FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 23, 1999

GARY D. MORGAN	:	
	:	
v.	:	Docket No. LAKE 98-17-D
	:	
ARCH OF ILLINOIS	:	

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

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Miner Gary Morgan seeks review of the decision by Administrative Law Judge Avram Weisberger dismissing a discrimination complaint against Arch of Illinois ("Arch") brought pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[1]

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[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 such violation occurs, file a complaint with the Secretary alleging such discrimination.
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> (3) . . . If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the

20 FMSHRC 571 (June 1998) (ALJ). For the reasons that follow, we vacate the judge's decision and remand for further consideration consistent with this decision.

I.

Factual and Procedural Background

Arch operates a number of underground coal mines, including the Kathleen Mine and Conant Mine in southern Illinois. *Id.* at 571. Gary Morgan, a miner with more than 25 years experience in various jobs, worked at the Kathleen Mine from 1989 until being laid off in July 1995, when the mine closed. *Id.* Morgan's primary jobs were operating the scoop and driving a ram car, and he filled in for other miners at lunch break or during overtime on the roof bolter and continuous miner. *Id.*

During Morgan's tenure at the Kathleen Mine, he made frequent complaints to his immediate foreman, Ben Williams, about dust conditions in the mine. *Id.* According to Morgan, Williams often ignored his complaints because he was busy loading coal. *Id.* at 571-72. In addition to complaining to Williams, Morgan also spoke to the manager of the Kathleen Mine, Harry Riddle, about dust conditions in the mine. *Id.* at 572. In 1990, Morgan complained to Riddle about dust conditions in the mine, and the following day there was some improvement, but dusty conditions later returned. *Id.*

In 1994, Morgan observed dust pumps being turned off and dust intake hoses being placed under miners' lapels during periods of high dust at the mine. *Id.* Morgan complained to his supervisor Williams and then to his union safety committeeman, Jasper Stirsman, about the way dust sampling was done at the Kathleen mine. *Id.* Stirsman eventually reported the problem to the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* Around August 1994, mine manager Riddle met with Williams' crew, and during the meeting Morgan indicated that he was the one who had reported the violation. *Id.* at 572, 579. At the meeting, a confrontation occurred between Morgan and the miner who had reportedly turned off the dust pump. *Id.* at 572. Riddle ordered the miners to take proper dust samples and sent them back to work. *Id.* Sometime after the meeting, Riddle told miners Gerald Selby and Dan Helmer that Morgan would never work for Arch again. *Id.* at 575; Tr. at 147-48, 153-54.

> Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

According to Stirsman, at a meeting to resolve dust complaints, Gene Sharp, superintendent of the Kathleen Mine, stated that he knew that it was Morgan who was causing the complaints, even though Stirsman had not mentioned Morgan by name. 20 FMSHRC at 572. On several occasions, Stirsman heard Sharp make derogatory remarks about Morgan. *Id.*

In July 1995, Morgan was laid off from the Kathleen Mine when it closed for economic reasons. *Id.* at 572. By agreement between Arch and United Mine Workers of America ("the Union"), Morgan's name was placed on a panel list from which Arch selected miners by seniority for job vacancies. *Id.* at 572, 576. In September 1996, Arch contacted Morgan to take the tests to qualify for an inby job at the Conant Mine. *Id*. at 572. Riddle, Williams, and a number of Kathleen supervisors had previously transferred to the Conant Mine. Tr. 157-58, 186-88, 296. Morgan's foreman at the Kathleen Mine, Williams, remarked at a meeting at the Conant mine held in September that he did not want Morgan on his crew. 20 FMSHRC at 575. Pete Wyckoff, manager of the Conant Mine, heard Williams say that he did not want Morgan on his crew, but testified that he did not know why. *Id.* at 577. Wyckoff supervised both Bob Blaylock, supervisor of safety, and John Cotter, a shift foreman at Conant, who were involved in testing applicants at the mine. *Id*.; Tr. 218, 245, 293.

Pursuant to the union agreement, miners were required to pass a written test before being given a hands-on test to qualify for available jobs. 20 FMSHRC at 576. Miners had to pass a hands-on test on three out of four pieces of equipment in order to qualify for an inby job. *Id.* Nearly every miner chose to be tested on the coal hauler, or ram car, and scoop because each of those pieces of equipment required minimal levels of skill. *Id.* About 75 to 80 percent of miners chose to be tested on the roof bolter, which required a higher skill level, while only 20 percent chose to be tested on the continuous miner, which required the greatest level of skill. *Id.* As a miner completed the test on each piece of equipment, a form was completed by the supervisor administering the test. Tr. 250; Pet. Ex. G.

Morgan took and passed the written test, which was administered by Cotter. *Id.* at 572. Cotter also administered the hands-on test to Morgan. *Id.* This included tests to operate the ram car and scoop, which Morgan passed. *Id.* Prior to the hands-on test on this machinery, Cotter allowed Morgan time to familiarize himself with the controls and practice with the equipment. *Id.* For the next part of the hands-on exam, Morgan tested on the roof bolter. *Id.* Morgan testified that Cotter did not allow him time to become familiar with the controls or practice. *Id.* As Morgan began bolting, Cotter told Kenny Anheuser, who was assisting Morgan by preparing the roof bolts and handing them to Morgan as he drilled the holes, to stop helping Morgan because he was being tested. *Id.* Morgan completed the test and asked Cotter how he did. *Id.* Cotter responded that he did not evaluate the tests but merely recorded information.[2] *Id.* at 572-73. Cotter stated that he generally does not time miners on drilling and bolting because of the varying roof conditions in the mine. Tr. 253-54. For the final component of the hands-on test,

[2] At trial, Cotter stated that, in fact, he did determine who passed or failed the test but that he would not be the one who notified Morgan of the test results. Tr. 263.

Cotter asked Morgan if he wished to be tested on the continuous miner, and Morgan agreed to it. 20 FMSHRC at 573. As with the roof bolter, Morgan was not given time to familiarize himself with the equipment. *Id*. Morgan admittedly performed badly on the test when he miscalculated on the position of the miner and cut too close to the roof. *Id*.

Several days later, Morgan contacted Blaylock, supervisor of safety at the Conant Mine who was also in charge of testing. *Id.* at 573; Tr. 209. Blaylock told Morgan that he had failed the hands-on test on the roof bolter. *Id.* Blaylock stated that Morgan did not change bits, that he had bent a "roof bolt steel," and that he had taken too much time. *Id.*[3] Blaylock further told Morgan that, because he failed the test on the roof bolter, he could not be considered for an outby position, which required passing tests on two of three pieces of equipment, including the roof bolter. *Id.* Blaylock concluded by telling him that, if Morgan could enhance his skill on the roof bolter, he could be retested. *Id.* Subsequently, a miner with less seniority than Morgan was awarded an outby position. *Id.*

After Morgan was notified that he failed the test, he filed a grievance with the Union that was ultimately withdrawn. Tr. 66, 84-85. Thereafter, in July 1997, Morgan filed a discrimination complaint with MSHA. Following an administrative investigation, MSHA dismissed Morgan's complaint. Subsequently, he filed a discrimination action under section 105(c)(3) of the Mine Act with the Commission, and a hearing was held.

In a pretrial order, the judge rejected a motion to dismiss filed by Arch on the grounds that Morgan's discrimination complaint filed with MSHA in July 1997 was untimely. Order at 2 (Feb. 26, 1998).

On the merits, the judge found that Morgan had clearly engaged in protected activities in reporting dust conditions to his immediate foreman, Williams, the mine superintendent, Riddle, and the Union safety committeeman, Stirsman. 20 FMSHRC at 578. The judge also found that the record was clear in showing that Morgan had suffered an adverse employment action when he failed the hands-on test and was not recalled at the Conant Mine. *Id.* In the judge's view, the main issue was whether the adverse action was motivated in any part by Morgan's protected activities. *Id.*

The judge found that Morgan had "many confrontations" with his foreman, Williams, including arguments over dust sampling. *Id.* at 579. The judge concluded that Williams bore animus towards Morgan, at least in part, because of dust complaints. *Id.* However, the judge also credited Williams' testimony that he did not tell Cotter, or anyone else, to fail Morgan on the hands-on testing. *Id.* The judge also found that superintendent Riddle was aware of Morgan's protected activities and had stated that Morgan would never work at Arch Minerals again. *Id.*

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[3] Cotter testified at trial that he failed Morgan because he was not "smooth" in operating the bolter. Tr. at 262.

The judge concluded however, that it had not been established that Cotter had any animus toward Morgan relating to his protected activities, or that he even knew about them before October 1996, when the adverse actions were taken. 20 FMSHRC at 581. The judge credited Cotter's testimony that no one told or suggested to him to fail Morgan, that no one told him to test Morgan any differently, and that he was not aware that Morgan had made dust complaints to MSHA or to Arch. *Id.* The judge determined that Morgan had failed to prove that the adverse action taken by Arch, acting through Cotter, was in any part motivated by Morgan's protected activities. *Id*. Accordingly, he concluded that Morgan failed to prove that he had been discriminated against in violation of section 105(c) of the Act. *Id.*

II.

Disposition

Morgan's primary argument on appeal is that substantial evidence does not support the judge's findings and conclusions. PDR at 1.[4] Morgan notes that the primary issues the judge had to resolve were the weight to be given to the circumstantial evidence of discrimination and the credibility accorded to the testimony of Arch's witnesses. *Id.* at 3. In support of his position, Morgan cites several examples of disparate treatment whereby other miners who were tested were given time to warm up, assisted by a helper, or allowed a retest. *Id.* at 3-4. Morgan cites to testimony indicating that the superintendent at the Conant Mine knew of Morgan's dust complaints and the animus of his foreman. *Id.* at 5-7. Morgan notes inconsistencies in roof bolting testing procedures, particularly as to timing and retesting. *Id.* at 7-8. Further, Morgan contends that inconsistencies in Cotter's testimony as to why he rated Morgan unsatisfactory on the roof bolter are a basis for discrediting Cotter. *Id.* at 11-12. Finally, Morgan argues that Arch improperly withheld during document production the original of the hands-on test that has white-out over a check mark in a box indicating that Cotter had failed Morgan in running a coal scoop. *Id.* at 16-17. Morgan argues that he was prejudiced by Arch's failure to release the document prior to trial, and that, more significantly, the document raises questions about Cotter's truthfulness and demonstrates that Arch officials at Conant conspired to ensure that Morgan would fail the hands-on test. *Id.* at 15-22.

In response, Arch argues that substantial evidence supports the judge's decision. Arch Resp. Br. at 5. Arch emphasizes that the judge based his decision on credibility determinations, and in particular crediting of Cotter, who administered the test to Morgan, including his denial that he knew anything about Morgan's dust complaints. *Id.* at 5-6. Arch argues that, while the judge found that Kathleen foreman Williams and superintendent Riddle harbored animus towards Morgan as a result of his dust complaints, the judge credited Cotter, who administered the test, and Blaylock, who was in charge of testing at Conant, that they did not know of Morgan's complaints and no one told them to fail Morgan. *Id.* at 5-7. Thus, Arch concludes that Morgan failed to prove a causal connection between his protected activity and his failure to be recalled as

[4] Morgan requested that his PDR be accepted as his opening brief.

a result of the test. Arch Resp. Br. at 8. Finally, Arch contends that the judge erred in not dismissing Morgan's complaint as untimely. *Id.* at 11-12.

A. Timeliness of Morgan's Complaint

The judge denied Arch's motion to dismiss Morgan's complaint on timeliness grounds, even though it was filed over 10 months after the adverse employment action. He found that Morgan had shown justifiable circumstances—lack of counsel and pursuit of a grievance over the failure to be recalled—that excused the late filing and that Arch had not shown that it was prejudiced as a result. Order at 2 (Feb. 26, 1998).

Morgan was notified that he failed the test on September 21, 1996. M. Resp. to Mot. to Dismiss at 3. During that conversation, he informed Blaylock that he would file a grievance through the Union. Pet. Ex. C at 38. According to Morgan, Blaylock told him to consider that this was the first step of the grievance process and his grievance was denied. *Id*. Thereafter, he raised a complaint with his Union that apparently led to a grievance that was later withdrawn. *Id.*; Tr. 84-85. Subsequently, he filed a grievance dated February 9, 1997, in which he grieved Arch's recall of a miner with less seniority to an outby job. Pet. Ex.C at 115. That grievance was eventually withdrawn. M. Resp. to Mot. to Dismiss at 3. Morgan stated that even when his second grievance was dropped, he continued to pursue his complaint through other communications with union officials. Pet. Ex. C at 38. He maintains that he was told by a union official on July 15, 1997 that his appeals were of no avail. *Id*. Morgan filed his discrimination complaint on July 29, 1997.

Morgan argued to the judge that he felt that his rights had been violated, but that he had initially pursued his complaint through the Union's grievance procedure. M. Resp. to Mot. to Dismiss at 4. Morgan further noted that he did not obtain an attorney until sometime later in pursuing his claims against Arch. *Id.* (He filed the discrimination complaint against Arch apparently without the assistance of counsel.) Arch argues that Morgan must have been well aware of his rights under the Mine Act because he filed his complaint without the assistance of counsel. A. Mot. to Dismiss at 4.

Commission case law is clear that the 60-day period for filing a discrimination complaint under section 105(c)(2), 30 U.S.C. § 815(c)(2), is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984). A judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" in order to determine whether a miner's late filing should be excused. *Id*. Finally, "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." *Schulte v. Lizza Indus., Inc*., 6 FMSHRC 8, 13 (Jan. 1984).

We believe that the judge correctly denied Arch's motion to dismiss. The delay in filing was significant, but not out of line with delays in other cases in which the Commission excused the Secretary from complying with a filing deadline. *See Secretary of Labor on behalf of Hale v.*

4-A Coal Co., 8 FMSHRC 905, 905-06 (June 1986) (two year delay); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994), *overruled on other grounds, Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996) (four month delay). In *Hale*, the Secretary delayed filing a discrimination complaint for two years after the miner contacted MSHA, while it was investigating the complaint. 8 FMSHRC at 905-06. However the Commission noted in that case that there was no evidence of prejudice to the operator as a result of the late filing. This, the Commission found, was a primary consideration in cases involving late filing. *Id.* at 908-09; *Nantz*, 16 FMSHRC at 2214-15 (failure to meet time limits in sections 105(c)(2) and (3) should not result in dismissal, absent a showing of "material legal prejudice").

In the instant proceeding, there is no evidence that this delay by Morgan in filing his complaint resulted in prejudice to Arch.[5] *See Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992) (filing a complaint 12 days late was de minimis and excused where the operator showed no prejudice in connection to the brief delay); *Lizza Indus.*, 6 FMSHRC at 13 (31-day delay in filing excused where the operator showed no prejudice). In addition, Morgan proceeded without benefit of counsel. Morgan's pursuit of related complaints through the Union indicates that he was not sleeping on his rights. Accordingly, we affirm the judge's denial of the motion to dismiss for failure to timely file a complaint.

B. Morgan's Claim of Discrimination

The linchpin of the ALJ's decision in this case is his decision to credit the testimony of John Cotter, the Conant foreman who was responsible for testing and failing Morgan. The judge concluded that the decision to fail Morgan was made by Cotter alone (20 FMSHRC at 580) and that it had not been established that Cotter, "the only agent of Arch to have taken adverse action against Morgan, had any animus toward Morgan relating to his protected activities, or even knew of Morgan's protected activity . . . when the adverse actions were taken." *Id*. at 581.

We have carefully reviewed this record, which is replete with evidence of Arch management's hostility towards Morgan and his safety complaints. The evidence portrays a mine where seemingly everyone — except, according to Arch witnesses, Cotter and Blaylock — knew about Morgan's protected activity and the hostility it engendered among his supervisors. However, when he made his credibility determination regarding Cotter's testimony, there is no indication that the judge took into account this evidence of hostility.

We note at the outset that we are hesitant to disturb a judge's credibility determinations on appeal. We are reluctant, however, to affirm a credibility determination that is undermined by record evidence to the contrary that was not examined by the judge. As explained in detail below, the cumulative force of this evidence leads us to the conclusion that the judge's credibility

[5] Arch argued in its post-hearing brief to the judge that "general prejudice . . . should be inferred." A. Post-Hearing Br. at 13.

findings must be reexamined.

We begin with the well-established principles of analysis of a discrimination case under the Mine Act. A complainant alleging discrimination 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, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

With regard to Morgan's prima facie case of discrimination, the record clearly shows that he engaged in the protected activity of reporting dust conditions at the Kathleen Mine, and the judge so found. 20 FMSHRC at 578. Further, he was the victim of adverse employment action when Arch refused to recall him. *Id.* The pivotal issue, then, was whether a nexus existed between Morgan's protected activity and Arch's refusal to rehire him.

As the Commission has long noted, "[d]irect 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.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). Some of the more common circumstantial indicia of discriminatory intent include knowledge of the protected activity, hostility or animus towards it, coincidence in time between the adverse action and the protected activity, and disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510. Although the judge acknowledged these principles (20 FMSHRC at 578-79) when he accepted Cotter, Riddle and Williams' testimony that neither told Cotter to fail Morgan, he emphasized, in crediting each of their statements, that there was no *direct* evidence impeaching or contradicting their testimony. *Id.* at 579-80. What he failed to consider, however, was that the record contains abundant *circumstantial* evidence that calls their assertions into question.[6]

[6] Although the absence of direct contradictory evidence is relevant, it is not dispositive. In fact, "[t]he Commission has made clear that such direct evidence is rare and that discriminatory intent may be established by the kind of indirect evidence involved here." *Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992) (rejecting contention that discrimination must be established by direct

We do not lightly question the judge's credibility determinations in this case. We recognize the principle that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 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) ("*Dust Cases*") (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, we have recognized that there are exceptions to this general rule. *Id*. at 1881 n. 80. "Credibility involves more than a witness' demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner which it hangs together with other evidence." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 578-79 (2d ed. 1995). Accordingly, we have determined that one such exceptional circumstance occurs when a credibility finding is contradicted by the record evidence. *Dust Cases*, 17 FMSHRC at 1881 n.80.

In *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989), for example, the Commission credited the testimony of a witness which the judge had summarily dismissed as "not conclusive." *Id*. We noted in that case that "[w]hile we have previously stated that we do not lightly overturn a judge's credibility findings and credibility resolutions, neither will we affirm such findings if there is no evidence or dubious evidence to support them." *Id.*

Here, Cotter's assertion that mine management never talked to him about Morgan is suspect in light of other compelling record evidence. The record shows, and the judge found, that Morgan made numerous dust complaints and that Arch management, including his foreman, Williams, and the superintendent at the Kathleen Mine, Riddle, were well aware of his role. 20 FMSHRC at 579. Further, the record shows that Arch reacted in a hostile manner to Morgan's protected activity. Hostility towards protected activity — sometimes referred to as 'animus' — is another circumstantial factor pointing to discriminatory motivation. *Chacon*, 3 FMSHRC at 2511 (citing *NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 233 (8th Cir. 1966)). In this case, there is no question that Arch supervisors at the Kathleen Mine were angry at Morgan for his vigorous pursuit of dust complaints. [7]

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evidence.) It is not clear from the judge's emphasis on "direct" evidence in his decision whether he recognized this principle.

[7] The possibility that Arch management was capable of retaliatory action is supported by the testimony of three Arch miners who testified under subpoena. Testimony of Dennis Harrison, Tr. 109 ("I'd like to stay out of this, just repercussions possibly down the road."); testimony of Stanley Warden, Tr. 128-29 ("I feel that being here today would jeopardize my chances of passing the test for employment."); testimony of Gerald Selby, Tr. 139-40 ("I'm just afraid for . . . me standing up for my rights, that — that they might classify me as a troublemaker,

Perhaps the most compelling testimony on this point is that of miners Selby and Helmer. Selby testified that a few days after the August 1994 meeting with mine manager Riddle, he asked Riddle about Morgan and the dust samples and Riddle stated "Gary Morgan will never work in an other Arch Minerals mines again (sic)." 20 FMSHRC at 579. Helmer corroborated this testimony. *Id*. at 579-80. Riddle, not surprisingly, denied this remarkable statement of hostility at trial. *Id*. at 580.[8]

The judge appears to have credited Selby and Helmer on this point. *Id.* at 580. However, he failed to factor this finding into his analysis of whether Cotter was truly oblivious to the mine manager's hostility towards Morgan. Specifically, since he credited the miners' testimony that Riddle made this remark, the judge should have considered this in assessing the credibility of Riddle's testimony that he did not ask or tell Cotter, or Wyckoff, his boss, to fail Morgan. *See Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984) (finding ALJ credibility determination unreasonable when witness testimony was not consistent with his affidavit nor with testimony of other witnesses); *NLRB v. Mt. Vernon Tel. Corp.*, 352 F.2d 977, 980 (6th Cir. 1965) (questioning trial examiner's credibility determination, in part, because he had not credited the witness on other aspects of his testimony). Additionally, the judge discredited both Williams' and Riddle's testimony that Riddle was not aware of Morgan's complaints about dust violations. 20 FMSHRC at 579. Although knowledge of protected activity is an accepted indicia of discriminatory intent (*Chacon*, 3 FMSHRC at 2510), the judge failed to factor management's discredited testimony regarding knowledge into his subsequent definitive credibility determinations.

The judge also credited the testimony of Williams, the section foreman, that he did not tell Cotter to fail Morgan. 20 FMSHRC at 579. Although he acknowledged Williams' statement that he did not want Morgan in his unit and found that Williams had some animus towards Morgan, due in part to his protected activity, he nonetheless accepted Williams' testimony because it was not directly contradicted or impeached. *Id*. As with the Riddle credibility determination, in crediting Williams' testimony on this point the judge appears to have failed to look at the entire body of evidence regarding his hostility towards Morgan. Williams' dislike of Morgan was so well known that it became the subject of jokes by several miners, who kidded Williams about the possibility that Morgan would be rehired onto Williams' section. Tr. 120-21, 170.

The credibility of the operator's witnesses' testimony that none of them alerted Cotter about Morgan is further drawn into question by the testimony of the superintendent at the Conant

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also."). *See also* testimony of Harrison, Tr. 123-24 ("[Morgan's failing the test] [d]idn't surprise me. I-I felt that [Morgan] was gonna flunk before he even took the test . . . [A]fter the report of the violations over at Kathleen Mine, I stated to Gary that he'd never work for another Arch mine.")

[8] He also denied it in his interview with the MSHA investigator. Pet. Ex. C at 10.

Mine, Wyckoff. Wyckoff testified that when he was presented with a list of panel applicants for employment at the Conant Mine, he usually tried to talk to their ex-supervisors, and that there were several ex-Kathleen supervisors at his mine. Tr. 295-96.[9] He also admitted that he attended a meeting at which Williams stated he did not want Morgan on his crew. Tr. at 296. Wyckoff stated, however, that he did not recall making any response or follow-up to Williams' criticism. Tr. 296-97.

Management witnesses insisted that they barely communicated to each other about this admittedly assertive miner. However, the record reflects that many of these individuals were working the same shift at this relatively small mine. Pet. Ex. C at 5 (mine has approximately 127 underground and 8 surface employees split into three shifts); Tr. 187 (Riddle worked on A crew); Tr. 243 (Cotter worked on A crew). The Commission has previously held that the small size of a mine supports an inference that an operator knew of a miner's protected activity. *Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 130-31 (Feb. 1999). *See also Chauffeurs, Teamsters & Help., Local 633 v. NLRB*, 509 F.2d 490, 497 (D.C. Cir. 1974); *Famet Inc. v. NLRB*, 490 F.2d 293, 295 (9th Cir. 1973).

We are unable to determine whether this backdrop of knowledge of, and hostility towards, Morgan's protected Mine Act activities was taken into account when the judge credited Cotter's testimony that not one of these management officials ever approached him about Morgan. Before a judge credits any testimony, he must reconcile all record evidence that is inconsistent with that conclusion. In reviewing a judge's credibility determination, we may "'refuse to follow [it] where it conflicts with well supported and obvious inferences from the rest of the record. Such refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives.'" *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 425-26 (6th Cir. 1964) (quoting *NLRB v. Pyne Molding Corp.*, 226 F.2d 818, 819 (2nd Cir. 1955)).

As the Fourth Circuit has noted, "administrative findings based on oral testimony are not sacrosanct." *Breeden v. Weinberger*, 493 F. 2d 1002, 1010 (4th Cir. 1974). The record evidence in this case portrays a mine where managers did not hesitate to express their hostility towards Morgan and his safety complaints. We simply cannot affirm a credibility determination that ignores extensive record evidence that tends to call that finding into question. In addition, we have rejected the contention that a discharging supervisor's non-discriminatory intent shielded the operator from a finding of discrimination, when other involved supervisors demonstrated animosity towards the protected activities of the affected miners. *Price v. Vacha*, 14 FMSHRC

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[9] The record reveals that hostility towards Morgan's safety complaints reached Gene Sharp, the Kathleen superintendent who stated that "[d]amn Morgan is the one that's causing the complaint," and that Sharp made derogatory remarks about Morgan at a safety committee meeting and in the bathhouse. Tr. 17, 19. The record also revealed that Wyckoff was acquainted with Sharp. Tr. 300. Although the judge mentioned these incidents, he did not address their significance.

at 1557. Although we will overturn a judge's credibility determination only in rare circumstances, we will not rubberstamp them. *See NLRB v. Motorola, Inc.*, 991 F.2d 278 (5th Cir. 1993). We agree with the approach of the Seventh Circuit, which has stated:

> there are certain times when a court must overrule [an ALJ credibility] determination by examining evidence in the record that detracts from the ALJ's findings. [citation omitted]. Otherwise an ALJ would have to be upheld whenever there was the slightest support in the record, and our standard of review would be transformed from substantial evidence to scintilla evidence.

Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980).

We dispute our dissenting colleagues' accusation that we are "drawing inferences in the absence of evidence." Slip. op. at 17. First, we have deliberately avoided drawing any inferences from the evidence ourselves. Instead, we are remanding this case to the judge. As the trier of fact, he will examine the evidence we have highlighted in this opinion. He will then decide whether to draw any inferences concerning Cotter's knowledge of Morgan's protected activity and the hostility of other members of Arch's hierarchy towards Morgan. Nor are we by any means suggesting that inferences may be properly drawn in the absence of supporting evidence. To the contrary, we have identified a wide array of evidence that we are simply asking the judge to consider in revisiting his credibility determinations. Accordingly, we remand this matter to the judge, for consideration of the additional evidence cited above in making his credibility determinations.

The judge's decision is flawed in another respect. Absent from his decision is any analysis of the hands-on test as a possible pretext for refusing to reinstate Morgan or whether Morgan was the victim of disparate treatment in application of the test. The judge did not address Morgan's testimony that he was not given time to warm up on the bolter, that he was denied the assistance of a helper, and that he did not bend a steel. *See* 20 FMSHRC at 572-73. In contrast, Dennis Harrison, a former pit committeeman at the Kathleen Mine, testified that when he took the test for an inby position he was given 25 minutes to familiarize himself with the equipment. *Id.* at 573. When the test began, a helper prepared the roof bolts and handed them to him. *Id.* The roof bolter lost power during the test, thereby preventing him from completing the test. *Id.* After testing Harrison on the scoop and hauler, Blaylock told him that he did not have time to further test him on the roof bolter but that he had passed and should report to work. *Id.* Similarly, when Lester Furlow tested successfully for an inby position in 1993, he was given 30 to 45 minutes to warm up. *Id.* at 574. During the test, he broke the steel and the clip holding the bit on the steel which a helper showed him how to change. *Id.* In addition, Stanley Warden testified that he helped several individuals when they were tested on the roof bolter. Tr. 130. Blaylock also testified that applicants are given a warm up period. Tr. 215.

The judge also failed to acknowledge or address inconsistencies in the record as to whether Cotter timed miners when they were tested on the roof bolter (*compare* Tr. at 272-74 *with* Pet. Ex. G at 6-7, and *compare* 20 FMSHRC at 573 *with id.* at 577), or Cotter's inability to explain why he gave Morgan "nonsatisfactory" ratings on aspects of the roof bolter test (Tr. 273-75). He also failed to resolve the conflicting testimony of Morgan (who claimed he had no warm-up time or helper, 20 FMSHRC at 572) and Cotter (who stated that he always allowed a warm up period, and that he always permitted a roof bolt helper to help applicants assemble bolts, Tr. 247, 254[10]). If the judge had resolved this conflict in Morgan's favor, he should have considered this when assessing the credibility of Cotter's testimony that nobody told him to fail Morgan.

The judge could have relied on Morgan's testimony as evidence of disparate treatment (*see, e.g.*, *Chacon*, 3 FMSHRC at 2512-13), or inconsistent treatment of Morgan versus other similarly laid-off miners who were tested. Accommodations given to other miners but not afforded to Morgan may be evidence of discriminatory treatment. *Price and Vacha*, 14 FMSHRC at 1559. Morgan's pretextual claim is bolstered by the fact that only 3 out of 20 Kathleen mine applicants failed the test at Conant (Pet. Ex. C at 15), and that Morgan had two to three years of roof bolting experience at the time he was tested. Tr. 81-84. The judge's apparent failure to consider this evidence also constitutes grounds for a remand. *See Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 18 FMSHRC 2096, 2102 (Dec. 1996).[11]

Based on the foregoing, we vacate the judge's decision and remand the case to enable the judge to more fully consider the record evidence that he did not address. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (vacating and remanding when judge failed to adequately analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision); Commission Rule 69(a), 29 C.F.R. § 2700.69(a) (requiring a judge's decision to "include all findings of fact and conclusions of law,

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[10] Morgan testified that when he started installing bolts, the helper began to pick them up and hand them to him, until Cotter explicitly informed him that he was not permitted to help Morgan. Tr. 56.

[11] Commissioner Marks believes that, in addition, the judge should have at least considered the use of white-out on the original of the test document (Pet. Ex. G at 12), which was not produced during discovery and appeared for the first time late at trial. Morgan argues (PDR at 17-18) that the white-out indicates that the test results were altered after he completed the test. The judge does not address this assertion. Moreover, the white-out must be evaluated with respect to Cotter's overall credibility. *See* Cotter's testimony at Tr. 260, 275-76, 285-90. On remand, the white-out issue should be fully examined. In addition to the white-out, the hands-on test results also reflects the handwriting of two different persons and the ink of three different pens. *See* Pet. Ex. G at 4, 10. The record is silent as to any explanation regarding those occurrences.

and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record").

III.

For the foregoing reasons, we vacate the decision of the administrative law judge and remand the case for further consideration.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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Robert H. Beatty, Commissioner

Commissioners Riley and Verheggen, dissenting:

We are not willing to follow the lead of our colleagues and take the extraordinary step of vacating the judge's credibility findings in this case. To the contrary, we see no basis for vacating the judge's decision on the merits.[1] Accordingly, we would affirm the judge's determination that Cotter failed Morgan on the hands-on test for nondiscriminatory reasons. We therefore dissent from Part II.B of our colleagues' opinion.

We agree with the majority that the "pivotal issue" in this case is "whether a nexus existed between Morgan's protected activity and Arch's refusal to rehire him" after he failed the hands-on test. Slip op. at 8. In resolving this issue, the judge credited Cotter's testimony on the basis of his demeanor and the lack of contradictory record evidence:

> The decision to fail Morgan on the bolter test was made by Cotter. I observed Cotter's demeanor and found his testimony credible. Also, I note that the record does not contain any direct evidence impeaching or contradicting his testimony that he was not told by anyone to fail Morgan, that no one suggested that he fail Morgan, that no one had told him to test Morgan any differently than any other candidate, and that at the time of the test he did not know that Morgan had made complaints to MSHA and Arch. I thus accept his testimony.

20 FMSHRC at 580. Although Morgan testified that he was the victim of disparate treatment because he was not given time to warm up and was denied the help of an assistant, the judge credited Cotter's denial that anyone told him to fail Morgan or treat him differently from any

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[1] We disagree with Part II.A of the majority's decision, which states: "the judge correctly denied Arch's motion to dismiss" Morgan's complaint on timeliness grounds. Slip op. at 6-7. The Commission has held that it "expects a showing of good cause to explain any . . . delay" in filing a complaint for discrimination or compensation. *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230 (May 1991). The judge, however, denied Arch's motion to dismiss Morgan's complaint solely because Morgan "apparently did not have the benefit of counsel until his present attorney filed a Notice of Appearance." Order at 2 (Feb. 26, 1998). We find this rationale legally insufficient, and on this question, would have remanded the case to him for further analysis consistent with Commission precedent.

We also disagree with the majority's blanket statement that "Morgan's pursuit of related complaints through the Union indicates that he was not sleeping on his rights." Slip op. at 7. We do not believe that the record clearly establishes that Morgan's grievance had anything to do with his rights under the Mine Act. This question, too, we would have remanded to the judge to determine whether Morgan's grievance was sufficiently related to his later complaint to the Secretary so as to constitute, in whole or part, good cause for his delay in filing his discrimination complaint. In light of our decision to affirm the judge on the merits, however, any such remand would be unnecessary.

other applicant.[2] *Id.*

The Commission must exercise a considerable degree of deference when reviewing a judge's credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *Id*. at 1881 n.80. Exceptional circumstances that would warrant overturning a judge's credibility findings include where such findings are self-contradictory, based on irrational criteria, or contradict the evidence. *Id*. As the Eleventh Circuit has explained, "[s]ince the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination." *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984). In light of this, the *Ona* court concluded that "as a general rule courts are bound by the credibility choices of the ALJ, even if they 'might have made different findings had the matter been before [them] . . . de novo.'" *Id*. at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)).[3]

We find no exceptional circumstances or any other basis for overturning the judge's credibility resolutions here. The judge's findings are not self-contradictory or based on irrational criteria. Furthermore, none of the record evidence contradicts the judge's credibility findings. Indeed, in vacating these findings, the majority can point to no single piece of evidence that contradicts the findings. Instead, the majority bases its ruling on what it sees as a "backdrop of knowledge of, and hostility towards, Morgan's protected . . . activities" (slip op. at 11), and the inferences it is willing to draw from this "backdrop."

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[2] We also note that Morgan's experience on the roof bolter, as that on the continuous miner, was limited to relieving other miners when on lunch breaks or on overtime. 20 FMSHRC at 571. Morgan admittedly failed the hands-on test on the miner. *Id.* at 573. We further note that Morgan believed that he was entitled to a job at the Conant Mine, without regard to his job skills. Tr. 102.

[3] *Cf. Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided."). *See also Secretary of Labor v. Consolidation Coal Co.*, No. 98-1613, 1999 WL 335777, at *3 (4th Cir. May 27, 1999) ("'[w]e must defer to the ALJ's credibility determinations . . . despite our perception of other, more reasonable conclusions from the evidence,'" (citations omitted)) (affirming separate opinion of Commissioners Riley and Verheggen in *Consolidation Coal Co.*, 20 FMSHRC 227, 238-42 (Mar. 1998)); *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

In considering the evidentiary effect of inferences, the Commission has held that judges *may* draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). While it is possible that inferences could have been drawn from the record, it is for the trier of fact to decide between reasonable inferences. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995). In addition, the effective use of inferences encompasses the right not to draw them, as well as to draw them, in the appropriate circumstances.

Here, in light of direct credited testimony from Cotter (and other Conant officials), the judge did not credit some of Morgan's testimony and refused to draw certain inferences from the record. The judge's rejection of inferences that are contravened by direct, credited (in several instances, uncontradicted) testimony is not a basis for vacating his decision. We reject the majority's insistence on drawing inferences in the absence of evidence,[4] and suggesting to the judge that he draw similar inferences that are contrary to testimony that he has seen, heard, and credited. It is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence. *See Mid-Continent Resources, Inc*., 6 FMSHRC 1132, 1139 (May 1984).

In sum, we are not willing to vacate the judge's explicit credibility rulings. To us, the majority's decision appears to be premised upon an assumption that Cotter was not telling the truth and that the judge was too myopic to see through his deceptive testimony in order to comprehend what really happened at the Conant Mine. Taking a speculative approach and acting on little more than a sympathetic hunch, our colleagues sweep away the judge's thorough review of the evidence and his credibility findings, a move that lacks support in the record. Instead, the majority relies on "the cumulative force of [the] evidence" (slip op. at 7-8) without reference to a single specific piece of evidence that contradicts the judge's dispositive credibility findings.

[4] Although our colleagues "dispute" this point (slip op. at 12), their opinion speaks for itself. For example, they characterize as "suspect" Cotter's testimony that no Arch management official ever approached him about Morgan. Slip op. at 9. The inference they appear to believe and seek to have the judge consider is that Cotter somehow knew about Morgan's protected activity, notwithstanding the ample and direct evidence to the contrary.

The Commission cannot, and reviewing courts will not, ignore the fact that the trial judge alone was able to observe the demeanor of Cotter and others on the stand, and is thus uniquely situated to evaluate the credibility of witnesses. We fear that under the majority's emotional approach, the Commission will be all too ready to second guess its judges in future cases, substituting its judgment for that of a judge. To avoid such confusion and disorder, we would affirm the judge's decision here because it is supported by substantial, credible evidence.[5]

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[5] In light of our decision, we need not reach the questions raised by the majority regarding whether the hands-on test was "a possible pretext for refusing to reinstate Morgan or whether Morgan was the victim of disparate treatment in application of the test." Slip op. at 12.

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