FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 2000

ANTHONY SAAB	:	
	:	
v.	:	Docket No. WEST 97-286-DM
	:	
DUMBARTON QUARRY ASSOCIATES	:	

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In this discrimination proceeding, Administrative Law Judge Richard Manning concluded that Dumbarton Quarry Associates ("Dumbarton") did not violate section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1994) ("Mine Act" or "Act"), when it laid off employee Anthony Saab on March 18, 1997, and April 4, 1997. 20 FMSHRC 508, 517 (May 1998) (ALJ). The Commission granted Saab's petition for discretionary review challenging the judge's determination. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

Dumbarton operates a gravel pit in Fremont, California that makes aggregate and asphalt. 20 FMSHRC at 508. Saab was hired on June 20, 1995 from Teamsters Local 291 to drive a haul pack[1] and a water truck. *Id.* He complained in late July or early August 1995 that a loader operator was slamming other employees' vehicles with the bucket of his machine. *Id.* at 509; Tr. I 10. On or about October 22, 1996, Saab sent a letter to Clay Buckley, the production operations manager at the quarry, complaining that loader operator Steve Hamblin used his loader to pick up

[1] Haul packs are large off-road dump trucks used to transport material from the pit to the crusher. 20 FMSHRC at 508.

Saab's haul pack. 20 FMSHRC at 509; Tr. I 14; Ex. C-1. The company's safety officer spoke to employees at the pit after the letter was sent and told Saab that that activity would never happen again. 20 FMSHRC at 509; Tr. I 14, 16. The unsafe equipment operator was later given a "write up" for other unsafe behavior. Tr. I 19.

On March 5, 1997, Saab called the Department of Labor's Mine Safety and Health Administration ("MSHA") to complain that the highwall had become too high and steep, and about the lack of berms on some of the haul roads. 20 FMSHRC at 509; Tr. I 19-21, 23-24, 58. On March 10-12, 1997, MSHA inspected the quarry. 20 FMSHRC at 509; Ex. C-2. At the time of the inspection, Saab raised safety issues about mobile equipment at the quarry with MSHA inspectors. 20 FMSHRC at 509; Tr. I 31. MSHA issued 17 citations during the inspection, including one citation concerning the condition of the highwall, one citation due to the lack of berms on a roadway, and several citations for violative conditions on mobile equipment. 20 FMSHRC at 509; Ex. C-2. On March 18, the day Dumbarton cleaned the highwall benches with a crane to abate the highwall violation, Saab and Larry Meyer, the other haul pack driver at Dumbarton, were laid off for the day. 20 FMSHRC at 509; Ex. R-1; Tr. I 38, II 66-70.

On March 25, Saab complained to Buckley that Mike Grant, an independent contractor, threw a rock at him from behind. 20 FMSHRC at 510. Buckley spoke with Grant about the incident, and Grant denied throwing the rock. *Id.* Buckley prepared an incident report with a safety officer stating that, "due to the lack of eyewitnesses, 'the event could not be proven as stated by Saab.'" *Id.* (quoting Ex. C-4). On March 26, Saab videotaped Grant at work to try to elicit an admission that Grant threw a rock at him. *Id.* Grant did not make any statements concerning the incident, but told Saab that he should start looking for another job. *Id.* On April 3, Saab observed an unidentified person in a van photographing him, which he considered to be harassment in retaliation for his complaints to MSHA. *Id.* (citing Tr. I 53-54, II 32); Tr. II 55.

On April 2, Dumbarton began making arrangements to move the spare water truck to another mine owned by its parent company, DeSilva Gates, in response to a memorandum from DeSilva Gates stating, inter alia, that Dumbarton must remove all excess equipment from the mine site by August 1. 20 FMSHRC at 512. On the afternoon of April 3, the operator of the primary water truck complained that the truck was not operating properly, and later that afternoon the truck broke down. *Id.* Dumbarton immediately arranged for delivery of a rental truck to perform necessary watering work. Tr. II 84-85. On April 4, when Saab arrived at the quarry, an independent contractor hired by Dumbarton was watering the roads with his own truck. 20 FMSHRC at 511. Buckley informed Saab that Randy Heuvel, a more senior Teamster at the quarry, had bumped him off the haul pack onto the water truck, and that Saab was laid off effective that day. *Id.* at 510. Also on April 4, the spare water truck was moved from Dumbarton to Curtner Quarry, another facility owned by DeSilva Gates. *Id.* at 511. The same day, Grant prepared an estimate stating that repairing the primary water truck would cost the company nearly $16,000. *Id.* at 513. DeSilva Gates' chief financial officer advised Buckley not to repair the primary water truck. *Id.* On April 7 or 8, Buckley also told Saab that the primary water truck would not be usable for a few weeks. *Id.* at 511; Tr. I 62. Saab believed that he

would be called back to work once the water truck was repaired, but the water truck was never repaired and Saab was not called back to work on a full time basis. 20 FMSHRC at 511. Dumbarton offered Saab work for a few days in June, 1997, but Saab turned these offers down because he was employed elsewhere. *Id.* at 513. At some point after April 4, Dumbarton decided not to repair the primary water truck, and permanently subcontracted its watering work. *Id.* Within six months, all of DeSilva Gates' quarries subcontracted their watering work. *Id.*; Unpublished Order Den. Recons. at 1 (June 12, 1998).

On April 10, 1997, Saab filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act, asserting that his one-day layoff on March 18 and his layoff on April 4 were discriminatory.[2] In a September 10, 1997 letter, MSHA informed Saab and Dumbarton that, based upon its investigation, there had been no violation of section 105(c). On September 19, Saab brought the instant proceeding under section 105(c)(3) of the Act.[3]

The judge determined that Saab's one-day layoff on March 18 was not in retaliation for his safety complaints. He credited Buckley's testimony that Dumbarton laid off Saab and the other haul pack driver because Buckley did not want anyone working in the pit on the day a crane was used to abate the highwall violation. The judge rejected Saab's contention that he should have been allowed to bump into a water truck operator position. He further found that, even if proven to have occurred, neither Grant's alleged rock throwing nor the photographing of Saab by an unidentified individual in a van was attributable to Dumbarton. 20 FMSHRC at 515.

Regarding Saab's layoff on April 4, the judge found that "Saab presented evidence that his termination was motivated at least in part by his protected activity." *Id.* at 514-15. However, he determined that Dumbarton successfully rebutted the prima facie case. *Id.* at 515-17. The judge rejected Saab's suggestion that Dumbarton planned events in order to lay him off in retaliation for his discussions with MSHA. *Id.* at 516. He also found that, although Buckley and Grant had a close working relationship, Saab did not prove that they conspired to harass him or cause him to be laid off. *Id.* at 515. Rather, the judge credited Buckley's version of events: that Dumbarton removed the spare water truck from the mine site due to Dumbarton's new policy of removing excess equipment from the mine; that Dumbarton removed its primary water truck from the mine site after its chief financial officer refused to pay the high cost of repair; that the operator of the primary water truck bumped Saab; and that Saab was laid off because he had the

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[2] Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides, in pertinent part: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[3] Section 105(c)(3), 30 U.S.C. § 815(c)(3), provides, in pertinent part: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

least seniority of the three Teamster employees at the mine. *Id.* at 511, 513, 516. The judge also rejected Saab's contention that Dumbarton's decision to use an independent contractor to water the roads did not make economic sense. *Id.* at 516.

Finally, the judge issued an order denying Saab's motion for reconsideration, in which he acknowledged that his finding that DeSilva Gates' other facilities had already subcontracted their watering work by the time Dumbarton decided to do so may have been erroneous. Order Den. Recons. at 1. However, the judge concluded that, even if De Silva Gates' other facilities subcontracted their watering work after Dumbarton, he would nonetheless have dismissed Saab's complaint. *Id.*

II.

Disposition

Saab argues that the judge erroneously placed on him the burden of affirmatively defending against the prima facie case. S. Supp. Br. at 2-5.[4] Saab also contends that undisputed record evidence mandates overturning several factual findings crucial to the judge's dismissal of Saab's claims. PDR at 1-2, 11. Saab submits that the judge improperly restricted testimony regarding Dumbarton's history of adverse treatment of employees who make safety complaints. S. Supp. Br. at 5-6. Saab further asserts that other employees affected by Dumbarton's abatement of the highwall violation on March 18, 1997 were offered work in other areas of the quarry. *Id.* at 6-7. Finally, Saab challenges several of the judge's factual findings, and maintains that Dumbarton's claim that it laid him off on April 4 because all its water trucks were unavailable is pretextual. PDR at 2-3, 7-11.

Dumbarton responds that the judge correctly determined that Saab engaged in protected activity but that his layoff was in no part motivated by that activity. D. Resp. Br. at 7. Dumbarton disputes Saab's assignments of error related to the judge's findings, and maintains that Saab has failed to set forth adequate reasons to overturn the judge's determination that neither Saab's one-day layoff on March 18 nor his layoff on April 4 violated section 105(c) of the Mine Act. *Id.* at 9-18.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 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

[4] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), Saab designated his PDR as his brief. Saab also filed a supplemental brief.

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) (applying *Pasula-Robinette* test).

A. Exclusion of Evidence

Saab contends that the judge erroneously placed the burden of affirmatively defending the case on him. S. Supp. Br. at 2-5. However, the judge's conclusion of his analysis at the rebuttal phase of the Commission's discrimination framework foreclosed any affirmative defense analysis. 20 FMSHRC at 517. At the rebuttal phase of the Commission's discrimination analysis, the burden remains on the complainant. *See Robinette*, 3 FMSHRC at 818 n.20. Accordingly, we affirm the judge's allocation to Saab of the rebuttal phase burden.

We decline to consider Saab's allegation (first raised in his supplemental brief) that the judge improperly limited Saab's testimony regarding Dumbarton's alleged pattern of "failing to respond to and adversely treating employees who exposed safety violations." S. Supp. Br. at 5. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(g); *see Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997). Saab did not raise the issue of the judge's limitation of his testimony in his petition for discretionary review, nor did the Commission direct review of this question sua sponte. Therefore, Saab's challenge to the judge's limitation of his testimony is not properly before the Commission. Contrary to our dissenting colleague, we do not consider Saab's generalized plea that the judge's decision was not based on an "accurate set of facts" to even implicitly raise the evidentiary question which Saab subsequently addressed in his brief. Nor do we share the concern of our concurring colleague that our holding here may appear to be at odds with the broad reading we have accorded petitions filed in *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) and *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in relevant part,* 170 F.3d 148 (2d Cir. 1999). Unlike those cases, the question of the exclusion of evidence does not follow analytically from the sweeping language in Saab's petition.

B. March 18 Layoff

We are not persuaded by Saab's challenges to the judge's determination that Saab's layoff on March 18 did not violate section 105(c) of the Act. We find meritless Saab's argument that the judge erred in finding that Buckley's decision to switch Heuvel to the water truck in February was unrelated to Saab's complaints. PDR at 8. Heuvel's February move to the water truck preceded Saab's March safety complaints, and Saab conceded that no events prior to those complaints motivated his layoffs by Dumbarton. Tr. I 11-17. Thus, Buckley's decision to switch

Heuvel to the water truck could not possibly have been motivated by Saab's safety complaints. Accordingly, we affirm the judge's finding that Saab's complaints and Heuvel's move to the water truck were unrelated.

Regarding Saab's claim that the collective bargaining agreement entitled him to bump Heuvel, a more senior Teamster, off the water truck on March 18 (PDR at 8), we conclude that substantial evidence[5] supports the judge's rejection of Saab's claim. The judge found no evidence that junior employees are contractually entitled to bump senior employees. 20 FMSHRC at 515. The union contract on its face permits senior Teamsters to bump junior Teamsters from positions for which the senior Teamster is qualified, not vice versa. Ex. R-6 at 9. Thus, Saab, as the least senior Teamster at Dumbarton, was not entitled to bump anyone. 20 FMSHRC at 515-16. Accordingly, we affirm the judge's finding that Saab was ineligible to bump on March 18, the day of his one-day layoff.

We are also not convinced by Saab's suggestion that Dumbarton's provision of work to other employees on March 18 was discriminatory. The judge found that Dumbarton laid off Saab on March 18 because he was a haul pack operator and there was no available work for haul pack operators that day due to the operator's abatement of the highwall violation. *Id.* at 515. It is undisputed that haul pack drivers at Dumbarton work beneath, and come within ten feet of, the highwall. Tr. I 23, 113. Because it would have been dangerous for employees to work beneath the area of the highwall being abated on March 18, that area was bermed off and other equipment operators were assigned to other areas of the facility. 20 FMSHRC at 512; Tr. I 113, 143, II 69-70. Buckley also testified that loader and dozer operators have other duties which do not necessitate being near the pit. Tr. II 70-71. In fact, Meyer, the other haul pack operator, conceded that the loader and dozer operators may also have been affected by the March 18 highwall abatement, but that Dumbarton "probably had something else for them to do." Tr. I 114. Buckley added that, when enough material is stockpiled — as was the case on March 18 — haul packs are not needed. Tr. II 69.[6] Accordingly, substantial evidence supports the judge's finding that Dumbarton laid off Saab on March 18 solely because there was no available work for haul pack drivers that day.

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[5] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[6] Meyer and Saab admitted that neither was at the quarry on March 18 and that neither knows what happened there that day. Tr. I 143-44, II 52.

C. April 4 Layoff

Saab submits that the primary water truck could have been partially repaired to operative condition without great expense, and that Dumbarton decided "to not repair the truck which broke down and to get rid of the spare truck, so it would have an excuse to fire [Saab]." PDR at 5; S. Reply Br. at 2-3 (citing Ex. C-2). Dumbarton states that its primary water truck had a cracked frame, and that it would have been unreasonable for it to engage in only a partial repair, particularly given the recent MSHA inspection. D. Resp. Br. at 13, 17.

The Commission's "function is not to pass on the wisdom or fairness of [an operator's] asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). Here, while the judge made no specific finding regarding Saab's claim that Dumbarton improperly declined to partially repair the primary water truck, his finding that the operator's actions related to the primary water truck were in no part motivated by Saab's complaints implicitly rejected Saab's contention. 20 FMSHRC at 517.

The judge found that Buckley was aware of the numerous mobile equipment citations MSHA had recently issued to Dumbarton. *Id.* at 516. He also found that MSHA advised Dumbarton that cracked frames would be cited and that anything that was installed by the manufacturer of equipment had to be operational. *Id.* at 513 (citing Tr. II 87). Buckley testified that several factory items on the primary water truck were inoperative and required repair. Tr. II 87. While Saab testified that there were no defective items other than the pump, the judge stated that "a lot of the [items requiring repair] could be things that an operator of a piece of equipment wouldn't even be aware of." Tr. I 70. The judge also credited Buckley's testimony regarding the events which preceded Saab's termination, including that repairing the primary truck to comply with MSHA standards would cost nearly $16,000, and that Dumbarton did not repair the primary water truck because Ernie Lampkin, its chief financial officer, did not authorize the money necessary to make the repairs. 20 FMSHRC at 516; Tr. II 81. Finally, we note that Lampkin told Buckley that Dumbarton had to make many purchases to secure renewal of the conditional use permit allowing Dumbarton to continue operating, and that repairing the primary water truck was not a high priority. Tr. II 81, 88-89.

In essence, Saab asks the Commission to overturn the judge's decision to credit Buckley's testimony related to Dumbarton's reasons for declining to repair the primary water truck. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)).

We find no compelling reason to overturn the judge's credibility determination. Accordingly, we conclude that substantial evidence supports the judge's finding that Dumbarton's decision not to repair the primary water truck was based on valid business considerations, not Saab's protected activity.

Saab also challenges the judge's finding that the spare water truck was removed because of a memorandum from DeSilva Gates stating that all excess equipment must be removed. PDR at 7. Dumbarton maintains that the spare water truck was "essentially non-operational," and was removed as excess equipment. D. Resp. Br. at 5 n.1.

The judge credited Buckley's testimony that the spare water truck needed significant repairs and was removed as excess equipment pursuant to a memorandum from its parent company. 20 FMSHRC at 516. Buckley further testified at the hearing that Heuvel told him that the spare water truck had "serious rear end problems" and would not pass inspection. Tr. II 79-80. Buckley further explained that both the spare water truck and a third truck needed repair, and that they were "red tagged" before the inspection to prevent MSHA from inspecting them. Tr. II 80, 114.

As with the judge's disposition related to the primary water truck, we find no basis for overturning his decision to credit Buckley's testimony regarding Dumbarton's reasons for removing the secondary water truck from the mine site. Accordingly, we conclude that substantial evidence supports the judge's finding that the secondary water truck was removed pursuant to the memorandum from Dumbarton's parent company.

We are also unconvinced by Saab's argument that, in light of the judge's erroneous finding that DeSilva Gates' other mines subcontracted their watering work before Dumbarton, the judge erred in finding that Dumbarton's decision to subcontract its watering work was not motivated by Saab's safety complaint. The judge based his dismissal of Saab's complaint on record evidence, his crediting of Buckley's testimony regarding the events of April 3 and 4, and his discrediting of Saab's alternative explanations for his termination. 20 FMSHRC at 516. Furthermore, in his denial of Saab's motion for reconsideration — where Saab raised the same argument he now raises before the Commission — the judge stated that his decision "is not affected by the order in which various quarries affiliated with DeSilva Gates began using independent contractors to water down roads." Order Den. Recons. at 1.

Dumbarton does not dispute that, at the time it contracted its watering work, the other two DeSilva Gates facilities had not yet done so. D. Resp. Br. at 14. Rather, it explains that DeSilva Gates subcontracted the watering work at its La Vista quarry after the engine broke on its water truck, and subcontracted the watering work at its Curtner quarry on the day that facility opened. Tr. II 118. Thus, evidence in the record undermines Saab's suggestion that DeSilva Gates subcontracted the watering work at its other facilities to "cover its tracks to try to make the excuses for the layoff look legitimate," (PDR at 5), and supports the judge's decision to place

little weight on the order in which DeSilva Gates' facilities subcontracted watering work. Accordingly, we find that the judge's error in chronology is harmless.

We are also not persuaded by Saab's claim that subcontracting the watering work was more costly than awarding this work to Teamster employees. *Id.* at 8-9. The judge discredited Saab's testimony regarding the cost of subcontracting, finding Saab's testimony "not very convincing because it was rather simplistic and did not consider all of the costs borne by an employer." 20 FMSHRC at 516. Buckley testified that the $60 per hour rate at which Dumbarton initially contracted watering work included costs of maintenance and repair of equipment, insurance, fuel, tires, and union benefits to the driver. Tr. II 91. Buckley also stated that Dumbarton pays approximately $42 per hour straight time for Teamster water truck labor, including benefits and social security, but that when the other costs borne by the company — including repair, maintenance, depreciation, fuel, tires, and vehicle insurance — are considered, the cost rises to approximately $53 to $60. Tr. II 108-11. Buckley testified that, while he agrees that the cost of renting water trucks was "exorbitant," all the water trucks were busy at the time the decision to subcontract was made, and that only later was he able to negotiate a more favorable rate. Tr. II 90-91, 110. Moreover, Saab does not dispute that Dumbarton's continued use of its employees to water the roads would have required that the operator pay the cost of repairing the primary water truck. Thus, substantial evidence supports the judge's rejection of Saab's claim that Dumbarton's decision to subcontract its watering work did not make economic sense.

Saab next claims that the judge disregarded Grant's bias towards Dumbarton and his motivation to retaliate against Saab. S. Supp. Br. at 7. Saab testified that Grant called him demeaning names and threw a rock at him. Tr. I 47-48. Saab also testified that Grant told him approximately one week prior to his layoff that he "better hope the hall has some work down there" and that he believed that this statement indicated that Grant knew Saab would be laid off imminently. Tr. I 60. Saab believes that Grant's actions are attributable to Dumbarton because Grant frequently went into Buckley's office, and because Grant had "made it known to everyone that he was tight with Clay, and if he didn't get along with you, you wouldn't get along with Clay." Tr. I 60-61, II 54.

As the judge stated, the endeavor Saab contends Dumbarton undertook to discriminatorily terminate him would have required at least the cooperation of Buckley and Grant. 20 FMSHRC at 516. The judge found that, while Buckley and Grant had a close working relationship, there was no showing of collusion between them to discriminatorily terminate Saab. *Id.* at 515. Buckley testified that Grant does not speak for him and that "Grant doesn't tell [him] how to do [his] job or how to run [his] operation. He's just a mechanic who works on the site." Tr. II 101. Buckley further testified that discussions between himself and Grant mainly concerned scheduling and paying for repair and maintenance of equipment. Tr. II 101-02. Regarding Grant's statement to Saab that he should be prepared to find other work, this statement was made during a discussion videotaped during work hours by Saab on the day after Saab complained to Buckley that Grant threw a rock at him. Tr. I 60. While Grant's reasons for making this

statement are unclear, Saab offered no other evidence that Grant possessed any knowledge that Saab would be bumped. Accordingly, substantial evidence supports the judge's finding that no collusive relationship existed between Grant and Buckley.[7]

On appeal, Saab attempts to weave his various assignments of error into a claim that Dumbarton's stated reasons for laying him off on April 4 were a pretext for his discriminatory layoff, PDR at 3, challenging the judge's finding that he was laid off due to lack of work and lack of seniority. 20 FMSHRC at 517. It is not our role to reweigh the evidence or to enter findings based on an independent evaluation of the record. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993). Furthermore, as we have recently recognized, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent . . . [a] finding from being supported by substantial evidence." *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 n.6 (Sept. 1999) (citation omitted).

Accordingly, since we have affirmed the challenged findings on substantial evidence and credibility grounds, we thus conclude that substantial evidence supports the judge's determination that Saab's April 4 layoff did not violate section 105(c) of the Act.

[7] From our affirmance of the judge's finding that Dumbarton's decisions related to the primary and secondary water trucks were not motivated by Saab's protected activity, together with his supported finding that no collusive relationship existed between Grant and Buckley, it follows that we find no merit in Saab's allegation (S. Reply Br. at 2) that Grant's repair estimate was inflated as part of a scheme to terminate Saab.

III.

Conclusion

For the reasons set forth above, we *affirm* the judge's determination that neither Dumbarton's one-day layoff of Saab on March 18, 1997, nor its layoff of him on April 4, 1997, violated section 105(c) of the Mine Act.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, concurring:

I concur in the result reached by the majority and in all aspects of the majority's decision with the exception of Section II.A, concerning Saab's claim that the judge improperly excluded evidence concerning his prior protected conduct and Dumbarton's response thereto. Based on my review of the current Commission case law on this issue, it appears that the majority's holding is seemingly at odds with the broad reading this body has accorded petitions filed pursuant to Rule 70 of the Commission's procedural rules, 29 C.F.R. § 2700.70. *See, e.g.*, *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) and *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in relevant part*, 170 F.3d 148 (2d Cir. 1999).[1] In this respect, I share the concerns raised by Commissioner Marks, in his dissent.

As a practical matter, I do not think it is appropriate for the Commission to engage in the practice of broadly interpreting petitions for discretionary review in determining whether issues have been properly raised before the Commission under Rule 70(d).[2] This position is seemingly at odds with the plain language set forth in Rule 70(d) which states in relevant part that "[e]ach issue *shall* be separately numbered and *plainly and concisely* stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon." 29 C.F.R. § 2700.70(d) (emphasis added).

Clearly, Rule 70(d) mandates that parties filing petitions for discretionary review before the Commission must do so with particularity. Unfortunately, it appears that in recent years we have not monitored this situation closely enough to assure that parties adhere to this fundamental requirement. The Commission's decision in *Fort Scott* is a perfect example of how this phenomenon has become all too commonplace. In order to insure objectivity in our decision making process, we must eliminate the need to second-guess the parties in determining the issues being appealed.

I would reject Saab's argument based upon the judge's exclusion of evidence on alternative grounds because I believe that Saab's counsel waived the right to have the evidence concerning his client's prior safety complaints considered by the trier of fact as evidence of discrimination. At the hearing, Saab's attorney attempted to elicit testimony from him regarding how Dumbarton treated him after he made complaints in late July or early August 1995 and on October 22, 1996 about a fellow equipment operator's unsafe actions. Tr. I 10-17. After an

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[1] Both the *Fort Scott* and *Rock of Ages* cases were decided prior to my tenure with the Commission.

[2] The only exception to this should be when a party appears pro se before the Commission. In these types of cases, the Commission should continue its practice of granting some leeway to the pro se litigant in interpreting the language of the petition for discretionary review.

objection by Dumbarton, Saab's attorney stated that the proposed testimony regarding these events was offered as background to establish Saab's "prior history of reporting to his supervisor what he considered unsafe conditions at the quarry" and for purposes of "credibility," and that no claim was being made that Saab "was laid off in retaliation for these [pre-March 5, 1997] complaints." Tr. I. 11, 17.

Moreover, Saab's attorney elected not to pursue further direct examination of him regarding the 1995 incident. Tr. I 10-12. The judge did permit testimony as to Saab's October 1996 safety complaint "strictly as background." Tr. I 10, 13-16. Saab's counsel then attempted to clarify his intention in adducing the testimony related to his client's prior complaints: "It's credible if there were actions in the past taken against [Saab] in retaliation for making safety complaints, it's more credible that later on there was action taken in retaliation for him making safety complaints." Tr. I 17. The judge then sustained Dumbarton's objection when Saab's attorney asked him if he suffered adverse action after his October 1996 complaint. Tr. 17-18. By characterizing this evidence solely as "background" with respect to Saab's credibility, and *not* relevant to Dumbarton's motivation for laying off Saab, his counsel essentially waived the right to have the evidence considered for anything other than the judge's credibility determinations.[3]

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[3] To the extent that the judge credited the version of events provided by Dumbarton's witnesses over that of Saab, he obviously determined that Saab's testimony in this regard was not entitled to dispositive weight on credibility questions. As the majority notes in its decision, a judge's credibility determinations are entitled to great weight and may not be overturned lightly. Slip op. at 7, and cases cited. I find no compelling basis for overturning the judge's credibility determinations in this case.

Commissioner Marks, dissenting:

I disagree with the majority (slip op. at 5), and believe that Saab's petition for discretionary review adequately raised the issue of whether the judge erred in preventing Saab from testifying on other instances in which Dumbarton had shown hostility to complaints about safety violations. Furthermore, I agree with Saab that the judge incorrectly excluded this evidence. Accordingly, I would vacate and remand the judge's decision to permit Saab to present his testimony on this matter.

During the hearing, Saab's counsel asked him whether any adverse action was taken against him after he sent a letter to the operator complaining about certain safety issues. Tr. I 16. The operator's attorney objected to the question, on the ground that it had not been alleged that those events were directly connected to the layoff at issue in this case. Tr. I 16-17. Saab's attorney argued that "[I]t goes to credibility. . . . [I]f there were actions in the past taken against [Saab] in retaliation for making safety complaints, it's more credible that later on there was action taken in retaliation for [Saab] making safety complaints." Tr. I 17. The judge nonetheless sustained the objection, on the ground that Saab was not alleging that his April 4, 1997, layoff was in retaliation for the earlier safety complaints. Tr. I 17-18.

The judge ultimately concluded that Dumbarton successfully rebutted Saab's prima facie case, because he found that although the evidence showed that Saab had engaged in protected activity, his termination was not motivated by that activity in any part. 20 FMSHRC at 515. In concluding that the operator had successfully rebutted the prima facie case, the judge relied heavily on Buckley's testimony regarding the events of April 3 and 4, explicitly crediting it and finding it more persuasive than Saab's. *Id*. at 516. Because he made this credibility determination without hearing evidence of prior adverse actions taken against Saab — evidence which conceivably could affect that credibility determination — the judge erred.

Of course we do not know the specific evidence of past adverse action that Saab would have offered had the judge permitted the line of questioning Saab's counsel attempted to pursue. I therefore will not speculate as to whether these actions allegedly taken by the operator after Saab wrote his letter containing safety complaints would have demonstrated its animus towards Saab's protected activity to such an extent that the judge no longer would have believed Buckley's testimony that he decided to use a contractor to water the roads simply because of problems with his water trucks. Nonetheless, I am reluctant to affirm the judge's finding of no discrimination, based in large part on this testimony, when the judge did not take the opportunity to consider the evidence of Dumbarton's animus to Saab's previous safety complaints which he excluded and factor it into his decision as to whether to believe Buckley.

While this evidentiary issue was not as clearly stated in Saab's petition for review as it could have been, there is more than enough in that petition to find that the issue is implicit in, and related to, the issues that the petition plainly raises, so therefore the issue is properly before us. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) (construing

Secretary of Labor's petition to reach three other issues implicit in single issue that was expressly raised); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998) (reaching three issues not expressly raised by operator but sufficiently related to other issue that was only generally raised), *aff'd in pertinent part*, 170 F.3d 148 (2d Cir. 1999). I do not believe that we should hold individual miners to a higher standard than we hold the Secretary of Labor or large mine operators in fashioning their PDRs.

According to his petition, Saab seeks to have the judge's decision "overturned," asserting that it was not based on "an accurate set of facts." PDR at 2, 11. He argues that "it is only fair that [he] be granted the opportunity to have the decision reviewed by the Commission and decided based on conclusions that can reasonably be made from the correct set of facts." *Id.* at 11. Implicit in his request that the decision be based on a correct and accurate set of facts is Saab's contention that the judge's evidentiary ruling prevented development of a record of those facts. Consequently, I believe Saab sufficiently raised the evidentiary issue in his PDR for purposes of our review.

As for the merits of the issue, the question is one of whether the judge abused his discretion when he refused to permit Saab to offer evidence about the operator's prior adverse actions against him after an earlier safety-related complaint. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997) (confirming that the abuse of discretion standard is the appropriate standard of review of a district court's evidentiary rulings); *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843-44, 1853-54, 1864, 1881-82 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998) (applying abuse of discretion standard in reviewing trial judge decisions involving the qualification and crediting of expert witnesses and the exclusion of trial testimony). With regard to the exclusion of testimony, it has been stated that a trial court abuses its discretion in so doing when its decision is based on, among other things, "'an erroneous view of the law.'" *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1557 (9th Cir. 1996) (quoting *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995)).

A review of relevant case law quickly reveals that the judge erroneously applied the law of evidence in prohibiting Saab from testifying on Dumbarton's previous reactions to his safety complaints. Many of the federal appellate courts in recent years have overturned trial judge rulings that evidence of a defendant's prior discriminatory behavior is inadmissible where those actions, while not the central cause of action, were offered to prove the defendant's discriminatory motive in subsequently discriminating against a plaintiff. *See, e.g.*, *Robinson v. Runyon*, 149 F.3d 507, 512-14 (6th Cir. 1998) (finding abuse of discretion in excluding evidence intended to show circumstantial case of discrimination because reviewing court was "firmly convinced that a mistake" was made). Courts have done so despite acknowledging that "a trial court's exclusion of evidence is entitled to substantial deference on review." *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 155 (8th Cir.), *cert denied*, 498 U.S. 854 (1990) (citation omitted).

A leading case on the question of the admissibility of prior discriminatory acts is *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), in which a black employee brought a race

discrimination claim after he was discharged from a car dealership. At trial, the jury ruled against him, and on appeal he argued, among other claims, that the trial court had improperly excluded evidence of other discriminatory acts of the dealership. *Id*. at 1102. The Eighth Circuit held that the judge had erred in excluding evidence of prior acts of discrimination against black customers. *Id.* at 1104. The court stated that "[i]t defies common sense to say . . . that evidence of an employer's discriminatory treatment of black customers might not have some bearing on the question of the same employer's motive in discharging a black employee." *Id.* The court also ruled that the judge improperly excluded evidence that a Ford manager had made racist remarks. *Id.* While acknowledging that the plaintiff was not claiming relief for having been insulted, the court reasoned that he was trying to prove by a preponderance of the evidence that he was discharged because of his race, and testimony that his supervisors occasionally used racial insults was probative of his claim. *Id.*

The Eighth Circuit criticized the trial court for limiting the plaintiff to proving the dealership's discriminatory intent solely from the facts of his own termination. According to the Court, evidence of the prior discriminatory acts could have provided evidence of discriminatory animus. *Id*. at 1105. The court emphasized that:

> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives. . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices — evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Id. at 1103.[1] These evidentiary rulings, along with other trial court errors, were the basis of the Court's decision to remand the case for a new trial. *See also Robinson*, 149 F.3d at 513-14 (relying on *Estes* to find admissible evidence which made existence of employer's discriminatory motive more probable, because even though by itself it could not prove motive, it was "a possible link"); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3rd Cir. 1995) ("discriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination") (citations omitted).

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[1] Admissibility of such evidence is even more appropriate in Commission discrimination cases, because they are the subject of bench, not jury, trials. In reaching their decisions, trial judges, unlike juries, are expected to be able to exclude from their minds improper inferences from the evidence. *See Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981).

Equally instructive is the decision in *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986), where an employer appealed a trial court verdict finding that it had discriminated against an employee by harassing him because of his race and then firing him in retaliation for complaining of the harassment. Rejecting the employer's appeal of the judge's ruling permitting evidence of harassment against other black workers besides the plaintiff, the Seventh Circuit recognized that,

> [g]iven the difficulty of proving employment discrimination — the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles — a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating [Federal] Rule [of Evidence] 403 would be unjustified.

Id. at 1423. The Court held that the evidence of harassment at issue was relevant in rebutting the employer's defense that it fired the plaintiff for cause. *Id.* The Court noted that the evidence increased the probability that the reasons given by the defendant (that the plaintiff's job performance was deficient) was "merely the pretext for the harsh discipline meted out to him by a management irritated by this complaints about racial harassment." *Id*. at 1424.

In light of these rulings and others, I believe it was clear error for the judge to prohibit Saab from testifying on Dumbarton's previous reactions to his safety complaints, particularly in light of the judge's acceptance of Dumbarton's claim that it laid off Saab for cause. *See Hawkins*, 900 F.3d at 155-56 ("Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.") (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973)); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1133 (4th Cir. 1988) (evidence of discrimination unrelated to alleged discriminatory action admissible because of value of evidence in showing employer's true state of mind). It has been recognized that where, as here, the complainant is relying heavily upon circumstantial evidence to carry his or her burden of proof of discrimination, the absence of even one piece of such highly relevant evidence may make the difference in the factfinder's mind as to the employer's true motivation in taking adverse action against the complainant. *See Robinson*, 149 F.3d at 515. Consequently, I would remand this case to the judge so that Saab can fully and fairly testify regarding his experiences with Dumbarton and its reaction to his previous safety complaints.

Marc Lincoln Marks, Commissioner

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