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LYNN DONOVAN V. BROWN & ROOT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LYNN DONOVAN,
COMPLAINANT

Complaint of Discharge, Discrimination
and Interference

v.

Docket No. WEST 82-92-DM

BROWN & ROOT, INC.,
RESPONDENT

Tenneco Soda Ash Project

DECISION

Appearances: Lynn Donovan, Denver, Colorado, pro se
Peter R. McLain, Esq., Houston, Texas,
for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant with the Commission on January 22, 1982. His complaint is dated January 19, 1982, and states as follows:

There is reason to believe that there was discrimination. And the uses of drugs on the job. I know for a fact the drug user's are still on the job. There for I am asking the commission for an appeal.

Mr. Donovan's complaint of discrimination was investigated by MSHA, and by letter dated June 26, 1981, MSHA advised Mr. Donovan that its investigation did not substantiate his charges of discrimination, and that a violation of section 105(c) of the Act did not occur. The record also reflects that due to a change of address and residence by Mr. Donovan, he did not receive actual notice of MSHA's determination until January 4, 1982. Mr. Donovan then retained counsel, and in an amended complaint filed March 15, 1982, counsel itemized the specific alleged facts of discrimination against Mr. Donovan.

In his amended complaint, Mr. Donovan asserted that in January 1981, while he was in the employ of the respondent, a contractor performing construction work with Tenneco Oil Company, Green River, Wyoming, constructing a mine and mill at Tenneco's Soda Ash Project, he was required to work on and around trucks hauling diesel fuel and gasoline at the project site. In summary, the amended complaint states that while employed with the respondent, Mr. Donovan made several complaints to respondent's management, as follows:

-- the trucks in question were not maintained in a safe condition in that they leaked quantities of fuel, and Mr. Donovan believed in good faith that such leaks constituted a danger or threat to his safety and the safety of other miners because of the possibility of fire or explosion started by sparks from cigarettes or other equipment, such as welders.

-- during the time Mr. Donovan was employed by the respondent, the person who normally drove the truck on which he (Donovan) worked, a man known to him as "Dave", and the leadman, known as "Doc", smoked marijuana in one of the trucks used on the job, often during their lunch time.

-- Mr. Donovan believed that the smoking of marijuana on the job constituted a danger to himself and others, in that the judgment and ability to react of those persons smoking would be impaired. Mr. Donovan also asserted that those persons drove trucks and operated other equipment which he believed, if done under the influence of marijuana, could result in accidents threatening the safety of himself and others on the site. He was afraid for his safety while the truck was being operated by someone smoking marijuana, or who had been smoking marijuana on the job.

In regard to his complaints concerning the alleged leaky fuel trucks, Mr. Donovan asserts that when he made his complaints known to the leadman "Doc", and to a foreman, Joe Erger, they were "hostile" and told him "don't worry about it, just get back in the truck and go back to work", or words to that effect. Further, Mr. Donovan asserted that rather than repairing the condition resulting in the unsafe leaking of fuel from the trucks, the respondent allowed the condition to continue, and he asserted that on at least one occasion he heard Joe Erger order "Doc" to "hide your trucks" from MSHA inspectors who "Doc" believed were coming for an inspection. Mr. Donovan claims the trucks were then driven off so that they could not be inspected.

With regard to his marijuana smoking allegations, Mr. Donovan asserted that he complained about this to his immediate superior, leadman "Doc", and that "Doc" did not attempt to cease and prevent the smoking of

marijuana. Rather than taking corrective action, Mr. Donovan stated that "Doc" responded to his complaints by increasing his hostility toward him by undertaking an effort to discredit him with his supervisor, Joe Erger. In support of this claim, Mr. Donovan asserted that "Doc" followed him around the job unjustifiably, complaining about his work performance to the supervisor, Joe Erger, and calling him derogatory names and starting arguments with him. Mr. Donovan claims that these actions by "Doc" were motivated in large part by his complaints about the unsafe condition of the trucks and the smoking of marijuana.

Mr. Donovan complained that the conduct of "Doc" and Joe Erger was intended to intimidate him and to prevent him from taking his complaints to any other person, to discredit him in the eyes of those to whom he might complain, and to make his working conditions so difficult that he would not be able to continue in his job. Mr. Donovan also asserted that in addition to the alleged harrassment, his wages were reduced by \$2.50 per hour, even though his duties remained the same, and that this reduction in wages was part of the discrimination against him for his complaints about safety.

Mr. Donovan stated that several days before the termination of his employment with the respondent, the harrassment became so severe that he went to Dave Warhol respondent's personnel officer, to request a meeting with John Murray, respondent's equipment superintendent and immediate supervisor of Joe Erger. Mr. Donovan claims that a meeting was arranged for the following Monday, but when he returned to work that day, Mr. Erger told him that he would not be permitted to meet with Mr. Murray, and that Joe Erger told him that he (Erger) would just as soon see him "drag up" or quit. Since he believed he was prevented from meeting with Mr. Murray, and since he believed that the unsafe conditions would continue unabated, Mr. Donovan claims that he was afraid that taking his complaints elsewhere would present a danger to himself, and he therefore left his job on or about March 17, 1981. Mr. Donovan stated further that he subsequently filed a written complaint regarding his alleged discrimination with MSHA's Green River field office on March 25, 1981.

Respondent filed an Answer to the complaint on April 6, 1982, denying Mr. Donovan's allegations of discrimination. Respondent maintained that Mr. Donovan voluntarily terminated his employment on March 19, 1981. Further, respondent asserted that in his original complaint filed with MSHA on March 25, 1981, the only colorable allegation of protected activity was Mr. Donovan's assertion that "during my employment I complained of safety violations and dangerous practices", and that after an extensive investigation by MSHA, it decided that Mr. Donovan had not been discriminated against in violation of the Act. Further, respondent asserted in its Answer that Mr. Donovan chose to renew his complaint with the Commission after respondent refused to comply with an alleged extortion demand by Mr. Donovan requesting \$5 million in exchange for the destruction of certain tapes allegedly in Mr. Donovan's possession showing respondent's

employees using controlled substances and other narcotics during their course of employment.

By Order issued by me on May 24, 1982, I denied the respondent's motion for summary decision for failure by Mr. Donovan to state a cause of action, and I also denied respondent's motion to dismiss the complaint as untimely filed. I also denied the respondent's motion to strike an affidavit filed by the respondent in support of its alleged claim of extortion, and the parties were directed to finalize any discovery so that the matter could be scheduled for a hearing on the merits at a site convenient to all parties.

On September 7, 1982, I granted Mr. Donovan's counsel's motion to withdraw as his representative in this case, and Mr. Donovan was advised that he could retain new counsel or proceed with his case pro se. At the conclusion of discovery, and after the issuance of certain subpoenas requested by the parties, a hearing was held in Green River, Wyoming, during the term October 20-21, 1982. Respondent appeared with counsel, and Mr. Donovan appeared pro se, and the parties participated fully in the hearing, and they both filed post-hearing arguments which I have considered in the course of this decision.

Issue

The crucial issue presented in this case is whether or not Mr. Donovan's claims of harrassment and intimidation on the job by mine management because of his safety complaints, including his claim that his wages were reduced because of these complaints, all of which he claims resulted in his leaving his job, constituted a "constructive discharge" and illegal discrimination under the Act. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 7-11):

Mr. Donovan was employed by the respondent from January 28, 1981, to March 17, 1981. Respondent during this time was performing contractual work at the Tenneco Soda Ash Project, a mining operation owned and operated by Tenneco Corporation, and the product being mined was trona.

Mr. Joe Erger, Mr. John Murray, and Mr. Dave Warhol, were during all times relevant to the complaint in this case supervisory or managerial

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employees of respondent at the mine construction site in question. These individuals had the authority to hire, fire, to recommend such action, and were otherwise authorized to direct the work force and discipline employees.

The individual identified as "Doc" in Mr. Donovan's complaint is in fact one James Kauss. However, the parties could not agree whether Mr. Kauss was in fact a "leadman", or supervisor or manager.

Mr. Donovan had a meeting with Mr. Warhol at his office in Green River. However, the date of the meeting is in dispute. Respondent believes that meeting took place on or about March 6, 1981, and Mr. Donovan believes the meeting was later.

Mr. Donovan's employment with the respondent ceased on March 17, 1981. However, respondent believes that Mr. Donovan voluntarily quit his job on that date, and Mr. Donovan does not consider it a voluntary quit.

Service of subpoena

The local sheriff's department was unable to effect service on three potential witnesses sought by Mr. Donovan. Mr. Donovan identified them as Duane Baker, Floyd Chacon, and Delmer Fiscus, and he stated that they were former oilers and co-workers who worked at the construction project in question. Mr. Baker's whereabouts were unknown, Mr. Chacon was purported to be residing in Granger, Wyoming, and Mr. Fiscus was purported to be "in the Pinedale area looking for work". In view of the unavailability of these witnesses, I requested Mr. Donovan to make a proffer as to what they would testify to so as to enable me to make a judgment and ruling as to whether their absence would be prejudicial or critical to Mr. Donovan's case.

Mr. Donovan stated that Mr. Baker would testify as to the use of drugs at the construction site and would confirm his efforts to arrange a meeting between Mr. Donovan and the former project equipment superintendent John Murray. Mr. Murray was not subpoenaed, but is reportedly working for the respondent in Springerville, Arizona (Tr. 8). Mr. Donovan stated that Mr. Chacon could testify to the use of drugs by leadman "Doc" on the job, and "maybe some safety conditions" (Tr. 9). As for Mr. Fiscus, Mr. Donovan stated that he could testify as to the use of drugs by "Doc" (Tr. 10).

After consideration of this matter, I concluded and ruled that the absence of these witnesses were not critical to Mr. Donovan's discrimination complaint. Aside from the fact that efforts to locate them and to serve them with the subpoenas were not successful, I ruled that the question of the alleged smoking of marijuana on the job site is one that was raised by Mr. Donovan, and even if it were an established fact, the question of discrimination and retaliation against Mr. Donovan by mine management personnel for these complaints would be the crucial question for decision. As for the efforts by Mr. Baker to

arrange a meeting, Mr. Donovan testified

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that these efforts came after his employment terminated, and Mr. Donovan testified that during the week after he left his job, and before filing his complaint with MSHA, he made several attempts to call Mr. Erger, but was unable to reach him. He did not know why he did not go to the mine to try and see him, but indicated that a friend, Duane Baker, tried to set up a meeting with Mr. Murray but could not arrange it. After that Mr. Donovan "forgot about it", and filed his complaint with MSHA (Tr. 141).

During the course of the hearing in this matter, MSHA's Denver Regional Solicitor's Office, through attorney James Barkley, made a limited appearance at the hearing to file an objection to a subpoena which had been served on the inspector who investigated Mr. Donovan's discrimination complaint. The subpoena was served on him by respondent's counsel, and MSHA's opposition stemmed from the fact that the subpoena had been served the day before the hearing, and MSHA's counsel indicated that MSHA had no opportunity to review the investigative files and other material sought by the subpoena. After further bench discussion, and in view of the fact that Mr. Donovan had in his possession a copy of MSHA's investigative report, respondent's counsel agreed to release the inspector from the subpoena, and the parties agreed that the inspector, Jerry Thompson, had no personal knowledge concerning Mr. Donovan's complaint, but that three pages from his report could be admitted as part of the record in this case. Further, Mr. Thompson confirmed that he issued no citations to the respondent during his inspections at the mine. In short, he confirmed that he issued no citations for any leaky fuel trucks, or for employees smoking marijuana (Tr. 47-56).

Complainant's testimony and evidence

Mr. Donovan testified that three weeks before the termination of his employment he complained to leadman "Doc", Mr. Erger, and his fellow co-worker Dave Barnhouse about the leaky fuel truck condition. Although Mr. Erger did temporarily repair the truck on one occasion, the problems persisted and Mr. Erger's response to Mr. Donovan was for him "not to worry about it, just get back to work". Mr. Donovan also stated that he complained to Dave Barnhouse and to "Doc" about their smoking marijuana in the trucks while on the job, and that he let them know that this was not safe. The complaints were oral, and were made two weeks before his employment ended. He also indicated that "Doc" and Mr. Barnhouse advised him that it didn't matter because they smoked marijuana on their lunch hour (Tr. 13-15). He did not complain to Mr. Erger about the asserted marijuana smoking because he did not know who else may have been involved and was afraid that "I might get hurt" (Tr. 16).

Mr. Donovan confirmed that he and Mr. Barnhouse were both classified as "oilers" and were expected to do the same work, but that because of a "lazy eye" condition, Mr. Donovan was not permitted to drive the fuel truck, and Mr. Barnhouse did the driving. On one occasion, Mr. Barnhouse nearly backed over him while driving the truck under the influence of marijuana, and Mr.

Donovan stated that he had to signal him three times to stop the truck (Tr. 18).

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Mr. Donovan described his duties as an oiler and he believed that "Doc" was in some supervisory position because he went around "checking on all of our work and to tell us certain things that needed to be done" (Tr. 18). Mr. Donovan confirmed that the extent of his safety complaints had to do with the leaky fuel trucks and the smoking of marijuana on the job by "Doc" and Mr. Barnhouse, and that these activities took place during the time he worked on the day shift. Mr. Donovan stated that after he made a mistake and put some gas in a diesel truck, and also put a half quart of oil too much in a welding machine, Mr. Erger informed him that he was going to cut his pay by \$2.57 an hour. At that time, Mr. Donovan was making \$10.57 an hour, and he confirmed that at the time his employment ended, he was making the same wage and that Mr. Erger had not cut his pay as of that date (Tr. 20-23).

Mr. Donovan confirmed that he had been "written up" by respondent's safety department for refueling some welding machines while welders were working nearby, and he also confirmed that he did not bring any of his safety complaints to the attention of MSHA because he "didn't know they existed". He also related an incident where he claims that Mr. Erger instructed Mr. Barnhouse to hide some leaky fuel trucks from some MSHA inspectors who were on the property, and that Mr. Barnhouse took the trucks out of service and parked them. Mr. Donovan confirmed that the inspectors did not inspect the trucks, and he also confirmed that he did not tell the inspectors about the leaky condition of the trucks (Tr. 24-37).

Mr. Donovan admitted that he had smoked marijuana "a time or two" in the past, but denied that he ever did so while on the job (Tr. 37-38). He knew that Mr. Barnhouse smoked marijuana on the job, because he observed him "light up" while actually driving the truck and his "responses or reflexes were real slow", and on at least two occasions when he signaled Mr. Barnhouse to stop the truck "he kept on coming", and he had to fall out of his way. He again discussed the matter with Mr. Barnhouse, but did not complain to Mr. Erger or to respondent's management about the marijuana smoking. However, he did say that he visited the office of respondent's personnel manager, Mr. Warhol, in Green River, but simply advised him that there were "safety problems on the job". Mr. Warhol advised him to consult the safety department, and also suggested that he take a couple of days off. Mr. Donovan indicated that Mr. Warhol had arranged a further meeting for him to discuss the matter with management, but that when he returned to work, Mr. Erger stated to him that there would be no meeting, and that Mr. Erger also stated to him that as far as he was concerned he didn't care if Mr. Donovan worked there anymore (Tr. 41).

Mr. Donovan stated that after the abortive meeting with Mr. Warhol, Mr. Erger and "Doc" "teamed up to get rid of him" (Tr. 41). He indicated that "Doc" would follow him around the job site, checking on his every move, and that Mr. Erger threatened to cut his pay. He also indicated that "Doc" worked for Mr. Erger, but he conceded that "Doc" had no office at

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the site (Tr. 60). He stated further that he complained to Mr. Erger about "Doc's" treatment, and that Mr. Erger stated that "he didn't care" (Tr. 61). Mr. Donovan believed that "Doc's" treatment of him stemmed from his complaints about his smoking marijuana, and Mr. Donovan stated that "Doc" was employed by the respondent, but he did not know if he was still employed with them (Tr. 61). When asked to explain the circumstances of his departure from his employment with the respondent, Mr. Donovan stated as follows (Tr. 62-64):

Q. March 17, 1981. What prompted you to leave work, not to go back? Just tell me in your words whether or not you believe -- Just tell me how it came to pass that your employment was terminated there.

A. Well, when they refused the safety meeting with me on a Monday, at that point the harrassment kept on and I think it was on a Wednesday I quit. I just felt like they weren't going to help me with any of my complaints so I left on a Wednesday, I believe.

Q. Now Wednesday -- March 17 according to my calendar would have been a Tuesday.

A. It could have been Tuesday.

Q. So it could have been either Tuesday or Wednesday, the 17th. Did you give the company any notice or did you tell anyone you were leaving?

