

CCASE:  
RONALD TOLBERT V. CHANEY CREEK COAL.  
DDATE:  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

RONALD TOLBERT,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 86-123-D

v.

Dollar Branch Mine

CHANEY CREEK COAL CORP.,  
RESPONDENT

DECISION

Appearances: Tony Oppeward, Esq., Appalachian Research &  
Defense Fund of Kentucky, Inc., Hazard, Kentucky,  
for Complainant; Thomas W. Miller, Esq., Miller,  
Griffin & Marks, Lexington, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Ronald Tolbert under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" alleging that Chaney Creek Coal Corporation (Chaney Creek) failed to hire him (or rescinded its February 25, 1986, hiring of him) in violation of section 105(c)(1) of the Act because he testified in a discrimination proceeding against Chaney Creek on behalf of another coal miner. (FOOTNOTE 1)

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In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that the discriminatory action taken against him was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). The Respondent may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

If the Respondent 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 Respondent bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983). The Supreme Court has approved the National Labor Relation's Boards virtually identical analysis for discrimination cases arising under the National Labor Relation's Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

The Complainant herein was laid off from his underground mining job with Chaney Creek in February, 1985. On January 15, 1986, while still on layoff status, Tolbert testified on behalf of former co-worker Odell Maggard in a section 105(c) case against Chaney Creek. (See Maggard v. Chaney Creek Coal Corp., 8 FMSHRC 806 (1986)). Tolbert testified in that case that he had been shocked in Chaney Creek's White Oak mine by the same electrical trailing cable which Maggard claimed had shocked him and which led to Maggard's protected work refusal. Tolbert's testimony therefore provided important corroboration for Maggard who subsequently prevailed in his case against Chaney Creek. It is not disputed that Tolbert, by testifying in Maggard's 105(c) case, thereby engaged in protected activity.

The issue then is whether Chaney Creek was motivated in any part by this protected activity. Pasula, supra. The evidence in this regard is circumstantial. Tolbert maintains that he was hired by Superintendent Clyde Collins at the mine site and told to report for work later that day after

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completing some administrative paperwork at Chaney Creek's office in London, Kentucky. He further maintains that it was the standard practice for Collins to hire the men he wanted before sending them over to complete the paperwork. According to Tolbert it was only after Chaney Creek personnel director Steve Shell was told of Tolbert's participation in the earlier 105(c) trial against Chaney Creek that he was suddenly denied employment. Chaney Creek on the other hand has advanced several different reasons for its failure to hire (or its discharge of) Tolbert but in any event denies that it relied in any part on Tolbert's protected activity. For the reasons set forth in this decision I find Tolbert's allegations to be credible. At the same time I find Chaney Creek's purported defenses to be without credible evidentiary support.

It is essentially undisputed that on February 25, 1986, approximately six weeks after his testimony in Maggard's case, Tolbert went to the White Oak mine seeking employment. He arrived around 9:30 or 10:00 a.m., and asked Richard Woodard the "outside man" if Chaney Creek was hiring. Woodard told Tolbert that he would have to talk to Clyde Collins, the mine superintendent who was then underground.

While Tolbert was waiting for Collins he helped Woodard shovel around the outside beltline. When some rocks from the moving beltline fell onto the head drive, Woodard climbed onto the hopper to remove them. In doing so, Woodard fell into and became wedged in the hopper. Unable to get out and afraid he would be carried over the top of the stacker, Woodard hollered for help. Tolbert heard Woodard's cries for help, cut off the power to the beltline and helped him get out.

Because Tolbert had come to Woodard's rescue, Woodard said he would talk to Collins about hiring Tolbert. When Collins later came out of the mine, Woodard reported what Tolbert had done, and told Collins that he would be appreciative if Collins would give Tolbert a job.

The evidence about subsequent events is in dispute. According to Tolbert, he waited in the parts shed while Collins, Woodard and Terry Wilson, the "outside foreman", met in the adjoining mine office. After a few minutes, Wilson motioned for Tolbert to come to the office. According to Tolbert, Woodard then told him that he had a job servicing equipment and helping with the roof bolting on the third shift. Woodard gave Tolbert directions to Chaney Creek's office in London, Kentucky, and told Tolbert to report there

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to have his "paperwork filled out." Tolbert says that he then asked Collins what time he should report to work that night, and Collins allegedly told him to "be sure and be here no later than 20 'til eleven" with his work gear "to start work."

I find that the credible evidence supports Tolbert's testimony that Clyde Collins indeed told him on February 25th to report to work that night on the 3rd shift. In this regard Terry Wilson confirmed that "Clyde Collins told [Tolbert] to go to London [the location of Chaney Creek's offices] to sign up and come out on 3rd shift that night." Woodard also tends to corroborate Tolbert. Although Woodard claims he did not hear Collins tell Tolbert to report to work that night, he nevertheless testified that he had the impression on February 25th, that Tolbert "had a job if everything was approved and he went over [to the Chaney Creek offices] and done the paper work." In addition Woodard acknowledged that he stated at his deposition that Collins "indicated that he would hire [Tolbert] if he went over there and everything was approved." (FOOTNOTE 2)

The evidence also shows that Collins had good reason to hire Tolbert that day. It is not disputed that Tolbert had just saved Woodard from possible serious injuries and Woodard had asked Collins to reward him with a job. Woodard acknowledged that Tolbert "really helped me out" and testified that he told Collins he would appreciate it if Collins gave Tolbert a job.

While Collins denied at hearing that he had hired Tolbert I do not find Collins' testimony to be credible in critical respects. It is significant to note that on February 25th the date Tolbert maintains he was hired by Collins, Collins did not know that Tolbert had testified

against the interests of Chaney Creek in Maggard's section 105(c) case. Collins' motivation for his testimony at hearing arose only after Chaney Creek officials had failed to hire Tolbert because of his prior testimony.

A number of inconsistencies between Collins' testimony and the testimony of other witnesses called on behalf of Chaney Creek also shed doubt on Collins' credibility. Thus, contrary to Woodard's admission, Collins denied that Woodard had even asked him to give Tolbert a job. Collins testified that he "never discussed hiring [Tolbert]" with Woodard. Collins also testified that Steve Shell, Chaney Creek's Personnel Director, had informed him that Tolbert's miner identification card was not up to date, while Shell testified that he had never discussed the matter with Collins. In addition, the evidence shows that Collins told the special investigator for the Federal Mine Safety and Health Administration (MSHA) that he did not even know if Tolbert had gone to the London office to fill out an application after he left the mine on February 25, whereas Collins admitted at hearing that Tolbert had called him from Chaney Creek's London office that same afternoon. Collins' testimony that he simply told Tolbert to fill out an application at the London office because he might hire him in a day or two is also not consistent with Tolbert's failure to have checked back with Collins as Collins alleges.

Moreover, the credible evidence in this case clearly demonstrates that Clyde Collins regularly told prospective employees that they were hired and that they were hired before he told them to fill out a job application at Chaney Creek's London offices. Indeed, six miners who began work at the White Oak mine from the beginning of January through the beginning of March 1986 all testified that they were not instructed to fill out a job application until after Collins told them they were hired. (FOOTNOTE 3) Before the date these miners were hired and instructed to report to the London office, all had previously asked Collins for a job and were simply told to check with Collins again. None were told to submit a job application on the occasion or occasions they were not hired. Thus, for example, Bobby Hensley had asked Collins for a job 5 or 6 times before being hired and was not told on those occasions to fill out a job application. In addition, Matt Gross had spoken with Collins 20 to 25 times before the date

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he was hired without being told to report to the London office.

