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U.M.W.A. V. WYOMING FUEL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA
ON BEHALF OF
FILBERT ROYBAL,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 90-118-D
DENV CD 90-01

v.

Golden Eagle Mine
Mine I.D. 05-02821

WYOMING FUEL COMPANY,
RESPONDENT

DECISION

Appearances: Susan J. Tyburski, Esq., Denver, Colorado
for Complainant;
Timothy M. Biddle, Esq., Washington, D.C.
for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed against Wyoming Fuel Company ("WFC"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

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

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative or miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine 30 U.S.C. 815(c)(1).

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After notice to the parties, a hearing on the merits commenced in Denver, Colorado, on July 25, 1990.

Both parties filed post-trial briefs.

APPLICABLE CASE LAW

The general principles of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that particular activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 802, 817-818 (April 1981). The operator may rebut the prima facie case by showing no protected activity occurred or the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

ISSUE

Was WFC's suspension of Complainant, with intent to discharge, motivated in any part by the exercise of rights protected under Section 105 of the Act.

STIPULATION

At the commencement of the hearing, the parties filed a written stipulation providing as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the parties and subject matter of this case under 105(c) and 113 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) and 823 ("Act").

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2. At all times relevant to this case, Complainant Filbert Roybal worked at Respondent Wyoming Fuel Company's ("WFC's") Golden Eagle Mine as a miner, as defined in 4(g) of the Act, 30 U.S.C. 802(g)

3. On November 1, 1989, Mr. Roybal was suspended with intent to discharge by WFC.

4. On November 13, 1989, Mr. Roybal filed a complaint with the Mine Safety and Health Administration, alleging that WFC discriminated against him in violation of 105(c) of the Act, 30 U.S.C. 802(g).

5. In a letter dated January 12, 1990, the Mine Safety and Health Administration informed Mr. Roybal that its investigation of his November 13, 1989, complaint did not reveal any violation of 105(c) of the Act.

6. By a January 16, 1990, Order of an Arbitrator in a grievance proceeding under the collective bargaining agreement, Mr. Roybal was reinstated as an employee of WFC, retroactive to December 1, 1989, and continues in the employment of WFC at the same wage rate as he earned before his suspension.

7. On February 16, 1990, Mr. Roybal filed a complaint against WFC under 105(c)(3) of the Act, 30 U.S.C. 815(c)(3).

SUMMARY OF THE EVIDENCE

Complainant Filbert Roybal has worked for WFC since 1984. He has performed numerous jobs (Tr. 69).

ROYBAL'S EXPERIENCE AND DUTIES

Roybal was first employed in the mining industry in 1971 and held a variety of jobs, including as a continuous miner operator for CF&I, WFC's predecessor as the operator of the Golden Eagle Mine. He had also worked as a helper to a continuous miner operator. (Tr. 68-69, 81). His employment application showed that his last job with CF&I was in such a classification. (Tr. 123). When Roybal applied for a job as a continuous miner operator with WFC, there were no such positions available, so Roybal was hired in 1984 as a shuttle car operator. (Tr. 103). However, since Roybal was an experienced miner operator, he was assigned periodically to fill in for regular continuous miner operators who were absent from work. (Tr. 70, 103).

In October 1989, a continuous miner operator position became available and Roybal bid for it. (Tr. 70, 103-104). He was awarded the job and became a full-time continuous miner operator beginning on October 9, 1989. (Tr. 71, 104-105).

On that date, Roybal reported for work on the afternoon shift. (Tr. 71, 181). His foreman was Jerry Romero, a miner with 14.5 years underground coal mining experience. (Tr. 71, 181). Romero and his crew - which included Roybal - were assigned to continue development of the longwall panel headgate entries of the Northwest Tailgate section. (Tr. 181). Roybal was the continuous miner operator on the shift; his helper was Donald Valdez. (Tr. 181-182). When the crew arrived on the section, Romero "task trained" both Roybal and Valdez because Roybal was starting a new job and federal regulations require task training under those circumstances; further, Valdez was filling in as a helper from his normal job as a mechanic. (Tr. 73, 105).

PRE-ACCIDENT ACTIVITIES

Romero took Roybal and Valdez to the continuous mining machine. He asked Roybal whether he wanted to read the company's task-training guidelines (Ex. C-10) or whether he wanted Romero to read them to him. (Tr. 73, 183). Roybal asked Romero to read them to him while he (Roybal) looked over the mining machine. (Tr. 73, 105, 183). Romero read the task-training guidelines to Roybal and pointed out the various controls with which Roybal was already familiar, since he had operated similar machines many times in the past. (Tr. 105, 183, 205-206). After he read the task-training guidelines to Roybal, Romero told Roybal to start the machine and operate it while Romero watched. (Tr. 73, 183). The pump for the rotating cutter head on the mining machine had lost its prime, and Roybal could not restore it, so Romero did it for him. (Tr. 73-74, 185).¹ Once the cutter head was fully operational, Roybal operated the continuous miner without difficulty. Romero stayed to watch Roybal run it for 45 minutes. (Tr. 106, 184).² Romero testified that, based on his observa-

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tions of Roybal's handling of the mining machine, he had no concern about Roybal's ability to operate it safely. (Tr. 184). In addition, Romero did not see any problems with the way Valdez worked with Roybal. (Tr. 185).

THE ACCIDENT

Filbert Roybal testified that on the day of the accident, about six hours into his shift, he started to cut the left side of the No. 2 Entry. Before the accident occurred, Valdez moved the continuous miner cable and Roybal backed up the miner. He then cleaned the right side of the entry, backed up, and then cleaned the center. His last intended move was to again clean the left side. At that point, he saw Valdez in a cross-cut; he was out of the way. Roybal turned to his left, centered the tail, and started moving the equipment to the face. He then heard some coal "dripping" on the tin covering the light. When he looked to his right, he saw Valdez and he knew what had happened. Roybal had not seen Valdez walk up on his blind side. (Tr. 76-78; Exs. R-1 and C-11 are drawings of the scene.)

After he saw Valdez in the crosscut, Roybal looked away, to keep the ventilation tubing in his vision. (Tr. 79).

Valdez had not signaled Roybal to indicate he was going to move. (Tr. 81-82).

After the accident, Roybal gave statements to foreman Jerry Romero as well as to Mark Boyes, general foreman. He also participated in the investigation that followed the next day. (Tr. 82). He met with Robert Butero and Mike Romero, Union safety officials at the home of Artie Maestas. (Tr. 83, 84). At the home meeting, Roybal explained how the accident happened. (Tr. 85). Later, he explained to MSHA officials how the accident had happened. (Tr. 86). On October 16, company representative Huey notified him he would be on "load out" until further notice. He later received a "blue slip." (Tr. 88, 89; Ex. C-2).

No one threatened him about participating in the investigation. (Tr. 109, 110).

Michael Romero was in an entry adjacent to the one where Roybal was operating the mining machine. He heard a crew member yelling that Valdez was pinned against the rib and needed help. (Tr. 106, 190). Romero immediately went to the entry where Roybal had been operating the machine and found Valdez seriously hurt. (Tr. 190). He learned that Valdez had been crushed against the rib by Roybal's mining machine. (Tr. 190).

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Mr. Romero and other crew members administered emergency first aid and notified appropriate officials. (Tr. 191). Valdez was taken out of the mine alive, but he died in the hospital early in the morning on October 10. (Tr. 190, 290).

Shortly after the accident occurred, Mr. Romero asked Mr. Roybal what had happened. He told Mr. Romero that the throttle stuck while he was pivoting the machine, causing the mining machine to pin Valdez, crushing him against the rib. (Tr. 190, 203-204). Mr. Roybal later told Mr. Romero that he had been backing up the mining machine to reposition it in the entry and that he had not known that Valdez was beside him next to the rib. (Tr. 199-200, 203-204). On the night of October 9, Mr. Romero filled out a company form entitled "Foreman's First Report of Accident" in which he summarized his understanding of the nature and cause of the accident. (Tr. 194-195; Ex. R-2). He included Roybal's explanation of the stuck throttle in the report. (Tr. 196). Later that same night, Mr. Romero completed another form entitled "Colorado Employee Personal Injury or Accident Report," which also provided information about the accident and its cause. (Tr. 197; Ex. C-6). That form essentially repeated information that was on the foreman's first report. Notwithstanding the information he provided on these forms, Mr. Romero had doubts that the throttle on Roybal's mining machine had been stuck, since he witnessed Mr. Roybal pivot the machine immediately after the accident and the throttle did not stick. (Tr. 193, 199). Mr. Romero also began to doubt that Mr. Roybal knew where Valdez was located when he pivoted the machine. (Tr. 199-200). Mr. Romero discussed his doubts with the company's accident investigators. (Tr. 199-200). After he talked with Mr. Roybal about the cause of the accident in the mine right after it happened, Romero had no further contact with him. (Tr. 201-202).

