

CCASE:  
SOL (MSHA) V. INDUSTRIAL CONSTRUCTORS  
DDATE:  
19890802  
TTEXT:

~1585

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF HARRY RAMSEY,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 88-246-DM

MD 87-51

v.

Colosseum Mine

INDUSTRIAL CONSTRUCTORS CORP.,  
RESPONDENT

INTERIM ORDER

Appearances: Norman J. Reed, Esq. and Nathaniel J. Reed, Esq.  
Reno, Nevada,  
for Complainant;  
William T. Murphy, Esq., Washington Corporations,  
Missoula, Montana,  
for Respondent.

Before: Judge Morris

This case involves a complainant discrimination filed by the Secretary on behalf of complainant pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. After the case was at issue, and after other counsel appeared, the Solicitor of Labor moved to withdraw as counsel for complainant. After notice, no person objected and the Solicitor's motion to withdraw was granted (Orders: January 9, 1989 and January 23, 1989).

After notice to the parties a hearing on the merits was held in Las Vegas, Nevada, on January 31, 1989. A subsequent hearing on the issue of attorney's fees is scheduled for October 24, 1989.

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion, provides as follows:

Discrimination or interference prohibited; complaint;  
investigation; determination; hearing

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 . . . . 30 U.S.C. 815(c)(1).

Post trial briefs on the merits were filed by the parties.

#### Applicable Case Law

The general principles of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that particular 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 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 in no 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 it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

SUMMARY OF THE EVIDENCE

This case does not lack for credibility issues: The prior employment of HARRY C. RAMSEY, SR., included 20 years with Mobil Oil Company. He retired from Mobil in 1987. While working for Mobil his work schedule permitted him to own and operate a construction company. His company employed up to 100 workers. The business was sold in 1983 when it became too large (Tr. 27-30).

Since July 1988 Ramsey has been a ranger at a golf course in Las Vegas, Nevada (Tr. 24, 26).

Between 1976 and 1987 Ramsey has owned and operated many pieces of heavy construction equipment (Tr. 27, 28, 33-34). He has been trained in fire fighting, safety training and first aid (Tr. 26, 29).

After leaving Mobil, Ramsey went to work for respondent, He was hired to operate all types of equipment on the job site (Tr. 30-33). He was also a pick and shovel laborer for one or two weeks (Tr. 35, 36).

In late June, or early July, when the company set up a crusher operation, Ramsey became the loader operator. He spent most of his time on the loader but he didn't receive a reclassification slip (Tr. 36, 37).

The crusher operator has various duties. He is involved with the continuous flow of material, monitoring personnel and signaling personnel by hand and horn signals if a problem occurs (Tr. 38, 39) (Exhibit C-3 is an unscaled drawing showing the equipment layout for the crusher spreader) (Tr. 40).

Cliff Morrison, the crusher foreman, instructed Ramsey in the manner and use of signals.

The 8 foot by 8 foot building (control tower) where Ramsey operated the crusher had windows on all sides. It was 20 feet above ground level so the operator could see everything in the work field (Tr. 41, 42). Ramsey's duties required him to remain in the control tower structure.

~1588

If a build-up of material occurred the mechanic or foreman would indicate this to the crusher operator. The operator would then, by whistle signal, bring in the rest of the workers. When he could see all of the workers, the operator would then shut down the equipment. This is normal procedure for shutting off the machine (Tr. 44). Morrison told Ramsey to operate under these procedures (Tr. 45).

On the swing shift of August 12/13, 1987, Ramsey was in the control tower. The evening shift had started at 4:00 or 4:30 p.m. The normal shift lasts 10 hours. The foreman was in and out of the tower all of the time (Tr. 42, 43).

About 45 minutes before the end of the shift they were crushing rock. At this point Superintendent Morrison came into view and gave Mr. Ramsey a hand signal to shut off the water. The signal was given from the normal signaling area. Ramsey hesitated when he saw the signal. There was still 30 to 45 minutes of production left and he wasn't anticipating a shutdown at that exact time (Tr. 45, 46). When the water remained on, Morrison signaled again. Ramsey had no idea why he should shut down the water but he followed the second direction (Tr. 46, 47). In a couple of minutes Ramsey could not see the window of the control tower in front of him (Tr. 47).

The main function of the water is dust control (Tr. 47).

Ramsey agreed that they have operated a few times without water. If a worker walked through the area it is necessary to see that person to know if he is safe. If an employee cannot be seen on the site, the control operator automatically shuts down "real quick" (Tr. 48). There have been occasions where Ramsey shut down the equipment without signaling (Tr. 49). Ramsey has followed normal procedure by shutting off the machine and getting all employees out in front of the tower (Tr. 49, 50).

On this occasion, after shutting off the water, in two or three minutes, Ramsey couldn't see anything. He listened but he heard nothing unusual (Tr. 50, 57). About two or three minutes elapsed after he shut off the machine (Tr. 51).

~1589

Ramsey estimated that five minutes elapsed from when he couldn't see at all until he could make out shadows and equipment (Tr. 52). As soon as visibility cleared Morrison came up to the control tower and asked Ramsey why he had shut down the crusher. Ramsey said he couldn't see. Morrison, who was hostile, told Ramsey that he'd tell him when to shut the water on and off (Tr. 54).

Morrison then tore the daily work paper off the wall and went down the stairs (Tr. 54).

Ramsey then ran the crusher (to clean off the accumulated material). It took about three to five minutes to clean the machine (Tr. 55).

Ramsey then approached Morrison and asked if he had the authority to turn the water on and off (as he had been previously advised when he started as an operator) (Tr. 57). In a three to five minute conversation, Morrison replied that he (Morrison) would be the one to tell him when to turn the water on and off (Tr. 58, 59). Ramsey then replied that he wouldn't work for him under these conditions (Tr. 59). Ramsey was trying to get Morrison to tell him there was no problem. But he would only say that he'd be the one to tell him what to do (Tr. 60). Ramsey repeated that he wouldn't work under those conditions. Morrison asked if he was quitting and Ramsey replied he was. Ramsey felt if he didn't have this latitude he would quit because it was not safe (Tr. 60, 61). However, Ramsey didn't intend to quit working for ICC(FOOTNOTE 1) (Tr. 61).

~1590

Ramsey and the rest of the crew spent another 15 minutes completing normal clean-up work. Ramsey then got in Morrison's truck to ride to the bus and eventually home. There was no conversation between Ramsey and Morrison on the way to the bus (Tr. 61-63).

About 9:30 a.m. the following morning Ramsey called Mine Superintendent Hildebrandt and told him what had occurred at the end of the shift (Tr. 65). Hildebrandt said he'd check into it and get back with him (Tr. 65, 66). When he again contacted Hildebrandt, about a week later, Ramsey was advised by the company secretary that there was no work available (Tr. 68, 69, Ex. C-18).

Ramsey talked to loader operator Boudreaux and company mechanic Chris Norskog. They concurred with what Ramsey had done (Tr. 70).

Ramsey subsequently filed a discrimination complaint with MSHA (Tr. 72, 73, Ex. C-5). He also took statements from company employees Chris Norskog, Alvin Boudreaux, Hildebrandt and Morrison (Tr. 75). The Norskog and Boudreaux statements were taken at the MSHA inspector's request (Tr. 78, Ex. C-16). Ramsey also heard the company had been cited for dust problems (Tr. 76, Ex. C-12).

After he was terminated Ramsey sought other employment. He sent 60 to 70 resumes to potential employers (Tr. 81, 84, Ex. C-7, C-8). He has continued to seek employment in his field. In addition, he has held several jobs (Tr. 87-90).

#### Respondent's Evidence

CLIFFORD MORRISON, a person experienced in construction, was laid off together with the entire crew at the Colosseum site when the crushing job was finished (Tr. 153, 154).

Morrison, as supervisor, reclassified and gave Ramsey a raise (Tr. 156). He felt the raise was deserved as Ramsey was doing a good job in the short period of time he was there (Tr. 157, 158). After the raise Ramsey was receiving the money crusher operators were worth (Tr. 158). However, there were a few unsatisfactory incidents involving Ramsey. [These incidents did not cause Ramsey to be discharged.]

~1591

On August 12, 1987, Ramsey and Morrison had a disagreement over crusher dust and safety procedures for the crusher (Tr. 158, 159, Ex. C-4).

On this occasion, about ten or fifteen minutes before the end of the shift the miners were standing in front of the parts trailer. At that point Morrison asked Ramsey to shut off the water so they could clean the screens(FOOTNOTE 2) (Tr. 160).

Ramsey turned the water off and then he turned off the crusher. Morrison went up into the tower and asked him why he had taken that action. There was no reason to shut off the crusher because Morrison was standing right below him. Morrison could see Ramsey and part of the plant. Before he signaled the shutoff of the water Morrison signaled him to assure the safety of the other workers. All of the workers were safe and they were standing next to Morrison or they were in the parts van. Ramsey could have seen them. Morrison agrees that Ramsey could have shut down if he hadn't seen the employees. This is standard procedure (Tr. 160).

In the tower, when Morrison asked Ramsey why he had shut down, Ramsey said he couldn't see. Morrison replied that there was only a little material left to run. It would only take a minute. Morrison then tore off the daily log and left (Tr. 161, 162).

Morrison finished his paper work and took it to the office. When he returned Ramsey handed him his hard hat and flashlight. He then said he quit. Morrison asked if he was going to quit over a little bit of dust. Ramsey said, "Yes, if it continues." Morrison walked away. The disagreement involved turning the water on or off (Tr. 162, 164). Ramsey never argued about turning the crusher on or off (Tr. 162). Ramsey had the authority to turn it on or off if there was a safety hazard. This was a standard procedure (Tr. 163). Ramsey requested no further consultations over the issues. Morrison was laid off a month later. Ramsey didn't contact him during that period (Tr. 163, 164).



~1592

When Morrison hired workers for the crusher crew, none of them were told that they would have long-term employment. Such employment is not standard in the industry. When crushing is complete the crew is laid off. Ramsey wasn't given any reason to believe he'd be kept on when the project was completed (Tr. 164).

Morrison told Ramsey to shut the water off -- not the crusher. He was also standing where he could view the dust once the water was shut off. Morrison could see every bit of the crusher. Visibility was not reduced to the extent that it was dangerous. Morrison could also see Ramsey in the control tower. He could have signaled him in the tower, even after the water was shut off, had he wanted to do so (Tr. 165, 166).

Morrison agrees that Ramsey was performing adequately as an operator when Morrison suggested he receive a raise (Tr. 174).

On Ramsey's separation slip Morrison wrote "quit" (Tr. 176, 186, Ex. C-4, R-1).

DICK NASH, ICC's personnel manager, identified certain records and testified the crusher crew was laid off September 25, 1986 (Tr. 200-202, Ex. R-1). He further testified concerning the 401(k) plan involving waged employees as compared to salaried employees (Tr. 211, 212, Ex. C-1, R-1). [Discussed under damages, infra].

ORVILLE HILDEBRANDT, ICC's project manager, worked on the Colosseum job (Tr. 244).

When he hired Ramsey he gave him a safety tour which is standard for all new employees. On one occasion while running the loader, ICC supervisor Brown gave Ramsey some instructions. Ramsey felt he was abusing the equipment and he might quit sometime over that issue. But he still wanted to work some other area of the project. Hildebrant believed that Ramsey felt he was probably more qualified than the foreman. As a result Hildebrant felt [Ramsey] resented the foreman giving him directions (Tr. 247, 248).

The morning after the August 12th incident Hildebrant learned of the conflict between Ramsey and Morrison. Ramsey said he'd quit but he would like to remain in another position on the project (Tr. 248). Ramsey said he'd return to the crusher if Hildebrant would authorize him to have control (Tr. 248).

~1593

Hildebrant and Morrison talked. Morrison told Hildebrant that Ramsey had quit over the dust and who was turning off the water and such (Tr. 249). Hildebrant did return Ramsey's call and he decided not to rehire him because of two incidents. These two incidents involved the loader and the crusher (Tr. 249).(FOONOTE 3)

On September 8, 1987, an MSHA investigator came to the plant and issued citations due to crusher dust(FOONOTE 4) (Tr. 251, 252, Ex. C-12). Hildebrant, in abating the citation, wrote a letter to control the dust from the crusher (Tr. 252, Ex. C-15).

Hildebrant also testified concerning the company's 401(k) plan (Tr. 254).

Superintendent Hildebrant also indicated that Ramsey received a raise; further, he was transferred to a different position at a later date (Tr. 259).

As a crusher operator a part of Ramsey's duties relate to when to shut the water and the machine on and off (Tr. 259). The crusher operator could shut down the machinery if he didn't know where the workers were located. In an emergency he could also shut the water on or off (Tr. 260).

When Ramsey called Hildebrandt he told him he had quit because he had a disagreement with Morrison over the way the water should be shut off or how the dust should be controlled (Tr. 278). He also stated he would like to work in some other area of the project (Tr. 278, 279). In addition, he would go back to the same position if Hildebrant would give him control of the crusher (Tr. 279).

~1594

The Colosseum mine is still operating. Further, miners are using heavy equipment used in the production of gold (Tr. 280, 289).

BEN BROWN was an ICC night shift foreman in the summer of 1987. He has since been laid off (Tr. 283, 284).

Brown considered Ramsey's skill as a loader operator to be below average. He further considered Ramsey to be a poor dozer operator (Tr. 285).

Brown and Ramsey were involved in two conflicts. These didn't cause Ramsey to be terminated. One involved Ramsey running the loader at half throttle or lower. The other involved loading with the front of the bucket rather than the heel. He considered that Ramsey's ability to take orders was poor (Tr. 286, 289).

Brown admits Ramsey received a raise after two conflicts between them. However, it was Morrison and not Brown who recommended the raise (Tr. 288, 289).

CHRIS NORSKOG testified by deposition. Norskog has spent 15 years working around rock crushers (Dep. 5, 6).

Norskog had to show Ramsey some basic matters concerning the rock crusher (Dep. 8).

Norskog recalls an argument between Ramsey and Morrison about whether to fire the crusher up again with or without water. Both men were angry (Dep. 8). Ramsey did not want to fire the crusher up. Morrison replied he was the boss and he'd fire the crusher up. Ramsey said he was going to quit (Dep. 8, 9). The two men didn't appear to be acting rationally (Dep. 9). Phillip Boudreaux heard less of the argument (Dep. 9, 10).

There was a little more dust than usual when they shut the water off but it was not enough to be dangerous (Dep. 11).

It was standard procedure to let the machine run without water. It would only take a short while to clean the screens. Ramsey hadn't complained about it prior to that time (Dep. 11). There are other options besides running the equipment without water but Norskog didn't know if Ramsey knew about them (Dep. 12, 13).

~1595

Within a day or two later Norskog refused Ramsey's request to sign a statement that it was unsafe to work in the area. However, Boudreaux signed the document. Norskog later gave a statement to an MSHA inspector (Dep. 15).

#### Discussion on the Merits

The credible evidence adduced by complainant establishes that Ramsey was engaged in a protected activity when he complained to his supervisor Morrison about the dusty conditions that precluded him from seeing the workers who were in close proximity to the crusher. He was thus constructively discharged since he has shown that ICC created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. One act of discrimination occurred at the time of the constructive discharge. A second act of discrimination occurred when the company refused to rehire Ramsey.

ICC contends that Ramsey was not engaged in a protected activity but merely disagreed with his supervisor about the crusher operation.

In support of its view, ICC points to several facets of the case. Specifically, in his complaint, it is asserted that Ramsey never indicated the dispute with Morrison involved anything other than turning the crusher on or off. (Ramsey could do this any time a hazard developed.) Further in support of ICC's position is found in MSHA's interview with Morrison (Ex. C-10, p.4-6).

I reject ICC's arguments. I question whether any discrepancy exists but the facts here involve a mix of what would occur when the crusher operator turned off the crusher and/or the water. The critical point is that Ramsey's complaint was clearly safety related.

