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MICHAEL D. BURTON V. ARCH OF KENTUCKY
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

MICHAEL D. BURTON, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. KENT 91-223-D
v.	
	BARB CD 90-31
ARCH OF KENTUCKY, INCORPORATED, RESPONDENT	Mine No. 37

DECISION

Appearances: Susan Oglebay, Esq., UMWA District #28, Castlewood, Virginia, for the Complainant; Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Michael D. Burton against the respondent 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 Department of Labor, Mine Safety and Health Administration (MSHA), and after completion of an investigation, Mr. Burton was advised that the information received did not establish any violation of section 105(c) of the Act. Thereafter, Mr. Burton filed a complaint with the Commission, and a hearing was held in Big Stone Gap, Virginia. MSHA filed a posthearing brief, but the complainant did not. However, I have considered all of the oral arguments made in the course of the hearing.

In his MSHA complaint of July 24, 1990, Mr. Burton stated that at the start of the second shift on July 5, 1990, a routine check of the mantrip used to transport miners underground disclosed an inoperable sander. He alleged that shift foreman Scott Johnson instructed the crew to walk to the underground working section and refused their request for self-contained self-rescuers (SCSR) and union representation. Mr. Burton stated that Mr. Johnson "forced" the crew to walk the track entry towards the longwall section which was approximately 3 to 5 miles away without SCSR's. Mr. Burton further alleged that Mr. Johnson sent him home on July 13, 1990, without pay, because he had previously complained about the defective mantrip sanders and unsafe practices in sending the crew underground without SCSR's,

and that he was charged with certain unexcused absences because of his safety complaint to Mr. Johnson.

In his Commission complaint, Mr. Burton alleged that following the initial filing of his discrimination complaint, the respondent continued to harass him and discriminate against him because he invoked his individual safety rights pursuant to the Act. Although Mr. Burton did not specify the alleged acts of additional harassment and discrimination, in the course of the hearing he provided testimony concerning a visit to the dentist on July 11, 1990, which the respondent initially treated as an unexcused absence charged against his attendance record. He also provided testimony concerning his placement in the respondent's chronic excessive absenteeism program sometime in late July, 1990, and a counseling session of August 1, 1990, concerning his work attendance. Mr. Burton believed that all of these incidents resulted from his July 5, 1990, complaint to foreman Johnson about the defective mantrip sanders and the refusal by Mr. Johnson to provide Mr. Burton and his crew with SCSR's after ordering them to walk to the working section. That incident triggered a union safety grievance pursuant to section 103(g) of the Act, with notification to MSHA, and a subsequently issued violation by an MSHA inspector for an alleged failure by the respondent to comply with its SCSR storage plan.

The relief sought by Mr. Burton includes payment of backpay with interest for the July 13, 1990, day that he was sent home by foreman Johnson, expungement from his personnel record of any record of any alleged unexcused absences, including the July 13, 1990, incident, the removal of Mr. Johnson from his position as second shift foreman, and a request that the respondent cease and desist from taking any further discriminatory actions against him for bringing unsafe conditions to its attention.

The respondent denied any acts of discrimination against Mr. Burton as a result of the July 5, 1990, mantrip and SCSR incident, and it maintained that any actions taken against Mr. Burton were taken as a business justification.

Issues

The principal issue presented in this case is whether or not the incidents referred to by Mr. Burton following his initial encounter with shift foreman Johnson on July 5, 1990, constituted prohibited acts of discrimination, harassment, or retaliation because of that event. 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

Michael Burton, the complainant, testified that he has been employed by the respondent for 14 years, and he could not recall having any prior work difficulties or disciplinary actions. He stated that he was a longwall shear operator, and that on July 5, 1990, he was the designated mantrip driver responsible for inspecting the mantrip before transporting the crew to the working place. After finding that the sanders were inoperable, he proceeded to clean them and he informed the second shift foreman, Scott Johnson, about the situation. Mr. Johnson pointed to two other mantrips and instructed him to use them. However, one mantrip had inoperable brakes, and while he was checking the sanders on the third mantrip, Mr. Johnson "got red faced and mad and said walk in" (Tr. 5-8). Mr. Burton stated that the working section was three miles away and when he asked for a self-contained rescuer before starting to walk, Mr. Johnson said "no" (Tr. 9). Mr. Burton stated that he had previously been exposed to smoke during a motor fire and wanted to take a self-rescuer with him. A certain number of self-rescuers are required to be on each mantrip which the crew usually rides to the section. However, since they were walking, he wanted to take one with him (Tr. 10).

Mr. Burton stated that Mr. Johnson informed him that he did not need a self-rescuer because the mine was on a storage plan which required that self-rescuers be located at several strategic underground locations. Mr. Johnson also informed him that after the sanders were repaired, the mantrip would come in and pick up the crew at the point where they had walked to (Tr. 10-12). Mr. Burton stated that 14 men were walking into the section and he later learned that four self-rescuers were kept at each head piece location. He believed that there were eight head pieces located along the three miles into the section (Tr. 13). Mr. Burton stated that he and the crew began walking at 2:45 p.m., and that the mantrip picked them up at approximately 4:00 p.m. (Tr. 13).

Mr. Burton stated that he never refused to walk to the section, and that other crew members also asked for self-rescuers. He requested to speak with a union safety committeeman, but Mr. Johnson denied his request. A few days later, union safety representative Bob Clay found out about the matter and contacted an MSHA inspector who came to the mine for an inquiry in response to a verbal section 104(g) complaint by

Mr. Clay. The inspector interviewed some of the miners, including Mr. Burton. As a result of the inquiry, a section 104(d)(1) citation was issued for an alleged violation of mandatory standard section 75.1101-23, and the parties stipulated that the citation was subsequently modified to a section 104(a) citation (Exhibit ALJ-1; Tr. 18-20).

On cross-examination, Mr. Burton confirmed that he is provided with a WD filter type rescuer and an SCSR when he is underground and that he is trained to use them. He stated that prior to the adoption of the SCSR storage plan, he was given an SCSR and was responsible for it at all times while underground. After the adoption of the plan, he no longer was responsible for the SCSR and they were stored on the mantrips, other mobile equipment, and at various locations throughout the mine. He further confirmed that he was trained about the location and use of escapeways and evacuation routes, and that company policy required him to check the mantrips, including the sanders, to see that they are operable (Tr. 45-49).

Mr. Burton confirmed that three supervisors and a longwall engineer were also scheduled to ride the mantrip with the crew to the section on July 5, 1990. After beginning work on the sanders, and performing other duties assigned by foreman Johnson while awaiting the repairs to the mantrips, Mr. Johnson then told the crew, including the three foreman and the longwall engineer to start walking. Mr. Burton confirmed that Mr. Johnson told him that he did not need to take an SCSR with him because there was a storage plan in effect underground. Mr. Burton confirmed that he did not refuse to walk, and did not invoke his individual safety rights, or refuse to continue walking when he encountered slippery conditions (Tr. 49-53).

The dental visit of July 11, 1990

Mr. Burton stated that on July 11, 1990, he was experiencing teeth and gum problems and did not go to work. He visited his dentist that day, and upon his return to work the next day he submitted a doctor's excuse pursuant to standard company procedure (Exhibit C-1). He gave the excuse to his immediate foreman Hubert Boggs, and mine clerk Jim Waldron informed him (Burton) that it contained insufficient information (Tr. 23). Mr. Burton stated that he had turned in similar doctor's slips in the past and never had any problems with them, but that Mr. Waldron told him to get another one within 24-hours and that he wanted to know about his specific problem which required a visit to the dentist. Mr. Burton then obtained another dentist slip (Exhibit C-2), but Mr. Waldron would not accept it and told him that it was late but that he would let mine superintendent Dan Strickle look at it and determine whether to excuse the absence (Tr. 24-25).

