FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

March 1, 2024

ROBERT THOMAS	:	
	:	
v.	:	Docket Nos. WEST 2018-0402-DM
	:	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

---

[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.

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 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]

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.*

---

[2] 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).

CalPortland Co., 993 F.3d at 1208-09.[3] Relying on Supreme Court 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:

> 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.

---

[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 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).

APPLICABLE LAW

1. But-for Causation

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).

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).

---

[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.

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

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

[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.

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

[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

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 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. <u>Disparate Treatment</u>

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

---

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."

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 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

---

[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).

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 e-mail, 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 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]

---

[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.

[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)).

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 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 3-4, 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

[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.

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.

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. 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 citation, by suspending him

---

[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 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.

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.

Mary Lu Jordan, Chair

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

Distribution:

Brian P. Lundgren, Esq.
Jackson Lewis P.C.
520 Pike Street, Suite 2300
Seattle, WA 98101
Brian.Lundgren@jacksonlewis.com

Colin F. McHugh, Esq.
Navigate Law Group
1310 Main Street
Vancouver, WA 98660
cmchugh@navigatelawgroup.com

Trevor J. Cartales, Esq.
Navigate Law Group
1310 Main Street
Vancouver, WA 98660
tcartales@navigatelawgroup.com

Alexander Higgins, Esq.
Law Offices of Alex J. Higgins
2200 Sixth Avenue, Suite 500
Seattle, WA 98121
alex@alexjhiggins.com

Emily Toler Scott, Esq.
Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Scott.Emily.T@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Susannah M. Maltz, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Maltz.Susannah.M@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety & Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov