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WENDELL COOK v. SOUTH EAST COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

WENDELL COOK, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 90-351-D MSHA Case No. BARB CD 90-16
SOUTH EAST COAL COMPANY, RESPONDENT	Mine No. 411

DECISION

Appearances: Wendell Cook, Whitesburg, Kentucky, pro se, for the Complainant;
James W. Craft, Esq., Whitesburg, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant, Wendell Cook, against the respondent South East Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated June 1, 1990, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, on July 5, 1990, the complainant filed a complaint with the Commission. A hearing was held in Hazard, Kentucky, and the parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the course of the hearing, and I have also considered a posthearing letter of December 16, 1990, submitted by the complainant on his behalf, and a copy was furnished to the respondent's counsel.

The complainant, who was employed by the respondent as a bolting-machine helper, alleges that he was harassed by the respondent and then discharged on or about April 20, 1990, in retaliation for filing a prior discrimination complaint against the respondent in August, 1989.

The respondent denies that it discriminated against the complainant, and asserts that the complainant was discharged for cause for fighting on mine property with another miner. The respondent further asserts that fighting on mine property is a violation of company policy and state law, and that both miners who engaged in the fight on April 16, 1990, were discharged.

Issues

The critical question in this case is whether Mr. Cook's discharge was prompted in any way by his engaging in protected activity, or whether it was the result of his engaging in a fight on mine property in violation of company policy. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

Alisha Cook, the complainant's wife, testified that on several occasions her husband came home from the mine upset "over things that had happened at work." She stated that her husband wanted to insure safe working conditions at the mine but that when he mentioned any unsafe conditions at the mine the supervisors and his fellow miners would become upset when production decreased. She asserted that the miners were upset because she also worked, and she felt that management discriminated against her husband by not offering him opportunities for advancement. She discussed her husband's work situation with company official Danny Quillen on April 6, 1990, and that Mr. Quillen stated "why doesn't he just quit?" (Tr. 16). She further stated that she was surprised by this statement because the company had been good to her husband and he wanted to benefit the company.

With regard to her husband's discharge for allegedly fighting with Mr. Jesse Gibson, Mrs. Cook stated that the respondent believed that her husband had a vendetta against Mr. Gibson because he had co-signed a bank loan for Mr. Gibson and Mr. Gibson was delinquent in his payments. She stated that since her husband's discharge, they have attempted to speak with Mr. Gibson about the matter, and that during a visit to Mr. Gibson's home on August 2, 1990, her husband asked Mr. Gibson

about his delinquent payments. Mr. Gibson accused her husband of getting him fired and pulled a pistol on her husband and shot over their vehicle as they were leaving. She then swore out a warrant for Mr. Gibson's arrest (Tr. 18; exhibit C-3).

Mrs. Cook stated that her husband had been shoved many times at work and had dirt put in his lunch bucket (Tr. 19). In response to further questions concerning the alleged fight with Mr. Gibson, Mrs. Cook stated that her husband came home upset and stated that Mr. Gibson had shoved him down in the parking lot while her husband was walking to his truck. She stated that her husband was upset because "all the men, including their supervisor and their foreman were present to witness that yet nothing was done" (Tr. 21). She was aware that her husband was fired by the respondent for fighting with Mr. Gibson, but as far she knew, there was no fight and her husband only told her that he had been shoved on his way to his truck (Tr. 21).

On cross-examination, Mrs. Cook stated that her husband was upset "because of the safety situation at the mines and the equipment" (Tr. 22). She stated that she learned that her husband had been fired 2 days following the alleged fight with Mr. Gibson, and did not know that Mr. Gibson had also been fired at the same time as her husband (Tr. 22).

Wendell Cook, the complainant, stated that it was not uncommon for fighting to go on at the mine, and he identified one miner (Greg Horn) who was transferred to another mine for fighting. Mr. Cook also stated that management provided moonshine for miners after they came out of the mine, and that "it was nothing uncommon for management to have women at the mines" (Tr. 24). With regard to the alleged April 16, 1990, fight with Mr. Gibson, Mr. Cook stated as follows (Tr. 26-27):

> MR. COOK: And the night that they are talking about there, that was on April 16th. When I come out of the mines--he had been calling me names all night inside the mine.
>
> THE COURT: Who is that, Mr. Gibson?
>
> MR. COOK: Mr. Gibson. And as I come up the bank there, he shoved me backwards. I had my dinner bucket in my left hand and my self-rescuer in my right hand and I am right-handed. If I was going to hit anybody, I think I would hit them with my right hand.
>
> He shoved me backwards and as I was falling backwards, trying to catch my balance, I may have thrown my hand. If I hit him, he done it himself, you know. I will say that he did have a scratch on the top of his

nose, now. But it was not from a punch or nothing that I throwed.

Mr. Cook stated that Mr. Gibson was a roof-bolting machine operator and that he had been bickering with other miners on the section and the mine foreman for a month or so prior to the incident of April 16. He stated that Mr. Gibson was complaining that he had to do most of the bolting, and on March 24, 1990, shoved him because he was angry about having to bolt so much and about some of the bolting practices. Mr. Cook stated that Mr. Gibson had words with another miner that evening about the bolting, and that as a result of all of this bickering, he (Cook) asked Mr. Quillen to transfer him off the section.

Mr. Cook stated that on April 21, 1990, the day following his discharge, another miner, Tommy Gibson, informed him that he (Gibson) "knew that they were going to set me up," but that Mr. Gibson could not admit to this if the matter were to go to court "because he had to have his job" (Tr. 31).

Mr. Cook produced a copy of his termination letter and a copy of a Kentucky Department for Employment Services determination concerning his unemployment claim which he filed after his discharge (exhibits C-1 and C-2). He pointed out that the unemployment examiner found that there was insufficient evidence available to substantiate the fight in question, and that his separation was not disqualifying under state law (Tr. 34-35).

Mr. Cook stated that after he received his termination letter from the respondent, he spoke to Mr. Steve LaViers, a company official, and Mr. LaViers confirmed that he had discussed the matter with Mr. Danny Quillen, and understood that the alleged fight with Mr. Jesse Gibson was over the bank note which Mr. Cook had co-signed (Tr. 41). Mr. Cook produced a copy of a letter dated April 17, 1990, addressed to him and Mr. Gibson, from the Bank of Whitesburg, Kentucky, reminding them that the loan payment was overdue (exhibit C-4). Mr. Cook stated that he received the letter on Wednesday (April 18, 1990), and that Mr. Quillen told him that Mr. Jesse Gibson told him that he (Cook) hit him because he was not paying the note (Tr. 42).

Mr. Cook stated that he spoke to Mr. Quillen on Wednesday, April 18, 1990, and that Mr. Quillen told him to take the day off until he could check into the matter. He then telephoned Mr. Quillen on Thursday, April 19, 1990, and Mr. Quillen informed him that he would have to let him go, but gave him no reason (Tr. 43). Mr. Cook then went to see Mr. Quillen and Mr. Quillen informed him that he knew that he had hit Mr. Gibson on April 16 (Tr. 43). Mr. Cook stated that he visited Mr. Gibson at his home on the evening of April 16, and that there was nothing wrong with him and he did not file any accident report that evening. Mr. Gibson reported for work the next day, April 17, and Mr. Cook

saw that he had "a little scratch across the top of his nose" (Tr. 44).

Mr. Cook confirmed that he has reviewed the hospital reports concerning Mr. Gibson's injuries (exhibits R-1 through R-6), and when asked how he could account for the extent of Mr. Gibson's injuries, Mr. Cook replied as follows (Tr. 45-46):

> MR. COOK: Well, I know I didn't hit the man.
>
> THE COURT: But I am talking about the injuries. The guy had his nose broken in two places and all those contusions and the things that those doctors said that he had, wouldn't you think that he would have more than just a little old scratch on his nose?
>
> MR. COOK: Well, he went to the doctor, what, Wednesday?
>
> THE COURT: You said that you didn't hit him, but you said early on you said that you may have, you may have swung your lunch bucket or something"
>
> MR. COOK: Well, if I did, it was--I mean, he walked into it, you know, me a falling.
>
> THE COURT: While you were swinging the bucket he walked into it?
>
> MR. COOK: Just falling backwards, naturally, you know, you are going to try to balance yourself. You know, I didn't hit the man. But now, he did have a scratch on his--I know that night--

Mr. Cook produced a receipt in the amount of $20 from the Daniel Boone Clinic, for services rendered by a doctor on April 20, 1990 (exhibit C-5). He explained that he went to see the doctor that day because he had been shoved by Mr. Gibson on April 16, 1990, and hit his head when he hit the ground (Tr. 49). He further stated that he spoke with Mr. Quillen about the bill on April 21, and Mr. Quillen informed him that his regular insurance, rather than workmen's compensation, should pay the bill (Tr. 49-50). Mr. Cook confirmed that the doctor's certification reflecting that he was under the doctor's care from April 20 to April 24, 1990, was an excuse to cover that week (Tr. 48).

Mr. Cook stated that he and Mr. Gibson had been the best of friends, but that on April 16, Mr. Gibson had called him some names, and when asked for an explanation as to what may have prompted the name calling, Mr. Cook stated as follows (Tr. 51-53):

MR. COOK: The only thing I can assume, which you know, you can't go on assumptions, but I just assumed that he didn't want to work with me and wanted to--he knew that he wasn't going to pay the bank note, which he didn't. I had to pay it, right at $1,000.00. I just assumed that he didn't want to work with me and just didn't--

THE COURT: But now, in your complaint, you said that Mr. Gibson was harassing you and you say that you believe this harassment was a direct result of management. What did you mean by that? Somebody reading that would think that the management put Mr. Gibson up to harassing you to give you an excuse to hit him to get rid of him.

MR. COOK: Well, you know, I wouldn't have no--

THE COURT: You think that is what happened? You think that the company told Mr. Gibson, "hey, start harassing Mr. Cook, and get him to do something to you; get him to hit you in the nose and fracture it so that we can set him up to fire him." You think that is what happened in this case?

MR. COOK: I think it is a very good possibility.

THE COURT: That just seems like an extreme thing for a company to do to get rid of somebody, and particularly extreme on Mr. Gibson's part. What did he get out of all this? He got fired, too, didn't he?

MR. COOK: I assume he did. He said he did. I don't know.

THE COURT: Is he working at this company, Mr. Cook?
MR. COOK: No.

Mr. Cook stated that there were fights at the mine "all of the time," and he confirmed that no one ever reported them (Tr. 55). He further confirmed that at the time he filed his MSHA complaint on April 24, 1990, he did not allege that he made any safety complaints or was fired for making such complaints. Mr. Cook stated that he told MSHA special investigator Mullins "about the violations," and when asked whether he is suggesting that the respondent fired him for reporting safety violations, Mr. Cook responded "I am not sure why they fired me. I know it was not for fighting" (Tr. 58).

Mr. Cook confirmed that he had filed an earlier discrimination complaint against the respondent in August, 1989, but withdrew it after reaching an agreement with Mr. Quillen who

assured him that he would be reinstated to his original job. Mr. Cook explained that after he returned to work he was put on another crew, and after complaining to Mr. Quillen, he was eventually returned to his old job and crew within 2 months (Tr. 58-63). In response to questions concerning his allegations that the respondent harassed him and retaliated against him for filing his earlier complaint, Mr. Cook alluded to the "bickering" which continued on his shift, his request to be transferred, management's refusal to transfer him, and the "hard feelings" which existed between him and mine superintendent Earl Duncil. Mr. Cook also believed that he was not given the same opportunities as others to change to less boring jobs, and he cited one instance in which he was denied an opportunity by Mr. Duncil to perform some clean up work rather than working as a roof-bolting assistant (Tr. 66-72).

On cross-examination, Mr. Cook stated that he was aware that Mr. Gibson left the mine at 6:00 p.m., on April 17, 1990, prior to the end of his shift, and that his replacement told him that Mr. Gibson was sick and had to leave (Tr. 73-74). Mr. Cook stated that he went to Mr. Gibson's home that evening at approximately 10:30 p.m., to see what was wrong with him and to ask him why he "acted in the manner that he did" when he pushed him down the prior evening. He stated that during his discussion with Mr. Gibson, he (Gibson) mentioned the bank note and told him that "he would fix me up that night" and ordered him to leave (Tr. 73-77).

With regard to a bank delinquency notice letter of April 13, 1990, addressed to him, (exhibit R-12), Mr. Cook stated that he received it the following Wednesday, April 18, 1990, and that he gave the post-marked envelope and original bank letters to Mr. Quillen when he spoke with him at the mine, but that when he retrieved the correspondence, the envelopes were gone. Mr. Cook admitted that he told Mr. Quillen that Mr. Gibson had shoved him, but denied telling him that nothing happened (Tr. 78-81). Mr. Cook confirmed that when he spoke with Mr. Quillen on April 18, Mr. Quillen knew about the bank note which he had signed, but he (Cook) denied that he knew anything about the bank delinquency letter of April 13, or that Mr. Gibson was not paying the note when the incident of April 16, occurred (Tr. 82-84). Mr. Cook stated further that he gave the bank correspondence to Mr. Quillen because Mr. Quillen told him that the incident with Mr. Gibson occurred because of the bank note, and that he (Cook) was trying to show Mr. Quillen that he knew nothing about the delinquent bank note payment on April 16 (Tr. 84-85).

Mr. Cook stated that miners smoked underground, would drink on the surface after they were off duty, and would engage in target shooting on the parking lot. He stated that he complained to Mr. Quillen and the mine superintendent, but did not complain to any mine inspectors. Mr. Cook confirmed that he did not tell

the mine foreman or superintendent that Mr. Gibson had shoved him to the ground on April 16, and that when he spoke with Mr. Quillen on April 18, Mr. Quillen said nothing about firing Mr. Gibson, and only indicated that he "was on compensation" (Tr. 96-97).

Respondent's Testimony and Evidence

Daniel Quillen, Jr., stated that he is employed by the respondent as Vice-President for operations, and that his duties include assisting in the management of the mines, hiring and firing, and the supervision of payroll and office records. He confirmed that the Brinkley Mine has been closed since October 10, 1990, that production has ceased, and that eight people are at the site removing the equipment. Mr. Quillen confirmed that Mr. Cook and Mr. Gibson worked on the second shift at the mine, from 2:00 p.m. to 10:00 p.m., and that they were both classified as "clean-ups," which including helping on the roof-bolting machine and attending or maintaining a belt conveyor (Tr. 98-101).

Mr. Quillen stated that the altercation of Monday, April 16, between Mr. Cook and Mr. Gibson first came to his attention on Wednesday morning, April 18, when Mr. Gibson walked into his office and it was obvious that he had been hit with something hard because his eye was black and "his nose was crooked like a dog's hind leg" (Tr. 102). Mr. Gibson told him that Mr. Cook hit him in the nose and eye with his dinner bucket Monday evening after leaving the mantrip and as they were proceeding to the parking area. Mr. Quillen stated that Mr. Gibson told him that he did not know why Mr. Cook struck him. He then instructed Mr. Gibson to go to the hospital emergency facility in Hazard to see a doctor, and either called, or had his secretary call Mr. Cook to come to the mine to speak with him (Tr. 102).

Mr. Quillen stated that he told Mr. Cook about Mr. Gibson's statement that he (Cook) had struck him, but that Mr. Cook denied that it ever happened and stated that "nothing happened" and "that if the man got hurt, it was after he left the mine because he didn't get hurt at the mines" (Tr. 103). Mr. Quillen confirmed that he advised Mr. Cook that he could not work until he found out what happened. Mr. Quillen further stated that Mr. Gibson had reported for work on Tuesday, April 17, but had to come out of the mine during his lunch hour at 6:00 p.m., after telling him that "he was hurting so bad and got sick in the mines" as a result of the injuries he had received on April 16 (Tr. 104).

Mr. Quillen stated that after investigating the matter, he fired Mr. Cook and Mr. Gibson for fighting on company property and that "it was just a disciplinary action that had to be taken to tell the people that works at South East Coal Company you

can't go around doing this on South East Coal Company's property" (Tr. 104). Mr. Quillen denied that his decision to discharge Mr. Cook had anything to do with the previous complaint filed by Mr. Cook, and that his decision to fire him was based on what he (Quillen) believed happened Monday evening, April 16 (Tr. 105).

Mr. Quillen stated that no one ever complained to him about drinking, women, or shooting on company property until he received Mr. Cook's letter of August 10, 1990, appealing MSHA's determination in connection with his discrimination complaint. Mr. Quillen stated that he has fired a miner for smoking in another mine, but that this was not brought to his attention by Mr. Cook. He confirmed that no one at the Brinkley Mine has been fired for smoking underground, and although he has heard several complaints about smoking, he stated that he needed definite proof in order to fire anyone (Tr. 107).

On cross-examination, Mr. Quillen stated that he did not believe that Mr. Gibson received his injuries somewhere else other than at the mine. He confirmed that Mr. Cook told him that nothing had happened, and if it did, it happened after Mr. Gibson left the mine. Mr. Quillen stated that he found out that Mr. Gibson rode home with another miner, Benny Campbell, Monday evening, April 16, and that when he contacted Mr. Campbell, Mr. Campbell told him that when he arrived at Mr. Gibson's truck, Mr. Gibson was already in it and that his nose was bleeding and that it bled all the way from the mine to his home (Tr. 107-110).

Mr. Quillen stated that he was unaware of any other fights at the mine, and could not recall Mr. Cook telling him about a fight between Larry Collins and Tommy Gibson (Tr. 114). Mr. Cook asserted that he told Mr. Quillen about this fight before he was discharged, when he had requested to transfer off the section, and that the fight was "over two men wanting a belt drive" (Tr. 115).

In response to further questions, Mr. Quillen confirmed that the termination letter of April 20, 1990, does not include a statement that Mr. Cook was discharged for fighting. Mr. Quillen explained that Mr. Cook knew why he was being fired and that he verbally informed him of the discharge on April 19, either by telephone, or personally at the mine office, and that they "had been talking about it for two days" (Tr. 118). Mr. Quillen confirmed that Mr. Cook gave him the two bank delinquency notices either on Wednesday, April 18, or a couple of days later, but that Mr. Gibson never said anything about any late payments. Mr. Quillen believed that Mr. Cook gave him the notices in order to show that "this was Jesse's fault, not my fault because Jesse hadn't made the payments" (Tr. 120).

Mr. Quillen could not recall the exact date of Mr. Gibson's discharge, but confirmed that it was before the doctor would have

permitted him to come back to work. Mr. Quillen was of the opinion that the argument was over the delinquent note payments, and he believed that "one of them was as much at fault as the other. So they should both be fired" (Tr. 121). Mr. Quillen confirmed that the company policy prohibiting fighting on company property is not in writing, and that the employees know about it through "common sense" (Tr. 123). He further confirmed that fighting at a mine is a violation of Kentucky Mine Law (Tr. 124). He stated that he had never previously fired or disciplined any other employees for fighting, and had no knowledge that anyone else had ever fought on mine property (Tr. 125-127). Mr. Quillen acknowledged that there were "hard feelings" at the mine and a conflict between Mr. Cook and management which resulted in his prior discharge. Mr. Quillen stated that the conflict concerned Mr. Cook's desire to be transferred from one job to another (Tr. 130).

Mr. Cook stated that at the time of his discharge, he was employed as a bolting-machine helper at an hourly rate of $11.25, and that he worked "maybe eight hours a month" overtime. He was covered by a hospitalization plan, but had no retirement benefits. He was also covered by a company vacation plan. His last day of work was April 17, 1990, and he was paid through April 20, by using his vacation time. He stated that he has been unemployed since his termination, and has sought employment at three mines but has not been successful. He has not looked for any non-mining jobs and has been receiving unemployment benefit payments since his discharge, and the respondent has not prevented him from receiving these payments (Tr. 134-135). Mr. Quillen could not recall whether he contested Mr. Cook's unemployment compensation claim, and stated that "it is awful hard to prevent a person from getting unemployment in Kentucky" (Tr. 137).

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 analysis for discrimination cases arising under the National Labor Relations Act.

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

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

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

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

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator

can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. Cook's Protected Activity

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

> 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 * * * because such miner * * * has filed or made a complaint under or related to this Act * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner * * * of any statutory right afforded by this Act.

It is clear that Mr. Cook enjoys a statutory right to voice his concern about safety matters, to make safety complaints, or to file a discrimination complaint without fear of retribution or harassment by mine management. Management is prohibited from harassing Mr. Cook, or intimidating or otherwise interfering with Mr. Cook's rights to engage in these kinds of activities.

In order to establish a prima facie violation of section 105(c)(1) of the Act, Mr. Cook must prove by a preponderance of the evidence that he engaged in protected activity and that his discharge was motivated in any part by the protected activity. In order to rebut a prima facie case, the respondent must show either that no protected activity occurred, or that the discharge was in no way motivated by Mr. Cook's protected activity.

Mr. Cook's Discharge

The record reflects that Mr. Cook was discharged on two occasions by the respondent. The first discharge occurred in August, 1989, and Mr. Cook confirmed that Mr. Quillen fired him and sent him a letter identical to the discharge letter Mr. Quillen sent him on April 20, 1990, when he fired him a second time. Mr. Cook testified that when Mr. Quillen called him to inform him of the first discharge, he asked Mr. Quillen for a

reason for the discharge and that Mr. Quillen responded "for no particular reason" and "slammed the phone down" (Tr. 131). Mr. Quillen could not recall why Mr. Cook was discharged the first time, but denied that it had anything to do with any safety complaints (Tr. 130-131).

The record further reflects that as a result of the first discharge in August, 1989, Mr. Cook filed a discrimination complaint against the respondent but voluntarily withdrew it. Mr. Cook confirmed that he withdrew the complaint because "I thought everything was going to be okay" and that he needed the work (Tr. 132). Mr. Cook further explained that he withdrew the complaint after Mr. Quillen assured him that he would be reinstated to his original job, and he confirmed that upon his return to work after his reinstatement, he was assigned work with another crew, but after complaining to Mr. Quillen, he was eventually returned to his old job and crew within 2 months of his reinstatement.

With regard to the second discharge which prompted the instant discrimination complaint, the discharge letter signed by Mr. Quillen informing Mr. Cook of the discharge is dated April 20, 1990, and it states that Mr. Cook's employment with the respondent "is terminated this date, April 20, 1990 (exhibit C-1). Mr. Cook testified that he was not sure why he was fired, but insisted that it was not for fighting. His wife testified that she learned that her husband had been fired 2 days after the alleged fight with Mr. Gibson. Although the discharge letter does not state the reason for the discharge, Mr. Quillen testified that he and Mr. Cook had discussed the fighting incident for 2 days after it happened, and after Mr. Quillen had observed Mr. Gibson's condition and instructed him to seek medical attention. Mr. Quillen further testified that he verbally informed Mr. Cook of the reason for his discharge when he spoke with him by telephone or in his office on April 19, 1990.

Mr. Cook confirmed that he telephoned Mr. Quillen on the morning of April 19, and that Mr. Quillen informed him that "he was going to have to let me go," but gave him no reason (Tr. 42-43). Mr. Cook confirmed that he then went to the mine and spoke with Mr. Quillen and that Mr. Quillen informed him that he (Quillen) knew that he (Cook) had struck Mr. Gibson on April 16. Mr. Cook further confirmed that on the evening of April 16, he went to Mr. Gibson's home and found that nothing was wrong with him (Tr. 43). He later testified on cross-examination that he visited Mr. Gibson at his home on the evening of April 17, "to see what was wrong with him" (Tr. 75). Thus, Mr. Cook's testimony corroborates Mr. Quillen's testimony that he personally spoke with Mr. Cook, by telephone, and in person about the fight with Mr. Gibson. Having viewed Mr. Quillen in the course of his testimony, I find him to be a credible witness. Further, since it would appear from his own testimony that Mr. Cook went to

Mr. Gibson's home to inquire as to his condition, this raises a strong inference that Mr. Cook was aware of the possibility that Mr. Quillen would possibly hold him accountable for the altercation with Mr. Gibson. Under all of these circumstances, I believe Mr. Quillen's testimony that he informed Mr. Cook that he was being discharged for fighting with Mr. Gibson, and I conclude and find that Mr. Cook was informed of the reason for his discharge and that he knew he was being discharged by Mr. Quillen for fighting with Mr. Gibson.

The Alleged Discrimination

Safety Complaints

In his initial complaint letter received by the Commission on July 5, 1990, Mr. Cook makes reference to his prior discrimination complaint, and he asserted that he was discharged in August, 1989, "for refusing to work in unsafe conditions," and that he was terminated the day following his notifying state and federal authorities "about the conditions." In the letter, Mr. Cook took issue with the manner in which his first complaint was investigated by MSHA, and he suggested that the investigating inspector was related to the mine superintendent, Earl Duncil, and that this was a conflict of interest. With regard to his instant complaint, Mr. Cook also took issue with the manner in which it was investigated by the same inspector who investigated his first complaint, and his letter states that when he spoke with the inspector, the inspector purportedly informed him that he had no case, tried to get him to sign some unspecified form, which he refused to sign, and that the inspector informed him that he "would not write the case up because there was no protected act."

In a subsequent letter of August 10, 1990, addressed to Mr. Quillen, and which I consider part of his complaint, Mr. Cook asserts that his discharge was out of retaliation for his first complaint. He further alleges that after his reinstatement following the first discharge, he was subjected to harassment which he attributed to "hard feelings" against him by superintendent Duncil because of his first complaint, and he accused Mr. Duncil of supplying intoxicating beverages to miners on mine property after their work shifts, allowing miners to bring women onto mine property, allowing miners to remain on mine property after they were intoxicated, which resulted "in people being shot at while in the parking lot," and allowing miners to miss as much as a week's work "after drinking moonshine" supplied to them by Mr. Duncil. Mr. Quillen testified that such complaints were never previously brought to his attention by Mr. Cook, and that he first learned about them when he received the letter of August 10, 1990, in connection with Mr. Cook's complaint.

I take note of the fact that when Mr. Cook filed his complaint with MSHA on April 24, 1990, shortly after his discharge, and executed the usual complaint form, he made no mention of any safety complaints as the basis for his discharge. At that time, he claimed that Mr. Gibson began harassing him at the end of his work shift on April 16, 1990, and that he (Cook) "believed that this harassment was a direct result of management. I had previously filed a complaint against the company and had been reinstated."

In his complaint letter of July 5, 1990, Mr. Cook alleges that the respondent "forced him to work under unsafe conditions." I conclude and find that these allegations were in connection with Mr. Cook's prior discrimination complaint which he withdrew, and I find no credible evidence in connection with his present complaint to support any such claim. In his letter of August 10, 1990, Mr. Cook makes reference to a conversation of April 6, 1990, between his wife and Mr. Quillen, and he asserts that his wife "mentioned the long cuts measuring as much as 52 feet, men smoking underground, and many other unsafe acts" during that conversation. Mrs. Cook confirmed that she spoke with Mr. Quillen on April 6, 1990, at the mine because she believed that he may not have been aware of her husband's "work situation" and his concern "about the safety situations" (Tr. 16).