Supporting Ramsey's testimony is his statement to MSHA. The statement reads in part as follows:

And on the morning of the 13th which is a continuance of, you know, the same shift, we work from 5 in the evening 'til 3 in the morning. It was approximately 2:30 and Cliff, the foreman, walked down to, this one area is kinda designated as a signal area for the men down below where I can see them. He walked into that area and signaled me to shut the water off to the whole spread

and I hesitated. He very abruptly motioned again. So I shut it off and within a matter of two to three minutes the visibility was just, I mean absolutely zero. I mean I couldn't, I couldn't see the window that I was looking out of let alone monitor the people, the equipment or anything else so I just shut the feeder and the jaws down which feeds material to the whole area and the minute that I felt that there was nothing else through it, just be noise, I shut the whole spread down and about seven to ten minutes later when everything cleared enough where a person could see to walk ten feet, Cliff come boiling up the steps. I mean he was hostile, attitude and asked me what the hell I was doing shutting the spread down. I said, "Well, if I can't see, I'm damn sure not going to run anything." I said "Well you know, when we shut that water off, I can't see nothing." And he's very, very verbally, I mean loud. "I've run one of these G-D things for so many years. I'll tell you when to shut it down."

And I says "Hey, you know, if I'm operating the damn thing, I've got to have the option whenever I can't see and I can't see the men down there to knock her off. You know, until we can safety operate." And he went boiling down the steps so I just went ahead and run the belts clear, what was on them, you know, so you don't leave them for the next shift and then I went downstairs and I confronted him again. I says "Cliff, you know, under those conditions," I says "we can't operate." "God damn it," he says, "I'll tell you when to run and when not to run." I says "Hey," I said, "if you're going to be like that," I said "I can't work for you." I said "I have got to have the option to be able to shut the damn thing down when we can't see. The first thing you told me when you hired me was that even if a man has got to go to the john, that he's got to check out with me because I've got to be able to see him and know where he's at. And now you tell me that you're going to tell me when to shut it down and half the time you're not even here." I says "Hey," I said "I'm not working for you under those conditions." He said "Are you

quitting?" I said "Under those conditions, you're damn right." And it was the end of the shift then so we went ahead and finished our normal 3 o'clock clean-up and I got in the truck with him, drove up to the impound area more or less, and we got in the buses and everything and went downhill.

(Exhibit R-2, pages 3, 4)

It necessarily follows that I disagree with ICC's view that the argument over when and how the screens are cleared is not a protected activity. For the reasons stated I find that Ramsey's complaints were safety related.

ICC further contends that Ramsey's refusal to work was not based on good faith belief that a hazard existed. This is so because Ramsey had operated the crusher for five weeks and it was standard procedure to turn the water off so the screens could be cleaned. Further, Ramsey's failure to voice his concerns for the safety of fellow employees (before August 13th) does not support his position that a hazard existed.

I disagree. The evidencing hearing focused on the events of August 12th, but in any event ICC's position lacks merit. Ramsey's testimony is unrebutted that if an employee cannot be seen on the site, the crusher operator automatically shuts down "real quick" (Tr. 48). Further, there have been times where Ramsey shut down the equipment without signaling (Tr. 49).

In addition, on the issue of good faith, Ramsey's testimony is further supported by Morrison, Hildebrandt and Norskog. Morrison, after the confrontation, asked Ramsey if he was going "to quit over a little bit of dust" (Tr. 162, 164). Morrison also told Hildebrandt that Ramsey quit over the dust and an argument as to who would be turning off the water (Tr. 249). See also separation slip (Ex. C-4). The slip, signed by Morrison, states, "We had a disagreement on the way to run the crusher." Further, Norskog recalled an angry argument between Ramsey and Morrison about whether to fire up the crusher again with or without water. Ramsey did not want to fire the crusher up. Morrison replied he was the boss and he'd fire the crusher up. Ramsey then said he was going to quit (Dep. pages 8, 9).

~1598

The above evidence causes me to conclude that Ramsey acted in good faith and he did not invent a safety complaint on August 13th.

ICC further argues that a difference of opinion over a proper way to perform a task are not a protected work refusal citing Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (1985).

The evidence shows more than a difference of opinion. It shows concern by Ramsey for the safety of miners at the worksite. In the instant case the nexus is clear between the complaint and possible injury to workers.

ICC asserts that Ramsey's work refusal, and his voluntary "quit", occurred after the end of the shift when the crusher had been shut down and the belts cleaned.

I agree that it is uncontroverted that Ramsey quit at the end of the shift. However, Ramsey's action was a constructive discharge as discussed infra. It is also apparent why Ramsey quit and the timing was closely related to the protected activity.

Cameron is not inopposite this view.

It is also ICC's view that Ramsey failed to communicate any hazard to ICC.

The thrust of ICC's argument is that Ramsey and Morrison did not communicate, rather they were "angry," "not listening to each other" and "excited." Further, when they rode down the hill it is undisputed that the two men did not talk.

It is apparent from the record here that the words spoken encompassed and communicated the safety hazard. Further, by their very nature safety complaints often revolve in a heated and argumentative manner. Compare, Secretary on behalf of John Gabossi v. Western Fuels - Utah, Inc., 9 FMSHRC 1481 (1987).

ICC also states that even if Ramsey was engaged in a protected activity no adverse action was taken against him in retaliation for the complaint, citing Pasula, supra; Thurman v. Queen Anne Coal Co. et al, 10 FMSHRC 131 (1988) and Edwards v. Aaron Mining Co., 5 FMSHRC 2035 (1983). Further, a single act of alleged discrimination standing alone would not constitute an aggravated situation which would force a reasonable person to resign, citing Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988).

~1599

In considering the doctrine of constructive discharge, different appellate courts have different views. For example, the Court of Appeals for the Fourth Circuit requires proof of the employer's specific intent to force an employee to leave (FOOTNOTE 5). *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (1985). The Commission adhered to this position in *Robert Simpson v. Kenta Energy, Inc.*, 8 FMSHRC 1034 (1986).

On the other hand, the Commission's decision in *Simpson* was specifically reversed by the U.S. Court of Appeals for the District of Columbia, 842 F.2d 453. The Court reversed the Commission and held that the proper application of the law involves an objective approach to constructive discharge. In short, the intent of an operator to cause a miner to quit is not relevant.

The Court summarizes its view that whether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact, 842 F.2d at 463.

The Commission on May 11, 1989, adopted the view of the Court of Appeals. I am constrained by the Commission's adoption of the Court of Appeals decision in *Simpson*.

In the instant case two acts of discrimination occurred. Ramsey was constructively discharged when he quit at the end of the shift on August 13th. Further, he was discriminated against (as was Robert Simpson) when the company refused to rehire him.

Whether the company was justified in refusing to rehire Ramsey requires a review of conflicting evidence.

Ramsey's evidence shows he has had extensive experience in operating heavy equipment. This appears from the testimony of his background and the resumes he has forwarded to potential employers.



~1600

On the other hand, the operator's evidence indicates Ramsey's skill as a loader operator was below average to poor. Further, he was inexperienced and not competent as a crusher operator. In addition, it was believed Ramsey didn't like to take orders because he felt he was more experienced than the foreman. I do not find ICC's evidence to be credible. If Ramsey was such a poor worker it seems incredible that he would receive a pay increase after a short time on the job. Compare: Secretary on behalf of Patricia Anderson v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984). In any event superintendent Hildebrant identified two reasons not to rehire. One reason involved Ramsey's claim that the instructions from Brown required him to abuse the loader teeth (an unprotected activity since it did not involve safety). The additional reason was the crusher incident of Ramsey and Morrison (a protected activity).

In sum, ICC discriminated against Ramsey in refusing to rehire him.

ICC also states that Ramsey failed to attempt to resolve the conflict. It argues such failure constitutes a bar to recovery.

In support of its position ICC cites Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (5th Cir., 1980) and Alicea Rosado v. Garcia Santiago, et al, 562 F.2d 114 (1st Cir. 1977).

Specifically ICC contends that Ramsey had two honest alternatives open to him. He could have simply refused to work until he discussed the matter with Morrison's superior, or he could have made sure all the other employees were away from the crusher for the final few minutes required to clean the screens.

The position urged by ICC would invoke a new doctrine not presently contemplated under the Mine Act. Further, the cases relied on by ICC do not arise under the Mine Act.

For the foregoing reasons the complaint of discrimination filed herein is sustained.

#### REINSTATEMENT

Complainant herein sought to be reinstated (Tr. 22).

If charges of discrimination are sustained then Section 105(c)(3) authorizes reinstatement of a miner to his former position with backpay and interest.

~1601

The evidence here is uncontroverted in several respects.

On behalf of ICC the evidence shows that none of the workers were given any indication that their job was long term. Such long term employment is not standard in the industry. The evidence also shows that the work shift was in fact shut down in its entirety about a month after the Ramsey/Morrison incident.

On behalf of Ramsey the evidence is uncontroverted that the Colosseum Mine is still operating. Further, the operator is presently using heavy equipment in the production of gold.

#### Discussion

If a miner has been discriminated against then he should be restored, as nearly as possible, to his position as if the discrimination had not occurred.

Accordingly, an order of reinstatement to his former position as a crusher operator at the Colosseum Mine is appropriate. If the position of crusher operator is no longer available (an uncontroverted fact in the record) then complainant is to be reinstated to a comparable position without any loss of pay or benefits. *Kenneth A. Wiggins v. Eastern Associated Coal Corporation*, 7 FMSHRC 1766, 1773 (1985).

#### Damages

The Act provides that a miner should be reinstated to his former position with backpay and interest.

Ramsey was constructively discharged on August 13, 1987. He is entitled to backpay with interest from that date until the date of his reinstatement.

Accordingly, the parties are directed, within 20 days, to agree on the wage loss incurred by complainant.

In calculating the interest the parties are directed to make their calculations on the bases of the attached memoranda from the Commission's Executive Director dated January 10, 1989, and April 6, 1989.

#### Further Damages

A further credibility issue in this case concerns whether Ramsey is entitled to certain retirement benefits under the company's 401(k) retirement plan.

~1602

In connection with this issue Ramsey testified that if you are with the company 30 days, an employee can contribute up to 15 percent of your paycheck. In turn, ICC will match the employee contribution up to the legal limit allowed by law. Ramsey asserts he contributed \$553.50 to this plan, as shown by his check (Tr. 91-93, Ex. C-6). Witness Wallis Hack, a certified public accountant, testified as to the benefits due Ramsey under the company plan (Tr. 127-149, Ex. C-1).

I credit the contrary evidence adduced by ICC's personnel manager DICK NASH. The witness, familiar with the plan, indicates there is a difference between the 401(k) plan for waged employees (such as Ramsey) as compared to salaried employees (Tr. 211). Salaried employees receive a matching contribution up to 50 percent of the first 4 percent of the base salary of that employee (Tr. 212). On the other hand, waged employees receive 75 percent per hour for every hour of straight time and overtime the employees work (Tr. 212).

Ramsey was a waged employee. The ICC pay stub for Ramsey (for 8/14/87) shows a figure of \$553.50 (Ex. C-6). That number is not related to the 401(k) plan but is ICC's matching contribution under FICA, social security tax (Tr. 215-220). Hourly employees do not receive a matching contribution. However, Ramsey received payment for the 590.5 hours he worked at 75 cents per hour or \$442.88. That amount was contributed by ICC to Ramsey's personal accounts.

#### Discussion

Ramsey is entitled to his lost pay until reinstated. Further, the pay would include ICC's 75 cent per hour contribution for each hour worked by Ramsey.

I credit ICC's evidence because a personnel manager would know the benefits the company provides its employees. ICC's position is also supported on this issue by the testimony of Hildebrandt (Tr. 254).

In addition, Ramsey, as a waged employee of less than 14 weeks, would not have the requisite expertise to know if he could participate in ICC's 401(k) plan.



zero weight because it is not shown how the conditions of that date related to the conditions on the morning of August 12, 1987.

~FOOTNOTE\_FIVE

5. The record in this case is devoid of any facts indicating ICC intended to force Ramsey to quit on August 13th.