A. Well, after he told me he was cutting my wages I decided there wasn't -- There was nothing more I could do there so I just quit. I told the time office people -- They asked me why I was quitting, what my reason was for quitting and I told them I was under a lot of harrassment. They didn't give me no layoff slip or nothing. I didn't get no kind of a layoff slip.

Q. Were you paid for the services that you performed out there up to the time you quit?

A. No, I had to come back and get my check.

Q. But you were eventually compensated?

A. Yes.

Q. Did anything transpire when you went back? Did you make any attempts to go back or did you contact anyone from the company?

A. A friend of mine, Mr. Baker, which was working out there, he tried to line up a meeting with Mr. Murray and by the time he had that lined up I had already went to MSHA. So Mr. Murray was willing to talk to me about it after so many days had went by.

Q. What made you decide to go to MSHA after you left the job?

A. Well, I figured MSHA was a safety program for the people and if I let this thing go that more people who were involved with the drugs on the job and more people would be exposed to either getting hurt or getting killed on the job so I decided I wouldn't let this go, that it would be taken care of.

Q. How did the fact that MSHA was in existence, or was available to you, come to your attention? Did someone tell you they were available or how did you come to file a complaint with them?

A. I don't really remember for sure how I did that.

Mr. Donovan stated that a month or so after he left employment with the respondent after he filed his discrimination complaint with MSHA, he was told "by some friends" that "dozens of people were either fired or run off their job for using drugs" (Tr. 66). When asked why he had simply not refused to work around any hazardous fuel trucks, he responded "I was kind of paranoid. I didn't want to get in any trouble. I wanted to keep my job. I just tried to live with the conditions as long as I could" (Tr. 70). He also confirmed again that the only time he complained to MSHA was "after I had quit. Then I later found out that I could do something about it, I could go to MSHA and they would do something about it. This was after I quit" (Tr. 71).

On cross-examination, Mr. Donovan reviewed his prior employments with other mine operators and construction companies, and confirmed that for the exception of the issuance of safety glasses and boots by the respondent, he received no safety training and that there were no safety meetings during the day shifts which he worked on. However, he did confirm that safety meetings were held while he was on the night shift (Tr. 75). He also confirmed that he worked on the night shift for two or three weeks before being switched to the day shift, and denied that his work was ever questioned (Tr. 78). He also denied that the night shift came to an end because the men on that shift were drinking and did not do their work (Tr. 80).

Mr. Donovan confirmed that he complained to Mr. Erger about the leaky fuel trucks on two or three occasions (Tr. 83), but he could not recall whether he had first complained to "Doc" and Mr. Barnhouse about their

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smoking marijuana (Tr. 84). He conceded that he didn't complain to Mr. Erger at first about the leaky truck when he first noticed it, but did so after the leak "began gushing" (Tr. 84). He also confirmed that he did not complain to any mechanics about the leaky truck when he first noticed it (Tr. 86). He explained that the leaks came directly from the pump on the truck as well as the hose nozzle, but that he personally never attempted to fix the leaks (Tr. 87). He later stated that he did not have the proper tools to fix any leaks (Tr. 88). He also confirmed that he brought the leaky truck condition to the attention of "Doc", and when he failed to do anything about it, he complained to Mr. Erger (Tr. 91). The first time he complained to Mr. Erger, the truck was tagged out by respondent's safety personnel, and Mr. Erger had it fixed, and that Mr. Erger told him not to worry about it and that he would have it fixed (Tr. 92-93). Mr. Donovan also indicated that one of his co-workers Keith, whose last name he does not recall, also complained to Mr. Erger about the leaky truck (Tr. 95).

Mr. Donovan indicated that "it was probably common knowledge throughout many, many people on the job" that miners were smoking marijuana, and that other oilers commented to him when he was getting off work that "they were going out to smoke a joint" (Tr. 100), and that this was still during working hours (Tr. 101). Although Mr. Donovan claims he was concerned about the safety aspect of this marijuana smoking, he said the other workers with whom he discussed the matter "didn't care" (Tr. 102). He confirmed that he did not bring this to the attention of Mr. Erger or to respondent's management because "he was scared", and he confirmed that he did not notify any of respondent's safety personnel about the marijuana smoking (Tr. 105).

Mr. Donovan stated that after the incidents where he put gas in a diesel truck and over-filled a welder with oil, "Doc" began harrassing him over these incidents and that he (Donovan) "blew up at him", and the two exchanged words. At that point, Mr. Donovan left the job site to seek out Mr. Warhol. Before leaving, he told Mr. Erger that he was upset over "Doc" harrassing him and told Mr. Erger that he was going to see Mr. Warhol. When he met with Mr. Warhol, he simply told him about "safety problems on the job", but told him nothing specific, and he told him nothing about the leaky trucks or marijuana smoking. Mr. Warhol informed him that while safety problems were not his concern, he would arrange a meeting with superintendent Murray, Mr. Erger's superior (Tr. 114-124).

Mr. Donovan stated that after his employment ceased and when he went back to pick up his final pay check, he was asked to sign a paper, and he identified it as exhibit R-1. He indicated that he did not remember telling anyone why he quit his job when he returned to get his check (Tr. 129). He could not recall receiving a copy of the paper which he signed (Tr. 131).

Mr. Donovan denied ever making video tapes of anyone smoking marijuana on the job, and he denied ever calling any official employed by the respondent to inform them that he had such tapes. He also denied ever calling any management official threatening to "go public" with the tapes unless he was paid five million dollars or given his job back (Tr. 133-135).

Mr. Donovan testified that he never heard "Doc" or Dave Barnhouse tell Mr. Erger about his safety complaints, and Mr. Erger never told him that "Doc" or Mr. Barnhouse had informed him about these complaints (Tr. 136). Mr. Donovan also conceded that Mr. Erger told him he intended to cut his wages because of the fueling mistakes which he had made, and that he did not directly state that he was cutting his wages because of his safety complaints (Tr. 138). He confirmed that his visit to Mr. Warhol's office was his last attempt prior to quitting that he made to communicate his safety concerns to respondent's management personnel (Tr. 143-144). He also confirmed that "Doc" never told him that he was "harrassing him" because of any complaints concerning the leaky fuel truck or the marijuana smoking (Tr. 145).

During further testimony at the hearing, Mr. Donovan stated that the last day he worked he was informed that his pay would be cut and that he "was just so discouraged I didn't want to stay any longer" (Tr. 137). He stated further that at the time he picked up his last pay check, he did not call Mr. Erger or Mr. Warhol to advise them that he was quitting his job. He identified a copy of the "termination paper", exhibit R-1, stated that the signature which appears thereon "looked like his signature", but he could not recall receiving a copy of the document at the time he visited the site trailer office to pick up his check and "sign out". He also stated that when he picked up his check he told the time clerk that he was leaving his job because he was being harrassed by "Doc" and had an agrument with him (Tr. 77, 79, 84-85). Mr. Donovan also identified exhibit R-8, as his final pay check in the amount of \$167.74 (Tr. 90).

Mr. Donovan stated that after he returned to work on Monday, March 9, he asked Mr. Erger about the meeting with Mr. Murray. "Doc" was present at that time, and Mr. Erger "implied or told" Mr. Donovan that there would be no meeting and that Mr. Donovan and "Doc" were to "work this out between us" (Tr. 143). Mr. Donovan stated further that he did not at that time tell Mr. Erger about the smoking of marijuana, but simply told him that "there were problems" which needed to be discussed (Tr. 146). Mr. Donovan confirmed that he never saw Mr. Erger smoke marijuana, and that he never saw Mr. Erger observe anyone else smoke marijuana and do nothing about it (Tr. 147). Mr. Donovan summed up his desire to meet with Mr. Murray as follows (Tr. 148-149):

MR. DONOVAN: I wanted everybody to be there when I exposed all this, and then there was no meeting. I had figured that all this could be exposed that morning in which I was planning on doing that, but there was no meeting at all.

THE COURT: Okay. What if Mr. Murray had been there and you told him all about this?

MR. DONOVAN: I would think the problem would have been corrected.

THE COURT: What kind of corrective action would have been taken?

MR. DONOVAN: I would imagine he would have investigated all these problems.

THE COURT: Okay.

MR. DONOVAN: And the man was a very intelligent man in my estimation, I believe he would have brought some justice to these problems.

THE COURT: And that wouldn't have given you any cause to leave the site, you still would have sat there and worked?

MR. DONOVAN: Yes.

THE COURT: And what if Mr. Erger said that's fine, but you're still going to be making \$7.85 an hour because we don't think you're cutting the mustard. Then what could have happened?

MR. DONOVAN: Well, I'd have a choice to stay or leave.

THE COURT: But you don't think you'd have a discrimination complaint?

MR. DONOVAN: Well, it would be much lesser without this.

THE COURT: So, you're saying now, you're suggesting that the fact that you weren't given an opportunity to talk to somebody higher up in the hierarchy of Brown & Root to tell them about these problems so corrective action would be taken, that that is what caused you to just leave the mine site?

MR. DONOVAN: That and the harrassment I was going through with the foreman.

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David A. Barnhouse, confirmed that he presently works for Tenneco Corporation, but that he did work as an oiler for the respondent and was Mr. Donovan's co-worker. He denied that "Doc" ever told him or Mr. Donovan to "hide the trucks" from any MSHA inspectors, and stated that he was told to check the trucks and "watch what you're doing" (Tr. 160). He confirmed that their fuel truck leaked "small amounts of fuel on and off", but he could not recall the truck ever being "tagged out" for any safety reasons (Tr. 162), but did recall that it was cited one day because the parking emergency braked slipped and would not hold the truck (Tr. 163).

Mr. Barnhouse denied that "Doc" ever claimed that he and Mr. Donovan were written up for driving a truck into an area where welding was going on, and he denied that he witnessed any arguments between Mr. Donovan and "Doc" (Tr. 164). Mr. Barnhouse denied that he and "Doc" ever smoked marijuana on the job, and he also denied that on occasion, he smoked marijuana with Mr. Donovan in the truck (Tr. 165).

When asked if he knew what this case was all about, Mr. Barnhouse replied as follows at Tr. 166:

THE WITNESS: All I know is he's wanting money off Brown & Root for quitting the job. That's about all I know about these proceedings.

Mr. Barnhouse also confirmed that Mr. Donovan subpoenaed him to appear at the hearing, and that he has not seen nor spoken with Mr. Donovan prior to the hearing and since he left his job (Tr. 167). He denied any "harrassment" of Mr. Donovan by "Doc", and stated that "Doc" "Just tried to get the job done is all I can say" (Tr. 168). Mr. Barnhouse confirmed that "Doc" was always around the job site checking their work, indicated "that was his job" (Tr. 168), but denied that "Doc" constantly followed them around (Tr. 169).

Mr. Barnhouse recalled the incident concerning Mr. Donovan's putting gas into a diesel truck, and confirmed that Mr. Donovan himself told Mr. Erger about the incident (Tr. 169). Mr. Barnhouse also confirmed that there were occasions when he complained about leaky fuel on the truck due to excessive fuel from the pump, but that the conditions were always fixed (Tr. 171). He confirmed that he had rumors about some people leaving the job because of using drugs, but denied any personal knowledge of any of the details (Tr. 171).

Mr. Barnhouse recalled one day when Mr. Donovan left the job "in a very upset manner", but could recall none of the details (Tr. 172). He conceded that during the time he worked with Mr. Donovan he considered him to be "an honest person" (Tr. 174).

On cross-examination, Mr. Barnhouse confirmed that he went to work at the site in question in February of 1980 or 1981, and started working with Mr. Donovan a month or two later (Tr. 175). During the time he

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worked with Mr. Donovan, there were complaints about his work in that he was "lax in the way he done things. He didn't wash things quite the way it should be done. Sometimes it was hard to explain to him some things like the difference between diesel welders and gas welders and so on" (Tr. 177). Mr. Barnhouse denied speaking with any MSHA officials after Mr. Donovan left the respondent's employ (Tr. 177).

Mr. Barnhouse indicated that when he was employed by the respondent he attended safety orientation classes while on the job, and that safety meetings were held every two weeks and that the leadman met with the crew once a month. He never heard anyone complain about marijuana smoking during any of these safety meetings (Tr. 179-180), and he stated that he never observed "Doc" smoke marijuana on the work site (Tr. 180). He confirmed that Mr. Donovan did complain about the leaky fuel trucks during safety discussions, and that these complaints were about certain pumps on the trucks. However, the pumps were taken off and fixed and he was never required to use a truck with a defective pump (Tr. 182). He also confirmed that he was never directed to fuel any welding machines while welders were working above them, and that had this been the case he would have refused to work (Tr. 183).

Respondent's testimony and evidence

David Warhol, respondents group personnel manager, Houston, Texas, confirmed that he was respondent's personnel manager for the Tenneco Soda Ash Project at the time of Mr. Donovan's employment. He explained the procedure for hiring for the project, and explained the employee orientation program (Tr. 49-56).

Mr. Warhol stated that there are "lead men" for each basic craft, and while the lead man is also a worker, he has the responsibility for insuring the quality of the work being performed. However, the leadman has no authority to hire, fire, or to independently give an employee time off (Tr. 57, 58). He does not have the authority to increase or decrease an employee's wages (Tr. 59). However, a leadman could direct the work of other employees as long as it has been previously outlined by the foreman, and in effect would be carrying out the foreman's orders (Tr. 61).

Mr. Warhol stated that the respondent had an "open door" policy at the construction project in question insofar as employee complaints or grievances were concerned, and employees were advised of the policy and procedures when they were hired and notices to this effect were posted on employee bulletin boards (Tr. 62).

Mr. Warhol confirmed that he first met Mr. Donovan when he applied for a job at the construction project. He was recommended by project superintendent John Murray, and he was hired as an oiler. Since Mr. Donovan had an eye problem, it took the project manager's approval to hire him (Tr. 63).

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Mr. Warhol testified that on Friday, March 6, 1981, sometime after lunch, Mr. Donovan came to his office and stated that he had an argument with James Kauss, who was also known as "Doc". The meeting was brief, and Mr. Donovan informed him that he and Mr. Kauss had called him an S.O.B. Mr. Donovan indicated that "he just wanted to get away from it and so he left". He was concerned that he didn't lose his job for walking off the project (Tr. 65).

Mr. Warhol stated that after speaking with Mr. Donovan, he called Mr. Murray, and rather than terminating Mr. Donovan, Mr. Murray indicated that they would meet with him on the following Monday "to work this thing out". Mr. Warhol then advised Mr. Donovan to "get away from it for the weekend, calm down, and go back Monday morning." Mr. Murray told Mr. Donovan the same thing and that was the extent of the meeting (Tr. 66).

Mr. Warhol confirmed that he was the custodian of Mr. Donovan's personnel file, and he identified his record, and he confirmed that Mr. Donovan was first hired as an oiler on the night shift on January 28, 1981, and his pay was \$10.50 an hour. He identified a notation that he made to the file concerning his meeting with Mr. Donovan on March 6, 1981 (Tr. 69-70; exhibit R-4). He also identified an "assignment authority" form and a "termination form", both from Mr. Dojovan's personnel file (exhibits R-5 and R-1).

Mr. Warhol testified that when he met with Mr. Donovan on March 6, he did not mention that employees were smoking marijuana on the job, nor did he mention that he had voiced safety complaints to Joe Erger, or to "Doc", or that he was being harrassed because of any safety complaints or any work action that he was taking (Tr. 104). After his meeting with Mr. Donovan, he spoke with Mr. Murray and Mr. Erger, and they assured him that there would be a meeting with Mr. Donovan on Monday. However, during that time and March 17, when Mr. Donovan left the job, Mr. Warhol had no knowledge of Mr. Donovan's safety complaints or his complaints concerning the smoking of marijuana, and he learned of the matter after Mr. Donovan's termination and after he filed his discrimination complaint (Tr. 105).

Mr. Warhol stated that respondent employed approximately 800 people at the site in question and that Tenneco had less than 50 employees (Tr. 106). He confirmed that after the night shift was laid off, Mr. Donovan and one other miner were retained and transferred to the day shift, and this decision would have been made by Mr. Murray and Mr. Erger (Tr. 110). Mr. Warhol also confirmed that two people were terminated for smoking marijuana on the job site, and that these are the only two incidents he was aware of (Tr. 112). He deined any wholesale layoffs, and has heard no rumors that 40 or more miners were laid off for smoking marijuana (Tr. 113).

On cross-examination, Mr. Warhol confirmed that he was simply the "go-between" Mr. Donovan and Mr. Murray in attempting to set up the Monday meeting in question. After his conversation with Mr. Donovan of Friday, he told him to go home and to return to work on Monday. Mr. Warhol did not know why the meeting never took place and he did not know that Mr. Donovan had been terminated until later when his "termination interview" came back to his office. Mr. Warhol also indicated that he was not scheduled to be at the meeting and that Mr. Donovan never contacted him again after Friday to advise him that the meeting did not take place (Tr. 120), and the instant hearing is the first time he has seen him since he left his job (Tr. 139).

Mr. Warhol stated that respondent had a good safety record during the Tenneco project and had no fatalities. He also alluded to an intensive safety program at the job site by respondent and Tenneco to insure a safe project (Tr. 124). Mr. Warhol confirmed that he had no knowledge that Mr. Donovan's pay would be cut until after he left the job. After receiving his "termination interview", he learned that there was talk of demoting him to a 2d class helper (Tr. 138).

Joseph Erger testified that he was the mechanic general foreman at the Tenneco construction project site during Mr. Donovan's tenure at that facility and that he was responsible for the supervision of all equipment repairs and servicing, and that Mr. Donovan and approximately 22 other workers worked under his supervision. He identified "Doc" as James Kauss, and confirmed that Mr. Kauss worked as a mechanic under his supervision, and had worked for him before Mr. Donovan was hired. Mr. Erger confirmed that Mr. Donovan worked initially as an oiler's helper, and was promoted by him to mechanic and oiler (Tr. 157). Although Mr. Kauss was never formally classified as a "lead man", Mr. Erger confirmed that he instructed Mr. Kauss to "oversee the oilers" to make sure they were doing their tasks, and that he gave Mr. Kauss daily instructions in this regard (Tr. 158).

Mr. Erger confirmed that Mr. Kauss, Mr. Donovan, and the other oilers worked the 9:00 a.m. to 6:30 p.m. shift, and he confirmed that he (Erger) had the authority to initiate any demotion, promotion, or termination of employees, and he also had the authority to grant employees leave. Mr. Kauss had none of this authority (Tr. 160).

Mr. Erger confirmed that he observed the night shift crew after he had some problems, and that Mr. Donovan appeared to be the only one doing any work. When the crew was layed off, he decided to retain Mr. Donovan and to reassign the night shift foreman to another job (Tr. 163-164). Mr. Donovan was placed on the day shift, and while he did not supervise him closely there came a time when Mr. Donovan admitted that he had fueled a welder with gas rather than with the required diesel fuel. A second incident occurred when Mr. Donovan put too much oil in a welder, and the machine had to be repaired. As a result of these incidents, he told Mr. Donovan that "I didn't think he was the oiler that he was or said he was" (Tr. 166).

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With regard to the "shouting match" between Mr. Kauss and Mr. Donovan, Mr. Erger stated that while he was not present, he could hear them arguing, and when he inquired as to what was going on, Mr. Donovan was upset and told him that he was "going to the office" and that he (Erger) told him "it would be fine". By "office", Mr. Erger meant the administrative office on the site where Mr. Murray, the project manager was located, and he explained the events which followed as follows (Tr. 168-169):

Q. (BY MR. McLAIN, continuing): No, okay. Anything else occur that day in regard to this argument?

A. Yeah, there was plenty I guess that happened, and apparently Mr. Warhol called Mr. Murray and told him that Mr. Donovan come down there and, you know, was all upset and everyting. And him and Doc had an argument or something. And I didn't know what the full thing was on it. And Mr. Murray told me to go ahead and pick up a phone, call him back and find out what went on, and this was, I assume Donovan was probably still down there. And I talked to Mr. Warhol, I found out a little bit more about it because when Mr. Warhol first called I was in the office with Mr. Murray. And Mr. Murray, while he was getting his call, kind of pulled the phone down, looked at me and he says, do you know your oiler walked off the job. And he was kind of concerned about it that he walked off the job. And well, he was upset about himself, I should say. And I told him, I says, I'm not going to do nothing about it because he stated to me he was going to the office. And like I say, that's why I called it a lack of communication.

THE COURT: You thought he was going to the office right there on the site? He didn't tell you he was going down to Mr. --

A. I didn't pursue that. He could be terminated for walking off the job, because I didn't feel he was really at fault at all. And after talking to Mr. Warhol on the phone, he said that, you know, we could get together Monday and straighten this all out.

Mr. Erger testified that when Mr. Donovan returned to work the following Monday, he spoke with him and Mr. Kauss just outside his office at the site, and Mr. Donovan told him that "he could work this out with Doc and it would be all right" (Tr. 170). No one described the precise problem, and Mr. Erger stated that he had heard that the two had gotten

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into a "personality conflict or whatever there was supposed to have been some cuss words between them", and Mr. Erger confirmed that he never heard anymore disagreements or arguments between the two, and if there were, none were ever brought to his attention. He also confirmed that at no time during the conversation on Monday with Mr. Donovan did he ever request to meet with Mr. Murray, and at no time did he ask where Mr. Murray was and gave no indications that he expected Mr. Murray to be there. Mr. Erger believed that the matter had been resolved (Tr. 171).

Mr. Erger conceded that leaky fuel trucks were a problem, and that the pumps and packing glands would go bad, but that the normal procedure called for the trucks to be brought to the shop for repairs and he would not always be aware of the conditions. On one occasion, Mr. Donovan brought a leaky truck to the shop for repairs after the safety department stopped it and took it out of service, but Mr. Erger could not recall when this happened (Tr. 172).

Mr. Erger testified that the incidents in which Mr. Donovan put gas rather than diesel in a vehicle and over-filled a welder with oil occurred during the Friday after the Monday meeting with him and Mr. Kauss. He discussed the matter with Mr. Donovan on the Monday before he left the job, and explained to him that he was going to "cut him back to helper". He also stated that he explained to Mr. Donovan that "this would give him an opportunity to work and learn, and he would still have his job". Mr. Erger claims that Mr. Donovan implied to him at that time "that he was glad I was doing that rather than just turning him loose" and "he implied to me that he was glad to keep his job" (Tr. 174). At that time, Mr. Donovan gave no indication that he was having problems with anyone, and in fact, at no time during his employment did Mr. Donovan ever indicate that he was having any problems on the job (Tr. 174).

Mr. Erger denied any "witchhunt" against Mr. Donovan, and denied that he made it a point to observe his work for reasons other than those which were work related. He also denied any "grudges" against Mr. Donovan, and at no time did he observe any employees smoking marijuana on the job. He also indicated that he was never advised of Mr. Donovan's attempts to "correct" Mr. Kauss or Mr. Barnhouse (Tr. 175). He confirmed that the decision to demote Mr. Donovan to an oiler's helpers was his decision alone, and at no time did Mr. Kauss ever advise him to demote or fire Mr. Donovan (Tr. 176).

Mr. Erger confirmed that during his employment at the site the respondent received one safety citation for a broken front spring on a truck, and he denied ever instructing any of his personnel to "hide" the fuel trucks from the inspectors. He confirmed that he did instruct them to be aware of the fact that inspectors were at the site and "to straighten up their act, you might say to make sure that they checked their wheels and such" (Tr. 178).

Mr. Erger identified exhibit R-1 as the "assignment termination" form which he signed on March 19, 1981, in which he rated Mr. Donovan's job performance as "fair". He explained his rating as "judging from the man's performance I had really nothing against his willingness to work and, you know, be a hand, but he was not an oiler as such as to be a journeyman" (Tr. 179). He also indicated that he had no knowledge that Mr. Donovan quit his job until he received the form and received a phone call at his office that Mr. Donovan had quit (Tr. 179). Although the form shows that Mr. Donovan signed it on March 17th, Mr. Erger stated that he kept it until he signed it on March 19, because he thought that Mr. Donovan may have had some second thoughts about quitting and would come in to see him. When he heard nothing further from Mr. Donovan, he went ahead and signed the form (Tr. 180).

Mr. Erger denied that he ever told Mr. Donovan that he no longer needed him, and he asserted that if this were the case he could have fired him. He decided to keep him because "it's a whole lot better to make a hand rather than run one off" (Tr. 180). He confirmed that he took no further steps to formally demote Mr. Donovan because he wanted to discuss the matter with him further, but had no opportunity to do so when he quit (Tr. 182).

On cross-examination, Mr. Erger denied that Mr. Kauss ever "came running to him" complaining about Mr. Donovan's work performance (Tr. 183). During further cross-examination of Mr. Erger by Mr. Donovan, Mr. Donovan's recollection of the Monday meeting with Mr. Erger and Mr. Kauss is that Mr. Erger stated that he and Mr. Kauss could "work it out" and if that was not possible, Mr. Erger didn't care if he worked there or not (Tr. 189). Mr. Donovan conceded that Mr. Murray may have been in his office at the site, and he explained that he did not seek him out because Mr. Erger told him that a meeting was not necessary, and that he should go back to work and "work it out" with Mr. Kauss and that Mr. Murray need not be involved (Tr. 190). Mr. Erger denied that this was true (Tr. 190).

In response to further questions, Mr. Erger stated that he advised Mr. Donovan that he was going to "cut him back to helper and cut his pay" on Monday, March 16, the day before he quit on Tuesday, March 17, and when he told him that he had no indication that Mr. Donovan would leave his job (Tr. 196-197). Mr. Erger confirmed that after Mr. Donovan left the job, Mr. Barnhouse told him that everytime Mr. Donovan checked the oil in the machine "he had to go behind him and check it", but he denied that Mr. Barnhouse ever commented about Mr. Donovan's work before he left (Tr. 199). Regarding any "harassment" of Mr. Donovan by Mr. Barnhouse or Mr. Kauss, Mr. Erger stated as follows (Tr. 200-201):

Q. Mr. Donovan seems to imply here that Barnhouse and Doc and you sort of conspired to run him off the job. What say you to that assertion?

A. It's not true.

Q. Okay. Is it possible that Barnhouse and Doc, without your knowledge or, you know, gave him such a rough time that they ran him off the job? And if I can believe that, would you have been aware of that situation?

A. No, I wouldn't have been aware of it, I wouldn't have put up with it.

Q. So, Mr. Donovan never came to you and told you that Doc and Barnhouse were giving him a hard time?

A. No.

Q. He never came to you and told you that Barnhouse was more or less tailgating him all the way around, and I mean that Doc was following him around checking up on him, trying to find things wrong with his performance and all that?

A. No, sir.

Q. Did you ever make a statement to Mr. Donovan on that Monday that you'd just as soon he drag up?

A. No, sir.

Mr. Erger confirmed that routine safety meetings or "safety chats" were held among the different crafts on the job, and that a general safety meeting was held in each Monday (Tr. 204-206). Since the oilers and mechanics came in at different hours, each group was responsible for their own daily safety sessions (Tr. 206-212).

James Kauss, mechanic, confirmed that his nick name is "Doc". He confirmed that he worked for the respondent until June 12, 1982, when he was laid off (Tr. 213). He described his duties while employed at the construction site in question, and confirmed that he reported to Mr. Erger (Tr. 214). He denied that he was ever classified as a "leadman" or ever performed the duties of a leadman. He stated that he had no authority to hire, fire, promote, or demote any employee, but that if he believed an employee deserved a raise he "could put in a word for him" with Mr. Erger (Tr. 215). He confirmed that he received instructions from Mr. Erger in the morning as to the equipment which needed to be serviced, and he confirmed that either he or Mr. Erger held safety meetings for the equipment people (Tr. 216).

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Mr. Kauss stated that he began working with Mr. Donovan when he was assigned to the day shift, and that when he first worked with him on the fuel truck a couple of times, he needed some help with checking the oil and water in the radiator. He confirmed that he had one argument with Mr. Donovan about two weeks after he started work on the day shift and the argument was over his failure to properly was down a diesel fuel island (Tr. 218, 220). He confirmed that the argument "was midly hot", but he denied swearing at Mr. Donovan (Tr. 220).

Mr. Kauss confirmed that he and Mr. Donovan met with Mr. Erger for about ten minutes on the Monday after Mr. Donovan had gone to see Mr. Warhol, and he believed their problems had been worked out (Tr. 221). He denied that he and Mr. Barnhouse ever smoked marijuana on the project, and he denied ever observing employees doing so. He also denied that Mr. Donovan had ever complained to him about any marijuana smoking on the job (Tr. 221-222).

Mr. Kauss identified exhibit R-12 as his "reduction in force" form, confirmed that it indicates his job classification as "heavy duty mechanic", and he confirmed that this was his job during his entire employment period with the respondent (Tr. 223). Mr. Kauss confirmed that he was currently unemployed and was never offered any employment by Tenneco, nor has he applied for a job with them (Tr. 223).

Mr. Kauss confirmed that he checked on all of the oiler's work while he was employed and he denied that he ever went out of his way to check up on Mr. Donovan's work. He indicated that it was his responsibility to repair leaky fuel trucks, and denied that he ever refused to repair any called to his attention by Mr. Donovan (Tr. 225). He denied any promises or threats for his testimony in this case (Tr. 226).

On cross-examination, Mr. Kauss confirmed his experience and education as a mechanic, and he also confirmed that while he has smoked marijuana, he never did it on the job (Tr. 234). Mr. Kauss denied that he called Mr. Donovan an "S.O.B." on March 6, at the time of their argument over the spilled fuel at the diesel island, and he confirmed that this is when Mr. Donovan told him "he was going to the office" over that encounter (Tr. 237). He denied that he and Mr. Donovan argued again on the subsequent Monday when they met with Mr. Erger (Tr. 238).

In response to further questions, Mr. Kauss stated that safety meetings were held every Monday morning at the mechanic shop and that he would go over a "safety check sheet" with the men, and that Mr. Donovan was usually present at these meetings, which took about five minutes (Tr. 249). Mr. Kauss denied he had ever threatened or harassed Mr. Donovan in any way, and he was not aware of any safety complaints made by Mr. Donovan (Tr. 251).

Findings and Conclusions

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act these complaints are protected activities which may not be the motivation by mine management in any adverse personnel action against an employee; Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1891), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Further, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

The thrust of Mr. Donovan's discrimination complaint in this case is that he complained to certain mine management personnel about certain leaky fuel truck conditions and the smoking of marijuana on the job by miners while engaged in their work. He alleges that the smoking of marijuana jeopardized his safety, as well as the safety of other miners in that the smoking of marijuana and the use of drugs on the job resulted in at least one incident where he claims a fellow worker nearly backed over him with a truck while under the influence of drugs. With regard to the leaky fuel trucks, Mr. Donovan claims that rather than taking corrective action to insure that the conditions were repaired, certain mine management personnel directed the work force to "hide the trucks" from MSHA inspectors who were on the scene.

In his amended complaint, as well as in a pretrial deposition taken by respondent's counsel, Mr. Donovan claimed that his safety complaints were made to equipment supervisor and foreman Joseph Erger, personnel manager David Warhol, and a "leadman" known to him only as "Doc" (James Kauss). Mr. Donovan also claimed that Mr. Kauss, as well as Mr. Donovan's co-worker, David Barnhouse, smoked marijuana on the job, and that he complained to them also in an effort to get them to cease and desist.

Mr. Donovan claims that as a result of his safety complaints, he was harassed and intimidated by Mr. Kauss and Mr. Barnhouse on the job, and that Mr. Kauss became hostile and sought to discredit him by complaining about his work, calling him derogatory names, and provoking arguments with him, all of which made it difficult for him to continue working.

Mr. Donovan claims further that rather than taking corrective action with regard to his complaints, Mr. Erger encouraged him to seek work

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elsewhere or to quit his job, ignored his complaints, and denied him access to, or an opportunity to meet with superintendent John Murray, all in an effort to prevent complete disclosure of his complaints. In addition, Mr. Donovan claimed that his wages were cut by \$2.50 an hour, with no change of duties, because of his safety complaints. In short, Mr. Donovan claimed that the actions taken against him by Mr. Erger and Mr. Kauss were motivated in large part by his safety complaints concerning leaky fuel trucks and the smoking of marijuana.

The crucial question in this case is whether the respondent, acting through or by any of its supervisors or managers, violated Section 105(c) of the Act by demoting, harassing or otherwise intimidating Mr. Donovan, and/or firing or constructively discharging him for engaging in protected activities. The parties stipulated that Joseph Erger, David Warhol, and John Murray were supervisors and/or managerial officials employed by the respondent at the time of Mr. Donovan's employment, and that these officials had the authority to hire, fire, discipline and independently direct the work force. Accordingly, as to these individuals, the issue is whether the record supports findings or conclusions that they individually, or collectively, violated any of the protections afforded Mr. Donovan by the law. A further issue is whether purported "leadman" James Kauss, was in fact a supervisory or managerial employee or agent of the respondent during the period in question, and if so, whether he also discriminated against Mr. Donovan, either individually or collectively.

Mr. Donovan's Safety Complaints

Employee's Use of Drugs

With regard to Mr. Donovan's allegations concerning the smoking of marijuana on the job, Mr. Donovan was not shy about discussing this with the individuals whom he claims were using drugs. Although I can understand his concern for his own personal safety, I find it strange that he made no attempts to inform the local authorities at that time about such a problem, particularly in a situation where he claims "dozens" of persons were involved. As a matter of fact, during the course of the hearing in this case, Mr. Donovan contacted the local police department in Green River and requested someone from that department to come to the hearing. A "plain clothes" police lieutenant walked into the courtroom during the trial and testimony in this case, and after identifying himself to me he stated that Mr. Donovan had requested someone to come. After a brief conference with this individual in private, I was convinced that he had no personal knowledge of Mr. Donovan's discrimination complaint, and did not even know who he was. After a further conference with Mr. Donovan, the police representative departed.

Mr. Donovan's claims concerning the use of drugs at the construction site in question escalated into a most serious pretrial allegation by the respondent that Mr. Donovan attempted to extort money or his job

back from the respondent in exchange for a promise by Mr. Donovan that he would not "go public" with certain video tapes which he claimed he had showing miners using drugs on the job. Although respondent supported its pretrial allegation in this regard with a sworn affidavit from the individual with whom Mr. Donovan purportedly had a telephone conversation with, and presented testimony and other documentation in support of its allegations of extortion, Mr. Donovan denied that he made the call in question and I find it unnecessary to make any findings on this question, particularly in light of the serious criminal implications of such an allegation (Tr. 106-107; 125-128; exhibits R-6 and R-10).

Mr. Donovan and Mr. Kauss admitted smoking marijuana in the past, but Mr. Barnhouse and Mr. Kauss denied they ever used it on the job, and Mr. Erger denied that he ever used drugs or observed others smoking marijuana while at work. Respondent's counsel conceded that the use of marijuana or other drugs by employees on the job presents a serious safety hazard and concern. However, even if I were to accept Mr. Donovan's assertions and testimony as true, the critical issue is whether his safety concerns were in fact communicated to mine management, and in return, rather than taking corrective action, management harassed and intimidated him to the point where he was forced to leave his job. In short, the issue is whether Mr. Donovan's safety complaints, once communicated to mine management, resulted in his "constructive discharge".

Mr. Erger and Mr. Warhol denied that Mr. Donovan ever mentioned the use of drugs or marijuana by anyone during their conversations and meetings, and I find them to be credible witnesses and believe them. I seriously question Mr. Donovan's credibility. In light of Mr. Donovan's prior assertions and subsequent denials regarding the question of whether he communicated his marijuana smoking allegations to mine management, I seriously question his credibility on this question.

In his deposition, at pages 12-15, Mr. Donovan stated that he specifically advised Mr. Erger, on at least two occasions, that Mr. Kauss and Mr. Barnhouse were smoking marijuana on the job in the truck and that he had observed them doing so. He also stated that he specifically told Mr. Erger that their smoking of marijuana endangered the lives of himself and other miners, and that Mr. Erger assured him "he would take care of it". Mr. Donovan also stated in his deposition that "there were a lot of people using dope on the job", and that this was a "daily occurrence". He claims that he "could get no satisfaction on the job" and went to complain to personnel manager Dave Warhol about the situation, deposition, pg. 15.

During the hearing in this case, Mr. Donovan recanted his prior statements made in his deposition and confirmed that he never told Mr. Erger or Mr. Warhol about the alleged smoking of marijuana on the job. When the deposition was received in evidence (Tr. 35; 46), Mr. Donovan alluded to certain statements

therein which he claimed "were incorrect".

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He was given an opportunity to review his prior statements and to explain or correct any statements which he believed were inaccurate (Tr. 36-46). After doing so, he recanted his prior statements that he had advised Mr. Warhol and Mr. Erger about the marijuana smoking on the job (Tr. 36-37; 43).

With regard to Mr. Donovan's asserted marijuana smoking "safety complaint" to James Kauss, I conclude and find that there is no credible evidence to support a finding that Mr. Kauss was in fact part of mine management. The fact that Mr. Donovan may have believed he was, doesn't make it so. Thus, I find respondent's testimony and evidence that Mr. Kauss was not in fact a "leadman", a manager, or an agent of the respondent credible.

During his cross-examination of Mr. Kauss, Mr. Donovan stated that to his knowledge, Mr. Kauss was not a mechanic. Mr. Donovan stated that he considered him to be a "leadman" because "he would come around and tell us what to do every day and here and there and chew on people whenever he felt like, so apparently he was the leadman" (Tr. 228). However, respondent has rebutted Mr. Donovan's assertions and has established by a preponderance of the probative and credible testimony that Mr. Kauss was in fact a mechanic and not part of mine management.

Even if I were to conclude that Mr. Kauss was part of mine management, I find no credible evidence to support a finding that he harassed or intimidated Mr. Donovan. Mr. Kauss had no authority to hire or fire anyone, and the fact that Mr. Donovan saw fit to leave his job over his somewhat heated arguments with Mr. Kauss does not per se mean that Mr. Kauss "ran him off the job" or otherwise conspired to "get him" for complaining about his marijuana smoking.

There is nothing in the record to suggest that during his employment tenure with the respondent Mr. Donovan made any safety complaints to MSHA with regard to any alleged use of drugs by miners on the job. In addition, in view of the above findings and conclusions, I conclude and find that Mr. Donovan did not communicate any safety complaints concerning the use of marijuana or other drugs by miners on the job to anyone in mine management during his employment at the work site in question.

The Leaky Fuel Trucks

It seems strange to me that at no time during his employment at the mine in question did Mr. Donovan make any safety complaints to any MSHA inspectors about the leaky fuel conditions on his truck or the fact that mine management was "hiding the trucks from the inspectors". Mr. Donovan's assertion that he didn't know of MSHA's existence until he filed his discrimination complaint is inconsistent with his allegations implying that management hid the trucks from inspectors when they were on the property. It is also inconsistent with Mr. Donovan's assertions

that while on the property, the inspectors never inspected the trucks. Further, since Mr. Donovan testified that he had several "encounters" with respondent's safety personnel at the job site, he could have complained to them about the leaky truck conditions.

Mr. Donovan's assertions of being "unaware" of MSHA is further contradicted by his own testimony that during his employment at the site an MSHA inspector asked him about a front-end loader which had apparently been involved in a fatality which MSHA was looking into (Tr. 185-186). In my view, Mr. Donovan had ample opportunity to bring to MSHA's attention any conditions concerning the trucks which he believed threatened his safety. In addition, he had an absolute right to refuse to work under such conditions, and at least on one occasion he did bring to Mr. Erger's attention a malfunctioning fuel pump which was corrected and repaired.

While the record in this case does suggest that there were some problems with leaky fuel pumps on the trucks, respondent has established through the credible testimony of Mr. Erger, Mr. Barnhouse, and Mr. Kauss that these matters were attended to and that the trucks were either taken out of service or repaired. Further, there is no evidence that the respondent had ever been cited by MSHA or any state inspectors for any leaky fuel truck conditions. Further, while the record also suggests that there were some problems with the fueling of welders in the vicinity where men were working, these matters were apparently attended to by respondent's own safety department, and at least on one or two occasions, Mr. Donovan may have himself been involved in those incidents.

I conclude and find that Mr. Donovan's asserted "safety complaints" concerning any leaky fuel trucks amounted to nothing more than his calling these conditions to the attention of management, and that the conditions were ultimately corrected. Further, Mr. Donovan conceded that he never specifically brought these so-called safety complaints to the attention of Mr. Erger or to Mr. Warhol, and even if he did, I cannot conclude that they retaliated against him in any way for voicing these safety concerns. I make these same findings with respect to any such complaints that Mr. Donovan claims he made to Mr. Kauss.