Mr. Burton stated that his dentist informed him that the respondent contacted him about his condition, but that no decision was made as to whether the dental visit was considered excused or unexcused. Mr. Burton stated that it was still unexcused until a few months later after he filed his discrimination complaint. At that time, he reviewed his work records and found that his absence of July 11, 1990, had been changed to an excused doctor's visit (Tr. 26). He confirmed that he is not paid for any doctor's visit, regardless of whether it is excused or unexcused (Tr. 28). However, an accumulation of unexcused absences may lead to a suspension (Tr. 29). He stated that no one ever informed him that his unexcused absence had been changed to an excused absence (Tr. 29).

On cross-examination, Mr. Burton acknowledged that he knew about the information which had to be included in a doctor's excuse slip in order to establish an excused absence, and he conceded that the first slip which he obtained did not contain all of the required information. He believed that the second slip was acceptable, but that the respondent would not accept it and considered it as an unexcused absence. He confirmed that if he were to work without an excuse, management would not know about the problem requiring him to be off and would consider his absence as unexcused. However, if he subsequently brings in an excuse, the absence would be excused, as it was in this case, albeit at a later date (Tr. 71).

The Grievance Meeting of July 13, 1990

Mr. Burton testified that the safety grievance meeting concerning the SCSR incident of July 5, 1990, was scheduled for 12:00 noon. He expected the meeting to last for an hour and he believed he had adequate time to go home and return before his work shift began at 2:15 p.m. He stated that he needed to go home to eat lunch, and to obtain his work clothes and medicine. When he realized that he would not have time to go home before his shift began he spoke with foreman Scott Johnson at approxi-approximately 1:00 p.m., and told him that he did not have his work clothes and had not eaten. Mr. Johnson did not reply and "never said no or yes" (Tr. 31). The grievance meeting ended at 2:42 p.m., and Mr. Burton stated that he went straight home and returned to the mine as quickly as possible, arriving at 3:37 p.m. (Tr. 32).

Mr. Burton stated that when he returned to the mine the crew was "at the mantrip getting ready to get on". Mr. Johnson was standing at the ramp and said nothing to him as he walked by to go and change into his work clothes. After changing into his work clothes ten minutes later, Mr. Burton stated that "I asked him what he wanted me to take in or if the other men had went in or not. By then I didn't know" (Tr. 33). Mr. Johnson then told him that "You're too late. I can't let you go to work" and sent

him home (Tr. 33). Mr. Burton stated that another miner, Bobby Rogers, was permitted to go home and return to work, but he did not know when Mr. Rogers may have returned to work. Mr. Burton did not believe that there were any problems or inconvenience with allowing him to go to work and he stated that "other people has went in before that have been late" (Tr. 32, 33). Mr. Burton stated that the mantrip had not left when he returned at 3:37 p.m., but he was not sure whether it was still there 10 minutes later after he changed clothes (Tr. 34). He also confirmed that he was not paid for that day and that this is the basis for his back pay claim (Tr. 35).

On cross-examination, Mr. Burton acknowledged that some of the miners who attended the grievance meeting came to the meeting prepared to go to work after it was over, and that they did so. Although no one from management gave him permission to go home, he casually mentioned to Mr. Johnson his need to go home but Mr. Johnson "never did reply back" and did not tell him to go (Tr. 74). Mr. Burton then left the mine and went home, and upon his return Mr. Johnson told him that he was tardy and sent him home. Mr. Burton was charged with an unexcused absence and lost eight hours pay (Tr. 76).

Mr. Burton stated that at 1:00 p.m., the grievance meeting was still in session, but he could not recall whether he had already testified. Assuming that he had, he believed he could have gone home at that time (Tr. 76). He confirmed that he lived seven to eight miles from the mine, and he explained that he did not take his work clothes or equipment with him because "I was late that day. I can't remember if I had to go get my allergy shot that day and I had my wife's vehicle . . . Something came up that day and I was running to get to the meeting that day at 12:00" (Tr. 82). When the grievance concluded at 2:43 p.m., he told Mr. Johnson that he had to go home but that Mr. Johnson "was kind of mad at the end of the meeting and he never would talk to me" (Tr. 83).

Respondent's chronic excessive absenteeism program

Mr. Burton stated that a week or two after July 13, 1990, he was on vacation, and that upon his return to work mine clerk Waldron informed him that he was being placed under the respondent's new chronic absenteeism program because of his July 11 and July 13, 1990, absences when he visited the dentist and when he was sent home after the grievance meeting. Mine superintendent Dan Stickle informed him that his vacation time and the two absences which were counted against him placed him in a "higher bracket" pursuant to the leave policy (Tr. 37). Mr. Burton confirmed that he was subsequently removed from the chronic excessive absenteeism list two months after he filed his complaint in this matter (Tr. 39). A copy of the notification letter removing him is dated October 29, 1990 (Exhibit C-3).

On cross-examination, Mr. Burton stated that he was aware of the respondent's tardiness policy, and although he recalled hearing about such a policy notice (Exhibit R-4), he could not recall seeing it posted on the mine bulletin board (Tr. 58). Mr. Burton "guessed" that he knew that if he was late for work it would be considered as tardiness, and he would be subject to an unexcused absence. He stated that he was aware of others being late for work, who were allowed to go to work, and that "I know they had some kind of a tardiness program, but I wasn't aware of how it works" (Tr. 60-61). He admitted that he knew that if he were sent home after reporting to work late that his absence would be considered unexcused (Tr. 62).

In response to questions concerning the respondent's chronic excessive absenteeism policy (Exhibit R-5), Mr. Burton stated that he was aware of it "When I got put in it" (Tr. 63). When asked if he were aware of it prior to that time, he replied "I heard talk about it", and that it "probably" and "might have been" discussed by management with the employees, but that he did not know because he could not remember (Tr. 63).

Counseling session of August 1, 1990

Mr. Burton confirmed that he had a counseling session under the excessive absenteeism program on August 1, 1990, and that he had a union representative with him (Exhibit R-6). He denied any knowledge that ten other miners who were not involved with the July 5, 1990, SCSR incident also received counseling at or about the same time (Tr. 66-67). Mr. Burton could not remember being told at the counseling meeting that it only pertained to the months of April, May, and June, 1990, and that July was not included. He confirmed that he was informed that his attendance had to at least meet the mine average, that quarterly attendance reviews would be made, and that his attendance would be monitored for the next three months (Tr. 69).

Mr. Burton confirmed that he refused to sign the counseling form because of union disagreement with the policy, and his disagreement with the seven days of absences that he was charged with in April, May, and June. He believed he was only absent five days and not seven. He explained that he was off sick for five days, that he attended a hydraulic class on June 29, and while he was paid for that day, it was considered a leave day. The remaining day was a contract "floating day" off with pay which he had turned in ahead of time, and it was considered an excused absence (Tr. 91). Mr. Burton stated that he spoke with the mine clerk and mine superintendent Stickle about the matter and that "it was cleared up later after August" (Tr. 96).

Robert Clay, Chairman of the mine safety committee, testified that the SCSR incident of July 5, 1990, came to his attention later that evening, or possibly the next day. Since he

determined that there was a violation he was asked by the crew to initiate a safety grievance under the union contract, and he did so. MSHA was notified and called in and provided with names of witnesses, including Mr. Burton. Mr. Clay stated that he and Dickey Estep, the respondent's safety director, estimated that the grievance proceeding would last about an hour and it came "right in the middle of a longwall move, a crucial time at the mine" (Tr. 101-102).

Mr. Clay stated that the meeting lasted considerably longer, and that sometime after 1:00 p.m., he indicated to foreman Scott Johnson that the meeting may go beyond the 2:15 p.m. start of the work shift and he asked Mr. Johnson if he wanted the men to go to work, and Mr. Johnson "indicated to me yes" and that "he wanted them to go to work" because people were needed for the longwall move. Mr. Clay stated that "my understanding was that when the grievance got through that he would like for the people to go to work because he needed people regardless of time" (Tr. 103-105).

Mr. Clay stated that during one of the grievance breaks he made Mr. Johnson aware that several of the men needed to go home and that Mr. Johnson "indicated to me that he didn't have a problem with that". Mr. Clay stated that Greg Adams, Bobby Rogers, and Mr. Burton went home and returned to go to work, and that only Mr. Burton was sent back home and not allowed to work (Tr. 106). Mr. Clay further confirmed that he specifically identified the three individuals who wanted to go home to Mr. Johnson, including Mr. Burton, and that Mr. Johnson indicated that it was "okay" for them to go home after the grievance meeting and then come back to work (Tr. 108).

Mr. Clay explained his understanding of the respondent's absenteeism policy and he confirmed that a copy is posted on the bulletin board. He could not remember whether any tardiness policy was posted at the time Mr. Burton arrived for work after the grievance meeting, and he confirmed that it is up to the discretion of the work supervisor as to whether a miner who arrives late for work will be allowed to go to work (Tr. 113).

On cross-examination, Mr. Clay stated that the respondent's chronic excessive absenteeism policy has been upheld through the grievance procedure, and that the tardiness policy is in effect at the mine. In response to questions concerning how Mr. Johnson indicated that Mr. Burton, Mr. Rogers and Mr. Adams could go home after the grievance meeting and then return to work, Mr. Clay stated as follows (Tr. 118-119):

> Q. (Mr. Rajkovich continues.) How did he indicate that? You said he indicated he didn't have a problem. What did he say?

A. He said, "Yes. We need all the people we can get."

Q. Did he give them permission to go home?

A. I took it from that that was permission for those people to go home and get their dinner buckets and return to work.

Q. Did he specifically give them permission to go home and leave the mine premises?

A. He told me.

Q. What did he tell you?

A. He told me, he said, "We need all the people that we can get."

Q. Did he tell you that he gave his permission for those people to go home?

A. I took that as being permission.

Q. But did he say that?

A. I took that as being permission.

Respondent's Testimony and Evidence

Joe Richard Estep, Safety manager, explained the respondent's SCSR storage plan, and he confirmed that it was in effect on July 5, 1990. He testified about the people walking into the mine that day for a distance of approximately 4,000 feet before they were picked up, and he believed the route of travel was safe since he traveled it and inspected the longwall face and working section on July 4 and 5, 1990, and he saw no hazards or dangers (Tr. 124-131).

On cross-examination, Mr. Estep confirmed that he was not involved with the matters concerning Mr. Burton's leave and that he was not Mr. Burton's supervisor (Tr. 137).

Kenneth McCoy, superintendent of High Splint #1 Mine, testified that he was superintendent of operations at the No. 37 Mine on July 5, 1990. With respect to Mr. Burton's absence to visit his dentist on July 11, 1990, Mr. McCoy explained that management had prior to that time received many doctor's slips from employees which simply stated that they saw a doctor but did not explain the reasons for the visit or whether or not the employee was able to work. As a result of this, a policy was instituted requiring the doctor's slip to state that an employee was under a doctor's care and was unable to work, and an example

of the type of slip required was posted and discussed at meetings with the employees. In Mr. Burton's case, the initial slip simply stated that he had gone to the dentist, but after he brought in an acceptable slip, his absence was excused (Tr. 139-140).

Mr. McCoy stated that he did not participate in the July 13, 1990, grievance meeting, but he was present on the surface at approximately 2:30 p.m. when it ended. He stated that Mr. Johnson came to his office and told him that Mr. Burton was leaving because he had to take his wife's car home and he had to go eat. Mr. Johnson asked Mr. McCoy "what do you want me to do?", and Mr. McCoy stated that he instructed Mr. Johnson to send Mr. Burton home (Tr. 142). Mr. McCoy explained further as follows at (Tr. 143-144):

> THE WITNESS: As I recall, Mike Burton said in the meeting, perhaps, I don't know, to Scott Johnson, I'm going home to take my wife's car home and get something to eat.
>
> THE COURT: Mr. Johnson told you that?
>
> THE WITNESS: No. See, Scott worked for -- I was superintendent of operations and he was the second shift mine foreman. He come to me for direction. He said, what do I do? He's going to come back in an hour or -- he's going to come back. When he comes back what do I tell him? I said, if you didn't give him permission to leave, when he comes back you send him home.
>
> THE COURT: All right.
>
> THE WITNESS: I made that decision.
>
> * * * * * * *
>
> Q. (Mr. Rajkovich continues.) And then Mr. McCoy, when he did come back, did you make that decision then not to allow him to go to work?
>
> A. Well, I didn't see him. I had already made the decision. When Scott came and asked me what do I do, I said you send him home. If you did not give him permission to leave, when he shows up you send him home.
>
> Q. Did Scott Johnson ever tell you if he gave him permission?

> A. No. I asked him that. He said he did not give him permission and that Mike just simply stated, I'm leaving. I have to take my wife's car home. I have to go get something to eat. I'll be back later.

Mr. McCoy stated that his decision to send Mr. Burton home was based on the company's tardiness policy which provides that an employee will be sent home and charged with an unexcused absence if he reports for work late without prior approval or if he asked for approval and had no legitimate reason to be late. To do otherwise, he stated, "you would have your entire work force coming to work when they wanted" (Tr. 144). Mr. McCoy identified Mr. Larry Johnson as an individual who he suspended with intent to discharge for violating the tardiness policy. Mr. McCoy denied that his decision to send Mr. Burton home and to treat it as an unexcused absence was motivated at all by Mr. Burton's section 105(c) complaint. He also denied that his decision was motivated by the July 5, 1990, SCSR incident (Tr. 145). Mr. McCoy stated that even if Mr. Burton had a clean record, he would still have given him an unexcused absence for showing up late without prior approval.

On cross-examination, Mr. McCoy denied that Mr. Johnson informed him that two other employees were also going home after the grievance meeting of July 13, and he stated that Mr. Johnson told him that the two went to work. He then stated that he did not remember who told him that they returned to work immediately, and that Mr. Johnson "probably" told him, but that he was not positive (Tr. 147).

Mr. McCoy stated that Mr. Johnson did not mention that "I need all the men I can get" in response to a statement by Mr. Clay that some of his men needed to go home. Mr. McCoy stated that Mr. Johnson mentioned that Mr. Burton had to take his wife's car home and get something to eat, but did not mention anything about medication or work clothes, or the fact that the meeting might end at 1:00 p.m. (Tr. 147). Mr. McCoy stated that any permission by him to allow Mr. Burton to go home and return to work would "depend on the circumstance". However, he would not have granted Mr. Burton permission to go home "if it meant coming back two hours into the shift", nor would he have granted permission to the other two men to leave (Tr. 149).

Mr. McCoy stated that an example of an acceptable doctor's slip was mailed to the employees, and he recalled that it was discussed and posted. He did not know why it took "a considerable amount of time" to approve the second slip and clear the matter up with Mr. Burton. He stated that management's contact with Mr. Burton's dentist was standard procedure and that "we contact the doctor's on a regular basis" when there are

questions and that he personally has visited doctors in this regard. He did not know why the dentist was not called after Mr. Burton brought in his first excuse rather than making him go back again (Tr. 151). He explained that with 250 employees "the updating of the cards sometimes lags behind", and that "when the time clerk ultimately gets to it is when it's taken care of" (Tr. 152).

In response to further questions, Mr. McCoy stated that as the superintendent, he would expect to know if someone other than Mr. Burton left the property. He stated that it was conceivable that Mr. Johnson may have allowed the two other employees to go home, but that he (McCoy) would expect people to go underground at the 2:15 p.m. shift starting time (Tr. 154). He stated that he expects the mantrip to leave at starting time, and "with 250 employees you don't hold their hand. You expect them to be responsible adults and to be at work on time and work eight hours" (Tr. 156).

Mr. McCoy stated that he was not present during the mantrip and SCSR incident of July 5, 1990, but after Mr. Johnson explained what had happened "I told him he messed up in regard to the self-rescuers". Mr. McCoy stated that he knew when Mr. Johnson sent 14 people underground with only four SCSR's stored at strategic locations that he had violated the plan and that he should have allowed the employees to take the devices with them. Mr. McCoy stated that the next day Mr. Johnson met with the crew and "told them that he screwed up and gave them bad information" (Tr. 157).

Mr. McCoy stated that he was not aware that Mr. Burton complained to Mr. Johnson about the SCSR's and sanding devices, and that Mr. Johnson did not tell him that Mr. Burton had complained. Mr. McCoy stated that it was not uncommon to have to repair sanders at the start of the shift. He confirmed that he was aware of the complaint filed with MSHA, and the citation which followed, and that he was at the first step prievance meeting where the matter could not be resolved. The union wanted him to write a letter stating that there was a violation of the law and Mr. McCoy would not agree to post such a letter (Tr. 159). The union then stated that it would call MSHA and Mr. McCoy stated that he replied "Well, call them" (Tr. 158).

Mr. McCoy stated that he was not aggravated with Mr. Burton because of his involvement with the sanders and the SCSR matter, and he indicated that sanders always need attention because of moisture which stops them up. He stated that he wanted the sanders repaired and would think less of Mr. Burton if they were not repaired. Mr. McCoy confirmed that Mr. Waldron discussed the first dentist slip supplied by Mr. Burton with him, and it

contained incomplete information. Mr. McCoy stated that he was not familiar with the second slip and could not recall seeing it (Tr. 160).

James Waldron, Acting Labor Relations Manager, stated that on July 5, 1990, he was the mine supervisor of human resources. He is sometimes referred to as the "mine clerk". He stated that the respondent's chronic and excessive absenteeism program is a standardized attendance control program that has been in existence for approximately 12 years, and he explained that it is designed to maintain and correct an employee's attendance behavior pattern, and it includes employee counselling (Exhibit R-5, Tr. 161-167). Mr. Waldron confirmed that he was familiar with Mr. Burton's attendance record through the records maintain by the clerks in his department. He stated that Mr. Burton was designated an "irregular worker" in 1989 because of six days of unexcused absences, and he explained how those absences were entered on his leave records (Exhibits R-11, R-12, Tr. 168-171). He also confirmed that Mr. Burton received counseling, as did other employees (Exhibit R-13, Tr. 174-178).

Mr. Waldron confirmed that he attended the grievance meeting of July 13, 1990, and he identified the grievants as Mr. Burton, Clifton Fox, Greg Adams, and Bobby Rogers. The meeting began at 12:15 p.m., and ended at 2:25 p.m. Mr. Waldron stated that to his knowledge, Mr. Burton was the only person who left the mine after the meeting ended, and that the others went to work (Tr. 179). He observed Mr. Burton at the parking lot going to his vehicle, and he confirmed that Mr. Johnson informed him about Mr. McCoy's statements concerning Mr. Burton being sent home upon his return to the mine at 3:50 p.m. (Tr. 180). Mr. Waldron stated that Mr. Johnson told Mr. Burton that he could not work and that this was consistent with the tardiness policy. Mr. Burton would have been charged with an unexcused absence for leaving the mine even if he had a "clean" attendance record (Tr. 181-182).

On cross-examination, Mr. Waldron confirmed that he assumed that no one but Mr. Burton left after the meeting because he did not watch each employee and Mr. Johnson did not tell him that anyone else left (Tr. 182). He further explained Mr. Burton's leave records and the leave entries that resulted in his being counseled, and he conceded that an error was made with respect to an absence, but that it was later corrected (Tr. 181-187). He also conceded that one of his clerks should have checked to determine whether Mr. Burton had any "floating days" available, and that vacation days should not have been counted in the attendance formula (Tr. 188, 191).

Posthearing testimony

Two miners who purportedly were allowed to go home and then return to work, at the conclusion of the July 13, 1990, grievance meeting (Greg Adams and Bobby Rogers), and foreman Scott Johnson were not called by the parties to testify in this case. At the conclusion of the hearing, the parties were advised that these were critical witnesses and that I would consider ordering posthearing testimony. I subsequently ordered the parties to take the testimony by deposition or affidavit and to file it with me. The parties have done so.

Affiants Gregory W. Adams and Bobby Rogers gave the following identical statement:

> That on July 13, 1990, I attended the safety grievance meeting; subsequently, I went home prior to reporting to work; that as a result of returning home I was late for my shift; that Mr. Johnson was aware that I was going to be late and approved it; and that he was aware that I was late and took no disciplinary action.

Affiant Scott Johnson, currently employed as a senior planning engineer for Arch of Wyoming, Rock Springs, Wyoming, stated that he was employed as a shift supervisor at the No. 37 Mine on July 13, 1990. He stated that he attended a safety grievance meeting on that day, and he confirmed that Mr. Burton, Mr. Adams, and Mr. Rogers, as well as others, were present. He identified these three individuals, and Mr. Clifton Fox, as the "grievants". Mr. Johnson stated that the meeting began at approximately 12:00 noon and was concluded by approximately 2:25 p.m. Since the meeting had extended beyond the shift starting time of 2:15 p.m., and the four grievants missed the mantrip into the mine, he arranged for another mantrip to transport these individuals to their underground section.

Mr. Johnson stated that he was approached by Mr. Clay and Mr. Burton at the conclusion of the grievance meeting, and Mr. Burton informed him that he was going home to eat and let his wife have their vehicle. Mr. Johnson stated that he told Mr. Burton, in the presence of Mr. Clay, that he should have come prepared to go to work as Mr. Adams and Mr. Rogers did, and that he would not be allowed to go to work if he left the mine and returned later. Mr. Johnson stated that shortly thereafter, at approximately 2:30 p.m., while making arrangements for another mantrip, he walked through the bathhouse and observed Mr. Burton, Mr. Adams, and Mr. Rogers having a conversation. Mr. Johnson stated that at approximately 2:42 p.m., he saw Mr. Burton get into his vehicle and leave the property.

Mr. Johnson stated that shortly after he observed Mr. Burton leave the property, he informed superintendent of operations Ken

McCoy that Mr. Burton had left and asked his advice as to what to do about the situation. Mr. Johnson confirmed that he informed Mr. McCoy that he had not given Mr. Burton permission to leave, and Mr. McCoy concurred that Mr. Burton should not be allowed to go to work that day and instructed him to send Mr. Burton home when he showed up.

Mr. Johnson stated that at approximately 2:50 p.m., the mantrip was readied, and Mr. Adams and Mr. Rogers got into the mantrip and left for their assigned work section underground. Mr. Burton returned to the property at approximately 3:50 p.m., and Mr. Johnson told him that he would not be allowed to work that day.

Mr. Johnson stated that between the time the grievance meeting ended and the time he saw Mr. Burton leave the property, he saw none of the other individuals in question leave the property, and to the best of his knowledge they did not leave. He denied that he gave any of these individuals permission to leave the property, or that he ever stated directly or indirectly that he had "no problem" with their leaving. He further denied giving Mr. Burton permission to leave, and he stated that when the subject was raised by Mr. Clay and Mr. Burton, he informed them that if Mr. Burton left he would not be allowed to return to work. Mr. Johnson stated that given the short time span between the conclusion of the grievance meeting and the departure of the underground mantrip, and based on his observations in the bathhouse, he had no reason to believe that anyone other than Mr. