FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 9, 1998

KENNETH L. DRIESSEN	:	
	:	
v.	:	Docket No. WEST 96-291-DM
	:	
NEVADA GOLDFIELDS, INC.	:	

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, 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 determined that Nevada Goldfields did not violate section 105(c) of the Act, 30 U.S.C. ' 815(c),[1] when it terminated employee Kenneth L. Driessen on February 7, 1996. 19

[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.
>
> (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
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> such violation occurs, file a complaint with the Secretary alleging

FMSHRC 157 (Jan. 1997) (ALJ). We granted the petition for discretionary review filed by Driessen challenging the judge=s decision. For reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

Nevada Goldfields, Inc. (ANevada Goldfields@) began mining operations at the Nixon Fork Mine, located in the central interior of Alaska near McGrath, in October, 1995. 19 FMSHRC at 158; Tr. 110. Access to the mine is limited; everything is transported in or out by airplane. 19 FMSHRC at 158; Tr. 129. The Nixon Fork Mine employs 50 miners and produces gold and some silver and copper. 19 FMSHRC at 158. The miners work 12-hour shifts, seven days a week. *Id.* The shifts begin at 7:00 a.m. and 7:00 p.m. *Id.* The miners work either two weeks on, one week off, or four weeks on, two weeks off. *Id.*

The ore comes out of the mine in rocks which are then conveyed through crushers, ball mills, and other processors until it is shipped out as bagged concentrate of dore ingots.[2] *Id.* The

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such discrimination. . . .

(3) . . . If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the 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] ADore@ is defined as Agold and silver bullion . . . .@ U.S. Dep=t of Interior, *Dictionary of Mining, Mineral, and Related Terms* 164 (2d ed. 1997). AIngot@ is defined as A[a] mass of cast metal as it comes from a mold or crucible; specif[ically], a bar of gold or silver for assaying, coining, or export.@ *Id.* at 279.

No. 1 ball mill at the mine processes the raw ore into copper/gold concentrate and operates continuously except during periods of maintenance. Tr. 118-19, 162. The ball mill is essential to processing ore at the mine. Tr. 167.

Prior to January 24, 1996, there were problems with the No. 1 ball mill and measures were taken to repair it. Tr. 47-48, 168. The mill sometimes overheated and slurry water leaked into the bearings, causing steam to be emitted. Tr. 48, 167. It was determined that the main problem was a seal leak, and grease fittings were installed as a stop-gap measure to reduce the operating temperature of the mill until the damaged discharge end bearing could be replaced. Tr. 47, 169-70, 173. The mill was shut down on the evening of January 24, and Kenneth Driessen, who was hired as a mechanic in October 1995, was asked to clean the mill, grease it, and put it back together. 19 FMSHRC at 160; Tr. 168. Driessen took apart the bearing and noticed that the grooves in the shaft of the mill were deep, indicating severe wear and damage caused by the leaking slurry water. Tr. 19, 168. Later that shift, Driessen informed mill superintendent Mike Rusesky that he believed that restarting the mill would be dangerous, and Rusesky decided not to restart the mill. 19 FMSHRC at 160; Tr. 19-20, 171. Both Driessen and Rusesky were later reproached for failing to speak with either maintenance supervisor Ted Botnan or mine manager Mel Swanson before deciding not to restart the mill, because this violated the procedures set forth in the communications section of the employee handbook. 19 FMSHRC at 160-61; Ex. H at 5.[3]

The faulty bearing in the ball mill was flown to San Diego for repairs. Tr. 172-73. Subsequently, it was fixed and returned to the mine early the following week. Tr. 173-74. From January 30 to February 6, a contract millwright supervised the installation of the bearing. Tr. 175. In a test on February 3, the mill did not exceed acceptable temperature levels when operated without grinding balls. Tr. 176-77. However, on February 6, the mill would not run when the steel grinding balls were put back into it. Tr. 20, 178.

At 7:00 p.m. on the evening of February 6 at the beginning of his shift, Driessen was asked to look at the ball mill to determine why it would not run normally, and he opined that the mill would not run because the rubber seal or flange on the feeder end of the mill, which was out of alignment, was binding. Tr. 179, 182-83. Management was aware that the flange was out of alignment, but this had never been a problem except to cause the flange to wear out more frequently. 19 FMSHRC at 164; Tr. 182. After allowing Driessen to attempt various repairs,

[3] The employee handbook provides in pertinent part: AIf you have a problem or concern, you should discuss it with your supervisor first.@ Ex. H at 5. Mill superintendent Rusesky, the only person to whom Driessen reported his initial concerns about the ball mill, was not Driessen=s supervisor. Tr. 116. Botnan acted as the mechanics= direct supervisor. Tr. 127, 130. According to company procedure, either Botnan or mine manager Swanson should have been consulted before the decision was made not to restart the ball mill. 19 FMSHRC at 161.

Botnan and Swanson became convinced that the problem was electrical rather than mechanical.[4] 19 FMSHRC at 163. Driessen suggested cutting a flap on the flange but, after some argument, mine manager Swanson specifically ordered Driessen not to touch the flange, which mechanics on the prior shift had spent several hours fabricating and installing. *Id.* at 164; Tr. 147, 182-83. At approximately 11:00 p.m., Botnan and Swanson left. Tr. 147-48, 183-84.

The parties differ regarding which tasks Driessen was assigned to perform when Botnan and Swanson left. Driessen maintained that he was assigned to troubleshoot the mill on February 6-7 and was not given any other assignments. 19 FMSHRC at 161; Tr. 24, 68. Swanson and Botnan testified that, after Swanson had concluded that the problem with the mill was electrical, Driessen was given three specific tasks to be completed on his shift: reassemble and tighten the

[4] Botnan and Swanson were correct in their assessment. 19 FMSHRC at 163 n.7. The electrical problem was repaired by an electrician the next day and the ball mill had operated without incident up through the date of the hearing. *Id.*

feed chute tube on the mill; reassemble the coupling on the mill=s motor; and change a tire on the 966 loader.[5] 19 FMSHRC at 163-64; Tr. 130, 186.

At 7:00 a.m. the following morning at the end of Driessen=s shift, Driessen spoke to Nevada Goldfields vice president Joe Kercher regarding the continuing problems with the ball mill, and gave Kercher a drawing of the mill he had drafted. 19 FMSHRC at 159, 164; Ex. 1. Botnan and Swanson arrived and discovered that the three assignments given to Driessen had not been completed; the flange on the mill had been cut; and Driessen had worked on drawings of the mill. 19 FMSHRC at 160, 164. The cut flange created a leak, destroying the work performed by the previous shift. *Id.* at 164; Tr. 185. After discussing the matter, Kercher, Botnan, and Swanson decided to fire Driessen for insubordination because he failed to complete the tasks assigned him and instead focused on other matters on which he had not been told to work. 19 FMSHRC at 164; Tr. 186. Botnan then informed Driessen that he was terminated. 19 FMSHRC at 164; Tr. 30-31, 187.

On March 4, 1996, Driessen filed a complaint with the Secretary of Labor=s Mine Safety and Health Administration (AMSHA@), alleging that he had been discriminated against for engaging in protected activity. 19 FMSHRC at 157. Following an investigation, MSHA informed Driessen it had determined that no discrimination had occurred. Ex. C. Driessen filed a complaint with the Commission, and the matter proceeded to hearing before Judge Hodgdon.

The judge concluded that Nevada Goldfields did not violate section 105(c) by firing Driessen. 19 FMSHRC at 164. The judge found that Driessen engaged in protected activity prior to his termination. *Id.* at 160. On January 24, 1995, Driessen told mill superintendent Rusesky that it would be dangerous to restart the ball mill; and on February 7, 1996, Driessen expressed to company vice president Kercher his opinion about what repairs were still needed to be able to restart the mill. *Id.* at 159; Tr. 26-27. While the judge held that Driessen had made a protected safety complaint under section 105(c), he nevertheless concluded that Driessen was fired for insubordination. 19 FMSHRC at 164. Based on his determination that the company had the more credible version of the events prior to Driessen=s discharge, the judge concluded that the termination was precipitated solely by Driessen=s failure to comply with several direct orders and was in no part based on protected activity. *Id.*

[5] On February 6-7, the 966 loader was the only piece of machinery that could unload freight from planes and plow snow off the landing field. Tr. 155-56.

II.

Disposition

Driessen, who was represented by counsel before the judge, filed a pro se petition for discretionary review, challenging the judge=s conclusion that Nevada Goldfields did not violate section 105(c). Driessen argues that the judge erred in finding that Nevada Goldfields fired him for his allegedly insubordinate behavior alone. PDR at 1-3. Driessen maintains that, as a result of twice bringing to the company=s attention what he considered to be dangerous situations, he was discriminatorily discharged. D. Br. at 1.[6] Finally, Driessen asserts that witnesses whom he subpoenaed for the hearing were unable to testify truthfully because they feared losing their jobs. PDR at 3.

Nevada Goldfields responds that the judge properly concluded that Driessen=s termination did not violate section 105(c). Resp. Br. at 1, 5. The company asserts that the judge correctly found that company officials assigned Driessen three specific tasks which were to be performed on the February 6-7 night shift and that Driessen failed to complete any of these tasks. *Id.* at 2, 10. The company further argues that the judge=s finding that it fired Driessen only for these insubordinate actions and that his safety complaints were in no part considered in the termination decision is supported by substantial evidence. *Id.* at 5. With regard to Driessen=s assertions about witness credibility, Nevada Goldfields argues that the Commission should reject them as untrue and based on non-record evidence. *Id.* at 6-7.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to

[6] Driessen also asserts that he was denied notice of the insubordination defense which was used against him at the hearing. *See* PDR at 2, 3. However, documents in the record undermine this claim. *See* Letter from Melvin R. Swanson with copy to Driessen, dated August 11, 1996, Ex. E (detailing the reasons for Driessen=s discharge, including Ahis failure to perform assigned tasks, and to destroy [sic] a previous shift=s construction effort@); Resp. Preliminary Statement at 2, dated November 8, 1996 (stating that Driessen was discharged for Ablatant insubordination@). In short, Driessen was on notice of the insubordination defense well before the November 13, 1996 hearing date.

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. *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). 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. *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. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

As the judge found, Driessen engaged in acts protected by section 105(c), when he complained that starting the No. 1 ball mill would be dangerous,[7] and that he believed problems with the mill still existed. 19 FMSHRC at 159-60. Nevada Goldfields nowhere denies that these acts were related to safety. Therefore, as the judge concluded, Driessen engaged in protected activity before he was terminated, satisfying the first element of a *Pasula-Robinette* prima facie case. *Id.*; *see Robinette*, 3 FMSHRC at 817 (citing *Pasula*, 2 FMSHRC at 2799-800). Further, it is undisputed that Driessen was discharged on February 7, 1996. *See Robinette*, 3 FMSHRC at 817. Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act. *See* 30 U.S.C. ' 815(c)(1); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984) (stating that discharge of a miner is Aa self-evident form of adverse action@).

The final inquiry to establish a prima facie case under *Pasula-Robinette* is whether the adverse action was motivated in any part by the protected activity. *Robinette*, 3 FMSHRC at 817 (citing *Pasula*, 2 FMSHRC at 2799-800). The complainant bears the burden of establishing that the adverse action complained of was motivated in any part by the protected activity. *See Secretary of Labor on behalf of Ribel v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015, 2019 (Dec. 1985). Here, substantial evidence[8] supports the judge=s conclusion that Nevada Goldfields=

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[7] Driessen was reproached for failing to inform his direct supervisors before advising Rusesky that restarting the mill might be dangerous. 19 FMSHRC at 160-61. Contrary to the dissent, slip op. at 14, Rusesky was verbally reprimanded as well for failing to inform his supervisors of his decision not to restart the mill. Tr. 114, 119-20. Following the shutdown of the mill on January 24, it was not run again **C** aside from a series of test-runs (Tr. 176-81) **C** until it was repaired during the following weeks. Tr. 117, 138.

[8] 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). *See Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992). ASubstantial evidence@ means A>such

discharge of Driessen was in no part motivated by his protected activity.

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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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Based on credibility determinations and the lack of any corroborating testimony or evidence supporting Driessen=s version of events, the judge concluded that Driessen did not carry his burden of proving that his safety complaints played any role in his discharge.[9] 19 FMSHRC at 160, 164. Mine manager Swanson testified that he, company vice president Kercher, and maintenance supervisor Botnan decided to fire Driessen for insubordination because Botnan Ahad given [Driessen] three specific instructions on what to do and he failed to do them, and he had done a project that . . . he was not instructed to do.@ Tr. 184-86; *see also* Tr. 130 (Botnan=s testimony that Driessen failed to do the three tasks given him). The judge credited Swanson=s and Botnan=s testimony that the company fired Driessen solely for his failure to complete his assigned

[9] The dissent=s use of circumstantial evidence to establish Nevada Goldfields= motive in terminating Driessen is misplaced. Slip op. 13-17. Here, the judge found that there was direct evidence of the reason for Driessen=s termination. 19 FMSHRC at 160, 164. Therefore, use of circumstantial evidence to bypass the judge=s fact findings on the pivotal issue of motivation is improper. *See Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSRHC 2508, 2510 (Nov. 1981), *rev=d on other grounds* 709 F.2d 86 (D.C. Cir. 1983).

tasks.[10] 19 FMSHRC at 160. The judge did not find credible Driessen=s testimony that he had been assigned to troubleshoot the mill. *Id.* at 161. The judge noted that Driessen=s testimony Awas so filled with inabilities to recall, irrelevancies, blanks, inconsistencies and lack of corroboration that it lacks credibility.@[11] *Id.*; *see id.* at 161-63. Our review of the record

[10] We also note that Driessen=s termination was not inconsistent with the company=s employee handbook. Ex. H at 5 (a Nevada Goldfields employee must be Awilling to take directions@), 6 (insubordination and failure to perform a satisfactory quantity or quality of work are considered acts of misconduct); *see also Chacon*, 3 FMSHRC at 2513 (noting that complainant=s discipline was consistent with company practice). While the handbook provides for a progressive discipline procedure, it also unambiguously states: AAny or all of the first three [disciplinary] steps may be omitted, depending on the seriousness of the violation.@ Ex. H at 6. Driessen=s conduct on February 6-7 exhibited a clear disregard for the orders given by his supervisors. *See* 19 FMSHRC at 164 (discussing Driessen=s failure to complete his assigned tasks). Furthermore, his failure to change the loader tire resulted in the delay of incoming cargo from the aircraft which arrived at the isolated mine on February 7. *See* Tr. 186; *see also* Tr. 129, 156 (discussing loader=s importance to mine=s operation).

[11] Driessen argues that the judge=s conclusion that he cut the ball mill seal or flange is not supported by substantial evidence. *See* PDR at 2. However, the judge did not specifically find that Driessen cut the seal, and he based his dismissal of the complaint on Driessen=s failure to complete the three tasks given him. *See* 19 FMSHRC at 164. The judge relied, however, on Driessen=s equivocal testimony regarding the cut flange (Tr. 60-67) to evidence his overall lack of candor. 19 FMSHRC at 162-63.

indicates no basis for overturning the judge=s credibility resolutions in finding that Driessen was terminated solely for insubordination.[12]

Nor are we persuaded by Driessen=s asserted reasons for failing to complete his assigned tasks. Driessen=s claim that his failure to complete his assigned tasks was due, in part, to another mechanic requesting assistance with a water problem has no credible support in the record. PDR at 2-3. As the judge found, Driessen=s testimony was Arambling@ and Acontradictory@ and not supported by any corroborating evidence. 19 FMSHRC at 164. *Compare, e.g.*, Tr. 26, 32 *with* 60. His claim that he made some progress on his assignments on February 6-7 (Tr. 71) is controverted by other testimony. Tr. 154, 156 (Botnan=s testimony that the ball mill assignments would take less than two hours to complete and that the tools and lug nuts near the 966 loader had not been moved during Driessen=s shift). Also, no evidence was presented that anyone other than Driessen was instructed to reassemble the feed chute tube on the ball mill, reassemble the coupling on the mill, or change the loader tire on February 6-7,[13] all of which went unfinished that night. *See* Tr. 130, 147, 182. The judge found that Driessen=s testimony regarding these tasks was unconvincing. 19 FMSHRC at 164. In sum, substantial evidence supports the judge=s finding that Driessen was not discharged in violation of section 105(c).[14]

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[12] The Commission does not lightly overturn an administrative law judge=s credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Generally, the Commission will uphold a judge=s credibility determination unless compelling evidence supporting reversal is offered. *See, e.g.*, *S&H Mining, Inc.*, 15 FMSHRC 956, 960 (June 1993) (upholding judge=s credibility determination because no compelling evidence supporting reversal was offered); *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984) (refusing to take the Aexceptional step@ of overturning judge=s findings based on credibility resolutions); *see also Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984), *aff=d* 766 F.2d 469 (11th Cir. 1985) (stating that when the judge=s finding rests upon a credibility determination, the Commission will not substitute its judgment for that of the judge absent clear indication of error).

[13] Driessen acknowledged that working on the loader tire was on his work list (Tr. 32) and that changing the tire was a Apriority.@ Tr. 71.

[14] Our dissenting colleagues correctly state that Botnan testified that Aat least some attempt to try to [perform assignments] is good enough for me.@ Slip op. at 17 (alteration added) (quoting Tr. 151). They fail to acknowledge, however, that Botnan further stated that *Driessen made Ano attempt to try@* completing any of his assigned tasks. Tr. 151 (emphasis added). Given that there were no plans to run the ball mill until further tests were run, the mill posed no danger

to Driessen or other workers that would have justified Driessen=s disregarding his work assignments in order to compose his two page sketch and notes.

The dissent evaluates Driessen=s termination as one involving disparate treatment. Slip op. at 12. However, it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same or more serious offense escaped the disciplinary fate suffered by the complainant. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 16 (Jan. 1984); *Chacon*, 3 FMSHRC at 2512. Here, Driessen introduced no evidence of disparate treatment, despite the dissent=s attempts to glean such evidence from the record. Finally, in addressing Nevada Goldfields= grounds for terminating Driessen as an affirmative defense, our dissenting colleagues invade the fact-finding province of the judge, slip op. at 16-17, and make credibility determinations, slip op. at 18, exceeding the Commission=s role under the Mine Act. *See* 30 U.S.C. ' 823 (d)(2)(C).

Driessen urges one final ground for reversing the judge **C** an allegation of witness bias. PDR at 3. In support of that ground, Driessen references a letter that he wrote to the judge after the hearing[15] and an affidavit attached to his petition for review. *Id.* Both documents allege essentially that, after the hearing, mill superintendent Rusesky told Driessen that Driessen was fired for saying that the ball mill was dangerous but that Rusesky could not so testify because he was afraid of losing his job. *See* Driessen Aff. dated Jan. 9, 1997; Letter from Driessen to Judge Hodgdon of Dec. 17, 1996. Neither document is properly part of the record and thus neither can be considered by the Commission on review. 30 U.S.C. ' 823(d)(2)(C).[16] Such evidence should

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[15] The judge declined to consider the December 17 letter which Driessen faxed to his office over a month after the hearing because the record was closed and the parties had elected not to file briefs. 19 FMSHRC at 158 n.3. The judge did not abuse his discretion in refusing to consider the letter. *See Kerr-McGee Coal Corp.*, 15 FMSHRC 352, 357 (Mar. 1993). In his PDR, Driessen indicated that he had attached a copy of the letter to his petition; however none was attached. The letter submitted to the judge was retained in the record.

[16] 30 U.S.C. ' 823(d)(2)(C) states in pertinent part:

> For the purpose of review by the Commission . . . the record shall include: (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.

be considered by the judge in the first instance (*see Union Oil Co. of Cal.*, 11 FMSHRC 289, 301 (Mar. 1989)), and Driessen has not established Agood cause@ for failing to explore the issue of witness bias at the hearing where he was represented by counsel. 30 U.S.C. ' 823(d)(2)(A)(iii). Indeed, Driessen asserts in his petition that he knew *before* the hearing that neither Rusesky, nor

a second subpoenaed witness, Dan Steely, could testify truthfully because of fear of losing their jobs.[17] PDR at 3.

Even if the Commission were to treat Driessen=s petition and supporting documents as a motion to reopen the proceedings before the judge under Rule 60(b)(2) of the Federal Rules of Civil Procedure,[18] he fails to meet the criteria of the rule. Given Driessen=s statement that he was aware prior to the hearing of the issue of the credibility of Rusesky and Steely, whom he subpoenaed and who were still employed by Nevada Goldfields, he fails to show that the evidence upon which he now relies was newly discovered and could not have been discovered by due diligence. *See Bruno v. Cyprus Plateau Mining Corp.*, 11 FMSHRC 150, 153 (Feb. 1989). Thus, it is not apparent why Driessen could not have pursued the issue of witness bias in discovery and used it at trial. Further evincing a lack of diligence, Driessen waited over a month after Rusesky=s purported statement to bring it to the attention of the judge. In these circumstances, we deny consideration of Driessen=s post-hearing evidence.

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[17] It is, of course, a violation to discriminate against any miner who has testified in a Mine Act proceeding. 30 U.S.C. ' 815(c)(1). However, the Commission cannot infer bias on every occasion a testifying witness is still employed by an operator which is a respondent in a Mine Act proceeding.

[18] Rule 60(b) states, in pertinent part: AOn motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).@

III.

Conclusion

For the foregoing reasons, we affirm the judge=s dismissal of Driessen=s section 105(c) complaint.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioners Marks and Beatty, dissenting:

We respectfully dissent from our colleagues= decision to affirm the judge=s dismissal of the complaint filed by miner Kenneth Driessen based upon the judge=s determination that the discharge of Driessen by Nevada Goldfields, Inc. (ANevada Goldfields@) was *in no part* motivated by Driessen=s conduct in raising safety complaints relating to the No. 1 ball mill at Nevada Goldfield=s Nixon Fork Mine. *See* slip op. at 6. We believe that the judge erred in failing to consider record evidence that, in our view, was clearly sufficient to establish a prima facie case that Driessen was discharged at least in part because of his protected conduct. Moreover, we believe that the record compels a conclusion that Driessen was discharged by Nevada Goldfields because of his protected activity, because Nevada Goldfields failed to either rebut the prima facie case or establish as an affirmative defense that it was also motivated by Driessen=s unprotected activity and would have discharged him for the unprotected activity alone. Accordingly, we would reverse the judge=s order dismissing Driessen=s complaint, and conclude that Driessen was discharged for his protected conduct in violation of section 105(c) of the Mine Act.[19]

A miner 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. *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). 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. *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. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Applying these principles, our colleagues in the majority conclude that substantial evidence supports the judge=s conclusion that ANevada Goldfields= discharge of Driessen was *in no part* motivated by his protected activity.@ Slip. op. at 6 (emphasis added). We cannot concur in this assessment. In our view, the judge misapplied the *Pasula-Robinette* test by failing to

[19] Section 105(c)(1) prohibits an operator from discharging or discriminating against a miner because he Ahas 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 . . . .@ 30 U.S.C. ' 815(c).

initially consider whether a prima facie case was established that Driessen=s discharge was motivated *in any part* by the protected activity that he undisputably engaged in. Instead of first analyzing this issue independently, as *Pasula-Robinette* requires, the judge jumped ahead to the second step of the analysis, and determined that he believed Nevada Goldfield=s explanation that Driessen was discharged solely on the basis of his failure to perform three work assignments on the evening of February 6-7, 1996. 19 FMSHRC 157, 160, 164 (Jan. 1997) (ALJ). As a result of his improper combination of the first and second steps of the *Pasula-Robinette* test, the judge failed to consider compelling record evidence indicating that the discharge of Driessen was motivated *at least in part* by his protected conduct. We believe that the Commission majority commits the same error as the judge by ignoring this strong evidence that the discharge of Driessen was unlawfully motivated *at least in part*, and focusing instead on Nevada Goldfield=s rebuttal explanation, based upon Driessen=s alleged insubordination, in upholding the judge=s conclusion that Driessen failed to make out a prima facie case under *Pasula-Robinette*. *See* slip op. at 6-8.

In our view, the majority also fails to consider Commission precedent which provides us with an analytical framework for determining whether a prima facie case of unlawful motivation has been established in cases involving alleged discriminatory conduct under section 105(c) of the Act. In a prior ruling, the Commission recognized the problems associated with establishing a motivational nexus between the complainant=s protected activity and adverse action taken by the operator. *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). ADirect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. . . . >Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.=@ *Id.* at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, the Commission held that discriminatory intent can be established by circumstantial evidence of: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* A review of the record evidence in this case shows support for each of the elements set forth in *Chacon*.

With respect to the first factor, the record indicates that on January 25, 1996, Driessen initially raised concerns about the condition of the ball mill. 19 FMSHRC at 160. Additionally, on the morning of his discharge, February 7, 1996, Driessen presented Nevada Goldfields management with a report outlining his continuing concerns about the safety of the ball mill. *Id.* at 159. Two safety complaints communicated directly to management within a two week period is more than sufficient to establish the operator=s knowledge of the employee=s protected activity.

