FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 10, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. WEST 93-336-DM through
on behalf of JAMES HYLES,	:	WEST 93-339-DM
DOUGLAS MEARS, DERRICK	:	
SOTO, and GREGORY DENNIS	:	WEST 93-436-DM through
	:	WEST 93-439-DM
v.	:	WEST 94-21-DM
	:	
ALL AMERICAN ASPHALT	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

These discrimination proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), are before the Commission by way of a petition for discretionary review filed by All American Asphalt ("AAA"). In its petition, AAA seeks review of the decision of Administrative Law Judge August Cetti, issued on November 2, 1994, in which he found that AAA's layoff of four employees on two occasions was discriminatory and violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c).[2] 16

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 105(c)(1) provides in 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 . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a

FMSHRC 2232 (November 1994) (ALJ). For the reasons that follow, we vacate the judge's decision and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, James Hyles, a leadman on AAA's third or "graveyard" shift, learned that AAA intended to start running the new plant even though all equipment was not in place. Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and a vice president of AAA. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers ("Operating Engineers"), which represented AAA's employees. *Id.* Thereafter, McGuire visited the plant and saw the plant running without numerous pieces of equipment in place. *Id.*; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2236. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails and trip cords. *Id*. at 2235-36. Working under Hyles's supervision in the finish plant area were Greg Dennis, Doug Mears, and Derrick Soto. Hyles warned them to be careful, and they complained to Hyles about conditions in the plant. Later, during the weekend, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto about what he was doing. *Id.* at 2236. Other employees on the videotape observed Hyles' videotaping, including leadman Gary Richter. Tr. 365-70. On Sunday night, Hyles was involved in a minor accident when he fell through a gap in decking. Tr. 367-70; Gov't Ex. 23. Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Mine Safety and Health Administration (MSHA). They all agreed that the plant's condition posed dangers to employees and that the tape should be turned in. 16 FMSHRC at 2236; Tr. 370.

On Monday morning, Hyles went to the MSHA field office and turned in the videotape. 16 FMSHRC at 2236; Gov't Ex. 54. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. MSHA issued numerous citations, including 29 unwarrantable failure violations. 16 FMSHRC at 2236. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had turned them in and MSHA had

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> coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . of any statutory right afforded by this Act.

shut the plant down. *Id.*

About a week later on the first day that the plant reopened, Hyles had lunch with Ryan and Gary White, leadman on the maintenance shift. Ryan asked if either man knew who turned him in. Ryan added that he wanted to find out who it was so he could make life so miserable for them that they would be happy to go to work someplace else. *Id.*; Tr. 375-76. Also after the plant reopened, AAA President William Sisemore stated that he wanted to find out who turned in the company and make it worth their while to go elsewhere. 16 FMSHRC at 2237; Tr. 391, 504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under 30 U.S.C. § 820(c). *Id.* at 2237; Gov't Exs. 2,3, 4, and 5.

In October 1991, Ryan, without explanation, demoted Hyles from his position as leadman. When asked why he was demoting Hyles, Ryan responded that they no longer saw eye-to-eye. 16 FMSHRC at 2237. On July 7, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. Over the succeeding weeks, all employees but the four complainants were called back to work, and some employees were working overtime. When Hyles and Soto went to the plant and saw less senior employees working, the four filed grievances under the collective bargaining agreement between AAA and the Operating Engineers. The grievants contended that the contract required AAA to conduct a "bumping" meeting prior to layoffs where employees could bid on jobs held by less senior employees and bump those employees out of jobs for which the more senior employee was qualified to perform. *Id.* at 2238-39. The grievances went to arbitration, and the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting; however, he concluded that only Hyles was entitled to relief to bump less senior employees, based on his qualifications. 16 FMSHRC at 2238-39; Gov't Ex. 51, at 11-14.

In September 1992, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. Following the institution of temporary reinstatement proceedings, AAA reinstated the four complainants on February 11, 1993. 16 FMSRHC at 2239-40. Upon their reinstatement, they were assigned to production work on the day shift. *Id.* at 2240.

In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at their higher rate of pay as repairmen. It was unusual for senior employees to work the night shift, because the day shift was seen as more desirable and the most senior employees generally bid on it. *Id.* Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. Rather than reassigning the four repairmen to their regular positions, AAA required the repairmen to participate in a bumping meeting. Rather than bumping into repairmen positions, they bumped into the production jobs held by Hyles, Dennis, Mears, and Soto. As a result, the complainants were the only four employees laid off. AAA subsequently hired new employees to

fill the vacant repairmen positions. *Id.* at 2240-41; Tr. 457, 481, 1693.

On March 24, the four complainants were called into the layoff meeting and told that they had been bumped by more senior employees and that they were to bid on jobs held by less senior employees. They were reluctant to exercise their bumping rights at the meeting for fear that Ryan would refuse to allow them to bump into other jobs because they were not qualified. Hyles and Soto requested that they be given time to consult with counsel from the Solicitor's office because of the pendency of their discrimination complaints. 16 FMSHRC at 2241. Shortly after the meeting, Operating Engineers Business Agent McGuire called Ryan to let him know that Hyles had decided to bump into the plant operator position. Ryan refused the request, stating that it was untimely. AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. *Id.*

Following the second layoff, Hyles, Dennis, Mears, and Soto filed a second discrimination complaint, alleging that the March 1993 layoff was in retaliation for their MSHA-related safety activity. AAA reinstated the complainants on April 26, 1993. After their reinstatement, the complainants were frequently given reduced working hours. In April 1993, AAA began hiring ten new employees and increased its output of finished material. In August 1993, AAA posted a seniority list indicating that Dennis, Mears, and Soto had seniority dates of January 1993. When Mears asked why the list did not reflect his original seniority date, Ryan responded that he had no seniority. *Id*. at 2242.

The Secretary issued four complaints for each of the two layoffs, and an eight day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (January 1994) (ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including that the complaints were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994). 16 FMSHRC at 2233-35. On the merits, the judge found that AAA had violated section 105(c) of the Mine Act by laying off the complainants on two occasions in retaliation for their MSHA related safety activity. *Id*. at 2247-49.

AAA filed a 95-page petition for discretionary review, raising 83 issues with regard to the judge's decision. A major thrust of AAA's petition is that: "An administrative law judge is required to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for his decision." PDR at 3. AAA argues that the judge repeatedly failed to make credibility findings and adequate factual findings necessary to support his decision. *See id*. at 4, 16, 18-19, 25, 36, 38-39, 40, 51, 53, 62. Further, AAA questions the extent to which the judge relied on the arbitration decision. AAA notes that the judge referred to the decision for establishing that AAA violated the contract by not conducting a bumping meeting but he failed to acknowledge the arbitrator's finding that three of the four complainants did not qualify for any jobs that were available on the basis of seniority. *Id*. at 28-

30.

During the period allowed for filing his brief, the Secretary filed a motion requesting that the Commission remand the matter to the administrative law judge to make necessary findings of fact, conclusions of law, explanations of bases for factual findings, and credibility determinations. S. Mot. at 2. The Secretary argues that the judge must make findings on "critical issues," including the existence of protected activity, whether adverse employment actions--namely, Hyles's demotion and the 1992 layoff--were motivated by protected activity, and whether AAA's reasons for failing to recall the complainants after the 1992 layoff were pretextual. S. Mot. at 4-10.

Over nine months later, on July 2, 1996, the Secretary filed a motion asking permission to file a brief and a stay. AAA filed an opposition to the Secretary's motion, arguing, inter alia, that the Secretary failed to establish good cause for missing the filing deadline and failed to timely seek an extension of time under the Commission's Rules. AAA Opp. at 5-8.

II.

Disposition

Upon review of AAA's petition for review and brief and the Secretary's motion to remand, we are vacating the judge's decision and remanding the case to the judge for further consideration, on the present record, consistent with this opinion.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of proof to establish that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). "[C]ircumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982). "Any such inference, however, must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate facts inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (November 1989).

Further, the operator may rebut the prima facie case by showing either that no protected activity occurred or the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Damron v. Reynolds Metal Co.*, 13 FMSHRC 535, 539 (April 1991) (citing *Pasula*, 2 FMSHRC at 799-800)*; Robinette*, 3 FMSHRC

at 817-18.

Finally, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "That standard requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision." *Wyoming Fuel Co., n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618 1627 (August 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table). In order for the Commission to effectively perform its review responsibility, a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *See Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981)). Commission Rule 69(a), 29 C.F.R. § 2700.69(a), also requires that a 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." (Emphasis added).

We agree with AAA that the judge "failed to explain why and how much weight he accorded the arbitrator's decision." PDR at 28-30, 93. The arbitration decision, which the Secretary placed into evidence, deals specifically with whether AAA violated its collective bargaining agreement with the Operating Engineers by implementing a layoff in July 1992 without conducting a pre-layoff bumping meeting. *See* Gov't Ex. 51, at 2-5, 9-11. The judge referred to the arbitrator's award in his decision with regard to the propriety of the July 1992 layoff under the contract. 16 FMSHRC at 2238. However, the judge's deference to the arbitrator's findings on the complainants' seniority and qualifications is unclear. *Id*. at 2238-39, 47. In fashioning relief for the grievants, the arbitrator considered the seniority and qualifications of the complainants for positions at AAA. *See* Gov't Ex. 51, at 5, 11-14. The judge's reliance on the arbitration award for one purpose (propriety of the layoff under the contract), while apparently disregarding it for another (qualifications for positions held by less senior employees) is, without further explication, inconsistent.

In determining whether to give weight to an arbitrator's findings, the Commission has held that the following factors must be considered: the congruence of statutory and contractual provisions; the degree of procedural fairness; adequacy of the record; and the special competence of the arbitrator. *Allan Goode*, 16 FMSHRC 674, 680 (April 1994) (citing *Pasula*, 2 FMSHRC at 2795). It is not apparent whether and to what extent the judge ultimately relied on the arbitration decision to reach his conclusions concerning the layoffs and failure to recall under the Mine Act. Therefore, on remand the judge must clarify in his decision whether he is relying on the arbitration decision, and he must evaluate the arbitration award based on the *Pasula* factors. While the judge may find that reliance on the arbitration decision in one area, but not another, is appropriate, he must explain his reasons for that conclusion.

We also agree with AAA's argument that the judge failed to analyze the evidence concerning several key issues and to make factual determinations that are integrally related to his legal conclusions. The judge recited the correct legal standard for analyzing a discrimination case

under section 105(c). 16 FMSHRC at 2246-47. However, he failed to apply that analytical framework to the record evidence before him. *Compare, e.g., Meek v. ESSROC Corp.*, 15 FMSHRC 606, 610-613 (April 1993), *overruled on other grounds by Secretary on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1323 (August 1996); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2509-17 (November 1981).

With regard to each of the complainants in each of the layoffs in 1992 and 1993, the judge must make findings regarding the nature of their protected activity and that there was a causal nexus between the adverse employment action--the layoffs--and the complainants' protected activity.[3] In particular, the judge must reconcile his finding that AAA was not aware of Hyles's protected activity prior to his October 1991 demotion with his determination that, by July 1992, AAA was aware of the protected activity of not only Hyles, but Dennis, Mears, and Soto, as well. Further, with regard to the 1992 and 1993 layoffs, AAA contends that economic conditions and weather conditions, respectively, were primary causes for the layoffs. The judge should address the evidence related to those defenses and determine whether those conditions caused the layoffs, or whether they were pretextual. If the judge's findings on these issues are based on credibility determinations, he should so state. Finally, if the layoffs were proper, the judge must make specific findings concerning the complainants' seniority and qualifications for available positions, and, if necessary, address the arbitrator's decision on the issue of qualifications during the 1992 layoff and recall.

After resolving the factual issues, the judge should determine, by applying the *Pasula/Robinette* test, whether the complainants have established a prima facie case of discrimination. If the judge so finds, he should then determine whether AAA has rebutted that case, or has affirmatively defended against it by demonstrating that it would have laid off the complainants and refused to recall them for reasons unrelated to their protected activity.

Also on remand, the judge must state his credibility determinations where there is disputed testimony involving a factual finding. With the exception of a general statement regarding reliance on certain evidence and witnesses to establish AAA's knowledge of the complainants' protected activities prior to the July 1992 layoffs, 16 FMSHRC at 2247, the decision is silent on credibility issues, particularly in such significant areas as alleged statements and inquiries of AAA officials concerning miners' protected activities, AAA's asserted economic and contractual defenses, and the complainants' qualifications for available jobs.

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[3] The propriety of AAA's demotion of Hyles from leadman in October 1991 is not before the judge on remand. Commission review is limited to issues raised by a petition for discretionary review, unless the Commission, sua sponte, has directed review of other issues. 30 U.S.C. § 823(d)(2)(B). The Secretary did not preserve the demotion issue for review through a timely filed petition, nor did the Commission order sua sponte review of the issue. Therefore, the judge's determination that Hyles's demotion did not violate section 105(c) of the Mine Act is final. 30 U.S.C. § 823(d)(1).

Accordingly, we vacate the judge's decision and remand for further analysis consistent with this opinion.[4]

III.

Conclusion

For the foregoing reasons, this case is remanded for further consideration in light of the issues raised by this decision.[5]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[4] On remand, the judge should avoid the wholesale incorporation of either litigant's brief into his decision. *See Energy West Mining Co.*, 16 FMSHRC 1414, 1419 n.8 (July 1994).

[5] In light of our remand, the Secretary's motion to file a brief is moot.