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HAROLD ATKINS V. CYPRUS MINES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HAROLD J. ATKINS,
COMPLAINANT

DISCRIMINATION PROCEEDINGS

v.

Docket No. WEST 84-68-DM
MD 82-82

CYPRUS MINES CORPORATION,
RESPONDENT

Cyprus Northumberland Project

DECISION

Appearances: Mary Gray Holt, Esq., Jolles, Sokol & Bernstein,
Portland, Oregon,
for Complainant;
John F. Murtha, Esq., Woodburn, Wedge, Blakey &
Jeppson, Reno, Nevada,
for Respondent.

Before: Judge Morris

Complainant Harold J. Atkins, (Atkins), brings this action on his own behalf alleging he was discriminated against by his employer, Cyprus Mines Corporation, (Cyprus), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act).

Section 105(c) of the Act, provides in part, 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.

After notice to the parties, a hearing on the merits took place in Reno, Nevada on June 19, 1985.

The parties filed post-trial briefs.

Issues

The issues are whether complainant was discriminated against by respondent in violation of the Act. If such discrimination occurred, then what damages should be awarded.

Summary of the Evidence
Complainant's Evidence

Harold J. Atkins, 43 years of age and inexperienced in mining, was hired by Cyprus on July 9, 1981. His initial duties included utility work and cleaning the leach pads. His activities also involved work in the ADR 1 unit where the utility crew helped mix cyanide and haul water. The water, dumped into a preholding tank, feeds the boiler (Tr. 34-37, 41).

After three months Atkins transferred to the pit as a grater operator where he remained about 2 1/2 to 3 months (Tr. 37).

About October 1, 1981, because of higher pay, Atkins transferred to the ADR plant as an operator (Tr. 38). He had no previous experience and the foreman trained him to run the mill (Tr. 39). The work process in the ADR was described as follows: material containing gold and precious metals enters a preg pond from the leach pads. The material then goes into the ADS circuit. Solution is filtered through and captured in the carbon (Tr. 39).

After a time the material is moved into a preheat holding tank and later transferred to a strip tank. The solution is then heated by a boiler and it then goes to electrowind where the gold is removed (Tr. 40). The procedures include stripping, reclaiming and preheating. The stripping process was almost continuous (Tr. 40, 42).

After two or three weeks in the ADR plant Atkins experienced a "nuisance" from the ammonia released in the stripping process. He had headaches; in addition, his nose was dry and bothering him. Since he felt the condition was minor he did not see a doctor at that time (Tr. 41, 42).

Atkins was elected to the mine safety committee and attended his first meeting in February 1982. The Committee discussed first aid, inadequate ventilation and communications in event of emergencies. When Atkins applied for the foreman's position he was told he could not remain as a member of the committee if he received the promotion (Tr. 42-44, 48).

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Atkins first became concerned about mercury because of workers Eagle, Legace and Bowers. Worker Eagle pointed out that the mercury (which could be seen) was accumulating in ADR tank No. 1. Legace spoke to Atkins about his dizziness and other problems which he related to the ADR work (Tr. 44, 45, 235).

Atkins thought Legace's physical problems and symptoms might be relevant to a worker in the ADR because of the carbon, the open tanks and the refining process (Tr. 46, 47). Atkins thought he was also exposed to mercury. Legace said it should be checked out. He further recommended that Atkins and anyone else in the ADR contact a doctor. This was the reason Atkins sought medical attention (Tr. 47).

Sometime in April, about the time of the discussions with Legace, Atkins thought he had a physical problem. The buildup of the ammonia was progressing to a point where he knew he should have his sinuses checked. His nose was dry all of the time and he was having breathing problems. Additional symptoms included headaches, dizziness and blurred vision. Neither food nor coffee tasted right (Tr. 49-51).

Most of the time during his stay in the ADR, Atkins' main problem and concern was exposure to ammonia fumes (Tr. 120; Ex. R23, pg. 2). MSHA did not issue any citations for excessive levels of ammonia (Tr. 121).

Atkins visited Dr. Horgan on April 24, 1982. A quantitative test for mercury showed a level of 65. Industrial guidelines indicate an acceptable level is under 150. A toxic level is above 150. Atkins wasn't satisfied with the doctor's answers (Tr. 193-196; Ex. R5).

On April 29, 1982, Atkins had a quantitative test from Dr. Andrews. The doctor stated that 65 was high and he indicated the State level was 150 milligrams. Atkins knew Legace was experiencing problems with a level of 86 or 87 (Tr. 49-53).

Atkins was the day foreman when MSHA inspector Frank B. Seale came on the premises on May 4, 1982. A 3M tag was used to test for mercury. There were no fans and the inspector, according to Atkins, was "staggered" at some of the readings (Tr. 60, 61, 221).

Atkins was not aware of the later MSHA visit on June 14. But in the interim Cyprus had taken corrective measures: these included warning signs, fume surveys, mercury testing and respirators (Tr. 223, 224, 318).

Within two or four days of the violation Atkins stopped at Seale's office to talk about the testing equipment. He was also interested in seeing the MSHA books. Seale gave Atkins copies of

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the Cyprus citation (Tr. 61-63). The citations had not been posted in the mine (Tr. 63). Atkins later received a full documentation from the MSHA Arizona office (Tr. 64).

There was probably more concern in the plant for ammonia than for mercury. There was no ventilation and you could feel the ammonia instantly (Tr. 64, 65).

After the MSHA inspection the company took care of the problem to a large degree (Tr. 65).

On June 9, 1982, Atkins visited Dr. Andrews, a pulmonologist. Complaints to Andrews included chemicals, ammonia, cyanide fumes and exposures to mercury. Complete blood and urine tests failed to confirm mercury poisoning. The blood mercury level was identified as less than 1. The reference range is less than 2.6; the level is potentially toxic if it is over 2.6 (Tr. 202-204; Ex. R14).

On June 10, 1982, Dr. Givens, a company doctor, gave Atkins a general physical examination. The symptoms exhibited by Atkins, which all occurred about June 10, included nausea, colitis and split vision. The doctor was more interested in writing than in listening so Atkins did not tell him all of his symptoms (Tr. 54, 69, 70). Atkins showed Dr. Givens the quantitative test. He stated that things were "alright" (Tr. 55). Dr. Givens also told Atkins that his health was generally excellent. Dr. Givens did not comment on the symptoms (Tr. 55).

On June 29, 1982, Atkins saw Dr. Badshah, his family physician, to whom he also showed the quantitative test. Dr. Badshah diagnosed Atkins' condition as colon colitis. He also had a lower and upper G.I. performed as well as a rectal examination. The blood tests forwarded to Dr. Badshah by Dr. Andrews were normal (Tr. 55-58, 65, 215).

Atkins was concerned about his health and he mentioned to superintendent Leveaux that he would like to temporarily leave the ADR because of his health. Leveaux said management would need a doctor's statement to that effect (Tr. 65-67, 238). Atkins believed that the severity of the colon problem was worsening, and the condition was playing on his nerves. Atkins felt the ADR was unsafe for him because his medical problems started there and they were not clearing up. He was having split vision, mostly in the right eye. This occurred four times in a 30 day span just after he started going to Dr. Badshah (Tr. 68, 69, 242). Badshah had suggested Atkins contact Dr. Schonders, an ophthalmologist. The specialist, in turn, suggested that Atkins go to the University because the problem was complicated (Tr. 69, 213). Dr. Schonders, as well as Doctors Horgan, Andrews and Givens failed to confirm mercury poisoning. But Dr. Badshah said it was possible (Tr. 214, 220).

Atkins returned to Dr. Badshah on July 9, 1982, where he related the same symptoms; namely, exposure to chemicals including ammonia, cyanide and fear of mercury exposure. Dr. Badshah gave Atkins a note which stated:

To whom it may concern: Jim Leveaux. This patient is having cramping, abdominal pains, nausea. On exam there is marked spasticity of the colon. He is advised to avoid exposure to chemicals which are likely to aggravate this condition. (Tr. 71, 72, 215, 216; Ex. R23).

Leveaux looked at the doctor's note and stated it would be necessary to talk to Appelberg, the Cyprus personnel manager (Tr. 73, 74). Appelberg told Atkins he would transfer him to utility but cut his pay. In the ensuing discussion Atkins claimed this was a medical situation and his miner's rights guaranteed that he keep his foreman's pay in the utility job. Appelberg agreed to the transfer (Tr. 73-79). Atkins went to utility thinking he would retain his foreman's pay (Tr. 126-127).

The next day Appelberg told him his pay was cut. He could either go back into ADR, leave the property, or be fired. Rather than be fired Atkins returned to the ADR. Atkins also stated he returned to utility the next day (Tr. 73-79).

One day before he was terminated Atkins explained the ultimatum and medical situation to MSHA inspector Frank Seale at the MSHA office. The next day (July 15) Atkins was told to work in the ADR or be fired (Tr. 78-81).

Before July 15th, between the two MSHA inspections, Atkins had told management that it was unsafe to work in the ADR. On the day he was terminated he did not say it was unsafe because he was more concerned about getting a note from the doctor than in closing down the ADR (Tr. 243).

Atkins also told Appelberg that he needed to get out of the ADR. It was unsafe for him (Tr. 238).

Atkins confirmed the contents of the typewritten note given to him by Appelberg when he was terminated and as well as his handwritten reply requesting an additional examination by a company doctor before he would return to the ADR (Tr. 112, 117, 118, 119; Ex. C21, R24).

Atkins was fired on July 15 as he refused to work in the ADR. The evidence contains a two page medical report, dated July 16, 1982, from Dr. Nur Badshah. The report states, in part, as follows:

IMPRESSIONS:

1. Loss of central vision of right eye, due to optic neuritis of the right eye, etiology most probably toxic neuritis due to metallic poisoning.

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2. Occult lower GI bleeding, probably due to gastroenteropathy related to metallic poisoning.

3. Spastic colitis.

So far, I have not received the copies of the report from the pulmonologist. I recommend that patient needs to be further evaluated by a neurologist, because metallic poisoning can cause nervous system changes affecting especially the cerebellar system. This should be thoroughly evaluated by a neurologist. I also recommend that the patient should be thoroughly evaluated by a gastroenterologist for his gastrointestinal symptoms. Until he is further evaluated by a neurologist and gastroenterologist, patient is advised to avoid contact with chemicals and he has been given a note to that effect on 7A9A82. (Exhibit C14).

Atkins believed he suffered mercury poisoning in 1982. His quantitative test was 65. He could not state whether the ADR was a safe place to work in July 1982. When he discussed termination with Appelberg on July 15, 1982, he may not have claimed that it was unsafe to work in the ADR. But at the time of that discussion he believed the levels were close to acceptable and it could have been perfectly safe in the ADR (Tr. 109). Atkins would go back in the ADR today (Tr. 109A110). Further, he would have gone back if there hadn't been a problem (Tr. 124).

Before Atkins moved from Round Mountain he would have accepted a job in the ADR if it had been offered to him. He would not have gone back to work in the ADR in August or September 1982 because of a possible NIC medical evaluation (Tr. 99A100).

Atkins last hourly wage at Cyprus was \$10.35 or \$11.47 as the ADR foreman. If he had not been fired he would have earned \$36,000. After being laid off in two months, Atkins found employment with Ray Dickinson earning \$5 an hour. He worked there two and one-half months (Tr. 80A85). He was also employed at Teague Motor Company in 1984 earning \$800 per month. In addition, he had a county job for three months earning \$800. After the county job Atkins received unemployment compensation. He has not worked since that time except about eight months ago he occasionally played in a band on weekends. This part-time work pays \$80 a weekend (Tr. 80A85, 94, 97, 98; Ex. C21, C27, C28). Atkins "guesses" that he has earned \$300 playing in the band since he was terminated by Cyprus (Tr. 94).

The 1040 U.S. income tax returns for 1981 and 1982 show, respectively, wages of \$12,924 and \$15,639 (Tr. 89; Ex. C25, C26).

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Atkins' trailer had been gutted before he acquired it in 1972 or 1973. At that time he paid \$4,000 for it. He fixed it and estimated its value at \$8,000. He sold it for \$4,000 because there was pressure on him to leave the company property (Tr. 87, 93, 94).

After he sold the trailer Atkins moved back to Oregon three and one-half months after he was terminated. There were two trips involved which cost him \$800 to \$900 for trailer rentals (Tr. 88, 109-110).

Atkins acknowledges that he received a written notice of having had eight absences in the previous twelve months (Tr. 114; Ex. R22).

Mrs. Atkins testified that her husband's health problems began in 1982. He complained and became irritable. Additional symptoms were mostly abdominal cramping and nasal headaches. She related his ill health to conditions in the mine because he had been in good health before working there (Tr. 250-252).

Respondent's Evidence

William Hamby, James Appelberg, Frank Seale and Sharon Badger testified for Cyprus.

William Hamby, the plant superintendent and metallurgist, indicated that Cyprus was closing down its operation in September 1985. He did not expect to be employed at the end of 1985 (Tr. 253, 254, 296, 297).

Hamby and Atkins were in daily contact when Atkins began working as an operator in the ADR in October 1981. Atkins had successfully bid on the operator's job. As an ADR operator Atkins' duties included monitoring the pump, reagent mixing, and reagent determinations for strength, advancing carbon and mixing it (Tr. 256-261).

In February 1982, Cyprus learned of mercury problems in the ADR. The mercury, which came as a surprise to Cyprus, was detected by monitoring with a 3M 3600 Model badge type dosimeter (Tr. 265, 266).

In March 1982 Cyprus ordered and installed a 98,000 C.F.M. fan in the ADR (Tr. 296).

When Atkins became safety representative he voiced his concerns about the plant environment, the mercury and the quality of the air. He also complained about ammonia (Tr. 261). There were four leaky pipes about the plant but, for the most part, ammonia in the atmosphere occurred when an operator would leave a hatch open. That would be the major source of the ammonia smell

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(Tr. 262). When Atkins complained about the ammonia Hamby instructed them to keep it out of the atmosphere (Tr. 262). Prior to March 1982 Cyprus was not certain what was "going on" in relation to the possibility of mercury being in the plant (Tr. 262).

Hamby wasn't sure of the circumstances but Atkins told him that he believed it was unsafe or hazardous to work in the ADR (Tr. 262-263).

In April 1982 Atkins was promoted to working foreman. The position opened because Cyprus went to full production. Hamby, Leveaux and three other working foremen thought he was best qualified for the position (Tr. 263). Because of the direct line between management and foreman it was suggested to Atkins that he might want to relinquish his duties as safety representative (Tr. 264).

Hamby denies that he ever threatened Atkins' job. Once he told him he was shooting his mouth off. In a handwritten note, dated April 23, 1982, he recorded that he told Atkins to keep his opinions to himself about possible contamination by mercury. Further, some of the people were complaining that he didn't know what he was talking about and it was upsetting them. Atkins replied that he would "cool it" (Tr. 282, 283; Ex. R4).

On April 27 Hamby, in a letter to plant personnel, sought to bring all employees together with the plant hygienist and company doctor to discuss mercury (Tr. 269; Ex. R7).

The company considered mercury to be a problem because of the hazards associated with it. Before May 4 the company had taken steps to discover the source of the mercury levels by using a Bacharach MB-2 sniffer. On May 4, 1982, the new equipment was not operating properly. It had been inoperative for a week (Tr. 267-269).

On May 4 MSHA inspector Frank B. Seale inspected the ADR. On that day he issued five citations. They allege Cyprus failed to post warning signs concerning health hazards in the ADR; atmospheric concentrations of mercury vapor exceeded the excursion limit for an eight hour TWA coupled with a failure to use respiratory protection; failure to conduct fume surveys; failure to use shielding during arc welding and failure to guard a chain sprocket. The foregoing citations were subsequently abated by Cyprus (Tr. 171-179; Ex. R9).

On the day of the inspection 3M badges were placed on employees Herrera, White and Atkins. The 3M badges were analyzed. The analysis indicated the three refinery workers had been exposed to mercury fumes. The TWA rates for Herrera, White and Atkins were, respectively, .081, .084 and .168 (Mg/M3). Atkins'

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dosimeter badge was 3.36 times the TLV. Further, it was twice the TLV of the other two employees. Citation No. 2008502 was issued by inspector Seale on July 20, 1982, for the exposure to the mercury fumes to Herrera, White and Atkins that occurred on May 4, 1982 (Tr. 171, 172, 189, 190; Ex. R9). The delay of over three months was caused in part by the time required to analyze the exposure (Tr. 171, 172, 189, 190; Ex. R9). On August 10, 1982, Citation 2008502 was terminated when it was found that the TLV for mercury complied with the standard (Tr. 184; Ex. R27).

Witness Seale also testified generally concerning the meaning of the TLV and TWA for mercury (Tr. 164-167; Ex. R6).

Hamby and Atkins discussed the TLV's. Atkins was always trying to convert the TLV's to parts per million. But there is no relationship between the two (Tr. 282).

After the MSHA inspection Cyprus continued to test for mercury by using 3M badges, sniffer equipment, as well as urine and blood sampling. Hamby discussed rules and practices with employees and instructed them to wear respirators (Tr. 268, 270-273, 285; Ex. R10, R11). The purpose was to address the mercury problem and protect the employees (Tr. 272). On one occasion Atkins was not wearing his respirator and Hamby advised him of the company policy (Tr. 174, 273; Ex. R11).

To alleviate the mercury problem Cyprus also hired D'Appalonia, a mercury clean-up company. They used sulfur dust, an industrial vacuum cleaner and sponges to clean-up the ADR in June (Tr. 280; Ex. R12).

In June 1982 Cyprus also ordered a new ventilation system. It was installed in the ADR in August 1982 (Tr. 296).

In a performance report of July 6, 1982, Hamby rated Atkins unsatisfactory in hygiene, safety, housekeeping, willingness to work, dependability, attendance and initiative (Tr. 275, 277; Ex. R13).

Concerning attendance, it was company policy to advise an employee when he had accrued six absences. After missing eight days the employee receives a written warning stating that termination is possible on the tenth absence. Atkins was given a written warning on July 8, 1982, for his eighth absence. Atkins refused to sign the notice because of a disagreement over what constituted an excused absence (Tr. 276; Ex. R22).

Atkins' doctor said he couldn't be exposed to chemicals so he couldn't be placed back in the ADR (Tr. 289).

On July 15, 1982, Atkins refused to go into the ADR. He wanted a doctor's approval to return to work (Tr. 263, 290). He was terminated because he refused to work in the ADR (Tr. 289, 290). Hamby claimed the ADR was a safe place to work (Tr. 289, 290).

James M. Appelberg, the supervisor of office services for Cyprus, participated in the decision to fire Atkins (Tr. 299, 301).

According to Appelberg, Atkins requested a transfer to utility from ADR because mercury contamination and ammonia vapors were causing him diminished sight in one eye, sinus and nose problems, as well as inflammation of the lungs (Tr. 301). They had several conversations regarding the transfer. Dr. Badshah's note indicated he should not work in a chemical environment (Tr. 301, 302, 312). Atkins was unwilling to take a cut in pay. An MSHA representative recommended that Atkins be kept at his present level of pay (Tr. 301-304).

Atkins worked on the utility crew for three days then he went back to the ADR for a day shift. He returned to the ADR because the Cyprus supervisor in Denver stated Atkins would have to take an appropriate cut in pay if he remained on utility work (Tr. 303). In the period of July 13th to July 15th Appelberg expressed his opinion to Atkins that the ADR had not been determined to be a hazardous place to work. Atkins concern was to get himself out of the ADR because of the chemical vapors (Tr. 304, 305).

On July 15, Appelberg advised Atkins in a typed note that he (Atkins) had been given a physical exam on June 10th by Dr. Givens and approved to work in the ADR plant. The note further stated that since he continued to refuse to do his assigned work "you leave us no alternative but to terminate your employment" (Tr. 305; Ex. R24). Atkins' final options were to go on disability, NIC (Nevada Industrial Commission), or remain as ADR plant foreman. Appelberg indicated it would not be a job related illness (Tr. 304, 313, 316). Atkins replied something to the effect of "OK, fire me" (Tr. 305).

At the time of the termination Atkins wrote on the termination notice that he would work in the ADR if the company doctor would examine him and state in a letter that he was physically able to work in the mill atmosphere (Tr. 305, 306; Ex. R24). In his handwritten reply Atkins further referred to the letter of June 30, 1982, and stated that his doctor (Badshah) had found colon colitis and further found that chemicals were aggravating his condition. In addition, he could not stand the smell of ammonia in the ADR. The ammonia smell and the mercury in the plant had not been corrected (Ex. R24).

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Appelberg replied that Atkins had been cleared for work by a company doctor five weeks before. Further, MSHA had abated the citations in the ADR, so there was no proven health problem (Tr. 305, 306). Prior to the termination Appelberg had received a note (1 July 1982) from Dr. Givens stating, in part, that he had not advised Atkins to consult outside medical help. Further, he told Atkins that the company would assume no financial obligation for his self procured medical attention (Tr. 306; Ex. R20).

Dr. Givens, in a telephone conversation, told Appelberg that he did not find that Atkins had been contaminated by mercury. In addition, Atkins should be able to perform his duties as plant working foreman (Tr. 307).

During conversations between July 1st and 15th Atkins claimed he had miner's rights in that he would not have to take a pay cut if he was transferred to utility. An MSHA representative said the easiest approach was to transfer him to utility at his current pay (Tr. 307, 308). According to Appelberg, Atkins assertion of his miner's rights did not enter into the decision to terminate him (Tr. 308).

Atkins was earning \$11.97 an hour as a working foreman compared with \$9.33 as a utility worker (Tr. 309, 310).

Appelberg testified that Joseph Legace had worked in the ADR for about two months. He filed a workmen's compensation claim alleging mercury contamination. The claim was disallowed (Tr. 310).

Sharon Badger, chief of benefit services for the State of Nevada Industrial Insurance System, indicated the state agency accepted Atkins' claim on September 17, 1982. On that day Atkins was placed on temporary total disability that was back dated to July 9, 1982. Atkins received travel benefits and, in addition, he was paid \$8,226.16 (\$38.44 a day x 214 days). He was also sent to Parnassus Heights Disability Consultants for a comprehensive integrated workup by medical specialists. The consultants were paid \$6,753.23 for their services (Tr. 155-159).

The disability evaluation by the Parnassus Consultants including psychological, neuropsychological and psychiatric examinations, "revealed that the patient's clinical picture warranted a diagnosis of Schizophrenia, Paranoid type. This type of illness is considered virtually independent of environmental etiology and is, therefor, not industrial in origin." (Ex. R32).

Atkins status under temporary total disability was terminated on the basis of the Parnassus report. NIC's last payment was February 7, 1983 (Tr. 80-81, 153-159; Ex. R32).

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For various reasons Atkins doubts the Parnassus diagnosis. A portion of the medical examination was not completed. Specifically, the small bowel series was never performed by Parnassus. Atkins felt he should have facts, not opinions (Tr. 131-138).

Atkins agrees he had some difficulty expressing his medical symptoms to the Parnassus doctors. But this difficulty occurred because he had driven directly to San Francisco from Oregon (Tr. 139-141, 149).

Atkins lacks medical or related training but in his opinion his symptoms had to be related to chemicals (Tr. 135, 143).

In the Parnassus report one of the physicians stated that "although the vision became poor after employment, he had not sought earlier consultation for this problem because of job threats" (Tr. 146; Ex. R32, pg. 19). Atkins states he was threatened by Hamby over a conversation concerning the manifold inside the ADR. Hamby also told him to mind his own business and to pickup his pay check (Tr. 146). Hamby stated he didn't like the idea of Atkins talking to miners about mercury problems (Tr. 147).

On August 10, 1982, MSHA inspector Seale reinvestigated the Cyprus plant. The investigation was caused by a letter dated July 18, 1982, identified in the exhibit index as an "Atkins to Fraser" letter. The letter refers to certain unhealthy conditions in the ADR. Inspector Seale failed to find any violative conditions. Specifically, he found that the alleged hazards did not exist, or it did not present a condition of imminent danger, or that it was not a violation of the Act or a violation of a mandatory standard (Tr. 180-184; Ex. R26, R27).

Discussion

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The

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operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C.Cir.1984) (specifically approving the Commission's *Pasula-Robinette* test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-403 (1983).

The vast majority of cases arising under Section 105(c) of the Mine Act concern matters of safety. However, the Commission applied the above legal analysis in *Rosalie Edwards v. Aaron Mining, Inc.*, 5 FMSHRC 2035 (1983), a case involving unsanitary toilet facilities.

In his post-trial brief Atkins asserts that his request for a transfer was a protected activity within the meaning of Section 101(a)(7) of the Act; further, that he had a reasonable good faith belief that the conditions in the ADR plant constituted a threat to his safety or health; finally, that Cyprus' termination of Atkins was motivated by Atkins' protected activity.

We will initially consider whether a request for a transfer is a protected activity. In this regard Atkins relies on Section 101(a)(7) of the Act which provides as follows:

(7) Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions safe use or exposure. Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and intervals, and in such manner so as to assure the maximum protection of miners. In addition, where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may

suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education and Welfare. The results of examinations or tests made pursuant to the preceding sentence shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the miner, to his designated physician.

Atkins' particularly relies on the underlined portion of Section 101(a)(7).

Atkins states there has not been any standard published pursuant to Section 101(a)(7). However, he argues that the only applicable standard in this factual situation is the threshold limit value (TLV) for mercury adopted in 1973 by the American Conference of Governmental Industrial Hygienists as contained in 30 C.F.R. 55.5Å1 (now recodified at 30 C.F.R. 56.5001).

Atkins has misconstrued the scope of the Mine Act. By its very terms under 105(c) the miners particularly protected are those miner's that are the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101. There are no medical evaluations or potential transfers now contemplated within the terms of the TLV for mercury, 30 C.F.R. 56.5001. Accordingly, the above regulation cannot be held applicable.

The Commission recently ruled that a miner may state a cause of action under Section 105(c)(1) if he is the subject of medical evaluations and potential transfers under such a standard published by the Secretary. *Goff v. Youghioghney and Ohio Coal Company*, 7 FMSHRC 1776 (November 1985). But there was no indication in the decision that the Commission intended to extend the doctrine any further than to encompass those situations where the Secretary specifically addressed, by his rulemaking authority, the issues of medical evaluations and transfers. Compare the Secretary's extensive standards at 30 C.F.R., Part 90 involving miners who have evidence of the development of pneumoconiosis as involved in *Goff*.

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Atkins' brief further asserts that the statutory right to a transfer combined with his good faith reasonable belief that the conditions in the ADR plant constituted a threat to his safety or health. Atkins claims that he was suffering ill-effects to his health due to mercury contamination in the ADR plant. This conclusion is urged on the basis of certain facts:

First, coworkers Legace and Bowers had been diagnosed as having mercury poisoning in the Cyprus refinery. Further, Legace had described his symptoms in detail to Atkins.

Secondly, Atkins' quantitative urinalysis, taken at Legace's suggestion, revealed a level of 65 mcg/24 hours. Atkins was alarmed because 0-20 mcg/24 hours is considered normal but 65 mcg is still within the state's guidelines.

Thirdly, Atkins knew the atmospheric conditions in the ADR violated the MSHA TLV standards for mercury. Atkins had been with the MSHA inspectors when he monitored the mercury levels in the ADR. Atkins had seen the mercury in the tanks. He also knew the citations issued by Inspector Seale were not posted by Cyprus, hence, he knew the company was not being candid with its employees.

Fourth, Atkins' family doctor, Dr. Badshah, examined and treated him for his headaches, sinus and breathing problems, gastroenteropathy and spastic colon. Dr. Badshah told Atkins he thought the health problems were related to exposure to mercury vapor in the Cyprus mine. Dr. Badshah subsequently wrote a note for the plant manager, Jim Leveaux. Atkins then based his request for transfer to the utility crew on Dr. Badshah's advice.

Atkins' claim lacks merit. The first four incidents he relies on occurred several months before he was terminated. Specifically, the Legace/Bowers conversations took place in April 1982. The quantitative urinalysis was in the same month. The TLV excursion for mercury was in May 1982. The Badshah medical reports relate to previous alleged exposures.

Atkins certainly may have had a reasonable basis of concern for his health. But the pivotal issue is whether he had a reasonable good faith belief that the work he refused to do on July 15, 1982, was hazardous to his health at or about that time. *Bush v. Union Carbide*, 5 FMSHRC 993 (1983).

A careful study of the record causes me to conclude that no credible evidence supports Atkins' reasonable belief that the ADR was hazardous on or about July 15, 1982.

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On the contrary, Atkins' evidence establishes that the ADR was safe. Particularly, Atkins indicated that corrective measures were taken by Cyprus between May 4 and June 15. These measures included fume surveys, mercury testing of the atmosphere, and the use of respirators (Tr. 223, 224). Further, after the MSHA citations the company attempted to cleanup the plant and, according to Atkins, Cyprus took care of the problem "to a great degree" (Tr. 65). In addition, on June 9, 1982, complete blood and urine tests failed to confirm mercury poisoning (Tr. 202-204).

When he was asked about the conditions in the ADR on July 15, 1982, Atkins said that he "believed the levels were close to acceptable." Further, the ADR "could have been perfectly safe at that time" (Tr. 108, 109).

Finally, Dr. Badshah's note of July 9, 1982, written for Atkins, addresses his physical conditions. It does not establish the conditions in the ADR at or about mid-July.

On his termination notice (Ex. C21, R24) Atkins wrote that he would work in the ADR if the company doctor said he was physically able to work in the mill atmosphere. His stated reason was that he could not stand the smell of ammonia. In addition, he asserts the ammonia and the merc (mercury) had not been corrected (Ex. R24).

I do not find the statements concerning the mercury to be credible. At the hearing, when speaking of Exhibit R24, Atkins stated "[t]he mercury was not a problem" (Tr. 112, 113).

For the foregoing reasons Atkins refusal to work was not a protected activity.

Cyprus at all times asserted that the ADR was a safe place to work at or about July 15th. But, since Atkins was not engaged in an activity protected by the Act, it is not necessary to examine respondent's evidence.

Briefs

Counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs, However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, I enter the following conclusions of law:

1. The Commission has jurisdiction to decide this case.

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2. Respondent did not discriminate against complainant in violation of Section 105(c) of the Act.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

The Complaint of discrimination filed herein is dismissed.

John J. Morris
Administrative Law Judge

footnotes start here-

1 ADR: an acronym for absorption, deabsorption and refining (Tr. 254).