FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 23 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CHARLES RIORDAN	:	
v.	:	Docket No. VA 2014-343-D
KNOX CREEK COAL CORPORATION	:	

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

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This proceeding concerns a discrimination complaint filed by the Secretary of Labor pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2012) ("Mine Act"),[1] on behalf of Charles Riordan. After a hearing on the case, the Judge issued his decision finding that discrimination had occurred and assessed a $25,000 civil penalty against the operator. 37 FMSHRC 1074 (May 2015) (ALJ). He subsequently entered a final unpublished order requiring Knox Creek to permanently reinstate Riordan to his former position with back pay.

For the reasons stated below, we affirm the Judge's decision and final order. We conclude that substantial evidence supports the Judge's findings that the Secretary established a prima facie case of discrimination and that a layoff occurring at the mine was used as a pretext to

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

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against . . . any miner . . . because such miner . . . 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 in a coal or other mine. . . .

30 U.S.C. § 815(c)(1). Section 105(c)(2) provides that the Secretary of Labor shall file a complaint with the Commission on behalf of a miner if he determines that section 105(c)(1) has been violated.

retaliate against the miner for making safety complaints. We also conclude that the Judge properly applied the Commission's longstanding analytical framework in reaching his determination that discrimination occurred.

I.

Factual and Procedural Background

A. Factual Background

Riordan began working at Knox Creek's Tiller No. 1 Mine in 2004. Tr. 30. Riordan, who had 32 years of experience as a miner, most recently worked for Knox Creek as a foreman on the active working section, an "outby" foreman for mine areas away from the active section, a trainer for other miners seeking foreman certifications, and a safety trainer for new hires. Tr. 29-33. Riordan received a $3,000 bonus from the operator in March 2013 following what he believed was a positive performance review for 2012. Tr. 34-35. On December 13, 2013, Knox Creek terminated Riordan's employment.

As part of his job as a section foreman, Riordan was responsible for checking the mine's ventilation to ensure that a sufficient volume of air reached the working section. Tr. 58-62. Riordan began voicing concerns about ventilation at the Tiller Mine to his supervisor, general mine foreman Mark Jackson, in late 2012, and did so "almost . . . daily." Tr. 36, 39. At that time, Knox Creek was developing a "super section,"[2] and controlling the flow of air to the two working faces became increasingly difficult as the cut went deeper. Tr. 37-38. Riordan did not retain any documentation of the ventilation problems, but did make verbal safety complaints and fixed the problems directly by doing "whatever was necessary." Tr. 62-64. When Riordan found inadequate ventilation, he would stop production until ventilation had been restored. *Id.* Although Riordan acknowledged that Knox Creek committed a large amount of resources and made "quite a number of changes" to address the ventilation problems, he did not see results from those efforts. Tr. 67-69, 73.

Jackson acknowledged discussing ventilation issues with Riordan, but testified that only two or three such conversations occurred and that they were as frequent as his discussions with other foremen. According to Riordan, Jackson "usually had a smart aleck comment about everything" in response to the safety complaints. Tr. 41-42. Riordan also voiced his concerns to Mine Superintendent Scott Jessee, Jackson's boss, and Mike Wright, Knox Creek's safety representative. Tr. 53-54, 207, 233; S. Ex. 1 at 22-23 (deposition testimony of Mike Wright). Jessee and Wright downplayed the frequency and import of those conversations with Riordan. Tr. 208; S. Ex. 1 at 22-23, 34-35.

On August 22, 2013, Riordan attended a company picnic at which Ron Patrick, Knox Creek's General Manager (and Jessee's supervisor), was present. KC Ex. 5, at 1. Jackson was on vacation and not at the picnic. Tr. 210. At the picnic, Riordan and fellow section foreman

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[2] A "super section" is a section with two continuous miners operating, one on each side of the section, with two splits of air. This allows both continuous miners to operate at the same time. Tr. 38, 53, 208-09.

Les Blankenship raised with Patrick their concerns with the adequacy of the ventilation to the super section. Tr. 43, 81-84. Riordan made some suggestions as to how to improve airflow. Tr. 43, 81-84. According to Riordan, Patrick responded that Knox Creek would do whatever was necessary to fix the ventilation problems. Tr. 43-44.

Riordan next saw Jackson on August 26, Jackson's first day back from vacation. According to Riordan, Jackson confronted Riordan then and told Riordan he had "thrown [Jackson] under the bus by discussing these problems with Mr. Patrick." Tr. 44-45, 85. Jackson denied that this conversation occurred. Tr. 285-86, 299.

The same day as the alleged "under the bus" comment, Jackson and Jessee claimed that they saw Riordan standing under unsupported roof. Riordan testified that he had been in the bleeder entry that was not being actively mined. Tr. 47-48. Jackson issued Riordan a written warning and suspended Riordan with pay for three days. Tr. 46-48. This was the only time Knox Creek ever disciplined Riordan in writing. Regarding Jesse, Riordan believed that his relationship with him began generally deteriorating in 2013 and "continued to go downhill" after the picnic. Tr. 33, 46.

Also in August 2013, the Dickenson-Russell Coal Company[3] ("Dickenson-Russell") began the process of closing two nearby coal mines and laying off the 133 miners who worked in those mines.[4] Tr. 118-22. Patrick, who was general manager for both Knox Creek and Dickenson-Russell, testified that he wanted to retain the best foremen from the closed mines. Tr. 122. Patrick asked the superintendents from the Tiller mine and Dickenson-Russell's three mines to evaluate their salaried employees, including foremen, using a standardized form. Tr. 123; KC Ex. 2A. According to Patrick, the highest-ranked foremen were retained and moved to other mines where necessary, while lower-ranked foremen were terminated. Tr. 126-28, 344.

Knox Creek terminated Riordan's employment on December 13, 2013, the same day Dickenson-Russell closed the Laurel Mountain mine. Tr. 48-49; KC Ex. 3. Riordan had scored a 46 on his standardized evaluation. Tr. 135, 194. A foreman who scored a 61 directly replaced Riordan. Tr. 135. Knox Creek also retained another foreman, Donald Duncan, who received a score of 45 on the evaluation. Tr. 135-37. Riordan was the only Knox Creek foreman fired in the layoffs. Tr. 160; S. Ex. 3.

Patrick asserted that Riordan's score was based solely on Superintendent Jessee's standardized evaluation. Tr. 127, 199, 232. Jessee denied speaking with anyone about the

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[3] Alpha Natural Resources controlled both the Knox Creek and Dickenson-Russell coal companies. Tr. 122-23.

[4] Dickenson-Russell mined out and closed the Roaring Fork mine in October 2013. Tr. 327. The company closed the Laurel Mountain mine the following December for economic reasons. Tr. 120, 327.

evaluations or inquiring as to their purpose.[5] Tr. 200-01, 220-21, 224, 242-44. Jackson denied any knowledge of or involvement with the evaluation process. Tr. 287-88. Jessee claimed that he filled out Riordan's evaluation on August 8-9, 2013, approximately two weeks before the company picnic. Tr. 199. Nevertheless, Knox Creek's summary of Riordan's evaluation apparently referenced the miner's subsequent incident under an unsupported roof on August 26, noting "[d]isciplinary measures regarding red zone areas." *See* Sec Ex. 3, at 19-20; Tr. 231. When confronted with this inconsistency, Patrick and Jessee both denied any knowledge of how the comments referencing the disciplinary measure came to be included in the summary of Riordan's evaluation. Tr. 155, 231-32.

Patrick referred some of the miners displaced by closures, but apparently not Riordan, to another Alpha company, Paramont Coal.[6] In the year after Riordan's termination, Knox Creek hired as many as six new foremen, including several who had not previously worked as foremen. Tr. 163, 237-38, 273.

Riordan believed his discharge resulted from his recent complaints about ventilation safety issues at the Tiller Mine. Tr. 51. Riordan filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration (MSHA), and the Secretary filed the section 105(c)(2) complaint on Riordan's behalf.

B. The Judge's Decision

The Judge analyzed the discrimination claim under the analytical framework set forth in *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); and *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The Judge rejected the operator's argument that the *Pasula-Robinette* approach to discrimination cases[7] "must be discarded" in light of the Supreme Court's recent decisions dealing with the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (2012), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (2012). 37 FMSHRC at 1100-04, n. 18 (discussing *Gross v. FBL Financial Services, Inc.*, 557

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[5] Knox Creek produced no objective criteria, or any guidance relied upon by Jessee regarding objective factors to be considered when evaluating foremen.

[6] Patrick testified that he could not remember if Riordan was on the list of employees sent to Paramont, and that list was not provided to the Secretary during discovery. Tr. 176-78. In its brief on appeal, the operator conceded that Riordan was not on that list. KC PDR at 28.

[7] Under *Pasula-Robinette*, as described *infra*, the Commission utilizes a shifting burden of proof in cases under section 105(c). The Secretary's initial burden is only to prove that the adverse action was motivated "in any part" by protected activity. The burden then shifts to the operator to prove that the adverse action was motivated "in no part" by the protected activity or, alternatively, that the adverse action would have been taken solely for non-protected activities. *See, e.g., Pasula*, 2 FMSHRC at 2786; *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

U.S. 167 (2009) (ADEA); *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (Title VII)). The Judge held that the Supreme Court's decisions in *Gross* and *Nassar* are inapplicable in the Mine Act context. *Id.*

Applying *Pasula-Robinette*, the Judge found that Riordan engaged in protected activity. 37 FMSHRC at 1074, 1104-05. He noted that Riordan made several verbal safety complaints about Knox Creek's inadequate ventilation, and he determined that these complaints constituted protected activity. *Id.* at 1104-05. In addition, the Judge found that Riordan's dismissal was an adverse action. *Id.* at 1104.

The Judge further determined that Riordan had established a prima facie case of discrimination, in that his protected activity motivated Knox Creek's decision to terminate his employment. The Judge found that Riordan's direct supervisor, Jackson, displayed animus toward Riordan's safety complaints in general and was particularly upset with Riordan's discussion of ventilation problems with Patrick at the mine's picnic. *Id.* at 1077, 1105. The Judge rejected Jackson's and Jessee's testimony that they had not heard of Riordan's comments to the mine's general manager.[8] To the contrary, the Judge found that Jackson took umbrage at Riordan's comments during the picnic and that Jackson's and Jessee's subsequent punishment of Riordan for allegedly standing under unsupported roof was "no coincidence." *Id.* at 1105. The Judge also noted a strong proximity in time between Riordan's protected activities and the adverse actions against him. *Id.* at 1104 n.20. The Judge thus found a nexus between Riordan's safety complaints and his termination, and accordingly concluded that Riordan's protected activity motivated Knox Creek's decision to terminate him.

Next, the Judge found that Riordan's inclusion in the layoffs was a pretext. The Judge rejected the operator's assertions of the "legitimacy of the [performance] rating system as applied." *Id.* at 1078. He found that the system "was malleable" and that "[d]esired outcomes trumped scores when needed." *Id.* at 1105. The Judge found that the allegations regarding Riordan's failings as a foreman lacked credibility, and thus dismissed the rationale behind Riordan's low evaluation score. Moreover, the Judge did not believe that Jessee conducted Riordan's evaluation in early August or independently of Jackson because Riordan's evaluation summary noted his later disciplinary action for allegedly standing under unsupported roof. *Id.* at 1094-95.[9] In addition, the Judge expressed doubts that Duncan, the foreman who received a lower rating than Riordan, was retained because of his membership on the mine rescue team. Finally, the Judge emphasized that Knox Creek hired a number of other foremen in 2014, undermining the operator's assertion that it needed to dismiss Riordan to make room for other foremen. *Id.* at 1105. In sum, the Judge inferred that the operator's witnesses were covering up the improper dismissal of Riordan. *Id.* at 1089-90 n.9, 1094-95, 1105.

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[8] The Judge also found Patrick's poor recollection of the picnic to be a sign of suspiciously selective memory. 37 FMSHRC at 1086, 1092 n.13.

[9] In discounting the operator's narrative, the Judge also pointed to inconsistencies in the testimony of Christy Viers, Knox Creek's human resources representative, about the evaluations' completion and processing. *Id.* at 1088-89.

In making his factual findings, the Judge found Riordan to be "a very credible and forthright witness." *Id.* at 1075. The Judge also made several specific negative credibility determinations about the operator's witnesses and discounted their testimony about Riordan's termination. The Judge generally found Jackson, Jessee, and Patrick to lack credibility in light of their demeanor, evasive answers during cross examination, reliance on leading questions during direct testimony, and selective memories. *Id.* at 1079 n.5, 1092 n.13, 1094 n.15.

The Judge concluded that the Secretary had proven that Knox Creek Coal unlawfully discriminated against Riordin for engaging in protected activity. *Id.* at 1104-06. The Judge assessed a penalty of $25,000, which was $5,000 more than the Secretary had proposed, in light of the operator's "lack of good faith, the gravity, and the negligence involved." *Id.* He retained jurisdiction to determine what remedies Riordan was owed. On July 23, 2015, the Judge issued a final order awarding Riordan relief.

II.

Analysis

Knox Creek challenges the Judge's decision on multiple grounds. First, the operator contends that the Judge improperly applied the Commission's *Pasula-Robinette* test because the Supreme Court has invalidated the same burden-shifting scheme in other, similar contexts. KC PDR at 18-23. Knox Creek further argues that substantial evidence does not support the Judge's conclusion that Riordan engaged in activity protected by section 105(c) of the Mine Act. *Id.* at 14-18. Third, Knox Creek contends that substantial evidence does not support the Judge's finding that animus toward Riordan's safety concerns motivated his dismissal. *Id.* at 27-35. Fourth, Knox Creek contends that substantial evidence does not support the Judge's conclusion that the broader layoffs were a pretext concealing the operator's discrimination against Riordan. *Id.* at 23-26.

A. The *Pasula-Robinette* test is the correct test for discrimination under the Mine Act.

Under *Pasula-Robinette*, a miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. 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 protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that the adverse action also was motivated by the miner's unprotected activity and the operator would have taken the adverse action against the miner for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Knox Creek contends that the Supreme Court has invalidated the same burden-shifting scheme in age discrimination and Title VII cases, and that therefore the burden-shifting scheme

in Mine Act discrimination cases must also be invalidated because the Mine Act involves the same operative language. KC PDR at 18-23; *see Gross*, 557 U.S. at 167 (age discrimination); *Nassar*, 133 S. Ct. at 2533 (Title VII). Specifically, the operator argues that section 105(c) of the Mine Act, like the ADEA's discrimination provision and Title VII's retaliation provision, only remedies discrimination that occurs "because of" the protected status or activity. KC PDR at 19. The operator asserts that the Mine Act provides no remedy where the protected activity was simply "a motivating factor." *Id.*

Knox Creek asserts that the cited Supreme Court cases establish two important principles pertinent to this case: first, the Secretary must prove as part of his case in chief that Riordan would not have been terminated "but for" the protected activity; and second, the burden of proof never shifts to the operator to show that the adverse action was motivated "in no part" by the protected activity or that the adverse action would have been taken solely for non-protected activities. *Id.* Rather, the burden of proof remains with the Secretary.

The operator's argument disregards the differences in the context, goals, and legislative history of the Mine Act and the statutes at issue in *Gross* and *Nassar*. In both *Nassar* and *Gross*, the Supreme Court emphasized that the legislative history and context of the discrimination provisions were essential to interpreting what standard of causation applies. *See Nassar*, 133 S.Ct. at 2530, 2533 ("Text may not be divorced from context"); *Gross*, 557 U.S. at 174 ("[We] must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."); *see also Paroline v. United States*, 134 S.Ct. 1710, 1727 (2014) (stating that even when Congress uses terms that, under *Nassar*, ordinarily connote "but-for" causation, such terms may have other meanings based on "textual or contextual" reasons (quoting *Burrage v. United States*, 134 S.Ct. 881, 888 (2014)).

In contrast to the ADEA and Title VII, the legislative history of the Mine Act affirmatively demonstrates that Congress envisioned such a burden-shifting framework when drafting the discrimination protections of section 105(c)(1). The report of the Senate committee that drafted section 105(c)(1) states that for the protections of the Mine Act "to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. 95-181, 35, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). Thus, Congress recognized that in a treacherous environment, miners had to have the ability to act to protect their safety. There is no equivalent to this concern in the ADEA or Title VII contexts. Obviously, if miners advocate strongly for their own safety, they could be inviting retaliation from mine management. For this reason, Congress concluded that "[w]henever protected activity is *in any manner* a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 36 (emphasis added). As noted in *Pasula*, "the [in any part] test reflects better the congressional policy under the 1977 Act of encouraging the free engagement by employees in protected activities . . . ." 2 FMSHRC at 2798.

The predecessor provision to section 105(c)(1) in the 1969 Coal Act prohibited discrimination "by reason of" a miner's protected activity. 30 U.S.C. § 820(b)(1) (1970). That provision was introduced as a floor amendment by Senator Kennedy, who said its purpose was to provide "the same protection against retaliation which we give employees under other Federal

labor laws." 115 Cong. Rec. 27948 (Oct. 1, 1969). Senator Kennedy cited the National Labor Relations Act (NLRA) as the first example of "other Federal labor laws." *Id.* At that point, the NLRB had long applied the "in any part" test in NLRA retaliation cases. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398-99 (1983) (discussing NLRA case law from 1938-1947); *see also Wright Line*, 251 NLRB 1083, 1083-84 (1980).

In *Pasula*, the Commission observed that the Mine Act replaced the Coal Act's phrase "by reason of" with the phrase "because of." *See* 2 FMSHRC at 2798. The only legislative history that speaks to this change suggests that it was calculated to *expand* the scope of the Coal Act's anti-retaliation provision. As noted above, the Senate Report stated that "[w]henever protected activity is in any manner *a contributing factor* to the retaliatory conduct, a finding of discrimination should be made." S. Rep. No. 95-181, at 36 (emphasis added); *see also Simpson*, 842 F.2d 453, 463 (D.C. Cir. 1988) (relying on this legislative history to construe section 105(c)(1) to protect conduct not discussed in the Mine Act's text). This suggests that, if anything, the "because of" language was intended to *reduce* the causation standard in mine health and safety cases – not to heighten it, as the operator argues.

Finally, Congress intended generally that the Mine Act be read broadly in favor of protecting miners. *See, e.g.*, *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 187 (3d Cir. 1997); *United Mine Workers of Am. v. Dep't of Interior*, 562 F.2d 1260, 1265 (D.C. Cir. 1977); *see also Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 315 (4th Cir. 2008). The legislative history of section 105(c)(1) is even clearer: the provision was intended "to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (emphasis added); *see Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994); *Pasula*, 2 FMSHRC at 2791.

Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission's reasoning in *Pasula* was sound, and we decline to overturn it. The Judge appropriately applied the Commission's burden-shifting framework to analyze this section 105(c)(2) case.[10]

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[10] We note that the burden of proof under both the test from *Gross* and *Nassar* and the *Pasula* approach is a preponderance of the evidence. *Gross*, 557 U.S. at 167; *Nassar*, 133 S. Ct. at 2533. This means that the party bearing the burden of proof only needs to show that it is more likely than not that causation does or does not exist. Regardless of which party faces this burden, the outcome is the same here. As discussed below, the Judge made several well-supported credibility findings and properly concluded that it was "clear enough from the record testimony that, circumstantially, [Jackson] was the force behind Mr. Riordan's discharge." 37 FMSHRC at 1078-79; *see also id.* at 1092 ("[T]he Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan . . . and not because he was simply the 'unfortunate' recipient of a lower evaluation score."). Thus, the Judge concluded in effect that Knox Creek would not have terminated Riordan "but for" his protected conduct. Given the Judge's findings, the result of this case would not change under the standard articulated in *Nassar* and *Gross*.

B. Substantial evidence supports the Judge's finding that Riordan engaged in protected activity.

Riordan testified that he raised safety issues regarding ventilation on an almost "daily" basis. Tr. 36, 39. Furthermore, both Jackson and Jessee acknowledged discussing ventilation issues with Riordan. Tr. 53-54, 207, 233, 278-79, 282, 294, 302. The Judge found that Riordan's complaints constituted protected activity under the Mine Act. 37 FMSHRC at 1104.

Knox Creek challenges the Judge's conclusion, asserting that Riordan's voiced concerns about the ventilation system were not protected safety complaints. Knox Creek agrees that Riordan regularly discussed ventilation problems with his supervisors. Knox Creek asserts, however, that Riordan's comments were nothing more than discussions between mine managers trying to address problems and were motivated by a desire to improve production, not to ensure safe working conditions.

Raising safety concerns is paradigmatic "protected activity" within the meaning of section 105(c)(2). Although other miners and foremen may have raised similar concerns, Riordan's safety complaints are no less protected as a result. *Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 n.3 (Nov. 2015).

Furthermore, Knox Creek's framing of Riordan's concerns is misleading. Riordan explained that he stopped producing coal whenever he observed insufficient airflow until he could remedy the problem. In this role, Riordan was thus responsible for satisfying the pressures of production demands without sacrificing the mine's safety requirements. Faced with this balancing act, Riordan's production concerns were inherently connected to safety.

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) is to "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *UMWA, on behalf of Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2095-96 (Aug. 2014) *vacated and remanded on other grounds*, 620 Fed. Appx. 127 (3d Cir. 2015), *citing* S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

Given these principles, the Judge was correct in determining that Riordan's complaints about the ventilation system were safety complaints protected under the Mine Act. Accordingly, the Judge's finding that Riordan engaged in protected activity is consistent with the law and supported by substantial evidence.

Other than its assertion that Riordan did not establish protected activity, Knox Creek does not dispute that Riordan demonstrated a prima facie case. Accordingly, we need not discuss the remaining elements of his prima facie case.

C. The Judge's finding that the adverse action was motivated by Riordan's protected activity is supported by the record.

Knox Creek contends that its termination of Riordan's employment was unrelated to his voicing of safety concerns. KC PDR at 27-35. Thus, in terms of *Pasula-Robinette*, the operator seeks to rebut Riordan's prima facie case by proving the termination was in no way motivated by the miner's protected activity. Specifically, Knox Creek asserts that the Judge improperly discredited the testimony of the operator's witnesses and made inferences that were not logically or rationally connected to the facts in evidence.[11] *Id.* at 27.

Among the indicia of discriminatory intent that establish that a complainant's adverse action was motivated by his protected activity are: (1) knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) a coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981)). The Judge found that those indicia had been established. His conclusions are supported by the record.

Riordan raised safety concerns to Jackson, Jessee, Wright and Patrick about ventilation, providing knowledge of his protected activity to his entire chain of supervision.

Concerning hostility, the Judge credited Riordan's testimony that Jackson accused Riordan of throwing him "under the bus" by discussing the ventilation problems with Patrick at the picnic. 37 FMSHRC at 1077 n.4. The Judge also credited Riordan's testimony that Jackson "usually had a smart aleck comment about everything" in response to safety complaints. *Id.* at 1077; *see* Tr. 41-42. For example, the Judge credited Riordan's testimony that when Riordan once tried to discuss inadequate airflow with Jackson, Jackson told Riordan that he could tell if there was adequate airflow by "slapping his jacket" and watching the "dust blow[...] off" it. 37 FMSHRC at 1077; *see* Tr. 55.[12] Additionally, the Judge reasonably found Patrick's claim that

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[11] Since Knox Creek contends that its termination of Riordan was completely unrelated to his protected activity, this is not a "mixed-motive" case where, under *Pasula-Robinette*, the operator could prove an affirmative defense by showing that it would have terminated Riordan for unprotected activity alone.

[12] Our dissenting colleague states that the Judge "rests the outcome of the case squarely on Jackson's reaction to the brief conversation in late August. . . ." Slip op. at 20. Although this conversation was important to the Judge, he based his findings of hostility on a whole course of conduct that culminated in the conversation at the picnic. Specifically, the Judge relied upon Riordan's testimony that from the time he began making safety complaints in late 2012, Jessee and Jackson were, at best, dismissive of Riordan's concerns. In one incident prior to the picnic in late August, he pressed Jackson to use air readings from an anemometer to ensure that the active face received a sufficient volume of clean air. Tr. 55, 62. Jackson insisted that the tool was unnecessary because he could tell by slapping his jacket and watching the dust blow off that the air flow to the face was an ample 2,000 cubic feet per minute. Tr. 55. Riordan, however, had measured less than a third of that amount. Tr. 55.

he did not discuss the picnic conversation with Jessee or Jackson to lack credibility because: 1) the Judge found Patrick's inability to remember the picnic conversation at all to be "suspiciously selective"; and 2) the Judge rejected as not believable Jackson's denial that he had accused Riordan of throwing Jackson "under the bus." 37 FMSHRC at 1077, 1086; Tr. 138-39, 285-86, 299.

The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981) ("to the extent the judge's conclusion reflects a credibility determination . . . that credibility determination should be given deference."). The Commission has also recognized that, because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Knox Creek's objections to the Judge's credibility findings amount to nothing more than a request that the Commission reweigh the evidence. We do not accept this invitation.[13]

The Judge's finding of discriminatory intent was particularly reasonable given that Riordan was not only disciplined almost immediately after the picnic, but was also terminated less than four months later. Taken together, these two incidents raise an inference that Riordan's termination was not coincidental. *See, e.g., Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) ("five months is not too long to find the causal relationship" between discipline and protected activity); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (four-month gap between protected activity and discharge probative of animus).

The record also supports a conclusion of disparate treatment. The Secretary showed that the operator did not discharge Duncan, the similarly situated foreman who had a lower evaluation score than Riordan. Patrick claimed that Duncan was retained specifically because he was a member of the mine rescue team and that if Duncan had lost his job, the rescue team would have fallen short of the required team members and the mine would have been in violation of the law. Tr. 135. On cross examination, however, Patrick admitted that other trained Knox Creek miners could have taken over for Duncan, preventing the team from falling short of the required members. Tr. 188. Patrick's willingness to retain a lower-ranked foreman, rather than finding other miners to fill in for Duncan undermines the legitimacy of Knox Creek's claim that

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[13] Likewise, our dissenting colleague's rejection of the Judge's credibility findings amounts to an attempt to reweigh the evidence. It is well-established that it is not within our power to reweigh the evidence or to enter *de novo* findings of fact based on an independent evaluation of the record. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993); *see also Wellmore Coal Corp v. Federal Mine Safety and Health Review Comm'm*, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. 1997) ("'[T] he ALJ has sole power to . . . resolve inconsistencies in the evidence.'").

it was necessary to retain Duncan while terminating Riordan. This supports the Judge's finding of disparate treatment.[14]

As a result, the Judge's finding that Riordan's adverse action was motivated by his protected activity is supported by substantial evidence.

D. Substantial evidence supports the Judge's finding that the layoff was used as a pretext to retaliate against Riordan for making safety complaints.

Knox Creek also argues that the Judge's finding that it used the layoffs as a pretext to terminate Riordan's employment lacks the support of substantial evidence in the record. The operator maintains that it would not fabricate wide-reaching layoffs merely to dismiss one foreman, and that its business judgment in the layoffs should be respected. Knox Creek further attests that it followed the evaluation scores closely, deviating only once to retain Duncan, who was a member of the legally required mine rescue team.

The Commission has explained that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982); *see Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 320 (6th Cir. 2013). In reviewing defenses, the Judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held 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 of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

In finding pretext, the Judge made a number of credibility determinations and drew reasonable inferences from the record. The Judge noted instances where testimony was inconsistent, vague, or simply implausible. For instance, he noted that Jackson and Jessee failed to document alleged instances of misconduct by Riordan. 37 FMSHRC at 1085, 1105. The Judge found that Jessee's claims – that he never spoke with anyone about the miner evaluation process, Riordan's termination, the closure of other Alpha mines, or the transfer of employees to Knox Creek's Tiller Mine – to be inherently implausible. The Judge also found Patrick's testimony to lack credibility because the general manager inconsistently remembered the mine picnic, alleged discussions with Jessee about Riordan's performance, and his own efforts to retain foremen displaced by the mine closures. We have reviewed these findings, find no error, and therefore affirm the conclusion of the Judge that Knox Creek's asserted business justification

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[14] Knox Creek asserts that the Judge improperly overlooked the operator's retention of Les Blankenship, the other section foreman who raised concerns about the ventilation to Patrick. Knox Creek's contention misses the point. Although Blankenship was retained, the operator provided no evidence that Blankenship worked under Jackson or scored similarly to Riordan on the foreman evaluations. Knox Creek therefore failed to establish that Blankenship and Riordan were similarly situated. Accordingly, the Judge properly disregarded the fact that Blankenship was retained while Riordan was terminated.

was pretextual and not credible. The Judge's specific findings are supported by substantial evidence.

The operator's asserted business justification relies on a factual timeline that is inconsistent with the record evidence. Jessee claimed to have conducted Riordan's evaluation prior to the picnic and without input from anyone else. Specifically, Jessee claimed that he filled out the evaluations on August 8 or 9, two weeks before the August 22 picnic and therefore before any of Riordan's supervisors had reason to retaliate. Tr. 199. However, Knox Creek's evaluation summary included the following reference to Riordan's written warning for allegedly standing under unsupported roof: "Disciplinary measures regarding red zone areas." Sec Ex. 3 at 19-20. Riordan received this warning on the first day Jackson returned to work *after* the picnic, and the same day that Jackson accused Riordan of throwing Jackson "under the bus."[15] Tr. 231. The evidence therefore indicates that the evaluation forms were amended, if not prepared, *after the picnic*,[16] when a motive to retaliate against Riordan clearly existed.[17] When confronted with this discrepancy in the evaluations' completion, Patrick and Jessee both denied any knowledge of how the comments referencing the disciplinary measure came to be included in the summary of Riordan's evaluation. Tr. 155, 231-32. This evidence, in the absence of any explanation, supports the Judge's finding that the layoff was used as a pretext to retaliate against Riordan.[18]

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[15] It is worth noting that Jessee was in Riordan's chain of supervision between Patrick, with whom Riordan had discussed ventilation, and Jackson, who resented that discussion.

[16] Our dissenting colleague suggests that we have conceded the numerical rankings were completed prior to the picnic. Slip op. at 26. We do not make any such concession.

[17] As noted *supra*, slip op. at 10 n.12, although Jackson's animus toward Riordan was most apparent following the picnic, Riordan's relationship with his supervisors began deteriorating months earlier. Tr. 33. According to Riordan, Jessee and Jackson displayed indifference or hostility to the ventilation complaints Riordan began making in late 2012. Tr. 39, 41-42.

[18] Our dissenting colleague rejects the inference that Jessee filled out or altered the form after the August 22 picnic as unsupported speculation. *See* slip op. at 25-28. Jessee testified he filled out the evaluation on August 8 or 9 and that he conducted the evaluations alone. Tr. 199. Riordan's evaluation included a warning for standing under unsupported roof. Ex. 3 at 19-20. However, it is undisputed that Riordan was not warned about standing under unsupported roof until after August 22. Tr. 231. This raises a question as to the accuracy of the August 8/9 evaluation dates.

Knox Creek was the only party that could explain how the warning was added to the evaluation. It had an opportunity to make that explanation at hearing but failed to do so; Jessee and Patrick simply testified that they did not know how or when the warning was added. Tr. 155, 231-32. The only reasonable conclusion that can be drawn from this record is that the evaluation was completed or amended after August 22. It is possible that there is some explanation for the inclusion of the warning that could lead to a different conclusion regarding

The record also lacks written documentation to support Jackson's and Jessee's testimony regarding Riordan. Jackson and Jessee attested that Riordan had serious shortcomings as a foreman.[19] However, Jackson and Jessee did not document in writing those alleged shortcomings, despite company policy requiring a written record of any serious failures by mine employees. Tr. 293, 303-09. Riordan's only written discipline was the warning he received for allegedly standing under unsupported roof, and that warning followed shortly on the heels of the picnic and Jackson's confrontation with Riordan. The lack of further written documentation undermines Jessee's and Jackson's testimony about Riordan's alleged shortcomings.[20]

Similarly, Patrick's testimony included inconsistencies. Patrick testified at hearing that he had previously discussed Riordan's allegedly subpar performance with Jackson because Patrick saw Riordan above ground suspiciously often. Tr. 132-35. During his earlier deposition, however, Patrick was unable to recall any significant detail about his conversation with Jackson. Tr. 145-48, 164-67. At another point, Patrick testified that he could not recall the picnic conversation with Riordan, but nevertheless contended he did not discuss that conversation with Jessee or Jackson. Tr. 137-39. Patrick also inconsistently remembered whether he sought to get jobs at Paramont for all terminated employees, including Riordan. And although Patrick insisted he wanted to retain Knox Creek's workers, the operator began *expanding* its workforce in the months following Riordan's December 2013 layoff but did not rehire Riordan. Tr. 163, 237-38, 273. Patrick's inconsistent recollections of the picnic conversation, his discussions about Riordan, and his efforts to retain miners call into question the veracity of his testimony.

In contrast to Knox Creek's witnesses, Mike Wright, Knox Creek's safety representative, considered Riordan a "conscientious" foreman, an "excellent employee" who "gave a hundred and ten percent to the mine," and "a stronger employee" than others at the mine. Sec Ex. 1, at 5-6, 16, 21, 25. Moreover, Knox Creek continued to allow Riordan to teach safety classes and train other foremen, despite alleged concerns about Riordan's safety record. Knox Creek's reliance upon Riordan to teach miners does not comport with its alleged low regard for Riordan's

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the timing of the evaluation. However, that explanation is not in the record. If anything would be speculative, it would be for the Commission to supply such an alternative explanation now.

[19] Jackson claimed that Riordan was a "poor" foreman who hung curtains incorrectly and lingered around instead of directing his men. Tr. 286-87, 292, 302-03. Jessee claimed that Riordan was one of Knox Creek's "weaker foremen." Tr. 203. Jessee added that he had difficulty getting Riordan to go underground in the Spring of 2013 because Riordan had back issues and desired instead to work on the surface as a safety trainer. Tr. 92, 203-04, 207, 225-26, 244-45.

[20] The dissent criticizes the Judge's analysis as flawed, asserting that the termination of Riordan's employment was not due to his poor performance, but rather was part of widespread layoffs. Slip op. at 22. However, Knox Creek's case justifying Riordan's dismissal was based on Jessee's and Jackson's testimony on direct examination that Riordan was a "poor" and "weak" foreman. Tr. 203-04, 207, 286-87. The dissent creates a distinction without a difference. Whatever the context for Riordan's dismissal, that dismissal was improper under the Mine Act if it resulted from animus toward Riordan's protected safety complaints.

work.[21] Given these inconsistencies, it was reasonable for the Judge to doubt Knox Creek's assertion that Riordan was a poor foreman. *See* 37 FMSHRC 1086-88, 1092, 1098-99, 1105. Accordingly, the Judge reasonably inferred that Knox Creek manipulated the layoffs and Riordan's evaluation to retaliate against the miner.

Knox Creek argues that the Secretary could not prove Jackson had any influence on the scoring process. This argument overlooks the difficulty of establishing such matters in this context. The Secretary acknowledges that he "couldn't prove exactly how this happened because Jackson, Jessee, and Patrick were each lying, dissembling, or 'forgetting' the relevant facts."[22] This is precisely why "the consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences." *Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002). The Judge reasonably drew the necessary and logical inference that "[w]hile the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge." 37 FMSHRC at 1078-79. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (recognizing the utility of circumstantial evidence to establish motivation in discrimination cases because such evidence "may [] be more certain, satisfying and persuasive than direct evidence"); *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089.[23]

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[21] Our dissenting colleague takes issue with the Judge's finding of an inconsistency between Knox Creek's view of Riordan as one of the mine's poorer foremen and his assignment to conduct safety training. Slip op. at 23-24, citing 37 FMSHRC at 1099. However, not only did Knox Creek allegedly regard Riordan as one of its poorer foremen, but the operator's evaluation of Riordan specifically gave him a score of "3" for safety, tied for the lowest score among all of the foremen at the Tiller mine included in Knox Creek's evaluation summary. KC Ex. 3. Thus, the low regard Knox Creek claims to have had for Riordan as a foreman extended to his concern for safety. Clearly, substantial evidence supports the Judge's finding of an inconsistency. The inconsistency may also call into question the specific score Knox Creek gave Riordan for safety.

[22] Our dissenting colleague assigns great significance to the fact that Patrick made the decision on which miners were retained. However, his "decision" was grounded on the numerical rankings provided by Jesse, who was either evasive or genuinely ignorant about any guidance or objective criteria used in calculating the ratings assigned to foremen. This is a classic "garbage in, garbage out" scenario. Jessee gave Riordan the lowest evaluation score of all the Knox Creek foremen. S. Ex. 3. If Patrick was provided with invalid or improperly skewed data, and he based his decision on those data, Patrick's decision was tainted by the flaws in the process. *See Turner*, 33 FMSHRC at 1067-69. As we have noted, both Jackson and Jessee were between Riordan and Patrick in the chain of command, and both participated in what the Judge fairly characterized as a retaliatory disciplinary action against Riordan almost immediately after Jackson confronted Riordan about his conversation with Patrick at the picnic.

[23] The operator further asserts that the closure of two mines and widespread layoffs could not reasonably be considered a pretext to fire one employee. KC PDR at 27. Knox Creek's argument, however, misrepresents the Judge's findings. The Judge did not deem the

Our dissenting colleague asserts that "[t]he lack of evidence that Jackson could, or did, manipulate the rankings, standing alone, warrants reversal of the Judge's decision." Slip op. at 21. Consistent with this statement, our colleague repeatedly accepts the truthfulness of the testimony of Knox Creek's witnesses.[24] However, the Judge generally disbelieved their testimony, and, as discussed herein, the Judge's credibility determinations were supported. Substantial evidence is not limited to direct evidence, but includes inferences drawn from negative credibility determinations. In *Southwest Merchandising Corp. v. N.L.R.B.*, 53 F.3d 1334 (D.C. Cir. 1995), for example, the National Labor Relations Board found that a successor corporation had committed an unfair labor practice by not hiring workers who had engaged in a strike while employed by the predecessor company. *Id.* at 1342-44. Although Southwest vehemently disputed the allegation that it was motivated by anti-union animus, the Board found an unfair labor practice based entirely on inferences drawn from finding Southwest's witnesses to be not credible. 53 F.3d at 1340-41. The court concluded that substantial evidence supported the NLRB's inferences drawn from negative credibility determinations. *Id.* at 1342-44. Here, the negative inferences drawn by the Judge after finding Knox Creek's witnesses to be not credible similarly are supported by substantial evidence.[25]

Knox Creek demands that its business justification for terminating a miner requires acceptance unless it is "plainly incredible or implausible." *Chacon*, 3 FMSHRC at 2516. However, the Commission has rejected this argument. The language Knox Creek relies on from *Chacon*, 3 FMSHRC at 2516, merely means that if an operator's explanation is true, a Judge should not reject it because he disagrees with the business decision or considers it unfair. *See Haro*, 4 FMSHRC at 1937-38. But that "does not mean that such defenses should be examined superficially or be approved automatically once offered." *Id.*; *see Cumberland River Coal*, 712 F.3d at 320. Before deferring to an operator's business justifications, a Judge must first "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Haro*, 4 FMSHRC at 1938 (emphasis and quotation marks

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closure of the mines to be a pretext for firing Riordan, but rather determined that the operator manipulated its broader layoff process to terminate Riordan's employment, and that Jackson's hostility influenced the decision-making process. 37 FMSHRC at 1078, 1092.

[24] For example, our colleague states that prior to the August 22 picnic, "evidence shows Riordan only engaging in ventilation discussions with Jackson and, occasionally, with Jessee in the same manner essentially as one would expect of all underground foremen." Slip op. at 25. This was the characterization by Jessee and Jackson, but it certainly was not how Riordan described the conversations. *See* footnote 12, supra. Our colleague's description is based on testimony that the Judge rejected.

[25] The dissent suggests we are reversing the burden of proof in this matter. Slip op. at 25 n.12. The dissent, however, fails to recognize how the burdens of proof are allocated under the approach set forth in *Pasula-Robinette*. The burden is upon the Secretary to establish a prima facie case, as was done here. The operator may then seek to rebut the prima facie case. *Robinette*, 3 FMSHRC at 818 n.20. On rebuttal, the operator bears the burden of proof. The Judge's negative inferences from finding the operator's witnesses to be not credible support the conclusion that Knox Creek's asserted justification for Riordan's dismissal was pretextual.

omitted). That is precisely what the Judge did here. He found that the justifications were not credible.

As discussed *infra*, a Judge's credibility determinations are entitled to great weight. *Farmer*, 14 FMSHRC at 1541; *Penn Allegh Coal*, 3 FMSHRC at 2770. The operator's complaints about the Judge's credibility determinations ignore the mutually dependent nature of those determinations and the fact that they were partially based on the witnesses' demeanor. *See Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (findings of "demeanor and credibility . . . are peculiarly within a trial judge's province"); *Cordero Mining LLC v. Sec'y of Labor ex rel. Clapp*, 699 F.3d 1232, 1236 (10th Cir. 2012). Evaluation of the demeanor of witnesses is an essential element of a judge's credibility determinations. For example, here the Judge noted that Jessee, when asked to explain a discrepancy between his trial testimony and his deposition testimony, looked over at his attorney to seek assistance in answering. 37 FMSHRC 1095; Tr. 236.[26]

Accordingly, we defer to the Judge's credibility determinations and conclude that his findings of pretext are supported by substantial evidence.

[26] Knox Creek's claim that Riordan testified inconsistently about the timing of the "under the bus" conversation is exaggerated. Although Riordan first said the conversation happened the day after the picnic, he later clarified – without prompting – that the conversation happened, "either the following day or the next time I encountered [Jackson], the next morning I encountered him." Tr. 44-45, 85.

III.

Conclusion

For the reasons stated above, we affirm the Judge's decision that Knox Creek discriminated against Riordan because it is supported by substantial evidence under a correct interpretation of the Mine Act.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Althen, dissenting:

The Judge's and majority's decision in this case rests upon wholly unfounded speculation rather than substantial evidence. I respectfully dissent.

I.

Analysis

Ronald Patrick, General Manager for operations of Dickenson Russell Coal Company and Knox Creek Coal Company, testified that he alone made the final decision to layoff section foreman Charles Riordan. Patrick testified he made that decision based upon the numerical rankings resulting from evaluations of foremen made by mine superintendents. Tr. 126. Therefore, there were two possible routes to prove that protected activity motivated, at least in part, the layoff of Riordan by Patrick.[1]

If Patrick laid off Riordan based upon animus by Patrick himself to protected activity by Riordan, then discrimination occurred. The Judge, however, does not find that Patrick himself chose to discriminate against Riordan. Despite several adverse credibility comments regarding Patrick,[2] the Judge does not find that Patrick lied in testifying that he was the person to decide which four foremen to lay off as a result of the two mine consolidations and does not find that

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[1] The operator raised an affirmative defense that, if Riordan's layoff was motivated in any part by protected activity, it would have occurred in any event based on unprotected activities alone — that is, the shutdown of Laurel Mountain and consequent layoffs. As I view the case, however, whether examined from the standpoint of the second part of the *Pasula* test or from the view of an affirmative defense, the case turns upon one issue — whether protected activity, standing alone, was the motive for the layoff of Riordan. For that reason, I do not find it necessary or desirable to deal with the operator's defense based upon the decisions in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), or *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013). I express no opinion regarding the impact of those decisions upon our discrimination jurisprudence. The majority agrees that consideration of those cases is not necessary for adjudication of this case. Slip op. at 8 n. 10 ("Given the Judge's findings, the result of this case would not change under the standard articulated in *Nassar* and *Gross*."). Nonetheless, it discusses the cases in a brief passage of dicta. Slip op. at 7-8. I look forward to a future case in which the Commission will have the opportunity to consider the issue when it is outcome determinative.

[2] The Judge found it not credible that Patrick did not recall the brief picnic conversation with several miners including Riordan and, to some extent, that finding carries throughout his decision. 37 FMSHRC at 1086. The Judge does not identify any motive Patrick would have had for not recalling that conversation. Given Patrick accepted the occurrence of the conversation (Tr. 138), it would have been better for the operator if Patrick remembered the conversation in exactly the detail as Riordan. There is no evidence of discrimination in the conversation. Instead, the conversation shows the most senior manager desirous of, and receptive to, comments and advice from a number of miners, including Riordan.

Patrick himself had animus against, or discriminated against, Riordan because of protected activities.

In finding discrimination, the Judge expressly identifies the culprit as Mark Jackson, an employee two levels beneath Patrick and with respect to whom there is no evidence of participation in the rankings leading to the layoff decisions. The Judge states:

> The issue is whether Riordan was discriminated against for making the safety complaints, which specifically came to rest on Mr. Jackson's doorstep, and about which Mr. Jackson took umbrage. While the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge.

37 FMSHRC at 1078-79.

Indeed, the Judge rests the outcome of the case squarely on Jackson's reaction to the brief conversation in late August, in which Riordan and other employees amicably discussed ventilation with Patrick:

> As noted, the Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks on that subject to mine president Ron Patrick and not because he was simply the "unfortunate" recipient of a lower evaluation score.

Id. at 1092.[3]

Riordan's testimony does not provide any evidence of manipulation of the ranking system. The Judge drew an outcome determinative inference of discrimination based upon circumstantial evidence drawn from testimony of operator employees, none of whom testified in any manner that the operator manipulated the rankings or discriminated against Riordan.

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[3] The Judge, in his "overview" of his findings, further stresses Jackson as responsible for the rankings manipulation, stating that "Riordan's candor with the president did not sit well with his immediate supervisor, Mark Jackson." 37 FMSHRC at 1075. The majority asserts that the Judge based his decision upon an entire course of conduct. Slip op. at 10 n.12. That is not what the Judge stated. Again, he said, "the Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks on that subject to mine president Ron Patrick." 37 FMSHRC at 1092. Ironically, the majority's footnote cites one conversation between Jackson and Riordan. Thus, the majority, along with the Judge, points at Jackson as causing manipulation of the rankings although neither is able to cite any evidence of such manipulation of previously completed rankings. Consequently, they expose their opinion to the critical flaw – there is an absence of any, let alone substantial, evidence of manipulation of rankings by Jackson.

The fatal problem with the Judge's decision, and the majority opinion, is that the evidence does not support the outcome determinative inference. It should be enough to reverse the Judge's unsupported inference to point out that the Judge bases his decision upon the finding that "Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks." There is not a speck, scintilla, or smidgen of evidence that Jackson, one of many general mine foremen, had or could have had any role in rankings that were compiled *before* the company picnic, or that he had any ability or made any effort to manipulate those already made rankings after the picnic. In reaching his circumstantial inference, the Judge writes a discursive opinion mostly citing irrelevancies to find that Jackson, an employee not involved in human relations and two steps below Patrick, took aim at Riordan due to a three-to-five minute conversation between Riordan and other miners with Patrick in late August and in some unexplained way manipulated a major workforce consolidation to discriminate against Riordan.[4]

The lack of evidence that Jackson could, or did, manipulate the rankings, standing alone, warrants reversal of the Judge's decision. However, it is useful to cut the many disparate threads of the Judge's decision.[5]

First, the Judge notes, but does not discuss, the testimony that the miner who replaced Riordan scored far above him on the ranking system. 37 FMSHRC at 1090. In fact, that miner had to take a demotion from general mine foreman to section foreman. Tr. 131. The Judge further notes testimony that Patrick gave Knox Creek Human Resources a list of high performers at the Cherokee, Roaring Fork, and Laurel Mountain mines with whom Knox Creek would like

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[4] The majority asserts that the dissent does not accept the Judge's credibility findings. Slip op. at 11 n.13. In fact, the dissent rests upon the absence of ***substantial evidence*** that Jackson, directly or indirectly, manipulated the rankings and thus that protected activity motivated one particular layoff made as part of a massive realignment and reduction in force. There simply is not substantial evidence that protected activity motivated Riordan's layoff. Further, neither the Judge nor the majority explain the anomaly of conspirators, determined to manipulate rankings to make sure Riordan was laid off, only manipulating the rankings to the extent that Riordan was fifth from the bottom of the ranked foremen, a position that did not assure that he would be reached in the layoff.

[5] Riordan was the first witness. 37 FMSHRC at 1075. The Judge enthusiastically praised Riordan's testimony immediately after he left the witness stand gushing, "you served yourself well" and "I want to compliment you on your demeanor . . . you did yourself a service by the way you maintained a calm demeanor, answered questions, I felt honestly, and so that's a compliment to you." Tr. 100-01. This praise contrasts with the Judge's treatment of the operator witnesses, whom he mocks with the contrived, flippant terms "recall-itis" and "no idea-it is." *Id.* at 1092-94 & nn.13-15, 1098. The Judge further explicitly "discounted" testimony of operator witnesses solely because of the form of questions, even though the Judge never intervened and opposing counsel, with rare exception, did not object to the form of the questions. *Id.* at 1075 n.5. There is no reason not to think the substance of the testimony would have differed had a more time-consuming approach been followed in this bench hearing. Further, all of these operator witnesses were subject to cross-examination.

to fill vacancies. 37 FMSHRC at 1089 n.9. Obviously, the Judge could not and did not find that a desire to retain the best workers would be a basis for finding unlawful discrimination in the layoff of less proficient employees. No one asserts that the general mine foreman who replaced Riordan suffered such demotion due to manipulated rankings. That miner suffered an adverse job action because of workforce consolidation and mine closures. None of this supports manipulation.

Second, the Judge writes at length about Riordan's job performance as if Riordan's layoff resulted from unsatisfactory performance; the Judge finds that the evidence does not support a conclusion that Riordan was an unsatisfactory foreman. *Id.* at 1097-99. This extensive discussion of whether Riordan was a competent foreman ignores the fact that the operator did not assert that Riordan was laid off for cause or for poor performance. The testimony, including Riordan's testimony, is consistent that the operator laid off Riordan because of a reduction in force in which four foremen and 129 other employees lost their positions, resulting from the consolidation of workforces resulting from the closure of two mines. There is no evidence, for example, that the three other foremen who were laid off as a result of the consolidations were not competent foremen. There is no evidence that, absent the consolidations, any of the four foremen would have been discharged for cause. By discussing the case as if it were a for-cause dismissal, the Judge miscasts the discussion and decision.

In terms of the rankings used for the necessary reduction in force, Riordan did not produce any evidence and in fact did not even claim that the points he received in the rankings were unjust — that is, that his ranking points on any specific performance characteristics were unfair, or that any other foreman received scores higher than deserved. By casting the layoff as if it were a dismissal for cause, the Judge holds the layoff to an entirely different standard than a necessary workforce contraction due to market or mining conditions, in which all foremen were evaluated and the best retained, albeit some with demotions.

Third, there is no evidence whatsoever that the ranking system or rankings themselves were unfair. The evidence establishes that, in planning for a substantial reduction in force, the operator asked superintendents to rank foremen under their supervision. Four separate superintendents individually ranked the foremen under their supervision by assigning each of them 1 to 5 points to each factor in a list of 15 specific and easily understood characteristics of performance. 37 FMSHRC at 1088; S. Ex. 3. The four superintendents assigned points to a total of 24 foremen based upon those criteria. *Id.*[6] Further, the ranking system added points for certifications. Riordan was the principal beneficiary of such additions – a fact that is, of course, inconsistent with manipulation of the system to dismiss Riordan. Riordan did not finish last – that is, in a position assuring layoff. He finished fifth from the bottom in rankings. That system and result does not speak to a discharge for cause; it speaks to an objective and business-like approach to keeping the best foremen. No evidence even suggests that Riordan was a superior

[6] The criteria were: safety, policy and procedure, attitude, right thing, cooperative, observations, knowledge, ability, reduce cost, results based, quick learner, dependable, adapt to change, proactive, and problem solver. S. Ex. 3. Additionally, extra points were awarded for certifications, thereby giving Riordan an extra 5 points. *Id.*

performer to any foreman ranked above him. Indeed, Riordan had expressed the desire to leave the position as an underground foreman and work on the surface.

Although the Judge writes in terms of the reduction in force as a pretext for laying off Riordan, he does not make the patently absurd suggestion that the operator closed two mines and laid off 133 employees as a pretext for the dismissal of Riordan. The Judge, therefore, must believe that the operator used the closures as a convenient opportunity to layoff Riordan. However, although Riordan claims, and the Judge implicitly found, that the rankings were manipulated in some way, Riordan does not contest the fairness of his score as compared to other foremen. There simply is no evidence that Superintendent Scott Jessee ranked Riordan unfairly as compared to other foremen under his supervision.

Fourth, the Judge finds it unbelievable that the operator did not explain the scoring process to the mine superintendents. 37 FMSHRC at 1091 n.10. However, as noted immediately above, superintendents entered 1 to 5 points based upon objective and easily understood characteristics or reasons for compilation of the rankings through assignment of points to each specific characteristic. A simple review of the criteria (listed *supra*, note 6) demonstrates they are self-explanatory. Further, a lack of explanation to superintendents had no particularized effect on Riordan. The state of the superintendents' knowledge applied equally to the ranking of all foremen by their respective superintendents and is irrelevant to Riordan being ranked fifth from the bottom.

Fifth, the Judge found it unbelievable that senior management did not explicitly inform superintendents of the reason for obtaining the rankings. 37 FMSHRC at 1094. He states this disbelief without identifying any evidence, testimony, or expertise on his part for such disbelief. It seems as likely that an operator would not announce to any persons other those to whom it was necessary that it was planning/considering closure of two mines in advance of the actual decision and a planned announcement. The Judge simply expresses his uninformed, non-expert opinion to take what amounts to judicial notice that an operator would explicitly identify plans to close mines in advance of such announcement becoming necessary. In any event, as with the point directly above, the absence of explanation would apply equally to all four superintendents who ranked their foremen. The Judge's disbelief is irrelevant to whether the operator manipulated the rankings and, therefore, is irrelevant to the claim made in this case.[7]

Sixth, the Judge states that the ranking of foremen process was malleable and allowed manipulation to achieve desired results – another merely conclusory statement. *See* 37 FMSHRC at 1093, 1105. In reality, of course, there is no evidence of manipulation to achieve predetermined or prejudicial results. This case involves one and only one person, Riordan. Other than Riordan's claim, there is not any other claim that any other foreman was favored or disfavored in the ranking system. The Judge cites no evidence of manipulation other than his own conclusory speculation that somehow Jackson caused the layoff of Riordan. However, no one, particularly none of the three foremen ranked lower than Riordan and, therefore, also laid off, has suggested how the process was "manipulated" to achieve dismissal of pre-selected

[7] Notably, the Judge does not find that Jessee had any discriminatory motive or intent when he ranked the foremen under his supervision in early August.

foremen. Here, we have one, explained exception to use of the numerical rankings. That does not constitute substantial evidence of nefarious malleability.

Seventh, the Judge finds it unbelievable that an operator would assign an inferior foreman to teach safety. 37 FMSHRC at 1099. Once again, the Judge just states a conclusion not supported by evidence or expertise and misses the point that the operator did not assert Riordan was an incapable foreman who would have been discharged absent the consolidations. Further, the shortcomings that witnesses describe in Jackson's performance did not have anything to do with knowledge of safe operating practices. No relationship may be drawn fairly between his performance as a production foreman and his ability to teach safety. It is not libelous to suggest that many a scholarly law professor or learned judge might be a poorly producing legal practitioner.[8]

A foreman with good knowledge of safety, reasonable communication skills, desire to work outside, and inferior production capabilities would seem an excellent candidate to teach safety. In any event, the Judge again simply engages in irrelevant speculation that has no evidentiary value to any conclusion regarding motivation for the layoff.[9] The Judge makes no mention in his analysis of the fact that three other foremen were ranked lower than Riordan and were also laid off in the consolidations. None of them filed discrimination complaints.[10]

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[8] The Judge finds fault with Patrick's testimony stating that Patrick was not entirely clear in recalling whether he asked a related company to try to find jobs for laid off employees only after the first layoff of 40 employees resulting from closure of the Roaring Forks mine or also after the closure of Laurel Mountain and a resultant 93 additional layoffs. 37 FMSHRC at 1087-88. The Judge never draws any connection between asking a related company to see if it could hire some of the 133 employees laid off as a result of the two consolidations and discrimination against Riordan. I do not suppose the Judge could be implying that perhaps Patrick reached out after the closure of Roaring Forks and loss of 40 jobs but did not reach out after the closure of Laurel Mountain with a loss of 93 jobs because reaching out after the second consolidation might have helped Riordan — one of the 93 laid off employees. The more important point is that, if there were a conspiracy to layoff Riordan, the conspirators skipped the first opportunity — the layoffs associated with the closure of Roaring Fork. In sum, the Judge did not connect how any confusion over whether Patrick asked a related entity to try to find jobs for the 40 employees laid off because of the Roaring Fork closure is relevant to Riordan's discrimination claim.

[9] The Judge's opinion places weight on the absence of any written reprimands of Riordan other than the one for violating the mine's roof control plan. 37 FMSRHC at 1105. Of course, this continues to miss the point that the operator did not discharge Riordan for poor performance or misconduct. Undocumented deficiencies might well explain his placement fifth from the bottom in the assessment of performance.

[10] Among the trivialities relied upon by the majority to uphold the Judge's decision is the fact that the layoff occurred four months after the picnic. Slip op. at 11. Of course, the majority ignores the inconvenient fact that there was a layoff soon after the picnic that Riordan survived so that the purported animus was not strong enough to cause quick action but apparently in minds of the majority was strong enough to be a slow burn. They assert this is a factor of "close

Eighth, the evidence testimony and exhibits demonstrate that Superintendent Jessee ranked the foremen under his supervision in early August. Tr. 260; S. Ex. 3. Prior to that time, evidence shows Riordan only engaging in ventilation discussions with Jackson and, occasionally, with Jessee in the same manner essentially as one would expect of all underground foremen. Obviously, discussions between mine foremen and a general mine foreman are routine and regularly occurring. Wright Dep. Tr. 10, 32.[11] The Judge does not cite such conversations as the reason for his inferential decision. Instead, he explicitly finds the motivation for his finding of manipulation of rankings to layoff Riordan arose from the three-to-five minute conversation at the company picnic in late August. Essentially, the Judge hangs his speculative inference on that brief conversation in which Patrick, the senior mine official and layoff decision maker, encouraged communication.

There is not a scintilla of evidence that anyone altered the rankings to reduce Riordan's ranking points in any way after the picnic. The Judge below does not even deal with that dilemma. He just infers there must have been manipulation stemming from the remark by Jackson. Yet, there is no evidence, none whatsoever, regarding how Jackson could have caused a change in a previously submitted ranking for Riordan.[12]

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in time" to the picnic. For support, they cite two cases involving individual adverse action against specific individuals. Obviously, those cases provide no support for that proposition when the layoffs were part of a major contraction resulting in displacement of 133 employees.

[11] The majority states that only Jackson and Jessee gave such testimony. To the contrary, the testimony of the Secretary and Riordan's deposition witness Mike Wright fully supports the routine nature of such discussions. Mr. Wright discussed his conversations with virtually all section foremen about ventilation. Those conversations were along the same lines and in the same manner as his talks with Riordan. Wright Dep. Tr. 33, 34. Of course, Wright was testifying only about his conversations with the section foremen, but there is no reason to believe other foremen talked to Wright in the same manner as Riordan but acted differently in talking with Jackson or Jessee. Further, although Commissioners are lawyers not miners, we have sufficient familiarity with mining to realize that section foremen and general mine foremen must regularly discuss ventilation. It will be a sad day for mining and miners if section foremen are not routinely discussing ventilation issues with the general mine foreman. Nonetheless, here, the Judge bases his decision upon a conversation among Riordan, several other miners, and Patrick in which Riordan made a specific suggestion related to ventilation after another miner raised the subject. The Judge found Riordan's immediate supervisor, Jackson, became angry because Riordan made a safety recommendation to Patrick, and then became a driving force behind Riordan's layoff. 37 FMSHRC at 1086-87. For that reason, I will accept that protected activity occurred in this specific case during the brief conversation upon which the Judge bases his decision.

[12] The majority suggests that the Judge could infer unlawful discrimination solely on the basis that he found all operator witnesses were lying. Slip op. at 16. This assertion amounts to a reversal of the burden of proof in which a Judge may base a discrimination finding solely upon an operator's alleged failure to prove a negative — that is, that the operator did not prove it did not discriminate against a claimant. The Secretary and Complainant bear the burden of

To their intellectual credit, the majority gamely attempts to deal with this fatal flaw. Slip op. at 13. Its effort, however, ends up only completing the trilogy of concessions that undercut its decision. It asserts that "evaluations" were "amended" after the picnic. That phrasing is important. In the context used by the majority, the term "evaluations" means follow-up notes made on a spreadsheet after Jessee entered the rankings in early August. The majority's focus on "evaluations" – that is, not the rankings that determined layoffs — constitutes an implicit concession that the actual rankings were made before the picnic and not changed afterwards. No witness suggested that any follow-up notes had anything to do with Patrick's decisions. Further, there is no evidence that the "evaluations" were "amended." Someone simply reviewed the evaluations and made supplemental notes as is normal for reductions in force. The case does not turn on when supplemental notes to the evaluations were made but rather upon the numerical rankings that determined the layoffs. Clearly, Jessee entered those rankings before the picnic.

As noted, the majority's concession on this point is the final concession necessary to complete the trilogy: Patrick used the rankings to determine layoffs; the rankings predate the picnic; and, no evidence shows Jackson manipulating the rankings made before the picnic. With those concessions, the raison d'etre of the majority decision collapses.[13]

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establishing protected activity and that such protected activity motivated at least in part an adverse action. *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). The United States Court of Appeals expressed an identical burden in National Labor Relations Board cases clearly when it said that "[T]he General Counsel must make a prima facie showing sufficient to support an inference that the applicant's protected conduct was a 'motivating factor' in the employer's decision." *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002). Because substantial evidence does not support a finding that protected activity was a motivating factor for the layoff, the Secretary and Complainant did not carry the initial burden of establishing a prima facie case.

Whether a sufficient prima facie case has been established is, of course, a question of substantial evidence. The problem for the majority in this case is that there is no substantial evidence that the "protected activity" of Riordan's cordial chat along with several other miners with Patrick at a company picnic motivated Jessee's ranking made before the picnic or Patrick's decision based upon the rankings. The majority posits that the operator waited, apparently patiently, for a massive realignment (even skipping a first round of layoffs) to layoff Riordan because Jackson was mad at him. However, they do not demonstrate how the Secretary or claimant carried their burden of proof. Having admitted the rankings were the basis of the layoff and that there is no evidence that Jessee ranked foremen after the picnic, the majority shifts the burden of proof to the operator to show it did not discriminate.

[13] By footnote, the majority observes that among marked follow-up entries on the spreadsheet of employee evaluations (S. Ex. 3), there is a notation of discipline of Riordan for standing under unsupported roof. Slip op. at 13 n.18. However, follow-up notations did not appear only with respect to Riordan. Notes were made for many if not all other foremen. There is no evidence that the follow-up notes that were made with respect to the foremen being reviewed were made by the superintendents, who did rankings. Of course, if Jessee did not enter

Ninth, despite discovery, the Secretary and Riordan did not introduce any evidence of any change in the rankings between the assignment of points by the four superintendents in early August and the layoffs in October and December. Further, there is no evidence that Jessee had any idea of the points being assigned other foremen by their respective superintendents. Additionally, there is no evidence offered as to how Jackson, identified by Judge as the progenitor of the discrimination, could have achieved such manipulation.[14]

Tenth, the majority observes, "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res.*, Inc., 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38). Here, the asserted reason for the layoff is certainly not weak, implausible, or out of line with the operator's normal business practices.

The reason for the layoff flows from a normal business practice. Closure of two mines resulted in consolidation of workforces. The operator utilized a system to retain the better performing employees. One can only imagine the Commission's reaction and the number of discrimination cases that employees would file if an operator arbitrarily picked and chose among foremen without any means for an objective evaluation. The practice in this case is not out of line with normal business practices. Instead, it is fully in line with normal and expected business practices. It is a lawful and typical business practice to evaluate employees based upon performance in a reduction in force resulting from consolidation of operations or reduction in production.

Eleventh, as stated at the outset, the absolute absence of any evidence that Jackson, an underground foreman, could or did lead a conspiracy involving multiple managers, standing alone, demonstrates the erroneousness of the Judge's decision. According to the Judge, the generator of the "conspiracy" to manipulate the rankings was Mark Jackson. For the Judge, the

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the notes personally, they are not evidence for when Jessee did his rankings and create no suspicion let alone proof of a post-picnic change in rankings. The Secretary's Exhibit 3 shows the date on which each of the four different superintendents entered their rankings. The exhibit shows that Superintendents Johnson, Ohlson, and Clevinger entered their rankings on August 8 and Superintendent Jessee entered his on August 9 — that is, weeks before the picnic. No evidence shows a later change to rankings as the majority effectively concedes by focusing on other entries on the evaluation forms. The follow-up entries on the ranked foremen are indicia of an ordinary reduction in force review, rather than any broad "manipulation" of the ranking point scores used by Patrick.

[14] The Judge and majority hint at something nefarious in Patrick's decision to keep a foreman who scored one point lower than Riordan because that foreman was a member of a mine rescue team. They assert that another arrangement could have been made to keep an active mine rescue team. 37 FMSHRC at 1090-91 & n.10; slip op. at 11. This is nothing more than second guessing a business judgment by Patrick that he wanted to keep an existing mine rescue team together rather than substitute personnel. Certainly, it does not show discrimination and is inconsistent with Patrick's favorable conversation with miners during the picnic and the Judge's focus on Jackson as the generator of some speculative manipulation.

specific animus resulting in discrimination against Riordan sprang from the heart and mind of Jackson when he, according to the Judge's findings, learned that Riordan and others spoke with Patrick about ventilation at the company picnic during the prior week. However, there is no evidence (none whatsoever) that Jackson was involved in ranking the employees by Jessee. There is no evidence (none whatsoever) that Jackson had anything to do with the many personnel decisions arising from the closure of two mines and the layoff of 133 workers. There is no evidence (none whatsoever) that Jackson had any relationship with individuals or access to records that would have permitted him, or others acting on his behalf, to manipulate rankings. In short, there is no evidence (none whatsoever) that Jackson played any role in compiling the rankings or in Patrick's consideration of the rankings. Yet, the Judge assigns Jackson the role as the generator of manipulation.

The majority strains to support an inference refuted by the Secretary's own exhibit. In doing so, the majority goes beyond reviewing the Judge's decision and the law. To infer that Jackson caused the manipulation of the rankings, one must simply blindly assert that Jackson somehow played a role in manipulating already prepared rankings and that all operator witnesses either had no knowledge of or lied about such manipulation. The finding that Jackson precipitated a manipulation in ranking is a bald and unsupported conclusory statement without evidentiary support or foundation.

II.

Conclusion

The Judge's speculative decision rests upon two unsupportable bases. First, the Judge evaluates the case as if this were a discharge for cause. In fact, of course, the operator laid off 133 employees in a reduction in force. The operator laid off four foremen based upon rankings calculated from 15 specific performance criteria entered by multiple superintendents and involving multiple mines.

Second, the Judge sums up as the rationale for his decision, "[w]hile the discrimination was not so clumsily or inartfully done so as to leave Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge." 37 FMSHRC at 1078-79. This is equivalent to saying "I know there is no evidence that Jackson, a mid-level employee, had anything whatsoever to do with the rankings or the layoffs. However, I think he said something mean to Riordan so I find Jackson managed to manipulate the operator's reduction in force rankings to achieve Riordan's layoff." That is an unfounded emotional sentiment; it is not an objective or judicious decision. The majority offers no reasonable basis for endorsing his sentiment. I respectfully dissent.

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