

**THERE WERE NO COMMISSION DECISIONS OR ORDERS**

**ADMINISTRATIVE LAW JUDGE DECISIONS**

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## MARCH 2003

Review was granted in the following cases during the month of March:

Secretary of Labor, MSHA v. Lodestar Energy, Inc., Docket Nos. KENT 2002-184, KENT 2002-238. (Judge Melick, January 28, 2003)

Secretary of Labor, MSHA v. Eastern Associated Coal Corporation, Docket No. WEVA 2002-46. (Judge Hodgdon, January 31, 2003)

No cases were filed in which Review was denied during the month of March



ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W. Suite 9500  
Washington, DC 20001-2021

March 4, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 1999-8-M
Petitioner	:	A.C. No. 44-06803-05508
v.	:	
	:	
	:	
VIRGINIA SLATE COMPANY,	:	
Respondent.	:	Adco Land Corp. No. 1

**DECISION ON REMAND<sup>1</sup>**

Appearances: M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; V. Cassel Adamson, Jr., Esq., Adamson and Adamson, Richmond, Virginia, for the Respondent.

**Before: Judge Weisberger**

This civil penalty case is before me based upon a decision of the Commission, 24 FMSHRC 507 (2002), which vacated and remanded the unwarrantable failure determinations and penalty assessments set forth in my prior decision in this matter, 23 FMSHRC 867 (2001).

**I. Unwarrantable Failure Determinations**

**A. Order No. 7711667**

In the order at issue, Virginia Slate was charged with failing to provide berms, bumper-blocks, safety hooks, or similar impeding devices for the front-end loader that loaded the hopper of the crusher. In essence, in its decision vacating my determination that the violation was not a result of Virginia Slate’s unwarrantable failure, the Commission instructed me to consider all the unwarrantable failure factors in conjunction with the specific facts of the violation. The Commission in this regard indicated that in addition to the length of time the front-end loader was used, there are additional factors that must be examined in determining whether conduct is aggravated, including the following: “... the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the

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<sup>1</sup>The Decision on Remand issued on March 4, 2003, contained clerical errors. These errors were corrected in an order issued on March 28, 2003. The instant published Decision on Remand has eliminated the clerical errors and is in conformity with the order issued on March 28, 2003.

operator's efforts in abating the violative condition, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation". 24 FMSHRC at 512. Specifically, in this regard, the Commission mandated that an analysis should be made of whether the violation posed a high degree of danger particularly in light of the finding I made that as a result of the violation there was a danger of a loader overturning. The Commission also required that "... when discussing whether the operator had knowledge of the violation, the Judge should explain his finding through reference to specific record evidence." 24 FMSHRC, *supra*, at 5113. The Commission further provided that on remand it should also be determined the extent of the operator's knowledge of the violation specifically addressing the testimony of Adamson, Jr. (Tr. Vol. II, 155-71). Lastly, the Commission required that if it be found that Adamson, Jr. knew or had reason to know that impeding devices had not been provided around the front-end loader then I should consider whether or not Adamson, Jr. was a supervisor and, if he was, whether he violated the standard of care required of supervisory personnel by failing to stop a known violation. 24 FMSHRC *supra* at 513.

**b. High Degree of Danger**

According to the inspector, the violative condition herein presented a risk of the front-end loader falling onto the hopper. He explained that if the front-end loader would over-travel a disabling injury could result by virtue of the front-end loader overturning by running into the hopper. Also, the loader could go over either side of the hopper, fall down to the ground and collide against rocks located on the ground. The inspector opined that such an accident was reasonably likely to occur in continued operations.

The high degree of danger in using the front-end loader to dump at the hopper without a berm or stop-block or impeding device was also recognized by Adamson, Jr. who indicated, in essence, that he was uncomfortable using the front-end loader at the hopper because it has "tremendous power and breakout force", (Tr. Vol. II, 165); that the loader operator could knock down any berm that could be constructed; and that although he was satisfied that for a "momentary test" it would "be all right", he didn't want somebody sitting "on a machine for eight hours, driving up and dumping in, ... and make a mistake, the consequences". (*Id.*) (*sic.*) He indicated that it was possible for the operator to become injured. Also, Adamson, Jr. testified that when he gave the instruction to use the front-end loader for a few minutes, he told the operator to be "super careful ..., be real cautious about this ... we don't want anybody hurt". (Tr. Vol. II, 166)

However, the inference of the presence of a high degree of danger is mitigated by the fact that the Commission in its decision, 24 FMSHRC *supra*, did not reverse my credibility finding, in the previous decision, 23 FMSHRC 867 (2001), accepting the testimony of Adamson, Jr. over Williams' testimony, and finding that from March, 1997 when operations commenced until June 1, 1998, the excavator was normally used to load the hopper, and that on June 1, the front-end loader was used to load the hopper for about ten minutes. In this connection I note that the inspector conceded on cross-examination that if an excavator feeds the hopper, blocks are not

necessary. Further, I accept Adamson's testimony, based upon his demeanor that I found trustworthy, that it was the intention of the operator to use the excavator to load the hopper once everything returned to normal. Based on my observations of Adamson's demeanor I accord more weight to his in-court sworn testimony, than to the uncorroborated hearsay testimony of the inspector that, "[t]heir [Virginia Slate's] intentions were to use the front-end loader, because the excavator was down in the pit area." (*sic.*) (Tr. Vol. II, 141) (Emphasis added.) Not much weight was accorded this statement as the inspector did not provide the basis for this conclusion, nor did he explain the source of this information. Further mitigating the level of the operator's negligence is the testimony of Adamson, Jr. that on two prior occasions "... this had been -- this aspect of doing it", had been inspected and no fault was found by the previous inspectors. (Tr. Vol. II, 162) I accept this testimony inasmuch as it was not impeached or contradicted.

**c. Was Adamson Jr. a Supervisor**

According to the inspector he referred to Adamson III as the foreman, and the latter told him that he was responsible for making examinations of the work areas. However, the Secretary did not call Adamson, III to testify nor did the Secretary offer any explanations for its failure to do so. Regarding Adamson Jr., it appears, as president of the company, that he had some supervisory responsibilities. In this connection, I note that on cross-examination, he was asked, in essence, whether he was on the site two hours a day four days a week. He answered as follows: "but at different times, with no precise schedule." (Tr. Vol II, 167) Further, Adamson testified, in essence, that on June 1 the loader operator had asked his permission to use the front-end loader to feed the crusher instead of the excavator, and he reluctantly agreed and allowed it. However, any of his negligence as a supervisor, imputed to the company, is mitigated by the fact that the front-end loader was used for only 10 minutes on June 1.

**d. Obviousness of the Violation**

The violative condition was observed by the inspector. Also, in response to a leading question on direct examination, the inspector agreed that it was his understanding that a stopping block had been missing for at least a week. Although the inspector did not provide the source for this information, it is significant that this testimony was not impeached or contradicted by the operator.

**e. Abatement efforts**

As abatement of the violative condition, a stop block was provided at the hopper, and the violation was terminated on June 4, three days after the citation had been issued.

**f. Discussion**

Weighting all the above factors, I find that the use of a front-end loader without a berm or stop block or any other impeding device at the dump hopper presented a high degree of danger; the danger was recognized by Adamson Jr.; the violative condition was obvious; and that it did not take a significantly long time to abate the violation. However, I find the existence of significant mitigating factors. In this connection I note that according to the inspector, the use of an excavator to load the hopper would not have violated the regulation cited; that from the time the operation at the subject site commenced until June 1, the front-end loader had been used for only 10 minutes; that it was not intended to use the front-end loader again once everything returned to normal at the hopper; and that no fault had been found by previous inspectors on two prior occasions. Within this context I find that the Secretary has failed to establish by a preponderance of the evidence that the operators negligence reached the level of aggravated conduct. Thus, I find that it has not been established that the violation herein was as a result of the operator's unwarrantable failure.

**B. Order No. 7711681**

**a. Extent and Duration of Failure to Perform Adequate Pre-Shift Examinations**

Consistent with my initial decision 22 FMSHRC 378, 390, *supra*, I reiterate my finding that because the record establishes the existence of defects on mobile equipment e.g., inoperable horns and lack of seatbelts, that it was more probable than not that a pre-shift examination had not been performed. Thus the operator was in violation of 30 C.F.R. § 56.14100. Further, the Commission, in the instant remand, 24 FMSHRC *supra*, took cognizance of my acceptance of the testimony of Roy Lee Green, regarding the missing portion of a seatbelt on mobile equipment, and that he had driven the truck for three weeks without a seatbelt.

Adamson testified that the pre-shift reports of the truck indicated that it was satisfactory. However the reports themselves constitute the best evidence of their contents. Since they were not proffered in evidence by the operator, I place more weight on the testimony of Green. I find Green's testimony that he had driven the truck for three weeks without a seatbelt to be credible, based upon observation of his demeanor. Thus based on this credible testimony, I conclude that it is more probable than not that the operator had failed to perform pre-shift examination of mobile equipment for at least three weeks.

**b. Knowledge that the Operator was not Adequately Carrying out Examinations**

Adamson testified that he had told Terry to check the truck before it was put into service; that a couple of days later he asked Green, who was driving it how it was and he (Green) said it was ok; that Adams' son drove it and said it was ok; and that the pre-shift reports of the truck indicated that it was satisfactory. Thus, it is reasonable to conclude that Adamson himself neither knew nor reasonable should have known that inspections had not been performed

adequately on the mobile equipment. However, it is significant to note that the inspector's testimony that Roy Terry, the foreman, informed him that after the truck was delivered three weeks prior to June 2, he (Terry) did not check it for safety defects. This testimony was not rebutted or impeached by the operator. Hence, the knowledge of Terry, a foreman, is imputed to the operator. Accordingly, I find that the operator did have knowledge that it was not adequately carrying out the required pre-shift examinations related to mobile equipment.

**c. Obviousness Posed by the Underlying Violations**

Green was the only person who testified and had personal knowledge of the lack of a seatbelt in the truck. Green indicated that in the three weeks that he drove the truck it did not have a seatbelt. Also, importantly, he testified that he had reported the lack of a seatbelt to Terry, and the latter did not do anything about it. This testimony has not been rebutted or impeached by the operator. I find it indicative of the fact that it was obvious that a pre-shift examination of the mobile equipment had not been performed in a satisfactory manner. Green and Horn, the only persons to testify who had personal knowledge of the condition, both noted that the seatbelt had just one side. I thus conclude that it can be found that it was more probable than not that it was obvious that proper pre-shift examinations had not been performed, and that the defective seatbelt was obvious.

Within this context I find that the level of the operator's negligence reached the level of aggravated conduct. Hence I find that the Secretary has established that the violation herein was as a result of the operator's unwarrantable failure.

**II Penalties**

**A. Order No. 7711661**

**1. Gravity**

Since the violative condition could have resulted in an injury to a miner, I find that the level of gravity was relatively high.

**2. History of Violations**

I have reviewed the history of violations, (Gx. 33) which is a two year history of violations, and indicates a total number of 33 violations but only nine of which were S&S. There is an absence of guidelines or framework provided by the Secretary to evaluate this history of violations i.e., no evidence was presented as to how this history of violations compared to other two year periods at this operation, or two year periods of history of violations at comparable operations of comparable size. Hence, I conclude that the history of violations has a neutral affect on the analysis of the penalty to be imposed.

**3. Good Faith Abatement**

I reiterate my earlier findings that violative condition was abated in a timely fashion. 20 FMSHRC *supra*, at 70.

**4. The Operator's Size**

I take cognizance of the Commission's finding, which becomes the law of the case, that based upon the production tons or hours of the operation, Virginia Slate is a small operator. 24 FMSHRC *supra*, at 516. Thus this is a factor mitigating the amount of the penalty.

**5. Ability to Continue in Business**

There is an absence of evidence that the proposed penalty would effect Virginia Slate's ability to continue in business. I take cognizance of the Commission's finding, which becomes the law of the case, that in such an event, it is assumed that no such adverse affect would occur (*Id.*).

**6. Negligence**

I reiterate my initial finding, for the reasons stated therein, 20 FMSHRC *supra*, at 870, that the level of Virginia's negligence was moderate.

**7. Discussion**

I note that the Secretary, in it's Petition, requested a penalty of \$700.00 for this violation. However, in evaluating the above statutory criteria, especially taking into account that the Secretary had characterized the Operator's negligence as high, whereas in contrast, I found the level of negligence was only moderate, and considering the mitigating factors of the small size of the operation and the good faith abatement, I find that a penalty \$300.00 is appropriate.

**B. Citation No. 7711663**

The 110(i) factors relating to history of violation, size, and the effect of the penalty on the operator's ability to continue business, are set forth relating to Order No. 7711661, *infra*, are common to all the citations at issue and are incorporated herein by reference.

**1. Good Faith Abatement**

I find that violative condition was abated in a timely fashion.

**2. Gravity**

I find that although an injury of a reasonably serious nature was not reasonably likely to have occurred, should an injury have occurred it could have been permanently disabling. I thus find that the level of gravity was moderately high.

### 3. Negligence

According to the inspector, Terry and two other crusher operators told him that the crusher, and apparently the pulleys, had been in operation in an unguarded condition for two weeks prior to his inspection. The Secretary did not call Terry to testify, nor did the Secretary indicate why Terry was not called. Hence, an inference might be drawn that Terry's testimony would not have been helpful to the Secretary's case. Further, the only crusher operator to testify, Leroy Williams, indicated that there was no guard at the tail pulley "at the time leading up to the inspection" (Tr. Vol. 1, 148), but he did not testify that it had been run without a guard. There is no evidence that a guard was not in place prior to the time the crusher and the operation of the entire plant including the belts at issue had been shut down approximately two weeks prior to June 2. I reiterate my initial findings, 20 FMSHRC supra, at 381-382. Specifically, I find, based on my observations of Adamson's demeanor, that his testimony was credible. I, accordingly, give more weight to Adamson's in-court testimony than Horn's hearsay testimony, that from May 10, 1998, through June 1, 1998, the plant was not in operation and no belts were in operation, because the conveyor was being worked on. I also reiterate my initial finding, 20 FMSHRC supra, at 383, that based on Adamson's testimony that I find credible, the guard at issue had been removed to clean the area. For these reasons, I find that the level of negligence of the operator to have been only moderate.

Within the context of the above evaluation, and considering the fact that the Secretary's Petition requesting a penalty of \$500.00 was based on, *inter alia*, a finding that the operator's negligence was high, whereas I have found that Secretary has failed to establish that the level of negligence was more than moderate, I find that a penalty of \$300.00 is appropriate.

#### C. Citation No. 7711665

As set forth above, for the reasons explained above, I find that the size of the operator's operation is small, and its history of violations has a neutral effect on the setting of the penalty. I reiterate the finding that I made in the initial decision, 22 FMSHRC supra, at 384, for the reasons set forth therein, that the level of gravity was relatively high. I also reiterate my earlier finding therein that the level of negligence was no more than moderate, and I reiterate the other findings that I made in the second decision, 23 FMSHRC supra, pertaining to abatement and effect of a penalty on the operator's ability to continue in business, as neither of these findings have been reversed or remanded. I find that a penalty of \$300.00 is appropriate for this violation.

#### D. Order No. 7711667

On remand, the Commission ordered me to fully consider the size of the operator's

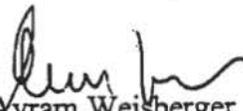
operation, and its history of violations. These factors have been set forth above, and are incorporated herein by reference, *i.e.*, that the size of the operation was small and the history of violations has a neutral effect on the penalty. I therefore reiterate the finding of a penalty of \$200.00 that was previously set forth in prior decisions, 23 FMSHRC *supra*, at 870 and 22 FMSHRC *supra*, at 385.

**E. Order No. 7711681**

In this remand, pursuant to the Commission's directive, I adopt and reiterate the findings and rationale set forth in the initial decision, 22 FMSHRC *supra*, at 390, that the gravity of the violation was high. The criteria of the size of the operation, history of violations, and effect of a penalty on the ability to remain in business are the same as set forth above relating to Order No. 7711661, *infra*, and are adopted herein. I reiterate my finding previously made that the violative condition was abated in a timely fashion, 23 FMSHRC *supra*, at 87, as it was not reversed or remanded by the Commission. I also reiterate the finding made above, I(B)(c), *infra*, that the level of negligence reached the level of aggravated conduct, *i.e.*, high negligence. Weighing all the above factors set forth in 110(i) of the Act, I finding that a penalty of \$750.00 is appropriate.

**ORDER**

It is **Ordered**, pursuant to the Commission's remand, 24 FMSHRC, *supra*, that Virginia Slate pay a total penalty of \$1,850.00 for the violative conditions cited in the following Order/Citation Numbers: 7711661, 7711663, 7711665, 7711667, and 7711681.

  
Avram Weisberger  
Administrative Law Judge

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/sc

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, Suite 9500  
Washington, D.C. 20001

March 6, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DANNY FOUST,	:	Docket No. KENT 2002-203-D
Complainant	:	BARB CD 2001-15
v.	:	
	:	Preparation Plant
MANALAPAN MINING COMPANY,	:	Mine ID 15-12602
Respondent	:	

## DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant,  
Susan C. Lawson, Esq., Lawson & Lawson, P.S.C., Harlan, Kentucky, For Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Danny Foust under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). The Secretary alleges that Manalapan Mining Company ("Manalapan") discriminated against Foust by terminating his employment on May 31, 2001, as a result of his complaints about safety. A hearing was held in Harlan, Kentucky. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Respondent did not discriminate against Foust and dismiss the complaint.

### Findings of Fact

Manalapan has produced coal in and near Harlan County, Kentucky for many years. After closing a facility at Brookside, Kentucky in 1997, it operated two facilities, the Highsplint Division and RB Coal, both consisting of underground mines, preparation plants and load-out facilities. Over the years, reductions in the market price of coal and decreasing quality of mineable coal have resulted in constriction of Manalapan's operations. The Highsplint operation effectively closed on September 14, 2002. Tr. II 88-89; ex. R-11.<sup>1</sup>

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<sup>1</sup> The transcript of the hearing consists of two volumes. The transcript of the first two days is referred to as "Tr." The separately numbered transcript for the third day is referred to

Danny Foust had been employed at a coal preparation plant owned by Great Western Coal, and was laid off when that operation shut down in 1995. In 1997, he began working for Manalapan, operating a bulldozer loading coal in the mines at Highsplint. Later, he worked on the crusher. When a vacancy occurred in a foreman's position at the Highsplint preparation plant, Foust, who had indicated an interest in such a position and was certified as a foreman and electrician, was selected for the job. Duane Bennett, Manalapan's chief executive officer, had heard reports that Foust was a hard worker and wanted to give him a chance at the position. Foust became the preparation plant foreman on the day shift in July of 2000. The foreman of the day shift was also in charge of the second shift, which had its own foreman. As a certified electrician, Foust was responsible for performing monthly electrical inspections and signing the "electrical book." Foust received an increase in pay and later became a salaried worker, earning \$700 a week. In addition he became eligible for higher bi-yearly bonuses and Bennett agreed to make half of the payments for a new truck that Foust purchased.

The preparation plant was a critical component of Manalapan's mining operation. All of the coal produced by the mines had to be processed through the plant to remove rock, clay and other impurities. Coal had been mined at Highsplint for almost 100 years and the quality of that remaining had declined considerably. Manalapan's most recent reject rate was as high as 50-60%, i.e., less than half of the raw product produced by the mines was marketable coal. The preparation plant, often referred to as a "washer," used water and chemicals to separate the marketable "clean coal" from the waste, or "sludge." Raw coal was crushed and combined with water and a chemical, "magnatite," which "floated" the useable coal from the sludge suspension. The clean coal was then dried, passed through screens where it was sorted by size, and transported by belts to stockpiles in the load-out area. Much of the water used in the process was recirculated. It was routed to a large tank called a "thickener" where a chemical, "Nalco", a cationic, was added to help cause the clay and other suspended impurities to settle. The sludge was moved to the tank's center by rotating "rakes," and was then pumped to a large impoundment area. Water that was not reused was discharged into a ditch that fed down into a series of settlement ponds. There was also a creek that flowed near the plant, roughly parallel to the ditch. Foust and other foremen were periodically directed to add Nalco to the water in the ditch and the creek. Trucks forded the creek making it muddy, and the Nalco settled the mud as the water flowed down into a large settlement pond and eventually into an adjoining river.

The Highsplint plant was an old facility, part of which had been re-built in conjunction with the installation of the present washer in 1987. It was designed to be operated by four men. Tr. II 33. Portions of the old plant were inactive, and some machinery had been removed. As recently as 1997, the plant had operated with three shifts, two running production, and the third performing maintenance. By the time Foust became foreman, the plant was operated on only two shifts. The primary responsibility of the day shift was to process coal. However, repairs often had to be made when equipment failures forced curtailment of plant operations. The primary responsibility of the evening shift was to perform repairs and maintenance that could not be done while the plant was operating. However, the second shift typically processed coal for several

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as "Tr. II."

hours before shutting the plant down, especially if the first shift had experienced significant down time. The respective foremen or members of their crews made daily notes of production and repair/maintenance tasks in a book. Ex. C-4. The first shift listed repair or maintenance tasks to be performed on the second shift, and the second shift checked the listed items as they were completed. If an item was not able to be addressed by the second shift, the first shift might do it, or it would be listed again the following day.

The preparation plant was a highly complex processing facility. There were numerous conveyor belts, vibrators and screens, motors, pumps, pipes and other devices, all of which experienced significant wear and tear in handling the abrasive coal and waste products. Continued efficient operation of the plant required substantial ongoing maintenance and clean-up. After Foust assumed his foreman position in July of 2000, the preparation plant was experiencing frequent breakdowns, coal spills, leaking pipes, and other problems, all of which impacted adversely on the production of marketable coal. The inability of the plant to process coal had caused the raw coal stockpile to grow to excessive proportions, almost ten times what it should have been, which threatened to force curtailment of mining activities. Tr. 507-08.

Bennett was increasingly concerned about the lack of production from the plant and the resulting inability to ship sufficient quantities of coal to maintain the economic viability of the Highsplint operation. In an effort to ascertain the causes of the problems at the plant, Bennett assigned Earl L. Goins, a foreman at the RB Coal preparation plant, to make an assessment of the Highsplint operation. Beginning in April 2001, Goins visited the facility during the day shift, two or three times a week for several hours. Tr. 551-53. He did not have extensive discussions with Foust about the operation, but did advise him of the purpose of his visits. Based upon his observations over a period of two weeks, he compiled a list of 12-14 problems that he felt needed to be addressed. He could not recall the specific items on the list, but described them as leaking pipes that needed to be repaired or replaced, damaged or worn chutes that caused substantial spillage, and similar items. Tr. 513-16. While he had concerns about Foust's ability to "boss" or manage the plant, he did not include any personnel issues on the list. *Id.* At least some of the second shift miners reacted with hostility to Goins' presence. He described "childish" things, e.g., a crude drawing of a man in a noose labeled with his name.

As Goins related his findings at the hearing, the plant was in a state of chaos. There were a "huge" number of leaking pipes and large amounts of coal spillage. In his words, the plant "just wasn't being took care of." Tr. 509-10. His concerns about Foust's management capabilities were based upon what he viewed as a lackadaisical attitude by the men under his supervision. "If something broke, the men weren't getting there to fix it." Tr. 511. He described an incident where a failure of a bearing required that a belt be shut down. Foust went to the problem and worked on it - but only one other man came to help, after approximately 15 minutes. Goins then went to look for the other men and found them just loafing or "piddling around." Tr. 548-49. Larry Ellis, the Highsplint surface foreman, made similar observations. Tr. 569.

In an effort to remedy the production problems, it was determined to try switching the personnel on the respective shifts. This move effectively demoted Foust, because the foreman of the first shift was also responsible for the second shift. Goins and Bennett testified that the switch was tried just to see if things would improve, and because they didn't want to do anything drastic to the men, i.e., discharge them. Tr. 533; Tr. II 83. There was some improvement in the first shift's production following the switch, and considerable improvement in the response to breakdowns. Tr. 544. However, the plant continued to experience too much down time to meet production goals. Tr. II 136.

Foust, who was a certified electrician, had inspected the plant's electrical system monthly, and through April 2001, had signed off on the electrical book. As Foust explained the purpose of the book, both MSHA and the State of Kentucky required that electrical equipment and circuits be inspected monthly and that the results of the inspections be noted in a book.<sup>2</sup> He would list any deficiencies and the date that repairs were made. Tr. 288-89. In late May 2001, about a week before the end of the month, Foust decided that he would no longer sign the electrical book, i.e., make the monthly certification that the electrical circuits of the plant met applicable standards.<sup>3</sup> Tr. 31-32; Tr. II 82. He did not want to be responsible for the electrical circuits, and feared that he might go to jail if someone got hurt. Tr. 210-11.

Foust's primary concern was overloaded circuit breakers located near the thickener. Tr. 211. The circuits for pumping sludge to the impoundment had become overloaded because a larger motor, and then a second motor, were added. Tr. 468-70. In order to keep the circuits closed and the pumps running, the doors to the breakers were left open and a fan was used to blow cool air to the breakers. He testified that this posed a serious threat of electrocution because a miner in the area might inadvertently contact one of the conductors carrying 480 volts. A miner might also be struck by pieces of the equipment in the event of a catastrophic failure. The condition was noted by a Kentucky State mine inspector, who threatened to shut the plant down. However, it was allowed to operate on the condition that the breaker boxes be closed and locked, with only a qualified electrician being in possession of the keys. Tr. 470-78.

Larry Shakelford, the Highsplint operation's shop foreman and chief electrician, had overseen the addition of the pump and had ordered new circuit breakers to handle the increased load. The breakers, which cost about \$35,000, required about six weeks for delivery. Tr. 468-72, 603. Six new boxes were delivered to the plant shortly after the Kentucky inspection, and were promptly installed by Shakelford. As far as Ellis was concerned, the problem with the breakers was Shakelford's, and he was "talked to" about that.

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<sup>2</sup> See, e.g., 30 C.F.R. §§ 77.800-1 and 77.800-2, requiring that written records be kept of monthly testing and examination of circuit breakers.

<sup>3</sup> Foust decided to cease signing the electrical book rather than make notations of the problems, because he felt that "they would never be fixed and they would shut us down." Tr. 290.

On May 30, 2001, the second shift commenced work at 3:00 p.m. and the plant was not operating. There were several major problems that needed to be addressed, and the crew worked overtime until about 2:00 a.m., on May 31, 2001. When the day shift arrived and powered-up the plant, it ran for a few minutes, but had to be shut down because of major damage to the clean coal conveyor belt. A strip, approximately a foot wide, had torn and become entangled in the structure, extending the tear to approximately 300 feet. Goins, Ellis and Gary Smith, then the first shift foreman, felt that the belt had been deliberately cut and tied off so that it would rip when the conveyor was powered-up. Tr. 522-23. Other individuals believed that the belt could have been damaged in the normal operation of the plant, e.g., by a piece of metal falling from the structure or mixed in with the raw coal. Tr. 83-85, 104-05. Bennett viewed this breakdown as the "last straw," since he was paying the second shift men considerable overtime but couldn't get any production. Tr. II. 85, 130-32. Bennett decided to discharge Foust and the miners on the second shift. Goins had advised him that he didn't think Foust could control the men, and Bennett felt that Foust and the second shift were largely responsible for the plant's problems. Tr. II 84-86, 107, 133. Ellis came back to him and asked to be able to move one of the men, Tommy Napier, to the first shift, which was short-handed, and he agreed. Tr. II 133. Foust and Derek Hensley were laid-off on May 31, 2001. Ex. C-19A. The other second shift miner, Robert Gross, worked two additional days.

The plant was shut down while a piece of belt from another conveyor owned by Manalapan was secured and spliced in. Operations resumed, but the plant continued to be plagued with breakdowns. More extensive maintenance work was normally performed at the beginning of July, when miners were on vacation. Bennett had hoped to be able to operate the plant until the July break, but was forced to alter that plan. A few days after the plant resumed operations, about June 11, 2001, when returning from an inspection of the impoundment, Bennett and John Phillips, Manalapan's engineer, observed that the rakes in the thickener tank were not turning. The inability to pump sludge from the thickener dictated that the plant be shut down. There was a build-up of sludge on the bottom of the thickener, and attempts to rotate the rakes resulted in failure of the drive gears. The sludge pumps also failed. The water in the tank was dipped out and the built-up sludge, which had become quite dense, was removed with a small front-end loader. An old coat, a gear wrapped in a piece of brattice cloth, and a piece of metal railing were discovered in the tank. The gear had migrated to the center of the tank and blocked the opening to the sludge pumps. It appeared that the gear, and perhaps the other items, had been deliberately placed in the tank.

Bennett determined to shut the plant down for extensive repairs. He had not realized that it was in as bad a shape as it was. Even though parts needed for the normal summer shut down repairs had not been ordered, Manalapan commenced a major repair effort. As described by Phillips, pipes, chutes and beams were replaced. Feeders were out of level because the springs were broken and had not been replaced, which caused the metal to deform. Chute liners, which should be replaced as they wear out, had not been replaced, causing the chute itself to wear through. He estimated that the conditions were the result of many months of neglected maintenance. Tr. II 65, 73. R.T. Welding & Fabrication, a contractor that had done extensive

work at the plant in the past, was retained to perform some of the repairs. From June through October, R.T. Welding performed repairs costing over \$68,326.75. Tr. II 51-52; ex. R-10. The plant was operational after a couple of weeks, but repairs and maintenance continued through the summer as ordered parts arrived. By September, the plant was running efficiently with a crew of four men. The raw coal stockpile was virtually eliminated, and the plant eventually needed to operate only three days a week to process the coal produced by the mines. As noted previously, the Highsplint operation, including the preparation plant, was closed for the foreseeable future, as of September 14, 2002.

On June 11, 2001, Foust filed a complaint of discrimination with MSHA, alleging that he had been laid-off “due to complaining about unsafe work conditions at the Prep Plant.” Ex. C-12. The following day, MSHA initiated an inspection of the Highsplint preparation plant. Inspections continued to early September. A total of 102 citations were issued for various alleged violations. Ex. C-1.

#### Conclusions of Law - Further Findings of Fact

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. See *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. See *Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

#### Prima Facie Case - Protected Activity

The Secretary asserts that Foust engaged in protected activity in three ways: his “refusal” to sign the electrical book, which is alleged to be the “primary” reason for his discharge; his raising of concern about putting Nalco into the creek; and his complaints to Ellis about various hazardous conditions at the plant. A complaint made to an operator or its agent of “an alleged danger or safety or health violation” is specifically described as protected activity in section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). I find that Foust engaged in protected activity when

he stated that he would no longer sign the electrical book because of the overloaded circuit breakers. However, I find that he did not make other complaints about dangers or health or safety violations, and that his expression of concern about the use of Nalco was not protected activity.

Approximately one or two weeks prior to May 31, 2001, Foust determined that he would no longer sign the electrical book because he did not believe that the electrical circuits met applicable standards. His action was prompted by the overloaded circuit breakers near the thickener. Tr. 211; ex. R-6 at 34-36. At the hearing, he emphasized the dangers the overloaded breakers posed to miners, including the risk of electrocution. *Id.* When questioned about why the breakers were not treated as imminent dangers, however, he responded that the men “never [were] around the boxes.” Tr. 404. Gary Smith, who became first shift foreman and was then Foust’s supervisor, recalled him saying that he would no longer sign the electrical book. Tr. 628. Foust testified that he told Ellis he would no longer sign the electrical book. Tr. 210, 436-37. Ellis did not recall Foust stating that he would not sign the book. Tr. 584-85. I find that Foust told both Smith and Ellis that he would no longer sign the electrical book because he believed that the overloaded circuit breakers did not comply with safety standards. Foust, therefore, engaged in activity protected under the Act.

I also find that Foust raised concerns about the use of the cationic “Nalco,” in the creek. He did not refuse to put it in the creek, but sometimes just didn’t do it. Tr. 314. His concerns were the chemical’s toxicity to aquatic life and the effect it might have if it got into the water supply of people that lived downstream, and were largely based upon his mistaken belief that the creek ran directly into the adjoining river.<sup>4</sup> Tr. 216-20, 291. There is no contention that the chemical could not be used safely by him and other miners at Manalapan.<sup>5</sup> He did not express any concern over use of Nalco in the plant’s thickener or its placement into the ditch carrying water discharged from the plant to a series of settlement ponds. Tr. 216-18, 291, 421. Neither Foust nor the Secretary contend that the use of Nalco posed a danger to miners or violated the Act or any of the Secretary’s health or safety standards promulgated pursuant thereto. Foust’s concerns about the environmental impact of that particular use of the chemical were admirable. However, his expression of those concerns was not activity protected by the Act.

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<sup>4</sup> Manalapan introduced a geological survey of the mine property depicting elevations and the layout of the plant and settlement ponds. Ex. R-8. The survey, along with the testimony of Ellis and Phillips, its engineer, establish that the creek flowed into a large settlement pond, “Pond SG-1,” not into the river, and that Manalapan’s use of Nalco was consistent with all regulatory requirements. Tr. 573-74; Tr. II 56, 75.

<sup>5</sup> The label on the product cautioned that it: “May cause irritation with prolonged contact,” and advised that the product should not be allowed to “get in eyes, on skin, on clothing.” Ex. C-20. Foust testified that he read and followed the label’s advice and simply didn’t get it on himself. Tr. 314.

The Secretary argues that Foust also complained about a number of hazardous conditions described by himself and other witnesses. Foust, for example, testified that there were numerous electrical hazards, “guards were rotted off,” the “catwalk was rotted out,” and the “basement was full” of coal spills. Tr. 220-21. The Secretary asserts that Foust complained to Ellis about these various conditions. However, Foust’s testimony about the alleged complaints was very general, lacking as to times, dates and precisely what he complained about, other than lack of manpower. Tr. 213-14, 220, 400-01, 434-35. Foust’s credibility regarding this issue is highly suspect. I find that he did not make complaints about these various alleged safety hazards.

As a foreman who was designated to conduct daily workplace inspections, Foust had the responsibility to report hazardous conditions.<sup>6</sup> He acknowledged his responsibility to conduct preshift inspections, and his duty to report any hazardous conditions that he found. He testified that he did, in fact, note in the preshift reports anything that needed to be fixed, and acknowledged that it was his responsibility to correct hazardous conditions, including those involving the electrical system. Tr. 401-05, 442; ex. R-6 at 23, 25-26, 40-41, 50-51. Yet, an examination of the preshift reports that he authored fails to disclose any significant problems, the only notations being that floors needed to be cleaned. Virtually none of the various unsafe conditions described by Foust or other witnesses were listed in Foust’s preshift reports. Ex. C-3. To explain this inconsistency, he testified that his preshift inspections were quite limited. “Preshift is just checking the floors and the tunnel checking for methane. It’s just a preshift, real fast inspection.”<sup>7</sup> Tr. 403-04. Though he acknowledged that his preshift examination included

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<sup>6</sup> 30 C.F.R. § 77.1713, requires that the plant be examined at least once during each working shift and that a written record be kept of each such investigation “together with a report of the nature and location of any hazardous condition found.”

<sup>7</sup> Considerable evidence was introduced regarding another reason offered by Foust to explain why he did not correct the various safety hazards he described. He testified that substantial restrictions had been imposed on his ability to obtain parts and supplies, i.e., that every part or supply item that he wanted had to be approved by Ellis or David Patterson, the superintendent. Tr. 216. His testimony was marginally supported by Randy Kelly, who worked in the parts warehouse until he was laid-off by Bennett on February 16, 2001. He testified that the pre-approval policy “seemed” to apply only to Foust, not to the other day shift foremen, but didn’t know whether Gary Smith, then the second shift foreman, was subject to the same restrictions. Tr. 342-43, 355, 364-65. Kelly also explained that the warehouse maintained over \$1 million worth of parts and supplies, and that restrictions had been placed on the availability of some items, especially more expensive items like circuit breakers, because of a theft and concerns about waste and cost control. Tr. 347-48. He agreed that Foust got some of the things he requested, but not others.

Several other witnesses, including Frank Sargent, the warehouse manager, and David Patterson, the surface superintendent, testified that there were no special restrictions applicable only to Foust and described a common sense structure to the expenditure of funds for parts and materials. Requests for expensive items, e.g. those costing \$500-\$1,000 or more, typically had to

checking for all hazards, including electrical hazards, he testified that he only examined the electrical system during the monthly electrical examinations. *Id.* He explained that he had been a foreman for only a short time and that he wasn't familiar with the regulations.<sup>8</sup> *Id.* Despite his explanation, Foust acknowledged that the purpose of the preshift inspection was to prevent the men on his shift from being exposed to such hazards, and that there was never an unsafe condition that he couldn't fix before the men started working. Tr. 402-05, 444-45.

The record is the same with respect to various electrical problems claimed by the Secretary to have existed. Foust testified that he performed a thorough inspection of the electrical system each month, checking all the switches, breakers, and everything electrical. Tr. 288-89. If anything was wrong he would write it down and then enter the date when it was fixed. When he signed the book, he certified that "everything was right" in the electrical system. Tr. 209-10. Despite the claims of numerous electrical hazards, Foust signed off on the electrical book through April, 2001, certifying that there was nothing wrong with the electrical system.<sup>9</sup>

Foust typically described his complaints to Ellis as lack of resources, i.e., "not enough men and not enough time to . . . get all the stuff done" and not "enough men to run that big of a washer." Tr. 213, 434-35; ex. R-6 at 26-27. Moreover, when asked why he was fired, he stated it was because of his complaints about the use of Nalco in the creek and his refusal to sign the

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be authorized by management. Commonly used parts and supplies that were in stock, were obtainable upon request. Tr. 562-63. Sargent explained that managers initiated a request for parts or supplies by filling out a "Warehouse/Purchase Request" form. Respondent's exhibit 5 consists of a sampling of eight such forms initiated by or on behalf of Foust during February - April 2001. All of the requests bear notations that the requested items were purchased from a supplier. Tr. 667-68.

The weight of the evidence rebuts Foust's claim, and I find that his access to parts and materials was no more restricted than other managers. It would seem that if the availability of such items was as restricted as Foust claims, there would be ample supporting evidence in the form of purchase requests that bore no indication that the items had been ordered. No such documentation was submitted.

<sup>8</sup> Another troubling claim of ignorance by Foust occurred when he was questioned as to why he didn't report the alleged safety violations to MSHA. He answered that he didn't complain to MSHA because he would have been fired. When asked why he didn't submit anonymous complaints (*See* 30 C.F.R. §§ 43.1-43.8), he stated that he was unaware of his right to make anonymous complaints, though he acknowledged receiving training that included the subject of miners' rights under the Act. Tr. 378-79.

<sup>9</sup> As noted, *infra*, MSHA had conducted inspections in the plant during January to March, 2001, and served a number of citations on Foust. Foust was responsible for correcting those conditions, and they presumably were corrected.

electrical book. He did not include the alleged complaints about other safety hazards. Tr. 210, 288, 408; ex. R-6 at 65-68. Ellis testified that Foust had not made any “safety complaints” to him. Tr. 569. Smith testified that Foust talked to him about general things, but did not recall him making safety complaints. Tr. 624-25.

I find that, with the exception of the use of Nalco in the creek and the overloaded circuit breakers, Foust did not complain about the various other conditions described by him and other witnesses. He made “general complaints” about limited resources, primarily what he viewed as inadequate time/men to do the job of running the washer. Foust’s general complaints to Ellis were not – were not intended to be – and were not taken as – complaints about dangers to miners or safety or health violations. When he made them, he was not exercising rights under the Act, and was not intending to do so. Rather, he was addressing why he was unable to remedy the frequent interruptions in the plant’s production.

#### Adverse Action

Foust clearly suffered adverse action. While the May 31, 2001, notice advised him that he was “laid off,” Bennett intended to discharge him. His departure from Manalapan has been treated as a discharge. In any event, a lay-off or discharge would constitute adverse action for purposes of his present claim.

#### Motivation

The principle issue as to Foust’s *prima facie* case is whether the adverse action was motivated in any part by his protected activity. In *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999), the Commission acknowledged:

the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. “Direct evidence of [unlawful] motivation is rarely encountered; more typically, the only available evidence is indirect. . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’” [citing *Chacon*]. In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.* We also have held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Id.*

As explained below, while Foust was discharged within a week or two of informing Ellis that he would no longer sign the electrical book, I find that Bennett made the decision to discharge Foust entirely on his own and that he had no knowledge of Foust's protected activity. His decision was solely a product of his frustration with the plant's poor production, which he largely attributed to Foust's inability to manage effectively.

Bennett was Respondent's chief witness at the hearing. He impressed me as a candid individual, whose overriding concern was profitable operation of the Highsplint facility. He testified, without contradiction, that he generally supported his workers, gave them bonuses when times were relatively good and was reluctant to take adverse actions, such as discharges. He also impressed me as a man who believed strongly in "company loyalty," and who would take a dim view of his employees invoking outside forces, such as MSHA, in the operations of the facility. In a telling response to a question about whether Foust was called back to work after being laid-off, Bennett stated: "No, he filed against me," i.e., Foust had filed a complaint of discrimination with MSHA. Tr. II 88. Bennett's expressed hostility toward Foust's post-termination exercise of his right, suggests that he harbored hostility toward miners' exercise of rights under the Act. However, there is no evidence of pre-termination hostility or animus toward Foust because of any of his claimed complaints. Ellis responded to his "complaints" quite benignly, replying "just do [your] job the best [you] could." Tr. 213-14. Foust testified that Ellis was not hostile towards him, made no derogatory comments about him, and that he liked Ellis. Tr. 389-90, 401.

Bennett made the decision to discharge Foust without consulting Ellis or anyone else. Tr. II 130-33; Tr. 571. Smith handed Foust his lay-off slip and didn't know why the decision had been made. Tr. 637-39. Bennett's decision to terminate Foust was the culmination of his increasing frustration with the inability of the plant to process sufficient coal. His concerns had prompted him to have Goins evaluate the operation. Tr. II 80. Goins eventually reported that, while Foust was a hard worker, he was not capable of managing the men. Tr. II 82; Tr. 514-16. As Bennett explained: "I was tired of excuses and I'd get reports, every day I get a report and I'd look at those reports. It would be the same old thing over and over." Tr. II at 80. Adding to his frustration was the fact that production problems persisted despite substantial amounts of overtime being worked by second shift miners. Tr. II 85, 130-31. His frustrations had nearly reached the breaking point prior to the May 31 incident. Tr. II 84, 130-33. That incident caused him to react by ordering the discharge of Foust and the second shift. The plant had been operating poorly, the second shift had worked significant overtime the night before, and the plant was non-functional at the start of the first shift. Tr. II 130-31.

Bennett had no knowledge of Foust's protected activity, i.e., his decision to no longer sign the electrical book. While he had frequent interaction with Ellis, and clearly was aware of Foust's complaints about lack of resources, he regarded them as excuses for Foust's inability to remedy the frequent breakdowns that interfered with the plant's production.

I decline to draw an inference that Ellis informed Bennett of Foust's protected activity, because there are a number of possible reasons why Ellis would not have viewed Foust's action

as an event meriting Bennett's attention. Foust did not testify to the exact words that he used to inform Ellis of his decision. Judging from his demeanor at the hearing, it is unlikely that he did so in an aggressive or hostile manner, and there is no claim that Ellis reacted with hostility toward Foust. Ellis may not have understood Foust's communication as a "refusal" to sign the book, or he may have considered the problem to be a temporary one that would soon be resolved by Shakelford's installation of the upgraded breakers. The fact that Manalapan was subsequently cited for failing to have examinations of the electrical circuits certified for the month of May, suggests that Ellis placed little significance on Foust's action. He neglected to assure that the examination and certification were done, despite the ready availability of other qualified individuals, including Shakelford and Rodney Tipton, a foreman at the R&B plant. Even if the new breakers could not have been installed by the end of the month, the certification could have been done with a notation of the problem of the overloaded breakers, along with the fact that new breakers were on order. Inspectors were not likely to fail to discover such an obvious problem, and it likely would have been better to note it, than ignore it. Inspectors from the State of Kentucky were aware of the problem, and had not shut the plant down.

There is no direct evidence of unlawful motivation and there is not enough circumstantial evidence to justify a conclusion that Bennett's discharge of Foust was motivated, in any part, by Foust's protected activity. Bennett had no knowledge of Foust's protected activity, the "most important" element of a circumstantial case. There was no animus or hostility toward Foust because of his protected activity. Only a limited coincidence in time, one to two weeks, between Foust's protected activity and the adverse action suggests a relationship between the two. I find that Bennett's decision to discharge Foust was not motivated, in any part, by Foust's protected activity. Therefore, Complainant failed to establish a *prima facie* case of discrimination.

I reach this conclusion based upon all of the evidence and my evaluation of the credibility of the witnesses, chiefly Bennett and Foust. Bennett testified in an open and forthright manner, and was consistent and convincing in his description of the economic problems and frustrations that resulted from the inability of the preparation plant to operate efficiently. His openness was apparent even when it was not to his advantage, e.g., when he expressed his hostility to the fact that Foust had exercised his right to file a complaint of discrimination under the Act.<sup>10</sup> I found highly credible his testimony that his decision to discharge Foust and the second shift miners was motivated by his building frustration with the operation, which was focused on Foust, who had been reported to be a poor manager.

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<sup>10</sup> Seizing on Bennett's statement at the hearing, the Secretary has argued that Manalapan's failure to call Foust back to work was retaliation for his filing of the discrimination complaint. While Bennett expressed hostility to Foust's exercise of his right to file a complaint of discrimination, I do not find that he discriminated against Foust by not recalling him. Bennett had intended that Foust be discharged, not laid-off, and he had no intention of re-employing him. Manalapan's operations were becoming smaller, Ellis explained that they didn't need another foreman, and Bennett felt that putting a former supervisor back to work in a non-supervisory position would have posed problems.

As noted above, I believe that Foust inflated his claims that numerous unsafe conditions existed at the plant and the nature of his "complaints" to Ellis. His overall demeanor was highly deferential, and appeared consistent with that of someone who might not be an effective supervisor. I have no doubt that he was a hard worker, both prior to and after becoming a foreman. However, as foreman, his primary responsibility was making sure that his men worked hard, something that, at least as far as Bennett was informed, he did not do effectively.

I have also considered the many arguments advanced by the Secretary, but find them insufficient to satisfy Complainant's burden. The Secretary makes much of the fact that Respondent terminated only two of the four second shift miners, Foust and Hensley. She asserts that, while Napier's move to the day shift was explained, Respondent offered no explanation as to why Gross was not also discharged on May 31, 2001. She argues that Manalapan "forgot to fabricate a reason for Gross' continued employment after the layoff, further establishing that the stated reasons for the 'layoff' were pretextual." Sec'y's Br. 93. However, this "theory" was not developed at the hearing. Neither the Secretary, nor the Respondent, probed Gross' status after the layoffs. The "hours worked" reports for the time period in question, exhibit R-3, establish that Gross worked only two more days. Gross testified that he left the plant voluntarily a couple of days after the lay-offs. Respondent may well have been aware of Gross' impending departure and may simply have allowed him to work until the date he had chosen to leave, an explanation at least as probable as the Secretary's.

The Secretary argues that the hiring of additional miners after the lay-offs exposes Manalapan's explanation as pretext. However, the decision to discharge the second shift was not made as a permanent move to reduce labor costs, it was made because Bennett was not satisfied with the performance of Foust and the men working the second shift. The hiring of additional miners shortly after the lay-offs is consistent with Respondent's explanation of the reasons for the decision to discharge Foust. Some additional labor was also required for the significant repair effort necessitated by the failure of the thickener, and the need to make other major repairs.

The Secretary also argues that Ellis' and others conclusion that the clean coal belt had been deliberately cut was an attempt to build a pretextual reason for Foust's discharge that "fell apart" when the "witnesses didn't have the heart to accuse Foust" of doing it. Sec'y's Br. 90. However, as Ellis stated, no one ever accused Foust of cutting the belt and he did not have any idea who might have done it. Tr. 572. 589. Bennett never cited a suspicion or belief that Foust had damaged the belt as a reason for his decision.

The Secretary argues that the citations issued during MSHA's inspection of the plant after Foust's departure confirmed the existence of numerous safety violations at the time Foust allegedly made his complaints to Ellis. Complainant's exhibit 1 consists of copies of citations issued at the preparation plant from May 31 to September 6, 2001. However, it is far from certain that most of the conditions cited existed for that length of time. MSHA had a somewhat constant presence at the plant, and had conducted recent inspections. A number of citations had

been served on Foust in January, February and March, 2001.<sup>11</sup> Ex. R-4. While many of the citations issued in the summer of 2001, were similar to those issued earlier, they were cited as new violations. There were a number of “accumulation” violations, an ongoing problem at the plant. Many of the guarding and electrical violations appear to have been within Foust’s ability to correct, even with limited resources. In some instances, guards had simply not been replaced. In others, guards were extended to cover small openings, which may have been of recent origin.

### Respondent’s Affirmative Defense

Even if Bennett had been aware of Foust’s decision not to sign the electrical book, and that knowledge somehow played a part in his decision to discharge him, I find that he would have taken the same action based solely upon Foust’s unprotected activity, i.e., Bennett’s perception that Foust was an ineffective manager, largely responsible for failing to remedy the frequent breakdowns that plagued the plant.

In *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission explained the proper criteria for analyzing an operator’s business justification affirmative defense:

Commission judges must often analyze the merits of an operator’s alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operators’s business judgment our views on “good” business practice or on whether a particular adverse action was “just” or “wise.” The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner’s protected activities. If a proffered justification survives pretext analysis . . . , then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge’s or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was

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<sup>11</sup> It was Ellis who appeared to be most concerned about those violations. Foust testified that Ellis was “on him” to make sure that the violations were abated, which they presumably were. Tr. 388-89.

enough to have legitimately moved that operator to have disciplined the miner. (citations omitted).

The Commission further explained its analysis in *Haro v. Magma Copper Co*, 4 FMSHRC 1935, 1938 (Nov. 1982):

[T]he reference in *Chacon* to a “limited” and “restrained” examination of an operator’s business justification defense does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of “industrial justice” for that of the operator. As we recently explained, “Our function is not to pass on the wisdom or fairness of such asserted business justifications, *but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.*” (citations omitted).

Respondent, through Bennett, advanced a credible business justification for discharging Foust. Bennett was extremely concerned about the frequent breakdowns that interfered with the plant’s production of marketable coal. The raw coal stockpile had grown to excessive proportions and threatened to negatively impact the other mining operations. This occurred while Foust was foreman in charge of the first shift, essentially in charge of the plant. Bennett’s concerns caused him to assign one of his trusted managers, Goins, to conduct an evaluation of the operation of the plant. Goins reported that there were a lot of problems with what appeared to be deferred maintenance items, and that Foust did not appear to have control of his men. Bennett switched the first and second shifts, hoping to avoid more drastic action. All of this occurred prior to Foust’s protected activity, which is alleged to be the “primary” reason for his discharge. Things did not improve significantly. Bennett’s frustrations built to the point that the incident of May 31, 2001, prompted him to discharge Foust.

As noted above, I have found that Bennett was not motivated, in any part, by Foust’s protected activity, of which he had no knowledge. Even if it could be said that Foust’s discharge was based in some part on his protected activity, I find that Bennett would have taken the adverse action against Foust based solely upon legitimate business reasons.<sup>12</sup>

To some extent, Foust may have been unfairly blamed for the plant’s problems. As Bennett stated, he hadn’t realized that the plant was in as bad a shape as it was. Tr. II 124. With the accumulation of deferred, or poorly performed, maintenance, breakdowns were frequent and production was impaired. While Foust had significant responsibility for maintenance, his

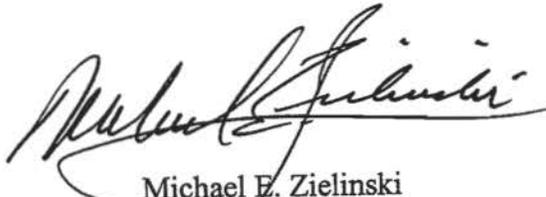
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<sup>12</sup> I would reach the same conclusion with respect to Foust’s expression of concern over the use of Nalco in the creek, if that action were deemed to be protected activity.

protests about limited resources may have had some legitimacy.<sup>13</sup> On the other hand, if Foust had been a more effective manager, maintenance tasks might have been better performed. It is not the function of this Administrative Law Judge to resolve the ultimate fairness of whether Foust should have born the brunt of Bennett's dissatisfaction with the plant's poor operation. I am convinced that it was reasonable for Bennett to have concluded that Foust bore enough responsibility for the problems that he should be discharged, for that reason alone.

**ORDER**

For the reasons stated above, I find that Bennett's decision to discharge Foust was not motivated in any part by Foust's protected activity. Alternatively, I find that, had Bennett been aware of Foust's protected activity, he would have made the same decision based solely upon legitimate business considerations. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.



Michael E. Zielinski  
Administrative Law Judge

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/mh

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<sup>13</sup> Although the Secretary's argument that Manalapan had decided not to spend money on the plant fails to recognize that it maintained over \$1,000,000 in parts and supplies and had spent over \$75,000 for work by R.T. Welding during the year 2000.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

March 13, 2003

JASON C. SHEPERD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-466-DM
	:	RM MD 02-13
	:	
v.	:	Mine I.D. 48-00243
	:	Casper Plant
BLACK HILLS BENTONITE,	:	
Respondent	:	

**DECISION GRANTING RESPONDENT’S MOTION TO DISMISS**  
**ORDER OF DISMISSAL**

Before: Judge Manning

This proceeding was brought by Jason C. Sheperd against Black Hills Bentonite (“Black Hills”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.40 *et seq.* Mr. Sheperd alleges, in part, that on August 9, 2000, he sustained a serious injury to his neck “while throwing 100 pound bags of bentonite” in Respondent’s Casper, Wyoming, plant. He contends that Black Hills showed no concern for his injury and continued to require him to perform hard physical labor, which exacerbated his injury. In its answer, Black Hills denies Mr. Sheperd’s allegations and maintains that he has not stated a claim that can be remedied under section 105(c)(3) of the Mine Act.

After taking Mr. Sheperd’s deposition, Black Hills filed a motion to dismiss this case. Mr. Sheperd opposes the motion. Because I find that Mr. Shepherd has not stated a claim that can be granted relief under section 105(c) of the Mine Act, I grant the motion to dismiss. The facts described below are facts that are not in dispute or are facts provided by Mr. Sheperd.

**I. BACKGROUND**

In March 2000, Mr. Sheperd, who is now 33 years old, began working at the Casper Plant as a loader operator/laborer. He believed that eventually he would become a plant operator. This plant mills bentonite clay for use in kitty litter and other products. At some point in time, Shepherd suffered a back injury while moving a conveyor belt. On August 9, 2000, Sheperd was throwing heavy bags onto the bed of a truck when he strained his neck. His neck hurt so much later that day, that he could not move it. The plant operator recommended that he see a doctor. A doctor diagnosed the injury as a strained muscle in his neck. The doctor prescribed several medications and gave Sheperd a letter stating that he could return to work as long as he was assigned “light duty” tasks.

Mr. Sheperd alleges that when he returned to work, he gave the light duty letter to the plant operator who handed it to the plant superintendent, Andy Mills. Mills "read it and laughed as he handed it back to me and said 'if you can't throw bags then you need to go home.'" (Sheperd's Discrimination Complaint). Sheperd apparently left for the day, but returned to work the following day because he needed to support his two children. During his deposition, Sheperd stated that Black Hills did not provide sick leave and he had not earned any vacation leave. (Depo. 93-94). When Sheperd returned to work, Mills told him to go throw bags even though he knew of Sheperd's work restrictions, knew that he was in pain, and knew that he was taking strong medication for the pain. Sheperd states that most of his work at the plant involved lifting 100 pound bags of bentonite. He also operated loaders and forklifts. In addition, Sheperd worked in the warehouse part of the time. He states that he performed these assigned tasks on succeeding days even though he was in severe pain and on prescription medications that cause drowsiness and alter one's judgment. Sheperd states that he was given light duty work on some days. (*Id.* at 23-24). He did not ask anyone from management if he could be put on temporary total disability through the Wyoming workers' compensation program because he did not know that it was available. (*Id.* at 96-97). As discussed below, he started collecting workers' compensation after his back surgery.

Mr. Sheperd further states that he visited David Iszler, a doctor of chiropractic, on August 11, 2000, because his pain was increasing. Dr. Iszler gave Sheperd a light duty letter which Black Hills also ignored. Sheperd alleges that because he continued to perform strenuous work at the plant, the pain increased in his neck and lower back and his headaches intensified. His arms and legs also became numb. His legs gave out at the plant several times causing him to fall to the ground. The plant safety manager helped him up on one occasion. When Sheperd asked the safety manager for light duty work, he was told that only Mr. Mills could assign such work. Sheperd maintains that when another employee was injured at work as a result of falling from a truck, he was assigned light duty work

On August 13, 2000, Dr. Iszler issued a letter stating that Sheperd should be restricted from lifting more than ten pounds. Sheperd was still required to lift 100 pound bags and perform his other duties. Sheperd believed that he would be fired if he refused to do the assigned work. His supervisors told him that he had to lift the bags of bentonite because there was no other work available to him. (Depo. at 35-36). On some occasions, however, he was given tasks that did not involve heavy lifting but required him to be hunched over all day. *Id.* at 37. Sheperd stated that he stayed at work most days because he needed the money. Sheperd stated that other injured employees had been given light duty work at the Casper Plant, which consisted of sweeping and vacuuming. Sheperd believes that other employees who had been injured on the job were treated better than he was treated in spite of the four restricted duty notes he obtained from doctors.

One of the light duty letters from Dr. Iszler, dated October 19, 2000, stated "Jason Sheperd has been instructed to refrain from any heavy lifting until further notice." (Depo. Ex. 1, p. 22). After that letter was given to Black Hills, Sheperd was transferred to Respondent's HT

Plant because the company did not want him doing any more heavy lifting. (Depo. at 53). Sheperd stated that it was “a little lighter-duty work.” *Id.* at 54. He had previously been offered a position at the Black Hills plant in Worland, Wyoming, but he turned it down despite the fact that the work at that plant was not very strenuous because he was hoping to get an easier operator job at the Casper Plant. *Id.* at 55-57. At the HT Plant, Sheperd was required to lift empty pallets weighing about 50 pounds, but he was not required to lift or carry 100 pound bags of product. *Id.* at 61-62.

At some point after October 19, 2000, Sheperd began seeing Dr. Kenneth Pettine of the McKee Medical Center in Casper. On March 7, 2001, Sheperd underwent surgery as a result of his injuries: a “posterior lumbar interbody fusion from L4 through L5-S1.” (Ex. A to Sheperd’s response to motion to dismiss). On the same day, he underwent a “C6-7 anterior cervical fusion.” *Id.* His last day at work before the surgery was about February 28, 2001. Sheperd had to return for more surgery on March 9, 2001, because “the screws were impinging into the aorta and were very close to and touching the iliac veins.” *Id.* He was given ongoing physical therapy and never returned to work after the surgery. He was placed on temporary disability by the State of Wyoming’s Division of Workers’ Safety and Compensation. In addition, he continued to receive health benefits from Black Hills. On March 26, 2002, the State of Wyoming issued a final determination of permanent partial disability benefits based on a 45% impairment of the whole person. Sheperd’s employment at Black Hills was terminated on or about April 30, 2002, because his impairment rating precluded him from returning to his job. Sheperd believes that he could do office or lab work for Black Hills. (Depo. at 75-76).

On May 10, 2002, Sheperd filed his discrimination complaint with MSHA alleging that he had been terminated from his employment and that the date of the alleged discriminatory action was August 9, 2000. MSHA notified Sheperd on July 1, 2002, that it determined that he had not been discriminated against.

Sheperd states that he engaged in protected activity after his injury when he told his supervisors that he could not lift heavy bags of bentonite. He states that he did not know that he had the right under section 105(c) of the Mine Act to refuse to work “for fear of my health or safety or for those around me.” *Id.* at 14, 35-36. He states that if he had known about section 105(c) rights, “I would have just stood there and not worked, especially with all of these narcotic prescriptions, driving the loader at night, you’re dizzy, you’re light-headed, blurred vision, you’re driving on narcotics, you could run someone over.” *Id.* 105. Sheperd believes that he was a safety hazard to himself and others after his injury but he did not go home because “that doesn’t pay the bills.” *Id.* 116. Sheperd states that Black Hills took adverse action against him by making him work even though his supervisors knew that his doctors advised the company that he could only perform light duty work. *Id.* at 39. Sheperd believes that Black Hills’ failure to honor the light duty releases constituted adverse action.

On December 11, 2002, MSHA received a hazard complaint under section 103(g)(1) of the Mine Act. The complaint alleged that since 1999 a number of employees working for Black

Hills had been under the influence of pain medications that could impair their abilities to work safely. On January 2, 2003, MSHA issued a citation at each of Black Hills' three plants alleging a violation of 30 C.F.R. § 56.20001. The citations state that the "operator has allowed employees to work while taking narcotics." The narcotics alleged to have been taken are various prescription medications. Section 56.20001 provides, in part, that persons "under the influence of alcohol or narcotics shall not be permitted on the job." Black Hills contested these citations under 29 C.F.R. § 2700.20.

## II. ANALYSIS OF THE ISSUES

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing 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. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

In its motion to dismiss, Black Hills argues that Sheperd did not engage in any protected activity and, in the alternative, that he did not suffer any adverse action as a result of engaging in protected activity. Black Hills argues that in order to exercise the right to refuse to work, the complainant must have a good faith reasonable belief that the work involves a hazardous condition. It argues that a complainant's refusal to work because of a pre-existing medical condition does not qualify. In this instance, Sheperd did not actually refuse to work because he continued working in spite of his injuries. The Commission has held that a miner's absences from work due to a medical condition exacerbated by his job duties does not constitute a work refusal. It contends that Sheperd's claim that he did not know about his rights under section

105(c) is belied by the fact that he took annual refresher training on April 5, 2000, which included a section on section 105(c). Black Hills maintains that Sheperd did not refuse to perform his job and did not exhibit conduct manifesting a work refusal. Consequently, it argues that there was no protected activity in this case.

Black Hills also argues that, even if Sheperd established that he engaged in protected activity, he did not suffer any adverse consequences as a result of that activity. Neither telling a miner to keep working nor telling him to go home when he has suffered an occupational injury can form the basis for an adverse action under section 105(c). It argues that the Mine Act does not require continued employment or provide for disability benefits when a miner is not capable of performing a job because of the miner's physical limitations, even if these limitations are the result of an on-the-job injury.

Sheperd believes that he engaged in protected activity when he was ordered to perform tasks that he was physically unable to do and he was not told that he had a right to refuse to perform these tasks. Sheperd argues that he continued working only because he did not know that he had a right to refuse to work. He states that had he known that he could refuse to work, he would have "just stood there and not worked, especially with all of these narcotic prescriptions" he was taking. (Depo. at 105). Sheperd told his supervisors that he had injured his back while throwing the bags of bentonite but he continued working because Black Hills would not permit him to take time off with pay and did not advise him that section 105(c) gave him the right to refuse to work. By continuing to work while on strong prescription medications, he presented a safety hazard to himself and to others as evidenced by the citations issued by MSHA in January. He argues that the failure of Black Hills to assign him light duty tasks that would not require heavy lifting constituted an adverse action under the Mine Act.

I find that Sheperd did not engage in protected activity. A miner's absence from work due to a medical condition that is made worse by the miner's normal job duties does not constitute a work refusal. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988); *Dykhoff v. U.S. Borax, Inc.*, 22 FMSHRC 1194, 1199 (Oct. 2000). In *Perando*, Ms. Perando had contracted industrial bronchitis from her exposure to coal dust in the mine. She argued that her protected activity was her request to work in a less dusty environment coupled with her doctors' letters that stated that she should no longer be required to work underground. The Commission held that neither "Perando's acceptance of Mettiki's offer of extended sick leave nor her request while on sick leave for a transfer to a surface position constitutes a work refusal." 10 FMSHRC at 495. As in *Perando*, there was no work refusal here. Sheperd's request that he be given work that did not involve heavy lifting and the letters from his doctors asking that he not be required to lift heavy objects is not a work refusal.

Sheperd believes that if he had refused to work, his refusal would have been protected by section 105(c). The anti-discrimination provisions of the Mine Act were designed to protect a miner from having to work in the face of hazards created by his employer. For example, if a mine operator requires a miner to work around equipment that has exposed moving machine

parts that are not guarded, the miner could reasonably and in good faith refuse to perform work around the equipment until guards were installed on the machinery to protect him. Section 105(c) of the Mine Act protects against hazardous conditions present in the work environment that are under the control of the mine operator rather than problems related to a particular miner. See *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1519 (Aug. 1990) (Commissioner Doyle concurring). “While a particular miner may hold a good faith, reasonable belief that it is unsafe or unhealthy for him or her to [lift and throw heavy bags of bentonite because of a back injury he sustained at work or to operate equipment while taking prescription medication for his injury], I do not believe that these are rights protected by the Mine Act or that Congress intended the operator to be charged with discrimination for failing to accommodate them, irrespective of the seriousness of the hazard.” *Id.* The Mine Act was not designed to “provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries, would find working most jobs in the mining industry impossible.” *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ).

Sheperd did not have the right under section 105(c) to refuse to perform his normal job assignments when management did not give him light duty work. Section 105(c) does not grant a miner the right to refuse his assigned duties because he is no longer capable of performing them as a result of an injury. The injuries that Mr. Sheperd sustained are obviously quite devastating and lamentable. Because of these injuries, he will no longer be able to perform the type of work that is typically required in the mining industry. Nevertheless, the Mine Act was not designed to remedy such problems. “It is clearly not the purpose of the Act, but rather worker’s compensation, social security disability, and other similar laws to provide loss of income protection under these circumstances.” *Collette*, at 1126.

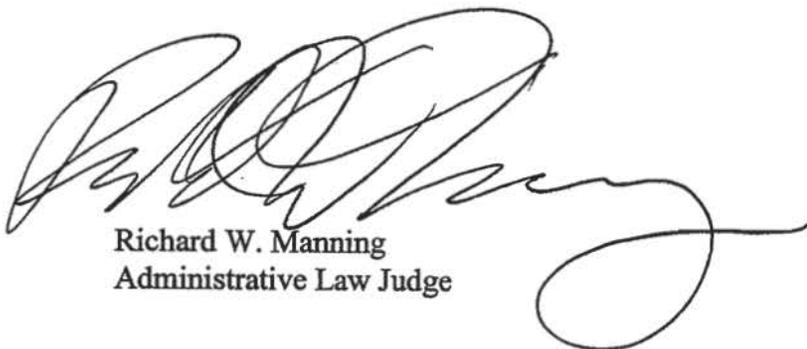
It appears that Sheperd started taking strong prescription medicine such as muscle relaxers and pain medication after he was injured. MSHA issued citations in January 2003 as a result of these allegations. Sheperd may have created a hazard to himself and others because he continued working at the plant while taking these medications. This fact does not establish that Sheperd engaged in protected activity, however. It merely demonstrates that he was not capable of performing work that was required by his job while taking these medications.

Sheperd also alleges that he was treated differently from other injured employees because he was not given light duty assignments while other injured employees were. Assuming that to be the case, it does not change the result because there can still be no showing that he engaged in protected activity in this case. While such disparate treatment may have been unfair, the Commission has cautioned its administrative law judges that the “Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator’s employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.” *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). As discussed above, requiring Mr. Sheperd to perform his standard job duties after he was injured did not violate section 105(c) and there is no evidence that Black Hills failed to assign him light duty work because of activity protected under the Mine

Act. In addition, I cannot draw such an inference from the record in this case.

### III. ORDER

For the reasons set forth above, Black Hills Bentonite's motion to dismiss is **GRANTED** and the complaint of discrimination filed by Jason C. Sheperd against Black Hills Bentonite under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

March 18, 2003

CASEY J. MAYBERRY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-561-D
	:	DENV CD 2002-14
	:	
v.	:	Mine I.D. 05-04452
	:	Sanborn Creek Mine
OXBOW MINING, LLC,	:	
Respondent	:	

**DECISION**

Appearances: Casey J. Mayberry, Hotchkiss, Colorado, pro se;  
James T. Cooper, Oxbow Mining, LLC, Somerset, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Casey J. Mayberry against Oxbow Mining, LLC, (“Oxbow”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Mr. Mayberry alleges that he was fired by Oxbow after he called the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to complain about ventilation at the mine. An evidentiary hearing was held in Delta, Colorado. For the reasons set forth below, I find that Mr. Mayberry did not establish that Oxbow discriminated against him in violation of section 105(c) of the Mine Act.

**I. BACKGROUND AND SUMMARY OF THE EVIDENCE**

Oxbow operates the Sanborn Creek Mine, an underground coal mine, in Delta County, Colorado. Although Oxbow employs miners, it also obtains miners through a temporary employment agency called Rocky Mountain Miners (“Rocky Mountain”) when it needs additional miners on a temporary basis. Mr. Mayberry started working at the mine in August 2001 as an employee of Rocky Mountain. Mayberry was not on Oxbow’s payroll but was a temporary contract miner who was paid on an hourly basis by Rocky Mountain. He worked on the graveyard shift, a non-production shift, rock dusting and cleaning up around conveyor belts. (Tr. 8).

Mayberry testified that in mid-October 2001, he called MSHA to complain about ventilation in the longwall section. (Tr. 9). This safety complaint to MSHA is not mentioned in the written discrimination complaint that he filed with MSHA on June 4, 2002. Indeed, I first learned about this allegation at the hearing because there is no mention of a safety complaint in the official Commission file. He testified that he discussed this October safety complaint with the MSHA investigator during her investigation of his discrimination complaint. Mayberry testified that he called MSHA in October to complain about the ventilation curtains in the longwall section. He stated that an MSHA inspector came to the mine to investigate his safety complaint and he believes that MSHA issued a citation. *Id.* He testified that the MSHA inspector did not talk to him when he came to the mine to inspect the ventilation in the longwall section.

On or about October 26, 2001, Mayberry talked to Brad Hanson and Lou Graco at Bowie Resources Limited, another coal mine operator in Delta County, to see if he could get a job there as a permanent employee. Mayberry was offered a position at Bowie Resources and he accepted the job. (Tr. 16). A few days later, Mayberry told James Cooper, Oxbow's vice president of operations, that he had taken a position with Bowie Resources and he gave Cooper notice that he would no longer be working at the Sanborn Creek Mine for Rocky Mountain. He was scheduled to start working for Bowie Resources on November 15, 2001.

At about 2:00 am on November 8, 2001, Mr. Mayberry was injured at the Sanborn Creek Mine when a rock fell from the roof and hit his left foot. (Tr. 12, 25-26). Mayberry was rolling up dust hose at the time. He estimated that the rock weighed between 45 and 65 pounds and measured about 1½ feet by 2 feet. Cameron Rountree, another miner on the crew, attempted to help Mayberry and was struck on the hand by falling rock. (Tr. 26). After Mayberry was removed from the mine, an air cast was put on his leg and he was taken to Delta County Memorial Hospital. The extent of his injuries was not immediately known because his foot was swollen. On November 11, 2001, local physicians could not determine if he was seriously injured. (Tr. 16). He subsequently saw a specialist in Grand Junction, Colorado. Mayberry was eventually diagnosed with "peripheral nerve damage, either severed or beyond repair." (Tr. 14, 20). It was later determined that he "sustained a twelve percent (12%) scheduled impairment to lower left extremity." ("Full and Final Settlement Agreement and Motion for Approval" filed with the Colorado Division of Worker's Compensation; Tr. 14). Mayberry was on crutches for several months as a result of his injury and did not work for Rocky Mountain at the Sanborn Creek Mine after November 8.

At about 7:30 am on November 8, 2001, Mayberry returned to the bath house at the mine to retrieve his belongings and his truck. Mayberry testified that Fred English, the assistant safety director at the mine, approached him. Mayberry testified that English said that he knew that Mayberry made the safety complaint to MSHA and that "Oxbow does not appreciate complaints to MSHA." (Tr. 14, 21-22). Mayberry said that English continued by saying that if "I have a problem with the way they do things, I should take it up with management or seek employment elsewhere." (Tr. 14).

At some point after November 11, 2001, Mayberry called Brad Hanson at Bowie Resources to tell him that he could not start working on November 15 because he was injured and asked if he could start working at a later date. (Tr. 17). Mr. Hanson advised him that Bowie Resources could not hold the position open for more than two weeks, so the offer of employment was withdrawn. Mayberry testified that he then went to see Cooper to tell him “to pull that two-week notice.” (Tr. 18). Mayberry believed that the “two-week notice was revoked automatically once he was injured.” *Id.* Cooper told him that, although he was sorry, Oxbow could not offer him a position. (Tr. 19). Cooper advised Mayberry that he had only been a contractor at Sanborn Creek and “part of being a contractor is running that risk.” *Id.* Mayberry called Cooper several times after that to try to get his old job back without success. Mayberry maintains that he engaged in protected activity when he called MSHA to complain about ventilation in the longwall section. (Tr. 21). He believes that the adverse action was the failure of Oxbow to rehire him after he had revoked his two-weeks notice and the intimidation he received from English on the morning of November 8. (Tr. 21, 71-73).

Mayberry received a medical release to return to work in late March or early April 2002. (Tr. 20). Soon thereafter he started working for Rundle Construction Company, another contractor, which “does earth moving for Oxbow.” *Id.* He worked for Rundle Construction at the Sanborn Creek Mine from April 2002 through October 2002 when he was laid off. (Tr. 23-24). On June 4, 2002, Mayberry filed his discrimination complaint against Oxbow with MSHA. By letter dated August 20, 2002, MSHA advised Mayberry that it determined that Oxbow had not discriminated against him. Mayberry filed this case with the Commission on September 20, 2002.

Cameron Rountree testified for Mayberry. Rountree was in the bath house on the morning of November 8, 2001. Rountree testified that English approached them to find out what happened that shift. (Tr. 27). He took a quick statement from both of them about the accident. Rountree testified that English then looked at Mayberry and said, “this is a small coal mining community . . . and we don’t appreciate you calling MSHA.” (Tr. 27-28). Rountree said that English told Mayberry that “you should talk to your foreman or upper management before you take that action.” (Tr. 28). Rountree stated that English’s tone of voice was firm and he seemed agitated.

Mr. English testified that, although he took a statement from Mayberry about the accident, he did not discuss an MSHA complaint with Mayberry. (Tr. 32). English stated that a number of MSHA complaints have been made at the mine and he does not know who made these complaints. *Id.* English testified that he was not aware that Mayberry phoned in a complaint to MSHA. (Tr. 33). English was adamant that on November 8, 2001, he did not know that Mayberry had complained to MSHA about safety conditions at the mine and that he did not have any discussion with Mayberry about safety complaints to MSHA. (Tr. 38-41, 75). In addition, English testified that, during mine safety and health training, company representatives tell miners that the company has an open door policy to bring safety complaints and that if a miner is not satisfied with management’s response “then by all means contact the Mine Safety and Health

Administration.” (Tr. 40). English further stated that “we do not have a problem with those calls [to MSHA].” *Id.* MSHA inspectors are instructors at the training.

James Cooper testified that he had only two face-to-face contacts with Mayberry. The first meeting was when Mayberry came into his office in late October 2001 to tell him that he would only be working for Rocky Mountain for two more weeks because he was going to work at the Bowie Mine. (Tr. 44). Cooper wished him good luck and called Randy Litwiller, Oxbow’s production superintendent, to tell him that Mayberry was leaving. Oxbow was hiring a few permanent full time employees at that time and so Cooper asked Litwiller if he would be interested in hiring Mayberry as an Oxbow employee. (Tr. 45). A few days later, Litwiller told him that he had talked to a few people who had worked with Mayberry and that he was not interested in hiring him. (Tr. 45; 58-59).

Cooper testified that the second meeting he had with Mayberry occurred the day before his accident. (Answer to Discrimination Complaint; Tr. 45, 73). At that time, Mayberry asked Cooper if he could stay on at the Sanborn Creek Mine as an Oxbow employee because he would “just as soon stay at Oxbow.” (Tr. 45). Cooper replied that he did not have a job for him. When Mayberry talked to him, Cooper understood that Mayberry wanted to stay on as a full-time Oxbow employee, not as a Rocky Mountain employee. (Tr. 55-56). Mayberry seemed interested in the benefits that Oxbow offered. (Tr. 58). After Mayberry’s accident on November 8, 2001, Cooper said that he received a voice mail message on his phone from Mayberry that was “very belligerent and loud and rude.” (Tr. 53). Cooper testified that he was not aware of Mayberry’s safety complaint to MSHA until he met with him to discuss settling this case in response to the prehearing order. (Tr. 47, 73-74).

Mr. Litwiller testified that he did not know that Mayberry had filed a safety complaint with MSHA when he discussed with Cooper whether he would be interested in hiring Mayberry as a permanent, full-time employee. (Tr. 60). Litwiller testified that when a Rocky Mountain employee gives notice that he is leaving, Litwiller talks to his supervisor to find out if he is a “real good hand.” (Tr. 62). If the supervisor replies that Oxbow will not be “losing anything” by letting him go, then no job offer is made. *Id.* Litwiller has no specific recollection of his discussions about Mayberry. (Tr. 63). Litwiller also stated that in November 2001 the total workforce at the mine was about 230 people (Tr. 61).

## **II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing 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. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on

Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). “Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

There can be no question that calling MSHA to complain about safety and health conditions at a mine is an activity protected under the Mine Act. In addition, if a mine operator takes any adverse action against a miner for making such a complaint, a violation of section 105(c) has been established. In this case, however, I find that Mr. Mayberry did not establish that he was discriminated against in violation of the Mine Act, as discussed below.

The discrimination complaint filed by Mayberry does not mention that he made a safety or health complaint to MSHA. The discrimination complaint also does not state that he was denied the opportunity to continue working for Rocky Mountain or Oxbow because he made a safety complaint. Mayberry's discrimination complaint first describes his accident and the fact that he had given Oxbow notice that he was leaving because he obtained a job at Bowie Resources. The complaint then states that Bowie Resources told him that it could not hold the job open for him. The remainder of the discrimination complaint states:

I spoke to Jim Cooper again to revoke my 2 week notice and he told me I was fired. He said that Randy Litwiller told him that I had given my notice and that it was too bad. Neither one of them seemed to care that I was hurt and now unemployed with a family to take care of.

Mr. Cooper testified that Mayberry did not mention that he had called MSHA to complain about safety or health conditions until the end of their settlement discussions prior to the hearing in this case. As stated above, none of the pleadings or documents filed with the Commission mention prior safety or health complaints. At the hearing, I asked Mayberry to describe what conditions he had complained about in October 2001 and his answer was vague and somewhat inconsistent.

First, he testified that he complained because the ventilation curtains “were hung in front of the gob along the longwall” and that they were blocking the methane detectors. (Tr. 10). Then he stated that the curtains “were keeping the gob air in that specific area.” (Tr. 10). Finally, he testified that “they weren’t ventilating anything down there . . . .” *Id.* Mayberry testified that he discussed his prior safety complaint with the MSHA investigator who investigated his discrimination complaint. (Tr. 90). The fact that Mayberry did not refer to a prior safety complaint to MSHA until late in this proceeding raises questions in my mind. Nevertheless, for purposes of this decision, I will assume that in mid-October 2001 Mayberry called MSHA to complain about safety conditions in the mine. Consequently, I find that Mayberry engaged in protected activity.

I find, however, that Mayberry did not establish that Oxbow’s decision not to hire him was motivated in any part by his protected activity. First, it must be noted that section 105(c) protects applicants for employment as well as miners. An applicant for employment establishes a violation of section 105(c) if he proves that a mine operator did not hire him because he had complained to MSHA about safety conditions while employed at another mine. I find that Mayberry was not “fired” from his temporary job at the mine with Rocky Mountain because he gave notice to Cooper that he was leaving for another job. He voluntarily quit his job with Rocky Mountain. The issue is whether Oxbow’s decision not to consider him for a permanent full-time job with the company was motivated in any part by the fact the he called MSHA to complain about ventilation in October 2001.\*

Mayberry testified that English confronted him about his call to MSHA on the morning of November 8, 2001 and that he felt intimidated by English. Mr. Rountree also testified that English told Mayberry that Oxbow did not appreciate his call to MSHA. English, on the other hand, denied making such statements and denied that he even knew that Mayberry had made a safety complaint. I credit the testimony of Mr. English for a number of reasons. As noted above, Mayberry did not include this allegation or any assertion that he had made a safety complaint to MSHA in his discrimination complaint that he filed with MSHA on June 4, 2002. Although Mayberry testified that he raised this issue with the MSHA investigator, neither Cooper nor English knew anything about it. Indeed, Cooper credibly testified that he did not become aware that Mayberry was predicating this discrimination case on a prior safety complaint to MSHA until he discussed settlement with Mayberry after he received the prehearing order issued in this proceeding. I did not become aware of this claim until the hearing because it was not included in any of Mayberry’s filings.

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\* Mayberry argues that when he asked to have his “two-weeks notice” revoked he wanted to continue working at the mine as a Rocky Mountain contract employee or as an Oxbow employee. Since his work as a contract employee was by the hour for time worked, he could not have returned as a Rocky Mountain employee as a result of his injury. As discussed above, he was not given a medical release to return to work until late March 2002. Oxbow may not have had an underground position available at that time. Nevertheless, my holding in this case would also apply if the adverse action was Oxbow’s refusal to take him back as a temporary Rocky Mountain contract employee.

English testified that he has worked for Oxbow for eleven years. He denied that he had ever discussed an MSHA safety complaint with Mayberry. It is highly unlikely that English would have approached Mayberry about an MSHA safety complaint the morning of November 8 because Mayberry was leaving the mine as a result of an injury. Mayberry was a contract employee from Rocky Mountain, not a permanent Oxbow employee, who would not be working at the Sanborn Creek Mine for at least a few weeks, if ever again, because he had been injured. Mayberry was on crutches for a considerable length of time and was paid for hours that he actually worked. There would have been no reason for English to raise this issue at that time. I observed Mr. English's demeanor at the hearing and he impressed me as someone who chooses his words quite carefully. In addition, as the assistant safety manager, he knew that such statements would set the company up for a discrimination suit if any adverse action were taken against Mayberry. English's testimony at the hearing, including his description of MSHA-required safety training, demonstrates that he has a rather sophisticated understanding of the requirements of the Mine Act including the anti-discrimination provisions of section 105(c). I find that English did not confront Mayberry on the morning of November 8 about Mayberry's call to MSHA. I also credit English's testimony that he did not know about Mayberry's call to MSHA.

I credit the testimony of Cooper that he did not know that Mayberry had called MSHA in October 2001 until Mayberry told him about it after their settlement efforts failed a few months prior to the hearing. Finally, I credit the testimony of Litwiller that he did not know about Mayberry's safety complaint when he discussed Mayberry's employment status with Cooper.

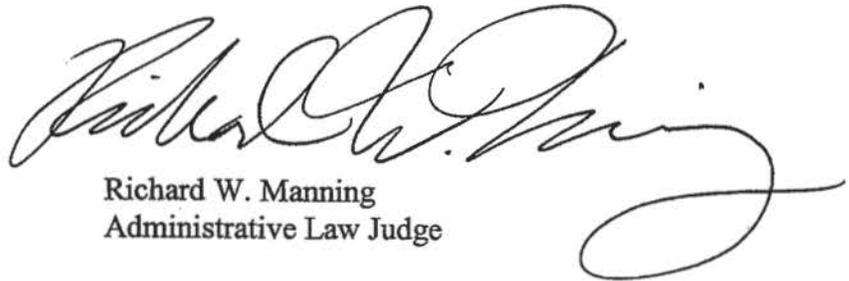
In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

The alleged adverse action in this case is Oxbow's failure to hire him as a permanent Oxbow employee in November 2001. I find that Mayberry did not establish that Oxbow's failure to take him back was motivated in any part by protected activity, taking into consideration circumstantial evidence of discriminatory intent. Considering the factors set forth in *Chacon*, for example, I find that Oxbow management did not have knowledge of the protected activity and did not display any hostility or animus toward the protected activity. Mayberry worked at the Sanborn Creek Mine for Rundle Construction from April 2002 through October 2002. In addition, there has been no showing that Mayberry was treated differently from other Rocky

Mountain employees who gave notice that they were leaving. I find that Oxbow's failure to "revoke" Mayberry's notice that he was leaving his job with Rocky Mountain and its failure to hire Mayberry as a permanent employee were not motivated in any part by Mayberry's protected activity.

### III. ORDER

For the reasons set forth above, the discrimination complaint filed by Casey J. Mayberry against Oxbow Mining, LLC, under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

Mr. Casey J. Mayberry, P.O. Box 863, Hotchkiss, CO 81419-0863 (Certified Mail)

James T. Cooper, Vice President, Oxbow Mining, P.O. Box 535, Somerset, CO 81434-0535  
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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W. Suite 9500  
Washington, DC 20001-2021

March 21, 2003

SECRETARY OF LABOR, MINE SAFETY	:	DISCRIMINATION PROCEEDING
AND HEALTH ADMINISTRATION,	:	
on behalf of ANDREW J. GARCIA,	:	DOCKET NO. WEST 2001-14-DM
Complainant	:	RM MD 00-12
	:	
v.	:	
	:	
COLORADO LAVA, INC.,	:	Antonito Plant
Respondent.	:	Mine ID 05-04232

**DECISION ON REMAND**

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant; Mark Nelson, Esq., Harris, Karstaedt, Jamison & Powers, Englewood, Colorado, for the Respondent.

Before: Judge Weisberger

**INTRODUCTION**

This case is before me based upon a decision by the Commission, *24 FMSHRC 350 (2002)*, vacating and remanding for further proceedings, my initial decision, which had granted Colorado Lava, Inc.'s motion to dismiss a discrimination complaint filed by the Secretary of Labor on behalf of Andrew Garcia.

**I. Factual and Procedural Background as Found by the Commission.**

The Commission, *24 FMSHRC supra*, at 351 - 353, set forth its findings relating to the facts in this case as follows:

The complainant, Andrew Garcia, worked as a front-end loader operator at Mountain West Colorado Aggregates ("MWCA") from January to June 1997. *23 FMSHRC at 213*. He then worked as a truck driver in MWCA's truck division from June 1997 to January 2000, and subsequently as a front-end loader operator at the railroad shipping yard in MWCA's Antonito bagging facility from January to June 2000. *Id.; Tr. 21*. Robert Duran was also employed a loader operator in MWCA's railroad yard. *23 FMSHRC at 213*.

In October 1999, Garcia tagged out a loader because the parking brake did not work. *Id. at 213-14*. The following day, Garcia told David McCarroll, the plant manger and Garcia's supervisor, that the parking brake on the loader was not working. *Id. at 214*. McCarroll responded that the loader did not need a parking brake, and ordered Garcia to continue using the loader. *Id.* Garcia complied and later complained to MSHA. *Id. at 214, 218*. As a result, MSHA came to the Antonito site to inspect the loader, issued a citation to MWCA, and initiated an investigation to McCarroll under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). *Id. at 214*.

Shortly after the incident, McCarroll learned of Garcia's complaint to MSHA, and when he was alone with Garcia, asked him "in a high toned voice" about the complaint. *Id.* Garcia denied filing the complaint. *Tr. 34*. According to Garcia, McCarroll responded, "You know all about it," and "Bull. It will all come out in the wash." *Tr. 255-56*. Garcia also testified that on another occasion in March 2000, when he was unable to load some marble chips because they were frozen, McCarroll swore at him in a loud voice. *23 FMSHRC at 214*. McCarroll testified that he was upset with Garcia for complaining to MSHA, acknowledged that he considered Garcia's complaint an example of his "trouble mak[ing]," and stopped speaking to Garcia socially. *23 FMSHRC at 214, 217; Tr. 224-27*.

Sometime in the spring of 2000, Ronald Bjustrom, the eighty-percent owner of Colorado Lava, became interested in purchasing MWCA's Antonito facility. *20 FMSHRC at 215*. Bjustrom visited the facility on four occasions prior to Colorado Lava's purchase on June 5, 2000. *Id.* During this time, Bjustrom decided to eliminate several positions, and asked McCarroll his opinion as to what jobs could be eliminated. *Id.* McCarroll suggested a railroad yard loader operator position and a mechanic position. *Id.* Bjustrom also asked McCarroll which MWCA employees were weak. *Id.* McCarroll told Bjustrom that Garcia and four other employees were weak,<sup>1</sup> and that Garcia caused trouble, tried to stir up trouble between employees, was a poor operator, abused equipment, and had filed union grievances. *Id.* Garcia was the only employee about whom McCarroll said only negative things. *Id.* Bjustrom testified that his conversations with

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<sup>1</sup>However, loader operator Duran testified that he supervised Garcia at the rail yard, and found him to be a satisfactory worker. *Tr. 291-92*.

McCarroll had no bearing on which MWCA employees would be rehired by Colorado Lava. *Id.*

In late May or early June 2000, prior to the interviews on June 5, Bjustrom told McCarroll that he would be retained as the plant manager. *Tr.* 100-01. Also prior to June 5, Bjustrom retained Terry Kissner, who was not an employee of Colorado Lava, to do the hiring. *23 FMSHRC at 215-16.* Kissner had done hiring for Bjustrom in the past.<sup>2</sup> *Id. at 215*

On June 5, Kissner interviewed the MWCA employees individually according to Bjustrom's instructions, which included asking the applicants the same questions from the booklet, asking the mechanics additional questions, including whether they would accept another position, and eliminating one railroad year loader operator position and one mechanic position. *Id. at 215-16; Tr. 174.* Kissner testified that, with respect to Garcia, he did not look at his personnel file, letters of recommendation, past safety record, or production levels, and that the interviews were a formality. *23 FMSHRC at 216.* He also testified: that he did not review the personnel files of any of the employees he interviewed; that before the day of the interviews, he had never visited the Antonito facility; that he had no personal knowledge of the MWCA employees; and that while he spoke with McCarroll "as few as three times," he did not meet McCarroll until the day of the interviews and never discussed the MWCA employees with him. *Id. at 215-16 Tr. 159, 178.* Bjustrom testified that Kissner made the final decision about which employees to rehire, and that he (Bjustrom) did not participate in that decision, although he retained the ultimate authority to hire. *23 FMSHRC at 215, 220.*

Garcia testified that on June 1, 2000, he was told of the sale of MWCA's Antonito facility to Colorado Lava and that all employees would be rehired, but was not informed that any jobs would be eliminated. *Tr. 39-40.* Garcia also testified that on the morning of June 5, Bjustrom gave the employees application packets, and scheduled each employee for an interview. *Tr. 40-41.* At the interview, Kissner did not inform Garcia that one loader operator position at the rail yard was being eliminated. *Tr. 42, 177.*

On June 6, 2000, Colorado Lava purchased MWCA and

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<sup>2</sup>Bjustrom received from his banker a booklet of interview questions, which he gave to Kissner, to use during the interviewing of the MWCA employees. *23 FMSHRC at 215.*

rehired all of the MWCA employees except Garcia, and Ernie Lucero, a mechanic. 23 FMSHRC at 216 & N.2. After Garcia learned that he was not going to be rehired, he secured a job with MWCA which is farther from his home, has a lower pay scale, and fewer incentives than his former position at the Antonito railroad yard facility. *Id.* at 215. Bjustrom testified that he first learned about Garcia's complaint to MSHA about a week or two after the decision was made not to hire him. *Tr.* 143-44.

## II. The Commission's Decision

The Commission found that substantial evidence supported the initial decision that Garcia had engaged in protected activity when he complained to McCarroll and MSHA that the parking brake on the front-end loader was operational, and also that the operator, Colorado Lava, took adverse action against Garcia when it declined to hire him. Thus, the threshold issue before the Commission, and on remand, is whether the Secretary established its prima facie case that the adverse action taken by Colorado Lava was motivated in any part by Garcia's protected activity. The Commission noted that in a prior decision, Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510, (Nov 1981), *rev'd on other grounds*, 709 F. 2<sup>nd</sup> 86 (D.C. Cir. 1983), *supra*, it had identified several indicia of discriminatory intent "... including: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." 24 FMSHRC at 354.

The Commission held that the record evidence of disparate treatment toward Garcia by Colorado Lava was not considered fully. The Commission, *id.*, restated the finding in Bradley v. Belva Coal Co. 4 FMSHRC 982, 992 (June. 1982), that circumstantial evidence of discriminatory motivation and reasonable inferences drawn therefrom may be used to sustain a prima facie case. The Commission, 24 FMSHRC, *supra*, at 354 -355, noted that the initial decision pointed to evidence of indicia of disparate treatment *e.g.*: (1) Doran was chosen over Garcia for the loader operator position because Doran had more experience than Garcia, on the other hand Vondrak who had less experience than Lucero was hired over Lucero as a mechanic; (2) that Lucero, the only other employee not rehired was offered another position at Colorado Lava, but Garcia was not; and (3) when considering which positions to eliminate Bjustrom only evaluated the loader operator and mechanic positions, and not other positions at the site. In addition, the Commission noted other evidence of record that "could" support a finding of disparate treatment (24 FMSHRC at 355). The Commission referred to findings in the initial decision that Kissner wanted to hire the best qualified employees for the loader operator and the mechanic positions, and testified that he reviewed the applications for these two positions prior to making his decision. It was found in the initial decision that Kissner stated that he looked at work history and tenure when he decided to hire Doran over Garcia for the loader operator position but admitted that he did not review Garcia's personnel file, letters of recommendation, safety record, or production level when considering whom to hire.

In addition, the Commission found that the record indicates that on approximately June 7, 2000, after Colorado Lava assumed ownership of the subject operation, McCarroll hired Jeremy Gallegos, a former MWCA employee who was not working for the company at the time of its purchase by Colorado Lava, to fill a bagger position that had been vacated prior to Colorado Lava's purchase on June 5. The Commission noted that Gallegos apparently had experience as a bagger. The Commission also noted that Garcia, while still employed at the Antonito facility was being trained as a bagger and had filled in as a bagger three or four times prior to June, but was not considered for the vacant position. The Commission cited as fact that although Gallegos had experience as a bagger, Garcia was also experienced as a bagger and more specifically with operations at the Antonito facility. The Commission concluded that "despite Garcia's availability when the bagger position was open, he was not considered for the position." (23 *FMSHRC at 355.*) Additionally, the Commission noted that in spite of McCarroll's recommendation that Bjustrom retain only one rail yard employee after assuming operations at the Antonito facility Colorado Lava continued to use two employees at the rail yard; that McCarroll testified that after June 5 a second employee of the Antonito facility worked at the rail site with either Doran or himself, including George Ruybal, Brian Kent, and Joe Padiolo, who were former MWCA employees rehired by Colorado Lava; that McCarroll testified that prior to June 5 Ruybal and Kent did not have experience operating the front-end loader and were being trained. The Commission noted that Doran confirmed McCarroll's testimony that two employees continued to work at the rail yard site after June 6.

The Commission, 24 *FMSHRC, supra*, at 555 directed that, consistent with *Chacon, supra*, ... "the Judge should consider all the evidence tending to show improper motivation, including that of disparate treatment of the miner." In a footnote, 24 *FMSHRC at 356, n. 6*, the Commission indicated that the initial finding that Kissner lacked knowledge regarding Garcia's protected activity and animus towards him is not dispositive of the prima facie case issue. The Commission also stated that "... before the Judge again reaches a conclusion regarding the strength of this rebuttal evidence, we would expect him to consider the Secretary's arguments for imputing McCarroll's knowledge of and animus toward Garcia's safety complaints to Bjustrom or Kissner." *Id.*

### III. DISCUSSION<sup>3</sup>

The Commission, 24 *FMSHRC supra*, at 355, held that in the initial decision the analysis of motivation was incomplete under *Chacon, supra*, and that, "consistent with *Chacon, supra*, the Judge should consider all the evidence tending to show improper motivation, including that of disparate treatment of the miner". In compliance with this holding and directive, cognizance is taken of the following indicia of discriminatory intent which had been initially listed in *Chacon, supra*, as follows: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse activity;

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<sup>3</sup>Subsequent to the hearing the Secretary proffered Sec. Ex. 5 along with a motion in support of its admission. This proffer was not objected to by Colorado Lava. Accordingly the record is re-opened for the limited purpose of admitting in evidence Sec. Ex. 5.

and (4) disparate treatment of the complainant.

A. **Knowledge of the Protected Activity, and Hostility or Animus Toward Protected Activities**

Garcia engaged in the following protected activities while an employee of MWCA prior to the time it was purchased by Colorado Lava, a totally independent entity: (1) Garcia informed his supervisor, Earl Gonzales, that a loader was tagged out because the brake did not work, and (2) Garcia told McCarroll, another supervisor at MWCA, that the loader had been tagged out because of problems with the parking brake. These two individuals were the only agents of MWCA who had actual knowledge of Garcia's protected activities. There is no direct evidence that any of Colorado Lava's agents had actual knowledge of these specific activities. The only individual who had expressed any animus towards Garcia was McCarroll. These expressions of animus occurred while both were employees of MWCA, prior to its purchase by Colorado Lava. Bjustrom, who has an 80 percent ownership interest in Colorado Lava, had the ultimate authority to hire former employees from MWCA. However, he delegated that decision to Terry Kissner who subsequently interviewed employees of UMWA, and did not select Garcia. I observed Bjustrom's demeanor while testifying and found him to be a credible witness. Accordingly, I accept his testimony that, prior to the time Colorado purchased MWCA, McCarroll had told him that Garcia was a weak employee, not a good operator, and had filed grievances, but this information did not have any bearing on the decision on June 5 regarding which employees of MWCA would be hired by Colorado Lava. Further, based on observations of Bjustrom's demeanor, I find his testimony credible that he not did take any part in the hiring decision, and that it was Kissner who made the final decision in that regard, and that he had delegated this task to Kissner, as the latter had done the hiring for him (Bjustrom), for eight years.

I also carefully observed the demeanor of Kissner, and found him to be a credible witness. I therefore accept his testimony that he did not have any knowledge of the applicants from MWCA before he interviewed them on June 5; and that the only time he had talked to McCarroll prior to June 5 had to do with ordering supplies. I also accept his testimony that he did not consult with McCarroll before the interviews regarding the interviewees; did not consult with McCarroll after the interviews; and that McCarroll not provide him with any information regarding the interviewees. I therefore find, that Kissner alone took the adverse action in not hiring Garcia on June 5, but that he did not have knowledge of Garcia's prior protected activities. Neither he nor Bjustrom manifested any animus toward Garcia prior to June 5.<sup>4</sup>

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<sup>4</sup>In a footnote, the Commission stated that before a conclusion is reached regarding the strength of rebuttal evidence "... we would expect him to consider the Secretary's arguments for imputing McCarroll's knowledge of and animus towards Garcia's safety complaints to Bjustrom or Kissner." (Emphasis added.) (24 FMSHRC *supra*, at 356 n.6)

The graveman of the Secretary's argument in its post remand brief, on the issue of imputation of McCarroll's animus and knowledge of protected activities, relates to their imputation to the new corporate entity Colorado Lava on the basis of agency. I find this argument to be without merit as it is beyond the scope of the remand. Also, most importantly, I note that on the date of the adverse action

**B. Coincidence in Time Between the Protected Activity and the Adverse Action**

The protected activities engaged in by Garcia occurred in October 1999. It was also on or about that time that McCarroll had expressed animus towards Garcia relating to these protected activities. McCarroll indicated that he continued to dislike Garcia. However, it is significant to note that no adverse action was taken by MWCA against Garcia. Indeed, the adverse action that was taken subsequently by Colorado Lava on June 6 was more than seven months subsequent to the dates Garcia had engaged in the protected activities. I thus find that the Secretary has not established a sufficiently close coincidence in time between the protected activity and the adverse action to support an inference of improper motivation.

**C. Disparate Treatment of the Complainant.**

As discussed above, based upon the findings of the Commission, which have become the law of the case, I am constrained to find that it may be inferred that Garcia was the subject of disparate treatment.

**D. Conclusions**

The posture of this case before the Commission was whether Colorado Lava's motion to dismiss, made at the conclusion of Complainant's case-in-chief should have been granted. The quantum of evidence sufficient to establish a prima facie case at this point in a trial, is "[e]vidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference ... until proof can be obtained or produced to overcome the inference." Black's Law Dictionary, (6<sup>th</sup> ed., 1990), at 1190. As set forth by the Sixth Circuit, in order to establish a causal link, a plaintiff is required to proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action. EEOC v. Avery Dennison Corp., 104 F 3d 858, 861 (6<sup>th</sup> Cir. 1997), (quoting Zanders v. National R.R. Passenger Corp., 898 F 2d 1127, 1135 (6<sup>th</sup> Cir. 1990), (quoting Cohen

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taken by Kissner, i.e. June 6, McCarroll had not yet been hired by Colorado Lava, and hence there was not any principal agent relationship at that time. Also, I reject the Secretary's arguments that, in essence, Bjstrom's delegation of the authority to hire to Kissner, and the manner in which Kissner conducted the interviews raised inferences of improper motivation, and Bjstrom's and Kissner's knowledge of Garcia's protected activities, and McCarroll's influence on the decisional process based on his animus towards Garcia. I find this line of reasoning to be too speculative, without foundation in the record, and outweighed by the direct testimony of Kissner and Bjstrom, whom, based on their demeanor, I find to be most credible witnesses.

v. Fred Meyer, Inc., 686 F. 2d 793, 796, (9<sup>th</sup> Cir. 1982)).<sup>5</sup>

However, in the case at bar, subsequent to the Commission's decision, Colorado Lava elected to rest on the basis of testimony elicited from the Secretary's witnesses, Bjustrom, Kissner, and McCarroll. Accordingly, at this stage of the proceedings, since Respondent has adduced rebuttal evidence, in order to prevail the Secretary must "...overcome the additional obstacle of [Respondent's] rebuttal and convincingly demonstrate the existence of discrimination. At that stage, he not only must present facts and evidence allowing inferences to be drawn in his favor, but also must present a case that allows those inferences to be of significant force as to overcome the [Respondent's] rebuttal or prove the rebuttal pretext" *Id.* In the same fashion, it is established Commission case law that the Secretary has the ultimate burden of proof of establishing discrimination under the Act. Secretary of behalf of Robinette v. United Coal Co., 3 FMSHRC 803, 817 (1981), Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (Oct. 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F 2d 1211 (3<sup>rd</sup> Cir. 1981). Hence, in order to prevail herein, the Secretary must establish, by a preponderance of the evidence, that the adverse action was motivated in any part by the protected activities.<sup>6</sup> *Id.*

In analyzing the indicia of discriminatory intent as set forth in Chacon, supra, it might be inferred that Garcia did suffer some degree of disparate treatment. However, I find that an inference of discriminatory intent, based on disparate treatment, to be diluted to a high degree by the lack of knowledge of the protected activities and lack of hostility or animus towards protected activity by Colorado Lava. In reaching this conclusion I accord more weight to the direct testimony of Bjustrom and Kissner, having found their testimony credible based upon their demeanor, rather than inferences to be drawn regarding disparate treatment. I also note the lack of significant coincidence in time between the protected activities and the adverse action. For these reasons I find that the Secretary has failed to establish, by a preponderance of the evidence (see Robinette, supra, Pasula, supra), that the adverse taken by Colorado Lava was motivated in any part by Garcia's protected activities.

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<sup>5</sup>Avery Dennison, supra, involved alleged discrimination under Title VII and 42 U.S.C. § 1981. Its analysis of the burden required to establish a causal nexus between protected activity and adverse action is analogous to discrimination under Section 105 of the Mine Act.

<sup>6</sup>Subsequent to the Commission's decision 24 FMSHRC, supra, Garcia filed a statement in which he stated that he does not intend to present further testimony "... for the purpose of making out [his] prima facie case of discrimination ... ." The Secretary filed a statement that if it be found on remand that the Secretary did not establish a prima facie case then it may not call witnesses to rebut the Judges' finding. The Secretary reserved the right to call rebuttal or sur-rebuttal witnesses if the Judge, Commission, or reviewing court finds that the Secretary and Garcia made out a prima facie case.

For all the above reasons, I find that the Secretary has failed to establish that Garcia was discriminated against by Colorado Lava in violation of Section 105(c) of the Act, and that accordingly this case shall be **DISMISSED**.

  
Avram Weisberger  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

March 27, 2003

ARNOLD J. JISTEL, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. CENT 2002-150-DM  
 : SC MD 02-05  
 :  
TRINITY MATERIALS, INC., : Trinity Materials  
Respondent : Mine ID 41-01163

**DECISION**

Appearances: Jason M. Willett, Esq., Hinds & Willett, Waxahachie, Texas,  
for Complainant,  
David M. Curtis, Esq., Gardere Wynne Sewell LLP, Dallas, Texas,  
for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by Arnold Jistel pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c)(3).<sup>1</sup> Jistel alleges that Trinity Materials (“Trinity”) discriminated against him by terminating his employment on October 25, 2001, as a result of his complaints about safety. A hearing was held in Dallas, Texas. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Respondent did not discriminate against Jistel and dismiss the complaint.

**Findings of Fact**

Trinity mines and processes sand and gravel at numerous locations in Texas and Louisiana. It owns a plant at Seagoville, Texas, at which it processed sand and gravel mined from adjoining land leased from the Southland Land and Cattle Company. Material had been removed from approximately ten different pit areas on the property since 1980. By late 2001, the marketable sand and gravel at other locations had been exhausted, and only one small pit was being worked.

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<sup>1</sup> Pursuant to section 105(c)(2) of the Act, the Secretary of Labor must investigate complaints of discrimination filed by miners and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

Jistel became employed at Trinity's Seagoville facility on December 12, 1997. In 2001, he held the position of plant operator, and also operated equipment when other employees did not report for work. He earned \$10.25 an hour and worked an average of 28 hours of overtime per week. Jistel was responsible for general operation of the plant and conducted daily workplace examinations of the facility. His immediate supervisor was Tommy Weatherly, the plant manager. Billy Rogers, was also a plant operator and had been the manager prior to Weatherly. Jistel had known Rogers, who had been his brother-in-law, for twenty years. He continued to view Rogers as a supervisor and was good friends with him. Tr. 216.

When Jistel conducted his daily inspections of the plant, he carried note paper and jotted down items of significance. He used his notes to complete a "Daily Work Place Inspection Checklist." The form had a series of boxes for each area of the plant for each day of the week. In each box he entered either a "✓" indicating that conditions were "OK," or an "X," indicating a "Discrepancy," which he described in a section of the form entitled "Remarks." A copy of the form was transmitted by facsimile each day to Trinity's main office at Ferris, Texas.

From January to March 2001, Jistel placed "✓'s" in all boxes on the forms, indicating that the areas were "O.K." However, each sheet bore notations, "walkway at doghouse needs welded," and "A.J. is working on guards and walkway." Beginning on March 26, 2001, however, "X's" were placed in boxes for "Walkways & Handrails" and "Guards." The remarks sections of the forms generally included comments that the walkway at the doghouse needed welding, the walkway on the rock belt needed to be replaced, the handrail at the log washer needed welding, an electrical box needed to be replaced, and a lock was needed on another box. Ex. C-48, R-G-6.<sup>2</sup>

On May 30 and 31, 2001, MSHA conducted a regular inspection of the pit area of the Seagoville facility. Eight citations were written for various alleged violations. On June 4 and 5, 2001, MSHA returned to the facility to inspect the plant and issued eight additional citations. Of particular note was Citation No. 6207305, alleging a violation of 30 C.F.R. § 56.11001, which requires that a "safe means of access be provided and maintained to all working places." The violation was based upon the poor structural condition of a conveyor tail pulley and attached elevated walkway that was used to service the conveyor. It was alleged to have been attributable to the "High" negligence of the operator, and was issued under section 104(d)(1) of the Act as an unwarrantable failure to comply with a mandatory standard. The basis of the unwarrantable failure allegation was that the condition had been noted by Jistel in his work place examination reports for the prior eight weeks and nothing had been done about it. Ex. C-47, R-G-4. In order to abate the conditions noted in the citations, particularly the structural problem, the plant was shut down for a few days, after which the facility was run under normal conditions.

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<sup>2</sup> Complainant's exhibits are referred to with the prefix "C," and are designated by a number. Respondent's exhibits are referred to with the prefix "R," and are generally designated with both a letter and a number.

Jistel claimed that after the June citations were issued, Rogers and Weatherly “kept picking on” him and “harassing” him. Tr. 151. He claimed that about a month after the citation was written, Rogers hollered at him and told him to stop writing safety problems on the daily reports because Carl Campbell, the general manager, was mad about it and might fire him. Tr. 155, 206-07. Rogers denied the allegation. Tr. 135. Jistel testified that his shift was changed from day to evening and that Rogers told him that the purpose was to keep him from talking to MSHA about safety violations. Tr. 166-67. Weatherly testified that he created an overlapping second shift immediately after the shut down because Trinity needed to make up production. He stated that he asked Jistel if he would take the second shift and that he agreed. Tr. 131. Jistel did not directly contradict that testimony. Rogers confirmed that Trinity began a second shift because they had gotten behind on production. Demand was typically high at that time of year and they had operated a second shift at some point every summer. Tr. 99.

Jistel described other jobs he was directed to do by Weatherly and Rogers. About three to four weeks after the citation was written, he was assigned to disassemble an old flatbed trailer with a cutting torch, and was directed to remove weeds from around the plant. Tr. 153-56. The cutting and weeding tasks lasted about one day each. Tr. 214. He was also assigned to drive a truck down to the pit to change a cable on a dragline whenever the cable broke. Tr. 215. It is not clear whether this was one of his ongoing responsibilities.

Jistel complained about “surveillance” activities, stating that: “[Weatherly] was just standing around watching over me, taking pictures and stuff like that . . . eyeballing me.” Tr. 157. He testified that Weatherly and Steve Key, the overall area manager, took pictures of him when he worked at night, and that they would hide the camera when he looked at them. He claimed that this type of activity, by Key and Errol Viator, who replaced Weatherly as plant manager in September 2001,<sup>3</sup> occurred every night after the citations were written until he was laid-off on October 25, 2001. Tr. 158. At one point, they allegedly took pictures of him when he used the restroom and placed a video camera in the control room. Jistel never inquired about the picture taking. Tr. 158.

MSHA initiated a special investigation pursuant to section 110(I) of the Act to determine whether individual managers should be charged in their personal capacities, with respect to the safe access violation cited in June. On September 12, 2001, Jistel signed a written statement of an interview that had been conducted by Michael Franklin, an MSHA special investigator. Ex. R-D-2. Jistel testified that he saw Rogers and Weatherly bring in a video camera that was placed in the control room, where the statement had been given. Tr. 164. In his statement, Jistel described a conveyor that had fallen over and a concrete belt line that had broken in seven places. Following the statement, Trinity allegedly re-erected the fallen conveyor and repaired the

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<sup>3</sup> Weatherly was transferred to a smaller plant around the beginning of September 2001, in part, because of his failure to address the problems noted in the daily inspection reports. Viator was manager of another nearby plant and was also given responsibility for the Seagoville plant for the few months that it was expected to be operational.

concrete belt line. Those actions convinced Jistel that Trinity had used the video camera to record his statement to Franklin, because he believed that the only place Trinity's managers could have gotten that information was from the statement. Tr. 165-66.

Jistel was inconsistent in relating his knowledge about the impending plant closure. He stated that he heard from Trinity's quality control personnel that the plant was about to close about two days prior to being laid-off on October 25, 2001. Tr. 176. However, he also stated that he was told, before the citations were written, i.e., prior to May 30, 2002, that Trinity did not want to spend any money on the plant because it was going to shut down. Tr. 200-01. He was looking for another job because of the impending lay-off, and had talked to a nearby sand and gravel company about a job, but they never got back to him. Tr. 203.

On October 13, 2001, Jistel became involved in a physical altercation with Emillio Padilla, a loader operator. Tr. 209; ex. R-D-3, R-D-7. Trinity's Employee Disciplinary Process cited fighting as a major infraction "which should result in discharge for a first offense." Ex. C-2, R-D-7. Neither Jistel nor Padilla were disciplined for the altercation. Campbell explained that he decided not to discipline the men because of the impending shut down of the Seagoville facility. Tr. 261.

The resources in the last workable pit were finally depleted in late October 2001. Trinity's managers met to determine what to do with the men and equipment. The pit operation was shut down because there was no more sand and gravel to remove from it. The plant was kept in operation on a small scale to process the "surge pile," material that had been stored near the plant so that it could be processed if weather conditions prevented the transport of material from the pit. Trinity also intended to process material that had been deposited around the plant to create a surface for the operation of trucks, loaders and other equipment.

Campbell met with Key, Viator, and Arturo Munoz, Trinity's human resources and safety manager, to determine what positions they needed to keep filled, in order to operate the plant for the limited purpose of processing the surge pile and other material. They reviewed the personnel files of the men then working and, for each such position, retained the individual with the most seniority with Trinity and the most experience at his position. Of the two operators, Rogers had more seniority and experience than Jistel. Since only one plant operator was needed, Jistel was laid-off. A dragline operator, trackhoe operator, and water truck driver were laid-off because they worked at the pit and it was closed. William Sanders, an oiler with twenty-nine years of seniority, was also laid-off. He took a vacation and returned to Trinity asking for any available work, and was hired for a few days to take down a fence on the leased property. A recently hired laborer was also let go. Emilio Padilla, a loader operator, was retained because a loader was needed to process the surge pile and other material.

On Thursday, October 25, 2001, Jistel and five other employees were notified that they were being laid-off, effective that day. Ex. C-1. Jistel does not believe that the other employees laid-off were discriminated against. Tr. 221-23. The limited operations at the plant continued

for a few months. The Seagoville facility was closed permanently in January 2002. Jistel registered for unemployment compensation, which he received for approximately thirteen months. He lives on a farm with his mother and, with assistance from other family members, operates the farm. He has not been re-employed, despite numerous attempts to find work.

Jistel was involved in some controversy following his departure. On Saturday, October 27, 2001, he was observed in the plant's office. The plant was not operating and the only other employee on site was performing other tasks. The following Monday, Trinity noted that many of the daily inspection reports had been altered. Tr. 93-94. Many "✓'s" had been changed to "X's" and numerous problems had been added to the remarks section. Of particular significance was the report for August 30, 2001. Three versions of that report were produced at the hearing. Ex. R-C-9, C-10, C-11. The third version lists twelve electrical, guarding and structural problems that were not included on the original form. MSHA returned to the facility that Monday and conducted a further inspection, specifically requesting to examine the daily inspection report for August 30, 2001. Jistel was suspected of changing the reports, although the newly added material was not in his handwriting. Jistel testified that he typically made additions to reports as the day went by, but agreed that there should have been only one version of the report. Tr. 230-33. Trinity reported the alterations to MSHA and was told that it was a matter that should be handled as a criminal investigation, which Trinity chose not to pursue.

Jistel also testified that the surveillance harassment continued after he was laid-off. He stated that different cars with people operating video cameras drove by his house and he speculated that Trinity may have hired a private investigator to monitor his searching for work. Tr. 217-18. He stated that he told MSHA special investigator Ron Mesa about it. However, there is no mention of that claimed activity in the statement he gave to Mesa on December 5, 2001. Ex. R-D-3.

On November 29, 2001, Jistel filed a complaint of discrimination with MSHA, alleging that he had been laid-off because he participated in the MSHA inspection and in the subsequent investigation to determine whether charges would be filed against individual managers at Trinity. Ex. R-C-5. He identified Campbell, Munoz, Key, Richard Forth, another area manager, Viator and Weatherly as persons responsible for the discriminatory action. By letter dated February 27, 2002, MSHA advised that its investigation had been completed and that it had concluded, on behalf of the Secretary, that Jistel had not been discriminated against. Jistel then filed a complaint of discrimination with the Commission, pursuant to section 105(c)(3) of the Act.

#### Conclusions of Law - Further Findings of Fact

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom.*

*Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. See *Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

### Prima Facie Case

Jistel reported safety hazards on the daily inspection sheets and provided information to MSHA during its investigation of alleged violations of mandatory safety standards. A complaint made to an operator or its agent of “an alleged danger or safety or health violation” is specifically described as protected activity in section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). I find that Jistel’s activities were protected under the Act. Jistel clearly suffered adverse action. He was laid-off on October 25, 2001.

The principle issue as to Jistel’s *prima facie* case is whether the adverse action was motivated in any part by his protected activity. In *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999), the Commission acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint.

“Direct evidence of [unlawful] motivation is rarely encountered; more typically, the only available evidence is indirect. . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’” [citing *Chacon*]. In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.* We also have held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Id.*

As explained below, I find that Trinity made the decision to discharge Jistel solely as a consequence of economic pressures that required closing of the Seagoville plant.

Although there is a suggestion to the contrary, Jistel does not contest the fact that the Seagoville facility was shut down because of the exhaustion of sand and gravel reserves.<sup>4</sup> He contends that, but for his protected activity, he would not have been laid-off on October 25, 2001, and would have eventually been transferred to another Trinity's facility. Tr. 281-83; Compl's. brief, part H. The problem with this theory is that Trinity's asserted reasons for the lay-off are un-rebutted. Complainant points to no evidence challenging Trinity's contentions that only one plant operator was needed after the pit was closed, and that Rogers had more seniority than Jistel and was retained for that reason. Complainant offered no proof that Trinity's explanation of the reasons for and procedures followed with respect to the lay-offs were not accurate descriptions of bona-fide business practices. While Trinity operated other similar facilities, there is no evidence that a plant operator position was available at the time of his lay-off.<sup>5</sup>

Jistel's credibility is suspect in many areas. His concerns about "surveillance" activities, especially that pictures were taken of him every day for months, strikes me as incredible. His conclusion that Trinity used a video camera to record his statement to Franklin is also highly questionable. Jistel described attempts by Trinity to find out what MSHA had asked him and what he had said in his statement. He was asked to write a letter relating what he had told Franklin and he was called to a meeting and asked what he had told MSHA, actions that Trinity acknowledged. Tr. 169-73; ex. R-G-8. Jistel offered no explanation as to why Trinity would ask him what he said in his statement, if it already had a recording of it. Moreover, his belief that his statement was the only place Trinity could have gotten information regarding the fallen conveyor and the broken concrete belt is difficult to accept. Jistel's statement contains one small paragraph about those problems, which appear to be descriptions of past events. The conveyor was said to have fallen over two months before the June inspections, i.e., about the beginning of April, 2001, and the report about the structure for the sand belt appears to refer to past repairs. Jistel, himself, had reported problems with the structure of conveyors in his daily inspection reports and claimed to have continued to do so, despite efforts by Trinity's managers to get him to stop. The fact that a conveyor had fallen more than five months before Jistel gave the statement could not possibly be information that only he knew.

The shift change and other "harassment" claims are also unconvincing. Trinity advanced a bona-fide business reason for the shift change. I find that Jistel agreed to the shift change, as

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<sup>4</sup> Jistel testified that he was told that Trinity was "re-digging" the material that was allegedly exhausted at Seagoville and processing it at another plant, Scurry-Rosser. Tr. 190. However, Campbell testified that Trinity has never had a plant at that location. Tr. 268. Trinity also established that no further material was removed from the Seagoville site. Tr. 295-96; ex. R-E.

<sup>5</sup> Jistel also claimed that he was qualified for other jobs, e.g., equipment operator. However, men laid-off at the same time had more seniority, and at least one was also qualified for such jobs.

Weatherly testified. The change created only overlapping shifts. Instead of working from 6:30 a.m. to 6:30 p.m., Jistel worked from 9:30 a.m. to 9:30 p.m. Ex. R-D-3. Those work hours would not have kept him away from MSHA inspectors, which he claimed he was told was the reason for the change. The "other work" assignments were few in number and of very short duration. I find that none of the actions Jistel complained of were taken in retaliation for his protected activities. Rogers may well have told Jistel that Campbell was upset about the citations. However, Jistel's claims of abusive treatment by Rogers are difficult to square with the fact that Jistel felt that he was good friends with Rogers and Rogers, similarly, felt that he was always on good terms with Jistel. Tr. 80.

If Trinity had wanted to retaliate against Jistel because of the June 4, 2001, citation, or his subsequent participation in the investigation, it seems that it would have done so before October 25, 2001. The lapse of more than four months between the event that allegedly provided the primary motivation for retaliation and the adverse action substantially weakens any inference of unlawful motivation. Jistel's involvement in the fight with Padilla presented an opportunity for Trinity to discharge Jistel consistent with its established disciplinary process. Yet, Jistel was not disciplined. It strains credulity to suggest that Trinity, supposedly eager to retaliate against Jistel, would have passed up the opportunity to discharge him for fighting and waited to use the curtailment of activities at the Seagoville facility as a "pretext" to lay him off.

On consideration of all the evidence, I find that Complainant has failed to carry his burden of proof, and that his lay-off was not motivated in any part by his protected activity.

### ORDER

For the reasons stated above, I find that Trinity's decision to discharge Jistel was not motivated in any part by Jistel's protected activity. Rather, it was based solely upon legitimate business considerations. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.



Michael E. Zielinski  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
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March 28, 2003

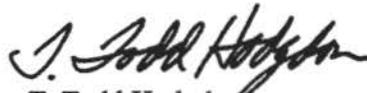
BAYOR MINING, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2001-124-R
v.	:	Citation No. 7188738; 9/5/01
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Jim's Branch No. 3A
ADMINISTRATION (MSHA),	:	Mine ID 46-08593
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-103
Petitioner	:	A.C. No. 46-08593-03529
	:	
v.	:	
	:	
BAYLOR MINING, INC.,	:	Jim's Branch No. 3A
Respondent	:	

**DECISION APPROVING SETTLEMENT ON REMAND**

Before: Judge Hodgdon

These cases are before me on a Notice of Contest and a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). These consolidated proceedings were reopened and remanded by the Commission. *Baylor Mining, Inc.*, Docket Nos. WEVA 2001-124-R and WEVA 2002-103 (May 30, 2002) (unpublished). The Secretary, by counsel, has filed a motion to approve a settlement agreement. Modification of the level of negligence from "moderate" to "low" and modification of the descriptive narrative in section 8 of the citation are advanced. In return, the Respondent has agreed to pay the proposed penalty in full.

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, the motion for approval of settlement is **GRANTED**, the citation is **MODIFIED** as indicated and the Respondent is **ORDERED TO PAY** a penalty of **\$259.00** within 30 days of the date of this order. In view of the settlement, the hearing scheduled for April 8, 2003, is **CANCELED**.



T. Todd Hodgdon  
Administrative Law Judge

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/hs

\*this settlement was originally issued March 28, 2003 and a corrected version issued April 2, 2003. The correction had no effect on the terms of the settlement.



**ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, NW, Suite 9500  
Washington, DC 20001

March 3, 2003

SECRETARY OF LABOR,	:	<b>CIVIL PENALTY PROCEEDINGS</b>
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-80-M
Petitioner	:	A.C. No. 41-00009-05555
	:	
	:	Docket No. CENT 2002-124-M
	:	A.C. No. 41-00009-05556
	:	
	:	Docket No. CENT 2001-285-M
	:	A.C. No. 41-00009-05550
	:	
v.	:	Docket No. CENT 2001-286-M
	:	A.C. No. 41-00009-05551
	:	
	:	Docket No. CENT 2001-363-M
	:	A.C. No. 00009-05552
	:	
	:	Docket No. CENT 2001-364-M
CACTUS CANYON QUARRIES OF	:	A.C. No. 41-00009-05553
TEXAS, INCORPORATED,	:	
Respondent	:	Docket No. CENT 2001-379-M
	:	A.C. No. 41-00009-05554
	:	
	:	Mine: Fairland Plant and Quarries

**ORDER ON MOTIONS TO DISMISS**

These consolidated cases are before me on Petitions by the Secretary for the assessment of Civil Penalties for the alleged violation of mine safety regulations. The Respondent has in each case filed a Motion to Dismiss the Petition on various grounds all related to the lapse of time between the inspection, assessment of penalty and petition stages of the process. An opportunity for presentation of evidence was afforded both parties on June 25, 2002. Both parties declined to present witnesses at the hearing while the Secretary presented two affidavits. The hearing became an extended oral argument on the several variations on the theme of dismissal for delay raised by the respondent. These cases present for careful decision questions both of procedure and substance in this frequently encountered but often finessed area of practice.

## Factual Background

Cactus Canyon Quarry operates a small facility in the Texas Hill Country. It has received regular visits from MSHA inspectors.<sup>1</sup> The quarry is located in the MSHA Region administered through the Dallas Regional Office. The first inspector visit of concern here occurred on August 14, 2000. The visit resulted in citations which form the basis for three of the seven cases before me. Subsequent visits occurred on March 29, 2001, and June 27, 2001. These visits resulted in citations which form the basis for the other four cases before me.

Based on the materials attached to the Petitions, as explained to a limited extent by representations of counsel, the inspections did not disclose potential violations with complex legal or factual implications. Only two potential violations were considered sufficiently important to require "special assessment" of the appropriate penalty. These potential violations included a failure to wear a safety harness and removal of a guardrail protecting dangerous machinery. As to the guardrail violation, Respondent has argued responsibility for the violation lies with a former employee who acted as a "saboteur."

The procedure followed after completion of the site inspections is described in affidavits by Mr. Michael Davis and Mr. Stephen Webber. Mr. Davis is now the Assistant District Manager for the Dallas, Texas District Office of the Mine Safety and Health Administration. He asserts he has knowledge of the methods and schedules for processing mine safety inspection reports as the reports are evaluated in the District Office for assessment of Civil Penalties. Mr. Webber is stationed in the national office of the Mine Safety and Health Administration with responsibility for processing of proposed assessments of Civil Penalties. Mr. Webber is one of the principal authors of a Program Policy Letter by the Department of Labor on the subject of Proposed Assessment of Civil Penalties. This Program Policy Letter purports to be the definitive interpretation of the Mine Safety and Health Act of 1977 issued by the Secretary as part of her responsibility for administration and enforcement of the Act. I note, however, that the time periods for processing penalty assessment recommendations are stated as goals rather than limitations, with liberal use of should rather than must as the modifier. It is undisputed that none of the assessments related to the citations issued in these cases was processed in the time periods which the Secretary established as processing time goals.

The affidavits by Mr. Webber and Mr. Davis describe an organization in some distress. Action on a report by an inspector requires documents to move through the organization with a computer record kept of each movement. But these movements cannot be completed in a timely manner if computer operators are not present in sufficient numbers. During the period the reports concerning Cactus Canyon Quarry were pending, severe shortages of computer operators were encountered. Other personnel shortages were also encountered. The affidavits do not

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<sup>1</sup> This summary is based on written material now in the record as well as representations of counsel. It does not preclude modification of these conclusions in the event an oral hearing is necessary.

indicate that any effective management response to these shortages was implemented. It appears management simply decided to “grin and bear it.” The citations issued to Cactus Canyon Quarries were not processed in any different manner or on any different schedule than any other citations processed during the same period. None of the alleged violations of mine safety regulations raised legal or factual issues of any great complexity or difficulty. Counsel for the Secretary essentially conceded at the hearing that delays in these cases were only the result of clerical shortages.

On the reverse side of the delay coin, Cactus Canyon Quarries has conceded that the delay in these cases has not worked any special hardship on its ability to respond to the claims, with the unsupported assertion that with respect to one claim it was deprived of the ability to raise an affirmative defense of intervening action by an alleged “saboteur” in the person of a disgruntled supervisory employee. The Commission has established relatively clear authority that a mine operator is held to a “strict liability” standard in assuring compliance with safety regulations and the intervening actions of a “saboteur” would not be sufficient to prevent liability. *Secretary of Labor v. Ideal Cement Company*, 13 FMSHRC 1346 (Sept., 1991). The only relevance a claim of actions by a “saboteur” would be to the level of negligence involved in the violation. In any event, testimony by the alleged “saboteur” would not be essential to evaluate the consequences of this argument for mitigation of the claim amount.

### **Policy Analysis**

My policy analysis of the issue of when a hearing on the merits can be preterminated begins by identifying three critical vectors; (1) the interest of the public in assuring a safe work place through administrative oversight, (2) the interest of the mine operator in fair and economical administration of a safety program; and (3) the interest of the government agency in economical and effective administration of a safety program. The direction the resulting vector points tells me whether a hearing is appropriate.

Resolution of these vectors begins by postulating a legislative intent in the Mine Act that every allegation of a safety defect identified by responsible officials should result in an opportunity for a hearing to resolve whether a defect was present and the appropriate sanction for that defect. An opportunity for a hearing serves to protect both the worker at risk from unsafe conditions as well as the operator responsible for providing those conditions. The safety system created by Congress assumes an opportunity for open contest of facts and policies. Only by open dialogue on these important questions can workplace safety be improved or maintained.

This “presumption” that every allegation of a safety problem is entitled to a hearing must be moderated by the need to establish a limit on hearings to protect the mine operator from unfairness or harassment in responding to safety inspections. The general trend of decided cases is to dismiss complaints where there is some reason to believe the delay in filing had the natural effect (intended or not) in putting the Respondent at an unfair disadvantage in making a defense. Where there is reason to believe the government intentionally manipulated the case schedule to deprive the Respondent of a legitimate defense, dismissal is even easier.

Finally, there are multitudes of cases which stand for the proposition that government agencies as entities cannot be prejudiced by the inadvertent acts of individual employees. There is no allegation by the Operator that any of the delays encountered in these cases was intentional or otherwise designed to put the Operator at a disadvantage. See, *Secretary of Labor v. Pierce County*, 476 U.S. 253 (1986) and cases cited there.

The vector for the public interest points clearly in support of providing a hearing in this and in most cases.

The Operator has an interest in prompt and fair adjudication of any claim against it. If heard and decided promptly (1) the evidence for any defense is fresher, (2) the uncertainty inherent in any claim clouds the financial status of the operator, and (3) the pending claim is a distraction from management focus. The Operator has an interest in resolution of unclear issues of law or policy even at the expense of some delay. There do not appear to be legal or policy issues of great significance raised in these cases.

The vector for Operator interest points away from a hearing in the face of any substantial delay in obtaining a hearing.

The interests of the Secretary fall into the areas of efficient management of resources and pursuit of program objectives. Efficient management of resources implies some flexibility in when and where to employ people and money, but with a need to maintain accountability. Pursuit of program objectives implies an intention to bring every case to a hearing on its merits and every hearing sooner rather than later.

The vector of the Secretary's interest appears to point strongly toward a hearing.

There remains one final interest to be considered, the interest of the Commission in enforcement of its procedural regulations. Commission Rule 28(a), 29 C.F.R. § 2700.28(a), provides that a petition for assessment of a civil penalty shall be filed within 45 days of receipt of a timely contest of a proposed penalty assessment. This time is subject to extension for good cause under Commission Rule 9, 29 C.F.R. § 2700.9. It seems fair to conclude that the longer the delay in filing the more compelling the reasons must be to justify extending the 45-day period.

### **Legal Conclusions**

Respondent makes two essential contentions; (1) the time between issuance of citations and assessment of a penalty was too long, and (2) the time between Respondent's objection to the assessments and filing of Petitions was too long.

#### **1. Time before Assessment**

Two key elements must be considered in connection with this period of delay; the

statutory language in the Mine Safety Act, 30 U.S.C. § 815(a), and the published interpretation of that language by the Secretary. The statute requires that notification of a penalty assessment shall follow issuance of a citation "within a reasonable time." The meaning of "within a reasonable time" has been litigated many times. The Fifth Circuit decision in *Seven Elves v. Eskenazi*, 635 F.2d 396 (C.A. 5, 1981) is particularly enlightening. The Court was confronted with a motion to vacate a default judgment entered under confusing circumstances. The judgment was for a substantial amount. The judgment debtor filed a motion to vacate within 2 weeks of learning of the entry of judgment and less than a year after the judgment was entered. Noting that the precise extent of a "reasonable time" is a matter to be determined on the particular facts of each case, the Court stated that the term should be "liberally construed in favor of trial on the full merits of the case." (*Supra*, at 403) See, *Secretary of Labor v. AMAX Coal Company*, 3 FMSHRC 1975 (Aug. 1981) which involved a period of 361 days between issuance of a citation and notification of assessment of a penalty.

These cases are consistent with the remand order by the Commission in CENT No. 2002-379-M that directed the Administrative Law Judge to determine whether the Respondent had suffered prejudice from the entire period of delay rather than the period between notice of assessment and filing of the Petition. The Commission was looking for prejudice to the Respondent as the key factor in determining whether the delay was a "reasonable time". Only in the face of significant prejudice would the Commission deal with the often complex questions of explanation of the time it takes for a government agency to act.

This principle would be very easy to apply in this case if it were not for the fact that the Secretary has also attempted to define a "reasonable time" for purposes of processing penalty assessments. The view of the Secretary on this topic should be entitled to deference, particularly because it is a subject virtually under her total control, i.e. the flow of paper through the agency. The Secretary quite laudably expressed a narrow view of what is a "reasonable time" for the agency to move a citation to a decision on assessment. The issue for me must be whether the failure to satisfy the time requirements stated by the Secretary is fatal to prosecution of these cases in the absence of a showing of prejudice to Respondent by the passage of time.

I consider this a difficult and delicate issue. While some effect must be given to the views of the Secretary on this fundamental concept of "reasonable time" to pursue penalty claims, I believe the bulk of the decided cases indicate that adopting the Respondent's position on this issue would be totally inconsistent with the intent and purpose of the Mine Safety Act. In the absence of demonstrated prejudice to a Respondent from delay in assessing a penalty or filing a Petition, the only effect of delay in proceeding longer than endorsed by the Secretary is to impeach the credibility of the witnesses called by the Secretary to argue the urgency and importance of the alleged safety violations.

I must conclude that the time taken in these cases by the Secretary to notify the Respondent of the penalty assessment was not so long and prejudicial as to preclude the Secretary from proceeding to a hearing on these claims.

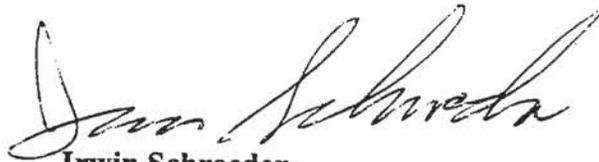
## 2. Time before Petition

The Commission has held in several cases that the 45-day period for filing a petition of assessment of a penalty is not a statute of limitations. See, *Rhone-Poulenc of Wyo. Co.*, 15 FMSHRC 2089 (Oct. 1993) aff'd 57 F.3d 982 (10<sup>th</sup> Cir. 1995). The test as to the limit of time at this point in the process is essentially the same as the test for a "reasonable time" at the earlier stage of the process, i.e. prejudice to the Respondent balanced by adequate explanation for the time taken beyond that afforded by the Commission's Rule. For small delays accepted adequate explanations include press of other work, inadequate clerical assistance and personal hardships. For longer delays the reasons need to be more unique and special to the particular case, e.g., distraction from investigation of a major mine accident or loss of staff to national emergency. My conclusion assumes good faith on the part of government agency management to reallocate people to cover the pending work load as quickly as possible.

I must conclude that none of the delays in filing Petitions in these cases was so long and so beyond the explanations given by counsel for the Secretary as to preclude the Secretary from obtaining a hearing on the merits of these claims.

### **ORDER**

For the reasons given above, the several motions to dismiss filed by the Respondent in the above captioned matters are denied. Counsel are directed to confer within the next 30 days on any discovery matters they believe need to be complete prior to a hearing. Counsel for the Secretary will initiate a prehearing conference by telephone call within 10 days of completion of discovery. The purpose of the prehearing conference will be to schedule a time and place for a hearing.



**Irwin Schroeder**  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

March 5, 2003

THOMAS P. DYE II,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-408-DM
	:	RM MD 02-11
v.	:	
	:	Mine I.D. 05-01732
	:	Cotter Mill
MINERAL RECOVERY SPECIALISTS, INC.,	:	
Respondent	:	

**ORDER REVOKING SUBPOENA ISSUED TO COTTER CORPORATION**

This proceeding was brought by Thomas P. Dye against Mineral Recovery Specialists, Inc., (“MRSI”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”) and 29 C.F.R. § 2700.40 et seq. The complaint alleges, in part, that MRSI violated section 105(c) of the Mine Act when it terminated Dye as a temporary full-time employee because he insisted that a recently repaired piece of equipment be fully safety-tested before it was put back into service. MRSI denies the allegations in the complaint.

Mr. Dye filed a motion for issuance of a subpoena to produce documents under the custody and control of Cotter Corporation (“Cotter”). Cotter Corporation owns and operates the Cotter Mill in Fremont County, Colorado. MRSI provided certain engineering and oversight services to CMS Enterprises, LLC (“CMS”) for the zirconium and uranium recovery process being developed by CMS at the Cotter Mill. In his motion for issuance of a subpoena, Mr. Dye alleged that he needed these documents for the preparation of his case in this proceeding. I mailed a subpoena to produce document or object to Mr. Dye on January 7, 2003. Cotter is not a party in this proceeding.

In response, Cotter filed a motion to revoke the subpoena under 29 C.F.R. § 2700.60(c). Cotter states that the subpoena is overly broad, exceedingly vague, and is unduly burdensome. Cotter states that the subpoena seeks information that is outside the proper scope of discovery because the information would neither be relevant to this case nor would it lead to the discovery of relevant evidence. In addition, Cotter states that the subpoena seeks the disclosure of information that is of a proprietary nature and protected by Colorado’s Uniform Trade Secrets Act.

The hearing on the merits in this case was held on March 4, 2003. About a week prior to the hearing, during a phone conversation with Mr. Dye, I advised him that if I enforced his subpoena, the hearing would have to be postponed to give Cotter time to comply with the

subpoena. Mr. Dye advised me that, although he would like the documents he requested, he did not want to postpone the hearing. Although Mr. Dye did not specifically state that he was withdrawing his subpoena, the subpoena is now effectively moot because the evidentiary hearing has been completed and the record in this case is closed.

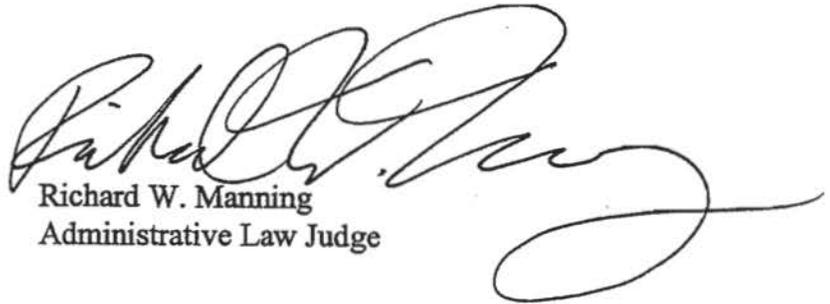
In addition, for the reasons stated below, I find that the documents requested are not relevant to this case and searching for them would place an unreasonable burden on Cotter. In the subpoena, Mr. Dye requested the following documents:

1. Copies of all training certificates on file for MRSI.
2. Copies of all incident, accident, and security reports which involve any workers employed by MRSI.
3. Copies of operation areas logbooks relating to sulfation, CCDs, and the Kiln from August 1, 2000, to August 16, 2002.
4. Copies of all shifters' logbooks from August 1, 2000, to August 16, 2002, that involve MRSI or its employees.
5. Copies of all mechanics' logbooks and records in relation to repairs, construction, engineering changes, commissioning and decommissioning of the zirconium project from August 1, 2000, to August 16, 2002.
6. Copies of mill foremen's logbooks from August 1, 2000, to August 16, 2002.

Cotter maintains that the subpoena is unduly burdensome because it would require Cotter to review thousands of pages of documents. Cotter also filed specific objections to each of the document requests. I agree that the subpoena is overly broad and I find that the subpoena is highly unlikely to uncover evidence that would be relevant to this proceeding. Mr. Dye was seeking the documents because of his belief that they would "reveal numerous incidents that involve Mr. Dilday and a lack of incidents involving Mr. Dye." Dye contends that he was a safer employee than Dan Dilday, MRSI's project manager at the Cotter Mill. As I advised the parties at the March 4 hearing, the issue in this case is whether Mr. Dye engaged in protected activity and whether he was terminated as a result of this protected activity. Whether Mr. Dilday had been involved in "numerous incidents" is not particularly relevant.

Dye also sought the documents to show that MRSI employees were not sufficiently task-trained and to "reveal the incompetent orders given by Mr. Dilday of MRSI, many of which resulted in failed pumps, spills, and unsafe incidents." Dye did not know if any of the requested documents would uncover such evidence but he wanted to review them to see if they did. Mr. Dye and his witnesses testified about Mr. Dilday's "incompetent orders" at the hearing and MRSI's witnesses responded to this testimony. The testimony on this subject was not relevant to the issues in this case. I find that the documents that Mr. Dye requested in the subpoena were unlikely to be admissible evidence and would not have led to the discovery of admissible evidence.

For the reasons set forth above, the motion to revoke the subpoena issued to Cotter Corporation is **GRANTED** and the subpoena is **REVOKED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

March 24, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-125-D
on behalf of RAYMOND ROMAN,	:	PIKE CD 99-04
Complainant	:	
v.	:	
	:	
EAGLE COAL COMPANY, INC.,	:	No. 10 Mine
Respondent	:	Mine ID No. 15-17977

**ORDER DENYING MOTION TO POSTPONE HEARING**

Hearings in this case were initially scheduled on April 21, 2000, to commence on June 6, 2000. On May 23, 2000, at the request of the Respondent, hearings were postponed and rescheduled to commence on August 15, 2000. At hearing on August 15, 2000, Respondent moved for a stay because two of its essential witnesses were then the subject of related criminal and "Section 110(c)" investigations.

On November 15, 2002, the Secretary filed a motion to lift the stay, however, counsel for both parties advised that they would not be available for trial until April 2003. On November 27, 2002, the stay order was therefore continued but the parties were ordered therein to hold open April 1, 2003, as the trial date. A second notice to that effect was issued on March 7, 2003.

On March 21, 2003, the Respondent again filed a motion for continuance of hearing claiming that it had not received a requested letter from the U.S. Attorney that he would not prosecute two of his key witnesses, and that those witnesses would therefore still find it necessary to assert their Fifth Amendment Constitutional privilege (the grounds for the initial stays in this case). However, since it is not the general practice of U.S. Attorneys to issue letters guaranteeing not to prosecute, it is unlikely, under the Respondent's scenario, that trial of this case could ever commence.

Respondent, as well as the Secretary, also claim that they are having difficulty locating witnesses. Since they were informed of the April 1, 2003, trial date nearly four months ago however they have had ample time to locate those witnesses.

Considering the age of this case and the above factors, I cannot grant the requested postponement, and it is therefore denied.



Gary Melick  
Administrative Law Judge  
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