FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001
May 20, 2011

JAYSON TURNER	:	
	:	
v.	:	Docket No. WEST 2006-568-DM
	:	
NATIONAL CEMENT COMPANY OF CALIFORNIA	:	

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

DECISION

BY: Young, Cohen, and Nakamura, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge Jacqueline Bulluck concluded that the discharge of Jayson Turner by National Cement Company of California ("National Cement") did not violate section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).[1] 31 FMSHRC 1179 (Sept. 2009) (ALJ). The judge consequently dismissed Turner's discrimination complaint. *Id.* at 1186. The Commission granted Turner's petition for discretionary review challenging the judge's decision. For the following reasons, we vacate the judge's decision and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

National Cement operates the Lebec Cement Plant in Kern County, California. *Id.* at 1180. Jayson Turner worked at the Lebec Plant as an electrician for ten years and three months. *Id.*; Tr. 36. During the period relevant to these proceedings, Turner worked the swing shift,

[1] 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.

2:00 p.m. to 12:30 a.m., Sunday through Wednesday. 31 FMSHRC at 1180; Tr. 65, 77. While employed by National Cement, Turner held a second job with Innovative Construction Solutions ("ICS"), a contractor that provided water treatment services to National Cement on the premises of its Lebec Plant. 31 FMSHRC at 1180; Tr. 32-33, 90-91, 110-11, 263. Turner's job at ICS had flexible hours, with no set schedule. 31 FMSHRC at 1180; Tr. 116.

National Cement has a "no fault attendance program" under which an employee earns credits for each month of perfect attendance and demerits for each "absence occurrence." 31 FMSHRC at 1184; Tr. 271; Ex. C-21. The program lists a number of exceptions for absences which would not be counted as absence occurrences, such as vacation, jury duty, bereavement leave, and doctor and dental appointments. Ex. C-21. The program establishes a progressive schedule of discipline for accumulated absence occurrences. For example, after three absence occurrences, an employee receives a verbal warning; after four, a written warning; after five, the employee receives five work days disciplinary suspension without pay; after six, ten work days disciplinary suspension without pay; and after seven, an employee is terminated. *Id.* To request time off, an employee is to make a reasonable effort to contact his/her immediate supervisor to report an impending absence and if the employee is unable to contact his/her supervisor, the employee is to notify the Production Control Supervisor. Ex. C-11.

On September 24, 2003, nearly three years before the incident which gave rise to Turner's termination, Turner did not report to his job at National Cement for "personal reasons." 31 FMSHRC at 1180; Ex. R-6. On that day, however, his supervisor, chief electrician Julius Wetzel, observed Turner at the ICS building. 31 FMSHRC at 1180; Tr. 528. Normally, during that time, Turner would have been working his shift at National Cement, instead of working for ICS. 31 FMSHRC at 1180; Tr. 62. In a letter dated October 1, 2003, Wetzel issued a "written verbal" reprimand to Turner, stating that on September 24, he was "absent from work without consent of the Company," and warning him that if such an incident happened again, it would result "in more severe disciplinary action, including possible discharge." 31 FMSHRC at 1180; Ex. R-6.

On June 13, 2006, Turner informed Wetzel, orally and in writing, that he would be taking the following day off to go to a doctor's appointment. 31 FMSHRC at 1180; Tr. 64; Ex. R-7. The following day, June 14, from approximately 10:30 a.m. until 1:30 p.m., Turner visited the ICS building to show the water treatment facility to his daughter, who was visiting Turner from out of town. 31 FMSHRC at 1180; Tr. 33-34, 68-70, 112-13. While at ICS, Turner engaged in work and "logged in some activities." 31 FMSHRC at 1180; Tr. 80, 114; Ex. R-4. After leaving the Lebec Plant property, Turner had lunch with his daughter and, at 4:00 p.m., went to his doctor's appointment. 31 FMSHRC at 1180-81; Tr. 69, 74-76.

On June 14, several National Cement employees informed Wetzel that "Turner was at the ICS water treatment plant." 31 FMSHRC at 1181; Tr. 532; Ex. R-8. Wetzel went to the ICS building and spoke with the supervisor there. 31 FMSHRC at 1181. He testified to being informed that Turner had been working. *Id.*; Tr. 533. Wetzel reported his findings to his immediate supervisor, electrical manager Bill Russell, and to plant manager Byron McMichael,

in a written statement dated June 15, 2006. 31 FMSHRC at 1181; Tr. 535; Ex. R-8. In a meeting with Wetzel and Russell on June 16, 2006, McMichael reviewed Turner's personnel file and asked for Wetzel's and Russell's input on Turner's job performance, and whether they thought termination was an appropriate response to Turner's conduct in disregarding the previous warning not to allow his secondary job to interfere with his job at National Cement. Tr. 260-61, 537-42. McMichael was ultimately responsible for deciding what disciplinary measures, if any, National Cement would take against Turner for the June 14 incident. 31 FMSHRC at 1181; Tr. 249-50. According to Wetzel, he and Russell recommended to McMichael that Turner's employment be terminated. Tr. 539-42.

Later on June 16, a meeting was held involving Turner, McMichael, Wetzel, and a union representative, Neal Janousek, in which Turner was informed of the decision to suspend him "pending discharge." 31 FMSHRC at 1181; Tr. 281-82; Ex. R-1. McMichael subsequently decided to terminate Turner's employment. By notice dated June 23, 2006, McMichael provided Turner with the company's reason:

> On Wednesday, June 14, 2006, you were on the premises of NCC working for Innovative Construction Solutions, Inc. The same day . . . you missed your entire shift (2:00 p.m. until 12:30 a.m.) at NCC. . . . As a result of your working for another firm on a day that you were absent from NCC and your less than acceptable performance[,] you are being terminated effective Friday, 6-23-06.

31 FMSHRC at 1181; Tr. 250, 267-69; Ex. R-2.

Turner testified that before his employment was terminated, he had brought safety concerns to the attention of his supervisors on at least four occasions.[2] 31 FMSHRC at 1182-83. During January 2006, Turner complained to management that the lack of lights on a manlift made it unsafe to operate the equipment at night. 31 FMSHRC at 1183; Tr. 49-50. He alleged that in April 2006, he requested that National Cement provide him with electrically-rated tactile gloves.[3] *Id.* at 1182; Tr. 18-19, 105-06. In late May 2006, Turner also complained that a medium voltage disconnect, which he mistakenly energized, was mislabeled and not properly locked and tagged out of service. 31 FMSHRC at 1183; Tr. 20-25; Ex. C-2. (When Turner energized this piece of equipment, it caused the entire plant to lose power. 31 FMSHRC at 1183; Tr. 25-26. He was subsequently disciplined for his mistake in a written warning that was placed in his personnel file. 31 FMSHRC at 1183; Ex. C-5; ALJ-1.) Lastly, on June 12, 2006 – four

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[2] Turner withdrew his allegation that he made a fifth safety complaint concerning unsafe conditions existing on a blower. 31 FMSHRC at 1182 n.6; Tr. 123-24; T. Post-Hearing Br. at 4.

[3] National Cement's safety manager, Randy Logsdon, testified that he told Turner that he had researched the availability of such gloves in his equipment catalogs, but could not find any thin rubber or latex gloves that had an electrical rating. 31 FMSHRC at 1183; Tr. 361-63.

days before his discharge – Turner complained to management that he had been directed to troubleshoot ignition controls on Pre-Calciner burners in an area that was allegedly very hot and gassy, needlessly placing him and his co-workers at risk. 31 FMSHRC at 1183; Tr. 43-45.

Turner filed a discrimination 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), on July 25, 2006. 31 FMSHRC at 1179; Ex. C-9. In a letter to Turner dated August 18, 2006, MSHA notified him that, based on its investigation of the allegations contained in the Complaint, it had concluded that a violation of section 105(c) had not occurred. 31 FMSHRC at 1179. Turner, *pro se*, filed a complaint before the Commission on August 31, 2006, pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). 31 FMSHRC at 1179. A hearing was subsequently held before Judge Bulluck. *Id.* at 1180.

The judge concluded that, although Turner engaged in activity protected under the Mine Act, he had failed to prove that his protected activity served as the basis for his termination by National Cement. *Id.* at 1180. Specifically, the judge found that McMichael credibly testified that when he decided to terminate Turner, McMichael knew nothing of Turner's safety concerns. *Id.* at 1183. The judge also credited Wetzel, who testified that his recommendation to discharge Turner was based on Turner's poor job performance and the fact that Turner worked at the ICS plant on June 14. *Id.*

The judge, assuming *arguendo* that Turner had proven that his protected activity could have served as a basis for his termination, concluded that National Cement discharged Turner for reasons that were wholly unrelated to his protected activity. *Id.* at 1183, 1186. The judge found that National Cement "offered credible evidence, unrebutted by Turner, clearly establishing that he was discharged for legitimate, business-related reasons, entirely unrelated to any protected activity, and that [National Cement] would have taken the adverse action based solely on Turner's conduct" with respect to his outside employment at ICS. *Id.* at 1183. While the judge acknowledged the testimony about National Cement's "no-fault attendance program," she also cited McMichael's and Wetzel's testimony that it was improper for Turner to work for ICS on a day he had taken off from National Cement, that it was unnecessary for Turner to miss his entire shift for his medical appointment, and that Turner should have scheduled his personal business so as not to interfere with his National Cement shift. *Id.* at 1183-84. Based on the record evidence, she concluded that "National Cement had ample grounds, unrelated to his protected activity, upon which to terminate [Turner's] employment" and dismissed his complaint. *Id.* at 1185.

Turner argues that the judge's dismissal of his discrimination complaint was erroneous. He claims that substantial evidence supports the conclusion that he engaged in protected activity. PDR; T. Br. at 4-10; T. Reply Br. at 3-6, 14-20. He contends that the operator's asserted justification for firing him – allowing his secondary job to interfere with his primary job at National Cement and his unsatisfactory job performance – was pretextual. PDR; T. Br. at 6, 14-18. He explains that the prior incident in 2003 involving his work for the secondary employer

was different from the current incident leading to his termination. T. Br. at 10-12. He argues that substantial evidence does not support the operator's claim of poor performance. T. Br. at 15-16, 23-24. Turner also claims that Byron McMichael and other supervisors knew about his safety complaints. T. Br. at 20. Finally, Turner contends that the judge erred by excluding evidence that he sought to admit at trial and by denying his requests to compel discovery.[4] PDR; T. Br. at 26-28; T. Reply Br. at 23-25.[5]

National Cement responds that the judge correctly found that its decision to terminate Turner was due solely to Turner's allowing his secondary job to interfere with his primary job at National Cement and for his poor job performance. NC Br. at 17-19. National Cement contends that there is no evidence that McMichael, the ultimate decisionmaker on Turner's termination, knew about Turner's protected activity. *Id.* at 20-21, 23-25. National Cement also argues that there is no evidence of hostility or animus toward Turner's protected activity or that Turner was disparately treated for his secondary job as compared to other National Cement employees. *Id.* at 21-23. National Cement explains that although some of Turner's protected activity occurred relatively close in time to his termination, the undisputed evidence is that the operator acted

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[4] Turner's personnel file, Safety Committee notes from February 2006 through June 2006, and Joseph Kowalski's personnel file were admitted into evidence after the hearing as ALJ Exhibit 1. Ex. ALJ-1.

[5] While this case was on appeal, Turner submitted documents to the Commission by email, and requested that they be included as evidence in the record. On January 19, 2011, the Commission's Docket Office, at the direction of the Commission, sent an email to Turner and the operator's counsel, rejecting these documents and stating that "[n]o additional evidence may be submitted after the close of the hearing before the judge in any case, unless a party has special permission from the Commission or the judge." On February 2, 2011, Turner sent an email to the Commission containing a motion to reconsider acceptance of the evidence previously submitted to the Commission. We hereby deny Turner's motion for reconsideration. As provided in section 113(d)(2)(C) of the Mine Act, the record in the case consists of:

> (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. *No other material shall be considered by the Commission upon review.*

30 U.S.C. § 823(d)(2)(C) (emphasis added). Contrary to Turner's understanding, the right of a miner or other party to "present additional evidence" pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), is limited to the period when the case is pending before the administrative law judge, and does not extend to the period when the case is on appeal before the Commission.

swiftly in response to the events of June 14. *Id.* at 22. National Cement contends that substantial evidence supports the conclusion that Turner's job performance was unsatisfactory. *Id.* at 25. National Cement also contends that the judge's discovery and evidentiary rulings were appropriate and not an abuse of her discretion. *Id.* at 25-29. Finally, National Cement argues that the judge's decision and order dismissing Turner's discrimination complaint should be upheld. *Id.* at 29.

II.

Disposition

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 Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y 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); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by 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).

Although the judge did not make an explicit finding as to whether Turner established a prima facie case of discrimination, it appears that she concluded that Turner did not establish a prima facie case because he failed to establish motivation, i.e., that his adverse action was in any part motivated by his protected activity. Nevertheless, the judge proceeded in her analysis to consider evidence of the operator's defense, assuming that Turner successfully established a prima facie case, and essentially concluded that the operator had affirmatively defended by proving that it had terminated Turner for his non-protected activity alone. The judge accepted the operator's business justification for dismissing Turner – because he had worked for his secondary employer on a day that he was scheduled to work for the operator but did not do so, and for his allegedly poor job performance – as the sole bases for its decision to discharge Turner.

We conclude that the judge's analysis is flawed in certain respects. First, in analyzing Turner's prima facie case, the judge failed to consider circumstantial evidence of motivation and, in doing so, incorrectly elevated the burden of proving a prima facie case of discrimination. Specifically, the judge failed to address significant probative circumstantial evidence of National

Cement's motivation. Second, in considering the operator's defense, the judge failed to address evidence that the justification proffered by National Cement for Turner's discharge was pretextual.

We first address the evidence regarding the prima facie case.

A. Prima Facie Case

A "prima facie case" is defined as "the establishment of a legally required rebuttable presumption; *a party's production of enough evidence to allow the fact-trier to infer the fact at issue* and rule in the party's favor." *Black's Law Dictionary* 1310 (9th ed. 2009) (emphasis added). To make out a prima facie case of discrimination, the complainant need only "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." *See Driessen*, 20 FMSHRC at 328 (emphasis added). This burden of proof is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. *See EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (holding that "[t]here must be a lower burden of proof to sustain a prima facie case than to win a judgment on the ultimate issue of discrimination"); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding that "the burden imposed on a plaintiff at the prima facie stage is not onerous")**;** *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001) (stating that the burden of establishing a prima facie case of discrimination is "minimal") (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998) ("'The prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue' of discriminatory action.").[7] To establish a prima facie case, it is sufficient that the alleged discriminatee present evidence from which the trier of fact could infer retaliation. *See Young*, 152 F.3d at 1022 (concluding that plaintiff "produced evidence sufficient to raise an inference of discrimination"); *see also Long v. Eastfield College*, 88 F.3d 300, 304-05 n.4 (5th Cir. 1996) (stating that at prima facie stage, plaintiff need not prove that protected activity was sole factor motivating employer's challenged decision; "[t]he ultimate determination . . . is whether the conduct protected . . . was a 'but for' cause of the adverse employment decision").

Here, the judge applied the wrong evidentiary standard to the miner's prima facie case and we review that legal conclusion de novo. *Mitchell v. Baldrige*, 759 F.2d 80, 84-87 (D.C. Cir. 1985) (holding that district court's formulation of the elements of a Title VII prima facie case of

[7] The Commission has looked to case law under similar federal anti-retaliation provisions, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"), in resolving questions involving the anti-discrimination provisions of the Mine Act. *See, e.g.*, *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1367-72 (Dec. 2000); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990).

disparate treatment was legally incorrect, and finding that, under the appropriate formulation, the district court's factual findings required the conclusion that plaintiff had proved a prima facie case); *see also Avery*, 104 F.3d at 860-62 (stating that "the elements that must be proven in a prima facie case are a question of law which is reviewed de novo"). When reviewing a trial court's determination that a plaintiff has failed to present sufficient evidence to meet the burden of establishing a prima facie case of discrimination, federal courts of appeals have proceeded to consider the evidence pertaining to the elements of a prima facie case and reversed the trial court's determination, concluding that a plaintiff has "produced evidence sufficient to raise an inference of discrimination." *Young*, 152 F.3d at 1022; *see also King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003) (reversing trial court's conclusion that plaintiff failed to make out a prima facie case of retaliatory discharge based on evidence proferred by plaintiff that "his termination came so close upon his filing of [an EEO] complaint giv[ing] rise to a sufficient inference of causation to satisfy the prima facie requirement"); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000) (concluding that "the District Court erred by requiring that the causal connection . . . be supported by a pattern of antagonism, retaliation or hostility," the circuit court considered the record and found "ample evidence from which to infer a causal connection" between the plaintiff's rejection of her supervisor's sexual advance and her subsequent termination); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (disagreeing with trial court's conclusion that plaintiff failed to make a prima facie case of retaliation and finding that "the less onerous burden of making a prima facie case of causality" was satisfied by proving that plaintiff was fired after her employer became aware that she had filed a discrimination charge). Thus, "[t]o make out a prima facie case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference" that Turner's termination resulted, at least in part, from his protected safety complaints. *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002) (Jordan, concurrence) (emphasis in original). We conclude that the record contains sufficient evidence to meet this low evidentiary burden.

In view of the cases cited herein, the dissent is incorrect in asserting that we have "stray[ed] well beyond the confines of the Commission's review function." Slip op. at 24. As a matter of law, a prima facie case is established by evidence from which a judge *could infer* retaliation. Since such evidence exists in the record, it is not necessary to remand the case to the judge on the issue of whether Turner has established a prima facie case. The record here compels the conclusion that retaliation *could* be inferred from the evidence, and thus that Turner established a prima facie case.

The judge found, and National Cement does not dispute, that Turner engaged in protected activity and that he suffered adverse action when National Cement discharged him. 31 FMSHRC at 1182-83. We disagree**,** however, with the judge's conclusion that there was no evidence of motivation. Indeed, Turner presented significant circumstantial evidence related to National Cement's motivation for his termination.

In *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, the Commission stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). In *Chacon*, the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510. Consideration of indirect evidence involves the drawing of reasonable inferences from the facts of record. In *Bradley v. Belva Coal Co.*, with regard to the issue of motivation, the Commission found that "circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case." 4 FMSHRC 982, 992 (June 1982) (*citing Chacon*, 3 FMSHRC at 2510-12).

Although the judge recited the *Chacon* factors in her decision, she did not adequately consider the circumstantial evidence on several of the factors critical to Turner's prima facie case, and failed to credit the evidence as establishing his prima facie case. We review the evidence under this minimal evidentiary standard to determine whether a reasonable person could infer that Turner was discharged, at least in part, for his protected activity. We conclude that there is ample evidence from which a reasonable person could infer a discriminatory intent for Turner's termination.[8]

1. Knowledge

As to knowledge, the judge's conclusion that "McMichael credibly testified that when he decided to terminate Turner, he knew nothing of Turner's [protected activity]" is undermined by the record and does not end the inquiry. 31 FMSHRC at 1183. The record indicates that McMichael consulted Wetzel and Russell prior to making his decision to terminate Turner, and that both Wetzel and Russell knew about Turner's protected activity. The Commission has stated that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984).

While the judge credited McMichael's testimony that he did not know about Turner's safety complaints and that he made his decision to terminate Turner based solely on his non-protected conduct, the judge did not reconcile this finding with the evidence that McMichael consulted Wetzel and Russell, who did in fact have knowledge of the complaints. Tr. 102-03, 148-49, 189, 198, 260-61, 438-40, 537-42. Nor did she consider the testimony of Bill Edminister that he raised Turner's concern about thin electrically-rated gloves to National Cement management at a safety meeting, and the concern was laughed off. Tr. 148. The significance of

[8] We recognize that the evidence of National Cement's motivation is relevant to both Turner's prima facie case and his ultimate burden of proving discrimination, which is intrinsically tied to his pretext claim. Therefore, where relevant, we address the evidence of motivation in both contexts in this portion of the decision.

this testimony as to management's knowledge of Turner's safety complaints is that McMichael attended the monthly safety committee meetings. Tr. 304. The safety committee minutes, ALJ Ex. 1, indicate that McMichael was at all but one of the meetings in the first part of 2006, that Gerald Guiot, who McMichael described as his "boss," with whom he consulted before terminating Turner, Tr. 261, 266, was at the safety meeting which McMichael missed, and that Edminister was at a number of the safety meetings.

Although the judge credited McMichael's testimony that he had no knowledge of Turner's safety complaints, based on the principles articulated by the Commission in *Metric*, a fact finder could still conclude that Wetzel's and Russell's knowledge should be imputed to McMichael. In *Metric,* the project superintendent terminated certain miners after being told by the night superintendent that these miners were refusing to perform work. However, the night superintendent had not communicated the protected safety reason behind the miners' refusal. 6 FMSHRC at 226, 228. The Commission rejected the operator's defense that the project superintendent himself did not know of the miners' protected activity and held that "the fact that [the night superintendent] did not communicate the miners' safety concerns to [the project superintendent] cannot serve to insulate Metric from liability for this unlawful discharge." *Id.* at 230 n.4. *See also Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (declining to "launder" regional sales manager's knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity, but "acted in direct response" to regional sales manager's recommendation to dismiss employee); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117-18 (6th Cir. 1987) (imputing plant manager's knowledge of, and animus against, employee's protected activity based on his "involve[ment]" in decision to terminate employee by recommending employee's termination to company's industrial relations manager, who had no knowledge of employee's protected activity and relied on plant manager's recommendation) (internal quotations and citations omitted). Here, if Wetzel's and Russell's recommendations to terminate Turner were at least partially a result of retaliatory animus and if those recommendations influenced McMichael's decision to terminate Turner, then Wetzel's and Russell's knowledge and retaliatory animus may be attributed to the decision maker.

For purposes of the prima facie case, there is considerable evidence in the record to permit the conclusion that Wetzel's and Russell's recommendations influenced McMichael's decision. On June 16, McMichael consulted Wetzel and Russell just prior to making his decision to suspend Turner pending discharge. Tr. 260. McMichael testified that he asked Wetzel and Russell about Turner's job performance and whether they thought termination was appropriate. Tr. 260-62, 537-42. Wetzel testified that he and Russell recommended that Turner be terminated. Tr. 539-41. McMichael also testified that he reviewed Turner's personnel file before deciding to terminate Turner. Tr. 261. However, Turner's file is devoid of any past instances of significant discipline or poor performance, the other basis provided for his termination. Ex. ALJ-1. It is reasonable to infer that Wetzel's and Russell's recommendations influenced McMichael's decision to terminate Turner. Therefore, a fact finder could find the requisite grounds to impute Wetzel's and Russell's knowledge to McMichael. *See Garcia*, 24 FMSHRC at 358-60 (Jordan,

concurring) (imputing the knowledge and animus of a supervisor to the operator where sufficient circumstantial evidence was presented to support an inference that the supervisor influenced the operator's decision not to employ the discriminatee).

As to the ultimate question of discriminatory motive, on remand, the judge must address whether McMichael's decision to terminate Turner was influenced by the recommendation of Wetzel and Russell. If so, Wetzel's and Russell's knowledge of Turner's protected activities should be imputed to McMichael.

2. Hostility or Animus

If the recommendation to terminate Turner made by Wetzel and Russell, who knew about Turner's protected activity, was the result of retaliatory animus for Turner's safety complaints, McMichael's ultimate decision to terminate Turner would likewise be tainted by the retaliatory animus. *See Metric*, 6 FMSHRC at 230 n.4. This is the case despite the judge's finding that McMichael had no personal knowledge of Turner's protected activity.

The judge failed to address any evidence of possible animus by the operator for Turner's safety complaints. In particular, she did not address whether such hostility on the part of Wetzel and Russell played any role in Turner's termination. Turner introduced evidence which could give rise to a finding of animus on the part of the operator. He contends that the operator was not responsive to his safety concerns for electrically-rated tactile gloves, driving lights on the manlift, safer means of repairing the Pre-Calciner burners and the mislabeled and unlocked power source for the roller mill which led to Turner's accidental powering of the machine. Tr. 37-38, 43-52, 189, 201-02, 228-29, 352-53, 361-63, 374-76, 438-41, 560-61; T. Br. at 15, 17; T. Reply Br. at 3; Ex. C-2.

Turner testified that Logsdon, National Cement's safety manager, did not share the results of his research on the safety-rated tactile gloves with Turner until he asked Logsdon about them again following his suspension meeting. Tr. 34-35. Indeed, Bill Edminister testified that when he raised Turner's concern about thin electrically-rated gloves to National Cement management at a union safety meeting, "the response I got was just kind of a chuckle and comments that had nothing to do with the request for it." Tr. 148.

Russell and Wetzel acknowledged Turner's safety concerns about the manlift, but told him to use a plug-in lamp in the basket and to pre-position the manlift during the day. Tr. 189, 438. Even after Turner continued to complain about the visibility at night, Wetzel testified that he did not further address the matter with Turner. Tr. 453-54, 457-60.

With regard to the Pre-Calciner burners, Thomas Hastings testified that he was acting as lead man for the crew, filling in for the shift supervisor, and called in Turner as the electrician to help repair the start-up problem. Tr. 349-51, 354-55. Hastings stated that Turner had angered management by what he had said over the radio at the time of the incident. Tr. 349.

At the hearing, Wetzel offered significant opinion testimony about Turner. He generally testified that Turner was a difficult employee and that he did not listen. Wetzel also provided hearsay testimony that other miners had stated that he was hard to work with. Tr. 460-61, 488. While the judge credited Wetzel's testimony regarding Turner's character and job performance, she failed to address whether Wetzel's characterization of Turner as "difficult" may have, at least in part, represented animus for his safety complaints. 31 FMSHRC at 1185-86. For example, Wetzel acknowledged that it was his responsibility to investigate the needs of National Cement employees for personal protective equipment. Tr. 438. He stated that he did not, however, investigate the possibility that electricians needed tactile electrically-rated gloves when Turner raised this issue. *Id.* Wetzel explained, in an answer which suggests sarcasm, "I remember you mentioning it, but you're not a lineman." *Id.*

Thus, in addition to the consideration of knowledge, for purposes of deciding the ultimate issue of motivation, the judge must address on remand whether the recommendation to terminate Turner by Wetzel and/or Russell was influenced by hostility or animus engendered by Turner's safety complaints.[9]

3. Coincidence in Time

In her decision, the judge noted that "Turner raised safety concerns in the months and days preceding his termination," but she failed to acknowledge it as an indicator of possible motivation. 31 FMSHRC at 1183. The record indicates that Turner made a string of complaints in the months preceding his termination. Specifically, Turner complained to his supervisors about safety-related matters in January, April, and May 2006. Finally, on June 12, 2006 – just four days before his suspension pending discharge – Turner complained about the problem with the Pre-Calciner burners and the need for driving lights on the manlift. Ex. C-9.

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[9] Our colleagues suggest that we "rely almost exclusively on the operator's lack of responsiveness to Turner's safety complaints to suggest animus or hostility towards his protected activity." Slip op. at 25. However, hostility or animus may clearly be demonstrated by indirect evidence. *Chacon*, 3 FMSHRC at 2510; *see Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992) (rejecting operator's argument that discriminatory intent must be proven by direct evidence). Additionally, we disagree with our colleagues' characterization of the evidence. In addition to being dismissive, Turner's supervisor, Wetzel, who knew about Turner's protected activity, clearly expressed his dislike of Turner and his view that Turner was "difficult." 31 FMSHRC at 1185-86; Tr. 460-61. Such opinion testimony, taken in the context of Turner's repeated safety complaints and the operator's lack of response to such complaints, may be suggestive of hostility or animus. *See Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089-90 (Oct. 2009) (acknowledging inferential evidence of animus that miner's supervisor "'dogged him,' swore at him, and assigned him more difficult and onerous tasks"). Moreover, animus is but one of several indicia of discriminatory intent.

The Commission has noted that it "applies no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). In *Chacon*, for example, complaints ranging from four days to one and one-half months before the adverse action were deemed sufficiently coincidental in time to indicate illegal motive. 3 FMSHRC at 2511. *See also Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (noting that two weeks between the alleged protected activity and the miner's dismissal is "itself evidence of an illicit motive"); *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986-87 (Sept. 2001) (concluding that the judge correctly inferred discriminatory motive from adverse action taken hours after miner's safety complaint).

Considering the evidence as a whole, a judge could reasonably conclude that there is a coincidence in time between Turner's safety complaints and his termination. Given Turner's history of safety complaints, his most recent complaints in the days immediately preceding his termination could have been the last straw for the operator. Thus, the close proximity in time between Turner's latest complaints and his termination could support an inference that National Cement may have been improperly motivated by Turner's complaints when it fired him, and the judge therefore should have considered the proximity in time and whether it indicated any improper motivation.

4. Disparate Treatment

The evidence as to whether Turner was disparately treated by National Cement is equivocal. Regarding outside employment, the only evidence Turner presented on other employees who engaged in secondary jobs and were permitted to work those jobs during National Cement shifts was his own hearsay testimony and the hearsay testimony of another miner. Tr. 159-61, 178-81, 441-46.[10]

National Cement presented evidence that another employee was terminated for his outside employment during a time that he was excused from work at National Cement on medical leave. Tr. 327-30; Ex. ALJ-1 (Kowalski personnel file). However, unlike Turner's incident, the reason provided by the operator for that employee's termination was a violation of National Cement's written attendance policy. Ex. ALJ-1 (Kowalski personnel file); C-21. Specifically, National Cement terminated that employee because he was "absent for three (3) consecutive working days without notifying the Company and providing a satisfactory reason for such absence." Ex. ALJ-1 (Kowalski personnel file). By contrast, Turner was terminated for

[10] While Turner does allege that he was disparately treated as compared to other National Cement employees when he was disciplined for the roller mill/power shut down incident (T. Br. at 5-6), the evidence does not seem to support Turner's allegations. The only evidence in the record regarding other employees causing a plant shutdown was Russell's and Wetzel's testimony that these employees, like Turner, received a written warning. Tr. 195-96, 507-08.

working at ICS on a day when he was no longer scheduled to work for National Cement because of a medical appointment, and at a time which was not part of his National Cement work shift. Thus, if anything, McMichael's testimony that Kowolski was the only other employee terminated for working another job, Tr. 330, would suggest a conclusion that Turner did, in fact, receive disparate treatment.

Based on our analysis of the foregoing factors, we conclude that the record presents sufficient circumstantial evidence of motivation on the part of National Cement to establish a prima facie case of discrimination. Because the judge analyzed the operator's defense under the assumption of a prima facie case and because we conclude that there is sufficient evidence to support a conclusion that Turner established a prima facie case of discrimination, we do not think that it is necessary to remand to the judge to address the prima facie case. However, as explained below, whether National Cement's purported reasons for terminating Turner were pretextual is intrinsically tied to the ultimate question of National Cement's motivation for terminating Turner. Thus, on remand, in the context of considering the issue of pretext, the judge must consider and address the circumstantial evidence of National Cement's motivation and make necessary findings on the ultimate issue of discrimination.

B. Operator's Affirmative Defense

The operator contends that Turner was terminated for working at ICS on a day that he was scheduled to work for National Cement, but did not, and for his poor performance. NC Br. at 17-19. Both below and on appeal, in response to the operator's defense, Turner argues that the decision to terminate him was a pretext. T. Post-Hearing Br. at 10; PDR; T. Br. at 6, 14-18. Given the considerable evidence supporting the argument, we conclude that the judge should have addressed this argument.[11]

[11] We disagree with our colleagues' suggestion that "the fact that the judge failed to discuss some of the evidence does not mean that she did not analyze it." Slip op. at 30. Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). The Commission thus has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009). The evidence pertaining to the reasons for Turner's discharge is pertinent to his argument of pretext and thus probative of the ultimate issue of discrimination.

The Commission has explained that a defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co*., 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has 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 the context of other federal discrimination statutes, courts have analyzed the issue of pretext as follows: "A plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Madden v. Chattanooga City Wide Service Dep't.,* 549 F.3d 666, 675 (6th Cir. 2008) (citing *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)), *overruled on other grounds*, *Geiger v. Tower Automotive,* 579 F.3d 614 (6th Cir. 2009) (emphasis in original)); *McNabola v. Chicago Transit Auth.,* 10 F.3d 501, 513 (7th Cir. 1993). As explained in *Manzer*, 29 F.3d at 1084, the first type of showing consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.,* that they are "factually false." The third type of showing ordinarily consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially similar conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttal are direct attacks on the credibility of the employer's proffered motivation for firing the plaintiff. The second type of showing is of a different ilk. There the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct *could* motivate dismissal. However, the plaintiff attacks the credibility of the proffered explanation indirectly, by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the employer. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext.

The record demonstrates that, at trial, Turner presented a significant amount of circumstantial evidence that the operator's purported reasons and explanations for firing him were inconsistent or otherwise suspect.[12] The record demonstrates that National Cement has a

[12] The dissent states, without citing any legal authority, that with regard to National Cement's business justifications for Turner's discharge, "even if neither reason standing alone may have justified the operator's actions, both taken together could have." We do not see how relying on two unsupported reasons offered by National Cement could justify its decision to fire Turner any better than reliance on one unsupported reason. As explained, *infra*, the dissent ignores the strong evidence in the record undermining each of the operator's purported reasons for Turner's discharge. *See Laxton v. Gap, Inc.*, 333 F.3d 572, 579-84 (5th Cir. 2003) (in overturning district court's grant of employer's motion for judgment as matter of law, circuit

no-fault attendance policy and permitted its employees to work second jobs. Tr. 246-47, 271. The record also indicates that National Cement informed Turner not to allow his secondary job to interfere with his scheduled shifts for National Cement. Tr. 246-47, 258-59. It is undisputed that Turner followed the written procedure for requesting time off, and the operator does not dispute that he had permission to take the day off on June 14 to attend a doctor's appointment. Tr. 110, 121, 283-84, 335, 447-48, 531; Exs. R-1, R-7, C-11. The record also indicates that it was common for employees to miss an entire shift for a doctor's appointment. Tr. 171-73, 333.

Only after the fact, when National Cement learned that Turner worked at ICS prior to his scheduled shift at National Cement, did Turner's supervisor intimate that he did not have permission to take the day off. McMichael and Wetzel testified that they were annoyed that Turner was absent from work, but worked at ICS on the plant grounds prior to the time his shift at National Cement would have started. They also speculated that he could have scheduled his doctor's appointment during the day before his shift at National Cement, and stated that he should not have allowed his personal business to interfere with his scheduled shift at National Cement. Tr. 252, 269-70, 276-77, 284, 483-85. However, Turner testified that he scheduled the first available appointment with his doctor on June 14 and explained that he needed to see the doctor on that day. Tr. 114-16, 284-85. His testimony was uncontradicted.

Although one of the reasons given for his termination was "working for another firm on a day you were absent from NCC," the incident leading to Turner's termination on June 14 is significantly different from the prior incident for which Turner was reprimanded. On October 1, 2003, Turner was disciplined with a "written verbal" warning for "being absent from work without the consent of the [c]ompany." Ex. R-6. In that prior incident, Turner did not report to work per his schedule on September 24, 2003, and was seen on National Cement property that day working for his secondary employer. *Id.* Turner admits that on that occasion, he had made the mistake of working for ICS during his scheduled National Cement shift. PDR; T. Br. at 10. In the warning letter he received from the operator for the September 2003 incident, he was reprimanded for "absenting [him]self from work without consent of the Company." Ex. R-6. Turner argues that the incident on June 14, 2006 does not involve the same type of infraction and therefore, it was not appropriate for National Cement to take the extreme and harsh measure of terminating him. PDR; T. Br. at 10.

We find Turner's argument persuasive. It is undisputed that on June 14, Turner worked at his second job *prior to* his scheduled shift at National Cement. The record shows that Turner was at the ICS facility from 10:30 a.m. to 1:30 p.m. to show the facility to his daughter, who was visiting, and also to perform some work. 31 FMSHRC at 1180 & n.4; Tr. 33-34, 68-70, 112-14. His shift at National Cement would not have started until 2:00 p.m. National Cement does not dispute that the incident in September 2003 involved Turner working for ICS *during* his National Cement shift. In addition, the prior incident occurred nearly three years earlier. While it is true

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court considered evidence challenging employer's proffered reasons for firing employee as false or unworthy of credence and thus indicative of pretext).

that when Turner was disciplined for his prior incident in September 2003, he was warned that if such an incident occurred in the future, it "would result in more severe disciplinary action, including possible discharge," we find the decision to terminate Turner after the June 14, 2006 incident to be suspect given the very different factual circumstances. In short, the judge should have questioned whether Turner's work for a short time at a second job prior to a shift for which he properly requested medical leave was a sufficient basis for firing him. *See Madden*, 549 F.3d at 675.

Furthermore, the operator apparently did not follow its written attendance policy pursuant to the effective labor agreement.[13] Ex. C-21. The operator's written attendance policy explicitly permits an employee to take time off for a doctor's appointment and does not provide any qualifications or limitations. If National Cement considered Turner's absence on June 14 to be unexcused, then it should have explained the basis for its disapproval and noted the incident as an absence occurrence in his personnel file. Because Turner's contention that he had a good attendance record is unrebutted, it seems very unlikely that this occurrence alone would have been enough to warrant terminating Turner. Tr. 119-20, 332.

Additionally, National Cement's reliance on "poor performance" as a basis for terminating Turner is suggestive of pretext. There was no mention of poor performance at the June 16, 2006 meeting where Turner's suspension pending discharge was discussed. Tr. 544-46. When Russell was asked why Turner was terminated, he did not mention poor performance but said, "Mr. Turner was terminated because he was working a secondary job, taking off from his primary job to do so." Tr. 208. Similarly, when Wetzel was interviewed by MSHA on August 3, 2006, and asked why Turner was terminated, he did not mention poor performance, but said:

> Sometime ago he was counseled for absenting himself from work because he was working for a contractor. Just recently he was absent again and working for the contractor. He was terminated for that.

Ex. C-14. And when National Cement filed its Opposition to Turner's Petition for Discretionary Review with the Commission, it began by stating: "This case concerns the Company's decision to terminate Turner's employment because he allowed his secondary job to interfere with his primary job with National Cement." Opposition at 1. The absence of any mention of poor performance in these statements suggests that it was not a serious factor in the decision to terminate Turner.

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[13] In other instances, National Cement has followed its written policy on attendance, which provides for progressive steps of discipline for unexcused absences. Ex. C-21. The other National Cement employee who was terminated for working a second job was terminated under this attendance policy. Specifically, the miner was fired for being "absent for three (3) consecutive working days without notifying the Company and providing a satisfactory reason for such absence." Ex. ALJ-1 (Kowalski personnel file).

Although McMichael's June 23, 2006 termination letter did mention "less than acceptable performance" as another reason for Turner's discharge, the only example cited was the roller mill incident, where Turner mistakenly energized the wrong equipment thus knocking out power to the plant, as documented in a June 5, 2006 letter. Ex. R-2; C-5. At trial, McMichael mentioned job performance as a factor, but he did not give any instances of less than acceptable job performance. Wetzel testified that Turner was not an adequate electrician, but only provided examples of the roller mill incident, an unauthorized repair to the air conditioning system a year before the termination, and an incident so minor that it was not documented in Turner's personnel file, where he did not satisfactorily wire circuits on top of the silo. Tr. 485-88, 558-60. The only documentation of Turner's allegedly poor performance contained in his personnel file was the roller mill incident referenced in the June 5, 2006 letter and a verbal reprimand issued on July 21, 2004 for the unauthorized repair to the air conditioning system.[14] ALJ Ex. 1. We also note that in a letter dated August 4, 2006, Laurie Conroy, an Administrative Clerk for National Cement, informed the California Employment Development Department that Mr. Turner's "less than acceptable performance" was limited to the June 5, 2006 letter referencing the roller mill incident. *Id.*

Although the judge addressed the operator's evidence of the roller mill incident, crediting Russell's testimony that it was the proper subject of reprimand (31 FMSHRC at 1184-85), she failed to acknowledge that the inadvertent shutdown of power to the plant that occurred during Turner's mistaken racking in of the roller mill was not an uncommon occurrence. Tr. 26, 143-44, 507-08. Importantly, both McMichael and Wetzel testified that it was not a firing offense and that Turner would not have been terminated for his performance alone. Tr. 262, 273-74, 462-63. Moreover, the judge failed to address contrary testimony that Turner had a good attendance record and was considered a reliable and dependable employee by other employees. Tr. 94, 119-20, 158-59, 571. Nor did the judge consider the testimony of Russell that Turner was an average electrician. Tr. 210. Indeed, at the time Turner was terminated, he was a level four electrician, the highest level for that job classification. Tr. 514-15. Finally, aside from the incidents testified to by McMichael and Wetzel, Turner's employment record has scant documentation that he was ever counseled or disciplined for poor performance. Ex. ALJ-1 (Turner's personnel file).[15]

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[14] Contrary to Wetzel's testimony, this occurred nearly two years prior to Turner's termination.

[15] Our colleagues heavily rely on Wetzel's opinion testimony to substantiate National Cement's claim that Turner was a poor performer warranting discharge. Slip op. at 28-29 & n.4. However, the dissent fails to acknowledge that Turner's personnel file was almost devoid of past instances of discipline for poor performance. Under similar employment discrimination statutes, courts have questioned an employer's purported claims of poor performance, where such claims are undocumented and unsubstantiated by the record. *See, e.g., Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 167-68 (6th Cir. 2004) (in considering whether proffered nondiscriminatory justifications for plaintiff's lower rate of pay were pretext for sex

In addressing this portion of the case concerning the operator's defense, the dissent erroneously relies on "substantial evidence" to support the judge's determination that Turner was discharged for legitimate, business-related reasons. Slip op. at 29. The dissent's analysis is flawed because it ignores the fact that the judge failed to consider Turner's surrebuttal argument of pretext and the related evidence. The judge's error in not considering the issue of pretext involves a legal question rather than a factual question controlled by the principle of substantial evidence. In this context, the judge should have considered the countervailing evidence that the reasons given for Turner's discharge were pretextual, for instance, that Turner was in compliance with the operator's policy for requesting time off, that he did not work his ICS job during his scheduled National Cement shift, and that National Cement did not follow its written attendance policy pursuant to the labor agreement.[16]

Because the judge did not consider the pertinent evidence in light of a pretext argument, we vacate the judge's finding of no discrimination and remand the case to the judge for further consideration. *See Pero*, 22 FMSHRC at 1365-68, 1372 (remanding to the judge to consider evidence related to complainant's argument of pretext).

C. The Judge's Discovery and Evidentiary Rulings

Turner alleges that the judge erred in excluding certain evidence that he sought to admit into the record and complains that the operator failed to comply with his discovery requests. PDR at 2; T. Br. at 26-28; T. Reply Br. at 23-25. Turner also takes issue with the judge's exclusion of evidence he sought to admit post-trial. PDR at 2; T. Br. at 27; T. Reply Br. at 25. The operator contends that the judge did not abuse her discretion in making her evidentiary and discovery rulings. NC Br. at 25-29.

When reviewing a judge's pre-trial rulings, the Commission has set forth its standard of review as follows:

> [T]he Commission cannot merely substitute its judgment for that of the administrative law judge . . . . The Commission is required, however, to determine whether the judge correctly interpreted the

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discrimination, court concluded that "a reasonable jury could disbelieve [supervisor's] statement about [plaintiff's] poor performance," which was not documented in plaintiff's personnel file and largely unsubstantiated).

[16] Because we are remanding the case to the judge, we do not address the sufficiency of this counter-evidence or the weight of the evidence as a whole as to the operator's justification for dismissing Turner. It is appropriate for the judge in the first instance to address the relevant evidence pertaining to pretext and to weigh such evidence with her findings and conclusions regarding the operator's defense.

> law or abused his discretion and whether substantial evidence supports his factual findings.

Asarco, Inc., 12 FMSHRC 2548, 2555 (Dec. 1990) ("*Asarco I*") (reviewing a judge's discovery rulings) (citations omitted).

An abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial. *See Medusa Cement Co.*, 20 FMSHRC 144, 147 (Feb. 1998) (applying the abuse of discretion standard when reviewing a judge's pre-trial order); *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995) (same). With regard to the judge's role at trial, the Commission has stated, "a judge is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result." *Sec'y on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985).

One of the evidentiary rulings involved certain photographs that Turner sought to include in the record. Turner took photographs on National Cement property without the operator's approval. Before the hearing, the operator submitted a motion in limine to exclude such evidence. Resp't Mot. in Limine to Exclude Petitioner's Evidence dated July 16, 2007. The judge granted the operator's motion and ordered that the inappropriately obtained photographs could not be admitted. Order dated Oct. 11, 2007. The judge did, however, permit Turner to arrange with the operator an opportunity to visit the National Cement property and obtain the photographs he sought. Tr. 130-32. At trial, Turner again attempted to admit the photographs. Tr. 130-31. Turner failed to follow the judge's instructions and did not make arrangements with the operator to re-take the photographs. Tr. 135-37. We believe that the judge did not abuse her discretion in excluding such evidence. In any event, Turner does not articulate a basis for admitting such evidence given the judge's ruling in his favor on the question of his protected activity.

The record below contains extensive submissions from Turner regarding his discovery requests, including numerous requests to the judge to compel discovery and for sanctions against National Cement. Turner does not raise any specific assignment of error, but generally objects to the operator's uncooperative responses to his discovery requests. In reviewing a judge's discovery rulings, the Commission "cannot merely substitute its judgment for that of the administrative law judge." *Asarco I*, 12 FMSHRC at 2555. Rather, the Commission is required "to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings." *Id.*

We conclude that the judge did not abuse her discretion. The record indicates that National Cement substantially complied with Turner's requests. In several instances, it appears that Turner lost documents that National Cement's counsel sent to him. NC Br. at 27-28 (citing to letters in the case file from National Cement). It also appears that the judge conducted numerous conference calls to address Turner's discovery concerns. *See* Turner's FOIA requests

for transcripts of conference calls dated Oct. 20, 22 and 29, 2009. Finally, Turner fails to establish any prejudice he has suffered as a result of these purported adverse rulings.[17]

After the hearing, Turner attempted to submit additional documentary evidence. T. Post Hearing Report at 3. The judge ruled on the matter, excluding the evidence. Order dated May 5, 2008. At trial, the judge did leave the record open to admit limited evidence, specifically, minutes of the safety committee meetings and Kowalski's personnel file. Tr. 575-76. After submitting his post-hearing brief, Turner attempted to admit two packages of documents he labeled "Joe's Records" and "Miner's Safety Committee notes."

The Commission has held that rulings on motions to reopen the record are "committed to the sound discretion of the trial judge." *Kerr-McGee Coal Corp.*, 15 FMSHRC 352, 357 (Mar. 1993). The Commission has further noted that the factors to be considered on such motions are (1) the timeliness of the motion; (2) the character of the additional evidence; and (3) the effect of granting the motion. *Id.* It does not appear that any of the evidence Turner sought to admit post-trial was newly discovered evidence. National Cement alleges that granting Turner's motion would prejudice the operator given the lack of opportunity to depose or examine witnesses concerning the content of the documents. NC Br. at 28-29. It appears that the documents Turner attempted to submit post-hearing were the very documents that the judge ordered the operator to submit at the conclusion of the hearing. Because Turner has not shown any prejudice, we conclude that the judge did not err in excluding such evidence.

Accordingly, we affirm the judge's rulings on the evidentiary and discovery matters.

[17] In reviewing the record below, it appears that many of Turner's complaints about discovery matters center on issues that are irrelevant to his discrimination case, such as training and work logs. To the extent that any of this evidence relates to his safety complaints, because the judge ruled in his favor finding that he engaged in protected activity, we conclude that any possible error in failing to order the disclosure of such evidence is harmless.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that National Cement did not discriminate against Turner in violation of section 105(c)(1) of the Mine Act and remand this case to the judge for further consideration consistent with this decision. We also affirm the judge's rulings on the specific discovery and evidentiary issues raised by Turner.

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Chairman Jordan and Commissioner Duffy, dissenting:

I. Introduction

Jayson Turner failed to establish that his termination was motivated by his protected activity in making safety complaints to the operator. Moreover, substantial evidence fully supports the judge's determination that Turner would have been fired irrespective of his protected activity, due to his poor job performance and his outside employment in contravention of National Cement rules. Consequently, we would affirm the judge's decision dismissing Turner's discrimination claim under section 105(c) of the Mine Act.[1]

A complaint 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 Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 633 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 805, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by 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).

II. Turner failed to establish a prima facie case that his termination was motivated by his protected activity

The judge determined that Turner "failed to prove that his protected activity served as the basis for his termination by National Cement." 31 FMSHRC 1179, 1180 (Sept. 2009) (ALJ). Although she did not explicitly state that he had failed to establish a prima facie case, it appears that she determined that, in light of National Cement's rebuttal evidence, Turner failed to establish that his adverse action was in any part motivated by his safety complaints. *See* 31 FMSHRC at 1183.

[1] We agree with the majority that the judge's discovery and evidentiary rulings appealed by Turner did not constitute an abuse of discretion.

Our colleagues in the majority reverse the judge's determination, and find that Turner did in fact establish a prima facie case that his termination was motivated by his protected activity in making safety complaints to National Cement. Slip op. at 14. We cannot agree.[2]

The majority's primary complaint is that the judge failed to consider certain circumstantial evidence that it contends shows that National Cement's termination of Turner was motivated at least in some part by his safety complaints. Slip op. at 6. In *Secretary on behalf of Chacon v. Phelps Dodge Corp*., the Commission acknowledged that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Consequently, the judge's treatment of the circumstantial evidence in this case merits careful review by the Commission.

However, to rectify the errors it believes the judge committed with regard to this evidence, the majority gives the judge's decision more than careful review; it considers the evidence, and proceeds to draw a number of inferences that support the conclusion that National Cement was unlawfully motivated in this instance. *See, e.g.*, slip op. at 10, 12-14. In so doing, the majority strays well beyond the confines of the Commission's review function.

First of all, as the Commission stated in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1283 (Dec. 1998), "[i]t is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence." While a judge can be faulted for failing to consider evidence, and the case returned so that he or she can do so and draw such inferences as are reasonable, if the judge has considered the evidence but has not drawn certain inferences, there are no grounds for remand, much less reversal, as long as the failure or refusal to draw the inference is reasonable in the context of the overall record. *See, e.g., Garden Creek Pocohontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

This is consistent with the role of the Commission versus the role of its judges: the latter find facts, while the former determines if substantial evidence supports those findings.[3] That the judge could have reasonably come to a different conclusion regarding the facts – that is, the judge could have inferred from the evidence that Turner's termination was motivated by his protected

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[2] We recognize that this burden of proof is lower than a complainant's ultimate burden of persuasion, which he or she must sustain as to the overarching question of whether section 105(c)(1) was violated. *See EEOC v. Avery Dennison Corp*., 104 F.3d 858, 861 (6th Cir. 1997).

[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

activity – is not a basis for overturning the judge's conclusion to the contrary. *See Chacon*, 709 F.2d at 92 (even if Commission's own view is supported by the record, it is bound to uphold the judge's findings to the contrary if those findings are supported by substantial evidence); *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (the possibility of drawing two inconsistent conclusions from the evidence does not prevent the finding of the trier of fact from being supported by substantial evidence).

Secondly, before the Commission on review can reach a conclusion regarding a contested issue of fact, it must be satisfied that the evidence compels that conclusion, and only that conclusion. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998); *Donovan ex rel. Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984). The majority here does not even attempt to meet that standard; rather, it merely notes what a trier of fact "could" conclude regarding the evidence of motivation and then proceeds to replace the trier of fact (in this instance, the judge), and hold that a prima facie case has been established. *See, e.g.* slip op. at 9, 10, 13.

What the judge could have concluded is not at issue; rather, the question is whether substantial evidence supports the decision she reached regarding the evidence Turner submitted at hearing. In *Chacon*, the Commission identified several indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510. Reviewing the evidence in light of these factors, the judge's conclusion that Turner failed to establish motivation is well supported by the record.

First, Turner failed to demonstrate animus toward any of his protected activity. Our colleagues, citing no supporting caselaw, rely almost exclusively on the operator's lack of responsiveness to Turner's safety complaints to suggest animus or hostility towards this protected activity. *See* slip op. at 11-12. However, even if the managers had completely failed to address Turner's safety concerns, such inaction does not rise to the level of hostility or animus towards such complaints. There are a variety of reasons unrelated to animus towards safety complaints that might lead to a supervisor's failure to address concerns expressed by employees. Establishing discriminatory motivation as part of a complainant's *prima facie* case requires more than a lack of responsiveness to a miner's complaints.

In any event, the record demonstrates that some managers did in fact look into Turner's safety complaints, making suggestions on how to rectify safety problems. For instance, when Turner asked Randy Logsdon, the National Cement safety manager, for safety gloves, Logsdon responded that he had investigated the matter but could not find in his equipment catalogs the type of thin, rubber latex glove that had the requisite electrical rating. Tr. 18-19, 105-106, 361-63. In addition, Turner acknowledged that when he complained that there should be driving lights on the manlift, Bill Russell suggested that he put a job light in the receptacle on the man basket. Tr. 49-50, 103. Julius Wetzel, Turner's supervisor, testified that he suggested to Turner

that he position the manlift in the quarry area during daylight so that it did not need to be driven there at night. Tr. 453, 459-60.

Our colleagues also fault the judge for failing to address whether Wetzel's characterization of Turner as "difficult" may have in part represented hostility towards Turner's safety complaints. Slip op. at 12. We believe that Wetzel's detailed and emphatic testimony regarding Turner's poor relationship with other employees and Turner's substandard job performance clearly explained why Wetzel considered him "difficult." For instance, the judge cited to Wetzel's testimony that Turner "doesn't listen. He's very hard to communicate with and he takes a lot of things personal that shouldn't be personal. . . . [He] didn't follow instructions . . . . The few other people in the shop expressed the concern that they would not work with him. They didn't like working with him." 31 FMSHRC at 1185, citing Tr. 460, 488. Wetzel also agreed that at times it was hard for him to get Turner to listen to him, to follow his instructions or to recognize his authority. Tr. 461.

Wetzel provided a clear rationale for his characterization of Turner. Asking the judge to decide whether the recommendation to terminate Turner by Wetzel and Russell was also influenced by hostility or animus engendered by Turner's safety complaints appears to us to be based on unfounded speculation.

Regarding the operator's knowledge of Turner's protected activity, Byron McMichael, the plant manager who fired Turner, testified that he was not aware of Turner's safety complaints, and other managers corroborated this statement. 31 FMSHRC at 1183, citing Tr. 238, 272-73, 310. *See also* Tr. 197-98, 311-12, 434-35, 468-69, 505-07. The judge credited this testimony. We note 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, 1540-41 (Sept. 1992); *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981).

Despite acknowledging that the judge credited McMichael's testimony that he did not know about Turner's safety complaints and that McMichael made his decision to terminate Turner based solely on his non-protected conduct, slip op. at 9, our colleagues attempt to link Wetzel and Russell's knowledge of those complaints to McMichael's decision. *Id.* at 9-10. They suggest that "if Wetzel's and Russell's recommendations to terminate Turner were at least partially a result of retaliatory animus and if those recommendations influenced McMichael's decision to terminate Turner, then Wetzel's and Russell's knowledge and retaliatory animus may be attributed to the decision maker." *Id.* at 10. However, as discussed above, we do not believe the record supports a finding of animus on the part of Wetzel and Russell, and accordingly, see no need for a remand to determine whether the termination decision was influenced by their recommendation.

Our colleagues also fault the judge for failing to consider, as possible proof of McMichael's knowledge of Turner's safety activities, the testimony of Bill Edminister regarding a discussion of Turner's concern about electrically-rated gloves at a safety meeting that

McMichael allegedly attended. We see no need for the judge to have done so in light of McMichael's testimony that he remembered discussion at one of the meetings that Randy Logsdon was investigating gloves for electricians but that he "didn't know who prompted the question." Tr. 310.

Regarding any possible coincidence in time between the protected activity and the adverse action, the judge recognized that Turner voiced safety complaints in the months and days preceding his termination. She thus was aware of record evidence that could have, pursuant to *Chacon*, raised an inference of discriminatory motivation. However, we view her comment that Turner "did not produce any evidence that these protected activities were in any way related to his termination," 31 FMSHRC at 1183, as implicitly rejecting the timing of the protected activity and adverse action as an indicia of retaliatory motive. In any event, as will be discussed below, the record reflects that the timing of his termination was a direct result of Turner's outside employment on June 14.

The final *Chacon* factor which a complainant may use as indirect proof of illegal motivation is disparate treatment. The majority appears to agree that Turner failed to introduce persuasive evidence on this point. Slip op. at 13. However, at the same time our colleagues reject National Cement's assertion that Turner was not disparately treated because they conclude that National Cement's evidence on this point involved an employee who was not similarly situated. *Id.* at 13-14. They conclude that if Turner was the only other employee fired for working another job, this suggests that he did receive disparate treatment. *Id*. at 14. We believe, however, that the lack of affirmative evidence in the record establishing that other employees who worked secondary jobs during National Cement shifts were not fired leads to the conclusion that Turner was not disparately treated.

In sum, it cannot be said that the record compels the conclusion that Turner presented sufficient evidence to meet his burden of establishing a *prima facie* case of discrimination. We would be more inclined to remand this case to the judge if the record could provide the basis for reasonable inferences of motivation that the judge should have considered. Because record support for such inferences is lacking, we disagree with our colleagues' conclusion, and would affirm the judge's finding.

III. Substantial evidence supports the judge's finding that the operator's decision to fire Turner was in no part motivated by his protected activity

Although the judge found that Turner failed to establish a *prima facie* case, she continued her analysis and assumed, *arguendo*, that if he had done so, "the company offered credible evidence, unrebutted by Turner, clearly establishing that he was discharged for legitimate, business-related reasons, entirely unrelated to any protected activity, and that the company would have taken the adverse action based solely on Turner's conduct respecting his outside employment." 31 FMSHRC at 1183. Substantial evidence in the record also supports this determination.

The record makes clear that National Cement viewed Turner's outside employment at ICS (his part-time employer) as interfering with his work at National Cement. As the judge noted, Turner knew that his employer had placed limitations on his outside employment at ICS. *Id*. at 1183, citing Tr. 32-33, 245-47. Significantly, on October 1, 2003, National Cement warned Turner that working for ICS in a way that interfered with his National Cement job would result in "severe disciplinary action, including possible discharge." 31 FMSHRC at 1183, citing Ex. R-6. On June 14, 2006, when Turner worked for ICS instead of for National Cement, McMichael concluded that Turner could have scheduled his doctor's appointment at a time that would have permitted him to work his shift at National Cement. Tr. 276-77. McMichael explained that Turner could have scheduled his medical appointment for earlier in the day, when he could have been absent from his job at the ICS plant. Tr. 284. The judge found, in sum, that National Cement fired Turner because "[h]e chose to give his services to ICS . . . that day, rather than National Cement." 31 FMSHRC at 1183-84, citing Tr. 276-77, 334.

When National Cement discovered that Turner had worked for ICS on June 14 instead of reporting to his National Cement shift, it responded swiftly. Wetzel spoke to the ICS supervisor and confirmed that Turner had been working there. *Id.* at 1181. The next day he reported his findings to his immediate supervisor and to the plant manager in a written statement. *Id*.; Tr. 535; Ex. R-8. A meeting was held shortly thereafter to discuss whether Turner should be terminated. 31 FMSHRC at 1181; Tr. 260-61, 539-41. On June 16, 2006, a meeting was held in which Turner was informed of the decision to suspend him "pending discharge." 31 FMSHRC at 1181; Tr. 282; Ex. R-1.

Arguably, National Cement overreacted to Turner's choice to miss work at its plant instead of at ICS. After all, Turner gave notice that he would be absent and offered to come to work at National Cement if he was needed. Nonetheless, the Commission's responsibility in this discrimination matter is to ascertain whether the miner's termination resulted from his protected activity, and our reading of the record does not support such a conclusion.

Substantial evidence in the record also supports the judge's finding, 31 FMSHRC at 1184, that National Cement fired Turner in part due to his poor job performance. The judge fully credited Wetzel's testimony that Turner's poor performance was his primary motivation in recommending to McMichael that Turner be discharged and that Turner "didn't follow instructions." 31 FMSHRC at 1185, citing Tr. 488. Wetzel also testified that Turner was not a good electrician, Tr. 474, and Wetzel cited several instances where Turner's performance was inadequate.[4] Tr. 486-489. As noted above, he testified that Turner was extremely difficult to

[4] Wetzel was unequivocal in this regard, providing several concrete examples:

> I assigned him to repair the fan on the outside of the supply building and . . . when the job was done, he had blown a hole in the side of the wall and ducted the air-conditioner vents into the warehouse. That

work with and that many employees refused to work with him. Tr. 461, 488, 558-59. The judge expressly credited Wetzel's testimony that his discharge recommendation was not based on any safety complaints made by Turner. 31 FMSHRC 1183, citing Tr. 527, 539.

The judge also credited Bill Russell's testimony regarding the incident in which Turner energized the wrong equipment, resulting in a power outage for the entire plant. 31 FMSHRC at 1184-85. She held that this was an appropriate factor to take into account in deciding whether to terminate Turner. *Id*. at 1185.

In light of the foregoing, we conclude that substantial evidence in the record supports the judge's determination that Turner was discharged for legitimate, business-related reasons. 31 FMSHRC at 1183. Accordingly, we disagree with the majority that remand is necessary in this instance. The majority appears to conclude that because neither reason given for Turner's termination was enough, standing alone, to justify termination, it is suggestive of pretext, and therefore the case must be remanded to the judge to consider the evidence on this issue. *See* slip op. at 15-19. In so doing, the majority commits multiple errors.

First, it relies on an improper weighing of the evidence of motivation. The reasons given for Turner's termination are only "suggestive" of pretext, as the majority holds (*id.* at 17), if there was enough evidence to even reach the issue of the operator's affirmative defense. As discussed earlier, the evidence of motivation to establish a prima facie case is lacking.

Secondly, the majority fails to take into account that, even if neither reason standing alone may have justified the operator's actions, both taken together could have. By parsing the reasons National Cement gave for terminating Turner, the majority fails to analyze the totality of the evidence.

Finally, this case is one that is largely determined by the judge's view of the credibility of the evidence, which here was predominantly witness testimony. The judge made an explicit finding that, having observed Turner's disruptive actions during the hearing, and generally

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> was not what I asked him to do. I didn't ask him to do that. It was a fan repair, and I came in and found a hole in the wall and the air-conditioner duct.

Tr. 486. Wetzel confirmed that this incident was in Turner's personnel file. Tr. 487. Moreover, in describing an incident in which Turner failed to wire circuits on top of a silo, Wetzel commented that "this happened on numerous occasions. Whenever Mr. Turner was asked to do something extra or something unscheduled, he always had wires everywhere . . . which leads me to believe there's wires unterminated. And we can't leave circuits like that . . . . I sent him to fix a circuit board and I got wires everywhere. It didn't make any sense." Tr. 488.

uncooperative nature throughout the proceeding, she would credit National Cement's witnesses such as Wetzel over Turner. *See* 31 FMSHRC at 1185.[5]

IV. Conclusion

Our colleagues suggest several scenarios that might conceivably have led to a finding of discrimination. However, the judge carefully reviewed the record, made credibility determinations, and provided record support for her findings. The majority, viewing the evidence in another light, speculates that certain inferences supporting a *prima facie* case may nonetheless be gleaned from this record and remands for the judge to make determinations on these issues and on whether the operator's affirmative defense was a pretext.

However, it is not the Commission's role to reweigh the evidence in this case. *See Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993). Moreover, the fact that the judge failed to discuss some of the evidence does not mean that she did not analyze it. *See Caldwell v. Astrue*, 365 Fed. Appx. 740 (8th Cir. 2010) (unpublished), citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence, and failure to cite specific evidence does not mean it was not considered).

[5] We note that, despite being specifically directed to cease filing additional materials with the Commission since the record on appeal is closed, Mr. Turner has submitted 12 communications to the Commission, many of which are duplicative of included materials already in the record before the judge and on review.

Commissioner Duffy further notes that the Commission, now having gained this first-hand experience with Turner and his lack of adherence to instructions, is certainly not in a position to question the judge's credibility findings as to Turner. Litigants, whether represented by counsel or pro se, are expected to behave appropriately before the Commission and its judges. To now return the case to the judge, without as much a comment on this matter, simply invites further inappropriate behavior on remand. Commissioner Duffy believes the Commission owes the judge more in this instance.

Turner has the ultimate burden of persuasion in this case – that is, it is up to him to prove that his discharge was motivated by protected activity. The judge concluded that Turner's dismissal was not motivated by his safety complaints, and this determination is amply supported by evidence in the record. Accordingly, we would affirm the judge's decision.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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