FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

June 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JUAN SMITHERMAN	:	Docket No. SE 2021-0153-D
v.	:	
WARRIOR MET COAL MINING, LLC	:	

BEFORE: Jordan, Chair; Althen and Rajkovich, Commissioners[1]

DECISION

BY THE COMMISSION:

This proceeding arises from a discrimination complaint filed by the Secretary of Labor on behalf of Juan Smitherman, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2018) ("Act" or "Mine Act").[2] The Secretary alleges Smitherman was terminated for raising a ventilation safety complaint, while Warrior Met Coal Mining, LLC ("Warrior Met") claims the miner was discharged for violating work rules.

The Administrative Law Judge found that Smitherman had engaged in protected activity, that his subsequent termination was motivated by that protected activity, and that Warrior Met's alleged business justification was pretextual. 44 FMSHRC 72, 97-99 (Feb. 2022) (ALJ). The Judge issued a decision finding discrimination and assessing a civil penalty, and a subsequent

[1] Commissioner Timothy J. Baker has recused himself from this matter.

[2] Section 105(c)(1) of the Act provides in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1). Section 105(c)(2) provides that the Secretary shall file a complaint with the Commission on behalf of a miner if she determines that section 105(c)(1) has been violated.

order on additional remedies. *Id.*; April 25, 2022 Order. On appeal, Warrior Met challenges the Judge's findings of protected activity and improper motivation, and claims the Judge failed to consider the operator's affirmative defense.

For the reasons below, we affirm the Judge's decision. We conclude that substantial evidence supports the Judge's findings that Secretary established a prima facie case and that Warrior Met's affirmative defense was pretextual.

I.

Factual and Procedural Background

A. Factual Background

a. General Background and Early Incidents

At the time of the relevant events, Juan Smitherman was a roof bolter on the Owl Shift (11:00 p.m. to 7:00 a.m.) at Warrior Met's No. 4 Mine in Brookwood, Alabama. Section Foreman Zachary Salyers became Smitherman's supervisor in January 2021. I:129.[3]

Smitherman and Salyers had at least one safety-related dispute prior to the key events. In early February 2021, they had a disagreement as to whether dust bags were required for roof bolters.[4] Smitherman refused to work without dust bags, and Salyers ultimately provided them. Smitherman testified that Salyers pushed him to run the roof bolter without a dust bag, which Salyers contested. I:42-46, 130-33, 251-52; II:131.

Smitherman testified to three additional incidents. First, he related seeing Salyers walk past miners cutting without a curtain. He asked Salyers about it and Salyers said he had not noticed. Smitherman responded, "I know you saw them," Salyers asked why Smitherman had "a problem with everything," and it "got loud." I:138-39. Smitherman also recalled another incident where Salyers denied knowing that a curtain was down and a third incident where he accused Salyers of not properly dusting an entry. I:140-43. Salyers claims he and Smitherman had no safety-related disagreements other than the dust bag issue. I:48; II:132.

b. February 28th Owl Shift – Fly Pad Ventilation Complaint

During the February 28th Owl Shift, Smitherman decided to walk by the next face and saw that no drop board or fly pads had been installed.[5] He hung a drop board then went to lunch. When he returned, the fly pads still had not been installed and the other roof bolters on the shift

[3] Transcript volumes one and two are cited as "I:--" and "II:--," respectively.

[4] Smitherman described dust bags as akin to a vacuum cleaner bag for the roof bolter's dust filter. I:131-32.

[5] Fly pads are temporary curtains that direct air while allowing people and equipment to pass through, akin to the plastic sheeting in industrial freezers. Fly pads are hung from a drop board, which is a long piece of wood mounted to the ceiling. I:49-51, 145.

(Jonathan Banks and Steven Volts) had started bolting. Smitherman told Banks and Volts that they were bolting without proper ventilation and needed to stop. They told Smitherman they would find Salyers and see what he wanted them to do.[6] Banks and Volts informed Salyers of the issue, and he had the ventilation controls in place within an hour. I:52-53, 144-49, 258.

Smitherman and Salyers disagreed on the content of Banks and Volts' conversation with Salyers. Salyers claimed they did not mention Smitherman. I:53; II:139. Smitherman was not present but testified that Banks and Volts recounted the conversation to him. According to Smitherman, they told Salyers "what [Smitherman] had said," that Smitherman refused to bolt without proper ventilation, and that they would not continue to bolt because Smitherman would "tell on them." I:150-51, 257. When interviewed by MSHA Supervisory Special Investigator Thomas O'Donnell, Volts stated that he did not mention Smitherman, and Banks said he could not remember. II: 69.

c. March 1st Owl Shift - Transfer Request

Before the start of the March 1st Owl Shift, Smitherman told Salyers that he wanted to transfer to a different section.[7] Smitherman did not explicitly identify a reason for his request, and Salyers did not ask. I:153-54, 261-62; II:141, 172. Smitherman claimed he told Salyers "I can't be up there with them doing what they did the day before," and assumed Salyers knew he meant the fly pad issue because there had not been any other serious incidents the previous shift. I:154, 262-63. Salyers claims Smitherman made no mention of "what happened the day before," and that he had no idea why Smitherman wanted to be moved. I:54, 96; II:142, 172.

Salyers raised Smitherman's transfer request with his supervisor, who directed Salyers to reassign Smitherman to the Lo-Trac. I:54-55; II:141-42. Salyers testified that Smitherman was reassigned because the usual Lo-Trac operator was absent. II:143. Smitherman conceded that the usual operator was absent and that he had relevant experience but testified that running the Lo-Trac is usually assigned to the service crew or a junior miner. Smitherman felt he had been reassigned because he slowed production when he stopped Banks and Volts from bolting but conceded he did not know for certain. I:158-62, 268-69.

d. March 1st Owl Shift – Lo-Trac Work

Smitherman's duties that night included bringing up some pallets of block and a bundle of water line and unloading supply cars. Smitherman claims Salyers also ordered him to bring up and load supplies for the roof bolter, though Salyers contests this. I:158, 162, 174, 271, 278-79; II: 149-50, 153.

According to Smitherman, he had a busy shift. He stocked the roof bolter, brought up pallets, unloaded supply cars, looked (unsuccessfully) for the water line, and brought up a rock duster at the request of the maintenance foreman. I:162-63, 174, 176, 280. He also testified to various complications such as grading issues that made it difficult to maneuver the Lo-Trac and

[6] Smitherman also looked for Salyers to discuss the fly pad issue but did not find him. I:150. Smitherman never directly mentioned the fly pad issue to Salyers. I:260.

[7] Smitherman had asked his shift foreman for a transfer a few days earlier. I:155-56.

had to be addressed, slowing his assigned work. I:164-65, 302-03. Finally, Smitherman stated that the rock duster tipped over and broke the pallet it was sitting on, so he had to wrestle the rock duster onto the Lo-Trac, take it to a new pallet, then wrestle it off the Lo-Trac onto the pallet, at which point (around 6:00a.m.) he took a rest break in the supply hole. I:167-68, 178.

Salyers found Smitherman and asked after his progress during his 3:00 a.m. lunchbreak, and again (as discussed further below) around 6:00 a.m. in the supply hole. Salyers testified that he was not pleased with Smitherman's progress at either point, though he only said so during the 6:00 a.m. interaction. I:60-66, 168, 271, 282; II:154-58. Smitherman concedes that during these interactions he did not tell Salyers of the difficulties he encountered. I:270-73; II:155.

Smitherman testified that by the end of the shift he had finished bringing up the pallets and delivered everything except the water line, which he could not find. I:174, 182, 299, 305. Conversely, Salyers claims Smitherman completed none of his assigned tasks because he had only brought up some of the pallets (to the wrong location) and had not found the water pipes. I:60-63, II:154-56.

e. March 1st Owl Shift - Supply Hole Confrontation

Salyers claims that, on March 2 at approximately 6:00 a.m., he found Smitherman in the supply hole, slumped over with the machine off, his hardhat and glasses off, and his cap light off. Salyers claims he shined a light in Smitherman's eyes with no response, moved to within twenty feet and called Smitherman's name, which "startled" him. Salyers concluded that Smitherman had been sleeping. II:155-57.

Smitherman claims he was not asleep and was only taking a break after wrestling with the rock duster. He explained that he turned off the Lo-Trac because the supply hole had poor circulation and the heat and exhaust fumes would have been unpleasant. He denied taking off his headlamp or turning off his light and made no mention of being startled. I:167-68, 179-81.

The outline of the ensuing conversation is uncontested: Salyers asked Smitherman what he was doing, and Smitherman said he was taking a break. Salyers asked Smitherman why he hadn't finished more of his work and threatened to write him up (without specifying the charge), and Smitherman told Salyers to "do what he had to do." I:168; II:158. However, the accounts vary as to specifics and tone.

According to Salyers, when Smitherman said he was taking a break, Salyers told Smitherman he had already had his lunch break and asked why he hadn't gotten anything done. Smitherman responded, "I told you I didn't want to work for you." At that point, Salyers told Smitherman the transfer hadn't been his decision and he was going to write him up. II:155-58.

According to Smitherman, Salyers asked why he had not brought up all the supplies, and Smitherman said he was "not done." Salyers started yelling and threatened to write Smitherman up. Smitherman claims Salyers' surprise at his lack of progress was "nonsense" because Salyers had seen Smitherman working several times before lunch and had assigned him additional tasks such as loading the roof bolter. Because Smitherman believed Salyers was just "messing with [him]," he told Salyers to "do what you got to do." I:168-69, 282. Smitherman claims he tried to explain everything that happened during the shift, but Salyers talked over him. I:300.

Shortly after, Salyers informed his supervisor that Smitherman had been sleeping. The issue was passed on to mine manager Chris Thielen, who asked HR manager Sherry Sterling and general mine foreman Jason Lee to meet with the miners involved. I:35-36; II:162, 188, 271.

f. Subsequent Investigation and Adverse Action

Sterling testified that her normal disciplinary investigation process involves speaking with witnesses, getting a written statement if the issue is sufficiently complex, and making credibility determinations. She does not normally take notes or issue reports. Disciplinary decisions are made by the mine manager (Thielen) with Sterling's assistance. II:179-84, 224-25.

Sterling and Lee interviewed Smitherman and Salyers after the end of the March 1st owl shift. They met with Smitherman first. Sterling claims Smitherman denied falling asleep but conceded that he had not completed his assigned work. Smitherman gave Sterling the names of two miners he claimed had seen him working shortly before 6:00 a.m., expressed unhappiness with the safety culture at the mine, and (either during the interview or a later phone call) informed Sterling that people had been bolting without proper ventilation. I:184, 187-89, 192, 208, 212; II:188, 193. She did not speak with Smitherman again until the union meeting. II:209.

Sterling and Lee next met with Salyers, who told them he had found Smitherman "slumped over with his lights off . . . asleep, and that he didn't complete [his] assignments." II:189-90. They asked Salyers to give a written statement, which provided a similar description but did not use the word "sleeping." I:77. Sterling claims she asked for a written statement from Salyers (but not Smitherman) because Salyers' allegation was "detailed" while Smitherman's account was "simple"—he was not sleeping and did not complete his tasks. II:190, 224-25. Salyers had no further involvement other than a brief call with a union representative. I:98.

Smitherman was suspended pending investigation. II:191-92. Sterling and Thielen then conducted various interviews. They spoke with the two miners Smitherman claimed had seen him working: according to Sterling they said they had not seen Smitherman that shift, while according to Thielen they said they saw someone running the Lo-Trac and assumed it was Smitherman. Sterling and Thielen also asked Banks about the fly pad incident, and asked others on the section what they thought of Salyers. II:18-19, 26, 193-97, 201-04, 274-76, 280.

Sterling and Thielen also reviewed Smitherman's personnel file and discovered that he had been suspended in 2018 for sleeping (dozing near the end of an owl shift). I:122, 127-28; II:197. The resulting disciplinary agreement stated that "any further violations of work rules . . . will result in immediate discharge." Gov. Ex. 14.

On March 8, Smitherman was issued a 5-day suspension with intent to discharge. Gov. Ex. 4. The relevant paperwork lists a violation of Work Rule 1 (wasting time, loitering, neglect of duties) and a violation of Work Rule 5 (sleeping on the premises).

Thielen and Sterling claimed that the loafing violation was uncontested because Smitherman conceded he had not completed his assigned tasks. II: 221, 242, 281. Specifically, Smitherman was disciplined for not working while tasks remained undone, i.e., taking an "unauthorized break." I:192; II:230, 281. Sterling testified that miners should not take a break before completing their assignments. However, she was unable to point to a written policy on breaks and could not recall any prior discipline for taking a rest break. II:227-32. Smitherman

testified that he had never heard of an unauthorized break, never had to request permission for a break, or heard of any miner previously being disciplined for an unauthorized break. I:192-94.

Sterling and Thielen found the sleeping violation based on Salyers' account and Smitherman's previous suspension for sleeping. II:284-86. Sterling explained that she chose to believe Salyers' version of events because she found Smitherman to be untruthful, based on the two miners' failure to confirm that they had seen Smitherman working. II:243-44, 249-50.

Thielen, Sterling, and Smitherman met with union representatives on March 15, 2021, after which Thielen upheld his decision to discharge Smitherman. II:210-11.

B. Judge's Decision and Arguments on Appeal

The Judge analyzed this matter under the Commission's traditional *Pasula-Robinette* test, in which a miner establishes a prima facie case of discrimination by showing that he engaged in protected activity and was subject to an adverse action at least partially motivated by that protected activity, while operators may defend affirmatively by proving that the adverse action was also motivated by the miner's unprotected activity and would have been taken for the unprotected activity alone.[8] *E.g.*, *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919, 1923 (Aug. 2016). Neither party challenges the application of this test. Op. Br. at 21; Sec'y Br. at 3 n.1.

The Judge found that Smitherman engaged in protected activity primarily by raising the fly pad safety complaint during the February 28th owl shift. 44 FMSHRC at 97. Although the complaint was conveyed by other miners, the Judge found that Salyers made the "logical connection" to Smitherman given their history of safety disputes, the fact that Smitherman was working with the other roof bolters, and the coincidence in time between the complaint and Smitherman's transfer request. *Id.* at 73, 81, 98. The Judge also found a causal nexus between the complaint and Smitherman's termination, noting Salyers' knowledge of the complaint, the proximity in time between the "core events," and indicators of hostility. *Id.* at 98.

The Judge rejected Warrior Met's alleged business justification–that Smitherman was terminated for violating work rules—as pretextual. Procedurally, the Judge found the operator's investigation was cursory, superficial and biased. *Id.* at 99. Substantively, he found that the allegations were ambiguous and not supported by the record. *Id.* at 84, 87, 91, 93, 97.

The Judge found a section 105(c) violation, assessed a $20,000 civil penalty, and ordered backpay for the period between Smitherman's suspension and his temporary reinstatement and reimbursement of Smitherman's 401(k) early withdrawal fees. *Id.* at 100; April 25, 2022 Order.

---

[8] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). The Ninth Circuit has since rejected *Pasula-Robinette* in favor of a "but-for" standard. *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021). *Thomas* is not binding here, as Warrior Met's No. 4 Mine is not located in the Ninth Circuit. Nevertheless, the Judge noted that he would find discrimination under either standard. 44 FMSHRC at 97.

On appeal, Warrior Met challenges the Judge's findings of protected activity, causal nexus, and pretext.[9] The operator claims Smitherman never made a safety complaint to Salyers about the fly pads (either directly or indirectly), challenges the Judge's findings as to knowledge and animus, and claims that the disciplinary investigation had a reasonable basis for concluding that Smitherman was sleeping and loafing.

II.

Disposition

The Judge found that Smitherman engaged in protected activity, that the protected activity motivated his termination, and that Warrior Met's business justification was pretextual. A Judge's factual findings in the context of a discrimination proceeding are reviewed under the substantial evidence standard. *E.g.*, *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 822, 837 (May 1997). "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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). As discussed below, substantial evidence in the record supports his findings of protected activity, improper motivation and pretext. Accordingly, we affirm the Judge's conclusion that discrimination occurred.

A. Substantial evidence supports the Judge's finding of protected activity.

The Judge found that Smitherman engaged in protected activity by raising the February 28th fly pad complaint.[10] 44 FMSHRC at 97. As a preliminary matter, the ventilation issue reached Salyers indirectly, through Banks and Volts. I:150, 260-61. The Commission has found discrimination where an operator mistakenly believed a miner had engaged in protected activity. *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982). Applying the same

---

[9] Warrior Met also briefly challenges aspects of the Judge's order regarding remedies in a footnote of its petition for discretionary review, without substantive discussion in either the petition or subsequent briefing. PDR at 32 n.10. Each issue raised in a petition must be "supported by detailed citations to the record . . . and by statutes, regulations, or principal authorities relied upon." 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d). We find that Warrior Met's remedies arguments have been abandoned and decline to address them. *See RNS Services, Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996), *aff'd*, 115 F.3d 182 (3d Cir. 1997); *Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

[10] The Secretary claims the earlier dust bag dispute and Smitherman's transfer request independently constitute protected activity. Sec'y Resp. at 18-19. The Commission has held that protected activity is not limited to the four corners of the initial complaint, noting the Secretary's authority to address issues uncovered during the investigation. *Sec'y on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997). Here, however, the prior dispute and transfer request were not mentioned in either the initial complaint *or* MSHA's post-investigatory findings. Regardless, we affirm the Judge's finding that the "core charge" of the ventilation complaint is sufficient to establish protected activity. 44 FMSHRC at 97-98, 98 n.20.

framework, protected activity here turns on whether Salyers *believed* Smitherman was involved in raising the complaint.

The Judge discredited Salyers' claim that he was unaware of Smitherman's involvement in the ventilation complaint.[11] Noting the two men's history of friction and Salyer's awareness that Smitherman was on the section with Banks and Volts that shift, the Judge concluded that Salyers "made the logical connection between Smitherman and his fellow bolters' complaints." 44 FMSHRC at 73. In other words, the Judge inferred that Salyers believed Smitherman was involved in raising the ventilation issue because Salyers was aware Smitherman had both the propensity and clear opportunity to do so.

Elements of a prima facie case may be sustained by reasonable inferences drawn from the record. *Con-Ag Inc. v. Sec'y of Labor*, 897 F.3d 693, 700 (6th Cir. 2018). Such inferences are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

Here, the record clearly establishes the underlying evidentiary facts. Salyers conceded that he and Smitherman had at least one prior disagreement regarding dust bags, and the Judge reasonably credited Smitherman's testimony regarding three additional incidents between the two men.[12] I:42-48; 44 FMSHRC at 80. Salyers also testified that he assigned Smitherman to assist Banks and Volts as the third "bolt man" on the February 28th owl shift. II:133. In sum, the record clearly shows that three roof bolters were working together on a shift, two of them raised a safety issue with their supervisor, the third roof bolter had a history of raising safety issues, and the supervisor was aware of all this. Given these evidentiary facts, it was reasonable for the Judge to infer Salyers' belief in Smitherman's involvement.

The record establishes that Salyers believed Smitherman had the predisposition and clear opportunity to be involved in the February 28th fly pad complaint. Based on those underlying evidentiary facts, the Judge reasonably inferred Salyers' belief that Smitherman was involved. Accordingly, we affirm the finding of protected activity.

B. Substantial evidence supports a causal connection between the complaint and Smitherman's termination.

The Commission looks to four indicia to establish whether an adverse action was motivated by protected activity: (1) knowledge of the protected activity, (2) hostility toward the

[11] The Judge generally did not find Salyers credible, noting inconsistencies in his testimony and a "reluctance to answer straightforward questions." 44 FMSHRC at 75. Judges' credibility determinations are entitled to great weight and are only overturned for compelling reasons. *E.g.*, *KenAmerican Res., Inc.*, 42 FMSHRC 1, 3-6 (Jan. 2020) *aff'd*, 33 F.4th 884, 891-92 (6th Cir. 2022).

[12] The Judge noted that Smitherman described the incidents "in detail and with particularity." 44 FMSHRC at 80. While Smitherman did not provide dates or locations for these additional incidents, he did recall the relevant conversations in moderate detail. I:138-41.

protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *E.g.*, *Riordan*, 38 FMSHRC at 1919, 1923.

Here, the Judge found a causal connection between Smitherman's discharge and his fly pad complaint based on knowledge of the protected activity, coincidence in time, and hostility. 44 FMSHRC at 98. As discussed above, substantial evidence supports the Judge's conclusion that Salyers knew Smitherman was involved in the complaint. The coincidence in time—between one day and two weeks—is also well within the bounds of Commission precedent.[13] Finally, the record clearly indicates that at least some degree of safety-related hostility existed: Salyers and Smitherman's prior disagreement regarding dust bags is uncontested, and the Judge reasonably credited Smitherman's account of other safety-related disputes, including a ventilation-related confrontation that "got loud." *See supra* pp. 8, 8 n.12; I:138-40.

The Judge also points to two other potential indicators of hostility: Smitherman's reassignment from roof bolter to Lo-Trac operator, and the confrontation in the supply hole. 44 FMSHRC at 98; I:160-61, 168-69.

The record clearly establishes sufficient evidence to support findings on knowledge, coincidence in time, and a degree of hostility. The Commission has recognized that a coincidence in time between protected activity and an adverse action may alone be sufficient to establish discriminatory intent. *E.g.*, *Pendley v. Fed. Mine Safety & Health Review Comm'n*, 601 F.3d 417, 427-28 (6th Cir. 2010). Accordingly, substantial evidence supports the Judge's finding of improper motivation.

C. Substantial evidence supports the Judge's finding of pretext for the affirmative defense.

Warrior Met could have established an affirmative defense by showing that Smitherman's termination was also motivated by a belief that Smitherman had engaged in unprotected activity, and that he would have been terminated for that unprotected activity alone. *E.g.*, *Knox Creek*, 38 FMSHRC at 1919; *Pendley*, 601 F.3d at 426. Warrior Met claims Smitherman was legitimately discharged for violating work rules against sleeping and loafing. Smitherman's 2018 last-chance agreement clearly required his discharge in the event of a work rule violation. I:287; Gov. Ex. P14. Accordingly, the question is whether the alleged work rule violations credibly factored into Warrior Met's motivation, or whether the proffered business justification was pretextual. *See Chacon*, 3 FMSHRC at 2516.

[13] The fly pad complaint occurred on the February 28th owl shift, the reassignment and supply hole confrontation occurred during the March 1 owl shift, and the decision to terminate was made on March 8. The Commission regularly finds a coincidence in time when the protected activity and adverse action are separated by a longer period, even a few *months* apart. *E.g.*, *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000); *Riordan*, 38 FMSHRC at 1924.

Substantial evidence supports the Judge's finding of pretext.[14] Two elements of the record particularly support this finding. First, as the Judge notes, there is a lack of clarity regarding the loafing charge. 44 FMSHRC at 93, 99, 99 n.23. The Commission has found pretext where a rule is applied "in a manner deliberately calculated to render compliance difficult or impossible." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Here, Smitherman was allegedly discharged for taking an "unauthorized break" before completing his tasks. I:192; II:277, 281, 287. However, the record shows this concept of an "unauthorized break" was not clearly or consistently applied. Sterling testified that employees should seek permission before taking a "breather," but that restroom and water breaks were permitted. She could not explain why only some breaks were permitted, conceded there was no written policy on breaks, and could not recall discharging any miner for taking a break. II:227-32. Smitherman had never previously heard of an unauthorized break or heard of other miners being discharged for taking a break. I:192-94. Without a policy or history of enforcement, Smitherman had no guidance as to what constituted an "unauthorized break."

Second, a conflict between Sterling and Thielen's testimony seriously erodes the legitimacy of the sleeping charge. Sterling testified that she chose to believe Salyers' account (Smitherman was sleeping) over Smitherman's (he was not) because Smitherman was untruthful on a related matter: he claimed two other miners saw him working shortly before Salyers found him in the supply hole, but they denied it when interviewed by Sterling and Thielen. II:243-51. Effectively, Sterling's conclusion that Smitherman violated Work Rule 5 depends on the two miners' statement that they *did not see Smitherman that shift*, because it convinced her to credit Salyers' version of events.[15]

According to Thielen, however, the miners claimed they saw someone operating the Lo-Trac *and assumed it was Smitherman*. II:275-76, 280, 295. Based on Thielen's testimony, Sterling loses her justification for crediting Salyers' sleeping allegation. As HR manager and mine manager, Sterling and Thielen were the two people responsible for deciding whether Smitherman had violated work rules. Yet their testimony regarding a *key justification* for finding the violation of Work Rule 5 is incompatible. This inconsistency supports the finding of pretext.