The Alleged Harassment and Intimidation

The record in this case reflects that Mr. Donovan was hired at the project by Mr. Erger upon the recommendation made to Mr. Murray by Mr. Donovan's friend Duane Baker. After some personnel problems developed with the night shift crew, problems which apparently did not directly involve Mr. Donovan, all of the night shift, with the exception of Mr. Donovan and another employee, were apparently dismissed, and the night shift was disbanded. Mr. Donovan was retained on the day shift, and the decision in this regard was made by Mr. Erger and Mr. Murray. Further, even though Mr. Donovan had an eye condition which resulted in his failure to pass an initial physical examination, he was still

retained in his capacity

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as an oiler making more money than his co-worker Dave Barnhouse, who drove the truck to which he and Mr. Donovan were assigned, and Mr. Barnhouse also continued doing the work of an oiler.

Mr. Warhol testified that when Mr. Donovan came to his office in an obviously agitated and irritated state on Friday, March 9, over his encounter with Mr. Kauss, Mr. Warhol suggested that he take the weekend off to "cool down" and to return to work the next Monday. Mr. Warhol testified further that he was concerned that Mr. Donovan's leaving work would result in his termination, and he acted as an intermediary in an attempt to set up a meeting with management to resolve Mr. Donovan's problems. At that point in time, Mr. Warhol had no knowledge of any specific complaints by Mr. Donovan, and he heard nothing further from Mr. Donovan until he later learned that he had left his job.

I find nothing in the record to support a finding or conclusion that Mr. Warhol did anything to violate Mr. Donovan's rights. Mr. Warhol impressed me as a most honest and credible witness, and there is no evidence to show that he was ever informed or made aware of Mr. Donovan's alleged safety concerns. With regard to the abortive meeting with Mr. Murray, I find that this was outside Mr. Warhol's control, and I accept his testimony that once he told Mr. Donovan to take some time off to "cool down" and never heard from him again, he assumed that any problems which he may have had were resolved. In short, there is no credible testimony or evidence to suggest that Mr. Warhol harassed, intimidated, or otherwise acted to intimidate Mr. Donovan. Nor is there any evidence that he violated any of Mr. Donovan's rights under the Act, or was part of any "conspiracy" or "witch hunt" to force Mr. Donovan to quit his job. I make these same findings and conclusions with regard to Mr. John Murray.

I agree with the respondent's argument that Mr. Erger's decision to demote Mr. Donovan was based entirely on nondiscriminatory and non-retaliatory reasons and would have occurred regardless of any purported protected activity. I find Mr. Erger's testimony that he considered lowering Mr. Donovan's wages and reassigning him as a helper to be credible. I also conclude that Mr. Erger's decision in this regard was prompted by the two incidents concerning Mr. Donovan's putting gas in a diesel piece of equipment and putting too much oil in a welder. Although Mr. Donovan characterized these incidents as "honest mistakes", they did result in damage to the welder, and required Mr. Kauss to drain the gas out of the diesel tank. Under these circumstances, I conclude that Mr. Erger was justified in believing that Mr. Donovan's work performance was not what he expected it to be. Further, as the record in this case establishes, at the time Mr. Erger informed Mr. Donovan that he was going to demote him, Mr. Erger had no knowledge of Mr. Donovan's complaints.

While I recognize the fact that Mr. Donovan may have made an "honest mistake" when he put gasoline in a diesel piece of equipment, and overfilled a welder with oil, and that these two incidents came shortly after his Monday meeting with Mr. Erger and Mr. Kauss, there is nothing to suggest that Mr. Donovan was harassed by Mr. Erger over this incident. The over filling of the welder caused the machine to be taken out of service for repairs, and I can understand Mr. Erger's concern about Mr. Donovan's ability to perform his job as an oiler. I can also appreciate and understand the concern that Mr. Kauss may have had over these incidents, particularly in a situation where Mr. Erger apparently relied on Mr. Kauss to make sure that his men were doing their job right. Further, from the record in this case, it appears to me that any differences between Mr. Kauss and Mr. Donovan preceded the two incidents in question, and their "shouting match" took place the week before. Given the fact that Mr. Erger testified that he could have fired Mr. Donovan over the two incidents in question, his decision to retain him does not indicate to me that Mr. Erger was "out to get" Mr. Donovan. It seems to me that Mr. Erger could have done that by simply firing him on the spot rather than deciding to keep him, and that fact that Mr. Erger advised him that he probably would reduce his pay and reassign him as a helper is a management decision that Mr. Erger had a right to make.

Mr. Donovan testified that when he put too much oil in a welder Mr. Kauss spoke to him in a "hasty type" way, was agitated over the mistake he had made, but did not curse him at that time (Tr. 239). During the incident when Mr. Donovan put gas in the diesel truck, Mr. Kauss went to find the tools to drain it, and Mr. Donovan stated that he "come back out and was cussing this and that" (Tr. 240). When asked whether Mr. Kauss was cursing at him, Mr. Donovan stated "he was cussing because he said, you guys are not doing your job correctly when you put the gas in a diesel rig" (Tr. 240). When asked whether Mr. Kauss was cursing at him or simply "over the situation", Mr. Donovan stated that Mr. Kauss said "you son-of-a-bitches ain't doing the job right" (Tr. 241), and Mr. Donovan indicated that Mr. Kauss was "apparently" referring to both him and Mr. Barnhouse (Tr. 241).

Mr. Donovan testified that "the dope issue" which he discussed with Mr. Kauss was prior to the time that he went to see Mr. Warhol, and that when he complained to Mr. Kauss about his use of drugs Mr. Kauss called him "a hick" or "something to that effect". When asked whether Mr. Kauss cursed him at that time, Mr. Donovan replied "the word he used, I can't think of right now" (Tr. 243).

Mr. Donovan confirmed that Mr. Kauss "used such words" when something went wrong to agitate him, and he also confirmed that when they argued on March 6, he too "said a few things" but did not swear at Mr. Kauss (Tr. 244). These were the only instances that Mr. Donovan could recall Mr. Kauss using "strong words" with him (Tr. 244).

After careful consideration of the entire record in this case, including my observations of Mr. Donovan and Mr. Kauss during the course of the hearing, I believe that Mr. Donovan's "frustrations" stem from his obvious dislike of Mr. Kauss. Aside from the allegation that Mr. Kauss smoked marijuana, that dislike obviously flows from Mr. Donovan's opinion that Mr. Kauss was not a particularly competent worker, his resentment of Mr. Kauss for questioning his work, and the ensuing arguments which resulted from Mr. Kauss' calling Mr. Donovan's shortcomings to his attention. As a matter of fact, in his two-page post-hearing statements Mr. Donovan states "I feel I was discriminated against by the respondent in that they allowed an unqualified person, James Kauss, to supervise other employees, and allowed this man to discriminate against me and to report untrue statements on my working abilities".

In his deposition of October 8, 1982, at page 17, Mr. Donovan states that after the Monday meeting with Mr. Erger, he made three or four attempts to see Mr. Murray, but that Mr. Erger "was in the way and would not let me go in and talk to him". However, during the hearing, he testified that after Mr. Erger told him to resolve his differences with Mr. Kauss, and that there was no need for a meeting, he made no further attempts to see Mr. Murray. Accordingly, there is nothing in this record to suggest that Mr. Murray was even aware of Mr. Donovan's "problems", and there is absolutely no evidence that Mr. Murray did anything in violation of any of Mr. Donovan's protected rights.

In view of the foregoing findings and conclusions, I find no credible testimony or evidence to support any findings or conclusions that anyone connected with mine management, either singularly or collectively, took any action against Mr. Donovan in retaliation for his engaging in any rights protected by the law.

Mr. Donovan's Employment Termination

I conclude and find that the preponderance of the evidence in this case suggests that Mr. Donovan voluntarily quit and abandoned his job on or about March 17, 1981, and that he did so for reasons unrelated to any purported "conspiracy" on the part of mine management to "get rid of him" for making safety complaints. Exhibit R-1, a copy of an "assignment termination" document from Mr. Donovan's personnel records, and which contains Mr. Donovan's signature, and which he acknowledge is his, reflects that he left his job "to work elsewhere", and coupled with the testimony of respondent's responsible officials, which I find credible, support my findings and conclusions that Mr. Donovan voluntarily quit his job. Although his quitting may have been precipitated by his impending demotion and disputes with Mr. Kauss, the record in this case strongly suggests that Mr. Donovan himself had something to do with these matters, namely his own work related mistakes and encounters with Mr. Kauss.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the record in this proceeding does not establish by a preponderance of any reliable, credible, or probative evidence that the respondent discriminated against the complainant because of any protected safety activities on his part. Under the circumstances, the complaint IS DISMISSED, and the relief requested by the complainant IS DENIED.

George A. Koutras
Administrative Law Judge