

No. 12-3918

Oral Argument Requested

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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CUMBERLAND RIVER COAL COMPANY,  
Petitioner,  
v.

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION and  
THE SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION  
(MSHA),  
Respondents,

CHARLES SCOTT HOWARD,  
Intervenor.

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ON PETITION FOR REVIEW OF A FINAL DECISION OF THE  
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

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## STATEMENT REQUESTING ORAL ARGUMENT

The Secretary of Labor (“Secretary”) requests oral argument in this case as it involves the important issue of whether a miner who was a leading safety activist in the mine was discriminatorily discharged for engaging in activity protected under the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801 *et seq.*

### JURISDICTIONAL STATEMENT

This Court has jurisdiction over proceedings for review of decisions of the Federal Mine Safety and Health Review Commission (“Commission”) under Section 106 of the Mine Act, 30 U.S.C. § 816. The Commission had jurisdiction over the matter under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d). The Secretary agrees with all aspects of the Petitioner’s jurisdictional statement.

### STATEMENT OF THE ISSUES

1. Whether the Commission administrative law judge properly concluded that Cumberland River Coal Company’s discharge of Charles Scott Howard was unlawfully motivated and violated Section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

2. Whether the Commission administrative law judge's order that Cumberland River Coal Company permanently reinstate Charles Scott Howard is consistent with the purposes of the Mine Act.

## STATEMENT OF THE CASE

### A. Nature of the Case and Statutory Framework

The Mine Act was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c).

Sections 101 and 103 of the Mine Act authorize the Secretary, acting through the Mine Safety and Health Administration ("MSHA"), to promulgate mandatory safety and health standards for the Nation's mines and to conduct regular inspections of those mines. 30 U.S.C. §§ 811 and 813. Section 104 of the Mine Act authorizes the Secretary to issue citations and orders for violations of the Mine Act or MSHA standards. 30 U.S.C. § 814.

Section 105(c) of the Mine Act prohibits mine operators from discriminating against miners for exercising any Mine Act right. 30 U.S.C. § 815(c). A miner who believes that he has been discriminated against may file a complaint with the Secretary. 30 U.S.C. § 815(c)(2).

Section 105(c)(2) of the Mine Act requires the Secretary to begin an investigation of a miner's discrimination complaint within 15 days. 30 U.S.C. § 815(c)(2). If the Secretary finds that the miner's complaint was "not frivolously brought," she must apply to the Commission for an order temporarily reinstating the miner, and the Commission, on an expedited basis, must order the miner temporarily reinstated pending final order on the complaint. *Id.* If, after an investigation, the Secretary determines that a violation has occurred, Section 105(c)(2) provides that she must file a complaint with the Commission. *Id.*

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204 (1994); *Pendley v. Fed. Mine Safety & Health Review Comm'n*, 601 F.3d 417, 421 (6th Cir. 2010); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). Commission administrative law judges ("ALJs") hear discrimination cases brought under Section 105(c), 30 U.S.C. § 815(c). *Pendley*, 601 F.3d at 421.

By filing a petition for discretionary review, a party may seek review of an adverse ALJ's decision before the Commission. 30 U.S.C. § 823(d). The ALJ's decision becomes the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that it be reviewed. *Id.* An adversely affected party may obtain review of a Commission decision in an appropriate Court of Appeals. 30 U.S.C. § 816(a), (b).

## B. Course of Proceedings and Disposition Below

In this discrimination case, brought by the Secretary on behalf of Charles Scott Howard (“Howard”), Commission ALJ Margaret Miller found that Cumberland River Coal Company (“CRCC”) discriminatorily discharged Howard in violation of Section 105(c) of the Mine Act, 30 U.S.C. § 815(c). *Sec’y of Labor ex rel. Howard v. Cumberland River Coal Co.*, 2012 WL 2499038 (June 15, 2012) (ALJ); Dec. A1, A11. Howard had been employed by CRCC from March 2005 until his discharge on May 16, 2011. Dec. A1. Howard filed a complaint of discrimination with the Secretary alleging that he was discharged for engaging in activity protected under Section 105(c) of the Mine Act, 30 U.S.C. § 815(c). Dec. A2.

On May 27, 2011, the Secretary filed an application for temporary reinstatement seeking Howard’s reinstatement pending final disposition of his discrimination complaint and, on June 15, 2011, Commission Chief ALJ Robert Lesnick ordered that CRCC temporarily reinstate Howard.<sup>1</sup> *Sec’y of Labor ex rel. Howard v. Cumberland River Coal Co.*, 33 FMSHRC 1547 (June 2011) (ALJ).

On August 8, 2011, the Secretary filed a discrimination complaint on Howard's behalf. Compl. A649. On March 14-15, 2012, a hearing was held before ALJ Miller. Tr. A70. On June 15, 2012, ALJ Miller issued her decision, finding that Howard was discriminatorily discharged in violation of Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), assessing a civil penalty, and ordering that CRCC permanently reinstate Howard. Dec. A11.

On July 13, 2012, CRCC filed a petition for discretionary review before the Commission. Pet. A13. On July 25, 2012, the Commission denied the petition, and the ALJ's decision thereby became a final decision of the Commission. Not. A41.

#### STATEMENT OF FACTS

##### A. Howard's Protected Activities

Howard was a miner employed by CRCC, which operates the Band Mill No. 2 underground coal mine in Letcher County, Kentucky.<sup>2</sup> Tr. 167-68, A240-41. Beginning in 2007, Howard engaged in numerous activities protected under the Mine Act and filed complaints against CRCC alleging discriminatory actions. Tr. 8-10, A81-83; HX-3, A721; GX-110, A842 (listing Howard's protected activities and CRCC's discriminatory actions). For example, in March 2007, Howard testified before Congress about safety issues. HX-3, A721; GX-110, A842. In April 2007, Howard recorded a video of leaking mine seals and then showed the video and testified at an MSHA public hearing regarding an emergency temporary standard on mine seals. *Id.* After being reprimanded by CRCC for recording the video, Howard filed his first discrimination complaint against CRCC. *Id.*; *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983, 2010 WL 3616453 (Aug. 2010) (ALJ) (finding that CRCC discriminated against Howard for engaging in activities protected under the Mine Act).

<sup>1</sup> Pursuant to an agreement, Howard was economically reinstated. Tr. 4, A77.

<sup>2</sup> In accordance with the ALJ's order that CRCC permanently reinstate Howard, he has returned to work at CRCC.

<sup>3</sup> CRCC self-insures for its workers' compensation, which is handled through Underwriter's. Tr. 59, A132.

<sup>4</sup> On September 29, 2010, Howard had requested that his primary care physician be April Hall, M.D. GX-12, A780. On September 30, 2010, Riddle denied the request and required that Howard select a doctor on “our panel.” GX-13, A782; GX-14, A782; *but see* GX-112, A856 (September 30, 2010 email from Carter to Lee (copy to Riddle) stating “Dr. April Hall is listed in the panel of physicians”). On October 7, 2010, Carter sent an e-mail to Hartling regarding Howard’s request for Dr. Hall. GX-15, A783; GX-16, A784. On October 8, 2010, Hartling replied to Carter (copy to Lee, McReynolds, Sisson, and Laskowitz) stating, “We should not allow him to use a physician outside the panel. This is getting ridiculous.” GX-17, A784; HX-1 59-65, A668-70.



<sup>5</sup> Kafoury participated in only one meeting by telephone. Tr. 469, 484, A544, A559.

<sup>6</sup> *See also* GX-120, A875; Tr. 139-40, A212-13 (on August 25, 2010, Lee sent an e-mail to Kafoury telling him to check out a website regarding Howard and his video of leaking mine seals, and Kafoury forwarded it to other Arch personnel).

<sup>7</sup> Sherry Brashear was a workers' compensation attorney who was not representing Howard in a workers' compensation case. Tr. 26-27, A99-100.

8 Previously, on December 13-14, 2004, Dr. Granacher had evaluated Howard for an unrelated incident at a different mine. GX-1, A727. On January 11, 2005, Dr. Granacher reported that “Howard ha[d] a 0% neuropsychiatric impairment due to an alleged mine injury September 17, 2002.” *Id.* at A749. Dr. Granacher concluded that “Howard ha[d] the mental capacity to engage in any work he is trained, educated, or experienced to perform.” *Id.*

9 In comparing Howard’s test scores from 2004 to his test scores from 2011, Dr. Granacher stated, “There is minimal difference between the score sets for 2004 and 2011 following his obvious traumatic brain injury July 26, 2010. Thus, the outcome from his traumatic brain injury is mild at worse.” GX-55, A634.

<sup>10</sup> CRCC had accommodated other miners who had restrictions placed upon them by doctors. Tr. 64-65, 136, 405-06, A137-38, A209, A480-81.

<sup>11</sup> The ALJ noted that, at the December 2010 quarterly claims meeting, the participants decided that Dr. Granacher, who was not a member of the physician panel that sees CRCC patients, should evaluate Howard. Dec. A7; *see* HX-1 87, A675; Tr. 87, 179-80, 333, A160, A252-53, A408. Despite CRCC's previous insistence that Howard use only physicians on the panel, Davidson suggested sending Howard to Dr. Granacher. HX-1 88, 91-93, A675, A676-77. No physician referred Howard to Dr. Granacher, and the record does not explain why Dr. Knox or another panel doctor was not chosen to perform additional neuropsychological testing and evaluation of Howard.

<sup>12</sup> Dr. Granacher has been around coal miners and mining most of his adult life, and is familiar with mining equipment and machinery. Tr. 233-34, 237-38, A307-08, A311-12. Throughout the years of his practice, coal miners are the occupational group he has most frequently examined. Tr. 235, 241, A309, A315. When Dr. Granacher issued his March 7, 2011, report, he knew that underground coal mining involves moving machinery and that miners frequently work in confined spaces. Tr. 239, A313.

<sup>13</sup> The Secretary acknowledges that the ALJ may have erred by stating that the beltline is not underground. Dec. A8 (stating, “Howard works on the belt line, which is not underground and not at a face.”). In reality, the belt corridor has both underground and aboveground areas. *See* Tr. 83-84, A156-57. The Secretary submits that any error is harmless, however, given the ALJ’s understanding that “Howard was classified as face worker, but he did not work at the face or in an area producing coal.” Dec. A1 n.1.

Over the years, Howard continued to raise safety issues with his supervisors, report unsafe conditions to MSHA, and file grievances naming specific managers for failing to protect miners. HX-3, A721; GX-110, A842. Howard filed three additional discrimination complaints (not including the one in this case), and filed civil lawsuits based on CRCC's allegedly discriminatory actions. *Id.*; GX-84, A827.

#### B. Howard's Injury and Subsequent Events

On July 26, 2010, Howard suffered a head injury while cleaning the beltline in the mine's belt corridor, which transports coal to the preparation plant. Tr. 55-56, A128-29. Howard's job was to operate either a low track vehicle to clean up gob and trash or a scoop vehicle to remove materials from the mine. Tr. 56, 256-57, A129, A330-31. As a result of Howard's injury, he was placed on leave of absence and received medical treatment and benefits through the Kentucky workers' compensation system. Tr. 134, A207.

During this time, several entities and individuals were involved in Howard's case. At CRCC, Valerie Lee was the human resources manager (Tr. 97, A170), Jack McCarty was a human resources employee (Tr. 69, A142), Gaither Frazier was the general manager (Tr. 54, A127), and Willie Gilliam was the production foreman at the belt corridor (Tr. 396, A471). Lee managed workers' compensation claims and provided oversight to a third-party administrator, Underwriter's Safety & Claims ("Underwriter's") to ensure that Underwriter's correctly administered the claims.<sup>3</sup> Tr. 97-98, A170-71. Frazier had the ultimate responsibility for safety, production, and costs at CRCC. Tr. 78-79, A151-52. At the time of Howard's injury, Gilliam oversaw Howard's work. Tr. 396, A471.

At Underwriter's, Sue McReynolds and Brenda Riddle were claims adjusters (Tr. 118, 326, A191, A401) and Gregg Sisson was a supervisor (Tr. 342, A417). Underwriter's employed Bluegrass Health Network, Inc. ("BHN") to do the hands-on administration of its claims for CRCC. Tr. 59, 478, A132, A553. At BHN, Penny Carter and Carolyn Rendon were nurse case managers who coordinated medical care for injured employees and requested medical information from doctors to provide to claims adjusters and employers. Tr. 328, 361, 374, 429, 431-33, 462, A403, A436, A449, A504, A506-08, A537.

CRCC is owned by Arch Coal, Inc. (“Arch”). Pet’r’s Br. (corporate disclosure statement); Tr. 58-59, A131-32. Arch’s corporate office is located in St. Louis, Missouri. Tr. 469, A544; *see* Tr. 69, 341, 360, A142, A416, A435. At Arch, Denise Hartling was the director of risk management (HX-1 10-11, A656; Tr. 73, 158, 160, A146, A231, A233), Mike Kafoury was in-house counsel (Tr. 69, 100, 140, 360, A142, A173, A213, A435), and John Lorson was vice president and chief accounting officer (HX-2 6, A705; Tr. 342, A417). Denise Davidson was a workers’ compensation attorney (Tr. 73, 348-49, 363, 466, A146, A423-24, A438, A541), and Mike Laskowitz was a workers’ compensation consultant (HX-2 23-24, A709; Tr. 342, A417). Hartling performed an oversight role with regard to workers’ compensation claims. Tr. 21-22, A94-95.

After Howard was released from the hospital, he was required to use doctors within the BHN managed care network for treatment.<sup>4</sup> Tr. 331-32, 449, A406-07, A524. Howard’s primary care physician was Van S. Breeding, M.D. Tr. 333, A408; GX-22, A785. In addition, Howard was examined and evaluated by others on the panel of the BHN managed care network, including Chandrashekar Krishnaswamy, M.D., a neurologist; Tamara Knox, Ph.D., a neuropsychologist; Syamala H. K. Reddy, M.D., an ophthalmologist; J. Travis Burt, M.D., a neurosurgeon; Larry P. Hartman, M.D., a neurosurgeon; and Sachin Kedar, M.D., a neuroophthalmologist. GX-10, A776; GX-19, A589; GX-28, A603; GX-29, A796; GX-31, A803; GX-36, A806; GX-54, A812; GX-70, A821; GX-72, A822; GX-88, A641; GX-89, A646; GX-99, A837; GX-118, A866. Dr. Krishnaswamy had referred Howard to Drs. Knox and Reddy. Tr. 437-39, A512-14. Dr. Reddy had referred Howard to Dr. Kedar. Tr. 309, 441, A383, A516. Dr. Breeding had referred Howard to Dr. Hartman. GX-88, A641; GX-99, A837; Tr. 463, A538. Drs. Breeding, Burt, Hartman, and Kedar all released Howard to return to work at CRCC without any restrictions. Tr. 197, 338-39, 355, 463-64, A270, A413-14, A430, A538-39.

Dr. Knox examined Howard in October 2010, November 2010, December 2010, and January 2011. GX-19, A589; GX-36, A806. Dr. Knox administered a neuropsychological screening test, the Neurobehavioral Cognitive Status Examination, and recommended that “[a] complete neuropsychological battery would be required to precisely define any specific loss of functioning or neuropsychological impairment.” GX-19, A596. Dr. Knox’s last clinic note in the record indicates that her plan was to follow up with Howard in approximately one month. GX-36, A807.

Howard's workers' compensation benefits were discussed at CRCC's quarterly claims meetings in August 2010, December 2010, and March 2011. Tr. 39, 67, A112, A140. Personnel at CRCC (Lee, Frazier, and McCarty), Arch (Hartling, Lorson, and Kafoury), Underwriter's (McReynolds and Sisson), and BHN (Carter), as well as Davidson and Laskowitz, participated in the meetings.<sup>5</sup> HX-1 39-40, 53, A663, A667; HX-2 8, 11, 24-25, 27-28, A705, A706, A709-10; Tr. 60, 71-72, 73, 156, 329, 342, 444, 466, A133, A144-46, A229, A404, A417, A519, A541. Everyone at the meetings knew that Howard had pending litigation against CRCC.<sup>6</sup> HX-1 24-34, 44, A659-62, A664; HX-2 29, A711; Tr. 54-55, 75, 99-100, 139-41, 154, 169-70, A127-28, A148, A172-73, A212-14, A227, A242-43. At the meetings, the participants reviewed open workers' compensation claims to determine status, issues, and medical treatment, and to ensure that there was enough reserve money set aside to cover expenses or to decide whether cases would be settled. HX-1 35, A662; HX-2 25, A710; Tr. 72, A145. The stated goal of CRCC's and Arch's workers' compensation program was to get employees back to work. HX-1 52, A666; Tr. 57, 76, 154, 330, 434, A130, A149, A227, A405, A509.

On December 5, 2010, Hartling sent an e-mail to Carter, Lee, and McReynolds (copy to Sisson, Lorson, and Laskowitz) stating, in part, “Sue, have you sent the [Howard] file to Denise Davidson (*this will be her biggest challenge yet*).” GX-32, A804; GX-33, A805 (emphasis added). Shortly thereafter, on December 7, 2010, at CRCC’s quarterly claims meeting, Davidson suggested sending Howard for an independent medical evaluation (“IME”) by Robert P. Granacher, Jr., M.D., a neuropsychiatrist who was outside the panel of the BHN managed care network, for neuropsychological testing. Tr. 206, 446-48, 450, A280, A521-23, A525; GX-55, A609. Neuropsychological testing and evaluation can be performed by either a neuropsychologist or a neuropsychiatrist. Tr. 443-44, A518-19.

On December 17, 2010, Hartling sent an e-mail to Davidson (copy to Lee, McReynolds, Sisson, Laskowitz, and Lorson) stating, in part, with regard to Dr. Granacher’s evaluation of Howard, “*I am wondering whether we stand a chance of getting Granacher to give him an impairment rating. . . . The hope is that we will get restrictions as we need to settle with a resignation. I think that both Sherry and Howard feel that they won’t get any restrictions and he will be back in the driver[’]s seat (not what we want).*” GX-42, A811 (emphasis added).<sup>7</sup> Hartling’s statement “back in the driver[’]s seat” meant that Howard would be back at work. HX-1 121-22, A684; HX-2 48-50, A715-16. Both CRCC and Arch wanted a resignation from Howard. HX-1 78-81, A673-74; HX-2 58-59, A718; Tr. 279-81, 298-99, 352, A353-55, A372-73, A427.

On February 1, 2011, Carter sent a letter to Dr. Granacher asking:

- 1) Is there evidence of a traumatic brain injury as a result of the work injury of 7-26-10?
- 2) Diagnosis as it relates to the work injury of 7-26-10
- 3) Is any treatment recommended for any work related diagnosis?
- 4) Prognosis
- 5) Has Mr. Howard achieved maximum medical improvement from your standpoint?
- 6) Is there any permanent impairment as it relates to the work injury of 7-26-10? Please provide the impairment rating.

GX-55, A609. On February 14-15, 2011, Dr. Granacher evaluated Howard.<sup>8</sup> *Id.* at A610. On March 7, 2011, Dr. Granacher reported that “Howard ha[d] a 7% neuropsychiatric impairment due to brain trauma July 26, 2010.” *Id.* at A635. Dr. Granacher concluded that “Howard ha[d] the mental capacity to engage in any work he is trained, educated, or experienced to perform,” but that “Howard [did] require restrictions upon job performance not to work at height.” *Id.* In Dr. Granacher’s opinion, Howard had a mild brain injury with a permanent 7% whole body impairment, and Howard’s current medication should prove sufficient for his treatment. *Id.* Dr. Granacher opined that Howard had achieved maximum medical improvement (“MMI”) with a reasonably good prognosis.<sup>9</sup> *Id.*

After meeting with Dr. Granacher on March 7, 2011, Carter sent an e-mail to Lee, McReynolds, Hartling, and Davidson summarizing Dr. Granacher’s report and stating, “I questioned whether he [Howard] could perform his regular work duties and the physician advised that with any brain injury, it is recommended that no work is done at heights. He advised that if we wanted documentation about his specific job, we can send a note to him and he would provide that.” GX-62, A816; GX-66, A818. Hartling responded, “We are anxious to get a copy of the report.

. . . Is it typical to do the ‘job analysis’ after doctor writes his report rather than provide this before?” *Id.* Carter replied, “It can be done either way. If he had not had a brain injury and had no restrictions, this would not be an issue. Since he does, even though mild, *if the height restriction alone does not exclude him from returning to work, we may need to clarify further with the job analysis.* Most of the IMEs that we do do not have a job analysis available and is usually not an issue. *This is certainly not one of our ‘usual’ cases.*” *Id.* (emphases added). Davidson also requested a copy of Dr. Granacher’s report and stated “*If these restrictions are permanent then he will not be able to return to Cumberland River.*” GX-114, A858 (emphasis added).

Frazier discussed Dr. Granacher’s height restriction with Lee and what it meant -- i.e., whether it was a height restriction in an enclosed area that Howard could not work in or whether Howard could not be at an elevated height -- and Frazier and Lee felt that, either way, if they knew what “height” meant, CRCC could accommodate Howard so he could return to work.<sup>10</sup> Tr. 64-66, 94, 145-46, A137-39, A167, A218-19. Frazier explained, “[I]f we knew that he couldn’t be at elevated heights, there were areas along the belt corridor that we could have worked him where he would not have been required to be at elevated heights, and, if it was enclosed heights, there were areas that we could have worked him where there wouldn’t have been enclosed heights.” Tr. 76, A149.

Although Frazier told Lee that CRCC could accommodate Howard, Lee did not make any effort to get Howard back on the job. Tr. 161, A234. Lee did not tell Carter or McReynolds that Frazier had said CRCC could accommodate Howard with the height restriction. Tr. 187-88, 362, A260-61, A437; *see* Tr. 146, 152, 181, 181-82, 481, A219, A225, A254-55, A556. Lee did not tell the safety department, which determines whether an accommodation can be made, that Howard could not work at height. Tr. 152, A225. Lee did not tell Howard that CRCC might be able to accommodate him. Tr. 136, A209.

On March 29, 2011, Carter sent an e-mail to Lee and McReynolds (copy to Hartling and Davidson) stating that she had sent a letter to Dr. Kedar, along with a job description and the neuropsychological test results from Dr. Granacher, asking whether “Howard [could] return to work at this job or whether there are restrictions.” GX-69, A820. On April 12, 2011, Carter sent an e-mail to Hartling (copy to Kafoury, Lee, McReynolds, and Davidson) stating that Dr. Kedar responded that Howard could return to work at the job as outlined on the job description without any restrictions, and asking “*Please let me know if you need me to forward the job description to Dr. Granacher for review or if we need to clarify the height issue restriction or how you would like to proceed.*” GX-70, A821 (emphasis added). Hartling forwarded the e-mail to Laskowitz. GX-72, A822. On April 13, 2011, Kafoury sent an e-mail to Hartling and Lee stating, “Per my discussion with each of you, we should pursue clarification from Dr. Granacher about the height restriction and what that means for the part of Howard’s job where he is on the elevated belt line. We need to know what he can and cannot do so that we can determine whether he can perform the job.” GX-71, A821.

On April 15, 2011, Carter sent an e-mail to Hartling, Kafoury, Lee, McReynolds, and Davidson stating, “Sue and I have been discussing this case this morning. *It is our understanding that I should send the job description (which outlines the height requirements for his job) to Dr. Granacher for his review to determine if he feels Mr. Howard can perform this job. I wanted to confirm this with you before I sent the letter & job description out.*” GX-78, A823 (emphasis added). Kafoury responded, “It is ok with me.” *Id.* Lee responded “Yes, that is correct. Please send Granacher the job description so we can know for sure whether he is released to full duty.” GX-80, A826.

On April 18, 2011, Carter sent a letter to Dr. Granacher asking:

1) Do you feel Mr. Howard can return to work at the job as outlined on the attached job description?

Yes \_\_\_ No \_\_\_

If no, please advise what restrictions he would need:

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Restrictions are: Permanent \_\_\_ or Temporary \_\_\_

GX-79, A824. Attached to the letter was a job description identifying Howard's job title as "Underground Face" located in the belt corridor. *Id.* at A825. Among other things, the job description described equipment climbed as "Beltline Catwalk to 20 ft, beltline underground to 5 ft." *Id.* The job description stated that work at heights of 5 to 20 feet is required once per week, described work performed at height as "cleans catwalk of coal debris," and indicated that, while working at height, the worker stands on "catwalk when cleaning walkway of coal debris." *Id.* "Underground Face" is a job classification and Lee, after consulting with Gilliam, wrote the job description to describe a generic underground face worker in the belt corridor. Tr. 111-14, 142-45, 171, 406-10, 423-25, A184-87, A215-18, A244, A481-85, A498-500. Lee did not tell Gilliam why she needed the information, and Gilliam never told Lee that Howard worked at height. Tr. 143-45, 148-49, 423-25, A216-18, A221-22, A498-500. Neither Gilliam nor Frazier remembered ever seeing Howard working on the beltline catwalk. Tr. 92, 427, A165, A502.

On May 11, 2011, Dr. Hartman released Howard to return to full duty at work with no restrictions. GX-88, A641; GX-99, A837. Howard's attorney sent an e-mail to CRCC's attorney notifying CRCC that Howard had been released by Dr. Hartman to return to work and requesting that Howard be scheduled for annual retraining as soon as possible. GX-89, A646. On May 12, 2011, Howard's attorney sent a follow-up e-mail explaining that Howard had been sent to Dr. Hartman by the workers' compensation system and that, since Dr. Hartman had released Howard to return to work, he would be cut off workers' compensation benefits. GX-96, A835. Howard's attorney requested that the annual retraining be quickly provided and that Howard be placed back at work as soon as possible. *Id.*

On May 12, 2011, Kafoury sent an e-mail to Lee and Hartling (copy to Frazier and McCarty) stating, “We should discuss how to handle Howard’s call today.” GX-90, A833; GX-116, A859. Carter sent e-mails to Hartling and Kafoury (copy to Frazier, McCarty, Lee, Sisson, McReynolds, and Davidson) stating, “I had Carolyn (our Lexington nurse) check back with Dr. Granacher’s office today. . . . [S]he had to leave her another message explaining how important it is to get a response back to my letter regarding the job description. . . . Sue and I called and left a message for Denise Davidson regarding this. Sue has asked that Denise call Dr. Granacher’s office also tomorrow morning. Hopefully with all of us calling, we can get this response.” GX-116, A859. Meanwhile, Howard was scheduled for annual retraining the following week. Tr. 69-70, A142-43.

On May 16, 2011, Dr. Granacher responded to Carter’s April 18 letter by selecting “No,” writing “He is restricted from underground coal mining and restricted from exposure to moving machinery,” and selecting “Permanent.” GX-79, A824. Upon receipt of Dr. Granacher’s response, Carter sent an e-mail to Lee, McReynolds, Davidson, Hartling, Kafoury, and McCarty stating, “Just got the documentation in from Dr. Granacher. He does not feel Mr. Howard can return to his job. Please see attached. Thanks!!” GX-106, A841. McReynolds promptly removed Howard from annual retraining and terminated his workers’ compensation benefits. Tr. 358, A433. Lee sent an e-mail to McCarty directing him to terminate Howard in the system in the morning. GX-113, A857.

On May 23, 2011, CRCC sent a letter to Howard stating, “Dr. Granacher, one of your treating physicians for your 07/26/2010 injury, notified Bluegrass Health Network, the workers’ compensation agent for Cumberland River Coal Company (CRCC) that you would not be able to return to work at your underground face position due to permanent work restrictions.” GX-108, A648. The letter continued, “[W]e do not have any jobs open at this time for which you are qualified that would not require you to be around operating equipment. In short, we do not know of any available job you could do, with or without accommodation given the restrictions identified by your treating physician.” *Id.* In reality, Dr. Granacher was not Howard’s treating physician because he was employed by CRCC to do an IME. Tr. 195-96, 236-37, 465, A268-69, A310-11, A540.

### C. The ALJ's Decision

The ALJ accepted the parties' stipulations that Howard had engaged in protected activities beginning in April 2007 and continuing until May 2011, and that Howard was the subject of an adverse action by CRCC when he was discharged in May 2011. Dec. A2-4; Tr. 7-18, A80-91. The ALJ found that Howard had engaged in numerous activities protected by Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and that everyone involved in this case, including CRCC, was aware of Howard's protected activities. Dec. A3-4. The ALJ also found that CRCC's refusal to allow Howard to return to work, after being released to return to work by his treating physicians, was an adverse action. Dec. A4. The ALJ found that, instead, CRCC sought the second opinion of Dr. Granacher, who, after changing his mind from his earlier diagnosis, determined that Howard could not return to work. Dec. A4.

Additionally, the ALJ found that Howard had shown a causal connection between the adverse action and the protected activities, demonstrating a prima facie case of discrimination. Dec. A4-9. The ALJ found that (1) Howard's protected activities were extensive and known to everyone involved with Howard's work-related injury and termination, (2) Howard was a hard worker and the only difficulty CRCC had with Howard was the fact that he continued to make safety complaints and contact MSHA, and (3) there was open hostility toward Howard, who was treated differently than other miners who had suffered work-related injuries. Dec. A4. The ALJ found that there was no credible evidence to rebut the prima facie case. Dec. A9.

Finally, the ALJ examined CRCC's affirmative defense that it discharged Howard for a legitimate business reason, i.e., Dr. Granacher's second opinion that Howard could not return to work. Dec. A9-11. The ALJ found that CRCC had "worked diligently to end Howard's employment" and "sought out and received the opinion they were seeking and immediately upon receipt of that single opinion, terminated Howard's employment." Dec. A10. In addition, the ALJ found that Dr. Granacher did not adequately explain why his two opinions were so drastically different, and that CRCC was obligated to engage in review and consideration before relying upon Dr. Granacher's changed opinion. Dec. A10-11. Accordingly, the ALJ found that Howard's discharge was not justified. Dec. A11.

### SUMMARY OF THE ARGUMENT

The ALJ properly concluded that Howard's discharge was unlawfully motivated and violated Section 105(c) of the Mine Act, 30 U.S.C. § 815(c). The ALJ analyzed Howard's discharge in accordance with the proper framework for Section 105(c) claims. Substantial evidence supports the ALJ's findings that CRCC's discharge of Howard was motivated by Howard's protected activities, and that there was no credible evidence to rebut the prima facie case. In addition, substantial evidence supports the ALJ's finding that CRCC's affirmative defense that it discharged Howard for a legitimate business reason was without merit. In essence, the evidence establishes that CRCC refused to let Howard return to work after Dr. Granacher released Howard to return to work with only a "not to work at height" restriction, and even after all of Howard's treating physicians released him to return to work without restrictions, and instead resorted to a coordinated effort to reformulate the situation until it got what it wanted -- an opinion from Dr. Granacher that Howard could not return to work. Finally, the ALJ's order that CRCC permanently reinstate Howard is consistent with the purposes of the Mine Act.

## ARGUMENT

### I.

#### APPLICABLE LEGAL PRINCIPLES AND STANDARD OF REVIEW

The Court's review of the Commission's decision is governed by the Mine Act and general administrative law principles. *Pendley*, 601 F.3d at 422. The Court applies a deferential standard of review to the Commission's factual determinations because the Mine Act requires that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." *Id.* (quoting 30 U.S.C. § 816(a)(1)). "Substantial evidence is determined by evaluating whether there is such relevant evidence as a reasonable mind might accept as adequate to support the [Commission's] conclusion." *Id.* at 422-23 (citing *National Cement Co. v. Fed. Mine Safety & Health Review Comm'n*, 27 F.3d 526, 530 (11th Cir. 1994) (quoting *Chaney Creek Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 866 F.2d 1424, 1431 (D.C. Cir. 1989) (quotation marks omitted)). Generally, the Court will not disturb credibility determinations by an ALJ who observed the witnesses' demeanor. *See Exum v. N.L.R.B.*, 546 F.3d 719, 724 (6th Cir. 2008). Moreover, an ALJ's reasonable inferences from the facts cannot be overturned on appellate review even though a different conclusion may have been reached through de novo review. *See Frenchtown Acquisition Co. v. N.L.R.B.*, 683 F.3d 298, 304 (6th Cir. 2012); *Exum*, 546 F.3d at 724. The Court reviews the Commission's application of law de novo. *Pendley*, 601 F.3d at 423 (citing *Olson v. Fed. Mine Safety & Health Review Comm'n*, 381 F.3d 1007, 1011 (10th Cir. 2004) (citations omitted); *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100 (D.C. Cir. 1998) (citations omitted); *Collins v. Fed. Mine Safety & Health Review Comm'n*, 42 F.3d 1388, 1994 WL 683938 at \*3 (6th Cir. 1994) (unpublished table decision)).

## II.

### THE COMMISSION ALJ PROPERLY CONCLUDED THAT HOWARD'S DISCHARGE WAS UNLAWFULLY MOTIVATED AND VIOLATED SECTION 105(c)

#### A. The ALJ Analyzed Howard's Discharge in Accordance with the *Pasula-Robinette* Framework

Discrimination cases brought under Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), are analyzed in accordance with the *Pasula-Robinette* framework. *Pendley*, 601 F.3d at 423 (citing *Collins*, 42 F.3d 1388, 1994 WL 683938 (citing *Sec'y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (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 (Apr. 1981)); *see also Eastern Assoc. Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 813 F.2d 639, 642 (4th Cir. 1987) (recognizing *Pasula-Robinette* as the proper framework for Section 105(c) claims)). Under *Pasula-Robinette*, a miner establishes a prima facie case of discrimination by showing, first, that he engaged in protected activity and, second, that he suffered adverse action that was motivated in any part by that protected activity. *Pendley*, 601 F.3d at 423 (citing *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *accord Collins*, 42 F.2d 1388, 1994 WL 683938 at \*2). “The mine 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.” *Pendley*, 601 F.3d at 423 (quoting *Nevada Goldfields*, 20 FMSHRC at 328 (citing *Robinette*, 3 FMSHRC at 818 n.20)). The mine operator may also defend affirmatively by showing that, although it “was motivated by the miner’s protected activity, [it] would have taken the adverse action for the unprotected activity alone.” *Pendley*, 601 F.3d at 423 (citations omitted). This Court has recognized that, in analyzing a mine operator’s asserted justification for taking adverse action under *Pasula-Robinette*, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator’s actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. *Pendley*, 601 F.3d at 425 (citing *Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983)). In so analyzing, the Commission may not

impose its own business judgment as to a mine operator's actions. *Pendley*, 601 F.3d at 425.

Here, the ALJ analyzed Howard's discharge in accordance with *Pasula-Robinette*. After finding a prima facie case of discrimination, the ALJ considered CRCC's evidence to rebut the prima facie case, as well as its affirmative defense. Dec. A4-11. The ALJ recognized several indicia of legitimate, non-discriminatory motivation for an employer's adverse action, including evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline, and personnel rules or practices forbidding the conduct in question. Dec. A9 (citing *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC 2786). The ALJ also recognized that an affirmative defense should not be "examined superficially or be approved automatically once offered." Dec. A9 (quoting *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)). In reviewing affirmative defenses, however, an ALJ must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Dec. A9 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982)). "[P]retext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." Dec. A9 (quoting *Sec'y of Labor ex rel. Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990)). Ultimately, the ALJ concluded that there was no credible evidence to rebut the prima facie case, and that CRCC's affirmative defense was without merit. Dec. A9, A11.

## B. Substantial Evidence Supports the ALJ's Findings That CRCC's Discharge of Howard Was Motivated by His Protected Activities, and That There Was No Credible Evidence to Rebut the Prima Facie Case

Contrary to CRCC's argument that its decision to discharge Howard was based solely on Dr. Granacher's second opinion (Pet'r's Br. 11-18), substantial evidence supports the ALJ's findings that CRCC's discharge of Howard was motivated by Howard's protected activities, and that there was no credible evidence to rebut the prima facie case. Dec. A3-9. CRCC, understandably eager to shift the focus from its conduct to Dr. Granacher's second opinion, attempts throughout its brief to create the impression that the ALJ based her finding of discriminatory motivation on an unjustified rejection of Dr. Granacher's opinion. The ALJ, however, did not base her finding of discriminatory motivation on what she thought of Dr. Granacher's opinion; she based her finding of discriminatory motivation on what CRCC did to obtain that opinion. Dec. A4. The ALJ found that CRCC, unwilling to let Howard return to work after Dr. Granacher himself indicated that Howard could return as long as he did not work "at height," and unwilling to let Howard return to work even after all of his treating physicians indicated that he could return without restrictions, engaged in an ongoing attempt to reformulate the situation until it finally obtained what it wanted -- an opinion from Dr. Granacher stating that Howard could not return to work. Dec. A4.

The ALJ found that, well before Dr. Granacher's second opinion, Howard was treated disparately, stating, "There can be no doubt that the mine sought to prevent Howard's return to work under any circumstance, and the evidence demonstrates that the only reason for such action was his protected activity." Dec. A5. As already detailed, Howard engaged in numerous protected safety activities -- including videotaping leaking mine seals, testifying at Congressional and MSHA hearings, and filing grievances, safety complaints, and discrimination complaints -- and CRCC was well aware of those activities. Indeed, CRCC makes no attempt to challenge the ALJ's finding of protected activity and knowledge of that activity.

## 1. CRCC Did Not Want Howard to Return to Work

The ALJ found that, inconsistent with the stated goal of CRCC's workers' compensation program to get employees back to work, Hartling's e-mails indicated that, from the beginning, CRCC did not want Howard to return to work. Dec. A4-5 (citing GX-32, A804 (December 5, 2010 e-mail stating, "[H]ave you sent the [Howard] file to Denise Davidson (this will be her biggest challenge yet).") and GX-42, A811 (December 17, 2010 e-mail stating, "I am wondering whether we stand a chance of getting Granacher to give him [Howard] an impairment rating.

. . . The hope is that we will get restrictions as we need to settle with a resignation." Otherwise, Howard "will be back in the driver[']s seat (not what we want)."). Additionally, the ALJ found that Hartling's deposition testimony indicated that CRCC wanted Howard to resign and not return to work. Dec. A5 (citing HX-1 106, A680; *see also* HX-1 78-81, 121-22, A673-74, A684 (Hartling explaining that her statement "back in the driver[']s seat" meant that Howard would be back at work and that both CRCC and Arch wanted a resignation from Howard). Hartling's testimony was corroborated by other witnesses. HX-2 48-50, 58-59, A715-16, A718 (Lorson); Tr. 123-26, 155, A196-99, A228 (Lee), 279-81, 298-99, A353-55, A372-73 (Howard), 352, A427 (McReynolds).

Hartling had never before indicated in a workers' compensation case that the case would be Arch's attorney's "biggest challenge yet," and had never before written an e-mail stating "we need to settle with a resignation." HX-1 83, 106, A674, A680; *see also* Tr. 60-62, A133-35 (Frazier stating that he had never heard anyone from Arch express the opinion that they wanted an injured worker to be given an impairment rating, that they wanted a doctor to give a miner restrictions, or that they needed to settle a workers' compensation case with a resignation), Tr. 158-59, A231-32 (Lee stating that, before Hartling, she had not heard anyone from Arch or CRCC state that they wanted a doctor to give an impairment rating or restrictions to an injured employee), Tr. 348-50, A423-25 (McReynolds stating that she had never before heard Hartling state that she wanted a claimant to be given an impairment rating or to get restrictions so the case could be settled with a resignation), Tr. 483-85, A558-60 (Carter stating that she had never heard anyone from Arch or CRCC state that they needed a resignation in a case or that they wanted a doctor to give a miner an impairment rating or put restrictions on a miner's return to work). It is undisputed that CRCC's hope that Howard would get an impairment rating resulting in work restrictions or a resignation is contrary to the goal of CRCC's workers' compensation program. Tr. 57, 159, 484, A130, A232, A559; *see* Tr. 348, A423 (McReynolds stating that, typically, Underwriter's wants a claimant to receive a zero percent impairment rating so they do not have to pay him any money).

The ALJ found additional evidence of Howard's disparate treatment in the communications discussing Howard's work-related injury and in the differences between Howard's case and other worker injury cases. Dec. A6-7. For example, Frazier stated that, other than Kafoury's involvement in Howard's case, he did not recall ever consulting with an Arch attorney regarding whether an employee could return to work following an injury or for any reason. Tr. 70, A143. Lee also stated that, aside from Howard's workers' compensation case, she could not recall Kafoury being involved in other cases. Tr. 100, 178, A173, A251. Carter stated that the only CRCC case in which she ever faxed documents to Hartling was Howard's case. Tr. 485-87, A560; *see also* HX-1 133-34, A687 (Hartling stating that Howard's case is the only case in which Carter faxed doctors' reports to her). Moreover, the fact that Hartling was e-mailing Carter about Howard's workers' compensation case was itself unusual. Tr. 474-75, A549-50. Carter did not remember receiving an e-mail from Kafoury in any workers' compensation case other than Howard's case. Tr. 484-85, A559-60. Carter stated that it was highly unusual for her to talk with Hartling and Kafoury about a workers' compensation case, but that she spoke with them about Howard's case. Tr. 468, 487-88, A543, A562-63.

## 2. CRCC Did Not Allow Howard to Return to Work After Dr. Granacher Indicated That He Could Return as Long as He Did Not Work “At Height”

The ALJ found that CRCC did not allow Howard to return to work after Dr. Granacher indicated that he could return as long as he did not work “at height.”<sup>11</sup> Dec. A5-6. According to Frazier, there was nothing in Dr. Granacher’s report to prohibit returning Howard to work. Tr. 65-66, A138-39. Frazier had told Lee that CRCC could accommodate Dr. Granacher’s height restriction so Howard could return to work, but Lee did not tell anyone. Tr. 64, 66, 76, 161, 362, 481, A137, A139, A149, A234, A437, A556. CRCC had previously accommodated other miners who had restrictions placed upon them by doctors. Tr. 64-65, A137-38.

Carter knew that, on March 7, 2011, Dr. Granacher said that Howard could return to work, that Howard had reached MMI, that the only restriction was Howard could not work at height, and that Howard needed no further treatment. Tr. 477, A552. Nevertheless, Carter advised that “if the height restriction alone does not exclude him from returning to work, we may need to clarify further with the job analysis. . . . *This is certainly not one of our ‘usual’ cases.*” GX-62, A816 (emphasis added); see Tr. 357-59, A432-34 (McReynolds stating that she read that to mean that Carter was looking for another way to exclude Howard from returning to work). Dr. Granacher, however, had not asked to be provided with a job analysis.<sup>12</sup> Tr. 355, 479, A430, A554.

Howard's case was discussed at the next quarterly claims meeting on March 15, 2011, at which the participants decided to send a job analysis to Dr. Granacher. Tr. 356, 373, A431, A448. No one at the meeting, however, suggested sending Dr. Granacher a request asking what he meant by the term "at height." Tr. 356-57, A431-32; *see* Tr. 478, A553 (Carter stating that it would have been easy to ask Dr. Granacher what he meant by working at height), HX-1 138-39, A688 (Hartling stating that it would have been simple to ask Dr. Granacher about what height could Howard not work), Tr. 67, A140 (Frazier stating that Dr. Granacher should have been able to easily explain what he meant by height), Tr. 353-55, A428-30 (McReynolds stating that it is a simple question to ask "What do you mean by at height?"). Instead, Carter asked Lee to prepare a job description. Tr. 458, A533. Lee prepared a job description for a generic underground face worker in the belt corridor. Tr. 143, 145, A216, A218. At no time did anyone follow up with Dr. Granacher to clarify the "at height" restriction. Tr. 245, 340, 355, A319, A415, A430.

### 3. CRCC Did Not Allow Howard to Return to Work Even After All of His Treating Physicians Indicated That He Could Return to Work, and Instead Requested a Second Opinion from Dr. Granacher

The ALJ also found that CRCC did not allow Howard to return to work even after all of his treating physicians indicated that he could return to work, and instead requested a second opinion from Dr. Granacher. Dec. A5-6. Howard's physicians, including Dr. Granacher, concluded that Howard had reached MMI and released Howard to return to work. Tr. 197, 338-39, 355, 463-64, A270, A413-14, A430, A538-39; GX-55, A609. On April 12, 2011, Dr. Kedar released Howard to return to work. GX-70, A821. According to McReynolds, Howard's case could have been closed and his benefits terminated after receiving Dr. Kedar's report because Dr. Kedar was the last doctor they needed inasmuch as MMI on all body parts was needed before benefits were terminated. Howard's case, however, was not closed. Tr. 380, 383-84, 389, A455, A458-59, A464; *see* Tr. 490, A565; GX-118, A866 (Carter indicating that Howard's anticipated return to work day would be determined following his appointment with Dr. Kedar). Instead, Carter asked whether she should forward the job description to Dr. Granacher or whether she should clarify Dr. Granacher's height restriction. GX-70, A821. Lee directed Carter to send the job description to Dr. Granacher. GX-80, A826; *see also* HX-1 173, 176, A697 (Hartling stating that she made the decision to send the job analysis to Dr. Granacher).

On April 18, 2011, the job description was sent to Dr. Granacher. Tr. 379, A454. Carter did not send the job description to Dr. Granacher until six weeks after his March 7, 2011, report because she was waiting for Dr. Kedar's report. Tr. 477, A552. Carter explained that, if Dr. Kedar had not released Howard to return to work, she would have talked it over with McReynolds and Lee, but she probably would not have needed further information from Dr. Granacher. Tr. 492-93, A567-68. On May 11, 2011, Dr. Hartman also released Howard to return to work, after which CRCC urged Dr. Granacher to send a response to its inquiry regarding the job description. GX-116, A859.

#### 4. CRCC Discharged Howard Immediately Upon Receipt of Dr. Granacher's Second Opinion

On May 16, 2011, Dr. Granacher changed his opinion from indicating that Howard could return to work as long as he did not work "at height" to indicating that Howard could not return to work as outlined in the job description and was "restricted from underground coal mining and restricted from exposure to moving machinery." GX-79, A824. Carter immediately forwarded Dr. Granacher's response to CRCC, Underwriter's, and Arch personnel, as well as to Davidson, exclaiming, "Just got the documentation in from Dr. Granacher. He does not feel Mr. Howard can return to his job. Please see attached. Thanks!!" GX-106, A841. The ALJ found that CRCC discharged Howard within hours of receiving Dr. Granacher's second opinion. Dec. A9. According to Lee, after receiving Dr. Granacher's second opinion, she did not discuss with anyone the now conflicting opinions regarding whether Howard could return to work. Tr. 198-99, A271-72. Indeed, the record does not reveal any discussions concerning either Dr. Granacher's two conflicting opinions or the conflicting opinions from Dr. Granacher and from Howard's treating physicians. In what Carter had flagged as "certainly not one of our 'usual' cases" (GX-62, A816), CRCC finally had what it wanted.

CRCC argues that it provided an appropriate job description to Dr. Granacher so he could help CRCC know how to accommodate Howard's height restriction, and that Dr. Granacher's opinion is unassailable. Pet'r's Br. 11-18. However, the questions sent to Dr. Granacher with the job description did not seek to clarify the height restriction. Instead, CRCC asked Dr. Granacher whether he felt that Howard could return to work as outlined in the job description -- a description that described the wide variety of duties that underground face workers in the belt corridor perform generally, rather than the specific tasks that Howard had been performing. Dec. A8; GX-79, A824; *see* GX-62, A817; GX-117, A863 (Carter stating that Dr. Granacher "advised that if we wanted documentation about his *specific* job, we can send a note to him and he would provide that." (emphasis added)).<sup>13</sup> Furthermore, it was not Dr. Granacher's role to say whether someone could return to work; it was his role to supply the employer and the insurer with an impairment rating. Dec. A8; Tr. 239-42, A313-16. As discussed above, Dr. Granacher's second opinion indicating that Howard could not return to work was opposite to his original opinion, and was opposite to the opinions of all of Howard's treating physicians, which had indicated that Howard could return to work.

CRCC's strikingly one-sided inquiry -- which disregarded multiple medical opinions, including Dr. Granacher's first opinion, that Howard could return to work, and instead sought out and acted upon a second opinion from Dr. Granacher that Howard could not return to work -- constitutes strong evidence of discriminatory motivation. *See Valmont Industries, Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001) (absence of "a meaningful investigation," and indicia of "a one-sided investigation," constitute circumstantial evidence of discriminatory motivation) (citations and internal quotation marks omitted).

“Pieces of evidence are not to be viewed in a vacuum; rather, they are viewed in relation to the other evidence in the case.” *Davis v. Lafler*, 658 F.3d 525, 533 (6th Cir. 2011) (citation omitted). Given the overall sequence of events in this case -- CRCC’s disparate treatment of Howard, CRCC’s unwillingness to let Howard return to work after Dr. Granacher and Howard’s treating physicians indicated that he could return to work, CRCC’s request for a second opinion from Dr. Granacher, and CRCC’s immediate discharge of Howard upon receiving Dr. Granacher’s second opinion -- the ALJ’s findings that CRCC discharged Howard because of his protected activities, and that there was no credible evidence to rebut the prima facie case, are supported by substantial evidence. *See Pendley*, 601 F.3d at 422-23.

### C. Substantial Evidence Supports the ALJ’s Finding That CRCC’s Affirmative Defense That It Discharged Howard for a Legitimate Business Reason Was Without Merit

CRCC’s argument that the ALJ “mangled” the analysis of CRCC’s asserted justification for discharging Howard (Pet’r’s Br. 18-25) is unavailing. Substantial evidence supports the ALJ’s finding that CRCC’s affirmative defense that it discharged Howard for a legitimate business reason -- i.e., Dr. Granacher’s second opinion -- was without merit. Dec. A9-11. The ALJ stated, “I agree that CRCC has a reasonable concern about the safety of returning any injured miner to work, but the circumstances in this case do not lead to the conclusion that terminating Howard was justified.” Dec. A10. The ALJ found that CRCC’s asserted justification was not credible because CRCC “worked diligently to end Howard’s employment,” “sought out and received the opinion they were seeking[,] and immediately upon receipt of that single opinion, terminated Howard’s employment.” Dec. A10. In addition, the ALJ found that Dr. Granacher did not adequately explain why his two opinions were so drastically different, and that CRCC was obligated to engage in review and consideration before relying upon Dr. Granacher’s changed opinion. Dec. A10-11. Because CRCC’s asserted justification did not survive pretext analysis, and so did not meet the first part of the *Pasula* affirmative defense test, a limited examination of its substantiality (i.e., whether the reason was sufficient to have legitimately moved CRCC to discharge Howard) was not required. *See Chacon*, 3 FMSHRC at 2516-17.

1. CRCC Worked Diligently to End Howard's Employment, Sought Out and Obtained the Opinion It Was Seeking, and Ended Howard's Employment Immediately Upon Receipt of That Opinion

The ALJ found it “obvious that CRCC worked diligently to end Howard’s employment,” explaining that CRCC “waited until every doctor . . . agreed Howard could return to work. Then it asked Granacher to further review his first finding of a 7% impairment and a restriction against working at height.” Dec. A10. The ALJ found that CRCC attempted to achieve its objective first by providing the job description to Dr. Kedar to have a restriction imposed and then, when that attempt failed, by going back to Dr. Granacher for a second opinion. Dec. A10. The ALJ stressed that “Granacher did not see Howard prior to making his second determination, did not change his impairment rating the second time, and did little more than answer a paragraph submitted to his office by Penny Carter.” Dec. A10 (citing Tr. 225, A299).

Dr. Granacher's second opinion was based on "th[e] catwalk issue, working in heights of five to twenty feet," as outlined in the job description provided by CRCC. Dec. A10 (citing Tr. 227, A301). The ALJ stressed that CRCC did not follow up with Dr. Granacher to clarify his earlier height restriction, but instead provided a job description that, while applicable to the general pay rate of Howard, did not accurately reflect Howard's duties. Dec. A10. Furthermore, the ALJ stressed that, after Dr. Granacher's first opinion, Frazier stated that CRCC could accommodate Howard, regardless of whether the height restriction meant not climbing ladders or working in high or confined spaces. Dec. A10; Tr. 64, 66, 76, A137, A139, A149. Gilliam also stated that he could assign work to Howard according to any restrictions that he might have. Dec. A10; Tr. 405-06, A480-81. Upon receiving Dr. Granacher's second opinion, however, CRCC discharged Howard with no meaningful review -- i.e., no one discussed possible accommodation, or questioned Dr. Granacher further, or sought another opinion in light of the stark disparity between Dr. Granacher's second opinion and all of the preceding opinions. Dec. A10. The ALJ concluded that CRCC sought out and received the opinion it was looking for and, immediately upon receipt of that opinion, discharged Howard. Dec. A10.

CRCC argues that, because the ALJ noted that CRCC has a reasonable concern about the safety of returning any injured miner to work, she erred by failing to find that CRCC's asserted justification was not pretextual. Pet'r's Br. 20-21. The argument is nonsensical. As the ALJ made clear, the circumstances *in this case* do not support a conclusion that *Howard's* discharge was justified. Dec. A10.