Mr. Cook confirmed that when he filed his complaint with MSHA he did not allege that his discharge was based on any safety complaints that he may have made. During the hearing, Mr. Cook mentioned one complaint when he claimed that he told the MSHA special investigator "about the violations." Mr. Cook also claimed that he had called an inspector "about the big cuts," and he explained that although the mine was on a 20-foot plan, it was common for 52-foot cuts to be made. He also claimed that he had mentioned the matter of "deep cuts" while attending a training class when a state mine inspector (Bobby Bentley) was present. However, Mr. Cook could not state when these complaints were made, and he asserted that "ninety-nine percent of the time they would -- the company would know it before an inspector got there" (Tr. 57). Mr. Cook makes no claim that he ever made any safety complaints to mine management.

It has consistently been held that a miner has a duty and obligation to communicate any safety complaints to mine management in order to afford management with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per

Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

As the complainant in this case, Mr. Cook has the burden of establishing by a preponderance of the evidence that he made and communicated any safety complaints to mine management or to an inspector, that management knew or had reason to know about the complaints, and that his discharge which followed was the result of the complaints and therefore discriminatory. In short, Mr. Cook must establish a connection between the complaints and his discharge. See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989).

After careful review of all of the testimony and evidence in this case, I find no credible probative evidence to support any conclusion that Mr. Cook ever made any safety complaints to mine management after he was reinstated following his first discharge, and prior to his subsequent discharge of April 19, or 20, 1990. With regard to Mr. Cook's asserted complaint to an inspector about "deep cuts," I find his testimony to be somewhat contradictory in that he first testified that he called an inspector about this matter, but later testified that he simply mentioned it during a safety class he was attending, during which the inspector was present. Mr. Cook could not state when this statement was made. Mr. Cook's purported complaint to an MSHA inspector "about the violations" were, by his own testimony, made after he filed his discrimination complaint and during the investigation of that complaint. Further, there is no evidence that mine management was ever aware of any such complaints, and I find credible Mr. Quillen's testimony that Mr. Cook never made any safety complaints to him, and that he first learned of the complaints concerning superintendent Duncil when he received Mr. Cook's letter of August 10, 1990, after he had filed his complaint. Although Mr. Quillen acknowledge that he was aware of complaints about smoking, he indicated that he needed proof of any such incidents in order to fire anyone, and could not accept unsubstantial allegations. He did confirm that he has fired miners at other mines for smoking, but denied that he ever received any such complaints from Mr. Cook prior to his discharge (Tr. 105-106).

In view of the foregoing, I conclude and find that Mr. Cook's discharge was not the result of any safety complaints made to mine management or to any mine inspector.

The alleged Harassment

As noted earlier, in his April 24, 1990, complaint to MSHA, Mr. Cook asserted that at the end of the work shift on April 16, 1990, the evening of the alleged fight with Mr. Gibson, Mr. Gibson began harassing him, and Mr. Cook believed that the harassment "was a direct result of management." Mr. Cook testified that Mr. Gibson, who was a bolting-machine operator, "had been calling me names all night inside the mine" (Tr. 26). He explained that Mr. Gibson "had been bickering" for at least a month prior to April 16, and that Mr. Gibson was upset and mad about having to do so much bolting work and had words with the mine foreman and another bolting crew "several times" (Tr. 28). Mr. Cook stated that on one occasion, on March 24, 1990, Mr. Gibson "gave me a big shove" because "he was mad over having to bolt so much," and that "it was just bickering within the whole crew" over the roof bolting work (Tr. 28-29). Mr. Cook stated further that "I wanted to get away from the bickering, quarrelling. And Mr. Quillen knew that this was going on amongst all the men, not just me. Really, I wasn't even involved in it" (Tr. 30).

Mr. Cook did not recall that Mr. Quillen was at the mine when the bickering and quarrelling went on (Tr. 63), but that he had spoken to Mr. Quillen about the situation, and although Mr. Quillen assured him that he would take him away from the section, he did no do so (Tr. 29). Mr. Cook stated that the mine foreman (Wood Stone) was "right in the middle" of the bickering among the work crew, and that Mr. Quillen knew that Mr. Duncil had "hard feelings" against him. He also stated that on one occasion Mr. Duncil "made his brags" about his (Cook's) refusal to ride a mantrip, and that when he went to the office to explain why he had not ridden the mantrip, Mr. Duncil instructed him to go back and that someone would come get him, and he heard Mr. Duncil comment "there comes the little S.O.B., I can fire him now" (Tr. 67). On another occasion, after asking foreman Stone for permission to trade shifts with another miner, the foreman advised him that Mr. Duncil would not approve it. On yet another occasion when he was offered an opportunity by another foreman to operate a scoop as a "clean up man," Mr. Duncil would not approve the change (Tr. 68-71).

Mr. Quillen confirmed that after his reinstatement, Mr. Cook informed him that "there were hard feelings" on his working shift, but that he had no way of knowing whether or not the other miners were jealous of Mr. Cook because his wife worked. Mr. Quillen denied that he harbored any grudge against Mr. Cook because he filed the prior discrimination complaint, and he confirmed that the complaint was withdrawn after they settled their differences. He explained that after Mr. Cook was reinstated, Mr. Cook came to his office and advised him that he wanted to go back to work and "really didn't want any arguments"

(Tr. 128). Mr. Quillen confirmed that he put Mr. Cook back to work, and although it may have taken a couple months, he eventually got his old job back (Tr. 129).

Mr. Quillen further confirmed that "there was a conflict between Wendell and the management over there that caused Wendell to be fired the first time" (Tr. 129). He explained that part of the "conflict" concerned Mr. Cook's desire to be transferred from one job to another, and his dissatisfaction with staying on one job for a long period of time (Tr. 130).

I find no credible evidence in this case to support any conclusion that mine management harassed Mr. Cook because of his prior complaint. The only direct evidence of any harassment is found in Mr. Cook's testimony which clearly points to Mr. Gibson as the culprit. Mr. Gibson was employed as a roof bolter and there is no evidence that he had any connections with management. Mr. Cook suggested that there was a "strong possibility" that management induced Mr. Gibson to start harassing him in order to provoke a fight so that it could have an excuse to fire him. I find this to be rather far-fetched, particularly since Mr. Gibson sustained rather serious injuries and was himself fired by the company.

Upon review of all of the testimony in this case, I conclude and find that the "bickering and quarrelling" alluded to by Mr. Cook was the result of dissatisfaction among Mr. Cook's fellow working crew members themselves and had nothing to do with any harassment by any foreman or other members of management. Based on Mr. Cook's own testimony, it seems obvious to me that Mr. Gibson was the principal cause of these encounters among the crew, and at one point during his testimony, Mr. Cook stated that he (Cook) was not involved in the quarrelling.

With regard to Mr. Cook's harassment by Mr. Gibson, I conclude and find that it was the result of personal differences between them, and not withstanding Mr. Cook's denials to the contrary, I believe that part of their differences concerned a dispute over the failure by Mr. Gibson to make payments on a loan note co-signed by Mr. Gibson. Although Mr. Cook asserted that he and Mr. Gibson had been the best of friends prior to the fighting incident of April 16, he confirmed that Mr. Gibson shoved him on March 24, and nearly caused him to fall in front of a mantrip. Although Mr. Cook stated that he was not angry at Mr. Gibson over that incident, he believed that there was no excuse for Mr. Gibson's conduct (Tr. 28).

Mr. Cook also confirmed that on the evening of April 16, Mr. Gibson began calling him names and continued his harassment. When asked for an explanation of Mr. Gibson's conduct that evening, Mr. Cook "assumed" that Mr. Gibson did not want to work with him. However, Mr. Cook alluded to the fact that Mr. Gibson

knew that he was not going to pay the bank note, and that he (Cook) had to pay the $1,000 note (Tr. 10). Mr. Cook further confirmed that when he went to Mr. Gibson's home on the evening of April 17, Mr. Gibson "mentioned the bank note" and ordered him off his property. A subsequent visit to Mr. Gibson's home by Mr. Cook and his wife after the discharge resulted in a confrontation over the bank note which was culminated by Mr. Gibson displaying a weapon and shooting over Mr. Cook's vehicle. As a result of that incident, Mrs. Cook obtained a warrant for Mr. Gibson's arrest.

It seems obvious to me after viewing Mr. Cook during his testimony at the hearing that he was dissatisfied with his working environment after he was reinstated. Mr. Cook apparently expected to be immediately put back on his former job and working shift upon his reinstatement, and he voiced his displeasure with Mr. Quillen for his failure to immediately return him to his old job. However, the fact remains that Mr. Quillen eventually put him back on his old job, albeit 2 months after the reinstatement. It seems to me that if Mr. Quillen harbored any ill will towards Mr. Cook over his prior complaint, Mr. Quillen would have left him where he was rather than ultimately putting him back on his old job. I take note of Mrs. Cook's testimony that when she spoke to Mr. Quillen on April 6, 1990, about her husband's "work station," Mrs. Cook told Mr. Quillen that the company "had been good" to her husband (Tr. 16).

With regard to Mr. Cook's displeasure after being rebuked in his attempts to shift to other job tasks after his reinstatement, and his belief that Mr. Duncil still "had it in for him" because of his first complaint, Mr. Cook conceded that as the mine superintendent, Mr. Duncil had the authority, within his managerial discretion, to regulate the work force and approve of all job assignments. Further, the record in this case establishes that on both occasions when he was discharged, it was Mr. Quillen, and not Mr. Duncil, who fired Mr. Cook, and there is no evidence of any involvement by Mr. Duncil in the discharge decisions. Under all of these circumstances, I find no credible or probative evidence to support any conclusion that mine management harassed Mr. Cook or retaliated against him because of his prior 1989 discrimination complaint.

The Fighting Incident of April 16, 1990

Mr. Quillen, the responsible company official for hiring and firing the work force, testified that he fired Mr. Cook for fighting with Mr. Gibson on mine property after the completion of their work shift on the evening of April 16, 1990, and he confirmed that such fighting was a violation of company policy, as well as the Kentucky mining laws. Mr. Quillen believed that the fight was the result of a personal dispute between Mr. Gibson and Mr. Cook over a personal bank loan note which Mr. Cook had

co-signed for Mr. Gibson, and he confirmed that after concluding that they were both equally at fault, he made the decision to discharge both of them for fighting.

Mr. Quillen confirmed that he conducted an investigation of the fighting incident, which included conversations with Mr. Gibson and Mr. Cook, and a statement by another miner (Benny Campbell) who rode to work with Mr. Gibson. Mr. Quillen testified that Mr. Gibson left his work shift early on April 17, because he was reportedly "hurting so bad" as a result of his injuries, and that when Mr. Gibson came to his office on April 18, Mr. Quillen observed that his eyes were black and his nose was crooked. Mr. Quillen stated that "it was obvious" that Mr. Gibson had been hit "with something hard," and that Mr. Gibson told him that Mr. Cook hit him in the eye and nose with his dinner bucket on Monday evening (April 16), after leaving the mantrip and while they were proceeding to the area where their vehicles were parked. Mr. Quillen instructed Mr. Gibson to seek medical attention, and after Mr. Gibson left to go to the hospital, Mr. Quillen summoned Mr. Cook to the mine to speak with him about the incident.

Mr. Quillen stated that when he spoke with Mr. Cook, and told him what Mr. Gibson had related to him, Mr. Cook told him that "nothing happened," and that if Mr. Gibson was hurt "it happened after he left the mine." Mr. Quillen confirmed that he also spoke to miner Benny Campbell, who rode to work with Mr. Gibson, and that Mr. Campbell informed him that when he got into Mr. Gibson's truck before leaving the mine, Mr. Gibson's nose was bleeding that it and bled all the way home.

Mr. Cook testified that prior to leaving the mine at the end of their work shift on April 16, 1990, Mr. Gibson had been calling him names all evening in the mine. Mr. Cook stated that after exiting the mine, and as he was walking up the bank, he had his dinner bucket in his left hand, and that Mr. Gibson shoved him backwards. Mr. Cook stated that as he was trying to catch his balance, "I may have thrown my hand." He confirmed that Mr. Gibson "did have a scratch on top of his nose," but denied that he struck Mr. Gibson with his fist or with a punch (Tr. 26-27). Mr. Cook testified further that if he indeed swung his bucket, it was because he was falling backwards, and was trying to balance himself, and that if it struck Mr. Gibson "he walked into it" (Tr. 45) and that "if he got hit, if I hit him," the only way it could have happened is that his bucket inadvertently struck Mr. Gibson on the nose (Tr. 76).

Mr. Cook testified that when Mr. Quillen spoke with him after summoning him to the mine on Wednesday, April 18, after he had spoken with Mr. Gibson, he (Cook) told Mr. Quillen that Mr. Gibson had shoved him backwards. Mr. Cook denied that he told Mr. Quillen that nothing had happened (Tr. 81). However, in

response to later bench questions, Mr. Cook stated that "nothing happened," and that Mr. Quillen may have said something about the incident. Mr. Cook further stated that he did not ask Mr. Quillen to fire Mr. Gibson and that he said nothing to Mr. Quillen about Mr. Gibson (Tr. 96). Mr. Cook stated that he said nothing to management about Mr. Gibson shoving him to the ground, and he "guessed" that both he and Mr. Gibson said nothing about this (Tr. 97).

Mr. Cook confirmed that when he spoke to Mr. Quillen following the April 16, incident, Mr. Quillen said nothing about firing Mr. Gibson, and simply told him that he was on compensation. At that point in time, and in light of Mr. Cook's testimony that he did not want to see Mr. Gibson fired, I believe it is reasonable to conclude that Mr. Cook would have said nothing to jeopardize Mr. Gibson's job. Coupled with his rather contradictory testimony concerning the shoving incident, I believe that Mr. Quillen testified truthfully that Mr. Cook said nothing to him about Mr. Gibson's shoving him to the ground, and that Mr. Cook made the statement that "nothing happened."

In a posthearing letter filed by Mr. Cook in support of his case, he questions the severity of Mr. Gibson's injuries, and the fact that there is no evidence that Mr. Gibson ever had surgery for his injuries. Mr. Cook suggests that it was possible that the x-ray reports may have related to previous injuries suffered by Mr. Gibson, and that the respondent "handpicked" and selected the medical records to support its case. Mr. Cook further asserts that all of Mr. Gibson's past and future medical records should have been produced so that he could have an opportunity to review them and verify that the injuries sustained by Mr. Gibson were in fact the result of the incident of April 16, 1990.

Mr. Cook also takes issue with the documentary evidence produced by the respondent with respect to Mr. Gibson's state workers' compensation claim (exhibits R-7 through R-10). The documents reflect that Mr. Gibson filed a claim against the respondent and its insurer, and that it was contested by the respondent. Mr. Gibson executed an affidavit on May 4, 1990, in connection with his claim, and in the space provided on the claim form for an explanation of the "accident," the following typed statement appears:

> Prior to the date of the injury, there had been a "switching" of job's at Southeast's Brinkley mine site. Claimant had been operating a roof bolter and had Wendell Combs as a helper. After the switch, Wendell was operating the bolting machine claimant had operated. Wendell was dissatisfied with his roof bolting position and blamed claimant. As they were leaving the man trip on April 16, 1990, Wendell called out Jesse's name and when Jesse turned around, Wendell hit him in

the face with his lunch bucket, and told him "It's all your fault" (emphasis added).

Mr. Cook argues that Mr. Gibson's affidavit is erroneous in two respects, namely, (1) that his last name is "Cook" and not "Combs," and (2) that he (Cook) was not operating the roof bolt machine. Mr. Cook makes reference to his last pay check stub which shows that he was not paid the wage earned by a roof bolter operator, and that this is proof of the fact that he was not operating the roof bolt machine.

During the course of the hearing, Mr. Cook produced a copy of the findings of a state unemployment examiner made in connection with his unemployment claim (exhibit C-2). The examiner found that Mr. Cook was not disqualified from receiving benefits, and his finding in this regard is as follows:

> The claimant was discharged for allegedly engaging in fighting while on company property. He has denied this allegation and there is insufficient evidence available to substantiate the charge. Therefore, it is concluded the separation was for reasons non-disqualifying under the law.

Mr. Cook suggested that since fighting would be an admission of misconduct, and since the unemployment examiner found that he was not guilty of misconduct, the alleged fight in question never occurred (Tr. 39). Mr. Cook further asserted that it was possible that Mr. Gibson lied when he executed the affidavit in connection with his compensation claim, or that someone "had to put him up to lying" (Tr. 90-91). Mr. Cook also suggested that if he had been fired for "misconduct," the respondent would have contested the unemployment examiner's finding (Tr. 136).

Mr. Quillen's conclusion that Mr. Gibson and Mr. Cook engaged in a fight was based on the results of Mr. Quillen's inquiry into the incident, including his interviews with the two principals, and another miner, and his personal observation of Mr. Gibson after the incident. Mr. Gibson and the other miner did not testify in this case, and neither party made any attempt to subpoena them for testimony. Mr. Cook acted pro se, and prior to the day of the hearing, the respondent, through Mr. Quillen, was acting pro se and retained counsel shortly before the commencement of the hearing. The documentary evidence presented by the respondent was obviously obtained and introduced at the hearing to support its contention that Mr. Gibson was injured in a fight with Mr. Cook.

Mr. Quillen's testimony regarding Mr. Gibson's purported statements that Mr. Cook struck him with his dinner bucket without provocation is hearsay. With respect to the hospital records concerning Mr. Gibson's injuries, they appear to be

genuine and ordinary business records maintained by the hospitals and attending physicians. Ordinarily, such records are admissible pursuant to the recognized "business records" hearsay exception rule when a foundation for their admissibility is established through testimony or affidavit of the custodian of the records or other qualifying witness. Absent these prerequisites for admissibility, the records are still hearsay. However, I have no reason to question their reliability or authenticity, and there is no evidence to rebut the presumption that they were obtained by the respondent from the hospital and Mr. Cook raised no objections (Tr. 99). In any event, I consider the hearsay statement attributed to Mr. Gibson and the hospital records in question to be relevant and material, and the Commission has held that such evidence is admissible in Mine Act proceedings. See: Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n. 7 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 77 L.Ed.2d 299 (1983); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-1137 (May 1984). The weight of such evidence is within the sound discretion of the presiding judge.

A hospital record from the Hazard Regional Medical Center (exhibit R-1), reflects that Mr. Gibson was x-rayed on April 18, 1990, for injuries diagnosed as "closed fracture of nasal bones," and that his employment was verified by Mr. Quillen. Exhibit R-3, a copy of a hospital emergency room record, reflects that Mr. Gibson was seen by a doctor on April 18, 1990, for injuries diagnosed as "fractured nasal bones, contusions, and left orbit." and on the space provided for writing in the patient's complaint, there is a notation which reads "states was hit in left eye with dinner bucket monday night." Another hospital form dated April 18, 1990, reflects the findings by a radiologist that Mr. Gibson had a "comminuted fracture involving the tip of his nasal spine" but "no evidence of any fractures of the left orbit."

Exhibit R-6, is a clinic doctor's report dated April 20, 1990, apparently made in connection with a workman's compensation claim filed by Mr. Gibson, and the results of the examination conducted by the doctor, reflects that Mr. Gibson had black eyes, a deviated nasal septum, external nose deviation to the right, and fractured nasal bones. The space provided on the report form for the "history of accident" contains the following typewritten statement: "32 year old man was hit on the nose on April 16 at work, 10:00 p.m. Having nasal bleeding, which has stopped. Also having nasal obstruction and headaches, some numbness over left check." The report reflects that Mr. Gibson was employed by the respondent at the time of his examination, that the doctor scheduled him for "closed reduction of nasal bones" on April 27, and that he would be out of work from April 16 to April 27, inclusive.

Mr. Cook's assertion that the injuries sustained by Mr. Gibson, as reflected in the aforesaid hospital reports, may have been incurred at a time earlier than April 16, and may have been injuries unrelated to that incident, are rejected. I find the information contained in these reports to be consistent and reliable, both as to the injuries sustained by Mr. Gibson, and the time frames shown in the reports, as well as to the information obtained by Mr. Quillen in the course of his inquiry.

Mr. Cook's arguments concerning the accuracy of the information contained in the workers' compensation application filed by Mr. Gibson are well taken and I have given this information little weight. However, Mr. Cook's suggestion that the findings of the examiner in connection with his own unemployment claim that he was not discharged for "misconduct" establishes that no fight ever occurred is rejected. Mr. Cook confirmed that he provided some information in connection with his claim, and that the respondent had apparently filed a reply indicating that he was discharged for fighting (Tr. 139). Mr. Quillen could not recall whether he protested the claim and he indicated that it is difficult to prevent anyone from receiving unemployment in Kentucky (Tr. 137). Respondent's counsel pointed out that unemployment benefits are paid out of a trust fund, that 99 percent of the cases go uncontested, that it is a costly process, and that it would have been easier for Mr. Quillen not to protest the claim (Tr. 138).

The examiner's conclusion that Mr. Cook was not disqualified from receiving unemployment was based on his finding that there was insufficient available evidence to support the allegation that Mr. Cook was discharged for fighting. In the absence of any further information as to what evidence was available to the examiner at the time he made that finding, it would appear that his finding was based on Mr. Cook's denial that he was discharged for fighting, and the respondent's assertion that he was. It would further appear that the respondent did not pursue the claim further, and that the examiner gave Mr. Cook the benefit of the doubt. In any event, I am not bound by the examiner's finding, which was made in the abstract, and I have given it no weight. The issue before me is whether Mr. Cook's discharge was in any way connected with or prompted by, the exercise of any protected rights on his part. See: Albert Vigne v. Gall Silica Mining Company, 6 FMSHRC 2625 (November 1984).

In his discrimination complaint letters, Mr. Cook insisted that nothing had happened on the evening of April 16, 1990, and he suggested that the respondent fabricated the fighting incident out of retaliation for his prior discrimination complaint. However, after careful consideration of all of the evidence and testimony in this case, including Mr. Cook's belated admissions concerning his encounter with Mr. Gibson, I conclude and find that something did in fact happen on the evening in question. I

further conclude and find that what happened was that after leaving the mine at the end of the work shift on Monday evening, April 16, 1990, and after an evening of name calling by Mr. Gibson, Mr. Gibson and Mr. Cook engaged in an altercation. During that altercation, Mr. Cook was shoved to the ground sustaining an injury to his head which required medical attention (exhibit C-5), and Mr. Gibson was struck in the face with the dinner bucket that Mr. Cook was holding in his hand, sustaining rather severe injuries to his nose and face. I find it difficult to believe that the injuries sustained by Mr. Gibson were the result of an "inadvertent swing of the bucket" while Mr. Cook was falling after he was shoved by Mr. Gibson, and I believe that Mr. Cook retaliated by consciously striking Mr. Gibson in the face with his dinner bucket. Under all of these circumstances, I conclude and find that Mr. Cook did in fact engage in a fight with Mr. Gibson on mine property on the evening in question.

Disparate Treatment

In his complaint, as well as at the hearing, Mr. Cook maintained that arguments and fighting, both underground, and on the surface, were common occurrences at the mine, that nothing was ever done about it, and he questioned why he should be "singled out" and fired (Tr. 23, 26, 54). He identified miner Greg Horn as one individual who engaged in a fight and who "was fired and transferred to another mine" (Tr. 24). During his cross-examination of Mr. Quillen, Mr. Cook identified two other miners (Larry Collins and Tommy Gibson), as two individuals who purportedly engaged in a fight over a dispute concerning "a belt drive" prior to his discharge (Tr. 114).

Mr. Cook stated that he informed Mr. Quillen about the Collins-Gibson fight prior to his discharge, and Mr. Quillen denied that anyone had ever reported that alleged incident (Tr. 114-115). Mr. Quillen confirmed that he was not aware of any prior fights on mine property, and he reiterated that "it is common sense you don't fight on mine property" and that "it is also Kentucky mine law that you don't hurt anybody around a coal mine" (Tr. 124). Mr. Quillen confirmed that prior to the discharge of Mr. Cook and Mr. Gibson, he had not previously fired or disciplined other miners for fighting on mine property (Tr. 126). Contrary to his testimony that he informed Mr. Quillen about one of the purported prior fights, and in response to an earlier bench question as to whether or not anyone ever said anything "about the fighting and all this carrying on" at the mine, Mr. Cook responded "No" (Tr. 55).

I find no credible or probative evidence to support any conclusion that Mr. Quillen was aware of any prior fights at the mine. Mr. Cook confirmed that Mr. Quillen was never underground when any of the "quarreling and bickering" was going on, and absent any evidence to the contrary, I cannot conclude that

Mr. Quillen knew of any prior fights and failed to act. I find Mr. Cook's earlier denials that anyone ever said anything about these incidents, and his later assertion that he told Mr. Quillen about at least one purported fight to be contradictory and not credible. Further, Mr. Cook himself confirmed that at least one miner who engaged in a purported prior fight (Greg Horn) was either fired or transferred for fighting. More to the point however, is the fact that both Mr. Gibson and Mr. Cook were discharged for the fight which occurred on April 16, 1990. Under all of these circumstances, I conclude and find that both of these individuals were treated equally, and Mr. Cook's inference of any disparate treatment by the respondent with respect to his discharge are rejected.

Respondent's Motivation for the Discharge of Mr. Cook

In view of the foregoing findings and conclusions, I conclude and find that Mr. Cook has failed to establish a prima facie case of discrimination. Based on a preponderance of all of the credible and probative evidence presented in this case, I conclude and find that Mr. Quillen's determination that Mr. Cook had engaged in a fight on mine property with Mr. Gibson on April 16, 1990, was based on all of the evidence then available to him. I further conclude and find that Mr. Quillen made a reasonable, credible, and plausible determination, and that the discharge which followed was justified. See: David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 9, 1984); Bruno v. Cyprus Plateau Mining Corp., 10 FMSHRC 1649 (November 19, 1988), aff'd, No. 89-9509 (10th Cir., June 5, 1989) (unpublished); James W. Dickey v. United States Steel Mining Co., Inc., 5 FMSHRC 519 (March 1983), Commission review denied, 5 FMSHRC (May 1983), aff'd, Dickey v. FMSHRC, 727 F.2d 1099 (3d Cir. 1984) (upholding the discharge of miners for fighting).

I further conclude and find that Mr. Quillen's decision to discharge Mr. Cook was motivated by the fight, rather than any intention by Mr. Quillen to retaliate against Mr. Cook for his prior discrimination complaint. In this regard, I take particular note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decisions, the Commission stated in part as follows at 4 FMSHRC 993: "* * * Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." On the facts presented in Mr. Cook's case, I conclude and find that the respondent's stated reason for the discharge of Mr. Cook is both credible and reasonable in the circumstances presented.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge