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ELMER HARRIS V. McGINNIS COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ELMER HARRIS, COMPLAINANT v.	Complaint of Discharge, Discrimination, or Interference Docket No. KENT 82-7-D
MCGINNIS COAL COMPANY, INC., RESPONDENT	Mine No. 2
CLARENCE JUSTICE, COMPLAINANT v.	Complaint of Discharge, Discrimination, or Interference Docket No. KENT 82-68-D
MCGINNIS COAL COMPANY, INC., RESPONDENT	Mine No. 2

DECISION

Appearances: Ransome C. Porter, Esq., Inez, Kentucky, for Complainants;
Michael J. Schmitt, Esq., Porter, Schmitt, Preston & Walker,
Paintsville, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued June 17, 1982, a hearing in the above-entitled proceeding was held on August 24 through August 28, 1982, in Prestonsburg, Kentucky, under section 105(c)(3), 30 U.S.C. 815(c)(3), of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 1325-1357):

> This proceeding involves two complaints of discharge, discrimination, or interference filed by Elmer Harris and Clarence Justice against McGinnis Coal Company, in Docket Nos. KENT 82-7-D and KENT 82-68-D, respectively, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.
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> Both complainants filed a joint complaint with the Mine Safety and Health Administration on July 29, 1981, alleging that they were discharged on May 7, 1981, by respondent in violation of section 105(c)(1) of the Act, because they had made safety complaints to respondent about the handling of explosives and had refused to operate an end loader with bad brakes on a mountain road. The complaints were filed with the Commission

under section 105(c)(3) of the Act after complainants were advised by MSHA that its investigation had shown that no violation of section 105(c)(1) of the Act had occurred.

I shall make some findings of fact on which my decision will be based. These facts will be set forth in enumerated paragraphs.

1. McGinnis Coal Company, respondent in this proceeding, was incorporated in January 1980. Its business office is in Beauty, Kentucky, and its president is Ted McGinnis who testified in this proceeding. Its first business consisted of operating a small coal mine, known as the No. 1 Mine, which was located in the Pevler complex owned by Island Creek Coal Company. McGinnis leased his coal from Island Creek and his contract with Island Creek required him to abide by the terms of the 1978 and 1981 Wage Agreements between the United Mine Workers of America and the coal operators. McGinnis was required to hire miners who were members of UMWA.

2. The No. 1 Mine had already been prepared by Island Creek for coal production before McGinnis began operating it and McGinnis produced coal from the Coalburg coal seam on two production shifts, employing a total of about 15 miners on both shifts combined. The coal produced by McGinnis was high in sulphur content and waste materials which made the coal difficult for Island Creek to process in its plant. Therefore, Island Creek asked McGinnis to reduce the output of coal from his No. 1 Mine. He first laid off the second shift. During the latter part of 1980, Island Creek ceased to accept coal for about 2 weeks. When Island Creek resumed accepting coal, it reduced the amount of coal it would accept to such an extent that McGinnis could work his day-shift crew of five miners for half a day and produce in less than a 5-day week all the coal that Island Creek would accept.

3. Island Creek advised McGinnis he could open a No. 2 Mine at a different location and deliver coal produced from the No. 2 Mine to Island Creek's Gund Mine, instead of to the Pevle complex, but McGinnis was told that Island Creek would not prepare the mine for him, and that he would be required to obtain the necessary Federal and Kentucky authorizations and construct a road and prepare a bench on the side of a mountain to serve as a means of access to the No. 2 Mine. McGinnis first offered to let the United Mine Workers of America miners at the No. 1 Mine work half a week at the No. 1 Mine and the other half at the site of the prospective No. 2 Mine, but only three of the miners wanted to do that kind of work. McGinnis did not have the heavy equipment, such as a dozer and a loader, required for preparing the No. 2 Mine site. Consequently, all the

three

miners were able to do initially was cut down trees and brush to commence clearing the mine site. They worked up to the commencement of the UMWA general strike which began on March 28, 1981, and ended on June 7, 1981, when UMWA and the coal operators entered into a new contract which is Exhibit "P" in this proceeding.

4. About the time the strike began, McGinnis realized that he would not be able to prepare the No. 2 Mine site unless he could hire someone who possessed heavy equipment and ability to perform surface construction work in mountainous terrain. McGinnis first engaged an independent contractor named Charles Moore, who purported to have the expertise to do the work, but Moore had inexperienced equipment operators for the most part and did not spend enough time in supervision to make satisfactory progress. Moore became dissatisfied with the arrangement and withdrew his equipment and personnel, but during the last week that Moore worked, Moore's "ace" dozer operator, Clyde Fitch, Jr., was sent to the site and Fitch was such a skillful operator of a dozer that he accomplished more in 1 day than the other dozer operators had done in 2 weeks.

5. After Moore had withdrawn his equipment, Fitch made an offer to McGinnis to the effect that he would prepare the mine site if he (Fitch) could rent heavy equipment from Moore, or anyone else. Fitch was unable to obtain the necessary equipment and made a counterproposal to McGinnis to the effect that he would work for $700.00 per 60-hour week if McGinnis would furnish all equipment and supplies. McGinnis eventually accepted Fitch's offer after he had determined that he could obtain a D-8 Caterpillar dozer, an end loader, and a Joy Air Track drill from Island Creek Coal Company. Fitch knew that he could personally operate the dozer and end loader as much and as often as would be required, but a second person was needed to operate the drill. Fitch knew that one of the complainants in this proceeding, Clarence Justice, could operate a drill. Therefore, Fitch obtained McGinnis's permission to offer Justice $600.00 per 60-hour week, and Justice was asked to operate the drill for $600.00, but very shortly after Fitch had offered Justice $600.00 per week, Fitch decided it would improve his relationship with Justice if they were both paid $650.00 per 60-hour week. In essence, Fitch proposed that his $700.00 per-week payment would be reduced from $700.00 to $650.00 and that Justice's $600.00 per-week payment would be increased to $650.00.

6. McGinnis and Fitch also realized that they would need a laborer to cut timber, haul supplies, and do other odd jobs. McGinnis agreed to pay such a person $6.00 per hour but left the selection of the third

person to Fitch. Justice suggested that the other complainant in this proceeding, Elmer Harris, be given the job as a laborer. Harris happened to be Fitch's cousin, but

Harris lives about a quarter mile from Justice, and it was Justice's suggestion that Harris be offered the laborer's job.

7. Both Justice and Harris claim that they thought they were being hired by McGinnis Coal Company not only for preparing the No. 2 Mine site, but also for prospective work in McGinnis' No. 2 Mine after they had finished getting the site prepared so that actual underground coal production could commence. Harris testified that he was in the process of building a house for Mary Prater, who works for a bank in Inez, Kentucky. Harris had a partner helping him, and it was understood that the partner would finish the house. Harris was not actually working on Mrs. Prater's house at the time he began working at the No. 2 Mine site because he had just undergone an appendectomy and was recuperating from the operation. At Fitch's suggestion, McGinnis told Harris on May 7, 1981, that Harris was not needed any longer at the mine site unless McGinnis needed Harris to help with installation of some drainage tiles at a future time. After Harris stopped working at the No. 2 Mine, he returned to working on Mrs. Prater's house and that work was completed. Harris' partner had not finished the house in the interim between the time that Harris began working at the No. 2 Mine site in March of 1981 and the time Harris was relieved from work there by McGinnis on May 7, 1981.

8. Harris also claims that he obtained an oral promise from McGinnis on Monday, the first day he reported for work at the No. 2 Mine, to the effect that McGinnis would employ Harris, possibly as an electrician, in the No. 2 Mine after it began producing coal. Both Fitch and McGinnis deny that any discussion took place involving employment of Harris as a coal-production worker at the No. 2 Mine.

9. As to the understanding Harris had at the time he left the No. 2 Mine site, Harris claims that McGinnis told him to take a week off until some drains had been put in, and Harris thought he would be called back to work when the No. 2 Mine was ready to produce coal. McGinnis testified he installed the drain tile himself and never did have any more work for Harris to do. Harris never did go back personally and ask McGinnis for a job, but on one occasion, Harris did go to McGinnis' office at Beauty, Kentucky, and ask McGinnis' bookkeeper, Homer Wright, to tell McGinnis that Harris wanted to talk to McGinnis about a job. The bookkeeper left a note for McGinnis to call Harris, but McGinnis says there was no phone number on the note and that he did not return the call because he did not take the time required to see if Harris had a phone number listed in the phone book.

10. Justice claims, just as Harris does, that he understood that he would be used as an underground worker in the No. 2 Mine

and that he specifically asked McGinnis for a job as an operator of a roof-bolting machine. Both Fitch and McGinnis deny that Justice was ever promised a job as operator of a roof-bolting machine. Exhibit 7 in this proceeding is a list of the companies for which Justice worked from 1953 to 1973. Two auto service stations and a lumber company are listed among the employers, besides coal companies, and Justice did not work for any employer for more than 2 years before changing jobs. Justice also received the maximum benefits which the state of Kentucky pays when a miner has been found to be totally disabled from silicosis. Justice applied for, but failed to obtain, any benefits under the Federal program which awards payment for disability incurred from pneumoconiosis.

11. Since Justice was laid off on May 19, 1981, while Harris was laid off on May 7, 1981, Justice was employed at the No. 2 Mine site for 12 calendar days longer than Harris was. Justice testified that McGinnis told him on May 19, 1981, that it was too wet to work in the hollow fill. Justice said that they had often had to stop working when it was wet and that he expected to be called back to work when it became dry enough, but he says that since he was told it was too wet to work, it Justice also claims that Fitch brought his last check to Justice's home, and that Fitch told him that McGinnis would call him back to work, but that McGinnis did not intend to call Harris back.

12. McGinnis testified that he let Justice know that he was no longer needed after Fitch told McGinnis that no more drilling needed to be done and no more shooting with explosives was required. As to Justice's allegation that Fitch delivered Justice's last check to Justice's home, Fitch claims that Justice and he both picked up their checks in McGinnis' office in Beauty just as they had throughout the entire No. 2 Mine site operation, and that McGinnis made it clear at that time that Justice's part of the work had been completed because McGinnis shook hands with Justice and thanked Justice for having done good work on getting the mine site ready for the underground mine to be opened.

13. Justice returned to the No. 2 Mine on two occasions between May 19, Justice's last working day at the mine site, and July 29, 1981, when Justice and Harris filed a joint complaint with the Mine Safety and Health Administration which resulted in the filing of the complaints involved in this proceeding. Justice claims that McGinnis promised to call him back to work on each of those occasions after a further state of mine development had occurred. On each occasion, one or two other persons went to the mine with Justice and one of those persons, Cubert Spence, testified that he heard McGinnis tell Justice he would give Justice his

job back

in about 8 days after they had completed the second line of breaks at the No. 2 Mine. Another witness, Darvin Morrison, testified that he was helping erect a chain link fence at Justice's home when Fitch came by and told Justice that McGinnis was going to rehire Justice, but not Harris. Edward Moore was with Justice on one of Justice's trips to the mine and Moore testified that he heard McGinnis tell Justice that Justice would be called back to work in a couple of weeks.

14. McGinnis testified that Justice did come to the No. 2 Mine after it had begun to produce coal, but McGinnis claims that Justice did not ask when he would be rehired and that Justice merely asked in general terms how the mine was progressing. In fact, McGinnis said that when Justice came to the mine the last time, Justice looked at the unusually high roof from which draw rock had fallen and remarked that he did not believe he would like to work in that mine and that he could earn whatever he needed from selling scrap metal. Moreover, McGinnis stated that if he had ever been aware that Harris or Justice had agreed to work in preparing the No. 2 Mine site on the assumption that they would be given a job in the No. 2 Mine after it was opened, that he would have explained that he could not give them jobs in the mine and that he would have made that clear to them even if both of them had stopped working upon finding that to be true.

15. McGinnis testified further that hundreds of experienced miners have been laid off within the last 2 years, and that he has as many as 15 to 20 skilled miners per day come to the mine seeking employment. McGinnis stated that he has a practice of telling applicants that he will consider them along with all other applicants for jobs when and if he has an opening. At that time, he compares all applicants' background experience and inquires about their performance from past employers. McGinnis stated that he did not know for several weeks after Harris began working at the No. 2 Mine site that Harris had served some time in a penitentiary for conviction of interstate transportation of a stolen motor vehicle, and that that would have been a factor to be considered, along with others, if he had ever had a reason to consider Harris for a job in the No. 2 Mine after it was opened. McGinnis said he did not know that Harris had taken over 1200 hours of electrical training at the Pikeville Mayo Technical School. Harris conceded, despite his electrical training, that he had never held a job as a mine electrician and that he would have had to have taken additional training to have qualified for such a position.

16. McGinnis did not know when Justice worked at the

No. 2 Mine site that Justice had a history of having applied for and been denied benefits under the Federal pneumoconiosis program and

did not know that Justice had actually received the maximum benefits available under the State program for total disability as a result of silicosis. McGinnis said Justice's health problem would have been a strong deterrent to McGinnis' hiring him for an underground job because McGinnis' exposure to payments for black lung benefits would have been subject to an increase.

17. McGinnis also claimed that the UMWA miners who had worked at his No. 1 Mine were placed on a panel which, under union procedures, required him to offer all of them jobs before he could have offered either Harris or Justice a job. McGinnis had 17 UMWA workers at the No. 1 Mine, and all but two of them elected to be on the panel. McGinnis did need to hire a continuous-mining machine operator and a shuttle car operator on or about July 27, 1981. He was fortunate in obtaining experienced miners to fill both positions. They had been laid off at another mine and had been operating equipment identical to that used by McGinnis for Island Creek's operations. Neither Harris nor Justice could have been considered for either job because neither was qualified to fill either position, even if McGinnis had known either of them was an applicant for such employment.

18. McGinnis maintained throughout the hearing that Fitch, Justice, and Harris had been hired as independent contractors to prepare the No. 2 Mine site. Although McGinnis personally paid each man for all the work he did, McGinnis wrote their checks from a general account and did not deduct any amount for income taxes, Social Security, or any other purpose. At the end of the year, each man was sent a Form 1099-NEC, as shown by Exhibit N in this proceeding. The letters "NEC" mean "Non-Employee Compensation." After Harris and Justice obtained a lawyer to represent them in this proceeding, each wrote a letter upon advice of counsel requesting McGinnis to send him a W-2 Form instead of the Form 1099-NEC. Those letters are Exhibits O and OO in this proceeding. Home Wright is an accountant who works for McGinnis. He produced samples of checks written to actual employees of McGinnis Coal Company. Their checks are written on a payroll account, and those checks are accompanied by stubs showing deductions for income tax, Social Security, and other purposes.

19. A copy of each check written to Harris was introduced as Exhibits A through F; a copy of each check written to Justice was introduced as Exhibits G through M; and a copy of each check written to Fitch was introduced as Exhibits S through FF. As previously indicated, Harris was paid through May 7, 1981, when he was laid off, and Justice was paid through May 19, 1981, when he was laid off. Fitch was paid through

August 8, 1981, because

all grading on the road and bench area of the mine was not completed until that time. Fitch also worked for Stafford Trucking Company for 1 month after he had stopped working for McGinnis. During the month Fitch worked for Stafford, he drove a truck which was used in hauling McGinnis' coal to Island Creek's Gund Mine. Fitch's job as a truck driver was obtained on the basis of a recommendation made by McGinnis.

20. Harris claims that the reason he was not given a job in McGinnis' No. 2 underground mine after preparation of the site had been completed, was that he had complained about the lack of brakes on the end loader, and had declined to operate the end loader for that reason after being asked by McGinnis to operate it. Justice claims that he was not hired because he also complained about the lack of brakes on the loader. Justice admits that he did operate the end loader on level ground for 2 days, but he says he declined to operate it on a hillside or steep grade. Justice additionally stated that he offered to repair the brakes himself, but that the mechanic, Morris Booth, told him it would take too much time to do so, particularly since Justice wanted to move a slack adjuster and Booth said they sometimes had to be cut off with a torch.

21. Harris presented five pictures which he had personally taken of the trailer in which the explosives were stored for use at the No. 2 Mine site. McGinnis did not realize that the pictures had been taken, and had not seen them until they were introduced as Exhibits 1 through 5 at the hearing. McGinnis and Fitch both agreed that the explosives, consisting of ammonite, permacord, detonators, and blasting powder, had been stored in a single trailer on an aluminum floor. Such storage of explosives is at least in violation of 30 C.F.R. 77.1301(b), 77.1301(c)(6), and 77.1301(f). Both McGinnis and Fitch denied that either Harris or Justice had ever mentioned to them that the explosives were being stored in an unsafe manner. Harris and Justice requested that a special inspection of the explosives trailer be made by MSHA, pursuant to section 103(g)(1) of the Act, but that request was not made until July 29, 1981, the same day that Harris and Justice filed their joint discrimination complaint with MSHA. They claimed that they had tried to make complaints about the poor brakes on the loader and the improper storage of explosives while they were working at the No. 2 Mine site, but that they never could get in touch with the appropriate MSHA office.

22. MSHA did inspect the No. 2 Mine site on July 30, 1981, the day after Harris and Justice had made the request for a special investigation, but the inspectors found no violations because, by that time, only

ammonite was stored in the trailer, and the inspector said that storage of ammonite, by itself, in a trailer having an aluminum floor was not in violation of the mandatory health or safety standards (Exhibit PP).

23. McGinnis claims that Fitch was actually in charge of preparing the No. 2 Mine site and that Justice and Harris received all instructions and orders from Fitch, who knew the number of hours they worked. Although McGinnis found it necessary to explain the construction plans to Fitch, the actual construction work was performed by Fitch, who was acquainted with the required procedures for moving dirt and arranging it in accordance with the plan.

24. Roger VanHoose, an operator of a continuous-mining machine at the No. 2 Mine, and Derek Merion, a roof bolter at the No. 2 Mine, testified that McGinnis operates the safest mine in which they have ever worked. They both stated that McGinnis readily considers, discusses, and shuts down production any time there is a problem about safety, and that it has never been necessary to invoke any kind of grievance procedures under the union contract in order to get McGinnis to carry out or perform or abide by safety regulations or maintain a safe mine. There was introduced as evidence in this proceeding as Exhibit RR, a list of results of inspections submitted to McGinnis by MSHA inspectors, and those reports show that inspections were made at McGinnis' No. 2 Mine on June 4, 1981, June 10, 1981, July 14, 1981, July 30, 1981, and July 31, 1981, and at no time did the inspectors ever write citations for any violations at the McGinnis No. 2 Mine during those inspections.

I believe that those are the primary findings of fact which need to be made in this proceeding.

The primary issue to be considered is whether McGinnis Coal Company violated section 105(c)(1) of the Act when its president failed to give Harris and Justice jobs in McGinnis' No. 2 Mine after it was opened.

Before the primary issue can be considered, however, a preliminary question must be resolved. Specifically, it must be determined whether Harris and Justice were employees of McGinnis Coal Company or merely independent contractors who were hired for a single construction project, upon the completion of which, both Harris and Justice would be considered to have fulfilled the purpose for which their services had been sought in the first place. In 30 C.F.R. 45.2(c), an independent contractor is defined as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine."

Harris, Justice, and Fitch are persons who agreed to perform services and construction at the No. 2 Mine site. Therefore, they come within the definition set forth in section 45.2(c).

Part 45 was promulgated for the purpose of enabling MSHA to cite independent contractors for violations they commit at mines and Part 45 became effective on July 31, 1980, and was in effect when Harris, Justice and Fitch agreed to prepare the No. 2 Mine site in March 1981. Since Harris, Justice, and Fitch come within the definition of an independent contractor, each of them could have been cited for storing explosives improperly and for operating an end loader with bad brakes.

The Commission has held in such cases as Consolidation Coal Company, 1 FMSHRC 347 (1979), Kaiser Steel Corporation, 1 FMSHRC 343 (1979), Monterey Coal Company, 1 FMSHRC 1781 (1979), Old Ben Coal Company, 1 FMSHRC 1480 (1979), and Republic Steel Corporation, 1 FMSHRC 5 (1979), that MSHA may cite operators for violations committed by independent contractors. Therefore, even if the unsafe brakes and improper storage of explosives could be attributed to Harris, Justice, and Fitch, McGinnis Coal Company may also be cited for those same violations. Courts have also held that operators may be cited for violations committed by independent contractors and their employees. (Bituminous Coal Operators' Association v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977); Association of Bituminous Contractors, Inc. v. Cecil D. Andrus, 581 F.2d 853 (D.C. Cir. 1978); and Cyprus Industrial Minerals Company v. FMSHRC and Secretary of Labor, 664 F.2d 1116 (9th Cir. 1981).

The Commission held in the Old Ben case, supra, that it would not approve MSHA's citing of an operator for an independent contractor's violation if MSHA did so purely for administrative convenience, and in Phillips Uranium Corp., 4 FMSHRC 549 (1982), the Commission declined to uphold MSHA's citing of an operator for the independent contractor's violation. Among the reasons for the Commission's refusal was its belief that the health and safety purposes of the Act would best be served by citing the independent contractor who is responsible for the violations of its own employees. Also, the Commission believed that large independent contractors, like the one involved in Phillips Uranium, are in the best position to eliminate the hazards. Moreover, the Commission majority said that citing the operator for the independent contractor's violation caused the operator to be charged in subsequent civil penalty cases with a history of previous violations, for which the operator might be unfairly charged, just for MSHA's administrative convenience.

In this proceeding, I believe that the operator, McGinnis, should be cited or held responsible for unsafe brakes, if any, on the end loader, because McGinnis had agreed to obtain the equipment used at the mine site, and McGinnis had agreed to provide fuel and

maintenance for the equipment used. Likewise,

McGinnis had agreed to obtain the explosives, and had purchased the explosives from the Independent Powder Company which supplied the trailer in which the explosives were stored. Therefore, McGinnis Coal Company, or the operator, should have been cited for the explosive-storage violations which occurred.

It has been shown above that McGinnis Coal Company was liable for the violations of the mandatory health and safety standards alleged by Harris and Justice, but the question still remaining to be decided is whether McGinnis Coal Company can be cited for a violation of section 105(c)(1), when the person alleging the violation qualifies as an independent contractor under the definition of an independent contractor given in section 45.2(c). Section 105(c)(1), in pertinent part, reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, * * * or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Section 3(f) of the Act defines a "person" as: "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization," and section 3(g) defines a "miner" as: "any individual working in a coal or other mine." McGinnis Coal Company is a person as that term is used in section 105(c)(1), and Justice, Harris, and Fitch were miners as the term "miner" is used in section 105(c)(1). Therefore, regardless of whether McGinnis hired Harris, Justice, and Fitch as independent contractors, those independent contractors were also miners within the meaning of section 105(c) (1), and if McGinnis Coal Company declined to hire Harris and Justice because they made safety complaints, or disengaged them as independent contractors before their services as independent contractors had been completed, because they made safety complaints, McGinnis Coal Company violated section 105(c)(1) in so doing.

The Commission, in Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), gave its rationale as to what must be shown by a complainant to establish a violation of section 105(c)(1). The Pasula decision was reversed in Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1982), but the Commission has indicated in Northern Coal Company, 4 FMSHRC 126 (1982), and in Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), that its Pasula rationale was not changed by the court's reversal which was based on the court's belief that the Commission had improperly used certain evidentiary facts. Therefore, the Pasula test is still applicable law, and according to Pasula (2 FMSHRC 2799-2800):

> * * * the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis is integral part of quotation.]

I believe that the evidence shows that Justice and Harris engaged in a protected activity. Both of them claimed that the brakes were defective on the end loader. Fitch, who was the primary equipment operator, said there was nothing whatsoever wrong with the loader's brakes, but McGinnis, who also operated the loader at times, candidly stated that while he had no difficulty in operating the loader, even on a grade, he would have to admit that the brakes were not as effective as they might have been. Justice is a mechanic, and his testimony about volunteering to move the slack adjuster sounds very much like something that might have occurred. McGinnis' mechanic refused to let Justice perform that work because he felt it would take

excessive time to

do so. While Fitch claimed that a loader without brakes could not be operated at all, his efforts to explain why that was so were unconvincing, and McGinnis' effort to explain what Fitch was trying to say increased my belief that a loader can be operated with poor brakes if an experienced operator really wants to please his employer by doing so.

I believe that Justice, rather than Harris, was the person who complained about the loader's brakes, because Harris had no experience at all in operating heavy equipment, whereas Justice, on occasion, did operate heavy equipment and, for 2 days, did run the loader on level ground.

On the other hand, I believe that Harris was the person who complained about the improper storage of explosives. Justice was quite knowledgeable in use of explosives, and Justice prepared the shots or supervised Harris and McGinnis in preparing the shots. Still, it was Harris who most often obtained explosives from the trailer and brought them to the holes for use in actual blasting operations. If Harris had not been concerned about the unsafe storage methods, he would hardly have had any reason to make five photographs of the storage trailer, particularly since the pictures were made before Harris was told that his services were no longer needed (Exhs. 1-5).

Fitch and McGinnis both claim that neither Harris nor Justice ever complained about any unsafe condition, but they both admitted that a lot of joking about explosives occurred. It may be that in the kidding that existed, both Fitch and McGinnis simply ignored the warnings which Harris and Justice expressed. McGinnis conceded that he was not careful in checking into the fact that neither Harris, Justice, Fitch, nor he himself was a licensed shot firer. Some of the evidence thus supports a finding that Harris and Justice engaged in protected activities when they complained about unsafe brakes on the loader and improper storage and handling of explosives.

The preponderance of the evidence, however, fails to show that when McGinnis told Harris and Justice their services were no longer needed, that he was motivated in letting them go by the fact that they had complained about unsafe brakes on the loader or improper storage of explosives. Although both Harris and Justice claim that they were let go with the understanding that they would be recalled to work when the No. 2 Mine began to produce coal, they failed to show that the work for which they had been hired remained uncompleted at the time they were laid off.

The work which Harris had been performing consisted of getting explosives out of the truck, taking it to the holes drilled by Justice, and helping in filling the holes and in firing shots. Harris also greased equipment and obtained supplies, such as fuel, for the equipment. Justice conceded that most of his time was used in drilling holes and preparing shots. There was no dispute by Harris or Justice about the fact that no drilling or shooting on the surface needed to be done at the time McGinnis let them go. The only work to which they could have been recalled would have been to a position as an underground miner in the No. 2 Mine after it was opened. Harris was unable to show that he was qualified to do a single job in the mine without taking additional training as an electrician, and Justice could not have qualified for a roof bolter without taking some training. In short, Justice and Harris were unable to show that McGinnis had any further need for their services at the time they were told that no work remained for them to do. Moreover, they were unable to show that all dozer work had been completed at the time they left. Consequently, no finding can be made that McGinnis discriminated against them by continuing to pay Fitch for operating the dozer for several weeks after they had left.

Assuming that another person reading the testimony in this proceeding might disagree with my finding that Harris and Justice failed to satisfy the second step of the Pasula test by showing that their dismissal was motivated by their having complained about unsafe brakes and improper storage of explosives, I shall now examine the evidence to determine whether McGinnis would have taken the adverse action of dismissal, or refusal to rehire, in any event because of Harris' and Justice's having engaged in unprotected activities.

In the Commission's Phelps Dodge decision, supra, the Commission stated (3 FMSHRC at 2516):

> * * * Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise". * * * The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality

> becomes appropriate. The question, however, is not whether such justification comports with the judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined that miner.

McGinnis provided several reasons for his failure to rehire Harris and Justice over the experienced UMWA miners from his No. 1 Mine.

(1) There is no doubt but that McGinnis was required by Article XVII of the UMWA Coal Wage Agreements of 1978 and 1981 (Exhs. P and R) to fill openings at the No. 2 Mine by taking miners from the panel of miners formed when McGinnis ceased to operate a second shift at the No. 1 Mine. There was an enlargement of UMWA miners with seniority rights for transfer to the No. 2 Mine when McGinnis closed the No. 1 Mine entirely before opening the No. 2 Mine.

(2) The only openings at the No. 2 Mine not filled by transfer of UMWA miners from the No. 1 abandoned Mine were the positions of an operator of a continuous-mining machine and an operator of a shuttle car, and neither Harris nor Justice was qualified to fill either of those positions.

(3) There was never a showing by Harris or Justice that McGinnis knew that they wanted jobs as underground miners. Neither of them actually alleged that they were qualified to fill even the jobs they claim to have discussed, that is, roof bolter as to Justice, and electrician as to Harris.

(4) There is little doubt but that Harris and Justice could have gone to school and could have become qualified for some sort of underground miner's job, but neither of them specifically discussed with McGinnis the actual schooling they would need, and neither got McGinnis' approval that he would undertake to hire either of them for a specific job if they had arranged to obtain the necessary training. While it is true that McGinnis may inadvertently have misled them by saying that he would consider them when he had an opening, McGinnis claims he tells all applicants that and does consider all applicants in light of their qualifications when such openings do occur.
If Harris and Justice did work at clearing the site for the No. 2 Mine solely because they thought they would be hired for a position at the No. 2 Mine when it was opened, and even if McGinnis deliberately led them to think that they would get

positions in the underground mine, McGinnis' failure to hire them as underground miners after the site was cleared was not a violation of section 105(c)(1), inasmuch as McGinnis did not refuse to hire them as underground miners because of safety complaints.

One reason for making the foregoing conclusion is that McGinnis does not use end loaders underground and complaints about brakes on surface equipment would not have been an over-riding consideration when Harris' and Justice's lack of qualification is examined in light of McGinnis' obligation to hire UMWA miners on the panel from the No. 1 Mine and the highly experienced unemployed miners otherwise available. The same consideration would also apply to complaints about improper storage of explosives, because McGinnis did not need explosives to operate his No. 2 underground mine since the coal was produced by a continuous-mining machine which does not rely upon explosives for extracting coal. That McGinnis did not need explosives after the site had been cleared for opening the No. 2 Mine is indicated in Finding No. 22, supra, where it is noted that before McGinnis began operating the No. 2 Mine, he had removed from the surface area of the mine all explosives except some ammonite which, when stored by itself, was stated by an MSHA inspector to be nonhazardous.

The foregoing examination shows that McGinnis' letting Harris and Justice go and his failure to rehire them as underground miners, were decisions based on business justifications, which were "not plainly incredible or implausible". I believe that the preponderance of the evidence shows that McGinnis would have taken the actions he did take as to Harris and Justice for the reasons he gave, regardless of whether they had complained about unsafe brakes on the loader or improper storage of explosives.

WHEREFORE, it is ordered:

The complaints filed by Elmer Harris and Clarence Justice, in Docket Nos. KENT 82-7-D and KENT 82-68-D, respectively, are denied.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)