# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 29, 2009

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of LAWRENCE L. PENDLEY | : | |
| v. | : | Docket Nos. KENT 2006-506-D<br>KENT 2007-383-D |
| HIGHLAND MINING COMPANY, LLC | : | |

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

DECISION

BY: Duffy, Chairman, and Young, Commissioner

This consolidated proceeding involves discrimination complaints filed by the Secretary of Labor on behalf of Lawrence Pendley under section 105(C) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(C) (2006) ("Mine Act" or "Act"), against Highland Mining Company, LLC ("Highland") and its agents, David Webb, Larry Millburg, and Scott Maynard.

Administrative Law Judge David Barbour determined that Highland and Webb discriminated against Pendley when they suspended him from work on December 21, 2005. 30 FMSHRC 459, 498 (May 2008) (ALJ).[2] The judge further determined that Highland and its agents did not discriminate against Pendley when he was suspended, with intent to discharge, on March 21, 2007. *Id.* at 499. The judge also found no merit to the Secretary's allegation of adverse changes in Pendley's working conditions following his temporary reinstatement in June

[1] Commissioner Cohen did not participate in this matter.

[2] Highland did not appeal the judge's determination that it had discriminated against Pendley when it suspended him on December 20, 2005. The judge subsequently issued a final decision in which he determined the backpay due Pendley and imposed a civil penalty against Highland. 30 FMSHRC 500, 502 (June 2008) (ALJ).

2007. *Id.* The Secretary appealed the judge's determination that Highland did not discriminate against Pendley when it suspended him on March 21, 2007. Pendley appealed the judge's determination that Highland did not discriminate against Pendley in his working conditions following his temporary reinstatement. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background[3]

A. Incidents at the Mine Involving Pendley and Creighton

Highland's No. 9 Mine is a large underground coal mine that employs approximately 300 miners on two production shifts that mine coal six days a week. R. Ex. 25 at 1-2. Highland's miners are represented by the United Mine Workers of America (UMWA). *Id.* at 1. Lawrence Pendley is a non-production miner who is classified as a "maintenance parts runner." 30 FMSHRC at 459-60. His responsibilities include delivering parts and supplies to underground miners. *Id.* at 462.

Beginning in May 2005, Pendley's job brought him in contact with Jack Creighton, who worked above ground as a supply man and hoist man and also maintained the bathhouse. *Id.*; Tr. 749. During the spring and summer of 2005, Pendley was involved in a series of events that he suspected Creighton had initiated. Pendley's truck was damaged while parked in the mine parking lot. 30 FMSHRC at 463. Around the same time as the damage to Pendley's truck occurred, someone opened his locker in the bathhouse and poured bleach on his clothes. *Id.* He reported these incidents to management. *Id.* Sometime after Pendley reported the damage to his clothes, Pendley found dirt piled in front of his locker in the bathhouse. *Id.* Also, during this time period, Creighton was hosing down the floor when Pendley walked between Creighton and a row of lockers. *Id.* at 464. Pendley was sprayed, and his pants and feet got wet. *Id.* Pendley had problems with his cap light caused by the light going out. *Id.* at 465. Pendley believed that the reason was that "bad" bulbs were being placed in his cap lamp. *Id.*

In the summer of 2005, Creighton admittedly knew that Pendley had gone to management and complained about him. *Id.* at 464. In the bathhouse, Creighton confronted Pendley and threw a paper towel on the floor and told Pendley, "[T]here is something to cry about, go cry about that." *Id.*; Tr. 764. Creighton then saw Pendley reach into his locker and pull out what Creighton thought was a gun. 30 FMSHRC at 464. Creighton told Pendley that he would shove

[3] The record includes the transcript of the three days of hearing before Judge Barbour in this consolidated proceeding (Docket Nos. KENT 2007-383-D and KENT 2006-506-D). References to that transcript are designated "Tr." In addition, by agreement of the parties and the judge, the transcript of the one-day temporary reinstatement hearing (Docket No. KENT 2007-2650) was also included in the record. References to that transcript are designated "TRH Tr."

the gun down Pendley's throat. *Id.* Pendley responded by "mouthing" at Creighton, who walked away. *Id.* About two or three weeks later, Creighton complained to operations manager Webb that Pendley had threatened Creighton that he had a gun in his locker or acted as if he had a gun in his locker. *Id.*

Also during this period, Pendley complained about the operation of the "man," or hoist, cars on which he rode.[4] 30 FMSHRC at 465. Pendley complained numerous times to assistant superintendent Maynard that Creighton had unnecessarily stopped and then restarted the man cars when Pendley was on board. *Id*. Pendley also complained that, when Creighton was at the controls in the hoist shack, he would send cars below ground without Pendley even though Pendley was waiting to board. *Id.*

Pendley also spoke to Maynard about Creighton running too close to Pendley in the motorized cart, or golf cart. *Id.* According to Pendley, Larry ("Lap") Lewis told Pendley that he did not understand why management did not do something about Creighton's "close calls" with Pendley. *Id.* Pendley spoke to Maynard about Creighton trying to run him over, but Maynard could not find any witnesses who could confirm the incidents. *Id.*

Sometime later, another incident occurred involving Pendley and Creighton, who was operating a forklift. *Id.* at 466. Creighton had a pallet of materials on the forklift that Lap Lewis was preparing to load into the hoist cars. *Id.* According to Pendley, rather than waiting to board the car near the hoist shack, he went to board the car where Lewis was loading. When Lewis finished unloading, Pendley walked behind him, placing himself between the forklift and the car. *Id.* Pendley testified that Creighton threatened to run him over. Creighton was certain that Pendley had placed himself between the forklift and the car, thereby endangering himself in the event the brakes on the forklift failed or the throttle stuck. *Id.*; Tr. 776-79.

Assistant superintendent Maynard learned of the forklift incident and spoke to Creighton, who denied knowing what had happened. 30 FMSHRC at 466; Tr. 933-35. Highland's safety manager, James Allen, also became involved in reviewing the incident. He determined that Pendley did not have to walk where he did, that he could have sat in another row of seats in the car, and that he could have sat in another car. 30 FMSHRC at 467; Tr. 704-05.

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[4] Man cars served to transport miners and supplies in and out of the mine. *Id.* at 465. Three cars were usually hooked together to go into the mine. Only one car had brakes to stop the cars. *Id.* Controls for the hoist cars, which included an emergency stop button (the "e-stop" button) were located in the hoist shack (or slope shack) and in the hoist house, both on the surface, and at the bottom of the slope inside the mine. Also, some of the hoist cars had e-stop buttons on their front compartments. *Id.* If the e-stop button is pressed, the man cars stop quickly, generally causing the brakes on the brake car to lock. *Id.*; Tr. 69-70.

As a result of Pendley's complaints regarding Creighton and Creighton's reporting the gun incident, Highland management held a meeting with the two men in the early fall of 2005. 30 FMSHRC at 467. Present at the meeting, in addition to Pendley and Creighton, were Maynard, mine superintendent Jesse O'Rourke,[5] operations manager Dave Webb, union president Ron Shaffner, and union safety committee chairman Shugg Dyer. *Id.*; Tr. 75-76. Pendley and Creighton met separately with the management and union officials, and then all the attendees met together. 30 FMSHRC at 467. Pendley reiterated many of his complaints, and the gun incident was also discussed. At management's request, both Pendley's and Creighton's lockers were searched, and no guns were found. *Id.* & n.10. At the end of the meeting, Webb told Pendley and Creighton that he was giving each of them a warning letter. *Id.* at 467. Highland officials as well as the union officials agreed that the letter should contain a strongly worded warning that future incidents would not be tolerated and future altercations were not acceptable. *Id.*

In letters dated October 7, 2005, Highland issued written warnings to Pendley and Creighton. *Id.* at 468; R. Ex. 9, 10. The letters, which were identical in substance, stated that, as result of, "verbal abuse, disregard for safety rules, and threatened violent behavior to a co-worker, you are hereby issued this last and final warning." R. Ex. 9, 10 (emphasis in original). The letters further stated, "Any further abuse, altercations, or violations of Company Safety and Work Rules may lead to . . . suspension with intent to discharge." *Id.* The letters concluded by stating that, if either Pendley or Creighton had any questions that were not discussed at the meeting, he should contact Webb, who signed the letter. *Id.*

B. The Man Car Incident

No further incidents occurred between Pendley and Creighton for over a month. 30 FMSHRC at 468. On November 29, 2005, Pendley got into the front seat of the middle car of three cars. One of the other cars had supplies in it. When Pendley was ready to go into the mine, he pulled the cord adjacent to the cars that released them into the mine. Pendley was the only miner in the cars. *Id.* Creighton was on the surface when Pendley got into the car but apparently was not at the control panel in either the hoist house or the slope shack. *Id.*

After traveling about halfway into the mine, the cars in which Pendley was riding came to an abrupt stop. In order to prevent himself from falling out of the car, Pendley leaned to the right, and he felt his back and neck muscles pull. *Id.* at 468-69. Pendley stayed in the car approximately five to ten minutes, waiting for the cars to start back up again. The cars started back, continued the descent to the bottom of the mine, and came to a gradual stop in the usual manner. *Id.* at 469.

After Phillips, a miner waiting to unhook the supply car, assured Pendley that no one in the bottom area of the mine had pressed the e-stop button, Pendley resumed work, although his

[5] Larry Millburg succeeded O'Rourke in the position of mine superintendent. *Id.*

back bothered him. *Id.* at 469-70. Pendley reported to his supervisor, Greg Moody, that his back hurt him. Moody asked Pendley to help in filling out an accident report, and the two went to the surface. When they got to the surface, they went to the common area where they filled out the report, which Pendley read and signed. *Id.* at 470.

A short time later, Pendley went to the hospital by ambulance where he had x-rays taken. In addition, he was given pain medication. *Id.* Pendley was also directed to visit a clinic in a nearby town. Pendley went to the clinic, and the doctor there instructed Pendley not to work for several days. *Id.* When Pendley returned to work, he asked Lap Lewis if he was in the area where the man cars were loaded. Lewis responded that he was not but that Creighton was. Lewis thought that Creighton had sent Pendley underground, but Pendley told Lewis that he had sent himself underground. *Id.*

Operations manager Webb heard about the man car incident the day after it happened. He retained an electrical company to ascertain that the hoist and its safety features had functioned properly. As Webb recounted, one of the theories being considered was whether the e-stop button had been pushed. The electricians concluded that the system was functioning as it should; however they were unable to ascertain if the e-stop button had been pushed. *Id.* at 471. After Webb received the electricians' findings, he learned that Pendley alleged that Creighton had pushed the e-stop button. *Id.* Based on the electricians' report, Webb did not believe that an e-stop button had been pushed, and he apparently did not ask Creighton about it. *Id.*

Pendley also requested a copy of the company accident report that he had assisted Moody in filling out. Highland safety manager Allen denied Pendley's request, stating that the report was company property. Allen also added that the Pendley's description of the accident could not be accurate. *Id.* at 470 n.11.

C. Pendley's December 2005 Complaint to MSHA

On December 15, 2005, following the hoist incident, Pendley went to MSHA. *Id.* at 471. According to MSHA investigator Kirby Smith, Pendley spoke to him about a number of things at the mine, including operation of the hoist and the harassment about which he had been complaining to management. Pendley had been keeping detailed notes of events at the mine for the last five months because of the problems he had been having with Creighton. *Id.* & n.14. Pendley asked for a copy of Highland's accident report of the November 29 hoist incident, but MSHA had not yet received one. *Id.* at 471.

Thereafter, MSHA inspector Michael Moore went to the mine to inspect the hoist. *Id.* Moore found nothing wrong with the hoist or the brake car. Contrary to the conclusion reached by Highland's electrical consultants, Moore concluded that the man car incident could have occurred by someone hitting the e-stop button. *Id.*; Tr. 326-27. Smith accompanied Moore on the inspection and believed that it was common knowledge at the mine that Pendley had gone to

MSHA. 30 FMSHRC at 471-72. Similarly, Pendley said that another miner had overheard several miners saying that Pendley had gone to MSHA, initiating the inspection. *Id.* at 471 n.16.

During the inspection, inspector Moore asked Highland officials about the November 29 hoist incident and whether Highland had filed an accident report. *Id.* at 472. Safety manager Allen gave Moore an intra-company memorandum that stated that Highland had not yet determined whether the event was an accident. *Id.* On December 20, MSHA issued a citation to Highland for failing to report the November 29 incident within 10 days of its occurrence.[6] MSHA became concerned that Highland was not reporting all of its accidents as required by regulation. 30 FMSHRC at 472. As a result of its audit, MSHA issued four more citations that charged Highland with failing to report accidents. *Id.*

D. Pendley's December 21, 2005, Suspension

The sign-in book where miners record their times of arrival and departure is kept in the common area, a room that is approximately 20 by 30 feet that is furnished with tables and benches. *Id.* at 472, 473 n. 19; Tr. 115-116; R. Ex. 11. A miner's sign-in time determines when he begins to be paid under the union contract. 30 FMSHRC at 472 n.18.

During the latter part of 2005, Pendley routinely worked 12-hour days with eight hours at regular time and four hours of overtime. *Id.* at 472. On December 21, Pendley arrived at the mine around 12:30 p.m. *Id.* Pendley signed in between 12:50 and 12:55 p.m., but indicated that the time was 1:00 p.m. *Id.* Pendley then went to the bathhouse, picked up some supplies, and went to the man load area. *Id.* When he arrived at the man load area, he saw Lap Lewis, who told him that the man cars were underground and that it would be several minutes before they returned. *Id.* Because it was cold, Pendley did not want to wait outside. *Id.* He and Lewis went to the common area to wait. *Id.* at 472-73. Miner Joe Adamson, who had signed in immediately after Pendley, was also in the room. *Id.* at 473. It was common practice for miners to wait inside when it was cold outside. *Id.* at 473 & n.20, 490.

Adamson had indicated to Pendley that he wanted to go underground with him when the man cars arrived. *Id.* at 473. Adamson and Lewis were sitting in front of Pendley where they could see the man cars outside of a window. *Id.* About 15 or 20 minutes after 1:00 p.m., operations manager Dave Webb walked into the room and asked Pendley if he was being paid to sit there. *Id.*; Tr. 630. Pendley responded that he was waiting to go underground. 30 FMSHRC at 473. Webb stated to Pendley, "Not on my time[,] you're not." *Id.*; Tr. 117. Pendley walked over to the sign-in book and leaned over to examine it. 30 FMSHRC at 490. Because Pendley had done nothing out of the ordinary, he did not change the entry in the book. *Id.* Neither Adamson nor Lewis spoke to Webb. *Id.* at 473. Webb then turned and walked out of the room. *Id.* The man cars arrived at the load area around 1:30 p.m. *Id.* Adamson, Lewis, and Pendley

[6] MSHA regulations require that reports of injuries or accidents must be filed within 10 days of their occurrence. 30 C.F.R. § 50.20-1.

left the common area and went outside where they boarded the man cars and went underground. *Id.*

Webb went back to the common area to see if Pendley had changed his time in the sign-in book. *Id.* at 474. The book still showed that Pendley had signed in at 1:00 p.m. *Id.* Webb felt that Pendley was being insubordinate by not changing his time and that he had falsified a company record.[7] *Id.* at 474. Webb called underground and notified Pendley that he wanted to see him in his office. *Id.* When Pendley arrived at Webb's office, in addition to Webb, assistant superintendent Maynard, safety committeeman Shugg Dyer, and union local president Ron Shaffner were there. *Id.*

Webb spoke about why Pendley had not caught the man load cars to go underground and then asked Pendley for his side of the story. *Id.* Pendley denied falsifying the sign-in book but stated that he needed better representation. *Id.* at 473, 490. Webb then announced that Pendley would be suspended for three days for falsifying a company record, the sign-in book. *Id.* at 474-75. Webb then handed Pendley a three-day suspension letter. *Id.* at 475.

E. MSHA' s Settlement of Pendley's First Discrimination Complaint and His Commission Appeal

On December 22, 2005, Pendley filed a complaint with MSHA, alleging that he had been suspended on December 21 because he requested a copy of Highland's accident report. *Id.* at 476. On September 25, 2006, following an investigation, the Secretary filed her first discrimination complaint on Pendley's behalf (Docket No. KENT 2006-506), alleging that he was suspended for making safety complaints. *Id.* The Secretary entered into a settlement agreement with Highland to resolve the discrimination complaint arising out of the suspension. Docket No. KENT 2006-506. By order dated January 18, 2007, the judge approved the settlement.

Subsequently, Pendley filed a petition for review of the judge's order in which he argued that the settlement did not fully compensate him for his loss of wages. Letter dated Feb. 11, 2007. The Secretary then moved to reopen the proceeding. Mot. to Reopen, Feb. 26, 2007. The Commission directed review in the proceeding on February 26, 2007. On April 3, 2007, the Commission vacated the judge's dismissal order in Docket No. KENT 2006-506, vacated the settlement because Pendley was not a party to it, and remanded the case to the judge for appropriate proceedings. 29 FMSHRC 164, 165-66 (Apr. 2007).

[7] Webb testified at trial that he agreed that miners could be paid while waiting for man cars. However, he objected to Pendley waiting inside, particularly for an extended period, because miners could wait outside at the slope shed. *Id.* at 474 nn.23 & 24.

F. Pendley's Meetings with the Office Staff on March 19 and 21, 2007

Sometime in early 2007, Pendley became aware that the employee at the mine in charge of payroll, Fay Hubbert, had questioned certain overtime pay that Pendley claimed. 30 FMSHRC at 476. On March 19, 2007, Pendley became upset over this and went to the office of Hubbert's supervisor, Sheila Gaines. *Id.* Pendley and Gaines discussed the matter, and Pendley became increasingly agitated over Hubbert's questioning of his pay. *Id.* Gaines, as Hubbert's supervisor, explained that part of Hubbert's duties was to review all claims for overtime and ensure that they were accurate. *Id.* According to Gaines, Pendley argued that Hubbert had no right to do this, that what she was doing was not right, and that Gaines would be held accountable, telling her that "You're going to take the fall." *Id.*; TRH Tr. 235. Gaines felt uncomfortable because of what Pendley said and how he said it; she felt as if he were planning something. 30 FMSHRC at 476; TRH Tr. 235. Another employee who worked down the hall from Gaines' office thought Gaines might need assistance, but Pendley left. 30 FMSHRC at 476. After the meeting with Pendley, Gaines reported the meeting to mine superintendent Larry Millburg because the meeting was "disturbing" to her and it made her "uncomfortable." TRH Tr. 237-38.

Two days later, on March 21, Pendley resumed the discussion about his overtime with Fay Hubbert. 30 FMSHRC at 476. It was shortly before 1:00 p.m., and Pendley had not yet signed in. *Id.* at 477. Sheila Gaines overheard a heated discussion in the payroll office and heard Hubbert tell Pendley that he needed to speak with mine superintendent Millburg, who was handling all questions regarding overtime pay. *Id*. Pendley then appeared at the door of Gaines' office and asked to speak to her. Gaines responded that she was very busy, but Pendley entered anyway. *Id.*; TRH Tr. 238. Pendley had a copy of the mine sign-in sheet and his pay stub. He told Gaines that he was not being properly paid, and Gaines told him to leave the sheet and stub with her and that she would check into it. Pendley continued to insist that his pay was inaccurate. He left when Gaines received a telephone call. 30 FMSHRC at 477.

After Pendley left Gaines' office, he looked for Millburg, but Millburg was unavailable. *Id.* Pendley then went to the bathhouse, dressed for work, and went to the man load area. *Id.* Pendley waited for a man car; however, the man cars passed him by without stopping. Lap Lewis explained to Pendley that MSHA inspectors were in the mine for a section 103(g) inspection.[8] Pendley noticed a federal inspector, Highland officials, and union personnel sitting in one of the cars. 30 FMSHRC at 477. Because he would have to wait 15 or 20 minutes for another car, Pendley decided to go back into the office area to look for Millburg. *Id.* at 477-78.

During that time, Gaines had called Fay Hubbert to come to her office. Account manager Roger Wise also came to her office. *Id.* at 478. Having gone into the building from the man load area, Pendley overheard the three talking, went into Gaines's office, and began discussing

[8] Section 103(g) of the Mine Act provides for an immediate inspection of a mine upon the complaint of a miner or representative of miners. 30 U.S.C. § 813(g). The section further provides that the name of the complaining miner should not be disclosed.

Highland's rules for overtime pay and how they should be applied. *Id.* Gaines described Pendley as "agitated" and "very loud." *Id.*; TRH Tr. 241. While they tried to explain to Pendley that they applied the rules for overtime pay given to them by Larry Millburg, Pendley argued that what they did was "illegal." 30 FMSHRC at 478. Pendley "got in [Wise's] face." *Id.;* TRH Tr. 279. Hubbert felt very uncomfortable. 30 FMSHRC at 478; TRH Tr. 265.

Gaines then tried to end the discussion, telling Pendley that he needed to talk to Larry Millburg. Hubbert then left the office. Pendley continued to press the issue with Wise, who said that he was not going to continue to listen to Pendley and left. 30 FMSHRC at 478. When Wise left, he intended to find Millburg to handle the situation. *Id.* That left Pendley with Gaines, who felt intimidated by Pendley. *Id.* According to Gaines, Pendley was "mad" and "upset." *Id.*; TRH Tr. 243. Pendley continued to talk about the pay situation, and Gaines continued to instruct him to talk to Millburg. 30 FMSHRC at 478. Gaines finally turned her back to Pendley, and he left. *Id.* After Pendley left, Hubbert, Wise, and Gaines locked the doors to the offices to prevent Pendley from returning. *Id.*; TRH Tr. 266. Wise said he would get Millburg, who would take control of the situation. However, Millburg was underground at that time. 30 FMSHRC at 478. Later that afternoon, Gaines reported the incident to Millburg. *Id.*

G. Pendley's Altercation with Creighton

After Pendley left Gaines' office, he immediately returned to the man load area to go underground. *Id.* at 479. Pendley stood outside the slope shack waiting for Creighton to bring up the cars to the man load area. *Id.* Lap Lewis was working nearby. *Id.* Creighton was under the canopy of the slope shack, sitting on the golf cart in front of the man car controls.[9] 30 FMSHRC at 478. The slope shack is open ended with panels on either side, and Pendley stood outside the canopy on the end nearest the controls. *Id.* at n.31; R. Ex. 18. Pendley believed that Creighton was not going to call the man cars to the load area.[10] Therefore, Pendley decided to use the control inside the slope shack to bring the cars to the man load area. 30 FMSHRC at 479.

[9] The hoist control panel contained about 15 buttons, including the red e-stop button and call button that could send the cars to the charging area or the man load area. In order to push the man load call button, one had to be positioned in front of the control panel. There was also a man load call button outside the slope shack that miners could use unless the cars were at the charger. Testimony established that, when Pendley was waiting for the cars, they were at the charger. *Id.* at n.31; Tr. 586-87; 1070-71.

[10] While Pendley testified that he waited outside the slope shack for "quite a period of time," Tr. 157, as the judge noted, the surveillance tape showed that Pendley waited for the man car for one minute and 20 seconds before moving into the slope shack to push the man car call button. 30 FMSHRC at 480 & n.33: s*ee* Gov't Ex. 3.

Pendley testified that he walked toward the slope shack with one hand up,[11] reaching between the golf cart where Creighton was sitting and the controls. He then looked at the control panel to see if the e-stop button was tagged out and reached to push the man load call button. According to Pendley, Creighton put his arm against Pendley's right arm to push it away from the controls. 30 FMSHRC at 479; Tr. 1055-56, 1070-71. Creighton then began yelling for foreman Rodney Barker. 30 FMSHRC at 479. Pendley stated that, after he pushed the call button, Creighton said that there was a hoist test going on. *Id.* at 479-80.

Creighton testified that the surface foreman and a mechanic informed him that they were on their way to the hoist house and, when the man cars came from underground, they were going to conduct a safety test of the hoist. After they left, the only other miner in the area was Lap Lewis, who was preparing to hook up a man car to take supplies into the mine. *Id.* at 480; Tr. 793-800. After the man cars came from the mine, the hoist test commenced. Creighton's role in the test was to monitor the slope shack control panel. Pendley was waiting for the man cars, standing about five to eight feet from Creighton. As Creighton was waiting for the call from the hoist house to tell him that the hoist test was completed, Pendley charged in with both hands raised and shoved Creighton out of the way. 30 FMSHRC at 480; Tr. 802-04. Creighton yelled out that there was hoist test going on and went to the telephone next to the control panel to call the surface foreman. 30 FMSHRC at 480; Tr. 805.

When foreman Rodney Barker arrived, he separated the two men. Creighton told Barker what had happened, and Pendley gave his version. 30 FMSHRC at 480-81. According to Pendley, Creighton put his finger in Pendley's face, and Pendley asked Barker to tell him to stop. *Id.* at 481. When the man cars appeared, Barker told Pendley to get on a car and for Creighton to move away. *Id.* Barker told them both to stay away from each other. Pendley then boarded a car and went underground. *Id.*

A short time later, superintendent Millburg came out of the mine, and Creighton motioned to speak to him. Creighton told Millburg that Pendley had come into the slope shack when a safety check was occurring, pushed Creighton aside, and taken control of the hoist. *Id.*; Tr. 1005-06. Millburg also talked to Lap Lewis, who confirmed what Creighton had said.[12] 30

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[11] Security tapes of the yard on March 21 show Pendley turning toward the slope shack with two arms raised. Gov't Ex. 3. Pendley explained that one of his hands was used for grabbing the pipe supporting the canopy roof to steady himself, while he used the other hand (the right hand) to push the man load call button. Tr. 1054-55.

