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SOL (MSHA) V. HECLA-DAY MINES
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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 CHESTER (SAM) JENKINS,
COMPLAINANT

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE
DOCKET NO. WEST 81-323-DM

v.
HECLA-DAY MINES CORPORATION,
RESPONDENT

MINE: Republic Unit

DECISION

Appearances:

Rochelle Kleinberg, Esq., Office of the Solicitor
United States Department of Labor
8003 Federal Building, Seattle, Washington 98174,
For the Complainant

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For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

On July 6, 1981, the Secretary of Labor, Mine Safety and Health Administration (hereinafter "the Secretary"), brought this action on behalf of Chester (Sam) Jenkins (hereinafter "Jenkins"), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1978)(hereinafter cited as "the Act"). In his complaint, the Secretary alleges that respondent Hecla-Day Mines, Inc., (formerly Day Mines, Inc., Republic Unit Mine and hereinafter "Day Mines"), unlawfully discriminated against Jenkins on or about January 12, 1981 through February 4, 1981 by suspending him from work for two days and failing to return him to his former worksite in violation of the Act. The Secretary alleges that Jenkins was engaged in activities relating to health and safety protected

by section 105(c)(1) of the Act at the time the Day Mines discriminated against him.(FOOTNOTE 1)

The Secretary's complaint seeks relief on behalf of Jenkins as follows: a finding of discrimination, an order: (1) directing Day Mines to pay Jenkins employment benefits plus interest for the period of time he was suspended from work, (2) reinstatement of Jenkins to his former worksite or to an equivalent one, (3) directing Day Mines to clear his employment record of any unfavorable references to his suspension, (4) directing Day Mines to pay Jenkins's costs in pursuing this action, and (5) that an appropriate civil penalty be assessed against Day Mines for its alleged unlawful interference with Jenkins exercise of rights protected by section 105(c) of the Act. On July 27, 1981, Day Mines filed an answer to the complaint admitting jurisdiction of the Federal Mine Safety and Health Review Commission and that Jenkins was a miner as defined in section 3(g) of the Act but denying all allegations of the Secretary that Jenkins was discriminated against while engaged in activities protected under the Act. Pursuant to notice, a hearing on the merits was held in Spokane, Washington 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.

FINDINGS OF FACT

1. The Republic Unit mine, of Hecla-Day Mines, Inc., is a gold and silver mine located near Republic, Washington.

2. Chester (Sam) Jenkins has been employed by Day Mines at its Republic Unit Mine as a contract miner from approximately the middle of 1979 up through the date of the hearing in this case. Prior to January 1, 1981, there were no complaints as to the nature, ability, or performance of work done by Jenkins for Day Mines.

3. Contract miners employed at the Republic Unit Mine work in pairs mining assigned stopes. Stopes are excavations from which ore has been

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mined in a series of steps.(FOOTNOTE 2) After a mining cycle involving drilling, blasting, and removal of rock is completed, miners are transferred to another area while the mined out stope is "backfilled" with sand.

4. In March 1980, Jenkins started working in stope 4114 and had completed two mining cycles by December 11, 1980. On December 12, 1980, Jenkins and his partner Don Vilardi were assigned to work in stope 4222.

5. Contract miners were paid \$9.70 per hour plus an additional amount of pay based upon the cubic feet of rock they mined from their designated stope. Stope 4114 was considered by management to be a large stope whereas stope 4222 is somewhat smaller. The miners are paid a higher unit price for work performed in the smaller stopes than that paid for work in the larger stopes (Tr. 107).

6. On December 24, 1980, a miner died as a result of an accident at the Republic Unit Mine. On the following day and as a result of this fatality, Jenkins wrote a four page letter addressed to Keith J. Droste, general manager, and W.M. Calhoun, President of Day Mines, describing several safety complaints Jenkins had including misconduct on the part of some fellow miners. A post script was added to this letter signed by four other miners agreeing with what Jenkins said in his letter (Exhibit P-1).

7. On December 29, 1980, the first working day following the fatality, a safety meeting for the miners was called by management of Day Mines at which meeting Jenkins raised several of the same complaints regarding safety that he had included in his letter dated December 25, 1980. Following this meeting Jenkins mailed his letter to the mine management (Tr. 38).

8. On December 30, 1980, Jenkins put a notice on the mine bulletin board requesting nominations for a mine safety committee. The nomination notice was removed from the board shortly thereafter (Tr. 112).

9. On January 2, 1981, Jenkins circulated a petition among fellow miners describing an occurrence on December 24, 1980 when the power to the main hoist in the mine was turned off for three hours creating what Jenkins considered a safety problem. During the safety meeting on December 29, 1980, Jenkins had brought up this situation and indicated in this petition that he believed management thought he was the only person concerned. He was asking that other miners sign the petition to show their concern and to have management establish a policy regarding turning power off to the main hoist. Forty-four miners signed the petition (Exhibit P-2). On January 7, 1981, the so called "power off" petition was delivered by Jenkins to William Hamilton, mine superintendent (Tr. 41).

10. On January 5, 1981, Droste sent a letter to Jenkins acknowledging

receipt on January 2, 1981, of Jenkins December 25, 1980 letter and promising an investigation and written response to the observations and accusations contained therein (Exhibit R-1).

11. On January 7, 1981, Jenkins and Dan Vilardi were escorted to the mine office by William Gianukakis, shift foreman, and asked by Ron Short, unit manager, if Jenkins and Vilardi objected to having the letter of December 25, 1980 posted on the mine bulletin board. Neither Jenkins or Vilardi objected and Short put the letter on the bulletin board (Tr. 42). After the letter was posted, Jenkins was threatened with bodily harm by Jack Davis, a fellow miner. David Hamilton, also a miner, accused Jenkins of being an agitator and a trouble maker (Tr. 42, 43). The following day, a threat was made to Jenkins's son Sam while he was at school (Tr. 46).

12. On January 8, 1981, following the threats against Jenkins and his son, Jenkins did not go to work at the mine but instead consulted with an attorney. The attorney advised Jenkins to go to the sheriff's office and file a complaint which he did. On this same day, Jenkins's wife telephoned Calhoun and Droste at Day Mines and informed them of the threats against her husband and son (Tr. 44, 45 and 46).

13. On January 9, 1981, Jenkins stayed off work for a second day and met with Daniel Klinchesselink, a mine inspector for Mine Safety and Health Administration (MSHA), in Spokane, Washington, and discussed what had occurred at Day Mines and what protection Jenkins could expect (Tr. 47). Also, on this date, Jenkins received a telephone call from Ron Short informing Jenkins that if he returned to work, Short could guarantee his safety while on company property (Tr. 47). Jenkins returned to work on the following day, January 10, 1981.

14. On January 11, 1981, a meeting of miners was held at Cassell (Duke) Koepke's residence. Jenkins raised safety concerns regarding the Day Mines. No member of Day Mines management was in attendance but shift boss William Gianukakis's wife was there.

15. On January 14, 1981, Jenkins received a letter from Droste responding to his letter of December 25, 1980 and discussing each matter Jenkins had raised therein (Exhibit R-2).

16. Jenkins was absent from work from January 15 through January 25, 1981 to attend the funeral for his father (Tr. 51).

17. On January 23, 1981, the sand fill operation was completed in Stope 4114 and John Holder and Tom Rice were assigned to mine this stope (Exhibit R-7).

18. On January 14, 1981, a letter was sent to Tom C. Lukins of MSHA indicating that Jenkins and Cassell (Duke) Koepke were elected to be representatives of the miners for the production shift at Day Mines. The letter was signed by Koepke, Jim Lindsey and Jim Monteyo (Exhibit P-3). Jenkins had prepared the letter

requesting Koepke sign it. On January 29, 1981, a copy of this letter was sent to Droste and Short of Day Mines (Tr. 65). A formal meeting of miners had not been held to elect representatives prior to the drafting and mailing of the above letters.

19. On January 31, 1981, Vilardi transferred out of stope 4222 and Terry Koepke was assigned to be Jenkins's new partner. Jenkins and Koepke continued to work in stope 4222 until February 17, 1981, when the mining cycle was completed (Exhibit R-7).

20. On February 2, 1981, a safety meeting of miners was conducted by Tom Bradley, shift boss for Day Mines, at which meeting various safety matters were discussed. In response to a request by Bradley for suggestions of any other safety problems, Jenkins was the only miner who spoke up and pointed out additional safety matters (Exhibit P-9 and Tr. 300).

21. On February 3, 1981, two petitions were circulated among the miners at Day Mines indicating the signatories were tired of Jenkins and Cassell (Duke) Koepke agitating and their disruptive accusations and that they did not wish to work with them. A third petition stated that Jenkins and Koepke did not and had never represented the miners at Day Mines Republic Unit. The petition against Jenkins had 43 signatures on it and the similar petition against Koepke had 28 signatures. The petition regarding Jenkins and Koepke not being miners's representatives contained 52 signatures. These three petitions were then delivered to the management of Day Mines (Exhibit P-4 and Tr. 66, 164).

22. On February 4, 1981, Jenkins was sent by his shift boss to the mine office where he was informed by Ron Short that he was to be suspended for an indefinite period of time because of the complaints about his disruptive behavior contained in the petition received from fellow miners and stating that they did not want to work with him. On the following day, Jenkins received a letter from Short advising him that his suspension was to be without pay. On February 5, 1981, Jenkins met again with Short and discussed his problems with fellow miners. Jenkins signed an agreement to the effect that he would improve his relationship with other employees by refraining from any dialogue concerning complaints or problems except as are absolutely necessary or emergency matters. Jenkins was then allowed to return to work having suffered a two day suspension without pay (Exhibit P-5 and Tr. 75). Cassell (Duke) Koepke, who had a similar petition circulated by the miners against him, was not suspended from work.

23. On February 27, 1981, Holden and Rice transferred from stope 4114 (Exhibit R-7).

24. From February 1981 up through the date of the hearing, a Miner's Rights Guide Book was allowed to remain on the mine bulletin board with pages pinned open to the part that refers to a fine that may be imposed against a miner for making false statements. The section was underlined and the name "Sam" had been written above a picture showing a miner sitting on a rock

with an arrow pointing from the underlined section to the miner. Also, handcuffs had been drawn across the picture. Jenkins is known by the name of "Sam". The location of the bulletin board where the book was posted is in an area visited by members of Day Mines management (Tr. 93).

25. On July 6, 1981, the Secretary filed the discrimination complaint on behalf of Jenkins against Day Mines.

26. From July 22, 1981 through August 14, 1981, Jenkins was the victim of numerous acts of harassment and vandalism at the mine by unknown persons. These acts consisted of human waste in his boots, drill oil poured over his lunch box, threatening messages on toilet paper placed in his storage basket, and water and urine put in his boots along with other foreign substances in his clothing. A clay doll was placed near the timecard box and a suggestion box placed in the area with a sign asking for suggestions of ways to get rid of "Sam". Jenkins brought these acts of harassment to William Hamilton's attention and was told by Hamilton that Jenkins brought this upon himself. On July 23, 1981, Ron Short posted a memorandum on the mine bulletin board regarding the acts of vandalism and threatening discipline up to and including discharge of anyone caught or implicated therein (Exhibit R-4). Short also instructed shift foremen to have meetings with miners to advise them that they would be disciplined for such acts (Tr. 254).

ISSUE

Did Day Mines discriminate against Jenkins in violation of Section 105(c)(1) of the Act, while Jenkins was engaged in a protected activity?

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in *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. 1981), and *Sec. ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination, bears a burden of production and persuasion to show (1) that he engaged in protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Pasula*, 2 FMSHRC at 2799-2800; *Robinette*, 3 FMSHRC at 817-18. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 817-18 n. 20. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend by proving that (1) it was also motivated by the miners unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. *Pasula*, 2 FMSHRC at 2799-2800. The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. *Robinette*, 3 FMSHRC at 818 n. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. The ultimate burden of persuasion does not shift from the complainant in either kind of case. *Robinette*, 3 FMSHRC at 818 n. 20. The

foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in *Mt. Health City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977).

