United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. U.S. POSTAL SERVICE, Respondent.	OSHRC DOCKET NO. 18-0188

Appearances: Kate S. O'Scannlain, Solicitor of Labor
Oscar L. Hampton, III, Regional Solicitor
Louise McGauley Betts, Senior Attorney
Jennifer L. Gold, Attorney
U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania

For the Complainant

Miriam Dole, Attorney
U.S. Postal Service, Eastern Area Law Office, Philadelphia, Pennsylvania

For the Respondent

Before: Keith E. Bell
Administrative Law Judge

SUPPLEMENTAL DECISION ON REMAND

The above-captioned case is on remand from the Commission.[1] The Secretary of Labor (Secretary) timely filed a Petition for Discretionary Review (PDR) of the underlying decision (Decision) at issue here. Thereafter, the Commission directed this case for review. On July 28, 2020, the Commission issued its Remand Order (Remand) for further consideration.

To recap, this case concerns a claim of alleged discrimination for reporting work-related injuries. It is brought under a new anti-discrimination regulation recently promulgated and published on May 12, 2016, under authority from the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). In its Remand, the Commission directed the Court to:

> make credibility determinations concerning evidence that is relevant to whether USPS retaliated against its two mail carriers for reporting work-related injuries, including the conflicting testimony specified above, and to reconsider in light of these determinations whether the Secretary established a violation of § 1904.135(b)(1)(iv).

(Remand at 4.) Additionally, the Commission directed the Court to:

> reevaluate the entire record to ascertain whether there is any other conflicting testimony that should be resolved through credibility determinations, or whether there are circumstances that may bear on the witnesses' credibility.

(Remand at 3.)

As discussed below, the Court sets forth the following credibility determinations as instructed by the Commission. After reevaluating the record, the Court reissues the previous Decision as clarified by this Supplemental Decision on Remand.

[1] In this context, "Commission" refers to the duly appointed and confirmed Commission members of the U.S. Occupational Safety and Health Review Commission who review decisions of the Administrative Law Judges on appeal.

I. Credibility Findings: Harry Wolfe and David Chludzinski

Acting Director Harry Wolfe

In contemporaneous notes taken during the testimony of Acting Director Harry Wolfe, the Court recorded, "I find this witness to be credible albeit that his memory wasn't very good." Much of the initial concern over Mr. Wolfe's credibility was related to the number of times he testified, "I don't remember." Normally, hearing a witness say "I don't remember" over and over would raise a flag to the Court regarding his/her credibility in general. However, context is everything. At the beginning of his testimony, it was established that Mr. Wolfe was moved around quite a bit from location to location. At the time of the hearing in December of 2018, Mr. Wolfe was the acting manager of Pennsylvania Station in Pittsburgh, PA. At the time of the incidents involving PW1 and PW2 in May and June of 2017, he was acting manager of the Mt. Oliver Post Office. Manager is the highest branch position. (Tr. at 206.) Harry Wolfe left Mt. Oliver sometime in July 2017. Mr. Wolfe was first at Mt. Oliver in 2014, then at McKnight towards the end of 2014, then, East Liberty and a few other offices, to include Castle Shannon Post Office, before returning to Mt. Oliver in 2017. (Tr. at 204, 303.) The sheer number of times Mr. Wolfe was moved around from one post office to another, makes it plausible that he would not remember the events and incidents in any one of those offices in great detail.

Additionally, the Court considered that Mr. Wolfe frequently assisted with delivery of the mail on top of his duties as manager. He testified that he carried/delivered mail as much as three times per week toward the end of his time at Mt. Oliver because carriers would bid out for a different route at a different location and some quit. (Tr. at 269.) Moreover, when he was out delivering the mail, he was still expected to do his job as manager. (Tr. at 267.) The combined

effect of being moved around multiple times and having to perform multiple jobs at the same time more than explains Mr. Wolfe's inability to remember all of the facts surrounding these incidents.

The Secretary argues that Harry Wolfe's "word has no credence." (PDR at 19.) The Secretary takes the position that Mr. Wolfe's inability to remember are mere "claims" and a matter of convenience. (PDR at 20-21.) According to the Secretary, "[h]e even claimed not to recall his own emails." (PDR at 21.) However, the Court views his difficulty remembering things such as sending emails differently under the circumstances. When pressed about his inability to recall many of the emails presented to him, Mr. Wolfe responded, "I'm sorry. I get a lot of emails a day. I send a lot of different emails to different people every day." (Tr. at 245.)

Although the Secretary does not believe Mr. Wolfe's reasons for his inability to remember certain things, the Court finds his reasons plausible and compelling. Indeed, in an exchange with Counsel for the Secretary during the hearing, the Court noted, "I would submit to you that his testimony seems to be consistent if you --- I think when you look back on the record, what you're going to see is overall Mr. Wolfe has just simply testified that he doesn't remember a lot of this." (Tr. at 244.) This statement here reflects the Court's impression that Mr. Wolfe was not attempting to deceive the Court, but rather genuinely could not remember certain facts.

Mr. Wolfe was also able to overcome any concerns regarding his credibility through a lot of direct eye contact, a calm and resolute tone, and a demeanor that instilled confidence in the veracity of his responses. However, the Court's impressions alone do not support the credibility findings for Mr. Wolfe. Taken as a whole, the Court finds that the record evidence also supports Mr. Wolfe's claim that he did not take action against PW1 or PW2 solely because they reported work-related injuries. Rather, the evidence reveals that Harry Wolfe disciplined PW1 and PW2 because, as he testified, he believed both performed unsafe acts. (Tr. at 291.) As found in the

underlying Decision, overall, the record establishes that any irregularity in paperwork or procedure is a result of business mistakes and unrelated to any retaliatory intent.

The Secretary affirmatively attacks Mr. Wolfe's credibility by arguing that he "apparently forged Mr. Mayfield's signature on the PW2 discipline request." (PDR at 30.) When asked about the alleged forgery, Mr. Wolfe testified that he did not sign Mr. Mayfield's name on the "Request for Discipline" form. (Tr. at 212; Ex. JX-12.) He further stated that Mr. Mayfield did not sign the document in his presence, and he has never signed for a subordinate before. (Tr. at 212.) Despite the Court's initial impression that there were similarities between Mr. Wolfe's signature and the signature that purported to be that of Mr. Mayfield, the Court has no expertise in handwriting analysis and no such expert testified in this case. (Tr. at 129.) Moreover, Mr. Wolfe's denial that he signed Mr. Mayfield's name on the form did not leave the Court with the impression that he was lying.

The Secretary also attacked Mr. Wolfe's credibility on the grounds that he ordered a drug test for PW1 and could not recall doing so, nor could he recall USPS's policy on when a drug test is authorized. (PDR at 20.) Mr. Wolfe testified that he did not remember ordering a drug test for any other worker and did not know the drug testing policy. "I don't know every policy." (Tr. at 224.) This testimony was not surprising in light of the fact that he had only been a manager for two years at the time of the hearing[2] which means that Mr. Wolfe had even less managerial experience at the time of these incidents. (Tr. at 246.)

[2] Mr. Wolfe's testimony here is corroborated by the dates and comments within his performance appraisal for that time period. (Ex. GX-4 at 74-75 of 78.) In April of 2016, Mr. Wolfe referred to himself as a "supervisor," while in October of 2016, he referred to himself as an "acting manager." Additionally, in April of 2016, Mr. Wolfe's evaluator remarked this about Mr. Wolfe: "Harry will be a great boss one day. Just keep doing what you are doing and the[y] will fight over this kid." (Ex. GX-4 at 74 of 78.) Later, in October of 2016, Mr. Wolfe's evaluator remarked: "Acting Manager is looking great[.]" (Ex. GX-4 at 75 of 78.)

Labor Relations Specialist David Chludzinski

The Court has vivid recollections of Mr. Chludzinski's testimony. As the record reflects, he and the Court had several exchanges during his testimony. (*E.g.,* Tr. at 397-408, 411-414, 416-422, 425-430, 436-440. 448.) He gave lots of eye contact and his demeanor during his testimony was calm and confident. Mr. Chludzinski's knowledge of Respondent's policies, practices and procedures coupled with his ability to explain them in an "easy to understand" way, instilled a sense of confidence that the Court could rely on his words. His testimony made the Court believe that he was unbiased and had no real interest in the outcome of this case.

Examples of his testimony supporting these credibility findings include the following excerpts: Mr. Chludzinski empathized with the letter carriers because he used to do that job "for years." (Tr. at 400.) He testified that he wanted to make sure employees were not disciplined improperly and that they should understand why when they did receive corrective action. (Tr. at 401.) He testified that he pushed back against management recommendations every day. (Tr. at 405.) He was brutally honest about admitting flaws in the system. (Tr. at 408 ln 10-13, 409-410.)

II. Conflicting Testimony & Other Evidentiary Disputes

As instructed by the Commission, the Court has reevaluated the record and identified the following evidentiary conflicts that are affected by these credibility findings. The Court understands the Commission's direction to "resolve all evidentiary conflicts" to be based on those indicated in the Secretary's PDR.

The Reenactment – What Happened?

One of the main conflicts the Commission identified in the testimony is related to "whether the mail carrier actually reenacted how he lifted the mail sack." (Remand at 2.) The Secretary asserts that PW1 never reenacted his lifting technique. (PDR at 3.) However, according to Mr. Wolfe, PW1 came into his office and demonstrated how he injured his shoulder. (Tr. at 206-207.)

On cross-examination, Respondent's Counsel asked Mr. Wolfe to demonstrate what PW1 showed him as his manner of lifting the sack. (Tr. at 277.) In response, Mr. Wolfe stood up while he demonstrated and described the lift as follows: "[y]es, [PW1] came into my office and informed me he lifted a sack like this (indicating) without bending his knees or back at all and a straight shoulder. He just grabbed the sack on the ground and lifted it up like this (indicating). His legs were completely straight." (Tr. at 278.) The Court considers this level of detail provided by Mr. Wolfe to describe PW1's lifting technique when evaluating his credibility on the issue of whether a reenactment took place.

Resolving this conflict would be near impossible if the Court only had PW1's injury and subsequent investigation to consider. However, this case provided another opportunity to see what Mr. Wolfe did in the aftermath of PW2's report of her work-related injury. It is undisputed that Mr. Wolfe went out to the site where PW2's incident occurred, he spoke to PW2, and took photos. (PDR at 10; Tr. at 230; Ex. JX-9.) This demonstrates his approach to an accident investigation and reflects an attempt to find out what led to the injury. Accordingly, it seems consistent that Mr. Wolfe would have asked PW1 to demonstrate his lifting technique and even go to the floor to view the mail bag at some point.

PW1's testimony itself also supports this finding. PW1 testified that he was in Mr. Wolfe's office for five minutes "talking about the accident or injury[.]" (Tr. at 34.) PW1 testified that Mr. Wolfe, "asked me what happened, and I told him what happened." (Tr. at 34.) PW1 never testified what exactly he said when he told Mr. Wolfe "what happened," to the extent of five entire minutes of discussion. He only answered in the negative when asked by the Secretary's Counsel, "whether Wolfe said anything to you at all about any unsafe acts?" and "whether you performed any reenactment of your lifting method to Wolfe." (Tr. at 35.) Further, the question posed by

Secretary's Counsel, whether PW1 "performed any reenactment of [his] lifting method to Wolfe," connotes a degree of formality that may not have been apparent to PW1 during the five-minute discussion he had with Mr. Wolfe, especially if PW1 was in enough pain to warrant seeking immediate medical attention.[3] Thus, to this Court, PW1's testimony is not squarely inconsistent with Mr. Wolfe's testimony.

Regarding where the reenactment took place, the Secretary claims that Mr. Wolfe's accounts eviscerate his credibility. The Secretary argues that in his statement to OSHA, Mr. Wolfe stated "unequivocally" that his entire investigation took place in his office, and they "did not go back out onto the work floor." (PDR at 4.) Then at the hearing, Mr. Wolfe testified that he remembered PW1 reenacting an improper lifting technique on the work floor. (PDR at 4 citing Tr. at 210.)

The record reveals the following:

> Q: But I mean, the initial conversation you had when he came to you, where did you have a conversation about his injury?
>
> A: He spoke with me in my office and then we went on the work floor and I looked at the sack that he lifted.

(Tr. at 207-208.) When confronted with his statement to OSHA, Mr. Wolfe agreed that his statement indicated that he had said "[PW1] reenacted out. He was lifting in the office. We did

[3] PW1's testimony regarding training also shows his careful interpretation of questions posed to him:

> Q: The Judge asked you before if you had been trained on safe lifting procedures and you said you had. Have you been trained on safe lifting procedures more than once?
>
> A: No. I mean we have talks, but not like actual training if that's what you're asking. We have service talks.

(Tr. at 50.)

not go back out onto the work floor." (Tr. at 209.) Afterward, however, Mr. Wolfe maintained that he remembered going back out on the floor at some point: "I remember going out and speaking with [PW1] of where the – where the sack was and looking at the sack. I remember going out there." (Tr. at 210.)

The Court has reconsidered this testimony as instructed by the Commission. This evidence does not reflect an inconsistency of whether a reenactment occurred. It reflects some discrepancy about whether Mr. Wolfe talked with PW1 at any point on the work floor after their conversation in Mr. Wolfe's office. The Court views this possible inconsistency as minor. The fact that there was a reenactment by PW1 is the consistent thread in Mr. Wolfe's testimony and statement to OSHA. Further, it is not a stretch to believe that Mr. Wolfe went to the floor at some point to see the mail sack that PW1 lifted when he got injured. Indeed, it is entirely consistent with his approach to the investigation of PW2's injury. The Court finds that the identified testimony regarding the work room floor reflects Mr. Wolfe's forgetful manner but does not reach the level of lacking credence.

Adverse Inference

The Secretary argues that Respondent never produced the "written statement" PW1 allegedly gave to Mr. Wolfe during his investigation. (PDR at 4.) Further, the Secretary argues that the Court should have applied an adverse inference "that the statement would have corroborated [PW1's] consistent testimony that he never reenacted his lifting technique for Mr. Wolfe." (PDR at 22.)

The Commission has recognized the existence and application of the common law principle of adverse inference in administrative proceedings. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1343 (No. 00-1968, 2003) *aff'd*, 391 F.3d 56 (1st Cit. 2004). In *Capeway,* the Commission

found that the application of an adverse inference was appropriate because when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, i.e., that the evidence would not help that party's case. 20 BNA OSHC at 1343-44. In *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 333 (3d Cir. 1995), the Third Circuit held that for the adverse inference rule to apply, it is essential that the evidence in question be within the party's control.[4] It must appear that there has been an actual suppression or withholding of the evidence. *Id.* No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for. *Id.* Regarding the application of an "adverse inference," the D.C. Circuit Court of Appeals found that, generally, whether to draw the inference is a matter of discretion for the fact finder. *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW) v. NLRB,* 459 F.2d 1329, 1335 (D.C. Cir. 1972).

The Secretary focuses on this alleged "written statement" from PW1 based solely on OSHA Whistleblower Investigator Ryan Fencik's interview notes with Mr. Wolfe – "I did not take notes when [PW1] was reporting the injury because he was writing a statement." (PDR at 4; Ex. GX-14 at 1 ln 19-20.) The record does not indicate what Mr. Wolfe meant by the phrase "writing a statement." The Secretary did not question Mr. Wolfe what he meant by that phrase at the hearing. (Tr. at 209, 218 (questioning Mr. Wolfe only on lines 4-16 of Ex. GX-14).)

[4] This case could be appealed to either the Third Circuit Court of Appeals or the D.C. Circuit Court of Appeals. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."), (b) ("The Secretary may also obtain review…in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office…"). ; *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

When examined at the hearing, Mr. Fencik was also not illuminating, even though he was "the primary fact gatherer in this case." (Tr. at 521.) He testified that he was a "whistleblower investigator," and that his involvement with this matter stemmed from the section 11(c) investigation, which closed in September 2017. (Tr. at 523; *see also* Tr. at 510, 520 (OSHA Compliance Safety and Health Officer Christopher Gavin testifying that he investigated the section 1904 matter, and that Mr. Fencik was part of the "whistleblower team.").) Mr. Fencik's October 2017 interview with Mr. Wolfe had been previously scheduled under the section 11(c) investigation, but the Secretary used Mr. Wolfe's resulting interview statement for the section 1904 matter at hand. (Tr. at 526-527.)

At the hearing, Mr. Fencik was questioned regarding Mr. Wolfe's statement:

> Q: So, during the course of your investigation what did the Respondent tell you about who was responsible for making the disciplinary decision?
>
> A: I was not given any information.
>
> Q: And what information did they provide you that substantiated – or what information and documents did they provide you to support that [PW1] was given his discipline?
>
> A: I don't understand that question.
>
> …
>
> Q: And could you give us some examples of some of the facts that are in addition to the timing which we've just spoken about that are indicative of discrimination or retaliation?
>
> A: I'm not quite sure what you're asking?

(Tr. at 532-533.) Mr. Fencik then testified that he did not see Mr. Wolfe read the statement after the end of their interview. (Tr. at 537.)

PW1 also supplied a statement to Mr. Fencik. (Ex. GX-7.) In his statement, PW1 states:

> I then went to see Wolfe, who was in his office. Wolfe asked if I could carry my route. I responded that I think I needed to see a doctor. Wolfe gave me the papers to go to Concentra which are the worker's comp papers that they need to sign. I

> then went to the doctor. The doctor put me on light duty and told me that I could not drive a company vehicle, raise my shoulder above my head, or lift anything over 10 lbs. After I saw the doctor I returned to work and gave Wolfe the worker's comp papers and the papers that I received from the doctor.

(Ex. GX-7 at 1-2.) PW1 did not mention any other written statement in his statement to Mr. Fencik. At the hearing, PW1 testified that "I had to fill out a – like a paper of what happened and sign," and that he gave that to Mr. Wolfe. (Tr. at 33-34.) Nothing else about this "written statement" was drawn out at the hearing.

In the case at bar, no adverse inference was applied because the record was not sufficiently developed to make such a determination. Although not required to do so, the Secretary did not file a motion to compel the production of PW1's "written statement." The response to such a motion may have shed more light on Respondent's reasons and culpability in not providing the statement. However, the record does not support drawing an adverse inference in this case.

Rescinded Discipline

The Secretary argues that the fact that Mr. Kammermeier rescinded the discipline (for both employees) imposed by Mr. Wolfe and expunged it from their records after concluding that the "evidence did not support discipline," supports his contention that Mr. Wolfe's decision to discipline PW1 and PW2 was motivated by an intent to discriminate against them for reporting work-related injuries. (PDR at 9, 13.)

Mr. Kammermeier testified that he met with Union Steward Mr. Bugay and considered whatever evidence was in the discipline file for the PW1 case. (Tr. at 313.) He further testified that his involvement in the PW2 case was "[t]he exact same." (Tr. at 314.) When asked what was in the case file, Mr. Kammermeier testified that he did not remember. (Tr. at 310, 316.) He agreed that he found no evidence to support the issued discipline, stating, "[if] there was nothing in the file, then I had nothing to go on, but what the union presented to me." (Tr. at 315.) He then

testified that when managers move around or supervisors "switch buildings," "[i]t's typical for information not to be passed along through the process. Either it's lost or just not placed in [the grievance file]." (Tr. at 332.)

Union Steward Mr. Bugay testified about the grievance meeting he had with Mr. Kammermeir regarding PW1 and PW2. (Tr. at 472-478.) Mr. Bugay testified that for the PW1 matter, he and Mr. Kammermeir had the request for discipline, the Pre-Disciplinary Interview (PDI) notes, and the accident investigation notes. (Tr. at 473-474.) For the PW2 matter, they reviewed the PDI notes, but Mr. Bugay did not recall seeing any photographs. (Tr. at 478.) In both matters, Mr. Bugay testified that he and Mr. Kammermeir resolved the grievances with the statement that there was "not enough" evidence to support "a seven-day suspension." (Tr. at 475, 478.)

When parsed, this testimony shows that Mr. Kammermeir decided, in his managerial discretion, that whatever was in Respondent's disciplinary record for PW1 and PW2 did not overcome what Union Steward Mr. Bugay presented to him – at least not to the point of justifying a seven-day suspension. As found in the underlying Decision, the disciplinary process in this case was marred by mishandling of paperwork. Mr. Chludzinski testified with brutal honesty about the shortcomings of Respondent's process – e.g., time constraints, inaccuracies entered into the system. (Tr. at 409-410.) He also testified that he relied on his conversation with Mr. Wolfe to approve the discipline matters in this case, and the record does not establish that this conversation was documented in the file that Mr. Kammermeir reviewed. (Tr. at 418-419, 429-430, 432-433.) Accordingly, Mr. Kammermeier's decision to rescind the discipline for PW1 and PW2 does not assist the Secretary in meeting his burden of proof.

Timing of Decision to Discipline

The Secretary claims that Mr. Wolfe's actions during the disciplinary process show his animus to discipline his employees solely for reporting their injuries. For example, the Secretary argues that emails reveal that Mr. Wolfe made his decision to discipline PW2 before her PDI was conducted. (PDR at 10, 24.)

Mr. Wolfe's emails to his management reflect his desire to keep them informed of happenings in his department and his belief that PW1 and PW2 performed unsafe acts. (Tr. at 220-221, 238; Ex. JX-15.) It is stipulated that Mr. Wolfe began investigating the accidents on the day they occurred. (Decision at 14-15 ¶¶ 17, 29 (parties stipulated that Mr. Wolfe began investigating PW1's and PW2's injuries on the day of their respective injuries). Despite these emails, and in accordance with Respondent's procedures, as testified to by Mr. Chludzinski, Mr. Wolfe moved the accident investigations along to the next phase – the PDIs. As noted above, Mr. Chludzinski testified that supervisors are under a time constraint to get investigations into the "system", so he does not rely on them a "whole lot." (Tr. 409-10.) During an exchange with Secretary's Counsel over an email in which he references the level of discipline to be determined in the PDI, Mr. Wolfe testified that "every PDI I've ever done has been the same. Every PDI is to gather information to determine what level --- whether what level of discipline is issued." (Tr. at 221.)

The Secretary also argues that Mr. Wolfe "admitted" he requested the discipline after denying to OSHA Whistleblower Investigator Fencik that he had any part in discipline for PW1. (PDR at 19-20.) The Secretary's critique of Mr. Wolfe's statement to Mr. Fencik is fierce but fruitless. The statement that the Secretary questions is the following: "I did not decide to discipline PW1, because I was not present…I do not recall being involved to any extent with PW1's injury

after holding initial investigation with PW1." (Tr. at 218-219; Ex. GX-14.) The Secretary claims that the record establishes that Mr. Wolfe's statement is "a glaring falsehood," "unequivocal," and "clearly false." (PDR at 19-20.)

These statements to Mr. Fencik are consistent with Mr. Wolfe's manner at the hearing. Indeed, the second sentence merely states that he does not recall being involved with PW1's injury after his initial investigation. (Tr. at 218.) Regarding the rest of the statement, Mr. Wolfe agreed with these sentences at the hearing, with the clarification that he was in fact in Oklahoma during PW1's PDI. (Tr. at 219.) The first sentence, "I did not decide to discipline PW1, because I was not present," was within the context of Mr. Wolfe being in Oklahoma at the time of the PDI. (Tr. at 218-219.)

Most importantly, the phrase "decide to discipline" in this context was not developed at the hearing. The record establishes that (1) PW1's immediate supervisor Robin Derry issued the official discipline letter, that (2) Mr. Chludzinski drafted the letter, that (3) Mr. Chludzinski and Mr. Wolfe discussed the matter, that (4) Mr. Mayfield delivered the disciplinary package to Mr. Chludzinski, that (5) Mr. Mayfield conducted the PDI, and that (6) Mr. Wolfe believed from the time of his initial investigation and submitting the disciplinary request that PW1 performed an unsafe act. As far as this Court is concerned, any of these people could consider themselves the one who issued the discipline, just as any of these people could consider someone else in this chain to have been the one to issue the discipline. Respondent's disciplinary process is not as clear in this record as the Secretary claims.

Meaningful Review

The Secretary claims that Respondent provided an "utter lack of meaningful review" of Mr. Wolfe's disciplinary requests. (PDR at 30.) The Secretary argues that Mr. Chludzinski "freely

admits" that he based his approval of the discipline solely on a conversation with Mr. Wolfe, without reviewing any documentary evidence or interviewing the employees. (PDR at 31 citing Tr. at 408.) What Mr. Chludzinski actually said was, with regard to PW1, "I don't recall seeing any photos…I don't recall specifically reviewing any documents related to this particular discipline. I write hundreds of these a year. But I do recall specifically talking to Harry Wolfe." (Tr. at 408.)

Mr. Chludzinski did note Mr. Wolfe's comment in PW1's accident report, of which he says he typically does not "put a whole lot of stock in" due to potential inaccuracies due to time restraints. (Tr. at 410-412; Ex. JX-2 at 2.) In this accident report, dated the day of the accident, Mr. Wolfe commented that he determined that PW1's injury was caused by "lifting the relay with all arms. Not using legs." (Ex. JX-2 at 2.) Mr. Chludzinski testified that he saw that comment in Mr. Wolfe's accident report and focused on that comment during their conversation regarding discipline for PW1. (Tr. at 412.) Here, Mr. Chludzinski testified that Mr. Wolfe told him that he [Wolfe] said: "I asked him to show me how he lifted the sack." (Tr. at 420.) Mr. Chludzinski went on to testify, "He [Wolfe] said he personally went out and had him show him how he lifted the sack." (Tr. at 420.) Further he testified, "He said he [Wolfe] had him [PW1] reenact." (Tr. at 421.)

Mr. Chludzinski used his conversation with Mr. Wolfe to draft both disciplinary letters for PW1 and PW2. He decided to insert his own language, based on his own mail-carrying experience, into the disciplinary letters. (Tr. at 400, 455-456.) For PW1, he added, "people don't normally injure themselves doing something as simple as lifting a sack a few feet onto a level surface." (Tr. at 397-400; Ex. JX-6.) For PW2, Mr. Chludzinski wrote that, "you should have avoided getting close enough to the fence so the dog could bite you. While it would not have helped in this

instance, you're also reminded to keep your dog spray on you while engaged in street delivery." (Tr. at 450; Ex. JX-13.) Here, these actions by Mr. Chludzinski establish that there was meaningful review of Mr. Wolfe's disciplinary requests.

The Secretary attempts to shoehorn Mr. Chludzinski's additions in these disciplinary letters into a "shifting justification" argument. (PDR at 18, 23, 25-26.) On the contrary, Mr. Chludzinski (not Mr. Wolfe) focused the disciplinary justifications based on his review of the matters and his personal mail-carrying experience. (Tr. at 400, 455-456.) The record also establishes that Mr. Chludzinski considers various collective bargaining agreements when reviewing disciplinary requests, not all of which are for alleged safety violations. (Tr. at 394, 413-414, 447.)

The issue here is whether Respondent legitimately performed its accident investigation and subsequent disciplinary review, not the legitimacy of Respondent's safety program's procedures. This record is not sufficiently developed to examine whether Respondent's safety program is inherently retaliatory, as the Secretary seems to be arguing. The Secretary had a chance to focus this case on Respondent's safety program – Respondent's own safety rules, its own rules of procedure, Mr. Wolfe's burden of proof, and Mr. Chludzinski's standard of review. But this information was not drawn out at the hearing. Instead, it has been undisputed throughout this proceeding that Mr. Chludzinski was the approving official for these disciplinary matters. (Tr. at 364-365.) And he testified that, in his opinion, Respondent's procedures were adequately followed in the disciplinary process and that he still believes that PW1 and PW2 deserve the discipline. (Tr. at 456-457.)

III. Reevaluation of the Evidence: Amplification/Clarification of Legal Analysis

As instructed by the Commission, the evidence has been reevaluated in light of the credibility determinations discussed above. After reconsideration, the Court concludes that the

previous Decision stands. The following legal analysis serves to amplify and clarify the analysis within the previous Decision.

Pretext not Prima Facie Causation

This case is about pretext, not the Secretary's *prima facie* causation burden. Many of the case citations that the Secretary relies on in his PDR center on the *prima facie* element of causation, not pretext. *See,* e.g., (PDR at 18, 29-31) citing *McKenna v. City of Philadelphia*, 649 F.3d 171, 178–80 (3d Cir. 2011) (holding that employer did not produce a legitimate business reason, never reaching pretext analysis); (PDR at 17-18, 23-24, 32) citing *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279, 280-81, 284, 286 (3d Cir. 2000) (specifically noting that the case did not address pretext, cautioning not to conflate analysis of causation in the *prima facie* case with pretext analysis, but allowing evidence within the causal chain to be used in both the *prima facie* case analysis and pretext analysis); (PDR at 18, 25, 26 n.20) citing *Waddell v. Small Tube Prods., Inc.*, 799 F.2d 69, 73 (3d Cir.1986) (discussing "inconsistent explanations" in the context of reviewing a lower court's holding of plaintiff's *prima facie* case.) These case citations are inapposite to the essential issue here: whether the Secretary proved that Respondent's proffered reasons are a mere pretext to the true reason it disciplined PW1 and PW2. *Ross v. Gilhuly*, 755 F.3d 185, 193 (3d Cir. 2014).

The underlying Decision specifies that the parties did not dispute that the Secretary established causation in his *prima facie* case for this matter. Once Respondent produced its legitimate business reason for disciplining PW1 and PW2, the burden shifted back to the Secretary to prove that this reason was pretextual, i.e., that in actuality, Respondent disciplined PW1 and PW2 "simply because they reported a work injury." Improve Tracking of Workplace Injuries and Illnesses, Final Rule, 81 Fed. Reg. 29624, 29672 (May 12, 2016) (to be codified at 29 C.F.R. Part

1904) (preamble explaining the scope of the cited regulation). Here, the Secretary must demonstrate that Respondent's explanation is untrue due to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions from which a reasonable juror could conclude that the Defendants' explanation is unworthy of credence, and hence infer that the employer did not act for the asserted [legitimate] reasons." *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 262 (3d Cir. 2017) (citation omitted).

The prism of a pretext analysis is different from the prism of the *prima facie* element of causation analysis. *Farrell*, 206 F.3d at 286. The pretext analysis is focused on whether the Secretary persuades the trier of fact to believe his story over Respondent's. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993). Taking the record as a whole, as explained in the underlying Decision, the Court found that the Secretary did not carry his burden here. Rather, the Decision credits Respondent's proffered reason of disciplining PW1 and PW2 for breaking Respondent's safety rules, and that business mistakes as opposed to any retaliatory animus caused the procedural irregularities that the Secretary unearthed in this matter.

It is irrelevant in this case whether PW1 or PW2 actually broke Respondent's safety rules (a surprising twist here since most all of the cases before this Court involve alleged safety violations). Even if Mr. Wolfe incorrectly concluded that PW1 and PW2 broke Respondent's safety rules, his potential incorrect conclusions are still valid, in this case, if he truly believed them. *See Capps v. Mondelez Glob., LLC*, 847 F.3d 144, 152-155 and nn.7, 9 (3d Cir. 2017) (Third Circuit explaining the concept of "honest belief" in the pretext analysis step of FMLA, ADEA and Title VII retaliation analyses when reviewing summary judgment holding).

The cited regulation in this case places OSHA's objective, with regard to this standard, at a crossroad with Respondent's objective when confronted with what Mr. Wolfe confronted: an

injury report *plus* an injury. OSHA wants to protect the reporting while Respondent wants to investigate the injury. At that point in time, the dual objectives of these two entities intertwined. Respondent's investigation of the injury must begin at some point. Respondent has put forth evidence to show that its investigation began, legitimately, when Mr. Wolfe discussed with his employees their actions that led up to their injuries. The record, though thin, establishes that Mr. Wolfe and PW1 did discuss PW1's actions (i.e., "what happened") that led to PW1's injury. The record for PW2 is more developed as discussed above – Mr. Wolfe left his building and travelled to PW2, took pictures, and discussed what happened with her before sending her to seek medical treatment.

As discussed above, both PW1 and PW2 stated that they discussed "what happened" with Mr. Wolfe with enough sufficiency so that Mr. Wolfe allowed them to leave their jobs and seek medical attention. Both instances establish that Mr. Wolfe began the investigation into each injury at the moment he was confronted with the injury report plus the worker's injury. He did not fail to begin to investigate either of these injuries at that point in time. *See also* Decision at 14-15 ¶¶ 17, 29 (parties' stipulations). Mr. Wolfe then followed the next steps to move the investigations along in accordance with Respondent's procedures as testified to by Mr. Chludzinski (whose testimony was not criticized by the Secretary before this Court).

The drug test order for PW1 is found to be a genuine mistake by Mr. Wolfe – Mr. Wolfe was notified shortly afterward by Respondent's nurse administrator that it was contrary to Respondent policy and Mr. Chludzinski also testified that it was "highly unusual." (Tr. at 222-223, 421-422.) When confronted with this at the hearing, Mr. Wolfe testified that he did not know all of Respondent's policies. (Tr. at 224.) Mr. Wolfe was an inexperienced manager who was still learning Respondent's procedures at the time of the incident. Based on the record as a whole, Mr.

Wolfe's questionable actions are found to be genuine procedural blunders and not evidence of true animus toward PW1 and PW2 simply because they reported their injuries.

The record, moreover, establishes that Mr. Chludzinski, not Mr. Wolfe, was the official who ultimately approved the discipline as part of Respondent's disciplinary process. The Secretary shoulders the burden at the pretext stage of this retaliation analysis, yet he did not question the validity of Mr. Chludzinski's testimony with regard to the process and procedures at issue here, or Ms. Gerst-Stewart's testimony that Respondent's Labor Relations officials (i.e., Mr. Chludzinski) are "the experts" who make sure Respondent's management officials (i.e., Mr. Wolfe) are "doing all the rules, following all the contracts and doing what we're supposed to do." (Tr. at 364-367.)

The record establishes that Respondent's disciplinary procedures involved multiple steps and multiple people up and down Respondent's management chain. It also included union representation. It is for Respondent to implement its own policy and procedures, and for the Secretary to prove that any alleged irregularities are a pretext to Respondent's proffered legitimate business reason. The Secretary parses Respondent's policies and procedures but has no expertise in them. The Secretary had the opportunity at the hearing to pose such questions to Mr. Chludzinski and then critique his answers with the aid of the record but did not do so. The Secretary's claim that any aspect of this complex system was pretextual is unsupported.

Here, as found in the underlying Decision, the record establishes that most of the deviations of policy and procedure were a result of general mishandling of paperwork. The record does not establish, as the Secretary claims, that any of the deviations of policy and procedure in this multi-step, multi-person investigative process, are a result of intentional retaliation against PW1 or PW2 solely for reporting their injuries. It is easier for this trier of fact to believe Respondent's story of

business mistakes, especially with a new manager who admits not knowing every policy, over the Secretary's story, which would require a level of concerted animus and sophistication that is just not evident in this record.

Abatement

In his PDR, the Secretary stated: "Yet the ALJ appeared to conclude that the Secretary was required to identify specific abatement in the citation based on the Secretary's interim enforcement procedures for § 1904.35, and that his failure to do so constituted a legal deficiency in the citation." (PDR at 33.) The Commission addressed this argument in the Remand with the following instruction to the Court:

> There is no requirement under the Occupational Safety and Health Act, OSHA's recordkeeping regulations, or Commission precedent that compels the Secretary to specify a means of abatement in a citation alleged under 29 C.F.R. § 1904.35(b)(1)(iv). *See* 29 U.S.C. § 658(a) (citation "shall be in writing and shall describe with particularity the nature of the violation, including a reference to the . . . regulation . . . alleged to have been violated" and "shall fix a reasonable time for the abatement of the violation"). Moreover, the Commission has long held that while OSHA's internal manuals may "provide[] guidance to OSHA professionals," they "[do] not have the force and effect of law, nor [do they] confer important procedural or substantive rights or duties on individuals." *Caterpillar Inc.*, 15 BNA OSHC 2153, 2173 n.24 (No. 87-0922, 1993). The judge shall take this ruling into account in reaching his decision on remand.

(Remand at 4 n.4.) The remarks regarding abatement, though unclearly stated in the underlying Decision, still stand and are clarified as follows.

In the pertinent section of the underlying Decision, the Court evaluated Respondent's claim, first raised in the applicability portion of its post-hearing brief, that the Secretary was seeking to touch Respondent's management incentive programs using "unfounded suspicion."[5]

[5] In its post-hearing brief, Respondent argued:

> OSHA's dismissive view of the impact of the new cause of action fails to explain how it now has the authority to demand a change in a business's performance

(Decision at 39-41.) Although the Secretary claimed that he was not challenging Respondent's pay-for-performance system, the Secretary was still attempting to use it as circumstantial evidence against Respondent. Therefore, the Court questioned the Secretary's claim, which seemed at odds with the following observations: (1) the Citation stated that abatement was still required at the time that the Citation was issued, (2) there was nothing else Respondent could do to make these employees whole at the time the Citation was issued, (3) the Secretary's own interim enforcement procedures required abatement, (4) the Secretary re-alleged that abatement was still required in the Complaint, and (5) the Secretary spent a considerable amount of effort researching and presenting that research of Respondent's pay-for-performance system in his post-hearing brief.

At no time did the Court find or consider the Citation to be "legally deficient." Rather, the Court observed that the Secretary's use of the evidence was more consistent with Respondent's claims of "unfounded suspicion" than with the Secretary's claims of "animus," and then found that the Secretary's arguments regarding Mr. Wolfe's actions with regard to Respondent's busines programs were not persuasive.

CONCLUSION

As instructed by the Commission when it set aside the initial Decision, the Court has reevaluated the record with particular focus on credibility findings related to the testimony of Harry Wolfe and David Chludzinski. The conclusions of law and fact in the initial Decision remain unchanged.

> review programs in the name of 'recordkeeping.' OSHA asserts the authority under 1904 to examine and evaluate an employer's performance and compensation programs, its training and evaluation of employees, including 'all criteria' used to evaluate management.

(Resp't Post-Hr'g Br. at 42.)

ORDER

The findings of fact and legal analysis in this Supplemental Decision on Remand are incorporated by reference into the Decision issued in the above-captioned case (Docket No. 18-0188) dated May 18, 2020. That Decision, as clarified with this Supplemental Decision on Remand, is hereby reissued.

/s/ Keith E. Bell
Keith E. Bell
Judge, OSHRC

DATE: December 22, 2020
Washington, D.C.