FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 14, 1998

MARVIN E. CARMICHAEL	:	
	:	
v.	:	Docket No. SE 93-39-D
	:	
JIM WALTER RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), Administrative Law Judge T. Todd Hodgdon concluded that Jim Walter Resources (AJWR@) did not violate section 105(c) of the Mine Act, 30 U.S.C. ' 815(c),[1] when it gave employee Marvin E. Carmichael a 5-day suspension

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

> (1) No person shall discharge or in any manner discriminate 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 or the operator=s agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by this [Act].
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> (2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . .
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> (3) . . . If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the

with intent to discharge on October 10, 1991. 19 FMSHRC 770, 771, 774 (Apr. 1997) (ALJ). Pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. ' 823(d)(2)(B), the Commission, on its own motion, directed review on the question whether the judge=s conclusion that Carmichael did not engage in activity protected under the Act is contrary to law. For the reasons that follow, we vacate and remand for further analysis consistent with this decision.

I.

Factual and Procedural Background

JWR operates the No. 7 mine in Brookwood, Alabama. JWR Br. at 2; Tr. 6. On October 10, 1991, roof bolter Marvin E. Carmichael and three fellow roof bolters were working the evening shift in the No. 6 section of the mine. 19 FMSHRC at 771. Prior to the beginning of the shift, they were informed by one of the section foremen, Mark Buzbee, that in the time before they had to begin roof bolting, and during the time throughout the shift when no bolting was required, they were going to be Atask trained@ on operating a scoop.[2] *Id.* While the parties agreed

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> complainant shall have the right, within 30 days of notice of the Secretary=s determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

[2] Under 30 C.F.R. ' 48.7, miners are required to be trained on mobile equipment before operating such equipment. Section 48.7 provides, in pertinent part:

> (a) Miners assigned to new work tasks as mobile equipment

at hearing that the training was never completed, they presented conflicting theories and evidence as to why the training was not completed and why Carmichael was disciplined.

> operators . . . shall not perform new work tasks in [this category] until training prescribed in this paragraph and paragraph (b) of this section has been completed. . . . The training program shall include the following: (1) . . . instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks . . . ; and (2) (i) *[s]upervised practice during non-production* . . . [or] (ii) *[s]upervised operation during production*.

30 C.F.R. ' 48.7 (italics in original).

JWR=s shift mine foreman, Trent Thrasher, testified that he directed the section foremen, Mark Buzbee and Kenny Looney, to task train the four roof bolters on the operation of a scoop.[3] *Id.* at 772. Thrasher testified that there were to be two components to the training. First, Buzbee was to cover what Thrasher termed Asafety aspects,@ such as checking roof and rib conditions, bucket position, location of fire extinguishers, operating the levers, and other Astandard rules.@ Tr. 36-37, 43-44. Following this portion of the training, Looney=s role was to Aput [the miner] on the scoop and watch him go back and forth . . . in a non-productive way.@ Tr. 37, 43.

Thrasher testified that, after the shift began, he received a call from Looney advising that the miners had refused the safety training which both Buzbee and Looney had attempted to give. Tr. 40, 44. Thrasher stated that he went into the mine and talked to the foremen for approximately 30 minutes and they told him that they had barely gotten started with the Asafety aspects@ of the training when Athe guys told them that they weren=t going to accept the training, they knew how to do the job, they didn=t want to be trained, they weren=t going to run the scoop[,] and they weren=t going to sign forms.@ Tr. 42, 43-44. Thrasher also testified that the foremen told him that the roof bolters had said Athey weren=t going to take another man=s job.@[4]

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[3] Neither Buzbee nor Looney testified at the hearing.

[4] Scoops are usually operated by a Abidded@ operator who has been assigned the job through the bidding procedures specified in the labor contract between the company and the United Mine Workers of America (AUMWA@). JWR Br. at 2. JWR asserts that it has the right under the collective bargaining agreement to require UMWA employees to Awork out of classification@ or perform tasks that do not fall within the duties normally associated with their job title. *Id.* at 3. As such, it claims that it had the right to require the roof bolters to run the scoop when they had finished their normal tasks. *Id.* At the pre-shift meeting on October 10, 1991, Looney told Thrasher that the union employees were unhappy about working out of classification on the scoop job. *Id.* at 4. In fact, the UMWA had filed a grievance 3 days earlier on behalf of the miners working on the No. 6 section, Ademanding [that] Management post the scoop jobs on #6 section that are being performed by other classifications.@ *Id.*; Resp. Ex. D.

Tr. 42. Consequently, according to Thrasher, Looney had not been able to begin the operational phase of training. Tr. 43-44.

Thrasher further testified that, after he assured himself that the miners had been given every opportunity to accept the training, including issuing them ultimatums of discipline, the miners continued to refuse the task training. Tr. 45. Thrasher asserted that he then informed the miners that they were being given a 5-day suspension with intent to discharge for insubordination. Tr. 45, 49. Thrasher added that, as he escorted the miners out of the mine, one of them asked for a safety committeeman. Tr. 45-46. Thrasher testified that he refused this request because the suspension had already been given, and because there was no safety issue since the miners had not yet been asked to run the scoop. Tr. 46-47. Thrasher stated that when the group got to the bottom of the elevator, some of the miners said that they would have signed under protest the form stating that they had been task trained. Tr. 47. Thrasher testified that he did not respond to this comment because the miners had already had three opportunities to sign the form or take the training. Tr. 44-45, 47. Thrasher denied that either Buzbee or Looney at any point that day asked the roof bolters to sign the training form. Tr. 69-70.

Carmichael=s version of the events leading up to the discipline of the roof bolters differs markedly from Thrasher=s. In essence, Carmichael complained that JWR required the roof bolters to sign the training form without first giving them hands-on training as required by MSHA. In his Discrimination Report, Carmichael stated that he Awas suspended with intent to discharge for refusing to sign and [f]alsify a [task training] form.@ Complaint to MSHA.[5] His complaint further stated that he refused to sign because he believed that his inexperience made operating the scoop dangerous to himself and the other miners in the section. Minutes from Grievance Meeting at 1.[6] Carmichael reiterated his falsification claim at the hearing, testifying that he and the other roof bolters were pressured to sign under threat of termination, despite the fact that the practical training required by section 48.7 was never mentioned, let alone administered,[7] and even though he had no prior experience operating a scoop. Tr. 9, 89.

Carmichael repeatedly testified at the hearing that the miners had not refused the oral

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[5] Carmichael=s Discrimination Report, on which the cited quotation appears, was submitted as part of his section 105(c) complaint to the Commission.

[6] The minutes of the grievance meeting, referred to as a A24-48 meeting,@ were submitted as part of Carmichael=s section 105(c) complaint to the Commission. Thrasher described a 24-48 meeting as a meeting between the employee and the mine manager regarding disciplinary action taken against the employee, which must take place after 24 hours of the discipline, but within 48 hours. Tr. 48.

[7] At the hearing, when Carmichael was asked why he refused to work on the scoop, he responded: ABecause we weren=t put on it to run it. I didn=t know how to run it or operate it. We were instructed verbally how to do it.@ Tr. 16.

portion of the task training. Tr. 16, 23, 89. He asserted that the roof bolters Adid participate in [the oral task training] and [were] still asked to sign [the task training form] or we were terminated by Mr. Looney. There was nothing ever mentioned about Mr. Looney showing us the procedures of running the machinery on the section.@ Tr. 89. Carmichael also stated that the Atask training [I was] given didn=t make me an operator.@ Tr. 23. Finally, Carmichael submitted that, after he was asked to falsify the training form, he made three requests for a safety committeeman to be brought in to clarify what his rights were. Minutes from Grievance Meeting at 2-3. He maintained that each request was either refused or disregarded. *Id.* at 2-4. Likewise, Carmichael contended that his offer to sign the form under protest was refused by Thrasher. *Id.* at 3.

The parties agree that after the discipline was announced, the miners met with mine management, as provided for under the collective bargaining agreement, and the discharge was converted to a 2-day suspension. 19 FMSHRC at 771. The miners agreed not to file a grievance seeking back pay and returned to work on October 14. *Id.* On that day, the four miners were task trained on the scoop without incident. *Id.*

On December 2, 1991, Carmichael filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act. *Id.* at 770. On October 8, 1992, MSHA informed both JWR and the complainant of its determination that Carmichael was not discriminated against. *Id.* On October 23, 1992, Carmichael brought this proceeding under section 105(c)(3) of the Act.[8] *Id.* The matter proceeded to hearing before Judge Hodgdon on October 16, 1996. *Id.* at 771.

In dismissing Carmichael=s section 105(c) claim, the judge characterized Carmichael=s position at trial as follows: ACarmichael asserts that he refused to be trained to operate the scoop for safety reasons and that his suspension was, therefore, a violation of section 105(c) of the Act.@ *Id.* The judge further stated that ACarmichael alleges that he refused to be trained on the scoop because he was >afraid of it.=@ *Id.* at 772 (citing Tr. 9). He concluded that JWR did not violate section 105(c) by suspending Carmichael, because Carmichael failed to establish that his refusal to accept the task training was activity protected by the Act. *Id.* at 774. The judge also found that neither Carmichael nor any of the other miners advanced a basis, reasonable or otherwise, as to how the task training involved a hazard sufficient to justify a work refusal. *Id.*

II.

Disposition

JWR contends that the judge correctly concluded that Carmichael=s refusal to accept task

[8] Carmichael began suffering from post-traumatic stress disorder soon after he was suspended, thereby rendering him medically unable to participate in depositions or a hearing for nearly 4 years. *See id.* at 770-71; Stay Order dated June 1, 1993. The stay was lifted on September 18, 1996.

training on the scoop was not protected activity under the Mine Act. JWR Br. at 8. JWR asserts that Carmichael failed to establish either that he entertained a good faith, reasonable belief that being task trained on the scoop involved a risk to his safety, or that he communicated a safety concern to either Buzbee or Thrasher. *Id.* at 8, 10. JWR argues that, even if the Commission were to find that Carmichael engaged in protected activity, the judge=s decision nonetheless should be affirmed because the sole basis for the suspension was Carmichael=s insubordinate refusal to accept the task training. *Id.* at 12-13. In his pro se brief, Carmichael disagrees with the judge=s decision, and asserts that his rights under the Act were violated when JWR suspended him with intent to discharge. Carmichael Br. at 1, 2, 4. Additionally, he claims that the basis for his discrimination claim was JWR=s insistence that he operate the scoop, a machine on which he had not been sufficiently trained. *Id.* at 2.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any right protected under the Act. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). After reviewing the pleadings and record, we conclude that the judge erred in characterizing Carmichael=s position as a claim that his refusal to accept the task training was a protected act. Nowhere in the record does Carmichael appear to make such a claim. In fact, his original complaint to MSHA states that he was suspended with intent to discharge for refusing to falsify a task training form. Carmichael=s complaint further indicates that the roof bolters= grievance following the suspension involved an allegation that JWR forced them to sign training forms before being properly trained. Carmichael=s statements regarding the basis for his discrimination claim show that the activity he claims to be protected is his refusal to falsify a training form, not, as the judge found, a refusal to accept task training.[9]

In support of his determination that Carmichael=s claim was that he refused training on the scoop for safety reasons, the judge stated: ACarmichael alleges that he *refused to be trained* on the scoop because he was >afraid of it.=@ 19 FMSHRC at 772 (emphasis added). The judge cited the following testimony by Carmichael as the basis of this finding:

[9] Our dissenting colleague concedes that the judge ignored Carmichael=s complaint, asserting erroneously that this was proper because the complaint was Anever admitted into evidence@ and therefore amounted to Aunsubstantiated allegations.@ Slip op. at 11 n.1. The dissent misses the point. Whatever its value as evidence, the complaint to the Commission, much like a complaint in a court proceeding, is a basic pleading that serves to frame the issues to be tried. *See* Commission Procedural Rule 42, 29 C.F.R. ' 2700.42. We previously have looked to the complaint for this purpose even when the complaint was not formally entered into evidence. *See Secretary of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1015-16 (June 1997) (analyzing complaint to determine scope of issues and proper parties before Commission).

> We were told that we were going to have to run this piece of equipment and that we were to be test [sic] trained by Mark Buzbee, and I told them that I had never run this piece of equipment.
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> I wasn=t familiar with it. I was actually afraid of that piece of equipment, to operate it. Besides that, we were told we had to sign the task training paper stating that you had been task trained on that.

Id. (citing Tr. 9). While Carmichael=s testimony at the hearing was not a model of clarity, this passage does not support the judge=s conclusion that Carmichael refused to be trained. The question to which Carmichael was responding was, ACan you tell the court what occurred to cause you to *not work on this machinery*.@ Tr. 9 (emphasis added). The question did not reference a refusal to be trained. In Carmichael=s version of events, JWR gave the roof bolters only verbal training, and did not offer them the operational training required by section 48.7. Tr. 89-90. Carmichael also testified that the roof bolters were told that Aany spare time that we had we would be put on this piece of machinery to do whatever was necessary.@ Tr. 8, 16-17. Thrasher agreed that, following training, Carmichael could be asked to perform production work with the scoop. Tr. 63. In light of this testimony, we conclude that the imminent possibility of being directed to perform productive work on the scoop, as opposed to the prospect of receiving hands-on training, was what Carmichael was referring to when he testified to his unfamiliarity with and fear of operating the scoop. 19 FMSHRC at 772.

The judge also stated that Carmichael claimed he Arefused to work on the scoop >[b]ecause I didn=t know how to operate it. The machine was not operating right. It was broke.=@ *Id*. (citing Tr. 15). Again, in light of Carmichael=s overall testimony, we find that this is a reference to Carmichael=s trepidation towards the prospect of being told, in the judge=s words, to A*work* on the scoop,@ rather than his alleged refusal to be trained. *Id*. (emphasis added). The judge=s reliance on these passages to show that Carmichael was asserting a right to refuse to be trained is misplaced.

Furthermore, the judge failed to address Carmichael=s testimony that, subsequent to accepting the oral portion of the training, he was terminated after refusing to falsify a training form. As mentioned above, the relevant regulation requires supervised practice or operation of mobile equipment as part of the training. However, on several occasions during the hearing, Carmichael stated or implied that he and the other roof bolters had only received the oral part of the task training given by foreman Buzbee on October 10 when asked to sign a form stating that they had received the full training.[10] Tr. 9, 29-30, 89-90. For instance, when asked whether he

[10] We note that counsel for JWR did not cross-examine Carmichael on his explicit assertion that he participated in Buzbee=s oral task training session.

was given a training form to sign before training was completed, Carmichael responded: AWe did participate in the training with Mr. Buzbee. . . . We did participate in that and was [sic] still asked to sign that or we were terminated by Mr. Looney.@[11] Tr. 89. Also, the judge reprinted from the transcript, but declined to address, Carmichael=s testimony that Awe were told we had to sign the task training paper . . . .@ 19 FMSHRC at 772. As Thrasher recognized at the hearing, asking Carmichael to sign a form stating that he had been fully trained, even though he only received oral training, would be improper. Tr. 68-69. The judge did not mention these statements of Carmichael, or resolve the conflict between Carmichael=s version of events and Thrasher=s.

In addition, although the judge quoted Thrasher=s testimony that a safety committeeman was requested and that he denied the request, the judge failed to discuss this testimony. *See* 19 FMSHRC at 773; *see also* Tr. 9, 30. Such evidence should have been analyzed in the judge=s decision.

[11] It was Looney who was to administer the practical training as required by section 48.7 (Tr. 60-61); as the operator concedes, Buzbee had never operated a scoop and may have been unqualified to conduct practical training on it. Tr. 10, 64.

The substantial evidence standard of review 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. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). Commission Procedural Rule 69(a) mandates that a Commission judge=s decision Ainclude 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). A judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 257 (Feb. 1997). The judge must analyze the evidence in the context of the theories advanced by the parties. Contrary to the assertion of our dissenting colleague, we are not attempting to Aresuscitate Carmichael=s claim of falsification@ (slip op. at 13); rather, consistent with the foregoing principles, we merely direct the judge to consider the evidence adduced in support of Carmichael=s claim that he was discharged for refusing to falsify a training form.[12]

[12] The dissent attempts to justify the judge=s failure to analyze Carmichael=s case on the theory that the judge made Aimplicit@ credibility determinations. Slip op. at 11-12. However, because the judge utterly failed to address Carmichael=s claim, it is impossible to discern if the judge made any credibility determinations, implicit or otherwise, that are pertinent to that claim. Indeed, absent the judge=s recognition of the claim at issue, the dissent=s theory that the judge made implicit credibility determinations is only speculation.

Here, the judge erred by misapprehending the nature of the complainant=s claim and neglecting to make credibility determinations and consider all relevant evidence. Accordingly, we vacate the judge=s decision and remand with instructions to evaluate Carmichael=s claim that he was suspended after accepting the oral task training and subsequently refusing to falsify a training form.[13] Further, we instruct the judge to address all record evidence relevant to Carmichael=s

[13] Commissioner Beatty agrees with the decision of the Commission majority to vacate and remand the judge=s decision based on his failure to decide the case on the issue presented by Carmichael in the complaint. Despite this error by the judge, which mandates a remand,

Commissioner Beatty is also troubled about the manner in which this discrimination case developed. His reading of the trial transcript and supporting documentation convinces him that Carmichael was actually engaged in a contractual dispute with the operator over the assignment of additional work duties. In fact, a grievance was filed just 3 days prior to the incident which lead to Carmichael=s filing of a section 105(c) complaint. The timing of the grievance, and the tone of the transcript testimony involving the contractual dispute, strongly suggest to Commissioner Beatty that this contractual disagreement may have been transformed into a safety dispute, thereby providing Carmichael with an additional forum in which to redress his displeasure over additional work assignments. It has been previously recognized, however, A[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity.@ *Haro v. Magma Copper Co.*,

claim, with appropriate credibility determinations, explaining the reasons for his decision.[14] If the

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4 FMSHRC 1935, 1937 (Nov. 1982) (quoting *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)); *see also Local Union 5869, District 17, UMWA v. Youngstown Mines Corp.*, 1 FMSHRC 990, 995 (Aug. 1979) (AOther forums are more appropriate than the Commission for resolving issues . . . closely related to collective bargaining and union-management relations.@).

Commissioner Beatty does not believe that section 105(c) of the Mine Act was promulgated by Congress to provide a vehicle for workers to litigate disputes with their employers which are not firmly grounded in the protection of their safety or the safety of co-workers. In future section 105(c) cases that appear to involve mixed motives underlying the filing of a discrimination complaint, he will be inclined to closely scrutinize the complainant=s position, particularly in cases that involve less serious errors by the judge.

[14] Whether the judge finds Carmichael=s version of events credible will dictate the analytical framework under which the merits of his discrimination claim should be evaluated. The judge analyzed Carmichael=s claim under the Commission=s work refusal doctrine. 19 FMSHRC at 774. *See generally Pasula*, 2 FMSHRC at 2789-96; *Robinette*, 3 FMSHRC at 807-12. This is not an appropriate analytical framework if Carmichael=s version of events is credited; the proper framework would be that governing retaliation for engaging in protected activity for his refusal to falsify a training form. In other words, Carmichael=s refusal to falsify a training form is not a Awork refusal@ for purposes of evaluating his discrimination complaint.

judge finds that JWR discriminated against Carmichael, then he shall award appropriate back pay and grant other appropriate relief under section 105(c)(3).

III.

Conclusion

For the foregoing reasons, we vacate the judge=s conclusion that Carmichael did not engage in activity protected under the Act and remand this matter for further analysis.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

My colleagues find that Athe judge erred by misapprehending the nature of the complainant=s claim.@ Slip op. at 8. Finding no such misapprehension, I respectfully dissent.

As my colleagues note, the testimony of the two principal witnesses in this case, Carmichael and Thrasher, Adiffers markedly.@ Slip op. at 4. In fact, their testimony differs to such an extent that the *only* way the judge could possibly have decided this case would be to have credited the testimony of either Thrasher or Carmichael. Thrasher testified that Carmichael was suspended for insubordination upon his refusal to accept training to operate a scoop.

Carmichael, on the other hand, offered a variety of explanations for his discrimination claim. He argued that the scoop on which he was to be trained was not operating properly (Tr. 15, 89); that Buzbee was not qualified to train him on this equipment, although Carmichael only learned of this after Buzbee was deposed (Tr. 10); that he was refused a safety committeeman when requested (Tr. 9, 11); that the task training he did receive was inadequate (Tr. 23); and that he was asked to falsify a training form (Complaint to MSHA).[1] Were the judge to have credited Carmichael=s testimony on any of these points, or lent credence to the unsubstantiated claims made in Carmichael=s complaint, any of these might have served as a basis for the discrimination claim. If, on the other hand, were the judge to have credited Thrasher=s testimony, the *only* conclusion he could have reached was that Carmichael refused to accept training, a refusal that is not protected activity under the Mine Act. Indeed, I find that this is precisely what he did in this case: the record compels the conclusion that the judge implicitly credited Thrasher in finding the discrimination claim groundless. *See Fort Scott Fertilizer***C***Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing implicit credibility finding of judge); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 261, 265, 267 (Feb. 1997) (same).

[1] My colleagues note that Carmichael=s testimony at the hearing was not a Amodel of clarity.@ Slip op. at 6. While I agree that this is true, my colleagues further confuse matters by relying primarily on Carmichael=s complaint to MSHA and so-called Aminutes@ from a grievance meeting in support of their assertion that falsification formed part of the basis for Carmichael=s claim. *See id*. at 4 & n.6. These Aminutes@ are actually handwritten notes, apparently taken by Carmichael himself, that were attached to his complaint. These notes were never admitted into evidence at the hearing, and thus, were properly ignored by the judge as unsubstantiated allegations.

It is well settled that the Commission may not overturn a judge=s credibility determinations except under exceptional circumstances. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *appeal docketed*, No. 95-1619 (D.C. Cir. Dec. 28, 1995); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (AFinal assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided.@); *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (when judge=s finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff=d*, 766 F.2d 469 (11th Cir. 1985). Here, I find no circumstances, extraordinary or otherwise, that would justify overturning the judge=s implicit credibility determination in favor of Thrasher, and on this ground alone would affirm his decision.

But I also find that substantial evidence supports the judge=s conclusion that JWR did not discriminate against Carmichael. In addition to Thrasher=s implicitly credited testimony (*see* slip op. at 3-4), there is the uncontroverted fact that the UMWA had filed a grievance just 3 days before the incident at issue here protesting JWR=s efforts to have employees **C** such as Carmichael **C** work outside of their job classifications to operate the scoop. Tr. 78-80; R. Ex. D. This concurrent contractual dispute is compelling corroborative evidence of Thrasher=s testimony that the roof bolters involved refused training because Athey weren=t going to take another man=s job.@ Tr. 42. As my colleague Commissioner Beatty notes, A[t]he timing of the grievance, and the tone of the transcript testimony . . . strongly suggest . . . that this contractual disagreement may have been transformed into a safety dispute, thereby providing Carmichael with an additional forum in which to redress his displeasure over additional work assignments.@ Slip op. at 8-9 n.13.

The majority decision states that ACarmichael=s statements regarding the basis for his discrimination claim show that the activity he claims to be protected is his refusal to falsify a training form.@ Slip op. at 6. The decision concludes with a remand order directing the judge Ato evaluate Carmichael=s claim that he was suspended after accepting the oral task training and subsequently refusing to falsify a training form.@ *Id*. at 8.

I am unable to reconcile this decision with Commission precedent. Carmichael carried the burden of establishing a prima facie case of discrimination. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). His burden was to support the allegations made in his complaint by presenting evidence sufficient to support a conclusion that he engaged in protected activity **C** refusing to falsify a training form **C** and that his 2-day suspension was motivated in any part by any such alleged refusal. *Id*. But having made allegations in his complaint that he refused to falsify a training form, Carmichael failed to substantiate this claim at trial. Neither he nor his counsel introduced any evidence in support of such a claim. The hearing transcript contains no testimony or any argument by

counsel, nor any exhibits tending to show, that Carmichael was asked to falsify a training form or that he refused to do so. In fact, neither the word Afalsify@ nor any derivation of the word appears in the transcript.[2] The only evidence adduced at trial in this vein is testimony on *Carmichael=s* request to sign a training form Aunder protest,@ a request JWR refused. Tr. 9, 47-48, 89-90.

The majority=s decision is merely an attempt to resuscitate Carmichael=s claim of falsification by treating his allegations as if they were evidence, which, by definition, is A[a]ny species of proof, or probative matter, *legally presented at the trial of an issue*, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court . . . as to their contention.@ *Black=s Law Dictionary* at 555 (6th ed. 1990) (emphasis added). If the judge Autterly failed@ to address the falsification claim, as the majority decision suggests (slip op. at 8 n.12), it is only because Carmichael utterly failed to do anything to substantiate the claim at trial. To require the judge to revisit the issue is an exercise in futility **C** and to fault him for not addressing the falsification claim is at odds with Commission precedent, which, after all, requires judges only to Aweigh all *probative record evidence*.@ *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (emphasis added).

I cannot accept the majority=s approach for the further reason that, using their approach, the judge=s decision might just as easily be vacated and remanded on the grounds that the judge failed to consider, for example, Carmichael=s testimony that the scoop on which he was to be tested was unsafe, or another of his various explanations for his claim. But that there might be evidence in the record tending to support alternative theories that could better serve as a basis for Carmichael=s claim cannot serve as grounds for remanding this case. Under the substantial evidence test, the Commission may not Asubstitute a competing view of the facts for the view [an] ALJ reasonably reached.@ *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *see also Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 n.13 (4th Cir. Dec. 30, 1997). Because substantial evidence supports the judge=s conclusion, I would affirm his decision.

Theodore F. Verheggen, Commissioner

[2] I also find it significant that JWR=s post-hearing submission makes no mention of a falsification claim. Given the gravity of such a claim, it is difficult to imagine that JWR would not have responded had the issue properly been presented to the judge.

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