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SOL (MSHA) V. ASH CEMENT  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) ON BEHALF  
OF OMAR J. PERSINGER,  
COMPLAINANT

v.

ASH GROVE CEMENT COMPANY,  
RESPONDENT

COMPLAINT OF DISCHARGE,  
DISCRIMINATION OR INTERFERENCE

DOCKET NO. CENT 80-202-DM

MD 79-85

MINE: Louisville Plant Quarry  
and Mill

DECISION

Appearances:

Robert S. Bass Esq.  
Office of the Solicitor  
United States Department of Labor  
911 Walnut Street, Room 2106  
Kansas City, Missouri 64106,  
For the Complainant

Mr. John H. Ross, III  
Vice President and Secretary and  
Mr. Harry N. Ahl Superintendent  
Ash Grove Cement Company  
1000 Tenmain Center  
Kansas City, Missouri 64105,  
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The Secretary, on behalf of Omar J. Persinger (hereinafter "Persinger"), filed a complaint against respondent Ash Grove Cement Company (hereinafter "Ash Grove"), alleging that on or about July 9, 1979 and for a period of time thereafter, Ash Grove discriminated against Persinger in violation of section 105(c)(1) of the Federal Mine Safety and Health Act

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of 1977, 30 U.S.C. 801(c) et seq., (hereinafter cited as "the Act"). (FOOTNOTE 1) Pursuant to notice, a hearing on the merits was held in Omaha, Nebraska following which both parties were afforded the opportunity to submit post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

#### STIPULATION

The parties stipulated to the following:

1. On July 9, 1979, and all times material thereafter, respondent Ash Grove Cement Company operated the Louisville Plant Quarry and Mill near Louisville, Nebraska. This is a mine as that term is defined in section 3(h)(1) of the Federal Mine Safety and Health Act of 1977.

2. Respondent employed Omar J. Persinger as a loader operator and laborer, and as such, Mr. Persinger was a miner as that term is defined in section 3 (g) of the Act. Mr. Persinger was so employed as of July 9, 1979.

3. Ash Grove Cement Company and the mine are subject to the Federal Mine Safety and Health Act of 1977.

4. This proceeding is authorized by section 105(c)(2) and 113 of the Act. The Federal Mine Safety and Health Review Commission and this Administrative Law Judge has jurisdiction in this case.

5. Respondent Ash grove had a total of 55 assessed violations for the years 1979 and 1980.

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6. Respondent Ash Grove had 439,033 man-hours worked in 1979 and 225,096 man-hours worked in 1980.

#### FINDINGS OF FACT

1. The facts stated in the above stipulation are accepted and adopted as Finding of Fact.

2. Persinger was employed by Ash Grove on December 29, 1956 and has continued this employment through the date of the hearing.

3. In April 1977, Ash Grove created a new job of loader operator and laborer in Departments 27 and 55 to work during the third shift (4 p.m. to midnight), Persinger was successful in his bid for this job. The notice of job vacancy number 35 stated in part as follows:

Remarks: Employee will work as loader operator and if time permits can be used as laborer in Dept. 27. If kiln goes down he will be used as laborer in either Dept. 27 or 55 but will continue to receive Bracket 18 pay. (FOOTNOTE 2)

4. Persinger's duties as a loader operator primarily involved using a front-end loader to stockpile coal and haul it from the stockpiles to a hopper from which the coal was then transferred by a feeder to a crusher and through a vibro-conveyor to an elevator which carried the coal to silos. The silos hold coal for use in an Allis Chalmers kiln in the cement plant. Additional duties involved digging out the crusher and coal spouts if they became plugged. Prior to May 1979, Persinger's principal job was to keep the coal silos full and when that was finished he would clean up around the coal building using a broom and shovel.

5. Departments 27 and 55 are designations used by respondent in its bookkeeping. Department 27 in the job description (Exhibit P-1) was to designate a vacancy in the coal handling system for the ACL kiln. Department 55 is the yard department description.

6. On May 9, 1979, Persinger, as a miner's representative, accompanied two mine inspectors of the Mine Safety and Health Administration (MSHA) on a walkaround inspection of Ash Grove's plant. During the inspection, Persinger pointed out certain housekeeping problems in the coal silo area where he worked including some grates which were "curled" and had holes in them through which a miner's leg could drop. He also pointed out

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an area under a conveyor belt where a fire had occurred and was allowed to burn itself out. As a result of this inspection, several citations were issued to Ash Grove for violations of the Act, some of which pertained to violations involving conditions in the area where Persinger worked.

7. Following the MSHA inspection which took place between July 9 and 12, 1979, a plant labor gang was utilized to clean-up the areas cited including the coal area. On July 19, 1979 after the general cleanup, Henry Mueller, ACL kiln foreman, told Persinger that he would have to clean the areas around the coal silos every day.

8. On a date not certain, but following the inspection ending July 12, 1979 and prior to July 20, 1979, Melvin Gerdes, a foreman in Ash Grove's quarry, told Persinger that he was to clean the air cleaners every night on the Hough 400 loader he operated on his shift.

9. On July 20, 1979, Persinger wrote a letter addressed to the MSHA inspectors stating that he considered the requirement to clean the air cleaners on his loader by himself, constituted an unsafe practice. (FOOTNOTE 3) The safety complaint was delivered by Persinger to Kenneth Sjogren, union president, who in turn delivered it to Ed Lilly, an MSHA inspector.

10. On July 24, 1979, Gar Summy, Ash Grove's supervisor of production and quality controls, inspected the ACL coal silo area and found the housekeeping conditions unacceptable.

11. On July 25, 1979, Summy wrote a letter to Persinger outlining that he had been verbally warned on two occasions about his responsibility to clean the coal silo area and that an inspection on July 24, 1979, by Summy, revealed that Persinger was not complying. The letter stated that continued neglect of duties will result in further action up to and including dismissal. (FOOTNOTE 4)

12. On the same day, July 25, 1979, Lilly investigated Persinger's safety complaint regarding the air cleaners at Ash Grove's plant. After a discussion of the problem, with management, it was agreed that Persinger would not clean the air cleaners on the loader unless another miner was present to help him. No citation was issued to Ash Grove as a result of this complaint.

13. On August 7, 1979, Persinger filed a complaint of discrimination against Ash Grove with MSHA alleging that since the inspection of July 9, 1979, he had been harassed by supervisors, assigned additional work, and sent a letter threatening dismissal. (FOOTNOTE 5)

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14. On August 23, 1979, Persinger filed a grievance through the union with Ash Grove alleging that the extra duties involved in cleaning the coal silos and the loader changed his job description. (FOOTNOTE 6) A denial of this grievance was not appealed by the union.

15. Since the filing of the complaint of discrimination, Persinger has continued to work for Ash Grove in the same job and pay bracket and has been considered by his supervisors as doing a satisfactory job of housekeeping in his work area.

16. Persinger is the only miner employed by Ash Grove in the job position of loader operator and laborer in the coal silo area.

#### ISSUE

Did Ash Grove discriminate against Persinger in violation of section 105(c)(1) of the Act, while Persinger was engaged in a protected activity?

#### DISCUSSION

In its decision of Secretary of Labor on behalf of David Pasula v. Consolidated Coal Company, 2 FMSHRC 2786, (October 14, 1980), Rev'd on other grounds, No. 80-2600 (3d Cir. October 30, 1981), the Federal Mine Safety and Health Review Commission set forth tests for determining whether or not a miner had been discriminated against. The Commission ruled that to establish a prima facie case for a violation of section 105(c)(1) of the Act, a complainant must show by a preponderance of the evidence that (1) the had engaged in a protected activity, and (2) that the adverse action taken against him was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone.

The first element of a prima facie case is a showing that protected activity occurred. The evidence in this case shows that Persinger, as a miner's representative, during a walkaround inspection on July 9, 1979, pointed out to MSHA inspectors various conditions which were health and safety violations and resulted in citations being issued to Ash Grove. Further, Persinger on July 20, 1979, filed a safety complaint with MSHA

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regarding a requirement by Ash Grove, that he clean air cleaners on his loader every night he used the machine. There is no question that these activities and complaints regarding health and safety amount to protected activity. Section 105(c)(1) in its relevant parts protects the miner or miner's representative who has "filed or made a complaint under or relating to this Act . . . of an alleged danger or safety or health violation . . . ." It is concluded that the first element of the requirement to establish discrimination is established.

The second element of a prima facie case is a showing that adverse action was motivated in any part by protected activity. Persinger, in his complaint of discrimination, alleged that as a result of his protected activity, he was harrassed by his supervisor, assigned additional work which he was accused of not completing, and subsequently received a letter from a supervisor threatening possible dismissal.

A review of the evidence of record shows a lack of direct evidence to show that the actions on the part of Ash Grove were motivated by the complaints of Persinger about health and safety violations. The Commission in its decision in Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, (November 13, 1981), stated as follows:

Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. As the Eighth Circuit, for example, has analogously stated with regard to discrimination cases arising under the National Labor Relations Act:

It would indeed be the unusual case in which the link between the discharge and (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the (NLRB) is free to draw any reasonable inferences. NLRB v. Melrose Processing Co, 351 F. 2d 693, 698 (8th Cir. 1965).

The Commission in Phelps Dodge, supra, in dealing with indirect evidence suggested four criteria to be utilized in analyzing the operator's motivation with regard to an adverse personnel action:

1. Knowledge of the protected activity;
2. Hostility toward protected activity;
3. Coincidence in time between the protected activity and the adverse action; and
4. Disparate treatment of (the complainant).

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Persinger in his complaint of discrimination dated August 7, 1979 alleged that he had worked for Ash Grove since 1956 and had always received compliments on his work and never had an adverse comment placed in his employment file until July 1979. However, since the inspection conducted at the plant on July 9, 1979, in which he participated, he had been harassed by his supervisors and sent a letter threatening dismissal. He stated that he believed this harassment was a result of his pointing out safety violations to the inspectors. (FOOTNOTE 7) A reasonable inference can be drawn from the evidence in this case that Ash Grove's management were aware of Persinger's activities as a miner's representative during the walk-around inspection which took place on July 9, 1979. Several of the citations that were issued involved safety violations in the coal silo area where Persinger was the only employee such as those involving the steel grates, the fire that was allowed to burn itself out, and the accumulations of coal and dust in the area. Further, it is apparent that a reasonable inference could be drawn that there was a coincidence in time between the date of the inspection and the assignment of additional duties to Persinger for clean-up in his area. These activities complained of all occurred within a three week period of time following the inspection.

However, the primary issue here is whether or not the activities complained of by Persinger amounted to adverse action motivated in any part by the protected activity. The evidence supports Ash Grove's contention that actions taken by them in ordering additional clean-up duties on the part of Persinger was motivated by the requirements of the citations issued by MSHA during the inspection conducted from July 9 through 12, 1979 and not as a result of Persinger's involvement therein as a miner's representative.

Henry Mueller, ACL kiln foreman and Persinger's direct supervisor since 1977, testified that prior to July 1979, he had discussed with Persinger that he needed to put more effort into clean-up in the coal silo area. Mueller stated that after the inspection, he had assigned miners from the day crew to do the initial heavy cleaning in the coal silo area required by the citations. On July 19, 1979, Mueller told Persinger that the area had received a good clean-up and was in "pretty good shape and that we would like to keep it that way."

On the next day, July 20, 1979, Persinger talked to Mueller and stated he was having trouble doing his regular work and the clean-up too. Mueller testified that he suggested to Persinger that he quit dumping coal earlier so he could do the clean-up that was required. On July 24, 1979, Persinger went to Mueller's office and stated that he was unhappy about the additional clean-up duties assigned to him and maintained that he was a



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loader operator and should not be responsible for the clean-up in the coal silo area. Mueller testified that he told Persinger that clean-up was part of his job classification as it was with all jobs at Ash Grove.

Summy testified that he was a party to the conversation with Persinger and Mueller on July 24, 1979 and told Persinger that he was expected to do more clean-up in his area. Summy also testified that on the next day, July 25, 1979, he inspected the coal silo area after Persinger completed his shift and did not feel Persinger had spent any time on his clean-up. As a result of this observation, Summy sent Persinger the letter dated July 25, 1979 indicating Persinger had previously been warned about the lack of clean-up on two previous occasions and specifying items that needed immediate attention. Summy also stated in the letter that "continued neglect would result in further disciplinary action up to and including dismissal." Mueller testified that after July 25, 1979, Persinger has done the clean-up and has also kept the silos full.

I find that the most credible evidence supports Ash Grove's contention that Persinger was not discriminated against. There is no evidence of disparate treatment of Persinger as the testimony of record indicated that housekeeping and clean-up was the responsibility of all employees at Ash Grove. Persinger was not discharged from his job, transferred, nor did he suffer a reduction in pay. The evidence shows that prior to the inspection on July 9, 1979, Persinger was required to do some clean-up. The fact that the duties were expanded considerably can logically be attributed to the increased housekeeping requirements placed on Ash Grove by the MSHA inspectors rather than any adverse treatment by Ash Grove's management of Persinger. The evidence does not show that Ash Grove ever complained that Persinger did not keep the silos full of coal or do his other assigned tasks.

Persinger has also alleged that the safety complaint filed on July 20, 1979 with MSHA over cleaning the air cleaners on the loader was an additional aggravation to Ash Grove. (FOOTNOTE 8) This may be true, however, Ash Grove was not aware of the complaint until it was brought to their attention by inspector Lilly on July 25, 1979 which is after the alleged harassment over the clean-up duties described above. There is no evidence of record that Summy knew of this complaint prior to his writing the letter dated July 25, 1979. There does not appear to be a nexus between this complaint and the alleged harassment over the clean-up duties.

Persinger did testify that since the events described above, other employees use his loader to move clinkers and leave it dirty so that he has to clean the machine before and after he uses it. Also, he has on several occasions had to go to the office to straighten out his pay checks and has difficulty in getting drinking water on his job site. These complaints fall short of establishing a complaint of discrimination for there is no showing of a disparate treatment on his part from that of

other employees at the plant.



to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

~FOOTNOTE\_TWO

2 Exhibit P-1.

~FOOTNOTE\_THREE

3 Exhibit P-3.

~FOOTNOTE\_FOUR

4 Exhibit P-4.

~FOOTNOTE\_FIVE

5 Exhibit R-5.

~FOOTNOTE\_SIX

6 Exhibit R-7.

~FOOTNOTE\_SEVEN

7 Exhibit P-5.

~FOOTNOTE\_EIGHT

8 Secretary's Brief p. 2.

~FOOTNOTE\_NINE

9 Title II - Equal Access to Justice Act.