The record also shows that 19 of the 30 miners hired during the weeks ending January 5, 1986 through March 9, 1986, began work on the same date they filled out their job application. The record further shows that another 7 miners started work the next workday after their application was completed. Thus 26 out of the 30 miners who were hired during the relevant period began work either the same day or the next work day after their employment application was completed. Of the 4 remaining miners, 3 began 2 workdays after submitting their job application, and 1 began 6 days thereafter. (FOOTNOTE 4)

Consistent with this pattern or practice at Chaney Creek, Outside Foreman Terry Wilson, who is familiar with Collins' hiring procedures, testified that when Collins "decided to hire [new employees] he would tell them to go to London and fill out an application." Thus it may reasonably be inferred that Tolbert had indeed already been hired by Collins before he went to the London office. Within this framework of evidence I conclude that Collins had indeed offered Tolbert a job on February 25th subject only to Tolbert's completing the formalities of filling out a job application form at Chaney Creek's offices in London, and to a rarely exercised disapproval by that office.

In any event after Tolbert left the White Oak Mine after being told to report to work that night, he stopped at his home, then drove to Chaney Creek's London office. Tolbert says that he told Personnel Director, Steve Shell at Chaney Creek's office that he had been hired to begin work on the third shift that night at White Oak mine. Shell told Tolbert to come into his office to complete his paperwork. Shell filled out Tolbert's employment application in his office, and then gave Tolbert a Chaney Creek Coal Corporation employee handbook. (FOOTNOTE 5) Shell than asked Tolbert for a copy of

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his Kentucky miner identification card. (FOOTNOTE 6) Tolbert, apparently gave Shell an out-of-date 1984 card. Shell then told Tolbert that he would be back in a few minutes, and left his office.

While Shell was completing Tolbert's application, but before leaving his office, Daryl Napier walked by Shell's office and saw Tolbert. Napier was Chaney Creek's representative at the Odell Maggard discrimination hearing and was present during Tolbert's testimony at that proceeding. Shell was gone from his office, out of Tolbert's sight, for about 5 minutes. When he returned, Shell reviewed the employee handbook with Tolbert for 5 or 10 minutes. After reading through the handbook with Tolbert, Shell told Tolbert that he could not hire him "because he'd hired too many men that day." When Tolbert told him that Collins had already given him a job on the third shift, Shell repeated that he could not hire Tolbert because he had hired too many men that day.

As Tolbert was leaving to return home he saw Daryl Napier loading supplies. Tolbert approached Napier and told him that Collins had hired him for the third shift and had instructed him to come to London to get his paperwork filled out, but now the company would not hire him. Tolbert asked Napier if the fact that he had testified against the company was being held against him, and Napier purportedly replied, "I wouldn't think so, that would be hard to say."

Napier suggested that Tolbert call Clyde Collins at the White Oak mine to be sure he had been hired. When Tolbert told Napier that there was no point in calling Collins because Collins had already told Tolbert he'd been hired Napier insisted that Tolbert call. Napier and Tolbert then went back into Chaney Creek's office, where Napier dialed the White Oak mine from a telephone on the receptionist's desk by

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the front door. (FOOTNOTE 7) Tolbert says that he then explained to Collins that Shell had said Chaney Creek could not hire him, and he asked Collins "what was going on." Collins then told Tolbert that he could not hire him because the continuous miner had broken down and he was going to have to lay some men off. Tolbert then left the Chaney Creek office and returned home.

The following day, February 26, 1986, Tolbert returned to the White Oak mine to talk again with Clyde Collins. Tolbert again asked Collins "what was going on," and he asked the superintendent if the company had decided not to hire him because of his prior testimony. Collins purportedly told Tolbert that he did not know. Although Collins had told Tolbert the previous afternoon that the continuous miner had broken down, the mine was producing coal on the 26th. Indeed, Chaney Creek's production reports for February 25 and 26, 1986 suggest the continuous miner did not require any major repairs on those dates.

Although Tolbert had given Shell his expired 1984 miner identification card at Chaney Creek's office on February 25, 1986, Shell failed to notice that the card was out-of-date and did not discuss the matter with Tolbert. Indeed Shell readily acknowledged at hearing that the fact that Tolbert's miner identification card was expired had nothing to do with the decision not to hire him.

According to Terry Wilson, on February 26th he asked Collins if Tolbert had reported to work the night before. Collins purportedly told Wilson that the company had called him "from the office" and told him not to put Tolbert to work because Tolbert "had testified in a case against them." (FOOTNOTE 8)

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Although Chaney Creek hired approximately 47 new miners from February 25, 1986, through July 7, 1986, Tolbert was not among those hired. In fact, although given opportunity to do so Chaney Creek had still not hired Tolbert as of the date of the hearing.

In defense Chaney Creek argues in its post hearing brief that Tolbert was not hired for two independent and unprotected reasons i.e., that there was a temporary hiring freeze in effect on February 25, 1986, and that Tolbert did not have a current miner's card. The former reason was advanced only after Tolbert had been given an employee handbook on February 25th, when Shell purportedly told Tolbert that Chaney Creek could not hire him because it had hired too many men that day. However, when Tolbert called Collins at the White Oak mine shortly thereafter, Collins said that he could not hire him because the continuous miner had broken down and he would have to lay some miners off.

Shell testified that he told Tolbert on February 25th that there was a "hiring freeze" at the White Oak mine. However in Shell's sworn statement to an MSHA investigator on May 1, 1986, he failed to even mention any such hiring freeze as a reason Tolbert was not hired. Rather, Shell stated that he told Tolbert to call Collins in order to get a starting date, but that Collins did not give him a date. Shell's complete statement to MSHA is as follows:

"On February 25, 1986, Ronald Tolbert came into the office and said they told me to come in and fill out an application. I asked Tolbert if they (whoever sent him to fill out an application; I don't remember who he said sent him) told him when he was to report for work. Tolbert said that they did not give him a date. I filled out Tolbert's application, then I gave him the telephone to call the mine and talk to Clyde Collins, Superintendent, to get a starting date as to when he would start to work. After Tolbert talked to Collins, he said Collins told him that he would not be starting to work at Chaney Creek. No date was given as to when he would start to work.

During the week of February 11, 1986, there had been five employees laid off at [Chaney Creek]. Tolbert then went outside of the office and talked to Daryl Napier, Production Manager. I did not talk to Tolbert anymore.

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It is the policy of this company for anyone to fill out an application before they are hired."

Collins, on the other hand, testified that when Tolbert called him on February 25th from the London office, Tolbert "asked me about a job and I told him to check back with me." However, this assertion likewise contradicts the sworn statement that Collins gave to the MSHA investigator on April 30, 1986. That statement is as follows:

"On February 25, 1986, Ronald Tolbert came to the mine and asked me for a job. I told Tolbert that I was not hiring at the time, but maybe later. I told him if he wanted to he could go to the main office in London, Kentucky, and fill out an application. I did not tell Tolbert he was hired. Tolbert then left the mine. I don't know if he went to the main office and filled out an application or not.  
This is all I know about Tolbert."

Although neither Shell or Collins mentioned a hiring freeze when they gave their sworn statements to the MSHA investigator, Chaney Creek raised this defense in its October 8, 1986, response to the prehearing order issued by the undersigned in this proceeding. In that part of its response entitled "Statement of Issues," Chaney Creek stated that when Tolbert filled out his job application on February 25th, "Chaney Creek was not hiring any new miners, but rather was in the process of laying off several miners."

It may reasonably be inferred from this failure of the two principal members of Chaney Creek's management involved in this case to even mention a hiring freeze when questioned about the case approximately two months after Tolbert was denied employment, that the purported excuse was nothing more than a pretextual afterthought. In addition the underlying evidence refutes Chaney Creek's claim that there was a hiring freeze in effect on February 25th.

Shell testified that the freeze began "less than a week" before February 25th and lasted "approximately a week after February 25th." Kenneth Gilliam, Chaney Creek's safety director, testified that the hiring freeze had been in effect for "about a week" prior to February 25th and that Chaney Creek had not hired any employees or taken any job applications during that week. Chaney Creek's answers to Tolbert's requests for admissions reveal however that 13 miners were

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hired at the White Oak mine between February 24th and March 4th, all during the alleged freeze. Indeed, three miners (Glennis Nelson, Lawrence Shepherd, and Tony A. Smith) were hired on February 24th, and one miner (Bobby Howard) was hired on February 25th, the same day that Tolbert was turned away. Two more miners (Alvin Caldwell and Gerald Lawson) were hired on February 28th, and 7 additional miners were hired the following week. Although Shell stated that it was their practice for Collins to call him when he hired a miner to replace another miner (who had quit, been discharged, or injured), and that he (Shell) would receive this information before the miner reported to the Chaney Creek office, Shell did not know whether any of the 13 miners hired between February 24th and March 4th had in fact replaced other miners.

It is also significant that Chaney Creek's prehearing assertion that it was "in the process of laying off several miners" on February 25th is contrary to the evidence of record. The evidence shows that not only were 13 miners hired during the alleged hiring freeze, but that no miners were laid off at the White Oak mine from mid-February to mid-April, 1986.

If there had been a hiring freeze at the White Oak mine on February 25th, as Respondent now alleges and if Shell had told Collins about the freeze as Shell testified, it is not reasonable to believe that Collins would have failed to tell Tolbert about the hiring freeze either when Tolbert was at the mine on the morning of February 25th, or when Tolbert called Collins later that day from the London office. Moreover, if there had been a hiring freeze, it is not reasonable to believe that Shell would then have told Tolbert to call Collins to get a starting date.

Collins testified that when Tolbert called him from the London office, Tolbert "asked about a job" and Collins told Tolbert to check back with him. However, if Collins had told Tolbert that morning to submit an application and then to check back with him in a couple of days, as Collins claims, it is not reasonable that Tolbert would have called Collins again a few hours later to ask about a job.

It is also noted that when Shell was first asked at hearing why Tolbert was not hired by Chaney Creek, Shell replied, "[a]t that period of time there was a . . . temporary hiring freeze." However, after it was established at hearing that many miners had been hired after February 25, 1986, Shell advanced another explanation. Thus when asked why Tolbert was not hired when the freeze was lifted, Shell

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replied, "[h]e didn't go back to the mine is the only thing I can tell you."

The argument that Tolbert was not hired because he did not report back to the White Oak mine is not however reasonable under the circumstances. Although he denied hiring Tolbert, Collins testified that he did tell Tolbert on February 25th that he might hire him "in a day or two," and that Tolbert should check back with him. Shell testified that he told Tolbert on February 25th that Chaney Creek would not be hiring for only "a short period of time." Under the circumstances, it is not reasonable to believe that Tolbert, who was looking for a job, would not have reported back to the White Oak mine and/or to the London office in the next few days. It defies common sense to believe that a miner who is seemingly on the verge of obtaining a needed job would ignore instructions to contact his prospective employer again in a couple of days, but rather would opt for filing a discrimination complaint against that company.

Finally even assuming, arguendo, that there was a temporary hiring freeze at the White Oak mine in effect on February 25th, as Chaney Creek alleges, the fact remains that Tolbert was not hired when the freeze was admittedly lifted approximately one week later. Chaney Creek had hired approximately 47 new miners other than Tolbert between February 25th and July 7th. Moreover, 14 of these new employees were hired as either servicemen or roofbolters, the two jobs which Tolbert said he was told on February 25th that he would be performing. In addition, another 12 miners were hired during this period to perform unskilled work watching (and shovelling) either the belt drive or the beltline. These are jobs for which Tolbert, or any miner with 6 years experience would be well qualified.

Under the circumstances I find the Respondent's argument herein that it did not hire Tolbert because of a "hiring freeze", to be without credibility and a pretext.

Chaney Creek also argues in its posthearing brief that Tolbert was not hired because he did not have a current miner's card. Chaney Creek explains that it has had a policy that miners must be eligible to go underground i.e., they must have an up-to-date Kentucky miners identification card, showing that the miner has received his annual retraining sometime during the previous calendar year, before the company will hire them. However, the question of whether Tolbert had an up-to-date miner identification card when he went to the Chaney Creek office on February 25, 1986, is not material to this proceeding because the question of Tolbert's

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training admittedly did not enter into Chaney Creek's decision not to hire him. See Pasula, supra. (FOOTNOTE 9)

Shell, Chaney Creek's personnel director, admitted at hearing that the fact that Tolbert's miner identification card was not up-to-date on February 25, 1986, had nothing to do with why Tolbert was not hired. Indeed, Shell admitted that he did not even notice at that time that Tolbert's card was expired, and that he did not discuss the matter with Tolbert.

Moreover neither Shell nor Collins even mentioned Tolbert's eligibility to go underground as a basis for not hiring him in their statements to the MSHA investigator. It may reasonably be inferred therefore that this issue was not considered by Chaney Creek as a factor in not hiring Tolbert. Indeed, Chaney Creek did not even raise the issue of Tolbert's eligibility to go underground as a defense in its Answer filed June 30, 1986; nor did the company raise the question in its "Statement of the Issues" in its October 8th response to the Prehearing Order. At that time, one week before the scheduled hearing, Chaney Creek's sole defense to Tolbert's claim was that it simply was not hiring on February 25th, but rather was "was in the process of laying off several miners." It is plainly apparent that this new defense arose for the first time at hearing only after it was discovered that the evidence would not support the earlier alleged defense. (FOOTNOTE 10)



~FOOTNOTE\_TWO

2 Woodard testified at his deposition that Collins said he would hire Tolbert "if he went over there and everything was approved". He testified at hearing on the other hand that Collins said he would hire Tolbert after he filled out an application at Chaney Creek office but only "if he needed him." If Collins did not know whether he needed Tolbert at that time it is unlikely under the procedure then followed by Chaney Creek that Collins would have bothered to send Tolbert to the mine offices to fill out an application. Under the circumstances I give but little credence to Woodard's testimony that Tolbert's hiring was subject to essentially a second determination by Collins of whether he was "needed".

~FOOTNOTE\_THREE

3 See the testimony of James Miracle, Elmer Davis, Robert Hensley, Lawrence Shepherd, Gleniss Nelson, and Matt Gross.

~FOOTNOTE\_FOUR

4 Although there were actually 33 miners hired at the White Oak mine during this period, the record shows that employment applications for 3 of the miners could not be located by Chaney Creek.

~FOOTNOTE\_FIVE

5 It is stated in the introduction to the handbook that "[t]his handbook is to familiarize the employee of Chaney Creek Coal Corporation with the company policies in mining practices, personnel management and safety rules." (emphasis added).

~FOOTNOTE\_SIX

6 This card is issued annually by the Kentucky Department of Mines & Minerals to miners who have completed their annual retraining. The card lists the miner's name, identification number, qualified occupations, and an expiration date. The card expires on the last day of the given calendar year.

~FOOTNOTE\_SEVEN

7 While Shell testified that he, not Napier, suggested that Tolbert call Collins, he was vague and equivocal as to why he wanted Tolbert to make the call. Shell testified at one point that it was because he wanted to save Tolbert the trip of driving back to the mine so Tolbert could find out "when he might be hired or something along that line" and at another point testified that it was because he (Shell) was just "curious [about] what was going on."

~FOOTNOTE\_EIGHT

8 Even assuming, arguendo, that Wilson had been subsequently fired from Chaney Creek for allegedly stealing gas and thereby may have been motivated by ill will, I nevertheless find his testimony internally consistent, forthcoming and credible.

~FOOTNOTE\_NINE

9 The Commission stated in Pasula that:

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.

~FOOTNOTE\_TEN

10 It is not disputed in this case that Chaney Creek ordinarily did require its new employees to be current in their training. The application forms submitted into evidence show that Chaney Creek customarily did verify whether its new employees had received their annual retraining. However, in this case, it is clear that Chaney Creek did not consider the matter and it is accordingly not relevant.