FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

MAR 28 2017

MICHAEL K. McNARY	:	
	:	
v.	:	Docket No. CENT 2015-279-DM
	:	
ALCOA WORLD ALUMINA, LLC	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involves a complaint filed by Michael McNary alleging that Alcoa World Alumina, LLC had interfered with his statutory rights in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1).[1] A Commission Administrative Law Judge granted the motion for summary decision filed by Alcoa and dismissed the proceeding on the grounds that McNary had failed to present evidence of any adverse action supporting his interference claim. 37 FMSHRC 2205, 2212-14 (Sept. 2015) (ALJ).

McNary filed a petition for discretionary review challenging the Judge's entry of summary decision on the basis that the Judge applied an incorrect standard in evaluating the interference claim and failed to view the record in a light most favorable to McNary, the non-moving party. We granted the petition and heard oral argument. For the reasons discussed below, we hold that the Judge erred in entering summary decision. Accordingly, we vacate the Judge's decision and remand for further proceedings.

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[1] Section 105(c)(1) of the Mine Act provides in relevant part:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

I.

Factual and Procedural Background

Alcoa operates the Bayer Alumina Plant in Point Comfort, Texas. Alumina is produced by grinding bauxite and mixing it with sodium hydroxide to form a slurry. The slurry is combined with steam under high heat and pressure to produce sodium aluminate. The sodium aluminate then undergoes clarification, precipitation, and calcination to produce alumina.

In 2013, McNary was a miners' representative[2] and managed pumps in the Digestion Department at the plant. Steve Emig, the Department supervisor, had been one of McNary's managers since March 2013.[3]

On January 8, 2014, McNary was walking through his work route when he observed a valve on the 5L5 pump blowing out hot slurry, which can reach a temperature of 480 degrees Fahrenheit. Emig arrived and helped some of the miners in the area to put on special suits to protect them from the slurry so that they could close the pump. Emig approached McNary, who was standing next to another miners' representative, Delton Luhn, and asked McNary to get tape from the tool room. The tape was to be used to prevent slurry from getting under the miners' gloves. *Id.* at 2206.

McNary was not able to find tape in the tool room. As he was returning to the 5L5 pump, he asked another miner to request that Kelly Grones, the health and safety manager, go to the 5L5 pump. Before he was able to return to the 5L5 pump, another supervisor, Miguel Gonzales, asked McNary to check on another pump to see if it was blowing out. McNary checked the other pump, which was not blowing out, and returned to the 5L5 pump. *Id.*

When he returned to the pump, McNary observed that two miners had attempted to close the pump. McNary gestured for Emig to come to the side. McNary informed Emig that Kelly Grones was on her way. McNary described the following reaction by Emig and the subsequent confrontation:

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[2] A miners' representative has various rights and responsibilities under the Mine Act. These include the right to accompany an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") during inspections of a mine, to be involved in pre- or post- inspection conferences (30 U.S.C. § 813(f)), and to request an immediate inspection of a mine (30 U.S.C. § 813(g)).

[3] Because this proceeding was decided on summary decision, there was no evidentiary hearing. McNary and Emig were deposed on July 8, 2015, and each provided different accounts of the events which are the basis of this proceeding. The Judge relied upon McNary's deposition testimony in his decision. 37 FMSHRC at 2205-06. It was proper for the Judge to rely on McNary's version of the facts in that McNary was the party opposing the motion for summary decision. *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016) ("'[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion.'") (citations omitted).

> [W]hen I told him that Kelly was on her way over there and he said, "You shouldn't have . . . called anyone, because this is my department and I direct the workforce," and I asked Steve [Emig], "Well, why did you direct . . . the operators into the hot slurry?" And Steve says, "I didn't direct them in there." I say[], "Well, you watched them go in there and you didn't stop them." And I asked him, "How did they get in there?" And Steve said, "They volunteered."
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> When . . . Steve said they volunteered to go in there . . . I basically told Steve, "You watched them go in there. You didn't stop them."
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> And Steve . . . said, "You shouldn't be involved in these matters." And I told him, "I'm an MSHA rep and I'm concerned for the safety of these operators. I should be. I should be concerned with these matters."
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> And that's when Steve told me, "I will remove you as MSHA rep. I will remove you . . . from this department, and I will remove you from the plant."

Id. (quoting McNary Dep. at 62-63).

Carlos Delgado, the chief miners' representative at the plant, and MSHA Inspector Brett Barrett then walked up to the area. *Id.* at 2214; McNary Dep. at 63-64. According to McNary, McNary informed them that Emig had just threatened him, and Delgado replied, "Yeah, I heard it." McNary Dep. at 64. McNary described the exchange that followed:

> Steve [Emig] started . . . explaining something to . . . Carlos and Brett that actually didn't happen that way. And, yes, I butted in.
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> . . . .
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> Well, actually, he was telling Carlos and Brett that he didn't threaten me, which I know he did threaten me. And I said, you know, "it didn't happen that way." And Steve says, "I'm done with you."
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> . . . .
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> And I asked Steve . . . , "Are you done with me? Are you done with me for good?" Because the threat was still there. He had threatened me prior. And when I asked him, "Are you done for good," I'm asking him, are you carrying out your threat? And he says, "No, I'm not done for good."

37 FMSHRC at 2214, *quoting* McNary Dep. at 64.

McNary subsequently filed a complaint with MSHA, and was later informed that MSHA would not be pursuing his case. McNary then filed a complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).[4] The operator subsequently filed a motion for summary decision, to which McNary responded *pro se*.

The Judge granted Alcoa's motion for summary decision, concluding that, making all inferences in favor of the non-moving party, McNary had not presented evidence of any adverse action that would dissuade a reasonable miner from engaging in protected activity. 37 FMSHRC at 2215. McNary subsequently retained counsel and filed a petition for discretionary review challenging the Judge's determination, which we granted.

II.

Disposition

Summary decisions are governed by Commission Procedural Rule 67, which provides that:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission reviews a Judge's summary decision *de novo*. *See Lakeview Rock Prods. Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). Summary decision is appropriate only if there are no material facts in dispute and the movant's position is entitled to judgment as a matter of law. *West Ala. Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1886-87 (Sep. 2015). The Commission has recognized that the record and the inferences drawn from the underlying facts on summary decision must be viewed in the light most favorable to the party opposing the motion. *KenAmerican*, 38 FMSHRC at 1946 (citations omitted). When the Commission reviews a summary decision and determines that the record before the Judge contains disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-17 (Aug. 1995).

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[4] Under section 105(c)(2) of the Act, a miner may file a complaint with the Secretary of Labor alleging discrimination or interference in violation of section 105(c)(1), and the Secretary is required to investigate the complaint. If, upon such investigation, the Secretary determines that a violation has occurred, the Secretary is required to file a complaint on behalf of the miner with the Commission. 30 U.S.C. § 815(c)(2). If, however, the Secretary determines that no violation has occurred, "the complainant shall have the right . . . 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).

Alcoa moved for summary decision on the basis that McNary had failed to establish an adverse action by Alcoa in response to McNary's protected activity.[5] 37 FMSHRC at 2205. In considering whether Alcoa's position is entitled to judgment as a matter of law, we preliminarily examine the standard applied by the Judge to determine whether Alcoa had impermissibly interfered with McNary's statutory rights in violation of section 105(c) of the Mine Act.

Section 105(c)(1) states in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . *or otherwise interfere with* the exercise of the statutory rights of any miner. . . ." 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(3) permits an individual to file a complaint charging "discrimination or interference" in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3).

The Judge set forth a legal framework that has been applied by the Commission to establish a discrimination violation under section 105(c), which has been commonly referred to as the "*Pasula-Robinette* test."[6] 37 FMSHRC at 2210 (citing *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (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 803 (Apr. 1981)). Under that test, a complainant establishes a prima facie violation of discrimination by showing that he engaged in protected activity, and thereafter, suffered an adverse employment action that was motivated at least in part by the protected activity.[7]

The Judge further recognized that the Commission applies the adverse action test articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). 37 FMSHRC at 2212-13 ("'[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington*, 548 U.S. at 68) (other citations omitted). Applying this test, the Judge reasoned that "Alcoa's actions will be found to be adverse actions if they would dissuade a reasonable miner from engaging in protected activity." 37 FMSHRC at 2213. Quoting *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Judge stated that "harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act." 37 FMSHRC at 2213.

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[5] The other basis for Alcoa's motion for summary decision was that McNary did not timely file his complaint with the Commission. A. Mem. Supporting Summ. Dec. at 9. The Judge excused the late filing of McNary's complaint (37 FMSHRC at 2212), and Alcoa did not file a cross-petition for discretionary review challenging that finding.

[6] The Commission has not explicitly held whether the *Pasula-Robinette* framework is the only framework applicable to claims brought under section 105(c). Given the Judge's errors in granting summary decision discussed *supra*, we need not reach that question at this preliminary stage of this proceeding.

[7] The operator conceded only for purposes of summary decision that McNary had engaged in protected activity by calling Grones and expressing concerns about safety. A. Resp. Br. at 11.

The Judge ultimately concluded, however, that "[m]aking all inferences in favor of the nonmoving party, Complainant has not presented evidence of any adverse action properly before the Court that would dissuade a reasonable miner from engaging in protected activity." *Id.* at 2215.

We conclude that while the Judge correctly set forth the standard for summary decision, he erred in its application. We therefore vacate the Judge's grant of summary decision and remand for an evidentiary hearing.

First, the Judge erred in entering summary decision in favor of Alcoa because he viewed some of the underlying facts in a light favorable to Alcoa, rather than to the opposing party, McNary. The Judge characterized Emig's threats to McNary that he would remove McNary as an MSHA representative, remove him from the department, and remove him from the plant as "vague," "not clearly directed at protected activity," and having "occurred during an emergency situation." 37 FMSHRC at 2214.

The Judge clearly viewed Emig's statement in a light most favorable to Alcoa by focusing on the surrounding circumstances of the emergency rather than by focusing on the language which could be viewed as a threat to terminate McNary's employment. At least two of the three threats were not vague. It may be said that "removal from the plant" is susceptible to different meanings depending upon the length of time of the removal. However, the threats to remove McNary as a miners' representative and to remove him "from the department" were quite specific.

Second, the Judge erred in drawing inferences from the underlying facts that favored Alcoa rather than McNary. At least two different meanings may be inferred from Emig's statement that he "was not done for good": (1) that Emig was done arguing with McNary and was backing off, and that McNary was in no danger of removal; or (2) that Emig was done talking with McNary now, but would deal with McNary later, and the removal threat was continuing. The first inference is favorable to Alcoa, while the second inference is favorable to McNary. The Judge drew an inference most favorable to Alcoa, the first meaning above, stating that Emig's statement was an assurance that Emig would not be carrying out his threat of removal. *Id.*[8] Confronted with these competing inferences, the Judge ruled in favor of the moving party, Alcoa, even though he acknowledged in his opinion that McNary had interpreted Emig's statement as a continuing threat of removal. *Id.*

The Judge also rejected McNary's interpretation because he found that there were no subsequent events that constituted retaliation or adverse employment actions. *Id.* This was error.

Even if there was no adverse employment action in the tangible sense of a firing, suspension, transfer or other action which directly impacts a miner's job status, the threats themselves may constitute interference within the meaning of section 105(c)(1) of the Mine Act.

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[8] Acting Chairman Althen takes the position that, when all material facts are uncontested in a bench trial with a judge as the ultimate trier of fact, the trial judge may draw necessary ultimate inferences of fact. *See KenAmerican Res.*, 38 FMSHRC at 1954-71 (Young and Althen, dissenting).

In this case, the evidence indicates that the statements which Emig made to McNary threatening to remove him as an MSHA representative, remove him from the department and remove him from the plant were very public. *See* Emig. Dep. at 19. Other miners in the area heard Emig's statements. *See, e.g.*, Delgado Aff. ¶ 3; Luhn Aff. ¶ 3. If miners understood those statements as threats directed at their representative for MSHA matters after the miners' representative raised a very serious safety concern,[9] the threats could broadly chill miners' willingness to raise safety concerns in the future.

Therefore, McNary does not have a burden of demonstrating that a threat of reprisal had actually been carried out in a tangible way. In *Moses*, the Commission concluded that "coercive interrogation and harassment over the exercise of protected rights" was prohibited under section 105(c). 4 FMSHRC at 1478. In so holding, the Commission noted Congress' direct and express concern about the chilling effect of such threats on miners in the legislative history for section 105(c) explaining that "it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against 'not only the common forms of discrimination, such as discharge, suspension, demotion . . . , but also against the more subtle forms of interference, such as promises of benefit or *threats of reprisal.*'" *Id.* (quoting S. Rep. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (emphasis added). Thus, under established Commission precedent, section 105(c) does not protect only against tangible *acts* of reprisal. Rather, it also protects miners against "*threats* of reprisal" that chill the exercise of protected rights.

In short, the Judge erred in entering summary decision because he failed to view the record and to draw inferences in a light most favorable to McNary, and because Alcoa was not entitled to summary decision as a matter of law. Accordingly, we vacate the Judge's decision and remand for further proceedings, including an evidentiary hearing.

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[9] McNary's concern about workers being burned by the hot slurry arose in the context of employees suffering serious burns at the Alcoa plant. Four months prior to this incident, on September 9, 2013, an operator was "badly burned" in an accident at the plant. Emig Video Dep. In December 2011, McNary himself suffered second and third-degree burns on his face, torso, back, and buttocks. *See* McNary Add. Resp. to Def's Proposed Findings of Fact and Mot. for Summ. Dec.

III.

Conclusion

For the foregoing reasons, we vacate the Judge's decision granting summary decision, and remand for further proceedings consistent with this opinion.

William I Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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