FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

August 22, 2013

MARK GRAY	:	
	:	
v.	:	Docket No. KENT 2010-430-D
	:	
NORTH FORK COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners[1]

DECISION

BY: Young, Cohen, and Nakamura, Commissioners

This proceeding involves a discrimination complaint filed against North Fork Coal Corporation ("North Fork") by miner Mark Gray under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2006) ("Mine Act" or "Act").[2] Administrative Law Judge Priscilla Rae concluded that North Fork did not discriminate against Gray when it discharged him in May 2009. 33 FMSHRC 2495, 2509-10 (Oct. 2011) (ALJ). Gray petitioned for review of the judge's decision, which the Commission granted. For the reasons that follow,

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[1] Commissioner William I. Althen assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Althen has elected not to participate in this matter.

[2] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1). Section 105(c)(3) permits a miner to file a discrimination claim on his own once the Secretary of Labor decides that he will not pursue a case on the miner's behalf (*see* 30 U.S.C. § 815(c)(3)), which is what occurred here.

we reverse the judge's order excluding expert evidence and remand the case for further proceedings.

I.

Factual and Procedural Background

In late 2007, Mark Gray was hired as a roof bolter by North Fork at its mine in Letcher County, Kentucky. He started on a night maintenance shift before moving to a day production shift after approximately six months. 33 FMSHRC at 2496-97; Tr. I 171-73.[3] Gray had worked as a miner in many mines over the preceding three decades, a majority of that time as a roof bolter. 33 FMSHRC at 2496.

At the North Fork mine, after a continuous miner operator had made a cut into coal, a two-man team operating a roof bolting machine would install bolts in the newly cut area to protect against the roof's collapse. *Id*. at 2497. Under the mine's roof control plan then in effect, coal cuts were limited to 40 feet, due to local geologic conditions that resulted in instability in the mine's roof. It was also the job of the roof-bolting team to hang curtains behind the bolting machine to ensure proper air flow and ventilation to the face. On the day shift, Gray's roof bolting partner was Chris Sheeks. They operated a double-headed bolting machine, which the two men could use to install bolts simultaneously. Gray had the primary responsibility for hanging curtains. *Id*.

On May 15, 2009, North Fork terminated Gray's employment, alleging poor performance on his part. *Id*. at 2496. A month later, Gray filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). He stated that he believed his dismissal was due to his having made safety complaints to his immediate supervisor, day shift foreman Thomas Cornett, in the weeks prior to his dismissal. *Id*. at 2495, 2499.[4]

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[3] The hearing was conducted on two days, December 15 and 16, 2010. The transcript of the hearing is paginated separately, with the proceedings on December 15 going from page 1 to page 275 and the proceedings on December 16 going from page 1 to page 124. For purposes of citation to the hearing transcript in this Decision, we shall indicate the proceedings on December 15 as "Tr. I" followed by the page number(s) and the proceedings on December 16 as "Tr. II" followed by the page number(s). Thus, the citation to "Tr. I 171-72" is to pages 171 and 172 of the transcript for December 15.

[4] In addition to Cornett, management at the mine at the time Gray was discharged included day shift outby foreman Steve Countiss and superintendent Anthony Estevez. 33 FMSHRC at 2497. Estevez had succeeded Russell Ison as mine superintendent in mid-to-late March 2009. *Id*.

Gray told MSHA that on May 5, 2009, a 50-to-60 foot deep cut of coal was made, which he and his partner then had to bolt. *Id*. at 2499. This not only was in violation of the mine's roof control plan, but it was well beyond the 18-to-20-foot cuts normally taken at the mine as a precaution given the unstable roof. *Id*. Gray later testified that after bolting the deep cut, he complained to Cornett that it was illegal and told Cornett that he would not bolt any more deep cuts. Tr. I 182-83. Gray alleges that three days later a second cut of 50 or more feet was made, which he refused to bolt because of the danger of working under such large expanse of unsupported roof. 33 FMSHRC at 2499.

Gray cited as further evidence of North Fork's discrimination an instance that occurred shortly before his discharge. According to Gray, when he stopped roof bolting to hang curtains, Cornett became angry at him and mumbled something under his breath; Cornett thereafter was not friendly towards him and acted differently. *Id*.; Tr. I 178-79, 203-06.

Pursuant to section 105(c)(2) of the Act, the Secretary of Labor obtained an order from a Commission judge temporarily reinstating Gray while MSHA investigated Gray's discrimination complaint further. 31 FMSHRC 1143 (Sept. 2009) (ALJ). The parties then agreed to economic reinstatement in lieu of Gray returning to work at the mine. *See* 31 FMSHRC 1167 (Sept. 2009) (ALJ).[5]

During the MSHA investigation, North Fork showed the agency two disciplinary letters directed at Gray. The first was dated February 27, 2009, and the supervisor's signature was that of Russell Ison. The second was dated April 28, 2009, had a supervisor's signature of Anthony Estevez, and included a witness signature from Steve Countiss. Tr. 37. Each letter contained a paragraph detailing the dissatisfaction of North Fork supervisors with Gray's job performance and included a signature for Gray. Gray Exs. A & B. Gray, however, denied to MSHA, and continues to deny, that the signatures acknowledging his receipt of the warnings were his or that he had ever received written or even oral warnings regarding his work performance at North Fork. Tr. I 194-97.

The Secretary eventually decided not to pursue a discrimination case under section 105(c)(2). *See* 31 FMSHRC 1420 (Dec. 2009) (ALJ). Consequently, Gray initiated his own action under section 105(c)(3) on December 30, 2009. 33 FMSHRC at 2496.

The first prehearing order in this case established a 45-day deadline for the parties to initiate a conference call with the judge to discuss whether they would be settling the case or, if they were not going to settle, to discuss potential trial dates with her. The order also addressed discovery matters. *See* Amended Prehearing Order at 1 (June 7, 2010) (ALJ).

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[5] Gray's temporary reinstatement has been the subject of protracted litigation before the Commission and court of appeals. *See Sec'y on behalf of Gray v. North Fork Coal Corp.,* 33 FMSHRC 27 (Jan. 2011), *rev'd* 691 F.3d 735 (6th Cir. 2012); *see also Sec'y on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 589 (Mar. 2011).

Despite MSHA no longer being involved in Gray's discrimination case, the possibility that Gray's signatures had been forged on the two disciplinary letters continued to be an issue for the agency. MSHA, along with the local United States Attorney, apparently investigated the creation of the two documents during much of 2010, while this case was in discovery. During that time, the originals of the two letters remained under the control of federal investigators, which prevented the documents from being examined by either party. *See* Gray Br., Ex. E.

During the conference call contemplated by the judge's June 7 order, Gray's counsel requested additional time to develop evidence.[6] In an order dated July 19, 2010, the judge scheduled another such call for a month later, at which time the hearing would be scheduled. In a later order, the judge explained that the additional time was granted to allow Gray to obtain "the document" containing his allegedly forged signatures and have an expert examine it. Amended Order at 1 (Dec. 8, 2010) (ALJ).

The conference call did not actually take place until September 8, 2010, at which time a hearing date of December 15, 2010, was set. *Id*. The hearing date was memorialized in a Notice of Hearing dated September 9, 2010. That notice also included a discovery cutoff date of December 3, 2010. None of the judge's orders or the Notice of Hearing addressed identification of expert witnesses as part of discovery.[7]

On November 2, North Fork served interrogatories on Gray, requesting that, among other things, he identify the witnesses he expected to call at trial and provide a summary of each witness's expected testimony. NF's 2nd Set of Interrog. to Gray at 1. On November 24, Gray served as-of-then unverified answers that provided the requested names and summaries, including informing North Fork that Estevez, Ison, and Countiss could potentially be called to discuss the two disciplinary letters. Answers of Gray to NF's 2nd Set of Interrog. at 1-2 (attached to NF's 1st Mot. in Limine). Gray explained, however, that while he also expected to call a handwriting expert, that expert had not yet been determined. *Id*. at 2.

On December 1, North Fork filed a motion in limine, requesting that the judge prohibit Gray from calling the three North Fork supervisors on the ground that Gray was simply calling them as witnesses to impeach them. NF 1st Mot. in Limine at 1-2. North Fork also urged the

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[6] No record was made of this conference call or other conference calls discussed herein. The Commission's description of what occurred during these calls is taken from subsequent orders issued by the judge.

[7] The judge's December 8 Order and Amended Order are not clear regarding what was discussed regarding the forgery issue in the September 8 conference call, as both versions state that Gray's counsel "discussed, at that time, the need for a handwriting expert. He indicated that he copies of the allegedly forged documents [sic]." Order at 1 (Dec. 8, 2010) (ALJ); Dec. 8 Amended Order at 1. As mentioned, the important issue was Gray's access to the originals of the documents.

judge to prohibit Gray from calling a handwriting expert on the ground that Gray's failure to name the expert constituted an inadequate response to the interrogatory. *Id*. at 2. North Fork also stated that it doubted that Gray had access to the originals of the disciplinary letters, and that it would be unfair to it to be confronted by an unidentified expert at such a late stage of the case.[8] *Id*.

On December 3, Gray supplemented his interrogatory answers to identify the expert he intended to call at trial: Doctor Larry S. Miller, a Professor of Criminal Justice and Criminology at East Tennessee State University. Suppl. Answers of Gray to NF's 2nd Set of Interrog. at 1. Three days later Gray identified Peter J. Belcastro, Jr., of the Federal Bureau of Investigation, as the second handwriting expert he expected to call. 2nd Suppl. Answers of Gray to NF's 2nd Set of Interrog. at 1.

North Fork immediately filed a second motion in limine, addressing the recent identification of the handwriting experts, among other issues. North Fork requested that the judge prohibit Gray from calling either expert as a witness at trial, because Miller had been named only 12 days before trial and seven days after interrogatory answers were due, while Belcastro was named nine days before trial, ten days after the interrogatory answers were due, and three days after the discovery cut-off date. NF's 2nd Mot. in Limine at 2-3.

Before Gray filed written responses to the motions in limine, a conference call with the judge was held on December 7. Dec. 8 Amended Order at 2. In his written response to the first motion in limine, filed the next day, Gray explained that the delay in obtaining MSHA's permission for an expert to examine the originals of the documents in question prevented him from retaining an expert,[9] but that once that permission had been received, Dr. Miller was retained, and the interrogatory answer was supplemented. Gray Resp. to NF's 1st Mot. in Limine at 3. Gray argued that the supplementation occurred only one day after the original answer was due and before the discovery cutoff date, and in any event did not prejudice North Fork. *Id*. Gray maintained that the issue had arisen so close to trial because North Fork had waited until only a month before the discovery cutoff to serve the interrogatories. *Id*.

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[8] Despite Gray's prior explanation that a verification of the answers would be forthcoming within five days, North Fork also argued that Gray's answers were inadequate because they had not been verified within the 25 days which Commission Procedural Rule 58 provides to answer interrogatories. NF's 1st Mot. in Limine at 1. However, the verification was e-mailed to North Fork on November 29, which, as will be discussed later herein, was the earliest date that the answers could have been considered due.

[9] Gray's counsel states that he did not obtain permission to examine the original documents from Assistant United States Attorney Davis Sledd until "on or about November 22nd." Gray Pet. For Interlocutory Review at 7.

Gray made similar arguments that same day in opposition to the second motion in limine's request that Belcastro not be permitted to testify, but added that he had yet to obtain the requisite governmental permission for Belcastro to testify at trial. Gray Resp. to NF's 2nd Mot. in Limine at 2 n.2. According to the judge, Gray stated at the conference call that he had a written expert's report from Belcastro, but had yet to receive one from Miller. Dec. 8 Amended Order at 2.

The judge denied North Fork's request that Gray be prohibited from calling North Fork supervisors Estevez, Ison, and Countiss as witnesses. Dec. 8 Amended Order at 2-3. However, she granted the operator's request that the expert reports and testimony of both Miller and Belcastro be excluded. *Id*. The judge held that, given the importance of the timing of the identification of expert witnesses during discovery, good cause had not been shown in this case for the disclosure of the identity of the two experts beyond the time that the interrogatory answers on the issue were due or beyond the December 3 discovery cut-off date. *Id*. The judge rejected the contention that the lack of a specific date in her earlier orders for the disclosure of expert witnesses excused the timing of the identification in this instance. *Id*.

Gray immediately moved for reconsideration of the judge's order because, among other grounds, she had ignored the fact that Gray had alerted North Fork on November 24 that he intended to call an expert handwriting witness and had explained why he was unable to identify the witness at that time. Mot. for Reconsideration at 2. Gray also argued that a continuance could be granted to permit North Fork to depose the two experts and retain its own expert. *Id*. at 5. Gray additionally filed a motion requesting that the judge certify her order for interlocutory review by the Commission and that she suspend the hearing pending the Commission's interlocutory review.

In a single order, the judge denied all of Gray's requests. *See* Order dated Dec. 9, 2010. The Commission subsequently denied Gray's petition for interlocutory review (Order dated Dec. 13, 2010), and the judge held the hearing as scheduled later that week. At the close of Gray's case, copies of the expert witness reports of Miller and Belcastro were provided to the judge as part of Gray's proffer on the evidence of forgery, but were not admitted into the record. Tr. II 110-19.

In her subsequent decision on the merits of Gray's discrimination complaint, the judge ruled that Gray had failed to establish that he had engaged in protected activity, and thus had failed to carry his burden of proving a prima facie case of discrimination under the Mine Act. 33 FMSHRC at 2509. In doing so, the judge refused to credit Gray's account of the deep cuts that he alleged had occurred and Cornett's treatment of him with respect to the hanging of curtains. *Id*. at 2503-04, 2505-07. The judge instead credited the company's witnesses, with respect to their testimony denying that deep cuts had been made as well as their testimony and Cornett's daily log as to Gray's poor and unsafe work performance as a roof bolter. *Id*. at 2499-2503, 2504, 2507-09. The judge concluded that, even if Gray had established that he had

engaged in protected activity, the company had demonstrated that Gray's work performance sufficiently established an affirmative defense to the charge of discrimination. *Id*. at 2509.

II.

Disposition

On review, Gray contends that evidence of the forgery of Gray's signatures on the disciplinary warning letters undermines the credibility of North Fork's witnesses, and that he should have been permitted by the judge to pursue the issue by presenting the expert testimony at the hearing. Gray argues that the judge abused her discretion in her pretrial rulings with respect to the expert evidence. Gray maintains that there was no basis for the judge to invoke the ultimate sanction of excluding evidence in this instance, where she had not established a deadline for parties to identify expert witnesses, and where North Fork had waited for months to serve interrogatories regarding the identity of witnesses, despite knowing that Gray was planning to retain handwriting experts.

North Fork responds that the judge did not abuse her discretion in excluding the proffered expert reports and testimony. North Fork contends that the proffered expert evidence would not have established forgery in any event and that there is insufficient evidence that the experts were prepared to testify at trial regarding their reports. North Fork also argues that the prior warnings are only relevant as to whether North Fork established the affirmative defense of Gray's poor work performance, and would not affect the primary issue the judge decided, which was that Gray had failed to establish that he had engaged in protected activity.[10]

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may

[10] On January 23, 2012, North Fork filed a motion requesting that the Commission exclude from the record on review certain attachments to Gray's brief. In an order dated February 7, 2012, the Commission denied North Fork's request as to some of the attachments (marked as Exhibits E and F) and deferred acting upon it as to the remainder of the attachments at issue until this time. Having considered the motion with regard to those attachments (marked as Exhibits A, D, H, and I) and Gray's response to the motion, we deny the motion as to those attachments as well. As Gray explains in his response, the documents in question were either previously provided to the judge and North Fork, or contain information that was previously provided in earlier pleadings in the case. Where it has been necessary to rely upon that information, the Commission has done so with regard to the earlier version provided.

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. *See 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 it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

A. The Judge's Exclusion of the Handwriting Experts' Reports and Testimony

1.

Although it resulted from a discovery dispute, the judge's decision to exclude witness testimony at trial is subject to the Commission's review of evidentiary rulings. "When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. . . . Abuse of discretion may be found when 'there is no evidence to support the decision *or if the decision is based on an improper understanding of the law*.'" *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (emphasis in original) (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)). Here we conclude that the judge's decision was based on an improper understanding of the law, specifically the Commission's Rules of Procedure addressing discovery requests and sanctions. Moreover, we conclude that there is insufficient evidence in the record to support the severity of the sanctions ordered by the judge.

2.

In this case, the event which triggered the exclusion of the expert witnesses was Gray's response to the interrogatory that North Fork served on November 2 requiring him to identify witnesses he expected to call at trial and provide a summary of the intended testimony of each witness. Rule 58(a) provides in pertinent part that "[a] party served with interrogatories shall answer each interrogatory separately and fully in writing under oath within 25 days of service unless the proponent of the interrogatories agrees to a longer time. The Judge may order a shorter or longer time period for responding." 29 C.F.R. § 2700.58(a).

Here, North Fork had not requested, nor had the judge ordered, that a shorter time be provided for Gray to answer the November 2 interrogatories. Thus, the initial answers that Gray filed on November 24 were clearly timely relative to the 25 days permitted by Rule 58(a) to submit a response. However, it is undisputed that the answers – although accurate – were incomplete at that time, because Gray did not provide the information North Fork requested as to the expert witnesses he hoped to call. Moreover, while Gray eventually supplemented his answer

to cure that inadequacy, the supplemental answers were filed more than 25 days after the interrogatory had been served by North Fork.[11]

In her December 8 Order and Amended Order, the judge noted that in its motions in limine, North Fork sought to exclude the testimony of Gray's expert witness pursuant to Commission Rule 59.[12] Dec. 8 Order and Amended Order at 3. Similarly, in her December 9 Order Denying Reconsideration, the judge invoked Commission Rule 59. Dec. 9 Order at 2. Rule 59 provides in pertinent part:

> Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery.

29 C.F.R. § 2700.59.

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[11] There is a dispute over how untimely Gray's supplemental answers were under Rule 58, but we need not decide that question, given that North Fork did not file a required motion to compel. Gray has contended throughout that he had until December 2 to answer the November 2 interrogatories, because they were mailed and he received them four days later. *See, e.g.,* Gray Br. at 8. Rule 8(b) adds five additional days when a document is served by means of other than same-day service. *See* 29 C.F.R. § 2700.8(b). North Fork takes the position that Gray's answers were due exactly 25 days later, on November 27, because the interrogatories were served not only by regular mail but also by e-mail, thus effectuating same-day service. NF Br. at 5 & n.3. The judge, in granting the motions in limine, appeared to have agreed with North Fork. *See* Dec. 8 Amended Order at 3 ("the answer to the interrogatory was due seven days prior to" its December 3 supplementation). However, even if we ignore the fact that the certificate of service for the interrogatories did not include the e-mail address for Gray's counsel that was used by North Fork and assume that same-day service of them was effective in this instance, November 27, 2010, was a Saturday. Consequently, the earliest that the answers were due was Monday, November 29, under Commission Rule 8(c). *See* 29 C.F.R. § 2700.8(c) (providing that submissions falling due on a weekend are consequently due the following business day).

[12] The judge's December 8 order addressed North Fork's outstanding motion to compel in conjunction with its motions in limine and discussed a previous motion to compel that North Fork had filed in the case. However, there is no clear indication that the order granting the motions in limine was in response to Gray's failure to comply with a previous or pending order to compel.

Thus, Rule 59 requires that if a party fails to adequately respond to a discovery request, the next step is for the opposing party to file a motion to compel which requests the judge to issue an order compelling the delinquent party to comply with the discovery request. Only after the judge has issued an order compelling compliance and the delinquent party has failed to comply may the judge take the further step of imposing "just and appropriate" sanctions. In other words, a judge may only impose sanctions for the failure to comply with *an order to compel discovery* – not the failure to comply with the opposing party's interrogatories or other discovery requests.[13]

Despite the clear terms of Rule 59, in this instance North Fork filed no motion to compel with respect to any failure on the part of Gray to adequately identify his expert witnesses or to do so on a timely basis. Nor did North Fork supplement its pending motion to compel, filed on November 23, 2010, and relating to its document production requests, to alert the judge to Gray's incomplete interrogatory answer regarding his expert witnesses. Consequently, the prerequisites to justify the exclusion of evidence as a sanction pursuant to Rule 59 were lacking, and the judge's order invoking Rule 59 as a sanction thus constitutes an abuse of discretion.

We note that the interrogatory in question was not served by North Fork until November 2. That was only a month before the discovery cut-off date established nearly two months earlier.[14] At least as of the prehearing telephone conference on July 20, 2010, North Fork was on notice that Gray alleged that his signature on the two Disciplinary Letters was forged, that he needed to obtain the documents, and that he intended to have an expert examine them. Dec. 8 Order and Amended Order, at 1.

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[13] It is clear that Rule 59 is modeled after Rule 37 of the Federal Rules of Civil Procedure. Rule 37(b)(2) provides for sanctions in the event a party fails to comply with a court's discovery order. A court order granting a motion to compel submitted pursuant to Rule 37(a) is a prerequisite to such sanction. "The absence of a prior order or direction compelling discovery precludes Rule 37(b) sanctions." 7 Jm. Wm. Moore, et al., *Moore's Federal Practice* § 37.42[1] (3d ed. 2012); *see, e.g., Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) ("[f]ederal court decisions . . . unanimously agree that sanctions pursuant to Rule 37 may not be awarded absent violation of a court order"); *R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 (1st Cir. 1991) ("The taxonomy of Rule 37 is progressive. If an order to answer is issued under Rule 37(a), and then disobeyed, Rule 37(b)(2) comes into play").

[14] North Fork's delay in attempting to discover the identity of expert witnesses is particularly curious, given that it had been alerted early in the proceeding to Gray's intention to provide expert evidence regarding whether it was in fact his signature on the disciplinary letters that North Fork had given MSHA.

In granting the requested sanction and prohibiting the expert testimony, the judge also cited in support her earlier discovery scheduling orders, which identified the applicable Commission discovery rules and established a discovery cut-off date.[15] Because she found that Gray's identification of his expert witnesses was not timely under those orders, the judge concluded that the sanction of exclusion of expert evidence was appropriate.

We recognize that under Federal Rule of Civil Procedure 37(c), a party who fails to identify a witness as required by Rule 26(a) may be precluded from calling that witness at trial.[16] *See* Fed. R. Civ. P. 37(c)(1). However, Commission Rule 59 does not have a comparable provision to Fed. R. Civ. P. 37(c). This does not mean that Commission judges are powerless to exclude witnesses identified after the expiration of a deadline for the disclosure of witnesses. Commission Rule 55, 29 C.F.R. § 2700.55, grants judges broad power to regulate the conduct of parties in proceedings before them. *In re: Contests of Respirable Dust Sample Alteration*

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[15] Although the judge's December 8 Order and Amended Order states that "Complainant's position disregards entirely my earlier [Amended Prehearing] Order directing the parties to comply with Commission Rule 58 which directs the parties to respond to interrogatories and requests for documents within 25 days of being served upon them" (Dec. 8 Orders at 2), her Amended Prehearing Order issued on June 7, 2010 actually only stated the following regarding Commission Rule 58:

> Discovery requests made pursuant to Commission Rules 56, 57 and 58, 30 [sic] C.F.R. §§ 2700.56, 2700.57, 2700.58, responses to discovery requests, and deposition transcripts **shall not** be filed with the Commission. The originals of such responses or transcripts shall be retained by the party initiating the discovery. No motion to compel discovery shall be filed until the party seeking discovery has exhausted **all** other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by a statement of the representative setting forth the efforts that have been made to resolve the differences. Alternatively, all unresolved discovery matters may be dealt with during the assigned conference call.

Amended Prehearing Order, at 1 (emphasis in original).

[16] Rule 26(a) operates separately from the provision of Rule 37(a) that a party must make a motion to compel discovery before seeking sanctions and includes a requirement for the disclosure of expert witnesses "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

Citations, 14 FMSHRC 987, 1003-04 (June 1992) ("when analyzing the manner, content, and effect of a judge's discovery rulings, the judge, by rule, is authorized to exercise wide discretion in discovery matters, and the Commission by precedent is disinclined to substitute its judgment for that of the judge unless error or abuse of discretion has occurred"). However, "the exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *In re Paoli Railroad Yards PCB Litigation*, 35 F.3d 717, 791-92 (3rd Cir. 1994), citing *Meyers v. Pennypack Woods Home Ownership Ass'n,* 559 F.2d 894, 905 (3rd Cir. 1977).[17]

In the present case, the judge did not set any deadlines for the identification of witnesses, expert or otherwise. Gray's identification of Miller on December 3, 2010 was on the date set by the judge for the completion of discovery, and his identification of Belcastro on December 6 was three days after the date set for completion of discovery. To the extent that Gray's identification of these witnesses was beyond the deadline set by the judge, we conclude that the judge abused her discretion in excluding the witnesses in light of the lack of surprise to North Fork, the importance of the evidence to be offered by the witnesses, the absence of bad faith or wilfulness on Gray's part, and the ability to cure the prejudice.

The documents which North Fork provided to MSHA with Gray's allegedly-forged signatures are critical evidence in Gray's case. As stated above, North Fork knew that Gray challenged the authenticity of the signatures, and was seeking to obtain the original documents from the government for inspection by a handwriting evidence. The judge did not cite bad faith or other improper motivation with regard to Gray's actions in responding to discovery requests, and we do not see anything in the record that would justify such a finding.[18]

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[17] The Third Circuit considers the following four factors in determining whether a trial court properly exercised its discretion in excluding evidence for failure to adhere to a pretrial order:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the district court's order.

Paoli Railroad Yards, 35 F.3d at 791; *Meyers*, 559 F.2d at 904-05.

[18] According to Gray's counsel, he had sent a letter to Gary Harris, the senior Special Investigator for MSHA's District 7 Office on July 1, 2010, asking for permission to have an independent handwriting expert view the "written warnings." Gray's counsel received a response to this letter in a letter dated September 7, 2010 – the day before the conference call setting the

Moreover, the judge did not explore alternative lesser sanctions that would have been more appropriate for supplementing discovery answers six and nine days beyond their due date. *See Betzel v. State Farm Lloyds*, 480 F.3d 704, 709 (5th Cir. 2007) (trial judge erred dismissing case instead of considering continuance in conjunction with possible lesser restrictions and financial sanctions).

The premature sanction for Gray's failure to fully and timely answer the interrogatory on the expert evidence was especially unwarranted in this case because of the unusual impediment to discovery that was present. This case was intertwined with a federal criminal investigation, but unlike most proceedings before the Commission, the Secretary was not a party before us and thus could not be relied upon to supply the judge with necessary updates as to the status of the criminal proceedings. Nor was the Secretary able to supply a necessary informational conduit for the parties. Consequently, the resulting lack of coordination may have impeded the efficiency of the Commission's proceedings.[19] But a concern for efficiency and courtesy alone, absent bad faith or unfair advantage, cannot justify the exclusion of vital evidence.

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case for hearing, and more than two months after the request. The response from Carolyn T. Jones, the Assistant Director of MSHA's Technical Compliance and Investigation Office, notified counsel that the documents in question were "part of an ongoing law enforcement action," and that further inquiries should be directed to H. Davis Sledd, Assistant U.S. Attorney ("AUSA") for the Eastern District of Kentucky. PDR at 5. Gray's counsel sent a copy of Ms. Jones' letter to the judge and to counsel for North Fork. *Id.* It was not until on or about November 22, 2010, that Gray's counsel received permission from AUSA Sledd to have the documents examined by a handwriting expert. *Id.* at 7 n.9. Gray's counsel then retained Dr. Miller as a handwriting expert, arranged for him to review the original documents, and supplemented the answers to North Fork's Second Interrogatories on December 3, 2010, identifying Dr. Miller as an expert witness. *Id.* at 9. Belcastro was the government's handwriting expert in its investigation concerning the allegedly forged documents. Gray's counsel state that they did not receive a copy of Belcastro's report from the government until on or about December 6, 2010. Oppegard Aff. at 6 (Jan. 16, 2012) (Gray Br. Ex. A). Gray's counsel submitted a Second Supplemental Answer to North Fork's Second Interrogatories on December 6, identifying Belcastro as an expert witness although permission had not been received from the United States Attorney, pursuant to 28 C.F.R. § 16.22, to call Belcastro as an expert witness. PDR at 10. That the pending criminal investigation cast a shadow over the proceedings in this case is further reflected in the fact that, at the hearing, witness Russell Ison, the company mine superintendent at the time of the first alleged warning notice, invoked his Fifth Amendment right against self-incrimination when questioned about the notice. Tr. I 99.

[19] The parties ideally should have communicated with the judge more frequently on the status of necessary evidence being delayed by the pendency of the criminal investigation. That Gray may have failed to do so, however, does not warrant the sanction ultimately imposed.

The importance of Gray's proffered evidence of forgery lies not only in its importance to his case, but in the nature of the evidence and its relationship to the integrity of our proceedings. The ultimate purpose of litigation is to determine the truth. Equally obvious, the truth-finding process is undermined if the court or agency is confronted with forged or fraudulent documents. As the Supreme Court stated in a case involving a fraudulent patent application, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 246 (1944):

> tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

In this case, the principal documentary evidence supporting North Fork's claim of Gray's poor work performance was a pair of disciplinary letters which Gray asserts were fraudulent.[20] The evidence of fraud should have been considered by the judge.

B. The Effect of the Evidentiary Exclusion on the Judge's Protected Activity Analysis

North Fork contends that whatever error the judge made in excluding the expert evidence was harmless in this instance, because the judge ultimately concluded that Gray had failed to establish that he had engaged in protected activity. According to North Fork, the introduction of the expert evidence would not have altered the judge's conclusion, because it was based on credibility determinations against Gray and in favor of North Fork's witnesses. However, we cannot agree that those determinations were unaffected by the judge's refusal to consider the expert evidence on the issue of whether Gray's signatures on the disciplinary letters were forgeries.

The witnesses relied on by the judge included both management and non-management employees. Specifically, the judge credited the testimony of management employees Anthony Estevez, Thomas Cornett, and Marty Bates, and non-management employees Chris Sheeks, William McFarland, William Peak, and Jerry Lynn Hall. 33 FMSHRC at 2507–09. These witnesses testified that there were no deep cuts beyond 20 feet taken in the North Fork mine, and that Gray was a poor and lazy employee who had been admonished and disciplined for his poor roof bolting on numerous occasions. The judge credited these witnesses largely because they

[20] The reports of Gray's excluded expert witnesses, which Gray included in his proffer at trial, tend to support this contention. Tr. II 110-17; OP Exs. 1, 2.

corroborated each other. *Id.* The judge also consistently discredited Gray's testimony, though her rationale in doing so does not entirely withstand scrutiny. *See id.* at 2499-2507.[21]

The only documentary evidence that Gray was ever disciplined for poor performance were the two alleged written warnings dated February 27, 2009 and April 28, 2009. Gray Exs. A & B. The disciplinary letter dated April 28, 2009, stated on its face that it was a "Final Warning." Gray Ex. A.

If these documents were forged by North Fork, as Gray contends, the testimony of mine superintendent Estevez would be directly and significantly impeached.[22] Estevez testified that he prepared and signed the April 28, 2009 disciplinary letter (Gray Ex. A), and that Gray signed it in his presence and the presence of Countiss. Then Countiss and he signed the document, all in each other's presence. Tr. I 36-43.[23] If it were determined that Gray's signature was forged, Estevez's credibility as a general matter would be called into question. Estevez also testified that when he wrote the April 28 disciplinary letter and when he, Countiss, and Gray signed it, the alleged Disciplinary Letter dated February 27, 2009, was not underneath it. Tr. I 44-45, 51.

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[21] For instance, the decision states that Gray testified at trial "that he told no one" about bolting the deep cut, contrary to his testimony at the temporary reinstatement hearing. 33 FMSHRC at 2504. However, Gray's testimony at trial was that after bolting the deep cut, Gray did indeed complain to Cornett that it was illegal and told Cornett that he would not bolt any more deep cuts. Tr. I 182-83.

Regarding Gray's testimony about Cornett's adverse reaction to Gray's stopping roof bolting to hang curtains, the judge concluded that Gray "could not articulate at either hearing what complaint he had concerning the curtains." 33 FMSHRC at 2506-07. It is possible, however, that Gray was using the term "complaint" in the Mine Act discrimination context, in that he thought he had engaged in protected activity by stopping roof bolting to take the safety precaution of hanging curtains, and then was subject to Cornett's animus towards him for doing so. Tr. I 203-08.

[22] The testimony of day shift outby foreman Steve Countiss, who signed the later of the two documents as a "witness," would also be impeached. However, the judge did not indicate in her decision that she relied on the testimony of Countiss in making her findings. 33 FMSHRC at 2507-09. As mentioned earlier, former mine superintendent Russell Ison, who allegedly authored and signed the disciplinary letter dated February 27, 2009 (Gray Ex. B), refused to answer questions about the document on the basis of his Fifth Amendment privilege against self-incrimination. Tr. I 99.

[23] However, Countiss testified that Gray signed the document and then left the room. Thus, according to Countiss, when Countiss signed the document, Estevez was the only person in the room. Tr. I 109-11. Countiss testified that he did not recall whether or not he saw Estevez sign the document. Tr. I 114.

However, the proffer of the testimony and reports of Miller and Belcastro was to the effect that there were indentations on the February 27 disciplinary letter indicating that the April 28 disciplinary letter was on top of it when the April 28 Letter was prepared. Tr. II 113-16; OP Exs. 1 & 2. This evidence, if admitted, could have impeached Estevez because it could be argued that the two letters, bearing dates two months apart, were actually prepared at the same time.

While day shift foreman Cornett was not present at the signing of the two letters, a finding that the letters had been forged would also undercut the credibility of his testimony. Cornett became Gray's immediate supervisor in April 2009 and remained his supervisor until Gray was fired on May 15, 2009. Tr. I 227. Cornett stated that for virtually that entire period, Gray's work was "real poor." Tr. I 229. Cornett testified that he kept a personal notebook in which he recorded Gray's poor work on nine separate occasions. Tr. I 233-45; NF Ex. 3. According to Cornett, he had admonished Gray on three of those occasions (April 23 and 28 and May 11) and had also given Gray verbal warnings on two occasions (April 28 and 29). Tr. I 238-44; NF Ex. 3. However, North Fork did not produce Cornett's original notebook but only pages which had been copied from it, and Cornett testified that he did not know where the original notebook was. Tr. I 233-35, 253. Cornett acknowledged that at the temporary reinstatement hearing on September 2, 2009, Administrative Law Judge Gary Melick had directed him to keep his original notes. Tr. I 253.

Cornett also testified that on May 15, the date Gray was fired, he gave Gray's roof bolting partner Chris Sheeks a verbal warning and recorded it in his notebook. Tr. I 259-60. However, the notes which North Fork submitted in evidence do not contain any mention of a verbal warning to Sheeks. NF Ex. 3. This fact suggests that the notes admitted in evidence were, at best, incomplete. If the two disciplinary letters were forgeries, it would mean that North Fork has no authoritative documents to support its contention that Gray had received warnings before being fired for alleged poor performance.[24] It would eliminate the "Final Warning" contained in the April 28 letter. Cornett agreed with counsel that on April 14, 2009, Gray's work was so bad that he was "intentionally . . . sabotaging production." Tr. I 265. But if the two disciplinary letters were forgeries, Gray was never disciplined in writing by North Fork until May 15, 2009, which was a month later – and just a week after Gray claims he refused to bolt a deep cut.

The authenticity of the disciplinary letters also affects consideration of the testimony of the non-management employees who testified. Gray's bolting partner, Chris Sheeks, was the most important non-management witness for North Fork, and was the non-management witness on whom the judge relied most heavily. 33 FMSHRC at 2500-01, 2504-05, 2507-08. Sheeks

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[24] Gray's attorney questioned the authenticity of Cornett's notes and objected to their introduction on grounds that the absence of the original documents and the use of incomplete copies prevented an evaluation of whether they were, in fact, prepared contemporaneously, or whether they were produced after Gray's discharge and discrimination claim. *See* Tr. I 233-35; Gray's Post-Hearing Br. at 18 n.17 (citing also the failure to tell MSHA investigator about notes maintained on Gray's performance).

testified on both direct and cross-examination that Gray told him that he had been "written up" four times by North Fork management – three times by Ison and once by Estevez – for poor performance. Tr. II 69-70, 90. Sheeks made clear that he understood being "written up" to mean that "[t]hat a piece of paper that has what you've done wrong, and you sign it." Tr. II 70. Gray, however, denied that he had ever been written up by North Fork. Tr. I 194-97. If the only two disciplinary letters in Gray's personnel file were actually forgeries, it would corroborate Gray's testimony that he had never been written up, and it would follow that Gray had never told Sheeks that he had been written up. Thus, a significant portion of Sheeks' testimony would be shown to be false.[25] Any assessment of the credibility of the rest of Sheeks' testimony – including the testimony that Cornett had never directed him and Gray to bolt a 50-foot deep cut and that Gray had never refused to bolt a 50-foot deep cut, Tr. II 75-76, as well as the testimony that Gray had threatened to sue North Fork if he was fired and denied unemployment benefits, Tr. II 74-75 – would have to account for this discrepancy.

Similarly, continuous miner operator Jerry Hall testified that he had heard talk among other miners that North Fork had "written [Gray] up." Tr. II 15. But if Gray had not, in fact, been written up, then Hall's testimony, like Sheeks', would be called into question.

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). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here it cannot be said that the judge's error in excluding Gray's expert evidence was harmless because the judge found that Gray failed to establish that he engaged in protected activity. Although the judge made credibility determinations in concluding that Gray had not engaged in protected activity, the credibility of these witnesses would have to be re-evaluated if it is found that the two disciplinary letters were forgeries.

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[25] Additionally, Sheeks testified that he actually saw one of the written warnings being given by Estevez. Tr. II 91-92. Then Sheeks qualified this testimony by saying that he was not actually present when the written warning was given by Estevez to Gray, but that he had been in Estevez's office with Gray "right before" Gray was written up. Tr. II 93. But this testimony was inconsistent with the testimony of Estevez, who stated that he had brought Gray and Sheeks into his office to admonish them together on a "prior occasion," and later gave Gray the disciplinary letter because he "hadn't seen any improvement on Mark's part." Tr. I 41. Thus, neither of the accounts that Sheeks gave – that he saw the written warning being given or that he had been in Estevez's office with Gray just before the written warning was given – is consistent with any other witness' account.

III.

Conclusion

For the foregoing reasons, we reverse the judge's order excluding the expert evidence and vacate and remand her decision for further proceedings, including any necessary discovery.

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Chairman Jordan, dissenting:

The majority concludes that the judge erred in excluding expert evidence proffered by Mark Gray, which would purport to show that Gray's signatures on two disciplinary letters were forged. I find that, even assuming arguendo the judge incorrectly excluded the evidence, this error would not in all likelihood have affected the outcome of the case. Accordingly, I would affirm the judge's decision.

Section 105(c) of the Mine Act prohibits discrimination against a miner because of the exercise by such miner of any statutory right afforded by the Act. 30 U.S.C. § 815(c). In order to establish a prima facie case of prohibited discrimination, a miner must present evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981).

In this case, Gray contends that his discharge was motivated at least in part by certain complaints he had voiced regarding practices he believed violated the mine's roof control plan. Specifically, Gray contends that North Fork was taking 50-to-60 foot cuts of coal, which exposed more roof than was allowed under the roof control plan, and departed from the usual 18-to-20 foot cuts taken at the mine. Gray maintains that after complaining about the legality of the practice, he refused to bolt the dangerously large expanse of unsupported roof. Gray also contends that he provoked his foreman's anger when he temporarily stopped roof bolting to hang the ventilation curtains. Gray submits that his discharge, occurring shortly after these events, was motivated by this protected activity.

In her October 20, 2011, decision, the judge concluded that Gray failed to produce a single credible witness or tangible evidence in support of his prima facie case, and that there was no support for his allegations of protected activity. 33 FMSHRC 2495, 2499 (Oct. 2011) (ALJ). Although Gray testified that he had been forced to bolt a deep cut and then refused to bolt a second one, the judge credited the numerous witnesses who testified consistently that, due to extremely adverse roof conditions, there had never been a cut in excess of 20 feet made in the mine *Id*. at 2499-2504. These witnesses encompassed both management and hourly employees and included Gray's bolting partner, the crew that would have had to bolt the cut Gray allegedly refused to bolt, and the continuous miner operator who would have made the two alleged deep cuts. *Id.* at 2499-502.

The judge's credibility findings were also influenced by Gray's failure to complain about the deep cuts to an MSHA inspector, a fact the judge found "defies common sense" particularly since "Inspector Doan . . . was in Gray's section to inspect his bolter twice on the day Gray was terminated." *Id.* at 2504. The judge also relied on the testimony of Gray's bolting partner Chris Sheeks, who maintained that Gray told him that if Gray were fired and denied unemployment he would then file a discrimination claim. *Id.* at 2500-01, 2504. Although Gray disputed making

these comments, the judge found that this provided "the motive behind Gray's alleging discrimination and falsely reporting illegal deep cuts being taken in the mine." *Id.* at 2504.

Besides the alleged protected activity of refusing to make a deep cut, Gray also claimed that his insistence on taking the time to hang the ventilation curtains provoked management's ire and was a factor in its decision to discharge him. Although there appears to be some confusion by the judge as to whether Gray was asserting, or needed to assert, that he had "complained" about the ventilation curtain, slip op. at 14-15 n.21, what is clear is that the judge was not persuaded by Gray's testimony and was persuaded instead by Supervisor Thomas Cornett's testimony (reflected also in his notes, NF Ex. 3) that he (Cornett) had reprimanded Gray on numerous occasions for not hanging the curtains as required. 33 FMSHRC at 2500.

Gray argues that the excluded evidence is the "centerpiece of his case," PDR at 15, and my colleagues appear to agree. Slip op. at 14-17. Like a loose thread in a sweater that when pulled unravels the entire item, my colleagues envision a scenario wherein the admission of the expert witness testimony will result in a finding that Gray's signature on the disciplinary letters was forged, which will in turn inexorably lead the judge to reconsider and reverse key credibility determinations. This anticipated result is highly speculative at best.

Climbing the first rung of the ladder requires the judge to find that, based on Gray's experts' testimony, his signatures on the two warning letters were forged. Such a finding is far from inevitable as, according to Gray's proffer, one of his experts (Belcastro) appeared equivocal about whether the documents were forged. Although he would have indicated that one discharge letter was prepared on top of another, the proffer regarding Belcastro's report stated that "a definite determination could not be reached concerning the authorship of the questioned, 'Mark Gray's' signatures. . . . Mark Gray . . . may not have prepared the . . . Mark Gray . . . signatures." Tr. II 115. Gray's counsel acknowledged during his proffer that he did not have the federal government's approval to use Belcastro (a federal government employee) as a trial witness. Tr. II 120-21.

My colleagues anticipate that a finding of forgery will necessarily call most, if not all, of the judge's prior credibility determinations into question. In particular, they suggest it will lead to the impeachment of one witness (Superintendent Anthony Estevez) and undercut the credibility of another management witness (Cornett) and two hourly employee witnesses (Sheeks and Hall). Slip op. at 15-17. We have made it plain, however, that a judge is not required to subscribe to a "false in one, false in everything" rule of testimonial evidence. *See, e.g., Nelson Quarries, Inc.*, 31 FMSHRC 318, 327 (Mar. 2009) (citing *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813 (Apr. 1981)). Therefore, even a witness who was involved with the letters, and whose credibility on certain issues might be impeached by a finding of forgery, could still be credited on other aspects of his testimony.

Moreover, the judge credited the testimonies of witnesses who had nothing whatsoever to do with the letters. As the majority acknowledges, the judge credited the testimony of

management employee Marty Bates and three other non-management employees (William McFarland, William Peak, and Jerry Lynn Hall), who were not linked to the disciplinary letters in any manner. No possible finding that the disciplinary letters contained a forged signature logically affects their consistent statements that there were no deep cuts at the mine, 33 FMSHRC at 2499, and that Gray was a poor performer. *Id.* at 2509.

The majority also fails to demonstrate how a finding of forgery on remand will impact the credibility determination the judge made regarding Cornett, the section foreman; they simply state that if the letters were forged, there was no support for the operator's contention that Gray had received written warnings before being fired. Even if this is true, it in no way undermines Cornett's testimony that "Gray never refused to bolt a cut or complained to him about having to bolt a cut." *Id*. at 2500.[1]

I believe my colleagues also overstate the importance a finding of forgery might have on the judge's decision to credit Sheeks, Gray's bolting partner. Sheeks stated explicitly that Cornett never told him to bolt a cut of 50 feet or deeper, that he never saw a cut of 50 feet or deeper in the mine, that he never bolted a cut of 50 feet or deeper in that mine, and that he never heard Gray refuse to bolt a cut of 50 feet or deeper or to refuse to bolt any cut. Tr. II 75-76.

Focusing on a comment by Sheeks that Gray told him he had been written up four times, the majority opines that if the only two disciplinary letters in Gray's file were forgeries, it would follow that Gray never told Sheeks that he had been written up. This may not be the case, however, particularly because one of the written disciplinary actions about which Sheeks testified did not concern the content of the two disciplinary letters at issue. Rather, he testified that Gray told him he received a written warning "for not having enough cable to reach Number One entry." Tr. II 70.

In sum, even if the judge erred in excluding the expert testimony, for the reasons outlined above I decline to vacate her ruling based on the highly speculative scenario suggested by the majority. The evidence regarding the allegedly forged warning letters was not relevant probative evidence regarding the issue of whether Gray engaged in protected activity. Consequently, the judge's ruling did not infringe on the "substantial rights" of Gray. *See Law v. Camp*, 15 Fed. Appx. 24, 26 (2d Cir. 2001) (holding that the district court did not abuse its discretion in precluding testimony of plaintiff's expert witnesses, and citing *Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994) (stating that a court abuses its discretion when a discovery ruling is improvident and effects the substantial rights of the parties)).

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[1] Cornett's testimony was supported by detailed notes in a journal. NF Ex. 3. Although my colleagues appear to challenge the completeness and perhaps the authenticity of the notes Cornett produced at trial, slip op. at 16 & n.24, the notes were admitted by the judge and the correctness of that ruling is not before us.

For the foregoing reasons, I would affirm the judge's decision and thus, respectfully dissent.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

Distribution:

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2228,
Arlington, VA 22209

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Derek J. Baxter, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Stephen M. Hodges, Esq.
Penn, Stuart & Eskridge
P.O. Box 2288
Abingdon, VA 24212

Wes Addington, Esq.
Appalachian Citizens Law Center
317 Main Street
Whitesburg, KY 41858

Tony Oppegard, Esq.
P.O. Box 22446
Lexington, KY 40502

Administrative Law Judge Priscilla M. Rae
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004