The record also indicates that Nevada Goldfields had previously demonstrated hostility to the protected conduct of Driessen in raising concerns about the safety of operating the ball mill. On the morning of January 25, after Driessen had initially raised concerns the night before about the condition of the ball mill, and the danger of restarting it, he was reproached by maintenance

supervisor Botnan and mine manager Swanson. *Id.* at 160. The record shows that Driessen was rebuked for failing to follow procedures set forth in Nevada Goldfields= employee handbook by reporting the problem to mill superintendent Mike Rusesky rather than Botnan, his immediate supervisor. *Id.* at 160-61.[20] Botnan criticized Driessen for making Amillion dollar decisions,@ such as shutting down the ball mill, without going through Athe standard procedures@ by informing Botnan or Swanson. Tr. 140. The record indicates, however, that it was mill superintendent Rusesky, not Driessen, who made the decision in the early morning hours of January 25 not to restart the ball mill, without consulting Botnan or Swanson, who were both asleep at the time.[21] 19 FMSHRC at 160. Therefore, if anyone was to blame for deciding not to restart the ball mill without consulting with other management officials, it was Rusesky, and not Driessen. There is no evidence, however, indicating that Rusesky was disciplined for failing to follow company

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[20] The employee handbook provides, in pertinent part: AIf you have a problem or concern, you should discuss it with your supervisor first.@ Ex. H at 5. Maintenance supervisor Botnan was the direct supervisor of the mechanics, including Driessen. Tr. 127, 130. Botnan testified that, according to company procedure, either he or mine manager Swanson should have been consulted before the decision was made not to restart the ball mill. 19 FMSHRC at 161; Tr. 140, 152. The record also indicates, however, that when Driessen initially notified Rusesky of his safety concerns relating to the ball mill, in the early morning hours of January 25, Botnan and Swanson were both in the mining camp asleep. Tr. 112-14, 119, 171.

[21] Rusesky testified that it was 3:30 a.m. on the morning of January 25 when he was notified of the problem with the ball mill, and that he decided to wait until 6:30 a.m., when Swanson, his boss, would be on the scene to make any further decision about restarting the mill. Tr. 114.

policies.[22] This hostility demonstrated by Nevada Goldfields officials to Driessen for raising a safety concern about the possible danger of restarting the ball mill, even though it was Rusesky who ultimately made the decision not to restart the mill, strongly suggests that the operator harbored a strong animus in connection with Driessen=s protected conduct in initially questioning the safety of operating the ball mill. This hostility was further reflected in Botnan=s remark to Driessen, at the time of his February 7 discharge, that, AI=ve had enough of your disasters.@ Tr. 104.

[22] Although Rusesky agreed that Mine Manager Swanson Agot mad@ at Rusesky for not informing Swanson immediately about the shut down of the ball mill on the night of January 24-25 (Tr. 114, 119-20), contrary to the majority=s assertion (slip. op. at 6 n.7), there is no evidence that Rusesky received a verbal reprimand or any other formal discipline as a result.

Apart from the aforementioned, it is evidence supporting the third factor of the *Chacon* analysis that, standing alone, warrants a remand of this case. The record establishes that Driessen was discharged on the morning of February 7, 1996, *moments* after he presented Nevada Goldfields= vice-president Joe Kercher with a report he had prepared that reflected his *continuing* concerns about the safety of the mill. Tr. 27. Kercher immediately consulted with maintenance supervisor Ted Botnan and mine manager Mel Swanson, who made a collective decision to fire Driessen. 19 FMSHRC at 164. The stated reason for the discharge was Driessen=s insubordination in failing to perform three tasks assigned to him the night before and working on another matter on which he had not been told to work.[23] Botnan then told Driessen: APack your stuff. You=re out of here.@ Tr. 104-05. Driessen was not afforded an opportunity to discuss his safety concerns, nor was he considered by the Nevada Goldfields officials to be a candidate for any progressive discipline mandated by the same employee handbook that he allegedly violated a week earlier.

In determining whether the timing between the reporting of safety concerns and a discharge implies a discriminatory intent, we again find guidance in *Chacon*. In that case, the Commission held that complaints ranging from four days to one and one-half months before the discharge were sufficiently coincidental in time to indicate an illegal motive. 3 FMSHRC at 2511. In *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954 (D.C. Cir. 1984), the D.C. Circuit Court of Appeals, noting that two weeks had elapsed between the alleged protected activity and the miner=s dismissal, held that A[t]he fact that the Company=s adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive.@ *Id*. at 960; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530-31 (Apr. 1991), and cases cited. A discharge which occurs *moments* after reporting a safety complaint would certainly fall into the time frames established in *Chacon.*

The final inquiry in evaluating the possibility of discriminatory intent in the context of a section 105(c) case is disparate treatment of the complainant. Disparate treatment of Driessen is evident in this case because, as noted, his discharge was also inconsistent with the progressive disciplinary policy provided for in the employee handbook distributed by Nevada Goldfields, which provides:

> **DISCIPLINARY ACTIONS**
>
> Disciplinary actions are obviously a last resort that we hope to avoid through sound work habits, a good working knowledge of rules,

[23] The latter matter involved the flange on the ball mill, which Driessen had been specifically instructed by mine manager Swanson not to cut. 19 FMSHRC at 164. As our colleagues acknowledge, however, the judge did not find that Driessen disobeyed these instructions and cut the flange on the night of February 6-7. Slip op. at 7 n.9.

> regulations and good communications at all levels. *Every reasonable effort will be made to use progressive discipline in dealing with violations*, administered as fairly as possible. Steps of progressive discipline at [Nevada Goldfields] include:
>
> (a) verbal warning or correction
>
> (b) written reprimand with a copy placed in the offender=s personnel file
>
> (c) written reprimand and suspension with pay; and
>
> (d) dismissal.

Ex. H at 6 (emphasis added).

In this case, there is no evidence that Driessen had ever previously received any form of discipline (verbal warning, written reprimand, or suspension) during his period of employment with Nevada Goldfields. This is particularly noteworthy in view of testimony from Botnan that several incidents occurred involving Driessen, prior to the incidents which lead to his discharge, where he had refused to work on jobs as requested. Tr. 130-34. In those instances, there was no evidence that Driessen received any type of discipline from Nevada Goldfields. This selective application of discipline for alleged insubordinate conduct is indicative of discriminatory intent. Moreover, until the time that he first reported safety concerns about the ball mill in January 1996, Driessen was regarded by Nevada Goldfields management as a capable and valued employee.[24] This sudden and marked change in the attitude of management regarding Driessen=s capabilities as an employee, and the operator=s failure to adhere to its own progressive disciplinary policy in discharging him,

[24] Personnel records for Driessen indicate that on December 8, 1995, less than two months after he began working for Nevada Goldfields, Driessen received a $1.00 an hour pay raise, from $16.00 to $17.00 an hour. Ex. 2 at 11. Mine manager Swanson testified that a portion of this pay raise (50 cents per hour) was intended to correct an administrative error in the hourly wage originally paid to Driessen, but that the remainder was a merit raise tied to the fact that Driessen made the second rotation, which Swanson described as Aan accomplishment.@ Tr. 166. The comment section on the form, which was signed by both Botnan and Swanson, states: ADo not want him to leave **C** excellent all around mech[anic.]@ Ex. 2 at 11. Dan Steely, a float operator for Nevada Goldfields, testified that Driessen Adid a good job for us.@ Tr. 122. Indeed, even Nevada Goldfield=s counsel conceded at the hearing that Driessen was Aa competent mechanic. . . . And in a place like Nixon Fork Mine or any remote location in Alaska, you don=t expect perfection.@ Tr. 204.

provide additional evidence that Driessen was discharged in retaliation for his protected conduct.[25]

[25] While the majority claims that ADriessen introduced no evidence of disparate treatment@ (slip op. at 8 n.14), Nevada Goldfields= failure to adhere to its established disciplinary policy in discharging Driessen is apparent from even a cursory examination of the above-quoted section of the employee handbook introduced into evidence by the operator. Although Driessen was represented by counsel at the hearing in this case, his counsel inexplicably failed to argue or even note that Nevada Goldfields failed to adhere to the progressive disciplinary system provided for in the employee handbook in discharging Driessen. As noted above, however, this employee handbook is included in the record in this case and Nevada Goldfields has relied upon other provisions of that handbook to support its claim that Driessen failed to follow company policy in raising his initial concerns about the safety of the ball mill.

Despite this demonstrated failure to adhere to the progressive disciplinary system set forth in Nevada Goldfields= employee handbook, our colleagues in the majority inexplicably conclude that ADriessen=s termination was not inconsistent with the company=s employee handbook,@ relying on provisions dealing with the willingness of employees to take directions and listed examples of employee misconduct, and finding that the handbook explicitly gives the company discretion to dismiss an employee for serious violations without first instituting progressive disciplinary measures. Slip op. at 7 n.10. This latter reference is presumably to language in the ADisciplinary Actions@ section that provides: AAny or all of the first three [progressive disciplinary] steps may be omitted, depending upon the *seriousness* of the violation.@ Ex. H at 6 (emphasis added). The mere existence of this provision, however, begs the question of whether Driessen=s purported failure to complete the three tasks assigned to him on the night of February 6-7 was a *serious* enough infraction to warrant immediate discharge, in contravention of the progressive disciplinary system that Nevada Goldfields has committed to make A[e]very reasonable effort@ to follow.[26] *Id.* The available evidence strongly suggests that this was not the case. For instance, referring to the three tasks purportedly assigned to Driessen on the night shift of February 6-7, maintenance supervisor Botnan testified that he Anever minded if a guy didn=t do any of [the assigned tasks,] but at least some attempt to try to do them is good enough for me.@ Tr. 151. This testimony hardly suggests an attitude on the part of Nevada Goldfields management that the failure to perform assigned work tasks was considered a *serious* form of employee misconduct that warranted immediate discharge. This is particularly true given Botnan=s earlier testimony that Driessen had failed to perform work on other occasions, none of which he was disciplined for according to the record.

In our view, the coincidence in timing between Driessen=s protected activities and his subsequent discharge, which was not addressed by the judge, is alone sufficient to establish a prima facie case that his discharge was motivated at least in part by his protected conduct. It is also evident from the record, however, that this case supplies evidence sufficient to meet all elements of the *Chacon* test for determining discriminatory animus in section 105(c) cases. We therefore

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[26] The majority concludes that Driessen=s conduct on the night of February 6-7 Aexhibited a clear disregard for the orders given by his supervisors,@ and thus amounted to a transgression of sufficient seriousness to warrant an exception to Nevada Goldfields= progressive disciplinary policy. Slip op. at 7 n.10. This determination, however, violates the majority=s own admonition against Ainvad[ing] the fact-finding province of the judge@ (slip op. at 9 n.14), since the judge never analyzed the question of Nevada Goldfields= failure to adhere to its progressive disciplinary policy in discharging Driessen, or whether it was warranted in doing so.

conclude that the judge erred in failing to consider the foregoing evidence and in concluding that Driessen failed to establish a prima facie case that his discharge was motivated at least in part by his protected conduct.

Since, in our view, there was ample evidence to establish a prima facie case that the discharge of Driessen was motivated at least in part by his protected conduct, [27] the burden shifted to Nevada Goldfields to either rebut this prima facie case by showing that the discharge was in no part motivated by his protected activity, or to establish as an affirmative defense that it was motivated by unprotected activity on the part of Driessen and would have discharged him for that unprotected activity alone. *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d at 642. In order to prevail on an affirmative defense based upon the purported insubordination of Driessen in failing to perform the three tasks that it claims were assigned to him on the night shift of February 6-7, Nevada Goldfields was required to demonstrate that it would have discharged Driessen for this conduct alone, irrespective of his protected conduct. To meet this burden, Nevada Goldfields was required to show that it considered an employee=s failure to perform assigned tasks to be a particularly *serious* form of insubordination that warranted immediate discharge. We believe that the self-serving testimony of maintenance supervisor Botnan (Tr. 130) and mine manager Swanson (Tr.

[27] Although we believe that the existing record compels a conclusion that Driessen was discharged because of his protected conduct, we also believe that the majority erred in not reopening the record to consider the letter submitted by Driessen to the judge following the hearing, and the affidavit attached to his petition for discretionary review, in which he alleges that, following the hearing, mill superintendent Rusesky told Driessen that Driessen was fired for raising safety complaints concerning the ball mill and that Rusesky had been threatened by mine manager Swanson with discharge if he brought this up at the hearing. Driessen Aff. dated Jan. 29, 1997. We believe that this evidence is entitled to consideration under Rule 60(b)(2) of the Federal Rules of Civil Procedure, which allows the consideration of Anewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).@ Fed. R. Civ. P. 60(b)(2). Contrary to the Commission majority (slip op. at 9), we find that the statements attributed to Rusesky, which were not even allegedly made to Driessen until after the hearing, clearly qualify as newly discovered evidence that could not with due diligence have been discovered previously within the meaning of Rule 60(b)(2). We believe that the statements attributed to Rusesky in the Driessen affidavit involve serious allegations of witness bias, and if true would provide additional evidence that the discharge of Driessen was unlawfully motivated. We also note that in a rebuttal affidavit attached to Nevada Goldfields= response brief, Rusesky did not directly deny having made the statements attributed to him by Driessen, but only stated that he could not Arecall verbatim what was said@ at a meeting with Driessen and Dan Steely, another Nevada Goldfields= employee, following the hearing. Rusesky Aff. dated April 30, 1997, at 2.

186) that Driessen was discharged solely because of his failure to perform the three tasks allegedly assigned to him, and that Driessen=s safety complaints did not influence that decision, was hardly sufficient in itself to overcome the persuasive amount of evidence in this case supporting a prima facie case of discriminatory intent on the part of Nevada Goldfields, or support its position that Driessen would have been discharged solely for his unprotected conduct. Moreover, this testimony is directly inconsistent with other testimony of Botnan indicating that Nevada Goldfields did not have a steadfast policy of requiring that all tasks assigned during a particular shift were entirely completed, and thus did not regard the failure to complete work assignments as a particularly egregious form of misconduct warranting immediate discharge.[28]

For the foregoing reasons, we would reverse the judge=s order dismissing Driessen=s complaint, conclude that Driessen has established a prima facie case that his discharge was motivated at least in part by his protected conduct, and further conclude that the record compels a conclusion that Driessen was discharged for his protected conduct in violation of section 105(c) of the Mine Act in light of the failure of Nevada Goldfields to either rebut the prima facie case or establish as an affirmative defense that it was also motivated by Driessen=s unprotected activity and would have discharged him for the unprotected activity alone.

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

[28] As noted above, maintenance supervisor Botnan testified that he Anever minded if a guy didn=t do any of [the assigned tasks,] but at least some attempt to try to do them is good enough for me.@ Tr. 151.

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