FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ANDREW GARCIA	:	
v.	:	Docket No. WEST 2001-14-DM
COLORADO LAVA, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners[1]

DECISION

BY: Verheggen, Chairman; and Beatty, Commissioner

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 granted Colorado Lava, Inc.'s motion to dismiss the discrimination complaint filed by the Secretary of Labor on behalf of Andrew Garcia pursuant to section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).[2] 23 FMSHRC 213, 217-18 (Feb. 2001) (ALJ). The judge found that

[1] Commissioner Riley participated in the consideration of this matter, but his term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] 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 applicant for employment in any . . . mine subject to this [Act] because such miner . . . or applicant for employment has filed or made a complaint under or related to this [Act], . . . or because of the exercise by such miner . . . or applicant for employment on

the Secretary failed to establish a prima facie case of discrimination. *Id.* at 222. The Commission granted the Secretary's petition for discretionary review challenging the judge's decision. For the following reasons, we vacate the judge's dismissal of the discrimination complaint and remand for further proceedings.

I.

Factual and Procedural Background

The complainant, Andrew Garcia, worked as a front-end loader operator at Mountain West Colorado Aggregates ("MWCA") from January to June 1997. 23 FMSHRC at 213. He then worked as a truck driver in MWCA's truck division from June 1997 to January 2000, and subsequently as a front-end loader operator at the railroad shipping yard in MWCA's Antonito bagging facility from January to June 2000. *Id.*; Tr. 21. Robert Duran was also employed as a loader operator in MWCA's railroad yard. 23 FMSHRC at 213.

In October 1999, Garcia tagged out a loader because the parking brake did not work. *Id.* at 213-14. The following day, Garcia told David McCarroll, the plant manager and Garcia's supervisor, that the parking brake on the loader was not working. *Id.* at 214. McCarroll responded that the loader did not need a parking brake, and ordered Garcia to continue using the loader. *Id.* Garcia complied and later complained to MSHA. *Id.* at 214, 218. As a result, MSHA came to the Antonito site to inspect the loader, issued a citation to MWCA, and initiated an investigation of McCarroll under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). *Id.* at 214.

Shortly after the incident, McCarroll learned of Garcia's complaint to MSHA, and when he was alone with Garcia, asked him "in a high toned voice" about the complaint. *Id.* Garcia denied filing the complaint. Tr. 34. According to Garcia, McCarroll responded, "You know all about it," and "Bull. It will all come out in the wash." Tr. 34. According to McCarroll, he asked Garcia about the complaint and said, "It will all come out in the wash." Tr. 255-56. Garcia also testified that on another occasion in March 2000, when he was unable to load some marble chips because they were frozen, McCarroll swore at him in a loud voice. 23 FMSHRC at 214. McCarroll recalled the incident, but denied confronting Garcia. Tr. 254-55. Nevertheless, McCarroll testified that he was upset with Garcia for complaining to MSHA, acknowledged that he considered Garcia's complaint an example of his "troublemak[ing]," and stopped speaking to Garcia socially. 23 FMSHRC at 214, 217; Tr. 224-27.

> behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

Sometime, in the spring of 2000, Ronald Bjustrom, the eighty-percent owner of Colorado Lava, became interested in purchasing MWCA's Antonito facility. 23 FMSHRC at 215. Bjustrom visited the facility on four occasions prior to Colorado Lava's purchase on June 5, 2000. *Id.* During this time, Bjustrom decided to eliminate several positions, and asked McCarroll his opinion as to what jobs could be eliminated. *Id.* McCarroll suggested a railroad yard loader operator position and a mechanic position. *Id.* Bjustrom also asked McCarroll which MWCA employees were weak. *Id.* McCarroll told Bjustrom that Garcia and four other employees were weak,[3] and that Garcia caused trouble, tried to stir up trouble between employees, was a poor operator, abused equipment, and had filed union grievances. *Id.* Garcia was the only employee about whom McCarroll said only negative things. *Id.* Bjustrom testified that his conversations with McCarroll had no bearing on which MWCA employees would be rehired by Colorado Lava. *Id.*

In late May or early June 2000, prior to the interviews on June 5, Bjustrom told McCarroll that he would be retained as the plant manager. Tr. 100-01. Also prior to June 5, Bjustrom retained Terry Kissner, who was not an employee of Colorado Lava, to do the hiring. 23 FMSHRC at 215-16. Kissner had done hiring for Bjustrom in the past.[4] *Id.* at 215.

On June 5, Kissner interviewed the MWCA employees individually according to Bjustrom's instructions, which included asking the applicants the same questions from the booklet, asking the mechanics additional questions, including whether they would accept another position, and eliminating one railroad yard loader operator position and one mechanic position. *Id.* at 215-16; Tr. 174. Kissner testified that, with respect to Garcia, he did not look at his personnel file, letters of recommendation, past safety record, or production levels, and that the interviews were a formality. 23 FMSHRC at 216. He also testified: that he did not review the personnel files of any of the employees he interviewed; that before the day of the interviews, he had never visited the Antonito facility; that he had no personal knowledge of the MWCA employees; and that while he spoke with McCarroll "as few as three times," he did not meet McCarroll until the day of the interviews and never discussed the MWCA employees with him. *Id.* at 215-16; Tr. 159, 178. Bjustrom testified that Kissner made the final decision about which employees to rehire, and that he (Bjustrom) did not participate in that decision, although he retained the ultimate authority to hire. 23 FMSHRC at 215, 220.

Garcia testified that on June 1, 2000, he was told of the sale of MWCA's Antonito facility to Colorado Lava and that all employees would be rehired, but was not informed that any jobs would be eliminated. Tr. 39-40. Garcia also testified that on the morning of June 5, Bjustrom gave the employees application packets, and scheduled each employee for an interview. Tr. 40-

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[3] However, loader operator Duran testified that he supervised Garcia at the rail yard, and found him to be a satisfactory worker. Tr. 291-92.

[4] Bjustrom received from his banker a booklet of interview questions, which he gave to Kissner, to use during the interviewing of the MWCA employees. 23 FMSHRC at 215.

41. At the interview, Kissner did not inform Garcia that one loader operator position at the rail yard was being eliminated. Tr. 42, 177.

On June 6, 2000, Colorado Lava purchased MWCA and rehired all of the MWCA employees except Garcia, and Ernie Lucero, a mechanic. 23 FMSHRC at 216 & n.2. After Garcia learned that he was not going to be rehired, he secured a job with MWCA which is farther from his home, has a lower pay scale, and fewer incentives than his former position at the Antonito railroad yard facility. *Id.* at 215. Bjustrom testified that he first learned about Garcia's complaint to MSHA about a week or two after the decision was made not to hire him. Tr. 143-44.

At the conclusion of the Secretary's case, the judge issued a bench decision granting Colorado Lava's motion to dismiss the discrimination complaint on the basis that the Secretary had failed to establish a prima facie case of discrimination. 23 FMSHRC at 217-18, 222. The judge found that Garcia participated in protected activity when he complained about the parking brake on the loader to his supervisor McCarroll and to MSHA. *Id.* at 218. He also found that Colorado Lava took adverse action against Garcia when Kissner decided not to retain Garcia after Colorado Lava's purchase of the Antonito facility. *Id.* He concluded, however, that McCarroll's animus could not be imputed to Kissner, who independently made the decision to take the adverse action against Garcia, because there was no evidence that McCarroll in any way participated in the decision not to hire Garcia, or that either Bjustrom or Kissner had knowledge of Garcia's protected activity. *Id.* at 218-21. The judge therefore concluded that there was no evidence that the adverse action was motivated in any part by Garcia's protected activity. *Id.* at 220-21.

II.

Disposition

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 Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

Here, the judge found that Garcia engaged in protected activity when he complained to McCarroll and MSHA that the parking brake on the front-end loader was not operational, and also determined that the operator took adverse action against Garcia when it declined to hire him.

23 FMSHRC at 218. Substantial evidence supports both of these conclusions.[5] The remaining issue before us is whether the adverse action taken by Colorado Lava was motivated in any part by Garcia's protected activity.

Concerning motivation, in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, the Commission stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). In *Chacon*, the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510.

Here, the judge concluded that the Secretary failed to show motivation based on his finding that Kissner, the person who allegedly made the decision not to hire Garcia, had no knowledge of his protected activity and no animus towards him. However, it is clear that the judge did not explicitly consider all of the evidence of motivation he was required to consider under *Chacon*. Specifically, it appears that the judge failed to consider fully record evidence of disparate treatment toward Garcia by Colorado Lava. In fact, the judge found "some indication in the record of disparate treatment of Mr. Garcia," but concluded that disparate treatment did not occur, stating instead that "there is a difference between establishing the existence of a fact based on an inference, as opposed to proffering evidence of sufficient probative weight to establish a fact in issue." 23 FMSHRC at 218-19.

On this point the judge was incorrect, because the consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences. As the Commission stated in *Bradley v. Belva Coal Co.*, "circumstantial evidence [of discriminatory motivation] and reasonable inferences drawn therefrom may be used to sustain a prima facie case." 4 FMSHRC 982, 992 (June 1982). Furthermore, inferences drawn by judges are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Since the judge's decision is premised upon a mistaken assumption that motivation may not be established through inferences based on circumstantial evidence, he erred.

Indeed, as the judge found, there are many "indication[s] in the record of disparate treatment." For example, the judge explicitly pointed to evidence that (1) Duran was chosen over

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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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Garcia for the loader operator position because Duran had more experience than Garcia, on the other hand, Vondrak, who had less experience than Lucero, was hired over Lucero as a mechanic; (2) Lucero, the only other employee not rehired, was offered another position at Colorado Lava, but Garcia was not; and (3) when considering which positions to eliminate, Bjustrom only evaluated the loader operator and mechanic positions, and not other positions at the site. 23 FMSHRC at 218-19.

There is additional record evidence set forth in the judge's decision that could support a finding of disparate treatment. The judge found that Kissner wanted to hire the best qualified employees for the loader operator and the mechanic positions and testified that he reviewed the applications for these two positions prior to making his decision. *Id.* at 216. Kissner stated that he looked at work history and tenure when he decided to hire Duran over Garcia for the loader operator position, but admitted that he did not review Garcia's personnel file, letters of recommendation, safety record, or production levels when considering whom to hire. *Id.*

Moreover, the record indicates that, on approximately June 7, 2000, with Bjustrom's approval, McCarroll hired Jeremy Gallegos, a former MWCA employee who was not working for the company at the time of its purchase by Colorado Lava, to fill a bagger position that had been vacated prior to Colorado Lava's purchase on June 5. Tr. 120-23, 241-42, 270-71. Gallegos apparently had experience as a bagger. Tr. 270-71. Garcia, while still employed at the Antonito facility, was being trained as a bagger and had filled in as a bagger three or four times prior to June, but was not considered for the vacant position. 23 FMSHRC at 214; Tr. 192-93, 274. Although Gallegos had experience as a bagger, Garcia was also experienced both as a bagger and more specifically with the operations at the Antonito facility. Despite Garcia's availability when the bagger position was open, he was not considered for the position.

The record further demonstrates that, in spite of McCarroll's recommendation that Bjustrom retain only one rail yard employee, after assuming operations at the Antonito facility, Colorado Lava continued to use two employees at the rail yard. Tr. 246-48, 289, 298. McCarroll testified that after June 5, a second employee from the Antonito facility worked at the rail site with either Duran or himself, including George Ruybal, Brian Kent, and Joe Padillo, who were former MWCA employees rehired by Colorado Lava. Tr. 246-47. He testified that prior to June 5, Ruybal and Kent did not have experience operating the front-end loader and were being trained. Tr. 247-48. Duran confirmed McCarroll's testimony that two employees continued to work at the rail site after June 6. Tr. 289.

We conclude that the judge did not adequately consider the record evidence of disparate treatment in this case. Under *Chacon*, therefore, his analysis of motivation is incomplete. Accordingly, his conclusion that the Secretary failed to establish motivation cannot be upheld and his decision to dismiss the discrimination complaint for failure to establish a prima facie case must be vacated. On remand, consistent with *Chacon*, the judge should consider all the evidence tending to show improper motivation, including that of disparate treatment of the miner. If the judge finds that a prima facie case has been established, he must reopen the record to allow the

operator to present further evidence, if it chooses, as part of its rebuttal,[6] and to allow the Secretary an opportunity to demonstrate that the operator's justification was pretextual.

III.

Conclusion

For the foregoing reasons, we vacate the judge's dismissal of the discrimination complaint, and remand for further proceedings consistent with this opinion.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

[6] Our concurring colleague, Commission Jordan, would have the Commission address at this time the judge's finding that Kissner lacked knowledge regarding Garcia's protected activity and animus towards him. Slip op. at 8-12. Because we view the finding as not dispositive of the prima facie case issue, we find it unnecessary at this time to address the evidence supporting it. Of course, before the judge again reaches a conclusion regarding the strength of this rebuttal evidence, we would expect him to consider the Secretary's arguments for imputing McCarroll's knowledge of and animus towards Garcia's safety complaints to Bjustrom or Kissner. Having dismissed the case in the middle of the hearing, it is apparent to us that the judge did not have an adequate opportunity to fully consider these arguments, and the evidence supporting them. That can only occur after a complete hearing.

Commissioner Jordan, concurring:

As a result of Andrew Garcia's safety complaint to MSHA, the operator received a citation and David McCarroll, Garcia's supervisor, became the subject of a section 110(c) investigation.[1] 23 FMSHRC 213-214, 218 (Feb. 2001) (ALJ). Subsequently, Garcia was the only worker not retained when Colorado Lava took over the mine from Mountain West Colorado Aggregates ("MWCA") eight months later. *Id.* at 215, 216 n.2. Garcia was also not considered for a job opening that arose shortly after the takeover. Tr. 120-23, 241-42, 270-271. For the reasons discussed below, I agree with my colleagues that the judge's decision dismissing the case should be vacated and the case remanded. However, because I conclude that the Secretary has already established a prima facie case of discrimination, I would not instruct the judge to revisit that issue.

The judge's holding that the Secretary failed to establish a prima facie case was based on his finding that Terry Kissner, the individual who allegedly made the decision not to rehire Garcia, had no knowledge of Garcia's protected activity and therefore could harbor no retaliatory animus towards him. 23 FMSHRC at 220. The judge failed to take into account, however, the pivotal role that Garcia's supervisor, McCarroll may have played in the decision not to rehire Garcia. McCarroll admitted that he was upset about Garcia's complaint to MSHA, Tr. 224, and the judge found that McCarroll harbored animus towards Garcia because of this protected activity. 23 FMSHRC at 219. Prior to the takeover by Colorado Lava, Ronald Bjustrom, who owned eighty percent of that company and had the ultimate authority to make hiring decisions, *id.* at 220, asked McCarroll about the employees he supervised. McCarroll described Garcia as "a poor employee" who "causes trouble" and "talks to other employees, trying to stir up trouble between them." Tr. 229. McCarroll also told Bjustrom that Garcia filed grievances, was a poor operator, and abusive to the equipment. Tr. 231.[2] In addition, McCarroll recommended to Bjustrom that one of the two rail loader jobs (the position Garcia held) be eliminated. 23 FMSHRC at 215; Tr. 240. On June 6, 2000, Colorado Lava purchased MWCA and hired all of the MWCA employees except Garcia.[3] 23 FMSHRC at 216 & n.2

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[1] Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c).

[2] Garcia was the only employee about whom McCarroll made only negative comments. 23 FMSHRC at 220. McCarroll identified four other employees as weak but they were all hired by Colorado Lava. *Id.* at 215, 216 n.2.

[3] Ernie Lucero was initially not rehired; however, he was subsequently offered a job at another location with a cut in pay. 23 FMSHRC at 216 n.2.

To make out a prima facie case of discrimination, the Secretary need only submit enough evidence so that the record *could* support an inference that the failure to rehire Garcia was motivated by his safety complaint. *See Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 127-28 (Feb. 1999) (a complainant establishes a prima facie case "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. . . . The 'possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them.'" (citation omitted)); *see EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861-862 (6th Cir. 1997) (reversing district court's finding that plaintiffs "failed to present sufficient evidence to meet their burden of establishing a *prima facie* case of retaliation" in a case where there was "ample evidence from which the court could have inferred retaliation at the *prima facie* stage"). The judge should have determined whether there was enough evidence in the record from which a reasonable person could infer that McCarroll's negative review of Garcia resulted, at least in part, from Garcia's protected activity and that the negative review in turn was a factor in Colorado Lava's decision not to hire Garcia.

If McCarroll's criticisms were a result of retaliatory animus and if those negative remarks influenced the decision not to hire Garcia, then the principle announced by the Commission in *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) applies and McCarroll's retaliatory animus should be attributed to the decision maker. In *Metric,* the night superintendent told the project superintendent that certain miners were refusing to perform work, but he did not communicate the protected safety reason behind the miners' refusal. 6 FMSHRC at 226, 228. The project superintendent thereafter terminated the miners. *Id.* at 228. In rejecting the operator's defense that the project superintendent himself did not know of the miners' protected activity, the Commission held that: "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Id.* at 230 n.4 (citation omitted). Since the judge here dismissed the case without considering the principle of imputing knowledge announced in *Metric*, he erred.

The approach used by the Commission in *Metric* is one that has also been extensively applied in cases arising under the National Labor Relations Act. If a supervisor has knowledge of an employee's protected activities, harbors animus towards that activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed knowledge and animus to the employer notwithstanding the actual decision-maker's ignorance of the protected activities. *See Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (declining to "launder" regional sales manager's knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity, but "acted in direct response" to regional sales manager's recommendation to dismiss employee); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 114 (6th Cir. 1987) (imputing plant manager's knowledge of and animus against employee's protected activity based on his "involve[ment]" in decision to terminate employee by recommending employee's termination to company's industrial relations manager, who had no knowledge of employee's protected activity and relied on plant manager's recommendation) (internal quotations and citations omitted); *JMC Transp., Inc. v. NLRB*, 776

F.2d 612, 619 (6th Cir. 1985) (imputing operations manager's unlawful animus to company because his corroboration of a fabricated story about employee was "a significant factor" in the president's and general manager's decision to terminate employee, despite the decision-makers' lack of knowledge regarding employee's protected activity).

The courts have used this same approach in cases arising under federal anti-discrimination statutes. For instance, in *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), the Seventh Circuit, applying agency principles in an ADEA suit, found that if the employer's career path committee, which ultimately made the decision to discharge the employee, acted as the "conduit" of the supervisor's prejudice — "his cat's paw" — the innocence of the committee's members would not spare the employer from liability. The court held that if the supervisory employee procured the employee's discharge by evaluating the employee and making recommendations to the committee on an unlawful basis, then the supervisory employee's unlawful actions would be imputed to the employer. *Id.*; *see also Bergene v. Salt River Project Agricultural Improvement and Power District*, 272 F.3d 1136 (9th Cir. 2001) (even if a manager was not the ultimate decision maker, that manager's retaliatory motive may be imputed to the company if the manager was involved in the hiring decision).[4]

Admittedly, in *Metric*, there was no dispute that the supervisor with knowledge caused the project superintendent to fire the miners. Here, on the other hand, the parties disagree as to whether McCarroll's comments played any role in the decision not to hire Garcia. The operator denies that McCarroll's comments were a factor in its decision not to retain Garcia. C. Br. at 9 - 14. Indeed, mine owner Bjustrom claims that the hiring was done by Kissner, an individual Bjustrom retained to interview the miners and who denies any knowledge of McCarroll's comments. 23 FMSHRC at 215-16. Furthermore, although Bjustrom eliminated one railroad loader position, in accordance with McCarroll's advice, *id* at 215, he claims that the decision to choose another miner over Garcia for the remaining loader position was based solely on the other miner's greater length of service. *Id.* at 218-219.

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[4] *See also Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir. 1993) (holding employer liable under ADEA where employer relied upon supervisory employee's recommendation to discharge employee, and supervisory employee, possessing unlawful animus, lied about employee's ability to work to ensure his discharge); *Long v. Eastfield College*, 88 F.3d 300, 306-08 (5th Cir. 1996) (in Title VII case, remanding to district court to apply principles enunciated in *Shager* and determine whether president who made ultimate decision to terminate employees made *independent investigation* severing causal connection or whether he "rubber-stamped" the supervisory employees' recommendations based on unlawful motive); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459-60 (7th Cir. 1994) (rejecting president's allegation that he based decision to terminate employee on independent assessment of employee's performance, because he solicited vice-president's opinion, who had knowledge of and animus against employee and recommended his discharge, and holding employer liable under Title VII even though president did not know about employee's protected activity).

Of course, a judge might ultimately decide that McCarroll's knowledge of and animus towards Garcia's safety complaint should not be imputed to either Bjustrom or Kissner, or that even after imputing that knowledge, Colorado Lava nevertheless demonstrated that Garcia would not have been hired on the basis of a valid neutral criteria. Nonetheless, dismissal for failure to make out a prima facie case is not warranted. The appropriate questions to ask for determining whether the Secretary made out a prima facie case is, *could* the evidence support an inference that McCarroll's comments were infected by retaliatory animus, and could one infer that those comments in turn influenced Colorado Lava's decision not to hire Garcia?

Clearly, the answer to those questions is yes. The record indicates that Bjustrom sought McCarroll's advice about jobs that could be eliminated and the performance of the employees under McCarroll's supervision. *Id.* at 215, 220. The judge found that McCarroll harbored animus towards Garcia because of Garcia's complaint to MSHA. *Id.* at 219. It would be reasonable to infer that McCarroll's thoroughly negative evaluation of Garcia, as well as his suggestion as to which jobs to eliminate, were tainted by this retaliatory animus.[5] Could one reasonably infer that McCarroll's remarks influenced the decision not to hire Garcia? I believe the evidence could support such inference.

Although Bjustrom claimed that Kissner decided who would be hired, a factfinder could reasonably conclude that it was Bjustrom who was the actual decision maker. Indeed as the judge pointed out, it was Bjustrom who retained the ultimate hiring authority, and it was Bjustrom who provided Kissner with explicit instructions on how to conduct the interviews, including what questions to ask, and which positions to eliminate. 23 FMSHRC at 215-216. As to whether Bjustrom was influenced by McCarroll's remarks, there is no dispute that Bjustrom followed McCarroll's recommendations regarding which jobs to eliminate, *id.* at 215-216, an action which in itself dramatically decreased Garcia's chances of being rehired. Furthermore, although Bjustrom claimed McCarroll's remarks played no role in the decision not to rehire Garcia, a factfinder could reasonably conclude that it strained credulity for a mine owner to claim that a thoroughly negative evaluation from an employee's former supervisor played no part in the decision not to hire that employee. Indeed, the factfinder could find this claim particularly difficult to accept since the mine owner had solicited the supervisor's views on employee performance. Moreover, since the record shows that Colorado Lava had already decided to retain McCarroll as supervisor by the time it interviewed the other employees, Tr. 215, a factfinder might find this assertion completely implausible. In light of McCarroll's remarks, Bjustrom would have realized that retaining Garcia would be tantamount to placing a permanent thorn in

[5] At the time McCarroll spoke to Bjustrom about Garcia's performance, the section 110(c) investigation against McCarroll was still pending. S. Br. at 3.

McCarroll's side. A factfinder might find it unlikely that Bjustrom would not have been influenced by that realization.[6]

Even if Colorado Lava could persuade a factfinder that McCarroll's remarks had no bearing on its decision of June 6 as to which MWCA employees would be retained, that factfinder could nevertheless conclude that Colorado Lava's failure to subsequently hire Garcia for the bagger position (a job filled on June 7), resulted at least in part from McCarroll's retaliatory animus. Garcia contends that he was receiving training for this position and had filled in for a bagger before he was let go. 23 FMSHRC at 214; Tr. 47. Clearly, Colorado Lava cannot claim that McCarroll did not influence the decision to hire someone other than Garcia for the position. Indeed the record indicates that it was McCarroll himself who filled the job, after consulting with Bjustrom. Tr. 120-23, 241-42, 270-71.

The majority vacates the decision below primarily on the basis of the judge's failure to examine evidence of disparate treatment. Slip op. at 5-7. My colleagues also "expect" the judge to consider the Secretary's imputation arguments before making his ultimate determination on the merits of the case, slip op. at 7 n.6., implicitly vacating his finding that Colorado Lava had no knowledge of Garcia's protected activity. The majority rightly insists that the judge consider all of the evidence regarding the operator's motivation for not hiring Garcia, but paradoxically deems the judge's finding pertaining to whether the operator even knew about Garcia's protected activity as "not dispositive of the prima facie case," and consequently declines to address the evidence supporting it. *Id*.[7] I fear this ruling leaves the judge and parties in a legal limbo.

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[6] Even if Kissner was found to be the decisionmaker, the evidence would still support the inferences necessary to make out a prima facie case. Although Kissner denied receiving any information about Garcia or the animosity between McCarroll and Garcia, a factfinder could reject this claim as incredible in light of the evidence that Kissner "may have talked to McCarroll as few as three times," Tr. 159, including a conversation on the very day he conducted his interviews with the employees. 23 FMSHRC at 216.

[7] Unlike my colleagues in the majority, I believe that evidence pertaining to the operator's lack of knowledge of protected activity is relevant and in fact may be dispositive of whether the Secretary has made out a prima facie case. *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (evidence of knowledge used to make a prima facie case); *Sec'y of Labor on behalf of Clay Baier v. Durango Gravel,* 21 FMSHRC 953, 957-58, (Sept. 1999) (in discussing prima facie case, Commission determines that substantial evidence supported judge's finding that operator had knowledge of miner's protected activity).

In sum, the Secretary has presented sufficient circumstantial evidence to support an inference that McCarroll influenced Colorado Lava's decision not to employ Garcia, and that McCarroll's knowledge and animus should be imputed to that operator. Accordingly, she succeeded in establishing her prima facie case. Thus, I would remand this matter to the judge solely to permit the operator to adduce additional evidence in support of its rebuttal, to provide the Secretary an opportunity to introduce additional evidence in support of her pretext argument, and for the judge to rule on the ultimate issue of whether discrimination occurred in violation of section 105(c).

Mary Lu Jordan, Commissioner

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