FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 11, 2021

ROBERT THOMAS	:	Docket No. WEST 2018-402-DM
	:	
v.	:	Mine ID: 4503687
	:	
CALPORTLAND COMPANY	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER OF REMAND

BY: Althen and Rajkovich, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It involves a complaint filed by miner Robert Thomas alleging that CalPortland Company ("CalPort") discriminated against him in violation of the Mine Act. After a Commission Administrative Law Judge found that CalPort unlawfully discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

On review, the Commission determined that the Judge erred in concluding that Thomas had established a prima facie case of discrimination, reversed the Judge's decision, and dismissed the case.

Thomas subsequently filed a petition for review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit on the grounds that the Commission had erred in its determination and asserted, along with Respondent CalPort, that the Commission's long-standing precedent under *Pasula-Robinette* should no longer apply to section 105(c) cases, as it misconstrues the word "because" in the statute.[1] *See Sec'y of Labor on behalf of Pasula v.*

[1] The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or

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 (3rd Cir. 1981). Citing several Supreme Court decisions,[2] the parties argued that the *Pasula-Robinette* standard conflicts with Supreme Court instruction that the ordinary meaning of "because" required application of the simple and traditional standard of "but-for causation."[3] *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208-09 (9th Cir. 2021).

Applying step one of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–44 (1984), the Circuit Court ultimately found the statute clear and rejected the *Pasula-Robinette* standard of review concluding that the Supreme Court has instructed "that the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise." 993 F.3d at 1211. It remanded the case to the Commission with instructions to apply the "but-for" causation analysis to Thomas' claim of discrimination. *Id.*

On June 7, 2021, the court issued its mandate in this matter, thereby returning the case to the Commission's jurisdiction. Accordingly, we remand this matter to the Judge for reconsideration of Mr. Thomas' claim of discrimination under the "but-for" causation standard consistent with the Ninth Circuit's decision.

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

> ***because*** such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . .

30 U.S.C. § 815(c)(1) (emphasis added).

[2] *Burrage v. United States*, 571 U.S. 204, 212-17 (2014); *Univ. of Sw. Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-60 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-80 (2009).

[3] At oral argument, however, Thomas changed his position and argued that the Court should apply the *Pasula-Robinette* standard instead. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Cir. 2021).

Chair Traynor, concurring in result only:

This case is already over.

It began with a complaint filed by miner Robert Thomas alleging that CalPort discriminated against him for his exercise of protected rights in violation of the Mine Act. After a Commission Administrative Law Judge found that CalPort unlawfully discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

On review, the Commission determined that the Judge erred in concluding that miner Thomas had established a prima facie case of discrimination. None of the five Commissioners found that protected activity in any way motivated Thomas's suspension and termination. Thus, the Commission unanimously reversed the judge's decision for lack of *any* evidence of unlawful motivation.[1] The Commission was unanimous in concluding that under *any* causation standard, the case must be dismissed.

Thomas subsequently filed a petition for review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit on the grounds that the Commission had erred in its determination. Initially, Thomas joined Respondent CalPort's assertion that the Commission's long-standing precedent under *Pasula-Robinette* should no longer apply to section 105(c) cases, claiming various Supreme Court holdings require application of some version of a "but-for" test when analyzing whether an adverse action is motivated by protected activity. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Cir. 2021).. At oral argument, however, Thomas changed his position and argued that the Court should apply the *Pasula-Robinette* standard instead. *Id.* It is of great significance that the Secretary of Labor—the indispensable party charged with interpretation of the Mine Act—was not a party to this case and did not participate at any of the stages of this proceeding, including at argument before the Ninth Circuit.

The Commission had unanimously ruled that there was no evidence whatsoever that CalPort's termination of Thomas was motivated at all by protected activity. Thus, it is immaterial to the resolution of this case whether in future cases the Commission and Courts should require the Secretary to offer an interpretation of section 105 that replaces the *Pasula-Robinette* test with a more stringent "but-or" test of causation. We know with certainty that the miner in this case failed to introduce evidence that would satisfy any test of causation—from the *Pasula-Robinette* test's requirement of "some motivation" to the most stringent conceivable application of a "but-for" causation standard. The Commission found and the Ninth Circuit did not disagree that there is simply no evidence of causation in this case. Yet rather than affirm the Commission, the Court purported to "reverse" the Commission (even though it did not disagree

[1] The two concurring Commissioners explained that they had "considered whether Thomas' putatively protected complaints about inadequate training and excessive work hours motivated in any way the same adverse action referenced in his administrative complaint - his suspension and ultimate termination" to conclude that "[a]long with the majority, we find *no proof* that they did." 42 FMSHRC 43, 58 (Jan. 2020) (Jordan and Traynor, concurring) (emphasis added).

with our review of the evidence in the case or our decision to dismiss it) in an opinion directing the Commission to revise its interpretation of section 105(c) as applied in discrimination cases and first announced in *Pasula-Robinette*. Unfortunately, that direction results from some confusion as to the role of the Secretary and Commission under the Mine Act's somewhat unique split-enforcement scheme.

The Ninth Circuit panel wrote that under the well-known *Chevron* doctrine it "need not consider the Commission's interpretation because the statutory text is unambiguous." 993 F.3d at 1211. Of course, the Commission is not responsible for interpreting section 105(c) of the Mine Act, its role is to review the Secretary of Labor's interpretation. "Since the Secretary of Labor is charged with responsibility for implementing this Act . . . the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 95-181, at 49 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). Because the Secretary has not yet proffered an interpretation of section 105(c) in light of case law purportedly requiring a 'but-for' standard of causation, the Ninth Circuit in this case did not (and could not have) correctly applied the *Chevron* doctrine in this case.[2] This confusion manifested itself again in the Court's final direction to the Commission on remand in which they state that it "is for the Commission to apply the but-for standard to this case in the first instance on remand." 993 F.3d at 1211. Of course, it is not for the Commission but for the Secretary of Labor to interpret section 105(c) in the first instance. The Commission and Courts are to provide deferential review.[3]

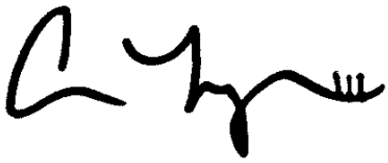
The Secretary of Labor is not a party to this case, and this is therefore not an appropriate case to litigate or announce a revised interpretation of section 105(c), especially since this case can (and has been) resolved without engaging in such reinterpretation. The Commission has already unanimously held that this case should be dismissed for lack of evidence of unlawful motivation under *any* standard of causation—whether *Pasula-Robinette,* or some yet to be articulated version of the "but-for" test. The Ninth Circuit did not disagree.

On remand, the Judge must be cautious not to usurp the Secretary's role interpreting section 105(c). The Judge need not stray far from the Commission's prior decision, undisturbed

[2] The Court addressed the precise question of whether the existing legal standard for making a prima facie case under section 105(c)—the *Pasula-Robinette* standard—was incompatible with recent caselaw addressing the text of the Mine Act and answered in the affirmative. What the Court did not do (and could not have done) is apply *Chevron* review to the Secretary's new interpretation of section 105(c) accommodating a but-for causation element.

[3] We cannot in this litigation know how the Secretary might choose to interpret section 105(c) in a future case in which he must demonstrate "but-for" causation to make out a prima facie case of discrimination.

by the Ninth Circuit's review,[4] to demonstrate that Thomas' complaint fails for lack of *any* evidence of unlawful motivation under any conceivable formulation of the "but-for" causation requirement. But interpreting section 105(c) in the first instance to arrive at a new test for discrimination that includes a "but-for" causation requirement is the role of the Secretary, not the Judge, Commission or Courts.



Arthur R. Traynor, III, Chair

[4] The Court did not find any error with the Commission's unanimous conclusion that the record in this case is devoid of any evidence that protected activity motivated the miner's termination.

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