

CCASE:
JOHN DIXON HACKER V. BLACK STREAK MINING
DDATE:
19891109
TTEXT:

~2240

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

JOHN DIXON HACKER,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 89-1-D
MSHA Case No. BARB CD 88-57

BLACK STREAK MINING,
RESPONDENT

No. 1 Mine

DECISION

Appearances: John C. Carter, Esq., Harlan, Kentucky, for the
Complainant;
Otis Doan, Jr., Esq., Harlan, Kentucky, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by Mr. Hacker with the Commission on October 4, 1988, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Hacker initially filed his complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), at its District 7 Field Office on August 15, 1988, and in a statement executed by him on that day on an MSHA complaint form, Mr. Hacker made the following complaint statement:

At the end of our shift I ride the belt outside. On 07/25/88 while riding the belt to the surface I observed a rock fall on the belt and where the fall was the belt was cribbed on both sides. When I jumped off the belt I hit one of the cribs and it threw me back into the belt structure. As of this date I have received no workman compensation. I have been told that I no longer have a job at this company. I want my job back with backpay. Also I want the workman's compensation due me and all my medical bills paid.

In a statement given to an MSHA Special Investigator on August 19, 1988, in the course of an investigation into his

~2241

complaint, Mr. Hacker stated that mine management instructed him to ride the belt into the mine, that riding the belt was illegal, and had he refused, he would not have a job. He stated that approximately a week prior to his alleged injury he informed an MSHA inspector who was at the mine that he rode the belt into the mine and that the belt stop cord was inoperative, and that the inspector issued several violations to the respondent. He further stated that he received medical treatment for his alleged injuries, was hospitalized for 9 days, and that when he contacted mine management on August 16, 1988, to inquire whether he still had a job, management informed him that he had quit and would not be given his job back. During the course of the hearing, Mr. Hacker alleged for the first time that he was discharged by the respondent for speaking with the inspector, and he suggested that he was fired because his conversation with the inspector resulted in violations being issued to the respondent. He also asserted that the respondent retaliated against him for informing the inspector about his riding the belt and the inoperable stop cord.

After the completion of its investigation of Mr. Hacker's complaint, MSHA advised him by letter dated September 15, 1988, that on the basis of the information gathered during the course of its investigation, a violation of section 105(c) of the Act had not occurred. Mr. Hacker pursued his complaint further with the Commission, and in a letter dated September 26, 1988, which accompanied his complaint, Mr. Hacker stated in relevant part as follows:

I have lost my job due to an injury that I received while being employed by Black Streak Mining. I have filed a workmen's compensation claim. I have yet to receive workmen's comp. or anything due to this injury. I want to know from you all is it right to lose your job while under a doctor's care? I have doctor's statements and X-rays due to this condition, and I also have witnesses stating verification of getting treated by a doctor at the emergency room in Pineville at the hospital.

The respondent filed an answer to the complaint denying that it discriminated against Mr. Hacker, denying that he was injured in any mine accident, and asserting that Mr. Hacker quit his job because he did not return to work on July 26, 1988, and did not supply a valid reason for not returning to work.

A hearing was held in Kingsport, Tennessee, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their arguments, as well as the arguments made by counsel during the course of the hearing.

Issues

The issues presented in this proceeding are (1) whether or not Mr. Hacker was discharged or voluntarily quit or abandoned his job; (2) whether or not his alleged discharge or voluntary termination was motivated or otherwise prompted by his engaging in any protected safety activity; and (3) whether or not the respondent retaliated or otherwise discriminated against Mr. Hacker by either discharging him or forcing his termination because of his engaging in any protected safety activities. 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.

Complainant's Testimony and Evidence

Complainant John Dixon Hacker testified that on July 25, 1988, at the end of his shift, he rode the conveyor belt out of the mine, and when he observed a rock on the belt in an area which had been cribbed, he jumped off the belt to avoid the rock and he was thrown back against the belt structure. He then waited until fellow miners Joe Stapleton and Mark LeMasters came into the area and he advised them that he was "all right." Mr. LeMasters returned to the outside to get a bar to break down the rock, and Mr. Hacker reversed the belt and went back to the belt head to obtain a hammer. He then rode the belt back to the location of the rock and helped Mr. LeMasters and Mr. Stapleton break down the rock. After they finished, they all left and exited to the outside (Tr. 11-14).

Mr. Hacker stated that he left the mine after the incident in question because he was "shook up pretty good" and "was pretty well scared and everything and I didn't think I was hurt that bad." When he arrived home he "was hurting bad" and could not get out of his car. His wife called the mine in an effort to contact the mine operator about taking him to the hospital but no one answered the phone. His wife then called mine operator Darrell Middleton's wife at a store which they operate and she told his wife to take him to the emergency room. Mr. Hacker stated that the calls were made by his wife because he wanted to report the accident, and in order for someone to verify for the hospital that he worked at the mine for workmen's compensation purposes (Tr. 15-17).

~2243

Mr. Hacker confirmed that Windell Middleton is the company vice-president and was his supervisor, and that his brother Darrell Middleton was the president. He stated that the lack of belt clearance where the rock was located contributed to his injuries, and that he had to turn his head sideways to clear the rock while riding the belt. He also confirmed that the belt was equipped with pull ropes but they were inoperative (Tr. 18).

Mr. Hacker stated that approximately a week before he was injured he spoke with MSHA Inspector Chaulk Myers "about the belts and stuff" and "the belt in general" (Tr. 20). He stated that he informed Mr. Myers that he rode the belt into the mine and that Mr. Myers advised him that he was not supposed to do this because there was no belt clearance. Mr. Hacker stated further that sometime between July 14 and 17, 1988, Mr. Myers was at the mine to conduct an electrical inspection and asked him to call the base to shutdown the belt so that he could inspect it. However, no one would answer the phone, and Mr. Myers waited an hour and a half before the belt was shutdown. Mr. Myers then told Mr. Hacker that he was "going to get him" for interfering with an inspection for not shutting the belt down (Tr. 23).

Mr. Hacker stated that he did not shut the belt down because he lacked the authority to do so and he was specifically told that if he ever shutdown the belt he would lose his job. He explained that shutting down the belt while it was loaded would make it difficult to restart and could result in belt damage (Tr. 24).

When asked whether the inspector issued any citations as a result of his riding the belt and the inoperative pull ropes, Mr. Hacker answered "to my knowledge, there was." When asked how he knew that citations were issued, he stated that the outside man, Johnny Brooks, informed him that the inspector was mad when he left the mine and that he wrote up a violation "for interfering with the inspector's job and for the belt. There were several violations on the belt." Mr. Hacker stated that this occurred a week to a week and a half prior to his injury (Tr. 25).

Mr. Hacker stated that he rode the belt to and from his work station and that it was illegal for him to do so. He explained that it was illegal because of the lack of clearance and the inoperative pull cords. He also stated that if the cords were operational, it would have been legal to ride the belt, but that the cords have never been operational for as long as he worked at the mine (Tr. 26-27).

Mr. Hacker stated that he rode the belt to his work station because that was the only way to reach the belt head to turn it on in order to transport the coal out of the mine. He also stated that Windell Middleton required him to ride the belt.

~2244

Mr. Hacker confirmed that he had previously quit his job at the mine when "I was starting to get scared," and that he was rehired (Tr. 28). He also confirmed that he did not inform Mr. Middleton that it was illegal to ride the belt because "if I would have complained to Mr. Middleton about the belt he would have first replaced me and got somebody else" (Tr. 29).

Mr. Hacker stated that after getting out of the hospital he spoke to Darrell Middleton on approximately August 9, 1988, and that Mr. Middleton "told me that he'd like to handle it more or less under the table and that, come on back to work." Mr. Hacker stated that he did not return to work because he was under a doctor's care at that time and that he so informed Mr. Middleton (Tr. 31-32).

Mr. Hacker stated that after filing his complaint with MSHA, the MSHA investigator suggested that he call Mr. Middleton and ask for his job back (Tr. 33). Mr. Hacker stated that he filed the complaint "because of the job and everything. And the injury. They was stating that nothing happened and stuff" (Tr. 34).

Mr. Hacker stated that he was never told he did not have a job, but that Mr. Middleton told his wife that he did not have a job because nothing happened to him. He also stated that Windell Middleton informed him on August 16, 1988, that nothing had happened "and for me to sue him" and that "I no longer had a job there" (Tr. 36).

When asked for his opinion as to why he no longer had a job with the respondent, Mr. Hacker replied as follows (Tr. 36-38):

A. If I was to give my opinion, I'd say that I was starting to be a heartache for them.

Q. Okay, why were you a heartache?

A. Well, they try to do the best they can running coal and stuff and the people goes to, you know, talking and everything, and stuff like that, they don't like that, and stuff.

* * * * *

Q. And you think that you, specifically, however, you're a heartache to them? You said you thought you was a heartache to them?

A. By, like, talking to-that mine inspector and stuff. And it got right back over to them that, over that. And they know that . . .

~2245

You know, some of the people take a lot of stuff, and I'm the type of feller, I won't take too much of anything.

Respondent's counsel stated that Mr. Hacker's workmen's compensation claim filed against the respondent has been settled and that Mr. Hacker will receive \$12,000 from the respondent's insurance carrier as an "out of court settlement" for his injury claim (Tr. 39-41).

Mr. Hacker confirmed that he has not been employed since he left the respondent's employ, and although he is able to work, he has not looked for work because of his pending workmen's compensation claim (Tr. 41).

On cross-examination, Mr. Hacker confirmed that the respondent disputed his claimed injury and workmen's compensation claim. He also confirmed that Inspector Myers told him that he was going to ride the belt out of the mine, but that he never observed him doing so (Tr. 44). Mr. Hacker further confirmed that he has no copies of any of the violations allegedly issued by MSHA, that he did not subpoena Mr. Myers to testify in this case, and that the only evidence he has to support his contention that violations were issued was based on what someone may have told him (Tr. 45).

Mr. Hacker confirmed that no one else was present when he spoke to Inspector Myers about the belt and that he did not tell either of the Middleton brothers that he had complained to the inspector about the belt (Tr. 46). He also confirmed that he was injured about a week after speaking with Mr. Myers, and that during that week his job status was not changed, and that he still worked as a belt headman and received the same pay. He also confirmed that Windell Middleton "has never jumped on me," and that although Darrell Middleton "has chewed on us a little bit," this occurred prior to speaking to the inspector and his injury, and that during the week after he spoke to the inspector, the Middleton brothers never "jumped on him for anything" (Tr. 47).

Mr. Hacker stated when he rode the belt into the mine to his work station on July 25, 1988, he observed a rock hanging down on the belt and reported it. At the end of the shift, while riding the belt out of the mine, he jumped off the belt to avoid the rock which he knew was there and was hurt when he hit a crib and was thrown back into the belt structure. He confirmed that after this occurred, he helped take down the rock by using a sledge hammer while he was bent down, and that this job took approximately 30 to 45 minutes (Tr. 61).

Mr. Hacker stated that after the rock was taken down, he and the other two men who helped do the work rode the belt out of the

~2246

mine. His brother-in-law Johnny Brooks was outside, and Mr. Hacker stated that he told Mr. Brooks that "I took a pretty good jolt" but did not tell him that he was hurt or needed to go to the hospital. Mr. Hacker stated that after coming out of the mine, and before leaving to go home, he told no one that he had been hurt and had to go to a doctor, and that the Middleton brothers were not present at that time (Tr. 63).

Mr. Hacker confirmed that the Middleton brothers never told him that he had been fired, that he "got along good with them," that "they were good men to work with and work for," that "payday was always there," and that they never gave him "a hard time" (Tr. 66). Mr. Hacker denied that his dispute with the Middleton brothers arose because of his workmen's compensation case, and when asked why the dispute arose, he responded as follows (Tr. 66-67):

THE WITNESS: Well, mainly the dispute arised because my wife was trying to get a hold of Darrell Middleton and she kept, or he kept on putting her off and he put her off for like three or four days and then the following week she had called back again and then they finally told her that nothing had happened and he wasn't going to do nothing, and that's why the dispute arised, sir.

JUDGE KOUTRAS: So, that all had to do with your compensation claim, doesn't it?

THE WITNESS: Sir?

JUDGE KOUTRAS: You claimed you were injured in the mine and they kept denying it.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And is that why the dispute arose?

THE WITNESS: Well, no, not really. I mean, the dispute rised because there was a lot of unsafe working conditions there.

Q. You never, but you never filed any injury complaints?

A. No.

Q. And you never complained to them prior to the time this dispute arose over this workers' compensation case, did you?

A. I just quit once.

~2247

And, at (Tr. 68-70):

Q. Maybe I'm not explaining it right. What I'm saying is, prior to the time you say you got hurt and you filed your worker's compensation case, you never filed any complaints with MSHA, you never complained to these fellows.

You say they were good men to work for and then after you filed this worker's compensation case, and they disputed notice, then's when all this problem came up, isn't it?

A. No, when I, like what I say, when I was dazed and everything, when I talked to Windell and stuff there, and then he's the one that brought it all out.

Q. But I'm talking about, that happened and you say

A. Because I wasn't getting nowhere.

Q. Okay, let me ask you this. You said, you just testified that the week from, that you talked to the inspector about a week before you got hurt and up until July 25th, you say you didn't, they didn't harass you. You didn't have any problem with them and they didn't fire you?

A. Right.

Q. And a week has passed and the reason you left work was because you say you got injured, isn't that right? They never fired you or ran you off or anything? Did they?

A. Well, what is it when . . .

Q. No, just answer my question.

A. No, okay.

Q. Did they?

A. Did they what?

Q. Did they fire you or run you off? Prior to your date of injury, July 25th?

A. No, sir.

~2248

In response to bench questions concerning his discrimination claim, Mr. Hacker stated as follows (Tr. 83-85):

JUDGE KOUTRAS: Now, let me ask you this question, why do you believe you were discriminated against here?

THE WITNESS: Why do I believe I was?

JUDGE KOUTRAS: Yeah?

THE WITNESS: I, to my knowledge, I just say that, you know, with me talking to the mine inspector and stuff like that, I believe that they don't, they didn't really take too good to that.

JUDGE KOUTRAS: Take too good to what?

THE WITNESS: To me, you know, talking to them and everything. Because the mine inspector, Chaulk Myers, told me, he said, anything that you say and everything, he said, they can't use against you and stuff like that.

The mine inspector had told me this himself and he said, you know, they can't get rid of you on your job and stuff and he said, answer it honestly.

JUDGE KOUTRAS: How did this conversation come up with this inspector a week before you were injured?

THE WITNESS: How did it?

JUDGE KOUTRAS: Yeah, how did the subject come up about your riding the belt and all that business?

THE WITNESS: Well, the man had . . . See, my job, my job consists of doing nothing but watching my belt. Do you understand what I'm saying? I watch the belt and make sure that the coal's running right and then do little odd jobs and stuff like that. Okay, what it consists of is not too much of anything. Just being there and making sure that the belt runs right. Okay, I had this free time while this inspector was in there trying to do his job. Okay, he didn't get to do his job, so we just sat there and chit-chatted, is what it amounted to. You know, just talked. And, you know, he was talking, asking me questions and, you know, I asked him a few and you know, we just chit-chatted, is what I'm trying to say.

JUDGE KOUTRAS: What do you mean, he couldn't do his job?

~2249

THE WITNESS: Well, he told me to shut the belt down and I was told not to shut the belt down.

And, at (Tr. 95-97):

JUDGE KOUTRAS: Now, I'm going to ask you up front, did somebody suggest to you, well, listen, in addition to your compensation claim, maybe you can say that you talked to the inspector and that the company fired you because you talked to the inspector and suggested to you that you file a discrimination complaint?

THE WITNESS: When I was more or less fired that's when I took further action. That's when it was.

JUDGE KOUTRAS: Yeah, but you never raised any issue then that you were fired for talking to the inspector. Are you trying to convince me that the Middleton's fired you for talking to an inspector, or wouldn't give you a job back because you complained to an inspector?

THE WITNESS: That, more or less, that's what a lot of it amounted to. I mean, they wouldn't give me my job back because of the accident. That's the whole main thing right there.

JUDGE KOUTRAS: Because of the accident.

THE WITNESS: But a lot of things, it's because they work illegal in the mine and then they get away with it.

JUDGE KOUTRAS: Have you ever reported their illegal activity?

THE WITNESS: No, sir, I have not.

JUDGE KOUTRAS: Why not?

THE WITNESS: Well, if you report it you won't have a job there.

JUDGE KOUTRAS: But how do they know you're going to report it. You know, you can pick up the telephone and make anonymous complaints.

THE WITNESS: Okay.

JUDGE KOUTRAS: Can't you do that? Can't you call up the, you know where the MSHA district office is in your neighborhood or in your local where you live?

~2250

THE WITNESS: Yeah, I know where it's at.

JUDGE KOUTRAS: Do you know who the inspectors are?

THE WITNESS: I just, I know that Chaulk Myers and, no, I don't know him personally, no.

Mr. Hacker confirmed that during his 8 months of employment at the mine he never reported any safety violations to MSHA, and when asked to identify the alleged "illegal things" at the mine, Mr. Hacker stated "I just soon not comment on it" (Tr. 101). He stated that he had informed the Middletons about the existence of the rock over the belt, but nothing was done about it (Tr. 102). He confirmed that he had quit his job in the past because "the top was bad" and because he was scared to work under the top (Tr. 105). He also confirmed that he told Windell Middleton that the top was bad and needed to be taken care of (Tr. 114).

Mr. Hacker stated that when he last quit his job at the mine because he was scared he had never worked in a mine before and that "it was all new to me" (Tr. 120). Mr. Hacker confirmed that he never told the Middletons about his conversation with Inspector Myers, and he has no proof that Mr. Myers told them about their conversation (Tr. 120). He also confirmed that he never spoke to any other inspectors during the time that he worked at the mine (Tr. 121).

Mrs. Virginia Hacker, complainant's wife, stated that she was at the mine on July 25, 1988, and observed her husband come out at 5:30 p.m. Her husband told her that "his back was bothering him." Present at this time was her brother John Brooks, and miners Joe Stapleton and Mark Masters (sic). Mrs. Hacker stated that after arriving home, her husband informed her that his back "was hurting rather bad" and she called the mine to see about taking him to the Pineville Hospital. There was no answer at the mine, and she placed a call to Darrell Middleton's wife, Mary Lynn, at a local store which they operate, and Mrs. Middleton instructed her to take Mr. Hacker to the doctor. Upon arrival at the hospital, Mrs. Hacker stated that someone from the hospital emergency room called Mrs. Middleton to verify Mr. Hacker's employment (Tr. 125-132).

Mrs. Hacker stated that on July 27, 1988, Mr. Hacker returned to the doctor at the hospital because "he was hurting real bad," and that she called the mine that day and spoke to Windell Middleton about filing an accident report, and that Mr. Middleton informed her that he would have to talk with his brother about the matter. Mrs. Hacker stated that she called again, and then went to the mine to pick up her husband's check, and that Windell Middleton advised her that he had spoken to his brother and that no accident had occurred and no accident report

~2251

would be made. Mrs. Hacker stated that she informed Mr. Middleton that she would see a lawyer and that he told her "that would be the thing for you to do." She confirmed that she has not spoken to the Middleton brothers since that time, and nothing was said about her husband returning to work (Tr. 132-134).

On cross-examination, Mrs. Hacker stated that when her husband came out of the mine on the belt he did not need any help in getting off the belt, and she did not hear her husband tell anyone else that he had been hurt. He only told her that "his back was hurting" (Tr. 134). Mrs. Hacker stated that her husband attended work regularly and had never been suspended or fired during his approximate 8 or 9 months of employment with the respondent, but that he had previously quit his job at the mine, and then returned to work there again (Tr. 137).

Mrs. Hacker stated that her husband had complained to her about the rock while he was employed at the mine and that "he was scared of it because he was not used to coal mining" (Tr. 146). She also stated that her husband "was all the time talking about the belt and the rock," and that "they wanted him to cut the belt off and he wouldn't cut it off because he was afraid he'd lose his job over it" (Tr. 149). She had no knowledge of any specific conversations that her husband may have had with any inspectors about the belt or rock, but that they discussed the mine "all the time" (Tr. 149). She believed that riding the belt was illegal, and that her husband had informed her that the belt pull cord was not working (Tr. 153). She confirmed that she had ridden the belt when she was employed at the mine when it was operated by another company, and that the only information she had about the respondent's operation of the mine is that which she received from her husband (Tr. 156-157).

Robert G. Hunley, stated that he has never worked for the respondent, but that he has worked in an underground mine for a couple of years. He stated that he knew Mr. Hacker for a couple of years and took him to the doctor on July 27, 1988, and then to the hospital emergency room where he was admitted. When asked about his knowledge of the case, Mr. Hunley stated that "all I know is, was he got hurt in the mines" and that he learned this from Mr. Hacker (Tr. 160). Mr. Hunley stated that Mr. Hacker informed him that "there was a rock hanging over the belt about to fall," but that he gave him no advice as to how to proceed with this case (Tr. 161). He stated that Mr. Hacker had complained to him about the rock hanging over the belt for a month or so before he was injured (Tr. 161).

Mr. Hunley stated that he had worked in low coal seams, and that some mines have problems with the top in low coal, and that it is an inherent condition of mining. He agreed that a mine is

~2252

a "scary place" for a young man on the job a few months (Tr. 162). He stated that his conversations with Mr. Hacker concerning the mine took place while he was eating at a restaurant operated by Mr. and Mrs. Hacker, and that he told Mr. Hacker that the rock may or may not be dangerous depending "on what it looked like." He could not recall any comments by Mr. Hacker in this regard, and that from what he knew the rock problem was only at one location over the belt (Tr. 164). Mr. Hunley denied that he suggested to Mr. Hacker to call a mine inspector about the rock, and that this conversation never came up (Tr. 165).

Mr. Hacker's counsel made a proffer that Mr. Hacker's sister, Russella Horner, was present at the mine on July 25, 1989, with Mrs. Hacker, and that if called to testify, she would state that she was present when Mr. Hacker complained to his wife about his back on that day. Respondent's counsel accepted the proffer and Mrs. Horner was not called to testify (Tr. 167).

John Brooks, stated that he works for the respondent and that he is married to Mr. Hacker's sister, and that Mr. Hacker is married to his sister. Mr. Brooks stated that he works at the mine as an outside man taking care of the outside and the No. 1 belt, back to the No. 2 belt. He confirmed that he worked at the mine during the entire time that Mr. Hacker was employed there, and that he was at work on July 25, 1988. He stated that Mr. Hacker, Mr. LeMasters, and Mr. Stapleton came out of the mine at the same time at the end of the shift, and that Mr. Hacker said nothing to him about being injured. Mr. Brooks explained that Mr. LeMasters and Mr. Stapleton had come out earlier, but went back in after Mr. Hacker called out (Tr. 171-175).

Mr. Brooks stated that at 11:30 p.m., the evening of July 25, 1988, Mr. Hacker came to his home and informed him for the first time that he had injured his back when he jumped off the belt to avoid a rock. Mr. Hacker informed him that he would not be at work the next day, and gave him a doctor's excuse. Mr. Brooks said that he did not look at it, and laid it on the night stand next to his bed. The next day, he called Windell Middleton and informed him that he would need someone for the belt head that day, but Mr. Brooks was not sure whether he explained the reason for needing someone that day. Mr. Brooks could not recall what he did with the doctor's slip that Mr. Hacker had given him, but he confirmed that he did not give it to Windell or Darrell Middleton. He confirmed that he later informed the Middleton's that Mr. Hacker would not be coming to work because he injured his back, and he believed that he advised them of this within 2 days of the accident (Tr. 175-177).

Mr. Brooks stated that he and Mrs. Hacker have discussed Mr. Hacker's working at the mine, and that Mrs. Hacker did not want her husband working there because "he didn't like the idea

~2253

of working in them, underground, . . . and he said he didn't like riding under the rock on the belt and stuff" (Tr. 178).

On cross-examination, Mr. Brooks confirmed that Mr. Hacker said nothing to him about being injured when he came out of the mine on July 25, 1988, and that he jumped off the belt after exiting the mine and said nothing about going to the hospital (Tr. 178-182). Mr. Brooks stated that he has observed MSHA Inspector Myers riding the belt in question, and that there are pull cords on the belt. The purpose of the cords is to stop the belt in the event of any problems (Tr. 183).

Mr. Brooks stated that Mr. Hacker "was skittish" about working in the mine, and that he (Brooks) has had no problems working for the Middletons and that they have never harassed him (Tr. 185). He confirmed that Mr. Hacker could crawl to his work station at the belt head, but that "it would be a long crawl" (Tr. 185). Mr. Brooks further confirmed that Windell Middleton instructed him to keep the pull cords working, and he was not aware of any violations being issued on the pull cords. He was aware of a violation concerning inadequate crawl space next to the belt. The condition was created when the belt was cribbed, and the space needed to be widened, and Windell Middleton instructed the crew to correct the problem (Tr. 187).

In response to further questions, Mr. Brooks stated that the belt in question was approximately 3,500 feet long, and he was not aware of any citations issued by Inspector Myers for the failure of the respondent to cooperate with him in shutting the belt down. He confirmed that he had no knowledge of any citations which may have been issued at the mine, and he explained that any citations would be posted in another mine area from where he works (Tr. 190).

Mr. Brooks stated that the pull cords on the No. 1 belt in question were operational on July 25, 1988, and that the No. 2 belt is not equipped with a pull cord because it is not an authorized mantrip. Mr. Brooks confirmed that when Mr. Hacker called out and told him about the rock on the belt, the Middletons were not present, and that he sent Mr. LeMasters and Mr. Stapleton in to see about the problem. Mr. Hacker had advised him earlier about the rock, but told him that "he was going to stop and get it on his way out" (Tr. 193-195).

Mr. Brooks stated that at the time Mr. Hacker came to his home on the evening of July 25, 1988, he lived 25 miles away, and drove to his home with his wife. Mr. Hacker woke him up, informed him that he had hurt his back and would not be at work the next morning. Mr. Brooks also confirmed that Mr. Hacker gave him a "pink slip," but he did not look at it and just put it on his night stand. Mr. Brooks stated that on his way to work that morning, he stopped and called Windell Middleton and informed him

~2254

that Mr. Hacker would not be at work, but he did not explain why. When asked why he did not explain to Windell Middleton the reason for Mr. Hacker's inability to report for work, Mr. Brooks stated "I don't really know" (Tr. 198). When asked if Mr. Middleton sought any explanation from him as to why Mr. Hacker would not be able to come to work, Mr. Brooks responded "this has been over a year, and I don't remember" (Tr. 199). Mr. Brooks confirmed that his wife misplaced the slip that Mr. Hacker had given him, that it never got to Mr. Middleton, and when Mr. Hacker informed him that he could get a copy, Mr. Brooks did not search for the slip (Tr. 200). When asked if he knew what the instant case was all about, Mr. Brooks responded "not for sure, . . . I'm not clear on whether its compensation or disability, . . . I don't know what, really" (Tr. 202).

Mr. Brooks explained the operation of the belt, and he stated that it is normally started and stopped from the outside by a switch, and that the pull cords are only to be used in an emergency. He confirmed that he started and stopped the belt from the outside on July 25, 1988, and that Mr. Hacker informed him by telephone that "he had a rock on a belt and he was going to have to bust it up" (Tr. 205).

Mr. Brooks stated that he was not aware of any safety complaints made by Mr. Hacker to the Middleton's or anyone else, but that Mr. Hacker has stated to him (Brooks) that he did not like riding the belt under the rock, and did not like being that far back underground. Mr. Brooks did not agree that the Middleton's were not concerned about safety or the lack of operational cords on the belt, or that anyone who did not ride the belt would be out of a job (Tr. 207). Mr. Brooks confirmed that he has never been cited for any violations on the Number 1 belt or any other equipment that he is responsible for (Tr. 208).

Mr. Brooks stated that Mr. Hacker informed him that he had spoken to Inspector Myers about a week before he was injured, but Mr. Brooks could not recall what was said, and he confirmed that he did not speak with the inspector (Tr. 209). Mr. Brooks explained that in the event the number 1 belt is loaded and needs to be shutdown, he was instructed to contact someone to make sure the belt was empty before it was shutdown, and he could not recall receiving any calls from anyone to shut the belt down on the day that the inspector was there. However, he confirmed that he was aware of the fact that someone was trying to contact the face area where coal was being run to stop loading coal so that the belt could be stopped, but that the face area was a long distance away and "we have phone trouble every once in a while." Mr. Brooks stated that the inspector did not like the fact that the belt wasn't stopped, but said nothing to him about it. He confirmed that the inspector shut the belt down from the outside because he wanted to check the smoke roller test switches, and that he inspected the belt. Mr. Brooks recalled that he had to

~2255

clean some dirt off one of the mats in front of the belt switch box (Tr. 210-210).

Mr. Brooks confirmed that the number 1 belt pull cord was broken, but denied that it was broken during all the time that Mr. Hacker worked at the mine. Mr. Brooks stated that he had worked on the cords three or four times at locations "where it was old," and that he conducts the inspections on the belt. He stated that while Mr. Myers was inspecting the belt, he (Brooks) was inspecting it to make sure that the cord switches were all working (Tr. 216). He confirmed that the inspector shut the belt down because of a smoke roller slippage switch, but could not recall whether he worked on the belt before or after the inspection (Tr. 219).

Mr. Brooks stated that as far as he knew, Mr. Hacker got along with the Middleton's, and that although Mr. Hacker told him (Brooks) several times that he did not like working at the mine, he never said anything to him about safety violations, rocks falling on the belt, or that the Middleton's did not care about safety and were intimidating mine inspectors. Mr. Brooks stated that he has never heard the Middleton's intimidating any inspectors (Tr. 226).

Jimmy Joe Stapleton testified that he now works at another mine company owned by the Middleton's, but worked for Black Streak on July 25, 1988. Mr. Stapleton stated that a day or two later, Windell Middleton asked him if Mr. Hacker had been injured at the mine on July 25, 1988, and Mr. Stapleton informed him that he had no knowledge of any injury. Mr. Stapleton stated that he was working on the number 1 belt "running fire sensor line," and that he had to crawl into the mine because he was working on the belt. He confirmed that he and Mr. LeMasters went back into the mine that same evening to help Mr. Hacker break up a rock. He stated that he crawled out of the mine, but was not sure whether Mr. LeMasters rode the belt out because he was already outside when he came out, and they waited until Mr. Hacker came out (Tr. 233).

On cross-examination, Mr. Stapleton stated that he never observed anything "illegal" at the mine, that "it was in fair shape" and "safe to me," and that he had worked in the mines for 14 years and would not work in any unsafe faces (Tr. 234). He explained the roof timbering, cribbing, and roof bolting work which was done at the mine pursuant to the roof-control plan, and confirmed that the number 1 belt was cribbed on both sides "almost all the way from outside to in" (Tr. 235). He confirmed that the mine was "low seam" with a 34-40 inch seam, and that "rock will fall every now and then" because of weather changes (Tr. 236).

~2256

Mr. Stapleton confirmed that Mr. Hacker helped him and Mr. LeMasters break up the rock in question and that Mr. Hacker used a sledge hammer on the rock while he and Mr. LeMasters were throwing the pieces out of the way. He also confirmed that Mr. Hacker said nothing to him about being hurt or going to the hospital, and if he had, he would have reported it. Mr. Stapleton stated that to his knowledge, the belt pull cords were operational (Tr. 237).

Mr. Stapleton stated that when he came out of the mine after working on the belt sensor line on July 25, 1988, he saw no reasons why anyone could not ride the belt out, and that "there was plenty of height over it" (Tr. 238). He confirmed that when he went back in to help Mr. Hacker break up the rock, he rode the belt in, and rode it back out after taking care of the rock (Tr. 239). He was not aware of any violations on the belt that day, and the only other violations he was aware of were "maybe rock dust or something like that" (Tr. 240).

Mr. Stapleton stated that he knows Inspector Myers and has observed him at the mine two or three times, and that he was aware of no problems on the belt in question, or any problems with Mr. Myers stopping the belt. He confirmed that Windell Middleton has instructed him and Mr. Hacker not to shut the belt off when it is loaded with coal because it will not start up again (Tr. 241). Mr. Stapleton stated that he has worked for the Middleton's for 2 years and that "they're good people to work for." He has never known them to make any miners work in unsafe conditions (Tr. 241).

Mark LeMasters confirmed that he has worked at the mine for 18 months, and although he knew Mr. Hacker worked as a belt headman, he never worked closely with him. He recalled that on or after July 25, 1988, when Mr. Hacker did not come back to work, he was assigned to do his work on the belt head (Tr. 247). Mr. LeMasters stated that he performed this work for several days, and that he was then replaced by Rusty Ledford. He confirmed that he did work with Mr. Hacker making belt splices, and that he could recommend him for this work (Tr. 249).

Mr. LeMasters stated that he observed no one get hurt while he and Mr. Stapleton were helping Mr. Hacker break up and load out the rock in question. Mr. Hacker was using an 8 or 10 pound sledge hammer to break up the rock, and said nothing to him about being hurt or that he had to go to the hospital. Mr. LeMasters stated that the mine was safe, and that he had never observed the Middleton's "harass Mr. Hacker or do anything out of the way to Mr. Hacker." He confirmed that he filled in 4 or 5 days doing Mr. Hacker's job after he failed to return to work (Tr. 252).

Mr. LeMasters stated that he had once quit working at the mine, but came back at a later time. He has never observed

~2257

anything illegal going on at the mine, and had plenty of supplies to work with. He did not know whether his replacement Rusty Ledford worked at any other mine operated by the Middleton's (Tr. 255).

Mrs. Mary Lynn Middleton, confirmed that she is Darrell Middleton's wife, and that she knows Mrs. Hacker, but does not know Mr. Hacker. She could not recall speaking with Mrs. Hacker on July 25, 1988, and did not recall Mrs. Hacker calling her that day. She also could not recall anyone calling her from a doctor's office or from a hospital to inquire as to any workmen's compensation insurance coverage at the mine (Tr. 256-257).

On cross-examination, Mrs. Middleton stated that she operates a grocery store, is not employed at the mine, has no authority to clear workmen's compensation, and that she is not familiar with everyone working for her husband (Tr. 258).

Respondent's Testimony and Evidence

Windell Middleton, testified that he and his brother Darrell operate the mine as a partnership, and have operated it since October, 1987. Mr. Middleton stated that he is the mine superintendent and served as Mr. Hacker's supervisor. He confirmed that the number 1 belt is a designated man-trip and is equipped with functional pull cords, and that they were working in July, 1988. He confirmed that he advised the belt headman not to shut the belt down if it is loaded except if there is an emergency, and he explained that if the belts are shutdown while loaded, they will usually break if the belt is started again while still loaded with coal (Tr. 263).

Mr. Middleton stated that Mr. Hacker could either ride the belt into the mine to his work station, or crawl in along a crawl space adjacent to the belt. He described the belt cribbing used for roof support, and the prevailing roof conditions, and he stated that bad top is always taken down when detected (Tr. 264).

Mr. Middleton confirmed that he hired Mr. Hacker as a belt headman, and that he had previously quit his job because "he was scared over a piece of rock . . . beside the belt." Mr. Middleton stated that the rock was taken down, but Mr. Hacker quit and was hired back after calling him for 2 weeks asking for his job back. Mr. Middleton confirmed that Mr. Elijah Myers is an MSHA inspector known as "Chaulk," and that he has inspected the mine 8 or 10 times since it was opened. He also confirmed that a state inspector is at the mine at least once every 2 months conducting inspections (Tr. 266-267).

Mr. Middleton stated that he has no knowledge of Mr. Hacker speaking with Inspector Myers prior to his complaint. He was aware of the fact that Mr. Myers visited the belt head where

~2258

Mr. Hacker was working on one occasion, but he has no idea as to what they may have talked about (Tr. 268). Mr. Middleton stated that the citations he received in July of 1988 from Mr. Myers were citations for rock dust on the belt line, and a safeguard on the belt dealing with inadequate crawl space. He confirmed that the safeguard was complied with, and as long as the pull cords were working, adequate crawl space was not required, and that the safeguard only provided for an additional precaution. He confirmed that the violations were all abated (Tr. 270).

Mr. Middleton stated that he first learned that Mr. Hacker was not coming to work when Mr. Brooks called him and informed him that he would need someone to watch the number two belt head. Mr. Brooks informed him that Mr. Hacker came to his home at 11 or 12 p.m. on July 25, 1988, and told him that he was not going back to work at the mine because "he was scared of the mines and that he was going to tell us that he got his back hurt, cleaning that rock up" (Tr. 271). Mr. Middleton stated that he never saw a doctor's excuse for Mr. Hacker's absence from work and that no one ever mentioned such an excuse to him (Tr. 271).

Mr. Middleton stated that after Mr. Hacker failed to report for work he assigned Mark LeMasters to watch the belt for 4 or 5 days, and since Mr. Hacker had quit his job before, Mr. Middleton believed that he would call him again and ask for his job back. Mr. Middleton stated that he waited 2 weeks to hear from Mr. Hacker before hiring Rusty Ledford to replace him, and when Mr. Hacker called him and informed him that he was ready to come back to work, Mr. Middleton told him that he thought he had quit and had hired someone else to replace him. Mr. Middleton stated that Mr. Hacker never called to inform him that he had been hurt, and that he has never seen a medical excuse of any kind. He confirmed that he made an inquiry into Mr. Hacker's alleged injury, and that Mr. Brooks and Mr. LeMasters told him that they had no knowledge of any injury sustained by Mr. Hacker, observed no injury, and that Mr. Hacker "didn't act like he was hurt" when he used a sledge hammer to break up the rock and throw it out of the way (Tr. 273).

Mr. Middleton stated that he operates a safe mine, has never threatened any mine inspectors, and he believed that Mr. Hacker filed the discrimination complaint because "he's too lazy to work and he wants somebody to hand him out something" (Tr. 273). Mr. Middleton confirmed that the company disputed Mr. Hacker's workmen's compensation claim, and that he had never harassed Mr. Hacker "or done anything out of the way to him" (Tr. 274).

On cross-examination, Mr. Middleton stated that Mr. Brooks called him at the beginning of the shift on the morning of July 26, 1988, and informed him that he needed to have someone else watch the belt head because Mr. Hacker claimed that he hurt his back. Mr. Middleton confirmed that during his 9 or 10 months

~2259

of employment, Mr. Hacker had the same job and could have ridden the belt to his work station or crawled in for a distance of 3,500 feet to his work station. He stated that the belt head area where Mr. Hacker was assigned was at the end of the number 1 belt line, and that this belt was the only permissible belt which could be ridden (Tr. 278).

Mr. Middleton stated that Mr. Hacker had previously worked for him for 5 months before he quit, and that after returning, he worked for an additional 4 or 5 months. He stated that Mr. Hacker did his work "most of the time," but that he complained about his difficulty in loading the belt and did not want to "muck the belt line." Mr. Middleton stated that Mr. Hacker required assistance when making belt splices, and that he assigned Mr. Brooks to help him. When asked if Mr. Hacker ever complained about rock, Mr. Middleton responded "he didn't have to complain about it. All he had to do was tell us if he saw a loose piece of rock and we would go in there and take it down" (Tr. 279). Mr. Middleton stated further that "I don't think there was a man at the mine that liked him. Or liked to work with him or around him," including his brother-in-law John Brooks, who Mr. Middleton stated tried to talk him out of rehiring Mr. Hacker after he had quit his previous job at the mine (Tr. 281).

Mr. Middleton confirmed that he also received a violation for the water dilute system on the belt head that Mr. Hacker was responsible for, and he explained that the safeguard required additional shoveling of a crawl space to be used in the event the pull cords were not working. He confirmed that there were times when the cords were not working, but that they were always repaired when they broke down (Tr. 285).

Mr. Middleton could not recall the date Mr. Hacker called him, but confirmed that when he called approximately a month after he last worked, that was the first time he had spoken with him about the matter (Tr. 285). Mr. Middleton explained further as follows at (Tr. 285-286):

Q. And you had told him at that time that as far as you was concerned he had quit and that he didn't have his job?

A. Well, that's what I had thought he had done. Like he done the first time. And I also told him, he started raving about his compensation. I told him, if he had just told me that he got hurt the day before he left work, we would have filled out an accident report on him, regardless whether he got hurt or not and he could have been drawing his compensation.

~2260

Mr. Middleton stated that the number 1 belt line is a legal belt line and has been a designated mantrip with pull cords since the mine opened. He also stated that the MSHA inspector rides the same belt, and no inspector has ever advised him that the belt may not be ridden (Tr. 288). He stated that Mr. Hacker has never complained to him about any safety violations, and whenever he said anything to him about loose rock, "we always tried to take it down" (Tr. 289). Mr. Middleton also stated that when Mr. Hacker complained about dusty conditions at his belt head, he was permitted to leave the mine, and the belt would be shutdown at the face, and he would then return to his work station if he wanted to come back and would ride the belt back into the mine (Tr. 289). Mr. Middleton stated that his work rules require an employee to inform him about any injury before he leaves the mine, and he explained as follows at (Tr. 291-292):

Q. The day Mr. Hacker left in July of 1988 were you mad at him about anything?

A. No, I wasn't.

Q. Okay.

A. I thought everything was all right. I mean, I didn't know he was I didn't know that he was mad at us or whatever.

Q. And the first conversation you had with him, after he left the mines on July 25th of 1988 was August the, around August 16th, of 1988, almost a month later?

A. Yes. I guess, I don't know what date it was.

Q. If he'd come back to work on the 26th or 27th, would his job been available, of July?

A. Well, if he'd just told me that he'd got hurt, you know.

Q. What would you have done if he had told you he got hurt?

A. I'd of filled out an accident report. He could have been drawing his comp. or whatever. Just like I told him on the phone when he called.

Q. What's your normal procedure when you do have a man get hurt? What do you do?

A. Well, I usually, we, you know, we've got signs up to report all injuries and accidents before you leave the work. You know, before leaving work.

~2261

And, at (Tr. 296-297):

JUDGE KOUTRAS: So, you're saying that had Mr. Hacker told you before leaving the mine that afternoon that, you know, I fell off the belt and hurt my back and might not be back to work tomorrow, that he would probably then have said, yeah, well, we'll see how it is or . . .

THE WITNESS: No, there wouldn't been any probably about it. I would have filled an accident report out on him, then, and we would have turned it in so he could have got his benefits.

JUDGE KOUTRAS: Well, an accident report, a reportable accident has to result in some injury, doesn't it?

THE WITNESS: Yes. But I would have went ahead and filled out an accident report.

JUDGE KOUTRAS: You ever had occasion to do that in the past? Fill an accident report on employees that are knocked about or get hurt?

THE WITNESS: Yes, we have.

Mr. Middleton believed that Mr. Hacker concocted his claim of injury, and that Mr. Hacker had previously advised him that he had sued someone over a back injury resulting from an automobile accident (Tr. 295). Mr. Middleton also believed that Mr. Hacker quit his job because he was afraid to work in the mine (Tr. 298).

Mr. Middleton denied that anyone ever required Mr. Hacker to ride the belt into the mine, and that Mr. Hacker had the option of riding the belt or crawling into the mine to reach his work station. He confirmed that there is no prohibition against anyone stopping the belt when its empty, and that he has instructed Mr. Hacker not to turn off the belt if it is loaded except in an emergency (Tr. 300). Mr. Middleton denied any knowledge of Inspector Myers having any difficulty with the belt or getting someone to shut it down, and that this never came to his attention. He also denied ever being cited for his failure to cooperate with an inspector or for obstructing any inspection (Tr. 303).

Darrell Middleton testified that he is the president and part owner of the company, but that his brother oversees the operation of the Black Streak Mine "mostly on his own" (Tr. 310). Mr. Middleton stated that he was familiar with the number 1 belt, and he confirmed that it is a designated mantrip which the belt headman may use to reach his work station. He stated that the

~2262

belt headman could also crawl to his work station, "or go around to the other side of the mountain and ride the scoop and crawl the other belt" (Tr. 311). Mr. Middleton stated that the mine is preshifted by his brother, and that all reports are kept at the mine office located on the "Flatland side" of the mine (Tr. 312).

Mr. Middleton stated that he was not present at the mine on July 25, 1988, when Mr. Hacker was reportedly injured, and that during an inquiry into the matter, he spoke with Mr. Stapleton, Mr. LeMasters, and Mr. Brooks, and when they could not confirm that Mr. Hacker had been injured, no accident or compensation report was made (Tr. 313). Mr. Middleton denied that he ever threatened any mine inspector, and that apart from a dust violation on the number 1 belt, he was unaware of any other violations on the number 1 belt. He confirmed that training is provided for all of the miners, and he believed that Mr. Hacker filed his discrimination complaint "when we objected to him being on compensation" (Tr. 314). He confirmed that the company has never had any prior discrimination claims filed against it (Tr. 314).

On cross-examination, Mr. Middleton confirmed that he spoke with Mr. Hacker's wife a week or two after July 25, 1988, and that she initiated the call. He stated that he spoke with her two or three times and that she wanted to know about compensation for her husband. Mr. Middleton stated that the only time he spoke with Mr. Hacker was when he called to inquire how he would respond to his discrimination claim, and that he never spoke with him about his compensation. Mr. Middleton confirmed that he discussed Mrs. Hacker's calls with his brother, and after speaking with the other individuals who were present on July 25, 1988, when Mr. Hacker claimed he was injured, they decided not to fill out any accident report in order to protect their compensation so that their costs would not be increased (Tr. 316).

Mr. Middleton questioned the reason for Mr. Hacker's attempting to ride the belt back out of the mine knowing the existence of the rock which he encountered while riding the belt in to work, and stated that he and his brother concluded that Mr. Hacker had ridden the belt out of the mine so that he could claim that he was hurt. Mr. Middleton believed that Mr. Hacker should have called the outside man to shutdown the belt and have the rock taken down before attempting to ride the belt out of the mine (Tr. 318). Mr. Middleton stated that he later learned of Mr. Hacker's pre-existing back injuries, and that the respondent decided to settle his compensation claim rather than to pay a lawyer to dispute it (Tr. 320).

Mr. Brooks was recalled by the court, and he stated that when he informed Windell Middleton about Mr. Hacker's claimed back injury, he did not believe that he told him that Mr. Hacker would claim that he was hurt, but told him that Mr. Hacker said

~2263

that he had hurt himself, and that he (Brooks) had no knowledge that Mr. Hacker had been injured (Tr. 332-333).

Mr. Hacker was recalled by the court, and he confirmed that the only thing he told Mr. LeMasters and Mr. Stapleton was that "I took a pretty good jolt," and that he did not tell them that he had jumped off the belt to avoid the rock (Tr. 336). Mr. Hacker confirmed that he had a pre-existing back injury which occurred in January, 1982, when he was in a truck accident and that he had a fusion done on his lower back. Mr. Hacker was not sure whether he disclosed this injury on his application form when he applied for work with the respondent, but stated that he informed the Middleton's about his prior surgery and that they knew about it (Tr. 338).

Mr. Hacker explained that he took the doctor's slip to Mr. Brooks so that he could take it to work with him, and he confirmed that he did not call the mine or Mr. Middleton the day following his injury, and that his wife did the calling (Tr. 340-341).

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 (1) 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 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

~2264

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.

Mr. Hacker's Protected Activity

It is clear that Mr. Hacker enjoys a statutory right to voice his concern about safety matters or to make safety complaints to a mine inspector 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.

In his posthearing brief, Mr. Hacker's counsel asserts that the respondent discharged Mr. Hacker after he was injured on July 25, 1988, and that the respondent's refusal to hire him back was based on the fact that approximately a week prior to his

~2265

injury, Mr. Hacker spoke to an MSHA inspector who was at the mine conducting an inspection and complained to the inspector about the working conditions and safety at the mine. Counsel argues that the respondent retaliated against Mr. Hacker for complaining to the inspector by not hiring him back.

In response to the respondent's contention that Mr. Hacker failed to return to work on July 26, 1988, after his purported injury, and failed to notify mine management that he was injured and would not be returning to work, counsel asserts that Mr. Hacker produced medical evidence to support his injury, and that the evidence establishes that Mr. Brooks informed management that Mr. Hacker would not be returning to work on July 26, 1988, because he was complaining to have been injured and that the wife of one of the co-owners of the mine gave her approval for the hospital treatment of Mr. Hacker's injury. Counsel concludes that this supports a conclusion that the respondent was aware that Mr. Hacker had been injured and would not be returning to work because of those injuries, and that its denials to the contrary were made in order to avoid the fact that Mr. Hacker was discharged for complaining to the inspector.

The record in this case establishes that Mr. Hacker failed to call Inspector Myers to testify in this case, and also failed to obtain his pretrial deposition. I take particular note of the fact that at the time Mr. Hacker filed his complaints with MSHA and with the Commission, he did not allege that he was discharged because of any protected activities. The thrust of both complaints focused on the failure by the respondent to acknowledge Mr. Hacker's purported injury and to agree to pay him workmen's compensation. Mr. Hacker's contention that the respondent fired him, or refused to rehire him, was raised during the course of the hearing when Mr. Hacker first suggested that the respondent discharged him because he informed Inspector Myers that he rode the belt into the mine to his work station, and that the belt stop cord was inoperable. Mr. Hacker asserted that the inspector issued several violations on the belt, including violations for riding the belt and the inoperative cord, and that the inspector also accused him of impeding his inspection for not shutting the belt down to facilitate the inspection. Mr. Hacker suggested further that the respondent was aware of his conversation with the inspector and discharged him because his complaints to the inspector resulted in violations being issued to the respondent because of the illegal belt conditions revealed by Mr. Hacker to the inspector.

I find no credible or probative evidence in this case to establish that Mr. Hacker's conversation with the inspector amounted to a safety complaint. The inspector did not testify, and there were no witnesses to the conversation. Mr. Hacker conceded that he did not inform the Middletons about his conversation with the inspector, and there is no evidence that the

~2266

inspector ever spoke to management about the encounter with Mr. Hacker. Further, Mr. Hacker admitted that he had never filed any safety complaints with MSHA or management, had never reported any safety violations to MSHA, and had never spoken to any inspectors other than Mr. Myers.

Mr. Hacker testified that his conversation, or "chit chat" with Mr. Myers was about the belt "in general," and that when he informed the inspector that he rode the belt into the mine, the inspector informed him that he should not do this because of the lack of clearance. Mr. Hacker also alluded to the fact that the inspector was angry at him for not shutting the belt down so that it could be inspected. Mr. Hacker believed that the inspector issued a violation for interfering with his inspection, and also issued some violations for certain belt conditions. Mr. Hacker also believed that riding the belt was illegal, and he contended that the belt stop cords had never been operational during the entire time that he worked at the mine.

Windell Middleton, who was Mr. Hacker's immediate supervisor, denied any knowledge of Mr. Hacker's conversation with the inspector, and there is no evidence that his brother Darrell was aware of any such conversation. As the mine superintendent, Windell Middleton exercised day-to-day supervision of the mining activities, and he confirmed that the No. 1 belt in question was a designated mantrip, and that the belt was equipped with operating stop cords. Mr. Middleton acknowledged that Inspector Myers issued some citations for certain belt conditions, but denied being cited for impeding any inspections or because of anyone riding the belt illegally.

Mr. Hacker's counsel submitted copies of all citations issued by MSHA inspectors at the mine from October, 1987, through July 25, 1988. Included in these submissions are several section 104(a) citations issued by Inspector Myers on July 13, and 18, 1988. Some of the citations were issued on the Nos. 2, 3, and 4 belts, and two were issued on the No. 1 belt because of the lack of water sprays and a slippage switch at the belt conveyor drive. I find no indication that any of the citations were issued because of the respondent's purported interference with the inspector's inspection, or because of the respondent's purported illegal use of the belt as a mantrip. Further, in each instance, Inspector Myers noted that the mine was not in production during his inspections of July 13 and 18, 1988, and he extended the citations. All of the citations were ultimately terminated after the respondent abated the conditions.

Mr. Hacker's brother-in-law, John Brooks, confirmed that he was not aware of any pull cord violations, or any violations by Inspector Myers because of the lack of cooperation by the respondent during an inspection. Mr. Brooks confirmed that Mr. Hacker told him he did not like riding the belt under the rock, but that

~2267

he was unaware of any safety complaints made by Mr. Hacker to management or anyone else.

Mr. Brooks stated that Mr. Hacker never complained to him about any safety violations, never indicated to him that management did not care about safety, and that Mr. Hacker got along well with management.

Miners Jimmy Stapleton and Mark LeMasters, testified that they were unaware of any "illegal" activities at the mine. Mr. Stapleton was not aware of any problems on the belt or with Inspector Myers. He believed that mine management were "good people to work for" and he has never known management to assign miners to work in unsafe conditions. Mr. LeMasters stated that he has never known management to harass Mr. Hacker or "do anything out of the way" to him.

After careful consideration of all of the testimony and evidence adduced in this case, I cannot conclude that Mr. Hacker filed any safety complaint with Inspector Myers. Even assuming that one could conclude that Mr. Hacker's conversation with the inspector amounted to a safety complaint, I find no credible or probative evidence to establish, or even suggest, that the Middletons were aware of any such conversation, or that the citations issued by Mr. Myers resulted from any safety complaints lodged by Mr. Hacker. According to the MSHA "type of inspection" code found in item 19 on the face of the citations (CBA), Mr. Myers was conducting a regular electrical inspection of the entire mine, and I can only conclude on the basis of the evidence presented in this case that he issued the citations in the normal and routine course of his inspections after observing the cited conditions independent of any conversations that he may have had with Mr. Hacker.

Mr. Hacker testified that after speaking with the inspector, his pay and job status were not affected, and that the respondent displayed no anger towards him. He also agreed that management never told him that he was being fired, that he got along well with management, was always paid his wages on time, and that the Middletons never gave him a "hard time." Mr. Hacker confirmed that Windell Middleton hired him back after he had previously quit his job at the mine. I find no evidence that the Middletons ever harassed, threatened, or intimidated Mr. Hacker because of any safety matters or protected activity, or that they treated him any differently from other employees. Mr. Hacker conceded that the Middletons "were good men to work with and work for" (Tr. 66).

On the basis of all of the evidence and testimony adduced in this case, I agree with the respondent's contention that the dispute in this case between Mr. Hacker and the Middleton brothers arose as a result of the respondent's challenge to

~2268

Mr. Hacker's workmen's compensation claim in connection with his purported injury of July 25, 1988. Mr. Hacker admitted as much several times during the course of his testimony, and his consistent claim prior to the hearing focused on the respondent's refusal to acknowledge that his injury was job related and that he was entitled to any compensation for his purported injury. The record reflects that the respondent settled the compensation claim on the day before the hearing in this case (see copy of agreement award submitted by Mr. Hacker's counsel). Mr. Hacker testified that although he is able to work, he did not look for any work after his injury because of his pending compensation claim. This raises a strong inference that Mr. Hacker did not want to return to work for fear of jeopardizing his workmen's compensation claim.

The record establishes that Mr. Hacker's last day of work was July 25, 1988, when he claimed that he injured his back. Darrell Middleton testified that Mr. Hacker never communicated with him again until he called to find out how he (Middleton) would respond to his discrimination complaint. Mr. Middleton confirmed that he spoke with Mrs. Hacker several times after July 25, 1988, and that the conversations focused on Mr. Hacker's compensation claim for his injury. Mrs. Hacker's testimony reflects that any conversations that she had with the Middleton brothers were in connection with her husband's claimed injury and his compensation claim, and she conceded that nothing was ever said about her husband returning to work at the mine. As a matter of fact, Mrs. Hacker's brother, John Brooks, testified that Mrs. Hacker did not want Mr. Hacker working underground because of his fear of the belt and the rock. Mr. Brooks confirmed that Mr. Hacker had told him on several prior occasions that he did not like working underground, and Mrs. Hacker confirmed that her husband always complained about the rock because he "was not used to coal mining."

Windell Middleton testified that he heard nothing further from Mr. Hacker concerning his claimed back injury and has never seen any medical excuse attesting to his claimed injury. Mr. Middleton confirmed that when Mr. Hacker failed to report for work after July 25, 1988, he assigned his job duties to Mr. LeMasters for 4 or 5 days, believing that Mr. Hacker would contact him and ask for his job back as he had done on a prior occasion when he quit his job. After waiting for 2 weeks to hear from Mr. Hacker, Mr. Middleton hired someone else to replace him, and when Mr. Hacker finally called on the advice of an MSHA inspector who was looking into his discrimination complaint, Mr. Middleton informed Mr. Hacker that he thought he had quit his job and that someone else had been hired to replace him. Mr. Hacker admitted that his first contact with Mr. Middleton about his job came on August 16, 1988, approximately 3 weeks after he claimed injury, and he conceded that neither Windell or

~2269

Darrell Middleton ever said anything to him to indicate that he had been fired.

All of the witnesses who were working with Mr. Hacker on the evening of his claimed back injury were consistent in their testimony that Mr. Hacker showed no visible physical signs of any injury, and that he never complained to them about any injury or the need for any medical attention. I believe that Windell Middleton's doubts concerning Mr. Hacker's claimed back injury, and his reluctance to agree to the workmen's compensation claim, were based on the information given him by these witnesses, and the fact that Mr. Hacker failed to promptly and directly communicate with him regarding his asserted injury. I also believe that Mr. Middleton's doubts were influenced by the fact that Mr. Hacker had previously abandoned or quit his job because of his fear of underground mining, that he had sued someone in the past over a back injury received in a traffic accident, and Mr. Middleton's view that Mr. Hacker was "too lazy to work" and was looking for a "handout."

Having viewed the Middleton brothers during the course of their testimony in this case, I find them to be straightforward and credible individuals. I find no credible or probative evidence to establish, either directly or indirectly, that the refusal by Windell Middleton to give Mr. Hacker his job back after he finally contacted Mr. Middleton was motivated in any way by Mr. Hacker's conversation or contact with MSHA Inspector Elijah "Chaulk" Myers, the filing of any complaint with Mr. Myers, or any other protected activity on the part of Mr. Hacker.

I find no credible or probative evidence in this case to establish that Mr. Hacker was either directly or indirectly discharged by the respondent. To the contrary, I conclude and find that on the facts here presented, Windell Middleton had a reasonable and plausible basis for concluding that Mr. Hacker voluntarily quit his job as he had done before, and that the hiring by Mr. Middleton of another individual to replace Mr. Hacker was not illegal or discriminatory under the Act. In short, I conclude and find that Mr. Hacker has failed to make out a case of discrimination.

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

~2270

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