UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ROBERT THOMAS, Complainant, v. CALPORTLAND COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2018-0402-DM MSHA Case No. WE-MD-2018-06 Mine: Sanderling Dredge Mine ID No. 45-03687

CALPORTLAND COMPANY'S PETITION FOR DISCRETIONARY REVIEW

CalPortland Company ("CPC") respectfully submits its Petition for Discretionary Review of the decision of Administrative Law Judge Margaret Miller ("ALJ") dated December 10, 2018 ("Decision"), and all associated rulings and orders. This matter arose under Section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), following the dismissal of the MSHA Complaint of Robert Thomas ("Thomas"). CPC requests Commission review pursuant to 30 USC § 23(d); 29 CFR § 2700.70(c).

The facts are clear and undisputed. CPC Human Resources Manager, Candy Strickland ("Strickland"), provided Thomas an opportunity to continue his employment under CPC's job abandonment policy. (Exhibit R). Thomas elected to not respond to that opportunity. As a result, Strickland processed Thomas' separation from employment. Strickland's processing of the separation of employment was consistent with policy, practice and the treatment of others. The separation of employment was caused by Thomas' own actions in not responding to the opportunity to continue his employment. MSHA does not have statutory authority to regulate Thomas' conduct in not responding to the opportunity to continue his employment, nor the authority to regulate human resources processing of the separation of employment.

I. GROUNDS FOR REVIEW

The ALJ Decision does not appear to be the product of honest judgment. The ALJ made up the facts. This is not about credibility determinations. This is not about conflicting testimony and evidence. The Decision rejected the uncontradicted facts of record. Nearly every line of the ALJ Decision is unsupported by the evidentiary record. Throughout the Decision, the ALJ novelized a fictional case.

An Agency ALJ must possess all the tools of federal trial judges, including the display of appropriate temperament, legal acumen, impartiality, sound judgment, and must clearly communicate their decisions to the parties, the agency, and the public. Executive Order 13843 of July 10, 2018; *Lucia v. SEC*, 138 S. Ct. 2044, 2047-48 (2018). The ALJ's proceeding and Decision failed to meet these standards. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

Pursuant to Commission Rule 2700(d), this Petition for Discretionary Review of the Decision is based upon the following grounds:[1] (1) The Decision and Remedy is contrary to applicable law, including but not limited to the Administrative Procedure Act, 5 USC § 706(2)(A) – (F), 30 U.S.C. § 823, and 30 U.S.C. § 815(c), and must be vacated in its entirety with prejudice; (2) Findings or Conclusions of material fact are not supported by substantial evidence; (3) Necessary legal conclusions are erroneous; (4) The Decision is contrary to law or to the duly promulgated rules or decisions of the Commission; (5) Substantial questions of law, policy, or discretion are involved; and (6) Prejudicial errors of procedure were committed. The Decision and remedy must be vacated in its entirety.

[1] Findings of fact and conclusions of law are referred to with the words: "conclusions" or "concluded." Likewise, Rule 2700(d) grounds for review are referred to with the words "erroneous," "error" or "erred."

At the outset, immediately below are a few examples of the ALJ's unlawful method.

Exception 1. This is not the first time the ALJ has employed the unlawful method of inventing facts contradicted by the evidentiary record. (Decision, pp.1-16). The ALJ knows this is improper. She was directly rebuked for the same practice by the Eighth Circuit Court of Appeals in *Bussen Quarries, Inc., v. Acosta*, 895 F.3d 1039 (8th Cir. 2018). In rejecting the ALJ's rank speculation, the *Bussen* Court noted "we have serious doubts regarding the validity of the ALJ's decision to disbelieve" witnesses, "and we have not detected any legitimate reason," but such credibility findings are immaterial when there is "*not* two competing versions of events." *Id.* at 1045-47. Here, the ALJ engaged in the same unlawful method throughout the Decision.

Exception 2. The ALJ erroneously concluded that Thomas worked for CPC "without any safety or other incident" for sixteen years. (*See, e.g.*, Decision, p.2). The ALJ knows this is false. Thomas previously turned a water cannon on a nest of osprey, blowing them into the water, and he was dishonest to state and federal investigators about his conduct. (*See* Motion for Hearing Subpoena of MSHA Inspector Mathew Johnson, and Laiho Decl. Exhibit L; Tr. 203:1-204:19; 311:16-313:19; 397:10-22).

Exception 3. The ALJ erroneously concluded that CPC *claimed* Thomas was terminated for failing to comply with the safety investigation. (*See, e.g.*, Decision, p.10). The ALJ knows this false. CPC did not discipline Thomas for his PFD misconduct or his conduct during the safety investigation. This case involves Strickland's February 1 and 2, 2018 decision to process Thomas as a voluntary resignation due to job abandonment, and the February 8 and 9 resulting separation from employment. Strickland's uncontradicted testimony and related exhibits are in the record. (Exhibits P, R, U, V, FF; Tr. 436:17-474:25). By letter, Strickland's voluntary

resignation process provided Thomas additional opportunity to continue working for CPC. Thomas' own unprotected behavior in not responding caused the separation from employment.

II. STANDARD OF REVIEW

The Commission must vacate the Decision. Federal courts review an ALJ's decision in the same manner as the Commission. Legal conclusions are reviewed *de novo*, and findings of fact are reviewed for substantial evidence. *CalPortland Co. v. Fed. Mine Safety & Health Review Comm'n*, 839 F.3d 1153, 1162 (D.C. Circ. 2016); *Am. Coal Co. v. FMSHRC*, 796 F.3d 18, 23 (D.C. Cir. 2015); *Donovan ex rel Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 958 (D.C. Cir. 1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

The record as a whole must be considered, including evidence in the record that fairly detracts. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 309 (D.C. Cir. 2006); *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1103 (D.C. Cir. 2001). It is reversible error for the ALJ to reject uncontradicted evidence. *Jim Walter Res. v. Sec'y of Labor*, 103 F.3d 1020, 1027 (D.C. Cir. 1997). An inference is precluded where its existence is contrary to the uncontradicted testimony and facts of record. *Bussen*, 895 F.3d at 1045; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Pa. R. Co. v. Chamberlain*, 288 U.S. 333, 340-41 (1933).

Agency findings that are grounded upon conjecture or suspicion are unreasonable under substantial evidence review. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Bussen*, 895 F.3d at 1045. Credibility findings do not provide a reasonable basis for drawing inferences that are contrary to uncontradicted evidence. *Bussen*, 895 F.3d at 1045-46. This

is especially true where, as in in this case, the unsupported inferences are drawn against CPC, the party without the burden of persuasion to prove a violation of the Mine Act. *Id.*

Prejudicial or harmful procedural error exists when the error prevented facts or arguments from being presented and entered into the administrative record. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002), *Shell Oil Co. v. EPA*, 950 F.2d 741 (1991); *Devine v. White*, 697 F.2d 421, 441 (D.C. Cir. 1983).

III. THOMAS' FEBRUARY 13, 2018 MSHA COMPLAINT

Exception 4. The ALJ erroneously construed Commission precedent to allow consideration of allegations outside Thomas' February 13, 2018 MSHA Complaint. (*See, e.g.*, Decision pp.7-8).[2] Unlike a Section 105(c)(2) proceeding, in a Section 105(c)(3) proceeding, Thomas' February 13, 2018 MSHA Complaint establishes the contours of Thomas' claim. Thomas may not expand his claim beyond that original MSHA Complaint or what was investigated prior to its dismissal by MHSA. *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (1991 FMHSRC LEXIS 758 (Apr. 1991); *Wilson v. Farris*, 39 FMSHRC 341, 351 (Feb. 2016) (ALJ) (apply *Hatfield* before applying *Pasula/Robinette*); *Secretary of Labor v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, 1340-41 (June 2016).

Thomas' Complaint, which CPC received February 21, 2018, was both temporally and topically limited. (Exhibit X). Thomas alleged in relevant part: "I experienced retaliation for speaking with an MSHA investigator about safety on multiple occasions, starting on January 24, 2018. I was suspended and terminated for a single isolated incident…."

There is no factual issue as to what MSHA investigated in relation to Thomas' Complaint. Thomas testified at Hearing that his only allegation of MSHA conduct motivating CPC was his

[2] This presents substantial questions of law, policy, or discretion.

discussion with MSHA Inspector Johnson on January 24, 2018. (Tr. 206:25-208:3). That discussion with Inspector Johnson related to Thomas' own unsafe act. Thomas admitted that he was not claiming that he was discriminated against because he was making an MSHA Complaint. (Tr. 205:20-207:4). Thomas testified that he did not claim he was discriminated against because he was about to testify in an MSHA proceeding. (Tr. 206:25-207:4). By Thomas' own admission, Thomas never discussed his interactions with Inspector Johnson with CPC, and CPC never expressed any hostility or ill will towards Thomas' interactions with Inspector Johnson. (Tr. 208:4-19). Thomas' 105(c) Complaint must be dismissed.

IV. SAFETY INVESTIGATION IS NOT A 105(c) CLAIM

Exception 5. The actions CPC took in the Company safety investigation of Thomas' January 24, 2018 unsafe act cannot form the basis of a Section 105(c) discrimination case. (*See, e.g.*, Decision, pp.3-4).[3] The ALJ erroneously attempted to find CPC liable for carrying out its statutory duties to ensure a safe workplace. CPC's investigation did not cause the separation of employment. Thomas' conduct in not responding to Strickland's opportunity to continue his employment caused the separation of employment.

To hold that a mine operator's exercise of its duties under 30 U.S.C. § 801(e) may also form the basis of a Section 105(c) claim would be irrational and would deter, rather than advance, the policy of workplace safety. *Collins v. FMSHRC*, No. 93-3427, 1994 U.S. App. Lexis 34459 at *11-12 (6th Cir. Dec. 6, 1994) (unpublished decision). The notion that after the report of Thomas' unsafe act, CPC should not have investigated Thomas's unsafe act, or questioned Thomas, or taken action to ensure Thomas' safety and the safety of others, is not the proper subject of a Section 105(c) case.

[3] This is a substantial issue of law, policy and discretion.

The facts were uncontradicted. CPC promotes a culture of safety, works with and partners with MSHA, and has a comprehensive Illness and Injury Prevention Program. (Tr. 225:5-227:25; 228:1-16; 229:12-230:4; 230:15-231:21; 232:18-234:5; 234:16-238:7; 275:11-276). Included is CPC's statutory obligation to investigate and consider discipline of employees who engaged in unsafe acts. (Tr. 234:6-15; 238:21-239:15; 240:2-242:14; Exhibit CC, pp.14 and 18). Employees who are working over water are required to wear a PFD ("life jacket") or fall protection, and Thomas was well trained in this requirement. (Tr. 238:8-20; 253:12-255:2; 281:1-7; 281:15-282:14; 279:10-280:25; 283:17-284:12; 372:1-10; 375:5-376:11; 442:9-22; Exhibit CC, p.20; Exhibit DD, p.18-19; Exhibit H, p. 1). Unsafe acts are not protected activity.

V. MSHA CANNOT EXPAND ITS STATUTORY AUTHORITY

Exception 6. The ALJ erroneously attempted to extend the agency's statutory authority to include non-Mine Act issues. (*See, e.g.*, Decision, pp.1-16). MSHA does not have authority to expand the protections of the Act, or to determine an employer's response to the unprotected behavior of its employees. *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1105 (D.C. Circ. 2001); *Landreville v. Northshore Mining Co.*, 25 FMSHRC 695, 704 (2003); *Roybal v. Wyoming Fuel*, 12 FMSHRC 2443, 2457 (1990); *Pack v. Maynard Branch Dredging Co*., 11 FMSHRC 168, 172-173 (1989); *Luttrell v. Jericol Mining*, 10 FMSHRC 1328, 1334-1335 (1988); *Pendley v. FMSHRC*, 601 F.3d 417 (6th Cir. 2010). To permit an agency to expand its authority would be an impermissible grant of authority for the agency to override Congress. *Louisiana Pub. Serv. Comm'n. v. F.C.C.*, 476 U.S. 355, 374-74 (1986); *Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Thomas' conduct in the separation of employment process is not regulated by the Act.

The ALJ speculated about a whole range of non-Mine Act issues. Without being exhaustive, MSHA does not regulate defamation claims by an employee against an employer. The

National Labor Relations Act, not MSHA, regulates whether a non-union employee such as Thomas has the right to an attorney in his communications with his employer, and holds there is no such right. Hours of work are regulated by the U.S. Department of Labor and state law. Likewise, MSHA does not regulate sick call communications between an employer and employee. MSHA does not regulate human resources (Strickland) policies and practices for voluntary resignation due to job abandonment and separation of employment resulting therefrom.

VI. UNCONTRADICTED FACTS OF RECORD

The Decision rests upon Strickland's separation from employment, which the ALJ falsely and erroneously concluded "violated the Mine Act." (*See, e.g.*, Decision, p.1). The ALJ was required to accept the uncontradicted factual record. The evidentiary record is undeniably insufficient to support a conclusion that Thomas was "discharged" in violation of the Mine Act.

Exception 7. The ALJ erroneously rejected the following uncontradicted facts of record, the record fairly detracts from any contrary conclusion, and to conclude otherwise is nothing more than rank speculation and conjecture. (*See, e.g.*, Decision, pp.1-16). On January 24, 2018, Thomas engaged in dangerous PFD misconduct while at sea on the cold waters of the Columbia River, placing himself, coworkers and the public at risk of fatality. (Exhibit I; Tr. 174:2-175:1; 249:16-250:7). Thomas' dangerous PFD misconduct was observed by MSHA Inspector Johnson. (Exhibit I). No other violations were identified by Inspector Johnson. (Tr. 381:17-19).

Consistent with its responsibilities under the Act, 30 U.S.C. § 801(e), CPC placed Thomas on non-disciplinary suspension pending investigation to ensure the safety of Thomas, and to determine the potential for repeatability of the unsafe act. (Tr. 250:11-21; 295:15-297:5; 446:23-447:20). Suspension pending investigation was not unusual because when unsafe acts or incidents

occur, CPC must ensure the employee's safety—first and foremost. (Tr. 250:11-21). In such circumstances, if the investigation clears the employee of wrongdoing, the employee receives full back pay. (Tr. 296:5-11).

Thomas was never disciplined or terminated for PFD misconduct or for his conduct during the investigation. (Tr. 311:25-313:7; 442:23-444:16). While Thomas' manager (Demers) intended to recommend Thomas for termination, the recommendation was never provided to the decisionmaker (Mc Auley) for approval—the discipline never occurred. (Tr. 442:23-444:20; Exhibit N). No discipline issued because after Thomas refused to answer questions at the January 29, 2018 safety meeting, Thomas cancelled a follow-up investigation meeting scheduled to provide him additional opportunity, and then told CPC to never call him again. (Exhibit P; Tr. 144:23-145:20; 186:1-13; 188:22-189:13; 311:25-313:7; 317:6-322:2; 394:15-396:15; 401:10-402:19; 436:17-437:15; 442:23-444:16; 450:23-451:7; 452:5-453:5; 454:19-455:3).

After these events, Strickland provided Thomas additional opportunity to continue his employment with CPC. Strickland is a highly experienced and sophisticated human resources manager, with human resources responsibility over 19 CPC facilities. (Tr. 439:13-440:15). Strickland reports directly to corporate human resources in Glendora, California; while the operational managers (*e.g.*, Demers and Mc Auley) do not report to Strickland. (Tr. 440:16-441:12).

There was no evidence of any dispute, disagreement, or other employment issue ever having arisen between Thomas and Strickland. Strickland had only met Thomas twice. (Tr. 444:23-445:6). During his employment, Thomas never came to Strickland with any work complaint—ever. (Tr. 445:19-446:9). Strickland did not participate in the safety investigation of Thomas' January 24, 2018 PFD misconduct. (Tr. 436:23-437:5; 446:23-448:7). Strickland never

had any conversations with Inspector Johnson. (Tr. 448:3-5).

Strickland's processing of Thomas' voluntary resignation due to job abandonment began on February 1, 2018, when Mc Auley informed Strickland that Thomas had told him not to call him (Thomas). (Tr. 452:2-453:3). That same day (February 1, 2018), Strickland contacted her direct supervisor at CPC's corporate human resources to ensure proper protocol and Strickland began the process for Thomas' potential voluntary resignation for job abandonment. (Tr. 452:15-454:18; Exhibit P). Strickland's email confirms she made the decision on February 1, 2018, to proceed under the voluntary resignation process ("the letter I'm sending him"). (Exhibit P, p.3). On Friday, February 2, 2018, Strickland discussed the voluntary resignation issue with her direct supervisor (Moreno) at corporate human resources. (Tr. 454:19-455:3). At that point (Friday, February 2, 2018), Strickland prepared Thomas' voluntary resignation for job abandonment letter and forwarded it to corporate human resources for review. (Tr. 455:4-456:9).

On Monday, February 5, 2018, Strickland sent the letter to Thomas by U.S. Mail and by United Postal Service ("UPS"). (Tr. 456:20-457:10; Exhibit R). The letter accurately recounted CPC's "numerous attempts to discuss the investigation further." (Exhibit R, p.1). The letter accurately informed Thomas:

> Per CPC's Attendance Policy: Employees who are absent for three (3) or more consecutive work days without personally calling in and reporting their absence to their supervisor shall be deemed to have abandoned their job and will be considered to have voluntarily resigned in the absence of a compelling excuse for having failed to do so.

(Exhibit R, p.2). The letter explained: "If I do not hear from you by Thursday, February 8, 2018 by 4pm we will have considered you to have voluntarily resigned your employment at CPC." (Exhibit R, p.2). Strickland testified the information described in the letter was accurate. (Tr. 457:2-7). The letter reflects multiple opportunities to contact Thomas both by phone and by text message. (Exhibit R). Thomas received the letters, but refused to accept or read the letters, marking

the regular mail copy "Return to Sender," and "refusing delivery" of the UPS copy. (Tr. 457:18-21). Thomas admitted this conduct that caused his separation from employment. (Tr. 189:14-190:25).

Strickland waited for the voluntary resignation process to finish—giving Thomas the three days to avoid job abandonment. (Tr. 459:19-22). On February 9, 2018, consistent with the letter, policy and practice, Strickland accepted Thomas' voluntary resignation for job abandonment and informed Thomas again by U.S. Mail and UPS. (Tr. 459:18-460:21; Exhibit U). The letter stated: "This letter confirms your decision, effective February 8, 2018 4:01 p.m. we have considered you to voluntarily resign your position with [CPC]" (Exhibit U). Strickland processed Thomas' separation from employment. (Tr. 461:14-463:10; Exhibit V).

Strickland's human resources action was a "separation from employment." The change in status form accurately reflects "Separation of Employment," as the type of change in status, and "Voluntary Resignation" as the reason for the termination. (Exhibit V). The form does not state "Discharge," or "Violation of Company Policy," as the reason for Thomas' separation of employment. (Exhibit V). When she processed Thomas' voluntary resignation, Strickland was following CPC's practices. (Tr. 466:14-467:1). Strickland's actions were wholly consistent with CPC's practice and the treatment of other employees. (Tr. 466:22-470:15; Exhibit FF).

Thomas produced no evidence that he was treated disparately. Strickland provided examples of comparator employees who were treated similarly to Thomas by CPC's human resources. (Tr. 466:22-470:15; Exhibit FF). The first comparator was an employee who, like Thomas, was involved in a CPC investigation, ceased responding to messages from CPC management, and was processed as voluntary resignation for job abandonment. (Exhibit FF,

pp. 1-3).[4] The second, like Thomas, failed to contact or respond to management and, like Thomas, was processed as voluntary resignation for job abandonment. (Exhibit FF, p.4). The third was an employee who, like Thomas, was involved in a CPC investigation, ceased responding to messages from CPC management, and was processed as a voluntary resignation for job abandonment. (Exhibit FF, p.5). The fourth failed to respond to multiple attempts at contact by CPC and, like Thomas, was processed as voluntary resignation. (Exhibit FF, p.6).

February 21, 2018, was the first time Strickland became aware of Thomas' MSHA Section 105(c) discrimination complaint. (Tr. 192:17-21; 464:16-465:2). Strickland was not aware of any protected Mine Act conduct by Thomas prior to that February 21, 2018 notice of the Section 105(c) discrimination complaint. (Tr. 465:3-466:8). Other CPC operational manages (Blanchard, Mc Auley, Demers) all confirmed they were aware of no protected activity ever having been engaged in by Thomas prior to his February 9 separation from employment. (Tr. 255:2-11; 325:18-327:16; 406:18-407:25; 411:16-19; 445:19-446:9).

Exception 8. The ALJ erroneously rejected Thomas' admissions. Of the witnesses Thomas called, only Thomas possessed foundation to testify as to his separation from employment. Thomas' testimony corroborated—and did not contradict—the above facts of record.[5] (Tr. 166:23-211:1).

Thomas had been recently trained on the PFD rule. (Exhibit H). Thomas admitted that he engaged in the PFD misconduct. Thomas admitted the PFD rule is an important rule, and that not

[4] A copy of the policy is provided at Exhibit FF, p.3, and cited to Thomas in the February 5, 2018 letter that Strickland sent providing Thomas opportunity to continue his employment at CPC. (Exhibit R).

[5] The ALJ erroneously precluded CPC from entering Thomas' deposition testimony into evidence as an admission by party opponent pursuant to FRCP 32(a)(3). (Tr. 09:20-110:3; 166:23-172:5; 111:9-112:5). While earlier in the hearing the ALJ stated she *allowed hearsay*, the ALJ appeared to not understand that an admission by a party opponent is *non-hearsay*.

following the rule puts people in danger, including the employee, coworkers, and other mariners. (Tr. 173:20-175:1). Thomas admitted that when *on the deck* of the barge, he was required to be tied off or wearing a PFD because there is a risk of drowning in the Columbia River. (Tr. 175:2-24). Thomas admitted that had he gone over the edge of the barge, he would have dropped 14 feet before hitting the cold water of the Columbia River. (Tr. 176:1-12).

While he admitted the misconduct, Thomas contended that Inspector Johnson fabricated the Inspector's statement about Thomas being *on the ladder*.[6] (Tr. 177:15-178:10). Much of Thomas' Hearing presentation involved attempting to establish that Inspector Johnson's observations were not true. Thomas argued that Inspector Johnson was "making false representations" about what he observed. (Tr. 178:9-18). Thomas testified that he has "no idea" why Inspector Johnson would do that. (Tr. 178:19-22; 197:2-10).

Thomas admitted that Inspector Johnson thought Thomas' unsafe act was a "big deal," and that Inspector Johnson reported his observations of Thomas' unsafe act to CPC the same day. (Tr. 176:13-177:10). Thomas admitted that CPC had no reason to believe that Inspector Johnson had made false statements about the Inspector's observations. (Tr. 178:23-179:5).

Thomas admitted that the following day (January 25, 2018), in the presence of Thomas' manager (Demers), Inspector Johnson stated to Thomas: "I saw you standing on the ladder." (Tr. 177:11-17; 179:2-15).[7] Very shortly thereafter and that same day, Demers informed Thomas that he was suspended pending investigation. (Tr. 179:16-25).

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[6] Thomas' disagreement with Inspector Johnson about the ladder is wholly immaterial to this 105(c)(3) discrimination case. It would be absurd to contend that CPC was precluded from carrying out its statutory duty to investigate Thomas' safety misconduct as reported by MSHA Inspector Johnson.

[7] As if this were a citation case, the ALJ allowed Thomas to present a case premised upon establishing that Inspector Johnson had lied about his observations. Yet, the ALJ denied CPC's

Demers requested a statement from Thomas and a safety investigation meeting was scheduled for Monday, January 29, 2018. (Tr. 180:1-182:5; Exhibit 19). Thomas admitted that during that safety investigation meeting he (Thomas) became uncooperative and refused to answer questions. Specifically, after Inspector Johnson's statement (Exhibit I) was read to Thomas at the meeting, Thomas stated: "This whole thing is nothing but a sham," and "it's completely false." (Tr. 144:23-145:20; 182:6-183:23). CPC safety investigators (Demers and Woods) asked Thomas if it was his common practice to not wear his PFD, and Thomas stated: "[he, Thomas] wasn't going to answer that question." (Tr. 145:13-20). Thomas contends he did so because he was "not going to incriminate himself." (Tr. 145:16-20). Thomas admits the investigation meeting abruptly ended as a result. (Tr. 145:21-24).

Thomas admitted that after the meeting on Monday, January 29, 2018, he prepared an Employee's Report of Incident that made no mention of the ladder issue and listed the deckhand (McMillan) as the only witness to PFD misconduct. (Exhibit 20). Thomas admitted that same day he also sent a narrative by email to Demers in which Thomas claimed Inspector Johnson asked: "Why I [Thomas] was on the ladder with no PFD? I [Thomas] said *I was not on the ladder and it was Joel* doing some welding on the studs on the rings." (Exhibit 22). McMillian's January 29, 2018 Employee Report of Incident, in contrast, stated: "Rob was cutting out a piece of steel he did not have his life jacket or hard hat on. *I am not sure if his PPE [personal protective equipment] was on while he [Thomas] was on the ladder*." (Exhibit 5). McMillian had been absent and unable

pre-hearing request to have MSHA Inspector Johnson testify at the Hearing, allowing only Thomas' side to be heard.

to observe Thomas for about 30 minutes[8] during the time of Inspector Johnson's observations of Thomas. (Tr. 82:19-83: 20).[9]

Thomas admitted that Demers scheduled another meeting for Thomas on the following day, January 31, 2018. (Tr. 185:3-21). Thomas admitted he cancelled the meeting the morning of January 31, 2018, by text message to Demers. (Tr. 185:18-21). Thomas testified that *he was unaware either way* whether CPC (Demers and Mc Auley) had attempted to contact him to reschedule (they had attempted at least 7 times by text and phone). (Tr. 186:1-7). Thomas admitted that on February 1, 2018, he spoke with CPC for the last time, telling Mc Auley to not call him again. (Tr. 85:22-186:13). Thomas admitted he has no first-hand knowledge whether anybody at CPC ever received any communication from Thomas' attorney. (Tr. 188:25-189:5).

Thomas admitted that after telling Mc Auley not to call him again, Thomas had no other contact with CPC. (Tr. 189:6-13; 186:14-20; 188:3-24). Thomas admitted that on February 5, 2018, CPC (Strickland) sent Thomas a letter, which Thomas received, but refused to open, and sent back to CPC. (Tr. 189:14-25). Thomas admitted he did not forward those letters to his attorney. (Tr. 190:1-10). Thomas admitted he knew who his attorney was, including phone number and address, and did not call his attorney to inform him of the letters from Strickland. (Tr. 190:4-17). Thomas admitted he received a second letter from CPC around February 8 or 9, 2018, and again chose to not read the letter and he did not send the letter to his attorney. (Tr. 190:5-191:13).

[8] "Before we elicit testimony from this witness (Ison) about these sorts of actions, he needs to lay the predicate as to foundation, observation, and also the relevance to this 105(c) proceeding." (Tr. 25:1-26:4). Yet, the ALJ erroneously allowed the witness to speculate about matters the witness eventually conceded he was not in position to observe. (Tr. 20:8-21:13).

[9] McMillian or Ison testifying "I did not see Thomas on the ladder without his PFD," is different than testifying "Thomas was not on the ladder without his PFD." Neither Ison nor McMillian were in a position to observe Thomas throughout the time Inspector Johnson was observing Thomas. Despite that lack of foundation, the ALJ allowed both Ison and McMillian to speculate.

Thomas' attorney eventually communicated with CPC on February 13, 2018, after the separation from employment. (Tr. 191:15-18). Thomas admitted that his attorney asked CPC about Thomas' final paycheck and requested a copy of Thomas' personnel file. (Tr. 191:15-24). Thomas admitted that he was provided his final paycheck and copy of his personnel file. (Tr. 91:25-192:5). Thomas admitted he signed his MSHA Complaint on February 13, 2018, which was filed sometime later. (Tr. 192:6-25). CPC received Thomas' MSHA Complaint on February 21, 2018.

VII. DISCRIMINATION BURDEN OF PROOF

It is plainly obvious that this case involves Strickland's February 1 and 2 decision to process Thomas as a voluntary resignation due to job abandonment, and the February 8 and 9 resulting processing of that separation of employment. This is the purported "discharge in violation of the Mine Act." (Decision, p.1).

Exception 9. The ALJ falsely and erroneously rejected uncontradicted evidence, failed to follow precedent, shifted the burden of persuasion to CPC, and erroneously concluded that Thomas was discharged in violation of the Mine Act. (Decision, pp.1-16). Section 105(c)(1) states, in pertinent part:

> [n]o 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, representative of miners or applicant for employment in any coal or other mine subject to this Act ***because*** ….

Section 105(c) (emphasis added). Strickland's decision to process Thomas as a separation from employment was not because of ("but for") Mine Act conduct by Thomas. Failing to communicate with your employer under a job abandonment policy is not protected by the Act. The ALJ has no statutory authority to regulate such unprotected behavior by Thomas. The legal framework is discussed in further detail, below.

<u>Exception 10</u>. The ALJ erroneously failed to conclude there was no motivational link or causal nexus between specific protected activity and Strickland's separation from employment decision. Precedent requires the evidentiary record reflect: (1) Thomas engaged in a specific protected activity, (2) Strickland took an adverse action, and (3) Strickland's adverse action was motivated by Thomas' specific protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980). The only temporal event was Inspector Johnson's observation of Thomas' own unsafe act, which is not protected activity. Thomas identifies no specific Mine Act conduct that motivated Strickland's separation from employment, the purported adverse action. Strickland's separation from employment process followed the natural order of events resulting from Thomas' own conduct in not contacting CPC to continue his employment. There is no causal nexus or motivational link to any specific Mine Act conduct by Thomas.

The following *Chacon* factors are considered: (1) Strickland's knowledge of Thomas' specific protected activity; (2) Strickland's hostility or animus toward Thomas' specific protected activity; (3) coincidence in time between Thomas' specific protected activity and Strickland's adverse action; and (4) disparate treatment of Thomas by Strickland. *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). The evidentiary record is insufficient to establish that Strickland was aware of specific Mine Act protected activity by Thomas, that Strickland possessed hostility or animus towards any such specific activity, or that Strickland treated Thomas disparately from the way other employees were treated for separation from employment due to job abandonment. The timing is not suspicious because the separation from employment process began immediately after Thomas' failure to communicate, and the final processing of the separation from employment was consistent with policy and Strickland's February 5, 2018 letter to Thomas. There

is no specific knowledge. There is no animus. There is no pretext. There is no disparate treatment. There is no causal nexus. The Decision must be vacated.

Exception 11. The ALJ erroneously failed to conclude that CPC's rebuttal burden of production had been readily met. To meet its rebuttal burden of production, the employer must simply articulate a legitimate business reason for the adverse action, which the ALJ must accept as a valid exercise of the employer's business unless the business justification is plainly incredible or implausible. *Chacon*, 3 FMSHRC at 2517; *Robinette*, 3 FMSHRC at 818 n.20; *Landreville* , 25 FMSHRC at 704; *Roybal* 12 FMSHRC at 2457; *Pack*, 11 FMSHRC at 172-173; *Luttrell*, 10 FMSHRC at 1334-1335; *Pendley*, 601 F.3d at 417. Strickland's February 1 and 2 decision to process Thomas for separation from employment, which provided Thomas additional opportunity to continue his employment, must be accepted as a legitimate decision. The decision is neither plainly incredible, nor implausible. The ALJ does not possess statutory authority to second guess that human resources' decision and process. Had Thomas contacted Strickland in the separation from employment process, he may still be working at CPC today. The ALJ engaged in rank speculation and conjecture by concluding otherwise[10]

A judge must accept the employer's proffered business justification because a federal agency such as MSHA has no statutory authority to supplant its judgment as to how the employer

[10] Judgment for the employer is warranted when an employee abandons their employment under a job abandonment policy. *Wilkerson v. Wackenhut Protective Servs.*, 813 F. Supp.2d 61, 68 (D.D.C. 2011); *Ritenour v. Tenn. Dep't of Human Servs.*, 497 F.App'x 521, 532-33 (6th Cir. 2012); *Aguilar v. St. Anthony Hosp.*, 207 F. Supp. 2d 747, 764 (N.D. Ill. 2001); *Johnson-Romaker v. Kroger Ltd. P'ship One*, 609 F.Supp.2d 719, 730-31 (N.D. Oh. 2009); *Outten v. Genesis Health Care, LLC*, No. 13-4708, 2014 U.S. Dist. LEXIS 111621, at *29-30 (E.D. Pa. 2014); *Hartwell v. Sw. Cheese Co., L.L.C.*, No. CIV 15-1103 JAP/GJF, 2017 U.S. Dist. LEXIS 10054, at *32-38 (D.N.M. 2017); *Tighe v. Worldspan, LP*, No. 1:08-CV-1889-RLV/AJB, 2010 U.S. Dist. LEXIS 150579, at *76-77 (N.D. Ga. 2010).

should respond to unprotected conduct, an employer is free to run its business as it pleases, and an employer may take employment actions for good reason, bad reason, or no reason. *Landreville*, 25 FMSHRC 695 at 704; *Epilepsy*, 268 F.3d at 1105. Thomas' lack of response to Strickland's February 5, 2018 letter is not protected Mine Act conduct.

Exception 12. The ALJ erroneously failed to conclude that Mine activity was not a "but for" cause of Strickland's decision to process Thomas' separation from employment. At the rebuttal stage and throughout, the burden of persuasion remains with Thomas to prove a violation of the Act. 5 U.S.C. § 556(d); 30 U.S.C § 815(c).[11] This burden of persuasion to prove a violation requires Thomas establish by a preponderance of the evidence that protected Mine Act conduct was a "but for" cause of an adverse action taken by the employer. *Id.*[12] Here, the evidentiary record is insufficient to support an inference that specific protected Mine Act conduct by Thomas was a "but for" cause of Strickland's processing of Thomas' separation from employment. Thomas' behavior in not responding to Strickland's February 5, 2018 letter is a superseding event eliminating any other purported discriminatory "but for" cause. This is not even a potential "dual motive" case. The evidentiary record likewise does not support an inference of

[11] *Burrage v. United States*, 571 U.S. 204, 213 (2014); *University of Tex. Southwestern Medical Center v. Nasser*, 570 U.S. 338, 346-347 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 173 (2009); *Shaffer v. Weast*, 546 U.S. 49 (2005); *Dept. of Labor v. Greenwich Colliers*, 512 U.S. 267, 275 (1994); *NLRB v. Transportation Mgt.*, 462 U.S. 393 (1983); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 555 (8th Cir. 2015); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1339-40 (D.C. Cir. 1995); *Meco Corp. v. NLRB*, 986 F.2d 1434 (D.C. Cir. 1993); *Saab v. Dumbarton Quarry*, 22 FMSHRC 491, 495 (Apr. 2000).

[12] To the extent Commission decision *Knox Creek Coal Corporation*, 37 FMSHRC 1074, 1100 (2015), is applied to challenge the legal framework set forth herein, it was wrongly decided. This presents a substantial question of law, policy and discretion. Such an erroneous construction would not survive *Chevron* review for the reasons stated in the statutes and precedent cited. *See CPC Co.* 839 F.3d at 1162 for the applicable *Chevron* review standards. CPC preserves all objections in this regard. (*See* CPC's Answer to Complaint of Discrimination, Affirmative Defense No. 6, June 15, 2018; Motion in Limine, pp.6-7 and n.4).

any other purported discriminatory motivation.

Exception 13. The ALJ erred by speculating, contrary to the evidentiary record, that Strickland was motivated by specific Mine Act protected activity when she processed Thomas as a voluntary resignation due to job abandonment. The ALJ's wandering, convoluted and patently false analysis (Decision, pp. 6-14) focuses on Demers, not Strickland. This Analysis (Decision, pp. 6-14), is unsupported by the evidentiary record and the necessary legal conclusions are erroneous.

Thomas did not call Strickland as witness. Strickland's testimony was uncontradicted and entirely corroborated by documentary evidence. (Exhibits P, R, U, V, FF; Tr. 436:17-474:25). Thomas must prove the *decisionmaker* (Strickland) was motivated by a *specific* protected activity, and speculation about what Strickland did or thought does not meet the burden of proof. *Nichols Aluminum v. NLRB,* 797 F.3d 548, 555 (8th Cir. 2015); *Direct TV Holdings v. NLRB*, 650 F.App'x 846, 852-53 (5th Cir. 2016); *Alldata Corp. v. NLRB*, 245 F.3d 803, 809 (D.C. Cir. 2001) (there is no evidence that the *decisionmaker* harbored animus towards the alleged specific protected activity). Strickland was not motivated by Mine Act protected activity in processing Thomas' separation from employment. No reasonable mind could conclude otherwise.

Exception 14. The ALJ erred by imputing to Strickland the alleged knowledge, actions, or animus of others. Discrimination is an intentional act. It is unlawful for the ALJ to impute the actions and beliefs of others by fiat into Strickland's mind and then conclude Strickland intentionally discriminated against Thomas. *Staub v. Proctor Hosp.*, 562 U.S. 411, 418-19 (2011) (a "cat's paw" theory requires establishing proximate cause to the unbiased decisionmaker's adverse action); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003); *Luttrell v. Jericol Mining*, 10 FMSHRC at 1334-1335; *Chacon*, 3 FMSHRC at 2510; *Garofalo v. Penn Big Bed Slate*, 33

FMSHRC 2471 (2011); *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980); *Cardenas v. AT&T Corp.*, 245 F.3d 994, 1000 (8th Cir. 2001); *Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526 (10th Cir. 1994). While Demers was not shown to have knowledge of or animus towards Mine Act protected activity, the evidentiary record is insufficient regardless. No individual with discriminatory motive towards a specific protected Mine Act activity by Thomas, including but not limited to Demers, was in any way a proximate cause of Strickland's separation from employment decision. The evidentiary record is insufficient to support the ALJ's inferences and conclusions. (Decision, pp.1-16).

Exception 15. The ALJ erred by concluding, contrary to the evidence of record, that CPC's affirmative defense had not been met. Even if Thomas had proven protected Mine Act conduct motivated Strickland, which he did not, an operator may likewise defend affirmatively by proving the adverse action would have occurred from unprotected activities alone. *Driessen*, 20 FMSHRC at 328–329; *Pasula*, 2 FMSHRC at 2800. CPC's affirmative defense was readily met. Thomas was treated the same as other employees when he voluntarily resigned his position due to job abandonment. (Exhibit FF). It is undisputed that Thomas engaged in the conduct that caused his separation from employment when he elected to not respond to Strickland's letter. Accordingly, the same result would have flowed from Thomas' unprotected conduct alone.

Exception 16. The ALJ conceded the facts that mandate the necessary conclusion that Strickland's legitimate nondiscriminatory reason was not disproved by Thomas, and that CPC's affirmative defense was readily met. The ALJ erroneously ruled that Strickland could not testify about the details of her comparable treatment of Thomas relative to other employees. (Tr. 469:9-470:8; Exhibit FF). When erroneously precluding such testimony by Strickland, the ALJ specifically stated: "Okay, that's a similar situation. We're not going to get into the facts of

each one, because that brings up a million other things. So we will accept, you know, that she used these (Exhibit FF) and that other people have gotten a similar letter (Exhibits R and FF)." (Tr. 470:2-6). This ends the case. A showing that Thomas was treated the same as other employees for job abandonment precludes a finding of discrimination and likewise readily establishes that the same result would not have occurred based upon unprotected conduct alone. Different treatment is the essence of discrimination. Thomas was treated the same as other employees. The evidentiary record is uncontradicted.

VIII. LIST OF ADDITIONAL EXCEPTIONS

Without waiving any objections or exceptions, the following are additional Exceptions to the ALJ Decision.

Exception 17. The ALJ erroneously concluded that it "was unusual to involve Strickland" after Thomas's lack of cooperation and refusal to answer at the safety meeting. (*See, e.g.*, Decision, p.5). This is false. (Tr. 304:11-305:8; 438:16-439:1). *See* previous Exceptions.

Exception 18. The ALJ erroneously concluded that Strickland drafted the separation of employment letter on February 5, 2018, and also precluded entry of corroborative evidence showing it was drafted on February 2, 2018. (*See, e.g.*, Decision, p.5). This is false. (Exhibits P, R, U, V, FF; Tr. 436:17-474:25). *See* previous Exceptions.

Exception 19. The ALJ erroneously concluded that "on February 5 or 6, 2018," MSHA Special Investigator Diane Watson told Demers about "discrimination." (*See, e.g.*, Decision, pp.6 and 14). This is false. On February 6, 2018, not February 5, Watson told Demers that Thomas's attorney stated Thomas intended to file a *defamation* lawsuit against CPC. (Tr. 261:19-262:12; 264:4-19; 403:19-406:11; 422:19-423:19; 464:14-23; 473:6-9; 472:6-473:9; Exhibit 61). Watson did not state "discrimination." (*Id.*) As a matter of law, and logic, such a

discussion after Strickland's February 1, 2018 separation from employment decision could not form the basis of a Section 105(c) discrimination complaint. *Garofalo,* 33 FMSHRC 2471. Likewise, Thomas's absurd theory that Special Investigator Watson violated a sacred duty of confidentiality by giving Demers a "heads up" about a miner intending to file a 105(c) "discrimination" complaint is preposterous. (*See* CPC Post Hearing Brief, pp.17-20). Thomas never called Watson as a witness, despite having the burden of proof. *See* previous Exceptions.

Exception 20. The ALJ erroneously concluded that on February 5, 2018, Demers told Mc Auley that Thomas thought he had been terminated. (*See, e.g.,* Decision, p.6). Demers told Mc Auley what Watson had said in the February 5, 2018 telephone discussion, and Demers called Watson back on February 6, 2018 to ensure Watson was aware Thomas had not been terminated. (Tr. 322:22-324:1; 403:19-404:22; Exhibit 61). *See* previous Exceptions.

Exception 21. The ALJ erroneously precluded evidence and testimony by both Demers and Strickland about the November 2017 sick call communication, while subsequently concluding Demers purportedly stated: "Rob Thomas is done, he was fucking done at CalPortland." (*See, e.g.,* Decision, p.3; Tr. 371:12-25; 446:10-15). The sick call incident and Demers alleged statement involved the "way Thomas talked to Demers on the phone" about the sick call issue; the sick call event was amicably and fully resolved without discipline in November 2017. (Tr. 48:10-15; 123:11-124:12; 202:17-25). *See* previous Exceptions.

Exception 22. The ALJ erroneously concluded that Demers was aware Thomas provided MSHA Inspector Johnson with specific safety information on January 24, 2018. (*See, e.g.,* Decision p.4). Thomas identified no protected activity in his discussions with Inspector Johnson, and no animus by CalPortland towards any interaction he had with Inspector Johnson. (Tr. 208:4-19). Engaging in an unsafe act, talking to an MSHA Inspector about that unsafe act,

and accompanying the Inspector on an inspection is not protected activity. *Fletcher v. Frontier-Kemper Constructors, Inc.*, 34 FMSHRC 2189 (2012); *Ross v. Monterey Coal*, 3 FMSHRC 1171 (1981). *See* previous Exceptions.

Exception 23. The ALJ erroneously concluded that Thomas explained to Demers that he was not on his ladder and that no one on board had witnessed Thomas on the ladder. (*See, e.g.,* Decision, p.4). Whether Thomas was or was not on the ladder is wholly immaterial to this discrimination case. (Tr. 179:19-180:8; 249:16-253:11; 293:4-297:5; 379:21-380:3; 381:1-4; 383:17-385:4; 446:23-447:20; Exhibits I, J, and 22.) *See* previous Exceptions.

Exception 24. The ALJ erroneously concluded that Thomas' non-disciplinary suspension was "without pay." (*See, e.g.,* Decision p.4). This is false. (Tr. 96:5-11; 307:23-311:15; 325:10-17; 185:18-21; 194:6-14; 316:7-18). *See* previous Exceptions.

Exception 25. The ALJ erroneously misrepresented Thomas' conduct during the January 29, 2018 safety meeting (*e.g.,* merely said "not accurate," and "tried to explain further but at some point felt it was unproductive"). (*See, e.g.,* Decision p.4). This is false. Thomas admitted that he refused to answer questions in the safety meeting; Thomas was never disciplined for that conduct. (Tr. 144:23-145:25; 286:5-287:4; 305:9-306:10; 385:5-17; 386:1-20; 449:3-7; 449:6-10; 307:23-311:15; 325:10-17; 185:18-21; 194:6-14; 316:7-18). *See* previous Exceptions.

Exception 26. The ALJ erroneously concluded Demers sent to "Mc Auley and Strickland" a corrective action form after their January 29, 2018 meeting. (Decision, p.5). This is false. Demers worked with Strickland to prepare the draft recommendation, not with Mc Auley. (Tr. 443:25-444:16; 314:25-316:6; 396:20-397:5; 434:11-435:7; 397:1-398:5; 388:6-16; 396:20-401:9; 387:3-393:25; 449:15-450:22; Exhibit N). *See* previous Exceptions.

Exception 27. The ALJ erroneously concluded Thomas believed he had been terminated as a result of Demers' accidental emailing of the corrective action form to the barge scheduling list. (*See, e.g.,* Decision, pp. 5 and 8). Strickland's is the decisionmaker and her beliefs, not the beliefs of Thomas, are material in a discrimination case. (CPC Motion in Limine, pp.1-8). Termination of employment is a legal act, and an employee cannot bring a wrongful termination claim predicated on an event where the employee was not actually fired, discharged, or terminated. *Touchstone Televisions Productions v. Superior Court*, 145 Cal.Rptr.3d 766 (2012). After the inadvertent email, a second email was sent to Thomas stating: "Please delete last e-mail it was sent by mistake." (Exhibit N, p.8). Likewise, the corrective action form was unsigned and undated. (Exhibit N, pp.4-5). The subject line of the accidental email stated; "Word smith Take two." (Exhibit N., p.4). The termination date was blank. (Exhibit N, p.5). Thomas admitted the email was directed to 43 different people both inside CPC and third parties, which Thomas recognized to be the barge schedule. (Tr. 150:3-7). Moreover, Thomas' belief is immaterial. *See* previous Exceptions.

Exception 28. The ALJ's erroneous conclusions regarding Thomas' attorney have no causal connection to Strickland's separation from employment decision or the Mine Act, and are beyond MSHA's statutory authority. (*See, e.g.,* Decision, p.5). (Exhibit W). MSHA does not regulate human resources dealing directly with their non-union employee, rather than through an attorney. An employee does not bring their attorney to work with them. The ALJ has no authority to regulate this issue. *See* previous Exceptions.

Exception 29. The ALJ erroneously concluded that Thomas had not been asked to return to work. (*See, e.g.,* Decision, p.5). This is false. (Exhibits P and R). *See* previous Exceptions.

Exception 30. The ALJ erroneously concluded that corporate human resources advised Strickland to begin the process of voluntary separation. (*See, e.g.*, Decision, p.5). *See* previous Exceptions.

Exception 31. The ALJ erroneously concluded Demers received a 4:35 p.m., Friday, February 2, 2018 email from Thomas's attorney. (*See, e.g.*, Decision, p.5). This is false and likewise immaterial to Strickland's February 1 decision and the separation of employment that resulted. (Exhibit W). *See* previous Exceptions.

Exception 32. The ALJ's erroneous conclusions about the "long hours" issue, such as that it was a "safety concern," that employees "grew concerned," to "avoid subsequent unsafe conditions," are false. (*See, e.g.*, ALJ Decision, p.2 and 6-10). McMillian's employment with CPC is not at issue in this case. (*See* Motion in Limine). The work hour discussion in October 2017, was a 2-3 minute conversation between Thomas and Demers: "We just needed to get someone hired and help relieve Joel and I to get some time off." Demers responded: "I am working on it." Thomas admitted Demers's statement was not indicative of animus and that Demers resolved the work hour issue. (Tr. 209:2-211:2). McMillian had no knowledge of Thomas's communications with Demers, but likewise testified that Demers stated "he was working on it," and did not express hostility or ill will. (Tr. 77:11-78:3). MSHA does not regulate hours of work issues. *See* previous Exceptions.

Exception 33. The ALJ erroneously concluded that Thomas and McMillian agreed the hours worked made it difficult to pay attention and work safely, and that Thomas believed it impacted his ability to remain alert. (Decision p.2). What Thomas and McMillian discussed with each other, if anything, is causally unrelated to the Mine Act and to Strickland's

separation from employment decision. (Tr. 209:2-211:2; Motion in Limine). *See* previous Exceptions.

Exception 34. The ALJ erroneously concluded that the hours worked had increased 2017, but the ALJ stated on the record that was not one of Thomas' allegations in this case. (*See, e.g.,* Decision, p.2). The record is wholly to the contrary and shows Thomas consistently worked the same hours for years, and the hours had decreased in 2017. (Tr. 409:25-410:10; 411:20-414:22; Exhibit DD). *See* previous Exceptions.

Exception 35. The ALJ's conclusions about the training of the rock barge workers are erroneous, including but not limited to the conclusions relating to "one problem for another" because the workers were subject to OSHA, not MSHA, how the training forms are signed, and that Thomas and McMillian were not competent to task train. (*See, e.g.,* Decision, pp. 2-3). Contrary to the ALJ's baseless conclusion, barge workers are fully trained MSHA miners, including fully trained on waterborne safety, and require only task training to work on the dredge. (Tr. 78:8-28). Both Thomas and McMillian are competent persons to task train. (Tr. 14:22-417:25; Exhibit DD, pp.1-7, and 114). The manager, Demers, signs the form for such training. (Tr. 373:18-374:8). MSHA twice reviewed Demers' training records since December 2017 to the time of hearing, without any violation. (Tr. 418:1-18). In their limited account of the barge training, neither Thomas nor McMillian identified any specific dispute or animus involving Demers and the rock barge training. *See* previous Exceptions.

Exception 36. The ALJ erroneously concluded that Thomas made Mine Act protected complaints in October 2017 to Demers about the hours of work. (Decision, p.7). The evidentiary record is insufficient to support this conclusion. Likewise, there exists no expression of any animus towards the issue. (Tr. 411:16-19). *See* previous Exceptions.

Exception 37. The ALJ erroneously concluded that Thomas made Mine Act protected complaints sometime in 2017 (the record reflects barge worker training in July 2017, Exhibit DD, pp.1-4) about the rock barge worker training. (*See, e.g.*, Decision, p.7). The evidentiary record is insufficient to support this conclusion. Likewise, there exists no expression of any animus towards the issue. *See* previous Exceptions.

Exception 38. The ALJ erroneously concluded that Thomas' interactions with MSHA Inspector Johnson on January 24, 2018 involved protected Mine Act activity. (Decision, p.7). The evidentiary record is insufficient to support this conclusion. Likewise, there exists no expression of any animus towards the issue. (Tr. 448:3-5). *See* previous Exceptions.

Exception 39. The ALJ erroneously concluded that protected Mine Act conduct occurred when "the mine" was aware of Thomas's February 13, 2018 MSHA complaint, which "the mine" received on February 21, 2018, but the mine became aware of it "no later than" February 6, 2018, prior to Strickland's "second notice of termination given to Thomas." (*See, e.g.*, Decision, p.7). This is nonsensical. This occurred after the separation of employment decision. The evidentiary record is insufficient to support this conclusion. Likewise, there exists no expression of any animus towards the issue. (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 40. The ALJ erroneously concluded that questions asking CPC witnesses about knowledge of protected activity were leading questions. (*See, e.g.*, Decision, pp.8-9). They were not leading questions. (*See, e.g.*, Tr. 464:16-466:8). A question that may be answered yes or no is not a leading question. Leading questions are those which suggest their own answers, and if the answer could be either yes or no, it is not a leading question. *Bell v. Warden*, 2017 U.S.

Dist. LEXIS 29799 (C.D. Cal. Jan. 25, 2017); *United States v. Wright*, 540 F.3d 833, 844 (8th Cir. 2008); *De Witt v. Skinner*, 232 F. 443, 445 (8th Cir. 1916). *See* previous Exceptions.

Exception 41. The ALJ erroneously concluded that there exists an adverse action in the present case from which a retaliatory motive may be attached. (*See, e.g.*, Decision, p.8). The evidentiary record is insufficient to support this conclusion. The separation of employment was caused by Thomas' own unprotected conduct in not responding to the opportunity Strickland provided to Thomas to continue his employment. (Exhibits R, U and V; (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 42. The ALJ erroneously concluded there existed discriminatory motive for Strickland's separation from employment decision based upon Demers. (*See, e.g.*, Decision, pp.8-10). The evidentiary record is insufficient to support this conclusion. (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 43. The ALJ erroneously concluded there exists a timing nexus between Strickland's separation of employment decision. (*See, e.g.*, Decision, p.9). The evidentiary record is insufficient to support this conclusion. The separation of employment followed the normal course of events. A finding of "suspicious' timing is rank speculation and conjecture. (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 44. The ALJ erroneously concluded that Demers "brushed off" Thomas' safety complaints and "no further effort was made to reschedule the safety meeting with Thomas." (*See, e.g.*, Decision, p.9). The evidentiary record is insufficient to support this conclusion. Demers and Mc Auley attempted to contact Thomas multiple times (7 at least) before Thomas told Mc Auley not to call him again. Moreover, Strickland's February 5, 2018 letter

provided Thomas yet another opportunity to continue his employment at CPC. (Exhibits P and R; Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 45. The ALJ erroneously reasoned there "is no evidence in the record to support an argument that … Thomas was treated like other employees who violated a safety rule that the "offense leads to automatic termination." (*See, e.g.*, Decision, p.9). The evidentiary record is insufficient to support this conclusion. Thomas, not CPC, had the burden to show disparate treatment. CPC showed Strickland treated Thomas like all other employees. (Exhibit FF; Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 46. The ALJ erroneously concluded Thomas was terminated for violating a safety rule, for his refusal to answer questions in the safety meeting, that CPC made no further effort to contact Thomas by phone, and that only a "letter" was sent. (*See, e.g.*, Decision, p.10). This is rank speculation and conjecture that is absolutely contradicted by all the facts of record, including Strickland's uncontradicted testimony and related exhibits. (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). The ALJ has no statutory authority over such issues. *See* previous Exceptions.

Exception 47. The ALJ erroneously concluded that there was no evidence that Thomas' refusal to answer questions asked by the safety department during the investigation leads to a firing by CPC. (*See, e.g.*, Decision, p.10). This entirely misses the point. Thomas was not disciplined for that safety meeting conduct. Mc Auley and Strickland wanted to meet with Thomas in hope that Thomas would answer questions. CPC does not have the burden to establish a lack of disparate treatment. Despite not having the burden, CPC established without contradiction that Thomas was treated the same as other employees. (Exhibit FF). *See* previous Exceptions.

Exception 48. The ALJ erroneously mischaracterizes Demers' statement in November 2017 about the sick call communication. (*See, e.g.,* Decision p.10). The 2017 statement in question according to the source—McMillian—related to "the way [Thomas] had talked to him [Demers]" during the sick call conversation. MSHA has no authority to regulate this sick call communication between Thomas and Demers; it is not protected Mine Act conduct. (Tr. 48:10-15). *See* previous Exceptions.

Exception 49. The ALJ erroneously concluded "that the only person who could testify" about Thomas' lack of cooperation was Woods, who was notably absent, and this was "pretext." (*See, e.g.,* Decision, pp.10-11). This is patently false. Both Demers and Thomas, who were present at the January 29, 2018 safety meeting, testified. *See* previous Exceptions.

Exception 50. The ALJ erroneously drew a negative inference that Woods was not present to further corroborate the undisputed testimony of Demers and Thomas about what occurred during the January 29, 2018 safety meeting. (*See, e.g.,* Decision, p.13). Thomas' attorney did not ask for such an inference. Despite having the burden, Thomas' attorney did not call Woods as witness. Thomas was not disciplined for his conduct at the safety meeting. At the time of the hearing, Woods no longer worked for CPC, and CPC had no idea if Woods was even still located in the area. (Tr. 243:1-244:1). It is hornbook law that a judge may not draw a negative inference from a party's failure to call a witness when the witness no longer works for the party. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C. Cir. 1999); *United Auto, etc., v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *New Life Bakery v. NLRB*, 1992 U.S. App. LEXIS 32651 (9th Cir. Dec. 3, 1992). *See* previous Exceptions.

Exception 51. The ALJ erroneously concluded that CPC and Strickland had not met their rebuttal defense. (*See, e.g.,* Decision, pp.10-13). The ALJ speculates that "Thomas

would have been terminated based on Demers' recommendation," and pretends that Thomas' misconduct was not serious enough to support Demers' recommendation. (*See, e.g.*, Decision, p.13). There is no dispute it was serious misconduct. (Exhibit F.) Demers has extraordinary experience in maritime safety, training, cold-water survival, search, rescue and recovery, spanning over 32 years with the Coast Guard, and his work with the Inland Boatmen's Union (ILWU), where he was contracted to the U.S. Department of Labor Job Corps program to train new mariners. (Tr. 334:16-357:9; 335:21-336:2; 336:8-12; 338:1-339:25; 340:1-344:25; 345:17-357:9; 346:16-347:13; 349:23-350:17). The discipline never occurred, regardless. *See* previous Exceptions.

Exception 52. The ALJ erroneously concluded that "another supervisor" (Demers), was observed by McMillian once entering onto the deck without a PFD. (*See, e.g.*, Decision, p.13). The ALJ does not understand the difference between the deck and the lever room. One does not need to wear PFD in the lever room, which is what McMillian was referencing. (Tr. 72:20-73:4; 89:19-90:2; 50:19-2). Thomas' misconduct occurred *while on deck*. (Tr. 175:2-24; Exhibit I). Demers never failed to wear PFD in location where it was required. (Tr. 375:5-376:11). The issue is immaterial to Strickland's separation from employment process regardless. (Tr. 436:17-455:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 53. The ALJ erroneously concluded that Demers and Mc Auley were "rehearsed" because they used the same terminology and most of the questioning was in the form of leading. (*See, e.g.*, Decision, pp.12). An ALJ is not given deference when their credibility determination is based upon the record because the reviewing court may review the record for itself and see the ALJ's conclusion is false. Likewise, "rehearsed" or "prepared" does not mean a witness is not telling the truth. The ALJ's credibility determination with respect to Demers and

Mc Auley does not allow the ALJ to reject uncontradicted evidence regardless, nor permit the ALJ to invent her own facts as she did in this case. *See, e.g., Bussen, supra*. Both before and during the Hearing, CPC requested 1.5 to 2 days to present its case, which the ALJ repeatedly refused to allow. Notably, the ALJ made no adverse credibility rulings with respect to Strickland. (Tr. 436:17-455:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 54. The ALJ erroneously concluded that CPC did not show that Thomas' violation of safety regulation is behavior that results in immediate termination. (*See, e.g.,* Decision, pp.12, 13). This is false. The evidentiary record is insufficient to support this conclusion, and the necessary legal conclusions are erroneous. Thomas was *not* separated from employment for violation of safety regulation. (Tr. 436:17-455:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 55. The ALJ erroneously concluded that there was no evidence that Thomas would have been expected to attend meetings, be part of an internal investigation, or to return to work following these events. (*See, e.g.,* Decision, p.14). This is false. The evidentiary record is insufficient to support this conclusion, and the necessary legal conclusions are erroneous. (Tr. 436:17-455:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 56. The ALJ erroneously concluded that she (the "ALJ") was not convinced the of CPC's asserted justification for "terminating" Thomas. (*See, e.g.,* Decision, pp.14). Thomas was not "terminated"; he was separated from employment under the voluntary resignation due to job abandonment policy. This is false. The evidentiary record is insufficient to support this conclusion, and the necessary legal conclusions are erroneous. (Tr. 436:17-455:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 57. The ALJ erroneously concluded that Thomas informed Mc Auley that he had hired an attorney to file a discrimination complaint. This is false. The evidentiary record is insufficient to support this conclusion, and the necessary legal conclusions are erroneous. (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). *See* previous Exceptions.

Exception 58. The ALJ erroneously concluded that Thomas informed Mc Auley that he had hired an attorney to file a discrimination complaint on February 1, 2018. (*See, e.g.*, Decision p.14). This is patently false. This evidence appears nowhere in the record. The evidentiary record is insufficient to support this conclusion, and the necessary legal conclusions are erroneous. (Tr. 436:17-455:15; Exhibits P, R, U, V and FF; Motion in Limine). *See* previous Exceptions.

Exception 59. The ALJ erroneously concluded that Watson informed Demers on February 5, 2016 that Thomas intended to file an MSHA discrimination complaint. (*See, e.g.*, Decision p.14). This is false. The conversation in question took place on February 6, 2018, after Strickland's February 1, 2018 decision to process Thomas as voluntary resignation for job abandonment, after the February 5 letter had been sent and received by Thomas, and cannot therefore have motivated Strickland regardless. The evidentiary record is insufficient to support this conclusion, and the necessary legal conclusions are erroneous. *See* prior Exceptions.

Exception 60. The ALJ erroneously concluded that Thomas did not abandon his job and that CPC used its attendance policy as a pretext to firing Thomas. (*See, e.g.*, Decision p.14). The evidentiary record is insufficient to support this inference and the necessary conclusions of law are erroneous. (Tr. 436:17-475:15; Exhibits P, R, U and V and FF; Motion in Limine). Thomas admits that he engaged in all the conduct that caused his separation from employment for voluntary resignation due to job abandonment. *See* previous Exceptions.

Exception 61. The evidentiary record is insufficient to support the inferences, findings and conclusions in the "Analysis" section of the Decision (Decision, pp.6-14), the necessary legal conclusions are erroneous, it is contrary to law and Commission precedent, substantial questions of law, policy and discretion are involved, and prejudicial errors of procedure were committed. *See* previous Exceptions.

Exception 62. The ALJ prejudicially and erroneously denied: (1) CPC's Affirmative Defenses set forth in its June 15, 2018 Answer to Complaint of Discrimination, (2) CPC's August 10, 2018 Motion for Hearing Subpoena for MSHA Inspector Mathew Johnson, (3) CPC's August 24, 2018 request for 1.5 to 2 days of hearing time to present its witnesses, (4) CPC's August 27, 2018 Motion in Limine, (5) CPC's objections at the Hearing, and (6) CPC's Motion for Directed Verdict. *See* previous Exceptions.

Exception 63. The ALJ's Penalty, Damages and Relief, and ORDER, including but not limited to civil penalty, back pay, attorney fees, benefit loss interest, reinstatement, notice posting, and all other relief is erroneous, must be vacated in its entirety, and Complainant's MSHA Complaint and Appeal must be dismissed with prejudice. *See* previous exceptions.

IX. CONCLUSION

Thomas' MSHA Complaint must be dismissed. The evidence of record is conclusive. No remand is necessary. In the event of a remand, CPC cannot as matter of due process, be required to submit any issues in this case to ALJ Margaret Miller.

RESPECTFULLY SUBMITTED this 8th day of January, 2019.

DAVIS GRIMM PAYNE & MARRA

By: _____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that, in addition to electronically filing via e-CMS with the Federal Mine Safety & Health Review Commission, service of the foregoing **Petition for Discretionary Review** was made upon the following, by forwarding a true and exact copy thereof to each of them in the manner set forth below, on this the 8th day of January, 2019.

Via Email and U.S. Mail
Colin F. McHugh
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Dated this 8th day of January, 2019.

Elizabeth A. Parry
Elizabeth Parry
Legal Assistant to Attorneys for Respondent
CalPortland Company