FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 8, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TARA OTTEN	: : : : :	
v.	:	Docket No. CENT 2021-0013
CONTINENTAL CEMENT COMPANY, LLC	: :	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This case, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), concerns a complaint filed by the Secretary of Labor on behalf of Tara Otten, pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[1] The Secretary alleges that Continental Cement Company ("Continental") violated section 105(c)(1) when it withheld pay from Otten because she exercised her statutory rights as a designated representative of miners pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f) (miners' representatives shall have the "opportunity to accompany [an inspector] during the physical inspection [of the mine]" while "suffer[ing] *no loss of pay* during the period of [her] participation.") (emphasis added).

After a hearing, a Commission Judge issued a decision holding that Continental violated sections 103(f) and 105(c)(1) of the Mine Act when it refused to pay Otten the wage-rate she would have otherwise earned on certain shifts, had she not served as a miners' representative. 44

[1] Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides that:

> [n]o person shall discharge or in any manner discriminate against . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners . . . because of the exercise by such miner, representative of miners . . . on behalf of himself or others of any statutory right afforded by this Act.

FMSHRC 121, 149 (Feb. 2022) (ALJ). The Judge awarded Otten backpay of $388.39 plus pre-judgment interest and assessed a civil penalty of $17,500 against Continental. *Id*. at 159. Thereafter, Continental filed a petition for discretionary review of the Judge's decision, which the Commission granted. For the reasons herein, we affirm the Judge's decision.

I.

Factual and Procedural Background

At the time of the events at issue, Tara Otten worked as a "Laborer" in the Yard department at Continental's underground limestone mine in Hannibal, Missouri. Otten also served as a designated representative of miners pursuant to section 103(f) of the Mine Act.

The United Steelworkers represents Continental's employees; a collective bargaining agreement ("CBA") governs the terms and conditions of their employment. According to the CBA, if there are an insufficient number of "Mobile Equipment Operators" on a shift, the most senior qualified "Laborer" is given the opportunity to perform mobile equipment work and is paid at the higher Mobile Equipment Operator hourly rate.[2] Therefore, in instances when Otten was the most senior qualified Laborer in the Yard department, she would receive the first opportunity for an available mobile equipment assignment.

On certain shifts that occurred between March 2020 and January 2021, Otten accompanied an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") as the designated miners' representative on inspections of the mine.[3] During these shifts, a Laborer operated mobile equipment and received the corresponding pay upgrade. It is undisputed that as the senior Laborer, Otten would have had the first opportunity to operate the mobile equipment on these shifts, had she not acted as a miners' representative.

Otten testified that she previously received Mobile Equipment Operator pay when she served as a miner's representative during shifts on which she would have otherwise operated mobile equipment. Vol II, Tr. 253-55. Otten further testified that she was assigned to operate mobile equipment "generally every day." Vol. II, Tr. 268.

A dispute arose when Heather Ames, a Continental human resources manager, instructed the payroll specialist to retract the Mobile Equipment Operator pay upgrades that Otten's

[2] According to the CBA's Wage Rate Schedule, effective May 5, 2019, the Laborer rate was $25.05 an hour and the Mobile Equipment Operator hourly rate was $28.21. Effective May 3, 2020, the Laborer hourly rate was $25.68, and the Mobile Equipment Operator hourly rate was $28.92. Jt. Stip. at 21.

[3] Specifically, Otten participated in MSHA inspections that took place on March 24, 2020; March 25, 2020; March 26, 2020; March 31, 2020; April 1, 2020; April 2, 2020; June 9; 2020; July 8, 2020; July 14, 2020; July 15, 2020; July 21, 2020; July 22, 2020; January 28, 2021; and January 29, 2021. Jt. Stip. 30.

supervisor had coded on her timecard for shifts on which Otten worked as a miners' representative (March 24-26, 31 and April 1-2, 2020). Ames testified that she believed that according to the new CBA, a miner must actually operate mobile equipment to receive the corresponding wage rate. Vol. II, Tr. 179, 182, 214-15. Ames relied upon the CBA's "zipper clause" which she understood to cancel past-practices concerning wage upgrades. Jt. Stip. at 24 ("This Agreement supersedes and cancels prior practices and agreements . . . ."). Accordingly, Ames believed that Otten should instead be paid as a Laborer for these specific shifts.[4]

Otten filed a grievance alleging that Continental wrongfully withheld pay, which Continental denied. On April 28, 2020, Otten filed the subject discrimination complaint with MSHA. The Secretary filed a complaint on behalf of Otten with the Commission.[5]

The Judge concluded that section 103(f) requires that a miners' representative receive the same compensation she would have otherwise received had the inspection not occurred. The Judge held that Continental structured its pay practices in a manner that may dissuade a miners' representative from exercising her statutory rights in violation of sections 103(f) and 105(c)(1). The Judge conducted two discrete analyses in support of his conclusion. In his primary analysis the Judge stated that the Secretary establishes a violation of section 105(c)(1) by demonstrating, by a preponderance of the evidence, that the miners' representative suffered a loss of pay in violation of section 103(f). 44 FMSHRC at 149. As an alternative analysis, the Judge utilized the traditional *Pasula-Robinette* test for discrimination, finding that the loss of pay was motivated by Otten's exercise of protected rights. *Id*. at 150.

On review, Continental raises numerous arguments as to why the Judge erred in his analysis and why his findings lack evidentiary support. For the reasons which follow, we reject those arguments, and we affirm the Judge.

II.

Disposition

Section 103(f), 30 U.S.C. § 813(f), establishes walkaround rights for miners who accompany MSHA inspectors on mine safety inspections. It provides that:

> . . . a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine . . . Such representative

[4] Continental later reinstated partial pay upgrades for March 31 and full upgrades for April 1-2 because Otten performed mobile equipment work during those shifts. Jt. Stip. 57, 77. Otten operated mobile equipment after finishing her duties as a miner's representative.

[5] On January 29, 2021, Otten became a full-time Mobile Equipment Operator.

> of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

The Act's legislative history states that section 103(f) was included in the Mine Act to:

> enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be *fully compensated* by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

S. Rep. No. 95-181, 95th Cong., 1st Sess, at 28-29 (1977), reprinted in Senate Subcomm. on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616-17 (1978) (emphasis added).

With respect to section 105(c) of the Mine Act, its legislative history has led the Commission and courts to conclude that the section is to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]." S. Rep. at 36, Legis. Hist. at 624 (quoted in *Moses v. Whitley Development Corp*., 4 FMSHRC 1475, 1480 (Aug. 1982)); *see also Sec'y of Labor v. Cannelton Industries,* 867 F.2d 1432, 1437 (D.C. Cir. 1989). In *Moses*, the Commission held that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "'not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . .'" *Id*. at 1478 (quoting S. Rep. No. 95-191, at 36, Leg. Hist. at 624).

A. Continental Violated Sections 103(f) and 105(c)(1) of the Mine Act.

Section 103(f) of the Mine Act plainly requires an operator to compensate a miners' representative with the pay she would have received had she not exercised her statutory rights. 30 U.S.C. § 813(f) ("[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation.). Our plain reading of the section is fully consistent with Congress' stated intention "to encourage [ ] miner participation" by providing "full compensation." S. Rep. No. 95-181, 95th Cong., 1st Sess, at 28-29 (1977); *see also Magma Copper Co.,* 1 FMSHRC 1948, 1951-52 (Dec. 1979) ("[t]he purpose of the right to walkaround pay granted by section 103(f) is [] clear: to encourage miners to exercise their right to accompany inspectors.").

We affirm the Judge's primary analysis and his holding that Continental interfered with miner representative Otten's statutory rights in violation of section 105(c)(1) when it paid her at a lower hourly rate than she would have otherwise earned. 44 FMSHRC at 149.

The Judge's decision is supported by *Roger L. Stillion v. Quarto Mining Co.,* 12 FMSHRC 932 (May 1990), in which the Commission concluded that the failure to compensate a miners' representative as required by section 103(f) demonstrates that the operator discriminated against the miners' representative. The Commission considered whether the miner was entitled to compensation pursuant to section 103(f) and whether the right was violated. *Id*. at 937-39. Notably, the Commission *did not* find it necessary to consider whether the operator was motivated by discriminatory animus.[6]

We also find the Judge's analysis to be fully consistent with *Sec'y obo Richard Truex v. Consolidation Coal C*o., 8 FMSHRC 1293, 1299 (Sept. 1986). In *Truex*, the Commission found that the operator interfered with the miners' representative's section 103(f) rights in violation of section 105(c)(l). As in *Stillion*, the Commission in *Truex* did not base its liability findings on whether the operator was motivated by discriminatory animus. The Commission therefore ordered backpay, finding "Consol's attempt to use the Contract as a defense [to be] irrelevant." *Id*.

The record in this case is clear. Continental does not dispute that Otten would have earned a higher wage-rate on the shifts at issue if she had not exercised her walkaround rights and instead accepted the available mobile equipment assignment. In fact, Heather Ames testified that she instructed the payroll specialist to retract the pay upgrades "[b]ecause [Otten] was accompanying the MSHA [inspector] during an inspection." Vol. II, Tr. 58-62, 67-68, 72. She further testified Otten "could say she didn't want to go on the inspection. There are other miners' reps." Vol II, Tr. 79-80. Furthermore, in an email to her colleague Ames wrote "if Tara [Otten] is unavailable for a job, she is not available – no different than if she was on vacation or in the store house filling in, she would not get the upgrade because junior people below her received the upgrade. She chooses to work with MSHA." J Ex. 7-j. Ames confirmed, in a written statement to MSHA, that Continental would not pay wage upgrades to miners' representatives when a less senior employee receives the upgrade. J Ex. 3.[7] Because Otten exercised her statutory walkaround rights, she suffered an adverse action (loss of pay in violation of section 103(f)).[8]

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[6] The parties' arguments addressing animus and the *Pasula-Robinette* test are addressed *infra* in subsection B.

[7] Our dissenting colleague claims that the Secretary submitted only "inconclusive" evidence regarding animus to support a finding that the violation was motivated by protected activity. Slip op. at 14. While our analysis as set forth herein does not turn on an evaluation of Continental's motivation, we note the record evidence described above.

[8] Also, our dissenting colleague claims the majority has arbitrarily dismissed a statutorily required element of section 105(c) by ignoring the operator's motivation. Slip op. at 14-15. However, what the statute explicitly requires is *causality*. 30 U.S.C. § 815(c)(1) (no person shall discriminate against a miner "because of" the exercise of a statutory right). None of the cases cited by our colleague support his proposition that the definition of "because" must inherently require a showing of motivation. Slip op. at 14. Of course, in standard discrimination cases motivation has traditionally played a critical role in establishing causality. However, as

The operator argues that it complied with the Mine Act's requirements when it paid Otten her Laborer rate of pay for time served as a miners' representative. We disagree. Otten suffered a prohibited "loss of pay during the period of [her] participation in the inspection" when she was paid less for the shifts than she would have otherwise earned. 30 U.S.C. § 813(f). Continental "unfairly penalize[d] the miner for assisting the inspector" contradicting the legislative purpose of the section.[9] S. Rep. No. 95-181 at 28-29, Legis. Hist. at 616-17.

Additionally, Continental argues that according to the CBA, Otten was only entitled to the wage upgrade provided that she actually operated the mobile equipment. In the event of a conflict between the terms of the parties' agreement and the requirements of a federal statute, the statutory requirements take precedence. *See Barrentine v. Arkansas-Best Freight System, Inc*., 450 U.S. 728, 740-41 (1981) ("[W]e have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement."); *see also W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (*citing Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) ("As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.")).

To the extent that the CBA may conflict with section 103(f), the requirements of section 103(f) control. *See also R. Mullins v. Beth-Elkhorn Coal Corporation*, 9 FMSHRC 891, 899 (May 1987) (citations omitted) ("we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes."). Any agreement between mine operators and unions must meet or exceed the statutory floor.[10]

Continental maintains that it did not discriminate against Otten or otherwise interfere with her rights, noting that during the same payroll processing period it also retracted the wage upgrades for Laborers that had performed carpentry work. Continental maintains it interpreted the CBA's zipper clause as canceling all informal prior pay practices, including its informal practice of providing pay upgrades for working as a miners' representative or as a carpenter. The analogy Continental draws between miner's representatives and carpenters is inapposite, performing carpentry work, in and of itself, is not a protected activity. Again, section 103(f)

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discussed further below, we find that discriminatory motivation is not required to establish causality under the conditions of this case. The record clearly shows that this miner suffered a loss expressly prohibited by the Act because of her exercise of an expressly protected right. A finding of discrimination is consistent with the statutory requirements of section 105(c).

[9] Continental also alleges that previous decisions of Commission Administrative Law Judges support its position. To the contrary, we conclude that the Judge's decision in this matter is consistent with previous decisions of our Judges. In any event, Commission Judge's decisions are not precedential according to Commission Procedural Rule 69(d), 29 C.F.R. § 2700.69(d).

[10] Furthermore, the evidence demonstrates that on at least one occasion Otten was not assigned to operate mobile equipment, but was provided with upgraded pay because a junior Laborer was assigned to operate mobile equipment. The CBA provides Continental management with the discretion to grant unilateral wage increases. Vol II, Tr. 93-94.

protects the pay of miners performing the statutory role of a "miners' representative" and is not superseded by any private agreement.

B. A Showing of Discriminatory Animus is Not Required to Establish a Violation of Section 103(f).

Continental argues that it did not interfere with Otten's section 103(f) rights in violation of section 105(c)(1) because it was not motivated by a discriminatory animus. Continental argues that the Secretary must demonstrate that Otten's loss of pay was motivated by the exercise of protected activity in accordance with the *Pasula-Robinette* test for discrimination, in order for Continental to be liable for the alleged violations of the Mine Act. [11]

The Secretary likewise argues that a finding of discriminatory animus is a necessary element of a claim. However, the Secretary maintains that the Judge's alternative analysis – finding that Continental was motivated by Otten's exercise of protected rights when it retracted the pay upgrades – is supported by substantial evidence. The Secretary relies upon *Sec'y of Labor on behalf of Glover v. Consolidation Coal Co*., 19 FMSHRC 1529 (Sept. 1997), in which the Commission applied the *Pasula-Robinette* test for discrimination and found that the operator violated section 105(c)(1) when it transferred the positions of two miners' representatives in retaliation for the exercise of their rights.

We disagree with Continental's and the Secretary's contentions. As established *supra*, the Commission has not required that a miners' representative demonstrate that a loss of pay was motivated by discriminatory animus to prove unlawful interference with section 103(f) rights. In fact, permitting the operator to provide an affirmative defense – as Continental seeks to do – would be inconsistent with the operator's duty to comply with the explicit "no loss of pay"

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[11] According to the *Pasula-Robinette* framework, in order to establish a prima facie case under section 105(c) the complainant must establish that the adverse action was motivated in any part by the complaint's exercise of protected activity. *Sec'y on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3rd Cir. 1981); *Sec'y on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). An operator may defend affirmatively against a prima facie case by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC 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).

The Ninth Circuit has rejected the *Pasula-Robinette* test in *Thomas v. CalPortland Co*., 993 F.3d 1204, 1209-10 (9th Cir. 2021). *Thomas* has been remanded to the Commission and remains a pending matter on our docket. Continental's Hannibal mine is located in the Eighth Circuit, and thus the Ninth Circuit ruling is not binding. Nevertheless, the Judge found that the loss of pay to Ms. Otten would not have occurred "but for" her engaging as a miners' representative during a walkaround inspection. We conclude that the Judge's findings under his alternative analysis are supported by substantial evidence, reasonable inferences drawn from the record, and proper consideration of relevant testimony.

requirement in section 103(f) of the Mine Act. *See Sec'y on behalf of Truex*, 8 FMSHRC at 1299 (finding the operator's affirmative defense "irrelevant").

We also find *Glove*r to be readily distinguishable. Transfers of positions are not generally prohibited under the Mine Act. A transfer is unlawful, however, when motivated by discriminatory animus in violation of section 105(c)(1). In contrast, the "loss of pay" while exercising rights as a miners' representative is *always* expressly prohibited by section 103(f) of the Mine Act, regardless of intent. 30 U.S.C. § 820(a) ("The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary . . . .")*; see also Nally & Hamilton Enterprises*, 38 FMSHRC 1644, 1650 (July 2016) (citations omitted) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.").

Accordingly, consistent with Commission precedent, we find that a showing of animus is not required to establish a violation of section 103(f) and that *Pasula-Robinette* is not the appropriate test for evaluating a miners' representative's claim of an unlawful loss of pay in that regard.[12]

C. We Affirm the Judge's Penalty Assessment.

Continental additionally argues that the Judge erred in assessing a $17,500 civil penalty. Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), provides that the Commission is authorized to assess all penalties under the Mine Act and that such penalties must reflect consideration of six statutory factors.[13] The Commission's review of a Judge's discretionary penalty assessment is a two-step process. First, the Commission reviews the Judge's findings on the penalty factors for the support of substantial evidence and, second, the Commission reviews the Judge's overall assessment for an abuse of discretion. *Solar Sources I*, 42 FMSHRC 181, 208 (Mar. 2020).

Here, the Judge found that the operator's previous violation history, size of the mine and the size of the controlling entity were all moderate. 44 FMSHRC at 159. However, the Judge concluded that the negligence and gravity factors were significant. *Id*. at 158.

Continental asserts that the Judge erred in his assessment of the mine's violation history, failing to account for its lack of a prior history of section 105(c) violations. Continental is incorrect. It is well established that the Commission considers the operator's *general* violation history, not just its history of similar violations, when assessing a penalty. *See Solar Sources Mining*, *LLC,* 43 FMSHRC 367, 373 (Aug. 2021) (citations omitted).

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[12] We make no other finding regarding the *Pasula-Robinette* test in this proceeding.

[13] [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 [operator] charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Continental also argues that the Judge erred in his gravity finding. The operator wrongly maintains that the Judge should have considered its reliance on the CBA as a mitigating factor.

We conclude that the Judge's findings are supported by the record and that the Judge did not otherwise abuse his discretion in assessing a civil penalty. *See American Coal Co. v. FMSHRC*, 933 F.3d 723, 726 (D.C. Cir. 2019), *aff'g* 40 FMSHRC 1011 (Aug. 2018) ("we review the ALJ's penalty calculation for an abuse of discretion."); *see also Donovan ex rel. Chacon v. Phelps Dodge Corp*., 709 F.2d 86, 92 (D.C. Cir. 1983) (Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached."); *Island Creek Coal Co*., 15 FMSHRC 339, 347 (Mar. 1993) ("[i]t would be inappropriate for the Commission to reweigh the evidence … or to enter *de novo* findings based on an independent evaluation of the record.").

Accordingly, we affirm the penalty assessed by the Judge.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision in all respects.

Mary Lu Jordan, Chair

Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

Commissioner Althen, concurring in part and dissenting in part:

I.

The record supports a loss of pay in violation of section 103(f).

I concur that the Complainant, Tara Otten, suffered a loss of pay due to not receiving an upgrade in pay to the status of a Mobile Equipment Operator ("MEO") on the days in question. I emphasize that nothing is illegal or improper in paying a miner for the work the miner performs on a given day. There is no legal deficiency with Article VI Section 9 of Continental Cement Company, LLC's ("Continental") contract with the United Steel Workers of America.

Here, however, the record permits no conclusion other than that Otten would have worked as an MEO on the days in question and, therefore, would have received upgraded MEO pay for those days. She was entitled to MEO pay for her time as a walkaround representative on those days.

II.

The Commission should overrule the discredited *Pasula/Robinette* standard and apply the "because" standard used in federal discrimination statutes.

Section 103(f) does not provide a private right of action for a miner to recoup a loss of wages. The miner must rely upon the Mine Safety and Health Administration ("MSHA") to recover lost pay.

Two routes are available to MSHA. It may cite the operator for a violation under section 104(a), 30 U.S.C § 814(a), for causing a loss of pay. For 103(f) citations issued under section 104(a), a strict liability section, MSHA must only prove a loss of pay from the miners' representative's participation in the inspection. A section 104(a) citation is straightforward and does not require proof of action motivated by protected activity. *See Magma Copper Co. v. Sec'y of Labor*, 645 F.2d 694 (9th Cir. 1981).

Alternatively, MSHA or a miner may file a discrimination complaint under section 105(c). 30 U.S.C. § 815(c). Section 105(c) requires proof of motivation "because of" protected activities. As relevant, Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [1] ***because such miner*** . . . has filed or made a complaint under or related to this Act . . . or [2]***because such miner*** . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or [3] ***because such miner*** . . .

> has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or [4] ***because of the exercise by such miner*** … on behalf of himself or others **of any statutory right afforded by this Act**.

30 U.S.C. § 815(c)(1) (emphasis added).

The Secretary asserted a section 105(c) violation in this matter. By doing so, the Secretary accepted an obligation to prove its claim under the statute's requirements.[1]

The Commission's traditional standard of proof for a section 105(c) discrimination violation has been the *Pasula-Robinette* test. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Under that test, the complainant or Secretary establishes a prima facie case of discrimination by proving (1) that the miner engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The operator may raise an affirmative defense by claiming it would have taken the same action for a reason other than protected activity. Despite its years as the Commission standard, it is now clear the *Pasula-Robinette* test is invalid.

In 2021, the United States Court of Appeals for the Ninth Circuit invalidated the *Pasula-Robinette* test, holding: "Section 105(c)'s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation." *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1211 (9th Cir. 2021). The *CalPortland* case focused squarely upon section 105(c). The Commission must now apply that standard in cases within the Ninth Circuit. However, more compelling is that the circuit court's holding is correct. Indeed irrefutable. In *CalPortland*, the circuit court cited numerous Supreme Court decisions. *Id.* at 1209-10, *citing Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). Those cases and CalPortland compel the application of the but-for standard to section 105(c) cases.

[1] The majority finds the Administrative Law Judge ("ALJ") grounded his decision on the basis that it was unnecessary to prove the statutorily required elements of discrimination. The majority errs in accepting and endorsing the Judge's error. It is startling to read the majority describe section 105(c) as a strict liability section to which intent does not apply. The concept of strict liability in the Mine Act is derived from the section 110(a) of the Act (30 U.S.C. § 820(a)) which authorizes the imposition of civil penalties for violations of mandatory health or safety standards. *See Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982). I disagree with the majority's attempt to expand strict liability into section 105(c) proceedings, beyond what Congress clearly intended. Moreover, if strict liability is to be incorporated into section 105(c) proceedings, the majority's decision must be read to only do so in the limited context of a section 103(f) contest. To do otherwise would present a major change in long-standing Commission precedent and fly directly in the face of the plain letter of the law.

As the inevitable result of *CalPortland*, Judges now hedge their decisions by referring to *Pasula-Robinette* and *CalPortland*. Continued citation to *Pasula-Robinette* will inevitably result in parties and Commission Judges trying, arguing, and deciding cases under two standards. In this case, the Judge added a tagline in the decision that he would have reached the same result under the but-for standard. Such pro forma references to but-for causation may result, as in this case, in a minimized finding of but-for causation without meaningful discussion. The Commission should forego whistling *Pasula-Robinette* in the wind and formally adopt the proper standard. The correct issue on this appeal is whether Continental's insufficient payment was "because" of animosity toward the exercise of walkaround rights. In other words, we should apply the but-for standard and decide the issue based on whether the preponderance of the evidence shows protected activity-motivated discrimination.

However, application of *Pasula-Robinette*, in this case, would not change the result because that test requires proof of causation based upon protected activity. Here, the majority fails to apply any causation standard without explaining why an explicit element of section 105(c) does not apply to section 103(f) cases.

In 2016, the Commission rejected a challenge to *Pasula-Robinette*. *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919-21 (Aug. 2016). However, times change, and Commission Judges now plot a course between two tests. It is time for the Commission to recognize the inevitability of the proper test for discrimination and adjust its test to the correct "but for" standard.

III.

The record does not contain substantial evidence that Otten received her regular pay "because" she acted as a miners' representative. Continental's human resource manager decided the appropriate pay "because" of Continental's collective bargaining agreement with Otten's union.

A. Relevant facts

Continental operates the Hannibal Underground Mine in Missouri. The United Steel Workers of America represents the hourly employees at the plant. The Union negotiated a collective bargaining agreement ("CBA") with Continental for union-represented employees, including Otten. As with most union contracts, the CBA created classified employee positions and established pay rates for each classification.

Two classifications were Laborer and Mobile Equipment Operator. Laborers are hourly-rate employees who perform primarily general clean-up work throughout the plant, lawn work, labor work involved in refractory replacement in kiln and cooler, snow removal from roadways and sidewalks, and painting. A Laborer is expected to be capable of operating various types of mobile equipment as needed. Of course, the work of an MEO is to exclusively operate mobile equipment.

The CBA pay rates provide slightly more than $3.00 per hour additional pay for employees classified as MEO workers. The CBA, however, also provides that management could require a Laborer to perform MEO work. When a Laborer does so, the CBA requires Continental to pay the MEO classification wage rate, stating, "[w]hen work of a higher paid classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours." J. Ex. 4, at 14. Under the CBA, this upgraded pay depended upon the performance of MEO work. If a Laborer performed MEO work for less than four hours, the Laborer received the higher rate for four hours. If the employee performed MEO work for more than four hours, the employee received MEO pay for the entire day.[2]

Otten's default classification was Laborer. She also was a miners' representative. All agree that she frequently performed MEO work and received the upgraded pay according to the CBA when she performed such work. Continental paid her according to her classification as a Laborer when not performing such work.

On the dates in question, Otten had or would have had the opportunity to perform MEO work at the MEO pay rate. On those dates, however, an MSHA inspector was present at the mine, and Otten chose to exercise her walkaround rights with the MSHA inspector. It is undisputed that based upon experience, Otten would have taken that opportunity for MEO work had she not chosen to exercise the right of a miners' representative.

Initially, Otten received pay at the rate of an MEO for the days in question. Subsequently, a Continental Human Resources specialist, Heather Ames, reviewed Continental's pay records including those of Otten and two other union-represented workers. According to Ames, she alone decided to apply the terms of the CBA. Ames found that Otten did not perform MEO work on certain days and, therefore, was not entitled to upgraded MEO pay under the CBA. On the same day, Ames reversed the paid upgrade for the two other employees because the upgrade pay provision did not apply to them. Ames testified that she later found that she had made a mistake for certain days and then partially reinstated the upgrades for Otten.

The evidence establishes that Ames made these pay decisions based on the terms of the CBA. Ames testified that she, and she alone, decided to reduce the pay and then partially upgrade the pay of Otten and other workers. No witness or evidence impeached Ames' testimony that she made these decisions.

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[2] Article VI, Section 9 of the CBA provides:

> When work of a higher paid classification is required of any employee, he/she shall receive the higher rate of pay for a minimum of four hours. If the employee exceeds four hours of work at the higher classification, then he/she shall receive the higher rate of pay for the entire day. When work of a lower paid classification is temporarily required of any employee, he/she shall receive his/her regular straight time hourly rate of pay.

J Ex. 4, at 14; Jt. Stip. 23.

B. The Judge's Decision

The Judge's decision initially recognized that *Pasula-Robinette* is the Commission's test for discrimination. He correctly found that under that test, a miner proves discrimination "when [she] proves by a preponderance of the evidence that the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by that protected activity." 44 FMSHRC 121, 148 (Feb. 2022) (ALJ).

The Judge acknowledged that "it is true that the Commission has applied the *Pasula-Robinette* framework in [s]ection 103(f) walkaround cases." *Id.* at 149. Immediately after that, however, the Judge asserted that he did not need to apply the third factor (adverse action motivated in any part by that protected activity) of *Pasula-Robinette* to find a violation of section 103(f).

The Judge concluded, "the Court does not believe that the Secretary *must* show, per the *Pasula-Robinette* framework, that Continental's refusal to pay Otten the wage upgrades was motivated by Otten's walkaround activities." *Id.*[3] Incredibly, the majority now accepts the Judge's deeply flawed reasoning and states violations of section 105(c) need not contain any element of expressly required causation.

Finally, after a brief discussion of the penalty factors, the Judge imposed a penalty of $17,500.

C. To Prevail on a Section 105(c) accusation, the Secretary Must Prove Three Factors: Protected Activity, Adverse Action, and Adverse Action Because of the Protected Activity. The Majority Errs by Disregarding the Necessity for Finding Causation by Protected Activity.

The majority correctly, albeit implicitly, decides that the Secretary did not prove the violation of section 103(f) was "because of protected activity." The Secretary introduced inconclusive evidence to suggest that certain supervisory employees of Continental may have harbored ill feelings toward Otten due to other safety activities. However, the record clearly demonstrates that Ames, and Ames alone, decided to pay Otten Laborer wages per the CBA.

As the Judge fleetingly acknowledged but then abandoned, motivation is critical for finding a violation of section 105(c). Indeed, all three elements—protected activity, adverse action, and motivation by the protected activity—are expressly articulated in the statute and are necessary to establish discrimination. Indeed, one might conclude that motivation is the

[3] It may be that the Judge felt and Commission mistakenly feels a need to find a violation of section 105(c) for Otten to prevail on the section 103(f) claim or that prevailing on the section 103(f) automatically required a finding of discrimination. That would be incorrect. MSHA's filing of the discrimination claim was sufficient to put both the right to pay and the occurrence of discrimination before the Commission. A supported finding of a failure to meet the requirements of section 103(f) may then be made separately even when the Secretary does not prove discrimination under section 105(c).

lynchpin of section 105(c) violations. Each day miners raise issues related to safety, thereby engaging in protected activity. Each day operators take adverse actions regarding miners. Section 105(c) crucially mandates that discrimination occurs only when the protected activity motivates the adverse action.

It is in this respect that the majority departed from the law. The majority declares by fiat that a clearly expressed requirement for a section 105(c) violation does not apply if the case involves section 103(f). The majority does not provide any support or explanation for arbitrarily dismissing an explicit factor for a violation. Nowhere does the majority explain why the express language of section 105(c) unambiguously requiring motivation does not apply in a section 103(f) context.

Circuit court cases uniformly recognize that "because" in section 105(c) means "because" and, therefore, a complainant must establish a motivational nexus between the protected activity and adverse action. *See generally CalPortland Co.*, 993 F.3d at 1208-1211; *Harrison County Coal Co. v. FMSHRC*, 790 Fed. Appx. 210, 213 (D.C. Cir. 2019); *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693, 700-02 (6th Cir. 2018); *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 318 (6th Cir. 2013); *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 88 (D.C. Cir. 1983).

The importance of section 103(f) neither requires nor suggests tarring Continental with a discrimination tag based upon Ames' belief that, per the CBA, Otten was only entitled to Laborer's wages. The majority finds discrimination by removing the necessary element of motivation from a section 105(c) violation, even though the Secretary concedes it is necessary.

In disclaiming the express requirement of the Mine Act, the majority does not cite the words of the Act, legislative history, or any policy requisite. Without meaningful analysis, the majority would establish that a violation of section 103(f) is a per se violation of section 105(c). In doing so, it primarily relies on one case. *Stillion v. Quarto Mining Co.*, 11 FMSHRC 523 (Apr. 1989) (ALJ), *aff'd* 12 FMSHRC 932 (May 1990).[4]

[4] The majority mischaracterizes the facts and decision in *Sec'y on behalf of Truex v. Consolidation Coal C*o., 8 FMSHRC 1293 (Sept. 1986). The Commission in *Truex,* expressly included "motivation" as part of the proof for a section 105(c) violation. Further, it explained that an operator could defend a 105(c) case by showing the action was not motivated by protected activity. *Id*. at 1297. The facts were that the safety supervisor knew Truex was a miner's representative and that he intended to attend a meeting with an MSHA inspector who would be arriving momentarily. Nonetheless, the safety supervisor ordered Truex to report to work at a location that would have prevented Truex from accompanying the inspector. Truex was forced to take unpaid leave in the form of "union business" to attend the meeting and was then barred from working for the rest of his shift. The operator claimed that, pursuant to the union contract, a miner could not be paid for a partial shift if he had claimed to be on "union business." The Commission found that the contract was irrelevant to the defense of the section 105(c) allegations, not because a union contract could not be used to demonstrate the operator's motivation, but because the discrimination happened before the operator invoked the contractual terms and was thus irrelevant. *Id*. at 1299. There is no resemblance to this case in which the

Quarto does not support the majority "per se" concept. At best, the ALJ and Commission decisions are cursory. To the extent the decisions recite facts, it is clear the failure to pay arose from the operator's animus to the walkaround. The operator refused to pay a miner any money "because" he did the walkaround with an MSHA inspector. Moreover, the Commission did not even discuss the standards for finding a section 105(c) violation or any issue of motive or causation.

In *Quarto*, a miner alleged violations of sections 103(f) and 105(c). The ALJ decision does not discuss *Pasula-Robinette* or any elements of section 105(c). Having not discussed section 105(c) in his decision, the ALJ did not discuss any requirements for finding a section 105(c) violation. The entirety of the ALJ's finding is: "Respondent violated § 103(f) of the Act by refusing to pay Complainant his regular rate of pay for his time spent accompanying a federal mine inspector on October 6, 7, and 8, 1987." 11 FMSHRC at 527. The Judge did not make any finding concerning section 105(c) or its necessary elements. Had the Judge considered motivation, he would have found it in the case. Further, the Judge did not impose any penalty upon the operator nor invite MSHA to do so. *See Stillion v. Quarto Mining Co.*, 11 FMSHRC 875 (May 1989) (supplemental decision on damages).

Upon review, the Commission mistakenly stated at the outset of its decision that the Judge had found discrimination. However, the Commission's conclusion of law did not find a section 105(c) violation. The Commission's concluded "that in the circumstances of the present case Stillion had a right to walkaround pay under section 103(f)." 12 FMSHRC at 939. As with the ALJ's decision, the Commission's decision did not discuss the essential elements of discrimination, *Pasula-Robinette*, or motive or causation, let alone dispense with motivation as an element of section 105(c). Further, the Commission also did not impose a penalty.

Therefore, *Quarto* supports a section 103(f) violation. However, *Quarto* does not reach a legal conclusion that a section 105(c) violation occurred, does not discuss the requirements for a section 105(c) violation, would have found motivation under the facts of the case, and does not support a claim of per se violations.

The majority expressly recognizes that the Secretary argues that a finding of discriminatory animus is a necessary element of a claim. Slip Op. at 7. The Secretary does not contend that violations of section 103(f) are per se violations of section 105(c). The Secretary's failure to make such an argument is an appropriate recognition that section 105(c) requires motivation (causation) arising from protected activity. The Secretary's position is correct.

operator did not take any action to prevent the miner's exercise of walkaround rights and paid the miner for the time spent on the walkaround.

IV.

The Facts Suggest Only a Small Penalty.

The Mine Act sets forth six factors in setting penalties: (1) effect on the operator's ability to continue in business; (2) an appropriate reduction for demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation; (3) the appropriateness of such penalty to the size of the business of the operator charged; (4) the operator's history of previous violations; (5) whether the operator was negligent; and (6) the gravity of the violation. 30 U.S.C. § 820(i).

Factors one and two play no role in this case. The proposed penalty would not affect the ability of the operator to continue in business. The statute allows mitigation of penalties when an operator acts rapidly to achieve compliance. In this case, believing in the legality of its use of the CBA, Continental continued to make payments in the same fashion after the Secretary filed the complaint. The failure to capitulate immediately to the Secretary's legal position with which an operator in good faith disagrees is not a reason to increase the penalty. Regarding size, the Hannibal mine is a mid-size operation, so size does not weigh heavily for or against a particular penalty.

Despite a long operational history, Continental has no history of a prior finding of a violation of section 103(f). The present case is a one-off in which the operator incorrectly thought it should use the CBA. Of course, even in discrimination cases, the Commission also considers the operator's history of safety violations. However, strict liability violations of operational safety rules have little to do with a tendency of an operator to be motivated to retaliate against a miner based on protected activity. Certainly, the absence of even one prior violation weighs heavily in favor of a low penalty.

It is difficult to know what to make of the ALJ's brief discussion of negligence. The ALJ cites a Commission decision to propose that the negligence issue is whether the operator engaged in intentional conduct in committing the violation rather than whether it intended to discriminate. 44 FMSHRC at 157, *citing Sec'y on behalf of Poddey v. Tanglewood Energy, Inc*., 18 FMSHRC 1315, 1319 (Aug. 1996) (Commissioners Marks and Riley).[5] Continental's actions were intentional to the extent Ames' decision to apply the CBA was intentional. In *Tanglewood Energy*, the Commission found that, although the conduct was intentional, the actions constituted low negligence. *Id.* at 1319-20. Continental, through Ames, had an objective, albeit mistaken, belief that it should apply the CBA to Otten's work. Continental's legal position was untenable. However, there is no evidence that Continental took the position in bad faith or, in taking an incorrect position, it failed to exercise reasonable care. Thus, substantial evidence supports that negligence is a minor factor in the penalty consideration.

[5] In determining negligence, the Commission considers whether an operator has met its duty of care. The Commission considers the actions of a reasonably prudent person familiar with the mining industry, the relevant facts, and the purpose of the regulation. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016). In short, did the operator act with the prudence a reasonable operator would have exercised under the same or similar circumstances.

Interestingly, *Tanglewood* has greater relevance to the gravity consideration than negligence. In *Tanglewood*, the Commission rejected the Secretary's argument that every section 105(c) violation must be presumed to have a chilling effect. *Id.* at 1320. As with any violation, the gravity of section 105(c) violation must be based on the evidence.

Objective and subjective evidence determine gravity. *Id.* at 1321. The subjective element is the chilling effect upon miners that rests upon "the testimony of the complainant or other miners." *Id*., *citing Sec'y on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 558 (Apr. 1996). From an objective standpoint, the question is whether there is evidence that the incident "reasonably tended to discourage miners from engaging in protected activities." *Id*.

In this case, the Secretary presented no evidence of any subjective or objective discouragement of such activity. The Secretary did not present any objective data or measurement showing any adverse effect upon Continental's miners. Otten was the only hourly miner who testified, and her continued performance of walkaround activities demonstrates that she was not discouraged. Thus, there is no evidence of a subjective chill upon miners. In sum, there is no evidence that this one-time occurrence had any subjective or objective adverse effect on Continental's miners' willingness to exercise their statutory rights. As with all factors of a penalty consideration, we must base the decision regarding gravity on evidence and not a Judge's desire to punish an operator. The gravity factor is low without any subjective or objective evidence of a chilling effect.

In summary, the effect on the ability to stay in business and mitigation through abatement are irrelevant here. Continental's size is moderate. The absence of any prior violation cuts in favor of a low penalty. Ames' actions were intentional in that she intended to do what she did but unintentional in any sense of a knowing violation of section 105(c). Finally, there is no subjective or objective evidence of a chilling effect. So, the gravity is low.

V.

Conclusion.

Here, the majority's unwarranted decision to delete a fundamental element from section 105(c) is more than a wrong result. The decision muddies proof of section 105(c) violations when the disparity between *Pasula-Robinette* and *CalPortland* already troubles the water. It creates uncertainty regarding whether there are other situations in which a majority might substitute its own wishes over that of Congress and decide by fiat to alter the statute's requirements. For the first time, it creates a per se violation of section 105(c). It fails to explain why a section 103(f) violation automatically violates section 105(c), even though finding a section 103(f) violation vindicates the miner's rights.

The Commission should find a violation of section 103(f). The evidence does not show Continental's actions were because of protected activity. Continental did not violate section 105(c). The violation of section 103(f) warrants no or only a minor penalty.

I concur with the violation of section 103(f) and respectfully dissent from the finding of a violation of section 105(c) and the assessed penalty.

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