FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 13, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CLAY BAIER	: : : : :	
v.	:	WEST 97-96-DM
DURANGO GRAVEL	:	

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

DECISION

BY THE COMMISSION:

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 Richard W. Manning concluded that Durango Gravel ("Durango") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it terminated employee Clay Baier on August 1, 1996. 20 FMSHRC 59, 60, 71 (Jan. 1998) (ALJ). The Commission granted Durango's petition for discretionary review challenging the judge's determination. For the reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

Durango owns and operates the J & J pit, a sand and gravel pit in La Plata County, Colorado. 20 FMSHRC at 59; Tr. 25. Durango is owned by James Helmericks and his family, and generally employs two individuals in addition to Helmericks. 20 FMSHRC at 59; Tr. 248. All Durango employees perform a variety of tasks, as directed by Helmericks. 20 FMSHRC at 60. The mine facility consists of a pit and a crusher. *Id.* at 59.

In April 1996, Baier began working for Durango as a truck driver. *Id.* at 60. Among other duties, Baier operated the loader and repaired equipment, including the crusher. *Id.* Also in April, the Department of Labor's Mine Safety and Health Administration ("MSHA") received

a complaint from William Elvidge, a former employee at the J & J pit, concerning hazardous conditions at the mine, including the operator's alleged undercutting of the highwall by removing material from the "toe"[1] of the highwall. 20 FMSHRC at 60, 64.[2] On or about July 17, 1996, MSHA inspectors Royal Williams and George Renton inspected the mine in response to Elvidge's complaint. *Id.* at 60; Tr. 314. During the inspection, Baier informed Inspector Williams that he had been cutting into the toe of the highwall to get material. Tr. 19-20, 215. The inspectors talked with Helmericks and Baier about the dangers of mining the toe of the highwall. 20 FMSHRC at 60. Inspector Williams told Baier not to dig into the face of the highwall because the highwall could fail and seriously injure or kill him. *Id.* Williams also advised Baier that if rock was needed to feed the crusher, material should be pushed down from the top of the highwall and scooped up with the loader. *Id.*

The parties dispute the circumstances surrounding Baier's discharge. *Id.* Baier testified that, in the weeks between the mid-July inspection and the August 1 discharge, he pushed material down from the top of the highwall with the loader, but that Helmericks told him not to go on top of the highwall. *Id.*; Tr. 17. Baier added that, on the Monday before the termination, Helmericks observed him pushing material off the top of the highwall, and that Helmericks berated him for doing so. 20 FMSHRC at 60; Tr. 65. Baier testified that, on Thursday, August 1, he arrived at work at 7:00 a.m. 20 FMSHRC at 60; Tr. 70. He stated that he had started all of the equipment in preparation for operations, and that the crusher was not down for repairs. Tr. 38, 41-42. Baier said that Helmericks and his son ("Jim, Jr.") arrived soon after, and that Helmericks fired Baier immediately. 20 FMSHRC at 60. Baier testified that Helmericks then verbally berated him, but that Helmericks did not give him a reason for the termination. *Id.*; Tr. 23.

Helmericks, however, testified that he did not observe Baier on the highwall during the two weeks preceding the August 1 termination. Tr. 273. Helmericks testified that he told Baier that only Helmericks was permitted to push material from the top of the highwall. Tr. 264, 267. Helmericks also testified that, upon his arrival at the property on August 1, he assigned Baier and Jim, Jr. to repair the crusher, which was inoperative. 20 FMSHRC at 60. Helmericks stated that he left the property and traveled to Farmington, New Mexico, to get parts and that, upon his return at approximately 10:30 or 11:00 a.m., Baier was on the highwall pushing material down with the loader. *Id.*; Tr. 250. Helmericks testified that he terminated Baier for disobeying two

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[1] The "toe" is the bottom part of the highwall face, and does not include the loose fallen material deposited near the highwall. 20 FMSHRC at 67 & n.1 (judge distinguishing between digging at toe and scooping loose material); Tr. 16-17, 19, 166-67; *see also* American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 576 (2d ed. 1997) (defining "toe" as the "lowest part of a slope or cliff").

[2] In 1993, MSHA issued Durango an imminent danger order because an inspector observed an employee digging at the toe of a highwall with a loader. 20 FMSHRC 60; Ex. P-3.

direct orders: assist Jim, Jr. with the crusher repairs and refrain from pushing material down from the top of the highwall with the loader. 20 FMSHRC at 60-61.

On March 5, 1997, the Secretary of Labor filed a complaint with the Commission on Baier's behalf alleging that Baier's termination constituted discrimination under section 105(c) of the Mine Act.[3] Compl. at 1. On October 8, the matter proceeded to hearing before Judge Manning.

The judge found that Baier's conversation with MSHA inspectors and his refusal to dig into the toe of the highwall constituted protected activity. 20 FMSHRC at 62, 65. He concluded that the Secretary established her prima facie case of discrimination. *Id.* at 66. The judge found that Helmericks knew that Baier had discussed safety issues with an MSHA inspector, and that Helmericks disapproved of the fact that Baier raised these issues with the inspector. *Id.* The judge further found that Helmericks expressed animus towards MSHA in general. *Id.* The judge observed that the termination occurred two weeks after the July 1996 inspection. *Id.* The judge acknowledged that Baier's action of pushing material off the highwall was not protected but recognized that "it was related to the safety concerns Baier raised with Inspector Williams." *Id.* He found that Durango did not rebut the Secretary's prima facie case. *Id.* at 66, 71. The judge further concluded that Durango did not prove its affirmative defense, because it "did not establish that it would have terminated Baier for being on top of the highwall on August 1 if his activities did not spring from his safety complaints to MSHA." *Id.* at 69.

The judge subsequently issued a supplemental decision awarding Baier $1,634 in back pay. 20 FMSHRC 268, 270, 272 (Mar. 1998) (ALJ). After considering the section 110(i) civil penalty criteria — particularly Durango's very small size and its ability to continue in business — the judge reduced the $2,500 civil penalty proposed by the Secretary to $100. *Id.* at 271-72.

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[3] Section 105(c)(2) provides, in pertinent part:

> Any miner . . . who believes that he has been discharged . . . in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . .

30 U.S.C. § 815(c)(2).

II.

Disposition

Durango challenges the judge's conclusion that Baier's termination was motivated in part by his conversation with an MSHA inspector, and the reasoning upon which this conclusion is based. PDR at 1.[4] Durango argues that the period of time between Baier's conversations with MSHA and his termination is too long to establish a coincidence in time, especially considering the judge's finding that Helmericks was not the type of individual to wait to take adverse action against an employee. *Id.* Durango also denies having harbored any hostility towards MSHA prior to MSHA's investigation of Baier's complaint of discrimination. *Id.* at 1-2. Durango further contends that the judge erred in analyzing this case as one involving work refusal because Baier could not reasonably and in good faith have believed that he was required to dig into the toe of the highwall to get material on August 1. *Id.* at 2, 4. The operator asserts that Baier's insubordination on August 1 constitutes a legitimate reason for his termination. *Id.* at 3. Durango also maintains that, following prior incidents that led it to regard Baier's work record as unsatisfactory, his insubordinate action on August 1 constituted the "straw that broke the camel's back." *Id.*

The Secretary argues that substantial evidence supports the judge's finding that Baier's termination was motivated at least in part by his protected activities. S. Br. at 7-13, 20. She contends that the 11 business days which passed between the July 17 inspection and the August 1 termination provide the requisite temporal relationship to permit a reasonable inference of improper motivation through circumstantial evidence. *Id.* at 8. She also maintains that the record contains evidence supporting the judge's finding that Helmericks harbored hostility towards MSHA in general as well as towards Baier's protected activity, and that such hostility played a part in Helmericks' decision to terminate Baier. *Id.* at 8-12. The Secretary submits that the judge correctly found that Baier's refusal to dig into the highwall was protected and that his August 1 activity was closely related to his earlier refusals and his discussions with the inspector and Helmericks about his concerns regarding mining the toe of the highwall. *Id.* at 12-13. The Secretary asserts that none of the grounds given by Durango to support its assertion that it would have terminated Baier for his unprotected activities alone provides a basis for reversing the judge's finding that the operator failed to establish an affirmative defense. *Id.* at 13-17.[5]

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[4] Durango is represented on appeal, as it was below, by Helmericks. PDR at 5; 20 FMSHRC at 69. Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), Durango designated its PDR as its brief.

[5] The parties focus partly on whether the judge properly analyzed the case as one presenting a work refusal and whether he correctly determined that Baier's termination was discriminatory based on Baier's work refusal. PDR at 2, 4; S. Br. at 12-13. However, the judge found that the Secretary established a prima facie case of discrimination with respect to Baier's safety complaint without reference to his alleged work refusal, and determined that "Durango

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. A miner 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. *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, 642-43 (4th Cir. 1987).

A. Prima Facie Case

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.* We also have held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case" and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Id.*

The judge found that "Helmericks knew that Clay Baier had discussed safety issues with MSHA inspectors." 20 FMSHRC at 66. On review, Durango does not appear to dispute the judge's finding that Helmericks knew Baier's discussion with Inspector Williams was safety-related. PDR at 1. However, to the extent Durango's challenge to "the reasoning upon which the

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Gravel did not establish that it would have terminated Baier for being on top of the highwall on August 1 if his activities did not spring from his safety complaints to MSHA." 20 FMSHRC at 66, 69. Because the judge relied on Baier's complaint to MSHA as a factor motivating his termination, and because we find that substantial evidence supports the judge's conclusion that Durango violated section 105(c) based on his protected conversations with the MSHA inspector, we need not reach the work refusal issue.

[judge's] conclusion [that the Secretary established a prima facie case of discrimination] is based" (PDR at 1) can be construed to raise the issue of knowledge, we address it. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (pro se complainant's pleadings held to less stringent standards than pleadings drafted by attorneys). In finding that Helmericks knew of Baier's safety-related discussion with Inspector Williams, the judge implicitly rejected Helmericks' claim at the hearing that he did not understand this discussion to be safety-related. Tr. 320-22, 444. The judge's finding of knowledge is supported by Helmericks' knowledge that the discussion involved an MSHA safety inspector, that Inspector Williams suggested to Baier a method of mining the highwall, and that the discussion coincided with an MSHA inspection of the mine site. Tr. 212, 320-22. We see no reason to disturb the judge's implicit rejection of Helmericks' claim that he was unaware that Baier's discussion with Inspector Williams was safety-related. *See, e.g.*, *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (finding no circumstances warranting overturning judge's implicit credibility determinations). Accordingly, we find that substantial evidence[6] in the record supports the judge's finding that Helmericks knew that Baier's discussion with Inspector Williams related to safety.

We previously have found improper motivation where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge. *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982 (June 1982). The Commission applies no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing whether an illegal motive can be inferred. *See Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Surrounding factors and circumstances may influence the effect to be given to such coincidence in time. *Id.* In *Chacon*, for example, complaints ranging from four days to one and one-half months before the adverse action were deemed sufficiently coincidental in time to establish illegal motive. *Chacon*, 3 FMSHRC at 2511. In *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954 (D.C. Cir. 1984), the court, noting that two weeks had elapsed between the alleged protected activity and the miner's dismissal, held that "[t]he fact that the Company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." *Id.* at 960.

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[6] When reviewing an administrative law judge's factual determinations, we are bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citation omitted).

Helmericks' discharge of Baier occurred approximately two weeks after Baier's discussion with Inspector Williams. 20 FMSHRC at 60; Tr. 314. The proximity in time between these events supports the judge's finding of a discriminatory motive on the part of Helmericks. *See Donovan*, 732 F.2d at 960. Moreover, the close relationship between Baier's discussion with Inspector Williams, concerning a safe method of mining the highwall, and the action which prompted Baier's termination also supports the judge's finding of improper motive by Helmericks.[7] The judge's conclusion of unlawful motivation is further supported by evidence that none of Baier's alleged insubordinate or disrespectful unprotected activities occurring prior to his complaint to MSHA — including damaging a loader, taunting Helmericks in front of his wife, being rude to female customers, disobeying Helmericks by bringing his dog to work, and the destruction of equipment at the mine by Baier's dog (20 FMSHRC at 69-70; Tr. 134-35, 140, 160-62, 182, 246-47, 372) — resulted in any discipline for Baier.

Additionally, we note that the judge found that Helmericks was hostile towards MSHA in general, as well as Baier's conversation with Inspector Williams. 20 FMSHRC at 66. Substantial evidence in the record supports the judge's finding of hostility. Helmericks appears to have viewed MSHA's decision on July 17 to talk to Baier rather than his son as an unwelcome threat to his authority over the mine. *Id.* at 62, 69; Tr. 129-30, 360-63. Furthermore, Baier testified that Helmericks told him that MSHA inspectors "don't know what they are talking about" and that MSHA inspectors "give [him] a hard time and want [his] money." Tr. 17. Finally, Helmericks' hostility towards safety complaints is evidenced by Elvidge's testimony that, when he expressed to Helmericks his safety concerns and took photographs of what he considered dangerous conditions, Helmericks told him to "shut up and get off his property and if [Elvidge] ever came back [he] would be arrested." Tr. 169, 173. At the hearing, Helmericks expressed hostility towards Elvidge for taking these photographs. Tr. 323. Accordingly, we find that substantial evidence supports the judge's finding that Helmericks harbored animus towards Baier's safety-related conversation with MSHA.

In sum, based on the factors enunciated in *Chacon*, substantial evidence in the record supports the judge's conclusion that Baier's protected conversation with an MSHA inspector contributed to Durango's decision to terminate Baier's employment.

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[7] We are not persuaded by Durango's argument that the two-week period between MSHA's inspection and the termination is too long to establish a coincidence in time in light of the judge's finding that Helmericks was not the kind of person to wait to take adverse action against an employee. PDR at 1. The judge found that Baier's unprotected activity was closely intertwined with his protected discussion with MSHA during the inspection. 20 FMSHRC at 69. According to Helmericks' version of events, the day Helmericks terminated Baier was the first time Helmericks had observed Baier on the highwall since the MSHA inspection. Tr. 273, 319. Helmericks fired Baier immediately thereafter. 20 FMSHRC at 65. Accordingly, the two-week period between the inspection and the termination supports the judge's finding that the termination was motivated in part by the MSHA inspection, and is not inconsistent with his finding that Helmericks was "volatile." *Id.*

B. Affirmative Defense

The raising of an affirmative defense necessitates an inquiry into whether the proffered business justification was reason "enough to have legitimately moved that operator to have disciplined the miner." *Chacon*, 3 FMSHRC at 2517. We have explained that this affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.* (citation omitted). In *Bradley*, 4 FMSHRC 982, we enunciated several indicia of non-discriminatory reasons for an employer's adverse actions. *Id.* at 993. These include evidence of past discipline consistent with that meted out to the complainant, the miner's unsatisfactory past work record, prior warnings to the miner, and personnel rules or practices forbidding the conduct in question. *Id.* We also have stated: "It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." *Pasula*, 2 FMSHRC at 2800.

The judge found that Durango had a personnel rule forbidding employees other than Helmericks from mining from the highwall. 20 FMSHRC at 65.[8] However, Helmericks did not discipline Baier following his prior violations of the highwall rule or warn him that any adverse action, let alone termination, would result from a violation of the highwall rule. Tr. 60, 63, 65-66, 273, 319. To the extent the operator argues that the violation of a work rule warrants immediate termination (PDR at 3-4), such an argument is inconsistent with Durango's treatment of Baier following his previous violations of the highwall rule. While the judge made no findings related to Durango's discipline of its employees, Durango's treatment of Baier is inconsistent with nearly all the record evidence of its prior treatment of allegedly insubordinate employees.[9]

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[8] Although Durango introduced no evidence of any written work rules or personnel handbook of any kind, it is uncontroverted that, prior to August 1, Helmericks told Baier that no one but Helmericks was permitted to operate equipment on top of the highwall. 20 FMSHRC at 65; Tr. 60.

[9] The evidence presented by Durango regarding James Johnson and William Elvidge does not support a claim of consistent past discipline. In Durango's answer to the complaint of discrimination, Helmericks stated that he "discharged" Johnson for refusing to accept a pay reduction after violating the no-smoking rule and for failing to complete repairs, but admits that Johnson walked off the job prior to the "discharge." Ex. P-5 at 3. Furthermore, Durango's admission that it did not terminate Johnson for his failure to obey an order to repair equipment or for his violation of a work rule undermines any claim of consistent past discipline. *Id.* In Durango's answer to the complaint of discrimination, the operator also claimed that it terminated Elvidge for "not return[ing] to work as ordered because he had to ride home with James Johnson" on the day Johnson was terminated. *Id.* Not only is this asserted reason for the

Moreover, the scant record evidence of past discipline (Tr. 171, 378) claimed to be consistent with that meted out to the complainant involved the violation of a different work rule and therefore is insufficient to warrant a remand to the judge. *See Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2106 (Oct. 1993) (holding that judge's error in failing to comment on evidence was harmless where such evidence would not have altered judge's determination).

Durango alleges that Baier's prior unsatisfactory work record rendered his insubordination on August 1 the "straw that broke the camel's back" justifying his termination. PDR at 3. The judge made no findings regarding whether the alleged previous incidents occurred but, after considering the evidence, he found that "[u]ntil Baier raised safety concerns following MSHA's inspection, . . . none of the alleged insubordinate and disrespectful actions Helmericks refers to caused him to terminate Baier's employment with Durango Gravel." 20 FMSHRC at 70.

Durango's "straw that broke the camel's back" argument was presented before the judge and implicitly rejected. *Id.* at 69-70; *see Fort Scott*, 19 FMSHRC at 1516. The complete absence of prior warnings and discipline for Baier's alleged prior bad behavior supports the judge's finding that Durango failed to establish that the cumulative effect of Baier's prior work record rendered his unprotected activity on August 1 the fatal "straw." Contrary to Durango's suggestion, we do not read the judge's decision as an indication that he considered the alleged incidents of poor workplace behavior in isolation. Rather, his analysis reflects a reading of the entire record, and complies with Commission Procedural Rule 69(a), 29 C.F.R. § 700.69(a),[10] and Commission precedent. *See Bradley*, 4 FMSHRC at 993 (affirming judge's finding that operator failed to establish affirmative defense, despite the fact that operator presented "some reasonable arguments"). We find nothing in the record warranting reversal of the judge's rejection of Durango's argument. Accordingly, we find that substantial evidence supports the judge's conclusion that Durango failed to carry its burden of establishing that it would have terminated Baier's employment for unprotected reasons alone.

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termination unrelated to insubordination, but, at the hearing, Helmericks equivocated and testified that he terminated Elvidge for violating Durango's no-smoking rule. Tr. 171, 378. We also note that Elvidge testified that he quit because of safety concerns. Tr. 168-70, 173, 193.

[10] Commission Procedural Rule 69(a) states, in pertinent part, that "[t]he [judge's] decision shall be in writing and shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a).

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that Durango Gravel's termination of Baier violated section 105(c) of the Mine Act.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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