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ALBERT DICARO V. U.S. STATES FUEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALBERT J. DICARO, COMPLAINANT — Complaint of Discrimination

v. — Docket No. WEST 82-113-D

UNITED STATES FUEL COMPANY, RESPONDENT

DECISION

Appearances: David O. Black, Esq., for Complainant
Barry D. Lindgren, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by the Complainant under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., seeking relief for alleged acts of discrimination. The case was heard at Salt Lake City, Utah.

Having considered the contentions of the parties and the record as a whole, * I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times Respondent operated an underground coal mine, known as King Four Mine, near Hiawatha, Utah, which produced coal for sale or use in or substantially affecting interstate commerce.

2. Complainant was employed by Respondent from August 25, 1978, until October 23, 1981, with an absence on sick leave from May 5, 1980, to August 9, 1981, because of an injury in a mine accident.

3. The complaint charges that Respondent discriminated against Complainant because of safety complaints in that he was:

(a) Given a disciplinary warning on September 22, 1981.

(b) Suspended for 5 days without pay on October 13, 1981.

(c) Given a disciplinary warning on October 21, 1981.

(d) Suspended with intent to discharge on October 23, 1981, and this suspension was converted into a discharge.

4. A Section 103(g) complaint(FOOTNOTE 1) signed by Albert Dicaro, dated September 10, 1981, was received by the Mine Safety and Health Administration (MSHA) on September 11, 1981, alleging that lighting on section equipment was not properly maintained. MSHA investigated the

complaint on September 22, 1981, and issued one citation on a roof bolting machine for an illumination violation of 30 CFR 75.179-3.

5. A Section 103(g) complaint signed by Larry Shiner, United Mine Workers of America District Safety Inspector, dated September 10, 1981, was received by MSHA on September 21, 1981. The complaint alleged that Albert Dicaro did not receive annual refresher training after his return to work on August 9, 1981. MSHA investigated this complaint on September 22, 1981. No citation was issued, since the inspector found that Dicaro had received the required training on September 19, 1981.

6. A Section 103(g) complaint signed by Albert Dicaro, dated September 28, 1981, requested an inspection of the sanders on the mantrips at the King Four Mine. MSHA investigated the complaint on September 30, 1981, and issued three citations on the sanders on mantrip jeeps.

7. A 103(g) complaint signed by Albert Dicaro, dated October 7, 1981, alleged float coal dust accumulations in the mine. MSHA investigated the complaint on October 9, 1981, and issued three citations for accumulations of coal dust.

8. On another occasion after his return to work on August 9, 1981, Complainant complained to a supervisor, Kent Powell, that there was inadequate rock-dusting for an area of about 2800 feet. Powell agreed that a small area (about 5 feet long) needed to be rock-dusted, but did

not agree that the "whole section" needed to be rock-dusted. Powell ordered the small area to be rock-dusted, using bags of rock dust that were near at hand, and told Complainant that if he wanted the rest rock-dusted he could hand-carry bags of rock dust and do the rock-dusting himself. Such work would have required Complainant to carry numerous heavy bags over an area of more than 2800 feet.

9. From August 9, 1981, until his discharge on October 23, 1981, Complainant's safety-complaint activities were common knowledge among his co-workers and mine management. Complainant's usual practice was to report a safety matter first to his supervisor and, if no corrective action was taken, he would file a complaint with MSHA. Mine management knew or had reasonable grounds to believe that the Section 103(g) complaints referred to in Fdgs. 4-7, above, were initiated by Complainant.

10. Complainant was appointed to the Mine Safety Committee around October 1, 1981.

11. Several weeks before his discharge, Complainant was threatened by a supervisor, Ken Powell, by words to the effect that Powell was going to have him fired. At another time, some weeks before Complainant's discharge, the mine foreman, Pat Jenkins, told Complainant that he wanted him to "leave the Federal Government out of company business," meaning that he did not want Complainant to file Section 103(g) complaints with MSHA and preferred that Complainant settle safety matters within the company.

12. From the time of Complainant's Section 103(g) complaints in September throughout the rest of his employment, mine management was hostile to Complainant because of his safety-complaint activities.

Warning on September 22, 1981

13. On September 22, 1981, the date that MSHA investigated the two Section 103(g) complaints dated September 10, 1981, Complainant's immediate supervisor, Jim Hanna, gave Complainant a disciplinary warning for "poor performance being that you broke between nine to twelve steels and put in ninteen roof bolts" on September 21 and 22, 1981. On September 22, Ken Powell, Maintenance Foreman, saw Complainant, a roof-bolt operator, break three drill steels in a period of about ten minutes, by moving the roof bolter while the drill steel was in the roof but still attached to the roof bolter. Powell reported this incident to Jim Hanna, who checked Complainant's records of broken steels and installed roof bolts for September 21 and 22, and issued the disciplinary warning.

14. On September 26, 1981, Complainant filed a Section 105(c) discrimination complaint with MSHA concerning the September 22 disciplinary warning. Complainant "dropped all charges" when the complaint was investigated by MSHA.

Suspension on October 13, 1981

15. On this date, at the start of the graveyard shift, Complainant and other miners told management personnel that the mantrip (equipment used to transport miners into and out of the mine) was unsafe because of inoperable warning bells or sanders. They requested that they be assigned other duties until the mantrip was repaired. Greg Mele, Foreman, ordered the crew to walk into the mine, about 2 to 2 1/2 miles. Complainant and his helper, George Brown, refused to walk into the mine, relying upon Complainant's interpretation of the following provision of the collective bargaining agreement (the "contract"):

> The Employer shall provide a safe mantrip for every miner as transportation in and out of the mines to and from the working section. [Art. III, Sec. 0(8).]

16. About six members of the crew walked into the mine, two left on sick leave, and Complainant and George Brown refused to walk into the mine. Mele cautioned them that it would be direct insubordination to refuse to walk into the mine.

17. Complainant and George Brown continued to refuse to walk and were suspended for 5 days. Later, Brown's suspension was reduced to 3 days, on the ground that he did not have a prior disciplinary record, and Complainant was offered a reduction to 4 days suspension.

18. Complainant was aware that his refusal to walk into the mine was an act of direct insubordination. It was not a safety issue but a contract dispute; that is, there was no contention by Complainant that it was unsafe to walk into the mine. As a matter of custom and practice, at various times Respondent required miners to walk into the mine. The union's interpretation of the contract was that such practice was appropriate if done occasionally, and that there was no violation of the contract in this incident.

Warning on October 21, 1981

19. Following his 5-day suspension, Complainant returned to the mine on October 20, 1981, and took a sick day. On October 21, he worked a full shift. Early in the shift, Complainant phoned Roy Bonuales, Maintenance Foreman, and informed him the section had not been pre-shift examined. He based this statement on the fact that he could not find pre-shift markings in the section. Bonuales checked the examiners' book, told Complainant the section had been preshifted, and read to him the name and certificate number of the examiner. After this call, Complainant told Foreman Mele that he (Complainant) was not sure about the regulations concerning pre-shift examinations and would work that night under protest, but he would check into the law the next morning.

20. At the end of the shift, Complainant and his helper missed the mantrip. Their immediate supervisor, Martin Ernie, told them to walk

out of the mine. It would have taken about 5 to 8 minutes to walk out. Complainant refused to walk out of the mine. Ernie told him to walk out, and then left. After Ernie left, Complainant used the mine phone to call Pat Jenkins, Mine Foreman, and requested a ride for him and his helper. Jenkins provided a ride. When Ernie arrived on the surface he told Jenkins that Complainant had been insubordinate in refusing to walk out. Jenkins prepared a disciplinary warning to Complainant for insubordination and instructed Roy Bonuales to give it to Complainant when he reported to work the next day.

21. Bonuales gave Complainant the written warning before the start of the graveyard shift on October 22. Upon receipt of the warning, Complainant told Bonuales that he was going home on sick leave. Complainant testified that he had "sick days coming" and had personal business to take care of.

Complainant's Discussion with Union Safety Inspector

22. Sometime between the end of his shift on October 21 and the beginning of his shift on October 23, Complainant consulted Larry Shiner, Safety Inspector for the International Union of UMWA, to discuss MSHA's regulations concerning pre-shift markings and a miner's safety rights when ordered to work in an area that does not have them. Shiner told him a miner would have two options: 1) work in the area and later file a safety grievance or 2) refuse to work in the area, requesting alternative duties, until a certified examiner makes a

pre-shift examination. Shiner explained the purposes of a pre-shift examination and pointed out a number of serious dangers that could be undetected without a proper pre-shift examination, including black damp, inadequate ventilation, unsafe roof or ribs, and methane gas.

Suspension with Intent to Discharge on October 23, 1981

23. Complainant worked the graveyard shift on October 23. His assignment was to roof-bolt in the first left entry of 8 North Section and then roof-bolt in the main entry of that section.

24. Complainant found pre-shift markings in the first left entry but thought there was a discrepancy between the time shown by his watch and the allowable time (within 3 hours) for making a pre-shift examination. He was on his way to the phone to call Bonuales, Foreman, about this question, when he saw Joe Montoya, a Mechanic, who told him he could find no pre-shift markings in the main entry. They both searched the main entry and could find no pre-shift markings there. Complainant then called Bonuales and requested a pre-shift examination of the main entry because there were no pre-shift markings there. Bonuales checked the examiners' book and told Complainant that the whole section, including the main entry, had been pre-shifted and read to Complainant the pre-shift report for the main entry. Complainant refused to do the roof-bolting work unless an examiner came in to pre-shift, and he requested alternative duties until the area was pre-shifted. Bonuales ordered him to perform his assignment but, after

Complainant's repeated refusal, Bonuales assigned him to other duties, telling him to go with his helper to assist in a belt move in the main entry.

25. Bonuales then phoned the pre-shift examiner, Ron Naccarato, a supervisor, who stated that he had pre-shifted the section and that the pre-shift markings in the main entry were on a brattice (ventilation curtain).

26. When Complainant arrived at the belt he checked an inspection pad at the tailpiece which did not show pre-shift markings for the graveyard shift. He called Bonuales back and told him that the belt had not been pre-shifted and that he would not work on the belt move without a proper pre-shift examination. Bonuales told Complainant that the belt did not have to be pre-shifted for the graveyard shift and ordered him to go to work. Complainant continued to refuse to work on the belt move and requested alternative duties. Bonuales told him that he had called Naccarato, who assured him that the main entry had been pre-shifted. Complainant still refused to work on the belt move and requested other available work until a proper pre-shift examination was made. Bonuales then ordered him out of the mine. At that point, Bonuales decided to suspend Complainant with intent to discharge. He told Mele to call Lee Heath, on the Mine Committee, because Complainant would be entitled to have a union representative present when Bonuales issued the suspension to him. Although Heath was also a member of the Safety Committee, Bonuales did not call him in that capacity and did not intend to discuss

or review the case with anyone before making a decision. He had already made up his mind to suspend Complainant with intent to discharge. The suspension was converted into a discharge, effective October 23, 1981.

DISCUSSION WITH FURTHER FINDINGS

Applicable Law

Section 105(c)(1) of the Act(FOOTNOTE 2) -- its anti-discrimation provision -- is the centerpiece of a comprehensive statutory scheme to give miners an active role in the Act's enforcement for their safety and health protection.(FOOTNOTE 3)

Section 105(c)(1) does not expressly provide a right to refuse to work because of safety or health hazards, but its legislative history and case law show that in certain circumstances such a right exists. Protected activity under this section includes a miner's refusal to work in conditions that he or she believes in good faith to be unsafe or unhealthful and a refusal to comply with work orders that are violative of the Act or a safety or health standard promulgated under the Act.

For example, the report of the Senate Committee that was responsible for drafting most of the 1977 Mine Act states in part:

Protection of Miners Against Discrimination

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. The Committee is also aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity.

Section 10[5](c) . . . prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under section [103(g)] or the participation in mine inspections under section [103(f)] but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

* * *

The listing of protected rights contained in section 10[5](c)(1) is intended to be illustrative and not exclusive. The wording of section 10[5](c) is to be construed expansively to assure that the miners will not be inhibited in any way in exercising any rights afforded by the legislation. * * * The Committee intends to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions: See, e.g. Phillips v. IBMA, 500 F.2d 772; Munsey v. Morton, 507 F.2d 1202. The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions . . . or the enforcement of those provisions . . . .

[S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 [(1978).]

The right to refuse to work was also discussed on the floor of the Senate:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10[5](c), the discrimination clause.
>
> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful work place for all miners.
>
> MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings. [Leg. Hist. at 1088-1089.]

Representative Perkins, the chief House conferee and chairman of the House Committee that drafted the House bill, stated during the customary oral report to the House describing the bill agreed to by the conference committee:

> Mr. Speaker, this legislation also provides broader protection for miners who invoke their safety rights. If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of Interior have improperly denied the miner the rights Congress intended. For example, Baker v. North American Coal Co., 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur. [Leg. Hist. at 1356.]

The predecessor to the 1977 Mine Act included a provision prohibiting discrimination for "notif[ying] the Secretary or his authorized representative of any alleged violation or danger" (section 110(b) of the 1969 Federal Coal Mine Health and Safety Act). This provision was interpreted to protect miners from discharge or other retaliation if they notified their supervisor of an alleged unsafe or unhealthful condition and refused to work in that condition. Phillips v. Interior Board of Mine Operations Appeals, 500 F. 2d 772 (D.C. Cir. 1974); Munsey v. Morton, 507 F. 2d 1202 (D.C. Cir. 1974). In pointing out the need for this application of the statute, the court in Phillips stated:

> [T]he miners are both the most interested in health and safety protection, and in the best

> position to observe the compliance or non-compliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with [the] mine foreman or top management. Only if the miners are given a realistically effective channel of communications re: health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced. [500 F.2d at 778.]

Citing Phillips as an example, the legislative history of the 1977 Act, quoted above, expresses an intention "to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provision4)4B"B")4B'

The Commission has interpreted section 105(c)(1) as protecting a right to refuse to work if a miner has a good faith, reasonable belief that working conditions present a hazard to safety or health. See, e.g., Secretary of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, Consolidation Coal Company, v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Robinettee v. United Castle Coal Company, 3 FMSHRC 803 (1981); and Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

Good faith simply means an honest belief that a hazard exists. A reasonable belief does not have to be supported by objective proof, but the evidence must show that the miner's perception of a hazard was a reasonable one under the circumstances. Unreasonable, irrational or completely unfounded work refusals are not protected by the statute. Robinette, supra, at 810 - 812.

In Robinette the Commission further explained the "reasonable belief" rule:

> The relatively stringent "objective, ascertainable evidence" test mentioned in Gateway is usually satisfied only by the introduction of physical evidence, "disinterested" corroborative testimony, and--not infrequently--expert testimony. Cf. NLRB v. Fruin-Conlon Construction Co., 330 F.2d 885, 890-892 (8th Cir. 1964), cited approvingly in Gateway, 414 U.S. at 387 (construing section 502). We think that such a test may be better suited to the broad scope of section 502, particularly where, as in Gateway, a union's contractually prohibited strike is involved. For while "objective, ascertainable" evidence is always welcome, it may not be readily obtainable in mining cases. Unsafe conditions can occur suddenly and in remote sections of mines; the miner in question may be the only immediate witness; and physical evidence may be elusive. Situations are also bound to arise where outward appearances suggest a dangerous condition which closer subsequent investigation does not confirm. Furthermore, we believe that such a test would chill the miner's exercise of the right to refuse work, an outcome inconsistent with the Act's legislative history favoring a broad right in a uniquely hazardous working environment. Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger. For all these reasons, a "reasonable belief" rule is preferable to an "objective proof" approach under this Act.
>
> More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing

> corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

[3 FMSHRC at 811 - 812, footnotes omitted.]

In Pasula, the Commission formulated the following test for "mixed motives" cases:

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

In W.B. Coal Co. v. Federal Mine Safety and Health Review Commission, et al (April 5, 1983), the Sixth Circuit rejected part of the test laid down by the Commission in Pasula. The court held that the "burdenshifting language in Pasula" is not a reasonable interpretation of the Act "because it conflicts with statutory language requiring proof of discrimination "because of'

protected activities, 30 U.S.C. 815(c)(2), and language requiring the burden of proof to remain with the claimant, see 5 U.S.C. 556(C)." (Slip Op. at 14.) The Sixth Circuit distinguished the Supreme Court's decision in Mount Healthy Board of Education v. Doyle, 429 U.S. 274 (1977), on which the Commission's Pasula burdenshifting test is based, and found the Supreme Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) to be apposite. In Burdine, the Supreme Court stated, in considering the requirements of a prima facie case under Title VII and the applicable burden of proof:

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
>
> * * *
>
> By establishing a prima facie case, plaintiff in effect creates a presumption that the employer unlawfully discriminated against the employee. If a trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.
>
> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact . . . . [450 U.S. at 253-255.]

In W. B. Coal Co., the Sixth Circuit concluded:

> In summary, the proper test in considering mixed motives under the Mine Act is that, upon plaintiff's showing that an employer was motivated in any part by an employee's exercise of rights protected by the Act,

> the employer has the burden only of producing evidence of a legitimate business purpose sufficient to create a genuine issue of fact. The plaintiff, who retains the burden of persuasion at all times, may of course rebut the employer's evidence "directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence.' Burdine, 450 U.S. at 256. The plaintiff's ultimate burden is to persuade the trier of fact that he would not have been discharged "but for' the protected activity. * * * [Slip Op. 15-16.]

The National Labor Relations Board adopted a test similar to the Mount Healthy test for labor discrimination cases, but the Circuit Courts appear split as to the burden-shifting portion of the test. See generally Note, Dual Motive Discharge, 58 Notre Dame L. Rev. 118 (1982), and cases cited in W.B. Coal (Slip Op. 10, fn 8). In declining to apply the Mount Healthy test to NLRA cases, the First Circuit discussed the difference between allocating the burden of proof to defendant and merely requiring defendant to rebut a presumption of discrimination (NLRB v. Wright Line, 662 F. 2d 899, at 905 (1st Cir. 1981), cert. denied, 455 U.S. 98):

> Professor Wigmore distinguishes between the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ultimate issue in a case by a preponderance of the evidence as follows:
>
> > "[A] prima facie case . . . need not be overcome by a preponderance of the evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof . . . .'
>
> 9 Wigmore on Evidence [Sec.] 2487, at 282 (3d ed. 1940), quoting Speas v. Merchants' Bank & Trust Co., 188 N.C. 524, 125 S.E. 298 (1924).

* * *

> The imposition of this limited burden, however, does not shift to the employer the burden of proving that [a violation of the Act] has not occurred. Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as "the burden of going forward with evidence to rebut or meet the presumption,' and distinguishes this duty from "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.' Fed. R. Evid. 301. Thus, the employer . . . has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel. [NLRB v. Wright Line, 662 F.2d at 905.]

Direct evidence of discriminatory motivation is not often encountered; more typically, the only available evidence is indirect. In Secretary of Labor ex rel. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), the Commission identified the following factors as particularly relevant in proof of a circumstantial case:

1) management knowledge of the complainant's protected activity;

2) management hostility toward the protected activity;

3) coincidence in time between the protected activity and adverse action against the complainant; and

4) disparate treatment of the complainant

Factor 4) is not a sine qua non, but another factor to consider.

Section 7(c) of the Administrative Procedure Act,(FOOTNOTE 4) which applies to adjudicatory hearings under the Mine Safety Act, sets minimum quality-of-evidence standards and a standard of proof. The provision directing the exclusion of "irrelevant, immaterial, or unduly repetitious evidence" and the requirement that the decision of the trier

of fact be "in accordance with" evidence that is "reliable" and "probative" mandate that the decision be premised on evidence of a certain level of quality. The further requirement that the decision be in accordance with "substantial" evidence implies quantity of evidence, and imposes the traditional preponderance-of-evidence standard. Steadman v. SEC, 450 U.S. 91, 98-101 (1980). This standard does not require proof to a certainty, proof beyond a reasonable doubt, or proof that is "clear and convincing" (Steadman, at 95, 99). Proof by a preponderance means only that proof that leads the trier of fact to find that existence of a contested fact is more probable than its nonexistence. Gardner v. Wilkinson, 643 F.2d 1135, 1137 (5th Cir. 1981); and see generally McCormick, Evidence 794 (2d ed. 1972). The burden is not met, however, by evidence that creates no more than a suspicion of the existence of the fact.

"Substantial evidence," when used to limit the scope of review -- for example, in section 10(e) of the APA, limiting judicial review of agency decisions, or in section 113(d) of the Mine Safety Act, limiting the Commission's review of administrative law judges' decisions -- means ""such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."' Steadman, at 99-100, quoting Consolo v. FMC, 383 U.S. 607, at 620 (1966).

Warning on September 22, 1981

Complainant's proof made a prima facie showing of discrimination as to this incident, in that: the warning was given on the same day that MSHA investigated two section 103(g) complaints initiated by Complainant (one signed by Shiner in Complainant's behalf), management knew that he was the source of the complaints (or had reasonable grounds

to believe he was), the record does not show prior discipline of a roof bolter for either breaking steel drills or installing too few roof bolts, and performance standards for the job of roof bolter were not clearly established either by written standards or oral training. However, Respondent proved by a preponderance of the evidence that on September 22 Complainant was observed breaking three drill steels by conduct (moving the roof bolter while a drill steel was connected to the bolter and still in the roof) showing either a deliberate intention to break the drills or gross negligence in operating the equipment. Complainant did not persuasively rebut this evidence. He offered only an indirect explanation for the breakage, saying that reconditioned steels broke more easily than new steel, but he was uncertain whether he was working with reconditioned or new steel; he did not effectively rebut Respondent's evidence, which I credit, that he was working with new steel on both dates, and his testimony was not probative in rebutting Powell's eye-witness testimony about his misuse of the equipment. As to the number of roof bolts installed by Complainant (19 on two shifts), Respondent did not establish a recognized performance standard, but Complainant's testimony that, depending on conditions, a bolter would install from 20 to 50 bolts a shift and that he had put in as many as 100 on one shift supported Respondent's evidence that Complainant's installation of only 19 bolts in two shifts was poor performance.

I find that the preponderance of the evidence establishes legitimate grounds for the warning on September 22 and does not establish a discriminatory motive. Complainant has not shown, by a preponderance of the evidence, a reasonable probability that, but for

his prior safety complaints, the September 22 warning would not have been issued.

Five-Day Suspension on October 13, 1981

Complainant did not meet his burden of proving discrimination as to this incident.

At the start of his shift on October 13, Complainant and some other miners complained that the mantrip cars were unsafe because of defective or missing bells or sanders. After some discussion, the employees rejected management's proposal that time be allowed to abate the condition and that they ride on the mantrips pending abatement. Greg Mele, Foreman, then directed the crew to walk into the mine because transporation was not available. Complainant and his helper refused to walk in, based upon Complainant's opinion that the contract gave them a right to a mantrip ride. Some miners walked in, some went home on sick leave, and Complainant and George Brown refused to walk. Both were suspended for insubordination. Complainant testified that his refusal to walk into the mine was not a safety issue. The preponderance of the evidence establishes a legitimate basis for the discipline, and does not establish a discriminatory motive.

Warning on October 21, 1981

Following his five-day suspension for refusal to walk into the mine, Complainant returned to the mine on October 20 and, instead of reporting to work, took a sick day and went home. The next day he was assigned to roof bolt in A-seem (9 North Section). After setting up his machine, Complainant looked for the pre-shift markings and could find none. He then used the mine phone to call Bonuales, Foreman, and informed him that the section had not been pre-shifted. Bonuales

checked the examiners' book and told Complainant that the section had been pre-shifted, and read to him the examiner's report and gave him the examiner's name and certificate number. After this, Greg Mele, Foreman, had a conversation with Complainant concerning the pre-shift markings. Complainant stated that he did not understand the law regarding pre-shift markings and would work that night under protest, but would check into the law the following morning.

At the end of his shift, Complainant and his helper missed the mantrip. Their immediate supervisor, Martin Ernie, told them to walk out of the mine. Walking would have taken about 5 to 8 minutes. Complainant testified that he refused to walk out and "asked Martin Ernie for a ride. I asked him to let us take the motor out because it was because of him that we missed our ride." 7/13 Tr. 52. Ernie testified that, "I don't remember the reason, but we was late leaving the section that day, and Albert had another worker with him. * * * I was on a motor and we're only allowed to have two people ride on the motor, so we was down at the mouth of A-seem at the end of the shift, and I told them to go ahead and walk out. * * * He refused. He said that he was not going to walk out. And I told him that I wanted him to walk out, and he said no, he would not walk out. He was going to get a ride. And I says, "Well, I want you to walk outside and I'll see you outside.' And I went ahead on the motor and headed towards the outside." 7/13 Tr. 79-80. Complainant then used the mine phone to call Pat Jenkins, Mine Foreman, and told him he and his helper needed a ride. Jenkins provided them a ride. Ernie overheard Complainant's call to Jenkins and on the surface reported to Jenkins that he had told Complainant to walk out and

that Complainant had refused. Jenkins then wrote Complainant a disciplinary warning for insubordination. The written warning stated that due to Complainant's refusal to follow a direct order on the first day back to work after a five-day suspension, he was being put on notice that the next instance of insubordination would result in suspension subject to discharge.

I find that the preponderance of the evidence shows a legitimate basis for the disciplinary warning and does not establish a discriminatory motive.

Suspension and Discharge on October 23, 1981

On October 23, 1981, Complainant worked on the graveyard shift, his usual shift. His assignment was to roof-bolt in the first left entry of 8 North Section and then to roof-bolt in the main entry of that section.

Despite a thorough search in the main entry, Complainant and another miner could not find markings of a pre-shift examination in the main entry. Complainant telephoned Bonuales, the outside foreman, to request a pre-shift examination of that area. Bonuales checked the examiners' book and told Complainant that the whole section had been pre-shifted, including the main entry, and he read him the examiner's report of a pre-shift examination of the main entry. Bonuales then ordered Complainant to perform his roof-bolting assignment. Complainant refused to roof-bolt unless an examiner came in to conducted a proper pre-shift examination of the main entry, and requested an assignment to other duties until such an examination was made. Bonuales finally agreed to an assignment of alternative duties, and told Complainant to go with his helper to assist in a belt move in the main entry.

After arriving at the belt, Complainant checked an examination pad near the tailpiece and saw no evidence of a pre-shift examination of that area. He then called Bonuales and told him that the area needed to be pre-shifted. Bonuales told him that the belt did not have to be pre-shifted for the graveyard shift, and ordered Complainant to go to work, but Complainant refused unless an examiner came in to make a pre-shift examination; he requested alternative duties until this was done. Part of Complainant's safety complaint to Bonuales, stated in this phone conversation, was the point that the belt was to be moved into the main entry area where Complainat had found no pre-shift markings, that is, the same pre-shift problem Complainant had just talked to Bonuales about in the prior phone call. Another part of his safety complaint, stated in the second phone conversation with Bonuales, was Complainant's contention that, if one working face in a section has not been pre-shifted, the entire section has not been properly pre-shifted. Bonuales again tried to get Complainant to go to work, but Complainant refused and requested alternative duties. Bonuales then ordered him out of the mine. It was at this point that Bonuales decided to suspend Complainant with intent to discharge. He did not plan to discuss the matter further with anyone else. He called his supervisor to tell him of his decision. He also arranged to have a member of the Mine Committee called, because Complainant would be entitled to union representation when the suspension was issued. This call, to Heath, was not for the purpose of discussing Complainant's safety complaint, but simply a formality of notifying the Mine Committee that a miner was about to be suspended with intent to discharge.

There is no question that pre-shift markings were not present in the main entry. There was a notation chalked on a brattice showing an examination for the previous shift, but there were no markings of a date and time for a pre-shift examination for the graveyard shift. Nor were there smudge marks that might indicate that pre-shift markings had been made but had been rubbed away. I find that the preponderance of all the evidence shows that pre-shift markings were not made in the main entry area for the October 23, 1981, graveyard shift. I do not credit the examiner's testimony that he had made pre-shift markings there.

It is not necessary to resolve whether or not the main entry had actually been pre-shifted for Complainant's shift. The evidence that the pre-shift markings could not be found, despite a thorough search, is sufficient to establish a protected activity in Complainant's refusal to work without physical, on-the-site evidence of a pre-shift examination of the area where he was required to work. The absence of pre-shift markings in the main entry also entitled Complainant to refuse to assist in the belt move, which would have required him to work in the main entry of 8 North Section.

Mine management, through the testimony of Mr. Vrettos, acknowledged that a miner has the right to refuse to work in an area that has not been pre-shifted, but contends that Complainant was required to accept Bonuales' assurance that a pre-shift examination had been made based on the examiner's book and the examiner's statement to Bonuales.

I conclude, however, that Complainant was entitled, without retaliation, to refuse to work in the main entry until there was a proper pre-shift examination of that area as evidenced by on-the-site pre-shift markings. He was also entitled to refuse to perform the

belt-move assignment, which would have involved moving the belt into the main entry of 8 North Section. It is not necessary to resolve whether or not the belt tailpiece was a part of the 8 North Section, or whether the belt was required to be pre-shifted before moving the belt on the graveyard shift. It is sufficient that Complainant was being ordered to perform work that would take him into the main entry of 8 North Section and that that area did not have markings of a pre-shift examination.

I find that Complainant had a reasonable, good faith belief that he confronted a threat to his safety when he refused to perform the roof-bolting assignment and later when he refused to assist in the belt move, because each of these asignments would require him to work in the main entry of 8 North Section, which did not have markings of a pre-shift examination. The danger he reasonably perceived was the uncertainty of working in an area that had not been properly preshifted.

Mine management was in error in minimizing the importance of preshift markings and in requiring that Complainant point to actual present dangers as the only basis on which it would permit him to refuse to work in the main entry. The mandatory safety standard for preshift examinations(FOOTNOTE 5) requires that an examiner be trained and certified to conduct a series of specific, expert, and technical examinations, and have the necessary tools and equipment to conduct them. Among other important safety duties, the preshift examiner must examine for accumulations of methane and oxygen deficiency, examine seals and doors, test ventilation and the roof, face and ribs, and examine active roadways and travel ways, belt conveyors and other areas to ensure that the working area is free of detectable hazards and that various mandatory safety and health standards are being complied with before men

are taken into the area to work. The preshift regulation also requires that the examiner make preshift markings in each area inspected. This requirement is an important safeguard to ensure that the miners' safety and health are being properly protected by compliance with the statute and regulations. Complainant was entitled to see that this safeguard -- placing preshift markings in the area inspected -- was met before he could be required to work in the area. Complainant had neither the training, certification, nor the necessary tools and equipment to carry out the preshift examination himself. It was not his obligation to inspect the area and point out dangers to his supervisor. Indeed, miners should not enter a working area that has not been preshifted. Therefore, Complainant was protected by section 105(c)(1) in raising a safety complaint (failure to make a proper preshift examination as evidenced by appropriate preshift markings) to his supervisor and in refusing to work in that area.

Respondent introduced a decision by an arbitrator upholding Complainant's discharge. However, this turns on issues under the contract and not the rights created by section 105(c)(1) of the Act. Work-refusal rights under the contract are limited to a narrow class of cases in which a miner is ordered to work under "conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated" (Art. III, Section (i)). However, section 105(c)(1) of the Act extends protected activites far beyond this test and is the relevant standard here. The arbitration

decision is not binding in this proceeding. See, e.g., Alexander v. Gardner-Denver Company, 415 U.S.26, 60 (1974).

The discharge on October 23 was not a "mixed motives" case. Complainant's refusal to work was a protected activity under section 105(c)(1) of the Act and his suspension and discharge were in retaliation of this protected activity. The evidence thus establishes discrimination in violation of section 105(c)(1). I find, also, that the evidence preponderates in showing a background of management hostility towards Complainant because of his safety-complaint activities, beginning with his section 103(g) complaints in September and continuing up to the time of his discharge; this evidence additionally raises a reasonable inference of specific hostility toward him because of his safety complaints on October 23, 1981.

CONCLUSIONS OF LAW

1. The judge has jurisdiction of this proceeding.

2. Complainant did not meet his burden of proving a violation of Section 105(c)(1) of the Act with the respect to any of the following incidents:

(a) The disciplinary warning on September 22, 1981.

(b) The suspension for 5 days without pay on October 13, 1981.

(c) The disciplinary warning on October 21, 1981.

3. Respondent violated Section 105(c)(1) of the Act on October 23, 1981, by suspending Complainant with intent to discharge and by discharging him effective that date.

4. Complainant is entitled to reinstatement, back pay with interest, and costs, including a reasonable attorney's fee and other litigation costs reasonably incurred in connection with this proceeding.

Other appropriate relief may be considered in formulating a final order.

All proposed findings of fact and conclusions of law inconsistent with the above are rejected.

PENDING A FINAL ORDER

The judge retains jurisdiction of this proceeding pending the issuance of a final order granting relief. Counsel for the parties should meet in an effort to stipulate the amounts due and other elements of an appropriate order. Such stipulation will not preclude Respondent's rights to seek review of this decision. Complainant shall have 10 days from receipt of this Decision to file a proposed order granting relief. Respondent shall have 10 days to reply to Complainant's proposed order. If necessary, a further hearing will be held on issues concerning relief.

WILLIAM FAUVER
ADMINISTRATIVE LAW JUDGE

FOOTNOTES START HERE-

* The transcript contains a number of phonetic-interpretation errors. Most are self-evident and cause no difficulty in following the testimony. I have corrected and initialed one error, at page 313 of the transcript, where the correct word is "Socratic," rather than "autocratic."

1 Section 103(g)(1) of the Act provides:

(g)(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

2 Section 105(c)(1) of the Act provides:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

3 Other provisions establishing an active role of miners in the enforcement of the Act include: section 103(g)(1) (right of miners' representative to obtain a government inspection whenever he or she "has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists"); section 103(f) (permitting miners' representative to accompany MSHA inspectors on all inspections); section 103(c) (requiring government regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents); section 103(d) (interested persons' access to accident reports); section 302(a) (miners' access to roof control plan); sections 303(d)(1), (f), (g) and (w) (interested persons' access to records of operator's safety and health examinations); section 305(e) (miners' access to map of electrical system); section 305(g) (miners' access to records of operator's electrical examinations); section 312(b) (miners' access to confidential mine map); sections 107(e)(1) and 105(d) (miners' right to challenge the modification or termination of withdrawal orders and to contest the reasonableness of the abatement time allowed by a citation or modification thereof); section 5(d) of the Act and the Commission's rules of procedure (permitting miners to participate in proceedings under section 105 of the Act).

4 Section 7(c) of the APA provides (5 USC 556(d)):

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 30 CFR 75.303(a) provides:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.