[12] The judge noted that Lewis' trial testimony regarding the incident "was informed by watching the video surveillance tape." 30 FMSHRC at 480-81 n.34. However, the judge noted that, although the video showed "Pendley standing some distance from the shack and then advancing toward the slope shack[,]" the judge found the video "inconclusive as to who pushed first." *Id.* Lewis testified that he saw Pendley shove Creighton but admitted he was 25 feet away from the slope shack and that Pendley's back was facing Lewis. Tr. 555, 572, 594.

FMSHRC at 481. Millburg considered it significant that Pendley apparently shoved Creighton and interfered when the hoist test was going on. *Id.*; Tr. 1006-07. When Millburg went to his office, Sheila Gaines told him about the earlier incident involving the office employees. 30 FMSHRC at 481. Millburg drafted a letter, notifying Pendley that he was suspended, subject to discharge. *Id.* The letter gave as the reasons for the discipline: "harassment of office staff;" "interference with safety check;" and "assaulting another employee." Gov't Ex. 4.

Prior to summoning Pendley to his office and presenting him the suspension letter, Millburg telephoned David Webb, who at this time was director of several mines owned by Peabody Coal, including Highland. Millburg would speak to Webb about non-routine personnel matters. Millburg recounted the offenses that Pendley was charged with, and Webb agreed that discharge was appropriate discipline but indicated that it was Millburg's call since he was present at the mine. 30 FMSHRC at 481-82 n.35; Tr. 605, 673-75, 1028-29.

H. Pendley's March 21, 2007, Suspension and Discharge, His Second MSHA Complaint, and Temporary Reinstatement

Sometime between 3:00 and 4:00 p.m. on March 21, Pendley was directed to come out of the mine and report to Millburg's office. 30 FMSHRC at 481. Pendley met up with union officials Shugg Dyer and Ron Shaffner. *Id.* When the three miners arrived at Millburg's office, assistant superintendent Scott Maynard, union safety committee member David Acker, and Millburg were already there. *Id.* at 482. Millburg gave Pendley the suspension letter. *Id.* After receiving the letter, Pendley apparently left Millburg's office. *Id.*; Tr. 176. Thereafter, two of the union representatives came and got Pendley from the bathhouse to return to Millburg's office and respond to the charges in the letter. 30 FMSHRC at 482; Tr. 176-77. When they reached the office, Maynard was still there with Millburg. Pendley indicated that with regard to harassing the office staff, he had been discussing his pay. 30 FMSHRC at 482. As to interfering with the hoist test, Pendley stated that he had looked on the control panel for any indicators that a test was going on and did not see any. *Id.* Finally, with regard to assaulting Creighton, Pendley denied that it happened. *Id.* Pendley then left Millburg's office, changed his clothes, and went home. *Id.*

Sometime after Pendley's departure, MSHA inspector Fazzolare completed his section 103(g) inspection and issued a citation alleging a violation of 30 C.F.R. § 75.400 for accumulations of coal. *Id.* Inspector Fazzolare had not given anyone from Highland a copy of the section 103(g) complaint when he arrived at the mine, because he had inadvertently put Pendley's name on it. *Id.* at 482-3 n. 36. Millburg was later given a copy of the citation Fazzolare had written. *Id.* at 483.

The day after his suspension, Pendley filed a complaint with MSHA.[13] 30 FMSHRC at 483. Pendley's discharge became effective March 24. *Id.* at 460. Following an investigation, MSHA filed a second complaint against Highland (Docket No. KENT 2007-383-D). *Id.* The Secretary filed a petition for temporary reinstatement of Pendley, and, following a hearing, Highland was ordered to reinstate Pendley in June 2007. 29 FMSHRC 424 (May 2007) (ALJ).

I. Pendley's Post-Reinstatement Working Conditions

After Pendley returned to work at Highland following the judge's temporary reinstatement order, he complained about changed working conditions, including closer supervision ("birddogging"), additional job duties, and someone posting his job duties on the company bulletin board. 30 FMSHRC at 483.

Pendley's supervisor, Steve Bockhorn, testified that Pendley's attitude changed after he returned to work. Tr. 861-62. Both Bockhorn and shift foreman David Howell believed that Pendley was working more slowly than before his discharge. 30 FMSHRC at 484-85. Howell observed Pendley driving his vehicle "extremely slow" (sic). *Id.* at 485. Following his reinstatement, Pendley decided that he did not want to work overtime. *Id.* at 484. Assistant superintendent Maynard received complaints from managers about Pendley's slowness. In response, Maynard told the managers just to ensure that Pendley did his job. He never instructed anyone to be tougher on Pendley. *Id.*

Pendley believed that, after his reinstatement, he was given the additional assignments of washing equipment and taking oil to units in addition to his regular duties of delivering supplies. *Id.*; Tr. 184-86. All the jobs that Pendley was asked to do were within his job classification. 30 FMSHRC at 484. He had occasionally been asked to wash equipment before his discharge. *Id.* Foreman Howell told Pendley to let him know if he could not get all his work done by the end of the shift, so Howell could get someone else to do it. *Id.* at 485.

Bockhorn had Pendley's job duties specified in a letter after Pendley questioned one of his assignments when he returned to work. *Id.*; Gov't Ex. 5. According to Millburg, assistant superintendent Maynard told him there was some confusion about Pendley's job duties and Maynard thought it best to lay out Pendley's duties so there would be no confusion. 30 FMSHRC at 485. Other parts runners were given letters describing their duties. *Id.* However, Pendley's was the only one posted on the bulletin board. Bockhorn did not know who posted it, and he had it removed as soon as Pendley complained about it. *Id.* at 485-86.

[13] Pendley also grieved his suspension and discharge under the union contract, and the matter was taken to arbitration. *See* R. Ex. 25 at 1. The arbitrator decided that Highland had shown "just cause" for disciplining Pendley for the reasons given in the March 21 letter and that discharge was appropriate discipline. *Id.* at 15.

J. The Judge's Decision

Based on the credited facts and inferences drawn from them, the judge concluded that Pendley's three-day suspension on December 21, 2005, was discriminatory and in violation of the Mine Act. The judge concluded that Pendley was suspended because of his safety complaints to MSHA and because of his protected safety complaints to Highland management.[14] 30 FMSHRC at 489-94.

The judge further concluded that Pendley's March 21, 2007, suspension and discharge were not taken in response to Pendley's MSHA complaints, his pending litigation before the Commission, or his prior safety complaints. *Id.* at 494. The judge found that Pendley's "confrontations" with the office staff on March 19 and 21 played pivotal roles in Millburg's decision to discharge Pendley "and well they should." *Id.* The judge further noted that Pendley "was disruptive, irrational, and orally aggressive." *Id.* Moreover, the judge found that Pendley knew that, after the March 19 meeting with Sheila Gaines, he needed to meet with Millburg on the overtime issue but kept pressing the issue with the office staff instead. *Id.* at 495. The judge also noted that Pendley had previously been warned in the October 5, 2005, letter that "verbal abuse" would lead to his discharge. *Id.*

The judge found that Millburg had another "compelling" reason to discharge Pendley – the altercation with his long-time antagonist, Creighton. *Id.* While acknowledging that it was disputed as to who first pushed whom, the judge found that Pendley "did not have to charge the slope shack," and that the situation could have been avoided if Pendley had not chosen to place himself "toe to toe with Creighton." *Id.* The judge further noted that the October 5 warning letter indicated that further "altercations" could lead to Pendley's discharge. *Id.* Finally, the judge found that the Secretary failed to establish that the section 103(g) inspection, which occurred on March 21, had anything to do with Highland's decision to discharge Pendley. *Id.* at 495-96.

The judge dismissed the Secretary's allegations of discrimination that Pendley received additional job duties, was more closely supervised, and was treated adversely because a letter to him concerning his job duties was posted on the company bulletin board. *Id.* at 496-98. The judge found that Pendley's job duties were within his job classification and, as Pendley even agreed, properly assigned to him. *Id.* at 496-97. Further, the judge found that there was no evidence that Highland assigned Pendley job duties to punish him for seeking reinstatement or for other protected activity. *Id.* at 497. As to the allegation of more intense supervision, the judge found that Highland had legitimate concerns about Pendley's work pace when he returned and that its post-reinstatement supervision was not improper. *Id.* With regard to the letter, the judge found that it was taken down as soon as Pendley notified his supervisor of its presence. *Id.*

[14] Highland did not appeal the judge's conclusion that it discriminated against Pendley when it suspended him on December 21, 2005. Accordingly, that matter is not before the Commission on review.

## II.

## Disposition

The Secretary appealed the judge's conclusion that Highland did not violate section 105(C) of the Mine Act, 30 U.S.C. § 815(C), when it suspended Pendley, with intent to discharge, on March 21, 2007. S. PDR at 1. The Secretary argues that extensive evidence supports a finding that Highland was motivated, at least in part, by Pendley's protected activity when it suspended him. The Secretary argues that Pendley's filing of a petition for review to appeal the Secretary's settlement of the December 21, 2005, suspension, culminating in the Commission's granting of the petition on February 26, 2007, was "the straw that broke the camel's back." S. Br. at 19. The Secretary further argues that Highland seized upon the events of March 19 and 21 to rid itself of Pendley because of his persistence in engaging in protected activity. S. Br. at 19-26. The Secretary also contends that the judge, in upholding the suspension, improperly relied on the October 2005 disciplinary warning letter to Pendley, reformulated Highland's accusations against Pendley, and erred by failing to correctly apply the Commission's legal test for mixed motive discrimination cases. *Id.* at 26-34. The Secretary concludes by asking the Commission to vacate the judge's decision and remand the proceeding for a complete and proper analysis. *Id.* at 34.

Pendley appealed the judge's determination that Highland did not discriminate against Pendley following his temporary reinstatement in addition to challenging the judge's conclusion regarding the March 21 suspension. P. PDR at 1. Pendley argues that the judge applied the incorrect legal standard in weighing whether the assignment of duties to Pendley following his reinstatement was discriminatory. P. Br. at 2-6. Pendley also argues that the judge misstated his testimony regarding his job duties. *Id.* at 4-5. Pendley concludes by requesting that the Commission vacate the judge's decision and remand the case to the judge to analyze the record evidence under the correct legal standard. *Id.* at 6.

In response, Highland argues that substantial evidence supports the judge's finding that the suspension and discharge of Pendley were not discriminatory. H. Br. at 8. In support, Highland asserts that there is nothing in the record to support a conclusion that management knew about Pendley's filing a PDR in the pending discrimination case. *Id.* at 8-12. Further, Highland argues that the Secretary essentially wants the Commission to overturn the judge's crediting of Highland's witnesses who testified concerning Pendley's misconduct. *Id.* at 13. Highland denies that it did not adequately investigate the incidents that led to Pendley's March 21 suspension and discharge. *Id.* at 13-15. Highland challenges the Secretary's position that the judge erred by improperly relying on the October 2005 disciplinary warning to Pendley, by reformulating Highland's reasons for suspending Pendley, or by improperly applying the Commission's legal test for discrimination cases. *Id.* at 15-22. Finally, Highland states that, during the period following Pendley's reinstatement, there was no change in Pendley's job duties that constituted adverse action. *Id.* at 22-23. Highland concludes that the Commission should affirm the judge.

A. The March 21 Suspension and Discharge

Section 105(c)(1) of the Mine Act states in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner." 30 U.S.C. § 815(c)(1). A complainant alleging discrimination under section 105(c)(1) of the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

On the record in this proceeding, the judge concluded that Pendley's complaints to MSHA, including his prior discrimination complaint, were protected activities. 30 FMSHRC at 493. The judge also found that many of Pendley's complaints to management about safety issues that arose out of his dispute with Creighton were also protected. *Id.* at 491-93. The judge further noted Pendley's administrative appeal to the Commission in which he objected to the agreement between the Secretary and Highland that settled the complaint.[15] *Id.* at 494. Nevertheless, the judge rejected the Secretary's position that Highland was motivated by "[k]nowledge of these factors" in taking adverse employment action against Pendley on March 21. *Id.* Rather, the judge relied upon direct evidence concerning the events on March 19 and 21 to conclude that the Secretary had failed to establish a prima facie case. Substantial credited evidence supports the judge.[16]

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[15] The judge specifically rejected any reliance on Millburg's knowledge of the section 103(g) inspection that took place on March 21 because "Millburg did not know about the section 103(g) inspection and the resulting citation until after he made the decision to suspend Pendley." 30 FMSHRC at 496. In addition to finding a lack of direct knowledge on Millburg's part, the judge also noted that there was no basis for implying knowledge that Pendley requested the inspection. *Id.*

[16] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh*

The credited testimony shows that on March 19, 2007, Pendley initially contacted Fay Hubbert, as payroll head, because she had questioned whether he was authorized to work overtime. TRH Tr. 261. He next showed up at the office of Highland controller Sheila Gaines. In Gaines' words, Pendley was "upset," "very vocal and very loud." *Id.* at 232-34. Pendley asserted that there were a lot of bad things going on and that Gaines would "take the fall." Gaines began to feel more and more uncomfortable. Before Pendley left, Gaines told him to discuss the matter with Larry Millburg. *Id*. at 237. Later that day, Gaines reported the confrontation to Millburg, told him that she felt uncomfortable with Pendley, and that she thought he was planning something. *Id.* at 237-38.

There is no record evidence that Pendley sought out Millburg to discuss the overtime issue, as Gaines had suggested. Rather, on March 21, Pendley again sought out Hubbert on the overtime issue. Gaines overheard Pendley talking to Hubbert in a heated manner. TRH Tr. at 239. Pendley then appeared at Gaines' office. He tossed his paycheck stub and a copy of the sign-in sheet onto her desk and asserted that he was not being paid properly. *Id.* at 240. After Pendley left her office, he signed in and got ready for work, but returned to the office area after he could not get in the man cars going underground. 30 FMSHRC at 477-78. Roger Wise and Hubbert had assembled in Gaines' office when Pendley came in. TRH Tr. 241. Pendley was very loud and agitated, arguing that the overtime policies were "illegal." Pendley was told repeatedly to take the matter up with mine superintendent Larry Millburg. *Id.* at 241, 278. At one point, Wise testified that Pendley moved toward Hubbert, who got up and left. Pendley then approached Wise and got within 10 to 12 inches of Wise's face. *Id.* at 278-79. Wise testified that "Normally, we don't have that type of aggression - - in the office." *Id.* at 280. Wise left to find Millburg. *Id.* Pendley then walked around the corner of Gaines' desk. She felt intimidated and that Pendley was "out of control." She turned her back to Pendley to work on her computer, and Pendley left. *Id.* at 243. Then, the doors to the office section of the building were locked so that Pendley could not return. *Id.* at 266. After Millburg returned from the mine, Gaines reported to him that there had been "another incident" involving Pendley." *Id.* at 245. At the time Gaines found Millburg in his office, he was investigating the shoving incident involving Creighton and Pendley. *Id.*

Our review of the record does not disclose any basis for overturning the judge's credibility resolutions.[17] Based on this credited testimony, the judge found that "The office

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*Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[17] A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting

incidents of March 19 and 21 played critical roles in Millburg's decision to suspend Pendley with an intent to discharge, and well they should. Pendley was disruptive, irrational, and orally aggressive." 30 FMSHRC at 494. The judge further found that as of March 19, Pendley knew that Hubbert and Gaines did not have authority to resolve overtime pay issues. Rather, Pendley knew he needed to talk to Millburg. Yet, he persisted in raising the matter on March 21, "again in a loud, agitated and irrational way." *Id.* at 495.

In addition to his findings as to what occurred when Pendley confronted the office staff on March 19 and 21, the judge also noted that Pendley had been warned in the October 7, 2005, letter concerning his "continued verbal abuse" and that further abuse "may lead to your suspension with intent to discharge." *Id.*; R. Ex. 10. The judge found it significant that Pendley "was on notice" of the consequences of engaging in conduct noted in the letter. 30 FMSHRC at 495. Based on the letter, the judge noted that "Pendley acted at his peril" when he angrily confronted the office staff on two occasions. Thus, the judge further concluded that it was appropriate to consider the confrontations as a basis for discharge because of this notice to Pendley. *Id.*

The Secretary challenges the judge's findings and conclusions on several grounds. However, our review of the record and relevant precedents compels us to conclude that the Secretary's objections are without merit.

The Secretary contests the judge's consideration of the warning letter. The Secretary argues that the judge cannot rely on evidence that Millburg was unaware of when he made his decision to discipline Pendley on March 21. S. Br. at 27-29. However, the Secretary misunderstands the judge's limited reliance on the letter. The judge did not find or suggest that Millburg knew of the letter or could have relied on it. Rather, the judge noted that *Pendley* was aware of the consequences for engaging in similar conduct for which he was reprimanded in the October 2005 letter. Moreover, the judge's consideration of the prior disciplinary warning was appropriate under the *Pasula-Robinette* analysis.[18] *See also Bradley v. Belva Coal Co.*, 4

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*Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

[18] Our colleague concludes that she would remand this case for the judge to reconsider the discharge, "without the letter playing any part in [his] consideration of Millburg's mental process in arriving at his discharge decision." Slip op. at 25. However, such a remand would inevitably lead to the same result in light of the judge's findings regarding Pendley's confrontation with the office staff and his altercation with Creighton. Significantly, nowhere does our colleague indicate any disagreement with the judge's findings in these areas and the role they played in Millburg's decision to discharge Pendley.

FMSHRC 982, 993 (June 1982) (an operator can carry its burden under *Pasula* by showing, for example, past discipline consistent with that meted out, the miner's unsatisfactory work record, prior warnings to the miner, and personnel rules or practices forbidding the conduct in question).

As the judge further found, Pendley's misconduct on March 21 was not limited to his interaction with the office staff. Millburg had "another compelling reason" to discipline Pendley because of "yet another run-in" with Creighton. 30 FMSHRC at 495. On this matter, the judge did not resolve the conflicting testimony as to who first pushed whom. *Id.* The judge, however, found it persuasive that Pendley chose to "charge" the slope shack, "putting himself in a situation where an altercation was all but certain to occur." *Id.* The judge further noted that Pendley had been warned that further altercations could lead to his discharge. *Id.*; R. Ex. 10. Finally, the judge found it significant that Millburg knew of the recent confrontation with Hubbert, Wise, and Gaines that occurred just minutes before his altercation with Creighton. 30 FMSHRC at 495. Substantial evidence supports the judge's finding that Pendley's discipline was justified, and we see no reason to disturb his findings.

The Secretary also argues that the judge impermissibly "reformulated" Highland's justification for disciplining Pendley because the judge referred to the incident with Creighton as an "altercation" rather than an "assault." S. Br. at 29-36. We conclude that the specific label that the judge attached to that incident is not significant here.[19] The pertinent point is that the judge, in weighing the sufficiency of the reasons that Highland gave for Pendley's discharge, relied on the trial testimony given by the Secretary's and Highland's witnesses concerning who was the aggressor in the dispute and found facts indicating that Pendley was at fault because he put himself in a situation where an altercation with Creighton was all but certain to occur. 30 FMSHRC at 495. Although the judge did not resolve the conflicting testimony as to whether Pendley pushed Creighton, he made the critical determination that Pendley initiated the incident with Creighton when Pendley decided to "charge the slope shack," thereby precipitating the ensuing altercation. *Id.*

The Secretary additionally argues that the judge erred when he found that reliance on Pendley's interference with the hoist test was not "crucial to the validity of the disciplinary

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[19] In support of her position that the judge improperly recast the basis for Pendley's discharge, the Secretary relies on the Commission's decision in *Secretary of Labor on behalf of McGill v. U.S. Steel Mining Co.,* 23 FMSHRC 981 (Sept. 2001). The *McGill* case is readily distinguishable from the instant proceeding. In *McGill*, the judge had found that the operator had established an affirmative defense to a complaint of discrimination, notwithstanding that the reasons relied on at the time of discharge and established at trial (insubordination and use of profanity) were completely different substantively from the reasons relied on by the judge in his decision (threats to file a grievance, failure to stop walking away, and union status). *Id.* at 987-88. In contrast to *McGill*, the judge's findings with regard to the altercation between Pendley and Creighton are well within the parameters of, and consistent with, the assault charge in the March 21 letter. *Compare McGill*, 23 FMSHRC at 989.

action" because of the other more serious misconduct. S. Br. at 30-31; *see* 30 FMSHRC at 495 n.43. The judge concluded that the two other reasons Millburg relied on for discharging Pendley – his confrontation with the office staff and his altercation with Creighton – were sufficient grounds for determining the validity of the disciplinary action under the Mine Act. *Id.* With regard to the interference with the hoist test allegation, the judge noted that the control panel was not tagged and Creighton did not advise Pendley of the test until after he pushed the man car call button. *Id.* Contrary to the Secretary's argument, S. Br. at 30, the judge did not find that the hoist test allegation was pretextual.[20] Rather, the judge simply found ample grounds for sustaining the discipline without relying on the interference allegation. Moreover, the judge's role in examining the reasons for Pendley's discharge under the Mine Act does not require that he adopt every reason given by the operator in order to sustain the discipline under the collective bargaining agreement.[21]

In addition to the Secretary's arguments relating to the specific reasons given for Pendley's March 21 suspension and discharge, she also argues that the judge failed to fully analyze the adverse action under the *Pasula-Robinette* test. Our reading of the judge's decision indicates that he made findings that are sufficient with regard to the requirements in Commission discrimination cases. First, the judge found that Pendley engaged in activities protected under the Mine Act, including making safety complaints and filing a discrimination complaint. 30 FMSHRC at 491-94. The judge further noted Pendley's subsequent protected activities, including his involvement in a section 103(g) investigation and his filing of an appeal with the Commission because of the Secretary's and Highland's settlement of his December 21, 2005, suspension. *Id.* at 494. Finally, and most significantly, the judge concluded that Highland's

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[20] Pretext may be found where the asserted justification for discipline is "weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.,* 4 FMSHRC 1935, 1937-38 (Nov. 1982)); *see also Moses v. Whitely Dev. Corp.*, 4 FMSHRC 1475, 1481-82 (Aug. 1982) (pretext found where defense of poor performance was so weak as to make the defense pretextual). "Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. . . . If a proffered justification survives pretext analysis and meets the first part of the *Pasula* affirmative defense test, then a *limited* examination of its substantiality becomes appropriate." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981).

[21] The arbitrator in the grievance proceeding, who addressed whether Pendley was terminated for "just cause" under the union contract, concluded that Pendley's "unilateral, blatant failure to check with Creighton or Lewis as to the availability of the hoist car was reckless and in disregard of his own safety and others." R. Ex. 25 at 14. Thus, even though the judge found that this reason for Pendley's discipline was unnecessary for his determination, the arbitrator's treatment of the defense offers substantial record support for concluding that the hoist test interference charge is not deemed pretextual under the rationale of *Chacon*.

knowledge of Pendley's protected activities did not motivate Highland to act adversely against Pendley. *Id.* Rather, the judge concluded that Pendley was disciplined on the basis of his unprotected activity alone. *Id.* at 494-95. Having concluded that, based on the evidentiary record before him, Highland was not motivated by Pendley's protected activities, the judge's analysis was complete under *Pasula-Robinette*. *See Driessen*, 20 FMSHRC at 329-31 (complainant failed to establish a prima facie case because substantial credited evidence supported judge's conclusion that the operator was in no part motivated by the complainant's safety complaints but rather complainant was terminated solely for insubordination).

The Secretary's argument that the judge's analysis was inadequate is premised in large measure on her disagreement with the fundamental conclusion that Highland's suspension and discharge of Pendley were not motivated in any way by protected activities. In particular, the Secretary in her brief relies extensively on *circumstantial* evidence to establish that Highland had an unlawful motive in suspending and discharging Pendley. S. Br. at 19-26, 32-33. However, in this proceeding the judge relied on *direct* evidence to establish Highland's non-discriminatory reasons for terminating Pendley. 30 FMSHRC at 494-96. Therefore, "use of circumstantial evidence to bypass the judge's fact findings on the pivotal issue of motivation is improper." *Driessen*, 20 FMSHRC at 330 n.9; *see also Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) ("consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences").

Moreover, even if the judge had found that Millburg was motivated in any part by Pendley's protected activities, the record amply supports the conclusion that Highland would have taken the adverse employment action in any event because of unprotected activity alone. *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1555-56 (Sept. 1992). Indeed, in the Secretary's brief, she concedes that the judge rejected her position that Pendley was discharged because of his protected activities, noting, "The [judge] disagreed, finding either that Highland was not motivated in any part by Pendley's protected activity or that Highland would have discharged Pendley for his unprotected activity alone." S. Br. at 3 (citing 30 FMSHRC at 494-96). In this regard, we additionally find that substantial evidence supports a conclusion that Highland affirmatively defended against the Secretary's discrimination case by proving that it would have discharged Pendley solely because of his confrontation with the office staff and his altercation with Creighton for the same reasons that we have concluded Highland rebutted the Secretary's prima facie case of discrimination. *See also Chacon*, 3 FMSHRC at 2512-13, 2516-17 (operator's reason for miner's discharge analyzed as a rebuttal to Secretary's prima facie case and as an affirmative defense).

In sum, we conclude, in agreement with the judge, that Lawrence Pendley was suspended, with intent to discharge, on March 21, 2007, solely because of the incidents that occurred that day in connection with the office staff and Creighton.

B. Post-Reinstatement Working Conditions

Pendley's allegations of changed conditions of employment essentially involved three areas – more intense supervision when Pendley returned to work ("birddogging"), changed job responsibilities, and Highland's posting a letter identifying Pendley's job responsibilities.

In addressing whether Pendley was more closely supervised, the judge found that credited trial testimony established that Highland supervisors were worried about the amount of time that it took Pendley to perform his assigned work after he was reinstated. *See* Tr. 869 (Bockhorn), 905-06 (Howell), 931 (Maynard). Based on this credited testimony, the judge found that "Pendley worked at a slower pace when he returned" and that Highland had "legitimate" concerns about Pendley's work pace. 30 FMSHRC at 497. In light of these findings, the judge concluded that Highland's post-reinstatement supervision of Pendley was not improper. *Id.* We see no reason to disturb the judge's credibility resolutions in this area.

As to the allegation of increased workload, the judge found that none of Pendley's work assignments involved jobs outside of his classification under the union-labor agreement.[22] 30 FMSHRC at 497*;* Tr. 257. Further, as the judge found, Pendley was never asked to complete more work assignments than he could accomplish during a regular shift of eight hours. 30 FMSRHC at 497; Tr. 255. Pendley admitted that, upon his reinstatement, he voluntarily chose not to work overtime, essentially decreasing his workday from 12 hours to eight. 30 FMSHRC at 497 n.46; Tr. 256; 919. Most significantly, the judge concluded that there was no evidence to support a finding that Pendley was assigned work to punish him for seeking reinstatement or for any other protected activity.[23] 30 FMSHRC at 497. *Compare Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1534-35 (Sept. 1997) (transfer of miners found to be unlawful where new position was less desirable and more hazardous and the adverse action was motivated by protected activity). Substantial evidence supports the judge.[24]

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[22] In particular, Pendley objected to the assignment of washing the "nurse" car that was used to deliver oil. Tr. 184. *See* Gov't Ex. 5.

[23] At least one other supply runner at Highland testified at the hearing that he and the two other runners including Pendley (each runner worked on a different shift), were assigned the task of washing the oil car and supply centers. Tr. 837-40.

[24] Our colleague relies on an apparent incident involving Pendley being instructed to move a pallet of glue by hand to conclude that we should vacate the judge's decision so that he can reevaluate the post-reinstatement evidence. Slip op. at 28. Pendley testified for the first time, during the Secretary's rebuttal case, that an unidentified "man" told him not to take a forklift to load the glue. Tr. 1081-82. However, the Secretary did not address the incident in her post-trial brief to the judge (Pendley did not file a separate brief before the judge), S. Post-Hearing Br. at 51-54, and neither the Secretary nor Pendley raised the incident in their briefs to the Commission. *See* P. Br. at 1-5. In these circumstances, we do not see how the judge's

Finally, with regard to the posting of Pendley's job duties, foreman Steve Bockhorn explained that Pendley's job duties were put in writing when he was reinstated because Pendley raised a question about his duties. Tr. 870-71, 926-28; Gov't Ex. 5. Other non-production employees received letters specifying their duties as well. Tr. 929; Gov't Ex. 6. Thus, mechanic Roger Grace also received a letter specifying his job duties, including the task of washing the oil car. Tr. 837-41. When Pendley saw his letter posted on the company bulletin board,[25] he spoke to Bockhorn, and the letter was immediately taken down. 30 FMSHRC at 497; Tr. 190-91, 876-77. In these circumstances, the judge properly concluded that the letter was removed as soon as Pendley complained to his supervisor and, therefore, "It would be a stretch indeed to find this mistake, which was quickly and fully rectified, constituted adverse action." *Id.*; *see also Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-49 (Aug. 1984) (letter posting not deemed unlawful under section 105(C) where second element of prima facie case not proved in light of no adverse action; also mine management was found to be acting in "good faith").

Pendley argues before the Commission that the judge's analysis of the reinstatement conditions under *Pasula-Robinette* is inadequate. P. Br. at 3-4; P. Reply Br. at 4. More specifically, Pendley argues that the judge failed to address whether Pendley was involved in protected activity that led to the adverse employment conditions. The judge made extensive findings with regard to the protected nature of Pendley's activities that preceded his March 21 suspension and discharge. 30 FMSHRC at 491-93. In addition, the judge noted that the Secretary alleged new acts of discrimination "as a result of Pendley's reinstatement," and the judge pointedly referenced his conclusion of no discrimination "since his reinstatement." *Id.* at 496 & n.44. Moreover, the judge would not have addressed the second element of the *Pasula-Robinette* analysis – whether an adverse employment action occurred – if he had not found that Pendley was involved in protected activity. In sum, we agree with the judge that none of the post-temporary reinstatement events are discriminatory under section 105(C) and *Pasula-Robinette.*

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determination not to address this incident is reversible error or a basis for remand.

[25] The letter was actually taped to the *outside* of a locked glass case; Highland job postings were placed *inside* of the case. Tr. 275-76, 876-77.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Michael F. Duffy, Chairman

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

In ruling that Highland was motivated solely by Lawrence Pendley's unprotected activity when it discharged him, the judge in this case improperly relied on evidence which the operator admitted was not a factor in its termination decision. In addition, the judge failed to consider certain testimony regarding work assigned to Pendley and other miners, testimony which could indicate anti-safety reporting animus by the operator. Finally, the judge applied an incorrect legal analysis to the evidence of Pendley's work assignments that he did discuss. Consequently, for the reasons outlined below, I would vacate the judge's decision and remand the case to him.

1. The Judge Improperly Relied on the October 2005 Disciplinary Letter

The judge found that Pendley's protected activity did not motivate Highland's decision to discharge him. 30 FMSHRC at 494. In reaching this conclusion, the judge focused primarily on conduct by Pendley that the judge believed warranted his termination. *Id*. at 494-95. In his analysis of the confrontational behavior the operator claimed was the basis for Pendley's discharge, the judge referred to the "last chance letter" that David Webb, Highland's operations manager, issued to Pendley in October 2005. *Id.* at 495[1]:

> On October 7, 2005, Pendley was warned in writing [that] "verbal abuse" on his part might lead to his suspension with intent to discharge. Resp. Exh. 10. Although he was on notice of the consequences, he persisted in the very behavior about which he was warned. Perhaps he just could not help himself, but he certainly knew his behavior could lead to the discipline he ultimately received. Pendley acted at his peril . . . .

*Id*.

Although it appears that the judge took the letter into account in ruling that Pendley's protected activity played no role in Highland's decision to discharge him, it is undisputed that Larry Millburg, the Highland official who fired Pendley, did not know the warning letter existed until after he issued the termination letter. When asked if he knew of the warning letter at the time he issued Pendley the written suspension with intent to discharge, Millburg replied unequivocally, "No, I did not know about – about this last and final written warning." TRH Tr. 211-212.

The judge's consideration of the warning letter when examining Millburg's motivation was erroneous. Highland readily admits that, "[t]he law holds that Millburg's disciplinary

[1] The judge had also discussed the letter at length in his factual findings. *See* 30 FMSHRC at 467-68.

decision must be judged on the basis of what Millburg believed *at the time of the decision* . . . ." H. Br. at 17 (emphasis added). As counsel for Highland acknowledged at oral argument before the Commission "case law clearly says that when assessing a disciplinary action . . . you look at the mindset of the decision-maker." O.A. Tr. at 62. Moreover, the First Circuit has emphasized, "an employer cannot avoid liability in a discrimination case by exploiting a weakness in an employee's credentials or performance that was not known to the employer at the time of the adverse employment action (and that, therefore, could not have figured in the decisional calculus)." *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996).[2]

The mindset of a supervisor determining the discipline to be meted out to an employee the supervisor knows to be the recipient of a "last chance letter" is obviously different from the mindset that would be employed if that supervisor was unaware of a prior warning. The supervisor in the first scenario is likely to engage in little or no weighing of factors – indeed might consider his or her hands to be tied. A supervisor in the second scenario, however, would undoubtedly consider him or herself to have more leeway in deciding the appropriate punishment. Such a supervisor would likely consider many factors before making a decision. The issue in this case is whether Pendley's protected activity was a factor that entered into Millburg's decision to discharge him. Close scrutiny of all pertinent evidence is required in order to answer that question. The manner in which the evidence is sifted and weighed, however, may well be affected by whether a judge believes the decision-maker was operating within the confines of a "last chance letter."

Because Millburg was not aware of the letter when he terminated Pendley, his motivation for the discharge must be viewed without reliance on this evidence. The judge's determination as to whether Millburg was motivated solely by Pendley's unprotected activity should thus be performed without the letter playing any part in the judge's consideration of Millburg's mental process in arriving at his discharge decision. The judge's reference to the letter leaves me unsure that this occurred.[3] Consequently, I would remand the case to the judge for such an analysis.

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[2] My colleagues claim that the judge's consideration of the prior disciplinary warning was appropriate. Slip op. at 17. They rely on *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), in which the Commission stated that an operator may carry its burden by showing past discipline consistent with that meted out, the miner's unsatisfactory work record, prior warnings to the miner, and personnel rules forbidding the conduct in question. In *Bradley*, however, there was no indication that such evidence should be taken into account if it was unknown to the decision-maker who took the adverse action against the complainant.

[3] The majority defends the judge's use of the letter, contending that he did not find that Millburg knew of it or relied on it. Rather, my colleagues emphasize that "the judge noted that *Pendley* was aware of the consequences for engaging in similar conduct for which he was reprimanded in the October 2005 letter." Slip op. at 17 (emphasis in original). Pendley's knowledge of the letter and the possibility that he could be discharged for future transgressions is not relevant to the analysis the judge was charged with performing. There was no other reason

2. In Analyzing Pendley's Retaliation Claim, the Judge Applied an Incorrect Legal Standard and Failed to Consider Relevant Evidence

The judge ruled that Pendley did not suffer any adverse action from Highland when, subsequent to the discharge, he returned to work as a result of the temporary reinstatement order. 30 FMSHRC at 496-98. However, the judge applied an unduly restrictive standard in reviewing evidence pertaining to the Secretary's claim that after his reinstatement, Pendley was assigned additional and more difficult job duties. *Id*. at 483-86; 496-98. The judge noted that:

> While an assignment of duties outside the labor agreement or an assignment of more tasks than can be accomplished in a normal work period conceivably can constitute adverse actions, in this instance . . . the evidence establishes the tasks Pendley was assigned fit squarely within the labor agreement . . . [and] the record does not support finding Pendley was assigned more tasks than he reasonably could accomplish in an eight-hour work day.

*Id*. at 497 (footnote omitted). The judge's premise that different or additional job assignments do not constitute adverse action if they fall within a miner's normal job classification constituted legal error and his adoption of this incorrect legal principle tainted his analysis of Pendley's adverse action claim.

In *Moses v. Whitley Development Corp*., 4 FMSHRC 1475, 1478 (Aug. 1982), the Commission emphasized that:

> it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) . . . .

In *Glover v. Consolidation Coal Co*., 19 FMSHRC 1529, 1534 (Sept. 1997), the Commission found that the complainants' transfer to section mechanic jobs involving more hazards and dangerous machinery than that used in their former positions, and heavy lifting not previously required, constituted adverse action. We acknowledged that "transfers to more

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for the judge to take into account whether the operator had given Pendley a warning except to use this information in deciding the question before him – whether Millburg's discharge of Pendley was motivated in any part by protected activity.

arduous or difficult work have been held to be discriminatory under the National Labor Relations Act." *Id*. at 1534 (citations omitted).

I have found no case law qualifying the principles stated above in the narrow manner articulated by the judge. A transfer to more arduous job duties based on a miner's protected activity may constitute adverse action even if the new task is permitted by a union contract and is within the miner's job classification. Such a transfer may still have a chilling effect on miners' willingness to make safety complaints.

The Supreme Court recognized this principle in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In that case, the Court reasoned:

> Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. . . . We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable.

*Id*. at 70-71.

The judge's error affected his analysis in two regards. First, it constrained his examination of the motivation behind the decision to discharge Pendley. A job assignment that might not rise to the level of adverse action can nevertheless indicate animus and therefore be relevant in analyzing whether the earlier decision to terminate Pendley was tainted by a retaliatory motive. Second, the error precluded the judge from correctly analyzing whether the job assignments Pendley received after he was ordered reinstated constituted a separate instance of discriminatory conduct in violation of section 105(c). Thus, a remand is needed to evaluate the evidence using the proper legal standard.[4]

The judge's evaluation of the record led him to conclude that "the evidence offers no support for finding Pendley's job assignments were designed to punish him . . . ." 30 FMSHRC

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[4] Pendley challenged his discharge and the job assignments that occurred after he was temporarily reinstated. Pendley also challenged his earlier three-day suspension as violative of section 105(c). 30 FMSHRC at 459-61. Pendley's suspension was determined by the judge to be illegally motivated by Pendley's protected activity. *Id*. at 461. This activity led to Highland receiving several citations for failing to comply with accident reporting requirements. *Id*. at 471-72. The judge's ruling that Highland discriminated against Pendley when it suspended him in December 2005 was not appealed. Slip op. at 1 n.2.

at 497. In reaching this conclusion, however, the judge omitted any mention of one particular task assigned to Pendley following his temporary reinstatement – moving pallets of glue by hand. Pendley testified that he was told to move glue pallets without a forklift, and that when he arrived at his destination, there were already full pallets of glue on the unit. Tr. 1081-82.[5] The implications of this assignment were not lost on fellow miners. Clarence Powell, a mechanic at the mine who tried to help Pendley (Tr. 483, 489), commented that

> [W]hat made it so ironic was the fact that they specified for him [Pendley] to specifically pick that up [the glue] and haul it to the unit when . . . there's low tracks or fork trucks passing by that area and they could just as easily scooped it up and took it theirselves instead of making an individual pick it up and haul it like they did him.

Tr. 488.

Bernard Alvey, an outby support miner, Tr. 518, also observed Pendley moving the glue by hand that night. He confirmed that "[a]ny other time . . . [the glue] would have been picked up by a forklift or a scoop. It wouldn't have been hand loaded." Tr. 521. Alvey explained that a scoop was available and that in fact he "pulled around him [Pendley] twice that night with a scoop" while he was picking up the glue, but "[h]e told me that he was told to pick it up, that I couldn't pick it up with a scoop." *Id*.

The judge also failed to discuss other evidence of work assignments being changed after persons made safety complaints. Larry Geary testified that after some miners questioned their foreman, Steve Bockhorn, about something "a few weeks later they were on a roof bolter off their regular job." Tr. 477. Asked why it would be bad to be assigned as a roof bolter, Geary explained, "the majority of us there are older people and we would rather have something other than a roof bolter because roof bolter basically is the hardest job in the mines." *Id*.

Steven Tramel, Jr. testified that, as a battery maintenance worker, when he complained to the safety director about smoke he was transferred to work on the belts. Tr. 508-09. He also testified about a fellow miner, Robert John, who complained about the slope rope being dirty and then was assigned to it full-time. Tr. 511. The assignment was viewed as a retaliatory action by the miners, because although "[i]t wasn't really a different type job . . . it was in the dead of winter," and, according to Tramel, "you don't need to be putting a man in the slope in the dead of winter all the time." Tr. 512. Asked "why is that?" Tramel responded "[t]oo cold." *Id.* Tramel

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[5] Despite the reluctance of my colleagues to address this evidence, slip op. at 21-22 n.24, I am mindful of the principle that "[i]n reviewing the whole record, an appellate tribunal must consider anything in the record that 'fairly 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)).

believed John got the slope rope assignment "[b]ecause he complained to the federal about it." *Id*. In response to a question by the judge, the witness conceded the assignment was a job within the same classification. *Id*. Finally, James Morris testified that when he complained to federal officials about excessive exposure to rock dust, he was removed from his scoop job position and put on a roof bolter on the return side, which is exposed to more dust. Tr. 407.

Accordingly, I would vacate the judge's decision and remand the case for a reevaluation of the post-reinstatement evidence. Such an analysis would be premised on the understanding that job duties assigned to a complainant may constitute adverse action, even if they are within his or her same job classification and permitted by the union contract. I would also have the judge consider this evidence in reevaluating whether the operator's decision to discharge Pendley was in any way motivated by Pendley's protected activity.

For the foregoing reasons, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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