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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR ON BEHALF OF DANNY H. BRYANT, COMPLAINANT	Complaint of Discrimination
v.	Docket No. VA 80-162-D
CLINCHFIELD COAL COMPANY, RESPONDENT	Judge Kennedy

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DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Complainant
W. Challen Walling, Esq., Penn, Stuart, Eskridge and Jones, Bristol, Virginia, and Paul R. Thomson, Jr., Esq., The Pittston Coal Co. Group, Lebanon, Virginia, for Respondent

Before: Judge Kennedy

STATEMENT OF THE CASE

The captioned complaint against reprisal presents the novel question of whether a miner's declared lack of competence and fitness to perform a temporary work assignment is a protected activity under section 105(c)(1) of the Mine Safety Law. The operator considered the miner's conduct a transparent attempt to shirk an onerous and distasteful work assignment, charged him with insubordination and suspended him with notice of intent to discharge.

Thereafter, the miner allegedly instigated a wildcat strike and the matter went to grievance and arbitration under the National Bituminous Coal Wage Agreement of 1978. The arbitrator found the miner's explanation for why he was too sick to work unconvincing. He further found the circumstantial evidence was persuasive of the fact that the miner encouraged and instigated a wildcat strike in support of his grievance. These combined instances of misconduct, he concluded, were just cause for the miner's discharge.

While the matter was in arbitration, the miner filed a complaint for reprisal (discrimination) with the Department of Labor. After a field investigation, the Office of the Solicitor concurred in MSHA's finding that the miner's refusal to accept the temporary work assignment was a protected activity. Subsequently, a complaint alledging unlawful discharge and seeking reinstatement and back pay was filed by the Secretary with the Commission. The complaint charged the miner was suspended with intent to discharge for both an antecedent and an immediate refusal to work. The operator denied the charges and raised as a plea in bar the miner's violation of his no-strike pledge and failure to mitigate damages. See, Ford Motor Co. v. EEOC, ___ U.S. ___, decided June 28, 1982; Metric Constructors, Inc., 4 FMSHRC 791, 804-805 (1982). The Secretary's reponse was a denial that the miner instigated a wildcat strike.

After extensive pretrial and discovery, the matter came on for an evidentiary hearing in Abingdon, Virginia on December 7, 8, and 9, 1981. The record was closed and the case submitted on April 1, 1982.

ISSUES PRESENTED

1. Whether a miner's discharge for refusal to accept a temporary work assignment was a pretext for firing him for antecedent protected activity.

2. Whether a miner's refusal to accept a temporary assignment on the ground that performance of the task might impair his health is a protected activity under section 105(c)(1) of the Mine Act, in the absence of a showing of a causal relation between a mine health or safety hazard and the refusal to work.

3. Whether upon a showing that a miner had mixed motives in refusing work assignments, the Secretary had the burden of persuasively showing that the true motives for claimed protected refusals to work were untainted by impermissible motives.

4. Whether a miner's post-refusal conduct created an independent ground and constituted just cause for his discharge, because it amounted to an illegal instigation of a wildcat strike.

5. Whether the Secretary carried his burden of persuasion on the issues of (1) protected activity and (2) the discriminatory motive for the miner's discharge.

FINDINGS OF FACT

Management Animus

Complainant, Danny Bryant, was first employed by the Pittston Company at its Kentland-Elkhorn Mine in Mouthcard, Kentucky in March 1975. Starting as a general inside, Mr. Bryant advanced to motor switchman and later to repairman. Although his formal education stopped at the sixth grade, Danny learned quickly and was considered a good and diligent worker. So good, in fact, that during the latter half of 1978 he persuaded Lloyd White, Manager of the Birchfield Division of the Clinchfield Coal Company, another subsidiary of Pittston, to obtain a waiver of the company policy against intercompany transfers without a break in service. As a result, around the middle of February 1979, Bryant was able to transfer to Pittston's Pilgrim Mine(FOOTNOTE 1) which was located just six miles from his new home in Wise, Virginia with a minimal break in service and loss of income.

The function of a repairman is to perform electrical, mechanical and hydraulic repairs on all types of mining equipment. Much of the work was performed above ground in the repair shop which was warm and dry but frequently involved working underground to repair equipment in the low coal (32 to 36 inches) of the Pilgrim Mine. In the winter of 1980, this required a miner to work in a cold, damp, dusty, physically demanding and restricted underground environment.

As a Mine Safety Committeeman, and as a safety conscious worker, Bryant on several occasions during 1979 found himself at odds with management over conditions and practices which he questioned as unsafe or unwise. (FOOTNOTE 2) With respect to these incidents, only one of which played any part in Bryant's challenged discharge, the Solicitor has sought in retrospect to magnify the importance of expected and normal tensions and disagreements over safety between a mine safety committeeman and management. The claim that these incidents considered either singly or in the aggregate resulted in a "grudge" or management "animus" against Bryant and a determination to "get him" I view as overblown. This trial judge takes notice of the fact that safety committeemen, like other enforcement officials who do their job, are seldom candidates for popularity awards by management. Mr. Bryant understood this, and, prior to his discharge, thought little of it. For example, Mr. Bryant testified that even when he was warned that his activities were incurring the displeasure of the evening shift foreman, Cecil Blevins, he did not give it "much consideration" and at the first opportunity transferred from the third (hootowl) shift to Mr. Blevins's evening (4 to 12) shift.

A searching review of the record reveals no convincing evidence that Lloyd White, who was responsible both for hiring and discharging Mr. Bryant harbored any secret or overt animus against Danny for reporting safety infractions. He did consider serious and unjustified the hazing of Mr. Tate, a maintenance foreman and Danny's immediate supervisor which

resulted in a disruption of the work effort by Mr. Bryant on June 1, 1979. The effort to establish this as part of a bona fide protected activity and the "real motive" for Mr. Bryant's challenged discharge for insubordination and instigation of a wildcat strike in March 1980, I find unpersuasive.

Though by the time he left, Danny's feisty combativeness had earned him a reputation as a "troublemaker," there is no basis on this record for imputing to management generally or to Mr. White in particular a pervasive resentment against Danny that resulted in an attempt to set him up or to discharge him under the cover of a legal pretext. The Secretary's attempt to supply by assertion the deficiency in his proof is unconvincing.(FOOTNOTE 3)

The Solicitor's has urged sweeping conclusions on the basis of recitations of atypical and inapt examples. This is no substitute for substantial evidence, the standard by which I must be guided. Section 7(c) of the APA, requires that I measure both the qualitative and quantitative sufficiency of the evidence in determining whether the Secretary has met his burden of persuasion by a preponderance of the reliable, probative and substantial evidence. Steadman v. SEC, 450 U.S. 91 (1980); Charlton v. FTC, 543 F.2d 903, 907 (D.C. Cir. 1976).

It is not enough that viewed in isolation the Secretary may have adduced "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" because at the trial level where the evidence is pro and con, the judge sitting as trier of fact must evaluate the credibility and weight of the evidence and must decide in accordance with the preponderance of the reliable, probative and substantial evidence in the record considered as a whole. Steadman, supra, 78; Charlton, supra, 907. Thus, only where reliable and probative evidence preponderates in favor of the existence of a challenged fact, such as the state of mind of management or its individual members, will the Secretary meet his burden of persuasion. This does not mean proof to a certainty. Proof by a preponderance means only that proof which leads the trier of fact to find the existence of a contested fact is more probable than its nonexistence. McCormick, Evidence, 794 (2d ed. 1972). This burden is not met, however, by evidence which creates no more than a suspicion of the existence of a predisposition to fire Mr. Bryant for reporting safety infractions.

The Incident With the Julie Car

The Julie car is a three wheeled, rubber tired personnel carrier that was used at the Pilgrim Mine to transport repairmen and mechanics from the surface to areas of the underground mine where machinery maintenance work was required.

On June 1, 1979, some nine months before the date of Mr. Bryant's discharge, Mr. Bryant instigated a work stoppage that involved himself and two other members of his maintenance crew that lasted approximately on hour. The grounds for the stoppage were (1) that the Julie car did not have a fire extinguisher and when this was found and provided that (2) the Julie car did not have a jack and jackbar and when this was provided that (3) Mr. Bryant and the other two miners did not have their safety glasses with them. When Delmar Tate, the maintenance foreman, finally borrowed some glasses from the desks or lockers of other foreman, Mr. Bryant and the other two miners proceeded to their work stations and Mr. Tate filed a complaint of their conduct with Lloyd White, the division manager.

This all occurred on the third or hootowl shift. At 7:00 a.m. the following morning Mr. White held a meeting with Mr. Tate, Mr. Bryant and the two other miners involved. The miners were provided with a union representative. A transcript of most of what transpired was provided for the record as RX-16. This was supplemented by testimony from Mr. White, Mr. Bryant and one of the miners involved, Mr. Robert Stair.

The Secretary claims this incident created in the mind of Lloyd White and other members of the mine management team an abiding animus

toward Bryant for the exercise of rights guaranteed and protected under the Act and that but for this animus Mr. White would not have discharged Mr. Bryant for refusing to accept a work assignment on March 7, 1980.

The operator claims the work stoppage was inspired by a personal dislike or resentment on the part of Mr. Bryant toward the maintenance foreman, Delmar Tate. The operator contends the claim that the Julie car incident was justified by the exercise of rights guaranteed under the Act was a pretext for a concerted effort to undermine Mr. Tate's supervisory authority and to embarrass and humiliate him in the eyes of the other miners and members of management.

I find it more probable than not that Mr. Bryant's motive for the work stoppage was, in fact, mixed, and stemmed from (1) his resentment over his recent transfer by Mr. Tate from the Mains to the 1 Right Section, (2) his ambition to be a safety committeeman, and (3) his desire to embarrass Mr. Tate. I conclude that while Mr. Bryant's reporting the absence of a fire extinguisher was protected, it was not grounds for prolonging a work stoppage while Mr. Tate was made to chase down a jack, jackbar and safety glasses.

What are the operative facts and reasonable inferences that support these findings?

The Pilgrim Mine was a two section low coal mine. Delmar Tate, whom we must view through the prism of others perceptions, was maintenance foreman on the third shift, the shift to which Bryant was assigned on June 1, 1979. As maintenance foreman on the third shift, Tate had

responsibility for maintenance work on both the 1 Right Section and the Mains Section where Bryant worked. Tate, while not unpopular, did not easily command obedience from the contract miners. He had trouble maintaining discipline among the members of his maintenance crews, especially the crew on the 1 Right Section. Tate's recent promotion from general inside to maintenance foreman was resented by Bryant who felt that Joey Stapleton, a close friend of Bryant's should have had the promotion. Bryant himself had a hidden agenda in that he was preparing to run for the office of mine safety committeeman and wished to impress his peers with his ability to stand up to management on safety issues.

Approximately a week before the incident with the Julie car, Tate announced that the maintenance crew on the Mains Section, including Bryant, Robert Stair and Scott Parrott, would be transferred to the 1 Right Section. The miners resented this because they felt they had been doing a good job on the Mains Section. Tate did not deny this but because of his difficulty with the crew on the 1 Right Section he and his supervisors, including Lloyd White, felt the better crew should be assigned to the 1 Right Section in an effort to get maintenance and repair work done and production up.(FOOTNOTE 4)

Bryant, Stair and Parrott rebelled at the idea of having to correct the work of the crew on the 1 Right Section. They blamed the problem on Tate's inability to get work out of the other crew. They did not think they should be called upon to cover up for his lack of leadership and that if he could not hack it he ought to get off the hill.

Thus, when Delmar Tate ordered Bryant and the others to take a Julie car underground to repair a bearing on a tail piece on June 1, 1979, Bryant thought he saw an opportunity to engage in some protected activity at Tate's expense. Bryant claimed he initially led the refusal to obey Tate's order because the personnel carrier was not equipped with a jack and jackbar as required by 30 C.F.R. 75.1403-6(b)(1); that when this was provided by Tate the refusal was repeated because the carrier had no fire extinguisher as required by 30 C.F.R. 75.1100-2(d); and that when Tate searched for and found an extinguisher Bryant still refused to budge because he and the other two miners did not have safety glasses to wear while operating the carrier as required by 30 C.F.R. 1403-7(e). (FOOTNOTE 5)

The Jack and Jackbar

Under close questioning, Bryant for the first time admitted the personnel carrier involved in the June 1 incident was a Julie car, a three wheeled rubber tired vehicle and not a "railrunner" or track mounted vehicle. (FOOTNOTE 6) Bryant further admitted that under the law and the mandatory

standard a jack and jackbar are required only on track mounted personnel carriers. He claimed this was immaterial to his conduct because it was company policy to require jacks and jackbars on "all" personnel carriers, not just on the railrunners. Assuming that was true, the fact remains that the absence of such equipment on a rubber tired vehicle does not affect its operational safety nor is its presence mandated by the Mine Safety Law. (FOOTNOTE 7) Mr. Bryant, as an experienced miner, knew that the principal function of a jack and jackbar is to assist in remounting a track mounted carrier that has derailed. That it might be useful for other purposes such as lifting track or changing a tire may have been relevant to the company policy but is not probative of the reasonableness of Mr. Bryant's refusal to operate the Julie car. I find Mr. Bryant's knowledge that a jack and jackbar are not required is probative of the lack of sincerity and honesty of his belief that the absence of this equipment created a

hazard of sufficient gravity to justify the initiation or prolongation of his June 1 work stoppage. For these reasons, I conclude Mr. Bryant's refusal to operate the Julie car in the absence of a jack and jackbar (1) did not justify his work stoppage on June 1, (2) was not a protected activity because the absence of this equipment resulted in no preceptible hazard, and (3) merited criticism by management.

The Fire Extinguisher

There is no dispute about the fact that portable fire extinguishers are required on all personnel carriers, 30 C.F.R. 75.1100-2(d), and that the Julie car in question did not have one on the third shift on June 1, 1979. Nevertheless, to justify a work stoppage in the face of a hazard that presented no clear and present danger, there must be a persuasive showing that the miner had a good faith i.e., honest belief that a recognizable hazard existed (FOOTNOTE 8) and that belief must be validated by a showing that the miner's perception of the hazard, including the affirmative, self-help taken to abate it, was "reasonable under the circumstances." Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 802, 810-812 (1981). Where a protected activity is inextricably intertwined with an unprotected refusal to work an inference of management hostility toward miners who exercise rights guaranteed under the Act is not shown by evidence that the miners involved were merely admonished to

mend their ways.(FOOTNOTE 9) An unlawful motive for an employer's conduct may not be inferred if it would be just as reasonable to infer a lawful motive. CCH Labor Law Reports Par. 4095. There is no more elemental cause for "dressing down" an employee than conduct so flagrant it threatens an employer's ability to maintain order and respect in the conduct of his business. American Tel. & Tel. Co., v. NLRB, 521 F.2d 1159 (2d Cir. 1975); NLRB v. IBEW Local 1229, 346 U.S. 464 (1953).

When considered in the light most favorable to the Secretary I find the evidence as to the fire extinguisher insufficient to establish a discriminatory motive for the challenged discharge of March 7, 1980.

Even if I assume, as I do, that a brief work stoppage was justified by the absence of the portable fire extinguisher I find that the miners overracted and that their real intent or motive was not as much a concern for their safety as to haze Mr. Tate.

The Safety Glasses

Generally speaking where a notice to provide safeguard has issued, safety glasses are to be worn by all persons being transported in open-type personnel carriers, including Julie cars. 30 C.F.R. 1403-7(e). (FOOTNOTE 10)

The record shows that two pairs of such glasses were furnished to each miner when he was hired.(FOOTNOTE 11) Messrs. Stair and Parrott did not deny this. Mr. Stair said he repeatedly lost his glasses and sometimes asked for a replacement but admitted he and the other miners regularly rode the mantrips without wearing their safety glasses even when they had them.

In any event, there is no dispute about the fact that Messrs. Bryant, Stair and Parrott reported for work on the third shift on June 1, 1979 without their protective glasses. There is also no dispute about the fact that after Mr. Tate provided a portable fire extinguisher and a jack and jackbar the three miners led by Mr. Bryant seized on the absence of their glasses as yet another excuse for prolonging their refusal to work and to harrass Mr. Tate.

On balance, I find Mr. Bryant's refusal to ride the Julie car without safety glasses stemmed from his own misconduct and was not based on a good faith belief that he would be exposed to a safety hazard of a severity sufficient to justify prolongation of his work stoppage. Mr. Bryant's claim that on June 1 he suddenly perceived a hazard he had ignored for the four months he had ridden the Julie car without glasses is at war with the Secretary's claim that Mr. Bryant had a good faith reasonable belief

that a realistic hazard existed. In Robinette, supra, the Commission held that "protected activity loses its otherwise protected character if pursued in an opprobrious manner." Id. at 817.

As noted, immediately after he satisfied the demands made by Messrs. Bryant, Stair and Parrott for a jack, jackbar, portable fire extinguisher and safety glasses, and they proceeded to their work assignment, Mr. Tate reported the incident to Mr. White the division manager and complained that he felt the miners harbored an ill-will toward him and were trying to harrass him because of their dissatisfaction with the change in their shift assignments (Tr. 437-455). Mr. White instructed Tate to have the three miners report to him at 7:00 a.m. in the morning.

The June 1 Meeting

At the 7:00 a.m. meeting Mr. White warned the miners they were skating on thin ice in acting as they did toward Mr. Tate and assured them he was not going to "let contract people run a boss off." The tone of the meeting was neither hostile nor threatening. It was a firm and temperate statement of top management's determination to back Delmar Tate and to put Mr. Bryant on notice that his conduct was considered insubordinate, irresponsible and unjustified by the circumstances.

I am persuaded that as a result of the June 1 incident, Mr. White was not prepared to tolerate any refusal to work by Mr. Bryant that was not a responsible reaction to a clearly perceived hazard. I find the admonition or warning was not an unlawful discrimination or retaliation but an appropriate management response to Mr. Bryant's irresponsible hazing of Mr. Tate.

I am also satisfied it was this resistance to accepting management's decisions on work assignments that tied this incident in Mr. White's mind to Mr. Bryant's refusal to accept the order to set jacks in March 1980.

When viewed objectively and dispassionately, I find in Mr. White's admonishment of the miners over the Julie car incident nothing more sinister than a healthy, adversarial exchange of views on the appropriate roles of management and labor in the management of the mine and in achieving compliance with the mandatory safety standards. Certainly, Messrs. Bryant, Stair and Parrott made their point, which was that management's level of safety consciousness left much to be desired and was in need of improvement. Mr. White indicated he understood, if he did not fully appreciate, this point but made clear that unnecessary disruption in the work effort and harrassment of supervisors in the name of marginal or irresponsible safety complaints would not and could not be tolerated.

Insofar as Mr. Bryant was concerned, the incident did nothing to deter his commendable zeal for safety. He went on to win election as a safety committeeman and in August did not hesitate to challenge management's failure to provide jacks and jackbars on the railrunners, a complaint that resulted in shutting down operations for two hours. This complaint which management treated as responsible resulted in no discernible retaliation or animus by Mr. White or any other member of management.(FOOTNOTE 12)

In conclusion, I find that because of (1) the ulterior motives involved in Mr. Bryant's conduct with respect to the Julie car incident; (2) the fact that much, if not all, of the allegedly protected activity was clearly unprotected; and (3) management's reasonable and temperate reaction, the Secretary has failed to carry his burden of persuasion on the issue of antecedent management animus toward Mr. Bryant for making safety complaints or the harboring of a secret intent to discharge him at the earliest opportunity for making such complaints.

Were it not for the fact that on March 7, 1980, Lloyd White cited the June 1979 incident as another instance of Bryant's insubordinate attitude, the Julie car matter would have to be dismissed as too remote to be considered of any probative value. Compare Santistevan v. C.F. & I. Corporation, 2 FMSHRC 1710, 1717, 1 BNA MSHC 2524 (1980), petition for discretionary review dismissed September 23, 1980.

Bryant's Refusal To Set Jacks

The events leading up to Danny Bryant's refusal to set jacks on March 7, 1980, began around February 25. After a three week absence due to an

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injury,(FOOTNOTE 13) Danny had run out of paid sick leave and vacation days and badly needed to return to work. The difficulty was that he did not feel he was well enough to work or to perform his normal work assignment as a classified repairman. This problem was overcome when he persuaded Henry Canady, his immediate supervisor and the maintenance foreman on the second shift to allow him to return to work on a "light duty" basis.(FOOTNOTE 14) According to Danny and Mr. Canady, this meant Mr. Canady would cover for Danny and protect Danny from assignment to any strenuous tasks by doing them himself

or assigning the work to others. Danny would only be expected to "piddle around" at light tasks in the warm, dry, fresh air of the well-illuminated repair shop and would not be asked to go underground to work in the cold, cramped, wet and dusty environment of a 32 to 36 inch low coal seam.

Bryant's return to work on February 25, 1980 was unremarked by top management, which was unaware of the arrangement for "light duty" worked out between Canady and Bryant. Canady, Joey Stapleton and the other miners friendly to Bryant managed to cover for him on the underground tasks so that he was able to work at the lighter tasks in the relative comfort of the repair shop. Bryant testified that it was during this or the following week that his stomach began to act up so that he was, or so he claimed, seldom able to eat his onshift dinner.

There was nothing in the records of Dr. Fonesca's examinations and testing to corroborate Bryant's statement that he had complained of stomach trouble as early as February 20 to 22. Prior to March 12, 1980 Dr. Fonesca did not treat Bryant for any disorder of his gastrointestinal tract.(FOOTNOTE 15) As a result of Bryant's complaints he was treated prior to March 7, 1980 only for a sore throat or what the doctor called mycoplasma pharyngitis, a viral infection of the pharynx. Despite this, Bryant convinced himself and Henry Canady that he had a stomach and lower respiratory condition during the period of February 25 to March 7 that precluded assigning him to perform tasks in the underground low coal environment.

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All proceeded smoothly and quietly except that Bryant took a paid vacation day on Friday, February 29. He rested and attempted to recuperate over the weekend, or so he said. I assume he continued to take his prescription for pharyngitis. He did not seek medical attention for either of his claimed stomach or lower respiratory disorders. On Monday March 3, 1980, he again returned to work on a "light duty" basis as per his arrangement with Henry Canady. Bryant pointed out that this was a "personal" arrangement between him and Henry. He did not consider it a favor extended by the company. In fact, he knew or should have known the arrangement was not sanctioned by company policy. Bryant, however, had no qualms of conscience. He believed that as long as Henry Canady was satisfied the company had no just complaint of the "light work" arrangement.

The work week that began March 3 went without incident until Friday March 7, 1980. That was the day before Danny finished taking the prescription for pharyngitis given him two weeks before by Dr. Fonesca. On arising, Danny did not feel any the worse for the wear and maybe a little better than he had for the last two weeks. He certainly did not consider himself in need of medical attention and did not seek such attention. His wife packed his dinner and he went to work expecting, as he said, to pull the usual light shift.

When he arrived at the mine, sometime between 3:30 and 4:00 o'clock he changed into his work clothes, including his hard hat and cap lamp and went to the repair shop. There he met Henry Canady who told him they were going to have to go underground to transport and install a 5 ton power center on the Union (Unit) #1 section. He told Bryant he

would also have to help remove and reinstall a considerable amount of brattice curtain. According to Henry, Danny was not expected to do anything strenuous because Henry was under the impression Danny was still recovering from a bout with pneumonia and an intestinal disorder. This, of course, was not true. But Henry, if he is to be believed, did not know the truth. In any event, he planned to assign Danny to operate the locomotive to pull the transformer into place and to help him make the final electrical connections.

The "light work" arrangement was rudely interrupted when Cecil Blevins, the evening shift mine foreman, suddenly appeared in the repair shop and told Danny Bryant he was needed to set jacks on the Wilcox miner on the Union 1 section because two faceman had failed to report for work on the evening shift.(FOOTNOTE 16) Joey Stapleton, a belt examiner, was also assigned to work out of classification. (FOOTNOTE 17) Stapleton was assigned to run the bridge conveyor, which also involved jack setting. He made no complaint about his assignment.

Bryant, who said he was shocked at this turn of events voiced no protest to Blevins who thought he had accepted the assignment. Instead when Blevins left Bryant immediately turned to Canady who, if he is to be believed, was also shocked but also voiced no complaint. Canady

testified he was convinced Bryant was in such bad physical condition that performance of the assignment might kill him. He speculated that this might result from exposure of Bryant's lungs to the dust and water encountered in face work or from the sheer physical exertion involved in setting jacks in low coal, or both. Bryant reminded Canady of his weakened physical condition attributable, he claimed, to a bout with pneumonia that had left him with fluid and congestion in his lungs.(FOOTNOTE 18) I find it of more than passing significance that Canady, who was responsible for Bryant's claimed predicament,(FOOTNOTE 19) shrank from the opportunity to present on behalf of Bryant his claimed belief that Bryant was too sick to do anything but light work in the repair shop. Instead, Henry's advice to Danny was to protest Blevins's and Tom White's instructions to their superiors, Lewis Blevins, the mine superintendent and Lloyd White the division manager. Bryant did not follow Henry's advice. He took his protest to Henry's superior, Bud Kilbourne, the chief electrician.

Bryant heatedly told Kilbourne that he did not think he should have to set jacks because he was a maintenance employee. He further stated he had "busted his ass" for Clinchfield and this was "the thanks he got--it was like putting a man in a mudhole." Kilbourne thought Bryant had a big "chip on his shoulder." Bryant seemed to feel that the company was "trying to run over the top of him." Kilbourne tried to explain to Bryant that they were short-handed and that because the mine was on probation they needed to run coal or take the risk of being shut down. He told Bryant several times that the only work for him that afternoon was setting jacks and that in effect he could take it or leave it. Kilbourne did not attempt to physically restrain Bryant or force him to set jacks. On the other hand, Kilbourne did not tell Bryant he was released and "free to go home." When Bryant complained he was too sick to set jacks, Kilbourne did not believe him because the very vigor of his attack seemed to belie his claim of physical weakness.

While the altercation was going on between Bryant and Kilbourne, Tom White told Lloyd White, who was concerned over the low productivity of the mine, that Bryant's refusal to work on the production section meant it would have to be idled. As he approached Kilbourne's office, Lloyd White overheard Bryant's remarks about this was "the thanks he got for busting his ass and being put in a mudhole." He also heard Bryant say he had been sick for two weeks and didn't feel like setting jacks. As Bryant turned to leave the room, both White and Lewis Blevins arrived on the scene and Blevins asked what was going on. Bryant restated his position. He, Blevins and White argued, rather excitedly, over Bryant's

claim that he deserved better than to be sent to set jacks in the mudhole that was the Union 1 section. Blevins and White backed up Kilbourne and Tom White and made clear to Bryant that if he persisted in his refusal to work on the section he could expect disciplinary action. Bryant, who by this time felt they were ganging up on him, said he was going to the bathhouse to change and go see a doctor. He said he would return with proof that he was too sick to work. He also offered to take White with him, an offer that White declined because he did not believe Danny was sick. According to Bryant, this exchange with management was the first time he felt he was being harrassed for making a complaint about working conditions.

Bryant took a shower and changed into his street clothes. He told some of the day shift miners, including Harlan Hall, who also had had a disciplinary discharge, about his run-in with White. In the meantime, Lloyd White, Tom White and Lewis and Cecil Blevins tried to realign the work crews so that at least one of the production sections could run coal. Before a final decision was made on how to operate, Lloyd White told Cecil Blevins to go to the bathhouse and once again order Bryant to set jacks. If Bryant still refused, Blevins was to tell him to report to White before he went home. Cecil Blevins did as instructed and when Bryant again refused an order to set jacks Blevins told him to report to Lloyd White, which Bryant did. Bryant said that at this point he felt he was being unnecessarily harrassed and that they should have taken his word for the fact that he felt too weak to set jacks. He felt management was just out

to punish and demean(FOOTNOTE 20) him but he did not feel he was being punished for pulling "light duty."(FOOTNOTE 21)

When Bryant reported to Lloyd White, White gave him a direct order to proceed to the Union #1 section to set jacks on the Wilcox miner. When Bryant again, and for the third time, refused the order,(FOOTNOTE 22) White said he wanted to go on the record and directed the mine clerk, Sharon Blevins, to turn on the recorder. A transcript of what transpired thereafter shows that Bryant immediately demanded that James Nichols, a mine committeeman, be called out to represent him. White complied with this request and Nichols was called out from his underground assignment as a miner operator on the Union #1 section.

White explained for the record that Bryant had been directed to work as a jack setter because they were short handed--only eleven men including Delmar Tate the section foreman were available and they needed twelve, six on each section, to run coal. He also pointed out that the mine was on probation because of its low productivity and that they had to run coal or risk being shut down. He then summarized the earlier discussions between management and Bryant. Bryant then stated his position. A review of this contemporaneous recital and the testimony at the hearing shows that Bryant declined the jack setting assignment because: (1) he felt it was demeaning, scut work--the kind of work that a highly paid, skilled repairman should not have to do, especially one who had given a 100% effort and who had been willing to risk his health by coming to work sick; (2) because he claimed to be seriously ill--Bryant claimed to have an infection of the bronchial tubes, severe stomach pains and nausea, and an inability to digest his food. In his recorded conversation with White he claimed his stomach "was tore all to pieces" and "was killing me." He said he thought he had "pneumonia or the flu or something." As previously noted, Henry Canady thought Bryant was just getting over pneumonia and was willing to believe Bryant was too sick to do anything but "light work."(FOOTNOTE 23) Lloyd White told Bryant he did not believe he was sick because he did not look or act like he was in pain or nauseated. To most of those who saw

him he looked perfectly normal. Even those who professed to believe he was too sick to set jacks refrained from offering to take his place at the job. Lloyd White, Lewis and Cecil Blevins, Tom White and Bud Kilbourne, all of whom carefully observed Bryant, thought he was not too sick to set jacks that day. Bryant said he would prove he was sick because he was going to the doctor immediately, even offered to take them with him, and would return with a doctor's slip excusing him from work. Although Bryant returned to the mine on the following Monday, he did not produce a slip from the doctor attesting to his condition. Lloyd White testified that if Bryant had brought in a medical excuse on Monday March 10, justifying his refusal of Friday, March 7 he would not have discharged Bryant. It was the consensus of management that Bryant was "faking" his illness to avoid an onerous work assignment.

In a statement which I find revealing as to his true motivation, Bryant repeatedly said he did not want to set jacks because he was "a classified repairman and I just didn't feel like setting those jacks." This refrain when considered together with Bryant's statement that the only time he tried to set jacks he suffered a "fright" over the personal danger involved disclosed a phobia about the job that was possibly disqualifying but which Bryant obviously did not wish to demonstrate to his employer or his peers.(FOOTNOTE 24) To cloak his mental reservations, Bryant took the position

that the hazard was to his physical health which he claimed would worsen if he attempted to perform the jack setting assignment. He admitted that had he demonstrated at the face an inability to do the job the operator would have relieved him of the task.

Another reason Bryant gave for being excused from the jack setting assignment was the fact that he had never been given new task training or shown how to accomplish the job. This objection was without merit. Jack setting is a low skill job that simply involves the repetition of the motions involved in setting 40-pound jacks from 30 to 60 times a shift.(FOOTNOTE 25) Aside from his mental reservations, Bryant was fully capable of mastering the

simple, if arduous and dangerous, physical tasks involved. (FOOTNOTE 26) The law permits and Lloyd White offered to give Bryant the necessary supervised task training required to qualify him as a jack setter. 30 C.F.R. 48.7(c); National Industrial Sand Assn. v. Marshall, 1 MSHC 2033, 2051-52; 601 F.2d 689 (3d Cir. 1979). Since new task training cannot be given when the miner refuses the task, the operator could not have discriminated by failing to give training that was refused.

In summary, I find that Bryant's refusal was based on his mental attitude toward, i.e., distaste for and fear of, the task as much, if not more, than his physical condition. Nor, as we shall see, was his physical condition as bad as he claimed. What I find most significant, however, is that Bryant never claimed that, aside from his own physical condition, there was any danger or hazard in the mine or on the Union 1 section which justified his refusal to work. Bryant emphasized that the only hazardous condition he was concerned about was his "health" or present physical condition, which he felt would be worsened by the conditions normally encountered on the production section.

Fear Of The Job

Before reaching the question of whether a miner's refusal to work because of a claimed physical condition is, standing alone, a protected

activity, I must also consider whether a miner's refusal to perform an assigned task solely on the ground that his mental condition is such that he is fearful of performing it safely is a protected activity. The undisputed facts here show that there was no condition or circumstance on the Union #1 section itself which constituted a hazardous(FOOTNOTE 27) condition. Such hazard as existed was in the person of Bryant himself.

Because the reasonableness of a fear can only be validated by a consideration of the gravity of the specific hazard addressed, a generalized fear of the job, unrelated to any condition or hazard actually confronting the miner, is too subjective to evaluate.

Consequently fear on the part of an otherwise healthy miner of performance of a risky or dangerous task regularly performed by other miners is not, standing alone, a protected justification for refusing to attempt

to perform the task. Pilot Coal Company, 2 FMSHRC 504, 1 BNA, MSHC 2363 (1980); Kaiser Cement Company, 4 FMSHRC 82 (1982).

To justify a refusal to make an attempt to perform a classified assignment, a miner must be able to point to a condition or practice in the mine that can be said to have induced a good faith, reasonable fear that performance of the rejected task will require the assumption of a recognizable risk not normally encountered.(FOOTNOTE 28) Duncan v. T.K. Jessup, Inc., 3 FMSHRC 1800 (1981); Boone v. Rebel Coal Co., 3 FMSHRC 1707 (1981); Adkins v. Deskins Branch Coal Co., 2 FMSHRC 2803, 2 BNA, MSHC 1023 (1980); Victor McCoy v. Crescent Coal Company, 3 FMSHRC 2211 (1981).

Impaired Physical Condition

What are the facts with respect to Bryant's claim that his physical condition, standing alone, justified his refusal to set jacks. As we have seen, when Bryant set out for work on March 7 he has just finished taking the antibiotic prescribed for his sore throat and laryngitis. According to his doctor, he was fully "recovered." He said he was feeling run down but not too weak to work. He was not running a temperature and had no plans to seek medical attention.

When he arrived at the mine he changed into his work clothes and reported to Henry Canady who told him they were going underground to install a power center on the Union #1 section. Henry expected Danny

to operate the locomotive and tractor required to move the transformer onto the section. He also expected Danny to help him connect 1,000 feet of high voltage cable to the power center and to remove and reinstall brattice curtain that would have to be taken down to make the installation. Bryant voiced no objection to performing this work which would take him underground into the 32 to 36 inch coal and would require considerable physical activity in the same bent over position that would be required to set jacks.(FOOTNOTE 29) Jack setters and timbermen usually work on their hands and knees in low coal or squat and crab around on their haunches.

As we have seen, after Bryant refused Lloyd White's order to set jacks, White directed that Bryant be suspended with intent to discharge for repeated insubordination in accordance with the applicable provisions of the collective bargaining agreement. White's position was: "I am not going to get into a situation here or anywhere else to where if I give a man a job to do that he doesn't want to do and he can just simply say I am sick and that is it." RX-5, p. 6.

Thereafter, Bryant, accompanied by his wife, was seen by Dr. Fonesca in the emergency room of the Norton Community Hospital at 6:39 p.m., the evening of March 7, 1980. According to the emergency room record he came in ambulatory complaining of a sore throat and nausea. The admitting nurse did not record that he was suffering abdominal pain. He was not running

a temperature. Bryant complained to the doctor of discomfort in his stomach which led the doctor to believe he was suffering from gastritis or an inflammation of the stomach tissues due to hyperacidity. Since this condition was consistent with the symptoms associated with peptic ulcer disease, Dr. Fonesca ordered a G.I. Series for Monday morning, March 10, 1980. Because Bryant's condition was as consistent with a benign or temporary stomach upset as with peptic ulcer disease including reflux esophagitis, the doctor wanted to run the tests necessary to allow him to "rule out," i.e., prove or disprove the existence of the suspected condition. He did not deem it necessary to prescribe any medication as Bryant did not appear to be suffering from any severe or disabling pain. In fact, he did not even suggest that Bryant take a dose of Pepto Bismol or any other antacid to relieve his claimed stomach disorder. The doctor released Bryant and told him to return Monday, March 10 for a barium treatment and X-Ray of his upper gastrointestinal tract.(FOOTNOTE 30)

On Monday morning Bryant returned for his G.I. Series. Dr. Straughan, the doctor who performed the series, noted on his clinical report that Dr. Fonesca wanted him to "Check for reflux" and to "rule out peptic ulcer disease." RX-13. The G.I. Series disclosed Mr. Bryant had an inflammation of the lower stomach or antrum which is the area of the gastrointestinal tract where the lower stomach enters the duodenum or small bowel. There was no indication of an inflammation of the upper digestive tract, or reflux esophagitis, which is caused by a back flow of hydrochloric

acid from the stomach into the esophagus, or of peptic ulcer disease. Thus, Dr. Fonesca's suspicion as to reflux esophagitis and/or peptic ulcer disease was not borne out by the G.I. Series.(FOOTNOTE 31)

Except for a sore throat, Bryant did not complain to the doctor of any problem with his respiratory tract although he had just told the mine managers one reason he could not work in the dust and dampness of the face area was because he had fluid in his lungs and a bronchial infection. Dr. Fonesca said his examination of Bryant disclosed that the infection of his pharenyx had "improved" to the point he could be considered "recovered."(FOOTNOTE 32)

The final diagnosis of Mr. Bryant's condition was that on March 7, 10 and 12, 1980, he was suffering from a disorder in his antrum and duodenum, i.e., "Antral gastritis and duodenitis." The abnormal condition was described as "hyperactivity" in the antrum and duodenum with swelling of the "bulb and postbulbar region," which is the area where the two tracts are joined. Bryant's problem was in the lower digestive tract, not the upper digestive tract as the doctor originally suspected.

When, as directed, Bryant returned to see Dr. Fonesca on Wednesday, March 12, 1980, the doctor, on the basis of the clinical evidence and his physical diagnosis, ruled out peptic ulcer disease or reflux esophagitis as the cause of Bryant's stomach disorder. He accepted the clinical evidence as establishing the disorder was antral gastritis and duodenitis (colonitis) and prescribed (1) Librex, a tranquilizer to relieve Mr. Bryant's stress and reduce the hyperactivity of the duodenum,(FOOTNOTE 33) (2) Tagamet, a drug which blocks the passage of acid-stimulating impulses down the main nerve (the vagus nerve) to the parietal cells which produce hydrochloric acid and pepsin, and (3) Mylanta, an antacid, to neutralize the hydrochloric acid in Mr. Bryant's stomach.

Dr. Fonesca then discharged Bryant with a return to work slip that put no restrictions on the type of work he could perform.(FOOTNOTE 34) He told Bryant to return for a checkup with him in a month. Bryant never did this.

If Bryant had severe abdominal pain or disabling cramps on March 7, it was not apparent from his physical appearance or actions. Even Henry

Canady, one of his most sympathetic supporters, said that for the two weeks he worked light he observed only a cough and a tendency to break out in a sweat when Bryant exerted himself.(FOOTNOTE 35) Even to the practiced eye of Dr. Fonesca, Danny did not look sick when he saw him on March 7. There were certainly no "objective manifestations" of pain that a layman could detect from observing Mr. Bryant. Pain, unless severe or disabling, is highly subjective, the doctor said. The doctor said it was obvious that Mr. Bryant was not suffering disabling pain and that he, himself, could not say whether Mr. Bryant's pain was moderate or severe. No record was made of the severity of the pain complained of on March 7. On March 12, the clinical record shows only that Bryant complained of generalized abdominal pain. Since Dr. Fonesca prescribed no analgesic, not even an antacid, to relieve the claimed discomfort on March 7, and since Dr. Straughan's clinical report of March 10 did not characterize the severity of the inflammation noted, I find the inflammation noted was not causing Mr. Bryant severe pain.(FOOTNOTE 36)

Although Danny Bryant told Lloyd White on March 7 he was going to the doctor to obtain proof that he was too sick to work as a jack setter, he never obtained such a statement. The statement of findings and unrestricted return to work slip Dr. Fonesca gave him on March 12 were

first produced by his union representative at the arbitration hearing held on April 5, 1980.

I find (1) that on March 7 Mr. Bryant was suffering from the same condition diagnosed on March 12, namely a mildly painful inflammation of the lower stomach and duodenum and (2) that despite the existence of this condition the doctor proffered and Danny accepted without protest an unrestricted return to work slip. Based on the clinical evidence and the doctor's contemporaneous actions, I conclude Mr. Bryant failed to prove by a preponderance of the evidence that he was unfit to attempt to set jacks on March 7, 1980.(FOOTNOTE 37)

The Post Hoc Medical Evidence

After March 12, Dr. Fonesca did not see Mr. Bryant again until July 31, 1980. Dr. Fonesca's clinical notes show Mr. Bryant was complaining of a sharp, burning pain in the upper abdominal area about a half hour after eating. Dr. Fonesca found some tenderness in the upper abdomen but was also concerned that Bryant seemed anxious, tense and depressed. Bryant told him that about a week before, when he was hospitalized for an acute muscular strain,(FOOTNOTE 38) a Dr. Miranda performed a gastroscopy on him and told him to take Maalox, a nonprescription

antacid, for his stomach condition. Dr. Fonesca told his secretary to obtain a copy of Dr. Miranda's gastroscopy report, and in the meantime prescribed the same tranquilizer, Librex, and cimetidine, Tagamet. He told Bryant to return on Monday, August 4.

By the time Bryant returned, Dr. Fonesca had reviewed Dr. Miranda's gastroscopy report which disclosed Bryant had "moderate to severe gastritis" and a "small hiatal hernia with minimal esophagitis." (FOOTNOTE 39) (JX-2, p. 3). Although Dr. Miranda's report did not say Mr. Bryant had "reflux," Dr. Fonesca interpreted the finding of "minimal esophagitis" as clinical support for a suspicion he said he had as early as March 7, that Mr. Bryant had reflux esophagitis. (FOOTNOTE 40) He continued Mr. Bryant on Tagamet for his acid indigestion, and prescribed antacids for Mr. Bryant's heartburn and sour stomach. He found Mr. Bryant recovered after four weeks of treatment.

In response to the question whether an individual in Bryant's claimed physical condition on March 7, 1980 could set jacks, Dr. Fonesca said he did not think so because Bryant "was having pain, and he was having respiratory symptoms." This was a reference to Mr. Bryant's pharyngitis which the doctor later admitted was "improved" to the point in March that no further treatment was indicated and which in his statement of

findings, which he gave to Bryant on March 12, he described Mr. Bryant as "recovered." (FOOTNOTE 41)

There is nothing in the clinical evidence--that is in the evidence based upon the actual observations and tests conducted by Doctors Fonesca and Straughan on March 7, 10, or 12--to support the view that either doctor was concerned during that period with a "respiratory condition." If Dr. Fonesca was truly concerned during that period with a respiratory condition that might worsen if Mr. Bryant worked underground, why did he certify Mr. Bryant was "recovered" from the condition and give him an unrestricted return to work slip on March 12. (FOOTNOTE 42) I conclude that in his zeal to assist Mr. Bryant and the Secretary's case, Dr. Fonesca expressed a professional concern at the hearing that did not, in fact, exist on March 7 or 12, 1980.

Dr. Fonesca also suggested that on March 7, Mr. Bryant was unfit because of a pain that "was manifested by a burning sensation and nagging

pain over his abdomen" which indicated reflux. These were symptoms which the clinical evidence shows were not manifest until Dr. Fonesca examined Bryant on July 31, 1980. Because of this the doctor was asked whether there was any "objective manifestation" of pain or discomfort on March 7. The doctor's reply was a dissertation on the subjectivity of pain that concluded with an admission that the answer to my question was "none," and certainly none discernable to a layman, because on March 7 Danny did not appear to be "suffering," at least "not very much." Tr. 364-365. Dr. Fonesca said that the only way he could have determined the condition of Bryant's gastrointestinal tract with any degree of certainty in March 1980 was to perform a gastroscopy which he did not do. (FOOTNOTE 43) Furthermore, the clinical evidence shows that when Dr. Miranda did a gastroscopy on July 24, 1980 some five months later he did not find "reflux esophagitis" merely "minimal esophagitis" a much less severe condition. The record shows Dr. Fonesca never had any clinical evidence of reflux.

Dr. Fonesca's medical opinion on Bryant's fitness to set jacks as expressed at the hearing can be accorded little weight. Not only is it contrary to the weight of the clinical evidence it is also contrary to his release of Bryant to return to work without limitation on March 12. Dr. Fonesca's medical opinion was based on the assumption that Bryant was suffering from two conditions that did not exist on March 7, namely a lower respiratory tract infection and reflux esophagitis. Dr. Fonesca

was willing to assume that what Dr. Miranda found in July "minimal esophagitis" existed in March and that it supported his findings, without further clinical observation, on August 4 that the condition was reflux, which he suspected in March but had ruled out. To assume Bryant had reflux in March because Dr. Fonesca diagnosed it in August is to engage in the most egregious post hoc propter hoc reasoning and flies directly in the face of the clinical evidence which supports at best a finding that Bryant had "minimal esophagitis" in July. (FOOTNOTE 44) As Dr. Fonesca admitted, the symptoms for gastritis are different from those for reflux and in March the clinical evidence supported only a finding of gastritis or acid indigestion and not reflux. This was why Bryant was not treated for reflux in March.

On balance, I am impelled to the conclusion that Dr. Fonesca did not believe Bryant's acid indigestion made him unfit to set jacks on March 7. If he did he would certainly have said so, and would not have been driven to include symptoms which he had ruled out in March and for which he had only tenuous support in July and August.

Further, if Bryant actually had the serious, chronic, respiratory and gastrointestinal track infections he alleged, it is my opinion that his refusal to work would not be protected. Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute. Kaestner v. Colorado Westmoreland, Inc., 3 FMSHRC 1994 (1981).

I do not believe a miner can, consistent with the good faith, reasonable belief requirement, present himself as ready, willing and able to work in accordance with the terms of the collective bargaining agreement and at the same time claim a protected right to refuse that work because of his impaired physical condition, even if his position is thereafter supported by sound medical opinion. (FOOTNOTE 45) I do not believe that in enacting the Mine Safety Law Congress intended to turn management's responsibility for disciplining the workforce over to the medical or legal professions.

The Wildcat Strike

Having found that Bryant's discharge for refusing to set jacks was not a protected activity or a pretext for retaliating against an antecedent protected activity, it becomes necessary, in the event the Commission disagrees, to consider the operator's failsafe defense, namely that Bryant in reprisal for his discharge instigated a wildcat strike that justified his disciplinary discharge. I say it becomes necessary because neither the Commission nor the courts have definitively indicated the extent to which the Commission may substitute its judgement of the facts and credibility

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of the witnesses for that of the trial judge. Because the determinations of protected activity and discriminatory motive are pure questions of fact the Commission may not have authority to substitute its evaluation of the evidence for that of the trial judge. (FOOTNOTE 46) Pullman-Standard v. Swint, ___ U.S. ___; 50 L. W. 4425, 4429 (1982). In view of the uncertainty in this area of the law, however, I deem it judicious to set forth my findings on this issue also. (FOOTNOTE 47)

Word of Bryant's suspension with intent to discharge spread quickly among the miners on the second shift on Friday evening, March 7. The men's mood turned sour and by the time the shift ended Joey Stapleton was satisfied there would be a sympathy strike for Danny on Monday. Stapleton was so sure of his reading of the collective intent that he determined to take a vacation day on Monday so he would be paid despite the anticipated strike (Tr. 262-267). Stapleton, whom I credit with considerable insight, testified the suspension of Bryant was the "catalyst" that triggered festering discontent among the rank-and-file miners over the way they were being treated by management.

In the Spring of 1980 the Pilgrim Mine was a paradigm of all that troubles labor relations in the mining industry. Working short-handed when combined with the push for production created considerable stress and tension (Tr. 267).

Morale was very low due, among other things, to recent and prospective layoffs, Lloyd White's efforts to curb absenteeism and increase production, a soaring accident rate, (FOOTNOTE 48) working men out of their classification without new task training, complaints of unsafe mining practices,(FOOTNOTE 49) and, of course, work slow-downs and stoppages.

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In addition to the causes for discontent over alleged mistreatment, traditional cultural ties and class loyalty dictated the miners show solidarity and support for a popular brother and leader like Bryant against what the miners viewed as the oppressive and burdensome policies of the company and Lloyd White. Don Kennedy, the company's labor relations manager, indicated Bryant would not have to solicit or persuade his brothers to come to his support. It was common knowledge that they would even if it hurt him and them more than the "bosses." The U.M.W.B.C.O.A. Arbitration Review Board has taken "judicial notice" of the fact that "one man, known to be a member of the Union and about whom information is gained that he has a grievance, can and does furnish ample signal to cause a work stoppage." Under the collective bargaining agreement's arbitration procedure such circumstances create a rebuttal inference or presumption of unlawful picketing or strike instigation that shifts the burden of persuasion to the miner in the event of a sympathy strike.(FOOTNOTE 50)

ARB, Decision 108, issued October 10, 1977, at 16-17. The Arbitration Review Board further held that in view of the "Miners' traditional willingness to shut down mines in supposed aid of fellow Miners" even informational picketing as distinguished from work stoppage picketing "cannot realistically be viewed as the exercise of constitutionally protected freedom of speech and must be viewed, instead, as a contractually improper act of work-stoppage inducement." Id. at 21.

The significance of the conventional wisdom for this case is that both Danny Bryant, the complainant, and Don Kennedy, the company labor relations manager, agreed that whether or not Bryant did anything other than provoke his suspension on Friday, March 7, 1980, he would surely be discharged for instigating a wildcat strike if the miners walked out on Monday (Tr. 165-166, 168, 173-175; RX-18, p. 40; 183, 658-159).

While Bryant had ample opportunity to advise and consult with his brothers on Friday and over the weekend, his testimony, if it is to be believed, was that he talked to no one except, I assume, his wife about his suspension.(FOOTNOTE 51) Dr. Fonesca indicated much of the stress, hyper-activity and agitation observed in Bryant that day may have been attributable to his suspension and prospective unemployment.

After Bryant was suspended and before he talked to Canady, he and Nichols conferred briefly in the bathhouse about their next step. It was agreed that Danny would carry his grievance to the second stage and that Nichols would contact the District 28 representative about when to schedule the second stage meeting. Over the weekend or on Monday, James Nichols contacted the District 28 representative, Ken Holbrook, and the latter talked to Don Kennedy, the company representative. They arranged to hold the second stage meeting on Tuesday, March 11, 1980 at 2:30 p.m., at the mine site. Bryant never denied that he knew about this arrangement.

Management was encouraged to think the miners might not support Bryant when the third or hoot-owl shift reported for work without incident on Sunday night. The situation was tense, however, and the tension rose further when the day shift also reported for work at 7:30 a.m., Monday morning, March 10, 1980.

This was the morning Bryant had his G.I. Series with Dr. Straughan at the Norton Community Hospital. By this time, Danny was convinced, as he said he was from the beginning, that management was out to "punish" him and that he would not prevail in his appeal of the suspension under the arbitration procedure. (FOOTNOTE 52) When he returned home from the hospital,

around noon, Danny called the mine office and talked to Sharon Blevins, the mine clerk. He told her to tell Lewis Blevins he wanted to come by and turn in his tools and pick up his clothes. (FOOTNOTE 53) Sharon told him he would have to call back around 2:00 p.m. because Lewis was underground.

Danny waited until 2 or 2:15 p.m. to call back. In the meantime, Lewis Blevins called Lloyd White who was at another mine and asked for instructions on Danny's request. White told Blevins to tell Danny not to come to the mine until after the evening shift went underground which would be sometime between 4:00 and 4:30 p.m.

White said if he came earlier and the men struck it would be bad for Bryant's case because then he would also be charged with instigating a work stoppage. When Danny called, Lewis Blevins conveyed White's instructions. (FOOTNOTE 54)

Bryant then asked for James Nichols' phone number and Lewis put Sharon on the line. He told Sharon and Lewis that he needed to meet with James Nichols, his mine committeeman, that afternoon so that he could sign his grievance and thereby preserve his right to arbitration of his dispute with Lloyd White.

I find it impossible to credit Bryant's version of why he needed to meet James Nichols before he went underground on the afternoon of Monday, March 10, 1980. The record shows that on Friday, March 7, at the conclusion of the suspension hearing it was agreed by all present, including Bryant that the 48 hour limitation on holding a second stage meeting was waived because of the intervening weekend (RX-5, p. 11). It also shows that by Monday, March 10, Nichols had spoken with Ken Holbrook, the Union's District 28 representative and that the latter had agreed with Don Kennedy, the operator's labor relations manager, to extend the time for the second stage meeting to 2:30 p.m., Tuesday, March 11, 1980 (RX-18, p. 3).

Under the collective bargaining agreement, there was no need for Bryant to sign a request for formal arbitration until the time of the

second stage meeting (RX-29, Art. XXIV(d)). Bryant had not elected to go to immediate arbitration and knew the second stage meeting which he had requested was set for Tuesday, March 11. (FOOTNOTE 55) Furthermore, whether or not a second stage meeting was held, the collective bargaining agreement guaranteed Bryant five days from the date the suspension notice issued to file a formal request for arbitration (RX-29, Art. XXIV(d)). Bryant testified that on Monday afternoon he was only on the third day of the five days allowed to file his request for arbitration. (FOOTNOTE 56)

Bryant made no effort, according to him, to reach Nichols over the weekend or at any time Monday prior to the time Lewis Blevins warned him against doing anything that might be construed as a signal for a sympathy strike. It was only at that point that Bryant determined he had to seek Nichols that afternoon and, if necessary, on the mine site.

I find that Bryant who was Chairman of the Mine Committee and who was advised and represented throughout the grievance and arbitration proceedings by a knowledgeable District 28 representative knew or should have known there was no urgent need for him to meet with James Nichols to sign a request for arbitration before Nichols went underground with the second shift at 4:00 p.m., Monday March 10, 1980. I further find that his claimed

need to see Nichols was an ingenious, if nevertheless manufactured, excuse or pretext for violating the instructions against being at the mine site Monday afternoon before the evening shift went underground.

After Bryant spoke to Lewis and Sharon Blevins he called James Nichols at his mother-in-law's house in Jenkins, Kentucky. This was around 2:30 p.m., Monday, March 10, 1980. At that time he was told James had already left for work. (FOOTNOTE 57)

According to Bryant, he left home imediately to try to intercept Nichols before he arrived at the mine. The undisputed evidence shows that James Nichols and Henry Canady were the only two miners on the evening shift who used the Bold Camp Road, State Route #633, to approach the mine access road from the north (RX-31). All the others, including Danny Bryant, came in from roads that fed into Bold Camp Road from the south and then right off that into the mine access road.

When Danny started from his home in Wise, Virginia to catch Nichols he took Route #23 north to Pound, Virginia and thereby bypassed the mine access road off Route #633. At Pound, he turned on to the Bold Camp Road

at Singleton's Department Store and headed south. He believed he was ahead of Nichols who would, he thought, be coming down through Pound from Jenkins which is north of Pound on Route #23. The mine access road is seven or eight miles south of Pound. Bryant was in his jeep and had his young son with him. Although he was confident he was ahead of Nichols, he did not stop along the road away from the mine but, while he watched for Nichols in his rear view mirror, he continued to drive south until he reached a wide spot in the road about 100 feet off mine property and approximately 500 to 1,000 feet above the mine access road. When he stopped his vehicle it was about 3:15 p.m. He and his son got out and stood beside the road looking, he said, for Nichols. The wide spot where Bryant stopped was on the downslope of the hill above the mine access road. The Bold Camp Road ran on down the hill to the point where it intersected the mine access road. Vehicles approaching from the south could see the spot where Danny was standing and he could see them.

Danny claimed that he could not be seen by miners in the parking lot or mine office but never denied that he could be seen by miners approaching from the south on the Bold Camp Road. Harlan Hall a union miner who worked the day shift was called as a witness by Danny's Union representative, Ken Holbrook, at the second stage meeting on Monday, March 17, 1980. Mr. Hall said he was familiar with the wide spot in the road where Danny parked because "I was parked up there when I was off the other time I was discharged" (RX-18, p. 48). At the arbitration hearing, Lewis Blevins testified that Hall's discharge also resulted in a wildcat strike (RX-26, p. 139). Larry Boggs, a union miner and a member of Bryant's Mine Committee,

further testified that from the wide spot in the road, "Yes, you can see cars coming up the hill" (RX-18, p. 51). The MSHA investigator confirmed that anyone with prior knowledge of the existence of the spot where Danny stopped and who looked would have been able to see Bryant.

At the time Bryant and his son dismounted from the jeep and stood beside the road, the other miners on the evening shift were approaching the mine access road from down the hill. James Nichols came up the hill and turned into the access road sometime between 3:30 and 3:45 p.m. Henry Canady also passed the spot where Bryant was standing with his son sometime between 3:15 and 3:30. Henry denied seeing Danny and Danny denied seeing Henry. Bryant did admit he saw Lloyd White pass on his way to the mine office around 3:30 p.m.

Upon arriving at the mine office, White told Lewis Blevins he saw Bryant beside the road about a 100 feet off mine property. White told Blevins that if there was a work stoppage he wanted to add a charge of instigating a strike to Bryant's notice of suspension.

Most of the miners on the evening or second shift, Danny's shift, arrived for work around 3:30 p.m. Apparently the miners had decided on their course of action before they arrived. In any event, around 3:45 p.m. the evening shift miners led by George Johnson, the President of the Local, approached Lloyd White and Lewis Blevins in the mine office and told White a "majority of the men voted to stay off from work until [White] brought Danny back to work." Lloyd White declined the demand

stating the matter was now the subject of a grievance and until that was settled the best thing they could do for Danny was to let the arbitration take its course. If Danny was reinstated, he would get back pay, but if they called a strike they and he would both be the losers. The miners then walked off the hill and did not return until Friday, March 14, 1980.

I find a preponderance of the evidence establishes that the sympathy strike of March 10 to 13, 1980 at the Pilgrim Mine was to protest the suspension of Danny Bryant and to put economic pressure on the operator to reinstate Bryant. (FOOTNOTE 58)

In the meantime, Danny accompanied by his son decided to drive to the mine office. They arrived at the bathhouse, which was in the same building, about five minutes to four. While I find it incredible, Bryant said that by that time the entire evening shift had left. The only person he saw, he said, was Harlan Hall of the day shift who told him the evening shift had struck and left. Later he admitted he also saw Larry Boggs the day shift mine committeeman who accompanied him when White called him in to tell him that a charge of instigation was being added to the charges against him. He said he did not see James Nichols and did not inquire as to his whereabouts. (FOOTNOTE 59)

At the arbitration hearing, Lewis Blevins testified, without contradiction, that on the afternoon of Tuesday, March 11, 1980, the entire Mine Committee consisting of Bryant, Nichols and Boggs accompanied by George Johnson the president of the Local came to his office and again told him a majority of the miners had voted to strike until management put Danny back to work (RX-26, p. 136; RX-4, p. 4). Bryant gave no indication that he was not present when the vote was taken or that he did not concur in his brothers' action.

I find that with the possible exception of Joey Stapleton, Bryant and the other miner witnesses who testified seriously undermined their credibility by their understandable (FOOTNOTE 60) but nevertheless transparent attempts to stonewall and disinform the trial tribunal over Danny's and the Local Union's involvement in the sympathy strike. (FOOTNOTE 61)

My conclusion, which is congruent with that of the arbitrator, is that Bryant's excuse for stationing himself beside the public road at a point where he could see and be seen by miners entering the mine access road was a mere pretext or cover for picketing the mine and a mute plea for support from his brothers. It was also a silent pledge of solidarity from Danny to his brothers who were doing only what he knew they had to do.

I find it unrewarding to attempt to draw any metaphysical distinction over whether Danny actively fomented the strike or was merely an interested bystander. Under the circumstances, his presence on the road was not a protected activity. His participation in the vote and the carrying of the message to Blevins on Tuesday is convincing evidence of his conscious strike activity. Nor do I find Danny's responsibility was in any way lessened because of the tradition among the miners which made the strike inevitable. Whether the miners struck only because of their loyalty to Danny or also because they had little or no faith in the fairness or equity of the arbitration system or for other reasons lost in the mists of tradition and memory I need not determine.

My conclusions are, therefore, that Danny did picket and otherwise help instigate the strike of March 10, 1980; that management was justified in charging him with instigating the strike; and that the arbitrator was correct in finding him guilty of that charge. (FOOTNOTE 62)

I further conclude that but for Danny's overt picketing before the sympathy strike he would not have been discharged. (FOOTNOTE 63)

Legality of the Wildcat Strike

Implicit in the arbitrator's finding that instigation of the wildcat strike on March 10 was "just cause" for Bryant's discharge is a finding that the wildcat strike was illegal. Indeed, the Secretary has not contended that instigation of a strike is a protected activity. His focus was on sustaining Danny's exculpatory excuse for standing beside the public road. My finding, as well as that of the arbitrator, is that the reasons given for Bryant being there were not convincing. (FOOTNOTE 64)

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My research leads me to conclude Bryant's conduct was a clear violation of the implied no-strike and compulsory arbitration clauses of the National Bituminous Coal Wage Agreement of 1978, the agreement in effect on March 10, 1980 and to which as a member of the union he was a party. (FOOTNOTE 65)

In Gateway Coal Company v. Mine Workers, 414 U.S. 368 (1974), the Supreme Court held the broad, compulsory arbitration provision of the 1968 National Bituminous Coal Wage Agreement required the arbitration of safety disputes and based on the well known presumption of arbitrability enunciated in the Steelworkers Trilogy implied a no-strike obligation on the part of the Union and its members "coterminus" with the arbitration provision. The Mine Workers Union had called a work stoppage in the Gateway mine, alleging that hazardous working conditions were created by the presence of two foremen, responsible for keeping ventilation records. These miners had recently been convicted of falsely preparing records so as to indicate no inadequacy in the ventilation. Although the 1968 Wage Agreement provided for the arbitration of "any local trouble of any kind arising at the mine," it contained no explicit

no-strike clause. The Court, after holding that the safety dispute was subject to arbitration, concluded it was proper to imply a no-strike obligation.

Shortly after the Gateway decision, Article III(p) was added to the National Bituminous Coal Wage Agreement. This section specifically provides for the arbitration of "Health or Safety Disputes" (RX-29, p. 25). There seems to be no question but that Danny Bryant was under a commitment not to strike or to picket to induce a sympathy strike over a health or safety dispute. U.S. Steel Corp. v. United Mine Wkrs. of America, 593 F.2d 201 (3d Cir. 1970); Cedar Coal Company v. United Mine Workers, 560 F.2d 1153 (4th Cir. 1977). As these decisions make clear, a sympathy strike over an arbitrable dispute is not sheltered by the Supreme Court's decision in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976).

It is true, of course, that section 105(c) of the Mine Safety Law confers on miners such as Danny Bryant specific substantive rights that are not subject to the contractual dispute-resolution procedures of the Wage Agreement. Pasula v. Consolidation Coal Co., 2 MSHC 1001, 1007 (1980) (Arbitral findings even those perfectly congruent with issues before the Commission are not binding on the Commission), affirmed on this ground, reversed on other grounds Consolidation Coal Company v. Marshall, 663 F.2d 1211, 1218-1219 (3d Cir. 1981). Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974). But the fact that rights guaranteed individual miners under the anti-reprisal provisions of the Mine Safety Law are "nonwaivable" and therefore

not subject to compulsory arbitration does not mean that in the exercise of such rights a miner or his local union may violate with impunity their no-strike pledge. Emporium Capwell Co. v. Western Addition Community Org. 420 50, 70-73 (1975).

In Emporium Capwell, the Court held that concerted activity in support of an arbitrable grievance is unprotected and renders the participants susceptible to discharge. Such activity which includes picketing is considered a prohibited resort to self-help and economic coercion because it contravenes the orderly disputes settlement process contemplated by the NLRA and the arbitration provisions of the collective bargaining agreement. Id. note 12 and accompanying text. Nor does the strong congressional policy of protecting miners from operators' reprisals in the exercise of rights guaranteed under the Mine Safety Law sanction violations of the no-strike pledge. The Court in Emporium Capwell rejected the claim that in order to give full sway to the anti-retaliation provisions of Title VII of the Civil Rights Act picketing and other concerted activity to protest racially discriminatory employment practices must be recognized as a protected activity under sections 7 and 8 of the National Labor Relations Act. The Court noted:

> Even assuming that %57704(a) protects employees' picketing and instituting a consumer boycott of their employer, the same conduct is not necessarily entitled to affirmative protection from the NLRA. Under the scheme of that Act, conduct which is not protected concerted activity may lawfully form the basis for the participants discharge. That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges in these cases are violative of %57704(a) of Title VII, the remedial provisions of that title provide the means by which [complainants] may recover their jobs with back pay. Id. 71-72.

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Picketing to induce a wildcat sympathy strike where the underlying dispute is over a preexisting health or safety problem even where it involves a protected refusal to work is not, therefore, a protected activity under either the National Labor Relations Act or the Mine Safety Law. (FOOTNOTE 66)

Because Danny Bryant violated the no-strike provision of his collective bargaining agreement with Clinchfield Coal Company, the operator had

the right under that agreement and the law to discharge him without right of reinstatement. Complete Auto Transit Inc. v. Reis, 451 U.S. 401, 415, n. 16, 416, n. 18, 420 (1981); Atkinson v. Sinclair Refining Company, 370 U.S. 238, 246 (1962); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939). (FOOTNOTE 67)

CONCLUSIONS OF LAW

Based on the foregoing findings I conclude that as a matter of law:

1. Bryant's refusal to accept a strenuous work task assignment based on his asserted belief that performance of the task in conditions normally encountered in the environment of a low coal mine would aggravate or worsen his claimed respiratory and gastrointestinal ailments was not an activity protected under section 105(c)(1) of the Mine Safety Law. To enjoy protection under the anti-reprisal provisions of the Mine Safety Law, a refusal to work must (1) be based on some condition or practice in the mine or working environment for which the operator is responsible and (2) create a hazard or danger to the miner's health or safety that is recognizable and in excess of that inherent in the operation and normally encountered. Where, as here, the claim of protected activity concerns not some identifiable presently existing threat to the miner's health or safety, but rather a generalized doubt on his part as to his competence

and physical fitness to perform the task, Congress did not intend that the public policy favoring the arbitration of grievances be circumvented and supervening jurisdiction over the dispute conferred on the Commission merely because a refusal to work was involved.

2. Danny Bryant's instigation of a work stoppage on June 1, 1979 in connection with the Julie car was not a protected activity under section 105(c)(1) of the Mine Safety Law.

3. The Secretary failed to prove by a preponderance of the reliable, probative and substantial evidence that Danny Bryant's refusal to accept Mr. White's order to perform the job of a jack setter on March 7, 1980, was a protected activity under section 105(c)(1) of the Mine Safety Law.

4. The operator proved by a preponderance of the reliable, probative and substantial evidence that Danny Bryant was one of the instigators of the wildcat strike that commenced on Monday, March 10, 1980. This activity was unlawful and in breach of Bryant's no-strike pledge under his collective bargaining agreement with the operator. This activity furnished just cause for Bryant's discharge.

OPINION

This was not a dual motive case. Reams have been written over the pleading and proof requirements in anti-reprisal (discrimination) cases involving dual or mixed motives. See, e.g. Lasky and Leathers, Applying the Wright Line Test: Mixed Results In the Circuits, NLJ, 3/22/82, p. 32. Applying the tests for evaluating a prima facie case of protected activity

as developed by the Commission in Pasula/Robinette I conclude the Secretary failed to prove by a preponderance of all the evidence that Bryant was at any time engaged in a protected activity. This eliminates, therefore, the necessity of making any extended "pretextual" or "but for" analysis. (FOOTNOTE 68) Compare, NLRB v. Chas. H. Batchelder Co., 646 F.2d 33, 42-44 (2d. Cir. 1981). I realize that because of Congressional concern over protecting the unhibited exercise of the right to refuse to work all the Act requires is proof that the miner honestly and reasonably believed that he confronted a threat to his safety or health. Consolidation Coal Co. v. Marshall, 663 F.2d 1211, 1219 (3d Cir. 1981). I also understand that such a refusal is protected from retaliation by the operator even if the evidence ultimately shows that

the conditions were not as serious or as hazardous as the miner honestly believed them to be. Id.

Under the circumstances presented in this case, however, I am not persuaded that the miner either had a good faith, reasonable belief that his illness was as serious as he claimed it was or, regardless of the bona fides of his belief, that it was the kind of threat to his safety or health covered by the Act. I do not believe Congress intended to afford miners the right knowingly to present themselves for work in a physical condition that precludes the safe or healthful execution of their tasks and then to decline or refuse to perform such tasks with total immunity from discipline by their employers.

For these reasons, I have determined that even if Mr. Bryant had a good faith, reasonable belief that his claimed weakened physical condition would not permit him to perform the tasks of a jack setter safely and without detriment to his health, this subjective belief was not, under the circumstances, a justification for his refusal to work because it stemmed from his own misconduct and violation of company policy in presenting himself for work in that condition.

Finally, I find the operator made a persuasive affirmative showing that subsequent to his disciplinary suspension Mr. Bryant was one of the instigators of a wildcat strike and that but for that activity Mr. Bryant would not have been discharged. The operator thus successfully carried a heavier burden than some of the courts of appeals would require and at least as heavy a burden as the Commission fashioned in Pasula and

Robinette. (FOOTNOTE 69) Not only did Bryant fail to validate the purity of his motives and the reasonableness of his beliefs with respect to the claimed antecedent protected activity but the operator successfully established through contemporaneous clinical evidence that Bryant's actually physical condition on the critical date did not render him unfit to perform the work assignment he refused.

The decision in this case has turned on a careful weighing of all the evidence in the record considered as a whole. Because the Secretary failed to prove Bryant engaged in protected activity, it has not focused on any narrow issues concerning burdens of proof as to motive. As a practical matter, those considerations fell away once the trial was concluded. I do not believe it productive, therefore, to attempt to unravel the labyrinthine holdings and literature spawned by the Commission's Pasula and the NLRB's Wright Line decisions. The reconciliation of these writings and their implications for the correctness of the Commission's allocation of the burdens of proof in dual motive cases under section 105(c) of the Mine Safety Law I must leave to another day or to the law reviews (FOOTNOTE 70) and the Commission. Suffice it to say that my distillation of the holdings and literature leads me to conclude that under Pasula and its progeny once a showing has been made that a disciplinary decision was tainted or motivated "at least in part" by a miner's protected activity, the burden of persuasion shifts to the operator to show that the

decision was motivated "at least in part" by unprotected activity and that "but for" the unprotected activity, and for that activity "alone," the miner would not have been disciplined or discharged. (FOOTNOTE 71)

Whether shifting the ultimate burden of persuasion to the operator to show a plausible motive for a disciplinary action contravenes section 7(c) of the APA or whether the Commission's burden shifting rule is more in accord with the Congressional purpose that underlies the anti-reprisal provisions of the Mine Safety Law, I need not decide. (FOOTNOTE 72)

Burdens of production and persuasion in an administrative proceeding are usually significant only where the evidence is in "equipose," that is, where after all the evidence has been submitted, it cannot fairly be said to preponderate in favor of either party. NLRB v. Transportation Management, Corp., (1st Cir., April 1, 1982) (concurring opinion).

The burden of persuasion is crucial, however, in retaliation cases which turn on the elusive concept of motive. Under Pasula and Wright Line the party bearing the burden of persuasion will lose when the evidence shows the employer's true motive was just as likely a business reason as retaliator. In other words where the evidence is in equipoise the operator, not the complainant, will lose. By relieving the Secretary of the burden of persuasion on the issue of true motive, the Commission has cast the balance in favor of finding a discriminatory motive in most cases where a protected activity was "in any way" involved. The Senate Committee Report, of course, supports this allocation of the burden of proof. S. Rep. 95-181, 95th Cong. 1st Sess., 36 (1977). See also, Larry D. Long v. Island Creek Coal Company, et al., 2 FMSHRC 1529, 2 BNA MSHC 1437 (1980); affirmed 2 BNA MSHC 1436 (4th Cir. 1981).

In this case, the operator not only rebutted the Secretary's showing of protected activity but positively negated the existence of such activity. By doing so, the operator successfully neutralized the claim of culpable motive for Bryant's discharge. In the absence of a showing of protected activity, there can be no "mixed" or "bad" versus "good" motive for a discharge. Bryant was suspended for an act of unprotected insubordination on March 7,

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1980 and discharged for that activity and for subsequent unlawful misconduct in instigating the wildcat strike of March 10, 1980. No matter how allocated, the operator carried his burdens of rebuttal and persuasion with respect to all of these issues by a clear preponderance of the reliable and probative evidence. It follows that Bryant's discharge was for just cause and for legitimate, nondiscriminatory business reasons. It was, therefore, in all respects proper.

ORDER

The premises considered, IT IS ORDERED that this matter be, and hereby is, terminated and the captioned complaint DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

~FOOTNOTE_ONE

1 The Pilgrim was a UMWA mine. In August 1981 Pittston closed the mine and turned it over to a contract operator.

~FOOTNOTE_TWO

2 Bryant was also Chairman of the Mine Committee which meant that he had to represent miners in the presentation of grievances against management.

~FOOTNOTE_THREE

3 Because of his involvement with the circumstances that led to Mr. Bryant's discharge and his departure from the Pilgrim Mine under a cloud shortly after Mr. Bryant, Henry Canady's testimony must be heavily discounted. Mr. Canady was the maintenance foreman on the evening shift and Mr. Bryant's close friend and supervisor at the time of the challenged discharge on March 7, 1980. Mr. Canady's uncorroborated, anecdotal testimony concerning the single occasion when he was allegedly privy to an incident in which he claimed management was displeased with Bryant's report of an unsafe condition hardly establishes a predisposition on the part of Lloyd White or any other member of management to "get" Bryant for carrying out his duties as a safety committeeman. Mr. Canady's testimony reveals that he, not Bryant, was primarily responsible for the ten minute delay required to correct a fault in the braking system of a locomotive. His testimony further reveals that he was not asked to single out Bryant for an adverse personnel report on this incident but had merely been instructed to make a report on any miner whom he believed occasioned an unnecessary disruption in operations or conducted himself in a manner inimical to good order and discipline. As Mr. Canady admitted, an adverse report was never made on the incident because he considered himself responsible for the brief work stoppage. A second incident, attributable to a misunderstanding of some directions Mr. Canady gave for the utilization of company property, did not involve a safety complaint and resulted in a complete exoneration of Mr. Bryant of any charge of wrongdoing or troublemaking. Mr. Canady's credibility was further seriously impugned by his

admission that he failed to intercede with management on Danny's behalf on March 7, 1980 at a time when such intercession might have persuaded Mr. White that Danny was not a malingerer.

~FOOTNOTE_FOUR
4 The mine was a marginal producer and its continued operation was in a probationary status.

~FOOTNOTE_FIVE
5 At the prehearing conference, it was stipulated this was the principal, if not the sole, incident of antecedent protected activity claimed to support a showing of animus toward Bryant because of safety complaints. As previously indicated, there is no substantial evidence to support the view that other complaints played any significant or adverse role in management's attitude toward Bryant.

~FOOTNOTE_SIX
6 Up to this point there had been some "confusion" of this incident with another incident involving the absence of a jack and jackbar that occurred in August 1979. This was shortly before Mr. Bryant transferred, at his request, to the evening shift. This incident resulted from Mr. Bryant's activity as a safety committeeman--a position to which he was elected after the June 1 incident. It did not involve a refusal to work. Mr. Bryant merely reported the absence of a jack and jackbar on a track mounted (railrunner) personnel carrier to Mr. Tate. When an operative jack could not be found, management delayed the third shift mantrip for two hours. During this time Cecil Blevins, mine foreman on the second or evening shift, stayed over and went underground to find a workable jack. Because there were two railrunners the requirement of the safety standard was not met, but Bryant agreed they could proceed inside by keeping the two carriers close together. On their way in, Delmar told Danny he might want to reconsider transferring to Mr. Blevins's shift because the incident angered Mr. Blevins and Delmar thought Cecil might hold it against Danny and might even try to discharge him. Bryant said he didn't give Tate's advise much consideration and went ahead with his transfer.

~FOOTNOTE_SEVEN
7 Section 314(b) of the Act, 30 C.F.R. 75.1403, authorizes issuance of safeguard notices against hazards connected with the transportation of men and materials. Until such a notice is issued, the regulatory criteria set forth at 30 C.F.R. 1403-2 through 75.1403-11 are not applicable or enforceable. The Secretary failed to prove that safeguard notices relating to the transportation of men ever issued to this mine. Since the law did not authorize such a notice for the Julie car and since the Secretary's effort to impeach Mr. Bryant on this point was unpersuasive, I am constrained to find that a jack and jackbar were not required on the Julie car.

~FOOTNOTE_EIGHT
8 Neither the Commission nor the courts have yet decided the level of severity, seriousness or imminence that a mine hazard must present to justify a miner's refusal to work. Consolidation

Coal Company v. Marshall (Pasula), 633 F.2d 1221, 1226 (C.A. 3, 1981) (dissenting opinion).

~FOOTNOTE_NINE
9 The Commission and the Supreme Court have recognized that the unreasonable, irrational or irresponsible exercise of rights conferred by the Act are not deserving of statutory protection. Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 385-386 (1973); Robinette, supra at 811-812.

~FOOTNOTE_TEN
10 There was no showing that such a notice had ever issued. The operator made no point of this, however, and seemed to assume the requirement applied.

~FOOTNOTE_ELEVEN
11 Mr. Bryant, who worked in another Pittston mine before coming to the Pilgrim Mine, claimed he was not furnished new glasses when he transferred but did not claim he was never furnished safety glasses or that he ever requested his original issue glasses be replaced from the time of his reemployment at the Pilgrim Mine in February 1979 to the time of the June 1 Julie car incident. He admitted he was furnished with prescription safety glasses later in June 1979.

~FOOTNOTE_TWELVE
12 The propriety and certainly the legality of Mr. White's conduct I judge by whether it had the effect of chilling the exercise of rights guaranteed Mr. Bryant under the Act. Mr. Bryant said it did not and his actions confirmed this. In fact, he said he knew of no action before his discharge of March 7, 1980 that he considered discriminatory. Obviously, the admonition and warning of June 1 did nothing to deter Mr. Bryant from asserting a right to refuse work on March 7, 1980. In the face of this hard evidence, I cannot accept the Secretary's claim that Mr. White's action on June 1 was an unlawful attempt to coerce or intimidate the miners in the exercise of rights guaranteed under the Act.

~FOOTNOTE_THIRTEEN
13 Around the end of January 1980, Bryant cut three fingers of his left hand. He was on sick leave as a result of this injury from Feburary 1 through February 15. He was treated for his injury and a cold by Dr. Bausch at the Wise Clinic, Wise, Virginia. On February 15, Dr. Bausch found Bryant sufficiently recovered to return to work and gave him an unrestricted work slip that allowed him to return to work on Monday, February 18, 1980. Instead of going to work, Bryant laid out on paid leave on Wednesday, February 20, went to the emergency room at the Norton Community Hospital complaining of a cold, sore throat and coughing. As a result of a blood test and diagnosis made by Dr. Fonesca, the doctor on duty, it was determined that Mr. Bryant had a virus infection of his pharynx but that he was not too sick to work. On Friday, February 22, the doctor prescribed an antibiotic for the condition that was to be taken four times a day for two weeks. Mr. Bryant began taking his prescription on Saturday, February 23, 1980 and returned to work on an

unrestricted basis the following Monday, February 25. Dr. Fonesca's final diagnosis was that Mr. Bryant had mycoplasma pharyngitis or a viral infection of the pharynx. According to Dr. Fonesca, Mr. Bryant's X-Ray showed his lungs were clear and his heart normal. He was not running a temperature and did not have bronchitis or pneumonia. Mr. Bryant did not seek further medical attention until the evening of March 7, 1980, the day he was suspended with intent to discharge for shirking work as a jack setter. Mr. Bryant did not ask that any of his absence during the week of February 18 be excused for illness and returned to work under the unrestricted permit issued by Dr. Bausch on February 15, 1980.

~FOOTNOTE_FOURTEEN
14 Even though Dr. Fonesca found no evidence of pneumonia or of an intestinal tract problem, Danny convinced Mr. Canady he had walking pneumonia and was suffering from a stomach ulcer. Mr. Canady admitted the only physical evidence of illness he noticed, however, was that Danny had a cough and seemed to break out in a sweat any time he was asked to exert himself.

~FOOTNOTE_FIFTEEN
15 Dr. Fonesca testified that prior to March 7 he treated Bryant only for an infection of his upper respiratory tract.

~FOOTNOTE_SIXTEEN
16 These instructions came from Tom White, the day shift mine foreman, not Lloyd White, the division manager.

~FOOTNOTE_SEVENTEEN
17 Temporary assignment out of classification is authorized under the miners' collective bargaining agreement.

~FOOTNOTE_EIGHTEEN
18 There was no support in Bryant's medical history for the claim that he was recovering from pneumonia or any other lung condition. Dr. Fonesca's X-Rays showed Mr. Bryant's lungs were clear on February 22, 1980, just two weeks before. In the interim there had been no diagnosis or treatment for pneumonia or any other lower respiratory condition. Dr. Fonesca's examination of Bryant on March 7, 1980 disclosed he had "recovered" from his pharyngitis and had no respiratory infection.

~FOOTNOTE_NINETEEN
19 In allowing Bryant to work "light" and covering for him, Canady violated company policy. While the company may have permitted men in the final stages of recuperation from injuries to return to work early at assignments they were fully capable of performing, it did not allow supervisors to encourage men who merely claimed they were ill to malinger on the job at company expense.

~FOOTNOTE_TWENTY
20 Jack setting on a Wilcox miner in low coal is considered an unskilled, common labor job. To have accepted such work without protest would have humiliated Bryant in the eyes of his peers. He felt he could not afford to let management "run over"

his self esteem and still retain the respect of the contract miners.

~FOOTNOTE_TWENTY ONE
21 Top management was apparently unaware of the extent of Mr. Bryant's "light work" assignment on March 7, 1980. In fact, during the course of the discussion Bryant told Lloyd White he was willing and able to perform his duties as a repairman. Since White did not understand this was confined to "light, outside work" this admission, he felt, only served to confirm his belief that Bryant was not too sick to work at the temporary assignment.

There was no charge that a discriminatory intent was to be inferred from the fact that Bryant instead of some other miner was assigned a difficult, dangerous and dirty job. The evidence shows no other miner was readily available. Even if one were available, I can find nothing in the statute that mandates giving preferential treatment to safety activists. Section 105(c) was not intended to diminish traditional management prerogatives.

~FOOTNOTE_TWENTY TWO
22 The record shows that Bryant was twice ordered to set jacks by Cecil Blevins, once in the repair shop and once in the bathhouse. The third order came from Lloyd White. In addition, the Chief Electrician twice told Bryant that the only work for him was setting jacks which Kilbourne and White considered tantamount to an order to set jacks.

~FOOTNOTE_TWENTY THREE
23 According to Henry this did not exclude working underground. Bryant, on the other hand, said that if Canady had asked him to do maintenance work underground "I would probably have went to the doctor." Bryant at first denied but when confronted with his earlier testimony admitted that Canady expected him to help install a 5 ton power center underground the same day Bryant refused to set jacks.

~FOOTNOTE_TWENTY FOUR
24 Bryant's fear of setting jacks was revealed in the following colloquies:

Judge Kennedy: Well, why wouldn't you be able to set jacks in the condition you were in?

Bryant: Well, on account of the breathing problem I had, and my stomach was bothering me, and also Mr. Morgan, like I said, removed me from jack setting one time and told me personally it was dangerous and, you know, he inflicted a fright upon me on this, you know.

Judge Kennedy: You were afraid of setting jacks, weren't you?

Bryant: Up to an extent, without any training; yes sir.

Tr. 131

Judge Kennedy: So is it your testimony that you would be happy to go underground tomorrow and work as a jack-setter for the next 10 years.

Bryant: If I went back to work for Clinchfield I wouldn't care to set their jacks, but I would take a repairman's job again.

Judge Kennedy: You wouldn't care to set jacks?

Bryant: No, sir.

Judge Kennedy: Why not?

Bryant: Well, I'm not sick; I'm not physically sick. I feel I'm able to do it, but I wouldn't care to. I would have went that night if I hadn't been sick; yes, sir I would have been more than glad to went.

Tr. 115

~FOOTNOTE_TWENTY FIVE
25 While jack setting is a low skill job, it is also very dangerous because so much of the work, which is done in low coal (32 to 36 inches), is often done under unprotected roof in a noisy, dusty, extremely damp environment. Communication depends almost entirely on signals with the miner's head lamps. If a jack is not properly set, it can pull loose and become a lethal missile.

~FOOTNOTE_TWENTY SIX
26 As Bryant repeatedly said, he knew in his own mind that if he tried to set jacks that day he would fail. He attributed this to his physical condition and not to his mind set. Bryant was most reluctant to perform any task that involved working at the face.

~FOOTNOTE_TWENTY SEVEN
27 By this I mean a condition affecting health or safety that exceeds the hazards normally incident to and generally accepted in the mining of coal. Underground mining is not inherently dangerous but is singularly unforgiving of carelessness, negligence or relaxation of the federal enforcement effort. Recent Congressional hearings on the mine disasters that occurred last December and January attest to the fact that an enfeeblement of the Federal enforcement effort is inevitably attended by a sharp increase in deaths and disabling injuries. Overall coal mine fatalities jumped a dramatic 51% in the first three months of 1982--43 fatalities during that time period compared to 22 fatalities during the first three months of 1981. Fatalities attributable to roof falls doubled during the first six months of 1982--from 9 in 1981 to 29 in 1982. The evidence strongly suggests the soaring accident rate to which Stapleton testified was the result of shortcutting and failure to follow safe work practices. Because the Mine Safety Committee failed to document its complaints, the evidence is too sparse to establish

what management's overall attitude was on safety, or what part that attitude, if any, played in Bryant's fear of the jack setting job.

~FOOTNOTE_TWENTY EIGHT
28 See Note 27, supra.

~FOOTNOTE_TWENTY NINE
29 Bryant's willingness to perform work for Canady conflicts with his statement to White that "if we was working outside I could make it, but if I had to go inside, even on maintenance, I would probably have went to the doctor." (RX-5, p. 10).

~FOOTNOTE_THIRTY
30 Bryant did not ask the doctor for a statement he could take to Lloyd White showing he was too sick to work that day.

~FOOTNOTE_THIRTY ONE
31 It is to be remembered that on March 7, 1980, Bryant was seeking not only medical attention but also support of his claim that setting jacks in low coal would worsen his physical condition. Dr. Fonesca said he suspected a reflux or inflammation of the upper digestive tract because Bryant told him he felt nauseated and that bending over was painful. Bryant, of course, had just come from his argument with White over whether the claimed pain in his stomach would worsen if he was required to set jacks in low coal.

~FOOTNOTE_THIRTY TWO
32 Dr. Fonesca thought Bryant's scratchy throat condition was a residual effect of the pharyngitis but required no further medication.

~FOOTNOTE_THIRTY THREE
33 Joey Stapleton said that recent layoffs had required that fewer men had to do more work, often out of their primary classification, and this had created unrest, stress and tension in the workforce. In addition, in January 1980, Clinchfield had announced it might have to close the mine because of low productivity, so people were worried about keeping their jobs.

~FOOTNOTE_THIRTY FOUR
34 Dr. Fonesca testified he thought he told Bryant he was not to work underground and was to do only "light work." On cross-examination, however, the doctor admitted this was only a "guess" on his part. He was never confronted with his signed statement of March 12, 1980, which shows he put no limitations on the work Bryant could perform. Ex. 3, RX-26.

~FOOTNOTE_THIRTY FIVE
35 Joey Stapleton, the other repairman assigned to set jacks, testified Bryant told him he had been ill. Because of this and the fact that Danny was working light he assumed Danny was ill. He was not asked whether Danny looked or acted sick on March 7.

~FOOTNOTE_THIRTY SIX

36 Five days elapsed between the time Dr. Fonesca saw Mr. Bryant on March 7 and the time he prescribed medicine for his condition on March 12. I cannot believe a doctor would permit a patient to suffer severe abdominal pain for five days when a mild antacid could have done much to ease it.

~FOOTNOTE_THIRTY SEVEN

37 The most probative evidence of Dr. Fonesca's state of mind and diagnosis of Bryant's physical condition is to be found in his contemporaneous clinical notes and in his statement of findings. These documents convincingly refute the Secretary's claim that "Based on his examination of Bryant on March 7, 1980, Dr. Fonesca diagnosed a microplasmic (sic) infection of the pharynx and possible reflux esophagitis, a stomach condition which is aggravated by bending." Secretary's Br. p. 17.

~FOOTNOTE_THIRTY EIGHT

38 In June 1980, Bryant went to work for the Paramount Coal Company.

~FOOTNOTE_THIRTY NINE

39 It was agreed that, standing alone, a hiatal hernia would not have justified Bryant's refusal to set jacks on March 7, 1980 (Tr. 397-398).

~FOOTNOTE_FORTY

40 Dr. Fonesca chose to ignore the fact that his findings and those of Dr. Straughan "ruled out" reflux in March 1980 as the condition causing Mr. Bryant's claimed discomfort.

~FOOTNOTE_FORTY ONE

41 This statement was, I find, the most definitive and objective evidence of Mr. Bryant's condition on March 7. It stated:

TO WHOM IT MAY CONCERN:

Danny Bryant was seen first by me at Norton Community Hospital Emergency Room on 2/20/80 with complaints of a rattle in his chest and sore throat. Evaluation and studies revealed he had mycoplasma pharyngitis for which he was treated and recovered. The next time I saw him was on 3/7/80 with symptoms consistent with peptic ulcer disease. Contrast studies of his upper GI tract revealed antral gastritis and duodenitis and he was started on treatment. RX-15; Tr. 365.

~FOOTNOTE_FORTY TWO

42 Concern over a respiratory condition was also inconsistent with Mr. Bryant's willingness to work underground with Mr. Canady to install the power center.

~FOOTNOTE_FORTY THREE

43 Dr. Fonesca said that while the tests performed by Dr. Straughan in March would not necessarily rule out reflux, only a gastroscopy could do that, he did not insist that a gastroscopy be performed in March.

~FOOTNOTE_FORTY FOUR

44 Post hoc reason is the logical fallacy of thinking that a symptom or condition found to exist in August was the cause of Bryant's discomfort in March.

~FOOTNOTE_FORTY FIVE

45 I think we might all agree that a miner whose physical condition is impaired by the use of drugs, including alcohol, might refuse to work because of his impaired physical condition and that a doctor might well agree that for him to work would be unsafe or detrimental to his health. But I also think we would all agree that such a refusal to work was not protected and that the operator would have just cause to discipline the miner. The analogy to the present case is that if Danny Bryant is to be believed he knew he was too sick to perform to the contract for at least two weeks before he refused the assignment to set jacks but did not seek to remedy his condition until after his suspension. Under the circumstances, Danny's degree of culpability in presenting himself for work on March 7 was not that much different from the miner caught drinking or using drugs or just sleeping it off on the job. On the other hand, fatigue, illness or injuries suffered on the job that affect a miner's ability to continue to perform his normal work tasks safely may well justify a refusal to work. Whether such a refusal is a protected activity is not presented by this record.

~FOOTNOTE_FORTY SIX

46 Under the substantial evidence standard, which I understand governs the Commission's review of the trial judge's factual findings, the reviewing body may not "displace the [trier of fact's] choice between two fairly conflicting views, even though the [reviewing body] would have justifiably made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1950). Findings of fact may only be overturned if a reviewing authority "cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes." Id. As the Court has recently noted, under the substantial evidence test, the reviewing authority may not "weigh the evidence" but may only determine whether on the record considered as a whole the evidence is sufficient to support the trial tribunal's findings and conclusions. Steadman v. SEC, 450 U.S. 91, 99, and n. 20 (1981). Where Congress has prescribed a standard of administrative or judicial review, the Commission and the courts must, of course, abide by it. Id. 94-95.

~FOOTNOTE_FORTY SEVEN

47 Under Section 7(c) of the APA, the trial judge resolves contested issues of fact by the preponderance of the evidence rule. Under section 113(d) of the Mine Safety Law, the Commission reviews the trial judge's findings under the substantial evidence rule. Secretary v. Kenny Richardson, 3 FMSHRC 8, 12, n. 7 (1981). Consequently, it would appear that a trial judge's findings, especially those on credibility, are to be accorded greater weight under the Mine Safety Law than under the APA. Under the latter, the agency is not required to accept the trial judge's findings because the agency on appeal determines the matter de

novo. The language and legislative history of the Mine Safety Law make clear that Congress intended the trial tribunal be accorded greater freedom to find facts including those based on impressions of credibility gleaned from demeanor, to the end that findings reflect either belief or disbelief of any particular testimony. I understand that to mean that in reviewing, as it does, a dead record, the Commission must accord considerable deference to the "lost demeanor" evidence that was available only to the trial judge. Labor Board v. Walton Mfg. Co., 369 U.S. 404 (1962); Alford v. Am. Bridge Division, 642 F.2d 807, 809 (5th Cir. 1981); Dir. Wkrs' Comp., Etc. v. Bethelem Steel Corp., 620 F.2d 60, 63-64 (5th Cir. 1980); Atlantic & Gulf Stevedores v. Director, Etc., 542 F.2d 602 (3rd Cir. 1976).

~FOOTNOTE_FORTY EIGHT

48 On March 5, 1980, Lewis Reed was seriously injured when the chain came off the drive clutch of the bridge conveyor. The injury occurred because he was required to operate the machine with the guard off the drive clutch chain. Stapleton said after they took Reed to the hospital Cecil Blevins, the mine foreman, ordered him to operate the bridge conveyor for the rest of the shift without a guard even though he had received no new task training for the job.

~FOOTNOTE_FORTY NINE

49 George Johnson, President of the UMWA Local, said he was receiving and transmitting safety complaints regularly to the company safety inspector, Mutt Townes. Some of these involved running the Wilcox miner without water to suppress the dust. Others involved setting jacks and pinning under unsupported roof. According to Johnson, whose classification was jack setter, he was not supposed to set jacks under unsupported roof, "but there is no way you can run a Wilcox without it." Bryant complained about being required to perform welding without a methane spotter and Lewis Blevins, the mine superintendent, said they were so short-handed on March 7 that "to work both sections we couldn't do any bolting of the roof during the shift." In May 1980, two months after Bryant's discharge, Lewis Blevins quit his job because he found it impossible to "get the mine straightened out" and "to producing good coal" due to absenteeism and strikes. Henry Canady quit the mine in April over a dispute concerning the use of alcoholic beverages on mine property and later in the year Lloyd and Tom White, among others, were indicted for alleged criminal violations of the Mine Safety Law. In December 1980, Clinchfield pleaded guilty to four counts of violating the Mine Safety Law and paid a fine of $100,000.

~FOOTNOTE_FIFTY

50 Thus, under the "law of the shop" a miner is presumed guilty until he proves his innocence.

~FOOTNOTE_FIFTY ONE

51 Henry Canady contradicted Bryant stating that after Bryant was suspended on Friday afternoon he came back to the repair shop and announced that "he was fired. It was over" (Tr. 251). Henry told Joey Stapleton what had happened when Joey came out to make his belt examiner's report. The word spread quickly

and according to Stapleton before the shift was over all the miners knew of the disciplinary action taken against Danny (Tr. 264). Scott Parrott, a maintenance man, told George Johnson, President of the Local, "about Danny getting fired" when Scott came up on the working section Friday night (Tr. 313).

~FOOTNOTE_FIFTY TWO

52 Indicative of Bryant's mood was the fact that he filed his discrimination complaint with MSHA on Friday, March 14, 1980, three days before the second stage meeting. The thrust of Bryant's initial complaint was that the assignment to set jacks was in retaliation for his refusal to operate the Julie car without a jack, jackbar and fire extinguisher in June 1979. He was convinced in his own mind that management picked him to do a dirty job when it could just as well have assigned it to someone else, such as the roof bolter Charlie Webb, because White wanted to "harrass" and "punish" him. White may well have wanted to make an example of Bryant but it was not because of any protected activity. White felt he had to assert his authority or risk losing control over his workforce. Bryant, on the other hand, felt he was being unnecessarily demeaned and seized upon his claimed illness and lack of new task training as an excuse for his resentment over being "singled out" for the dirty work. Since new task training cannot take place if a miner refuses to accept the assignment where the training is to be given, Bryant's anticipatory refusal was obviously not a protected "affirmative action."

~FOOTNOTE_FIFTY THREE

53 This action was the first overt indication or "signal" of Danny's concern over the outcome of the pending arbitration case. This may have stemmed from his failure to obtain a timely excuse due to illness from Dr. Fonesca.

~FOOTNOTE_FIFTY FOUR

54 At the hearing much was made over whether Blevins told Bryant not to come until after 4:00 p.m. or 4:30 p.m. It is undisputed that Bryant appeared at the bathhouse at five minutes to 4 on the excuse that he was looking for Nichols to sign his grievance. Bryant knew, of course, that if the men struck he would be held accountable regardless of what he did or did not do to foment a work stoppage. Bryant, Don Kennedy, Lewis Blevins and others confirmed that this is the tradition in the coalfields. Thus, everyone agreed that it was "common knowledge" that if a union member, and especially a union leader, is suspended with intent to discharge, there will almost "automatically" be a work stoppage and management will retaliate by charging the miner with instigating a wildcat strike. The miner will then have to assume the all but impossible burden of proving he did not provoke the strike and when he fails, as he almost invariably does, the arbitrator will uphold the imposition of a disciplinary discharge, the industrial equivalent of capital punishment. The Arbitration Review Board feels these draconian measures are needed to force the miners to honor the obligation to arbitrate these disputes and enforce the no-strike provision of the collective bargaining agreement.

~FOOTNOTE_FIFTY FIVE

55 Because of the work stoppage that occurred on Monday afternoon, this meeting was postponed until Monday, March 17.

~FOOTNOTE_FIFTY SIX

56 Since the suspension notice issued at 4:00 p.m., Friday, March 7, 1980 Bryant had until 4:00 p.m., Wednesday, March 12, 1980 to file his formal grievance and request for arbitration by an umpire. Bryant knew, of course, that if there was a strike management would refuse to go forward with the second stage meeting until the men returned to work. He also knew that this would automatically toll the running of the five day period.

~FOOTNOTE_FIFTY SEVEN

57 James Nichols said he left home around 2:30 p.m., Monday afternoon to meet with Holbrook at the District 28 office in St. Paul, Virginia. After he finished talking to Holbrook about Danny's grievance, he left St. Paul on his motorcycle and arrived at the mine access road from the south--coming up the hill around 3:30 p.m. He denied seeing Danny who by this time was waiting for him halfway up the hill at the wide spot above the mine access road. The first time he remembered seeing Danny was in the bathhouse about a half hour to forty-five minutes after the men struck. Bryant denied seeing Nichols at all that day. I find it significant that Bryant seemed to lose all interest in finding Nichols after the strike occurred.

~FOOTNOTE_FIFTY EIGHT

58 As a result of the four day stoppage, the operator claims it lost 2,150 tons of coal production.

~FOOTNOTE_FIFTYNINE

59 Nichols contradicted this at the second stage meeting. He said he saw Bryant in the bathhouse about 30 to 45 minutes after the mine was struck. Nichols was subpoened by counsel for the Secretary but the subpoena was never served and, despite repeated assurances by counsel, Nichols was never produced. The trial tribunal was thus deprived of an opportunity to test Bryant's version of why he needed to see Nichols on March 10 against Nichol's version. The record shows that on Tuesday, March 11, 1980, Bryant went with Nichols and others to see Lewis Blevins about the second stage meeting and to file Bryant's grievance. At that time, Bryant apparently signed a request for arbitration dated March 11. When Blevins told them management would not meet with them until the strike ended, they took the document back. It was redated on March 17, when the second stage meeting actually occurred.

~FOOTNOTE_SIXTY

60 Until the Supreme Court's decision in Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981), it was not clear to what extent union members who participated in a wildcat strike might be held personally liable in damages to their employer. And while most local unions are judgment proof, they are not immune from damage suits occasioned by wildcat strikes.

~FOOTNOTE_SIXTY ONE

61 For example, George Johnson, the president of the Local, could not remember why the miners decided to walk off the hill that day, even though he admitted to the MSHA investigator that he demanded management put Danny Bryant back to work as the price of settling the strike.

~FOOTNOTE_SIXTY TWO

62 A full immersion in this record is persuasive of the fact that a majority of the miners at the Pilgrim Mine felt, as miners have for eons, that the only way to redress their sense of outrage over what they perceived as a rank injustice to Bryant was to take direct action and shut down the mine. I reject the idea that the strike was the result of some arcane signal that Bryant sent to his brothers. Their support, he firmly believed, could not help him. Yet he wanted and needed it. Their action and his sprang from a deep well of resentment over the way the workforce was being treated. This was the same resentment toward what was perceived as management's callous disregard for human dignity that caused Bryant to rebel against the assignment to set jacks in the first place. For whatever reason, Lloyd White was driving his workforce to the breaking point. Maybe it was the insatiable push for production. Maybe it was the sloth and intransigence of the workforce. The reaction on both sides was a conditioned overreaction. The roles seemed preordained, Pavlovian and almost trance like. It has been difficult to separate the legal rights from the legal wrongs in this minor tragedy in human and labor relations. Everyone seems to have been as much a victim as a villain.

~FOOTNOTE_SIXTY THREE

63 The arbitrator found that standing alone, the refusal to work on March 7, 1980 did not merit a disciplinary discharge. He concluded that it was the "misconduct of March 7 . . . combined with his [Bryant's] inducing a wildcat strike on March 10" that was "just cause for the discharge" (RX-7, p. 8).

~FOOTNOTE_SIXTY FOUR

64 Generally, the law recognizes that intention or purpose can be ascertained either from verbal or nonverbal conduct of a party. The simplest proof is where the actor admits he consciously intended his conduct to produce the result it did.

The more usual situation is where intention must be inferred from a person's conduct. Under the circumstances of this case, the trial judge has evaluated the degree of probability that Bryant's presence beside a road at a point visible to miners approaching the mine access road contributed to the occurrence of the strike. Because of the high degree of probability that such presence or picketing would result in a strike, the trial judge has inferred that inducing such a strike was Bryant's intent or purpose in being there.

~FOOTNOTE_SIXTY FIVE

65 The National Bituminous Coal Wage Agreement of 1978 runs between each signatory employer and the International Union "on behalf of each member thereof" (RX-29, Art. I).

~FOOTNOTE_SIXTY SIX

66 On the other hand, a concerted refusal to work because of a good faith, reasonable belief that a hazard exists is protected activity under section 105(c) of the Mine Safety Law. Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 134 (1982); Isaac A. Burton, et al. v. South East Coal Company, 4 FMSHRC 457, 462 (1982); Mark Segedi, et al. v. Bethleham Mines Corporation, 3 FMSHRC 765 (1981). The right to strike over safety and health issues is also protected by section 7 of the National Labor Relations Act and section 502 of the Labor Management Relations Act. Whirlpool Corp. v. Marshall, 445 U.S. 1, 17, n. 29 (1980); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962): NLRB v. Knight-Morley Corp., 251 F.2d 753 (6th Cir. 1957).

The effect of these provisions as well as those found in the Occupational Safety and Health Act is to create an exception to a no-strike obligation in a collective bargaining agreement. Id.; Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 385 (1974). While different standards of proof may be required to trigger the immunity, all provide protection to workers who walk off their jobs because of hazardous conditions. In addition, the miners' collective bargaining agreement authorizes individual miners to withdraw their labor in the face of "abnormally and immediately dangerous" conditions (RX-29, p. 18). The Mine Safety and Health Committee can close down a mine or any portion thereof that it has reason to believe presents an imminent danger to the lives or bodies of the miners (RX-29, p. 12).

But a miner may not bypass the arbitral process and resort to self-help by inducing a wildcat sympathy strike in an effort to coerce an operator into resolving an existing health or safety dispute in his favor. Emporium Capwell, supra. In this case, the Secretary never claimed the strike was a protected activity or that it involved a refusal to work because of any hazardous or extrahazardous condition that existed in the mine. On the contrary a preponderance of the evidence established that the underlying dispute that triggered the strike was Bryant's suspension. The strike was not, therefore, in furtherance of any rights guaranteed under the Mine Safety Law to Danny Bryant or the other miners who participated. The absence of any right to engage in economic coercion is negated by the availability of the remedy of reinstatement pending resolution of a protected health or safety dispute.

~FOOTNOTE_SIXTY SEVEN

67 Compare, Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d 1981), where the court held that while a miner has a right to refuse to work in the face of a hazard to his safety or health he does not have the right to prevent others from working by shutting down the means of production. See also Blankenship v. W-P Coal Company, 3 FMSHRC 969 (1981); Gooslin v. Kentucky Carbon Corporation, 3 FMSHRC 640 (1981).

~FOOTNOTE_SIXTY EIGHT

68 The Secretary argues that Bryant was fired for engaging in two instances of protected activity: (1) the Julie car incident, and (2) the refusal to set jacks. The Secretary says

both incidents stemmed from a management animus against safety activists and were inspired by a single discriminatory motive. My evaluation of the evidence shows: (1) the Julie car incident did not involve any protected activity because the absence of a fire extinguisher presented no immediate or recognizable hazard that justified a work stoppage and, even if it did, it was under the circumstances so clouded by pretextual reasons for harrassing the section foreman that it lost all independent significance as a cause of management's displeasure with Bryant's conduct; (2) the refusal to set jacks was unprotected because there was no immediate or long-term health or safety hazard that justified Bryant's claimed right to be selective in his work assignments. Since both activities relied upon were unprotected, a presumption of discriminatory motive was never established. Both the prima facie and rebuttal cases show the sole reason for Bryant's suspension was his refusal to work at setting jacks. This was a serious breach of his employment obligation that justified disciplinary action. Whether it was of a magnitude sufficient to justify discharge, I need not, and probably should not, be concerned. See, Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2516, 2 BNA MSHC 1505 (1981); Bradley v. Belva Coal Co., ___ FMSHRC ___, Dkt. WEVA 80-708-D, decided June 4, 1982. In any event, the undisputed evidence shows Bryant was actually fired because he instigated a wildcat strike, a breach of his employment obligation that undoubtedly justified his discharge. The fact that few, if any, tears were shed over his departure may be regrettable but it was not unlawful.

~FOOTNOTE_SIXTY NINE

69 Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800, 2 BNA MSHC 1001 (1980); Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818, 2 BNA MSHC 1213 (1981).

~FOOTNOTE_SEVENTY

70 See, generally, Broderick and Minahan, Employment Discrimination Under the Federal Mine Safety and Health Act, 84 W.Va. L. Rev. ___ (1982).

~FOOTNOTE_SEVENTY ONE

71 Robinette, supra: %BFacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2 BNA MSHC 1505 (1981); Bradley v. Belva Coal Co., ___ FMSHRC ___, Dkt. WEVA 80-708-D, decided June 4, 1982.

The courts of appeal are split over the authority of the NLRB to shift to an employer the burden of persuasion in rebutting a charge of discrimination under the National Labor Relations Act. Compare Behring International, Inc., v. NLRB, No. 81-1937 (3d Cir. April 7, 1982); NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981); TRW v. NLRB, 654 F.2d 307 (5th Cir. 1981) with NLRB v. Fixtures Manufacturing Corp., 669 F.2d 547 (8th Cir. 1982); NLRB v. Lloyd A. Fry Roofing Co., (7th Cir. 1981); and NLRB v. Nevis Industries Inc., 647 F.2d 905 (9th Cir. 1981).

~FOOTNOTE_SEVENTY TWO

72 The Commission relied on Mount Health City Board of Education v. Doyle, 429 U.S. 274 (1977) for guidance in arriving at its position. On the other hand, Texas Dept. of Community

Affairs v. Burdine, 450 U.S. 248 (1981) indicates the ultimate burden of persuasion as to the motive for a disciplinary action lies on the Secretary and not the operator. In Chacon, supra, however, the Commission greatly diluted the operator's Pasula burden by holding that it is carried merely by a showing that the operator's motive for a disciplinary suspension was "not plainly incredible or implausible."

If the Commission is ultimately required to follow Burdine, the operator to rebut a prima facie case or presumption of discrimination, need only articulate a legitimate, nondiscriminatory reason for the allegedly unlawful action. Contrary to Pasula, the operator would not need to persuade the trial tribunal it actually was motivated by the proffered reason and that "but for" the permissible reason and that reason "alone" the miner would not have been disciplined. The burden of proceeding would then shift back to the Secretary and then, as the Court stated, "This burden now merges with the ultimate burden of persuading the court that [the complainant] has been the victim of intentional discrimination. [The complainant] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id.