PRELIMINARY INVESTIGATION

The company's investigators, accompanied by a federal inspector, quickly arrived on the scene and interviewed Mr. Roybal and the other members of the crew. (Tr. 222). Mr. Roybal gave the company's investigators essentially the same account he had given Mr. Romero, including his claim that the throttle on the machine had stuck. (Tr. 228-229). The company's investigators took notes of each person's story. (Tr. 222). These notes were turned over to senior management, including Mr. Callor and Dave Huey, WFC's Manager of Mine Operations. (Tr. 223, 225-226).

In addition to interviewing eye-witnesses, Frank Perko, WFC's Safety Supervisor, and Mel Shively, the local MSHA inspector, conducted an inspection of the accident scene. (Tr. 31,

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221, 228). Mr. Shiveley reported the results of the preliminary investigation to Mr. Callor. (Tr. 227-228). Mr. Shiveley told Mr. Callor they couldn't find anything wrong with the mining machine throttle when the machine was tested. (Tr. 31).

On the morning of October 10, Mr. Callor met with UMWA International Safety Representative Robert Butero and UMWA Local President Mike Romero. (Tr. 229). Based on the reports he had received from the company investigators, Mr. Callor briefed them on what he understood to be the sequence of events leading to the accident and its cause. (Tr. 229).

THE FEDERAL INVESTIGATION

The afternoon of October 10, MSHA and state investigators arrived at the mine and examined the accident scene underground with WFC and UMWA officials and the witnesses to the accident. (Tr. 230-231). The throttle on the continuous miner was not checked at that time. (Tr. 235-236).

After the MSHA and state investigators completed their underground investigation, they interviewed Mr. Roybal and the other miners on his crew. (Tr. 233). During his interview, Mr. Roybal continued to claim that the mining machine throttle had stuck and that Valdez had been positioned well behind him immediately prior to his backing up the mining machine. (Tr. 233, 308-309). Tom Hay, however, was 30 to 40 feet away from the accident site and the noise from his shuttle car and a nearby auxiliary fan would have made it difficult to hear whether a throttle stuck. (Tr. 206, 297-298, 298, 308-309).³ As a result of that testimony, Mr. Callor decided that the mining machine throttle should be checked more carefully. (Tr. 233-234). Mr. Callor conferred with Archie Vigil, the supervisor of the MSHA field office in Trinidad, and they decided an MSHA expert should examine the throttle. (Tr. 234). Accordingly, Mr. Vigil made arrangements for an MSHA hydraulics expert to come to the mine from Denver to tear down the throttle valve. (Tr. 32, 234).

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Late in the day on October 11, Mr. Huey decided it would be best to remove Mr. Roybal from further operation of a mining machine and transferred him to another job. (Tr. 321). Mr. Huey made that decision because, as a result of the accident, he did not believe Mr. Roybal was in a state of mind to safely operate a mining machine; that transfer was not meant to be disciplinary action. (Ex. C-12). Accordingly, Mr. Roybal was informed on October 12 that he was being removed from his new job as a mining machine operator at least until MSHA's accident investigation was over. (Tr. 43).

On the morning of October 12, Mr. Huey and MSHA officials, including Stanley Kretoski, the MSHA District 9 Special Investigator, as well as the MSHA hydraulics expert, re-entered the mine to check the continuous miner. (Tr. 32-33, 236, 315). Under the supervision of the MSHA officials, Huey tested the miner, but found no operating problems and no stuck throttle. (Tr. 33, 315-316). The throttle mechanism and the hydraulic valves were then disassembled underground under MSHA supervision and removed to the surface where they were taken apart and examined by MSHA's hydraulics expert and Leonard Carnavale, a maintenance expert at the mine, who also serves as a UMWA Local official. (Tr. 236-237, 316). No problems were found with the throttle mechanism or valve. (Tr. 34-35, 236-237, 316-317). In fact, the MSHA investigator commented that the valves were extremely clean. (Tr. 317). At that point, Mr. Callor doubted that the throttle had stuck; he began to believe that the accident had been caused by Mr. Roybal's negligence in not assuring himself that he knew where Valdez was when he backed up the mining machine. (Tr. 237). The MSHA officials agreed that there was no problem with the continuous miner and that the accident must have been caused by human error, i.e., Valdez put himself in a dangerous position and Mr. Roybal failed to check Valdez's location before pivoting the machine. (Tr. 237).

Between October 9 and 11, Charles McGlothlin, WFC's Vice-President for Operations, had been briefed regularly on the course of the accident investigation and the company's search for the cause of the accident. (Tr. 366-368).⁴ Mr. Callor and

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witnessed the valve tear-down; Mr. Callor reported the results to Mr. McGlothlin. (Tr. 316, 326-327, 370). Both Callor and Huey began to suspect that Mr. Roybal's claim that a stuck throttle caused the accident was not true. Mr. Roybal was persisting in that claim. (Tr. 373). Messrs. Callor and Huey told Mr. McGlothlin of their suspicions. (Tr. 372-373).

INVESTIGATION FINDINGS

On October 12, MSHA conducted a conference at the mine to review the accident investigation up to that time. (Tr. 239, 318-319).⁵ Chief Investigator Kretowski gave company and UMWA representatives his preliminary conclusions about what caused the accident. (Tr. 239, 318-319). His conclusion was that the accident had been caused by Roybal's failure to know where his helper was when he backed up the machine. (Tr. 240).⁶ At that conference, Union representative Butero was critical of MSHA's investigators for failing to address the time it took to remove Valdez from the mine and in relation to the number of blankets on the section and the adequacy of the task-training provided Mr. Roybal. (Tr. 149, 163). Mr. Kretowski told Mr. Butero that the evacuation time and the blankets were not connected with the cause of the accident. (Tr. 163). Mr. Butero followed up his criticisms of the MSHA investigation with a letter in mid-October to the MSHA District 9 Manager. (Tr. 147-149). Although Mr. Butero had privately told Mr. Kretowski before the October 12 conference started that he intended to write such a letter, no one from WFC saw the letter until after Mr. Roybal was suspended with intent to discharge. (Tr. 149, 164, 243, 402).

After the conference with MSHA, WFC officials discussed on several occasions whether Mr. Roybal should be fired.

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(Tr. 377). Both Messrs. Callor and Huey recommended to Mr. McGlothlin that Mr. Roybal be fired for (1) negligence, (2) for lying during the company's and MSHA's accident investigations⁷ and (3) for conspiracy, because of testimony given by Mr. Roybal and other miners during the investigation who, in management's view, were trying to lay blame for the accident on the equipment, not Roybal. (Tr. 61, 252, 324-325, 372). Mr. McGlothlin, however, was not willing to take any action with respect to Mr. Roybal until MSHA's accident investigation was completed. (Tr. 377, 388-90). Mr. McGlothlin thought that more information, including any mitigating circumstances, might result from the continuing MSHA investigation. (Tr. 377, 390).

On October 17, Colorado State mine safety regulatory officials presented WFC with their written report about the cause of the accident. (Tr. 44, 248, 323, 376). The primary cause of the accident, according to the state investigator, was "[Roybal] was not aware of where his helper was . . ." when he backed up the equipment. (Tr. 45, 249; Ex. R-8 at 3).

Concerned about the effect of the collective bargaining agreement between WFC and the UMWA with respect to any disciplinary action against Mr. Roybal, Mr. McGlothlin discussed the Roybal matter with the president of KNEnergy, WFC's parent company, as well as with a labor consultant used by WFC for contract interpretation purposes and with outside legal counsel. (Tr. 392). By that time, Mr. McGlothlin had talked extensively with Messrs. Callor and Huey, who had explained to him Mr. Roybal's degree of negligence, as evidenced by the position of the mining machine when the accident occurred. (Tr. 46, 61, 329-330).

UNION REPRESENTATIVES

Mike J. Romero, President of Local Union 9856, District 15, has represented Mr. Roybal since 1979.

Prior to this accident, Mr. Roybal had a very good work and safety record. (Tr. 124, 125).

Mr. Romero received a copy of the blue slip (Ex. C-2) on the day it was served on Mr. Roybal, namely, November 1, 1989. (Tr. 127).

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Company representative Huey stated to Mr. Romero that they were "tired of the community accusing WFC of the fatality and blaming WFC." Mr. Romero denied Mr. Huey's assertions.

The next day, again in Mr. Huey's office, Mr. Callor said "they were tired of being hammered" and "tired of people going to Arlington." (Tr. 129).

Robert Dale Butero also testified. He is an international representative of the International Union of the United Mine Workers of America. He is assigned to the Union's Department of Occupational Health and Safety. (Tr. 130).

Mr. Butero went to the Golden Eagle Mine when he was notified of the accident. (Tr. 133). After talking to company representatives, he wanted to talk to the crew. As a result, a meeting was held at Art Maestas's house. No company representatives were present. Mr. Butero told those present they were going to give statements to MSHA; he advised them to give true statements. (Tr. 136-138, 162).

The crew were later questioned in the presence of the witness, an MSHA investigator, a state inspector, and company representatives. At that time, Mr. Roybal stated the throttle had stuck. (Tr. 140).

Mr. Butero stated he didn't believe the task training given to Mr. Roybal complied with MSHA's regulation. At that point, it became very combative. (Tr. 141). In the course of the meeting, Mr. Butero raised several issues: task training, failure to have proper blankets, inadequate transportation from the mine (whether the miner died of shock or injuries). (Tr. 142-147). Mr. Butero agreed no citations were issued for the areas about which he was concerned. (Tr. 163).

MSHA said they were also going to have an MSHA Tech support man check the throttle valve. This was done the following day. (Tr. 147).

Mr. Butero also wrote to John DeMichiei, MSHA district manager. In his letter, he complained about the investigation and he expressed his concerns. (Tr. 129, 149).8

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On October 31, 1989, after writing to Mr. DeMichiei, MSHA reviewed the company's training records. About that time, Mr. Butero had a lengthy discussion with WFC's attorney Larry Corte. Mr. Corte was wondering why the union was "hammering" them through the investigation. (Tr. 152, 153). Mr. Butero explained why he wrote the letter to MSHA and he gave him a copy. Mr. Corte replied, "You're hammering us and stuff. If you don't quit, we're going to have some action." Then he said, "We're starting a good safety program here." (Tr. 154). Mr. Butero didn't know exactly what he meant. (Tr. 155).

On November 1 or 2, Mr. Butero learned Mr. Roybal had been suspended with intent to discharge. (Tr. 156).

In a mining community when a fatality occurs, people choose sides. Some blame the company, others blame the union. (Tr. 157).

Later Mr. Butero recommended that a 105(a) complaint be filed. Mr. Roybal agreed. (Tr. 160, 161).

Mr. Butero wrote the discrimination complaint. In pursuing the case, Mr. Butero talked to Linda Raisovich-Parsons in Washington and told her the facts of the case. (Tr. 164-166).

Mr. Butero agrees it was fair for the company to conclude that Mr. Roybal had performed an unsafe act resulting in a fatality; further, there was some basis for the company to believe someone wasn't telling about the stuck throttle "as it happened" and several miners agreed that they would identify the cause of the accident as the machine. (Tr. 168-170).

The State of Colorado report was not issued by October 12. (Tr. 174).

DECISION TO DISCHARGE

On October 31, MSHA investigators completed the last part of their accident investigation by auditing WFC's training records, including those of Roybal and Valdez. (Tr. 37, 256, 379-380, 396). No violations were found. When the audit had concluded, the MSHA investigators told Mr. Callor that the Valdez fatality investigation was over. (Tr. 163-164, 256).⁹ Messrs. Callor and Huey reported to Mr. McGlothlin that MSHA had completed its investigation.

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(Tr. 380). Shortly thereafter Messrs. Callor and Huey met with Mr. McGlothlin to make a decision about Mr. Roybal. (Tr. 256-257, 326). Since no new facts had come to light during MSHA's investigation, Mr. McGlothlin decided to accept Mr. Callor and Mr. Huey's recommendation and he approved Mr. Roybal's suspension with intent to discharge. (Tr. 379-380, 397).¹⁰ Messrs. McGlothlin, Huey, and Callor drafted a Notice of Suspension with Intent to Discharge that day. (Tr. 256-257, 326, 397). Mr. McGlothlin gave it to his secretary for typing and instructed Mr. Huey to issue it to Mr. Roybal the next day, November 1. (Tr. 257, 328, 331, 397).

Huey gave Mr. Roybal the notice on the afternoon of November 1 in the presence of Mr. Roybal's UMWA representative. (Tr. 328, 330-331). The Notice informed Mr. Roybal that the company believed he had engaged in an unsafe act which resulted in the Valdez fatality, had violated company safety rules, had misrepresented the facts to investigators, and had engaged in a conspiracy to blame the company for the Valdez accident. (Tr. 326-328; Ex. C-2). The next day the UMWA filed a grievance under the collective bargaining agreement contesting Mr. Roybal's suspension, and WFC and the UMWA began the grievance procedure steps under the collective bargaining agreement. (Tr. 332, 398).

THE 105(c) ACTIONS

On November 13, the UMWA filed a 105(c) complaint on Mr. Roybal's behalf. (Tr. 161-162, 164; Ex. C-1). On February 16, 1990, Linda Raisovich-Parsons, a UMWA official in Washington, filed the 105(c)(3) complaint at issue here. (Tr. 113). Mr. Roybal said he never saw the second complaint and, indeed, testified that the allegation in the complaint that he had been "discriminated against because he had participated in an MSHA

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dent investigation" was not true. (Tr. 114)11 Mr. Roybal admitted that no one from WFC discussed the MSHA accident investigation with him. (Tr. 109-110).12

COLLECTIVE BARGAINING AGREEMENT

In the meantime, Mr. Roybal's grievance was being processed in accordance with the collective bargaining agreement. (Tr. 173, 260-262). Unable to resolve the grievance through the informal negotiations provided for in the contract, Mr. Roybal's grievance was heard by an arbitrator. After the hearing, the arbitrator decided that Mr. Roybal had been negligent but that the company's decision to discharge him was too severe. Accordingly, the arbitrator ordered WFC to reinstate Mr. Roybal effective December 1, 1989, but upheld the company's suspension of Mr. Roybal for the period of November 1, 1989, to November 30, 1989. WFC reinstated Mr. Roybal as required, paid him continuous miner operator wages, but did not allow him to operate a mining machine. (Tr. 114-115, 218-219, 261-262). At the time of the hearing in this proceeding, Mr. Roybal was employed by WFC as a belt cleaner being paid miner operator wages.

DISCUSSION

Under the Mine Act, a complaining miner bears the burden of proving that he was engaged in a protected activity, and that the adverse action complained of was motivated in any part by that activity.

In this case, it is conceded that Mr. Roybal engaged in a protected activity by participating in the MSHA fatality investigation. It is further conceded that WFC took adverse action against Mr. Roybal by suspending him with intent to discharge.

However, Mr. Roybal has failed to show the adverse action was motivated in some part by the protected action. The record

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fails to show any such motivation. In the second complaint¹³ filed here, Mr. Roybal alleges he had been "discriminated against because he had participated in an MSHA investigation." However, at the hearing he asserted this was not true. (Tr. 114). Further, there was no evidence that WFC had interfered with Mr. Roybal's participation in MSHA's accident investigation in any way.

Finally, Mr. Roybal admitted that no one from WFC discussed the MSHA accident investigation with him. (Tr. 109-110). In addition, WFC witnesses Callor, Romero, Huey, and McGlothlin¹⁴ corroborated Mr. Roybal's testimony. (Tr. 36, 201, 241, 320, 371).

In addition to the foregoing, the evidence establishes that WFC's decision to suspend Mr. Roybal was based on a valid business judgment. These reasons, stated in WFC's notice (Ex. C-2) were (1) Mr. Roybal's failure to comply with standard operating job procedures, (2) unsafe act resulting in fatality, (3) misrepresentation of facts, (4) conspiring with fellow employees against Wyoming Fuel Company.

The first two reasons are amply supported by the uncontroverted evidence. The third factor is also apparent: during the period of the investigation, Roybal blamed the accident on the stuck throttle. However, the evidence indicates the throttle was not defective. At the hearing, Roybal did not refer to the throttle in any manner. The fourth facet of WFC's discharge, conspiring with fellow employees, was not established in the evidence. However, the Commission's function is not to pass on the wisdom or fairness of the operator's business justification, but rather only to determine whether they are credible, and whether they could have motivated the particular operator as claimed. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (1982); *Secretary on behalf of Brock Blue Circle, Inc.*, 11 FMSHRC 2181, 2214 (1989) (Koutras, J). I find the company's motivations to be credible and they motivated the operator to proceed as it did.

Mr. Roybal's witness Mr. Butero believed the company's views of the accident were erroneous. However, he testified that WFC has a reasonable basis to reach such conclusions. I agree. (Tr. 167-170).

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In sum, Mr. Roybal has failed to establish that the adverse action taken against him was for any protected activities.

Mr. Roybal argues that WFC's activities establish a discriminatory intent. Specifically, he claims WFC discriminated against him because of his Union's protected activities during the investigation¹⁵ as well as Mr. Butero's letter to MSHA's District 9.16

As to the initial facet, Mr. McGlothlin testified that allegations concerning first aid safety, transportation, training, and recordkeeping did not relate to Mr. Roybal. He indicated the misrepresentation of facts "has to do with the throttle valve that he alleged malfunctioned and caused the accident." (Tr. 389).

Further, Mr. McGlothlin was not aware of the Butero letter until after Mr. Roybal was suspended. (Tr. 154, 382).

Mr. Roybal also relies on the Corte and Callor statements to establish discriminatory motive.

The witnesses in this case all showed considerable partisanship. I consider the Corte statements (Tr. 153, 154), as related by Mr. Butero, to be hesitant and inconclusive. In analyzing the statement Mr. Butero himself stated "it didn't dawn on me that it might be action against Mr. Roybal." (Tr. 155). I agree it would be speculative to conclude that the Corte statement established discriminatory intent.

In addition, there is no evidence that Mr. Corte had any involvement in Mr. McGlothlin's decision to suspend Mr. Roybal, nor is there any evidence that any WFC management official was aware that Mr. Corte had talked to Mr. Butero. (Tr. 397).

The Callor statements (Tr. 292-294) were made during a grievance meeting concerning Mr. Roybal's suspension. The meeting was after Mr. Roybal had been suspended. In any event, the

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main thrust of Mr. Callor's statements was that it was seeking advice whether it could counter what it saw as the Union's disruption of the MSHA investigation. An operator is entitled to seek expert advice as to what its rights are without being in violation of Section 105(c) of the Mine Safety Act.

Further, Mr. Roybal claims WFC's contact with the Las Animas County District Attorney (Colorado) was an apparent attempt to persuade the District Attorney to file charges against him.

The uncontroverted evidence shows the contact between WFC and the District Attorney occurred because WFC officials believed that the evidence uncovered during the accident investigation indicated there may have been a negligent act that resulted in the death. (Tr. 383).

Company attorney Corte felt there was an obligation to report the fatality to the authorities. (Tr. 383).

No doubt, the contact with the District Attorney was to have him file charges. Given the circumstances involved, this conduct does not establish a discriminatory intent against Mr. Roybal within the meaning of the Mine Act.

Finally, Mr. Roybal perceives a discriminatory inference in WFC's delay until October 31 before taking adverse action against him.

The decision to suspend Mr. Roybal was made following MSHA's review of WFC's training records. The event marked the conclusion of the MSHA accident investigation. (Tr. 379-380, 396). The management's communications with legal counsel and a Labor Relations consultant were made for the purpose of identifying what actions could be taken against Mr. Roybal. (Tr.392-396).

WFC's delay was not inappropriate, since MSHA's investigation could have disclosed additional facts, including mitigating factors, which might indicate that suspension was inappropriate. (Tr. 390). Further, given the potential for litigation, WFC's consultations with legal counsel and a labor expert, were not inappropriate.

In support of its position, Mr. Roybal relies on Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom, Donovan ex rel. Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C. 1983); Borch v. Federal Mine Safety & Health Review Com'n, 719 F.2d 194 (6th Cir. 1983) citing NLRB v. Transportation Management Corp., 51 U.S.L.W. 4761 (U.S. June 15, 1983); Eastern

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Associated Coal Corp., 7 FMSHRC 1766 (1985), aff'd in part and rev'd in part Eastern Associated Coal v. Federal Mine Safety & Health Review Com'n, 813 F.2d 639 (4th Cir. 1987); and Secretary of Labor, Mine Safety & Health Administration (MSHA) on behalf of Bobby Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1 (1982). However, these cases are not inopposite the views expressed herein.

For the foregoing reasons, the complaint herein is DISMISSED.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

1. The need to prime a pump on a mining machine does not indicate there might be a throttle problem. (Tr. 355).

2. Romero did not witness any problems with the controls of the mining machine prior to the accident, nor did Roybal report any problems with the controls to Romero. (Tr. 185).

3. Mr. Romero testified that, at the time of the accident, Mr. Hay should have been sitting in his shuttle car which was located 30-40 feet from the scene of the accident. (Tr. 210; Ex. R-1 location of the shuttle car in relation to the continuous miner.) Mr. Callor testified that noise from a 60-horsepower fan and the engines of the shuttle car and the continuous miner would have made it difficult to hear whether the miner's throttle stuck. (Tr. 298, 352-353).

4. McGlothlin is the senior on-site company official for WFC operations, including the Golden Eagle Mine. He has final authority on personnel decisions. (Tr. 362-363, 373).

5. Although this conference was called a "closeout" conference, it was not the close of MSHA's accident investigation. The MSHA accident investigation did not end until October 31, according to those conducting it. (Tr. 36-37, 256).

6. Leonard Carnavale, the UMWA representative who assisted in the valve tear-down, agreed with Mr. Kretowski that the accident was the result of human error. The human error consisted of Valdez's placing himself in a bad position and Mr. Roybal's not knowing where Valdez was. (Tr. 239-240).

7. Making false statements during accident investigations is a violation of Rule 7 of WFC's Rules of Conduct. Mr. Roybal was aware of and had acknowledged receipt of a copy of such Rules. (Tr. 216-217; Exs. R-3, R-4).

8. The letter to Mr. DeMichiei was not in evidence.

9. MSHA issued a written accident investigation report, but not until December 1989; it was received into evidence as Exhibit

R-9. (Tr. 262-263).

10. After Mr. McGlothlin accepted the recommendations of Messrs. Callor and Huey, and after consultation with counsel for WFC, Mr. McGlothlin reported WFC's conclusions concerning the cause of Valdez's death to local law enforcement authorities. (Tr. 383-384, 399). A meeting was held in late November between Messrs. McGlothlin, Lawrence J. Corte, WFC counsel, and the county district attorney and county sheriff. (Tr. 383-384). The district attorney informed Mr. Roybal in January 1990 that no criminal charges against him were contemplated. (Ex. C-15).

11. There was no testimony that WFC had interfered with Mr. Roybal's participation in MSHA's accident investigation in any way.

12. The WFC personnel responsible for ordering Mr. Roybal's suspension with intent to discharge agreed with Mr. Roybal's testimony on this point. (Tr. 36, 201, 224, 241, 320, 371).

13. It is not necessary to explore the activities involving the filing of the complaints in this case. (Tr. 161-162, 164; Ex. C-1).

14. These are the WFC personnel responsible for ordering Mr. Roybal's suspension with intent to discharge.

15. Mr. Butero complained to MSHA about task-training, inadequate blankets, and evacuation methods. (Tr. 149, 163) MSHA's representative told Mr. Butero that these factors were not connected to the cause of the accident, hence not related to the investigation. (Tr. 163).

16. The Butero letter was not in evidence.