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ROBERT A. COOK V. COLLIER STONE  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

ROBERT A. COOK,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. PENN 89-46-DM  
MSHA Case No. MD 88-62

COLLIER STONE,  
RESPONDENT

DECISION

Appearances: Mr. Robert A. Cook, McDonald, Pennsylvania,  
pro se, for the Complainant;  
Timothy P. O'Reilly, Esq., Pittsburgh,  
Pennsylvania, for the Respondent.

Before: Judge Fauver

Complainant brought this action under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., alleging he was discharged in violation of that section.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below.

FINDINGS OF FACT

1. Respondent operates an open pit mine in Pennsylvania where it produces crushed stone and aggregate used in or substantially affecting interstate commerce.

2. Complainant was employed by Respondent from March 2, 1987, to May 6, 1988.

3. The mine was inspected by the Mine Safety and Health Administration (MSHA), United States of Labor, on May 6, 1988. Around noon on that date, the MSHA inspector interviewed Complainant near the machine he was operating. Complainant talked to the inspector about 5 minutes, and told him about certain safety defects on the equipment.

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4. Respondent's manager (and part-owner), William F. Duchess, knew that Complainant talked to the MSHA inspector.

5. At the end of Complainant's shift, around 3:00 p.m.,<sup>1</sup> on May 6, 1988, Mr. Duchess handed Complainant two paychecks, instead of his normal paycheck, and told him he was fired. The parties are in sharp dispute as to Mr. Duchess' statement to Complainant as to the reason for his discharge.

#### DISCUSSION WITH FURTHER FINDINGS

Complainant shortly found another job and is satisfied where he is presently employed. He does not seek backpay or reinstatement in this action. He seeks a finding that Respondent fired him because he reported safety defects to the MSHA inspector on May 6, 1988.

He testified that Mr. Duchess stated, when he fired him, that the company did not want any "stool pigeons" in its employment. Mr. Duchess denies this, and testified that he stated to Complainant that he was fired because he was not performing his job satisfactorily despite a prior warning. He also testified as to a prior warning he gave to Complainant about his job performance.

Mr. Duchess' testimony is consistent with the testimony of the payroll clerk, who stated that on May 4, 1988, Mr. Duchess had told her to prepare two checks for Complainant and two checks for another employee, named Adler, because they were both being fired for unsatisfactory job performance.

Generally, 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 proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. 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); Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (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

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activities and would have taken the adverse action on those grounds alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, supra. The ultimate burden of persuasion does not shift from the complainant. United Castle Coal Company, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

The reliable evidence does not preponderate to sustain, by greater weight, Complainant's account of the facts. Inasmuch as Complainant has the burden of proof, I find that he has not proven a discriminatory discharge within the meaning of section 105(c) of the Act.

CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.
2. Complainant has not met his burden of proving a violation of section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver  
Administrative Law Judge

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FOOTNOTES START HERE

1. One check was a normal paycheck; the second check was a termination check.