**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**WASHINGTON, DC 20004-1710**

July 15, 2026

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| WANDA PALO<br><br>v.<br><br>UNITED STATES STEEL CORP. | Docket No. LAKE 2023-0202-DM |

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

**DECISION**

BY: Jordan and Baker, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act" or "Act"). It involves a complaint filed by miner Wanda Palo alleging that United States Steel Corporation ("U.S. Steel" or "USSC") discriminated against her in violation of the Mine Act.[1] After a hearing on the merits, a Commission Administrative Law Judge dismissed the complaint. For the reasons stated below, we reverse the Judge's decision and remand this matter for a determination of appropriate relief.

[1] The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . .

30 U.S.C. § 815(c)(1).

## I.

## Factual and Procedural Background

The proceeding revolves around an incident that occurred on February 26, 2023 involving Palo's co-worker, Michelle Mesich. On that day, at the end of Palo's shift, Mesich struck Palo with her bag filled with heavy metal tools in a hallway near the shift manager's office. Palo then entered the office doorway and stated words to the effect of "Did anybody just see that?" and referenced being hit. 47 FMSHRC 378, 382 (June 2025) (ALJ); Tr. Vol. I at 80; USSC Ex. 16; Palo Ex. 38; Palo Ex. 46; Palo Ex. 80. This was not the first time Palo reported an incident with Mesich to management. Mesich had a history of intimidating conduct towards Palo, which management had not corrected. Tr. Vol. I at 72-76, 78-79; Tr. Vol. II at 143; Palo Ex. 38, at 1.

The following morning, Palo texted the Union president, Steve Bonach, stating that the blow had "twisted the pins in [her] hip" and that she had iced it. 47 FMSHRC at 383; Tr. Vol. I at 88. The Union president informed Labor Relations Representative Nicole Koski on February 28. 47 FMSHRC at 383; Tr. Vol. II at 20-22, 143-44.

The operator concluded that Palo violated Safety Rules 1.7 and 1.8, which require employees to report incidents and injuries to a supervisor "as soon as possible."[2] Palo was also on a Last Chance Agreement ("LCA") at this time, whereby she had agreed and understood that her failure "to follow any plant or corporate rules, policies, or procedures" would be a material violation of the agreement and "result in suspension subject to discharge." 47 FMSHRC at 379. On March 7, 2023, Palo received discipline notices, and on March 13, 2023, she was discharged for violating the safety rules and breaching her Last Chance Agreement. *Id.* at 387, 388.[3]

On March 8, 2023, Palo filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") alleging that she reported the incident and her resulting injury to the operator. Subsequently, MSHA notified Palo that it declined to pursue a discrimination case on her behalf. On June 16, 2023, Palo filed a discrimination complaint with the Commission pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).[4] The Judge held a hearing

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[2] Safety Rule 1.7 states: "Report to your supervisor, as soon as possible, all incidents with or without injury." USSC Ex. 7.

Safety Rule 1.8 states: "Report all injuries or hazardous exposures, however slight, to your supervisor as soon as possible. If you are injured, no matter how slightly, obtain first aid treatment promptly. Neglecting minor scratches or cuts may result in serious infections." USSC Ex. 7.

[3] In essence, a Last Chance Agreement removes a union employee's contractual protections against discharge or discipline, placing that employee in the same position as an at-will employee.

[4] Section 105(c)(3) provides a miner with the right to file an action on his or her own behalf before the Commission. 30 U.S.C. § 815(c)(3) states:

and concluded that Palo failed to establish that her discharge by U.S. Steel violated section 105(c) of the Mine Act.

## II.

## The Judge's Decision

In his June 18, 2025 Decision, the Judge concluded that Palo failed to prove that her protected activity motivated the discharge.

The Judge applied the Commission's well-established discrimination framework under *Pasula*, under which a complainant must prove by a preponderance of the evidence that she engaged in protected activity, that she suffered an adverse action, and that the adverse action was motivated in any part by the protected activity. 47 FMSHRC at 379 (citing *Sec'y of Labor ex rel. 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 ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981)). The Judge determined that the central issue in the case was whether U.S. Steel's discharge of Palo was motivated by her protected activity (i.e., Palo's report of the incident and injury) versus her failure to comply with the company's injury reporting requirements, particularly in light of her LCA. 47 FMSHRC at 378-79.

The Judge acknowledged that on February 26, 2023, Palo was struck by her co-worker and immediately reported the incident to supervisors, stating that she had been hit or shoved. However, the Judge found that Palo did not report that she had sustained an injury at that time. *Id.* at 382. The Judge further found that Palo subsequently informed her union representative of the incident and later met with management on March 2, 2023. Only then did Palo report that she had sustained a work-related injury. *Id.* at 380, 383-84.

The Judge determined that U.S. Steel maintained rules requiring employees to report injuries "as soon as possible," and that Palo was aware of these requirements. *Id.* at 379. The Judge further found that Palo was subject to the LCA that provided that any violation of company rules could result in suspension or discharge. *Id.* at 381. Based on the record, the Judge concluded that Palo did not report her injury in a timely manner and therefore violated the company's reporting rules and her LCA.

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> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

Although the Judge acknowledged evidence that U.S. Steel had previously failed to respond adequately to Palo's complaints regarding Mesich and characterized that conduct as indicative of animus toward Palo's protected activity, the Judge ultimately concluded that Palo failed to establish a causal nexus between her protected activity and her discharge. *Id.* at 380, 381-82. Instead, as part of his *prima facie* case analysis, the Judge credited U.S. Steel's position that it disciplined and discharged Palo solely because of her failure to timely report her injury in violation of company rules and the LCA. *Id.* at 379.

Accordingly, the Judge held that Palo did not prove that her protected activity was a motivating factor in the adverse action and dismissed the complaint.

## III.

## Summary of Parties' Arguments

### A. The Complainant's Arguments

Palo contends that the Judge erred in concluding that her discharge was not motivated by protected activity and argues that the record establishes a violation of section 105(c) of the Mine Act.

Palo asserts that the Judge applied an incorrect legal standard by focusing on whether U.S. Steel had "appropriate grounds" to discipline her, rather than determining whether her protected activity was a motivating factor in the adverse action. She maintains that the proper inquiry under Commission precedent is whether the protected activity played any role in the employer's decision, and that the Judge's framing improperly narrowed that inquiry. Palo Br. at 4-5.

Palo further argues that her report of a workplace assault and resulting injury constituted protected activity and that her discharge was directly based on that activity. She emphasizes that U.S. Steel expressly terminated her for allegedly reporting her injury too late, and therefore, in her view, the adverse action was inherently tied to her protected activity. *Id.* at 1-2.

Palo also contends that her reporting was timely under the circumstances. She states that she immediately reported the incident to management on February 26, informed her union representative of her injury the following day, and that the union promptly relayed the information to U.S. Steel. She argues that these actions satisfied any requirement to report an injury "as soon as possible," particularly because the full extent of her injury was not immediately apparent. *Id.* at 1-3.

In addition, Palo asserts that the record demonstrates animus toward her protected activity. She relies in part on the Judge's own finding that U.S. Steel previously failed to respond to her complaints that her co-worker had struck her and argues that such inaction reflects hostility toward her safety complaints. Palo contends that the Judge erred by failing to consider this evidence of animus when analyzing the events surrounding her discharge. *Id.* at 5-6.

Palo further argues that U.S. Steel applied its reporting requirements inconsistently and held her to a stricter standard than management personnel, who delayed investigating her report. She maintains that this disparity supports an inference of discriminatory motive. *Id.* at 4-5.

Finally, Palo challenges the Judge's conclusion that her report was untimely, asserting that applicable legal standards require only that injury reports be made within a reasonable time. She maintains that her report, which was made before her next scheduled shift and relayed through her union, was reasonable as a matter of law. Accordingly, Palo requests that the Commission reverse the Judge's decision and find that U.S. Steel violated section 105(c). *Id.* at 5.

**B. The Operator's Arguments**

U.S. Steel argues that the Judge correctly determined that Palo's discharge was based on legitimate, non-discriminatory reasons and was not motivated by protected activity.

The operator contends that the record demonstrates that Palo failed to comply with clearly established safety rules requiring employees to report injuries to a supervisor as soon as possible. It emphasizes that Palo did not report any injury on February 26, when the incident occurred, nor did she report an injury to any supervisor in the days that followed, despite continuing to work and interact with supervisory personnel. According to U.S. Steel, Palo first reported an injury to management during a meeting on March 2, several days after she was aware of her condition. USSC Br. at 18-19.

U.S. Steel further asserts that Palo was fully aware of the reporting requirements, having received training and repeated reminders regarding the company's safety rules. In addition, U.S. Steel notes that Palo was subject to the LCA requiring strict compliance with all company policies and providing that any violation could result in discharge. The operator maintains that Palo's failure to timely report her injury therefore constituted both a violation of safety rules and a material breach of the LCA, warranting her termination. *Id.* at 2-3.

The operator also argues that there is no evidence of discriminatory animus or disparate treatment. It contends that Palo's brief interaction with management on February 26 did not communicate that she had sustained an injury and therefore could not have triggered any retaliatory response. The operator further asserts that Palo failed to identify any similarly situated employees who were treated more favorably under comparable circumstances. *Id.* at 22-23.

Finally, U.S. Steel argues that, even assuming Palo engaged in protected activity, it would have taken the same action based solely on her violation of reporting requirements and the LCA. *Id.* at 30. Accordingly, the operator urges the Commission to affirm the Judge's decision.

## IV.

## Analysis

### A. The Judge Erred in Concluding that the Complainant Failed to Establish a *Prima Facie* Case of Discrimination.

To establish a *prima facie* case of discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c)(1), a complainant must prove by a preponderance of the evidence that: (1) she engaged in protected activity; (2) she suffered adverse action; and (3) the adverse action was motivated in any part by the protected activity. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18; *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). Because this case arises within the Eighth Circuit, we apply the traditional *Pasula-Robinette* framework. *See Sec'y of Labor ex rel. Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC 523, 530 n.8 (Aug. 2024).

The parties do not dispute that Palo engaged in protected activity or that she suffered adverse action. The Judge found that Palo engaged in protected activity when she reported a workplace injury to management on March 2, 2023, and the parties stipulated to that fact. 47 FMSHRC at 390. The Judge also found that Palo's suspension and discharge constituted adverse action. *Id.* at 389.

The principal dispute concerns whether Palo established the requisite nexus between her protected activity and the adverse action. The Commission has long recognized that discriminatory motivation is frequently established through circumstantial evidence. Relevant indicia include: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-12 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983); *Sec'y of Labor ex rel. Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); *Hargis*, 46 FMSHRC at 530. Not all indicia need be present to establish discriminatory motivation. *Williamson*, 31 FMSHRC at 1089; *Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

As stated above, the Judge found several indicators of discriminatory motivation. The Judge found that the operator possessed knowledge of Palo's protected activity. He further found coincidence in time between Palo's protected activity and the adverse action. Finally, the Judge found evidence of animus, concluding that the operator's repeated failure to respond meaningfully to Palo's earlier complaints regarding Mesich demonstrated hostility toward Palo's protected safety complaints. 47 FMSHRC at 390-400.

Despite these findings, the Judge concluded that Palo failed to establish a *prima facie* case. Importantly, he did not find that the operator exhibited any animus toward the March 2, 2023 injury report itself. We conclude, however, that these determinations are inconsistent with both the Judge's overall factual findings and with Commission precedent.

The Judge's analysis improperly incorporated the operator's asserted justification into the *prima facie* inquiry. Under *Pasula-Robinette*, the relevant question at the *prima facie* stage is whether protected activity contributed in any part to the adverse action. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. Whether an operator possessed a legitimate business justification for its conduct is addressed separately through rebuttal and affirmative-defense analysis. *Robinette*, 3 FMSHRC at 818 n.20; *Driessen*, 20 FMSHRC at 328-29; *Sec'y of Labor on behalf of Smitherman v. Warrior Met Coal Mining, LLC*, 45 FMSHRC 446, 455-56 (June 2023).

By accepting the operator's asserted justification as part of the *prima facie* inquiry, the Judge effectively collapsed the *Pasula* burden-shifting framework and resolved the operator's affirmative defense before determining whether Palo had established a *prima facie* case. That approach is inconsistent with *Pasula*, *Robinette*, *Driessen*, and *Smitherman*.

Furthermore, the Judge erred by overlooking the direct link between Palo's protected activity and the adverse action. This case differs from many discrimination cases in which motivation must be inferred entirely from circumstantial evidence. Here, the conduct that allegedly justified the discipline was inseparable from the protected activity itself. The operator disciplined and discharged Palo because it concluded that she failed to report a workplace injury in the manner required by company policy. Absent Palo's report of a workplace injury, there would have been no basis for the discipline imposed. Accordingly, the protected activity and the adverse action are directly linked.

The Judge's treatment of animus further illustrates the error. The Judge stated that "it is the very definition of animus" when an operator ignores a miner's protected safety complaints and found that the operator's prior disregard of Palo's complaints regarding Mesich demonstrated hostility toward protected activity. Yet the Judge failed to apply that same reasoning to the operator's handling of Palo's February 2023 complaints. The Commission evaluates animus in light of the entire record and the operator's treatment of protected activity over time. *See, e.g.*, *Chacon*, 3 FMSHRC at 2510-12; *Hargis*, 46 FMSHRC at 530-32 & n.9. The Judge identified no meaningful distinction between the operator's prior treatment of Palo's complaints and its treatment of the complaint at issue here.

The operator's interpretation of its reporting rules also carries broader implications that reinforce the existence of a discriminatory motive. Under the operator's theory, a miner who promptly reports a workplace incident (e.g., getting hit with a bag of tools) but delays reporting an injury until symptoms develop risks suspension or discharge for failing to report "as soon as possible." Such an interpretation would discourage miners from reporting injuries and safety-related incidents, particularly where the existence or severity of an injury is not immediately apparent. The Mine Act is intended to encourage, not deter, the reporting of workplace injuries and safety concerns. *See Pasula*, 2 FMSHRC at 2790-92. An operator's reliance on a rule interpretation that would predictably chill miners from engaging in protected reporting activity is relevant evidence supporting an inference of discriminatory motivation.

Accordingly, we conclude that Palo established a *prima facie* case of discrimination because she engaged in protected activity, she suffered adverse action, and the adverse action was motivated by the protected activity.

### B. The Operator Failed to Establish that the Complainant Violated Company Safety Rules 1.7 and 1.8.

The operator's affirmative defense rests upon its assertion that Palo violated Safety Rules 1.7 and 1.8 by failing to report her injury "as soon as possible." The operator contends that this violation constituted a breach of Palo's LCA and justified her suspension and discharge. Substantial evidence does not support this conclusion.

As an initial matter, the operator's reporting rules do not establish a fixed reporting deadline. Instead, they require reporting "as soon as possible." Unlike a rule requiring reporting within a specified period of time, this language necessarily implies consideration of the surrounding circumstances. For instance, in the context of MSHA's mandatory reporting requirements, the Commission has stated that the "immediateness" of an operator's reporting notification under 30 C.F.R. § 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting. *Cf. Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). As such, the Commission analyzes whether the miner's injury report was filed as soon as reasonably possible.

This interpretation also comports with the policy goals of section 105(c) of the Act. The Commission has consistently construed section 105(c) broadly in order to encourage miners to report injuries and safety concerns without fear of retaliation. *See Pasula*, 2 FMSHRC at 2790-92; *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). As such, we hold that analyzing whether a miner's report of injury under company reporting rules was filed as soon as reasonably possible comports with the safety goals of section 105(c).

In the present case, immediately after the February 26 incident, Palo reported that she had been struck by Mesich. Although the Judge found that Palo did not specifically report an injury at that moment, the operator was immediately placed on notice that a workplace "incident" had occurred. This is consistent with Safety Rule 1.7, which states: "Report to your supervisor, as soon as possible, all *incidents* with or without injury." USSC Ex. 7 (emphasis added).

Likewise, Palo also reported her injury within a reasonable time. Palo was struck late at night, at the end of her shift. The morning after being struck, Palo reported to Bonach, who reported to Koski, that she felt stiff and sore after she had iced her hip and that she was still in pain after a night's sleep. 47 FMSHRC at 383. This is by definition "reasonable." Union Safety Manager Mitchell McDonald testified that it is common for miners to be stiff and sore after a 12-hour shift. Tr. Vol. I at 140. Miners are "industrial athletes." Tr. Vol. I at 162-63 (same). Soreness, aches and pains are part of the daily life of miners and are expected after twelve hours of hard physical labor. Tr. Vol. I at 162-64, 193 (same). Therefore, the expectation that a miner is to report and file an injury report every time they feel sore or pain from a workday is not reasonable. *See* Tr. Vol. I at 193 (same).

This is particularly true for Palo who had major surgery because of her injuries at the mine. Tr. Vol. I at 31-33, 36-47. After icing, doing her regular exercises, and taking Aleve, Palo was still sore and made her (potential) injury report when she woke up the next day and did not feel better. This is not an instance of a miner seeking medical care and failing to report it. This is the situation of a miner taking a night's rest, still being in pain, and reporting it.

The Judge further concluded that Bonach's communication was insufficient because Bonach was not a member of management. We disagree. Upon being informed of the injury by Palo, Bonach, the miner's Representative, promptly communicated that information to Koski, who is a member of mine management. 47 FMSHRC at 383. Section 105(c)(1) of the Act expressly protects communications made through miners' representatives. 30 U.S.C. § 815(c)(1).

While we need not hold that every communication to a union representative automatically satisfies every operator reporting requirement, the facts before us are narrower. Here, the undisputed record establishes that Bonach immediately relayed Palo's report to management and that management actually received the information before Palo returned to work. *See, e.g.*, Tr. Vol. I at 97-98; Tr. Vol. II at 47, 49-50. We conclude that management possessed actual notice of both the underlying incident and Palo's claimed injury before it initiated disciplinary proceedings.

Under these circumstances, the operator failed to prove that Palo violated company Safety Rules 1.7 and 1.8. The available evidence demonstrates that Palo reasonably reported the incident and her injuries in compliance with the Rules.

Accordingly, the operator failed to establish the predicate rule violation upon which its affirmative defense depends.

### C. The Operator Failed to Prove that It Would Have Taken the Same Action for Unprotected Conduct Alone.

Assuming *arguendo* that the operator established a technical violation of its reporting rules, it nevertheless failed to carry its burden under *Pasula-Robinette*. Once a complainant establishes a *prima facie* case, an operator may avoid liability only by proving that it was motivated by the miner's unprotected conduct and would have taken the same action for that conduct alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; *Driessen*, 20 FMSHRC at 328-29.

However, the Commission has explained that a defense should not be "examined superficially or be approved automatically once offered." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1072 (May 2011) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)). We evaluate whether the asserted justification is credible, whether it actually motivated the operator, and whether it would have resulted in the same adverse action absent the protected activity. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982); *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 319 (6th Cir. 2013). The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1925 (Aug. 2016) (quoting *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38)).[5]

U.S. Steel has not satisfied its burden. The operator's justification depends entirely upon characterizing Palo's protected report as untimely. Yet, as stated above, management possessed notice of the incident through multiple channels, including Palo's immediate report of being struck, Bonach's communication to Koski, and Palo's subsequent discussion with management. Tr. Vol. I at 74-78, 118-21, 245-47. Despite possessing this information, the operator characterized the matter as a serious reporting violation warranting discipline and discharge under the LCA. Tr. Vol. I at 248-52, 301-04.

Several aspects of the record further undermine the credibility of the operator's asserted justification. The Judge found that the operator had previously disregarded Palo's complaints regarding Mesich and characterized that conduct as evidence of hostility toward protected activity. 47 FMSHRC at 389-90. That same history weakens the operator's claim that its actions concerning the February 26 incident were motivated exclusively by neutral enforcement of workplace rules. *See Chacon*, 3 FMSHRC at 2510-12; *Hargis*, 46 FMSHRC at 530-31; *see also* Tr. Vol. I at 72-76, 78-79, 82-89, 132-36; Tr. Vol. II at 143; Palo Ex. 38, at 1.

Additionally, before completing its investigation into the underlying February 26 incident, the operator had already issued discipline slips to Palo for allegedly failing to report an injury.[6] Tr. Vol. II at 48-52; Palo Ex. 30. The decision-making process therefore appears to have begun with a predetermined conclusion rather than an objective assessment of the facts. This sequence of events is relevant to the Commission's assessment of whether the operator's asserted justification actually motivated the adverse action. *See Bradley*, 4 FMSHRC at 993 (directing judges to determine whether asserted justifications are credible and whether they would have motivated the operator as claimed). In light of the operator's decision to impose discipline before interviewing Mesich, the record raises substantial questions regarding the credibility of the operator's asserted rationale and strongly supports a finding of pretext. *See also Price*, 12 FMSHRC at 1534.

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[5] The Commission has also stated that a complainant may "attack[] the credibility of the proffered explanation indirectly, by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the employer. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext." *Turner*, 33 FMSHRC at 1073.

[6] Koski testified that the disciplinary notices (i.e., the slips) were issued on March 7. She also testified that Mesich was not interviewed until March 9. Tr. Vol. II at 89-90; Palo Ex. 30. As such, substantial evidence supports the conclusion that the operator began the process of disciplining Palo before interviewing Mesich and before completing its investigation into the underlying February 26 incident. This supports the inference that the decision to discipline Palo was made before the investigation was complete.

The subsequent investigation further undermines the operator's position. After interviewing Mesich, the operator was unable to determine what, if anything, had occurred between Palo and Mesich on February 26. Tr. Vol. II at 90. Yet the operator nevertheless discharged Palo for failing to timely report an alleged injury arising from that same event. Tr. Vol. II at 19-30, 99 (Koski admitting that she did not prepare a formal incident report regarding Palo's workplace-violence allegation, although she maintained that she conducted an investigation); *see also* Tr. Vol. II at 93 (Koski characterizing Palo's physical injury as an "alleged injury"). Yet despite that inability to substantiate the very event that supposedly triggered the reporting obligation, the operator nevertheless discharged Palo for failing to report it in a timely manner. *Id.* The operator cannot logically maintain both that it could not determine whether an incident or injury occurred and that Palo committed a dischargeable offense by failing to report that same incident or injury. The Judge found this view to be "not credible" but simply disregarded it. 47 FMSHRC at 396 n.14. This inconsistency substantially weakens the credibility of the operator's asserted rationale and is further evidence of pretext.

As such, substantial evidence supports the inference that U.S. Steel disciplined Palo before interviewing Mesich, then later admitted it could not determine what happened between Mesich and Palo, while still firing Palo for allegedly failing to timely report the injury arising from that event. This constitutes evidence of pretext.

Moreover, the alleged misconduct was not independent of Palo's protected activity. Rather, the alleged misconduct concerned the manner in which Palo reported a workplace injury. Tr. Vol. II at 19-30, 93, 99. The Commission has long cautioned that asserted business justifications must be carefully scrutinized where the alleged misconduct is closely intertwined with protected activity. *Smitherman*, 45 FMSHRC at 455-56 (affirming as supported by substantial evidence the Judge's conclusion that business justification was pretextual); *Con-Ag, Inc. v. Sec'y of Labor*, 897 F.3d 693, 703-05 (6th Cir. 2018). The testimony of the operator's managers confirms that the discipline decision turned entirely on their view of when and how Palo reported her injury, rather than on any separate act of misconduct. Tr. Vol. II at 19-30, 93, 99. This direct evidentiary link further supports the conclusion that the operator failed to prove it would have imposed the same discipline for unprotected conduct alone.

The operator also relies heavily upon the LCA. We recognize that an LCA may provide a legitimate basis for discipline when an operator establishes a material violation of workplace rules. However, the existence of an LCA does not relieve an operator of its burden under *Pasula-Robinette* to establish that it would have taken the same action for unprotected conduct alone. *See Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18.

Because the operator failed to establish a clear violation of its reporting rules, and because it failed to prove that it would have suspended and discharged Palo for unprotected conduct alone, we conclude that the operator failed to establish an affirmative defense.

## V.

## Conclusion

For the foregoing reasons, we conclude that Palo established a *prima facie* case of discrimination under section 105(c) of the Mine Act and that the operator failed to establish an affirmative defense. Accordingly, we reverse the Judge's decision and remand this matter for a determination of appropriate relief.

Mary Lu Jordan, Commissioner

Timothy J. Baker, Commissioner

**Chair Rajkovich, dissenting:**

I join the majority in finding that a *prima facie* case of discrimination has been established, but dissent from my colleagues' conclusion that the operator failed to demonstrate an affirmative defense. Substantial evidence supports the Judge's finding that U.S. Steel took adverse action against Palo solely due to her violation of company rules. Accordingly, I would affirm the Judge in finding no violation of section 105(c) of the Act, 30 U.S.C. § 815(c).

The Commission's traditional *Pasula-Robinette* framework applies in this proceeding. Slip op. at 6-7. Under this framework, the Complainant must first establish that she engaged in protected activity and that the relevant adverse action was motivated in any part by that activity. The operator may affirmatively defend against this *prima facie* case by proving that it would have taken the adverse action because of the complainant's unprotected activities alone. The Complainant may then attempt to refute the affirmative defense by showing that she did not engage in unprotected activity or that the unprotected activities did not motivate the adverse action, i.e., that the affirmative defense is pretextual. Ultimately, the burden of persuasion remains with the Complainant. *Sec'y on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18, 818 n.20 (Apr. 1981).

Here, the Judge erred in finding that Palo failed to establish a *prima facie* case. As the majority notes, the Judge's own factual findings demonstrate protected activity, adverse action, and sufficient indicia of discriminatory motive to meet this initial burden.[1] Slip op. at 6-8, *citing* 47 FMSHRC at 390-400. However, remanding this proceeding for the Judge to consider the operator's affirmative defense is unnecessary. As the majority also notes, the Judge has already addressed U.S. Steel's affirmative defense. Slip op. at 6-7. For the reasons below, substantial evidence supports both the Judge's implicit finding of an affirmative defense, and his implicit rejection of Palo's pretext argument.

When reviewing a Judge's factual findings under the substantial evidence standard, we ask whether there is "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). Notably, the "'possibility of drawing two inconsistent conclusions . . . does not prevent an administrative agency's finding from being supported by substantial evidence."

[1] The majority also finds a "direct" causal link between Palo's protected activity and the adverse action, asserting that "[a]bsent Palo's report of a workplace injury, there would have been no basis for the discipline imposed." Slip op. at 7. I disagree. The basis for discipline was not Palo's action of reporting to her union representative, but her failure to report to a supervisor. Notably, *she could have done both*. Rather than discouraging miners from promptly reporting incidents and injuries, a finding of no discrimination here encourages miners to comply with company policy and report incidents as comprehensively as possible. *See* 47 FMSHRC 378, 401 (June 2025) (ALJ) (noting the Mine Act's goal of encouraging miners to report accidents and injuries). Regardless, as the majority notes, the Judge found sufficient *indirect* indicia of discriminatory motivation to establish a *prima facie* case.

*Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1173 (Sept. 2010) (quoting *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996)).

U.S. Steel's affirmative defense is that Palo was disciplined for violating Safety Rules 1.7 and 1.8, which require miners to report all incidents and injuries to the miner's supervisor as soon as possible. USSC Ex. 7. Accordingly, a key question is whether Palo in fact violated company policy. Based on the facts below, a reasonable mind could conclude that Palo violated at least one safety rule by failing to report her injury to a supervisor until March 2, four days after the injury occurred. 47 FMSHRC at 396.

At approximately 5:30 p.m. on February 26, 2023, Palo came to the entrance of the shift manager's office where Shift Manager Hunt was present, asked "[d]id anybody just see that," mentioned being struck by a bag, and then left before Hunt had a chance to ask questions. 47 FMSHRC at 382-83, 394. The majority defines this as notice of an incident pursuant to Safety Rule 1.7. Slip op. at 8. Conversely, the Judge emphasized that Palo gave no specifics and did not stay to answer questions, and he concluded that Hunt had no reason to interpret Palo's vague statement as an incident report. 47 FMSHRC at 394. The Judge's conclusion is one reasonable interpretation of the facts. Regardless, even if the majority is correct and this exchange counts as an *incident* report, Palo concedes that she did not mention an *injury* at that time.[2] Tr. I:134-35.

The pain in Palo's hip worsened throughout the night, and on the morning of February 27 she texted her Union President, Steven Bonach. The text mentioned both the incident (being struck by a bag) and the resulting injury (pain from twisted pins). Bonach suggested that Palo call mine management or alternatively offered to speak to them on her behalf. Significantly, Palo responded, "I'll leave it up to you" and took no further action. 47 FMSHRC at 383-84, 400; Ex. C-80 at 4. Palo chose not to report the injury to a supervisor herself, *nor* did she explicitly request that her union representative make a report on her behalf. Instead, she reported to her union representative (who is not an employee of the operator) and left the decision of whether to report it to mine management with him.[3] The Judge reasonably concluded that Palo's text to Bonach *did not* constitute a report of injury as required by Safety Rule 1.8. 47 FMSHRC at 400-01.

In finding that the text satisfied the company's reporting rules, the majority notes that Bonach promptly communicated the information contained in the text to Labor Relations Representative Nicole Koski, thereby providing the operator with actual notice of the incident and injury. Slip op. at 8-9. First, as the Judge notes, Bonach did not show the texts to mine

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[2] It is unclear whether Palo was yet aware of an injury requiring reporting. On one hand, she seems to have been immediately aware that the pins in her hip had twisted. Tr. I:71. On the other hand, she testified that she was unsure whether the pain was from the pin misalignment or general soreness. Tr. I:98. Either way, as discussed below, she was aware of the injury by the next morning but chose not to promptly report it to mine management for a further three days.

[3] Leaving it "up to" Bonach indicates that Palo was leaving the *choice* of whether to report to him (as opposed to leaving the matter "to" Bonach to report). This interpretation is supported by her following statement—"I guess my only concern is that it would escalate, if [Mesich] is thinking to get one good hit in before she leaves"—which indicates that Palo was still unsure whether reporting the matter was her best choice. Ex. C-80 at 4.

management until the next day. 47 FMSHRC at 396; Tr. II:83. More broadly, whether mine management had actual notice has no bearing on whether Palo complied with the Safety Rule. Miners have a responsibility to report incidents and injuries, rather than simply assuming that information will reach mine management through others. The incident happened to reach mine management in this case, but that will not always be true and does not change the fact that Palo took no action (either directly or through a representative) to notify her supervisor of the incident or injury.

This lack of action continued through Palo's next shift. Upon arriving for her night shift on February 28, Palo informed her Team Leader and Shift Manager that she was sore *without specifying why* and asked if there were any notes about her in the system *without specifying what those notes would be about*. A few hours later she asked to leave early simply because she was sore and not feeling well.[4] Palo chose not to report the incident or her resulting injury to mine management at any point during that shift. 47 FMSHRC at 384-85, 400; Tr. I:99, 148.

Ultimately, Palo did not inform management of the injury until March 2, when she was called into a meeting to explain why she had left work early on February 28. Palo described the February 26 incident and resulting injury to Koski during the meeting and filed out an incident report. 47 FMSHRC at 386, 396.

I accept the majority's interpretation of the Safety Rules as requiring miners to report incidents and injuries "as soon as reasonably possible." Slip op. at 8. Notably, my colleagues do not contend that waiting four days is reasonable. Rather, they conclude that the incident was reported immediately and the injury was reported the next morning. For the reasons above, the record reasonably indicates that Palo was aware of her injury no later than the morning of February 27 but chose not to report it to a supervisor until March 2. Accordingly, substantial evidence supports the Judge's implicit finding that Palo violated Safety Rule 1.8.

My colleagues assert that even if Palo did violate a safety rule, U.S. Steel has failed to prove that it would have taken the same adverse action for her unprotected conduct alone. Slip op. at 9. However, U.S. Steel presented a list of seven employees who had been disciplined reporting violations between 2019-2023. The Judge reasonably concluded that the operator "has established that it consistently enforced its reporting rules." 47 FMSHRC at 399. Substantial evidence supports Judge's finding of an affirmative defense.

Once an operator establishes an affirmative defense, the complainant then bears the burden of showing that the affirmative defense was pretextual. *Robinette*, 3 FMSHRC at 818 n.20; *Thomas v. Calportland Co.*, 46 FMSHRC 119, 133 (Mar. 2024); *Jayson Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1073 (May 2011). One way to establish pretext is to demonstrate disparate treatment, i.e., that other employees were not disciplined even though they engaged in substantially similar conduct. *See Turner*, 33 FMSHRC at 1073; *cf. Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1925 (Aug. 2016) (noting that pretext may be found when the asserted justification is inconsistent with normal practices).

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[4] Palo testified that she left early because she had a muscle spasm but does not appear to have conveyed this information to her supervisors. *See* Tr. I:99-100, 148.

Here, Palo argued below that the Union's safety chair and president testified to multiple instances where employees had failed to report workplace injuries for several days but were not disciplined. 47 FMSHRC at 399, *citing* Complainant Br. at 23. Upon review, however, the testimony does not describe substantially similar conduct. The Union Safety Chair recalled "9 or 11" instances where employees turned in late reports of injuries without facing discipline but clearly assumed it was because the employees had not immediately realized they were injured. Tr. I: 175-77, 197-98. Bonach similarly testified that while there had been instances of miners reporting injuries 2, 5, or even 10 days after the inciting incident without facing discipline, whether such a delayed report is timely turns on when the miner realizes he or she is injured. Tr. II:158-59, 166-68. Effectively, the testimony upon which Palo relies describes miners who were not disciplined because their delayed reports *were not untimely*, rather than miners who were not disciplined even though they failed to timely report an injury of which they were aware. The Judge reasonably found that Palo failed to provide sufficient evidence of disparate treatment. The record supports his implicit determination that Palo failed to establish pretext. 47 FMSHRC at 399.

As a final note, I question the relevance of U.S. Steel's investigation into the underlying incident that occurred on February 26. My colleagues look to the investigation as evidence of pretext, noting that U.S. Steel began the investigation with a pre-determined result and failed to conclusively determine what had occurred. Slip op. at 10. They assert that U.S. Steel "cannot logically maintain both that it could not determine whether an incident or injury occurred and that Palo committed a dischargeable offence by failing to report the same incident or injury." *Id.* at 11. The majority appears to conflate the underlying incident with the reporting of that incident. Palo was not disciplined for being *involved* in an incident resulting in injury, she was disciplined for failing to follow proper protocol in *reporting* what she believed to be an incident resulting in injury. The key facts are whether and when Palo notified a supervisor, and whether such conduct *in reporting* normally results in discipline. Beyond the basic fact that some sort of event occurred and resulted in injury, the precise details of what occurred on February 26 when Mesich hit Palo with a bag have little bearing on whether Palo complied with company reporting rules.

In conclusion, the record substantially supports the Judge's implicit findings that U.S. Steel disciplined Palo for failing to comply with company reporting rules, and that Palo failed to establish that the stated reason for discipline was pretextual. Accordingly, I would affirm the Judge's finding of no discrimination.

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