In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), the Commission affirmed their Pasula-Robinette test, and explained the proper criteria for analyzing an operator's business justification for an adverse action:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979)(articulating an analogous standard). 3 FMSHRC at 2516-17. Thus, the Commission first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, they held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the

Commission intends that its Judges, in carefully analyzing such defenses, should not substitute his business judgment or

sense of "industrial justice" for that of the operator. As the Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

Having restated the principles that govern this case, it is necessary to consider these principles as they apply to the facts before me.

First, Jenkins has the burden of proof to establish, by a preponderance of the evidence, that: (1) he was engaged in a protected activity and (2) that adverse action taken against him by Day Mines was motivated in any part by this protected activity. Jenkins alleges that he was engaged in the protected activity of raising safety complaints on December 25, 1980, and January 2, 7, 11, and February 2, 1981 (Pet's Br. p. 5).

Second, Jenkins alleges that there were three separate instances of adverse action by Day Mines taken against him as a result of his protected activities involving safety complaints. The first involved the posting on the mine bulletin board by a member of management Jenkins's letter of December 25, 1980 which had the effect of identifying Jenkins as a troublemaker. Second, was the failure of Day Mines to reassign Jenkins to stope 4114 after January 23, 1981. Third, was the suspension of Jenkins for a two day period without pay commencing on February 4, 1981 (Pet's Br. p. 5, 6, 7 and 8). Day Mines denies that the actions taken in the above instances were in any way motivated by Jenkins's protected activity and argues that each action alleged as adverse was instead motivated by the operator's business judgment which was neither incredible or implausible (Resp's Brief p. 19).

I Did the posting of Jenkin's letter of December 25, 1980 constitute an adverse action by Day Mines?

The threshold issue to be determined is whether the miner had engaged in a protected activity as defined in the Act. In this case, Day Mines specifically concedes in its brief that Jenkins did in fact engage in certain protected activities during the time period from December 25, 1980 through February 4, 1981 (Resp's Brief p. 7).

The second element of a prima facie case as it applies to this specific allegation is whether the posting of Jenkins's letter of December 25, 1980 by Day Mines was an adverse action against Jenkins and was motivated in any part by his protected activity. Jenkins alleges that the purpose behind mine management posting the letter on the bulletin board where other miners could read it was to identify him as a troublemaker. In support of his position, Jenkins points to the testimony of fellow miners John Holden and Cassell (Duke) Koepke wherein they stated that the type of reaction that occurred to the letter by

the other miners would not surprise anyone (Tr. 134, 172).

The evidence of record shows that Jenkins was involved in several activities involving safety matters prior to the posting of his letter on January 7, 1981. The first involved Jenkins writing and mailing the four page letter following the fatality at the mine on December 24, 1979. This letter recited Jenkins's concerns regarding several safety matters including turning the power off to the main hoist for three hours without advising the miners, the drinking of alcohol by some of the miners and members of management, riding the skip in an unsafe manner, and inadequate miner training. Jenkins had raised some of the same safety concerns at a mine meeting held on December 29, 1980 and posted a letter on the mine bulletin board to solicit nominations for members for a mine safety committee. This notice was quickly removed from the bulletin board and caused William Hamilton, mine superintendent, to be upset. Jenkins then circulated a petition among the miners regarding concern over the power being shut off in the main shaft and secured the signatures of 44 miners. This petition was presented to William Hamilton on January 7, 1981 at 3:00 p.m. which is the start of the swing shift (Tr. 41). At the end of this swing shift, William Gianukakis, shift boss, met Jenkins and his partner Danny Vilardi and asked them to accompany him to the mine office where they were met by Ronald Short, unit manager. Jenkins testified that Short appeared agitated, distraught, and distressed and held Jenkin's letter in one hand and a stapler in the other and stated that he believed everyone should have a chance to read the letter because it concerned them. Short asked both Jenkins and Vilardi several times if they had any objection to his posting the letter on the bulletin board. Jenkins and Vilardi did not object to this. Jenkins testified that following the posting of the letter, he was threatened while in the shower with bodily harm by Jack Davis, a fellow miner, if Jenkins "pointed his finger at him or any of his friends" (Tr. 42). Also, David Hamilton was "yelling and screaming that I was an agitator and a troublemaker" (Tr. 43). On the following day, Jenkins's son Sam was threatened while at school.

Jenkins argues that the purpose behind Day Mines posting his letter was to identify him as a troublemaker and any other explanation was pretextual. Day Mines denies this and argues that there was a credible business justification for such an act. It cannot be denied that posting this letter was a catalysis for the harassment and threats suffered by Jenkins from fellow miners that occurred afterwards. However, the issue here is whether this amounted to discrimination against Jenkins by Day Mines as defined in the Act.

Day Mines argues in their post-hearing brief that the evidence fails to support any showing of discrimination by them against Jenkins in posting this letter. They allege that the letter was not entirely a private matter before its posting as it had been shown to and signed by at least four other miners employed at the Republic Unit. Also, it was mailed to management at the corporate headquarters and to the local MSHA office. Further, they argue that Short asked Jenkins and Vilardi several times if they objected to the letter being posted and no

objection was raised. The main thrust of Day Mine's argument to the allegation of discrimination is that Day Mines had a credible business justification for posting the

letter. In support thereof they submit that Short testified he believed that by posting the letter he would find out whether there was some truth to the accusations (Tr. 214).

In review, it has been conceded by Day Mines that safety complaints by Jenkins amounted to a protected activity under the Act. Also, Ron Short's posting Jenkins's letter of December 25th was, at least in part, motivated by this protected activity. However, Day Mines denies that this was an act of discrimination against Jenkins but argues that there was a credible business justification for posting the letter. Having set out the facts and arguments of the parties, it is necessary to apply the principles that govern those issues as set forth by the Commission in Pasula-Robinette-Chacon, supra. The first test is whether the proffered business justification is plainly incredible or implausible. Webster's New Collegiate Dictionary, 1973 Edition, defines incredible as "too extraordinary and improbable to be believed" and implausible as "provoking disbelief".

In light of the above, I reject Jenkins's argument that Ron Short's explanation for posting the letter is, on the face of it, incredible. Considering the tragic event that occurred on December 24, 1980 and the serious accusations against fellow miners and mine management, by Jenkins in his letter of December 25, 1980, some type of reaction by both of the accused parties could have been expected. Short testified as to the circumstances leading up to the posting of the letter as follows:

Well, in reading the letter, of course, it brought out a lot of questions to my mind. Being in my position, I am aware that not everyone is going to talk to me with the freedom that they would someone else and so I thought that there may be a chance that the things that Sam had mentioned in his letter, there may be some truth to parts of it. I didn't actually believe that there was, but I felt that I had to find out if these allegations were true. I felt that by posting the letter that I would find out one or two things: either there was some truth to it and a group of miners, either who signed the letter or who also agreed with Sam and did not sign the letter, would come forth to me on posting the letter and say, "yeah, this is true," or I would get a negative response in the sense that no one would come forward and that this would also indicate to me that there was no truth to what he was saying (Tr. 214-215).

In light of all of these circumstances, I do not find that Short's explanation is either so weak or implausible, or so out of normal practice as to be a mere pretext seized upon to cloak a discriminatory motive. The credible evidence in this regard clearly demonstrates that the letter was not that private prior to its posting, as it had been read by several of Jenkins's fellow miners and a post-script was added thereto signed by four

of them. Also, some of the complaints about safety had been raised by Jenkins at an earlier meeting of miners. Also, the letter had been mailed by Jenkins to the mine management and to MSHA. These acts by Jenkins indicate an attempt on his part to publish his views as to what he considered was wrong at the Republic Unit of Day Mines. Further, Short asked both Jenkins and Vilardi several times if they objected to the letter being posted and was advised that they did not. As stated by the Commission in *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, (June 1982):

"Our function is not to pass on the wisdom or fairness of such asserted business justification, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." (emphasis added).

It would appear that posting the letter was the act that triggered a quick and threatening response against Jenkins, but the evidence does not support the contention by Jenkins that posting the letter was intended to be a discriminatory act against him and such allegation is rejected.

II Was the failure to return Jenkins to stope 4114 an adverse action?

The evidence shows that Jenkins started working for Day Mines in approximately the middle of 1979. From November 1979 through March 1980, Jenkins was assigned to work as a contract miner with four different miners as partners principally in stope 3031 completing five mining cycles. From March 24, 1980 through December 11, 1980, Jenkins and his partner Vilardi completed two mining cycles in stope 4114 and two in stope 3058 while the sand fill operations were being performed in stope 4114. On December 12, 1980, Vilardi and Jenkins were assigned to stope 4222 where Jenkins continued working until February 17, 1981, when that mining cycle was completed. The sand fill operation was finished in stope 4114 on January 23, 1981 and miners Holden and Rice were assigned to mine it. Vilardi had transferred out of stope 4222 on February 1, 1981 and Terry Koepke had taken his place (Exhibit R-7).

Jenkins argues in his brief that the alleged adverse action occurred after January 23, 1981 when stope 4114 became available for further mining and he and Vilardi were not assigned to go back to it. Jenkins argues that stope 4114 is considered to be one of the larger and more productive stopes in the Republic Unit mine. He contends that those miners assigned to the larger stopes have the potential to earn more in wages than is possible to earn in the smaller stopes. Jenkins states that both he and Vilardi were told by members of management that they would be returning to stope 4114 after the sand fill operation was completed. Jenkins argues that it had been the usual practice in the past at this mine to return the same mining crew to the stope they had previously worked in when the sand fill operation was completed.

Day Mines denies this and argues that stope assignments given to Jenkins during the period of time after January 23, 1981 was not an adverse action on their part. Day Mines argues that Jenkins's assignments were made in accordance with the then existing policy at the mine, that is,

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generally by the availability of crews. Also, they contend that by reason of miners receiving higher unit pay in smaller stopes, that Jenkins's actual earnings for the year 1981, were not adversely affected.

The same principles to prove a prima facie case of discrimination in Pasula-Robinette, supra, discussed earlier herein, apply to this issue. As to the first element, again Day Mines concedes in its brief that Jenkins was engaged in certain protected activities during the period of time from December 25, 1980 through February 4, 1981. The second element, and the specific issue here, is whether Day Mines took an adverse action against Jenkins after January 23, 1981 in not assigning him back to stope 4114 when it became available, and if so, was such adverse action motivated in any part by Jenkins's protected activities?

The most credible evidence supports Day Mines's contention that there was not an existing policy at the Republic Unit mine which expressly guaranteed permanent stope assignments. Ron Short testified that when a stope becomes available, after the sand filling operation is completed, if the miners who previously mined this stope are available and not presently in an assigned operating stope, and had done a good job before, they would be reassigned to that same stope. However, Short stated, it was not the operator's policy to substitute miners during the mining cycle as this would be unfair to the originally assigned crew. Further, crew availability was an essential element to stope assignments.

William Gianukakis, shift foreman at Republic Unit mine, testified that he had been a miner at this particular mine for over 20 years and shifter during the last two years having responsibility for crew assignments. He concurred with Short's testimony as to how stope assignments were made and stated that this had been the same policy for as long as he had worked there. Tom Bradley, the other shifter responsible for crew assignments, agreed with both Gianukakis's and Short's testimony on crew assignments. He stated that the understanding with Jenkins and Vilardi was that they would be reassigned to stope 4114 if they were finished with 4222 when 4114 became available. However, it took longer than expected to finish the mining cycle in 4222, partly because Jenkins was gone for a week during that time. Bradley admitted that at times a stope will stand idle for a period of time, if everyone is working elsewhere. However, when stope 4114 became available, Jenkins and Vilardi were not finished in 4222 and other miners were waiting to go into a stope. About a conversation with Jenkins in January 1981 regarding his complaint of not being sent back to 4114, Bradley testified as follows:

I told him basically that since he wasn't done with 4222, we weren't going to pull him out in the middle of a mining cycle to put him in 4114 when we had other miners that were waiting to go into a stope. I didn't feel it would be fair to put John Holden and Tom Rice

in 4222 on cleanup where you didn't make any money and then put Danny and Sam in 4114 where they'd make the money (Tr. 295).

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John Holden testified that the usual practice was to reassign miners to their former stopes. Also, Holden stated that larger stopes earned the miners more money than the smaller ones. Holden signed a statement to the effect that he would have felt discriminated against if Jenkins had been put in stope 4114 and he had been assigned to 4222 to finish it (Exhibit P-9). However, at the hearing, Holden claimed he was coerced into signing it. Cassell Koepke testified that nine out of ten times miners will be reassigned to their former stopes. Terry Koepke testified that usually miners are returned to the stopes they formerly worked in but that it is not always the situation. Dan Vilardi admitted on cross-examination that one of the reasons that the mining cycle was not completed as soon as had been expected in stope 4222 was due to Jenkins being absent for a week to attend his father's funeral and that he didn't expect Holden and Rice to be pulled out of 4114 before they had finished working that stope.

From the conflicting testimony of miners regarding stope assignments, I find that the policy as described by Short was most credible. A review of Exhibit P-7 consisting of 41 pages of stope assignments, sand fill completion dates, and crew assignments prepared by Ron Short from the operator's records support the argument of Day Mines that crews are not assigned to permanent stopes and that availability of stopes and crews are both factors in making this decision.

I have considered Jenkins's argument that the failure to return him to his former stope assignment must be examined in the light of direct and circumstantial evidence surrounding the incident, and particularly in view of the tests enumerated in Phelps Dodge, supra (Pet's Brief, page 7); that is, the effect that Jenkins's safety complaints had on the operator's decision in this matter. These tests assume that such action was an adverse action, which I find is not substantiated. Even assuming that the stope assignment was partly based upon animus of the operator over Jenkins's safety complaints, the argument would nevertheless fail on its merits in light of Day Mines defense and argument that the evidence shows a business justification for such action which is not pretextual and neither incredible or implausible. Chacon v. Phelps Dodge Corp., supra.

I find that the weight of the evidence supports Day Mines contention that their actions in this instance were motivated by the time schedules as to the availability of miners and stopes and the requirements for continued production in the mine. Stope 4114 became available for mining on January 23, 1981 and Jenkins was not finished in 4222 until February 17, 1981 which would cause measurable loss of production if the stope was to remain idle during that time.

I am not persuaded by Jenkins's argument that his having been assigned for the two previous mining cycles in 4114 was evidence that this was to be his permanent stope. That he had been given some assurance that he would return to this stope was conditional on his finishing the mining cycle in 4222 which was

delayed by his absences. Considering all of these facts together, Day Mine explanation is not incredible or implausible, and I find, not discriminatory.

III Was the two day suspension of Jenkins an adverse action motivated by his protected activity?

The evidence shows that Day Mines suspended Jenkins without pay for two days commencing February 4, 1981 and ending February 6, 1981 after Jenkins signed a statement agreeing to improve his relationship with the other miners (Finding No. 22). This action was taken by the operator after management was presented a petition signed by 43 miners stating that they were tired of Jenkins's agitating and disruptive accusations and that they did not wish to work with him (Exhibit, p. 4)

The act of suspending Jenkins for two days was the culmination of various events recited earlier herein, such as, the December 25th letter, his efforts to elect miners's representatives, and safety complaints made by petition and at safety meetings. Again, Day Mines had admitted that certain activities Jenkins engaged in during this period of time prior to his suspension were protected activities under the Act. In light of the foregoing, I conclude that the two day suspension was, at least in part, motivated by these protected activities. The evidence also shows there was animus on the part of Day Mines's management towards Jenkins because of these activities which caused tension amongst the miners, was disruptive to the operation of the mine, and reflected badly upon the supervisors. From all of these circumstances, I conclude that Jenkins has established, by a preponderance of the evidence, a prima facie case under the test set forth by the Commission in *Pasula-Robinette*, supra.

Day Mines in its brief, denies that Jenkins has met his burden of proof in establishing a discriminatory motivation by its act of suspending him for two days. However, if it is found that Jenkins has proven a prima facie case as to this issue, Day Mines argues that it has shown a business justification for such action. Here again, the evidence of record as it applies to this issue, must be viewed in the light of the criteria set forth by the Commission in *Chacon*, supra, for analyzing an operator's business justification for its adverse action. That is, was the business justification so weak, so implausible, or so out of line with normal business practices to be merely a pretext to hide the operator's discriminatory motive.