---

[14] Warrior Met claims the Judge failed to analyze its affirmative defense. Op. Br. at 27-28. The Judge calls Warrior Met's argument a "rebuttal" but his analysis is consistent with an affirmative defense. *See* 44 FMSHRC at 99.

[15] The Judge appears to have fundamentally disagreed with Sterling's credibility-based approach, instead focusing on whether there was sufficient evidence to support Salyers' claims. II:216-17, 243-51; 44 FMSHRC at 91, 94-95. An investigation is not pretextual simply because a Judge disagrees with the investigatory approach. *See Chacon*, 3 FMSHRC at 2517. Insofar as the Judge found pretext because he would have required Salyers to prove his allegations rather than deciding the issue based on credibility, the Judge erred by imposing his own judgment as to the appropriate burden of proof. However, as discussed *supra*, there is reason to believe this *particular* credibility determination was pretextual.

The Judge took issue with other aspects of Warrior Met's investigatory process. While these additional factors do not necessarily establish pretext, neither do they contradict a finding of pretext.[16]

Ultimately, as discussed above, two key elements clearly establish pretext: the vagueness of the "unauthorized break" charge, and the inconsistencies in critical testimony regarding Sterling's justification for concluding that Smitherman was sleeping. The record contains sufficient evidence to support the Judge's finding of pretext. Accordingly, the Judge's rejection of Warrior Met's affirmative defense is affirmed.

III.

Conclusion

For the reasons stated above, substantial evidence supports the Judge's finding of discrimination. Accordingly, we affirm the Judge's decision.

Mary Lu Jordan, Chair

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

[16] The Judge took issue with the operator's investigation, finding it cursory and superficial. 44 FMSHRC at 99. Certainly, the quality of an operator's investigation may be considered in a pretext analysis. In this case, the record suggests that the operator followed its normal processes, and it is unclear the degree to which the cursory nature of *this* investigation supports a finding of pretext. *Cf. Con-Ag*, 897 F.3d at 704. The Judge also found evidence of bias in Sterling's search of Smitherman's personnel file. 44 FMSHRC at 91, 93, 99, 99 n.22. It is not improper for an investigator to check the file of someone under disciplinary investigation. Finally, in taking issue with Warrior Met's conclusion that Smitherman was loafing and/or sleeping, the Judge implied Warrior Met had the burden of showing that unprotected activity *in fact occurred*, and Warrior Met failed to do so. 44 FMSHRC at 84, 87. In the affirmative defense context, the Commission looks to the operator's actual belief at the time rather than the ultimate truth of the alleged unprotected activity. *Pendley*, 601 F.3d at 426; *Chacon*, 3 FMSHRC at 2517; *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). We find that the Judge's additional considerations constitute harmless error at worst. *See* Fed. R. Civ. P. 61. Ultimately, given the preponderance of evidence as discussed above, none of these issues call into question the decision in this case.

Distribution:

Brock Phillips
Maynard Cooper & Gale, P.C.
1901 Sixth Avenue North
1700 Regions / Harbert Plaza
Birmingham, AL 35203
bphillips@maynardcooper.com

T. Hill Pickens
United Mine Workers of America
18354 Quantico Gateway Drive, Suite 200
Triangle, VA 22172
hpickens@umwa.org

Juan Smitherman
924 Aster Place
Helena, AL 35022
juansmitherman@bellsouth.net

Susannah M. Maltz, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450
maltz.susannah.m@dol.gov

Emily Toler-Scott, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450
Scott.Emily.T@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave. N.W., Suite 520N
Washington, DC 20004-1710
wmoran@fmshrc.gov

Chief Administrative Law Judge Glynn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave. N.W., Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov