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(MSHA) MICHAEL PRICE AND JOE VACHA & UMWA
V. HJIM WIALTER RESOURCES
DDATE:
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TTEXT:
September 9, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of MICHAEL L. PRICE
and JOE JOHN VACHA
and
UNITED MINE WORKERS OF AMERICA

v. Docket No. SE 87-128-D

JIM WALTER RESOURCES, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY: Backley, Doyle, Holen and Nelson, Commissioners
This matter involves the Secretary of Labor's discrimination complaint against Jim Walter Resources, Inc. ("JWR"), alleging that it discharged complainants Michael L. Price and Joe John Vacha in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), 30 U.S.C. • 815(c), after they failed to provide urine samples as required by JWR's Substance Abuse Rehabilitation and Control Program ("Drug Program"). This is the fourth time that this discrimination proceeding has been before the Commission on review. In its earlier decision on the merits, Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (August 1990)("Price and Vacha I"), the
Commission reversed Commission Administrative Law Judge Broderick's finding that the Drug Program was facially discriminatory in violation of section 105(c) of the Mine Act (10 FMSHRC 896 (July 1988)(ALJ)), and remanded the case
to the judge to determine whether JWR's Drug Program had been discriminatorily applied against Price and Vacha.
On remand, Judge Broderick found that the Drug Program had been discriminatorily applied against Price and Vacha, and that JWR had not shown it would have discharged Price and Vacha for unprotected activity alone. 12 FMSHRC 2635, 2639 (December 1990)(ALJ) ("Decision on Remand"). The judge

ordered the reinstatement of Price and Vacha. Id. Both JWR and intervenor United Mine Workers of America ("UMWA") filed petitions for discretionary review, which the Commission granted. For the following reasons, we affirm the judge's Decision on Remand.

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I.

Factual and Procedural History

A. Factual Background

The factual background of this proceeding is set forth in Price and Vacha I, 12 FMSHRC at 1522-28, and is incorporated by reference. JWR operates five underground coal mines in Alabama, employing over 2,800 employees, including 2,200 hourly workers represented by the UMWA. Each JWR mine has a local union affiliated with District 20 of the UMWA. At all times relevant to this proceeding, the UMWA and JWR were signatories to a collective bargaining agreement governing labor relations in the JWR mines. 10 FMSHRC at 897-98; 12 FMSHRC at 1522. That bargaining agreement establishes a mine health and safety committee at each mine composed of miners selected by members of the local UMWA. Both Price and Vacha were members of such a committee.

At the time of the incidents, both Price and Vacha had worked for JWR's No. 4 Mine for approximately nine years. 12 FMSHRC at 1524. Price and Vacha and the safety committee had the reputation of being "safety activists." 10 FMSHRC at 903; 12 FMSHRC at 2636. In six years on the safety committee, Vacha had filed from 75 to 100 section 103(g) complaints and participated in 50 to 75 safety grievances against JWR. In his eight and one-half years on the committee, Price had annually filed approximately 25 section 103(g) complaints, and handled approximately 70 safety grievances against JWR management.

In 1987, JWR initiated its Drug Program. Most directly involved in this matter is section II.E. of the program, dealing with random drug testing, which states:

> Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.

12 FMSHRC at 1523.

When Price and Vacha failed to provide the urine samples required for testing, they were suspended with intent to discharge and subsequently discharged. 12 FMSHRC at 1525. They were later reinstated by order of Judge Broderick.

B. Procedural Background

On May 14, 1987, pursuant to section 105(c)(2) of the Mine Act, 30

U.S.C. • 815(c)(2), the Secretary filed an application for temporary reinstatement of Price and Vacha to their JWR positions. On June 29, 1987, a temporary reinstatement hearing was held before Judge Broderick. At the
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outset of the hearing, the judge orally granted the UMWA's motion to intervene in this matter. JWR did not oppose the UMWA's participation as an intervenor. TRH 11-12.(Footnote 1)

On July 7, 1987, the judge issued an order directing the temporary reinstatement of Price and Vacha. This unpublished order also confirmed the UMWA's right to intervene. JWR appealed the reinstatement order to the Commission. See 29 C.F.R. • 2700.44(e). The Commission affirmed the judge's order of temporary reinstatement. 9 FMSHRC 1305 (August 1987). JWR appealed
the Commission's order to the United States Court of Appeals for the Eleventh Circuit (No. 87-7484, filed 8-7-87). The Eleventh Circuit subsequently affirmed the Commission's order requiring Price and Vacha's temporary reinstatement. Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

In March 1988, Judge Broderick heard the merits of the case. In his decision of July 13, 1988, the judge ordered the permanent reinstatement of Price and Vacha. 10 FMSHRC at 911. He determined that paragraph II.E. of the Drug Program was facially discriminatory under section 105(c) of the Mine Act because it targeted safety committeemen, but no other rank-and-file miners, for random testing and that the complainants' discharges pursuant to the Drug Program were discriminatory. 10 FMSHRC at 906-08. As to whether the Drug Program, assuming facial validity, had been discriminatorily applied to the complainants, the judge concluded that Price and Vacha had established a prima facie case of discrimination in that their discharges were motivated, in part, by their protected activity. 10 FMSHRC at 909-10. Nevertheless, the judge held that JWR had affirmatively defended against the discrimination claims in that it had discharged Price and Vacha for insubordination, i.e., violation of a valid "work order," the Drug Program. 10 FMSHRC at 910. The Commission granted JWR's petition for discretionary review, which challenged only the judge's determination that the Drug Program was facially discriminatory.

In its decision on the merits in Price and Vacha I, the Commission reversed the judge's conclusion that the Drug Program was facially discriminatory under section 105(c) of the Mine Act. 12 FMSHRC at 1531-33. Concerning the application of the Drug Program, the Commission affirmed the judge's determination that Price and Vacha had established a prima facie case of discriminatory discharge. 12 FMSHRC at 1533-34. However, the Commission remanded the case to the judge for reconsideration and further findings on the issue of whether JWR had established an affirmative defense, given certain of the judge's other findings. Those findings included the pre-testing supervisory harassment of Price and Vacha; the complainants' inability to urinate because of "genuine physical and psychological difficulties"; the

different testing procedures at other JWR mines; and the evidence of accommodation of other miners who had experienced urination difficulties. 12 FMSHRC at 1534-35. The Commission held:

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1 The Transcript of the Temporary Reinstatement Hearing of June 29, 1987, is referred to herein as "TRH."

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> [A]n operator does not establish a Pasula-Robinette affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed "independent" basis for discipline is actually an extension of the operator's discriminatory conduct.

12 FMSHRC at 1534.

The Commission instructed the judge as follows:

> We find that the judge did not fully examine and explain, in the context of ruling on JWR's affirmative defense, the impact of the evidence summarized above. If, in fact, Price and Vacha were fired for failing to comply with discriminatorily applied drug testing procedures or if those procedures were deliberatively manipulated to contribute to such failure, a Pasula-Robinette affirmative defense based on those same procedures cannot stand. In other words, a discharge for failure to comply with a discriminatorily implemented work order would not satisfy the affirmative defense requirements of Commission precedent.

12 FMSHRC at 1535-36. Accordingly, the Commission remanded the case to the judge, with instructions that the parties should be permitted the opportunity to brief the merits of the remanded issues.(Footnote 2)

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2 In Price and Vacha I, only JWR filed a petition for review. JWR did not challenge the judge's "as applied" findings nor had the Commission sua sponte directed that issue for review. The UMWA raised the "as applied" issue in its response brief. JWR moved to strike that portion of the UMWA's brief as being outside the Commission's direction for review. A majority of the Commission denied that motion (Commissioners Backley, Doyle, and Nelson). See 12 FMSHRC at 1529 ("[W]e hold that ... the `appellee' [in Commission review proceedings] may urge in support of the judgment below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack

the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review." (Emphasis in original)). Chairman Ford voted to grant JWR's motion to strike. 12 FMSHRC at 1542-43. Commissioner Lastowka voted to grant the motion to strike, but would have remanded the matter to the judge for a "final, appealable order" concerning the "as applied" issue. 12 FMSHRC at 1538-41. JWR summarily repeats its argument that the UMWA's "as applied" contentions were outside the proper scope of Commission review. For the reasons set forth in Price and Vacha I, 12 FMSHRC at 1528-29, we again reject JWR's argument on this issue.

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JWR unsuccessfully moved the Commission for reconsideration. 12 FMSHRC 2418 (November 1990). On December 20, 1990, Judge Broderick issued his Decision on Remand. He evaluated the evidence concerning "pre-testing supervisory joking directed at Price and Vacha, and the differences in procedures followed at other [JWR] mines." 12 FMSHRC at 2635. The judge found that:

> Price and Vacha were made to feel nervous and upset by the manner in which the testing was conducted. They did not refuse to submit the samples but were physically or psychologically unable to do so. I conclude that the fact that the procedure was supervised by those who often had an adversarial relation to them in safety disputes, contributed to their discomfort. I also conclude that the past safety activities of Price and Vacha were part of the motivation of these supervisors in their conduct of the drug testing program.

12 FMSHRC at 2637. Judge Broderick also found that:

> The procedures followed in testing Price and Vacha which differed from those followed in other mines contributed to their inability to comply with the request for urine samples. They were in part related to Price and Vacha's prior safety activities in that they were conducted by those who bore an adversarial relationship to Price and Vacha in mine safety matters.

12 FMSHRC at 2638-39.

The judge concluded that the drug testing program had been discriminatorily applied to the complainants and could not serve as an independent nondiscriminatory justification for their discharges. Accordingly, he held: "JWR has not established that it would have discharged Price and Vacha for unprotected activity alone, i.e., without reference to the implicated drug testing program. Therefore, their discharges were in

violation of section 105(c) of the Mine Act." 12 FMSHRC at 2639. The judge directed the permanent reinstatement of Price and Vacha and ordered JWR to pay them back pay and benefits. Id.

The Commission granted JWR's petition for review, which, essentially, attacks the judge's conclusions that Price and Vacha established a prima facie case and that JWR failed to defend affirmatively against that case. For the first time, JWR also challenges the standing of the UMWA to represent the individual claims of Price and Vacha. The Commission also granted the UMWA's petition, which asserts pro forma that the Drug Program is facially discriminatory.

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II.

Disposition of Issues

The petitions raise four issues:

(A) Whether Price and Vacha established a prima facie case of discrimination; (B) Whether JWR established an affirmative defense to the discrimination claims; (C) Whether the UMWA has the standing to bring an individual claim of discrimination on behalf of Price and Vacha; and (D) Whether JWR's Drug Program is facially discriminatory under section 105(c)(1), 30 U.S.C. • 815(c)(1).

We dispose of issue D summarily. That issue was decided by the Commission in Price and Vacha I, and the UMWA has presented no new arguments with respect to that issue. In Price and Vacha I, the entire Commission determined that section II.E. was not facially discriminatory under the Act. 12 FMSHRC at 1531-33, 1538 (Lastowka opinion), 1542 (Ford opinion). The Commission reasoned that the Mine Act does not bar operators from adopting substance abuse programs and that "JWR advanced adequate and reasonable business justifications for including safety committeemen, along with other employees whose job duties involved safety matters, in the pool of miners subject to the drug testing provision of section II.E." 12 FMSHRC at 1532-33. The Commission concluded that safety committeemen were not "singled out" from all other miners, because JWR reasonably targeted all safety positions for drug testing. 12 FMSHRC at 1532. We reaffirm the Commission's holding that section II.E. of the Drug Program is not facially discriminatory under section 105(c) of the Mine Act.

A. Whether Price and Vacha established a prima facie case of discrimination

The Commission also considered issue A in Price and Vacha I. There, a majority of the Commission concluded that Price and Vacha established a prima facie case of discrimination. We reaffirm that determination here. In its petition, JWR raises additional arguments that we will briefly discuss.

To establish a prima facie case of discrimination, a complaining miner must prove that he engaged in protected activity and that the adverse action

complained of was motivated in some part by that activity. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also, e.g., Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

The judge found in his first decision on the merits that "the discharge of Price and Vacha was motivated in part because of protected activity, i.e., because of their activities as safety committeemen." 10 FMSHRC at 909-10. He based that holding on the following evidence: Price and Vacha had engaged in ~1555
considerable protected activity as safety committeemen; Kelly was "clearly aware" that Price and Vacha were "notorious" for filing safety complaints; the supervision of the urine collection at No. 4 Mine was delegated to Andrews and Hendricks, company safety inspectors, rather than remaining in the Industrial Relations Department, as in other mines; JWR offered no accommodation to Price and Vacha when they were unable to urinate, although some accommodation was given to others involved in the Drug Program; and, Price and Vacha did not refuse to provide samples but were unable to do so. 10 FMSHRC at 909.

The thrust of JWR's present argument is that Kelly's decision to discharge Price and Vacha was not connected to their safety activities.(Footnote 3) JWR argues that neither direct nor circumstantial evidence demonstrates JWR's (i.e., Kelly's) discriminatory intent. On questions of a judge's fact finding, the focus of JWR's contentions on review, the issue before the Commission is whether substantial evidence on the record as a whole supports the judge's findings. Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 92 (D.C. Cir. 1983). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." See, e.g., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1984), quoting Consolidated Edison Co. v. NLRB, 305
U.S. 197, 229 (1938). Applying the substantial evidence test, the foregoing evidence shows protected activity, company knowledge of protected activity, and sufficiently disparate treatment of Price and Vacha during the drug testing procedures to support the judge's inference of discriminatory motivation.

JWR contends, however, that discriminatory intent must be proven by direct evidence and that there is no such evidence in this case. The Commission has made clear that such direct evidence is rare and that discriminatory intent may be established by the kind of indirect evidence involved here. E.g., Secretary on behalf of Johnny Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds, 709 F.2d

86 (D.C. Cir. 1983). We note further that much of the evidence of discriminatory application of the Drug Program, which we discuss below in the affirmative defense analysis, bolsters our conclusion that a prima facie case has been established by Price and Vacha.

JWR has added nothing on review that causes us to depart from the Commission's prior holding affirming Judge Broderick's finding that Price and Vacha established a prima facie case. Thus, we reaffirm the judge's determination that the complainants established a prima facie case that the Drug Program was discriminatorily applied to them.

B. Whether JWR established an affirmative defense

The issue here is whether JWR established an affirmative defense under the Pasula-Robinette analysis, which allows an operator to defend affirmatively against a prima facie case by showing that: (1) the adverse

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3JWR raised the same argument in challenging the judge's finding that JWR had not affirmatively defended. As discussed here and below, we reject JWR's argument on both counts.

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action was also motivated by the miner's unprotected activity and, (2) the operator would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817; Stafford, 732 F.2d at 959. See also Jim Walter Resources, 920 F.2d at 750, citing Eastern Associated Coal, 813 F.2d at 642. An operator must prove this affirmative defense by a preponderance of the evidence. E.g., Eastern Associated Coal, 813 F.2d at 642.

JWR contends that it could legitimately discharge Price and Vacha solely on the unprotected basis of their refusal or failure to provide the required specimens. As noted, the Commission made clear in Price and Vacha I that if the Drug Program were discriminatorily applied to Price and Vacha, JWR could not legitimately raise the complainants' failure to comply with the Drug Program as justification for their discharges. We conclude that substantial evidence in the record as a whole supports the judge's conclusion that JWR applied the Drug Program in a discriminatory manner against Price and Vacha.

Rayford Kelly, the Industrial Relations supervisor at the No. 4 Mine, testified that Price and Vacha were "notorious" for filing safety complaints against JWR management. TRH 362, 411, 421-23; 10 FMSHRC at 903, 909; 12 FMSHRC at 2636. Price had been disciplined and discharged for performing his duties as a safety committeeman; the discharge was reversed by an arbitrator. TRH 155, 157; 10 FMSHRC at 903. JWR Deputy Mine Manager Donnelly allegedly

told Vacha that the Drug Program was a way of getting rid of Price and him. TRH 64. Another safety committeemen, Thomas Wilson, testified that Price and Vacha were "constantly targets of discipline" and that the mine foremen stated that "they [were] after Mr. Price and after myself." TRH 222, 223. Mr. Wilson testified that he attended meetings where JWR upper management, "Bill

Carr, Buck Piper, complained about myself, Mr. Price and Mr. Vacha as to filing 103 G's, filing safety grievances, the way we took care of business." TRH 222; see generally 10 FMSHRC at 903, 909; 12 FMSHRC at 2636.

Both Price and Vacha were subjected to joking by supervisors concerning their participation in the upcoming drug testing program. TRH 63-65, 68-75, 152-155, 162-165; 10 FMSHRC at 900; 12 FMSHRC at 2636. On several occasions
both Price and Vacha were given "practice cups," such as Coke cans with the tops cut off. 10 FMSHRC at 900. A urine specimen bottle with "UMWA, Mike Price" written on it was displayed on the desk of Wyatt Andrews, head of the safety department at the No. 4 Mine, for two days before it was finally removed. TRH 63, 70; 10 FMSHRC at 900. Kelly was aware of the displayed specimen bottle. TRH at 399-400; 10 FMSHRC at 900; 12 FMSHRC at 2638. Andrews
also handed Vacha an empty self-rescuer container and said, "Here, practice up. This is your practice p--s cup." TRH 63-64, 162-164; 10 FMSHRC at 900.

Kelly delegated the testing of Price and Vacha to Andrews and Hendricks, management safety officials. TRH 387-91; 10 FMSHRC at 901; 12 FMSHRC at 2638.

At the No. 4 Mine, Kelly personally administered and observed the specimen collection of the management safety officials. TRH 385; see 12 FMSHRC at 2637. At all other JWR mines, the Industrial Relations Supervisors administered the testing of all miners. 10 FMSHRC at 901; 12 FMSHRC at 2637.

When Hendricks accompanied Vacha to the bathroom, Hendricks stood next to him
in the toilet stall, tapping on the divider, singing and humming. TRH 62, ~1557
129-30. See 10 FMSHRC at 901, 909; 12 FMSHRC at 2637.

Price and Vacha attempted to provide urine specimens every half hour, for four hours. TRH 61; 10 FMSHRC at 901. They asked Kelly if they could return in the morning to provide specimens. TRH 89, 181-83. Kelly refused. TRH 89, 181-83. Price testified that he offered to strip naked if he would be permitted to enter the restroom by himself. TRH 177-78. This request was rejected. TRH 177-78. Vacha testified that he was taking medication that could inhibit urinating. TRH 81. See 10 FMSHRC at 901, 909; 12 FMSHRC at 2637, 2638. The next morning, Price took a drug test at the company's medical facility, and Vacha did so at a local hospital. They submitted the results, which were negative, to JWR. TRH 111, 183-184, 88; 10 FMSHRC at 901.

In contrast, JWR accommodated other miners having difficulty urinating. See Tr. 730 (miner tested for cause permitted to return the next day to provide sample); Tr. 92 (miner who could not produce sample at beginning of his shift allowed to provide it at end of shift) 10 FMSHRC at 902, 909; 12 FMSHRC at 2637, 2638.

The foregoing constitutes substantial evidence to support the judge's conclusion that JWR applied its drug testing in a discriminatory manner

against Price and Vacha. We regard as particularly important the evidence of the notoriety of Price and Vacha's safety efforts when combined with JWR's failure to accommodate them, while others were accommodated. We also find telling the delegation of testing of Price and Vacha to those same supervisors who had engaged in pre-testing joking, and who had often assumed an adversarial role in safety matters against Price and Vacha. However, the judge's Conclusion of Law II, which states that "[t]he evidence does not establish that the pre-testing joking and harassment directed toward Price and Vacha were related to their ... safety activities" (12 FMSHRC at 2638), is not supported by substantial evidence and, further, is inconsistent with the balance of the judge's decision. For example, the record is clear, and the judge so found, that a few months before the Drug Program began, a urine sample bottle labelled "Mike Price UMWA" was exhibited on supervisor Wyatt Andrews' desk in the safety office. 10 FMSHRC at 900; see also 12 FMSHRC at 1535. Thus, the reference to the UMWA on the urine bottle and its location in the safety office demonstrate that the pre-testing "humor" was linked, at least in part, to the complainants' safety activities on behalf of the UMWA.

JWR also contends that Kelly possessed no unlawful motive when he discharged Price and Vacha. JWR cannot escape liability by focusing on the motivation of supervisor Kelly while overlooking the actions of Hendricks and Andrews, the other supervisors involved. Even assuming that Kelly did not possess discriminatory motive, the record is clear that JWR's other supervisors applied the Drug Program in a discriminatory manner. Under such circumstances, the supervisors' discriminatory motive and behavior must be imputed to the company even though the officer who actually makes the firing decision may not share the animus. JMC Transport, Inc. v. NLRB, 776 F.2d 612, 619 (6th Cir. 1985); Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529, 531 (3d Cir. 1962).

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In sum, the record supports Judge Broderick's holding that JWR applied the drug testing in a discriminatory manner, in violation of section 105(c), and that JWR failed to affirmatively defend against Price and Vacha's prima facie case.

C. Whether the UMWA has the standing to bring an individual claim of discrimination on behalf of Price and Vacha

JWR now asserts, for the first time in this proceeding, that the UMWA lacks standing to represent the complainants' individual claims. JWR's contention is based on principles of constitutional standing, drawn from Article III, Section 2 of the Constitution, which defines the scope of the federal judicial power. As the Commission has recognized, "the Article III `case or controversy' requirement does not literally apply to federal administrative agencies like the Commission." Mid-Continent Resources, Inc., 12 FMSHRC 949, 955 (May 1990), citing Climax Molybdenum Co. v. Secretary of

Labor, 703 F.2d 447, 451 (10th Cir. 1983), affirming Climax Molybdenum Co., 2

FMSHRC 2748 (October 1980).

In any event, miners' representatives, such as the UMWA, have standing to participate in Mine Act proceedings on behalf of miners, because the Act expressly confers such standing upon them. The Supreme Court in Warth v. Seldin, 422 U.S. 490 (1975), pointed out:

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.... [P]ersons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others....

422 U.S. at 501. The Mine Act authorizes miners' representatives to participate in a number of proceedings under the Act and section 105(c)(1) protects them from discrimination in so participating. Indeed, the Act expressly permits miners' representatives to take part in Commission discrimination actions:

> The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.

30 U.S.C. • 815(d). Commission Procedural Rules expressly authorize that "representatives of miners(Footnote 4) may intervene and present additional evidence" in

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4 29 C.F.R. • 2700.2 defines representatives of miners as follows:

> (a) Any person or organization that represents two or more miners at a coal or other mine for the purposes of

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discrimination proceedings instituted by the Secretary. 29 C.F.R. 2700.4(b)(2). The Rules also authorize representatives of miners t practice before the Commission. 29 C.F.R. • 2700.3. Moreover, 29 C.F.R. 2700.1(c) provides: "These rules shall be construed to ... encourage th participation of miners and their representatives." (Emphasis added). See UMWA, District 31, v. Clinchfield Coal Co., 1 IBMA 31, 1 MSHA (BNA) 1010, 1015 (May 1971); Peabody Coal Co., 1 FMSHRC 1785, 1791 (November 1979) (UMWA as the representative of miners at the subject mine was authorized to bring compensation proceeding on behalf of individual miners under 30 U.S.C. • 821). Furthermore, as pointed out by the UMWA and the Secretary on appeal, JWR's argument as to standing was not first raised to the judge below. Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. • 823(d)(2)(A)(iii), provides: "Except for good cause shown, no assignment of error by any party shall rely

on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." See also Commission Procedural Rule 70(d), 29 C.F.R. • 2700.70(d). This statutory review limitation precludes JWR from raising the UMWA's standing at this late stage.

The UMWA moved to intervene on June 29, 1987, just prior to the temporary reinstatement hearing. The UMWA specifically requested intervention on behalf of Price and Vacha, individually, as well as on its own behalf as an organization. As noted earlier, that motion was not opposed by JWR. (At the temporary reinstatement hearing, JWR merely requested that the UMWA not be permitted, for purposes of that hearing, "to offer evidence beyond that and through individuals other than those identified as witnesses by the Secretary." TRH 11.) The judge granted the motion to intervene. TRH 12; Temporary Reinstatement Order, July 7, 1987, at 2. Since then, the UMWA has actively participated in every aspect of this case, without previous challenge from JWR.

Because JWR never provided the judge with an "opportunity to pass" on this issue, we dismiss JWR's challenge to the UMWA's standing in accordance with section 113(d)(2)(A)(iii) of the Mine Act.

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the Act; and

(b) Representatives authorized by the miners, miners or their representatives, authorized miner representative, and other similar terms as they appear in the Act.

The UMWA falls under this definition of a miner's representative.

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III.

Conclusion

For the foregoing reasons, we reaffirm the Commission's prior ruling that section II.E. of the Drug Program was not facially discriminatory. We reaffirm the judge's finding of a prima facie case of discrimination and affirm his holding that JWR failed to establish an affirmative defense. Finally, we dismiss JWR's challenge to the UMWA's standing in this matter. Accordingly, we affirm the judge's decision on remand.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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Chairman Ford, concurring in part and dissenting in part:

I concur with the majority's reiteration of the prior ruling in Price and Vacha I, that section II. E. of Jim Walter Resources' (JWRs') Drug Program is not facially discriminatory. Furthermore, if this matter were properly before the Commission, I would agree to affirm the judge's finding of a prima facie case of discrimination and his rejection of the operator's affirmative

defense. Notwithstanding my agreement with the majority's substantive conclusion that the Drug Program was discriminatorily applied, I continue to hold the view, first expressed in my earlier dissent (12 FMSHRC at 1542), that the "as applied" issue is not properly before the Commission.

In Price and Vacha I, the judge found that the Drug Program was facially discriminatory but went on to hold that it had not been discriminatorily applied to Price and Vacha. Only JWR filed a petition for discretionary review and that petition was limited to issues with respect to the judge's conclusion that the Drug Program was facially discriminatory. After the deadline for petitions for discretionary review had passed, the United Mineworkers of America (UMWA), in a reply brief, challenged the judge's conclusion that the Drug Program had not been discriminatorily applied. JWR filed a motion to strike that section of the UMWA's brief, arguing that since the "as applied" issue had not been raised in JWR's petition, it could not be raised by the UMWA except in a petition of its own.

A majority of the Commission denied JWR's motion to strike by "adopting the general federal rule of appeal...that...the `appellee' may urge in support of the judgement below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgement itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review." 12 FMSHRC at 1529. In relevant part, I dissented from that holding as follows:

> Although general federal appellate procedure may permit an appellee to offer alternative grounds to support an ultimate judgement- even those rejected by the judge below - the Mine Act by its clear terms constricts that option here. Section 113(d)(2) of the Act states that "review shall be limited to the questions raised by the petition" and that "the Commission shall not raise or consider additional issues in such review proceedings" unless it has complied with the procedures and criteria for granting sua sponte review. (Emphasis added). The issue of whether JWR's Drug Program was discriminatorily applied to Price and Vacha was not raised in JWR's petition for discretionary review, nor was it directed for review sua sponte. It arose solely as a component of the UMWA's reply brief filed well outside the 30 day time limit for filing petitions under the Act. ~1562
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> The UMWA and the Secretary argue that they were not "adversely affected or aggrieved by [the] decision" of the judge so that there was no reason for them to file a petition for discretionary review.

There is, however, a distinction here between a "judgment", i.e., a favorable outcome for the appellees, and the "decision" itself, and it is the term "decision" to which section 113(d)(2) refers. In this instance the judge's decision is composed of two distinct parts, each involving separate allegations of discriminatory treatment, separate legal theories to support those allegations, and separate modes of analysis to resolve the issues raised. Indeed, one might argue that within the single docket the judge was deciding two discrete cases: one generic case brought in the names of Price and Vacha on behalf of all safety committeemen against the Drug Program as designed (the "facially discriminatory" case), and one brought exclusively by Price and Vacha and involving only their particular relationship to and interaction with JWR and its Drug Program (the "discriminatorily applied"case). In that context it cannot be said that the judge's decision with respect to the latter case was not adverse to Price and Vacha.

The two matters were even tried somewhat separately. Price and Vacha did not testify at the hearing on the merits. Testimony at that hearing on behalf of the Secretary and the UMWA was predominantly provided by safety committee members or potential members who were not disciplined but who testified to the inhibitive effects of the Drug Program generally and its impact upon their decisions to continue serving as committeemen or to run for committee office. That testimony went only to the "facially discriminatory" issue. The "discriminatorily applied" issue was tried in the June 29, 1987 hearing on temporary reinstatement wherein Price and Vacha testified to the specific circumstances under which they were subjected to random drug testing under the Drug Program, their history of activism as safety committeemen, and their perceptions of retaliatory link between the two. Secretary/Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305 (August 1987).

Appellees also object on practical grounds to the filing of "protective" petitions for discretionary review by prevailing parties, characterizing such a requirement as "meaningless", "cumbersome," and "nonsensical." Given the time and treasure expended

in this case, the odds of JWR's appealing the "facially discriminatory" issue so as to place the judge's
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determination thereon at risk were extremely high. In such circumstances a protective petition for discretionary review would not have been meaningless but would have been prudent. Furthermore, the judge's decision was issued on August 26, 1988 and JWR's petition was filed on September 20, 1988, thus leaving the Secretary, the UMWA, or both, five days to file a pro forma petition on the "discriminatorily applied" issue. In any event, the procedural fault at issue lies with the restrictive review scheme devised by Congress and both the Commission and the parties are bound by it.

In summary, Part III of the UMWA's brief raises important issues and compelling arguments. Unfortunately, at this juncture, I find no means by which the Commission can resurrect the "discriminatorily applied" charge when the statute limits our consideration to those issues contained within the four corners of the only petition for discretionary review before us. Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1429 (D.C. Cir. 1989).

As noted above, my views on the tightly circumscribed scope of review set forth in section 113(d)(2) of the Act have not changed,and I am therefore again constrained to dissent.

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1 For example, if this case were properly before the Commission, I would agree with the majority that section 113 (d)(2) would preclude the Commission from entertaining JWR's challenge to the UMWA's standing on the grounds that the judge had not been given an "opportunity to pass" on that issue.