Day Mines argues that the suspension of Jenkins was an extremely reasonable measure motivated by concerns over production in the mine, the safety of the miners, Jenkins's personal safety, and concerns regarding Jenkins's personal satisfaction with continued employment (Resp's Brief, page 15). Adversely, Jenkins argues that the disparate treatment between Jenkins and Koepke (who also had a petition presented against him by the miners) belies that there is a credible justification for suspending Jenkins (Pet's Brief, p. 11).

After a careful review of all of the evidence and on the basis of the Commission's directives regarding this issue, I conclude that Day Mines's business justification for suspending Jenkins for two days was not pretextual and the reasons for doing so were both credible and plausible enough to prompt management to take this adverse action. The suspension incident must be viewed in light of the existing mood of the miners at this time. Threats of bodily harm by fellow miners had been made against Jenkins and his son a month earlier which Jenkins believed were serious enough to be reported to the sheriff's office. Jenkins was off work for two days at this time and came back after Short guaranteed his safety while on the mine property. Even though Jenkins was absent for two weeks during the month prior to his suspension, apparently the tension among the miners did not subside. Ron Short testified that the circumstances that led to the decision to suspend Jenkins were the verbal complaints from the miners, considerable tension underground reported by the mines supervisors, and finally the petition by miners. Short stated that these conditions were affecting production and that he was concerned about the safety of the miners underground. Also, he did not feel Jenkins was helping correct the situation for he was insisting on talking to miners who did not wish to discuss these matters with him and forcing himself on them (Tr. 245).

Again, it is not necessary to pass upon the wisdom or fairness of the decision by Short to suspend Jenkins but rather to determine whether it was credible, and would motivate the operator to take such action. Belva Coal Co., supra. I find that the explanation by Short of his reason for suspending Jenkins is plausible. Obviously, conditions at the mine were worsening and some type of action was necessary to correct the situation. The petition containing the names of 43 miners from a total of approximately 65 underground miners indicating they did not want to continue to work with Jenkins supports the action taken by mine management. The two day suspension and a written promise by Jenkins to try to improve his relationship with the miners seems reasonable under the circumstances.

As to the alleged disparity on the part of Day Mines in not also suspending Koepke, Short testified that he had not had verbal complaints against Koepke by other miners as he had against Jenkins and he didn't believe the miners were against Koepke as much as against Jenkins (Tr. 248). This is supported by the record in this case. Only 28 miners signed the petition against Koepke. Also, there is a lack of evidence to show that Koepke was in any way a leader in safety complaints although it is shown that he had joined Jenkins in various activities in this regards. However, under the circumstances it appears that the fact that Koepke was not suspended does not prove that the business justification by Short was pretextual.

Evidence was presented in this case that Jenkins was a victim of harassment and vandalism by fellow miners at the Republic Unit mine following the filing of the complaint of discrimination on July 6, 1981.

The Secretary in its brief on behalf of Jenkins has not alleged that this was part of the adverse actions taken by Day Mines against Jenkins but instead restricted its argument to the three issues previously identified. However, I believe that this matter deserves to be addressed for it was discussed in both parties' briefs. I find that the evidence fails to show that Day Mines was involved directly or indirectly in any of the acts of vandalism or harassment that was inflicted on Jenkins following the filing of his complaint of discrimination.

The evidence shows that upon notification of these acts of vandalism, Short took direct action by writing a memorandum to the miners which was posted on the mine bulletin board that vandalism was against company policy and would not be tolerated. Further, the memorandum stated that anyone caught or implicated in this would be disciplined up to and including discharge (Exhibit R-4). Shift bosses were directed to have a meeting with their crews and inform them of what was stated in the memorandum.

CONCLUSION

I find that complainant, Chester (Sam) Jenkins has failed to establish a case of discriminatory conduct on the part of the respondent, Day Mines in regards to their posting Jenkins letter of December 25, 1980, failing to return Jenkins to Stope 4114 when it became available for mining, suspending Jenkins for two days without pay, and acts of harassment and vandalism against Jenkins after he filed his complaint of discrimination.

ORDER

The complaint is dismissed.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 105(c)(1) reads in pertinent parts as follows:

No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

2 Dictionary of Mining, Mineral, and Related Terms, 1968 Edition, Bureau of Mines, U.S. Department of Interior.

