FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 10, 2018

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

DECISION AND ORDER

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

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

Before: Judge Miller

This case is before me on a complaint of discrimination brought by Robert Thomas against CalPortland Company ("CalPortland"), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). Thomas alleges that he was discharged from his employment at the mine because of his participation in an MSHA investigation and because of safety and task training complaints he made to his immediate supervisor. CalPortland denies the allegations, and states that Thomas abandoned his employment and voluntarily resigned after failing to cooperate with management during an investigation. The parties presented testimony and documentary evidence at a hearing commencing on September 4, 2018, in Portland, Oregon. Based on the testimony and exhibits presented at hearing, the stipulations of the parties, my observation of the demeanors of the witnesses, and the post-hearing briefs of the parties, I find that Thomas was discharged in violation of the Act and is entitled to back pay and other relief.

I. FINDINGS OF FACT

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

Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000).

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

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

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

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

To address their concerns, Demers attempted to bring in personnel from the rock barges

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

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

Thomas and McMillan agreed at hearing that in the year leading up to Thomas' termination, the Sanderling dredge was understaffed. Demers stepped in to help out occasionally when they were short of help or when one of them was out on leave. While no testimony was presented as to how Demers felt about stepping in to help, he did have a disagreement with Thomas about sick time in November 2017. Thomas had requested a sick day and received push-back from Demers. McMillan testified at hearing that immediately following that disagreement, Demers indicated to him that "Rob Thomas was done, he was fucking done at CalPortland." Tr. at 48.

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

Near the end of the day, as the dredge neared the port, Thomas saw MSHA Inspector Mathew Johnson on the dock. From the dock, Inspector Johnson called out and asked if it was

1. *See* Comp. Ex. 14.

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

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

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

On Saturday, January 27, Demers called Thomas and asked him to come to the office on Monday, January 29, at 8:00 a.m. When Thomas arrived on Monday morning, he met with Demers and Jeff Woods, the safety manager. Demers proceeded to read the narrative portion of the MSHA citation aloud to Thomas. After hearing what the inspector had written, Thomas asserted that the inspector's statement was not correct. Thomas tried to explain further but at some point felt it was not productive to respond to Woods' follow-up questions. Woods left the meeting and Demers asked Thomas to fill out an employee incident report. Thomas complied and also submitted an additional, lengthier statement later that day. Comp. Ex. 22. At some time that same day, McMillan was also asked to complete an employee incident report. Comp. Ex. 5.

Following their meeting with Thomas, Demers and McAuley met with Candy Strickland, who is a human resources manager for CalPortland. They sought Strickland's advice on next steps. In their view, Thomas had become uncooperative with the investigation when he failed to

respond to the last questions Woods had asked. McAuley noted at hearing that it was unusual to involve Strickland at this point, but insisted that no disciplinary decisions had been made at that time. However, shortly after the meeting ended, Demers sent McAuley and Strickland a corrective action form. The form contained Demers' recommendation that Thomas be fired from his employment for violating the PFD rule and for his lack of cooperation with the company investigation.

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

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

Later that same day, Thomas directed his attorney to send a letter to Demers and CalPortland about his intent to file a discrimination claim against them.[2] On February 2, Strickland spoke with a human resources supervisor at company headquarters about the situation with Thomas. She was advised to begin the process of voluntary resignation based on a violation of the company's attendance policy. At this point, Thomas remained on suspension and believed he had been terminated based upon the email he received from Demers. He had not been asked to return to work. That Monday, February 5, Strickland drafted a letter notifying Thomas that he was in violation of CalPortland's attendance policy. Resp. Ex. R. The letter stated that if Thomas did not contact human resources by Thursday, February 8, "he will be considered to have voluntarily resigned." *Id.* at 2. Thomas was sent two copies of the letter and refused to

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

accept delivery on both. Additionally, Demers testified that on February 5 and 6, 2018, he spoke with MSHA Special Investigator Diane Watson over the phone. She indicated that MSHA would not be opening a separate investigation against Thomas, that she understood he had been fired, and that he may be filing a discrimination complaint. Following the phone calls with Ms. Watson, Demers told McAuley that Thomas thought he had been terminated based on Demers' January 30 email and that Thomas had retained counsel.

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

II. ANALYSIS

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

a. Protected Activity

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

The legislative history of the Mine Act states that that Congress intended "the scope of

the protected activities be *broadly interpreted* by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and, the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act." S. Rep. No. 95-181 at 35 (1977) (emphasis added). Moreover, the history notes that "the listing of protected rights contained in . . [what eventually became section 105(c)(1)] is intended to be illustrative and not exclusive," and that the section should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id.* at 36.

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

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

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

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

b. Adverse Action

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

c. Discriminatory Motive

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

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

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

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

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

Finally, Thomas testified that Demers continued to brush off his safety complaints, suggesting hostility toward the protected activity. Just weeks after his complaints, Thomas was observed without his life jacket on the barge and discussed the matter with the inspector, resulting in a citation. Demers was justifiably upset that Thomas violated the Mine Act by failing to wear his PFD while working on the dredge and later failed to respond to all of the questions asked by Wood regarding the citation. However, the mine insists that Thomas was not terminated for either of those actions, but was instead terminated because he violated the mine's attendance policy in part by failing to show up for a requested meeting. Yet, Thomas advised his supervisor that he would not attend the meeting and no further effort was made by the mine to reschedule the meeting, or gather more information from Thomas.

There is no evidence in the record to support an argument by CalPortland that Thomas was treated like other employees who violated a safety rule. In fact, no evidence in the record suggests that violating a safety rule is the type of offense that leads to automatic termination.

Nor is there any evidence to demonstrate that the failure of a long term employee to answer the several questions asked by a member of the safety department is an offense that leads to firing at Calportland. At hearing, the mine presented some evidence regarding employee discipline but nothing to indicate how the mine operator normally handled incidents where an employee's activity resulted in a citation. Thomas worked for the mine for 16 years without any safety related incident, and yet, he was summarily terminated for this violation in Demers' email.

CalPortland continues to deny that Thomas was terminated for violating a safety rule, and instead argues that he was terminated in part for failing to comply with an investigation into the incident, thereby leading to the ultimate allegation that he violated the attendance policy. The pattern and reasoning the mine posits is not persuasive. Thomas failed to answer some questions of Jeff Woods and immediately Demers and McAuley determined he was not cooperative. Still Thomas continued to submit further written information as requested. Thomas cancelled a meeting at the mine only after receiving an email letting him know he was being fired. No further phone calls, texts, or emails (the method of communication throughout the incident), were sent to Thomas to discuss the matter or attempt to reschedule or gather further information. Instead for the first time, a letter was mailed from the human resources department.

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

d. Operator's Rebuttal

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

CalPortland presented witness testimony in an effort to justify firing Thomas based on his violation of the PFD safety rule, along with his alleged unwillingness to cooperate in the safety investigation. Company representatives testified at great length about the safety and training programs at the mine. All of the witnesses agreed that the mine's safety plan includes a rule mandating that employees wear a PFD while on the dredge and, for the most part, life jackets are worn in accordance with that rule. Demers, Thomas' immediate supervisor, spent a majority of his testimony explaining how serious it was not to wear a PFD, and what could happen if

someone fell into the river without wearing a PFD. Both Demers and Chad Blanchard,[3] the corporate safety director, testified that they had never seen anyone on deck without a PFD. However, McMillan said that he observed another supervisor enter onto the barge several days after the January 24 incident without a life jacket. It is unrefuted that it is important to wear a flotation device on the barge and failure to wear it could result in a serious injury were the miner to fall into the very cold waters of the Columbia River.

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

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

Here, the investigation into Thomas' conduct began shortly after the incident on January 24. Demers and McAuley held or scheduled numerous meetings with Thomas both before and following his suspension from work. Thomas argues that he cooperated with the investigation by speaking with Inspector Johnson and communicating with management both on site and at the Scappoose location regarding the incident on January 24, 2018. Thomas also testified that he participated in the January 29 meeting, which was the only one attended by Woods, but stopped answering questions once it became clear to him that Demers and Woods had little interest in his

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

description of the incident. The investigation involved four statements: three written by Thomas and one written by McMillan. McMillan's written statement did not state conclusively whether or not he observed Thomas without a PFD while on the ladder, but he made additional statements and testified at hearing, suggesting that he agreed with Thomas' characterization of the incident. The observations of the inspector as written in the citation were also part of the investigation. However, Ison, the towboat captain, was not questioned by CalPortland, and Woods, the safety manager in charge of the investigation, gave no recorded statement or opinion as to the nature or outcome of the investigation. Woods notably did not testify and the only mention of Woods in the testimony at hearing came from Demers, who claimed that Woods was not happy with Thomas' responses to questioning and left the room. Following that January 29, 2018 meeting, Demers decided that Thomas had been uncooperative with the investigatory process, relayed his opinion to McAuley, and together they contacted Strickland in human resources. Given the statements provided by Thomas, as well as his attendance at various meetings, I find that the arguments regarding Thomas' refusal to cooperate in the investigation are pretext.

Immediately after contacting Strickland, Demers recommended in writing that Thomas be fired due to the seriousness of the PFD rule violation and for his failure to cooperate in the company's investigation process. Demers gave no further justification for his recommendation to fire a 16-year employee with no other safety violations on his record but, instead, sent his recommendation by email to at least 50 contractors and co-workers of Thomas, albeit inadvertently. Demers did not base his recommendation on any apparent company discipline policy. The evidence shows, however, that Thomas did participate in the investigation and only became uncooperative after repeated questioning about issues he had already addressed.[4] In the five days following the incident, as described above, Thomas prepared and submitted three statements while suspended from work and participated in at least three meetings. While Thomas did refuse to answer a few questions at the last meeting with Woods, he continued with the investigation by providing a lengthier written statement regarding the incident. Therefore, I find that Demers explanation regarding his recommendation to fire Thomas does not have a basis in fact. Instead, based on his description of the incident and ensuing investigation, Demers seemed unconcerned with objectively assessing the situation. Nor did he seem concerned about actually completing the investigation and considering the recommendations of the safety department.

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

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

the same coined term by each witness causes the evidence to lose its element of truthfulness. Therefore, I do not find either Demers or McAuley to be credible witnesses.

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

e. Affirmative Defense

Having found that Thomas has established a prima facie case of discrimination, I must now consider whether CalPortland discharged him in part for unprotected activity and "would have taken the adverse action for the unprotected activity alone." *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley*, 4 FMSHRC at 993. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has stated that, "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

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

First, the mine did not meet its burden to show that Thomas' violation of a safety regulation is behavior that results in immediate termination, or is an activity that alone would have justified termination. Instead, the mine demonstrated it is a serious violation and it could result in serious injury. There is no indication that Thomas had a history of violating safety

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

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

Finally, the timing of the "voluntary resignation" letter fits with the information learned from the mine regarding Thomas' plan to file a complaint of discrimination. Even if McAuley did not hear Thomas' statement regarding the attorney on February 1, 2018, there is no dispute that on or around February 5, 2018, Demers was notified by MSHA that they were not going to pursue a case against Thomas regarding the citation issued to the mine, and that Thomas was intending to file a discrimination case against the mine.[5] During that same timeframe, Strickland sent Thomas the initial attendance policy violation letter. These actions, when viewed in the context of the incident as a whole, suggest that CalPortland used its attendance policy as pretext for terminating Thomas' employment. Based on the evidence, I do not believe that Thomas abandoned his position with CalPortland; instead, he was first fired as a result of the email sent by Demers and then fired a second time by a formal letter based on an attendance policy violation that he could not cure.

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

III. PENALTY

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

IV. DAMAGES AND RELIEF

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

Prior to hearing, the parties were given the opportunity to submit calculations of back pay and other damages potentially owed to Thomas. Counsel for Thomas submitted proposed relief on August 1, 2018. CalPortland did not submit back pay calculations. However, both parties stipulated that Thomas earned $26.90 as an hourly employee and worked 53.9 hours on average per week while employed by CalPortland. Jt. Stips. ¶¶ 3-4.[6] Both parties also stipulated to monthly totals for certain benefits, including medical insurance, life insurance, short-term disability insurance, and voluntary accident, death, and dismemberment insurance. Am. Jt. Stips ¶¶ B.1, 3-5. Those amounts are:

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

The requests for back pay, lost benefits, and attorney's fees are appropriate. I find that Thomas is entitled to total back pay of $49,281.09. The total back pay amount reflects a weekly rate of approximately $1,637.00 that Thomas would have earned at CalPortland from January 26 through November 30, minus a weekly rate of approximately $852.00 that he has earned at A-1 Redi Mix from May 27 through November 30, 2018. The back pay amount will increase until Thomas is reinstated to his former position and full payment is made with interest. I further find that Thomas is entitled to the monetary value of his lost insurance benefits, in the amount of $21,223.30, calculated monthly from February through November 2018. Additionally, Thomas

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

is entitled to lost company pension benefits, which amounts to $5,681.28 and is calculated from the total base pay he would have earned from January 26 through November 30, 2018, at CalPortland. In sum, Thomas is due a total payment of $76,185.67, calculated through November 30.

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

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

V. ORDER

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

Respondent is further **ORDERED** to pay back pay and lost benefits to Thomas in the amount of $76,185.67 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. All back pay and benefits' awards, including attorneys' fees, shall be recalculated and brought up to date with interest as of the date paid, and shall continue until Thomas is reinstated. *See Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2053 n.1 (Dec. 1983). Such payments shall be made within 30 days of the date of this decision. This case is referred to MSHA for assessment of a civil penalty that must be filed within 45 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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