the Commission's discrimination case law.

It is important to leave as much of the FMSHRC discrimination framework intact as possible, for three reasons. First, any Commission precedent that is consonant with the "but-for" causation analysis remains binding upon this court under the doctrine of *stare decisis*—a doctrine that promotes consistency and predictability for miners alleging discrimination as well as mine operators. Second, the discrimination framework has been carefully crafted to encourage miners' free engagement in protected activities without fear of reprisal. This was Congress's intent when drafting section 105(c) of the Mine Act, and it remains an important consideration for judges interpreting the Act. *See* S. Rep. 95-181, at 36, *reprinted in* LEG. HIST. at 624. Finally, it is noteworthy that the Secretary is not party to this case and has not had an opportunity to interpret the statute in light of the Ninth Circuit's decision.[3]

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[3] While the Ninth Circuit held that the term "because" unambiguously indicates a but-for causation standard, any other

Therefore, instead of dispensing with the traditional prima facie case and burden shifting, this Court aims to clarify how such a process fits with the discrimination standard articulated by the Ninth Circuit. This clarification process will draw from longstanding Commission precedent and will make only subtle modifications to the existing test, to ensure that it aligns with other employment-discrimination regimes that have been sanctioned by the U.S. Supreme Court.[4]

The Commission has defined a prima facie case as "the establishment of a legally required rebuttable presumption" and as "a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Turner*, 33 FMSHRC at 1065 (internal citations omitted). In essence, the complainant has an opportunity to make a case of first impression that would allow the court to find in his favor, absent countervailing evidence from the respondent.

The prima facie case is a vital instrument in the context of employment discrimination. Direct

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ambiguity in the Act's text could be informed by the Secretary's interpretation.

[4] I will look toward the burden-shifting framework that the Supreme Court developed to evaluate disparate-treatment claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (hereinafter "Title VII"), as a model. The Commission often looks to other federal anti-retaliation legislation like Title VII when addressing questions involving the anti-retaliation provision of the Mine Act. *See, e.g., William Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1830 (Aug. 2012); *Turner v. National Cement Company of California*, 33 FMSHRC 1059, 1065-66 (May 2011).

evidence of intentional discrimination is rare, and the employer is best situated to present evidence of its own decision-making. *See Sec'y of Labor on behalf of Johnny Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) ("It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence.") (Internal citations omitted); *Pasula*, 2 FMSHRC at 2800 ("[I]t is the employer who is in the best position to prove what he would have done."). The prima facie concept allows a miner to advance a case based on indirect evidence of discrimination, therefore helping to level the playing field between employer and employee.

After the complainant proves his prima facie case, the burden of production shifts to the employer. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The employer is tasked with offering evidence rebutting the employee's prima facie case of discrimination. In the Title VII context, this requirement is rather minimal. The employer must only introduce legitimate evidence that, if taken as true, would permit the conclusion that the employer did not discriminate. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). If the employer meets that burden, the presumption dissipates, and the factfinder must adjudicate the claim based on the typical standard for a claim of discrimination. *Id.* at 507-08. This final stage of analysis must give the complainant a fair opportunity to show that the rationale offered by the employer amounts to a pretext that obscures its intentional discrimination. *Cf. McDonnell Douglas*, 411 U.S. at 804.

Importantly, even as the burden of production may shift, the complainant always carries the "ultimate burden of persuasion . . . as to the overall question of whether section 105(c) has been violated." *Turner*, 33 FMSHRC at 1065; *see also Robinette*, 3 FMSHRC at 818 n.20; FED. R. EVID. 301 ("[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption, [b]ut this rule does not shift the burden of persuasion, which remains on the party who had it originally.").

C. The restated test for discrimination

Therefore, the test for whether discrimination has occurred under section 105(c) of the Mine Act is whether the complainant has proven, by a preponderance of the evidence, an adverse action that would not have been taken but for his engagement in protected activity.

In the absence of direct evidence of discrimination, a complainant may assert a prima facie case of discrimination under the Mine Act by showing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. This lower standard is *not the ultimate standard of discrimination*, but rather an evidentiary device that allows a poorly positioned miner to state a claim of discrimination using indirect evidence of discrimination, such as (i) the operator's knowledge of the protected activity, (ii) its hostility towards the protected activity, (iii) the coincidence in time between the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510. If the miner successfully states his prima facie case, he has

established a rebuttable presumption of discrimination under the Mine Act.

The mine operator then has an opportunity to rebut the miner's prima facie case by producing evidence showing (1) that no protected activity occurred or (2) that the adverse action was not motivated by the protected activity. This is merely a burden of production, not of persuasion. An operator's failure to produce any legitimate evidence in rebuttal to the prima facie case would result in a judgment in favor of the complainant. However, when an operator produces such evidence, the presumption of discrimination is nullified, and the judge must weigh the conflicting evidence according to the substantive "but-for" standard. During this final phase, the complainant must have an opportunity to show that the operator's explanation in rebuttal is pretextual. Throughout this entire process, the burden of persuasion never shifts to the mine operator.[5]

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[5] Previously, the Commission placed the burden of persuasion on the respondent to prove the affirmative defense that "although part of his motive was unlawful, he was also motivated by the miner's unprotected activities, and that he would have taken adverse action against the miner in any event for the unprotected activities alone." *Pasula*, 2 FMSHRC at 2800. This is incompatible with the Ninth Circuit's decision and with the Supreme Court precedent that it cited. Under the Ninth Circuit's test, it is the complainant's burden to prove that the respondent's discrimination was a but-for cause of the adverse action. A respondent offering the defense stated above would merely be denying or negating the but-for causation claimed by the complainant. Accordingly, it is improper to label this an "affirmative defense" or to task the respondent with the burden of proving this defense. *See Gross*, 557 U.S. at 177-180.

D. Application of the new test to Thomas's claim of discrimination

1. Thomas's prima facie case

Under this newly articulated test, Robert Thomas must prove that he suffered an adverse action and that the adverse action would not have been taken but for his protected activity. As an initial offering, Thomas must establish a prima facie case of discrimination. He has clearly done so here.

i. Protected activity

I find that Thomas has successfully proven his engagement in several instances of protected activity. First, he complained to his immediate supervisor, Dean Demers, that he was tired from working so many hours, that it was unsafe because he could not concentrate, and that the dredge needed more workers. The complaint centered on the safety of his working conditions, and it is protected under the Act. Second, Thomas expressed his concern about the lack of task training for the rock barge employees who were moved over to work on the dredge. Several times, he refused to sign the task training certificates because he believed the substitute workers were not trained adequately. Third, Thomas spoke with MSHA Inspector Johnson when he boarded the dredge on January 24, 2018, and provided information that the inspector relied upon in issuing a citation. Finally, Thomas let the mine know that he had hired an attorney and the mine was alerted that Thomas was filing this discrimination complaint with MSHA. While there is some dispute about the timing of the last activity, the mine was told to speak to Thomas' attorney as of a February 1 phone call and they

became aware of the discrimination complaint no later than February 6, 2018, following a call from an MSHA supervisor. McAuley admitted at hearing that he was aware of Thomas's legal representation by the latter date. Tr. 322. Both of these notifications occurred prior to the second notice of termination given to Thomas.

CalPortland argues in its post-hearing brief that Thomas's complaint should be dismissed because he did not include all the above-listed protected activities in his MSHA complaint. The mine points to *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991) and contends that Thomas's private Section 105(c)(3) complaint is limited to the specific activities he identified in his original MSHA complaint. However, recent Commission case law does not support the mine's narrow reading of *Hatfield*. In *Hopkins County Coal*, 38 FMSHRC 1317 (June 2016), the Commission addressed a similar argument. The majority concluded that it is not the terms of the initial complaint that control the scope of the Section 105(c)(3) action; it is whether the Secretary investigated the miner's broader claim of discrimination. *Id.* at 1323 n.9. Embedded within the decision in *Hopkins County Coal* is an acknowledgment that "the Secretary has the authority to investigate possible discriminatory acts, even if the miner's initial complaint is deficient." *Id.* Here, Thomas listed one protected activity on his MSHA complaint, and the Secretary had the opportunity to investigate the related activities discussed above. In addition, the acts that Thomas alleges as protected acts were all the subject of various types of discovery in this case. The mine therefore was

aware of the allegations and had ample time to explore them and present a defense at hearing.

ii. Adverse action

The Commission has defined "adverse action" to mean "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). According to this definition, Thomas has proven multiple adverse actions taken by CalPortland. First, Thomas was suspended without pay from CalPortland on January 25, 2018, pending an investigation into the events that resulted in the January 24 MSHA citation. Second, Dean Demers sent a draft termination memo to Thomas and his coworkers on January 30 that was reasonably interpreted as a termination letter. Finally, a human resources manager at CalPortland sent Thomas a letter on February 9 indicating that his employment at the company had been terminated following his "voluntary resignation." Each of these actions represents a discipline or detriment in Thomas's employment relationship, and therefore Thomas has proven that he has suffered adverse action under the Mine Act.

iii. Discriminatory motive

The final component in Thomas's prima facie case is proof of a motivational nexus between the protected activity and the adverse action. A miner can establish this nexus with indirect or circumstantial evidence of discrimination, such as (i) the operator's knowledge of the protected activity, (ii) its hostility towards the protected activity, (iii) the coincidence in time between

the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510. A miner need not establish all four indicators of discrimination, but rather each indicator proven by the miner contributes cumulatively to his case of discriminatory motive.

Thomas has successfully shown the presence of all four indicia of discrimination, including that the operator knew about his protected activity. An operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon*, 3 FMSHRC at 2510. Here, Dean Demers—the marine manager at the mine and the individual who ultimately recommended Thomas's termination—knew of Thomas's protected activity. Thomas testified that he had complained to Demers repeatedly about the long work hours and the impact those hours had on his safety and health. (McMillian made similar complaints to Demers.) In addition, Thomas complained about the use of workers who were not adequately trained, and he refused to sign the task training certificates. In some instances, Demers signed them without having worked alongside those being trained. Demers denied that he had conversations about long hours or training, but instead remembered a conversation about Thomas wanting a day off. McMillian explained that shortly after the many conversations about safety and training, Demers showed up to take Thomas' place while he was out sick and told McMillan at that time that Thomas was done working at CalPortland. Demers was upset about Thomas's actions, not only wanting a day off, but the related issues of safety, long hours, and training. Based on my observations of the

demeanor of the witnesses at hearing, I credit the corroborated testimony from Thomas and McMillan on this matter, over Demers's testimony, which appeared rehearsed.

Next, Demers was aware of Thomas's discussions with the MSHA inspector on January 24 and 25. Thomas handed the phone to Inspector Johnson so he could speak with Demers on January 24, and Thomas spoke to the inspector in front of Demers on January 25, shortly before his suspension became effective. Additionally, Demers had several follow up discussions with the inspector wherein the information provided by Thomas was discussed. Demers indicates that he did not tell McAuley or Strickland about the actions taken by Thomas, but it was Demers who pushed for termination and made the initial recommendation to fire Thomas. Under Commission case law, Demers' knowledge of Thomas' protected activity is therefore imputed to McAuley and Strickland. *See Con-Ag., Inc. v. Sec'y*, 897 F.3d 693, 702 (6th Cir. 2018) (finding that the ALJ reasonably imputed a mine manager's knowledge of a miner's protected activity to upper management in making a termination decision). Mine management was also aware that Thomas had acquired legal counsel before the mine formally terminated Thomas's employment relationship.

Timing is another factor that points towards discriminatory motive. The Commission has noted that it "applies no hard and fast criteria in determining coincidence in time" and that "[s]urrounding factors and circumstances may influence the effect to be given." *Hicks v. Cobra Mining Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

According to testimony at hearing, both Thomas and McMillan made repeated safety and health complaints to Demers in the months leading up to Thomas' suspension and termination. During that same time frame, they consistently complained about the lack of task training that the temporary dredge barge workers were receiving. In November 2017, Thomas requested a sick day, but Demers was reluctant to approve the request because he did not have enough workers for the dredge and became angry with Thomas. McMillan testified that immediately following the sick day disagreement, Demers wanted Thomas gone from CalPortland.

Furthermore, there is a compelling coincidence in time between the adverse actions and both Thomas's conversations with the MSHA inspector and Thomas's retention of counsel in pursuit of his discrimination claim. Mere days passed between these events, pointing towards a discriminatory motivation behind his suspension and firing.

Disparate treatment is a third factor that can establish a motivational nexus. CalPortland has argued that it did not terminate Thomas and that all its actions were motivated by his dangerous PFD misconduct. *See* Resp. Br. at 15. Thomas, however, has introduced evidence that other CalPortland employees who had committed similar PFD misconduct had not been punished equivalently. Joel McMillan testified that when he worked shifts with Dean Demers, Demers would routinely unfasten his PFD and remove his hardhat while aboard the Sanderling. Tr. 50. Demers was never suspended or terminated for his safety violations, and therefore Thomas has submitted evidence showing that he was

treated disparately. Additionally, Demers makes much of the fact that Thomas would not answer the final, pointed questions of Woods and therefore was not being cooperative. Demers and McAuley then took the issue to the HR office, a move that is not usual at this point in dealing with an employee. Demers clearly wanted Thomas gone and made that known to McMillan before the incident with MSHA. Demers also told McMillan that he got rid of Thomas, when in fact, he told Thomas he was merely suspended while the matter was being investigated. Demers then told Thomas, along with every other employee and contractor at Calportland, that his employment was terminated on January 31 BEFORE Thomas took any action that could be construed as a voluntary termination. Another practice that was unusual at this company.

The final circumstantial indicator of discrimination is hostility. Thomas has introduced evidence showing that, after he had complained of his hours and workload, Demers remarked to a coworker that "Rob Thomas was done, he was fucking done at CalPortland." Tr. 48. Then, after Thomas's separation from CalPortland, Demers made another remark indicating that he "got rid" of Thomas, indicating that Demers viewed Thomas as a problem that he jettisoned. Tr. 71. Finally, the aggressive and "pointed" approach that Woods took with Thomas in the post-citation interview indicates further hostility towards the Complainant. Tr. 385.

Altogether, these indicia of discrimination support a showing of discriminatory motive. Thomas has introduced sufficient evidence to show that he engaged in a protected activity, that he suffered an adverse

action, and that there was a motivational nexus between the two. He has therefore successfully established a prima facie case of discrimination, giving rise of a rebuttable presumption that he was discriminated against.

2. CalPortland's rebuttal

CalPortland now has an opportunity to rebut Thomas's prima facie case by producing evidence that indicates either (1) that no protected activity occurred or (2) that the adverse action was not motivated by the protected activity. At hearing and in briefing, CalPortland has made arguments that go towards the latter issue.

The company first argues that no adverse action occurred. With regard to Thomas's suspension, the company submits that the suspension was non-disciplinary and was meant to promote a robust investigation to protect miner health and safety. Then, regarding Thomas's termination, CalPortland describes the separation as a voluntary resignation on the part of Thomas. This Court cannot simply accept the operator's characterization of its own actions, however, and must determine whether the action constitutes "discipline or a detriment in [Thomas's] employment relationship." *Pendley*, 34 FMSHRC at 1930. The operator suspended Thomas without pay, which is objectively a detrimental employment action. And the combination of sending a termination memo and formally separating Thomas from his employment is clearly a detriment, as well. This portion of CalPortland's rebuttal is unavailing.

CalPortland next argues that its actions "were motivated by [his] dangerous PFD misconduct." Resp.

Br. at 15. The company has produced evidence showing that the mine inspector personally witnessed Thomas aboard the Sanderling without his PFD, that the company initiated an investigation quickly thereafter, and that the adverse actions were proximate in time to the alleged misconduct. This explanation could stand as a legitimate and nondiscriminatory reason for the adverse actions. However, the mine asserted at hearing that Thomas was fired for not cooperating in an investigation and "abandoning" his position. Calportland did not argue that it terminated Thomas' employment for failing to wear his PDF. In addition, the mine has failed to explain why the investigation was so limited. The facts clearly indicate that the motivation asserted by the mine has no basis in truth.

3. Disposition

Thomas established a prima facie case, and CalPortland offered evidence in rebuttal. The rebuttable presumption has dissipated, and one question remains in this case: whether Thomas has shown by a preponderance of the evidence that his protected activity was a but-for cause of CalPortland's adverse action.

In many employment-discrimination contexts, an important aspect of a complainant's final burden is whether he or she can show that the employer's stated nondiscriminatory rationale is pretextual. The complainant "must . . . have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53

(1981). Indeed, the Supreme Court has held "that a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000) (under Title VII).

The Commission has explained that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug 1990) (internal citations omitted). In previous cases, the Commission has described the array of evidence that may show pretext: a complainant may demonstrate "either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Turner*, 33 FMSHRC at 1073.

In the present case, a preponderance of the evidence shows that CalPortland's explanation of events is pretextual. The company claims that Thomas voluntarily resigned by violating the company's attendance policy, and that the steps taken by the company were a response to Thomas's PFD misconduct. Both justifications prove to be feeble.

First, there are many reasons to doubt the claim that Thomas voluntarily resigned. Thomas was suspended on January 25 and continued to participate fully in CalPortland's investigation. Thomas even submitted a more-detailed written statement, as requested by the company, following the heated

interview on January 29. Thomas only stopped participating in the investigation when he received Demers's email containing the termination memo. I find that Thomas reasonably believed that his employment was terminated at that juncture. Based upon this belief, Thomas cancelled the next day's meeting and then spoke with McAuley on February 1, when he informed McAuley that he had hired an attorney. CalPortland claims that it directed Thomas to return to work, but it has not produced any text messages or emails to support the claim, even though the parties frequently communicated via email during the investigation. It appears that Calportland asserts that Thomas failed to report to work when asked to meet with Demers, after Thomas believes he was fired. The only proven communications after February 1 were the "voluntary resignation" letters that were returned to CalPortland unopened. I thus find that there was no reason for Thomas to believe he was supposed to return to work, and therefore he did not "abandon" his job. Finally, comments from mine management after Thomas's discharge indicate that it was not a voluntary resignation: Joel McMillan testified that, following Thomas's termination, Demers bragged that "I got rid of Rob."

Second, the record is riddled with red flags surrounding CalPortland's claim that it was merely reacting to Thomas's "PFD misconduct." For instance, the termination memo that Demers distributed listed another reason for termination: Thomas's failure to cooperate in the investigation. The fact that CalPortland has alleged an additional motivation for termination (one that, itself, is of questionable

veracity) [6] casts doubt on truthfulness of the justification that CalPortland has offered at hearing. Moreover, there are reasons to doubt that Thomas's PFD conduct was sufficient to motivate his discharge. McMillan, a witness without an interest in the outcome of this case, testified that he had personally observed Demers engage in the same type of conduct without facing discipline. The same witness attested that the mine inspector had opined that, given Thomas's tenure and clean safety history, the citation issued should not be grounds for his termination. Nowhere in the evidence is there any indication that Thomas was fired for not wearing a PFD.

Relatedly, I find that CalPortland's witnesses on this point were overly rehearsed. The company's legal counsel led the witnesses with certain terminology that was coined to spin the facts in CalPortland's favor. This questioning elicited answers or agreement from the witnesses endorsing these jargony terms, such as Thomas's "PFD misconduct" or the decision to suspend Thomas "pending investigation." Demers and

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[6] The only person besides Demers and Thomas who attended the meeting was CalPortland safety manager Jeff Woods, who did not testify at hearing. His absence leads me to the conclusion that he may have had some unfavorable information about the company's investigation into the incident. "It is well established that an adverse inference may be drawn against a party if the party fails to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party." *Virginia Slate Co.*, 23 FMSHRC 482, 485 (May 2001). Woods was a main participant in CalPortland's investigation and led the January 29, 2018, meeting. While the mine acknowledged that Woods is now a former employee, there was no indication that the mine made any attempt to contact him.

McAuley appeared particularly well-coached and well-rehearsed during the hearing, and they both had an interest in seeing the demise of Thomas's discrimination complaint. Although Demers testified at length about his background and experience, I cannot credit his testimony about Thomas' actions or the reasons for his termination. I found Demers to have impressive credentials but did not find him credible. Instead, he was rehearsed and disingenuous in his statements. For these reasons, I do not find either Demers or McAuley to be credible witnesses on these points. I credit the relatively disinterested testimony of McMillan and the straightforward and believable testimony of Thomas over the testimony from Demers and McAuley.

Additional red flags are found when scrutinizing CalPortland's "investigation" into the alleged PFD misconduct. The company's inquiry was not thorough. It appears Thomas himself was only asked one question before Jeff Woods ended the interview. Furthermore, CalPortland neglected one of the three potential eyewitnesses to the alleged misconduct; Roger Ison was never approached to give a statement or to be interviewed. In fact, a second eyewitness, Joel McMillan, only submitted a brief statement (fewer than fifty words) and was never interviewed as part of the investigation. McMillan's statement indicated that he did not know whether Thomas wore his PFD while on the ladder. Dean Demers relied on this threadbare investigation—consisting in total of written statements from Thomas, a one-question interview with Thomas, and a short-written statement from McMillan—while writing his original corrective action form.

CalPortland conducted a rushed and incomplete investigation of Thomas's conduct, and within hours Demers had drafted and distributed his recommendation that Thomas should be terminated.[7] Evidence of an inadequate investigation can give rise to a finding that the stated reason for termination is pretextual. *See Con-Ag, Inc.*, 897 F.3d at 704-05 (holding that evidence of an "unreasonably brief" investigation can lead to an inference of pretext); *Sec'y of Labor on behalf of Robert Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015 (Dec. 1985). A finding of pretext is even more likely in the absence of "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). Here, Thomas had a sixteen-year career at CalPortland with a clean safety record, and without indication of previous violations of this kind.

Altogether, these defects in the operator's justification show that it is pretextual. While concerns about Thomas's PFD usage may have a basis in fact, the evidence indicates that these concerns were insufficient to motivate his firing.

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[7] Thomas was interviewed on January 29. CalPortland requested a longer written statement, and Thomas submitted a statement at 12:30 PM on that same date. *See* Compl. Ex. 22. McMillan also submitted his written statement on January 29. *See* Compl. Ex. 5. Demers had completed his draft corrective action form and emailed it to Candy Strickland by 3:58 PM on January 29, the very same afternoon. *See* Resp. Ex. N.

Given his strong showing of discrimination in addition to the showing of pretext, I find that Thomas has successfully proven by a preponderance of the evidence that his protected activities were a "but-for" cause of the adverse actions that he suffered. Thomas has demonstrated that he engaged in protected activity by reporting safety issues in November 2017 and has shown that animus toward him only grew from that point forward ("Rob Thomas was done, he was fucking done at CalPortland."). I find that CalPortland simply seized on the January 24 safety violation to initiate a spurious investigation with the intent to terminate Thomas. Thomas's receipt of the corrective action form—and his reasonable decision to forgo the next day's meeting where the company seemed sure to fire him—only provided more cover to CalPortland by allowing it to paint Thomas's actions as "voluntary resignation." Based on my careful review of the evidence and my credibility determinations of the witnesses at hearing, I find that Thomas's suspension and later termination would not have occurred but for his protected activities.

Even if CalPortland was motivated in part by Thomas's safety violation, I find that this motivation was not sufficient to provoke his termination. As the Ninth Circuit determined, the "but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Thomas*, 993 F.3d at 1209 (citing *Bostock*, 140 S. Ct. at 1739). CalPortland would not have conducted such a rushed investigation and would not have terminated Thomas, a miner with a sixteen-year tenure, in the absence of his protected activity.

♦ IV. PENALTY

Thomas originally brought this case individually, and following the original disposition of the case, the Secretary instituted an action for the assessment of a civil penalty of $17,500.00. That civil penalty action remains pending in Docket No. WEST 2019-0205. On May 22, 2020, the Commission issued an order staying proceedings in that case. That stay is hereby lifted, and the Respondent is conditionally ordered to pay $17,500.00, pending exhaustion of its appeals, pursuant to the Decision Approving Settlement issued on March 21, 2019.

♦ V. DAMAGES AND RELIEF

The Mine Act gives the Commission the authority in proceedings under Section 105(c)(3) to assess against an operator "a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner." 30 U.S.C. § 815(c)(3). The Commission has explained that back pay "is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package." *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993). An award of attorney's fees is "a matter that lies within the sound discretion of the trial judge." *Sec'y on behalf of Ribel v. E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2017 (Dec. 1985).

As part of my previous decision in this case, the Respondent was ordered to pay $76,185.67, plus

quarterly interest at the federal underpayment rate through the date of payment, in backpay and lost benefits to Thomas. That order is hereby restored. Furthermore, CalPortland remains liable for Thomas's backpay that accrues up until the time at which he is reinstated. *See Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2053 n.14 (Dec. 1983) ("In a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made."); *cf. Inda v. United Air Lines, Inc.*, 405 F.Supp. 426, 435 (N.D. Cal. 1975) (under Title VII) ("United is further liable to plaintiffs for back pay in 1975 until such time as they are reinstated pursuant to this Court's order."). If the prevailing employee is not reinstated during the appellate process, the backpay period remains open and encompasses the time that the appeal was pending. *Cf. Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 788 (7th Cir. 1979) (under Title VII) ("Because we hold that Taylor was the victim of unlawful discrimination, the relief should cover the period up until the date of her reinstatement, including the time occupied by this appeal."). Accordingly, the parties are ordered to submit additional documentation regarding Thomas's backpay that has accrued since November 30, 2019. The Complainant shall submit his accounting of the backpay within twenty days of the date of this decision, and the Respondent shall submit a response within twenty days of the Complainant's filing.

Thomas is also entitled to reasonable attorney's fees. 30 U.S.C. § 815(c)(3). To evaluate reasonableness, courts typically consider an attorney's reasonable

hourly rate and whether the number of hours expended on the case was reasonable. *See Perdue v. Kenny A. ex rel. Winn*, 599 U.S. 542, 551-52 (2010). Following the original disposition of this case, the Respondent was ordered to pay $74,852.05 in attorney's fees. That order is hereby reinstated. Furthermore, the Complainant shall submit itemized invoices for additional fees incurred during the appeals process. The Complainant shall submit his accounting of attorney's fees within twenty days of the date of this decision, and the Respondent shall submit a response within twenty days of the Complainant's filing.

♦ VI. ORDER

WHEREFORE, Respondent is hereby **ORDERED** to reinstate Robert Thomas to his former position with CalPortland with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove from Thomas' personnel file any mention of any employment action stemming from this incident and shall post a notice at the nearest CalPortland land-based office, in a conspicuous location, and on paper at least 8 x 10 size, setting forth the rights of miners protected by 105(c) of the Mine Act.

Respondent is further **ORDERED** to pay back pay and lost benefits to Thomas in the amount of $76,185.67 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. All back pay and benefits' awards, including attorneys' fees, shall be recalculated and brought up to date with interest as of the date paid, and shall continue until Thomas is reinstated. *See Ark.-Carbona Co.*, 5 FMSHRC at 2053 n.14. Such

payments shall be made within 30 days of the date of this decision.

Complainant is **ORDERED** to submit, within twenty days, its updated estimates of (1) the backpay to which he is entitled for the period between December 10, 2019, and the date of this decision's issuance, and (2) the reasonable attorney's fees incurred during that period. Respondent is **ORDERED** to submit its response to the Complainant's estimate within twenty days of service of the Complainant's submission.

Respondent is **ORDERED** to pay the Secretary of Labor the sum of $17,500.00 within 30 days following the exhaustion of its appeal rights in this case, if the assessment for civil penalty remains or has otherwise not been vacated.

s/Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

APPENDIX E

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

June 11, 2021

ROBERT THOMAS	:	Docket No. WEST 2018-402-DM
v.	:	Mine ID: 4503687
CALPORTLAND COMPANY	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER OF REMAND

BY: Althen and Rajkovich, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It involves a complaint filed by miner Robert Thomas alleging that CalPortland Company ("CalPort") discriminated against him in violation of the Mine Act. After a Commission Administrative Law Judge found that CalPort unlawfully discriminated against Thomas, CalPort filed a petition for discretionary review challenging

the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

On review, the Commission determined that the Judge erred in concluding that Thomas had established a prima facie case of discrimination, reversed the Judge's decision, and dismissed the case.

Thomas subsequently filed a petition for review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit on the grounds that the Commission had erred in its determination and asserted, along with Respondent CalPort, that the Commission's long-standing precedent under *Pasula-Robinette* should no longer apply to section 105(c) cases, as it misconstrues the word "because" in the statute.[1] *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

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[1]The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or ***because*** such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act. . . .

30 U.S.C. § 815(c)(1) (emphasis added).

Citing several Supreme Court decisions,[2] the parties argued that the *Pasula-Robinette* standard conflicts with Supreme Court instruction that the ordinary meaning of "because" required application of the simple and traditional standard of "but-for causation."[3] *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208-09 (9th Cir. 2021).

Applying step one of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), the Circuit Court ultimately found the statute clear and rejected the *Pasula-Robinette* standard of review concluding that the Supreme Court has instructed "that the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise." 993 F.3d at 1211. It remanded the case to the Commission with instructions to apply the "but-for" causation analysis to Thomas' claim of discrimination. *Id.*

On June 7, 2021, the court issued its mandate in this matter, thereby returning the case to the Commission's jurisdiction. Accordingly, we remand this matter to the Judge for reconsideration of Mr. Thomas' claim of discrimination under the "but-for" causation standard consistent with the Ninth Circuit's decision.

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[2]*Burrage v. United States*, 571 U.S. 204, 212-17 (2014); *Univ. of Sw. Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-60 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-80 (2009).

[3]At oral argument, however, Thomas changed his position and argued that the Court should apply the *Pasula-Robinette* standard instead. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Ch. 2021).

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

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

Chair Traynor, concurring in result only:

This case is already over.

It began with a complaint filed by miner Robert Thomas alleging that CalPort discriminated against him for his exercise of protected rights in violation of the Mine Act. After a Commission Administrative Law Judge found that CalPort unlawfully discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

On review, the Commission determined that the Judge erred in concluding that miner Thomas had established a prima facie case of discrimination. None of the five Commissioners found that protected activity in any way motivated Thomas's suspension and termination. Thus, the Commission unanimously reversed the judge's decision for lack of *any* evidence of unlawful motivation. [1] The Commission was unanimous in concluding that under *any* causation standard, the case must be dismissed.

Thomas subsequently filed a petition for review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit on the grounds that

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[1] The two concurring Commissioners explained that they had "considered whether Thomas' putatively protected complaints about inadequate training and excessive work hours motivated in any way the same adverse action referenced in his administrative complaint - his suspension and ultimate termination" to conclude that "[a]long with the majority, we find *no proof* that they did." 42 FMSHRC 43, 58 (Jan. 2020) (Jordan and Traynor, concurring) (emphasis added).

the Commission had erred in its determination. Initially, Thomas joined Respondent CalPort's assertion that the Commission's long-standing precedent under *Pasula-Robinette* should no longer apply to section 105(c) cases, claiming various Supreme Court holdings require application of some version of a "but-for" test when analyzing whether an adverse action is motivated by protected activity. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Cir. 2021).. At oral argument, however, Thomas changed his position and argued that the Court should apply the *Pasula-Robinette* standard instead. *Id.* It is of great significance that the Secretary of Labor—the indispensable party charged with interpretation of the Mine Act—was not a party to this case and did not participate at any of the stages of this proceeding, including at argument before the Ninth Circuit.

The Commission had unanimously ruled that there was no evidence whatsoever that CalPort's termination of Thomas was motivated at all by protected activity. Thus, it is immaterial to the resolution of this case whether in future cases the Commission and Courts should require the Secretary to offer an interpretation of section 105 that replaces the *Pasula-Robinette* test with a more stringent "but-or" test of causation. We know with certainty that the miner in this case failed to introduce evidence that would satisfy any test of causation—from the *Pasula-Robinette* test's requirement of "some motivation" to the most stringent conceivable application of a "but-for" causation standard. The Commission found and the Ninth Circuit did not disagree that there is simply no evidence of causation in this case. Yet rather than affirm the Commission, the Court purported to

"reverse" the Commission (even though it did not disagree with our review of the evidence in the case or our decision to dismiss it) in an opinion directing the Commission to revise its interpretation of section 105(c) as applied in discrimination cases and first announced in *Pasula-Robinette*. Unfortunately, that direction results from some confusion as to the role of the Secretary and Commission under the Mine Act's somewhat unique split-enforcement scheme.

The Ninth Circuit panel wrote that under the well-known *Chevron* doctrine it "need not consider the Commission's interpretation because the statutory text is unambiguous." 993 F.3d at 1211. Of course, the Commission is not responsible for interpreting section 105(c) of the Mine Act, its role is to review the Secretary of Labor's interpretation. "Since the Secretary of Labor is charged with responsibility for implementing this Act . . . the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 95-181, at 49 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). Because the Secretary has not yet proffered an interpretation of section 105(c) in light of case law purportedly requiring a 'but-for' standard of causation, the Ninth Circuit in this case did not (and could not have) correctly applied the *Chevron* doctrine in this case.[2]

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[2]The Court addressed the precise question of whether the existing legal standard for making a prima facie case under section 105(c)—the *Pasula-Robinette* standard—was incompatible with recent caselaw addressing the text of the Mine Act and answered in the affirmative. What the Court did not do (and could not have

This confusion manifested itself again in the Court's final direction to the Commission on remand in which they state that it "is for the Commission to apply the but-for standard to this case in the first instance on remand." 993 F.3d at 1211. Of course, it is not for the Commission but for the Secretary of Labor to interpret section 105(c) in the first instance. The Commission and Courts are to provide deferential review.[3]

The Secretary of Labor is not a party to this case, and this is therefore not an appropriate case to litigate or announce a revised interpretation of section 105(c), especially since this case can (and has been) resolved without engaging in such reinterpretation. The Commission has already unanimously held that this case should be dismissed for lack of evidence of unlawful motivation under *any* standard of causation—whether *Pasula-Robinette*, or some yet to be articulated version of the "but-for" test. The Ninth Circuit did not disagree.

On remand, the Judge must be cautious not to usurp the Secretary's role interpreting section 105(c). The Judge need not stray far from the Commission's prior decision, undisturbed by the Ninth Circuit's review,[4]

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done) is apply *Chevron* review to the Secretary's new interpretation of section 105(c) accommodating a but-for causation element.

[3] We cannot in this litigation know how the Secretary might choose to interpret section 105(c) in a future case in which he must demonstrate "but-for" causation to make out a prima facie case of discrimination.

[4] The Court did not find any error with the Commission's unanimous conclusion that the record in this case is devoid of any

to demonstrate that Thomas' complaint fails for lack of any evidence of unlawful motivation under any conceivable formulation of the "but-for" causation requirement. But interpreting section 105(c) in the first instance to arrive at a new test for discrimination that includes a "but-for" causation requirement is the role of the Secretary, not the Judge, Commission or Courts.

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

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evidence that protected activity motivated the miner's termination.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert THOMAS, *Petitioner*, v. CALPORTLAND COMPANY; Federal Mine Safety and Health Review Commission, *Respondents*.	No. 20-70541

Argued and Submitted December 10, 2020 Seattle, Washington

Filed April 14, 2021

Synopsis

Background: Former dredge operator brought action challenging the decision of the Federal Mine Safety and Health Review Commission, denying operator's discrimination claim against employer under the Federal Mine Safety and Health Act.

[Holding:] The Court of Appeals, Hunsaker, Circuit Judge, in a matter of first impression, held that claim under antidiscrimination provision of the Federal

Mine Safety and Health Act required showing of "but-for" causation.

Petition granted; remanded.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (9)

[1] **Labor and Employment** Review

The Court of Appeals reviews the Federal Mine Safety and Health Review Commission's interpretation of a statute de novo and its factual findings for substantial evidence.

1 Case that cites this headnote

[2] **Administrative Law and Procedure** Plain, literal, or clear meaning; ambiguity or silence

Statutes Plain Language; Plain, Ordinary, or Common Meaning

If a statute's meaning is plain, that is the end of the matter, and a court interpreting the statute need not defer to the interpretation of an administrative agency.

2 Cases that cite this headnote

[3] **Administrative Law and Procedure** Substantial evidence

"Substantial evidence," as applied to judicial review of an administrative agency decision, means more than a mere scintilla but less than a preponderance; it is an extremely deferential standard.

149 Cases that cite this headnote

[4] **Labor and Employment** Purpose

Purpose of the Federal Mine Safety and Health Act is to ensure safety of miners. Federal Mine Safety and Health Act of 1977 § 3, 30 U.S.C.A. § 802.

1 Case that cites this headnote

[5] **Labor and Employment** Purpose and construction in general

Labor and Employment Purpose

One purpose of the Federal Mine Safety and Health Act is to protect against discrimination or interference with protected activity. Federal Mine Safety and Health Act of 1977 § 105, 30 U.S.C.A. § 815(c).

2 Cases that cite this headnote

[6] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

Statutes Context

The ordinary meaning of statutory language may not control a court's interpretation of the statute when there is textual or contextual indication to the contrary.

[7] **Civil Rights** Practices prohibited or required in general; elements

In the Title VII employment discrimination context, applying the but-for causation standard means the employer cannot avoid liability just by

citing some other factor that contributed to its challenged employment decision. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Case that cites this headnote

[8] **Labor and Employment** Causal connection; temporal proximity

Claim under anti-discrimination provision of the Federal Mine Safety and Health Act, prohibiting discharge or other adverse employment action against a mine worker because of complaints of safety or health violations in a mine, required showing of but-for causation. Federal Mine Safety and Health Act of 1977 § 105, 30 U.S.C.A. § 815(c)(1).

1 Case that cites this headnote

More cases on this issue

[9] **Labor and Employment** Review

Federal Mine Safety and Health Review Commission is statutorily bound to review an ALJ's factual findings for substantial evidence, and it errs if it substitutes competing view of facts for view ALJ reasonably reached. Federal Mine Safety and Health Act of 1977 § 3, 30 U.S.C.A. § 802.

1 Case that cites this headnote

On Petition for Review of an Order of the Federal Mine Safety and Health Review Commission, MSHR No. WEST 2018-402-DM

Attorneys and Law Firms

Colin F. McHugh (argued), Trevor Cartales, and Alex Higgins, Navigate Law Group, Vancouver, Washington, for Petitioner.

Brian P. Lundgren (argued), Jackson Lewis P.C., Seattle, Washington, for Respondents.

Before: M. Margaret McKeown, Danielle J. Hunsaker, and Patrick J. Bumatay, Circuit Judges.

OPINION

HUNSAKER, Circuit Judge:

Robert Thomas—a dredge operator—claims his former employer CalPortland Company discriminated against him for engaging in protected activities related to safety issues. In this appeal, Thomas challenges the Federal Mine Safety and Health Review Commission's (Commission) conclusion that he failed to prove a prima facie case of discrimination under Section 105(c) of the Mine Safety and Health Act (Mine Act). Interpreting Section 105(c) in light of recent Supreme Court precedent, we conclude the Commission applied the wrong causation standard, and we grant the petition and remand.

I. BACKGROUND

A. The Sanderling's dredging operation

CalPortland operates the Sanderling, a 220-foot dredge, on the Columbia River. Like its much smaller avian namesake, the Sanderling sucks. Specifically, it sucks sand from the riverbed, deposits it in compartments on the deck, and—with a push from its towboat, the Johnny Peterson—transports the sand to CalPortland's Vancouver, Washington facility. Once there, the crew unloads the sand with water cannons,

creating a slurry that flows from the Sanderling to a settling pond via underground pipes.

The Sanderling dredge is not just a boat—it is classified as a surface mine and, accordingly, is regulated by the Mine Act, 30 U.S.C. § 803. The Mine Act subjects mine operators, like CalPortland, to a variety of requirements, including safety standards and employment practices. CalPortland and the Mine Safety and Health Administration (MSHA) often work together collaboratively; for example, MSHA reviewed and approved CalPortland's Sanderling fall-protection safety training. To verify CalPortland's compliance, MSHA inspectors examine CalPortland's mining facilities, including the Sanderling.

The Sanderling's crew includes Thomas, dredge operator, and Joel McMillan, deckhand. Helming the towboat and rounding out the crew is the captain of the Johnny Peterson, a third-party contractor. The shore operations include CalPortland's marine manager, Dean Demers, who oversees and has management authority over the Sanderling and her crew. Demers reports to CalPortland's general manager of aggregates for Oregon material, David McAuley. McAuley works with CalPortland's safety manager, Jeff Woods, and human resources manager, Candy Strickland.

B. Work-schedule dispute

Thomas started working for CalPortland in 2002 as a deckhand. In 2015, he was promoted to dredge operator— the Sanderling's person in charge (PIC). *See* 30 C.F.R. § 56.18009. Two years later, in July 2017, Demers became CalPortland's marine manager. As marine manager, Demers led safety investigations

involving the Sanderling and her crew. He also played a leading role in disciplining Sanderling crew members, in consultation with McAuley and Strickland, but delivering any disciplinary message, including termination, himself.

Sometime in fall 2017, Thomas and McMillan complained to Demers that the lack of other crew members forced them to work long hours, without relief. While Demers responded that "he was working on it," Thomas and McMillan did not believe he was sincere. Although Thomas testified that working such long hours was unsafe, he did not say that he told Demers about his safety concerns and Demers testified that Thomas did not. In response to Thomas's and McMillan's complaints about long hours, Demers moved several CalPortland miners from rock barges to the Sanderling to relieve Thomas and McMillan. Thomas and McMillan testified that these miners were inadequately trained, however, and they refused to sign off on the training forms for these miners.

C. Thomas's safety violation

On January 24, 2018, an MSHA inspector spotted Thomas working on the Sanderling without his personal flotation device (PFD) as the dredge arrived in Vancouver. According to Thomas, he removed his PFD while welding to prevent it from catching fire. According to the MSHA inspector, he saw Thomas on a ladder without his PFD—an egregious safety violation. The inspector and Thomas discussed the incident on deck, and Thomas admitted that he was not wearing his PFD for some period of time but disputed he was on a ladder without it on. Thomas

informed Demers of his conversation with the inspector and went home.

D. CalPortland's disciplinary actions

The next morning, Thomas returned to work and discussed the incident again with Demers and the inspector. Thomas and the inspector continued to disagree about whether Thomas was on the ladder without his PFD. After the conversation, Demers and McAuley decided to suspend Thomas pending investigation. As Thomas had already returned to the Sanderling, Demers called ahead and told McMillan he was on his way to "get rid of [Thomas]," instructing McMillan to ensure Thomas did not leave.

On January 29, Demers and Woods interviewed Thomas. They provided Thomas with the MSHA inspector's statement and Thomas responded that "this whole thing is nothing but a sham." Woods left thereafter, and Thomas filled out a more detailed report. Later that afternoon, Strickland, McAuley, and Demers met to discuss the situation and decided that Demers would begin drafting a discipline recommendation. Demers sent his first draft to Strickland—recommending termination—that day.

The following afternoon, Demers mistakenly emailed the second draft of his discipline recommendation—still recommending termination—to the entire barge-scheduling email list, which included Thomas. When Thomas read the email the morning of January 31, he immediately canceled his scheduled meeting with Demers and hired an attorney, believing he had been terminated.

On February 1, McAuley called Thomas at home. Thomas instructed McAuley to direct all further

communications to his attorney. That same day, Strickland decided to begin the voluntary resignation process based on Thomas's refusal to communicate. She sent two letters to Thomas indicating he had until February 8, 2018, to respond or CalPortland would consider him to have voluntarily resigned; Thomas rejected delivery of both letters. On February 9, Strickland sent Thomas another letter confirming Thomas's voluntary resignation; again, Thomas rejected it.

E. Thomas's discrimination claim

Thomas filed a written discrimination complaint with MSHA, alleging he was disciplined and ultimately terminated for engaging in protected activity regarding his safety concerns and his safety violation. MSHA declined to pursue the discrimination claim on Thomas's behalf, and Thomas filed a Section 105(c)(3) action with the Commission, which CalPortland contested. After a hearing, the Administrative Law Judge (ALJ) found for Thomas, concluding that CalPortland took adverse action against him because of his protected activity, including speaking with the MSHA inspector after the inspector observed Thomas's safety violation and reporting his concerns about safety and insufficient crew training to CalPortland. CalPortland petitioned for administrative review, which was granted, and the Commission reversed the ALJ's finding of discrimination and dismissed the case. Thomas now petitions our court for review.

II. STANDARD OF REVIEW

We review the Commission's interpretation of a statute de novo and its factual findings for substantial

evidence. *See Stillwater Mining Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 142 F.3d 1179, 1183 (9th Cir. 1998); *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 157 (4th Cir. 2016). If the statute's meaning is plain, "that is the end of the matter," and we need not defer to the Commission's interpretation. *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001); *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see also Local Union* 1261, Dist. 22, *United Mine Workers of Am. v. Fed. Mine Safety & Health Review Comm'n*, 917 F.2d 42, 44 (D.C. Cir. 1990). Substantial evidence means "more than a mere scintilla[ ] but less than a preponderance;" it is an extremely deferential standard. *NLRB v. Int'l Bd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003) (citation omitted); *Velasquez-Gaspar v. Barr*, 976 F.3d 1062, 1064 (9th Cir. 2020).

III. DISCUSSION

"The purpose of the Mine Act is to ensure the safety of miners." *Cumberland River Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 712 F.3d 311, 317 (6th Cir. 2013) (citing 30 U.S.C. § 802). "The Mine Act also serves to protect against discrimination or interference with protected activity." *Id.* (citing 30 U.S.C. § 815(c)). In discrimination cases under Section 105(c) of the Mine Act, the Commission has applied the *Pasula-Robinette* framework. *Secretary ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (1980), rev'd on other grounds sub nom., *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *see also Cumberland River*, 712 F.3d at 317–18. Under this framework, a miner proves a prima facie case of discrimination by showing that: (1) he engaged in

protected activity and (2) was subject to an adverse action motivated "at least partially ... by his protected activity." *Cumberland River*, 712 F.3d at 318; *see also Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 88 (D.C. Cir. 1983). The mine operator may then rebut the prima facie case by showing: "(1) the miner was not engaged in any protected activity, or (2) the adverse employment action was not even partially motivated by the miner's protected activity." *Cumberland River*, 712 F.3d at 318. Or, if the mine operator cannot rebut the prima facie case, it may assert an affirmative defense by demonstrating—by a preponderance of evidence—that: (1) the adverse action was also motivated by the miner's unprotected activity; and (2) the adverse action would have been taken in response to the unprotected activity alone. *Id.* at 319.

We have never adopted the *Pasula-Robinette* framework in a published opinion. Indeed, it appears we have resolved only two discrimination appeals under Section 105(c) of the Mine Act, which both resulted in unpublished dispositions. *Bennett v. Fed. Mine Safety & Health Rev. Comm'n*, 12 F. App'x 492 (9th Cir. 2001); *Jaxun v. Fed. Mine Safety & Health Rev. Comm'n*, 408 F. App'x 70 (9th Cir. 2011). And of these two cases, only *Bennett* explicitly cites and applies the *Pasula-Robinette* framework. 12 F. App'x at 494.

On appeal, CalPortland argues that the *Pasula-Robinette* standard should no longer apply to Section 105(c) cases. In his reply brief, Thomas agreed that *Pasula-Robinette* conflicts with Supreme Court precedent. Specifically, in their briefing, both parties urged us to construe the word "because" in Section

105(c) to mean "but-for" causation, rather than the *Pasula-Robinette* partially motivated standard. Citing *Burrage*,[1] *Nassar*,[2] *Gross*,[3] and *Bostock*, the parties claimed that the *Pasula-Robinette* standard conflicts with the Court's instruction that the ordinary meaning of "because" incorporates the "simple and traditional standard of but-for causation." *Bostock v. Clayton Cnty.*, — U.S.—, 140 S. Ct. 1731, 1739, 207 L.Ed.2d 218 (2020) (internal quotation marks omitted) (citing *Nassar*, 570 U.S. at 346, 360, 133 S. Ct. 2517). At oral argument, however, Thomas changed his position and now argues that we should apply the *Pasula-Robinette* standard.

The recent Supreme Court precedent cited above strongly supports reading "because" to require a "but-for" causation analysis. In *Burrage*, *Nassar*, *Gross*, and *Bostock*, the Court considered the meaning of "because of" and similar phrases in various statutory schemes and concluded that the ordinary meaning mandates but-for causation. The Court noted, however, that the ordinary meaning may not control when there is "textual or contextual indication to the contrary." *Burrage*, 571 U.S. at 212, 134 S. Ct. 881. For example, in *Bostock*, the Court explained that Congress can avoid imposing liability under a but-for causation theory by drafting legislation that uses terms like "solely" and "primarily" to modify "because of." *Bostock*,

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[1] *Burrage v. United States*, 571 U.S. 204, 212–17, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014).

[2] *Univ. of Sw. Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–60, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013).

[3] *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174–80, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

140 S. Ct. at 1739. Such terms would modify the traditional but-for standard, indicating respectively that "actions taken 'because of' the confluence of multiple factors do not violate the law" or "the prohibited factor had to be the main cause of the defendant's challenged employment decision." *Id.* (noting that Congress can also draft a statute that uses a "motivating factor" causation standard). But absent such modifiers, the Court instructs us that "because of" means "but for." *Id.* And—at least in the Title VII context—a "but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision." *Id.*

Because we have not previously addressed the applicability of the *Pasula-Robinette* standard in the context now before us, the horizon is clear of binding precedent. *Pedroza v. BRB*, 624 F.3d 926, 931 (9th Cir. 2010) (explaining "an unpublished decision is not precedent"). We begin our interpretive exercise with the plain text of Section 105(c). *See Bottinelli v. Salazar*, 929 F.3d 1196, 1199 (9th Cir. 2019) (beginning and ending its statutory interpretation with the plain text). Section 105(c) prohibits a mine operator from discriminating against a miner "because" the miner engaged in protected activity. 30 U.S.C. § 815(c)(1). It protects against discrimination via the following language:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other

> mine subject to this chapter ***because*** such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ***or because*** such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title ***or because*** such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, ***or because*** of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

Id. (emphasis added). We note that Section 105(c) uses the term "because" four times, and each time without any modifiers. We also note that no other provision in Section 105(c) expands upon, or modifies, the substantive protections in the above quoted language—they merely describe the enforcement and adjudication process. *See id.* § 815(c)(2), (3).

The lack of modifiers before or after "because," and the ordinary meaning of "because," plainly indicate that Section 105(c) incorporates the "simple and traditional standard of but-for causation." *Bostock*, 140 S. Ct. at 1739 (internal quotation marks omitted)

(citation omitted). Had Congress wished to deviate from this "traditional background principle[ ] against which [it] legislate[s]," it would have provided a "textual or contextual indication." *Burrage*, 571 U.S. at 212–14, 134 S.Ct. 881 (internal quotation marks omitted) (citing *Nassar*, 570 U.S. at 347, 133 S. Ct. 2517). Yet nothing in the text of Section 105(c) or the surrounding provisions indicates that Congress attempted to deviate from the customary meaning. *See generally* 30 U.S.C. § 815. Section 105(c)'s plain meaning then requires a but-for causation standard for employment discrimination under the Mine Act.

In interpreting a different statute, we recently relied on *Gross* and *Nassar* to discard circuit precedent requiring a "motivating factor" test for causation. *Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 (9th Cir. 2019). In *Mayo Clinic*, the underlying statute, the ADA, used a phrase that "indicate[d] but-for causation" and did "not contain any explicit motivating factor language." *Id.* (internal quotation marks omitted). In holding that the relevant ADA provision required but-for causation, we looked only to the text of the provision at issue. *Id.* (noting also that "[the Court] must be careful not to apply the rules applicable under one statute to a different statute without careful and critical examination" (quoting *Gross*, 557 U.S. at 174, 129 S. Ct. 2343)). As *Mayo Clinic* extended the holdings of *Gross* and *Nassar* to a statute not at issue in those cases, we do not venture into uncharted waters by applying the "because means but-for" rule to the Mine Act. Indeed, as *Mayo Clinic* predated *Bostock*—which reinforced and amplified the holdings of *Gross* and *Nassar*—*Bostock* placed an additional marker by which to navigate.

Still, we consider the decisions of our sister circuits and the Commission. It appears that no circuit has considered whether to reject *Pasula-Robinette* based on the cases cited above, *see, e.g., Hopkins Cnty. Coal, LLC v. Acosta*, 875 F.3d 279, 288–89 (6th Cir. 2017); *Harrison Cnty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 790 F. App'x 210, 213 (D.C. Cir. 2019). However, in 2016, the Commission reconsidered *Pasula-Robinette* in light of *Gross* and *Nassar* and declined to change direction. *Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920, 2016 WL 5594252, at *6 (August 23, 2016). Under *Chevron*, we need not consider the Commission's interpretation because the statutory text is unambiguous, but we nonetheless explain why we find unpersuasive the Commission's decision not to adopt but-for causation despite *Nassar* and *Gross*.

In *Riordan*, the Commission stated that "[i]n both *Nassar* and *Gross*, the Supreme Court emphasized that the legislative history and context of the discrimination provisions were essential to interpreting what standard of causation applies" and concluded "the legislative history of the Mine Act affirmatively demonstrates that Congress envisioned such a burden-shifting framework when drafting the discrimination protections of section 105(c)(1)." *Id.* Even assuming the legislative history of the Mine Act weighs as strongly in favor of *Pasula-Robinette* as the Commission asserts, its premise for looking to the legislative history was flawed. In neither *Nassar* nor *Gross* did the Court look to the legislative history to determine the causation standard—much less "emphasize[ ]" it as the Commission claimed. *See Nassar*, 570 U.S. at 346, 133 S. Ct. 2517; *Gross*, 557

U.S. at 175–76, 129 S. Ct. 2343. Neither decision even used the phrase "legislative history." Instead, both decisions considered the text of the provision at issue and its context, e.g., how it fits into the statute as a whole and how the statute at issue compares to other similar statutes. *See Nassar*, 570 U.S. at 360, 133 S. Ct. 2517 ("Based on these textual and structural indications, the Court now concludes [but-for causation applies]..."); *Gross*, 557 U.S. at 175–76, 129 S. Ct. 2343 ("[The Court's] inquiry... must focus on the text."). Thus, the Commission overstated those decisions by arguing that their holdings flow from an analysis of legislative history.

IV. CONCLUSION

In the end, the only question we must answer is simple. Section 105(c)'s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation. Therefore, as the parties both requested originally, we reject the *Pasula-Robinette* framework. The Supreme Court has instructed multiple times that the word "because" in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise. Section 105(c) contains no such indication. And we drop anchor there because it is for the Commission to apply the but-for standard to this case in the first instance on remand.[4]

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[4] We further note the Commission is statutorily bound to review the ALJ's factual findings for substantial evidence, and it errs if it "substitute[s] a competing view of the facts for the view the ALJ reasonably reached." *Donovan ex rel. Chacon*, 709 F.2d at 92. Although we do not reach the issue, the Commission on remand should pay particular attention to Thomas's argument regarding

The petition for review is **GRANTED** and **REMANDED** to the Commission for further proceedings consistent with this opinion.

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whether the Commission appropriately deferred to the ALJ's factual findings and credibility determinations.

APPENDIX G

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 2004-1710

Jan 29 2020

ROBERT THOMAS	:	
v.	:	Docket No. WEST 2018-402-DM
CALPORTLAND COMPANY	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It involves a complaint filed by miner Robert Thomas alleging that CalPortland Company ("CalPort") discriminated against him in violation of the Mine Act. [1] After a Commission

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[1] The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against

Administrative Law Judge found that CalPort discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

For the reasons discussed below, we hold that the Judge erred in concluding that Thomas established a prima facie case of discrimination. Accordingly, we reverse the Judge's decision and dismiss this case.

I.

Factual and Procedural Background

A. Factual Summary

The Sanderling Dredge is a surface sand mine located in Vancouver, Washington. CalPort is the owner and operator of the dredge and is a mine operator subject to the jurisdiction of the Mine Act. Robert Thomas worked for CalPort in Oregon and Washington from March 2002, through the beginning of 2018. At the beginning of 2018, Thomas worked as a dredge operator on the Sanderling dredge with

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> ... any miner ... because such miner ... filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine, ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this chapter ....

30 U.S.C. § 815(c)(1).

deckhand Joel McMillan and Roger Ison, a contractor and captain of the Johnny Peterson tugboat. The Johnny Peterson pulls the Sanderling Dredge up and down the Columbia River between Vancouver, Washington, and Scappoose, Oregon. The Dredge requires two miners to operate it, and one person to operate the tugboat. Thomas was the most senior of the two dredge miners and was designated the Person in Charge ("PIC").[2] Tr. 40, 289; 40 FMSHRC 1503, 1504 (Dec. 2018) (ALJ).

At the beginning of 2017, when the mine changed from two shifts to a single day shift, the miners on the Sanderling Dredge began working long hours, sometimes around 80 hours per week. 40 FMSHRC at 1504. In July 2017, Dean Demers took over the job as Marine Manager, which gave him management authority over four sand and gravel barges, as well as the Sanderling Dredge. The barges under Demers' management are subject to the jurisdiction of the Occupational Safety and Health Administration ("OSHA") and the Sanderling Dredge is subject to the jurisdiction of the Mine Safety and Health Administration ("MSHA").

1. <u>Thomas' Concerns and the Phone Call Hang-up</u>

Thomas and McMillan grew concerned that working so many hours had resulted in them being exhausted, which caused difficulty in paying attention while working with equipment. The two men eventually voiced their concerns to Demers and asked for help to

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[2] 30 C.F.R. § 56.18009 requires that: "When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency."

avoid the long days and safety concerns. *Id*. Thomas had expressed his concerns to Demers as recently as November 2017. Tr. 118-20; 40 FMSHRC at 1504. Demers responded that he "was working on it" and subsequently brought in personnel from the rock barges to work some of the shifts. This alleviated the problem of long hours for Thomas. Tr. 120-21.

Thomas also believed that the barge workers were not receiving adequate task training to safely perform their work on the Dredge. Tr. 121-22. When asked by Demers to sign the task training sheets of the barge workers, Thomas refused, responding that the barge workers were not being properly trained in his view.[3] Tr. 122.

In November 2017, Thomas called Demers saying that he would not be coming into work the following day and would be taking a sick day. Tr. 123-24. A disagreement ensued and Thomas abruptly hung up the phone on Demers. Tr. 47-48, 123-24, 371, 445. McMillan testified that the next day Demers said to him that "after the way Rob talked to him on the phone that Rob Thomas was done, he was f****** done at CalPortland." Tr. 48, 88. Thereafter, Thomas met with Demers and Candy Strickland in CalPort's Human Resources Department ("HR") to resolve the incident, which included discussing protocol, the proper way to call out sick, and how to communicate with your manager and peers in a professional manner. Tr. 445. CalPort did not discipline Thomas for this

[3] Generally, Demers signed off on task training records as the "person responsible for health and safety training," while Thomas or McMillan were the competent persons conducting the training. Tr. 414-16.

incident, and Thomas testified at the hearing that after the meeting "everything was fine." Tr. 202.

2. The Personal Flotation Device Incident and Suspension

At the end of the shift on January 24, 2018, the Sanderling Dredge was traveling downriver on its return to the dock in Vancouver. Thomas and McMillan were changing out a valve above deck on the dredge, which sits 14 feet above the waterline. Thomas stood on the ladder to help lower the valve down from its position. He and McMillan testified that they were both wearing their personal flotation devices ("PFDs") during the change out. McMillan then climbed up on the ladder in order to weld the studs while Thomas went to perform another task. As McMillan was welding, Thomas removed his PFD and hung it outside of the lever room, then walked over to the welding table, in the middle of the barge, to use the cutting torch.

At some point, McMillan had to pause his work and go over to the tugboat to help Ison with a transmission problem. He was gone for about 30 minutes during which he did not see Thomas working. As McMillan was returning to the dredge, and as Thomas had just completed cutting and was putting his PFD back on, they noticed MSHA Inspector Mathew Johnson standing on the dock. Tr. 51-57, 61, 124-25, 131-34; 40 FMSHRC at 1505.

As the dredge neared the dock, Inspector Johnson called out and asked if it was company policy to *not* wear a PFD. Thomas responded that CalPort's policy requires miners to wear PFDs. Once in port, Thomas admitted to Inspector Johnson that he had not worn

his PFD while operating the cutting torch at the welding table. Thomas then called Demers, who was working at a different location, to explain what had happened and then handed the phone to Inspector Johnson. After speaking with Demers, Inspector Johnson completed his inspection of the dredge and issued a citation to CalPort for Thomas' failure to wear a safety device or to be tied off while working on the open portion of a dredge.[4] 40 FMSHRC at 1506. The inspector determined that Thomas engaged in aggravated conduct. He deemed the action an unwarrantable failure and a significant and substantial violation that could reasonably likely result in a fatality.[5]

The next day, Thomas told Demers that he was not on the ladder without his PFD.[6] Tr. 139. Inspector Johnson returned that day and met with Demers to discuss the previous day's violation. Demers called Thomas to join them. Thomas and Inspector Johnson disagreed about whether Thomas was on the ladder without his PFD. Tr. 141, 380-81. After Inspector Johnson left, Thomas returned to the tugboat to help McMillan, and Demers called David McAuley, CalPort's Regional Operations General Manager, to

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[4] 30 C.F.R. § 56.15020 states that: "Life jackets or belts shall be worn where there is danger from falling into water."

[5] McMillan also testified that Johnson told Thomas that he could be cited personally for the violation and that it could be a fireable offense, although unlikely, given Thomas' history of having no safety violations. Tr. 62.

[6] McMillan's position on whether or not Thomas was on the ladder without his PFD was inconsistent. Thomas Ex. 5; Tr. 54-55, 82-83.

discuss the matter. Based on the differing versions of events by Inspector Johnson and Thomas, McAuley and Demers decided to suspend Thomas, without pay, pending further investigation. Having decided to suspend Thomas, Demers called the dock and instructed McMillan not to let Thomas go because he needed to come down to "get rid of him." Tr. 67.

During the course of Thomas' career at Calport, the record reflects that he had been involved in a previous disciplinary incident in 2012. He received a verbal warning, as well as a three-day suspension for violating company work rules after it was determined that he lied to government and CalPort officials during an investigation. Decl. of Erik M. Laiho, Ex. L at 1; Tr. 203-04.

3. <u>The Draft Disciplinary Recommendation and Premature E-mail</u>

Demers returned to the Dredge to notify Thomas that he was suspended pending an investigation. Tr. 142, 179, 180, 182-83. Thomas gathered his things and punched out for the day. The next morning, Demers contacted Thomas and asked him to provide a written statement about the incident that led to the citation. Thomas prepared and emailed his statement to Demers two days later. Tr. 142; Thomas Ex. 19. On Saturday, January 27, Demers called Thomas and asked him to come to the office on Monday, January 29, at 8:00 a.m.

When Thomas arrived that Monday, he met with Demers and Safety Manager Jeff Woods. Demers read the narrative portion of the MSHA citation aloud to Thomas. Thomas disagreed with the inspector's statement, proclaiming that: "This whole thing is

nothing but a sham[].... It's completely false." Tr. 145, 386. Woods asked Thomas if it was common practice for Thomas to not wear his PFD. Thomas refused to answer the question saying that he did not believe they would listen to him and he did not want to "incriminate [him]self." Tr. 145, 385-86, 438. While at the meeting, Thomas was asked to fill out an employee incident report and to submit a lengthier statement, which he completed at home and emailed to Demers that afternoon. McMillan also completed an employee incident report that same day.

Following the meeting with Thomas, Demers met with McAuley and Strickland to discuss the matter further. McAuley asked Demers to work with Strickland to prepare a draft disciplinary recommendation. Demers sent the first draft of his recommendation in an email to Strickland entitled "Wordsmith Please" the same day. Tr. 306-07, 387, 443, 448; CPC Ex. N at 1. On January 30, Strickland, Demers, and McAuley participated in a meeting with upper management to brief them on the situation with Thomas. Demers was asked to set up another meeting with Thomas for 11:00 a.m. the next day, which he did.

After the management meeting, Demers sent a second draft of his recommendation to Strickland in an email entitled "Wordsmith Take II," attaching an unsigned and undated draft corrective action form. CPC Ex. N at 2-7. The form contained Demers' recommendation to discharge Thomas based on Thomas' violation of the PFD rule, his lack of cooperation with the company investigation, and his

perceived lack of candor.[7] CPC Ex. N at 4-5. Mistakenly, Demers' had also sent the same email to the barge scheduling list, which included Thomas, other employees of CalPort, and contractors. Demers attempted to recall the email immediately. He then sent a follow-up email, which stated "Please delete last e-mail it was sent by mistake." Tr. 389-93; CPC Ex. N at 8. He also contacted McAuley and Strickland to let them know what had happened.[8]

4. <u>The Engagement of Thomas' Attorney</u>

Around 6:30 a.m. the following morning, January 31, Thomas was preparing to go to the 11:00 a.m. meeting when he received a phone call from Ison, the tugboat

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[7] In part, the memorandum states:

> Your explanation of what took place does not match what others had to say. During the interview, you were asked 'if it was normal policy to take off your PFD to conduct hot work' and you refused to answer the question. During the interview, you were uncooperative and aggravated with the questioning. You also stated that you thought that the whole process was 'a sham.' However, you admit to being on deck conducting work underway without wearing a PFD. It is impossible to work on that valve without a ladder or something to stand on.

CPC Ex. Nat 5.

[8] Demers thereafter received a written warning from McAuley for his mishandling of the sensitive email. Tr. 314-15; CPC Ex. 0.

captain, telling him to check his email. When Thomas checked, he saw the email from Demers containing the corrective action stating "that [he] was terminated effective immediately," and that the email had been sent to his co-workers and to contractors. Tr. 149; Thomas Exs. 1 and 2, 71; CPC. Ex. N at 4-6. Thomas notified his wife that he had been terminated and then texted Demers to let him know that he would not attend the 11:00 a.m. meeting. There is no evidence that Thomas told Demers that he had seen his termination email. That same afternoon, Thomas hired an attorney and directed his attorney to send a letter to Demers and CalPort about his intent to file a discrimination claim against them. [9] Tr. 155-56. CalPort witnesses testified that they did not receive anything from Thomas' counsel until February 13. Tr. 158, 191.

The following morning, Thomas received a call from McAuley on his personal cell phone. With his stepdaughter present, and before hanging up, Thomas told McAuley that he should not be calling him on his personal phone, not to call him again, and to contact him by mail or contact his attorney.[10] Tr. 156-57, 186, 318-19, 452; CPC Ex. P. There is no evidence that the termination email was mentioned during the call. After speaking with Thomas, McAuley contacted

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[9] Counsel for Thomas alleged that on February 2, 2018, he sent an email to Demers containing a letter notifying CalPort that Thomas was now being represented by an attorney. Demers testified that he did not receive the email until February 13 and that it did not have a letter attached. Tr. 157-160, 421-22.

[10] McAuley testified that he did not recall hearing Thomas mention an attorney during that phone call. Tr. 319-20.

Strickland the same day to discuss the situation, and they collectively determined that the matter was now one for HR to address. In light of Thomas' comments to McAuley and his failure to come in for the meeting, Strickland immediately began working on a letter advising Thomas that a failure to contact the company would result in his discharge.

5. <u>The Voluntary Resignation</u>

On February 2, Strickland was directed to begin processing a "voluntary resignation" for Thomas based on his actions foreshadowing violation of the company's attendance policy. CPC Ex. FF at 3. That same day, she drafted the letter to Thomas informing him that his continued silence would result in his voluntary resignation. That Monday, February 5, Strickland sent the letter to Thomas via standard mail and UPS, which stated that if Thomas did not contact HR by Thursday, February 8, "he will be considered to have voluntarily resigned." Tr. 456-57; CPC Ex. R. Thomas refused receipt of both copies of the letter and did not forward them on to his attorney. 40 FMSHRC at 1507-08.

On February 5 and 6, Demers spoke with MSHA Special Investigator Diane Watson who indicated that "she wasn't going to open a 101 case against Rob because she knew he had been terminated," and that he may be filing a "decimation" law suit.[11] Tr. 106-07,

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[11] While the Judge stated in her finding of facts that Watson said "discrimination" complaint, CalPort refutes the Judge's description and maintains that Watson said "defamation" complaint. Demers wrote "decimation" law suit in his notes. CPC PH Br. at 17-19; PDR at 22; CPC Op. Br. at 5, 17; Tr. 405-06; Ex.

403-05; Thomas Ex. 61. The following day, Demers called Watson back, in accordance with McAuley's instructions, to tell her that Thomas had not been "terminated."[12] On February 9, after Thomas did not respond to the letter of February 5, CalPort sent Thomas another letter, notifying him of his voluntary resignation.

6. <u>The Discrimination Complaint</u>

Thomas filed his written discrimination complaint with MSHA on February 13, 2018, pursuant to section 105(c)(2) of the Act.[13] Tr. 206; Thomas Ex. 46; 40 FMSHRC at 1508-09. He did not request temporary reinstatement. His attorney reviewed the complaint before it was filed. Oral Arg. Tr. 63. On February 21, 2018, MSHA Investigator Watson emailed Demers to notify CalPort that Thomas had filed a section l05(c)(2) complaint. Two months later, on April 23, 2018,

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61; 40 FMSHRC at 1508. The Judge did not resolve the discrepancy in her decision.

[12] The Judge inaccurately stated that "Demers told McAuley that Thomas thought he had been terminated *based on Demers' January 30 email*." 40 FMSHRC at 1508 (emphasis added). According to Demers' testimony, which is consistent with McAuley's, Demers simply stated that Watson said that she understood that Thomas had been terminated. Tr. 323-24, 404. Demers never stated that Thomas believed he was terminated based on Demers' action.

[13] 30 U.S.C. § 815(c)(2) states that: "Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary ... shall cause such investigation to be made as he deems appropriate."

MSHA declined to pursue a discrimination case on Thomas' behalf. *See* Thomas Compl. Ex. 1. On May 23, 2018, Thomas filed a section 105(c)(3) complaint with the Commission, which was contested by CalPort on June 18, 2018.[14]

B. The Judge's Decision

After a hearing on the merits, the Judge issued a decision finding that CalPort had discriminated against Thomas in violation of the Mine Act and awarded Thomas back pay, lost benefits, and attorney's fees. 40 FMSHRC at 1517-18. The Judge found that Thomas engaged in four activities protected by the Act. First, she determined that Thomas' discussions with Inspector Johnson, beginning on January 24 arising from his unwarrantable failure to wear his PFD, were protected. Second, she found that he complained to Demers that he was tired from

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[14] 30 U.S.C. § 815(c)(3) states that:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

working so many hours, and that he could not concentrate, making it unsafe. Third, she found that Thomas expressed concern about the lack of task training for the rock barge employees. Lastly, she determined that Thomas let the mine know that he had hired an attorney and the mine was alerted that Thomas was filing this discrimination complaint with MSHA.[15] 40 FMSHRC at 1509.

The Judge also determined that there was adverse action against Thomas demonstrated by his suspension pending investigation, his termination under the company's voluntary resignation policy, and the accidental termination email sent out by Demers. In finding the elements of knowledge and timing most persuasive, she concluded that there was "sufficient circumstantial evidence to demonstrate a connection between Thomas' discharge and his protected activity." *Id.* at 1512.

II.

The Standard of Review

A. Substantial Evidence

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

[15] The Judge did not find the call between Thomas and Demers regarding sick leave to be protected activity.

U.S. 197, 229 (1938)). Under the substantial evidence test, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996).

B. Prima Facie Case of Discrimination

The Commission has held that a complaint alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Jayson Turner v. Nat'l Cement Co.,* 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.,* 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 805, 817-18 (Apr. 1981).

The Complainant bears the burden of establishing protected activity. *Pasula,* 2 FMSHRC at 2797-2800, *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); *SOL on behalf of Riordan v. Knox Creek Coal Corp.,* 38 FMSHRC 1914, 1920-21 (2016). "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510 (Nov. 1981).

In evaluating whether there exists a causal connection between the protected activity and the adverse action, the Commission has identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510.

It is upon these standards that we find that the Judge erred in concluding that Thomas had established a prima facie case of discrimination.

III.

Disposition

Thomas failed to introduce any evidence that his suspension and eventual discharge were in any way motivated by protected activity. In fact, the available evidence strongly suggests that the adverse actions he experienced were direct results of his own unprotected and dangerous activity of failing to wear a PFD and his walking away from the operator's necessary investigation.

Citing *Hatfield v. Colquest Energy, Inc.,* 13 FMSHRC 544 (Apr. 1991), the operator argued before the Judge and the Commission that Thomas' claim must be limited to the protected activities alleged in his initial section 105(c)(2) complaint because issues regarding his work hours, task training, and intent to file suit were not included in his section 105(c)(2) complaint, and thus, not investigated by MSHA. In *Hatfield,* the Commission held that a miner's section 105(c)(3) complaint could include any matter investigated by MSHA in response to the section

105(c)(2) complaint. *Id.* at 545-46. We need not address the operator's *Hatfield* objection. We do address those claims below only for the purpose of completeness and in case of appeal to show that even were we to consider activities beyond those arising out of Thomas' responding to the Inspector in January 2019, substantial evidence could not support a finding in Thomas' favor. Consequently, our discussion of those alleged activities does not portend any change in *Hatfield*. It only demonstrates that the evidence does not support the Judge's decision under any conceivable theory.

A. Cooperation with MSHA Inspection

The Judge found Thomas' cooperation with the MSHA inspection on January 24, to be protected. However, neither Thomas nor the Judge was able to identify any signs of hostility, circumstantial or direct, displayed by CalPort regarding Thomas' cooperation with MSHA Inspector Johnson. 40 FMSHRC at 1510-12. Instead, CalPort engaged in the necessary task of evaluating the circumstances resulting in issuance of an unwarrantable failure order.[16]

Thomas conceded at the hearing that the company did not display any animus or hostility towards his participation in the inspection. Tr. 208. Additionally, given Inspector Johnson's eyewitness account of

[16] As to the factors set forth in *Chacon* that might demonstrate motivation, CalPort obviously learned almost immediately from the MSHA Inspector that Thomas had committed a violation by failing to comply with CalPort's PFD policy and acted, as it should, to investigate such wrongful misconduct. Such events, therefore, were necessarily close in time and do not indicate any discrimination.

Thomas' unsafe and violative conduct, the circumstances compelled Thomas' cooperation. There is no evidence that CalPort officials were upset with or suspended him because of his necessary cooperation in MSHA's investigation. Clearly, their investigation and meetings with him arose out of, and only out of, his failure to wear a PFD.[17]

B. Complaints about Long Hours

The evidence does not support a finding of any adverse action motivated by the complaint over hours. The Judge did not consider Thomas' continued testimony where he explained that "he knew [Demers] had a lot on his plate. … [H]e was trying to man – take care of three barges, shorthanded, and taking care of a new item, the dredge, Sanderling." Tr. 120-21. Demers explained to McMillan that he had a stack of applications, that he was trying to find someone, and that several successful applicants made it through the hiring process but turned out to be uninsurable due to DUIs. Tr. 79. McMillan did not testify that he felt or saw animus towards his request.

Thomas was asked if he thought that Demers did anything to alleviate his concerns about the hours, and even Thomas testified: "Yes, he started bringing out the rock barge guys . . ." Tr. 121; *see also* Tr. 43-44. He further stated that Demers' solution to this complaint resolved the issue of excessive hours for him.

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[17] Moreover, Thomas was well aware that company policy required his full participation with government investigations. In the 2012 incident, Thomas was disciplined for making false statements to government investigators and failing to cooperate with an investigation. He was specifically warned that such behavior could lead to termination in the future.

Tr. 210. Thomas conceded that Demers' response to his request to work fewer hours was not one of animosity or hostility. Tr. 208-11. Contrary to the Judge's determination, there was more than ample evidence through Thomas' own words that Demers did not develop animus toward Thomas as a result of his complaint about the hours being worked.[18]

C. Complaint about Task Training

The Judge found that the barge workers worked under OSHA regulations, and that they required task-training and "an introduction to MSHA regulations." 40 FMSHRC at 1505. However, the record shows that while the barge workers may have required task training for the Dredge, CalPort's dredge and barge workers are all trained miners. Tr. 210, 229. CalPort's Corporate Safety Director Chad Blanchard testified, without contradiction, that its employees undergo MSHA new employment training during their new-hire orientation and are trained in waterborne safety and their discrimination rights. There is undisputed testimony that CalPort had its task training records inspected by MSHA in December 2017 and March 2018, with no citations issued. Tr. 418; CPC Exs. DD, EE. There is no indication that

[18] The Judge relied on Demers' statement that "Rob Thomas is f--ing done." 40 FMSHRC at 1511. But this was not in response to the conversation involving hours. Rather, it resulted from a discussion of a sick day not found by the Judge to be protected activity. Moreover, the facts suggest the comment resulted from Thomas' insubordinate behavior of hanging up on Demers in the middle of the conversation on the prior day. There is no evidence to link that statement to any safety complaints. Finally, Thomas testified that after he and Demers discussed the telephone call "everything was fine." Tr. 202.

MSHA found it improper that the person signing off on the task-training sheets was different from the "competent person" conducting the training.

There is no testimony or other evidence regarding Demers' response to Thomas' complaints about the lack of task training for the substitute miners. Obviously, there are many reasons unrelated to animus towards safety that might lead to not discussing Thomas' action, including, most likely, that Demers was not concerned by Thomas' refusal. Establishing discriminatory motivation as part of a complainant's prima facie case requires more than a lack of responsiveness to a miner's action. Again, it is most compelling that Thomas explicitly testified that he did not sense animus from Demers regarding his complaints, and he agreed that he did not believe anything MSHA-related motivated CalPort to take an adverse action against him. Tr. 205-08.

Moreover, McMillan made the same complaints and refused to sign task training sheets, just as Thomas. McMillan did not suffer any adverse action by Demers or any other CalPort official. *See Metz v. Carmeuse Lime,* 34 FMSHRC 1820, 1827 (Aug. 2012) (finding operator lacked animus against complainant's safety-related complaints where other employees complained of same safety issue and none of them experienced retaliation).

D. Notice of Legal Action

The first sign that Thomas was involving an attorney occurred on February 1, 2018, two days *after* Demers had already made his recommendation to terminate Thomas' employment on January 30, 2018. That was also six days *after* he was suspended pending

investigation. Thus, any adverse action experienced by Thomas prior to February 1 cannot be attributed to Thomas' decision to involve his lawyer. According to the Judge's finding of fact, CalPort became aware of the discrimination complaint by February 6. 40 FMSHRC at 1509. That was four days *after* the decision was made to process Thomas as a voluntary resignation based on the company's last communication with Thomas about CalPort's attendance policy.

Thomas has not presented any evidence demonstrating that, after his February 1 statement that he was involving his lawyer, Demers, McAuley, Strickland, or any other CalPort official even knew of, let alone, harbored or directed any animus towards Thomas' decision to involve an attorney. Since February 1, Thomas had refused to communicate with his employer. Prior to issuing the voluntary resignation on February 9, CalPort made several attempts to reach Thomas to resolve the communication breakdown. He refused to communicate or even open his mail thereby choosing to forego the possibility of being retained as an employee.

Thus, there is insufficient evidence to support a finding that any animus resulted from Thomas' alleged protected activity. To the contrary, the evidence demonstrates that Thomas' suspension and then discharge arose from actions other than protected activity. These actions are, at least, the commission of an unwarrantable failure, his uncooperative and disrespectful conduct in a meeting with company personnel, and, ultimately, his ill-considered refusal to

take or respond to calls and mail asking that he come to the office to discuss his situation.

III.
Conclusion

In conclusion, we hold that there is not substantial evidence in the record to establish that any protected activity by Thomas motivated the operator in any part to take any adverse action toward him. For the reasons set forth above, we reverse the Judge's finding of discrimination by CalPort and dismiss this case.

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

s/Michael G. Young
Michael G. Young, Commissioner

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

Commissioners Jordan and Traynor, concurring:

We concur with the majority, but write separately to address more fully the Respondent's argument that our decision in *Hatfield v. Colquest Energy Inc.,* 13 FMSHRC 544 (Apr. 1991), precludes our Judges from considering evidence of certain protected activities when examining what motivated a properly pled adverse action.

Section 105(c) of the Mine Act provides to miners a full administrative investigation and evaluation of an allegation of discrimination, as well as the right to commence a private action before the Commission in the event that the Secretary's administrative evaluation results in a determination that there is not evidence that the provisions of section 105(c) were violated. Section 105(c)(2) provides that, upon receipt of a complaint of discrimination or interference, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . . " 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Act provides that, if the Secretary determines he has not found evidence that a violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Though section 105(c) contains no explicit restriction on the subjects a miner may include in the action he files on his own behalf, the structure of the subsection necessarily implies that an action a

miner brings on his own behalf must be related to his initial complaint submitted for administrative investigation.

On occasion, we must determine whether a private action under section 105(c)(3) concerns matters that were first submitted for investigation and evaluation as required by section 105(c)(2). In *Hatfield,* an operator argued on interlocutory appeal that certain discrete allegations of protected activity a *pro se* miner included for the first time in his amended section 105(c)(3) complaint should be stricken for his failure to explicitly allege them in his initial administrative complaint. 13 FMSHRC at 544. We interpreted section 105(c) expansively to hold that a miner could allege in his private right of action any matter investigated by the Secretary, not merely those allegations explicitly alleged in the four corners of the administrative complaint. We therefore directed the Judge to determine whether protected activities alleged in the miner's amended complaint "were part of the matter that was investigated by the Secretary in connection with [the miner's] initial discrimination complaint to MSHA." [1] *Id.* at 546. Our decision

[1] Notably, the Secretary of Labor did not participate in the *Hatfield* case and had no opportunity to file an *amicus* brief as the Commission granted the operator's petition for interlocutory review, vacated the Judge's order, and remanded the proceeding without taking briefs. The Secretary has not had occasion to offer the agency's view as to how Mine Act provisions requiring him to investigate administrative complaints filed pursuant to section 105(c)(2) should be interpreted to accommodate his own investigatory role with the Congressional directive that we should "expansively" construe section 105(c) "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 35-36 (1977),

preserved and balanced both the Secretary's investigatory role and a miner's right to file and process a complaint of discrimination through a system intended for use by laypersons unfamiliar with the technical science of pleading.

The *Hatfield* decision served to shelter from summary decision those allegations advanced in a section 105(c)(3) private right of action that were not explicitly referenced in the section 105(c)(2) complaint submitted for investigation, but were investigated. *See, e.g., Saffell v. National Cement Co.,* 14 FMSHRC 1053, 1055 (June 1992) (ALJ); *Womack v. Graymont Western U.S. Inc.,* 25 FMSHRC 235, 248 (May 2003) (ALJ). Under *Hatfield,* a miner's lay explanation in an administrative complaint of why he or she "believes that he has been discharged, interfered with, or otherwise discriminated against," 30 U.S.C. § 815(c)(2), is not scrutinized like a formal pleading in order to preclude a miner from advancing a related allegation the Secretary investigated. We extended this approach to hold a section 105(c)(2) complaint filed by the Secretary on behalf of a miner could include any allegations addressed in the administrative investigation. *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.,* 19 FMSHRC 1009, 1017 (June 1997).

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reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 623-24 (1978). However, this is not surprising, given miners may only file a private action under section 105(c)(3) if and when the Secretary declines to pursue the complainant's case.

Our approach in *Hatfield* and *Pontiki* was intended to preserve miners' rights to an administrative investigation and evaluation, while ensuring they are not denied their right to pursue a private section 105(c)(3) action for reasons unrelated to the merits of their claims. However, recent ALJ decisions applying *Hatfield* reveal miners are too frequently denied access to specific proof of the scope and content of the administrative investigation. *See, e.g., Willis v. Jeffrey Tyler for Heart of Nature (NV), LLC,* 2018 WL 2529561, Unpublished Order at 3 (May 11, 2018) (ALJ) (recounting Secretary's refusal to produce a transcript of the investigatory interview); *Justice v. Gateway Eagle Coal Co.,* 36 FMSHRC 2371 (Aug. 2014) (ALJ) (renewing motion to enforce a subpoena). [2] And sometimes a complainant has no access to facts about the scope of the administrative investigation because no adequate investigation was conducted. *See, e.g., Deuso v. Shelburne Limestone Corp.,* 41 FMSHRC 232, 242 (Apr. 2019) (ALJ); *Myers v. Freeport-McMoRan Morenci, Inc.,* 34 FMSHRC 1593 (July 2012) (ALJ). In these cases, *Hatfield* has been misapplied to the extent miners have been barred from advancing a case of discrimination solely because they are denied access to evidence delineating the scope of the Secretary's investigation of his or her protected activities, or denied an adequate investigation.

Our holding in *Hatfield* must not operate to prevent a miner complainant from identifying and offering

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[2] **MSHA** should ensure its policies for responding to requests for information from section 105(c)(3) complainants do not thwart their ability to advance a claim on matters investigated by **MSHA**.

instances of protected activity as evidence in support of a private action. *Hatfield* only precludes a miner from broadening his complaint to request relief for an *adverse action* that was neither pled in the initial administrative complaint or investigated by the Secretary after receipt of such complaint.

In the instant case, the only protected activity explicitly referenced in the administrative complaint filed in the wake of Thomas' suspension is his interaction with MSHA inspector Johnson at the dock. However, Thomas alleges in his section 105(c)(3) private action that his reports to his supervisor of inadequate training and excessive work hours are additional protected activities that also motivated, at least in part, his suspension and subsequent termination. These pleaded protected activities concern the adverse action raised in Thomas' administrative complaint. Importantly, Thomas did not seek additional or separate relief.

It is significant that the protected activities not referenced in Thomas' initial complaint but alleged in his private action are claimed to have motivated the same adverse action explicitly referenced in his initial complaint. The adverse action element of a discrimination case is a particularly helpful lens for understanding appropriate application of our *Hatfield* decision. A miner can be expected to be especially familiar with the facts establishing the adverse action prong of a discrimination case. He or she will be able to easily identify and explain in lay terms a termination, suspension, reassignment, threat, etc. These facts describing the adverse action are those a lay miner is most likely to identify as salient and necessary for inclusion in the initial filing explaining

why he or she "believes that he has been discharged, interfered with, or otherwise discriminated against." 30 U.S.C. § 815(c)(2). By contrast, miners are comparatively less likely to specifically reference in their initial complaint other allegations critical to the evidentiary burden of establishing a discrimination case, such as protected activity and unlawful motivation, because their importance is only apparent to those familiar with the legal requirements of our *Pasula-Robinette* framework.[3] These are the types of facts an effective administrative investigation and evaluation is reasonably expected to uncover.[4]

Permitting a miner to plead other discrete instances of protected activity alleged to have motivated a properly pled and investigated adverse action does not

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[3] *Sec'y on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 805, 817-18 (Apr. 1981).

[4] This point is echoed in both the majority and dissenting opinions accompanying our decision in *Hopkins County Coal, LLC,* 38 FMSHRC 1317 (June 2016), where the majority stated in footnote 11 of their opinion that "MSHA's initial interview with the miner can provide the investigator with much needed clarity regarding the allegations, and can possibly lead to the discovery of other violative conduct the miner did not know to allege or had trouble articulating in his charging complaint." The dissenters agreed, observing at footnote 2 of their opinion that "Miners may initially fail to assert in precise legal terms the elements of a discrimination claim in their written complaint. When, as here, a miner's complaint is facially invalid, MSHA is entitled to ask questions and investigate whether any facts asserted by the miner at that point might support a discrimination claim--that is, can the miner allege the elements of protected activity and adverse action because of such activity." *Id.* at 1339 n.2.

interfere with or diminish the Secretary's ability to ensure every administrative complaint receives a full investigation. An investigator helping determine whether Thomas' administrative complaint makes out a case for relief would have had a reasonable opportunity to investigate whether Thomas had engaged in other protected activity – in addition to the interaction with the inspector - that could have possibly motivated his suspension and termination. Though the Secretary's evaluation of Thomas' administrative complaint determined there was not sufficient evidence to establish a violation, a reasonably diligent investigation would have thoroughly examined Thomas' participation in protected activity.

To resolve this case, we considered whether Thomas' putatively protected complaints about inadequate training and excessive work hours motivated in any way the same adverse action referenced in his administrative complaint - his suspension and ultimate termination.[5] Along with the majority, we find no proof that they did.

s/Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

[5] We do not address here whether these additional activities are the type that are protected under *Pasula-Robinette.*

APPENDIX H

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500

TELEPHONE: 303-844-5266 / FAX: 303-844-5268

December 10, 2018

ROBERT THOMAS,	:	DISCRIMINATION
Complainant	:	PROCEEDING
v.	:	Docket No. WEST 2018-0402
CALPORTLAND	:	DM
COMPANY,	:	Mine: Sanderling Dredge
Respondent	:	Mine ID: 45-03687

DECISION AND ORDER

Appearances: Colin F. McHugh, Navigate Law Group, Vancouver, WA, for Complainant;

Brian P. Lundgren & Erik M. Laiho, Davis Grimm Payne & Marra, Seattle, WA, for Respondent.

Before: Judge Miller

This case is before me on a complaint of discrimination brought by Robert Thomas against CalPortland Company ("CalPortland"), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). Thomas alleges that he was discharged from his employment at the mine because of his participation

in an MSHA investigation and because of safety and task training complaints he made to his immediate supervisor. CalPortland denies the allegations, and states that Thomas abandoned his employment and voluntarily resigned after failing to cooperate with management during an investigation. The parties presented testimony and documentary evidence at a hearing commencing on September 4, 2018, in Portland, Oregon. Based on the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the post-hearing briefs of the parties, I find that Thomas was discharged in violation of the Act and is entitled to back pay and other relief.

I. FINDINGS OF FACT

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony should not be deemed a failure to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433,436 (8th Cir. 2000).

The Sanderling Dredge mine is a surface sand mine located in Vancouver, Washington. CalPortland is the

owner and operator of the dredge and is a mine operator subject to the jurisdiction of the Act. Robert Thomas was an employee of CalPortland from March 7, 2002, through the beginning of 2018, and he worked as a dredge operator for the company in Oregon and Washington. Jt. Stips. ¶ 1.1 and 2.1. His discharge from employment at the mine is the subject of this case.

Thomas worked at CalPortland, without any safety or other incident, for sixteen years. He first worked as a deck hand and then became a dredge operator in 2015. As a dredge operator, he worked on the Sanderling dredge. The Sanderling dredge is 220 feet long by 40 feet wide and is moved by an attached towboat called the Johnny Peterson. The dredge is typically operated by two persons on the barge, a dredge operator and a deck hand. The towboat is operated by a captain and sometimes a deck hand, who are both employed by a contractor. The captain and deck hands connect the towboat to the dredge each day to transport the dredge up and down the Columbia River. The dredge operates by pulling sand through a suction system from the bottom of the river, loading the sand evenly onto the barge, and then transporting it to a location on shore to be unloaded. Tr. at 115-16. For the most part, the Sanderling dredge is docked in Vancouver, Washington. A usual run for the dredge includes a four-hour journey in one direction on the river, and then several hours retrieving sand from the river bottom and unloading the sand before returning to port. Repairs and maintenance are done on the dredge often while it is traveling on the river.

The miners who work on the Sanderling dredge typically arrive in the early morning around 5 a.m. to

do maintenance work to prepare for the day. The captain of the towboat arrives shortly thereafter to connect the towboat to the dredge and begin the day's trip on the river. Typically, the Sanderling does one load during the day and returns to the dock around 5 p.m. Occasionally, when the dredge travels farther on the river, it returns around 8 p.m. It is not unusual for the miners to work 12 hours per day and sometimes as much as 80 hours per week. During January 2018, Thomas was the dredge operator, and he worked on the Sanderling with Joel McMillan, an experienced deck hand. Roger Ison captained the towboat, the Johnny Peterson.

In the months leading up to the events at issue here, Thomas, McMillan, and other CalPortland employees were required to work long hours, working 16-hour days and sometimes around 80 hours per week. These long hours began in January 2017, when the mine changed from two shifts working on the dredge to a single day shift. Over the course of the year, Thomas and other employees grew concerned about their safety and health. They complained to their supervisor and marine manager, Dean Demers, and asked for additional help to avoid the long days and subsequent unsafe conditions. Both Thomas and McMillan agreed that working so many hours caused them to be tired during the day, making it difficult to pay attention and work safely. Thomas was particularly concerned that his lack of sleep was impacting his ability to remain responsive and alert at work.

To address their concerns, Demers attempted to bring in personnel from the rock barges to take over on some of the shifts. However, the practice resulted

in an exchange of one problem for another. The rock barge workers, who worked under OSHA regulations, did not have experience with the tasks and work required on the dredge. Each barge employee, therefore, required task-training and introduction to MSHA regulations before being able to fully perform their duties. Instead of assigning a trainee to shadow Thomas or McMillan, Demers frequently assigned a rock barge worker to the Sanderling and expected the one experienced worker to both task train the new person and to perform their normal job duties. When it came time to certify that a trainee had been task-trained, Demers asked Thomas to sign off in his capacity as a designated training person. However, Thomas believed the new workers were not adequately trained and refused to sign the task-training forms. McMillan signed one task training document, but was not a designated training person. For the most part, Demers signed off on the task training, but was not present and did not conduct the training himself.

Demers started his career in the Coast Guard and after retiring, began working at CalPortland in July 2014 as a barge worker. He became the marine manager in July 2017 and was assigned to manage four barges and the Sanderling dredge. The barges under Demers' management are subject to OSHA jurisdiction and the Sanderling dredge is subject to MSHA jurisdiction. While Demers had years of experience on various water craft, this was his first experience on a project subject to MSHA jurisdiction.

Thomas and McMillan agreed at hearing that in the year leading up to Thomas' termination, the Sanderling dredge was understaffed. Demers stepped in to help out occasionally when they were short of

help or when one of them was out on leave. While no testimony was presented as to how Demers felt about stepping in to help, he did have a disagreement with Thomas about sick time in November 2017. Thomas had requested a sick day and received push-back from Demers. McMillan testified at hearing that immediately following that disagreement, Demers indicted to him that "Rob Thomas was done, he was fucking done at CalPortland." Tr. at 48.

On January 24, 2018, Thomas and McMillan were returning to the dock in Vancouver at the end of a shift when they observed an MSHA inspector on the dock. As they headed downriver, earlier in the day, they realized they needed to change out a valve on the barge. They used air wrenches to remove the bolts, and extracted the valve from in between the pipes to lower the valve onto the deck. *See* Comp. Ex. 14 (showing the bow of the Sanderling dredge, where the valve was changed out). Thomas stood on the ladder to help lower the valve down from its position. Thomas and McMillan testified that they were both wearing their personal flotation devices ("PFDs") during the change out. On their approach to the Vancouver railroad bridge, McMillan climbed up on the ladder in order to weld the studs and return the valve. McMillan testified that as he was welding, he saw Thomas remove his PFD and hang it on the hooks outside of the lever room. McMillan watched Thomas walk from the lever room to the table in the middle of the barge,[1] use a cutting torch to cut a piece of steel,

[1] *See* Comp. Ex. 14.

and put the PFD back on once he was finished with the torch.

Near the end of the day, as the dredge neared the port, Thomas saw MSHA Inspector Mathew Johnson on the dock. From the dock, Inspector Johnson called out and asked if it was company policy to *not* wear a PFD. Thomas responded that CalPortland's policy requires miners to wear PFDs. Once in port, Thomas admitted to Inspector Johnson that he had not worn his PFD for up to ten minutes while operating the cutting torch at the welding table in the middle of the deck. Thomas also indicated that he and McMillan had been on the ladder while working that day, and that they had been on the ladder up to the third rung. Following their conversation, Inspector Johnson asked to speak to a supervisor, so Thomas called Demers, who was working at a different location. After some discussion with Demers, Thomas handed the phone to the inspector. Demers was aware that Thomas had provided information to the inspector prior to handing over the phone. After hanging up, Inspector Johnson completed his inspection of the barge with Thomas. The inspector then issued a Section 104(d) citation to CalPortland for a miner failing to wear a safety device or be tied off while working on the open portion of a dredge.

Thomas returned to work around 6 a.m. the next morning, and began to repair the transmission on the dredge. Demers arrived shortly after 7:30 a.m. He then accompanied Thomas and McMillan to the dredge's engine room and conducted a refresher PFD training in order to terminate the citation. Following the training, Thomas explained to Demers that he was not on the ladder without his PFD and that no one on

board had witnessed him on the ladder without his PFD. McMillan agreed with Thomas' statement, and said additionally that he was the one who had used the ladder to return the valve. At around 8:30 a.m., Inspector Johnson returned to the dock area and met with Demers to discuss the previous day's violation. Thomas joined the meeting so that he could respond to further questioning by Inspector Johnson. Once the inspector left the dock, Thomas returned to work.

Demers and Dave McAuley, CalPortland's regional operations manager, then met and the two decided to suspend Thomas, without pay, pending further investigation. Following the decision, Demers called McMillan to tell him he was coming down to the dredge to "get rid of" Thomas. Tr. at 67. At about 10:30 a.m., Demers pulled up to the dock and suspended Thomas. Thomas gathered his things and punched out for the day. The next morning, January 26,2018, Demers contacted Thomas and asked him to provide a written statement about the incident that lead to the citation. Thomas prepared and emailed his statement to Demers on January 28. Comp. Ex. 19.

On Saturday, January 27, Demers called Thomas and asked him to come to the office on Monday, January 29, at 8:00 a.m. When Thomas arrived on Monday morning, he met with Demers and Jeff Woods, the safety manager. Demers proceeded to read the narrative portion of the MSHA citation aloud to Thomas. After hearing what the inspector had written, Thomas asserted that the inspector's statement was not correct. Thomas tried to explain further but at some point felt it was not productive to respond to Woods' follow-up questions. Woods left the meeting and Demers asked Thomas to fill out an employee

incident report. Thomas complied and also submitted an additional, lengthier statement later that day. Comp. Ex. 22. At some time that same day, McMillan was also asked to complete an employee incident report. Comp, Ex. 5.

Following their meeting with Thomas, Demers and McAuley met with Candy Strickland, who is a human resources manager for CalPortland. They sought Strickland's advice on next steps. In their view, Thomas had become uncooperative with the investigation when he failed to respond to the last questions Woods had asked. McAuley noted at hearing that it was unusual to involve Strickland at this point, but insisted that no disciplinary decisions had been made at that time. However, shortly after the meeting ended, Demers sent McAuley and Strickland a corrective action form. The form contained Demers' recommendation that Thomas be fired from his employment for violating the PFD rule and for his lack of cooperation with the company investigation.

On January 30, Thomas was asked again to return to the office for a meeting the next day. Following that request, Strickland, Demers, and McAuley participated in a meeting with management to brief them on the situation with Thomas. After that meeting, Demers sent an email to numerous people, including contractors and employees of CalPortland, and attached a corrective action form that included his recommendation to fire Thomas. Demers testified that he sent the email by accident, he attempted to recall the email immediately, and he sent another email asking recipients to disregard his previous email. Tr. at 389-93; Resp. Ex. N. He also contacted

Strickland and McAuley to let them know what had happened.

As Thomas was preparing to go to the scheduled meeting on January 31, he received a phone call from Ison, the captain of the towboat, at around 6:30 a.m. Ison, who had received the email from Demers, suggested to Thomas that he check his email. When Thomas opened his email, he saw the email from Demers that was sent to his co-workers and contractors with the attached corrective action form recommending Thomas' termination. Comp. Exs. 1 and 2; Resp. Ex. N at 4-6. After reading the email, Thomas believed that he had been terminated and sent a text message to Demers to let him know that he would not attend their scheduled meeting. That afternoon, Thomas hired an attorney. The next morning, February 1, Thomas received a call on his personal phone from McAuley. Thomas did not recognize the number, but asked his step-daughter to return the call on his behalf in order to determine who had called. She hung up when McAuley identified himself on speaker phone. With his step-daughter in the room, Thomas called McAuley back and said, "[y]ou have no business calling me on my personal phone, I don't know how you got it, you need to contact my attorney." Tr. at 157. McAuley denied at hearing that Thomas mentioned an attorney during the February 1st phone call, but Thomas and his step-daughter remember it being a part of the conversation. Immediately following the phone call with Thomas, McAuley contacted Strickland to discuss the matter. Together they determined that this issue was now one for human resources to address.

Later that same day, Thomas directed his attorney to send a letter to Demers and CalPortland about his intent to file a discrimination claim against them.[2] On February 2, Strickland spoke with a human resources supervisor at company headquarters about the situation with Thomas. She was advised to begin the process of voluntary resignation based on a violation of the company's attendance policy. At this point, Thomas remained on suspension and believed he had been terminated based upon the email he received from Demers. He had not been asked to return to work. That Monday, February 5, Strickland drafted a letter notifying Thomas that he was in violation of CalPortland's attendance policy. Resp. Ex. R. The letter stated that if Thomas did not contact human resources by Thursday, February 8, "he will be considered to have voluntarily resigned." *Id.* at 2. Thomas was sent two copies of the letter and refused to accept delivery on both. Additionally, Deniers testified that on February 5 and 6, 2018, he spoke with MSHA Special Investigator Diane Watson over the phone. She indicated that MSHA would not be opening a separate investigation against Thomas, that she understood he had been fired, and that he may be filing a discrimination complaint. Following the phone calls with Ms. Watson, Demers told McAuley that Thomas thought he had been terminated based on Demers' January 30 email and that Thomas had retained counsel.

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[2] The letter was dated February 2, 2018. At hearing, Demers testified that he did not receive the letter from Thomas' attorney until February 13, 2018.

When Strickland did not hear back from Thomas, she sent him a second letter, dated February 9, to notify him of his voluntary resignation. CalPortland asserts that Thomas abandoned his employment and voluntarily resigned effective February 8, 2018. Thomas filed his written discrimination complaint with MSHA on February 13,2018.

II. ANALYSIS

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" or "because of the exercise by such miner ... of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). In order to establish a prima facie case of discrimination under section 105(c)(1), a complaining miner must prove by a preponderance of the evidence: (1) that he engaged in protected activity; and (2) that the adverse action he complains of was motivated at least partially by that activity. *Turner v. Nat 'l Cement Co. of Cal.,* 33 FMSHRC 1059, 1064 (May 2011); *Sec'y on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds,* 663 F.2d 1211 (3d Cir. 1981). The operator may rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner,* 33 FMSHRC at 1064. The operator may also defend affirmatively by proving that, "it was also motivated by the miner's unprotected activity and would have

taken the adverse action for the unprotected activity alone." *Id.*

a. Protected Activity

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. While Section 105(c)(1) does not include the term "protected activity", Commission cases have nevertheless found that the section defines certain protected activities. An individual covered by Section 105(c)(1) engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint... of an alleged danger or safety or health violation[;]", (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [;]", (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]", or (4) he has exercised "on behalf of himself or others ... any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

The legislative history of the Mine Act states that that Congress intended "the scope of the protected activities be *broadly interpreted* by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and, the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the

participation by a miner or his representative in any administrative and judicial proceeding under the Act." S. Rep. No. 95-181 at 35 (1977) (emphasis added). Moreover, the history notes that "the listing of protected rights contained in .. [what eventually became section 105(c)(1)] is intended to be illustrative and not exclusive," and that the section should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id.* at 36.

I find that Thomas engaged in a number of activities protected by the Act. First, he complained to his immediate supervisor, Dean Demers, that he was tired from working so many hours, that it was unsafe because he could not concentrate, and that the dredge needed more workers. The complaint was one of safety about his working conditions and is protected under the Act. Second, Thomas expressed his concern about the lack of task training for the rock barge employees who were moved over to work on the dredge. Several times, he refused to sign the task training certificates because he believed the substitute workers were not trained adequately. Third, Thomas spoke with MSHA Inspector Johnson when he boarded the dredge on January 24, 2018, and provided information that the inspector relied upon in issuing a citation. Finally, Thomas let the mine know that he had hired an attorney and the mine was alerted that Thomas was filing this discrimination complaint with MSHA. While there is some dispute about the timing of the last activity, the mine was told to speak to Thomas' attorney as of a February 1st phone call and they became aware of the discrimination complaint no later than February 6, 2018, following a call from an MSHA

supervisor. Both of these notifications occurred prior to the second notice of termination given to Thomas.

CalPortland argues in its post-hearing brief that Thomas' complaint should be dismissed because he did not include all of these protected activities in his original complaint to MSHA. The mine points to *Hatfield v. Colquest Energy, Inc.,* 13 FMSHRC 544 (Apr. 1991) and contends that Thomas' private Section 105(c)(3) complaint is limited to the specific activities he identified in his original MSHA complaint. However, recent Commission case law does not support the mine's narrow reading of *Hatfield*. In *Sec'y v. Hopkins County Coal,* 38 FMSHRC 1317 (June 2016), the Commission addressed a similar argument. The majority concluded that it is not the terms of the initial complaint that control the scope of the Section 105(c)(3) action; it is whether or not the Secretary investigated the miner's broader claim of discrimination. *Id.* at 1323 n.9. MSHA did investigate the discrimination complaint that alleged Thomas was terminated for cooperating in an MSHA inspection. After the investigation, MSHA notified Thomas that they would not take his case further, and subsequently he filed a complaint here that included each protected activity raised at hearing. In addition, the acts that Thomas alleges as protected acts were all the subject of various types of discovery in this case. The mine therefore was aware of the allegations and had ample time to explore them and present a defense at hearing.

The mine also contends that Thomas did not engage in any protected activity. It relies on evidence at hearing wherein the attorney for the mine operator read a list of protected activities which included making a complaint to MSHA to each of the mine's

witnesses, and asked each witness if they were aware that Thomas had engaged in that particular activity. In response to the attorney's leading questions, each witness for the mine replied "no." I am not persuaded and instead find that there is ample evidence in the record to demonstrate that Thomas engaged in a number of activities commencing both prior to the MSHA citation issued in January and after.

b. Adverse Action

Pursuant to the provisions of the Mine Act, the Commission has defined "adverse action" to mean "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y on behalf of Pendley v. Highland Mining Co.,* 34 FMSHRC 1919, 1930 (Aug. 2012). Thomas was suspended without pay from CalPortland on January 25, 2018, pending an investigation into the events that resulted in the January 24, 2018, MSHA citation. Demers, CalPortland's Marine Manager, sent Thomas a draft termination memo on January 30, 2018. After reading that email on January 31, 2018, Thomas reasonably believed he had been fired from his employment. On February 9, 2018, CalPortland's Human Resources Manager sent Thomas a letter explaining that, in their view, Thomas had decided to voluntarily resign his position by failing to contact CalPortland by February 8, as had been requested in a February 5, 2018 letter to Thomas. Thomas was first suspended and then terminated from his employment by email on January 30, 2018, with a follow up written termination effective February 9, 2018 and therefore has shown several adverse actions that were taken against him.

c. Discriminatory Motive

Thomas must next demonstrate that his protected activity is connected to the adverse action. A complainant is not required to provide direct evidence of discriminatory motive; "circumstantial evidence...and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner,* 33 FMSHRC at 1066 (quoting *Bradley v. Belva Coal Co.,* 4 FMSHRC 982, 992 (June 1982)). Factors that may tend to prove a discriminatory motive for the adverse action include the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, the timing of the adverse action in relation to the protected activity, and disparate treatment as compared to other employees. *Turner,* 33 FMSHRC at 1066; *Sec'y on behalf of Chacon v. Phelps Dodge Corporation,* 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds,* 709 F.2d 86 (D.C. Cir. 1983).

In this case, two factors are most persuasive: knowledge and timing. An operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon,* 3 FMSHRC at 2510. Demers, the manager at the mine and the person who ultimately recommended termination, knew of Thomas' protected activity. Thomas testified that he had complained to Demers repeatedly about the long work hours and the impact those hours had on his safety and health. McMillian made similar complaints to Demers. In addition, Thomas complained about the use of workers who were not adequately trained and he refused to sign the task training certificates. In some instances, Demers signed them without having worked alongside those

being trained. Demers denied that he had conversations about long hours or training, but instead remembered a conversation about Thomas wanting a day off. McMillian explained that shortly after the many conversations about safety and training, Demers showed up to take Thomas' place while he was out sick and told McMillan at that time that Thomas was done working at CalPortland. Demers was upset about Thomas' actions, not only wanting a day off, but the related issues of safety, long hours, and training. Based on my observations of the demeanor of the witnesses at hearing, I credit Thomas' and McMillan's testimony on this matter, over Demers'testimony, which appeared rehearsed.

Next, Demers was aware of Thomas' discussions with the MSHA inspector on January 24 and 25. Thomas handed the phone to Inspector Johnson so he could speak with Demers on January 24, and Thomas spoke to the inspector in front of Demers on January 25, shortly before his suspension became effective. Additionally, Demers had a number of follow up discussions with the inspector wherein the information provided by Thomas was discussed. Demers indicates that he did not tell McAuley or Strickland about the actions taken by Thomas, but it was Demers who pushed for termination and made the initial recommendation to fire Thomas. Under Commission case law, Demers' knowledge of Thomas' protected activity is therefore imputed to McAuley and Strickland. *See Con Ag., Inc. v. Sec'y,* 897 F.3d 693, 702 (6th Cir. 2018) (finding that the ALJ reasonably imputed a mine manager's knowledge of a miner's protected activity to upper management in making a termination decision).

Timing is another factor that weighs in favor of Thomas. The Commission has noted that it "applies no hard and fast criteria in determining coincidence in time ... [s]urrounding factors and circumstances may influence the effect to be given." *Hicks v. Cobra Mining Inc.,* 13 FMSHRC 523, 531 (Apr. 1991). According to testimony at hearing, both Thomas and McMillan made repeated safety and health complaints to Demers in the months leading up to Thomas' suspension and termination. During that same time frame, they consistently complained about the lack of task training that the temporary dredge barge workers were receiving. In mid-November 2017, Thomas requested a sick day but Demers was reluctant to approve the request because he did not have enough workers for the dredge and became angry with Thomas. McMillan testified that immediately following the sick day disagreement, Demers wanted Thomas gone from CalPortland. Thomas testified that he thought their disagreement had been settled.

Finally, Thomas testified that Demers continued to brush off his safety complaints, suggesting hostility toward the protected activity. Just weeks after his complaints, Thomas was observed without his life jacket on the barge and discussed the matter with the inspector, resulting in a citation. Demers was justifiably upset that Thomas violated the Mine Act by failing to wear his PFD while working on the dredge and later failed to respond to all of the questions asked by Wood regarding the citation. However, the mine insists that Thomas was not terminated for either of those actions, but was instead terminated because he violated the mine's attendance policy in part by failing to show up for a requested meeting. Yet, Thomas

advised his supervisor that he would not attend the meeting and no further effort was made by the mine to reschedule the meeting, or gather more information from Thomas.

There is no evidence in the record to support an argument by CalPortland that Thomas was treated like other employees who violated a safety rule. In fact, no evidence in the record suggests that violating a safety rule is the type of offense that leads to automatic termination. Nor is there any evidence to demonstrate that the failure of a long term employee to answer the several questions asked by a member of the safety department is an offense that leads to firing at CalPortland. At hearing, the mine presented some evidence regarding employee discipline but nothing to indicate how the mine operator normally handled incidents where an employee's activity resulted in a citation. Thomas worked for the mine for 16 years without any safety related incident, and yet, he was summarily terminated for this violation in Demers' email.

CalPortland continues to deny that Thomas was terminated for violating a safety rule, and instead argues that he was terminated in part for failing to comply with an investigation into the incident, thereby leading to the ultimate allegation that he violated the attendance policy. The pattern and reasoning the mine posits is not persuasive. Thomas failed to answer some questions of Jeff Woods and immediately Demers and McAuley determined he was not cooperative. Still Thomas continued to submit further written information as requested. Thomas cancelled a meeting at the mine only after receiving an email letting him know he was being fired. No further

phone calls, texts, or emails (the method of communication throughout the incident), were sent to Thomas to discuss the matter or attempt to reschedule or gather further information. Instead for the first time, a letter was mailed from the human resources department.

I find that there is sufficient circumstantial evidence to demonstrate a connection between Thomas' discharge and his protected activity. Demers said he would get rid of Thomas shortly after the first discussions of safety regarding long hours and task training. Additionally, Demers decided to terminate Thomas immediately following the discussion with MSHA without considering his past history or long-term employment with the mine. Finally, Demers asserts that Thomas did not cooperate with the investigation, but the only person who could testify about that lack of cooperation, Jeff Woods, was noticeably absent from the hearing.

d. Operator's Rebuttal

CalPortland denies that Thomas was terminated in violation of the Mine Act, and argues instead that no protected activity occurred and that any adverse action was not motivated in any part by protected activity. As discussed in more detail above, I have found that Thomas engaged in protected activity by making safety complaints, voicing concerns about task training, speaking with the MSHA inspector, and notifying the mine that he was filing a discrimination complaint against the mine. The mine argues that Thomas was terminated, not for any reason related to that protected activity but, for a violation of the company attendance policy. Based on the evidence

available to me, I find that CalPortland has failed to demonstrate that the termination of Thomas' employment was in no part related to his protected activity and therefore, CalPortland has failed to rebut Thomas' prima facie case.

CalPortland presented witness testimony in an effort to justify firing Thomas based on his violation of the PFD safety rule, along with his alleged unwillingness to cooperate in the safety investigation. Company representatives testified at great length about the safety and training programs at the mine. All of the witnesses agreed that the mine's safety plan includes a rule mandating that employees wear a PFD while on the dredge and, for the most part, life jackets are worn in accordance with that rule. Demers, Thomas' immediate supervisor, spent a majority of his testimony explaining how serious it was not to wear a PFD, and what could happen if someone fell into the river without wearing a PFD. Both Demers and Chad Blanchard, [3] the corporate safety director, testified that they had never seen anyone on deck without a PFD. However, McMillan said that he observed another supervisor enter onto the barge several days after the January 24 incident without a life jacket. It is unrefuted that it is important to wear a flotation device on the barge and failure to wear it could result in a serious injury were the miner to fall into the very cold waters of the Columbia River.

CalPortland points out that it relied on the information provided by Inspector Johnson, regarding Thomas' actions and that the mine took the inspector

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[3] Blanchard was not involved in the Thomas investigation, but testified that Woods told him about the citation.

at his word as set forth in the citation, even though the citation conflicts with the information provided by Thomas and McMillan. The citation states that Inspector Johnson saw Thomas walking around the deck and performing work on the ladder that was within 8 feet of the edge of the dredge barge deck in an elevated position approximately 3 feet (or 3 ladder rungs) above deck level. Resp. Ex. I. While the mine is correct to have concerns about the ramifications of not wearing a PFD and receiving a citation, it asserts that it did not terminate Thomas for those reasons. Instead, CalPortland argues that there is no evidence that Thomas would have been terminated based on Demers' recommendation and argues Thomas was actually terminated in part for his failure to cooperate in an internal investigation regarding the citation. Demers' memo recommending firing includes failure to cooperate, prior to Thomas making a decision not to attend another meeting with the mine. Therefore, the uncooperativeness alleged by CalPortland in Demers email includes the single incident with Woods. After that memo, Thomas informed Demers that he would not attend the next scheduled meeting, which resulted in a finding that Thomas had violated the attendance policy. The alleged violation of the attendance policy, then, is based upon Thomas' decision not to attend the meeting of January 31. However, Thomas did provide notice of his intent not to attend the meeting to his supervisor and the meeting was not rescheduled nor were any other directions given to Thomas.

CalPortland's witnesses agreed that the company typically conducts an investigation following a workplace safety incident. While company witnesses testified that conducting an investigation was a

standard practice, there was little discussion as to the process those investigations routinely follow. In this instance, according to McAuley, it was Demers' job, as the manager of the Sanderling dredge, to lead the investigation into the safety incident with assistance from someone in the safety department, which in this case was Woods. McAuley denied having any input into the investigatory process or the disciplinary recommendation, stating that it was up to Demers to draft an initial opinion as to discipline, which would then be vetted through human resources and brought to McAuley for final approval.

Here, the investigation into Thomas' conduct began shortly after the incident on January 24. Demers and McAuley held or scheduled numerous meetings with Thomas both before and following his suspension from work. Thomas argues that he cooperated with the investigation by speaking with Inspector Johnson and communicating with management both on site and at the Scappoose location regarding the incident on January 24, 2018. Thomas also testified that he participated in the January 29 meeting, which was the only one attended by Woods, but stopped answering questions once it became clear to him that Demers and Woods had little interest in his description of the incident. The investigation involved four statements: three written by Thomas and one written by McMillan. McMillan's written statement did not state conclusively whether or not he observed Thomas without a PFD while on the ladder, but he made additional statements and testified at hearing, suggesting that he agreed with Thomas' characterization of the incident. The observations of the inspector as written in the citation were also part

of the investigation. However, Ison, the towboat captain, was not questioned by CalPortland, and Woods, the safety manager in charge of the investigation, gave no recorded statement or opinion as to the nature or outcome of the investigation. Woods notably did not testify and the only mention of Woods in the testimony at hearing came from Demers, who claimed that Woods was not happy with Thomas' responses to questioning and left the room. Following that January 29, 2018 meeting, Demers decided that Thomas had been uncooperative with the investigatory process, relayed his opinion to McAuley, and together they contacted Strickland in human resources. Given the statements provided by Thomas, as well as his attendance at various meetings, I find that the arguments regarding Thomas' refusal to cooperate in the investigation are pretext.

Immediately after contacting Strickland, Demers recommended in writing that Thomas be fired due to the seriousness of the PFD rule violation and for his failure to cooperate in the company's investigation process. Demers gave no further justification for his recommendation to fire a 16-year employee with no other safety violations on his record but, instead, sent his recommendation by email to at least 50 contractors and co-workers of Thomas, albeit inadvertently. Demers did not base his recommendation on any apparent company discipline policy. The evidence shows, however, that Thomas did participate in the investigation and only became uncooperative after repeated questioning about issues he had already

addressed.[4] In the five days following the incident, as described above, Thomas prepared and submitted three statements while suspended from work and participated in at least three meetings. While Thomas did refuse to answer a few questions at the last meeting with Woods, he continued with the investigation by providing a lengthier written statement regarding the incident. Therefore, I find that Demers explanation regarding his recommendation to fire Thomas does not have a basis in fact. Instead, based on his description of the incident and ensuing investigation, Demers seemed unconcerned with objectively assessing the situation. Nor did he seem concerned about actually completing the investigation and considering the recommendations of the safety department.

Next, I find that Demers and McAuley were overly rehearsed in their testimony, using or agreeing to terminology that was coined to spin the facts in CalPortland's favor. Most of the questioning was in the form of leading, and often by virtue of having documents, including emails, in front of the witnesses to bolster their testimony. For example, Demers testified that he believed what the inspector told him about Thomas' "PFD misconduct," and that same term was used by each witness for CalPortland. Demers and McAuley were careful to note that they decided to suspend Thomas "pending an investigation" into the

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[4] In the context of a retaliation case under a different statute, it has been recognized that a company's justification for interrogating an employee was pretextual when the company already knew the answers to the questions it was asking that employee. *United Serv. Auto. Ass 'n v. NLRB*, 387 F.3d 908,916 (D.C. Cir. 2004).

facts surrounding the citation, rather than as discipline for the alleged conduct. While some of this testimony is accurate, use of the same coined term by each witness causes the evidence to lose its element of truthfulness. Therefore, I do not find either Demers or McAuley to be credible witnesses.

Furthermore, Woods' absence at hearing leads me to the conclusion that he may have had some unfavorable information about CalPortland's investigation into the incident. "It is well established that an adverse inference may be drawn against a party if the party fails to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party." *Sec'y of Labor v. Virginia Slate Co.,* 23 FMSHRC 482, 485 (May 2001). Woods was a main participant in CalPortland's investigation and led the January 29, 2018 meeting. While the mine acknowledged that Woods is now a former employee, there was no indication that the mine made any attempt to contact him.

e. Affirmative Defense

Having found that Thomas has established a prima facie case of discrimination, I must now consider whether CalPortland discharged him in part for unprotected activity and "would have taken the adverse action for the unprotected activity alone." *Sec'y on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799-2800 (Oct. 1980). The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse

action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley,* 4 FMSHRC at 993. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.,* 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley,* 4 FMSHRC at 993. The Commission has stated that, "pretext may be found ... where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990).

An affirmative defense requires more than showing that the operator's business justification is plausible. As the Commission has noted, evidence of practices and policies consistent with the adverse action taken may be persuasive support of an operator's defense of justifiable cause. *Bradley,* 4 FMSHRC at 993. CalPortland's attendance policy was introduced into evidence, along with examples of individuals who were designated as having "voluntarily resigned" for violating the policy. Resp. Ex. FF. However, I find that the practices and policies described by CalPortland are not consistent with the evidence in the record. The justification is weak and implausible. I find instead that the mine has failed to demonstrate that it would have taken the adverse action based on the mine's attendance policy alone.

First, the mine did not meet its burden to show that Thomas' violation of a safety regulation is behavior that results in immediate termination, or is an activity that alone would have justified termination. Instead, the mine demonstrated it is a serious violation and it could result in serious injury. There is no indication that Thomas had a history of violating safety regulations or that he had received any kind of written reprimand, or even that there was a policy of progressive discipline. There was some evidence that Thomas had a disagreement with Demers in November, and that one time in the past he had received a warning about some behavior but, the mine witnesses testified that neither of those actions had anything to do with his termination. The evidence shows that Thomas worked for CalPortland and on the Sanderling dredge for 16 years without any safety incident, and the record contains no evidence to demonstrate that an employee with such a record would summarily be terminated for violating a safety standard. Second, CalPortland argues that it would have taken action against Thomas because his failure to report to work or respond to management after February 1, 2018, constituted an abandonment of his position. According to the mine, when Thomas did not return calls or respond to the February 5, 2018 letter notifying him he was in violation of the attendance policy, it had no choice but to terminate him based on a voluntary resignation. I am not convinced by CalPortland's asserted justification for terminating Thomas' employment.

The mine argues that Thomas violated the company's attendance policy while he was on suspension, and after he reasonably believed that he

had been fired by the mine. No call, text message, or email was made to Thomas lifting the suspension or explaining that the email sent by Demers was not, in fact, a termination of his employment. Thomas had been suspended pending an investigation on January 25, and he continued to participate in the investigation until he received the email from Demers. Based upon the understanding that his employment had been terminated, Thomas cancelled his next meeting, and then spoke with McAuley on February 1. Thomas informed McAuley that he had hired an attorney to file a discrimination complaint. There is no evidence to support how Thomas would have been expected to attend meetings, be part of an internal investigation, or to return to work following those events.

Finally, the timing of the "voluntary resignation" letter fits with the information learned from the mine regarding Thomas' plan to file a complaint of discrimination. Even if McAuley did not hear Thomas' statement regarding the attorney on February 1, 2018, there is no dispute that on or around February 5,2018, Demers was notified by MSHA that they were not going to pursue a case against Thomas regarding the citation issued to the mine, and that Thomas was intending to file a discrimination case against the mine.[5] During that same timeframe, Strickland sent Thomas the initial attendance policy violation letter. These actions, when viewed in the context of the

[5] CalPortland addresses this phone call in its post-hearing brief, and argues that counsel for Thomas tried to suggest at hearing that the MSHA investigator violated her duty of confidentiality by warning Demers that Thomas' discrimination complaint was imminent. I have considered the mine's argument and, based on my review of the testimony, I find that it is wholly without merit.

incident as a whole, suggest that CalPortland used its attendance policy as pretext for terminating Thomas' employment. Based on the evidence, I do not believe that Thomas abandoned his position with CalPortland; instead, he was first fired as a result of the email sent by Demers and then fired a second time by a formal letter based on an attendance policy violation that he could not cure.

III. PENALTY

Thomas has brought this case individually without the assistance of the Secretary and thus no penalty has been proposed by the Secretary. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision is being sent to the Secretary for the assessment of a civil penalty against CalPortland Company within 45 days.

IV. DAMAGES AND RELIEF

The Mine Act gives the Commission the authority in proceedings under Section 105(c)(3) to assess against an operator "a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner." 30 U.S.C. § 815(c)(3). The Commission has explained that back pay "is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross back pay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package." *Ross v. Shamrock Coal Co.,* 15 FMSHRC 972, 976 (June 1993). An award of attorney's fees is "a matter that lies within the sound discretion of the trial judge." *Sec'y*

on behalf of Ribel v. *E. Assoc. Coal Corp.,* 7 FMSHRC 2015,2017 (Dec. 1985).

Prior to hearing, the parties were given the opportunity to submit calculations of back pay and other damages potentially owed to Thomas. Counsel for Thomas submitted proposed relief on August 1, 2018. CalPortland did not submit back pay calculations. However, both parties stipulated that Thomas earned $26.90 as an hourly employee and worked 53.9 hours on average per week while employed by CalPortland. Jt. Stips. ¶¶ 34.[6] Both parties also stipulated to monthly totals for certain benefits, including medical insurance, life insurance, short-term disability insurance, and voluntary accident, death, and dismemberment insurance. Am, Jt. Stips ¶¶ B.1, 3-5. Those amounts are:

Lost benefits:

- $2,105.01 per month for medical insurance;
- $12.77 per month for basic life insurance;
- $2.60 per month for short-term disability insurance;
- $2.02 per month for voluntary accident, death, and dismemberment insurance;
- 12% per year of base pay towards company pension benefits.

The requests for back pay, lost benefits, and attorney's fees are appropriate. I find that Thomas is entitled to total back pay of $49,281.09. The total back pay amount reflects a weekly rate of approximately $1,637.00 that Thomas would have earned at

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[6] Based on payroll reports submitted into evidence as Respondent's Exhibit EE, Thomas was paid at an overtime rate of $40.35 beginning in August 2017.

CalPortland from January 26 through November 30, minus a weekly rate of approximately $852.00 that he has earned at A-1 Redi Mix from May 27 through November 30,2018. The back pay amount will increase until Thomas is reinstated to his former position and full payment is made with interest. I further find that Thomas is entitled to the monetary value of his lost insurance benefits, in the amount of $21,223.30, calculated monthly from February through November 2018. Additionally, Thomas is entitled to lost company pension benefits, which amounts to $5,681,28 and is calculated from the total base pay he would have earned from January 26 through November 30,2018, at CalPortland. In sum, Thomas is due a total payment of $76,185,67, calculated through November 30.

Thomas is also entitled to reasonable attorneys' fees. 30 U.S.C. § 815(c)(3). To evaluate reasonableness, courts typically consider an attorney's reasonable hourly rate and whether the number of hours expended on the case was reasonable. *See Perdue* v. *Kenny A. ex rel. Winn,* 599 U.S. 542, 551-52 (2010). While counsel for Thomas submitted a proposed award amount of at least $16,000, counsel did not provide the information necessary to evaluate the reasonableness of those attorneys' fees. Therefore, subject to the submission of itemized invoices, this Court will consider the reasonableness of counsel's fees and set an appropriate award. Counsel for Thomas has 10 days from the date of this order to submit the requested invoices to opposing counsel and this Court. Counsel for CalPortland will then have 10 days following receipt of the invoices to agree to or object to the reasonableness of Thomas' attorneys' fees. The

Court will issue an award for reasonable attorneys' fees prior to the date on which this decision becomes final.

Under Commission case law, Thomas is entitled to interest until the damages' amount is paid at the short-term Federal underpayment rate established by the IRS. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.,* 10 FMSHRC 1493,1504-06 (Nov. 1988).

V. ORDER

Respondent is hereby **ORDERED** to reinstate Robert Thomas to his former position with CalPortland with the same pay and benefits as he would have accrued had he remained employed. The mine shall remove from Thomas' personnel file any mention of any employment action stemming from this incident and shall post a notice at the nearest CalPortland land-based office, in a conspicuous location, and on paper at least 8 x 10 size, setting forth the rights of miners protected by 105(c) of the Mine Act.

Respondent is further **ORDERED** to pay back pay and lost benefits to Thomas in the amount of $76,185.67 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. All back pay and benefits' awards, including attorneys' fees, shall be recalculated and brought up to date with interest as of the date paid, and shall continue until Thomas is reinstated. *See Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co., 5* FMSHRC 2042, 2053 n.1 (Dec. 1983). Such payments shall be made within 30 days of the date of this decision. This case is referred to MSHA for

assessment of a civil penalty that must be filed within 45 days of the date of this decision.

/s/ Margaret Miller
Margaret A. Miller
Administrative Law Judge

APPENDIX I

30 U.S.C. § 816

§ 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection

shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree[1] shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

(2) In the case of a proceeding to review any order or decision issued by the Commission under this chapter, except an order or decision pertaining to an order issued under section 817(a) of this title or an order or decision pertaining to a citation issued under section 814(a) or (f) of this title, the court may, under such conditions as it may prescribe, grant such temporary

relief as it deems appropriate pending final determination of the proceeding, if--

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(C) such relief will not adversely affect the health and safety of miners in the coal or other mine.

(3) In the case of a proceeding to review any order or decision issued by the Panel under this chapter, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if--

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding.

(b) Petition by Secretary for review or enforcement of final Commission orders

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in the Court of Appeals for the District of Columbia Circuit, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no

petition for review, as provided in subsection (a), is filed within 30 days after issuance of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such 30-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 815 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the operator named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 820 of this title, in addition to invoking any other available remedies.

(c) Stay of order or decision of Commission or Panel

The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the order or decision of the Commission or the Panel.

30 U.S.C. § 823

§ 823. Federal Mine Safety and Health Review Commission

(a) Establishment; membership; chairman

The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms; personnel; administrative law judges

(1) The terms of the members of the Commission shall be six years, except that--

> **(A)** members of the Commission first taking office after November 9, 1977, shall serve, as designated by the President at the time of appointment, one for a term of two years, two for a term of four years and two for a term of six years; and
>
> **(B)** a vacancy caused by the death, resignation, or removal of any member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(2) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission. The Commission shall appoint such

employees as it deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and general pay rates. Upon the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the administrative law judges assigned to the Arlington, Virginia, facility of the Office of Hearings and Appeals, United States Department of the Interior, shall be automatically transferred in grade and position to the Federal Mine Safety and Health Review Commission. Notwithstanding the provisions of section 559 of Title 5, the incumbent Chief Administrative Law Judge of the Office of Hearings and Appeals of the Department of the Interior assigned to the Arlington, Virginia facility shall have the option, on the effective date of the Federal Mine Safety and Health Amendments Act of 1977, of transferring to the Commission as an administrative law judge, in the same grade and position as the other administrative law judges. The administrative law judges (except those presiding over Indian Probate Matters) assigned to the Western facilities of the Office of Hearings and Appeals of the Department of the Interior shall remain with that Department at their present grade and position or they shall have the right to transfer on an equivalent basis to that extended in this paragraph to the Arlington, Virginia administrative law judges in accordance with procedures established by the Director of the Office of Personnel Management. The Commission shall appoint such additional administrative law judges as it deems necessary to carry out the functions of the Commission.

Assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362 and 7521 of Title 5.

(c) Delegation of powers

The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d) Proceedings before administrative law judge; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and

serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon.

Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote

of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

(The provisions of section 557(b) of Title 5 with regard to the review authority of the Commission are expressly superseded to the extent that they are

inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

(e) Witnesses and evidence; subpoenas; contempt

In connection with hearings before the Commission or its administrative law judges under this chapter, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.