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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
WILLIAM J. BROCK,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. CENT 89-24-DM
MSHA Case No. MD 88-10

Tulsa Plant

v.

BLUE CIRCLE, INC.

DECISION

Appearances: E. Jeffery Story, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for the
Complainant;
Mark A. Lies, II, Esq., Seyfarth, Shaw,
Fairweather & Geraldson, Chicago, Illinois, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (MSHA), on behalf of the complainant pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). The complainant alleges that the respondent discriminated against him by giving him a verbal and written warning for taking too long at work breaks and lunch, a written disciplinary warning for unsatisfactory job performance, and a 1-day suspension with pay for calling a supervisor at 2:00 a.m., to inform him that he was going on a work break, and that it did so because of his reporting safety violations to mine management and calling MSHA to address these violations. MSHA requests a finding that the respondent discriminated against the complainant in violation of section 105(c) of the Act, an order directing the respondent to expunge the complainant's employment records of all references to the aforesaid disciplinary actions, an order directing respondent to pay to the complainant all expenses occasioned by these adverse actions, with interest, and it seeks a civil penalty assessment against the respondent in the amount of \$2,000, for the alleged violation.

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The respondent filed a timely answer to the complaint denying that it has discriminated against the complainant. Respondent asserts that the disciplinary actions taken against the complainant were justified on their merits and were unrelated to the filing of any safety complaints. A hearing was held in Tulsa, Oklahoma, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their arguments in my adjudication of this matter. Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Issues

The critical issue in this case is whether or not the disciplinary actions taken against the complainant by the respondent were motivated by the respondent's desire to punish him, or otherwise retaliate against him, because of his safety complaints to management and MSHA. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Stipulations

The parties stipulated to three documents which reflect the disciplinary action taken against Mr. Brock, and they are as follows (Tr. 5):

1. A memorandum from Mr. Jim King to Mr. Brock, dated August 28, 1987, concerning a verbal warning given to Mr. Brock on August 17, 1987, "for taking too long at breaks and lunch" (Exhibit C-1).

2. A memorandum from Mr. Jim King to Mr. Brock dated September 18, 1987, and titled "Disciplinary Letter-Unsatisfactory Job Performance" (Exhibit C-2).

3. A memorandum dated September 29, 1987, from Mr. Jim Hicks, addressed to Mr. Brock and others, as well as his "personnel file," concerning a disciplinary meeting held on September 28, 1987, to discuss Mr. Brock's "work performance and conduct" (Exhibit C-3).

The parties also stipulated to the respondent's history of prior civil penalty assessments for the period August 17, 1987 through August 16, 1987 (Tr. 6, exhibit C-4).

Complainant's Testimony and Evidence

Complainant William J. (Jerry) Brock, testified that he has worked for the respondent for approximately 19 years, and that he is classified as a repairman-welder working in the maintenance department under the supervision of Mr. Jim King. Mr. Brock confirmed that he serves as the vice-president of his local union, International Brotherhood of Boilermakers, and also serves as the miner's representative, and member of the safety committee. His duties in this regard include safety matters, and accompanying MSHA inspectors on their mine inspections. He confirmed that he received a safety complaint on or about August 11, 1987, concerning some roofing work being done by independent contractors at the plant. He explained that he pursued the complaint with several management officials at the mine, including Mr. King, and that he was permitted to go to the area where the work was being performed to look into the complaint, and that he subsequently contacted MSHA to report the matter. He stated that the respondent's safety and employee relations manager Bob McCormick informed him that the contractor personnel were non-union and "they were none of my business." Mr. Brock confirmed that MSHA inspectors came to the mine in response to his complaint, and that he subsequently met with them at the mine on August 14, 1987. However, since the contractors were not working that day, he was informed by the inspectors that "there wasn't anything they could do about it" (Tr. 9-18).

Mr. Brock identified exhibit C-1 as a "verbal warning" he received on August 17, 1987, from Mr. King for taking long lunch and other breaks, and he confirmed that he discussed the matter with Mr. King and asked him to be more specific, but that Mr. King was unable to tell him the specific days and times that he took too long for lunch or breaks (Tr. 19). Mr. Brock also identified a memorandum dated September 18, 1987, from Mr. King concerning his unsatisfactory work performance in connection with work which he performed on two sliding gates and two screws on the No. 2 clinker/cooler dust collector (Tr. 20).

Mr. Brock stated that the verbal warning was not justified because all of the miners took their allotted lunch hour and breaks together and "that when its time to go everybody just kind of gets up and goes" (Tr. 22). Mr. Brock stated that all lunches and breaks are taken together in the same room, and that the normal allotted time for lunch is 35 minutes, from 12 to 12:35, and that the normal breaks are for 15 minutes each, at 9:30 and 2:00 (Tr. 25).

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Mr. Brock explained the work that he and a trainee performed on the dust collector in question on September 16, 1987. He confirmed that after he requested Mr. King to explain his statement that he was spending too much time away from his work on personal business, Mr. King gave him a written explanation "a couple of days to a week" after he received the memorandum of September 18, 1987, and informed him that anything not related to his job was considered to be "personal business." Mr. King did not give him any specific instances of "personal business" on that particular day (Tr. 27-30).

Mr. Brock identified exhibit C-3 as a memorandum concerning a September 28, 1987, meeting with maintenance manager John Bayliss and plant manager J. R. Hicks over an incident which occurred on September 25, 1987. Mr. Brock explained that on that day, he was rinsing off his face and hands during the day shift at 11:40 or 11:45 a.m., before the lunch hour, after working in a dusty hopper. Mr. Bayliss accused him of washing up early, and instructed him that before taking any future breaks he was to call him (Bayliss) before taking a break. Mr. Brock stated that he requested Mr. Bayliss to give him a letter confirming that he was to call him before taking any breaks, and Mr. Bayliss then informed him that he was to call him, or supervisors Jim King or Frank Vargas before he washed up for any breaks (Tr. 33).

Mr. Brock stated that he worked the midnight shift on September 25, 1987, and that following Mr. Bayliss' instructions, he called Mr. Bayliss at his home at 2:00 a.m., to inform him that he was washing up before taking a break. Mr. Brock stated that he called Mr. Bayliss because Mr. Vargas and Mr. King were not working the shift. The meeting in question was called to discuss this call, and Mr. Brock was suspended for 1 day with pay, and was told "that I was to take the day off and think about whether I wanted to continue working for Blue Circle or not" (Tr. 35). Mr. Brock understood that he was given the day off because of his call to Mr. Bayliss, and he believed that the disciplinary actions taken against him were the result of his calling MSHA (Tr. 36-37). Mr. Brock stated that his last disciplinary action occurred approximately a year and a half prior to the verbal warning of August 17, 1987 (Tr. 37).

On cross-examination, Mr. Brock confirmed that he had permission from Mr. Bayliss to observe the work of the contractors on August 11, but that he (Brock) had no knowledge as to the respondent's policy concerning its dealing with contractors. Mr. Brock confirmed that prior to this time he had brought a number of safety matters to the attention of management during monthly safety meetings and no action was ever taken against him by the respondent for doing this. Mr. Brock could not recall that Mr. King spoke with him a week prior to the verbal warning of August 17, concerning his leaving his job too early to wash up

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for lunch and that he was going to the shop too early to wash up to leave work before the regular quitting time (Tr. 38-43).

Mr. Brock testified to the work that he and a trainee performed on the slide gate. Mr. Brock stated that Mr. King was upset with him because he told him that he did not know whether the gate was opened or closed, and that Mr. King told him that his workmanship on the gate in question was not satisfactory (Tr. 43-49).

Mr. Brock confirmed that at the time he received the letter from Mr. King concerning his verbal warning for being away from his job on personal business, Mr. King said nothing about MSHA or the roofing contractor, and said nothing about his safety complaint (Tr. 50). With regard to the washing-up incident, Mr. Brock confirmed that Mr. Bayliss told him he was washing up too early, and that he was to contact him before he took his break or when he was washing up to take a break so that he would know when he was starting his break. Mr. Brock denied that Mr. Bayliss advised him that same afternoon that he was to contact his shift supervisor and tell him that he was taking his breaks, and he stated that Mr. Bayliss told him to contact Mr. King or Mr. Vargas (Tr. 52).

Mr. Brock confirmed that he telephoned Mr. Bayliss at his home at 2:00 a.m., and advised him that he was calling to inform him that he was going to wash up before taking his break, and that Mr. Bayliss responded "Is this some form of harassment" (Tr. 52). Mr. Brock confirmed that he tried calling Mr. Bayliss again at 6:00 a.m. that same morning but his line was busy, and that he did so because "He never changed his orders" (Tr. 53).

Mr. Brock confirmed that at the meeting of September 29, his prior disciplinary letters which were in his personnel file, as well as his phone calls to Mr. Bayliss, were discussed. He also confirmed that plant manager J. K. Hicks, who was in charge of the meeting, informed him that his personnel file did not reflect a good work record or attitude, and that Mr. Hicks informed him that he would be given a day off to think about whether he wanted to continue working for the company. Mr. Brock confirmed that he took the day off with pay, and upon his return, he continued to serve as a union officer and miner's representative, and that the respondent has taken no action against him because of any safety complaints since his return to work (Tr. 56).

Mr. Brock identified certain documents from his personnel file, exhibits R-1 through R-7, as copies of prior disciplinary warnings he received from 1978 up to and including September 1987, regarding attendance, absenteeism, and tardiness (Tr. 56-57). In response to a question concerning prior ongoing counseling given to him and all others in his maintenance department concerning timely breaks and lunch hours, Mr. Brock stated

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that "Mr. King would just say watch your breaks and stuff like that, you know, to everybody. Kind of a general statement" (Tr. 58).

Mr. Brock confirmed that Mr. King became his supervisor on approximately January 1, 1987, and that he (King) had previously served as president of the union local. Mr. Brock did not know whether or not Mr. King had also served as the miner's representative, and he could not recall whether Mr. King began counseling all employees in his department in 1987 about lunch hours and breaks because Mr. Hicks was "leaning on him" about these matters (Tr. 58).

In response to further questions, Mr. Brock stated that he believed that the safety of contractor employees, even though they are non-union, fall within his safety duties as long as they are on mine property, and that if he observes such employees in his work area without proper safety equipment, he will speak with them. He stated further that "most of the time" he will seek management's permission before leaving his job to speak with contractor employees, and that when Mr. Hertzog advised him that contractor employees "wasn't any of my business," this was the first time he had been told this (Tr. 64).

Mr. Brock confirmed that when he received the safety complaint concerning contractor employees, he did not seek out the employees or speak with them, but he did speak with Mr. Bayliss about it before calling MSHA. Mr. Brock stated that he did not know whether Mr. Hicks or others in management were aware of the fact that he had called MSHA (Tr. 65). He also confirmed that he had previously called MSHA inspectors about "general questions" and complaints. He believed management knew that he had called MSHA because "I went and asked Mr. King if I could use the phone to call them" (Tr. 66).

Mr. Brock stated that he got along "fair-to-middling" with Mr. King, and that "I've had better relationships but I've had worse too." He confirmed that when he called Mr. Bayliss at 2:00 a.m., he "guessed" that he woke him up, and he stated that Mr. Bayliss sounded "sleepy" and "agitated" (Tr. 69). Mr. Brock stated that after the meeting concerning this call, he was instructed to call the supervisor who was on duty, rather than Mr. Bayliss, when he was going to take a break, and he confirmed that Mr. Bayliss never put these instructions in writing (Tr. 70). Mr. Brock confirmed that after attempting to call Mr. Bayliss again at 6:00 a.m., he informed production foreman Jake Barber that Mr. Bayliss's phone was busy and that he was going to take his break (Tr. 71).

Mr. Brock stated that the complaint concerning the contractor employees and roofers was the only time he made a safety complaint to management, and he believed that the verbal warning,

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disciplinary letter, meetings, and Mr. Bayliss' instructions concerning lunch and other breaks were all the result of management's punishing him for calling MSHA. In support of this conclusion, Mr. Brock stated that he had not previously been counseled by management "on anything of that nature," and that Mr. King had previously informed him that "I was twice as productive as I used to be" (Tr. 72).

Mr. Brock stated that as a result of his call to MSHA, two inspectors came to the mine and met with him and Mr. Bayliss and Mr. Hicks, to discuss the contractors' use of safety glasses and hard-toed shoes, but that no violations were issued because no contractors were working that day. Although no one from management discussed his call to MSHA, Mr. Brock stated that he was under the "general impression" by the "way they were acting" and their "general tones," that "they weren't too happy about it" (Tr. 74-75).

Robert Joe Thompson, respondent's lab technician, testified that he previously worked as a maintenance welder repairman, and that he serves as president of the local union at the mine. He confirmed that he attended the September 28, 1987, meeting with Mr. Brock and management concerning his work performance, and that Mr. Brock's telephone call of 2:00 a.m. to Mr. Bayliss was discussed. Mr. Thompson stated that Mr. Bayliss told him that he had given Mr. Brock a direct order to call him, Mr. Vargas, or Mr. King, before washing up for any breaks. Mr. Thompson also stated that he repeatedly asked Mr. Hicks for instructions as to who Mr. Brock was to call in the future, but received no answer, and Mr. Hicks kept referring to Mr. Brock's work record and attitude, and indicated that "he should act as an adult" (Tr. 79).

Mr. Thompson stated that on August 11 or 12, 1987, Mr. Brock requested him to call MSHA because contractors were working on a roof without wearing safety equipment. He confirmed that he did not tell management about the call, and management did not indicate that they knew he (Thompson) had called. However, Mr. Hertzog stated to him that there was no sense in Mr. Brock calling MSHA because such matters should be handled "in-house" (Tr. 80).

Mr. Thompson stated that he knew of no one being previously suspended with pay and he explained the procedures for employee breaks, and stated that while working in the maintenance department, he observed employees abusing the time for breaks and lunch, that it happens "everyday" (Tr. 84). When asked how management addresses these abuses, Mr. Thompson replied "it depends on who you are, how much brown nosing you do with the foreman. If the superintendent don't like you, you're going to take 2 or 3 minutes to get to break, take a break and get back to work. If they like me I can take 30, 45, an hour" (Tr. 85).

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Mr. Thompson believed that Mr. Brock was being treated differently from other employees because "right after they thought he made this call to MSHA, he got into a big argument with Mr. Hertzog and Mr. McCormick" (Tr. 86). He also believed that the respondent intends to fire Mr. Brock, and is awaiting the outcome of this proceeding to do so (Tr. 87). He also stated that the respondent did not know until his testimony in this hearing that it was he who called MSHA, and that Mr. Hertzog suspected that Mr. Brock had called (Tr. 88).

Mr. Thompson confirmed that he serves as an alternate on the mine safety committee, and while he believed he had the authority to ask a contractor employee about wearing a hard hat, he has always contacted management and requested it to insure that contractor employees wear hard hats or safety glasses (Tr. 89). Mr. Thompson disagreed with management's position that the safety of contractor employees is within management's prerogative, and is of no business of the regular safety committee. Mr. Thompson stated that he did not know whether contractor employees are union or non-union (Tr. 93).

Mr. Thompson stated that he gets along fine with Mr. King, but that everyone does not get along "fine" with each other, that there is a lot of "chain pulling" going on, and although he does not sometimes tell management how to run the mine, management sometimes tells him to "mind his own business" (Tr. 94). Mr. Thompson believed that management was "fed up" with Mr. Brock when they thought he called MSHA after telling him that "it was none of his business" (Tr. 96). Mr. Thompson was not aware of any other employee being disciplined over breaks or lunch time, and that prior to Mr. Brock's case, he was never called in to any management meetings about such matters (Tr. 100).

On cross-examination, Mr. Thompson confirmed that his conversation with Mr. Hertzog concerning the handling of safety complaints "in-house" took place in October or November of 1987 in the conference room when Mr. Hertzog came to the mine to explain insurance benefits to mine employees (Tr. 107-108). Mr. Thompson stated that Mr. Hertzog was referring to the meeting between Mr. Brock, Mr. Hertzog, and Mr. McCormick when he made the statement that it was not Mr. Brock's business, and the fact that he believed Mr. Brock had called MSHA (Tr. 109).

Mr. Thompson confirmed that he checked no company records to support his statement that no other employees have ever previously been suspended for a day with pay. He also confirmed that Mr. Brock filed a grievance over the suspension, and that it is still pending (Tr. 111).

Arthur Wayne Roache, repairman/welder, confirmed that he has worked for the respondent for 21 years, and that he attended the September, 1987, meeting in Mr. Bayliss' office as a witness on

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behalf of Mr. Brock. Mr. Roache stated that the meeting concerned Mr. Brock's telephoning Mr. Bayliss during the night, and that at the meeting, Mr. Brock requested Mr. Bayliss to put in writing his instructions as to who he was supposed to call before taking any breaks. Mr. Roache stated that Mr. Bayliss told Mr. Brock that he did not have to put it in writing, and after the meeting got "a little heated," Mr. Bayliss stated that Mr. Brock was to call him, Mr. King, or Mr. Vargas before taking any breaks (Tr. 113).

Mr. Roache confirmed that he worked the same hours as Mr. Brock, but on different jobs, and that they took their breaks at the same time. When asked whether he (Roache) had ever gone beyond the normal break hours, Mr. Roaches responded "I've took more; I've took less." He also stated that it was not unusual for other employees to take more time, and that "sometimes you get in later and go later," and that "sometimes the clocks will be a little different or whatever, and it will be some that go earlier." He admitted that lunch and break hours have been abused, and that "sometime last week I probably abused it. I probably went early," and that he had "probably" done this during August or September of 1987, but received no verbal or reprimands for doing so (Tr. 117). He identified miner Bob Clark as one who "went down 2 or 3 minutes early," and he stated that "all of us do it. Everybody is going to exceed it a little," and he confirmed that this was an ongoing practice during August and September of 1987, as well as "today." He further stated that "we have a whistle. Sometimes it works; sometimes it doesn't" (Tr. 118).

Mr. Roache confirmed that Mr. King was his main supervisor in August and September of 1987, and that Mr. Bayliss and Mr. Vargas also served as his supervisor. He confirmed that he was aware of the fact that Mr. Brock had received disciplinary warnings for exceeding lunch or break times, but knew of no other employees who have received any such actions. He stated that "we're generally called together as a group and told to watch our breaks and lunches," and that he was not aware of any other occasions that Mr. Brock was singled out over this issue (Tr. 119). He confirmed that he was not aware of the prior disciplinary actions taken against Mr. Brock, although he did recall that "they was on him over being late," but did not recall the time frame (Tr. 120).

Mr. Roache confirmed that he has been the subject of disciplinary action by management for being late or missing work, and has been counseled over missing too much work (Tr. 120). He explained management's absentee policy and program which was established by Mr. Bayliss, and he confirmed that employees were aware of it. He also confirmed that he had been called to Mr. Bayliss' office and counseled about missing too much time from work, but that nothing further happened to him (Tr. 121).

On cross-examination, Mr. Roache confirmed that nothing was said about employee health and safety at the meeting he attended with Mr. Brock, and there was no discussion about MSHA. He believed the meeting lasted 10 minutes, and he did not hear Mr. Bayliss tell Mr. Brock to call the supervisor who was on duty before taking a break. He confirmed that the respondent has had an absentee program in effect since he has worked at the mine, that management monitors attendance and absenteeism, and that once an employee is in the program he is subject to further discipline. He believed that Mr. Brock was placed in this program, but did not know when, and he explained that when management decides that an employee has missed too much work "they call you in and you start through the steps." He stated that he has never been "singled out" and counseled about his breaks or lunch, and that this is always done as a group. He was aware of one employee who was counseled "one-on-one" about his absenteeism, but could not recall the details (Tr. 127). He confirmed that he has attended meetings when Mr. Bayliss has talked about "tightening up on going to breaks, coming from breaks, and same time periods in going to lunch and coming back from lunch," and that Mr. Bayliss holds meetings on this subject "when he thinks it's needed" (Tr. 127). Mr. Roache confirmed that "counseling" is the first step leading to further discipline, and that following counseling, written or verbal warnings may be issued (Tr. 129).

David Mike St. John, accounts payable clerk, and member of the local union, testified that his office is in the general area of Mr. Hicks' office. He confirmed that he was at work when the two MSHA inspectors came to the mine on August 13, 1987, and met with Mr. Hicks and Mr. Bayliss just outside of Mr. Hicks' office door. Mr. Brock was not present then, but was called in later. Mr. St. John stated that he asked Mr. Bayliss what was going on, and that Mr. Bayliss was agitated and stated "that god damn Brock called MSHA on us." Mr. St. John stated further that he overheard a conversation that same afternoon or the next day when Mr. Brock, Mr. Hertzog, and Mr. McCormick were meeting "with the MSHA people," and heard Mr. Hertzog tell Mr. Brock that "this was a family matter and he didn't have any business calling MSHA, and that would Jerry (Brock) like for him to call the IRS on him" (Tr. 132). Mr. St. John stated that Mr. Hertzog appeared agitated.

On cross-examination, Mr. St. John confirmed that he had never previously heard Mr. Bayliss swear, and that he is a very soft spoken individual. He confirmed, however, that he "didn't use soft words at that time" and that Mr. Bayliss made the statement as he was passing through the hallway (Tr. 134). He was not sure of the time this was said, and stated that "I just know that they were talking about Jerry calling MSHA," and that he overheard the second conversation while he was passing through the hallway coffee shop (Tr. 135).

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Mr. St. John confirmed that he was serving as the elected union secretary/treasurer in August of 1987, and still serves in that capacity. He confirmed that he recalled Mr. Hertzog's statement because he considered it a threat to Mr. Brock and told him that "you'd better look out." Mr. St. John stated that Mr. Brock responded that "we have to do what we have to do" (Tr. 138).

Anthony Rodney Sutherland, laborer, confirmed that he has worked for the respondent for over 8 years, and that he previously worked in the maintenance department for about 5 months, including August and September, 1987, on the evening shift. Mr. King was his supervisor at that time, and Mr. Brock was working the day shift. Mr. Sutherland confirmed that on one occasion, he was on a break with Mr. King and other members of the work crew, and that the break lasted for 25 minutes. He confirmed that he and the other maintenance employees did not receive any verbal or written warnings for taking excessive breaks, and that he has occasionally exceeded the allotted 15 minute break period for "a minute or two," and that he has observed other employees doing the same thing (Tr. 144). He confirmed that Mr. King was aware of the fact that he took a 25 minute "that one night," but that he was not aware of the other instances when this has occurred (Tr. 144).

On cross-examination, Mr. Sutherland stated that he could not recall the date that he took the 25-minute break with Mr. King, but confirmed that it occurred during a shutdown period when maintenance was being performed and when the work schedule was a "little bit" different (Tr. 146). He confirmed that this was the only time during his 8 years at the mine that Mr. King took an extended break. He also confirmed that he has attended meetings where Mr. King has talked "about attendance and keeping your break times to what they should be and your lunch times to what they should be," and that he has heard Mr. King state "Watch your breaks. Don't come in early. Don't leave early. Take a 15-minute break" (Tr. 147).

In response to further questions, Mr. Sutherland stated that Mr. Hicks was the plant manager and Mr. King's supervisor at the time of the extended break. He did not know whether Mr. Hicks was aware of the extended break, and confirmed that Mr. Hicks would not be in a position to know when employees took breaks unless someone were to tell him (Tr. 149). Mr. Sutherland confirmed that he has never been counseled for being late (Tr. 149).

Maurice Lamar Harris, laborer, stated that he has worked for the respondent for 15 years, and that on September 26, 1987, he was working in the maintenance department as a trainee. He confirmed that he worked with Mr. Brock for 3 days during this time, and that Mr. Vargas had instructed them to repair the gates

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on the No. 2 dust collector at the "west end." There were four or five different gates in the area, and Mr. Vargas did not specify the particular gate in need of repair, and after searching for the equipment required to make the repairs, he and Mr. Brock went to the area and proceeded to take one of the gates apart. While they were working, Mr. King arrived in the area and asked them what they were going, and that he explained to Mr. King that they were taking the gate apart. Mr. King advised them that it was the wrong gate and instructed them to put it back together, and that this took an hour or two to finish. Mr. King then pointed out the correct gate which was in need of repair, and the work was finished by 3:00 p.m., a half-hour before the shift had ended (Tr. 150-156).

Mr. Harris stated that Mr. Vargas had come to the area where he and Mr. Brock were working on the gate before Mr. King did, and that Mr. Brock had gone to have his blood pressure checked at that time and was not there. Mr. Harris stated that he and Mr. Brock took the normal 15-minute break and 35-minute lunch hour that day. However, Mr. Harris confirmed that on other occasions, he and other employees had taken more than their allotted time for breaks, and that he was never reprimanded for doing this (Tr. 157). Although Mr. Harris believed that he and Mr. Brock had done a good job in repairing the gate, Mr. King informed them that the work was "shoddy," and Mr. Harris stated that the latex caulking would come out at the edges when it is pressed down, but that the gate was working when they finished the job (Tr. 158).

On cross-examination, Mr. Harris stated that the work on the gate in question was the first time he had ever worked on such a gate, that Mr. Brock was showing him how to repair it, and that they received the work assignment at 7:00 a.m. He confirmed that Mr. Brock pointed out the gate which they believed needed to be repaired, and he explained the time spent on gathering up the needed tools to do the job. He stated that Mr. King showed up before 9:30 a.m., and after informing him that they were working on the wrong gate, he proceeded to reinstall the gate bolts which he had removed, and Mr. King left the area. Mr. Brock returned 3 or 4 minutes later, and was there before 8:00 a.m. Mr. Harris stated he informed Mr. Brock that Mr. King had been by and informed him that they were working on the wrong gate, and that Mr. Brock had been gone for about 15 minutes to get his blood pressure check, but was back at 10:15 or 10:30 a.m. The wrong gate had been repaired and reinstalled before the lunch break (Tr. 166).

Mr. Harris stated that after lunch, Mr. Brock went to see Mr. McCormick, and returned to work on the gate at 1:00 p.m., or shortly thereafter (Tr. 167). - Mr. King returned again in the afternoon, and discussed the work being performed on the gate with him, and Mr. Harris heard Mr. King use the term "shoddy" in

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referring to the work he and Mr. Brock were performing on the gate (Tr. 169). Mr. Harris stated that he could not recall he and Mr. Brock sitting in the storeroom laughing and talking with another employee when Mr. King came in and told them "You're ten minutes past the break. It's time to get back" (Tr. 169). He did recall Mr. King coming to the storeroom while he and Mr. Brock were there, but did not hear Mr. King's statement (Tr. 170). Mr. Harris confirmed that another crew was working on gates nearby, but did not know how many gates they had completed, and that he did go to the area to borrow a tool from the other crew (Tr. 171). He confirmed that he and Mr. Brock discussed Mr. King's comment about the "shoddy" work, and that Mr. Brock told him "Don't even worry about it" (Tr. 174). He also confirmed that although Mr. Brock spent some time looking for a welder, there was no need for any welding work on the second gate which they repaired (Tr. 175). He also confirmed that Mr. Brock went to get his blood pressure checked because that was the only time the mine nurse was available, and that this was part of a routine check available to employees (Tr. 177).

Robert A. Clark, repairman/welder, confirmed that he has been employed by the respondent for 21 years, and that on approximately September 16, 1987, he was performing work on some dust collector slider gates adjacent to the area where Mr. Brock and Mr. Harris were working. He confirmed that he began work on this job a week or so prior to this time, and that on September 16, he repaired "two, maybe three" gates, and he explained the work he performed, and the amount of time required to do the work. He confirmed that after completing his work, he helped Mr. Brock and Mr. Harris repair the gate they were working on because they had some alignment problems (Tr. 179-184).

Mr. Clark confirmed that he and other employees have taken more than the allotted 15 minutes for breaks, and that he has taken more than 35 minutes for lunch and that Mr. King, Mr. Vargas, and Mr. Bayliss were aware of it because "they may be present when I come in to wash up early. Or, if it's getting back late, they may be present when I get back to the job." He could not recall that he or any other employee were ever given any oral or written reprimands for taking excessive break or lunch times (Tr. 185).

On cross-examination, Mr. Clark confirmed that he observed Mr. King and Mr. Vargas "coming and going" in the area where Mr. Brock and Mr. Harris were working on the gate, and that they were working approximately 35 feet from where he was working. He confirmed that the subject of overextending lunch periods and breaks has been discussed with the people in the maintenance department periodically at safety meetings (Tr. 188). He confirmed that he has observed Mr. Brock stop and "chit-chat" with people around the workplace, and has observed him being slow in

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coming back from breaks and lunch because he's talking to people (Tr. 189-190).

Mr. Clark identified exhibit C-1, the memorandum concerning the August 17, 1987, meeting between Mr. King and Mr. Brock, and although the document reflects that he was present, Mr. Clark could not recall being at the meeting (Tr. 191). Mr. Clark confirmed that he was aware of the fact that Mr. Brock was a member of the safety committee, that he has approached him with safety complaints, that it was possible that Mr. Brock was discussing safety matters and union business when he stops and talks to people, and that he has been present when this has happened (Tr. 192).

Respondent's Testimony and Evidence

James R. King, maintenance supervisor, testified that he has been employed by the respondent since 1972, and he confirmed that he served as the elected president of the local union from 1975 to 1977, and again from 1979 to 1984, and served as vice-president in 1978. He also confirmed that he served as the miner's representative for each of the years that he served as president of the union, with the exception of 1975. He also confirmed that he was familiar with the Act and the employee's rights under the Act, that he was involved in reporting health and safety complaints on behalf of employees while a member of the union, and that he was never discouraged from doing so by the respondent. He stated that during the time he served as union president and representative of miners, he was not aware of any miners ever being disciplined by the respondent for calling MSHA, that he himself has called MSHA, but was never disciplined for doing so (Tr. 199).

Mr. King stated that he accepted a management position with the respondent in February, 1986, and became the maintenance supervisor in January, 1987, and he described his duties. He confirmed that during his tenure with the union, he received "group counselling" from the respondent regarding the proper time periods for lunch periods and morning and afternoon work breaks from time-to-time, and that when he became the maintenance supervisor, he conducted such counselling for the employees he was responsible for. He explained that he did this at safety meetings, and that Mr. Brock was present when this was done. He confirmed that he also conducted "one-on-one" talks with each employee in his department with respect to what he expected on the subject of breaks, and that after his initial counseling he still had problems with Mr. Brock, and employees Bill Hobbs and Dean McKellips. He explained that his individual talks with Mr. Hobbs and Mr. McKellips took place on the same day that he spoke with Mr. Brock, and that Mr. Hobbs and Mr. McKellips responded to his talks and improved their work habits and break practices (Tr. 199-205).

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Mr. King confirmed that he spoke with Mr. Brock concerning his breaks and he explained what transpired at the meeting as follows (Tr. 205-208):

Anyway, I told Jerry that he was taking too long on breaks, that I'd been--you know, I'd been paying particular attention to the breaks. They all knew I had been. Jerry's response was, "Give me a specific instance and time." And I said, "Jerry, for the last week, you've been late every break, every lunch during the past week." I said, "You come in too early, you leave too late on each and every of fifteen occasions that I've watched you."

Jerry said, "well, I don't believe I have. Give me a specific example." I said, "Jerry, I'm telling you, each and every time, you're the last one back to the shop. You're the first one to come in. This deal with going to break in the afternoon and taking a 30-minute shit after the break has got to stop." Jerry said, "That's just a normal function of mine." And I said, "If it is, I'd be thinking about clocking out." And that was the words I used to do that. Jerry said he didn't feel like he was abusing it. I said, "Well, this is a verbal warning because I feel like you are. I want to document it, so I'm giving you a verbal warning." And that was the results of that meeting.

* * * * *

Q. And the week that you were referring to that you had observed him. You said you observed him for a week before you gave him this warning. Was that the week of August 10th, 1987?

A. Yes, I assume. Yes, sir.

Q. And you said that you had observed him at all the breaks. How were you able to do that? Was he coming into the shop near you, or how were you--

A. I was being back in the shop at the time the guys were coming to and from their breaks and their lunch period. I was making a point to be in the shop to watch everybody, because they come in from all different places.

And secondly, the way we assign our jobs, everybody is not out for the day. Some guys may be coming back in. They may be through with their jobs at ten or fifteen minutes till break, and at that time, it's time

to reassignment them and communicate with them what you want. There's no sense in trying to send them out; they don't have time to get back to the job. But it's the best time to communicate with everybody how the jobs are going because I can't be on all the jobs at once.

Mr. King confirmed that a week prior to Mr. Brock's receipt of his verbal warning, Mr. Brock spoke to him about his belief that contractor employees were not following MSHA's guidelines on safety equipment. Mr. King stated that he informed Mr. Brock that he would look into the matter, and that he immediately checked on the contractor employees and spoke with them about wearing hard-toed shoes, hard hats, and safety glasses, but could not recall whether he informed Mr. Brock that he had done so. Mr. King denied that the verbal warning had anything to do with Mr. Brock's complaint concerning contractors or with MSHA, and that this was never brought up. He stated that at the time of the verbal warning to Mr. Brock, he had no information that Mr. Brock called MSHA. He also confirmed that the decision to issue the verbal warning was his (Tr. 209-210).

Mr. King explained the circumstances under which Mr. Brock and Mr. Harris were assigned to do some work on the slide gates on September 16, 1987, and he confirmed that the work assignment was made at 7:00 a.m., and that barring any problems, he would have expected the work to be completed by 1:00 p.m. He stated that he checked the progress of the work at 9:30 a.m., 11:50 a.m., and 3:00 p.m., and also visited the shop and waited there until the employees came back from their break. During his initial visit to the work area, Mr. King confirmed that Mr. Brock was not there, and that he advised Mr. Harris that he was working on the wrong gate, and asked about Mr. Brock's absence. Mr. Harris stated "I don't know. He went to use the bathroom or something" (Tr. 213). Mr. King later visited the storeroom at the conclusion of the 2:00 p.m., break, and Mr. Harris was there, but Mr. Brock came in later and he and Mr. Harris talked until 2:27 p.m., and then "kind of casually" returned to their work (Tr. 214). At the conclusion of the work shift, he found Mr. Brock back at the shop at 3:17 p.m., standing by his locker ready to go home, and he confirmed that normal "wash-up" time starts at 3:20 p.m., and that Mr. Brock was cleaned up and ready to leave at 3:17 p.m. (Tr. 216).

Mr. King stated that when he returned to the slide gate area, the gate was still stuck, and that he had previously told Mr. Brock about this and that it needed to be corrected. Mr. King stated that he assigned a night shift repairmen, M. U. Taylor, to fix the gate and he stayed until the work was completed. He confirmed that the repairs took approximately 20 minutes (Tr. 217). Mr. King confirmed that as a result of

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Mr. Brock's work performance with respect to the gate in question, he took disciplinary action against Mr. Brock, and he explained as follows (Tr. 217-220):

A. What I said to him was that I felt like, you know, the entire job that day was entirely wasted because he hadn't applied himself. And the basic problem we had that day was Brock wasn't on the job. The only time I found Brock on the job was at three o'clock when I came back.

The other times where I looked up on the job or I went up on the job, he wasn't there. And he told me that he had seen Mr. Hicks and that he had went down to take his blood pressure and saw Mr. Hicks in the console, and he had talked to him for 30 minutes or so, one time. At this meeting, that's what he told me. And I knew that he had been to see Mr. McCormick at--right after lunch. They had to finish a safety meeting or something. But that didn't take very long, as it turned out. It just took 30 minutes or-- He was supposedly back on the job by 1:00.

Q. Were you the person that made the determination to issue this disciplinary letter, sir?

A. Yes.

Q. And did your issuance of this disciplinary letter have anything to do with the fact that Mr. Brock had told you about the outside contractors not wearing personal protective equipment?

A. No, didn't have anything to do with it.

Q. And did the issuance of this disciplinary letter have anything to do with any discussions that Mr. Brock may have had on September 16th with Mr. McCormick about the safety committee?

A. I wouldn't have known what those were. That conversation was . . .

Q. Now, in the letter or in the warning, you talk about "taking care of personal business." What did you mean by that?

A. Taking-- Well, he'd been down to get his blood pressure checked. Any time any of the employees leave the job to be gone, anything other than job-related trips such as to get parts or go find equipment or

something, and they're going to be gone for any period of time over like five minutes, they're supposed to tell me.

He had been gone 30, 45 minutes, and he hadn't notified me. Which puts me in a spot because if my supervisor or the plant manager asks me, "What's he doing over there?" I'm supposed to know. I'm supposed to know where he's at unless he's looking for-- I'm assuming it's needed tools unless

Mr. King reiterated that his disciplining of Mr. Brock had absolutely nothing to do with anything he may have done with MSHA, and while he knew that Mr. Brock was a committeeman, he stated that "I had no idea of anything he was doing with MSHA" (Tr. 221).

Mr. King stated that he issued no warning to Mr. Harris about his work activities of September 17, 1987, and while he assumed that he had previously spoken with him about breaks at one of his meetings, he could not recall doing so. He explained that Mr. Harris was a probationary employee, and he identified exhibit R-8 as a copy of a probationary work report concerning Mr. Harris, including his notations that he warned Mr. Harris about taking excessively long breaks on September 16, 1987, and October 7, 1987 (Tr. 222-223). He explained that he spoke with Mr. Harris about his break of September 16, but did not formally "warn" him under the applicable disciplinary procedure, and that he simply observed him taking an excessive break on October 7, but could not recall talking to him about it (Tr. 224).

Mr. King confirmed that he was at work on September 25, 1987, and that he was seated at his desk in Mr. Vargas' office, approximately 10 feet away from where Mr. Bayliss and Mr. Brock were discussing Mr. Brock's breaks. Mr. King explained what transpired as follows (Tr. 225-227):

A. John had called Jerry in to the office. He had told me at the lunch period he was aggravated because Jerry was continually in too early to wash up, and every time he asked him, he always had a reason. And he had just asked him what he was doing in at fifteen till or approximately that. And Jerry said he had dust in his eyes. He was just washing his face. And he was going to warn Brock about doing that. So, they were in the office, and John's first statement was, "I want you to tell me any time you go to break, to wash up or go to break." And Jerry says, "You want me to tell you?" And John said, "I want you to tell your supervisor any time you leave."

Q. There's no question in your mind that Mr. Bayliss indicated that Mr. Brock should call his supervisor?

A. No, there's no question because I was listening to it, and it caught my ear when John said, "call me." And I thought, no, he don't want him to do that. And John changed it to "call your supervisor," which is first of all, myself, Frank Vargas, and when we're not present due to the normal operations of the plant, it's the shift foreman that is on charge.

Q. So that on the morning of September 26th of 1987 at about two o'clock in the morning, there would have been what? A shift supervisor or someone there for Mr. Brock--someone at the plant--

A. That's correct.

Q. --for Mr. Brock to call and tell him that he was going on break.

A. Mr. Brock had asked to come in that day at midnight. We had offered overtime to everybody on that Saturday. Jerry had come to me and said, "I would like to come in at midnight instead." And I was granting his wish. And that is the reason he was working at that hour, some--only twelve hours after this conversation with John.

On cross-examination, Mr. King confirmed that Mr. Brock spoke with him about independent contractors working on the roof, and that at the end of the day, Mr. Brock stated to him that "I'm not getting any results. I want to call MSHA" (Tr. 229). Mr. King also confirmed that a company nurse is available for routine blood pressure checks, and that many employees wash up three or four minutes early. He also confirmed that he did not issue a formal warning to Mr. Harris because he was on probation and stated that "If he don't make it, he doesn't stay" (Tr. 229).

Mr. King confirmed that in May, 1987, he began to try and "crack down" on excessive use of break time and lunch times, and that during the week of August 10, 1987, he observed Mr. Brock using excessive time. He confirmed that he was in the break room observing employees, and that he also watched them coming back to the maintenance shop from his office. He confirmed that he kept no notes on the exact times Mr. Brock was "going in and coming back out," and stated that "He was the first one in and the last one out" (Tr. 231).

In response to further questions, Mr. King stated that when Mr. Brock asked to use the phone to call MSHA, it was close to the end of the work shift and that he asked Mr. Brock to wait

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until the shift was over, and that he responded "Okay" (Tr. 241). Mr. King confirmed that he had no personal knowledge that Mr. Brock in fact called MSHA (Tr. 231). He also confirmed that Mr. Brock had never previously asked his permission to call MSHA, and that he asked him to wait because it was a busy time in his office, and since the shift was almost over, he did not believe that it made any difference for Mr. Brock to wait (Tr. 233). If Mr. Brock had asked him to use the phone at the start of the shift, he would have allowed him to do so (Tr. 233).

Mr. King explained that he spoke to the contractor employees in response to Mr. Brock's concerns, and informed them about the need to wear hard hats and safety glasses. Mr. King assumed that Mr. Bayliss was responsible for the contractor employees, and that he discussed the matter with him at a later time. Mr. King could not recall whether Mr. Brock had previously discussed contractor employees with him (Tr. 234-239).

Mr. King confirmed that he had no knowledge of the disciplinary meeting between Mr. Brock and Mr. Hicks, and was not present at this meeting because he was not asked to attend and was not involved in the incident concerning Mr. Brock's calls to Mr. Bayliss at his home. Mr. King did not know whether Mr. Hicks was aware of his prior verbal and written warnings to Mr. Brock at the time of the meeting, and he confirmed that Mr. Hicks and Mr. Bayliss never discussed Mr. Brock's calling MSHA inspectors with him at any time (Tr. 238-241).

John Bayliss, maintenance manager, stated that he has worked for the respondent for 3 years, and that Mr. King and Mr. Vargas are two of seven maintenance managers who work under his supervision. He stated that employee breaks and lunch hours have been an "ongoing problem," and that "it manifests itself in Mr. Hicks noticing the maintenance department that the laborers are taking too long breaks, and he instructs me to tighten up." Mr. Bayliss confirmed that he "passed the word" to Mr. King in 1987 to "tighten up on the break times and the lunch times." He also confirmed that he was aware that Mr. Brock was the miner's representative, and he explained the functions of the safety committee, and explained that safety complaints concerning mechanical and electrical matters are assigned to each of those departments for corrective action. He stated that the respondent has never prevented any employee from making complaints to MSHA, and has never taken any disciplinary action against any employee for doing so (Tr. 242-245).

Mr. Bayliss confirmed that he received a call from Mr. Robert McCormick on August 10, 1987, concerning a roofing contractor who was doing some work at the mine. Mr. McCormick informed him that he had received a complaint that contractor employees were not wearing safety equipment, and that he went to the job site with union repairman and welder Durst as a witness

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to verify that he was pursuing the complaint. Mr. Bayliss stated that he spoke with the contractor employees and they advised him that someone else had been there earlier, and that they explained to Mr. King that they did not wear safety shoes on the roof because they would damage the roofing membrane material, and that the wearing of hard hats on the roof presented a problem. Mr. Bayliss stated that he informed the contractor employees to wear hard hats when they came down from the roof, and they accepted this instruction. Mr. Bayliss stated that he met with Mr. Brock later that day in the maintenance shop and informed him that he had visited the roof and did not believe that the employees working on the roof needed to wear hard hats, but that Mr. Brock disagreed and stated that "they have to wear hats all the time the same as we do" (Tr. 248). Mr. Bayliss later saw Mr. Brock without a hard hat in the maintenance shop, and when he asked him about it, Mr. Brock responded "If they don't have to wear a hat, I don't have to wear a hat." After Mr. Bayliss pointed out to Mr. Brock that a crane was above them and it was essential that he wear a hard hat, Mr. Brock "started wearing his hat" (Tr. 249).

Mr. Bayliss confirmed that he attended a meeting in Mr. Hick's office on August 13, 1987, and that two MSHA inspectors were present. Inspector Lavell informed him that Mr. Thompson had called MSHA about a roofing contractor, and Mr. Bayliss informed the inspector that the contractor was not working that day. The inspector then told Mr. Bayliss that he wanted to discuss the matter, and Mr. Brock was called to the meeting. Mr. Bayliss stated that at this time, the MSHA inspectors said nothing about Mr. Brock calling MSHA, and only Mr. Thompson was identified as the person who made the call. Mr. Bayliss stated that since the contractor was not working that day, everyone present went to lunch together, including the inspectors, Mr. Brock, Mr. Hicks, and himself, and that they discussed "MSHA in general, and the new political situation and administration in Washington" (Tr. 251). Mr. Bayliss stated that some 6 months after this meeting, MSHA began issuing citations to contractors working at the mine (Tr. 249-252).

Mr. Bayliss denied that he ever made the statement that "That god damn Brock called MSHA on us." He stated that he considers such language to be blasphemous, and while he sometimes used "flowery language," Mr. Bayliss stated that "that is not a word I ever use." Since the inspector informed him that Mr. Thompson had made the call to MSHA, Mr. Bayliss stated that he had no intention of saying anything about Mr. Brock making the call, and that he would have been surprised if Mr. Brock had made the call, but not surprised that Mr. Thompson made it because he felt that Mr. Thompson didn't know what was going on, and "so he called them" (Tr. 254-255).

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Mr. Bayliss stated that he had nothing to do with the disciplinary letters issued by Mr. King to Mr. Brock. He confirmed that he observed Mr. Brock washing up too early before the lunch break on September 25, 1987, and remarked that "it was too early to get washed up." Mr. Brock informed him that he was getting dust out of his eyes and intended to go back to work, and Mr. Bayliss remarked "Well, I hope you are because you're always looking for specific instances of taking breaks or lunches, and this is one that I'm going to tell you about." Mr. Brock then stated that he was going back to work, and Mr. Bayliss said nothing to him at that time about Mr. Brock's need to tell him before taking any breaks (Tr. 256).

Mr. Bayliss stated that at approximately 2:00 p.m. on the afternoon of September 25, 1987, he met with Mr. Brock in the maintenance office, and that Mr. King was in the office. Mr. Bayliss stated that the following conversation took place with Mr. Brock (Tr. 257-258):

A. I said to him that before--that he's got to be careful and that before he goes on breaks, he should tell me before he goes on breaks. And then, I realized that I was going to fall into a trap here because I'm never--or, very rarely in the vicinity of where he might be able to find me. So, I said, "You better don't call me, call your supervisor that's responsible for you at that time." And I meant either Jim or Frank or the shift foreman.

Q. Now, would a shift foreman be the-- Strike that. The individuals you named, as well as the shift foreman, that would be someone that would be on duty basically 24 hours a day, so that if he were working an off shift, he'd have somebody to report to; is that right?

A. And that's why I restated my position on this. Because he--

Q. And what did he say after you told him that?

A. He wanted it in writing what he's supposed to do.

Q. All right. And what did you say?

A. I didn't want to give it to him in writing.

Q. And why didn't you want to give it to him in writing?

A. Because we're in a real dynamic situation out there, and it's terribly difficult to cover every

eventuality for what a guy should do when he's going on breaks or leaving a job.

Mr. Bayliss stated that on the day following his meeting of September 25, 1987, with Mr. Brock, Mr. Brock telephoned him at his home at 2:00 a.m. in the morning and said "This is Jerry. I'm ready to go on break. Is that okay." Mr. Bayliss confirmed that the call woke him, but that he was not angry and was a light sleeper. He stated that he told Mr. Brock "Jerry, this is harassment. You understand what I mean, And let's talk about it tomorrow" (Tr. 258). Mr. Bayliss stated further that Mr. Brock was friendly and was not abusive, and said "Okay," and that he then took the phone off the hook, and subsequently learned that Mr. Brock tried to call him again at 6:00 a.m. (Tr. 259).

Mr. Bayliss confirmed that a meeting was held with Mr. Brock and others on Monday, September 28, 1987, to discuss the telephone calls by Mr. Brock, and he identified exhibit C-3 as a memorandum concerning that meeting. He stated that Mr. King was not present at the meeting because Monday was a busy day and that enough people were present to take care of the matter. Mr. Bayliss confirmed that he participated in the decision to give Mr. Brock a one-day suspension with pay, and that there were no discussions at the meeting concerning Mr. Brock's involvement with the roofing contractor, his safety activities, or his activities involving MSHA. Mr. Bayliss also stated that Mr. Brock's disciplinary history with the respondent was completely reviewed during the meeting, and that the suspension had nothing to do with any MSHA related activities. Mr. Bayliss also confirmed that the matter concerning Mr. Brock's reporting in to anyone before taking a break was discussed at the meeting, and he explained what transpired as follows at (Tr. 261-262):

Q. Was there a complete review on that date of Mr. Brock's disciplinary history with the company?

A. Yes.

Q. Now, did Mr. Brock ask, during the course of this meeting, whether he should continue reporting in to anyone regarding when he was going on break?

A. Yes, he did.

Q. And what was said to him at this meeting regarding that?

A. We said that he should tell his supervisor when he's going on break, and he wanted it written down exactly what we were saying, how he should do it, what he should do, and we declined that.

We felt like-- Or, I felt that he'd been there seventeen years. He knew the chain of command. He knew that his first-line supervisor was the first guy he should call. If he wasn't there, the second guy or myself. Or, if nobody was there, the shift foreman. He knew who was responsible for the plant, and we felt like, after seventeen years, he should know how to behave.

Q. Do you know whether the company has a policy of having the supervisory management people issue written orders to every employee about how they're supposed to do their job or when they're supposed to do their job?

A. We don't have a written order.

On cross-examination, Mr. Bayliss stated that he presumed that Mr. Hicks summoned Mr. Brock to the August 13, 1987, meeting with the MSHA inspectors because Mr. Brock was the miner's representative. He confirmed that Mr. Brock never contacted him directly about any problems with contractors, and it is his understanding that Mr. Brock contacted Mr. McCormick in this regard. Mr. Bayliss stated that he told no one about Inspector Lavell's telling him that Mr. Thompson had called MSHA because he didn't feel that it was important to do so (Tr. 264).

Mr. Bayliss confirmed that he never directed any other employee to call his supervisor before taking a break, and he explained that when Mr. King discussed the letter he had sent to Mr. Brock concerning his breaks, Mr. King told him that Mr. Brock was the only employee who did not accept the fact that he was taking long breaks and this was why Mr. King gave him the letter. Mr. Bayliss also confirmed that he told Mr. Brock that he was to contact Mr. King or Mr. Vargas because all other employees accepted this as the "chain of command," and that Mr. Brock "chose to say that he didn't know what the chain of command was" (Tr. 265).

In response to further questions, Mr. Bayliss confirmed that when he met with Mr. Brock about his calling him in the morning, he was aware of the fact that Mr. King had previously issued him verbal warnings concerning his work performance. When asked why he did not specifically discuss these prior matters with Mr. Brock, Mr. Bayliss stated that he believed the letters were in Mr. Brock's file and that there "were general discussion about his file. We just went over everything in his file" (Tr. 266). Mr. Bayliss denied that there was any friction between Mr. Brock and mine management, and stated as follows at (Tr. 270-271):

A. Some guys, if you give them a letter for a tardy or you give them, like I did with Wayne Roache, I counselled him on absenteeism, he just said, "Thanks."

I'm sorry I've done it," and go on. He don't write a grievance against me for doing that. Brock will never accept, "Thanks, I'm going to go on." So, whenever we get a situation involving Brock, and not anybody else, he will grieve that discipline.

* * * * *

A. I think that we--I feel like we try to be really creative in our punishment. Our punishments at Blue Circle--I've been there only three years, but we're extremely creative. We try to give a punishment that does not hurt the guy at all. We try to be just as fair and as positive as we can. We're not trying to run people off. In fact, we never run people off. I've never seen a guy, in three years, run off here. And we try to make a good employee out of a questionable one. And that's my whole object in discipline.

My discipline is not a situation--And I think that you can see our disciplines are not vindictive, nasty, I'm going to hurt you for what I consider to be kind of silly stuff. We're going to give you a day off to think about things and try to work with you to make you into a nice employee who's got a positive outlook on the company. That's what we try to do.

J. K. Hicks, operations manager, stated that he is in charge of the entire plant and has served in that position for 5 years. He stated that under no circumstances have any employees been disciplined for making safety complaints to MSHA or cooperating with MSHA. He confirmed that no action has ever been taken by the respondent against a miners' representative for performing his duties in connection with MSHA. He also confirmed that he is involved in the selection of contractors, and that company policy requires contractors to comply with MSHA's regulations while on mine property. He identified a copy of the respondent's safety and work rules, exhibit R-10, and confirmed that he was not aware of any employee ever being disciplined for reporting safety hazards, and that in many cases, employees have been thanked for reporting unsafe incidents (Tr. 275-278).

Mr. Hicks confirmed that he has observed some employees being tardy in coming to and from lunches and breaks, and that he discussed it with Mr. Bayliss in 1987, as well as with other managers and supervisors, and requested that they bring employees back to their normal time limits. He also confirmed that in August, 1987, he became aware of a complaint concerning a roofing contractor, and that he attended a meeting on August 13, 1987, when this was discussed. He stated that he summoned Mr. Brock to the meeting after the MSHA people advised that they were there in response to a complaint about the contractor. Mr. Hicks stated

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that he was aware of a problem with contractor personnel wearing hard hats and had discussed it with Mr. Bayliss, and was informed that the matter had been resolved. Mr. Hicks stated that Mr. Thompson's name was mentioned during the meeting, and that he never heard Mr. Bayliss make any statement that "That god damn Brock called MSHA on us," had never heard Mr. Bayliss use such language, and that he would have been surprised if he made any such statement (Tr. 278-282).

Mr. Hicks stated that the respondent never took any disciplinary action against Mr. Brock because of any involvement with a complaint about contractors, and that he would strongly disapprove of any such action (Tr. 283). Mr. Hicks confirmed that he issued the September 29, 1987, memorandum concerning Mr. Brock's call to Mr. Bayliss after the meeting which was held to discuss that matter, and that Mr. Bayliss had discussed the matter with him earlier in the day before the meeting. Mr. Hicks confirmed that the disciplinary letter in question was his idea, and that the meeting with Mr. Brock had nothing to do with Mr. Brock's involvement in calling MSHA, and that other than knowing that Mr. Brock accompanied inspectors as the miner's representative, he had no knowledge that Mr. Brock called MSHA (Tr. 284).

Mr. Hicks explained what took place at his meeting with Mr. Brock as follows (Tr. 285-287):

A. Well, basically, in the meeting we reviewed the personnel file of Mr. Brock and made him aware that he had quite a number of disciplinary incidents in his file, and he had recently been disciplined for some--some events-- incidents which we regarded as pretty serious. Such things as he was getting into an area where we may not have any choice but to take further, very negative discipline to him. And we did not want to do that.

* * * * *

A. I told him that his file was disturbingly getting more disciplinary letters and disciplinary actions against him in it and that he was getting to the point in his career where he needed to make a decision, that the decisions of his own which led to his getting those disciplines were his decisions. There weren't his supervisor's or mine or anyone else's. They were his decisions. And if he continued to make decisions to do things which would lead to further discipline and he knew the rules, he had the book, and we had had enough other with him-- "We" being his supervisors and other personnel in the plant. --that he was coming to the point in his career when he needed to decide if he

wanted to continue to be a member of our organization or not. And that we could take further discipline against him at that time, such as, days off or further discipline, and we had elected not to do that, that we had thought that he needed to consider very carefully what his future would be with the company and we were going to give him a day to do that with pay. At the end of that day, he was to come back and his actions would tell us what kind of decision he had come up with. We proceeded with that situation, and to my knowledge, Jerry has responded very positively.

Mr. Hicks stated that the disciplinary action he took against Mr. Brock was in compliance with the provisions of the applicable labor-management agreement, exhibit R-11, and he confirmed that he had not previously given a similar disciplinary suspension to any other employee, and explained as follows (Tr. 288):

A. Not precisely. We have tried to tailor disciplines to meet the matter at hand. We have given other disciplines, we believe, of a similar, positive disciplinary nature to other employees, again which we tailor to their particular situation.

Q. Do you feel that this discipline in any way singled Mr. Brock out?

A. No, I do not.

Q. Why do you say that, sir?

A. I believe we-- that Mr. Brock, in regard to his previous disciplinaries over a period of a number of years, was coming to the point where he was walking a tightrope as far as his future with the company, and I believed that the man had a lot of good in him and that it was up to us to try to figure out a way how to get that out of him.

On cross-examination, Mr. Hicks confirmed that all of the documents concerning prior disciplinary actions against Mr. Brock were reviewed by him prior to the September 18, 1987, meeting with Mr. Brock, and were considered at that meeting. He confirmed seeing a statement in Mr. Brock's file concerning a commendation to him from Mr. Bayliss for excellent attendance, and stated that "we try to give credit when its due" (Tr. 289-292).

Mr. Hicks confirmed meeting with MSHA Inspector Jim E. Jones, during his investigation of Mr. Brock's discrimination

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complaint, but stated that he did not know it was a discrimination complaint, and did not recall Mr. Jones mentioning Mr. Brock's name. He also did not recall telling Mr. Jones that management assumed that Mr. Brock had called MSHA because its inspectors were raising the same issues that Mr. Brock had raised (Tr. 293).

In response to further questions, Mr. Hicks identified copies of prior disciplinary actions taken against Mr. Brock on April 13, 1986, May, 1986, and December 31, 1984. With regard to the April action, he stated that Mr. Brock could have been suspended for 4 days without pay, but was only suspended for 3 days. He confirmed that these actions, as well as the others found in exhibits R-1 through R-7, were in his file and considered at the time he took his disciplinary action against Mr. Brock (Tr. 293-295).

Mr. Hicks stated that he had no reason to believe that Mr. Brock had any involvement in contacting MSHA about any complaints, and that Mr. King and Mr. Vargas never advised him that Mr. Brock may have called in the inspectors. He confirmed that MSHA inspectors have been called in before and that no action has been taken against anyone for doing this, and he recognized the right of employees to call MSHA or their union representative as required (Tr. 298).

Robert Kenneth McCormick, industrial relations manager, stated that safety related matters fall within his job duties. He confirmed that in December, 1986, MSHA Inspector Jim Smeorz came to the mine in response to a complaint concerning three mine areas, and that he had a list of employee names who apparently had some knowledge of the complaint. Mr. McCormick stated that all of the employees in question and their miners' representative Nick Adams were allowed to communicate with the inspector, and no action was ever taken by the respondent against any of these employees for participating in the investigation of the complaint. Mr. McCormick also mentioned another MSHA complaint earlier this year, concerning an aluminum additive, and that Mr. Harris took samples of the material and no action was taken against any employee who participated in the inspection (Tr. 301-302).

Mr. McCormick confirmed that he was aware that Mr. King had disciplined Mr. Brock because the documents came to him to be placed in Mr. Brock's personnel file. He confirmed that he was at the meeting conducted by Mr. Hicks concerning Mr. Brock's calls to Mr. Bayliss, and that everything in Mr. Brock's file was reviewed at that meeting (Tr. 302). He confirmed that mine supervisory personnel do not report to him, and that he does not spend time watching employees to see whether they are taking long breaks. He also stated that each individual supervisor handles any "problem" employees working for them and that each supervisor

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is responsible for disciplining their employees as needed (Tr. 304).

On cross-examination, Mr. McCormick stated that in August, 1987, Mr. Brock indicated that he had received complaints from employees concerning contractors, and that Mr. Brock told him that he was going to call MSHA. Mr. McCormick stated that subsequent to this time he believed that Mr. Brock had called MSHA, and stated that "He told me he was going to so I believed him" (Tr. 304). When asked whether he shared this with other management officials, Mr. McCormick stated "I don't know whether I did or not. It's not anything out of the ordinary" that someone would call MSHA. He denied that he told Mr. King at any time before he (King) disciplined Mr. Brock that he thought Mr. Brock had called MSHA (Tr. 305).

Mr. Maurice Lamar Harris was recalled by the court, and confirmed that Mr. King had spoken to him about taking long breaks in September, 1987. He stated that Mr. King told him that "I'm going to get you away from Brock because it will get you in trouble," and Mr. Harris assumed that Mr. King made this statement because "I guess, because they were watching Brock" (Tr. 307). Mr. Harris could not recall that Mr. King spoke to him on September 16, and October 7, about taking excessive breaks, and he stated that he only had two meetings with Mr. King "about my progress as a repairman." He stated that the only time Mr. King said anything to him about long breaks was when he and Mr. Brock were taking their breaks together (Tr. 308). Mr. Harris also stated that when he and Mr. Brock completed their work on the gate, it was working properly, that they both tested it and found it operable, but that he did not hear all of the conversation between Mr. Brock and Mr. King when Mr. King was there (Tr. 309).

MSHA's Arguments

MSHA asserts that after receiving a complaint concerning independent contractors at the plant who were not wearing safety equipment, Mr. Brock presented these concerns to mine management, including the maintenance supervisor and the industrial relations manager, and that through Mr. Brock's efforts, the matter was subsequently investigated by MSHA. MSHA concludes that the reporting of what Mr. Brock perceived to be safety violations concerning the independent contractors is clearly protected activity within the meaning of the Act.

MSHA asserts that subsequent to Mr. Brock's safety complaint to management on August 11, 1987, and the MSHA investigation of August 13, 1987, the following adverse actions were taken against Mr. Brock by the respondent:

1. August 17, 1987 - Brock received a verbal warning for taking too long at breaks and lunch.

2. August 28, 1987 - The verbal warning of August 17, 1987, was memorialized in writing.

3. September 18, 1987 - Brock was issued a written disciplinary warning for unsatisfactory job performance. The disciplinary specifically referenced a job Brock was assigned to on September 16, 1987. The disciplinary stated that Brock had spent entirely too much time away from the job on breaks and taking care of personal business. Also, it was stated that the assigned job had not been done properly.

4. September 25, 1987 - Brock was ordered to report to certain supervisors prior to going on breaks.

5. September 25, 1987 - A disciplinary meeting was held to discuss Brock's having called a supervisor at 2:00 a.m., to inform the supervisor that he was going on break. Brock was given a one day suspension and was to consider if he wanted to continue working for respondent.

In response to the respondent's assertions that the actions taken against Mr. Brock were for non-protected activities (abuse of break time and poor job performance), and the respondent's reliance on evidence of prior disciplinary actions taken against Mr. Brock, MSHA points out that these actions were taken years prior to the subject adverse actions, and that the most recent disciplinary action against Mr. Brock prior to August 17, 1987, was taken on May 22, 1986. MSHA further points out that Mr. Brock was commended by maintenance manager John Bayliss on January 9, 1987, for his excellent attendance record in 1986, and for his contribution to the department. MSHA concludes that such a commendation is inconsistent with the respondent's contention that the actions taken against Mr. Brock were for non-protected activities.

MSHA argues that the evidence in this case establishes that the respondent suspected that Mr. Brock had reported safety violations to MSHA and that its belief that he had done so was the motivating factor in taking the adverse actions against him. MSHA asserts that the abuse of break and lunch periods was an age old problem at the plant, and although employees testified that they had exceeded established time limits for breaks and lunch on various occasions, Mr. Brock was the only employee disciplined for abuse of break time. MSHA concludes that the respondent cannot claim ignorance of violations of break and lunch times by other employees because the evidence establishes that respondent's management observed such violations on occasion.

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MSHA asserts that consideration should be given to the statements attributed to Mr. Bayliss, "one of the key players" in the disciplinary actions. MSHA points out that Mr. St. John testified that Mr. Bayliss commented "that god damn Brock called MSHA on us," and that Mr. St. John also testified that industrial relations manager Hertzog told Mr. Brock that "this was a family matter and he didn't have any business calling MSHA, and that would Jerry like for him to call the IRS on him" (Tr. 132). MSHA points out that Mr. St. John felt that this statement was a threat and told Mr. Brock "you'd better look out."

MSHA concludes that where adverse action closely follows protected activity, an illicit or discriminatory motive is established, and that in this case, the first adverse action against Mr. Brock was taken on August 17, 1987, only 6 days after he engaged in protected activity. Together with the failure of management to treat other employees' abuse of break time in the same manner as Mr. Brock, and the statements attributed to management officials, MSHA further concludes that Mr. Brock's engagement in protected activity was the motivating factor for the adverse actions taken against him.

Respondent's Arguments

Respondent argues that there is no nexus between the respondent's actions in this case and Mr. Brock's protected activity. Respondent asserts that the verbal warning to Mr. Brock on August 17, 1987, was given by maintenance supervisor Jim King, who made the sole determination with respect to this action. Respondent maintains that Mr. King was completely unaware at this time that Mr. Brock had called MSHA, and that his action had nothing to do with the complaint about roofing contractors. Respondent asserts that Mr. Brock's assumption that Mr. King knew that he had called MSHA is based on Mr. Brock's mentioning to Mr. King the use of a telephone for that purpose. Respondent points out that Mr. Brock testified that he did not really know for a fact that Mr. King, or any other management official, were aware of his call, and that Mr. King's credible denial is more reliable than Mr. Brock's supposition.

Respondent confirms that Mr. King was also responsible for giving Mr. Brock the written warning on September 16, 1987, for unsatisfactory work performance. However, respondent maintains again that Mr. King was unaware that Mr. Brock had called MSHA at the time of this action, and that Mr. King's action had nothing to do with the complaint about roofing contractors or any other of Mr. Brock's safety activities. Respondent asserts that Mr. King disciplined Mr. Brock because of his job performance and taking too much time away from the job.

Respondent confirms that Mr. Bayliss was responsible for having Mr. Brock report to his supervisor before washing up for

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breaks or lunch beginning on September 25, 1987. Respondent asserts that the action taken by Mr. King was in response to Mr. Brock's abuse of break and lunch times, and that contrary to any suggestion that Mr. Bayliss knew that Mr. Brock had called MSHA, Mr. Bayliss in fact believed that it was Mr. Thompson who was responsible for the MSHA inspectors coming to the mine to look into the contractors' violations. With regard to the statement attributed to Mr. Bayliss by Mr. St. John, respondent asserts that Mr. Bayliss and Mr. Hicks testified that such a comment is wholly inconsistent with Mr. Bayliss' character.

Respondent further confirms that Mr. Hicks was responsible for the disciplinary meeting and 1-day suspension of Mr. Brock on September 28, 1987, for calling Mr. Bayliss at his home at 2:00 and 6:00 a.m., the previous Saturday morning. However, respondent maintains that Mr. Hicks was unaware of Mr. Brock's prior call to MSHA.

Respondent concludes that none of the management personnel who disciplined Mr. Brock between August 17, 1987 and September 29, 1987, knew that Mr. Brock had called MSHA, and that those individuals who concerned themselves with the matter thought that Mr. Thompson had called. Respondent maintains that confirmation of this fact lies in Mr. Brock's own testimony that he had no knowledge as to whether or not mine management in fact knew that he had called MSHA (Tr. 65). Respondent concludes that under the circumstances, MSHA has failed to show a nexus between the disciplinary actions and any protected activity by Mr. Brock.

As an affirmative defense, the respondent maintains that the evidence establishes that the disciplinary actions taken against Mr. Brock were motivated by unprotected activity and would have been taken in any event because of this unprotected activity. In support of its argument, the respondent asserts that each warning Mr. Brock received was warranted by, and a direct result of, his unprotected activity. Respondent points out that over the course of the week before the August 17, 1987, verbal warning, Mr. King observed Mr. Brock taking extended breaks and lunches at every opportunity, and that the warning was given after Mr. Brock had received group counselling and Mr. King had tried to convince him through individual counseling to willingly conform to company policy. Respondent further points out that Mr. Brock filed a grievance concerning this action and that it was summarily denied by an arbitrator on May 1, 1989.

With regard to the September 18, 1987, disciplinary warning for unsatisfactory job performance, the respondent asserts that the record clearly demonstrates that this warning was justified, and that this conclusion is reinforced by an arbitrator's decision of May 2, 1989, denying Mr. Brock's grievance with respect to this unsatisfactory job performance warning.

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With regard to the instruction by Mr. Bayliss to Mr. Brock on September 25, 1987, to call his supervisor before washing up, respondent argues that Mr. Bayliss' response to Mr. Brock's "rebellious" attitude with regard to break and lunch time restrictions, was a constructive effort to foster Mr. Brock's cooperation, and that the warning was given after Mr. Bayliss observed Mr. Brock washing up early.

With regard to the September 29, 1987, disciplinary meeting and 1-day off with pay given to Mr. Brock by Mr. Hicks, respondent asserts that it was provoked specifically by Mr. Brock's calls to Mr. Bayliss in the middle of the night, and was the culmination of many disciplinary problems that Mr. Brock had recently created, as well as those he had been continually having since coming to work for the respondent. Respondent concludes that all of the disciplinary actions in question were in response to unprotected activity brought on by Mr. Brock himself, and that his combativeness with management and his disregard for his work responsibilities are unprotected activities, regardless of his involvement with safety or his safety concerns. Respondent further concludes that the Act simply does not protect an unsatisfactory worker, and that the instant case has nothing to do with safety in the workplace.

Findings and Conclusions

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 (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator 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. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's

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Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

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Protected Activity

It is clear that Mr. Brock enjoys a statutory right to voice his concern about safety matters or to make safety complaints to mine management or to MSHA or one of its inspectors without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede a miner's participation in these kinds of activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

Unprotected Activity

The respondent asserts that the disciplinary actions taken against Mr. Brock for poor work performance and for abusing lunch and work breaks were justified. Respondent also asserts that the disciplinary meeting resulting in Mr. Brock's being given a day off with pay was prompted by Mr. Brock's calling his supervisor in the middle of the night to obtain permission to cleanup and was indicative of his combative attitude and disregard for his work responsibilities. If the acts and conduct attributed to Mr. Brock which resulted in the disciplinary actions in questions are true, I conclude and find that they may not be considered protected activities under the Act.

The Alleged Disparate Treatment of Mr. Brock

While it is true that other employees may not have been formally disciplined pursuant to the applicable labor-management rules and procedures, the fact is that other employees have been counseled and talked to by supervisors with respect to their abuses of work and lunch breaks. Given the graduated disciplinary punishment scheme for offenses, I can only conclude that all employees are equally at risk for repeat offenses which may lead to suspension or discharge.

Mr. Thompson confirmed that employees abuse their break times, and Mr. Roache, who also worked for Mr. King, confirmed that he had been counseled for missing too much work. He explained that the respondent's absentee policy and program includes a graduated disciplinary plan which begins with counseling, and then moves to a letter, time off from work, and termination (Tr. 120-121). Mr. Sutherland confirmed that Mr. King has counseled employees at various meetings about taking extended breaks (Tr. 147). Mr. Clark testified that he has observed Mr. Brock "chit-chatting" with people at the workplace,

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and has observed him coming back "slow" from his lunch and work breaks because he would stop and talk with people (Tr. 190).

Mr. King testified that he spoke with employee Maurice Harris about taking excessively long breaks on September 16, 1987, but did not formally "warn" him under the disciplinary rules. He also observed him taking another long break on October 7, 1987, but said nothing to him. Mr. King explained that Mr. Harris was not issued a formal warning because he was a probationary employee and that if he did not successfully complete his probation, he would not be retained (Tr. 229). The record shows that Mr. Harris did not satisfactorily complete his probationary period because of his failure to perform adequately, and was not accepted in the position of repairman welder (Arbitrator's decision of May 2, 1989, pg. 4, Appendix B to respondent's brief).

Mr. King also testified that during his prior tenure as an hourly employee and union official and miners' representative, he was counseled by the respondent about the use of lunch and work breaks. He confirmed that during this time he was unaware of any employee being disciplined for calling MSHA, and he stated that he had called MSHA and was never disciplined for doing so (Tr. 199).

Mr. King confirmed that after he became a supervisor, he continued his "one-on-one" counselling with his employees concerning lunch and work breaks, including Mr. Brock and two other employees, all of whom had "problems" with their breaks. Mr. King confirmed that Mr. Hicks informed him that there was a need to "tighten up" the lunch and work breaks by his employees and that this would be one of his priorities. He confirmed that sometime in May, 1987, he began counselling his employees in group sessions, and found that Mr. Brock, and employees Bill Hobbs and Dean McKellips were still having problems with their lunch and work breaks. He spoke with Mr. Hobbs and Mr. McKellips during the same day in August 1987, when he spoke with Mr. Brock concerning their long breaks, and that Mr. Hobbs and Mr. McKellips acknowledged they were taking too long on their breaks and agreed to improve. Under these circumstances, Mr. King believed that his talks with these two employees was all that was necessary, and that they responded and showed improvement in their work (Tr. 205).

Mr. King stated that when he met with Mr. Brock and his union representative on August 17, 1987, to discuss his extended lunch and work breaks, Mr. Brock took the position that he was not abusing his breaks and asked him for more specific information. Mr. King informed Mr. Brock that he had personally observed his comings and goings during the prior week, and that on at least 15 separate occasions he observed that he was late for every break. Mr. King confirmed that on the basis of his

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personal observations as stated to Mr. Brock he concluded that Mr. Brock was abusing his break times and he decided to give him a verbal warning in order to document his conclusion and action (Tr. 206).

Industrial relations manager Robert McCormick confirmed that the disciplining of individual employees is left to the discretion of their supervisors. Operations manager Hicks testified that individual disciplinary actions are tailored to the particular circumstances concerning each employee. He did not believe that Mr. Brock was singled out for disciplinary action. He confirmed that Mr. Brock's previous disciplinary record over a number of years of his employment with the respondent was considered and discussed with him at the time he disciplined him on September 29, 1987, and that Mr. Brock had reached the point where "he was walking a tightrope as far as his future with the company" was concerned (Tr. 288).

Mr. Brock denied receiving any counseling from management prior to the disciplinary actions in question (Tr. 71-72). However, the record reflects the following prior disciplinary actions taken by the respondent against Mr. Brock for violations of company rules and policies:

May 22, 1986. Disciplinary suspension for 3 days for lost time accident. In lieu of the suspension, Mr. Brock was required to prepare a job safety analysis. (Exhibit R-14).

December 31, 1984. Verbal warning for a safety rule infraction.

July 27, 1984. Supervisory warning for excessive time in the use of toilet facilities.

September 21, 1984. Supervisory warning for reading newspaper in the toilet for thirty minutes (exhibit R-7).

July 27, 1984. Supervisory counseling for leaving job without foreman's permission, and for leaving job early to go home. (Exhibit R-6).

March 17, 1983. Supervisory counseling for leaving job early repeatedly. (Exhibit R-5).

April 23, 1982. Disciplinary warning for tardiness. The warning noted that Mr. Brock had been counseled on August 25, 1981, and given a written warning on September 16, 1981, for tardiness. (Exhibit R-4).

September 16, 1981. Disciplinary warning and reprimand for leaving work without foreman's permission. (Exhibit R-3).

April 3, 1986. Five day suspension without pay for failing to follow supervisor's safety instructions and failing to take steps to insure his (Brock's) safety in connection with an accident in which Mr. Brock broke his foot. (Exhibit R-13).

September 25, 1979. Disciplinary warning and five day suspension for sleeping on the job. The warning noted that Mr. Brock had been previously disciplined for sleeping on the job. (Exhibit R-2).

February 1, 1978. Supervisory counseling for excessive tardiness. (Exhibit R-1).

I find no credible or probative evidence to establish or suggest that Mr. King, Mr. Bayliss, and Mr. Hicks conspired to reach out and isolate or treat Mr. Brock any differently from other employees because of his safety activities or involvement with the MSHA visit concerning the complaint about independent contractors. The record establishes that each of the disciplinary actions in question were taken independent of each other, and were based on the facts then known to management. Further, Mr. Brock's record reflects a consistent application of its disciplinary rules by the respondent in each instance where such action was warranted. The record establishes that Mr. Brock was put on notice by the respondent that he would be subject to more severe disciplinary sanctions for repeat offenses, and absent any evidence to the contrary, I can only conclude that what set Mr. Brock apart from other employees was his record of non-compliance with company work rules over a rather extended period of time. The fact that he serves as a union official and member of the safety committee does not insulate Mr. Brock from legitimate managerial business-related non-discriminatory personnel actions. *UMWA ex rel Billy Dale Wise v. Consolidation Coal Company*, 4 FMSHRC 1307 (July 1982), *aff'd* by the Commission at 6 FMSHRC 1447 (June 1984); *Ronnie R. Ross, et. al v. Monterey Coal Company, et al.*, 3 FMSHRC 1171 (May 1981).

MSHA's conclusions that the commendation letter given to Mr. Brock by Mr. Bayliss on January 9, 1987, is inconsistent with the respondent's contentions that the disciplinary actions taken against Mr. Brock were for non-protected activities is rejected. The letter in question recognized Mr. Brock's excellent attendance record in 1986. The individual actions in question had nothing to do with Mr. Brock's attendance per se. They deal with conduct which took place while Mr. Brock was at work, and concern separate and distinct violations of work rules and policies.

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Mr. Hicks acknowledged the letter and commented that he believed in "giving credit where credit is due," and he confirmed that he saw the letter when he considered Mr. Brock's overall employment record at the time of his disciplinary action of September 29, 1987.

The Disciplinary Actions Taken Against Mr. Brock

As noted earlier, Mr. Brock's grievances concerning the August 17, 1987, verbal warning for taking long work and lunch breaks, and the September 18, 1987, disciplinary action for unsatisfactory job performance, were both denied and the arbitrators who heard those cases found ample cause for the actions taken against him. Although I am not bound by decisions of arbitrators, I may nonetheless consider such decisions. Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

With regard to the August 17, 1987, verbal warning for abusing break times, I take note of the arbitrator's findings that there was sufficient evidence that Mr. Brock was guilty of taking excessive breaks and lunch periods and gave no indication to management that he would improve, and that management had good cause to issue the verbal warning. I also take particular note of the arbitrator's comments at page 8 of his decision, that while it was true that two other employees did not receive verbal warnings for similar offenses, they both indicated to their supervisor that they recognized the problem and would correct their abuse of break times. I agree with the arbitrator's findings. I further find and conclude that the preponderance of the evidence adduced in the instant case establishes that Mr. Brock abused his break privileges, and given the fact that he had been previously counseled in this regard, I further conclude and find that Mr. King's action was clearly justified and warranted.

With regard to the September 18, 1987, written disciplinary warning for unsatisfactory job performance, I take note of the arbitrator's findings that Mr. Brock was away from his work excessively on the day in question, was inattentive in the manner in which he performed the work, that his work productivity and performance on that day was below what was expected by management, and that he was shirking his duty and avoiding work. Although the arbitrator took into account the union's assertions that Mr. Brock was being punished because of certain union activities, for allegedly reporting some unspecified "alleged discrimination" to a government agency, and that management accorded him disparate treatment, the arbitrator nonetheless concluded that these factors did not account for Mr. Brock's

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overall lack of productivity and most of his absences from his assigned work place in question, and that this incident was not an isolated one and indicated a course of conduct on the part of Mr. Brock which had been carried on over a period of time about which he had been warned repeatedly (Arbitrator's decision, pgs. 9-10).

I also take note of the credibility findings by the arbitrator with respect to Mr. King. The arbitrator concluded that Mr. King, who was shortly removed from the union ranks before he became a management supervisor, could not have had the motivations attributed to him in the area of "union discrimination" (Arbitrator's decision, pg. 10). The arbitrator also found that Mr. King was a credible witness and was sincere in disciplining Mr. Brock for his unsatisfactory job performance, and had no axes to grind since his past history with the union indicated that he would have a good understanding of Mr. Brock's perspective in the grievance case (Arbitrator's decision, pg. 8).

Although I am in agreement with the arbitrator's findings, on the basis of my own independent observations of Mr. King during the course of the hearing, I conclude and find that he is a credible witness. With regard to the merits of Mr. King's conclusions that Mr. Brock's work performance on the day in question was less than adequate, I find that his testimony and assessment of Mr. Brock's work performance on the day in question supports the actions taken by him and was clearly within his managerial authority and discretion. Mr. King testified that he assigned the work in question to Mr. Brock and his helper at 7:00 a.m., and he expected the work to be normally completed by at least 1:00 p.m. Mr. King stated that he made occasional visits to the work area, and when he visited the area at 11:50 a.m., Mr. Brock was absent, and Mr. King found that the helper, who was a trainee probationary employee, was working on the wrong gate. When asked about Mr. Brock's absence, the trainee informed Mr. King that he did not know where Mr. Brock was, and speculated that he had gone to use the rest room. Mr. King later visited the storeroom area at the conclusion of the 2:00 p.m. break, and found the helper there, and Mr. Brock walked in later and spoke with the helper before they both "casually" walked back to their work area. Mr. King later found Mr. Brock at his locker cleaned up and ready to go home 3 minutes before the normal "wash-up" time.

Mr. King testified that Mr. Brock had wasted the entire day because he did not apply himself to the job to which he was assigned. Mr. King indicated that the only time he found Mr. Brock on the job was at 3:00 p.m., when he visited the area. He further stated that Mr. Brock informed him that he had left the job to get his blood pressure checked, visited with Mr. Hicks for approximately 30 minutes, and had attended a safety meeting which took another 30 minutes. The helper, Mr. Harris, confirmed

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that Mr. Brock left the work area several times, and that when Mr. King found them in the store room, he ordered them back to work because they had overstayed their break time by 10 minutes. Mr. Harris also confirmed that when he advised Mr. Brock about Mr. King's assessment of their "shoddy work," Mr. Brock told him "not to worry about it."

After careful consideration of all of the testimony concerning Mr. Brock's work performance which led to the disciplinary warning of September 18, 1987, including Mr. Brock's and Mr. Harris' versions of the incident, I believe Mr. King's version of the events which led him to issue the disciplinary action, and I conclude and find that it was warranted and justified.

With regard to Mr. Bayliss' order of September 25, 1987, to Mr. Brock instructing him to report to his supervisors before taking a break, I find nothing unusual about this action, nor do I find that it rises to the level of an adverse disciplinary action. Given Mr. Brock's record of abuse of break times, I believe that it was well within Mr. Bayliss' supervisory authority to instruct Mr. Brock to report to a supervisor before taking breaks. The fact that the respondent has no written policy authorizing supervisors to do this, and the fact that other employees may not have been similarly instructed is irrelevant. It seems obvious to me from the record, that management has had an ongoing problem with Mr. Brock in that he does not appear to accept or recognize the fact that he abused his break times, while other employees do and agree to improve their work habits. This attitude by Mr. Brock sets him apart from the other employees who were counseled about their break times, acknowledged their abuses, and promised to improve. Under these circumstances, I find nothing discriminatory about the instructions given to Mr. Brock by Mr. Bayliss.

Mr. Bayliss testified that Mr. Hicks had informed him to "tighten up" on maintenance department employees taking extended lunch and work breaks, and that after observing Mr. Brock washing up early before his lunch break on September 25, 1987, he discussed it with him, and that Mr. Brock informed him that he was simply washing dust out of his eyes. Mr. Bayliss stated that he met with Mr. Brock at 2:00 p.m., that same day and initially instructed him that he was to tell him (Bayliss) before taking any breaks, but after realizing that this may be a problem because Mr. Brock may not be able to find him, he instructed Mr. Brock to contact his responsible supervisor. Mr. Bayliss stated that he had in mind the shift foreman, or Mr. King, or Mr. Vargas, as the supervisors to be contacted.

Mr. King testified that he was present when Mr. Bayliss instructed Mr. Brock to inform his supervisor before taking a break. Mr. King acknowledged that Mr. Bayliss first told

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Mr. Brock to contact him (Bayliss), but then told him to call his supervisor. Mr. King confirmed that he and Mr. Vargas were Mr. Brock's normal shift supervisors, but that the shift in question when the phone call was made was a midnight Saturday shift and was not Mr. Brock's normal work shift. The company had offered overtime for anyone willing to work that day, and Mr. Brock had requested to work the midnight shift, and Mr. King allowed him to do so.

Mr. Brock testified that Mr. Bayliss instructed him to call him (Bayliss), or Mr. King or Mr. Vargas before washing up for breaks. Since Mr. Vargas and Mr. King were not present during the midnight shift in question, Mr. Brock confirmed that he telephoned Mr. Bayliss at his home, and that he did so because he was simply following his instructions. Mr. Brock confirmed that he called Mr. Bayliss at 2:00 a.m., and that he sounded "sleepy and agitated." He also acknowledged that he attempted to call him again at 6:00 a.m., but that the phone was busy. He then informed shift foreman Jake Barber that Mr. Bayliss' phone was busy and that he was informing Mr. Barber that he was taking a break.

Mr. Bayliss testified that the phone call by Mr. Brock woke him up, but that he was not angry, that Mr. Brock was friendly and not abusive, and that after the call, he took the phone off the hook. Mr. Bayliss further testified that he informed Mr. Brock that he considered the call as harassment and that he would discuss the matter with him the next day.

Mr. Hicks testified that he made the decision to initiate the disciplinary meeting of September 29, 1987, and to give Mr. Brock a day off with pay to consider his future with the company. Mr. Hicks confirmed that he took the action because of the call made to Mr. Bayliss, and because of Mr. Brock's record of disciplinary incidents and actions. He also confirmed that the action taken was in compliance with the applicable labor-management agreement, and that after this action was taken, Mr. Brock has responded "very positively" (Tr. 287).

Mr. Brock acknowledged that when he called Mr. Bayliss at 2:00 a.m., Mr. Bayliss informed him that he believed he was being harassed. Notwithstanding this initial conversation, Mr. Brock again called Mr. Bayliss at 6:00 a.m., and found that the phone was busy. (Mr. Bayliss had taken it off the hook). Mr. Brock's explanation for not contacting Mr. Vargas or Mr. King was that they were not at work. I find this to be a rather weak excuse, since Mr. Bayliss also was not at work. Mr. Brock could have called Mr. Vargas or Mr. King at their homes, but instead, he chose to call Mr. Bayliss. Mr. Brock also chose not to initially speak to the foreman who was at work on the same shift, and only spoke with him to inform him that he was taking a break after he could not reach Mr. Bayliss at 6:00 a.m. In my view, if

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Mr. Brock truly believed that he was required to contact only Mr. Bayliss before he could take a break, the prudent thing for him to have done was not to take his 6:00 a.m. break since he could not reach Mr. Bayliss at that time. Instead, he informed the foreman who was on the shift and took his break.

Given the fact that Mr. Bayliss had spoken with Mr. Brock on two occasions the day before the phone calls, and the fact that Mr. Brock attempted to again call Mr. Bayliss after he had awakened him in the middle of the night knowing full well that Mr. Bayliss considered the initial call to be harassment, I believe that Mr. Bayliss' conclusion in this regard has a ring of truth about it. I further believe that Mr. Brock's calls to Mr. Bayliss were prompted by Mr. Brock's prior encounters with Mr. Bayliss about his abuse of break times, Mr. Bayliss' refusal to put his instructions in writing, and Mr. Brock's obvious disagreement that he was abusing his break privileges. I also believe that Mr. Brock wished to "make his point" by calling Mr. Bayliss in the middle of the night. Although Mr. Brock may have made his point, he also precipitated the disciplinary action taken against him. Under all of these circumstances, I conclude and find that this action was justified and warranted.

Respondent's Knowledge of Mr. Brock's Safety Complaint to MSHA

Mr. Brock confirmed that in his capacity as a safety committeeman, he has on past occasions called and spoken with MSHA inspectors concerning safety complaints and "general questions" (Tr. 65). I find no evidence that the respondent has ever inhibited Mr. Brock from performing his safety duties in this regard. As a matter of fact, Mr. Brock confirmed that upon his return to work after his 1-day suspension with pay for having called Mr. Bayliss in the middle of the night, the respondent took no action against him because of his involvement with mine safety matters (Tr. 56).

Mr. Hicks testified that he recognized the right of an employee to call MSHA or their union to the mine, and that MSHA inspectors have been called to the mine in the past and no action has ever been taken by management against anyone for doing so (Tr. 298). He also confirmed that no action has ever been taken by management against any miners' representative for performing any MSHA related safety activities (Tr. 275-278). Mr. Bayliss testified that the respondent has never prevented any employee from making complaints to MSHA, and that no disciplinary action has ever been taken against any employee for doing so (Tr. 242-245). I find Mr. Hicks and Mr. King to be credible witnesses, and the record is devoid of any evidence that the respondent has ever prevented or inhibited any employee or safety committeeman from exercising their safety rights.

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Mr. McCormick testified that an MSHA inspector came to the mine in December, 1986, in response to employee safety complaints, and that the miners' representative was permitted to meet with the inspector and that no action was taken against any of the miners for making the complaint. He also mentioned another recent complaint by an employee which resulted in an MSHA inspection, and confirmed that no action was taken against the complaining miner.

The crux of MSHA's case lies in its belief that mine management, and in particular Mr. King, Mr. Hicks, and Mr. Bayliss, believed that Mr. Brock had called MSHA to come to the mine to look into a complaint concerning certain alleged violations by independent contractors and that the disciplinary actions taken against Mr. Brock were taken to retaliate against him for calling MSHA to the mine.

Mr. Brock testified that he was under the "impression" that mine management was not too happy about his calling MSHA about the independent contractors. When asked the basis for this impression, he responded "the way they were acting and just general tones" (Tr. 74). He confirmed that at no time during his disciplinary meetings with Mr. King, Mr. Bayliss, and Mr. Hicks did anyone say anything to him about his calling MSHA (Tr. 74-75).

Mr. King testified that at the time he issued the verbal warning of August 17, 1987, he had no information that Mr. Brock had called MSHA about the independent contractors. However, he acknowledged that a week earlier, Mr. Brock spoke to him about his belief that contractor employees were not following MSHA's safety equipment guidelines. He also acknowledged that Mr. Brock told him that he was not getting any results concerning his contractor complaint and wanted to call MSHA, and that he (King) asked Mr. Brock to wait until the end of the shift before using the phone to call. I take note of the arbitrator's comments in his decision of May 1, 1989, that the respondent in that proceeding acknowledged that Mr. King told Mr. Brock to go ahead and call MSHA when he got off work (Arbitrator's decision, pg. 6).

Although Mr. King denied that he had any personal knowledge that Mr. Brock had called MSHA about the independent contractors, his own testimony supports a conclusion that he knew that Mr. Brock was concerned about the contractors, expressed his dissatisfaction with what he perceived to be management's inaction, and that he specifically notified Mr. King that he wanted to call MSHA. Further, Mr. King told Mr. Brock that he could use the office phone to call, but to wait until the end of the shift to place the call because of pressing business in the office. Under all of these circumstances, I conclude and find that there is a strong inference that Mr. King either knew or

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suspected that Mr. Brock had called MSHA about the complaint concerning the roofing contractor.

With regard to the statement attributed to Mr. Bayliss by Mr. St. John, having viewed Mr. St. John during the course of his testimony, I find him to be a credible witness. Notwithstanding Mr. Bayliss' denials to the contrary, and taking into account his admission that he sometimes uses "flowery language," I believe that he made the statement in question. Aside from the statement, I believe that there is other sufficient evidence to support a reasonable inference that Mr. Bayliss also knew or suspected that Mr. Brock was responsible for the MSHA inspectors coming to the mine to follow up on the complaint concerning the contractors.

Mr. Bayliss acknowledged that he was first informed about the complaint concerning the contractors on August 10, 1987, and that he discussed the matter with Mr. Brock later that same day. The testimony establishes that Mr. Bayliss and Mr. Brock had a difference of opinion concerning the contractors' wearing of hard hats, and Mr. Bayliss admonished Mr. Brock for not wearing his hard hat.

Mr. Bayliss contended that one of the MSHA inspectors who came to the mine in response to the contractor complaint informed him that Mr. Thompson had called MSHA, and Mr. Brock was summoned to the meeting simply because he was safety committeeman. The inspector who was named did not testify in this case, and I have given no weight to Mr. Bayliss' hearsay testimony that the inspector revealed the name of the informant. I have serious doubts that an inspector would divulge the name of any informant and place himself at risk for disciplinary action for doing so.

Although there is no direct evidence that Mr. Bayliss knew for a fact that Mr. Brock was responsible for the call which brought the MSHA inspectors to the mine to look into the complaint concerning contractors, I conclude and find that the aforementioned circumstances concerning Mr. Bayliss' knowledge about Mr. Brock's concern for contractor safety violations, and his discussions with Mr. Brock concerning the matter, support a reasonable inference that Mr. Bayliss was not totally oblivious to Mr. Brock's involvement in the complaint and that he more than likely suspected that the visit by the inspectors was the result of some action on the part of Mr. Brock.

Mr. Hicks denied any knowledge of Mr. Brock's "involvement with MSHA," and he also denied any knowledge that Mr. Brock may have called MSHA about the contractor complaint. However, Mr. Hicks confirmed that prior to the August 13, 1987, meeting with the MSHA inspectors, which was held just outside his office he was aware of the complaints concerning the roofing contractors, and that Mr. Bayliss told him that he had discussed the

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matter with Mr. Brock (Tr. 279, 281). Mr. Hicks had previously visited the area where the roofing contractors were working to ascertain whether or not they were wearing the required safety equipment, and I believe that he did this in response to Mr. Brock's concerns to Mr. Bayliss. Mr. Hicks confirmed that during the meeting with the inspectors, he explained to them, as well as to Mr. Brock, the actions taken by management to insure contractor compliance with the safety regulations. Under all of these circumstances, I believe that Mr. Hicks also either knew or suspected that Mr. Brock was responsible for the inspectors' visit to the mine.

The fact that the respondent may not have known as a fact that Mr. Brock had called MSHA is immaterial. In *Moses v. Whitley Development Corporation*, 4 FMSHRC 1475 (1982), the Commission held that a complaint may establish a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion. See also: Judge Broderick's similar holding in *Larry Brian Anderson v. Consol Pennsylvania Coal Company*, 9 FMSHRC 413 (March 1987).

In view of the foregoing, I conclude and find that there is sufficient probative circumstantial evidence to support a reasonable inference that the three management official's who disciplined Mr. Brock in this case, either knew or suspected that he was responsible for the MSHA inspectors coming to the mine to look into the complaint concerning roofing contractors. Mr. King's verbal warning to Mr. Brock came a few days after the visit by the inspectors, and the subsequent actions taken by Mr. King, Mr. Bayliss, and Mr. Hicks followed within the next 45 days or so. These disciplinary actions, which fairly closely followed an MSHA inspection which I believe was prompted by Mr. Brock's complaint, coupled with what I believe was knowledge or suspicions by these officials that Mr. Brock was responsible for the inspection visit, raises an inference that the disciplinary actions were prompted in part by Mr. Brock's protected activity, and sufficiently establishes a prima facie case.

On the facts of this case, even though the complainant may have established a prima facie case, I conclude and find that the respondent has successfully rebutted any inference or prima facie showing of illegal discrimination. I conclude and find that the respondent has established by a preponderance of the evidence that the independent disciplinary actions taken by Mr. King, Mr. Bayliss, and Mr. Hicks, were clearly warranted and justified on their merits. Coupled with the lack of any probative evidence that the respondent was guilty of any disparate treatment of Mr. Brock, the lack of any probative evidence of animus, harassment, or other acts by the respondent inhibiting Mr. Brock from exercising his safety rights under the Act, I simply cannot conclude that Mr. Brock has made out a case. To the contrary, I

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conclude and find that the disciplinary actions taken by the respondent's management personnel were motivated by unprotected factors alone, namely, Mr. Brock's abuse of work and lunch breaks, his unsatisfactory job performance, and his calling of a supervisor on the phone at his home in the middle of the night.

ORDER

In view of the foregoing findings and conclusions, and on the basis of the preponderance of all of the credible and probative evidence adduced in this case, I conclude and find that the complainant has failed to establish that the respondent discriminated against him. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge