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DONALD LUND V. ANAMAX MINING  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

DONALD L. LUND,  
COMPLAINANT

COMPLAINT OF DISCHARGE,  
DISCRIMINATION OR INTERFERENCE

v.

DOCKET NO. WEST 81-193-DM

ANAMAX MINING COMPANY,

RESPONDENT

Appearances:

Donald L. Lund, appearing Pro Se  
Tucson, Arizona

Steven Weatherspoon, Esq., Chandler, Tullar,  
Udall & Redhair, Tucson, Arizona, appearing for Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

Complainant Donald Lund brings this action on his own behalf alleging he was discriminated against by his employer, Anamax Mining Company, (Anamax), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an

alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits was held in Tucson, Arizona on August 25-27, 1981. The parties filed post trial briefs.

#### PRE-TRIAL MATTERS

A pre-trial hearing was held in this case in Tucson, Arizona on July 14, 1981. At the hearing, the Commission's procedures were explained to the parties as well as the applicable case law as set forth in David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981).

At the prehearing conference complainant Donald Lund (Lund) indicated his case involved some 20 instances of discrimination (Tr. 15, 24, 70, Pre-Hearing), The Judge and the parties discussed discovery, the filing of an amended complaint, and a trial date of September 29, 1981. Various other matters relating to the hearing were discussed. Lund asserted that the acts of discrimination by Anamax were continuing. However, since it was necessary to bring the case to issue an oral order was entered to the effect that only claims of discrimination that had occurred before the previous day (July 13, 1981) would be considered (Tr. 29, Pre-Hearing). On July 31, 1981, Lund filed his amended complaint alleging thirty-six instances of discrimination.

On July 20, 1981, Lund filed a letter with the Commission stating that a fellow worker, whom he identified by name, stated to Lund on Anamax property, among other things, "If you close this mine down I'm going to get my .357 and shoot you."

A copy of Lund's letter with a general explanation of the nature of the case was forwarded to A. Bates Butler, then the United States Attorney in Tucson, Arizona. Copies of this correspondence were forwarded to Lund, the MSHA office in Tucson, counsel for respondent, and the Commission's Chief Judge, James A. Broderick.

The allegations in Lund's letter occurred after July 13, 1981 and any issues arising out of that incident are not considered in this decision.

ISSUES

The issues are whether Anamax discriminated against Lund and thereby violated the Act.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone, David Pasula, supra. Further, in order to support a valid refusal to work the miner's perception of the hazard must be reasonable. *Robinette v. United Castle Coal Company 3 FMSHRC 803*, (1981). In *Johnny Chacon v. Phelps Dodge Corporation WEST 79-349-DM* (November 13, 1981) the Commission analyzed some of the circumstantial indicia of discriminatory intent.

SYNOPSIS OF THE CASE

Lund asserts that he gave a statement concerning an unsafe condition on a power shovel to the Anamax safety department and was, thereafter, the subject of retaliatory conduct by Anamax for engaging in that protected activity. The alleged retaliation suffered by Lund consists of the following claims: he was ordered to work under unsafe conditions; he was threatened; he was verbally abused; he was issued letters of discipline; he was unjustifiably charged with absences from his job; and other miscellaneous actions by Anamax. Lund complains about thirty-six instances of alleged retaliation. Additionally, it appears from the transcript of the hearing that Lund claims that when Anamax failed to provide him a safe work place, and he argues that, in and of itself, this constituted discrimination.

Lund's last claim has no support under the Act. The failure to provide a miner with a safe workplace may constitute a violation of a mandatory health or safety standard and thereby be a violation under the Act, but such a failure does not without more constitute discrimination. An act of discrimination under the Act occurs only when a mine operator takes adverse action against a miner because the miner has engaged in an activity that is protected by the Act. Pasula, supra.

Lund's contention that all thirty-six instances of alleged adverse action occurred because Anamax was retaliating against him for the statement he gave concerning the power shovel incident is not supported by the record. Lund's statement and the various other safety complaints voiced by him were protected activity. However, Lund either failed to establish a connection between these thirty-six incidents and the protected activity or

the incident itself cannot be considered to be adverse action.  
In short, Lund does not show that Anamax retaliated against him  
for any protected activity.

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This decision initially analyzes the power shovel incident and then the various acts of discrimination as set forth in the amended complaint. In each of the instances of alleged discrimination the decision sets out the allegation followed by the findings of fact and a discussion. Occasionally controverted facts appear and they are identified as such in the discussion portion of the incident.

Various management supervisors were involved with Donald Lund in the various aspects of his case.

Lund, an Anamax welder, worked in the weld shop. His direct supervision in the weld shop included:

Dayton Miller  
Jerry Hyder

additional supervisors included:

Tony Rael, assistant superintendent  
Robert Nelson, superintendent

Lund's welding duties also took him to various other Anamax departments. While in those other departments he would be under the directions of other supervisors. These included the following:

Bill Bissell  
Maderas, Bissell's supervisor  
Marshall Foster, front line supervisor  
Keppner, supervisor  
Rudolfo Ypulong, front line supervisor in electrical parts department  
Hassell Logan, superintendent, conveyors  
Shelley, shovel superintendent  
Justin "Red" Taylor, supervisor

Bissell was terminated by Anamax a few months before the trial because "he was not an adequate supervisor" (Tr. 805). Maderas and Keppner resigned in protest of Bissell being discharged. Also involved in portions of Lund's case are:

Paul Weathers, security guard  
Charles Bishop, plant protection and Emergency Medical Technician

Persons in Anamax's safety department include:

Gerald Johnson, Director of Loss Prevention  
John Caylor, Manager of safety and health under Johnson's supervision

POWER SHOVEL INCIDENT

Witness: Lund, Pijanowski, Johnson, and DeAnda.

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1. Donald Lund had been employed as a welder by Anamax since November 1979 (Tr. 124).

2. On April 25, 1980, the S-10 shovel shorted out due to a ground fault on the 4160 volt circuit. Foreman Bill Bissell was told by electrician Richardson to keep personnel off the shovel, but Bissell nevertheless directed 5 men to work on the shovel (Exhibit P-3).

3. The seven members of the shovel crew filed an employee complaint with the Joint Health and Safety Committee. Robert Snyder, as the Teamster union steward, filled out the complaint. All members of the crew signed the complaint (Tr. 57, 61-62, 387, P-3).

4. Lund was in the manbasket preparing to repair the shovel; if there had been a short he could have been electrocuted when the power was turned on (FOOTNOTE 1) (Tr. 55).

5. Worker DeAnda and all of the members of the crew were interviewed by the Joint Safety Committee which consisted of Arno Gates (for management) and Walter Yturralde (for the union) (Tr. 57, 58, P-3).

6. The Joint Safety Committee is provided by contract between Anamax and the workers. Under the contract an employee is to report an unsafe condition to his supervisor. If they do not agree the worker has a right to relief from his job and he may return on the next shift without discipline. If the right is exercised there is an automatic investigation by the Joint Safety and Health Committee which consists of an equal number of representatives for management and the union. If the individual's actions are found to be justified he'll be paid for the time he was off the job (Tr. 503, 504).

In this instance the Committee report outlined the power shovel dispute, made recommendations, and concluded that there could have been a communication problem between Richardson (electrician) and Bissell (foreman). Further, the Committee concluded that two men working on the tracks and the welder working on the boom out of the bucket could have been hurt when power was restored if there still had been a short in this machine. Fortunately, this did not happen because there was no power due to faulty circuits. Also the high voltage fuses had blown.

8. Worker DeAnda, a member of the crew, was not treated any differently after the shovel incident than before (Tr. 61).

9. Within one or two weeks after the incident, about April 1, 1980, Lund went to the Anamax safety office and gave a statement to Gerald Johnson, Anamax's Director of Loss Prevention. Lund volunteered to give the statement because the company had not disciplined anyone as a result of the shovel incident (Tr. 390-391, 774).

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10. Gates and Yturralde were present in the safety office when Lund's statement was taped (Tr. 393).

11. Lund declined the company's offer of a copy of the tapes or a transcription of his statement at that time (Tr. 397).

12. Johnson testified that Lund requested that the tape be played by Johnson for "the powers that be" and it was (Tr. 778).

13. According to Johnson he played Lund's tape for Pijanowski (Vice President, Personnel, Johnson's superior); for the shovel and drill crew management comprising of Kepner, Maderas, and Bissell; also he played it for Rosson, maintenance superintendent, as well as some for the Anamax Legal Department (Tr. 805-806).

Lund is correct when he states that his activities in reporting to the Anamax safety department were protected under 105(c) of the Act. However, at this point no retaliatory moves had been made by Anamax. If there is no discriminatory retaliation there is no violation of the Act. It is accordingly necessary to review the subsequent events.

#### I

#### TIPPING FRAME INCIDENT (FOOTNOTE 2)

14. Lund was dispatched out of the weld shop to work on a drilling rig (Tr. 134-135, P-7).

15. A portion, or about half, of the area where the drilling rig was situated had been blasted (Tr. 135-136).

16. As Lund was welding underneath the outrigger the pad behind him rose and because of the loose ground the drill started to tip over (Tr. 136-139).

17. At this point Maderas (Bissell's supervisor) drove up, and started hollering. The mechanics immediately told Lund to get out from under the drill (Tr. 138, 139).

18. Foreman Bissell was at the site before the drill started to tip over (Tr. 399).

Lund's theory here is that he was discriminated against because he was told to work in a situation which proved to be unsafe. The Act and its legislative history do not support Lund's theory of the case. Discrimination occurs when a mine operator retaliates against a miner because the miner engaged in a protected activity.



USE OF WELDING TRUCK WITHOUT BACKUP ALARM (FOOTNOTE 3)

Witnesses: Lund, Miller, Ypulong, Johnson.

19. Two or three weeks after his statement was taped, Lund's duties required him to use a truck (Tr. 140-45, P-8, P-9).

20. The truck did not have a backup alarm. When he discussed the problem with his foreman (Ypulong) he was told to take the truck, be careful, and tag it out when he returned (Tr. 146, P-10).

21. Foreman Dayton Miller arrived at 6:30 for the 7:00 o'clock shift. He was hostile and mad and he told Lund he could receive a safety warning letter (FOOTNOTE 4) for taking the truck (Tr. 147, 148).

22. No one had ever been issued a safety warning letter for using a truck without a backup alarm (Tr. 148).

23. Lund did not receive a safety warning letter (Tr. 148, 410).

24. When Lund complained to Johnson about Miller's threat of issuing a safety warning letter Johnson checked the truck's records. The records showed the truck was in "rebuild" until the shift before Lund used it (Tr. 786).

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25. Johnson further told Lund he should have received a safety warning letter (Tr. 784).

26. The truck also lacked a whip light (similar to an off of the road antennae).

27. Lund told Miller he considered that the threat of the issuance of a safety letter was retaliation for his taped testimony. Miller denied that (Tr. 148).

28. Miller treated Lund the same as any other worker, and he told him if he checked out a similar truck in the future someone would give him a safety warning letter (Tr. 696).

It is not necessary for this decision to consider whether the events here constitute a violation of Title 30, Code of Federal Regulations, section 55.9-87, or the same regulation at Section 56.9-87. The MSHA mandatory standard provides as follows:

Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

No evidence supports Lund's conclusion that the threat of the issuance of a safety warning letter was in retaliation for his taped statement to the safety department. Miller's statements to Lund occurred immediately upon his discovery of the use of the truck. Johnson, the director of loss prevention, thought such a letter should have been issued. This evidence supports the view that Miller's anger was genuine and not related to Lund's protected activity.

Lund claimed the truck had been used by 12 shifts, or 12 people, before he used it but I accept Johnson's testimony because he checked the truck's records. These records indicated the truck was in "rebuild" until the shift before Lund used it (Tr. 785, 786).

A safety warning letter generally is issued by a foreman and such a letter is not unusual. Approximately 50 such letters were issued in the last 12 months (Tr. 806-807). The issuance of a safety warning letter or the legitimate threat of the issuance of such a letter, as in this situation, is a proper management device.

### III

FOREMAN RAEL REPRIMANDS LUND FOR NOT  
GOING THROUGH THE CHAIN OF COMMAND (FOOTNOTE 5)

Witnesses: Lund, Rael

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29. Immediately after Lund concluded his discussion with Dayton Miller (in II) he left. He walked about 200 feet and met Tony Rael, Miller's supervisor. Rael asked Lund why he went around the chain of command and shot his mouth off to Johnson. Furthermore, why hadn't he notified Rael if he had a problem (Tr. 150-152).

30. Rael told Lund it was company procedure for a worker to go to his superintendent with a safety problem. He further explained that if the worker did not obtain relief, (as from foreman Miller), he could go to the next senior supervisor (to Rael), or to Rosson, and right on up (Tr. 524, 525).

31. Lund told Rael the three page handwritten statement concerning the shovel incident was on Rael's desk. Rael said he hadn't seen it. Lund said he was upset and Rael said to write it out or write a book (Tr. 151-152).

32. Lund and Rael also discussed the backup alarm. When he was asked to elaborate Rael said that weld trucks didn't need a backup alarm (Tr. 152).

33. Lund asked about various safety matters and Rael didn't have the answers (Tr. 152).

Lund, in rebuttal, asserts that Rael's testimony is only correct insofar as he spoke about workers going through the chain of command (Tr. 835).

Lund's rebuttal testimony is not further discussed at the hearing or in his post trial motion. I assume he is complaining about Rael's characterization that he did not reprimand Lund which conflicts with Lund's statement that he was reprimanded. In any event such testimony of each witness is conclusory in nature and it is necessary to look to the actual statements of each of the participants.

Reprimand, according to Webster (FOOTNOTE 6) means "a severe or formal reproof", or "to reprove sharply or censure formally usually from a position of authority." In the latter sense Rael did censure Lund. However, the uncontroverted evidence is that it is company policy for a worker with a safety complaint to first complain to his immediate supervisor. If the situation is not relieved then the worker goes to the second

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tier supervisor (such as Rael or Nelson) (Tr. 608-611). Rael and Nelson, the second tier supervisors, both indicated that Lund had never come to them with a safety complaint (Tr. 525, 610). The purpose of a worker first going to his immediate supervisor with a safety complaint is to give that supervisor an opportunity to correct the condition (Tr. 524). While Lund's explanation is that he went to Johnson's safety department because he was unable to accomplish anything at the lower level (Tr. 525), I conclude Rael had a legal right to reprimand Lund for not following the company procedure.

Rael had been told by the supervisors that Lund was argumentative and going to the safety department to register complaints rather than routing them through the line supervisors (Tr. 524). The absence of Lund at the safety department presented scheduling problems for Rael (Tr. 527).

There are three avenues a safety complaint can go at Anamax. These are the Joint Safety and Health Committee; a complaint lodged with the supervisor and up the chain of command; and a complaint lodged directly with the safety department. In short, I conclude that Rael had a legal right to reprimand Lund. Cf Chacon v. Phelps Dodge Corporation, WEST 79-349-DM (November 13, 1981).

#### IV

#### ROSSON THREATENS LUND WITH SAFETY LETTER (FOOTNOTE7)

Witnesses: Lund, Johnson

The events here are a sequel and they occurred on the same morning that Miller threatened to issue the safety warning letter for no backup alarm in II, and the conversation with Rael in III (Tr. 155-158).

34. Lund went to Johnson's office to report the situation (Tr. 155-158).

35. Lund related to Johnson his conversation with Miller and Rael. Johnson said he'd take care of it (Tr. 156).

36. Rosson (management) talked to Johnson over the telephone while Lund was in Johnson's office (Tr. 413).

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37. Lund couldn't hear Rosson talking to Johnson but Lund said he'd take a safety letter if one was issued to every welder and foreman who took the truck as well as those who assembled it without the alarm (Tr. 414-415).

38. Rosson didn't talk to Lund personally (Tr. 158).

39. Johnson didn't recall talking to Rosson over the phone about whether Lund should get a safety letter (Tr. 786-787).

Lund claims Rosson threatened the issuance of a safety warning letter while he (Rosson) talked to Johnson. Lund didn't hear the conversation nor did he talk to Rosson. Johnson doesn't recall the conversation. I conclude there is no basis in fact for the allegation since there is no showing how such a threat was ever conveyed to Lund. The proof of this allegation fails.

V

RUPTURED FUEL TANK ON WELDING MACHINE (FOOTNOTE8)

Witness: Lund

40. Right after lunch, (on an unstated date), Lund found a split seam on his gas tank. The seam crack had a hole in it (Tr. 158-163, 424).

41. Raw gasoline was running into the armature (Tr. 161).

42. When he found this situation Lund rolled up his gear and pulled away (Tr. 161).

43. Within 5 to 15 minutes foreman Bissell appeared. He refused Lund's request for the water truck to wash down the gasoline (Tr. 162).

44. Bissell told Lund to return the truck and get another. Lund was concerned about the 20 gallons of gasoline in the welder and 26 gallons of gas in the tank of the truck (Tr. 162).

45. Lund didn't see anyone puncture the tank (Tr. 424).

46. Bissell said he'd assume responsibility for fire, which did not occur (Tr. 162, 430).

Lund alleges that someone punctured the tank (Tr. 424). At the time of this incident, Lund thought he was "being hunted", but he didn't write on his equipment defect report that someone had punctured the tank because he wanted to "catch them" (Tr. 426, 428). There is no evidence to support Lund's view that some person or some person on behalf of Anamax was "hunting him."

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Lund is entitled to think whatever he wants, but on the basis of the evidence I conclude that, at best, he was required to return a truck that was leaking gasoline. As previously discussed in paragraph I these activities do not constitute discrimination under the Act. Lund would have been justified in refusing to drive the truck under the conditions he described, but his evidence does not support a claim of discrimination.

VI

HYDER'S STATES "I DON'T GET MAD, I GET EVEN" (FOOTNOTE9)

Witnesses: Lund, Hyder

47. Two to three weeks after he made the tape concerning the power shovel incident, a remark brought up the subject and Lund asked his direct weld shop foreman, Jerry Hyder, if he had any hard feelings (about the tape).

48. Hyder's reply was "I don't get mad, I just get even."

49. Hyder hasn't done anything to "get even" (Tr. 432).

50. Hyder explained that there was something said about a person getting mad hence the nature of his answer to Lund (Tr. 765).

51. Hyder's statement was made in a joking manner (Tr. 765, 766).

52. Hyder knew about the tape recording (Tr. 766).

According to Webster's New Collegiate Dictionary a threat is defined as 1: "an indication of something pending [the air held a-- of rain] 2: an expression of intention to inflict evil, injury, or damage 3: something that threatens."

Lund indicated that it didn't appear to him that Hyder was joking and "he sure didn't smile" (Tr. 165). I find Hyder's view that his statement was made in a joking manner is more credible. By it's very nature Hyder's reply requires a touch of solemnity. Further, in finding this a mere exchange between the parties I note that Hyder never did "get even." He certainly had the opportunity since he was Lund's direct weld foreman and responsible for the safety equipment on the truck (Tr. 163, 164).

VII

ATTEMPTED DISMISSAL OF LUND BY BISSELL (FOOTNOTE10)

Witnesses: Lund, Hyder, Johnson

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53. On a workday during the last two weeks in July, Lund was dispatched to work on a shovel for Bissell (Tr. 168).

54. Lund cut off a catwalk and had laid out material to construct a new one (Tr. 173, 434, P-13, P-14, P-15).

55. Bissell arrived and told Lund to modify the old catwalk and put it back (Tr. 174).

56. A heated argument ensued (Tr. 174).

57. Lund refused to build the catwalk the way Bissell wanted it (Tr. 174).

58. Lund told Bissell if he wanted to take him "to the gate" he'd have to get some security guards (Tr. 175).

59. Lund was upset and when Bissell returned without any guards Lund said he was sick (Tr. 175).

60. Lund went to the guard shack and called Gerald Johnson in the safety department (Tr. 177).

61. Johnson appeared, investigated the incident, and said there was a misunderstanding over Lund's work attitude (Tr. 788).

62. Hyder initially marked Lund's time card to indicate he was being sent home for disciplinary action but later, because of Johnson, he changed it to show that Lund went home "sick" (Tr. 768, 769).

63. Lund was not disciplined nor fired as a result of this incident (Tr. 178, 179).

64. A front line superintendent (such as Bissell) has no authority to dismiss an hourly employee (Tr. 787).

Lund's theory in this incident is that discrimination occurred when Bissell refused to listen to Lund's reasons why Bissell was wrong in his instructions. Bissell told Lund to do the job the way he (Bissell) wanted it done (Tr. 435).

An hourly employee does not have a right to direct a supervisor in an area within the supervisor's authority. However, Lund's testimony is considered a general complaint of a supervisor's directive that could result in an unsafe condition. As such the complaint is a protected activity. Lund's evidence shows a type of catwalk construction done incorrectly (Tr. 169, P-13) and one done correctly with a center splice (Tr. 169, P-14). However, while the record favorably supports Lund's ability as a craftsman, I am unable to perceive from the evidence whether Lund's claim of an unsafe condition is reasonable. The Commission has required that to support a refusal to work a miner's perception of the unsafe condition must be reasonable. Robinette, supra. In this situation it is not possible to tell whether the argument between Lund and Bissell was over the

asthetics of the catwalk or over a unsafe condition that might



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arise if Bissell's instructions were followed. Inasmuch as the reasonableness of Lund's perception is not shown it follows that this claim of discrimination cannot be sustained. Further, I find the action attempted by Bissell was unrelated to any protected activity. It is apparent that the argument was over who would be "boss", Lund or Bissell. To reach for the conclusion that Bissell was retaliating because of some protected activity by Lund is not justified under the evidence.

VIII

TEN DAY ATTENDANCE DISCIPLINE LETTER  
RECEIVED BY LUND. THE LETTER WAS ISSUED IN ERROR (FOOTNOTE11)

Witness: Lund

65. Lund received a discipline letter stating that he had been charged with ten absences in the past 12 months (Tr. 179).

66. Lund had missed only eight days. When Lund contacted foreman Dayton Miller the error was corrected and the letter withdrawn (Tr. 180-181).

67. Lund could not get an answer as to who was responsible for the letter (Tr. 181).

The Anamax procedure on employee absences is discussed infra.

The evidence here fails to establish any discrimination against Lund. When the error was established the letter was withdrawn. A mere error in an internal company procedure will not generally support a claim of discrimination.

IX

LUND RECEIVED SAFETY DISCIPLINE LETTER FOR LIFTING A LINER  
WITHOUT HELP. HE ASSERTS THE LETTER WAS ISSUED COMPLETELY  
WITHOUT GROUNDS. (FOOTNOTE12)

Witnesses: Lund, Foster, Hensen, Johnson

68. On July 26, 1980 Lund was welding liners on a shovel bucket (Tr. 182-184, P-16).

69. Supervisor Foster and two mechanics assisted Lund in setting two or three liners in place. A man was on each corner moving the liners into place (Tr. 182, 563).

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70. Without any assistance from Foster and the mechanics, Lund, toward the end of the shift, took the remaining liner, tipped in back on one corner, and dropped it on the floor (Tr. 185).

71. When Foster left the work area the liner was three to three and one half feet from where it was to be placed (Tr. 552).

72. Lund then took a 24 inch crowbar and moved the liner around until it got to the spot where he could tack it down (Tr. 186).

73. Lund felt a twinge in his back (Tr. 186).

74. The liners weigh 208 pounds and measured 24 by 36 inches; it is one and half inches thick (Tr. 185, 189, P-38).

75. When Lund reported the incident of possible back injury to Foster he was asked if he wanted to file a written report. Lund declined. When his other foreman suggested he report it, he did (Tr. 187).

76. Foster, who was not aware of the shovel incident nor aware of Lund's safety complaint to Johnson, stayed overtime to investigate the incident (Tr. 554).

77. Foster conferred with Kepner and Maderas before issuing the safety letter to Lund (Tr. 565, P-2).

78. The safety warning letter indicated Lund's actions violated an Anamax safety regulation by "lifting a shovel liner that was too heavy for one person to lift when lifting equipment was available." Further, the letter stated that a repeated formal warning of "safety infractions" would Lund to disciplinary action (P-2).

79. Section 6 of Anamax's safety rules discusses handling materials. Subsection A provides: "Do not lift bulky or heavy material by yourself, get help" (R-2).

80. Foster, when he left the work area, told Lund to call him on the portable radio if he needed help (Tr. 550).

81. Johnson, Director of loss prevention, received a copy of the letter, talked to Lund, and investigated the incident (Tr. 789).

82. Johnson concluded that the letter had been properly issued (Tr. 790).

83. In Johnson's 15 years with Anamax two workers had been discharged for receiving a safety warning letter (Tr. 790).

The issuance of a safety warning letter is an internal company safety procedure. The evidence here fails to establish that the issuance of the

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letter to Lund was clearly pretextual. The uncontroverted evidence here establishes that a man on each corner helped lift the first two or three liners into place (Tr. 549, 563). Mechanic Hansen further indicated that welders usually request help when moving the liners (Tr. 49). Therefore, I do not find Lund's testimony credible which to the effect that he handled the liners alone for one and a half years prior to this incident (Tr. 189).

Accordingly, Anamax was justified in issuing Lund a safety letter. In his rebuttal evidence Lund says the portable radio issued to him was inoperable (Tr. 838). However, the gravamen of this claim is whether the issuance of the letter was a disguised effort at retaliatory conduct. For the reasons stated, I conclude it was not.

X

LUND'S GRIEVANCE LETTER PROTESTING THE  
SAFETY WARNING LETTER DISAPPEARS (FOOTNOTE13)

Witnesses: Lund, Nelson, Miller, Matthews

84. Al Matthews, a steward for the Operating Engineers at Anamax, deposited a grievance letter for Lund in the grievance box in August, 1980. Lund was protesting the safety warning letter he received in IX (Tr. 13).

85. Under the labor contract, a grievance procedure initially goes to the Anamax foreman. If the grievance is denied it then goes to the union's chief steward (Tr. 13-14).

86. In three days Lund's grievance was denied. In accordance with ordinary procedure, Matthews deposited the grievance letter for the Chief steward by depositing it in the locked union box situated at the Anamax main gate (Tr. 14-16).

The chief steward, after removing the grievance, sets up an additional hearing in the union appeal process (Tr. 15).

87. The purpose of the union box is to pass notes between union stewards and the chief steward in the appeal process (Tr. 21, P-1).

88. Before any action was taken on the grievance and after an extended strike at the mine Lund contacted Anamax labor relations and was advised they had not seen his grievance (Tr. 193).

89. Nelson, the acting chief steward, hadn't seen Lund's grievance, and he checked with the other stewards who indicated they didn't have it (Tr. 30).

90. Persons having access by key to the union box include management, and the chiefs stewards of the Operating Engineers, the Teamsters, the

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International Brotherhood of Electrical Workers, and the Steelworkers (Tr. 27, 29).

91. After the strike a number of grievance letters could not be accounted for (Tr. 33).

92. Since Lund was not a union member he could to one of three unions and they would be required to represent him (Tr. 28).

When mail is properly addressed and deposited in the United States mail, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail, I Wigmore, Evidence 95 at 524 (3d ed 1940); Weinstein on Evidence 57 406 (3).

Several difficulties prevent the rise of any presumption in this case. First, Anamax and four unions have access to the box. Second, an 83 day strike intervened. Third, a number of grievance letters apparently were lost about the same time. Therefore, there is no presumption to explain what happened to Lund's letter.

Accordingly, there is a failure of proof that Anamax removed Lund's in retaliation for any protected activity.

#### XI

LUND'S DAMAGED TOOL BOX WAS  
NOT REPLACED FOR TWO MONTH (FOOTNOTE14)

Witnesses: Lund, Miller

93. Four to six weeks before the strike Lund requested that his tool box be replaced because it had been damaged. In accordance with Anamax policy, the company agreed to replace the box (Tr. 199, 443).

94. Miller ordered the tool box the same day Lund showed him his damaged box (Tr. 700, 702, 722).

95. During the strike Lund called Johnson who located the box in storage (Tr. 199, 701).

96. The tool box came into the company in about two months and it was two or three weeks before it was brought to Miller's attention (Tr. 722).

I see no discrimination nor retaliatory action in the above facts. Anamax followed standard policy and agreed to replace Lund's tool box. The order was placed. Anamax cannot be held responsible for a vendor's delay in delivering a tool box.

An inconsequential credibility issues arises in this incident. Lund says Miller told him the day before the strike that the tool box had not been ordered. Miller testified that

the tool box was ordered the day Lund

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requested it. I give credit to Miller's testimony because such evidence is more credible on the record as a whole.

XII

LUND IS DISPATCHED ALONE, WITHOUT A RADIO, TO CUT AND WELD ON A PAIR OF SIDE FRAMES. HE FOUND FOUR HALF FILLED BUCKETS OF SOLVENT UNDER THE FRAMES (FOOTNOTE15)

Witnesses: Lund, Miller

98. On the first Saturday shift after the strike concluded (approximately November 1, 1980) shovel superintendent Shelley assigned Lund to do routine repairs on side frames resting on timbers (Tr. 202-204, P-19).

99. Lund would be using his torch and regular welding outfit to rebuild the framework (Tr. 204).

100. In looking over the area Lund found four clear five gallon half full buckets of solvent underneath the sideframes (Tr. 205).

101. Lund removed the buckets (Tr. 208).

102. The yard where the frames were located was somewhat of a junkyard and it was used for storage (Tr. 209-210).

103. Anamax's standard procedure permits welders to weld outside of the shop without a radio (Tr. 210, 211, 447).

104. Lund didn't see anything in the yard that needed cleaning (Tr. 211).

105. Lund considered it his responsibility as well as his foreman's to remove solvents from the area (Tr. 449).

Lund testified that these solvents had been set as a "trap" for him, (Tr. 450) but foreman Miller's uncontroverted testimony is that it is customary for solvents to be in this area (Tr. 721). One would also expect solvents in an area where there were worn out parts.

Lund's claim of discrimination also lies in his stated but unpleaded argument that it is discriminatory for a man to be assigned to a job without a radio. This matter is an internal business decision by Anamax. I will not upset such a business judgment unless the action by Anamax was actually taken in retaliation for some protected activity.

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At best, Lund established an unsafe work place resulting from the proximity of the solvents and the lack of a radio. The same ruling as in paragraph I is applicable here.

#### XIII

#### LUND IS REFUSED PERSONAL PROTECTIVE EQUIPMENT ON JANUARY 31, 1981, AND FEBRUARY 1, 1981 (FOOTNOTE16)

Witnesses: Lund, Miller, Taylor, Hyder

#### MADERAS INCIDENT

106. On this occasion Whitmore lubricant was dripping into the area where Lund was welding (Tr. 213, P-23).

107. Lund asked for personal protective equipment other than the pair of leather shouldered. Maderas (Bissel's foreman) said "I'll think about it." Further, Maderas told Lund that "I like to see you get your pants dirty" (Tr. 214).

108. Lund did the work and burned holes in his pants (Tr. 214).

109. Lund also asked for a mechanics paper protective suit and an asbestos blanket (Tr. 214, 215, 450-451, P-20).

110. Lund made this request three times (Tr. 218).

#### TAYLOR INCIDENT

111. The following day, February 1, 1981, Lund was directed to weld in a gear blank on the underneath side of an S-10 shovel (Tr. 218).

112. The grease lined gear box was seven to eight inches over Lund's head.

113. Lund told supervisor Taylor that he needed protective clothing and ventilation (Tr. 218).

114. Taylor brought a fan but the A/C motor burned out on the D/C current of the welder (Tr. 220, 221).

115. Taylor didn't give Lund a paper suit. He further explained the hazard of such suits to Lund (Tr. 534).

116. Welders are issued leather sleeves and gloves, small aprons, safety toe shoes, hard hat, glasses and a welding hood. Anamax replaces any damaged leather jackets, but it does not require them (Tr. 704, 706, 760).

117. Lund had the standard equipment as is issued to any welder, but he did not have a leather jacket (Tr. 706).

Lund claims he was discriminated against because he wasn't issued the necessary clothing to do the job without injury. An MSHA regulation concerning protective clothing or equipment is contained in Title 30, Code of Federal Regulations, Section 55.15-7, which provides as follows:

55.15-7 Mandatory. Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal.

The issue here is whether Anamax discriminated against Lund in violation of Section 105(c). The issue is not whether the standard was violated. I conclude Lund's complaint of discrimination fails.

The evidence in connection with the Maderas incident shows Lund asked for protective clothing. Maderas refused and Lund did the welding but burned his pants (Facts 106, 107, 108, 109). The availability of the jacket in the cage (Tr. 451-453) is not relevant to a determination of the issue. As indicated in paragraph 1 of this decision Lund was engaged in a protected activity when he protested the lack of protective equipment. At that point he could have validly refused to work. However, the Act is not intended to reward a worker for working under an unsafe condition. Anamax did not further discriminate against Lund for engaging in his protected activity. Maderas remarks, certainly not the most pleasant, fail to show that Maderas was discriminating against Lund for his protected activity in protesting the lack of personal protective equipment.

The Taylor incident does not involve a refusal to furnish protective clothing but rather it concerns a dispute over its use. Lund clearly testified he asked Taylor for ventilation and protective clothing (Tr. 218). Taylor brought a fan (Tr. 220). However, Taylor refused to provide a paper suit as he thought it would be more hazardous. Taylor explained the hazard to Lund (Tr. 534). Lund claims Taylor refused him protective clothing, (Tr. 220) but both Lund and Taylor agree that Lund obtained and used a paper suit (Tr. 221). Lund describes it as "tore up" and that it had been under the seat of his truck (Tr. 221). Taylor says Lund got one from the weld shop (Tr. 534). The origin of the paper suit is not vital. The ultimate facts establishes that Lund used protective clothing. Taylor's refusal does not show any discriminatory intent but rather was a dispute over the safety of the paper suit. If Taylor intended to retaliate against Lund for his protected activities one would hardly expect that he would secure a fan and argue over whether a mechanics paper suit could be safely used. In summary, no evidence of discriminatory or retaliatory conduct is shown here.

XIV

LUND IS VERBALLY ABUSED BY SUPERVISOR DON NOEL (FOOTNOTE17)

Witnesses: Lund, Mattausch, Butler, Vanderburg, and Noel



118. On February 12, 1981, Lund, Vanderburg, and Mattausch were discussing the shovel incident in the heavy equipment maintenance shop when supervisor Don Noel walked up to the group (Tr. 73-75).

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119. Noel, a line foreman, in an above normal and sarcastic tone, called Lund "a Jerry Johnson suck ass" (Tr. 74, 75, 85).

120. Mattausch and Vanderburg laughed, but Lund didn't (Tr. 80, 85).

121. Gerald Johnson is head of the Anamax safety department (Tr. 77).

122. Noel went into the office and he was talking to Lund's foreman concerning what Lund was doing and why he was talking to the two men, etc. (Tr. 237).

123. Lund interrupted, explained his work, and he made an issue about what Noel called him. Lund then left (Tr. 237-238).

124. It is the practice to swear in the maintenance shop and Mattausch had heard Noel swear before (Tr. 77).

125. After leaving the office Noel came to Lund and said he didn't mean it the way it sounded. He apologized (Tr. 94, 238).

126. Johnson, within a week, told Lund the insult was to Lund alone. Lund then filed a complaint. Johnson told Lund not to "smack" anyone (Tr. 238-239).

A credibility issue arises between Noel's and Lund's versions of this incident particularly as it relates to Noel's stated reason for referring to Gerald Johnson. Noel says he mentioned Johnson because his name just "popped into his head." I find the likelihood of that to be so remote as not to be credible. I find that Noel's remark was a rather clear reference to Lund's protected activities in protesting to the Anamax safety department. The legislative history indicates that the Congress intended to protect miners against not only the common forms of discrimination, [naming a few] "but also against the more subtle forms of interference such as promises of benefit or threats of reprisal." Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session 624 (July 1978).

The difficulty with Lund's position is that the statements by Noel does not constitute a threat of reprisal. It is not shown that any discriminatory action was taken by Noel against Lund. Noel's remark is not a threat, Cf paragraph VI, supra. It did not injure Lund or his employment in a way that Congress intended to prohibit. It was merely a derogatory statement which are commonplace among some workers. Congress in my view did not intend to legislative in the area of derogatory statements made in the work place.

LUND RECEIVES IMPROPER FIRST AID  
TREATMENT FOR AN EYE INJURY. HE IS  
FURTHER REFUSED A TAXI SLIP BACK TO  
THE MINE AND A SECURITY OFFICER REFUSES  
TO TELEPHONE GERALD JOHNSON HIS BEHALF (FOOTNOTE18)

Witnesses: Lund, Taylor, Rosenthal, Johnson, Bishop, and  
Weathers

The following events occurred in sequence.

125. On February 1, 1981, Lund was welding on a large  
conveyor (Tr. 240).

126. When supervisor Taylor appeared Lund said he had a  
foreign body in his eye. Taylor took Lund to the Anamax aid  
station (Tr. 240) .

127. Bishop, the emergency room technician, said he wasn't  
going to examine the eyes until they were washed out in the high  
pressure eye wash (Tr. 240-241).

128. After using the eye wash Bishop examined Lund's eyes  
with a large magnifier and he indicated he couldn't find any  
foreign object (Tr. 241, 242).

129. Lund's eye continued to bother him so he returned to  
the first aid room and Bishop took him to the hospital (Tr. 242).

130. Dr. Rosenthal, the emergency room physician, without  
any magnification saw that Lund had a foreign body in his eye  
(Tr. 66-70, P-4).

131. It is inappropriate to use a high pressure eyewash  
before the eye is examined (Tr. 70, 71).

132. Dr. Rosenthal anesthetized the eye, removed a one to  
two millimeter metallic body, and patched the eye (Tr. 68).

133. In the emergency room Bishop handed Lund a taxi slip.  
The company later pays for the worker's taxi fare home (10  
miles). Lund asked for a taxi slip to get back to the mine (28  
miles) to get his vehicle (Tr. 243, 244, 459, 640-644, 791,  
P-25).

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134. At Lund's request Bishop called John Caylor, Johnson's assistant on duty on that shift. Caylor refused Lund's request for a taxi slip to the mine (Tr. 649).

135. Lund asked Weathers, the security guard, to call Gerald Johnson at his home. Weathers refused because Caylor was on duty, that is, he was in charge of safety and health matters at that particular time (Tr. 648-652).

136. Bishop, an emergency medical technician, received forty hours of training in that specialty. He also receives annual refresher courses (Tr. 631, 632).

137. It is Anamax's policy to furnish workers with a taxi slip to go from the hospital back to their residences (Tr. 639).

138. If an individual lives beyond the mine the company issues a taxi slip only to the mine (Tr. 646).

139. Bishop has given out approximately 24 taxi slips in the last 12 months (Tr. 641).

There are two areas of credibility in this incident. Lund says Bishop didn't examine his eye before telling him to use the eye wash. Bishop, to the contrary says he "believes" he examined Lund's eyes before the wash. The belief of a witness is far less persuasive than positive testimony. The second area of credibility involves the conflict of whether Lund complained about the taxi slip. The evidence supports Lund's version.

I do not find that the three incidents involved here support a claim of discrimination nor retaliatory conduct. Taylor took Lund to the aid station. Although the method of treatment was inadequate no evidence supports the conclusion that Anamax was retaliating against Lund. On the contrary, Taylor took Lund to the aid station. Even though the treatment was inadequate thereafter Bishop took him to the hospital.

In the hassle over the taxi slip, Lund's claim seeks to establish discrimination based on Anamax's policy. Anamax's policy is to pay a worker's taxi fare from the hospital to his home. If the worker lives in the direction of, and beyond the mine, then Anamax pays for the trip to the mine (Tr. 791-792). Obviously, it is less expensive for Anamax to pay the lesser amount. It is uncontroverted that Lund was treated the same as anyone else (Tr. 641). No discrimination nor retaliatory conduct arises in these circumstances.

Weathers, a security guard, refused Lund's request to call Gerald Johnson. Weathers refused because Caylor was "on duty" and in charge of safety and health (Tr. 651-652). A company policy cannot be faulted which prohibits workers from contacting higher authority when a management person is already "on duty."

XVI  
ANAMAX FAILED TO CORRECT AN UNSAFE  
CONDITION AT A FUEL LOAD OUT AREA (FOOTNOTE19)

Witnesses: Lund, Ypulong, Miller, Hyder

139. Lund observed that the seal of the nozzle of the fuel tank used to fuel his welder was leaking (Tr. 250).

140. Lund tagged it with a "DO NOT START" tag (Tr. 250, 707).

141. The next night the tag was off and Lund tagged it again and asked foreman Ypulong why it hadn't been fixed (Tr. 250, 734).

142. Ypulong said they couldn't get the parts (Tr. 251).

143. A week later the nozzle was still leaking. Lund was upset and he didn't fuel his welder (Tr. 251).

144. The next day Lund called Johnson and threatened to call MSHA (Tr. 251).

145. Four hours later when Lund reported for work the leaking nozzle had been repaired (Tr. 252).

Lund's activities as outlined above were clearly protected under the Act. However, no retaliatory action was taken by Anamax. Accordingly, no claim exists under the discrimination section of the Act.

Lund's query on this complaint is why wasn't the leaky nozzle fixed sooner? The record does not directly answer this question. Indirectly, foreman Ypulong indicated the part had to be ordered. In any event, Lund's position here is that he was required to work in an unsafe condition. The law in that area has already been discussed in paragraph I, supra.

XVII

LUND IS REFUSED SAFETY EQUIPMENT BY FOREMAN BISSELL (FOOTNOTE20)

Witness: Lund

146. On this occasion Lund was assigned to do some pin keeper welding for Bissell (Tr. 253).

147. The pins were nine to ten feet off of the ground (Tr. 253).

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148. Two mechanics working on the shovel had radios but Lund did not (Tr. 254).

149. The mechanics, at Lund's request, asked Bissell, apparently by radio, for a ladder. Bissell refused (Tr. 254).

150. Bissell told Lund to use the ladder on the shovel but Lund felt that the ladder was inadequate because it didn't furnish adequate support or balance (Tr. 254, 462, 463).

151. Lund took one of the mechanics radio and when he started to raise cain (about being refused safety equipment) one of the mechanics took off in the truck and returned with the ladder (Tr. 254-255).

Lund contends he was not given permission to take his truck and get the ladder he thought he needed, but the mechanic, who wasn't involved on the repair, was free to zip back and forth and pick up anything he needed (Tr. 255). Lund seeks to have the Commission interfere with Anamax's internal procedures. I am unwilling to do so. The protest of the inadequacy of a ladder was a protected activity under the Act. However, this incident, like all other alleged Bissell related incidents, if they show protected activity, they fail to show retaliatory conduct for the protected activity. Bissell was terminated by the company because his supervision was "inadequate." The mere inadequacy of a supervisory person is not retaliatory conduct under the Act.

#### XVIII

ON APRIL 7, 1981 LUND ASSERTS THAT HE WAS REFUSED  
ACCESS TO THE TAPE HE MADE FOR GERALD JOHNSON  
CONCERNING THE SHOVEL INCIDENT (FOOTNOTE21)

Witnesses: Lund, Johnson

The details surrounding the tape, or tapes, (FOOTNOTE22) of the shovel incident are set forth in Facts 1 through 13, supra.

The only credibility determination here arises in connection with Lund declining a copy of the tape or a transcription of the statement he gave the safety department. Johnson says he declined the offer. Lund agrees he declined the offer but he adds the proviso that he'd get them later, if he

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needed them. I do not find Lund's evidence credible. Lund contacted Johnson a dozen times regarding safety matters but he didn't contact Johnson about the tapes until a year later, namely April 1981 (Tr. 780-782). In connection with the non production of the tapes I note that Anamax was under no obligation to preserve the tapes. Further, I find the following facts to be credible:

152. Johnson didn't refuse Lund access to the tape (Tr. 780).

153. When Lund contacted Johnson for the tape in April 1981, Johnson said he'd search for them (Tr. 780-781).

154. The tapes could not be located (Tr. 780-781).

155. Johnson didn't know if anyone had found the tape (Tr. 781).

Lund was available and testified about his statements on the tape. This was a protected activity but no evidence supports the view that the failure to produce the tape was in retaliation.

#### XIX

ON APRIL 8, 1981 LUND ALMOST LOSES HIS HAND  
BECAUSE OF INADEQUATE LOCKOUT PROCEDURES IN THE CRUSHER  
DEPARTMENT A DISCIPLINE LETTER IS THREATENED IF THE INCIDENT  
IS REPORTED (FOOTNOTE23)

Witnesses: Lund, Logan

156. At the time of this incident Lund was dispatched to work in the secondary crusher building (Tr. 263, P-27).

157. Lund was with co-worker Harold Crumley (Tr. 264).

158. Crumley was shown by another person where to place his lock to lock out the equipment (Tr. 265).

159. Lund placed a patch to see if it would fit. The patch fell inside. Just as he pulled his hand out after retrieving the patch, 500 to 600 pounds of muck slid down the chute (Tr. 265, P-28).

160. The muck fell right where Lund's hand had been (Tr. 265).

161. The man upstairs said the east unit wasn't locked out (Tr. 260).

162. The people above were calibrating equipment and they showed Crumley where to lock out the equipment (Tr. 267).

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163. To lock out properly it was necessary to lock out in three places (Tr. 268).

164. Logan was first made aware of this incident when an MSHA complaint was filed (Tr. 658).

165. Logan didn't threaten Lund about the issuance of a safety letter for such an incident (Tr. 660).

We will consider the dual complaints in reverse chronological order.

The second issue is whether there was a threat of retaliation if the incident was reported. A credibility issue arises over whether there was such a threat. That is, did management threaten a safety letter if the incident was reported. I am not persuaded by Lund's evidence. It is triple hearsay because hourly workers stated to Crumley that if Crumley or Lund made "trouble" they'd get safety letters and apparently Crumley related the statements to Lund. A further difficulty with the credibility of the triple hearsay statement is the fact that, according to Lund, "supervision had left" when this incident occurred (Tr. 267). Logan came on the job after the incident, and I accept his testimony that he did not threaten Lund with the issuance of safety letter (Tr. 660). In fact, his first knowledge of the incident was when an MSHA complaint was filed. This view is confirmed by Lund's testimony to the effect that no one came to him and said, "I'm going to issue a safety letter" (Tr. 467).

The primary issues are whether Lund was engaged in a protected activity and whether Anamax took retaliatory action. Lund was working as a welder in his ordinary activity. No protected activity was involved. Lund seeks to prove that the falling muck occurred as a result of his statements to the safety department, but no evidence supports that view. Quite to the contrary, whoever put the conveyor in motion and apparently thereby released the muck was on the floor above where Lund and Crumley were working. There is no showing that persons on a different floor could even have known of the presence of Lund and Crumley.

Lund contends discrimination occurred here because these two incidents were not "sorted out" when Lund wanted to have them investigated (Tr. 465). No further evidence is offered in support of the argument of how the two instances were not "sorted out", and since I find no protected activity nor retaliatory conduct, it follows there is no merit to the argument.

XX

LUND IS GRANTED EMERGENCY MEDICAL LEAVE TO BE  
PRESENT AT THE BIRTH OF HIS CHILD; THE LEAVE IS THEN  
REVOKED. FURTHER, AN ATTENDANCE DISCIPLINE IS ISSUED  
AFTER LUND'S ABSENCE (FOOTNOTE24)



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Witnesses: Lund, Miller, Nelson, Pijanowski

166. On April 20, 1981, just prior to the birth of his child, Lund asked supervisor Rael for a couple of days [or half a day] of emergency leave (Tr. 275).

167. Supervisor Nelson called back and said he thought it would be all right (Tr. 275).

168. Later, Nelson called Lund again and said Lund couldn't have the leave he'd previously approved. The reason given by Nelson was that it was not in accordance with company policy (Tr. 275-276).

169. For being absent while he took his wife to the hospital Lund received an attendance letter (Tr. 277, P-26).

170. Lund didn't know of anyone else at Anamax who had been given permission to be with their wife at the birth of a child and who was not charged with an absence that would count against their attendance record (Tr. 468).

171. Nelson treated Lund the same way as any other miner. His leave would be without pay and he would be charged for the days he was absent (Tr. 612).

172. The Anamax written absentee control policy is dated January 1, 1977.

173. Anamax has three classes of absences: AWOL, chargeable, and non chargeable (Tr. 499).

174. A worker is AWOL if his absence is unexcused. Five unexcused absences results in termination (Tr. 499).

175. A worker is allowed 16 chargeable absences in 12 months. At the 8th absence the worker receives a verbal warning, at the 10th and 12th absence he receives a written warning; at the 14th absence the worker is suspended for 3 days (Tr. 500).

176. Non-chargeable absences include jury duty, witness subpoena per labor agreement, military leave, funeral leave, union business, vacations, holidays, and absences due to industrial accident or injury (Tr. 501, R-6, R-7).

Lund's complaint is that Nelson granted him an emergency medical leave and then revoked it. The requesting of medical leave is not an activity protected under the Act. Further, Anamax did not, in any event, discriminate against Lund. Anamax merely advised him on April 24, 1981 that he had been charged with 13 absences and in the event there was one more absence he would be given a three day suspension (P-26). An operator may in his business judgment impose attendance requirements and sanctions without being in violation of the Act.

