FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of TERRY MCGILL	:	
v.	:	Docket No. SE 2000-39-DM
U.S. STEEL MINING COMPANY, LLC	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), the Commission granted the Secretary of Labor's petition to review Administrative Law Judge Avram Weisberger's dismissal of a complaint charging U.S. Steel Mining Company, LLC ("U.S. Steel") with having discharged miner Terry McGill in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 22 FMSHRC 1327 (ALJ) (Nov. 2000). For the reasons that follow, we vacate and remand the judge's decision.

I.

Factual and Procedural Background

McGill worked as a miner for U.S. Steel for approximately 27 years, mostly as a roofbolter. 22 FMSHRC at 1328; Tr. 20. In 1999, he worked at its Oak Grove Mine, an underground mine in Alabama. 22 FMSHRC at 1328; Tr. 20. At the mine, McGill was a member of the United Mine Workers of America local committee ("mine committee"), which handles labor contract issues. 22 FMSHRC at 1328; Tr. 20-22. McGill injured his knee at the mine in the spring of 1999, and was off work for 13 weeks. 22 FMSHRC at 1328.

McGill returned to work around June 21, 1999, and learned that Carl Harless had become his section foreman. 22 FMSHRC at 1328; Tr. 44. Thereafter, Harless told McGill and his partner on the roofbolter, Jerry Norris, also a mine committeeman, that, because he was outnumbered by mine committeemen on the section, he "probably needed to start wearing a tape recorder." 22 FMSHRC at 1328, 1330; Tr. 44-45,139-40. Both McGill and Jerry Norris testified that they believed Harless was serious about the tape recorder. Tr. 45, 139. McGill stated that he felt that Harless "kept trying to goad me into something or get me to say something or get me to act." Tr. 45.

In July 1999, Harless' crew was working in the 6 East Main section of the mine. Resp't Ex. A, B. On July 11 or 12, McGill and Norris bolted the roof of the No. 2 entry as far as they could, but not all the way to the face, as rocks on the floor prevented the roofbolter from advancing further inby along the right side of the entry. 22 FMSHRC at 1328 n.2, 1330-31; Tr. 178-83. When McGill asked Harless why the continuous miner had not "squared up" its cut before departing the entry, which would have allowed the roof of the entry to be bolted up to the face, Harless said that it was "his f___ing section, he'd run it like he wanted to." 22 FMSHRC at 1328 n.2; Tr. 216, 218-19.

According to McGill, on July 13, 1999, he passed the No. 2 entry and saw that it had still not been bolted as far as he thought it should, the last row of bolts being approximately 7 to 8 feet from the face along the right side of the entry, while on the left side the last row of bolts was approximately 10 to 12 feet from the face. 22 FMSHRC at 1328; Tr. 53, 56-57. When McGill learned from Luther Self, the continuous miner operator on the crew, that Self planned to crosscut all the way through from the No. 3 entry to the No. 2 entry, McGill told Self that would result in cutting into an area that was not completely bolted. 22 FMSHRC at 1328. Self responded that Harless had told him to crosscut through to the No. 2 entry. *Id.*

Shortly thereafter McGill and Jerry Norris saw Harless while they were on their way to the section dinner hole for lunch; McGill asked Harless if he intended to cut through to the No. 2 entry, and was told that he did. *Id.*; Tr. 54. When McGill told Harless that "you know you will be cutting into a place that is not completely pinned," Harless responded "that it was his f___ing section and he would run it like he wanted to and for us to get our . . . butts out there and eat." 22 FMSHRC at 1328; Tr. 55-56. Jerry Norris told Harless that the cut would be illegal under federal law, and essentially confirmed McGill's account of the conversation. 22 FMSHRC at 1330; Tr. 141, 186-87.

While at the dinner hole, McGill asked MSHA Inspector Bud Norris, who was present that day conducting an inspection, whether the law would be violated if a cut was taken "and it [was] not bolted up all the way." 22 FMSHRC at 1328. According to McGill, Inspector Norris stated that it would be a violation, and then asked if such a cut had already been taken, to which McGill replied it had not. *Id.* at 1328-29. After seeing McGill speaking to Inspector Norris, Harless entered the dinner hole and asked Norris what he was inspecting that day. *Id.* at 1329.

According to both McGill and Harless, Norris replied he was inspecting a belt, upon which Harless then left McGill to continue talking to the inspector. *Id.*; Tr. 61, 376.

After lunch, McGill started to return to the No. 3 crosscut with Jerry Norris to bolt the roof, but Harless instructed the two instead to build run-through curtain drops for ventilation. Tr. 63-64, 142-43. McGill was directed to retrieve the approximately 10 to 12 curtains that had been left in the tail track area, which was eight to ten crosscuts away.[1] 22 FMSHRC at 1329; Tr. 64-65. McGill testified that while the curtains only weighed 3 pounds each, they were bulky, and the walkway from the tail track to the section sloped downhill and was covered with mud that was more than ankle-deep. 22 FMSHRC at 1329. McGill stated that the scoop normally used to bring materials such distances was right beside him, but when he reminded Harless of the condition of his knees and asked if he could use a scoop to transport them, Harless responded: "Look, I told you to walk out there and get it. Are you violating a direct work order?" *Id.*; Tr. 64-68. McGill then told Harless that it would take him some time to get the curtains. 22 FMSHRC at 1329. According to Jerry Norris, when he subsequently asked Harless where the material to build the curtain drops was coming from, Harless responded that "McGill would bring me the curtain if he wasn't too f___ing crippled." Tr. 143.

McGill took one curtain to the section, returned to the tail, and put another curtain on his shoulder, intending to take it to the section. 22 FMSHRC at 1329. At that point Harless again met up with him and, admittedly upset that McGill was only carrying one curtain at a time, told him to put the curtain down, saying that he would carry the rest of the curtains, and assigned him another task. *Id.* at 1329, 1332. McGill responded that if Harless carried the curtains, then he (McGill) would file a grievance, as Harless would be performing "classified" work in violation of the union contract. *Id.* at 1329; Tr. 71-73, 409-10.

At this point the testimony of McGill and Harless sharply diverge. According to McGill, Harless, as soon as McGill threatened to file a grievance, told him to put down the curtain and said "you little son of a bitch, I'm going to show you something about what's right and what's wrong." 22 FMSHRC at 1329; Tr. 73. In response to what he described as Harless' "cussing," McGill told him that he would leave to go and return with Hank Keaton, a section repairman and the mine committee chairman, to be a witness. 22 FMSHRC at 1329; Tr. 73-74, 77, 194-95, 205.

Harless responded that McGill did not need Keaton to be a witness because McGill "was a f___ing committeeman." 22 FMSHRC at 1329; Tr. 74, 205-06. McGill said that Harless then began to run at him with a fist drawn, telling him that "'[y]ou're not going nowhere," and ordering him to stop. 22 FMSHRC at 1329; Tr. 74, 77, 205. McGill again told Harless that he was getting Keaton and started to walk away, at which point Harless said that McGill was

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[1] The judge stated the distance the curtain had to be transported was 180 feet, but that is the average length estimated by McGill of *each* crosscut, so the distance was much greater than that. 22 FMSHRC at 1329; Tr. 65. Moreover, Harless testified that McGill was 500 feet away from entry No. 3 when he saw him carrying a curtain. Tr. 406-08.

insubordinate and "you're a fired son of a bitch," and stated that his time was stopped at that point. 22 FMSHRC at 1329; Tr. 74-75, 206. In response, McGill told him that he was calling Mike Sumpter, a management official, and when informed by Harless that Sumpter was on the section, McGill started to leave to get him. 22 FMSHRC at 1329; Tr. 75-76. Harless then again called McGill insubordinate, again told him that he was fired, and told him that he would get Sumpter. 22 FMSHRC at 1329; Tr. 76. Harless left and returned with Sumpter, who asked what was going on. 22 FMSHRC at 1329; Tr. 77. McGill said that he did nothing, and he went outside accompanied by Harless and Sumpter. 22 FMSHRC at 1329-30; Tr. 77-79.

According to Harless, when McGill responded to Harless' offer to help carry curtain material with the threat to file a grievance, he began walking away, refusing to stop walking so that Harless could give him instructions for the remainder of the shift. 22 FMSHRC at 1332; Tr. 409-10. Harless testified that four times McGill responded by saying "f___ you," or a like phrase, to Harless' order for him to stop and listen. 22 FMSHRC at 1332; Tr. 411-12. According to Harless, it was only then that he fired McGill, at which point McGill requested the presence of Keaton. 22 FMSHRC at 1332; Tr. 413-14. Because McGill was a committeeman himself, Harless responded by leaving and returning with Sumpter. 22 FMSHRC at 1332; Tr. 414.

Harless recommended that McGill be fired. 22 FMSHRC at 1332. U.S. Steel suspended McGill with the intent to discharge him for failing to comply with Harless' direction and using profane and abusive language towards Harless in violation of Mine and Shop Conduct Rule No. 4. Gov't Ex. 4 at 5-6, Gov't Ex. 8. At the conclusion of the meeting held July 14, 1999, regarding Harless' recommendation, McGill was informed that the company intended to discharge him. 22 FMSHRC at 1331; Gov't Ex. 4 at 6. U.S. Steel then discharged McGill effective July 18, 1999. Gov't Ex. 4 at 6. By decision issued August 19, 1999, however, an arbitrator ruled that the company had failed to carry its burden of showing that McGill had engaged in the conduct that Harless alleged. *Id.* at 11-13. The arbitrator ordered U.S. Steel to reinstate McGill with full backpay. *Id.* at 15.

Thereafter, the Secretary filed a discrimination complaint on McGill's behalf pursuant to Mine Act section 105(c). Subsequently, McGill retired on January 3, 2000. Tr. 19. The Secretary seeks reimbursement of McGill's case-related mileage expenses, and a civil penalty of $5,000. S. Post-Trial Br. at 24; Tr. 85-87.

Following a hearing, the judge determined that McGill engaged in protected activity when he communicated to both Harless and Inspector Norris his concern that, because the right side of the No. 2 entry had not been bolted to within 5 feet of the face, completing the crosscut between the No. 3 and No. 2 entries and continuing into the No. 2 entry would be unsafe and in violation of MSHA regulations. 22 FMSHRC at 1333. In addition, based on the coincidence in time between those communications and Harless' statement that McGill was fired, as well as the animus Harless displayed in responding to McGill's concern about the crosscut, the judge

concluded that the Secretary had established that the adverse action taken against McGill was at least in part motivated by McGill's protected activities. *Id.* at 1333-34.

Under the heading "U.S. Steel's Defense," the judge found it significant that Harless exhibited animus and took adverse action against McGill, but not against any of the three other members of the crew. *Id.* at 1335. The judge found it even more significant that Harless stopped McGill's time immediately upon McGill's threat to file a grievance if Harless were to carry curtain material, and that Harless' cursing of McGill and firing him immediately followed McGill's statement that he was going to get mine committee chairman Keaton. *Id.* The judge also took into account the testimony of Norris and McGill concerning Harless' prior statements to them expressing displeasure with having union members on his section, and the unrebutted testimony of Harless (which the judge found credible on this point) that McGill refused to stop walking away when ordered to do so by Harless. *Id.* The judge concluded that Harless would have taken the adverse action against McGill for these actions. *Id.* The judge, after noting that the activities for which McGill was actually discharged may be protected by the National Labor Relations Act, concluded that they are not protected under the Mine Act, determined that U.S. Steel had thus "prevailed in its affirmative defense," and dismissed the complaint. *Id.* at 1335-36.

II.

Disposition

The Secretary urges the Commission to vacate the judge's decision because the affirmative defense which he found was established was not the affirmative defense the operator attempted to establish at trial, is not supported by the record, and should not be allowed as a matter of public policy. S. Br. at 9-13. The Secretary argues that the record compels the conclusion that the operator did not establish the affirmative defense on which it relied at trial (that McGill was discharged for cursing and insubordination). *Id.* at 14-21. The Secretary submits that, if the Commission does not find a violation of section 105(c), it should remand the case to the judge with instructions to correct errors the Secretary believes he made, including failing to admit certain evidence, and to properly reevaluate the record. *Id.* at 21-34.

U.S. Steel contends that the judge was mistaken in finding that the Secretary established the elements of a prima facie case of discrimination under the Mine Act. USS Br. at 7-8, 11-12, 14-15. U.S. Steel also argues that the judge did not raise an affirmative defense sua sponte, but rather relied on evidence showing that McGill was insubordinate and disrespectful to Harless, thus essentially finding that U.S. Steel had established its affirmative defense. *Id.* at 8-9, 12-15, 17-18. U.S. Steel also urges the Commission to uphold the judge's credibility and evidentiary rulings. *Id.* at 20-27.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the

individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

A. Prima Facie Case

We are not persuaded by U.S. Steel's challenges to the judge's finding that McGill engaged in protected activity. It is undisputed that McGill complained about roof conditions he considered to be unsafe. Whether the conditions were objectively unsafe is not determinative of the protected status of the complaints. Section 105(c) defines protected activities as including any "complaint notifying the operator or the operator's agent . . . of an *alleged* danger or safety violation" at the mine. 30 U.S.C. § 815(c)(1) (emphasis added). *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) ("section 105(c)(1) broadly protects" miners' complaints to management about alleged dangers), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

We also reject U.S. Steel's contention that the coincidence in time between the adverse action taken against McGill by Harless and McGill's safety complaint is insufficient to support an inference of discriminatory motive. The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence."[2] *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id*. With regard to the coincidence in time between protected activity and adverse action, in *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984), the court observed that adverse

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

action taken against a miner two weeks after his protected activity qualifies as "evidence of an illicit motive." Consequently, the judge was well within his authority when he inferred discriminatory motive from adverse action taken by Harless less than 2 hours after McGill's safety complaints to him and the inspector.

Also unconvincing is U.S. Steel's challenge to the judge's finding that Harless exhibited animus towards McGill and his concerns about the insufficiency of the roof bolting. While Harless testified that he gave a calm, measured response to McGill's concern about unsupported roof (Tr. 343-44), both McGill and Jerry Norris reported that Harless reacted in a profane and dismissive fashion to McGill's advice not to make the crosscut. Tr. 55-56, 141. The judge credited McGill and Norris. 22 FMSHRC at 1334. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We see no reason here to overturn the judge's credibility determination in favor of McGill. Accordingly, we conclude that substantial evidence supports the judge's determination that the Secretary established a prima facie case of discrimination.

B. Affirmative Defense

1. Affirmative Defense Found by Judge

Under *Pasula-Robinette*, if an operator cannot rebut the prima facie case, it may affirmatively defend by alleging that unprotected activity also motivated the adverse action, and that it would have taken the adverse action against the miner for that activity alone. *See Robinette*, 3 FMSHRC at 817-18. The operator bears the burden of proving the affirmative defense. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 838 (May 1997); *Meek v. Essroc* Corp., 15 FMSHRC 606, 613 (Apr. 1993).

Here, U.S. Steel sought to affirmatively defend its discharge of McGill. However, it is necessary to first determine what the affirmative defense was in this case, as the judge found one affirmative defense — that McGill was discharged for threatening to file a grievance and other labor contract related issues — while the operator attempted to establish at trial, and continues to argue (USS Br. at 13-19), another affirmative defense — that McGill was discharged for insubordination and profanity.

These alternative rationales first surfaced during the hearing in this case.[3] At the close of the Secretary's case, counsel for U.S. Steel moved to dismiss on several grounds, including that

[3] The pre-trial pleadings are of no assistance in discerning the substance of U.S. Steel's affirmative defense prior to trial. The only mention of an affirmative defense is in U.S. Steel's answer to the Secretary's initial complaint, where it avers that McGill "was engaged in unprotected activity on July 13, 1999 that justified the imposition of the discipline of termination." Resp't Answer to Compl. at 3.

McGill's testimony established that his discharge was due to his threat to file a grievance against Harless. Tr. 173-74. The judge denied the motion. Tr. 174-77. The grievance threat was not subsequently cited by U.S. Steel's witnesses as a reason for McGill's discharge, and no other evidence was presented by the operator that U.S. Steel fired McGill for these reasons. Instead, the evidence introduced by U.S. Steel in support of its affirmative defense was limited to the reasons given at the time McGill was discharged — his alleged insubordination and use of profanity towards Harless during their July 13 confrontation — as well as his past work record.[4]

Nevertheless, in his decision, the judge cited the grievance threat, along with McGill's failure to stop walking away and his union status, as activity that would have resulted in McGill's discharge regardless of his protected activities, and concluded that an affirmative defense was therefore established. 22 FMSHRC at 1335. In his decision, the judge made no mention that the affirmative defense differed from the one on which U.S. Steel primarily relied.[5]

We are thus faced with a situation in which the operator sought to establish at trial one reason for the discharge as an affirmative defense, but the judge found another reason for the discharge, which was only mentioned in passing, as the basis for an affirmative defense. For the following reasons, we believe the judge erred.

In examining whether the operator has successfully established its affirmative defense, the Commission has based its review on the reasons given by the operator for taking the adverse action in evaluating whether the adverse action would still have occurred absent the protected activity. *See, e.g., Pasula*, 2 FMSHRC at 2801; *Robinette*, 3 FMSHRC at 819-20. For example, in *Pasula*, the Commission upheld the judge's determination that the operator had failed to show that the reasons it gave for the miner's discharge — his alleged insubordination, interference with mine management, role in causing an unnecessary interruption in production, and past disciplinary record — would have resulted in his discharge regardless of the miner's protected activities. 2 FMSHRC at 2788, 2801. Similarly, in *Robinette*, the Commission remanded to the judge the factual determination of whether the adverse action would have taken place regardless of the protected activity, and in so doing instructed the judge to analyze the evidence presented regarding the specific reasons given by the operator for the miner's discharge. 3 FMSHRC at 819-20; *see also E. Assoc.*, 813 F.2d at 643 (affirming judge's rejection of operator's affirmative defense that it fired miner for act of sabotage on ground that operator failed to show good-faith basis in blaming miner for act); *Chacon*, 709 F.2d at 92-94; *Haro v. Magma Copper Co.*, 4

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[4] In an isolated reference in its initial post-trial brief, U.S. Steel argued that, according to McGill's account, the triggering event of his discharge by Harless was McGill's threat to file a grievance against Harless. USS Proposed Findings of Fact and Post-Hr'g Legal Argument at 25. However, that brief closes by stating that U.S. Steel's reason for the discharge was McGill's gross insubordination toward Harless. *Id.* at 27.

[5] Contrary to U.S. Steel's arguments, the judge entirely ignored the allegations that it was McGill's insubordination and profanity that resulted in his discharge.

FMSHRC 1935, 1939-45 (Nov. 1982); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1481-82 (Aug. 1982); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993-94 (June 1982).

We are aware of no case in which an affirmative defense to discriminatory conduct was found to have been established based not on the evidence supporting the reasons the employer asserted for taking the adverse action against the employee, but rather on the basis of evidence the judge considered sufficient to establish that the employer took the action for a different reason. Simply put, under *Pasula-Robinette*, once a prima facie case has been established, the affirmative defense determination is not an open-ended search for the "one true reason" for the adverse action taken against the employee alleging discrimination. *See Robinette*, 3 FMSHRC at 819 (rejecting as irrelevant to determination of affirmative defense under *Pasula* judge's conclusion on the "primary" and "effective" cause of adverse action). Rather, the judge's inquiry is limited to an examination of the reasons given by the operator for the adverse action. The Commission, in setting out the operator's burden in *Pasula*, used the phrase "the unprotected activity" to refer not to just any unprotected activity, but rather to the unprotected activity the operator alleges would have resulted in the adverse action regardless of any protected activity. *See Moses*, 4 FMSHRC at 1481 (Commission's role in determining whether affirmative defense has been established is to "examine whether [the operator] nevertheless would have discharged [the miner] for certain unprotected activities alone that it asserts were the cause of his departure"); *Bradley*, 4 FMSHRC at 993 (Commission's function in deciding whether affirmative defense has been established is limited to determining whether business justifications asserted for adverse action "are credible and, if so, whether they would have motivated the particular operator as claimed").

The judge's approach of relying on an affirmative defense which the operator has not consistently raised nor attempted to prove also presents due process problems. The Secretary and the miner must have adequate notice of the affirmative defense in order to effectively rebut it at trial, just as any party must have adequate notice of the issues being litigated. *See Consolidation Coal Co.*, 20 FMSHRC 227, 236-37 (Mar. 1998) (party must understand during trial that issue is being litigated). By ignoring the justification proffered at trial for McGill's discharge — insubordination and profanity — and finding the operator to have instead been motivated by other conduct which was also not protected by the Mine Act, the judge misapplied the concept of an affirmative defense. We therefore vacate his determination that U.S. Steel established an affirmative defense, and remand the case to him to determine under Commission law whether U.S. Steel established that it would have fired McGill in any event for his conduct during his confrontation with Harless.

2. Remand

Remand is necessary because U.S. Steel's affirmative defense is entirely dependent upon Harless' testimony that McGill was insubordinate and profane during their confrontation, and

that McGill only requested the presence of mine committee chairman Keaton after being fired.[6] McGill's version of events is that he was neither insubordinate nor profane, and that Harless aggressively and profanely responded to McGill's threat to file a grievance, firing him when he attempted to leave to get Keaton as a witness to Harless' conduct. We cannot discern from the judge's decision whose version of events he credited.[7] After examining all of the evidence,[8] the judge needs to resolve these widely disparate accounts of what occurred between Harless and McGill without contradicting any of the factual findings and credibility resolutions included in his original decision.

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[6] The judge apparently rejected the notion that the adverse action resulted from anything other than the Harless-McGill confrontation. *See* 22 FMSHRC at 1333-34. Mine Superintendent Rick Nogosky testified that he made the decision to fire McGill based not only on the accounts of the July 13 events provided by McGill and Harless, but also based on having heard McGill say "f___ you" on two prior occasions to different supervisors, and on a review of McGill's personnel file. *Id.* at 1331 & n.5. However, the judge noted that Nogosky's deposition testimony was that he relied solely upon the events of July 13 in upholding Harless' discharge of McGill, and the judge limited his analysis of whether an affirmative defense was established to the Harless-McGill confrontation. *Id.* at 1331 & n.5, 1335. Moreover, the documents notifying McGill of the grounds for his discharge only mentioned the confrontation between Harless and McGill, so the arbitration that resulted in McGill's reinstatement was similarly limited. Gov't Ex. 4. U.S. Steel does not take issue with the judge's approach, and seems to drop the issue on review, stating that it "never has sought to justify Mr. McGill's discharge on the basis of an unsatisfactory work record." USS Br. at 18.

[7] The judge's determination to credit Harless' "unrebutted" testimony that McGill refused to stop walking away when he ordered him to stop (22 FMSHRC at 1335) does nothing to resolve the two very different accounts on *why* it was that McGill walked away from Harless. Unlike the Secretary, we do not read the judge's decision to in any way credit Harless as to what else occurred during his confrontation with McGill, so we do not address the Secretary's arguments that we should overturn the judge's credibility "finding" in favor of Harless and order reopening of the record for the admission of evidence the judge excluded. *See* S. Br. at 23-34. The judge made no credibility finding in favor of Harless or against McGill on the facts necessary to support U.S. Steel's affirmative defense that McGill was fired for insubordination and use of profanity.

[8] For example, the judge failed to discuss the arbitration award entirely in McGill's favor. Gov't Ex. 4. Having properly admitted the arbitration decision, the judge must consider it and determine the weight, if any, to which it is entitled. *See Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 18 FMSHRC 2096, 2101 (Dec. 1996) (in determining whether to give weight to an arbitrator's findings, judge must consider congruence of contractual and statutory provisions, degree of procedural fairness, adequacy of record, and special competence of arbitrator).

Because U.S. Steel bears the burden of proving any affirmative defense, if the judge does not credit Harless' version of events, he cannot find that U.S. Steel has established its defense that McGill was profane and insubordinate, as there is no other record support for that assertion. If the judge does credit Harless, he must then decide whether U.S. Steel has shown that, absent McGill's protected activities, it would have discharged him for what Harless alleges he did and said during their confrontation. *See Pasula*, 2 FMSHRC at 2801. The judge must evaluate the reasons given for McGill's discharge — use of profanity and insubordination — pursuant to the principles set forth in *Bradley*, where the Commission stated:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC at 993. The reasons supporting an operator's business justification defense must not be "examined superficially or be approved automatically once offered." *Haro*, 4 FMSHRC at 1938. Moreover, we have recognized that "pretext may be found . . . where the [operator's] asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534.[9]

[9] In *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984), the Commission tailored the *Bradley* principles specifically to situations involving the use of profanity by looking to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed or used threats. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 532-33 (Apr. 1991) (applying the factors announced in *Cooley*). The previously discussed facts of this case constitute only some of the evidence the parties supplied on these issues. In addition, if the judge finds that McGill acted insubordinately in refusing to stop and listen to Harless, the judge can look to a number of our cases which applied the *Bradley* principles to an affirmative defense based on a miner's insubordination. *See, e.g.*, *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 960-61 (Sept. 1999); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 17-18 (Jan. 1984).

It is U.S. Steel's burden to show that its asserted justification would have moved it to take the adverse action against McGill. *Price*, 12 FMSHRC at 1534. Therefore, on remand the judge must closely scrutinize the merits of the operator's evidence because:

> [i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, [it should] not [be] consider[ed]. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event."

Pasula, 2 FMSHRC at 2800 (emphasis in original).

We also agree with the Secretary that, even if the judge determines that U.S. Steel has established the elements of its affirmative defense, as a matter of law he must address the question of whether that defense might nevertheless fail because the conduct for which McGill was discharged was provoked by the operator. *See* S. Br. at 17-19; S. Reply Br. at 1-2, 8-9; *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 305-06 (Mar. 2000) (*Bernardyn I*); *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC ____, Slip op. at 12-16, Nos. PENN 99-129-D, etc. (Sep. 19, 2001) (*Bernardyn II*). We have recognized the inequity of permitting an employer to discipline an employee for actions which the employer provoked. *Bernardyn I*, 22 FMSHRC at 306-07. As we made clear in *Bernardyn I*, in a case such as this, a judge is obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity, and if so, "whether the particular facts and circumstances of this case, when viewed in their totality, place [the miner's provoked actions] within the scope of the 'leeway' the courts grant employees whose 'behavior takes place in response to [an] employer's wrongful provocation.'" *Id.* at 307-08 (quoting *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977)) (second alteration in original).

In sum, on remand the judge should examine all of the facts and circumstances leading up to McGill's alleged conduct in his confrontation with Harless, making further findings of fact, including credibility resolutions, necessary to decide disputed issues.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand for further proceedings consistent with our decision.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Anthony F. Jeselnik, Esq.
U.S. Steel Mining Co., LLC
600 Grant Street
Pittsburgh, PA 15219-2749

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041