FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 29, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 93-336-DM
ADMINISTRATION (MSHA)	:	WEST 93-337-DM
on behalf of JAMES HYLES,	:	WEST 93-338-DM
DOUGLAS MEARS, DERRICK	:	WEST 93-339-DM
SOTO, and GREGORY DENNIS	:	WEST 93-436-DM
	:	WEST 93-437-DM
v.	:	WEST 93-438-DM
	:	WEST 93-439-DM
ALL AMERICAN ASPHALT	:	WEST 94-021-DM

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

DECISION

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

These discrimination proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), are before the Commission for a second time on cross-petitions for discretionary review filed by All American Asphalt ("AAA") and the Secretary of Labor. Both parties seek review of a decision on remand by Administrative Law Judge August Cetti involving two layoffs of miners James Hyles, Douglas Mears, Derrick Soto, and Gregory Dennis. In his first decision in this proceeding, the judge found that a failure to recall the complainants following a 1992 layoff and a subsequent layoff in 1993, after complainants had been reinstated, were discriminatory and violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 16 FMSHRC 2232 (Nov. 1994) (ALJ). The Commission granted AAA's petition for discretionary review of the judge's decision, and the Secretary thereafter moved to remand the case to the judge for further findings and conclusions. The Commission issued its decision in which it vacated the judge's decision and remanded the case for further consideration. 18 FMSHRC 2096 (Dec. 1996) ("*All American Asphalt I*"). The judge subsequently issued his second decision, in which he concluded that AAA's failure to recall the complainants following the 1992 layoff was violative; however, he reversed his prior determination that the 1993 layoff violated the Act. 19 FMSHRC 855 (May 1997) (ALJ). The

Commission granted petitions for discretionary review ("PDRs") of the judge's remand decision filed by AAA and the Secretary.

For the reasons that follow, we affirm the judge's determination that AAA's refusal to recall the complainants following the July 1992 layoff violated section 105(c) of the Mine Act. However, we reverse the judge's determination that the March 1993 layoff did not violate section 105(c).

I.

Factual and Procedural Background

AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and for sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, Hyles, a leadman on AAA's third ("graveyard") shift, learned that AAA intended to start running the new plant even though some safety equipment was not in place. *Id.* Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and a vice-president at AAA. Tr. 314-16, 319, 1131, 1231. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers ("Operating Engineers"), which represented AAA's employees. 19 FMSHRC at 856; 16 FMSHRC at 2235; Tr. 175. Thereafter, McGuire visited the plant and observed it running without numerous pieces of safety equipment in place. 16 FMSHRC at 2235; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2235-36. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails, and trip cords. *Id.* Dennis, Mears, and Soto, who worked under Hyles on the temporary combined production shift during the startup weekend, complained to Hyles and Gerald Richter, the other leadman on the combined shift, concerning plant conditions. Tr. 338, 370, 685, 826, 957, 2257. Hyles warned them to be careful. Tr. 339. On the evening of Saturday, April 20, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto, among others, about the conditions at the plant. 16 FMSHRC at 2236; Tr. 339, 365-66. Numerous employees, including leadman Richter, observed Hyles openly videotaping the plant. Tr. 365-66.

On Sunday night, Hyles was involved in a minor accident when he fell through a gap in the decking. Tr. 367-70; Gov't Ex. 23. Later during the shift, Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). They all agreed that the plant's condition posed dangers to employees and that the tape should be turned in to MSHA. 16 FMSHRC at 2236; Tr. 370. On Monday morning, after his shift ended, Hyles went to the MSHA field office and turned in the

videotape. 16 FMSHRC at 2236; Gov't Ex. 54; Tr. 370, 373. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. 16 FMSHRC at 2236. Subsequently, MSHA issued numerous citations, including 29 citations alleging unwarrantable failure, and shut down the plant for nearly a week. *Id.*; Tr. 55, 375, 1187. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had reported the condition of the plant to MSHA. 16 FMSHRC at 2236.

On April 27, the day the plant reopened, Ryan asked Hyles and leadman Gerry White "if they had any idea who 'turned him in' and . . . told them he wanted to find out who it was and that he would make it so miserable for them, they would be happy to go work someplace else." 19 FMSHRC at 856-57, 862; *see* Tr. 375. While AAA president William Sisemore was in the plant office, Hyles heard him say he would like to "find out who was causing him all the problems and that he would make it worth their while to seek employment elsewhere." 19 FMSHRC at 862. While operating the plant, AAA miner William Smillie overheard Ryan and Sisemore say that they "would like to know who filed the hazard complaint so they could make it worthwhile for them to leave." *Id.*; Tr. 504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under section 110(c), 30 U.S.C. § 820(c).[1] 16 FMSHRC at 2237; Gov't Exs. 2-5.

In October 1991, Hyles was demoted from his position of leadman to that of loader operator. 16 FMSHRC at 2237; Tr. 130-31. When he asked Ryan why he was being demoted, Ryan responded that they "didn't see eye to eye anymore." Tr. 394.

On or about July 8, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. *See* Gov't Exs. 14, 15; Tr. 403, 704. On July 24, MSHA issued its proposed penalty assessment, which was addressed to Ryan, with fines in excess of $45,000. Gov't Ex. 53; Tr. 1600. Sometime after the initial layoff, Ryan purportedly decided that he needed to cut back the workforce for economic reasons. Tr. 1295-96. By the end of August, AAA had recalled every employee but the four complainants. 16 FMSHRC at 2238. In addition, some employees worked overtime during the period the complainants were on layoff.[2] *Id.* When Hyles and Soto went to the plant and saw less senior

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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 corporate 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] There was initially a fifth employee, Martin Hodgeman, referred to in the arbitrator's decision, who was not called back. Gov't Ex. 15; Gov't Ex. 51 at 4. However, Ryan allowed Hodgeman, who was classified as a loader operator and was junior to Hyles, Dennis, and Mears,

employees working, all four complainants filed grievances under the collective bargaining agreement between AAA and the Operating Engineers. *Id.* The complainants contended that AAA failed to comply with the contract requirement that it conduct a "bumping" meeting prior to layoffs, where employees could bid on jobs held by less senior employees and bump those employees out of jobs for which a more senior employee was qualified. *Id.* at 2238-39. The grievances went to arbitration, and, in December, the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting. *Id.* at 2238. However, the arbitrator concluded that only Hyles possessed the qualifications to bump a less senior employee, and only granted relief to Hyles. *Id.*; Gov't Ex. 51 at 11-14.

In September 1992, while the grievances were being processed, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. 16 FMSHRC at 2239; Gov't Exs. 20, 33, 38, 43. Following the institution of temporary reinstatement proceedings, AAA reinstated the four complainants on February 11, 1993. 16 FMSHRC at 2239-40. Upon their reinstatement, the complainants were assigned to perform production work on the day shift. *Id.* at 2240. In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. *Id.* AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at the higher rate of pay they had received as repairmen. 19 FMSHRC at 858. AAA then moved the primary production shift to the day shift, and moved the maintenance shift to the night shift. *See* Tr. 990. Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. 16 FMSHRC at 2240. Rather than reassigning the four repairmen to their prior positions, AAA required the repairmen to participate in a bumping meeting. *Id.* Instead of bumping into repair positions, they bumped each of the complainants, selecting the production positions held by Hyles, Dennis, Mears, and Soto. *Id.* at 2240-41. AAA subsequently hired new employees to fill the vacant repairman positions. *Id.* at 2242; Tr. 457, 480-81, 1693.

The following day, the four complainants were called into a layoff meeting and told that each of them had been bumped by a more senior employee and that they would be permitted to bid on jobs held by less senior employees. 16 FMSHRC at 2241. They were reluctant to exercise their bumping rights at the meeting for fear that Ryan would treat them as unqualified and refuse to allow them to bump into other jobs. *Id.* Hyles and Soto requested that they be given time to consult with counsel from the Solicitor's office because of the pendency of their discrimination complaints. *Id.* They were permitted to speak with counsel, but were not informed that, by delaying the exercise of their bumping rights, they had forfeited those contractually protected rights. *See id.* Shortly after the meeting, Operating Engineers business agent McGuire called Ryan to inform him that Hyles had decided to bump into the plant operator

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to change his classification to dozer operator and bump a more junior employee, Greg Melvin. *See* Gov't Exs. 14, 15. Melvin, who was junior to all the complainants, subsequently was hired at the asphalt plant owned by AAA, while the complainants remained on layoff. Gov't Exs. 13, 14; Tr. 1956, 1965, 2014.

position. *Id.* Ryan refused the request, stating that it was untimely. *Id.* AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. *Id.*

Following the second layoff, Hyles, Dennis, Mears, and Soto each filed a second discrimination complaint. *Id.* at 2242; Gov't Exs. 21, 34, 39, 44. On April 26, 1993, after MSHA had initiated temporary reinstatement proceedings, the complainants were reinstated by agreement of the parties; however, after their reinstatement, management frequently gave the complainants reduced working hours. 16 FMSHRC at 2242. In April 1993, AAA began hiring ten new employees and increased its output of finished material. *Id.* In August 1993, AAA posted a seniority list indicating that Dennis, Mears, and Soto had seniority dates of January 1993. *Id.* When Mears asked why the seniority list did not reflect his original hire date, Ryan responded that Mears had no seniority. *Id.* This was the first time the complainants were told that AAA had removed their seniority.

A. Judge's Decision

The Secretary issued four complaints for each of the two layoffs, and an eight-day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (Jan. 1994) (ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including its argument that the complainants' discrimination claims were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994). 16 FMSHRC at 2233-35.

The judge then addressed Hyles' October 1991 demotion from his leadman position to a journeyman loader position. *Id.* at 2247. The judge found that, at the time of the demotion, AAA had no knowledge that Hyles had "turned in" Ryan and AAA to MSHA, but that Ryan "had received credible substantiation of the rumors of Hyles' on the job misconduct," including "sleeping on the job and possible time card fraud." *Id.* Accordingly, the judge determined that AAA did not violate section 105(c) when it demoted Hyles from his leadman position. *Id.*

With regard to AAA's July 1992 layoff and its subsequent recall of the entire workforce except the four complainants, the judge found that sometime prior to the layoff, AAA became aware of the complainants' protected activity. *Id.* He also found that AAA's failure to recall the complainants constituted adverse action, and he concluded that AAA's refusal to recall the complainants was "to obscure its discriminatory animosity towards the Complainants." *Id.*

Finally, the judge considered the circumstances surrounding AAA's unusual post-reinstatement manipulation of job shift assignments which culminated in the bumping of the complainants from their positions in March 1993. *Id.* at 2248. The judge found that "this convoluted series of work assignments was contrived by Respondent to terminate the Complainants, while appearing to comply with the contractual requirement of holding a meeting

with the union." *Id.* The judge concluded that, based upon reasonable inferences drawn from the record, AAA discriminated against the complainants in March 1993 in violation of section 105(c) of the Mine Act. *Id.* at 2249. AAA petitioned the Commission for review of the judge's decision.

B. *All American Asphalt I*

The Commission remanded the judge's decision and ordered him to address specified issues and evidence not considered or enunciated in his initial decision. *All American Asphalt I*, 18 FMSHRC 2096. We instructed the judge to explain the extent to which he relied on the arbitration decision to reach his determinations concerning the first set of layoffs and AAA's failure to recall the complainants. *Id.* at 2101. We also instructed the judge to apply the Commission's *Pasula-Robinette* discrimination framework: whether the complainants established a prima facie case, and whether AAA rebutted or affirmatively defended against the prima facie case. *Id.* at 2102. We called upon the judge to make findings regarding the nature of the complainants' protected activity preceding each of the layoffs, and to state whether there was a nexus between the protected activity and the layoffs. *Id.* We directed him to reconcile his finding that AAA was unaware of Hyles' protected activity prior to his October 1991 demotion with his finding that AAA was aware of the protected activity of all four complainants prior to the July 1992 layoff. *Id.* We further ordered the judge to address, with regard to both the 1992 and the 1993 layoffs, AAA's asserted defenses and any related evidence to determine whether the defenses were valid or merely pretextual. *Id.* Finally, we ordered the judge to render credibility determinations related to "alleged statements and inquiries of AAA officials concerning miners' protected activities, AAA's asserted economic and contractual defenses, and the complainants' qualifications for available jobs." *Id.* at 2102-03.

C. Judge's Remand Decision

On remand, the judge addressed the existence of protected activity, whether the operator was aware of the protected activity, and whether there was a nexus between the protected activity and the subsequent layoff. 19 FMSHRC at 855. With regard to the July 1992 layoff, the judge concluded that the protected activity consisted of Hyles' videotaping of the plant conditions; the safety complaints of Soto, Mears, and Dennis to Hyles and leadman Richter; and Soto, Mears, and Dennis agreeing that Hyles should turn the videotape in to MSHA. *Id.* at 860, 864. The judge found that AAA was aware of the complainants' protected activity. *Id.* at 860. He also determined that the threats of retaliation directed towards the individuals whose complaints led to the citations against AAA, coupled with the layoffs of the four complainants, constituted the nexus required to support a finding of a 105(c) violation. *Id.* at 860, 863, 865. He further concluded that AAA's claim that it did not call back the complainants to work because they were

not qualified was pretextual. *Id.* at 866. Because he found that the initial layoff was discriminatory, he held that it did not affect the complainants' seniority. *Id.* at 865.[3]

In addressing the propriety of the March 1993 layoffs, the judge described the complainants' protected activity as "taking an active part in the Section 110(c) investigation of the plant supervisor, Ryan," as well as their "April 1991 protected activity." *Id.* at 861. He found that AAA was aware of this protected activity. *Id.* He concluded that the second set of layoffs was not motivated by the complainants' involvement in the section 110(c) investigation or filing their *second* set of discrimination complainants. *Id.*[4] He concluded instead that it was motivated by the protected activity which led to the first set of layoffs. *Id.* Because the judge concluded that there was no nexus between the second set of layoffs and the complainants' role in the 110(c) investigation, he found no discrimination and dismissed the complaints. *Id.*

In a separate section of his decision, the judge addressed credibility. *Id.* at 861-62. He broadly credited miner Smillie's testimony, specifically finding that Smillie heard AAA president Sisemore and vice-president Ryan discuss their desire to find out who turned them in so that they "could make it worthwhile for [those responsible] to leave" AAA. *Id.* at 862. The judge credited Hyles' testimony that both Ryan and Sisemore threatened to make the working conditions more difficult for the individuals who notified MSHA of safety violations at the plant. *Id.* The judge credited the testimony of all four complainants, including their testimony as to their respective qualifications for available positions, and discredited Ryan's testimony regarding the complainants' qualifications. *Id.* The judge also broadly credited the testimony of McGuire and Martin Collins, the business representatives for the Operating Engineers. *Id.*

Finally, the judge addressed the arbitrator's decision and indicated that he accorded it no weight. *Id.* at 863. Accordingly, he did not consider the arbitrator's findings on the issue of the complainants' qualifications for available positions. *Id.*

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[3] Attached to the judge's May 1997 decision is a stipulation between the parties, in which they agree on back pay and interest due each complainant through the December 1993 hearing. 19 FMSHRC at 870-71 (Ex. A). Assuming liability on the part of AAA, the parties agreed that a civil penalty of $3,500 would be appropriate for each of the eight alleged discrimination violations. *Id.* at 871-72. The judge accepted this amount for the set of dockets in which he found AAA liable under section 105(c). *Id.* at 861.

[4] We note that the second set of layoffs could not possibly have been motivated by the complainants' filing their second set of discrimination complaints since those complaints were filed in response to the second set of layoffs. Furthermore, the judge erroneously stated that the "second set of dockets . . . arose out of the second set of discrimination complaints that the four complainants filed . . . in September 1992." *Id.* In fact, the *first* set of discrimination complaints (relating to the July 1992 layoffs) were filed in September 1992.

II.

Disposition

A. Parties' Arguments

The Secretary appeals from the judge's dismissal of the complaints relating to the March 1993 layoffs. S. PDR at 1-2.[5] The Secretary submits that the Commission should, as a matter of law, reverse the judge's finding that the 1993 layoff did not violate section 105(c). *Id.* at 10-11. The Secretary notes that the judge specifically found that AAA manipulated the seniority list in March 1993 for the purpose of terminating the complainants in retaliation for their protected activities that resulted in the plant shutdown, the 29 unwarrantable failure citations, and the subsequent section 110(c) investigation against Ryan. *Id.* at 7. Further, the Secretary argues that, because she never alleged that the March 1993 layoff was motivated solely by the complainants' participation in the section 110(c) investigation, the judge incorrectly relied on the lack of a causal nexus between that participation and the layoff in dismissing the second set of dockets. *Id.* at 9.

In its petition for discretionary review,[6] AAA contends that the judge did not comply with the Commission's remand instructions by failing to make key factual findings and by failing to explain the basis for his credibility resolutions. A. PDR at 7-13. The operator further asserts that the Secretary failed to show that AAA knew of Hyles' protected activity. *Id.* at 6-7. AAA also alleges that the complaints of Dennis, Soto, and Mears to leadmen Hyles and Richter do not constitute protected activity because leadmen are not supervisors or members of management. *Id.* AAA argues that the fact that every other employee was interviewed by MSHA investigator Mesa without suffering retaliation weighs against a finding that AAA retaliated against the complainants. *Id.* at 24. In addition, AAA asserts that the judge failed to reconcile his finding of discrimination related to the July 1992 layoff with the arbitration decision under the collective bargaining agreement. *Id.* at 27-29, 47-48, 67, 69. Finally, AAA objects to the civil penalties ordered by the judge. *Id.* at 73-74.

In response, the Secretary argues that leadmen Hyles and Richter were agents of the operator within the meaning of section 105(c), and that the concerns voiced by complainants Mears, Soto, and Dennis to the leadmen constitute protected Mine Act activity. S. Resp. Br. at 15-18 & n.6. The Secretary submits that analysis of the circumstances surrounding both layoffs

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[5] The Secretary designated her petition for discretionary review as her opening brief.

[6] AAA submitted a 95-page PDR challenging the judge's initial decision, after which we admonished AAA that Commission Procedural Rule 70(d), 29 C.F.R. § 2700(d) requires that "each issue [in a PDR] shall be . . . plainly and concisely stated." In apparent disregard of this warning, AAA's present PDR spans 75 pages.

establishes that the bumping procedure of March 1993 violated section 105(c). *Id.* at 19-22. The Secretary asserts that, while AAA's defenses should be rejected, the judge's failure to analyze AAA's affirmative defenses warrants a remand for further analysis. *Id.* at 22-24 & nn.7-8. The Secretary also contends that the judge's failure to address the complainants' qualifications for available positions requires a remand to analyze this issue. *Id.* at 24-25. Further, the Secretary argues that, while AAA's economic defense is unconvincing, the Commission should remand this question to the judge with instructions to make specific findings on this issue. *Id.* at 25-26. Finally, the Secretary requests a remand to allow the judge to explain the bases for his credibility determinations. *Id.* at 26-27.

AAA replies that the Secretary has failed to rebut AAA's evidence of inconsistencies in the complainants' hearing testimony. A. Reply Br. at 1-2, 14-15. AAA also claims that the 15-month delay between the alleged protected activity in April 1991 and the alleged adverse action against the complainants in July 1992 is too long a period to establish the nexus required for a finding of discrimination. *Id.* at 10-11 & n.7. AAA submits that the ALJ's finding that it "manipulated the shift and job assignments in March of 1993" to terminate the complainants is "based upon nothing more than supposition and speculation" and contradicts his prior finding that the March 1993 discharge was not in retaliation for the complainants filing discrimination complaints. *Id.* at 12-13. AAA contends that, even assuming the Secretary is able to establish a prima facie case of discrimination, the complainants declined to exercise their bumping rights and were unqualified to fill the open positions. *Id.* at 13. Finally, AAA argues that the Secretary failed to rebut AAA's economic justification for the March 1993 layoff. *Id.* at 14 & n.10.

B. Discrimination

1. Governing Principles

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 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 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Under the Mine Act, an administrative law judge's findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992).[7] In addition, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The "possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them." *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). The Commission has emphasized that inferences drawn by the judge 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*, 6 FMSHRC at 1138.

2. July 1992 Layoff

a. Prima Facie Case

The judge found that the complainants engaged in protected activity, that AAA learned of the complainants' protected acts and that AAA expressed hostility to this activity before failing to recall them in July or August 1992, and concluded that a nexus existed between the protected activity and AAA's failure to recall. 19 FMSHRC at 860-65. However, he did not frame his analysis in a manner consistent with the Commission's *Pasula-Robinette* analytical framework. Previously, we have excused a judge's failure to apply our discrimination framework, provided the judge's analysis was consistent with this framework. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 130 n.11 (Feb. 1982) (holding that, because judge's analysis was consistent with the Commission's discrimination framework, his failure to organize his analysis within that framework did not require a remand for express application of that analysis).[8] Although the judge's analysis in his remand decision was not formulated within our *Pasula-Robinette* framework, he has provided us with findings sufficient to render a remand unnecessary.

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[7] "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)).

[8] In addressing a similar situation, the National Labor Relations Board affirmed a judge's decision where the judge's findings satisfied the analytical objectives of its discrimination framework expressed in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced sub nom. NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981). *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced sub nom. NLRB v. Limestone Apparel Corp.*, 705 F.2d 799 (6th Cir. 1982).

In July 1992, AAA laid off sixteen employees due to an equipment move. 16 FMSHRC at 2238. Over the course of the next several weeks, AAA recalled all of the laid-off workers except the complainants. *Id.* Thus, what started as a temporary layoff for AAA's employees became, in effect, a permanent layoff of Hyles, Mears, Dennis, and Soto. *See All American Asphalt I*, 18 FMSHRC at 2098. It is undisputed that the four suffered an adverse employment action. The main issue on review is whether that employment action was linked to protected activity under the Mine Act.

Based on our review of the credited record evidence, substantial evidence supports the judge's conclusion that each of the complainants engaged in protected activity. Initially, Hyles, while assigned to work as a leadman for a combined production shift during the weekend of the plant startup operation, complained to Ryan about plant conditions he perceived as dangerous. Tr. 316, 319. He also discussed the plant conditions with Richter. Tr. 338. The record further shows that he openly videotaped the plant startup in the presence of numerous other employees, turned in the tape to MSHA, and complained to MSHA about the hazards the plant conditions posed to himself and others. Gov't Exs. 1, 54. Thus, Hyles instigated the events that led to the plant shutdown by MSHA and the issuance of $45,000 in penalties in July 1992. Later, Hyles cooperated as a witness during MSHA's section 110(c) investigation of Ryan. Gov't Ex. 2.

Similarly, the actions of complainants Dennis, Mears, and Soto constitute protected activity under the Act. Dennis, Mears, and Soto were on Hyles' crew, working under his supervision in the finishing plant during the startup weekend. 16 FMSHRC at 2236. Each of them conferred with Hyles and supported his efforts to complain to MSHA about unsafe plant conditions. Tr. 338, 366, 370. Furthermore, each of them complained directly to leadman Richter regarding the plant conditions. Tr. 685, 826, 957, 2257. In Hyles' initial statement to MSHA, he identified, inter alia, Dennis, Mears, and Soto as witnesses.[9] Gov't Ex. 2 at 1. Finally, these three complainants, along with other AAA employees, gave statements to the MSHA investigator when he came to interview miners at AAA's facility. 16 FMSHRC at 2237; Gov't Exs. 2-5. In short, substantial evidence supports the judge's finding that the four complainants engaged in activities protected under section 105(c) of the Mine Act. *See* 30 U.S.C. § 815(c)(1).

AAA's assertion that the complaints of Dennis, Mears, and Soto to leadmen Richter and Hyles do not constitute protected activity because leadmen are not supervisors or members of management conflicts with our precedent. In determining whether a miner is an operator's agent, we have examined such factors as whether the miner was exercising managerial or supervisory responsibilities at the time the allegedly violative conduct occurred (*U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) and whether the miner to whom a safety complaint was made

[9] Of the six witnesses Hyles identified to MSHA, the three witnesses other than Dennis, Mears, and Soto had been laid off prior to MSHA's section 110(c) investigation of Ryan. *See* Gov't Ex. 2 at 1.

was in a position to affect mining operations and, hence, safety. *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 n.5 (May 1997). Here, Hyles described the duties of leadmen as including being "responsible for the . . . shift . . . and in charge of the employees to see that they did their assigned jobs." Tr. 278-79. As leadmen, Richter and Hyles acted in a supervisory capacity and were in a position to affect safety, and, therefore, were "agents" of the operator to whom employees would logically voice their complaints. Thus, the safety complaints of Mears, Dennis, and Soto to Hyles and Richter were protected activity under the Act. *See Knotts*, 19 FMSHRC at 837 n.5.

We also find that substantial evidence supports the judge's finding that AAA's failure to recall the complainants was in retaliation for their protected acts. As the judge noted, "[d]irect evidence of actual discriminatory motive is rare." 19 FMSHRC at 860. "[M]ore 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)), *cited in* 19 FMSHRC at 860; *see also Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982) ("[C]ircumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination.").

Against the backdrop of AAA's pronounced hostility to employees' protected acts (19 FMSHRC at 862-63), the record fully supports the judge's inference that AAA ascertained the complainants' identities. *See id.* at 864. Many of Hyles' protected acts, including his complaints to Ryan and his videotaping of the plant were open and highly visible to AAA. Indeed, Hyles did not try and hide his videotaping, and conversed with leadman Richter, inter alia, as he videotaped. *See* Gov't Ex. 54. In this regard, leadman White, who testified on behalf of AAA at the hearing, stated that it was generally known that Hyles had turned in his videotape to MSHA. Tr. 2077-79. In addition, Richter, another one of AAA's witnesses, testified that he told Ryan that Hyles had a video camera present at the plant during startup weekend. Tr. 2163. Even more significantly, Ryan testified that he knew that Hyles had videotaped the plant and that he suspected that Hyles had turned in the tape to MSHA. Tr. 1535, 1539. Moreover, given the small size of the AAA plant, and management's desire to discover the identities of those who turned AAA in, it is reasonable to infer that the operator knew about Hyles' role in turning in the videotape and complaining to MSHA. *See Chauffeurs, Teamsters and Helpers, Local 633 v. NLRB*, 509 F.2d 490, 497 (D.C. Cir. 1974) (holding that existence of only six employees in bargaining unit is circumstantial evidence that protected activities would come to the attention of

management).[10] In sum, credited record evidence supports the judge's inference that AAA knew of Hyles' protected activity under the Mine Act by the time of the July 1992 layoff.[11]

It was also reasonable for the judge to infer that AAA knew of the protected activity of Dennis, Mears, and Soto. *Id.* Each had worked under Hyles in the finishing plant during the weekend before MSHA shut down the plant on the morning of April 22. 19 FMSHRC at 864-65. Each had complained about plant conditions to Richter. Tr. 685, 826, 957, 2257. Indeed, by the time of the investigation, they, along with leadman Richter, were the only employees still employed at AAA who had worked with Hyles during the start-up operations in the finishing plant. *See* Tr. 337, 379, 548, 2248-54. Richter, to whom they had voiced their complaints, testified on behalf of AAA at the hearing. Tr. 2118-88. Further, there is nothing in the record indicating that any AAA employees other than Dennis, Mears, Soto, and Hyles complained to Richter about the plant conditions during the startup weekend. Finally, Ryan's knowledge of the pivotal role that statements from the three played in the MSHA investigation is borne out by the fact that Ryan solicited Dennis to write a letter to MSHA, while he was on layoff in May 1991, that would support Ryan's claim that no employees were exposed to unguarded equipment during the startup weekend.[12] Tr. 841-44. In view of these facts, we find that it was reasonable for the judge to infer that AAA had determined that, in addition to Hyles, complainants Dennis, Mears, and Soto had engaged in the protected activity that caused it so much trouble. 19 FMSHRC at 865; *see Teamsters v. NLRB*, 509 F.2d at 497.

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[10] The Commission occasionally has looked for guidance to case law interpreting similar provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1994) ("NLRA") in resolving questions arising under the Mine Act. *See, e.g.*, *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (deciding discrimination case in part through reference to NLRA case law).

[11] AAA may well have known of Hyles' protected activity by the time of his demotion in October 1991. Indeed, the arguably discriminatory circumstances surrounding his demotion presented a close case. In addition to AAA's knowledge of and hostility towards the protected activity, the record shows that Ryan told Hyles that he and Hyles no longer saw "eye-to-eye," that Ryan did not rely on the reasons that he subsequently gave to MSHA at the time he demoted Hyles, and that the major misconduct on which Ryan purportedly relied in demoting Hyles — sleeping during work hours — was long condoned both for Hyles and other AAA employees. Tr. 64, 394, 402, 1568, 1574-75, 1584-85, 2153. While the demotion is consistent with a pattern of recrimination towards the complainants because of their protected activities, the Secretary did not challenge the judge's finding of no discrimination in the demotion, and the issue, therefore, has not been preserved for review.

[12] Shortly after Dennis wrote the letter, he was recalled from temporary layoff. Tr. 841-42.

We reject AAA's argument that the lapse of time between the April 1991 complaint to MSHA and the July 1992 layoff undercuts any finding that its failure to recall the complainants was in response to protected activity. A. Reply Br. at 10-11 & n.7. We "appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Significantly, in reviewing the record in response to this argument, we note an element of timing on which the judge did not rely in making his determination of discrimination.[13] On July 24, 1992, four days after AAA began recalling employees it had laid off (*see* Gov't Ex. 15), MSHA issued a proposed penalty of $45,000 against AAA in an assessment addressed to Ryan.[14] Gov't Ex. 53. By August 3, 1992, Ryan had signed a notice of contest that was returned to MSHA. Gov't Ex. 57. These penalties provide the proverbial "straw that broke the camel's back," and coincide in time with the transformation of a temporary layoff for an equipment move to a layoff of unlimited duration for only the complainants. As we noted in *Chacon*, "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive . . . ." 3 FMSHRC at 2511.

In sum, substantial evidence supports the judge's finding that the complainants engaged in protected activity, that AAA knew of this activity prior to the July 1992 layoff, and that this layoff was implemented in response to the complainants' protected activity. The judge's ultimate finding of discrimination necessarily implied a finding that the Secretary established a prima facie case of discrimination. *See Boswell v. National Cement Co.*, 14 FMSHRC 253, 259-60 (Feb. 1992) (recognizing from judge's conclusion of discrimination an implicit finding that complainant's disqualification constituted adverse action). Accordingly, we find that substantial evidence supports the judge's implicit finding that the Secretary established a prima facie case of

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[13] In other circumstances, we have considered record evidence upon which a judge has not expressly relied. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-95 & n.9 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (finding that evidence upon which the judge did not expressly rely supported his imposition of penalty). Here, while the judge did not expressly consider the coincidence in time between Ryan's receipt of MSHA's proposed penalty and the adverse action taken against the complainants, we find it appropriate to consider this uncontroverted evidence in light of its probative value.

[14] On cross-examination, Ryan testified that he did not recall when he reviewed the penalty assessments, but he did not deny having received them around the time they were issued. Tr. 1597-1602. Ultimately, the dockets involving the citations against AAA and Ryan were settled, and the judge ordered Ryan to pay $7,600 in satisfaction of his section 110(c) liability and ordered AAA to pay $36,000 in penalties. Order Approving Settlement, dated February 22, 1994.

discrimination regarding AAA's failure to recall the complainants. *See Dunmire*, 4 FMSHRC at 130 n.11.

b. Affirmative Defense

AAA argues that it did not recall the complainants — effectively terminating their employment — because they were not qualified for any positions held by less senior employees.[15] The judge rejected this defense and concluded that AAA's refusal to recall the complainants violated section 105(c). 19 FMSHRC at 860-61. Substantial evidence supports the judge's conclusion.

"[P]retext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982)). As we stated in *Price*, "[u]ltimately, the operator must show that the justification is credible and would have legitimately moved it to take the adverse action in question." *Id.*

It is undisputed that each of the complainants contacted AAA on numerous occasions regarding the duration of and reasons for the layoff. Tr. 403, 706-07, 848, 976-77. It is also undisputed that AAA never told any of the complainants at the time of the layoff that lack of qualification prevented any of them from being recalled. Tr. 407, 708, 849, 978, 1600-03. In fact, the record does not indicate that AAA's management ever told the complainants that they were disqualified from available positions. *See* Tr. 1601, 2085 (testimony of Ryan and White that they never told complainants that they had been disqualified from available positions).[16] Further, as the judge found (19 FMSHRC at 863), in implementing the July 1992 layoff, AAA violated its collective bargaining agreement and thereby avoided holding a contractually mandated bumping meeting where AAA would have been required to address the complainants' qualifications. AAA's consistent failure to tell the complainants, upon repeated inquiry by each of them during the July-August 1992 layoff period, that they were unqualified for available work supports the judge's conclusion (*id.* at 866) that lack of qualification was not the real reason for AAA's refusal to recall them, but rather a pretext. *See Price*, 12 FMSHRC at 1534.

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[15] AAA's refusal to recall the complainants — until they were voluntarily reinstated in February 1993 — resulted in the complainants' loss of seniority under the collective bargaining agreement. 16 FMSHRC at 2239-40, 2247.

[16] The first record evidence of AAA offering lack of qualification as its motivation for not recalling the complainants appears in the arbitration decision, which was litigated beginning on December 16, 1992 — over three months after AAA's recall of all laid off employees except the complainants. *See* Gov't Ex. 51.

Substantial record evidence also supports the judge's finding that the complainants were, in fact, qualified for available positions. First, each of the complainants testified that he had completed the union's apprenticeship training program and had performed a variety of operations at AAA. *See* Tr. 280-92, 658-60, 796-801, 934-45;[17] *see also* Tr. 199-201, 236-38 (McGuire testifying that the complainants had performed numerous other tasks at AAA and were qualified to perform tasks outside their respective classifications). Second, in refusing to recall the complainants, AAA inexplicably deviated from its routine practice of allowing its employees to become qualified for various job classifications through on-the-job training. *See, e.g.*, Tr. 299, 500, 662, 799-800, 946-47, 1656-59 (discussing AAA's practice of training employees on the job to qualify for various positions). *Compare* Tr. 1649 (Ryan denying that dozer operators learned on the job at AAA), *with* Tr. 2262-64 (Hyles testifying that miner Bob Christenson, after bumping into miner Melvin's dozer operator position after the plant shutdown, learned to operate the dozer on the job "to some extent").[18] Third, the judge credited each of the complainants' testimony as to their respective qualifications to operate various types of equipment.[19] 19

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[17] Union business representative McGuire testified that "[g]enerally, after completion of an apprenticeship program, [a miner] should be able to perform any duties at the mine." Tr. 196.

[18] Given the extent of the credited evidence of the complainants' qualifications, it is apparent that Hyles, Mears, and Soto were each eligible to bump into the dozer position occupied by Melvin, who was junior to all the complainants, and subsequently occupied by miner Hodgeman, who was junior to all the complainants except Soto. *See* Gov't Exs. 14, 15. Furthermore, Dennis and Mears were eligible to bump into the shovel positions occupied by Sean and Barry Laycock and Danny Stinson, all of whom were junior to the complainants. *See* Gov't Exs. 14, 15.

[19] Hyles stated at the hearing that he is qualified to run a dozer and that he considers himself "qualified to be a plant repairman." Tr. 286, 299. Hyles further testified that he could run the new plant if he was afforded the same training opportunities as those given to AAA employees White, Bobby Crowell, and Rick McLane for that position. Tr. 296-97. It perplexes us that Ryan allowed Hyles, as leadman, to train other employees, yet did not consider him a candidate for on-the-job training for any available position. Dennis testified that he had received three weeks of training on a shovel and that, if afforded the same duration of shovel training as Allen Richter, he could have become as proficient as Richter on the shovel. Tr. 807-08. Dennis also testified that he was qualified to be a plant operator and could run the new plant if trained. Tr. 800-01. Mears testified that he was capable of operating a dozer and a shovel. Tr. 671. He also stated that if he was allowed the opportunity to train on the job, he could perform any plant repairman duty. Tr. 777. In fact, through on-the-job training, Mears became qualified to operate a crusher and a loader and to perform plant operation and repair. Tr. 660, 1654. Soto stated that he could perform the same dozer work as dozer operators Christenson, Hodgeman, and Melvin. Tr. 945. Soto also indicated that in May 1991, Ryan offered to allow him to bump into a dozer position. Tr. 966. Soto testified that he could learn to be a plant repairman if given the same on-

FMSHRC at 862. In light of "Ryan's blatant hostility to the [complainants'] protect[ed] activity," the judge also discredited Ryan's testimony that the complainants were unqualified. *Id.* Despite the very general nature of the judge's credibility determinations, the judge nonetheless complied with our remand instruction to render appropriate credibility determinations. *All American Asphalt I*, 18 FMSHRC at 2102-03. We also note that the judge was in the best position to make credibility determinations, and that abundant evidence in the record supports these determinations. In short, we see no basis for reversing the judge's credibility findings. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995).

Furthermore, the judge did not err in his remand decision by according no weight to the arbitration decision and the credibility determinations made therein. The Commission's holding in *Pasula* firmly places the decision whether to defer to an arbitrator's decision in the sound discretion of the judge. *Pasula*, 2 FMSHRC at 2795. As we held in *Pasula*, "[a]rbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling upon the judge." *Id.*, *citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In the instant matter, the judge made different credibility determinations than the arbitrator, discrediting Ryan (19 FMSHRC at 862-63), whose testimony the arbitrator credited. Gov't Ex. 51 at 12, 14 n.6. In addition, the arbitrator did not consider Ryan's expressed hostility to the complainants' protected activity. *See id.* at 1-14. Finally, the arbitrator was not asked or permitted under the collective bargaining agreement to consider whether AAA's claim that the complainants lacked necessary qualifications was a pretext to keep the complainants on layoff because of their protected activities under the Mine Act. *See* Resp. Ex. at 23-24. We see no reason to disturb the judge's exercise of discretion in declining to accord weight to the arbitrator's decision.

There is additional record evidence supporting the judge's rejection of lack of qualifications as a defense to AAA's refusal to recall the complainants. By the end of August 1992, in addition to the four complainants, one other employee, Hodgeman, was on layoff. Gov't Ex. 15; Gov't Ex. 51 at 4. Hodgeman, who was classified as a loader operator, as were Hyles and Soto, was allowed to bump a junior employee, Melvin, who was classified as a dozer operator. 16 FMSHRC at 2238; Gov't Ex. 14; Tr. 1889-90. Although Ryan allowed Hodgeman to bump, he did not afford any of the complainants the same opportunity. Tr. 423-25, 1316-18. Despite Melvin's layoff after he was bumped by Hodgeman, he was later rehired to work at AAA's asphalt plant, which adjoined the rock finishing plant but was under a separate collective bargaining agreement. Tr. 1955-57, 1965, 2013-14. Thus, even though Melvin was initially bumped out of a job, unlike the complainants, he did not remain out of work.

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the-job training as AAA gave to Richter and McLane. Tr. 946, 948. Ryan testified that he did not "know of any reason that [Soto] couldn't" learn on the job to perform reclamation, grade work or pioneering on the dozer (Tr. 1653), and didn't know of any reason that Mears could not learn other equipment on the job as well. Tr. 1655.

AAA's disparate treatment of these complainants with respect to employee classifications and bumping further supports the judge's conclusion that the operator's failure to recall the complainants in July and August 1992 was not based upon their alleged lack of qualifications. In short, substantial evidence supports the judge's finding that the complainants' purported lack of qualifications for available work was pretextual. 19 FMSHRC at 862, 865, 866; *see Price*, 12 FMSHRC at 1534.

AAA also argues that it had a valid economic reason for the cutback in its operations that resulted in the permanent layoff of the four complainants. A. PDR at 25-26, 32-33, 66. In light of the judge's rejection of AAA's assertion that the complainants were not qualified for positions held by less senior employees, he did not reach the issue of whether AAA's economic justification for the initial layoff was proper. We agree with the judge's approach. Thus, the issue presented by the July 1992 layoff and failure to recall is not whether there was a valid economic need for a layoff, but rather whether AAA improperly failed to recall the four complainants while recalling all other employees, including employees less senior than the complainants. Accordingly, our rejection of AAA's qualifications argument does not require us to reach AAA's economic defense.[20]

Accordingly, we find that substantial evidence supports the judge's determination that AAA violated section 105(c) by refusing to recall the complainants, while recalling every other employee laid off because of the July 1992 equipment move.

3. March 1993 Layoff

In his remand decision, the judge limited his analysis of the complainants' second layoff to a determination of whether the layoff was connected to the complainants' participation in

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[20] Nonetheless, based on facts found by the judge and other evidence from AAA's own witnesses, we believe that AAA's economic defense is suspect. AAA expert witness Dr. Michael Phillips' admission that production increased in July and August 1992, severely undermines the relevance of his assessment that declining economic conditions in California's construction industry as a whole in 1992 necessitated AAA's economic layoff. Resp. Ex. 40A; Tr. 1750-51; *see* Gov't Exs. 25, 50; Resp. Ex. 38A-G; Tr. 1604, 1753, 1760. Moreover, Dr. Phillips had neither been to AAA's facility, nor had he advised AAA concerning the advisability of an economic layoff in 1992. Tr. 1760, 1768, 1771. Also, several employees worked overtime hours outside their classifications while the complainants were on layoff. Gov't Ex. 25; Tr. 1605, 1717-20. While Phillips testified that employers often utilize existing employees to work overtime to save costs, (Tr. 1760), he admitted that he had not reviewed the wage and benefit package in AAA's collective bargaining agreement, so as to know whether that was the situation at AAA. Tr. 1796. In sum, testimony that an economic layoff became necessary at some unspecified date after the temporary layoff is at odds with the testimony of AAA's own witnesses and documentary evidence in the record.

MSHA's section 110(c) investigation of Ryan. 19 FMSHRC at 861. Because the judge concluded that there was no nexus between the second set of layoffs and the complainants' role in the section 110(c) investigation, he found no discrimination and dismissed the second set of complaints. *Id.*

We find that the judge erred in limiting his analysis to the complainants' participation in the section 110(c) investigation. The Secretary did not base her claims of discrimination regarding the second set of layoffs solely upon this participation.[21] *See* Compl. dated June 2, 1993. Therefore, the judge erred in failing to consider the complainants' other protected activities in analyzing the legality of the March 1993 layoff. *See Carmichael v. Jim Walter Resources, Inc.*, 20 FMSHRC 479, 486-87 (May 1998) (vacating judge's determination that operator did not violate section 105(c) based on judge's error in construing argument asserted by complainant). Further, his conclusion that there was no nexus between the layoffs and the complainants' involvement in MSHA's section 110(c) investigation is contrary to his own findings. *See* 19 FMSHRC at 866 (finding that AAA manipulated shift and job assignments in March 1993 for the specific planned purpose of terminating the complainants in retaliation for, inter alia, their participation in the section 110(c) investigation of Ryan).

Although both AAA and the Secretary assert that a remand would be appropriate on certain issues related to the March 1993 layoff, the judge has made sufficient factual findings upon which we can decide this issue without remanding to the judge. In our view, the record viewed as a whole compels only one conclusion: that the March 1993 layoff of the complainants violated section 105(c). Accordingly, we need not remand this issue to the judge. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)).

a. Prima Facie Case

As the judge found, by the time of the July 1992 layoff, AAA's management had learned the identity of those employees who participated in the protected activity that it so deeply resented.[22] 19 FMSHRC at 865. The judge also concluded that, in March 1993, AAA "manipulated the shift and job assignments" to terminate the complainants in retaliation for their protected activity "that resulted in the shutdown of the plant, the 29 unwarrantable failure

[21] In the second discrimination complaint, the Secretary alleges that AAA discriminated against the complainants for "their protected safety activity, including the filing [of] their initial complaints of discrimination with MSHA." Compl. dated June 2, 1993 at 5.

[22] Ryan admitted that, by the time of the second layoff, he knew that it was Hyles who had gone to MSHA prior to the inspection that led to the plant shutdown. Tr. 1690.

citations and the 110(c) investigation of Ryan . . . ." *Id*. at 866. Thus, the judge explicitly found a nexus between the March 1993 layoffs and the complainants' protected activity.

The judge's finding of a nexus between the complainants' 1991 protected activity and the 1993 layoff finds abundant support in the record. First, when the events occurring between July 1992 and March 1993 are reviewed, a continuing pattern of discrimination is evident. AAA's conversion of a temporary layoff to a permanent layoff with respect to only the four complainants occurred about the same time Ryan signed and dated the notice of contest regarding MSHA's July 1992 issuance of over $45,000 in proposed penalties stemming from the plant conditions leading to the shutdown.[23] *See* Gov't Ex. 57. The complainants remained on layoff until their reinstatement in February 1993. 16 FMSHRC at 2240. Less than one month after their reinstatement, the complainants were again laid off. 19 FMSHRC at 858.

Second, the circumstances surrounding the March 1993 bumping meetings compel a finding that the complainants established a prima facie case. In early March — less than one month after the complainants were reinstated — Ryan reestablished a new graveyard shift for production — purportedly because of the extra time needed to mine wet materials from the pit[24] — and unilaterally assigned four of AAA's most senior repairmen to staff the new shift despite Ryan's prior acknowledgment that placing repairmen on the production shift would decrease production. Tr. 382, 1390-97; *see* Resp. Ex. 9 at 7-8. The graveyard shift is generally considered the least desirable shift; employees with highest seniority normally choose the day shift when bidding on jobs. 16 FMSHRC at 2240; Tr. 447. Soon after Ryan's assignment of the senior repairmen to the third shift, AAA moved the primary production shift to the day shift, and moved the maintenance shift to the night shift, an arrangement not present at AAA for at least three years. *See* Gov't Ex. 15; Tr. 990. Just prior to the March 1993 layoff, Ryan remarked to union business representative McGuire that he had "four operators too many" and that he had "four problem children."[25] Tr. 203-04. McGuire understood Ryan's comments to refer to the

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[23] We also note that the $9,500 proposed assessment for Ryan's alleged 110(c) violations is dated October 22, 1992. Ryan's notice of contest is dated October 30, 1992. *See* WEST 93-65-M.

[24] We assume the need for an additional shift because of the increased production time required to process the wet material in the pit. Thus, our disposition of the March 1993 layoff does not require us to reach the issue of the need for the shift or its rapid elimination.

[25] The complainants testified that, following their reinstatement in February 1993, they were subjected to discriminatory working conditions, including increased scrutiny by management and verbal harassment. Tr. 444-45, 468-70, 714 (Mears' testimony that Ryan kept closer tabs on the complainants after the February 1993 reinstatement), 987-90 (testimony of Soto that he was given reduced working hours and that Ryan purposely caused Soto to miss his ride with Hyles). However, the judge made no findings in this area.

complainants. Tr. 204. On March 24, only three weeks after the creation of the third shift, Ryan eliminated that shift, announced a layoff, and allowed the repairmen to exercise their bumping rights.[26] 16 FMSHRC at 2240. Notwithstanding that there were repair positions available, each of the repairmen bumped one of the complainants and was eventually reclassified as a production worker. Gov't Ex. 16; Tr. 211-17.

AAA's inversion of the production and maintenance shifts so that production would be performed on the more desirable day shift for the first time in at least three years; Ryan's assignment to the temporary graveyard shift of four senior repairmen accustomed to working the day shift; and AAA's subsequent elimination of the temporary shift created a situation in which the four repairmen almost certainly would bump into the day shift when given the opportunity. *See* Tr. 1946 (testimony of senior repairman assigned by Ryan to the temporary third shift that he wanted to return to working the day shift). In fact, prior to the meeting, Ryan admitted that he knew that the senior repairmen would bump into day jobs (Tr. 1687-90) even though they had performed primarily repair work for many years and had not worked production during Hyles' tenure at AAA. Tr. 447.

At the subsequent bumping meeting, Hyles and Soto each requested that he be allowed to consult with the Solicitor's office because of their recent temporary reinstatement and the pendency of their discrimination complaints. 19 FMSHRC at 858; Tr. 452, 995-96. All the complainants believed that Ryan would disqualify them for any position into which they attempted to bump.[27] 19 FMSHRC at 858. In fact, at the December 1992 arbitration, Ryan argued that the complainants were not qualified to perform any available duties at AAA. Gov't Ex. 51 at 10 (arbitrator indicating that Ryan believed that the complainants were unable to perform available work); *see* Tr. 453. Ryan's testimony also leaves no doubt that he was the sole arbiter of an employee's qualification for a given position. *See* Tr. 1420, 1459, 1613 ("I am the judge [of whether an employee is qualified]."). As the judge found, animus tainted Ryan's judgment as to the complainants' qualifications. 19 FMSHRC at 863. These facts lend credence to the complainants' belief that Ryan would have summarily rejected any attempt by them to exercise their bumping rights at the March 1993 bumping meeting. *See* Tr. 452-53, 721, 857, 996 (testimony of complainants that they did not attempt to bump because Ryan would have

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[26] Although Ryan testified that the Operating Engineers and the contract forced him to have a bumping meeting when he eliminated the temporary third shift (Tr. 1396-97), the contract exempts temporary jobs from the bidding and bumping procedures. *See* Resp. Ex. 9 at 19-20; Tr. 241.

[27] Moreover, the Operating Engineers filed grievances against AAA on behalf of Soto and Dennis, as a result of the March 1993 layoff, assertedly because Ryan violated the contractual provision regarding layoff of Operating Engineers' stewards. Tr. 258, 1420-22. The grievances were withdrawn when Soto and Dennis were temporarily reinstated by agreement of the parties. 16 FMSHRC at 2242; Tr. 258.

disqualified them to prevent the bump). When all of the complainants sought to exercise their bumping rights after consulting with the Secretary's counsel, Ryan refused to consider them for any position. 19 FMSHRC at 858. The complainants were the only employees left without a job after the March 1993 bumping process was completed, and AAA subsequently hired new employees to fill the vacant repairman positions. 16 FMSHRC at 2240-41; Tr. 481, 1429, 1693.

Evidence supporting AAA's knowledge of the complainants' protected activities, the timing and circumstances surrounding the bumping of the complainants, and AAA's subsequent refusal to permit the complainants to bump junior employees persuades us that substantial evidence supports the judge's finding that AAA "manipulated the shift and job assignments . . . for the specific planned purpose of terminating the [complainants] . . . ." 19 FMSHRC at 866. Accordingly, we conclude that the record compels a finding that the complainants established a prima facie case that their March 1993 layoff was discriminatorily motivated.

b. Affirmative Defense

AAA asserts that the March 1993 layoff was not discriminatory because the complainants chose not to avail themselves of the bumping procedure after they were bumped by the senior employees. A. Reply Br. at 12-13. AAA also alleges that the judge failed to find that permitting the complainants to bump after job assignments already had been rearranged would cause "commotion" and the filing of grievances by the bumped employees. A. PDR at 45.

In finding that AAA used the March 1993 bumping procedure to retaliate against the complainants for their protected activity, the judge implicitly rejected AAA's argument that the complainants' attempts to bump were untimely. We agree that ample record evidence supports rejection of AAA's argument. Bumping requests were made by three of the complainants approximately one week after the bumping meeting, and the remaining complainant three weeks after the meeting. *See* Gov't Exs. 21, 45, 52; Tr. 721, 857. Nothing in the collective bargaining agreement dictates a deadline by which bumping rights must be exercised. Tr. 1699-701. Even Ryan admitted that nothing in the bargaining agreement requires that a miner must bump at the bumping meeting or immediately thereafter. Tr. 1700. Furthermore, nobody from AAA objected to Hyles' or Soto's request to consult with their attorney before deciding whether to bump, nor did anyone inform the complainants that by taking the time to consult an attorney, they were forfeiting their bumping rights under the bargaining agreement. Tr. 218, 244-45, 452. The complainants' decision to bump only after considering the repercussions of doing so was reasonable in light of their unanimous belief that Ryan would disqualify them from any position into which they sought to bump, and their uncertainty regarding whether attempting to bump would jeopardize their previous reinstatement. Thus, we reject AAA's defense that the complainants' bumping requests were untimely.

AAA further defends on the ground that the complainants did not seek to bid on a plant operator job that was posted on March 24, 1993 — the same day as the bumping meeting. A. PDR at 38. After assertedly being laid off on March 24, Crowell, the employee who successfully

bid on the job, was temporarily placed in the job on the same day by Ryan. The job was posted on the afternoon of the day the complainants were laid off, and, not surprisingly, Crowell was the only employee to bid on the job. Resp. Ex. 18A; Tr. 1400-06. AAA's claim that the complainants' failure to bid on the job filled by Crowell indicates their lack of interest in bumping into an available position was presented to the judge (A. Br. at 77 n.67) who nonetheless found that the bumping procedure violated section 105(c). The judge's implicit rejection of AAA's argument is reasonable. There is no evidence in the record that the complainants were even aware of the posting, because, unlike Crowell, when they were bumped on March 24, they were not placed in another job.[28] Accordingly, we find that AAA's arguments fail to establish an affirmative defense to the Secretary's prima facie case.

In sum, the record compels a finding of discrimination regarding the second set of layoffs in March 1993. Ryan was able to manipulate the seniority/job classification so that the complainants were the only employees laid off. In addition to the judge's pertinent findings in his remand decision, he made strong factual findings of discrimination in his initial decision. 16 FMSHRC at 2248-49. Moreover, when the two layoffs and the circumstances surrounding them are viewed together, a clear pattern of discrimination by Ryan and AAA to retaliate against Hyles, Mears, Dennis, and Soto for their protected activity under the Mine Act emerges. We conclude that the credited record evidence compels the conclusion that AAA discriminatorily laid off the complainants in violation of section 105(c).

Accordingly, we reverse the judge's determination that the March 1993 layoffs were not discriminatorily motivated.

C. Penalties

In the judge's initial decision, in which he found both layoffs unlawful, he did not reach the issues of backpay or penalties. 16 FMSHRC at 2249. In a subsequent decision, the judge accepted a stipulation submitted by the parties, referred to previously (slip op. at 7 n.3), on the amount of backpay due the complainants, while AAA continued to argue against a finding of liability. 17 FMSHRC 799, 800 (May 1995) (ALJ). The parties also stipulated that the penalties should be levied in the amount of $3,500 per individual violation. *Id*. at 800-01. AAA now objects to the judge's imposition of $14,000 in penalties as contrary to the stipulation. AAA PDR at 73.

[28] Further, Ryan's actions in placing Crowell in the job before it was even posted — and thus before the complainants had an opportunity to bid on it — indicates that any efforts by them to bid on the job and be reclassified would have been futile.

In making his penalty assessment, the judge failed to properly apply the penalty criteria set forth in section 110(i)[29] in his penalty assessment. *See* 17 FMSHRC at 801. Likewise, the supporting stipulation of the parties, which the judge attached to his decision, does not address the penalty criteria or offer any supporting rationale for the agreed upon penalty of $3,500 per violation. *Id*. at 803-08 (Ex. A). In the judge's remand decision, he cited to the parties' earlier stipulation on penalties and stated that, "after consideration of the relevant statutory criteria," a penalty of $14,000 ($3,500 per violation for each of the four discrimination violations he found) was appropriate. 19 FMSHRC at 861. The judge did not specifically analyze any of the penalty criteria or offer any supporting reasons for the penalty in accordance with statutory requirements. *See Sellersburg Stone*, 5 FMSHRC at 290-94. Accordingly, we vacate the penalties imposed for the two layoffs and remand to the judge solely for the narrow purpose of reassessment of penalties through application of the section 110(i) penalty criteria. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1539 (Sept. 1997).

[29] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

III.

Conclusions

For the foregoing reasons, we affirm the judge's determination that the July 1992 layoff and failure to recall complainants was violative of section 105(c). We reverse the judge's determination that the March 1993 layoff was not discriminatorily motivated, and conclude that the record compels a determination that the March 1993 layoff violated section 105(c). Finally, we remand to the judge for the limited purposes of reinstating his backpay order, 17 FMSHRC at 801, (which adopted the parties' stipulation regarding backpay owed) and direct him to add the interest due on the backpay amounts accruing from the date referred to in the parties' stipulation, pursuant to the Commission's decision in *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2051-53 (Dec. 1983), *modified, Local 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988). We also order the judge to reassess the penalties, reviewing the parties' stipulation, and applying the section 110(i) criteria. *See Energy West Mining Co.*, 16 FMSHRC 4, 4 (Jan. 1994) (considering section 110(i) criteria and approving penalty to which parties stipulated).

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

I dissent from the majority decision because I believe that, in light of the judge's disregard of the instructions set forth in the Commission's original remand order (*see* 18 FMSHRC at 2101-03), his decision must be vacated and the matter remanded. For example, the judge failed to "frame his analysis in a manner consistent with the Commission's *Pasula-Robinette* analytical framework" (slip op. at 10), after the Commission directed him to do so (18 FMSHRC at 2102). Nor did the judge "reach the issue of whether AAA's economic justification for the initial layoff was proper" (slip op. at 18) as directed by the Commission (18 FMSHRC at 2102).

I also believe that a remand is necessary in light of what is in some respects an internally contradictory decision. As my colleagues point out, the judge's "conclusion that there was no nexus between the [March 1993] layoffs and the complainants' involvement in MSHA's section 110(c) investigation is contrary to his own findings." Slip op. at 19. I am not prepared to resolve such issues at this appellate level, issues which I believe must be resolved by the judge in the first instance. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) ("[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence.") (citations omitted).[1]

Theodore F. Verheggen, Commissioner

[1] I would also vacate and remand the judge's penalty assessment and backpay awards with the instruction to reconsider them in light of any new findings made pursuant to my remand instructions on the merits. I agree with my colleagues that the judge must follow *Sellersburg Stone Co.*, 5 FMSHRC at 290-94, in reassessing any penalty. Slip op. at 24. On remand, the judge thus must enter findings on each of the section 110(i) penalty criteria and assess an appropriate penalty based on his findings. *See* 5 FMSHRC at 292-93.

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