

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 2, 2021

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

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.

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 view² under *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

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

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.

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

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 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.”).

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).

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

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

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.

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 veracity⁶) 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 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

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.

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.

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

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.

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.

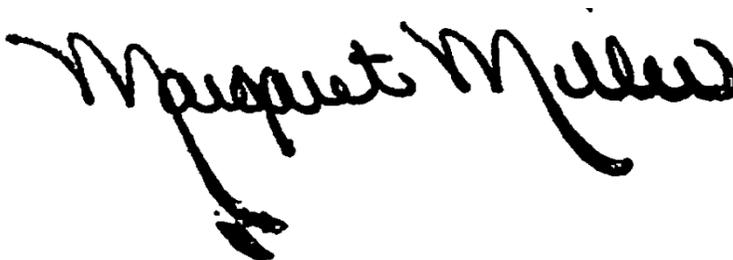
VI. ORDER

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.

A handwritten signature in black ink, reading "Margaret Miller". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

Margaret A. Miller
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

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