FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 15, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of WILLIAM KACZMARCZYK	:	
v.	:	Docket No. PENN 97-157-D
READING ANTHRACITE COMPANY	:	

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

DECISION

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

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that Reading Anthracite Company ("Reading") did not violate section 105(c) of the Act,[1] 30 U.S.C. § 815(c), when it rejected William Kaczmarczyk for the position of temporary haul truck driver and delayed awarding him the position of water truck driver. 20 FMSHRC 397, 411 (Apr. 1998) (ALJ). The Commission granted the petitions for discretionary review filed by Kaczmarczyk and the Secretary of Labor challenging the judge's decision. For the reasons that follow, we affirm the judge's decision.

[1] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this Act.

I.

Factual and Procedural Background

Kaczmarczyk began working for Reading in 1976 at its Maple Hill/Ellangowan coal mine in Pennsylvania. Tr. 12-13. As a result of injuring his back at work in 1989, he stopped working and was placed on workers' compensation. 20 FMSHRC at 398; S. Ex. 4 at 19, 37-44. In January 1992, he presented Reading with a report from Dr. Keith R. Kuhlengel, his personal physician and a neurosurgery specialist, stating that he was able to return to work on a trial basis. 20 FMSHRC at 398; S. Exs. 26 & 29. At Reading's request, a second physician, Dr. Robert Gunderson, also examined Kaczmarczyk and determined he was able to work. 20 FMSHRC at 398; S. Ex. 30. He returned to work in January 1992 as an electrician on Reading's light duty program.[2] 20 FMSHRC at 398.

From June to September 1995, Kaczmarczyk drove a haul truck and a water truck on an irregular basis. *Id.* at 399. In July and August 1995, he reported a number of health and safety problems to Reading concerning the company's trucks and pumphouse. *Id.* at 406-07. On September 13, 1995, Kaczmarczyk was told by Frank Derrick, Reading's general manager, to pick up garbage in an area that included an incline, but he refused because he believed it was unsafe. *Id.* at 407; Tr. 124-25, 218-19.

In late September 1995, Kaczmarczyk re-injured his back and was again placed on workers' compensation. 20 FMSHRC at 405 n.3, 411. On December 20, Dr. Kuhlengel issued a report that Kaczmarczyk could return to work provided his job did not involve bending, squatting, twisting, pushing, pulling, crawling, climbing, kneeling, or overhead work. *Id.* at 400. He also stated that Kaczmarczyk should not lift or carry over 10 pounds. *Id.* A copy of the report was given to Reading. Tr. 165-66. On June 5, 1996, Dr. Kuhlengel evaluated Kaczmarczyk and determined that he could return to work, but restricted him from lifting more than 10 pounds, doing overhead work, and bending, pushing, or pulling. 20 FMSHRC at 410-11; S. Ex. 12 at 2. A copy of the evaluation was sent to Reading. 20 FMSHRC at 410.

On June 24, Reading posted a water truck driver position and Kaczmarczyk applied for it. S. Ex. 8; Tr. 351-53. Under the Contract, such posted positions at Reading are awarded to the most senior and qualified employee who applies. 20 FMSHRC at 400-01; Tr. 435-36; S. Ex. 4 at 85. The position was awarded to a more senior driver and Kaczmarczyk did not dispute the award. Tr. 351-53. On September 25, Dr. Kuhlengel sent Reading a letter repeating the restrictions he recommended on June 5 but adding that Kaczmarczyk was able to drive a truck with an air seat. 20 FMSHRC at 400; S. Ex. 13.

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[2] According to the collective bargaining agreement covering Reading's employees (the "Contract"), the light duty program involves work "in which occupations [sic] hazards, lifting of weight and exposure to extremes of temperature, dampness and dust are substantially less than those of the job held by the Miner at the time of his disabling accident . . . ." S. Ex. 4 at 37-38.

On October 8, 1996, Reading posted an opening for a temporary haul truck driver position and Kaczmarczyk applied for it. S. Ex. 25. On October 16, Reading awarded the position to another employee even though Kaczmarczyk was the most senior applicant. 20 FMSHRC at 401; Tr. 16. Later that day, pursuant to the Contract, Kaczmarczyk had a Step 1 grievance meeting with Reading to appeal its decision not to award him the haul truck job. Jt. Ex. 1; R. Ex. 3.

At a Step 2 grievance meeting on November 6, Kaczmarczyk told Reading that he had a doctor's authorization to work as a truck driver. 20 FMSHRC at 402. On November 11, Kaczmarczyk filed a complaint with MSHA claiming that Reading discriminated against him when it did not award him the haul truck position. Compl. at 6. On November 13, Dr. Kuhlengel issued a report stating that "[a]s long as the [truck driver] position is within the stated restrictions, [Kaczmarczyk] should be able to perform that job. His restrictions continue to be no overhead working as well as a 10-pound lifting restriction. He should not be bending, squatting, twisting, pulling, crawling, or climbing." S. Ex. 14 at 2. At a Step 3 grievance meeting on November 14, Kaczmarczyk and Jay Berger, a United Mine Workers of America representative, informed Reading that Dr. Kuhlengel had released Kaczmarczyk to drive a haul truck. 20 FMSHRC at 402. At the meeting, Kaczmarczyk asked Reading to prepare a job analysis of the haul truck position. *Id.* at 403.

On December 27, Derrick sent a letter to Berger stating that Kaczmarczyk was not awarded the position because of his medical restrictions. S. Ex. 21. Following a request for clarification from Kaczmarczyk (20 FMSHRC at 403), Dr. Kuhlengel sent a letter to him on January 19, 1997, stating that "you are able to drive a truck with an air seat. You would not be able to load and unload . . . a freight truck because that obviously would require pushing, pulling, carrying, climbing and twisting, which will aggravate your spinal condition." S. Ex. 15. Kaczmarczyk gave a copy of the letter to Reading. Tr. 376.

At Berger's request, Dr. Kuhlengel sent Berger a letter on February 10, stating that Kaczmarczyk's condition would not prevent him from climbing several steps to a truck cab. 20 FMSHRC at 403; S. Ex. 7. He added that Kaczmarczyk could check the truck's fluid levels and that he should keep "bending, squatting, twisting, pushing, pulling, crawling, climbing and kneeling . . . to less than 15 minutes total in an 8-hour day." S. Ex. 7.

At a Step 4 grievance meeting on February 11, Berger gave Derrick a copy of Dr. Kuhlengel's February 10 letter. 20 FMSHRC at 403; Tr. 392. On February 24, Reading sent a job analysis of the haul truck position (the "haul truck job analysis") to Dr. Kuhlengel, who issued a report on March 7 indicating that Kaczmarczyk's physical restrictions did not prevent him from working as a haul truck driver. 20 FMSHRC at 404. On that same day, Reading informed Kaczmarczyk by letter that he should make arrangements to return to work. *Id.*; R. Ex. 4.

On March 10, 1997, Reading called Kaczmarczyk to tell him to report to work as a haul truck driver. 20 FMSHRC at 404; Tr. 207. When he went to the mine a half hour after the call, he was told that the haul truck driver position no longer existed because of the completion of a new conveyor belt system on March 2. 20 FMSHRC at 404; Tr. 376. Upon learning that the haul truck driver position was not available, Kaczmarczyk requested a job analysis of the position of water truck driver, apparently with a view to bumping into that position. Tr. 182, 276, 380-81. On March 13, Reading completed its job analysis of the water truck position and sent it to CRA Managed Care, Inc. ("CRA"),[3] which forwarded it to Dr. Kuhlengel on April 9. 20 FMSHRC at 401, 405. The job analysis indicated that the water truck position involved similar physical demands as the haul truck position but in addition required climbing eight times a shift, standing for a total of one hour, walking a total of one hour, and turning a water valve. *Id.* at 405; S. Ex. 20. Dr. Kuhlengel issued a report on May 16 stating that Kaczmarczyk was physically able to drive a water truck. 20 FMSHRC at 405. On May 19, Kaczmarczyk returned to work at Reading as a water truck driver. *Id.*

Kaczmarczyk's discrimination complaint concerning the haul truck position proceeded to hearing on November 18 and 19, 1997. During the hearing, the judge amended the complaint, at the Secretary's request and Reading's agreement, to include a second adverse action covering Reading's alleged delay in awarding Kaczmarczyk the position of water truck driver. Tr. 32-39.

The judge held that Reading did not discriminate against Kaczmarczyk in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 20 FMSHRC at 411. He found that Kaczmarczyk engaged in protected activity when he reported health and safety problems to Reading during July and August 1995, and that Reading took adverse actions toward Kaczmarczyk when it rejected him for the temporary haul truck job and delayed awarding him the water truck job. *Id.* at 406-07. The judge found that the Secretary established a prima facie case of discrimination by showing some discriminatory intent by Reading when it took these adverse actions against Kaczmarczyk. *Id.* at 409-410. However, based on Kaczmarczyk's medical restrictions, the judge determined that Reading would have rejected him for the haul truck position in any event for the legitimate business reason that Kaczmarczyk could not meet the physical requirements of the job. *Id.* at 410-11. The judge also found that Reading had a legitimate business reason for obtaining a job analysis of the water truck position because the job was more physically demanding than the haul truck driver position. *Id.* at 411. Accordingly, the judge determined that Reading established its affirmative defense by proving it would have taken the adverse actions solely for legitimate business reasons related to Kaczmarczyk's inability to perform the physical demands of the jobs. *Id.*

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[3] CRA is Reading's contracted managed care consultant with respect to workers' compensation claims. Tr. 14.

II.

Disposition

The Secretary argues that the judge erred in finding that Reading did not violate section 105(c). S. PDR at 1-2.[4] She asserts that he incorrectly applied a "not unreasonable" standard when analyzing Reading's affirmative defense instead of determining whether Reading proved it would have acted as it did for nondiscriminatory reasons alone. *Id.* at 8-12. The Secretary argues that the judge failed to place the burden of persuasion on Reading to establish its affirmative defense. *Id.* at 12 n.3. She contends that the judge's conclusion that Reading established its affirmative defense is not supported by substantial evidence. *Id.* at 20-27. She also argues that the judge failed to consider relevant evidence concerning Reading's delay in completing the haul truck job analysis and its failure to pursue alternatives, such as contacting Kaczmarczyk's doctor to clarify his restrictions. *Id.* at 12-19. The Secretary requests that the Commission reverse the judge's decision and remand the case for determination of damages and assessment of an appropriate civil penalty. *Id.* at 27.

Reading responds that the judge applied the correct standard to its affirmative defense by determining that it would have carried out the adverse actions for nondiscriminatory reasons alone. R. Br. at 6-9. It argues that the judge compared Kaczmarczyk's restrictions with the physical requirements of the haul truck job and concluded correctly that, at the time the job was posted, Kaczmarczyk could not meet the physical demands of the job. *Id.* at 13-16. Reading asserts that the judge correctly found that it did not discriminate against Kaczmarczyk by performing a job analysis of the water truck position because Kaczmarczyk requested the job analysis. *Id.* at 16-17. In addition, the operator contends that the judge considered all the relevant evidence in the record. *Id.* at 9-13. Reading requests that the Commission affirm the judge's determination. *Id.* at 17.

A. Whether the Judge Applied the Correct Legal Standard

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in

[4] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary and Kaczmarczyk designated the Secretary's petition as their opening brief.

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 these issues, the operator bears the ultimate burden of persuasion. *Pasula*, 2 FMSHRC at 2800.

Here, at issue is whether the judge, having found a prima facie case of discrimination by Reading, used the correct legal standard when examining Reading's affirmative defense. We conclude that he did. Concerning the haul truck position, the judge found that Reading had "a legitimate business concern . . . that Kaczmarczyk be physically capable of operating a haul truck." 20 FMSHRC at 410. Similarly, with respect to the water truck position, the judge found that Reading had a "legitimate concern" whether Kaczmarczyk could perform the job. *Id.* at 411. The judge concluded that Reading would have taken the adverse actions for legitimate nondiscriminatory business reasons alone. *Id.*

We do not agree with the Secretary's argument that the judge erred by basing his analysis on whether Reading's adverse actions were reasonable business decisions rather than on whether it would have acted as it did for nondiscriminatory reasons alone. Although the judge stated that Reading's business concerns were "not unreasonable," his conclusion that it would have taken the adverse actions solely for legitimate business reasons is faithful to *Pasula-Robinette. Id.* at 410-11.

We also do not agree with the Secretary's argument that the judge failed to shift the burden of persuasion to Reading in his analysis of its affirmative defense. S. PDR at 12 n.3. The judge's statements that "Reading has established its affirmative defense" and "Reading has established that the adverse actions complained of would have been taken . . . based solely upon" nondiscriminatory grounds show that he properly placed the burden of persuasion on Reading. 20 FMSHRC at 410-11.

B. Whether Substantial Evidence Supports the Judge's Finding that Reading Established an Affirmative Defense

1. Haul Truck Driver Position

In determining whether substantial evidence[5] supports the judge's finding that Reading established an affirmative defense for failing to award Kaczmarczyk the haul truck job, we examine two subsidiary issues: first, whether the judge failed to consider evidence that Reading delayed the haul truck job analysis and failed to pursue other alternatives in order to avoid awarding the job to Kaczmarczyk; and second, whether there is sufficient evidence in the record to support the judge's finding that Reading prevailed on its affirmative defense. Contrary to the Secretary's assertions, the judge's decision indicates that he did consider the Secretary's arguments. He stated that he took into account the Secretary's claim "that the only motive was one of retaliation as set forth in pages 9-25 of [her] brief," which included her assertion that Reading purposefully delayed offering Kaczmarczyk the haul truck position and failed to pursue alternatives such as contacting his doctor. 20 FMSHRC at 410; S. Post-hearing Br. at 9-25. The judge noted the Secretary's position that pretext was shown by evidence that it took Reading four months to contact Dr. Kuhlengel following Kaczmarczyk and Berger's request to do so. 20 FMSHRC at 410. The delay in contacting Dr. Kuhlengel and the delay in creating a job analysis are closely related because Reading had to contact Dr. Kuhlengel in order to complete the job analysis. *Id.* at 404; Tr. 59-60.[6] In terms of Reading's obligations to pursue alternatives, the judge found that Reading was not obligated by previous practice or the Contract to contact Kaczmarczyk's doctor or make referrals to other doctors.[7] 20 FMSHRC at 402. Moreover, the

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[5] 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 Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "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)).

[6] In the "Findings of Fact" section of his decision, the judge described the events and dates surrounding Reading's rejection of Kaczmarczyk for the haul truck position, Kaczmarczyk's request to Reading for a job analysis of the position, and Reading's issuance of the job analysis. 20 FMSHRC at 400-04.

[7] We disagree with our dissenting colleague's argument that Reading's affirmative defense should be rejected on the ground that, contrary to established practice, Reading did not require Kaczmarczyk to obtain a second medical opinion regarding his ability to perform the haul truck driver duties. Slip op. at 15-16; Tr. 465. The dissent claims that this treatment compares

judge went on to state: "I have considered all of these arguments, as well as the balance of the Secretary's arguments as set forth in the post hearing brief. For the reasons that follows [sic], I conclude that Reading has established its affirmative defense, and I reject the Secretary's arguments." 20 FMSHRC at 410.

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). We thus have held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). However, the Commission has also stated that "[i]t is within a judge's discretion to sift through the testimony presented and to base his decision on that which he deems to be credible, relevant and dispositive of the issues before him." *Damron v. Reynolds Metal Co.*, 13 FMSHRC 535, 542 (Apr. 1991). The judge explicitly, albeit summarily, considered the Secretary's arguments and rejected them. He then set forth his rationale for holding that Reading established an affirmative defense, relying on Kaczmarczyk's physical restrictions and the physical requirements of the jobs. 20 FMSHRC at 410-11. By explaining in detail his analysis of other evidence that led him to find that Reading established its affirmative defense, the judge complied with Rule 69(a).

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unfavorably to the "past procedure of having Kaczmarczyk independently evaluated." Slip op. at 16. In fact, the record reveals only two other distinguishable instances when Kaczmarczyk provided medical releases, and does not establish the existence of any definitive procedure regarding the necessity for obtaining second opinions. One incident involved Kaczmarczyk's presentation of a medical release for an electrician's job in 1992, before he engaged in protected activities, but it is unclear whether the medical restrictions in that release were relevant to the job. S. Ex. 29. A second opinion was obtained. S. Ex. 30. The other incident involved Kaczmarczyk's request to perform overtime work in 1995, after he had engaged in protected activity, when he provided Reading with a doctor's report stating that he could work overtime. S. Ex. 26. Reading then asked for a second medical opinion — to *confirm* that he could work overtime. S. Ex. 10. In contrast, when he applied for the haul truck position in 1996, the first doctor's report did not state that he could perform that job — instead, it included relevant restrictions. Consequently, there was nothing for a second doctor to confirm. Thus, Kaczmarczyk's situation in 1996 was simply not comparable to that of 1995.

The dissent also contends that Reading's affirmative defense was suspect because, contrary to established practice, Derrick did not consult with Rick Muntone, one of Reading's accountants (Tr. 260-61), and Dave Wolfe, Reading's safety director (Tr. 133-34), about Kaczmarczyk's application for the haul truck position. Slip op. at 15-16. However, the record is not clear on this issue because Derrick testified that he did consult with Muntone and Wolfe, but Muntone testified that he was not consulted by Derrick. Tr. 150-51; 263-64. The judge made no finding as to whether or not Derrick did consult with co-workers regarding Kaczmarczyk's application.

Next, we turn to the Secretary's argument that substantial evidence does not support the judge's conclusion that Reading established its affirmative defense. We find that substantial evidence supports the judge's determination that Reading would have rejected Kaczmarczyk for the haul truck position based solely on the nondiscriminatory reason that he could not meet the physical requirements of the job.[8]

The judge correctly found that Kaczmarczyk was subject to bending restrictions when he was rejected for the haul truck position. The judge noted that Dr. Kuhlengel's reports of December 20, 1995, June 5, 1996, and September 25, 1996, stated that Kaczmarczyk was restricted from bending. 20 FMSHRC at 410-11. He also noted that the haul truck job analysis included bending and he accepted Derrick's testimony that the job required it. *Id.* at 401, 410-11. The judge also found that "[a] miner must bend to perform the preshift inspection and to check fluids on the haul trucks." *Id.* at 401. He gave little weight to Kaczmarczyk's testimony that fluid checks do not require bending, as Kaczmarczyk had not performed such checks. *Id.* He also discredited Kaczmarczyk's claim that only mechanics and not drivers performed pre-inspections and fluid checks on the haul trucks.[9] *Id.*

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 *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). We find no basis for overturning the judge's refusal to grant much significance to Kaczmarczyk's testimony that the fluid checks did not require bending and that only mechanics performed the pre-inspections and fluid checks on the haul trucks. We find that Kaczmarczyk's bending restrictions and the haul truck job's

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[8] We disagree with our dissenting colleague's assertion (slip op. at 13) that we have overlooked evidence of Kaczmarczyk's past safety activity and the fact that the Commission determined, in a different case, that Reading discriminated against Kaczmarczyk in violation of section 105(c) because of his protected safety activity. *See Secretary of Labor on behalf of Kaczmarczyk v. Reading Anthracite Co.*, 17 FMSHRC 784, 785 (May 1995) (ALJ). These matters were appropriately considered by the judge when he found a prima facie case of discrimination by Reading (20 FMSHRC at 406-10), which Reading does not challenge on review. The issue on review, however, is whether substantial evidence supports the judge's conclusion that Reading established an affirmative defense by showing that it would have acted as it did notwithstanding Kaczmarczyk's protected activities.

[9] Derrick and Berger's testimony and the haul truck job analysis indicate that the position involved pre-shift inspections and fluid checks. Tr. 120-21, 138-41; S. Ex. 19.

bending requirements support the judge's finding that Reading would have rejected Kaczmarczyk for the legitimate business reason that he could not meet the physical requirements of the job.

The judge's conclusion that Reading established its affirmative defense is further supported by the record evidence on overhead work and lifting. The judge noted that the June 5, 1996 medical report stated that Kaczmarczyk was restricted from doing overhead work and lifting and that the haul truck job analysis indicated that the position required lifting above the shoulder level.[10] 20 FMSHRC at 410-11; S. Ex. 19 at 2. Based in part on the evidence concerning overhead work and lifting, the judge found that it was reasonable for Reading to conclude in October 1996 that Kaczmarczyk could not perform the duties of the haul truck job. 20 FMSHRC at 410-11.

In addition, the judge found that the June 5 and September 25, 1996 medical reports about Kaczmarczyk listed pushing and pulling restrictions. *Id.* at 400, 410-11. Although he failed to note that the haul truck job analysis included pushing and pulling requirements (*see* S. Ex. 19 at 1-3), those requirements provide further support for the judge's finding that Reading would have rejected Kaczmarczyk for the haul truck position for the legitimate business reason that he could not meet the physical requirements of the job.[11]

In sum, we find that Kaczmarczyk's restrictions on bending, overhead work, lifting, pushing, and pulling provide substantial evidence to support the judge's finding that Reading established its affirmative defense that it would have taken the same action concerning the haul truck position based solely on legitimate business reasons.

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[10] The haul truck job analysis rated the requirement to reach above the shoulder as 20% of the haul truck job. S. Ex. 19 at 2. The job analysis stated that the position required lifting a 15 pound bucket of antifreeze above the shoulders but that such lifting could be avoided by using a rope to pull the bucket onto the truck. *Id.* at 2, 3.

[11] The Secretary argues that the judge erred in finding that Kaczmarczyk was subject to climbing and squatting restrictions when he was rejected for the haul truck position. S. PDR at 20-22. The record evidence as a whole is not conclusive on this issue. When Kaczmarczyk was rejected for the haul truck position in October 1996, his two latest medical reports (the June 5 and September 25, 1996 reports) did not mention climbing or squatting restrictions. S. Exs. 12, 13. However, an earlier December 20, 1995 report and two reports after his transfer (the November 13, 1996 and January 19, 1997 reports) contained climbing and squatting restrictions. S. Exs. 11, 14, 15. Even if the judge erred concerning Kaczmarczyk's climbing and squatting restrictions, these errors would be harmless because the record provides other evidence, i.e., Kaczmarczyk's bending, overhead work, lifting, pushing, and pulling restrictions, that supports the judge's finding that Reading would have rejected Kaczmarczyk for the haul truck position for the legitimate business reason that he could not meet the physical requirements of the job.

2. Water Truck Driver Position

When Reading carried out a job analysis of the water truck position in March 1997, Kaczmarczyk's latest medical report, dated February 10, 1997, stated that he could drive a truck and climb up to a truck cab, but that "bending, squatting, twisting, pushing, pulling, crawling, climbing and kneeling should be restricted to less than 15 minutes total in an 8-hour day." S. Ex. 7. The water truck job involved greater physical demands than the haul truck job, such as more climbing, walking, and standing, and turning a water valve. 20 FMSHRC at 411; Tr. 273, 339-46. Thus, we find that substantial evidence supports the judge's conclusion that, given Kaczmarczyk's numerous medical restrictions and the increased physical demands of the water truck job, it was not unreasonable for Reading to carry out the job analysis to determine if he could perform the water truck job. 20 FMSHRC at 411. Moreover, as Reading notes, Kaczmarczyk himself requested the analysis. R. Br. at 16. We also find that substantial evidence supports the judge's rejection of the Secretary's argument that Reading discriminated against Kaczmarczyk by delaying the job analysis. 20 FMSHRC at 411; S. PDR at 25-27. Reading completed the job analysis and sent it to CRA on March 13, 1997, just a few days after Kaczmarczyk showed an interest in the position. 20 FMSHRC at 405. CRA then sent it to Dr. Kuhlengel on April 9, 1997, who approved and returned it to Reading on May 16, 1997. *Id.* Kaczmarczyk returned to work as a water truck driver on May 19, 1997. *Id.* Thus, the record evidence indicates that the two month delay in finalizing the job analysis was due to delays by CRA and Dr. Kuhlengel, not Reading. Accordingly, we affirm, on substantial evidence grounds, the judge's decision that Reading established its affirmative defense to the discrimination claim regarding the delay in awarding Kaczmarczyk the water truck position.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Reading did not violate section 105(c).

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

This case turns upon the issue of whether Reading successfully established an affirmative defense to the judge's adjudication of a prima facie case of discrimination. Because I conclude that the record compels the conclusion that Reading did not establish such an affirmative defense, I dissent.

The majority has overlooked a very significant fact in this case, that is — the record establishes that, by the time William Kaczmarczyk tried to obtain the truck driver positions at issue, he had a history of safety activism which was met with antagonism by the management at the Reading mine. In 1993, Kaczmarczyk was the treasurer of Local 7226 of the United Mine Workers of America (UMWA). *Secretary of Labor on behalf of Kaczmarczyk v. Reading Anthracite Co.*, 17 FMSHRC 784, 785 (May 1995) (ALJ, Amchan). He was also a mine committeeman and the safetyman for his local union, which represented Reading's employees. *Id.* On May 24, 1995, a Commission administrative law judge, in a different case not at issue here, determined that Reading discriminated against Kaczmarczyk in violation of section 105(c) of the Mine Act because of his activities as a walkaround representative for an MSHA inspection. *Id.* at 784, 797. The judge there permanently reinstated Kaczmarczyk (*id*. at 798) and Kaczmarczyk drove haul and water trucks for Reading on an irregular basis. 20 FMSHRC at 399. Just months after he was reinstated, between July and September 1995, Kaczmarczyk made a number of safety complaints, to which the parties stipulated and the judge in this case found were protected activities under the Mine Act. *Id.* at 406-07. Kaczmarczyk's extensive protected activity serves as an integral backdrop for his current discrimination complaint against Reading.

This case involves Kaczmarczyk's attempt to return to active duty work at Reading in October of 1996, after he injured his back in September of 1995. *Id.* at 400-01, 405 n.3. Here, the judge determined that the Secretary established a prima facie case of discrimination when it awarded the haul truck driver position to a less senior miner than Kaczmarczyk. *Id.* at 409-10. In particular, the judge found that Reading had "animus toward the protected activities" of Kaczmarczyk, as exhibited by the personal statements made by the General Manager of Reading, Frank Derrick, to Kaczmarczyk. *Id.* at 409; Tr. 124-25. Upon a finding of prima facie case of discrimination, it became incumbent upon the operator to establish an affirmative defense. *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). In *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521 (Aug. 1990), the Commission explained:

> [A]n operator proves an affirmative defense pursuant to the *Pasula-Robinette* test if it shows that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. The operator must prove that it would have disciplined the miner

> anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee . . . . As a corollary to these principles, it follows that an operator does not establish a *Pasula-Robinette* affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed "independent" basis for discipline is actually an extension of the operator's discriminatory conduct. Further, pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.

12 FMSHRC at 1534 (citations and internal quotations omitted).

There is one disturbing and undisputed fact in this case that sheds significant doubt on Reading's asserted justifications for its delay in awarding a haul truck driver position to Kaczmarczyk. On March 10, 1997, approximately five months after Kaczmarczyk bid on the truck job, Reading called Kaczmarczyk and asked him to report to work. 20 FMSHRC at 404. He arrived a half hour later and was told that there was no position available. *Id.* Why would the company call him into work and then provide him with no position? Neither the Judge nor the majority answers this compelling question or even discusses its relevance. Because of this alarming fact, I am led to the conclusion that Reading's asserted business justification was nothing more than a pretext for discriminating against a miner with a history of safety activism at the mine.

The Secretary asserts that Reading waited to resolve Kaczmarczyk's dispute until the position was effectively eliminated. I cannot help but agree. General Manager Derrick testified that he was aware that the new conveyor system, that was to replace the haul truck drivers, would be operational by March of 1997. *Id.*; Tr. 211. Therefore, all Reading needed to do to keep Kaczmarczyk out of active duty was to delay the grievance procedure until after the position was no longer available. From a review of the record, that is exactly what happened.

On September 25, 1996, Kaczmarczyk's doctor, Dr. Kuhlengel, sent a letter to Reading permitting Kaczmarczyk to drive a truck with an air seat and repeating the restrictions he recommended in an earlier letter sent on June 5, 1996.[1] 20 FMSHRC at 400; S. Ex. 13.

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[1] On June 5, 1996, Kaczmarczyk's doctor, Dr. Kuhlengel evaluated Kaczmarczyk and determined that he could return to work, but restricted him from lifting more than 10 pounds, doing overhead work, and bending, pushing, or pulling. 20 FMSHRC at 410. A copy of the evaluation was sent to Reading. *Id*.

Kaczmarczyk gave the letter to Reading. 20 FMSHRC at 400. On October 8, 1996, Reading posted an opening for a temporary haul truck driver position and Kaczmarczyk applied for it. S. Ex. 25. On October 16, Reading awarded the position to another employee even though Kaczmarczyk was the most senior applicant. 20 FMSHRC at 401; Tr, 16. Under the Contract, such posted positions at Reading are awarded to the most senior and qualified employee who applies. 20 FMSHRC at 400-01.

After learning that he was not awarded the position, on October 16, 1996, Kaczmarczyk had a Step 1 grievance meeting with Reading to appeal its decision not to award him the haul truck job. Jt. Ex. 1; R. Ex. 3. Step 2 and Step 3 grievance meetings were held on November 6 and November 14, at which Kaczmarczyk claimed that he was permitted to drive a truck as authorized by Dr. Kuhlengel. 20 FMSHRC at 402. At the November 14 meeting, Kaczmarczyk and Jay Berger, a UMWA representative, asked Reading to prepare a job analysis of the haul truck position. *Id.* at 402-03. No response was forthcoming from the company and, on December 4, union representative Berger sent a letter to Derrick, informing him that Kaczmarczyk had a release from his doctor and asking for the reasons why he had been denied the truck driver position. S. Ex. 5. On December 27, six weeks after the Step 3 meeting, Derrick sent a letter in reply to Berger stating that Kaczmarczyk's medical restrictions were the reason for denying him the position. S. Ex. 21. At the Step 4 grievance meeting, on February 11, 1997, Berger gave Derrick a copy of Dr. Kuhlengel's letter that clarified that he could perform other duties associated with truck driving, such as checking truck fluid levels and climbing several steps into the cab. 20 FMSHRC at 403; S. Ex. 7. A job analysis was finally ordered and it was confirmed on March 7 that Kaczmarczyk's physical restrictions did not prevent him from working as a haul truck driver. 20 FMSHRC at 404.

The problem is that by the time Kaczmarczyk was awarded the position, there was no position to be had and the operator forced Kaczmarczyk to start the process all over again resulting in additional delay. Incredibly the judge misses the obvious point — that Reading's delay and offer of a non-existent job was motivated by its discriminatory intention to keep Kaczmarczyk, who Derrick called the "downfall of Reading," (*id*. at 409), out of a job. When enacting the Mine Act, Congress explained that the anti-discrimination provision was intended to protect miners "against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits . . . , but also against the more ***subtle*** forms of interference." S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 ("*Legis. Hist.*") (emphasis added). Extending a miner an offer of a non-existent job qualifies as the type of subtle discrimination the Mine Act was intended to reach!

In addition to this unexplained empty job offer on March 10, Reading's affirmative defense is further undercut by the evidence that Kaczmarczyk received disparate treatment when he was denied the truck driver position in October of 1996. Although the judge determined that there was "no evidence that Reading was obligated to contact . . . another physician," (20

FMSHRC at 402), the judge seems to have overlooked that, when Kaczmarczyk attempted to re-enter the work force in the past and presented a doctor's release that also contained restrictions, Reading sent him for an independent evaluation from another physician. S. Exs. 26, 27, 29 & 30. However, in October 1996, the company did not follow its past procedure of having Kaczmarczyk independently evaluated.[2] Further disparate treatment was shown in the way Reading handled the decision to deny Kaczmarczyk the truck driver position. General Manager Derrick testified that normally he would confer with Rick Muntone, who worked with worker's compensation, and safety director Dave Wolfe when considering the bid of an employee with medical restrictions. Tr. 133-34. However, the record revealed that no such conference occurred when it came to Kaczmarczyk's bid for truck driver. Tr. 150-51, 263-64. As the Commission has recognized, pretext may be found, for example where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.[3] *Price and Vacha,* 12 FMSHRC at 1534. Given that Kaczmarczyk's rejection was out of line with normal business practice, I am further led to the conclusion that Reading's asserted business justifications were not the sole motivating factor in its decision not to award Kaczmarczyk the truck driver position.[4]

Further, the medical restrictions on which the judge relied are also suspect. I agree with Secretary that the judge erred in finding that Kaczmarczyk was subject to climbing and squatting restrictions when he was rejected for the haul truck position on October 16. S. PDR at 20-22. The judge incorrectly stated that Dr. Kuhlengel's September 25, 1996 report contained "the same restrictions as . . . his report of June 5, 1996, [including] . . . no bending, climbing, or squatting . . . ." 20 FMSHRC at 411. The June 5 and September 25 reports, which were the two most

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[2] The majority unsuccessfully attempts to distinguish the company's practice of seeking a second opinion in two prior instances on the grounds that Kaczmarczyk had received releases in the past. Slip op. at 7-8 n.7. The majority overlooks that Dr. Kuhlengel's September 25, 1996 letter stated: "he is able to drive a truck with an air seat." S. Ex. 13. Thus, Kaczmarczyk had a release from his doctor to drive the haul truck.

[3] Even though this case turns on whether Reading proved a successful affirmative defense, the judge failed to even meaningfully address the evidence that Reading's rejection of Kaczmarczyk's bid was out of line with its normal business procedures. The majority also recognizes this. Slip op. at 8 n.7. Indeed, the judge's opinion is so seriously deficient in its evaluation of the affirmative defense that it should not be permitted to stand. *See Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (vacating the judge's conclusion when he failed to make appropriate findings and explain the reasons for his decision).

[4] In addition, the judge failed to consider other evidence of disparate treatment, which is crucial in evaluating an affirmative defense. The Secretary attempted to put on evidence that Reading performed a job analysis for a truck driver position for a similarly situated Reading employee, at the same time that Kaczmarczyk was trying to be truck driver. However, the judge incorrectly did not see any relevance to the exhibit and refused its admittance. Tr. 191-92.

recent medical reports at the time of Kaczmarczyk's rejection for the position, *contained no restrictions regarding climbing and squatting.* S. Ex. 12, 13. That leaves the restrictions — no bending, no overhead work and no lifting of over 10 pounds — upon which the judge relied. However, as these were minor aspects of the jobs, the restrictions should not have justified outright refusal of the haul truck position. Instead, if Reading had doubts about Kaczmarczyk's capabilities to perform the job, the company should have ordered an immediate job analysis or had Kaczmarczyk independently evaluated as it had done in the past.

As to bending in order to perform pre-shift evaluations, the judge acknowledged "as a result of a grievance, mechanics still service and start the haul trucks." 20 FMSHRC at 401. What the judge failed to realize from this fact is that, even if drivers sometimes checked the fluids, as he found, it was a minor portion of the job. Derrick admitted that mechanics performed the truck servicing jobs, but added "but that doesn't mean that the workers can't do it." Tr. 460-61; *see also* Tr. 120 (Berger testifying that bending to check fluids is an insignificant part of the job). Although the drivers may have sometimes performed the fluid checks, it is hard to imagine that the company would have outright denied Kaczmarczyk the truck driving job because of his bending restriction when, practically speaking, it was an insignificant part of the job. As to lifting and overhead work, the only item that required above the shoulder work was lifting a bucket of anti-freeze once daily. S. Ex. 19 at 2. Dr. Kuhlengel's September 1996 release letter permitted Kaczmarczyk to lift 10 pounds. Thus, as Derrick conceded, Kaczmarczyk could have managed lifting 20 pounds of anti-freeze by simply making two trips of the bucket. Tr. 145-46. The job analysis also stated that above shoulder lifting was not necessary and could be avoided by using a rope to pull the bucket onto the truck. S. Ex. 19 at 2, 3. Because bending and lifting were such small parts of the job and Kaczmarczyk was not subject to climbing and squatting restrictions,[5] I am led to the conclusion again that Reading's asserted reliance on Kaczmarczyk's medical restrictions was a mere pretext to keep him from returning to work, and was not the sole motivating factor in its denial of the haul truck position.

Given the unexplained March 10 "job" offer, the evidence of disparate treatment, and the weakness of the actual medical restrictions, I am unable to conclude that substantial evidence supports the judge's finding that Reading established an affirmative defense when it denied Kaczmarczyk the haul truck job. Instead, the record compels the conclusion that Reading's asserted justifications were out of line with their business practices and nothing more than a pretext. For this reason, I would reverse the judge's dismissal of the discrimination violation with respect to the haul truck position.

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[5] In affirming the judge's decision that Reading had legitimate business reasons for denying Kaczmarczyk the haul truck driver position, the majority also relies on pushing and pulling restrictions that were listed in Dr. Kuhlengel's 1996 letters. Slip op. at 10. However, the judge never found that pushing or pulling were required components of the haul truck job. 20 FMSHRC at 410. Therefore, those two restrictions are irrelevant to the inquiry of whether Reading had a legitimate basis for denying Kaczmarczyk the truck driver job.

Reading's discriminatory treatment of Kaczmarczyk carried over to the water truck position. On March 7, 1997, Reading received the completed job analysis from Dr. Kuhlengel in which he stated that Kaczmarczyk's physical restrictions did not prevent him from working as a haul truck driver. 20 FMSHRC at 404; S. Ex. 19. It was undisputed that the water truck was only a modified haul truck. 20 FMSHRC at 411; Tr. 188, 271 (testimony of Derrick and Muntone). Furthermore, the reasons that Reading offered, and the judge relied on, to justify a further delay and a second job analysis do not withstand scrutiny when one examines the March 7 job analysis that Reading had in hand. The judge found that operation of the water truck, in contrast to the haul truck, "required climbing eight times a shift, standing a total of [one] hour, and walking a total of an hour." 20 FMSHRC at 411. The March 7 job analysis permitted these activities. S. Ex. 19. The March 7 job analysis provided for climbing 20 percent of the time and standing and walking up to half an hour at any one time without providing a total time restriction in a day. *Id.* Dr. Kuhlengel approved Kaczmarczyk for all of these activities. *Id.* Furthermore, Kaczmarczyk was not restricted from walking and standing in any of the doctor's letters or reports given to Reading in 1996 and 1997. S. Exs. 7, 12, 13, 14, 15. In addition, Dr. Kuhlengel had specifically explained that climbing the steps into a truck cab was permissible in his February 10, 1997 letter. S. Ex. 7.[6] Therefore, substantial evidence does not support the judge's finding that it was reasonable for Derrick to conclude that Kaczmarczyk's restrictions would have prevented him from driving the water truck.

Further, I reject the majority's reasoning that Kaczmarczyk's request of the job analysis for the water truck job somehow legitimizes the company's decision to order a second job analysis. Slip op. at 11. On March 10, Reading pulled the rug from under Kaczmarczyk's feet by ordering him back to work and, on the very same day, informing him that no positions were available. As the Secretary asserts, Kaczmarczyk had no choice but to ask for a job analysis for any and all available positions, as that seemed the only way that Reading was ever going to consider him for a job. S. Reply Br. at 3. Given the similarities of the two truck driver positions, I conclude that Reading should have arranged for Kaczmarczyk to be a water truck driver in March, not in May after a second job analysis.

Indeed, the record can only support the conclusion that ordering the second job analysis on March 12, when Reading already had a March 7 analysis for basically the same position, was a pretext to further delay Kaczmarczyk's return to active duty. Jt. Ex. 1. I therefore conclude that Reading failed to establish an affirmative defense that it was solely motivated by its asserted medical reasons when it delayed awarding Kaczmarczyk the water truck position.

Congress, when enacting the Mine Act, was "cognizant that if miners are to be

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[6] In concluding that the water truck job involved allegedly greater physical demands, the majority relies on the act of turning a water valve. Slip op. at 11. The judge however ruled that, with the exception of climbing, standing and walking, "[a]ll other physical demands of these job[s] were the same." 20 FMSHRC at 411. Moreover, the March 7 job analysis covered simple grasping to the right and left, which included the act of turning the water valve. S. Exs. 19, 20. In that analysis, Dr. Kuhlengel approved Kaczmarczyk's continuous participation in activities that required grasping to the right and left. S. Ex. 19.

encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35, *Legis. Hist.* at 623. Kaczmarczyk had a history of upholding safety rights under the Mine Act at Reading's mine. I conclude that Reading would not have refused Kaczmarczyk the haul truck job, stonewalled him through the grievance procedure, offered him a non-existent job and, to add insult to injury, further delayed in awarding him a water truck position, if not for Kaczmarczyk's safety history and protected activities.[7]

Accordingly, I would reverse the judge's dismissal of the discrimination complaint, and remand solely for consideration of damages and penalty.

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Marc Lincoln Marks, Commissioner

[7] Unlike the majority's assertion (slip op. at 9 n.8), the affirmative defense issue is very much tied to the extensiveness of Kaczmarczyk's protected activities. Much of the evidence pertinent to the affirmative defense, e.g., the non-existent job offer and Kaczmarczyk's disparate treatment, was simply not evaluated by the judge. After analyzing this overlooked evidence, one cannot help but conclude that Kaczmarczyk's treatment was inextricably linked to his significant protected activities, and that Reading failed to show that it would have taken the adverse action in any event for unprotected reasons alone.

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