

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 2000

GILBERT V. ANKROM :
 :
 v. : Docket No. LAKE 98-126-DM
 :
 WOLCOTTVILLE SAND :
 AND GRAVEL CORPORATION :

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

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”), Administrative Law Judge Avram Weisberger concluded that Gilbert V. Ankrom established a prima facie case that Wolcottville Sand & Gravel Corporation (“WS&G”) had taken adverse employment action against him in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 20 FMSHRC 1185 (Oct. 1998) (ALJ). The judge determined, however, that WS&G established its affirmative defense that it would have taken such action in any event based upon Ankrom’s unprotected activity alone, and dismissed Ankrom’s complaint. *Id.* at 1191. The Commission granted Ankrom’s petition for discretionary review of the judge’s decision. For the reasons that follow, we affirm the judge’s determination.

I.

Factual and Procedural Background

WS&G operates a gravel pit in Newcomerstown, Ohio. Tr. 32. On August 18, 1997, Ankrom began working as a front-end loader operator on the night shift at the gravel pit. 20 FMSHRC at 1185-86. Ankrom was also certified as a foreman. Tr. 73. Ankrom stated that he made safety complaints on nearly a daily basis. Tr. 69, 210. After his first day on the job, Ankrom complained to his supervisor, Mark McKitrick, that the front-end loader did not have a seat belt. 20 FMSHRC at 1186; Tr. 302.

Approximately 3 weeks later, Dennis Jackson began working as the night shift foreman in place of McKitrick. 20 FMSHRC at 1187; Tr. 126-27. Other members of the night shift besides Jackson and Ankrom included Dan Gay, a front-end loader operator, and David Gay, a laborer. 20 FMSHRC at 1186; Tr. 275. Ankrom complained to Jackson that the berms were inadequate on the road on which he operated the front-end loader. 20 FMSHRC at 1186, 1187. Jackson testified that when he discussed Ankrom's safety concerns with Kevin Schemp, the superintendent at the mine, Schemp changed the subject and did not address them. *Id.* at 1187.

In early September, Ankrom complained to Jackson about employees repairing belts without adequate safety equipment, the lack of adequate berms, and that draglines were operated without lights, encouraging him to contact state and/or federal authorities so that the conditions would be corrected. *Id.* at 1186; Tr. 132-34. Jackson contacted an inspector with the Ohio Department of Natural Resources ("ODNR"), Fred Kidd. 20 FMSHRC at 1186; Tr. 49-50. On September 11, 1997, Kidd inspected the pit and issued correction orders to WS&G. 20 FMSHRC at 1186.

On October 8, 1997, Ankrom informed Glenn Freese, the day shift foreman, that the berms were inadequate and that the previous day, he had almost rolled over his front-end loader. *Id.* Ankrom also later so informed Jackson. *Id.* After receiving telephone numbers for the Department of Labor's Mine Safety and Health Administration ("MSHA") from Ankrom, Jackson contacted MSHA and the mine was inspected on October 14 and 15, 1997. Tr. 56-57, 61, 147-48. MSHA issued citations for various violations including inadequate berms. Tr. 66-67; C. Exs. 2A, 2B, 2C. Schemp later spoke to the employees at the mine and stated that MSHA had inspected the mine, and he was curious regarding the reason for that inspection. 20 FMSHRC at 1187; Tr. 61-62. Jackson made no response to Schemp's inquiry. Tr. 62.

In the middle of October, Schemp moved Ankrom and Jackson to the day shift. 20 FMSHRC at 1186 n.1. Schemp stated that he moved Ankrom and Jackson to the day shift because the night shift was "ineffective" in terms of production, and because the mine needed to have plant stock moved to the feed bin and he wanted to have WS&G employees, rather than independent contractors, move the overburden. *Id.* at 1188; Tr. 277. On the day shift, Ankrom and Jackson operated moxy trucks to haul material and remove overburden.¹ 20 FMSHRC at 1188. David Gay and Dan Gay remained on the night shift and moved material from stockpiles. *Id.*; Tr. 276.

On Friday, October 31, 1997, WS&G employees were asked to indicate on a form any of their safety concerns, and to return their forms by Monday, November 3. 20 FMSHRC at 1186; Tr. 160-61. Ankrom returned a completed form, noting his concerns regarding the lack of inspections by foremen at the beginning of shifts, and inadequate berms. 20 FMSHRC at 1186. The only other employee to return a completed form was David Blank, a day shift laborer, who voiced concerns about greasing the head sections of the conveyors. Tr. 285, 287. The mine was

¹ A moxy truck is a 30-ton rock truck. Tr. 28.

inspected again by State Inspector Kidd in early November. 20 FMSHRC at 1186; Tr. 153.

On November 7, 1997, Schemp informed Ankrom that he would be returning to the night shift. 20 FMSHRC at 1186; Tr. 165-66, 282-83. On November 8, Ankrom called State Inspector Kidd regarding the lack of adequate berms. 20 FMSHRC at 1187. The November 8 entry in the foremen's log notes that the ODNR had been contacted. Tr. 176-77; R. Ex. 1.

During the morning of November 9, Schemp called Ankrom at home and asked him why he had not gone to work. 20 FMSHRC at 1187. Ankrom replied that he was scheduled for the night shift. *Id.* Schemp told Ankrom to forget about that day and just come to work on November 10. Tr. 174. Ankrom brought up his safety concerns, including those he had described in the form, and a heated discussion ensued. 20 FMSHRC at 1187; Tr. 172-74.

On November 10, 1997, Schemp left a message on Ankrom's telephone answering machine, in which he stated: "After looking at everything around here, I think I'm going to park the moxy trucks and take them off rental and go to a straight day turn until the weather breaks and we can do something with the roads. So you are laid off until further notice, which I'll call you at the point that there's something to do here." Tr. 186-87. On that same day, Schemp also laid off Jackson, stating that for safety reasons, he did not want the crew to operate the moxy trucks in the mud. 20 FMSHRC at 1187. Approximately one day later, Schemp also laid off Dan Gay and David Gay. *Id.* at 1188; Tr. 223. Schemp stated that he made the decision to lay off the night shift "due to not being able to have any productive work being generated at that point in time from those particular four people." Tr. 316. The season ended on approximately December 10, 1997. 20 FMSHRC at 1188; Tr. 282.

On approximately March 12, 1998, Ankrom visited the mine and asked Schemp the status of his job. 20 FMSHRC at 1187. According to Ankrom, Schemp stated that the job was expected to last only another 4 months. *Id.* According to Schemp, Ankrom mentioned that he found other work, and Schemp had replied that he thought Ankrom should take it. Tr. 232, 234.

The night shift resumed on March 20, 1998, and consisted of Dan Gay, David Gay, Dennis Williamson, Robert Ferguson, and Brett McCune. 20 FMSHRC at 1188; Tr. 225. Williamson had worked during the day shift during the previous season. Tr. 225. McCune had been newly hired as a laborer, and Ferguson had been hired as a front-end loader operator in early March. Tr. 225-26. Ankrom and Jackson were not recalled. 20 FMSHRC at 1188.

Schemp stated that his decision not to recall Ankrom was based on Ankrom's poor work performance, lack of ability, and unwillingness to perform.² Tr. 229, 292-93. Schemp testified that he reviewed operations during the winter, and found it "wanting in places, and Gilbert Ankrom was one of the places." Tr. 227. Schemp testified that he reviewed personnel, and

² Schemp stated that he did not recall Jackson because he found his performance worse than Ankrom's. 20 FMSHRC at 1188; Tr. 238.

production figures on daily reports, the foremen's log, and cost accounting documents. Tr. 228, 253-54. In addition, he stated that Ankrom was unable to operate his equipment to maintain a flat pit floor, or a clean floor, and to efficiently load the end-loader bucket, and that he had to counsel him in an effort to correct his performance on approximately a weekly basis. Tr. 229-30, 291. Schemp stated that in January and February 1998, he was tending toward deciding not to recall Ankrom, and that the final decision was made with the assistance of his supervisor, Gary Saathoff, who found a more qualified person, Ferguson, to operate the loader. Tr. 230-31, 236-37, 294.

On November 24, 1997, Ankrom filed a complaint with MSHA alleging discrimination under section 105(c) of the Mine Act.³ C. Ex. 7A. MSHA investigated the complaint and informed Ankrom by letter dated March 25, 1998, that the investigation had not revealed a violation of section 105(c). By letter dated April 28, 1998, Ankrom filed a discrimination action with the Commission pursuant to section 105(c)(3) of the Mine Act. C. Ex. 7B. The matter proceeded to hearing before Judge Weisberger.

The judge concluded that Ankrom had proved his prima facie case of discrimination. 20 FMSHRC at 1189-90. First, the judge found that un rebutted testimony by Ankrom and Jackson revealed that Ankrom had engaged in protected activity by making safety complaints to Jackson, Schemp and Freese; by discussing with Jackson the need to contact government inspectors; and by making safety complaints on November 3 and 9, 1997, as stipulated by the parties. *Id.* at 1189. The judge also noted that the parties stipulated that WS&G took adverse action against Ankrom when it laid him off and failed to recall him. *Id.* Third, the judge concluded that the adverse actions taken by WS&G were motivated in some part by Ankrom's protected activities based on his findings that Schemp knew of Ankrom's safety complaints; there was a coincidence in timing between the protected activity on November 9 and the layoff the following day; and Schemp was hostile towards the safety complaints. *Id.* at 1190. In making his finding that Schemp was hostile toward the safety complaints, the judge discredited Schemp's denial that he told Inspector Kidd that part of the reason for downsizing was due to safety complaints. *Id.*

The judge determined, however, that WS&G had established its affirmative defense that its adverse action was also motivated by unprotected activity and it would have taken the adverse action in any event for the adverse action alone. *Id.* at 1191. As for the layoff, he concluded that Ankrom would have been laid off in any event for economic and weather reasons, relying on evidence that the entire shift had been laid off, including two members who had not made any safety complaints. *Id.* As for the decision not to recall Ankrom, the judge relied upon un rebutted evidence that Ankrom's work performance was unsatisfactory. *Id.* Accordingly, the judge dismissed Ankrom's discrimination complaint. *Id.*

Although he was represented by counsel during the hearing and filing of post-hearing

³ Jackson also filed a complaint alleging discrimination under section 105(c) of the Mine Act. Tr. 103.

pleadings, Ankrom filed a petition for discretionary review without benefit of counsel. In the petition, Ankrom cites to pages of the transcript and objects to various points raised by WS&G in its reply to Ankrom's proposed findings of fact filed before the judge. WS&G filed a statement in opposition to Ankrom's petition, stating that the petition does not refer to any conclusion made by the judge or identify an issue. Opp'n at 1-2. WS&G attached to its opposition the proposed findings of fact that it had submitted to the judge ("WS&G FOF"). The Commission granted Ankrom's petition for discretionary review. Ankrom subsequently designated his petition as his brief. *See* 29 C.F.R. § 2700.75(a).

II.

Disposition

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 Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20.

If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test). An operator bears the burden of proving an affirmative defense to a discrimination complaint. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982). This line of defense applies in "mixed motive" cases, e.g., cases in which the adverse action is motivated by both protected and unprotected activity. *Id.* The ultimate burden of persuasion does not shift from the complainant. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984). An operator may attempt to prove that it would have disciplined a miner for unprotected activity alone 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." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.*

A complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have taken place in any event for such unprotected activities alone. *Robinette*, 3 FMSHRC at 818 n. 20. Because the ultimate burden of persuasion never shifts from the complainant, if a complainant who has established a prima facie case cannot refute an operator's meritorious affirmative defense, the operator prevails. *Id.*

Here, it is undisputed on review that the layoff and WS&G's failure to recall Ankrom were in some part motivated by Ankrom's protected activity in expressing safety concerns to WS&G supervisors and in discussing with Jackson the need to consult with government inspectors. The issue is whether substantial evidence supports the judge's determination that WS&G was also motivated by reasons unrelated to the protected activity and would have laid off Ankrom and failed to recall him for those reasons alone.

A. The Layoff

Ankrom argues that substantial evidence does not support the judge's finding that WS&G would have laid him off based on his unprotected activity alone.⁴ Ankrom contends that Schemp's testimony that he made the decision to lay off the night shift for economic reasons is inconsistent with the weather-related reason that Schemp gave Ankrom for his layoff. PDR at 4 ¶ 12; Tr. 316. Ankrom also asserts that the foremen's log does not reflect a lack of productivity by the night shift. PDR at 3 ¶ 7.

We agree that the judge erred in relying upon weather-related reasons in finding that WS&G established its affirmative defense. WS&G abandoned the weather-related reasons that Schemp gave for the layoff during the hearing and in post-hearing pleadings. As noted by Ankrom, at the hearing Schemp testified that he made the decision to lay off the second shift because he could not get "any productive work" from them. Tr. 316. Likewise, in its post-hearing brief, WS&G maintained that the entire night shift was laid off due to their lack of productive work and effectiveness, including two night shift members who had not made safety complaints. WS&G FOF at 3, 7.

⁴ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Nonetheless, the judge's conclusion that WS&G would have laid off Ankrom anyway for economic reasons is supported by substantial evidence. It is undisputed that Schemp laid off all four members of the night shift, including Dan and David Gay, who had not made safety complaints. Tr. 222-23, 283, 285, 307. In addition, Blank, the day shift laborer who had returned a completed safety complaint form to WS&G, was not laid off. Tr. 285, 287. Schemp testified that he laid off Ankrom as well as the entire night shift "due to not being able to have any productive work being generated at that point in time from those particular four people." Tr. 316. It appears that Schemp had ongoing concerns with the night shift's productivity, in that Schemp testified that he transferred Ankrom and Jackson in mid-October to the day shift in part because the night shift was "ineffective" in terms of production. Tr. 277. Moreover, contrary to Ankrom's assertion, it appears that the foremen's log generally reflects lower productivity for the night shift than the day shift. R. Ex. 1.

The judge credited testimony that Schemp would have laid off Ankrom in any event because he was dissatisfied with the productivity of the entire night shift. 20 FMSHRC at 1191. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) ("*Dust Cases*"), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *Dust Cases* at 1881 n.80. We do not find sufficient evidence in the record to take the "extraordinary step" of overturning the judge's credibility determination. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997). Accordingly, we affirm as supported by substantial evidence the judge's determination that WS&G would have laid off Ankrom for his unprotected activity alone.

B. The Failure to Recall

Ankrom argues that substantial evidence does not support the judge's finding that WS&G established its affirmative defense as to its decision not to return Ankrom to work. He contends that Schemp's testimony that his review of production was part of the basis for his decision not to recall Ankrom is inconsistent with Schemp's testimony that he laid off the entire night shift because of their lack of productivity. PDR at 3 ¶ 7. Ankrom also relies on Schemp's testimony that there are no specific records in the foremen's log that reflect individually on Ankrom. *Id.* In addition, Ankrom argues that there is testimony suggesting that there may not have been any witnesses to Schemp's counseling of Ankrom, and that there are inconsistencies in Schemp's testimony regarding the number of times that Schemp counseled Ankrom. PDR at 3 ¶¶ 8, 9.

WS&G responds that substantial evidence supports the judge's determination that it established its affirmative defense. WS&G Br. at 2. It argues that Ankrom would not have been recalled to work in any event because of his poor work performance. WS&G FOF at 4, 9. Thus,

although WS&G does not specifically rely on *Bradley* factors to justify its decision not to recall Ankrom, it appears that it effectively relies upon the factor of “the miner’s unsatisfactory past work record.” *Bradley*, 4 FMSHRC at 993.

Schemp testified that he found after the lay-off, from approximately November 12 to December 5, the day shift was very efficient without a night shift, which led him to believe that he had problems with the night shift and its personnel. Tr. 228. As noted by Ankrom, Schemp testified that there were no specific figures in the foremen’s log or elsewhere that he relied upon in his decision not to recall Ankrom, and that the production figures reflected on the entire night shift. Tr. 241, 255. Although he could not point to any specific figures, however, Schemp explained that Ankrom’s performance would have impacted the shift he worked with just like any employee’s performance would have. Tr. 239. Schemp testified that he attributed the negative production of the night shift to Ankrom and Jackson because when he moved Ankrom and Jackson to day shift, and left Daniel and David Gay on night shift, he got “results.” Tr. 242. Although Schemp later transferred Ankrom from day shift to night shift, it appears that Schemp was not fully aware of Ankrom’s impact on productivity until he reviewed operations after the close of the season. Tr. 230. Schemp explained that he was not completely sure he made the right decision not to recall Ankrom until he reviewed production figures at the end of March and saw improvement in production. *Id.*

In addition, there is un rebutted testimony in the record regarding Ankrom’s unsatisfactory work performance. Schemp testified that Ankrom could not maintain a flat pit floor, which caused severe rutting and water run-off problems, or keep a clean floor through which vehicles could drive. Tr. 229. In addition, he was dissatisfied with the amount of time that it took Ankrom to fill the front-end loader’s bucket. Tr. 292. Schemp also testified that Ankrom was “mediocre on maintenance.” Tr. 230. Schemp’s testimony was corroborated by Dan Gay, who testified that Ankrom always left the pit floor in an uneven state. Tr. 322. Gay testified that Ankrom did not reach the same levels of production as Gay on the second shift, and that he observed Ankrom fail to inspect and maintain his front-end loader. Tr. 322-23. Schemp also testified, without rebuttal, that the miner hired to operate the loader in Ankrom’s place was more qualified and experienced, particularly with the screening applications that were being done at the mine.⁵ Tr. 237.

Moreover, there is un rebutted testimony that Schemp counseled Ankrom more than any other employee in an effort to improve his performance. Tr. 291-92. Schemp testified that he counseled Ankrom on the performance of his work about every week regarding maintaining a flat and level pit floor, keeping a clean floor when working around the stockpiles, and about the amount of time that he took filling a bucket and the method that he used. Tr. 291. Schemp

⁵ Ankrom did, however, rebut Daniel Gay’s testimony that Gay observed Ankrom “hang up” his front-end loader on berms two or three times per week. Tr. 323. Ankrom testified that he had two instances in which he hung up his loader, which occurred in foggy conditions with inadequate berms. Tr. 208.

testified that Ankrom's performance did not improve after such counseling. Tr. 238. Similarly, Dan Gay testified that he informed Schemp that Ankrom was having trouble on the loader, and indicated that it might be due to his vision or lack of ability. Tr. 326-27. Gay stated that Schemp had replied that he would speak to Ankrom, and that the next day, Gay observed Schemp talking to Ankrom in Schemp's office. Tr. 329-30. Ankrom did not dispute that he was counseled about his performance. Rather, on review Ankrom disputed the frequency with which he was counseled, and whether there were witnesses to his counseling.⁶ PDR at 3 ¶¶ 8, 9.

We note that an affirmative defense requires more than a plausible showing of business necessity. The Commission has previously held that an operator bears the burden of proving an affirmative defense to a discrimination complaint. *Haro*, 4 FMSHRC at 1937. The question raised here is whether oral testimony alone supporting the operator's affirmative defense (alleged unsatisfactory work performance by Ankrom) is sufficient to carry the operator's evidentiary burden. The Commission has previously found that testimony regarding an employee's unsatisfactory work performance, if rebutted by contrary evidence, is insufficient to establish an operator's affirmative defense. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1481 (Aug. 1982) (noting that an operator who had presented such self serving testimony "failed to present any evidence as to what its usual practices and policies were with respect to bad operators of equipment.").

This case, however, is distinguishable from the Commission's decision in *Moses* because the record here clearly establishes that no rebuttal testimony regarding the complainant's work performance was presented. *Compare* Tr. 117-220 with Tr. 229, 238, 292-93. *See also* Ankrom's Reply to WS&G's FOF at 2 ¶ 9 (lacking citations to record). Consequently, the judge correctly credited the testimony offered by the operator supporting its affirmative defense that it would not have recalled Ankrom to work based on his unsatisfactory work performance alone.⁷

⁶ Specifically, Ankrom states that in his deposition, Schemp testified that he counseled Ankrom five times, while at the hearing, Schemp testified that he counseled Ankrom weekly (Tr. 291). PDR at 3 ¶ 9. Ankrom also notes that Daniel Gay testified only that he observed Ankrom in Schemp's office, and that Gay had no personal knowledge regarding whether Ankrom was counseled. *Id.* at 3 ¶ 8. In addition, he notes that at the hearing, Schemp testified that McKitrick observed the counseling (Tr. 302), but that Schemp stated in his deposition that there were no witnesses to the counseling. PDR at 3 ¶ 8. Schemp's deposition does not appear to be included in the official record. In any event, even accepting Ankrom's arguments, Ankrom does not dispute that he was counseled on his performance.

⁷ We note that the judge's discrediting of Schemp's denial that he told Inspector Kidd that part of the reason for downsizing was due to safety complaints did not require the judge to discredit Schemp's testimony on other matters. As the Commission has previously recognized in rejecting the "false in one, false in everything" rule of testimonial evidence, "it is not uncommon, and certainly not reversible error, for the trier of fact to find a witness to be credible on some, but not other, matters." *Faith Coal Co.*, 19 FMSHRC 1357, 1372 (Aug. 1997).

20 FMSHRC at 1191. Because of the failure to introduce any contrary evidence to rebut WS&G's affirmative defense, we cannot take the extraordinary step of overturning the judge's credibility determinations in this regard. *See Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (stating that the Commission's role is limited to searching for "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion") (quoting *Consolidated Edison*, 305 U.S. at 229). Thus, we affirm as supported by substantial evidence the judge's determination that the operator proved its affirmative defense.⁸

⁸ We reject our dissenting colleagues' conclusion that the judge failed to explain his crediting of Schemp's testimony that Ankrom would not have been recalled in any event based upon his poor work performance. Slip op. at 1. The judge explained that Schemp's testimony regarding Ankrom's poor work performance was corroborated by Daniel Gay, who worked with Ankrom, and that Ankrom did not rebut the evidence. 20 FMSHRC at 1191. We note that Jackson, Ankrom's supervisor, also did not rebut evidence that Ankrom's work performance was poor and that he was counseled more than any other employee in an effort to improve his performance. Overturning the judge's credibility determination absent such rebuttal testimony would amount to substituting a competing view of the facts, which we decline to do. *See Phelps Dodge*, 709 F.2d at 92 (stating that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached"); *see also Consolidation Coal Co.*, 20 FMSHRC 227, 238 (Mar. 1998) (separate opinion of Commissioners Riley, Verheggen) ("[T]he Commission's review [is] limited to whether the ALJ's findings of fact were supported by substantial evidence. The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'") (citation omitted), *aff'd*, No. 98-1613, 1999 WL 394191 (4th Cir. May 27, 1999).

III.

Conclusion

For the reasons discussed above, we affirm the judge's determination that WS&G established its affirmative defense.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Because we conclude that the record in this case establishes that WS&G failed to meet its burden of establishing an affirmative defense and that it discriminated against Ankrom in violation of the Mine Act, we write separately from our colleagues and dissent.

Once a prima facie case of discrimination has been found, as the judge did in the instant case, the operator must prove by a preponderance of the evidence that it would have taken the adverse action in any event because of unprotected activity alone. *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1556 (Sept. 1992). The record in this case does not support the judge's conclusion that WS&G would have failed to recall Ankrom for reasons unrelated to protected activity.

The judge based that conclusion primarily on evidence of WS&G's dissatisfaction with the quality of Ankrom's work (20 FMSHRC at 1191), and the majority finds substantial evidence to support the judge's finding on this point. Slip op. at 8-10. The analysis of the judge and the majority only answers half of the question, however, for to establish the affirmative defense, WS&G was required to show, *by a preponderance of the evidence*, that its dissatisfaction with Ankrom's work was *linked* to the discipline it meted out to him. *Donovan ex rel. Anderson v. Stafford Const. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (rejecting affirmative defense because, while there was record evidence supporting operator's claim that the complainant had a personality conflict with a manager, the evidence was "entirely too meager to permit the conclusion" that the employee was disciplined by the operator for that reason). A review of the record demonstrates that WS&G provided only scant evidence that its dissatisfaction with Ankrom's work was the reason it failed to recall him. We find WS&G's justification singularly unconvincing.

The record evidence of WS&G's dissatisfaction with Ankrom's performance is dubious since WS&G never attempted to inform Ankrom that his performance could or would merit his termination. WS&G's superintendent, Schemp, bluntly admitted that "I have never stated that Gilbert was a lousy employee to Gilbert." Tr. 235. Indeed, WS&G never even told Ankrom that it was terminating him because of work performance. Tr. 235. Instead, WS&G led Ankrom to believe that he was going to be re-hired. Tr. 186-87. Furthermore, WS&G conceded that it could point to no written documentation detailing Ankrom's alleged faulty performance, much less documentation that it was the reason for his termination. Tr. 237, 255. It strains credulity that WS&G decided not to recall a miner for poor work performance but never informed the miner of this so-called overriding reason.

The only evidence WS&G presented that its dissatisfaction with Ankrom's work was the reason it terminated him was Schemp's testimony to that effect. However, the judge's apparent crediting of Schemp on the issue (20 FMSHRC at 1191) lacks a required explanation. Earlier the judge had directly discredited Schemp's testimony. *See id.* at 1190. The judge therefore should have explained why he found Schemp's testimony credible in one respect, but not in another. *See Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813

(Apr. 1981).¹ Absent such an explanation here, we are not prepared to accept the judge's crediting of Schemp, especially when the testimony in question is the sole source of the operator's evidence on an issue on which the operator has the burden of persuasion and which has become the dispositive issue in the case.

WS&G also did not provide sufficient support for Schemp's claim that production concerns were the reason Ankrom was not recalled. In fact, upon careful examination, WS&G's production rationale appears to be nothing more than a pretext for failing to rehire Ankrom. On November 10 and 11, 1997, Schemp notified Ankrom and Jackson that he was going to operate with only a day shift until the weather broke, and that they were therefore laid off until further notice. 20 FMSHRC at 1187; Tr. 91, 186. In his testimony and written submissions, Schemp made it very clear that he laid off the night crew when he did because he could not get "any productive work . . . from those particular four people." Tr. 316; WS&G FOF at 3, 7.

When the night shift resumed on March 20, 1998, Ankrom and night shift foreman Dennis Jackson were not recalled to work. 20 FMSHRC at 1188. Former night shift employees Dan and David Gay were called back, however. *Id.* Although four allegedly "unproductive miners" were laid off in November, two were recalled in March. Schemp claims that he decided not to recall Ankrom and Jackson after he reviewed the production reports over the winter. Tr. 227-28, 253-54. On its face, this rationale appears implausible, since the two night crew miners Schemp did rehire were, by his own testimony, not producing satisfactorily at the time he laid them off. The assertion regarding Ankrom's low productivity is further undercut because WS&G could point to no specific figures in the foremen's log or elsewhere in the record that would allow one to draw any conclusions regarding any individual miner's impact, either positive or negative, on productivity. Tr. 239, 241, 255-56. In fact, Ankrom testified that just before he was

¹ In *Robinette*, the Commission stated:

[w]here it is apparent that a witness has testified untruthfully in part, the judge should ordinarily explain how that fact affects the credibility of the witness with respect to his remaining testimony. . . . [F]ailure to [provide such an explanation] is not necessarily reversible error[] [when] the remainder of a questionable witness' testimony is corroborated by other credible evidence, or is otherwise inherently believable

3 FMSHRC at 813 (citation omitted). Here, some of the remainder of Schemp's testimony — on his belief that Ankrom's poor performance adversely impacted the productivity of the night shift — is not only uncorroborated, but is inconsistent with his decision to return Ankrom to the night shift, as is discussed in further detail below. Given the judge's discrediting of some of Schemp's testimony and that another part of that testimony was inconsistent, the judge's decision to credit without explanation Schemp's claim that he terminated Ankrom because of his work performance was clear reversible error.

laid off, Schemp informed him that he was being transferred from the day to the night shift in part because Schemp needed to increase productivity. Tr. 166, 168.

That Schemp's productivity justification is merely a pretext becomes all the more apparent when one considers the fact that the two miners who were not recalled — Ankrom and night shift foreman Dennis Jackson — were the two miners who, prior to the layoff (1) made safety complaints to supervisory personnel, (2) made safety complaints to state personnel that resulted in the issuance of correction orders (20 FMSHRC at 1186), and (3) made or assisted in making safety complaints to MSHA that resulted in several inspections and numerous citations being issued in the two-month period prior to the layoff. Perhaps more significantly, after the layoff and prior to the recall, Ankrom and Jackson had filed formal complaints with MSHA alleging discrimination in violation of section 105(c).

Schemp's asserted productivity rationale is all the more suspect because of the hostility he showed towards safety complaints. While the judge concluded there was a "lack of significant animus" on the part of Schemp (20 FMSHRC at 1191), this finding is contradicted by the overwhelming weight of the evidence. The judge relied on the fact that another miner, David Blank, had submitted a written safety complaint to WS&G and was not laid off or discharged. *Id.* Blank's complaint, however, was submitted to WS&G after the operator distributed forms and requested employees to note their concerns. Tr. 285, 287. In contrast, Ankrom made a complaint to the state authorities, not just to WS&G, and also filed a formal discrimination charge with MSHA claiming his layoff violated the Mine Act. Tr. 177-79; C. Ex. 7A. Schemp received a copy of this discrimination complaint in December 1997, prior to his decision not to recall Ankrom. Tr. 226-27.

Schemp reacted angrily when formal safety complaints were made to MSHA. 20 FMSHRC at 1190. After several inspections of WS&G in the 2-month period prior to Ankrom's layoff, Schemp told Ankrom he intended to downsize the company because he was tired of all the inspections that were taking place as a result of safety complaints.² *Id.* WS&G suspected that Jackson was responsible for these inspections. Tr. 307.³ Jackson was Ankrom's foreman and Ankrom assisted him in making these complaints. Tr. 61, 133. Even if Schemp may not have suspected Ankrom of making formal safety complaints to MSHA or state mining authorities until the time of the hearing (another highly questionable claim of Schemp's which the judge

² Although at the hearing Schemp denied making the statement, the judge found the denial not credible in light of similar statements Schemp had made to the federal inspector. 20 FMSHRC at 1190.

³ As with Ankrom, WS&G claims Jackson was not recalled because of the quality of his work. 20 FMSHRC at 1188; Tr. 238.

appears to credit (20 FMSHRC at 1191)),⁴ WS&G was aware that Ankrom had filed a formal discrimination complaint to MSHA between the time of layoff and the decision not to recall him. Tr. 226-27.

The judge's finding that Schemp lacked sufficient animus is further undermined by his earlier determination that Schemp was hostile towards Ankrom and hung up on him when Ankrom complained, on November 9, 1997, that "a lot of things" do not comply with state or federal safety standards. *See* 20 FMSHRC at 1190. Ankrom was laid off the day after this heated safety discussion (Tr. 185-86), which is itself a strong indicia of discriminatory motive. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In sum, the justifications that WS&G offered to try to establish that it would not have recalled Ankrom for his unprotected activity alone are inadequately substantiated and implausible. In the absence of any valid justification for the adverse action, WS&G fails in its attempt to defend against the prima facie case of discrimination. Accordingly, we conclude that the record compels the conclusion that WS&G discriminated against Ankrom, and would reverse the judge.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

⁴ As the judge acknowledged, Ankrom's complaints about inadequate berms resulted in an MSHA inspection and citations for that condition in October of 1997. 20 FMSHRC at 1186. The judge also recognized that Schemp soon thereafter quizzed employees regarding the reason for the inspection without success, and that on October 31, 1997, WS&G distributed forms on which employees were asked to note any of their safety concerns. *Id.* Although it is undisputed that Ankrom was the only miner to use his form to note the inadequacy of the berms (*id.* at 1186; Tr. 285, 287), the judge inexplicably drew no connection between these series of events. The only safety concern noted by a miner other than Ankrom — Blank's concern about the conveyors — was not connected to an MSHA inspection. In these circumstances, the judge should not have blindly accepted Schemp's contention that he did not know of Ankrom's connection to the MSHA inspections, and the judge clearly should not have drawn an inference favorable to WS&G based on the differing treatment between Ankrom and Blank.

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