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Lund agrees he knows of no one else who was given leave for the same reason and not charged for it. Lund's absence was excused. Anamax's policy requires discipline at the 10th and 12th excused but charged absence. Lund agreed that his 13th day of absence was the day he took his wife to the hospital (Tr. 469). The only "discipline" was charging Lund for the day he missed. No further suspension occurred. Anamax's activities were in accordance with its attendance policy and, therefore, no discrimination is shown.

XXI

ON MAY 1, 1981 LUND IS DISPATCHED BY LOGAN TO WORK AT THE INTERSECTING CONVEYOR BELTS UNDER UNSAFE WORKING CONDITIONS (FOOTNOTE 25)

Witnesses: Lund, Logan, Miller

178. Logan dispatched Lund to work on intersecting conveyor belts known as W-1 and R-1. Their duties included cleaning much out of the shuttle (Tr. 279-281).

179. Lund and co-worker locked out the equipment in the lockup shack (Tr. 280, Exhibit P-29).

180. After working for approximately two hours in the chute, a belt-rider (trouble shooter) asked Lund if he had locked out the shuttle (Tr. 281, 289, Exhibit P-26, P-30, P-31).

181. When Lund requested an additional lock, an electrician came and installed a "tree" with a lock on it. Lund refused to get back in the shuttle until the conveyor was locked out with a lock to which he had the only key.

182. Lund explained the situation to Logan who had Lund write out on a piece of paper why he was refusing to work (Tr. 285).

183. Lund refused Logan's request to leave his lock and at that juncture Logan told Lund to load up. Logan sent Lund to a different job (Tr. 287).

184. Logan told Lund he was taking the issues to a safety committee to see who was right (Tr. 287-288).

185. Approximately two to four weeks later a new Anamax policy resulted in each welder being issued two locks to prevent this situation reoccurring (Tr. 288, 711).

The credible evidence establishes that Lund was engaged in a protected activity when he refused to work in the chute. His arguments to Logan were

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correct. However, the evidence fails to show that Anamax took any retaliatory action against him. The uncontroverted testimony by Logan indicates that Lund was reassigned back to the weld shop after this incident (Tr. 285, 673, 674).

Lund claims he was discriminated against because he was yelled and hollered at and he was working under unsafe conditions that the supervisor thought were safe without Lund being given a fair hearing on the dispute (Tr. 287, 288, 473).

The evidence does not show retaliatory action by the company. The facts here rebut any harassment of Lund that is subject to redress under the Act.

The fact that Lund was working under an unsafe condition for approximately two hours was not discriminatory conduct for the reasons discussed in paragraph I, supra.

## XXII

LUND RECEIVED ATTENDANCE DISCIPLINE LETTER AND THREE DAY SUSPENSION. HE CONTENDS THE SUSPENSION SHOULD NOT HAVE BEEN ISSUED BECAUSE MANAGEMENT KNEW HE HAD BEEN INJURED ON THE JOB (FOOTNOTE 26)

Witnesses: Lund, Johnson, Pijanowski,

186. According to Anamax's policy an industrial accident is not chargeable against attendance (Tr. 303, 506).

187. Anamax policy requires a worker to immediately report an injury to his supervisor (Tr. 105, 793).

188. Lund claims he was injured on the job on May 12, 1981, when he lifted a handrail over his head. Lund filed his report of the injury on May 24, 1981 (Tr. 597, 796, Exhibits P-32, R-16).

189. Due to Workmen's Compensation, Anamax requires immediate reporting of any accident (Tr. 793, 794).

190. On May 18, 1981 Lund received a three day disciplinary action notice due to his attendance. He was suspended for three days because he had been charged with 14-1/2 absences in the prior 12 months (Exhibit P-5).

191. Lund called in each day that he didn't work after the May 12th incident. He told the guard he felt he couldn't work and he was going to the doctor (Tr. 298, P-33).

Anamax may impose legitimate accident reporting requirements. Lund's evidence fails to establish that Nelson's actions were anything other than the enforcement of the Anamax absentee policy, discussed in XX, supra.

In paragraph IX, supra, Lund orally reported an accident and filed a written report the night of the incident (Facts, 5775). At the time of this incident, in July 1980, Lund knew of Anamax's requirements concerning the filing of an accident report. In May 1981 he didn't file the report until 12 days later. In addition to the late filing Lund's co-worker James Johnson "didn't recall" that Lund ever claimed to have incurred any injury in lifting the 25 pound handrail (Tr. 100). In short, I conclude that Lund failed to prove that his back injury occurred on the job.

XXIII

LUND IS THE SUBJECT OF VERBAL ABUSE BY SUPERVISOR LOGAN  
AND LOGAN FURTHER DEFAMES LUND'S ABILITY AS A CRAFTSMAN (FOTNOTE27)

Witnesses: Lund, Hall, Vidal, Logan

192. Twice on the same day, Vidal heard Logan call Lund "dung" (Tr. 307, 308).

193. On other occasions Logan said to Lund words to the effect that "who down there [in welding] hates me that they'd send me you for a welder (Tr. 110, 313-315).

194. These statements upset Lund (Tr. 308).

195. Before June 1, 1981 this occurred less than ten but more than five times (Tr. 314).

Logan concedes he called Lund "dung" OTNOTE252628) a dozen times over a year but he indicated Lund had not objected. When Lund protested Logan apologized and stated he wouldn't call him that again. Logan didn't recall ever making any disparaging remarks concerning Lund's skill as a welder. He considered him an "excellent" welder (Tr. 678 - 679).

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The credibility issues are resolved in Lund's favor as enumerated in paragraphs 192 through 195. Logan confirms he used the "dung" term and "doesn't recall" any disparaging remarks of Lund's ability. I find in Lund's favor because of Logan's failing memory on this issue.

The statements by Logan are derogatory in nature but they do not rise to the level of a threat of reprisal. In short, Lund is not protected by the Act against such statements.

#### XXIV

A VANDAL DAMAGES LUND'S CAR AND HE MISSES WORK. ON HIS RETURN HE IS QUESTIONED BY TWO ANAMAX FOREMEN AND HE RECEIVES AN ATTENDANCE DISCIPLINE LETTER FOR THE WORKDAY HE MISSED. (FOTNOTE 29)

196. On June 13, 1981, while Lund's automobile was alongside his trailer home in Tucson, Arizona, someone placed a jumper cable across his ignition wires and burned the wiring in his car (Tr. 316).

197. Lund didn't know who vandalized his car (Tr. 477-478).

198. Lund's repairs cost were \$524.53 (Tr. 319).

199. Lund received an attendance discipline letter for his failure to appear at work on June 13, 1981 (Tr. 320).

200. Lund was apparently not docked a day without pay (Tr. 323).

A credibility issue arises whether the facts are as outlined above or whether Lund burned up the car when he was jumping the battery as he allegedly told the foreman (Tr. 713). I find this issue in Lund's favor since he offered his insurance card to the foreman (Tr. 713). Further, the hearsay statement of the automobile service manager is to the effect that someone had been tampering under the automobile's dash (Tr. 320).

A resolution of the credibility issue here does not resolve the incident since the evidence utterly fails to connect Anamax with the vandalism of Lund's automobile. Accordingly, any claim of discrimination in connection with that allegation should be dismissed.

Lund also contends he was discriminated against because of the tremendous amount of attention paid to the incident by his supervisors (Tr. 477-478). However, Lund offers no supporting detail other than the fact that he was questioned by Logan about his absence (Tr. 479, 480). It is uncontroverted that Logan gave Lund an "excused absence". Any inquiry was at best enforcement of rules concerning absences. In short, Lund did not establish a claim of discrimination by merely showing that Dayton Miller

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questioned him twice and Ypulong with Miller (both foremen) questioned him a third time about the car burning incident (Tr. 322-324). I find Logan's testimony credible which is to the effect that the next day when Lund came to work he questioned Lund as he would any other employee (Tr. 712).

The final portion of the claim of discrimination in this incident deals with the attendance discipline letter. I find a failure of proof in this regard. At one point Lund stated he received a discipline letter for failing to appear on June 13 (Tr. 320). However, as the Judge further developed Lund's testimony he stated he wasn't issued such a letter, but he was assessed a day's absence (Tr. 321). Lund's direct testimony is totally conflicting and for this reason his proof fails. Even if Lund had received an attendance letter it would have been in furtherance of the Anamax attendance policy, discussed in paragraph XX, supra. If a worker misses a day an operator may legitimately assess him for the day he missed.

XXV

LUND ALLEGES A THREAT BY DAYTON MILLER IN THAT HE HAD TO BE SUBPOENAED TO APPEAR FOR A PRE-TRIAL HEARING IN THE INSTANT CASE OR HIS ABSENCE WOULD BE COUNTED AGAINST HIS ATTENDANCE RECORD. (FOTNOTE 30)

Witnesses: Lund, Pijanowski

201. On July 2, 1981 Lund asked Dayton Miller that he be excused from work to appear at a prehearing conference in the instant case on July 14, 1981 (Tr. 324, 325).

202. Nelson told Lund he wouldn't be given an excused absence unless he was subpoenaed (Tr. 325, 480-481).

203. Whether an absence is excused or unexcused is a matter within the discretion of the hourly worker's supervisor (Tr. 326).

204. When the prehearing conference took place Lund was working the graveyard shift which did not conflict with the prehearing schedule. Accordingly, his attendance record at Anamax was not adversely affected (Tr. 326).

The evidence is uncontroverted that during the 1977 labor negotiations Anamax and the union discussed and agreed that an appearance pursuant to subpoena at a hearing in a court of law for a municipality, a county, a state, or a federal court would not be a chargeable absence. The negotiators also discussed administrative hearings. MSHA was not mentioned but NLRB, EEOC, Workman's Compensation, state unemployment, etc., were a part of the union demand. The demand was not met and the net result is that appearances before an administrative hearing are a chargeable absence (Tr. 505-507).

The Act prohibits an operator from discriminating against a miner because he "has testified or is about to testify in any such proceedings under the Act" 30 U.S.C. 815(c)(1). Anamax's policy is inherently discriminatory against a miner who must appear in an MSHA proceeding during a miner's day shift work hours because such an appearance has an adverse affect on his employment record, namely an unexcused absence is charged. This policy then could have a chilling effect on a miner's willingness to institute a proceeding under the Act. Lund's appearance before the Judge was protected activity. However, the pre-hearing conference did not take place during Lund's work shift and consequently, he was not required to take time off from his job in order to attend the conference. Anamax's policy was not enforced against Lund, and, therefore, notwithstanding the validity of the policy under the Act, Lund suffered no discrimination because of it.

XXVI

AN ANAMAX SAFETY OFFICIAL REFUSES LUND'S REQUEST  
TO ISSUE A SAFETY LETTER TO SUPERVISOR LOGAN. (FOOTNOTE 31)

Witnesses: Lund, Logan, Caylor, Johnson

205. On July 5, 1981 Lund's supervisor Hassell Logan climbed a structure and welded a ladder in place as he stood on a cross member of the structure (Tr. 327, 680).

206. Lund's complaint to the safety department was that a supervisor had climbed the tower without tying off with a safety belt and lanyard. The climbing was done over Lund's head (Tr. 327, 593, 690).

207. The day following this incident Lund contacted John Caylor in the Anamax safety department. Lund requested that a safety letter be issued to Logan (Tr. 330).

208. Caylor told Lund, and he reiterated at trial, that Anamax has no policy authorizing an hourly employee to issue a safety letter to a supervisor (Tr. 330, 592, 593).

209. Caylor took Lund's safety complaint and investigated the incident (Tr. 593).

210. Caylor found that Logan was 12 feet off the ground (outside measurement) and unsecured while he welded the ladder. On the inside of the structure Logan was four to five feet off of the ground.

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211. A verbal warning was issued to Logan by the safety department for this incident (Tr. 690).

It is not necessary to decide in this case whether Logan violated the MSHA standard promulgated at 30 C.F.R. 55.15-5. The standard provides:

55.15-5 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The issue is whether Anamax discriminated against Lund. I conclude no such discrimination occurred. Lund's theory is that the company policy (or lack of it) denies him recourse while being required to work under a supervisor in these circumstances. I reject Lund's theory. If an hourly employee had authority to issue a safety letter the results in a mine could well be chaotic. Under the Act, Lund had a right to complain about the unsafe act to Logan. He didn't do so at the time (Tr. 683). Further, he had the right to refuse to work under the circumstances. In addition, he had the right to complain to the safety department or to a joint safety and health committee.

The issuance of a safety letter is an administrative matter resting in the management discretion of Anamax. On its face the Anamax safety policy appears viable. The uncontroverted evidence shows that Anamax has some 1500 to 1600 employees (Tr. 603). The safety department has three safety inspectors in the field and three industrial hygienists (Tr. 602). The safety department receives about 100 to 150 complaints over a 12 month period (Tr. 601-602). A safety and health committee must resolve complaints about once a week (Tr. 601).

A careful study of the record might lead one to the conclusion that Lund did not want to issue a safety letter to Logan but merely wanted to cause the safety department to issue such a letter and advise Lund of the accomplished fact (Tr. 484, 485). I conclude, under the circumstances here, that in either event, a company policy that does not require the issuance of safety letters to supervisory personnel with hourly employees being advised of that fact does not form the basis of a discriminatory complaint by an hourly worker. Lund's safety complaint was protected activity, but no adverse action was taken against him in retaliation for such protected activity.

#### XXVII

#### LOGAN TAKES LUND'S OPERATOR REPORT (FOOTNOTE32)

Witnesses: Lund, Logan

205. An operator's report is filled out when a worker operates a piece of equipment such as truck (Tr. 336-337).



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206. The report should be in the operator's possession at all times when he is around the equipment (Tr. 337).

207. Logan took Lund's report because he wanted the list of materials Lund had put on the back of the form (Tr. 685-686).

208. The materials were to be for the workers on the following shift (Tr. 685-686).

209. Logan overrode Lund's protest and told him he'd see that the report got into the proper hands (Tr. 686-687).

A minor credibility issue arises here. Lund "didn't recall" whether there was anything written on the report but Logan says it had a list of materials for the subsequent shift. I have resolved this credibility determination in favor of Logan due to Lund's failure to recall. However, neither version establishes any retaliatory conduct by Logan. Lund felt he had to have the report or he'd "be in trouble" (Tr. 340-341). These events occurred the day after Logan climbed the tower, (in XXVI), but no retaliatory conduct is shown.

#### XXVIII

LUND ASSERTS HE IS SENT HOME WHEN HE COMPLAINS ABOUT FUME INHALATION. HE IS ALSO CHARGED FOR ONE DAY ABSENTEEISM AND NOT PAID FOR THE REST OF THE DAY. HE CLAIMS THIS IS CONTRARY TO ANAMAX POLICY. (FOOTNOTE33)

Witnesses: Lund, Miller, Ypulong, Nelson, Pijanowski

210. On July 6, 1981 Lund inhaled fumes while sodering with silver (Tr. 341, 486).

211. The following morning he experienced profuse sweating and vomiting (Tr. 341).

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212. The next day he experienced dizziness while enroute to work (Tr. 342).

213. Lund reported for work at 3 p.m. and before 4 p.m. he reported to Dayton Miller that he was sick and dizzy (Tr. 343).

214. Miller told Lund he was responsible for him, and they didn't want him driving a truck if he felt that way (Tr. 343, 717).

215. He was sent home on July 7 at approximately 4 p.m., after one hour's work (Tr. 343).

216. Lund wasn't paid for the seven hours he didn't work on July 7, and he was assessed a full day's absence (Tr. 345).

217. When a worker is sent home because of an industrial accident it is Anamax's policy to pay the worker's wages for the balance of that day (Tr. 505).

218. Subsequent days, after an injury, are covered under workman's compensation (Tr. 505).

219. If a worker is injured and does not leave work that day but returns the following day and then goes home because of the injury he receives no pay for the second day other than for hours actually worked on the second day (Tr. 506).

The uncontroverted evidence indicates there is a reasonable basis for the Anamax wage policy on the date of an injury and on subsequent days. The facts in this incident fail to show any discriminatory conduct against Lund. Further, Lund offered no evidence to establish that he was treated differently than any other worker under similar circumstances.

XXIX

LUND ASSERTS MILLER THREATENED HIM ABOUT HIS ATTENDANCE AT THE PRE-TRIAL HEARING IN THE INSTANT CASE ON JULY 13, 1981 AND THAT IT WOULD RESULT IN ANOTHER THREE DAY SUSPENSION WITHOUT PAY. (FOOTNOTE34)

Witnesses: Lund, Miller

220. Lund was told that if he took off from the graveyard shift to attend the pre-hearing in the instant case he would be assessed for one day for being absent (Tr. 347).

221. Lund was warned that he could incur an additional three day suspension (Tr. 348).

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222. Miller told Lund he'd be excused for the prehearing but wouldn't be paid (Tr. 713-714).

223. Lund worked the graveyard shift and then came to the prehearing (Facts, 57 204 XXV, supra).

A credibility issue arises here. Lund says that with each conversation he felt "intimidated and harassed" (Tr. 348). However, Miller says he didn't threaten Lund, but when Lund brought in the subpoena he checked his attendance record and he stated he had 13-1/2 days and if he missed one more day he would get three days off without pay (Tr. 714).

Lund may have felt intimidated and harassed but no collateral facts support his conclusion. A foreman may advise a worker of his attendance record without that forming the basis of a discrimination complaint. The uncontroverted evidence from Miller is that he treated Lund the same as any worker (Tr. 714). As previously noted (XXV) the Anamax policy is inherently discriminatory. However, Lund was not adversely affected by that policy because he was working the graveyard shift and at the completion of that shift he attended the pre-hearing conference. To sustain Lund's position here would mean that an operator would be required to give a worker time off to prepare his case. Neither the Act nor the legislative history support such a proposition.

#### TRIAL SANCTIONS

During the trial Lund asserted that Anamax failed to comply with the Commission order authorizing him to take photographs. In addition, Lund claimed that witnesses had been told not to appear at the hearing (Tr. 117). Lund's complaints were treated in the context of a request by him for the Judge to impose sanctions on Anamax.

I conclude that Anamax did not interfere with the Commission's order, and I decline to impose sanctions. Lund offered in evidence and the Judge received 25 photographs. Lund alleges that Anamax interfered and refused his right to take photographs. (Tr. 358). Particularly, Lund says he did not have an opportunity to photograph the weld truck involved in V; in addition, he wanted to photograph the conveyors in XXI while the conveyors were stopped. Finally, he wanted a posed picture of a man cutting and welding.

The photographs taken by Lund fairly illustrate his testimony: a different weld truck was photographed as well as different conveyor belts. Lund did not state and I am unable to find why a posed picture of a worker welding was necessary in his proof. I conclude that the Commission discovery order did not require Anamax either to shut down its production or to furnish the exact vehicle for photographs.

During the trial Lund further stated that witnesses had been told not to appear at the hearing. Ultimately the facts on this

allegation boil down to one witness, Rudy Ypulong, who was allegedly told not to appear.

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This witness was an Anamax supervisor. When Lund identified the witness who had been allegedly interfered with counsel for Anamax indicated Ypulong would be called by respondent. No evidence supports Lund's allegations that Anamax told any witnesses not to appear at the hearing.

Finding no basis for Lund's allegations, I refuse to impose any sanctions against Anamax.

#### POST TRIAL MOTIONS

The trial of the above case concluded on August 27, 1981 in Tucson, Arizona.

On September 21, 1981 Lund filed a letter with the Judge. In its relevant portions he inquired as to penalties for perjury before the Commission. He claimed that a supervisor had lied on the stand and was considering a recant. Further, Lund inquired as to how he should treat false documentation before the Judge concerning the Anamax safety rule book and the "real" burn permit. Further, Lund asserted he had been discharged by Anamax.

Anamax objected to Lund's communication, moved to strike it, and further moved for an order to prohibit Lund from any further attempts to supplement or confuse the record.

On September 29, 1981 an order was entered treating Lund's letter as a motion to reopen the record. In the order the Judge indicated he would reopen the record if there was a material defect in the trial proceedings. The order further stated that Lund's motion lacked a factual basis to determine its validity and Lund was granted additional time to supplement his motion.

When he supplemented his motion Lund offered seven items. The initial two items are a burn permit and an Anamax safety book.

The burn permit was involved in factual discussion in XII (five gallons of solvent under sideframes, half filled). The Judge understands this evidence and the receipt of what Lund calls the "real" burn permit does not affect the result in XII, supra. A burn permit as a cutting/welding permit that addresses fire hazards.

Lund asserts the Anamax safety booklet received in evidence (R-2) contains a different lockout procedure that the one in effect relating to XIX (Lund almost loses hand) and XXI (intersecting belts). Facially there does appear to be a minimal difference in the revised safety book publications but in any event the results in XIX and XXI would not be affected by the new evidence, even if true.

Items 3, 4, and 5 are MSHA citations and they are offered by Lund to counter the testimony of Logan and Caylor. Item 3 contains two MSHA citations relating to XIX supra. (Lund almost lost hand). The issuance of MSHA citation would not affect the

result in XIX. Item 4 also relates to

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inadequate lockout procedures in XXI (intersecting belts). An MSHA citation would not affect the results in XXI.

Item 5 relates to XXVI, supra. (Anamax refuses to issue a safety letter to Logan upon Lund's request). The MSHA citation would only support the facts as already found in XXVI. Further, such evidence would be repetitious.

Items 6 and 7 relate to Lund's termination by Anamax. This event occurred after the testimony was concluded in this case. Since it was not an issue raised in the trial I refuse to consider it or to reopen the record to receive evidence thereon.

On October 27, 1981 the Solicitor for the Department of Labor under the Freedom of Information Act requested a copy of the transcript in this case "in order to complete his investigation of a subsequent complaint of discrimination filed by Mr. Lund."

Lund's supplemental motion to reopen the record did not identify the witness who perjured himself nor were further facts mentioned to support Lund's allegations of perjury.

For the reasons stated I refuse to reopen the record on the basis of Lund's supplemental motion.

#### CONTENTIONS IN POST TRIAL BRIEF

Lund's post trial brief raises various issues. They will be treated as they appear in his brief.

Lund's initial contentions are that he was engaged in a protected activity, and he was the object of discrimination by the supervisors of Anamax. I agree that many of Lund's activities were protected by the Act but for the reasons indicated I find no retaliatory conduct by Anamax against Lund. Since I did not find any discrimination I reject Lund's position that he sustained financial loss.

Lund's further contention involves the credibility of the testimony of various witnesses.

Lund attacks the testimony of Ypulong concerning his qualifications to discuss the construction of the handrail involved in XXII. The ultimate construction of the handrail has virtually nothing to do with the determination and conclusions in that paragraph. Lund also complains about Pijanowski's testimony concerning numerous "unwritten" Anamax policies. I find such "unwritten" policies do not destroy the credibility of the Anamax case even when such "unwritten" policies are asserted as a defense. The evidence on these issues is essentially uncontroverted. Many of the Anamax policies are written.

Lund's attack on the burn permit was discussed, supra, in his motion to reopen the record and the same ruling applies here.

I agree with Lund when he states in his brief that the burden of responsibility for safety rests with the supervisors in each respective department in which he works. The Act protects him while engaged in a protected activity and further, as outlined in Robinette, supra, of the Act protects his refusal to work.

Lund states that the supervisors had a motive for their discriminatory conduct since Johnson played the taped testimony he gave to the safety department. As previously stated I have found no retaliatory conduct against Lund by Anamax's supervisors.

Lund also contends management treated him in a degrading and humiliating manner. Further, he never received this kind of treatment until he made his original safety complaint or became involved with MSHA.

This contention has already been reviewed. In summary I have reached contrary conclusions. Lund's claims fail for the reasons previously stated.

Lund's further argument relates to 57 XXVI (safety letter refused for Logan). He claims Logan's reprimand was minimal and private but his discipline was public. Lund's facts do not support his allegations. The only discipline he ever received for safety was the letter outlined in 57 IX, supra.

Lund's further argument addresses the events of the telephone calls at the hospital. These contentions have already been reviewed in 57 XV, supra. The same ruling pertains.

Lund attacks Logan's testimony regarding the lockout procedure 57 XXI, supra), (intersecting belts). As previously indicated no conflict exists on the facts. The only conflict is whether Lund or Logan was correct in the lockout procedures. Subsequent procedural changes by Anamax indicate Lund was correct. This does not indicate that Logan lied.

A further argument relates to Lund's asserted intimidation about his attendance at the pretrial hearing. These issues were discussed contrary to Lund's view in 57 XXV, and XXIX, supra.

The further argument is that the personnel files Lund requested for his case were incomplete, incorrect, and illegible. Lund did not prove the first two allegations and the Judge gave him ample opportunity to discuss with Anamax's counsel and to secure copies of any documents that he thought were illegible. The two files sat on the court bench throughout most of the hearing.

Lund's additional argument centers on the photographs. This issue was discussed under "Trial Sanctions."

A further argument focuses on the apparent reprinting of the Anamax safety booklet. This was discussed under the "Motion to reopen the record."



Lund also contends documentation he received in the case was not timely surrendered, as ordered at the prehearing but Anamax stalled until an order issued. I reject this argument. Lund does not identify the "documentation" nor does he claim to be prejudiced by any delay if there was any.

The further proposition Lund urges is that Anamax did not surrender the cassette tapes. This was discussed and decided in 57 XVIII, supra. In view of my prior discussion I conclude that the order to produce the cassette was unprovidently issued and it is vacated. Lund was able to testify at length as to the nature, scope, and context of his statements to the Anamax safety department. No issue of fact arose in the case involving the tapes. Lund therefore suffered no prejudice because of the unavailability of the tapes.

Lund further argues that Anamax's counsel, Steven Weatherspoon, was a major obstacle for him to deal with in the presentation of his case. He complains of Weatherspoon's defiance of Commission orders, profane language, conduct he considers unethical, refusal to surrender evidence, and false documentation. He also moves for disciplinary proceedings against Anamax's counsel.

Lund's arguments involving Anamax's counsel have already been reviewed in connection with the photographs at the mine, or in connection with his motion to reopen the record. While the Commission may discipline practitioners before it, 30 C.F.R. 2700.80, there is no factual basis to support Lund's contentions. In all proceedings herein Steven Weatherspoon conducted himself in accordance with the highest standards of ethical conduct required of practitioners before this Commission. However, in view of Lund's allegations the Judge reviewed his depositions on file with the Commission. The depositions were taken on August 14, 1981 and August 21, 1981. Nothing in the depositions support Lund's contentions. For these reasons I deny Lund's motion to discipline Counsel for Anamax.

#### SUMMARY

The record supports Lund's position that he had a reasonable belief that various safety hazards existed at the Anamax mine (particularly in paragraphs I, II, V, XII, XIII, XVI, XIX, XXI, XXVI). Further, the Congress intended that miners would play an active part in the enforcement of the Act. However, even in those situations where a safety hazard existed the record fails to establish retaliation against Lund because of his concerns about safety. Without retaliatory conduct on the part of Anamax in response to Lund's protected activity no discrimination can occur under the Act.

Based on the foregoing findings of fact and conclusions of law I hereby enter the following:



7 Paragraph 4 of the amended complaint.

~FOOTNOTE\_EIGHT

8 Paragraph 5 of amended complaint.

~FOOTNOTE\_NINE

9 Paragraph 6 of the amended complaint.

~FOOTNOTE\_TEN

10 Paragraph 7 of amended complaint.

~FOOTNOTE\_ELEVEN

11 Paragraph 8 of amended complaint.

~FOOTNOTE\_TWELVE

12 Paragraph 9 of the amended complaint.

~FOOTNOTE\_THIRTEEN

13 Paragraph 10 of the amended complaint.

~FOOTNOTE\_FOURTEEN

14 Paragraph 11 of the amended complaint.

~FOOTNOTE\_FIFTEEN

15 Paragraph 12 of the amended complaint.

~FOOTNOTE\_SIXTEEN

16 Paragraphs 13 and 14 of the amended complaint.

~FOOTNOTE\_SEVENTEEN

17 Paragraph 15 of the amended complaint.

~FOOTNOTE\_EIGHTEEN

18 Paragraphs 16, 17 and 18 of the amended petition.

~FOOTNOTE\_NINETEEN

19 Paragraph 19 of the amended complaint.

~FOOTNOTE\_TWENTY

20 Paragraph 20 of the amended petition.

~FOOTNOTE\_TWENTY ONE

21 Paragraph 21 of the amended complaint.

~FOOTNOTE\_TWENTY TWO

22 The record is unclear whether Lund's 15 minute taped statement (Tr. 776) was recorded on one or more tapes. The decision accordingly at various times refers to "tape" or "tapes".

~FOOTNOTE\_TWENTY THREE

23 Paragraph 22 and 23 of the amended complaint.

~FOOTNOTE\_TWENTY FOUR

24 Paragraph 24 and 25 of the amended complaint.

~FOOTNOTE\_TWENTY FIVE

25 Paragraph 26 of the amended complaint.

~FOOTNOTE\_TWENTY SIX

26 Paragraph 27 of the amended complaint.

~FOOTNOTE\_TWENTY SEVEN

27 Paragraphs 28 and 29 of the amended complaint.

~FOOTNOTE\_TWENTY EIGHT

28 Webster's new Collegiate Dictionary 1979 defines "dung" as follows: 1. the excrement of an animal: MANURE 2. something repulsive.

~FOOTNOTE\_TWENTY NINE

29 Paragraphs 30 and 31 of the amended petition.

~FOOTNOTE\_THIRTY

30 Paragraph 32 of the amended petition.

~FOOTNOTE\_THIRTY ONE

31 Paragraph 33 of the amended petition.

~FOOTNOTE\_THIRTY TWO

32 Paragraph 34 of the amended petition

~FOOTNOTE\_THIRTY THREE

33 Paragraph 35 of the amended complaint.

~FOOTNOTE\_THIRTY FOUR

34 Paragraph 36 of the amended petition.