It is undisputed that CRCC had previously accommodated other miners who had restrictions placed upon them by doctors. Tr. 64-65, 406, A137-38, A481. CRCC argues that it offered Howard the possibility of accommodation, but that he ignored the offer. Pet'r's Br. 23 (citing GX-108, A648, A271). The record shows, however, that CRCC's May 23, 2011, letter to Howard stated, "[W]e do not have any jobs open at this time for which you are qualified that would not require you to be around operating equipment. In short, *we do not know of any available job you could do, with or without accommodation* given the restrictions identified by [Dr. Granacher]." GX-108, A648 (emphasis added). Although CRCC's letter also stated, "If you would like to discuss your medical restrictions and/or your qualifications, in person or over the telephone, please contact me[.]" that statement was not an offer of accommodation. *Id.*

CRCC also argues that there was no disparity among the physicians' opinions because the physicians considered different symptoms in various body parts and no physician disagreed with Dr. Granacher's eventual conclusion that Howard's injury prevents him from returning to work. Pet'r's Br. 23. The record shows that all of Howard's treating physicians reached precisely the opposite conclusion, releasing Howard to return to work without any restrictions. Tr. 197, 338-39, 355, 463-64, A270, A413-14, A430, A538-39. In addition, the original opinion of Dr. Granacher himself indicated that Howard could return to work as long as he did not work at height. GX-55, A609.

2. Dr. Granacher Did Not Adequately Explain Why His Opinions Were So Drastically Different, and CRCC Did Not Engage in Review and Consideration Before Relying Upon Dr. Granacher's Changed Opinion

The ALJ stated that Dr. Granacher's actions were "questionable" and that he "did not explain why the conclusions were so drastically different, but the impairment rating had not changed." Dec. A10 (citing Tr. 234-35, A308-09). The ALJ rejected CRCC's argument that it chose to rely upon Dr. Granacher's second opinion because his specialty is different from the other physicians, so he dealt with Howard's head injury in a different way and a different opinion would not be out of the ordinary. Dec. A11. The ALJ stated:

Given the many physicians who examined Howard, including several neurosurgeons whose specialties are integrally related to Granacher's, something should have come up to demonstrate that Howard's injury had resulted in some type of impairment. If the other doctors had given any kind of impairment rating, it may have been different, but they found none at all. In this circumstance, it certainly required more review and consideration before relying upon the changed opinion of Granacher.

Dec. A11.

The record shows that Dr. Granacher's response to CRCC's inquiry based on the job description consisted of three short statements: "No," "He is restricted from underground coal mining and restricted from exposure to moving machinery," and "Permanent." GX-79, A824. In his response, Dr. Granacher did not provide any explanation for changing his opinion from one that Howard could return to work as long as he did not work "at height" to one that Howard could not return to work as outlined in the job description and was permanently "restricted from underground coal mining and restricted from exposure to moving machinery." GX-79, A824.

At the hearing, Dr. Granacher testified, "The job analysis was much more extensive than anything I knew when I examined him." Tr. 226, A300. Dr. Granacher stated that the "catwalk issue, working in heights of five to twenty feet," caused him to conclude that Howard should not go back into the mine. Tr. 227, A301. Regarding the fact that his second opinion differed from his first, Dr. Granacher testified, "Well, it appears that. Well, it may just be my stupidity and my misunderstanding. I assume that when I say he couldn't work at height, that that would take him out of his job. . . . Well, I would not put that in the report. That would be inappropriate . . . but that is my assumption." Tr. 239-40, A313-14. Dr. Granacher testified, "This was a workers compensation disability evaluation to determine percentage of disability. You have now enlarged this into another scope of legal investigation that was not part of my examination, wasn't part of my mind set, it was not part of the purpose of the report. . . . I was doing what I always do in a workers comp. . . . But I am not going to write something that I think might be prejudicial to a person being able to make a living, that's not my role. I don't think I should go there as a physician." Tr. 240-41, A314-15. Dr. Granacher stated that his second opinion differed from his first because "I only had a subjective job analysis for Mr. Howard. I'm not criticizing Mr. Howard, but that's not the same as a true job analysis." Tr. 242, A316.

Dr. Granacher stated that his second opinion was based on the job analysis, in addition to the material that he had at the time of his first opinion. Tr. 242-43, A316-17. Dr. Granacher stated that, if the job analysis was incorrect, his opinion could change. Tr. 243, A317. Dr. Granacher relied upon the job analysis information provided to him by CRCC, and did not conduct an independent investigation. Tr. 244, A318.

Dr. Granacher's testimony shows that he had no adequate explanation for the difference between his second opinion and his first. Most important, it shows that his second opinion was triggered by CRCC's attempt to secure a different answer by asking a different question -- i.e., by providing the job analysis.

CRCC argues that Dr. Granacher evaluated Howard for different medical problems than the other specialists who examined him. Pet'r's Br. 24. The record indicates, however, that Dr. Knox had also administered neuropsychological testing and planned to follow up with Howard. GX-19, A589; GX-36, A806. CRCC also argues that no evidence supports the ALJ's finding that the specialties of neurosurgeon and neuropsychiatrist are "integrally related" and that "something should have come up to demonstrate that Howard's injury had resulted in some type of impairment." Pet'r's Br. 24-25. In reality, however, both neurosurgery and neuropsychiatry are medical specialties that address the nervous system, and the use of brain imaging by both specialties establishes a connection between these areas of expertise. See GX-28, A604-05; GX-55, A611-12, A615-16; GX-88, A643 (reviewing CT and MRI scans of Howard's brain); Tr. 203-06, A277-80 (Dr. Granacher stating that neuropsychiatry is "brain tissue based" while neurosurgery involves the central and peripheral nervous systems).

For all of the foregoing reasons, the ALJ's finding that CRCC's affirmative defense was without merit is supported by substantial evidence. See *Pendley*, 601 F.3d at 422-23. Accordingly, the Court should affirm the ALJ's finding that Howard's discharge was not justified and violated Section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

### III.

#### THE ALJ'S ORDER THAT CRCC PERMANENTLY REINSTATE HOWARD IS CONSISTENT WITH THE PURPOSES OF THE MINE ACT

Contrary to CRCC's argument (Pet'r's Br. 7-10), the ALJ's order that CRCC permanently reinstate Howard is fully consistent with the purposes of the Mine Act. The Mine Act was enacted to improve safety and health in the Nation's mines, and to that end it expanded miners' protection against discrimination by mine operators by prohibiting discrimination against miners for filing safety complaints or exercising statutory rights under the Mine Act. H.R. Rep. No. 95-312, at 23-24 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 379-80 (1978) ("*Legis. Hist.*"). The Senate Report accompanying the passage of the Mine Act explains:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181, at 35 (1977), *reprinted in Legis. Hist.* at 623.

Unlike cases that involve miners with significant physical limitations (*see* Pet'r's Br. 8-9), the miner in this case had a mild injury and all of his treating physicians released him back to work without any restrictions. Tr. 197, 338-39, 355, 463-64, A270, A413-14, A430, A538-39. In addition, the original opinion of Dr. Granacher himself indicated that Howard could return to work as long as he did not work at height. GX-55, A609. According to Frazier, CRCC could accommodate Dr. Granacher's height restriction so Howard could return to work, and CRCC had previously accommodated other miners who had restrictions placed upon them by doctors. Tr. 64-66, 76, A137-39, A149. As to Dr. Granacher's second opinion, that opinion, for the reasons identified by the ALJ and set forth above, is hardly entitled to controlling weight. In the circumstances, reinstating a miner to work that he can perform, and to a workplace where he can promote miners' safety and health, serves the purposes of the Mine Act. If there were any question as to whether Howard is fit to return to work, that question is answered by the fact that, pursuant to the ALJ's reinstatement order, Howard *has* returned to work.

## CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Commission in all respects.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the rules of this Court, I hereby certify that the Brief for Respondent the Secretary of Labor is in compliance with the applicable type-volume and typeface limitations. This brief contains 11,008 words as determined by Microsoft Word, the processing system used to prepare this brief, and was prepared in proportional Times New Roman 14-point type.

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I hereby certify that on November 2, 2012, a copy of the foregoing Brief for Respondent the Secretary of Labor was served through the Court's electronic case file (ECF) system to:  
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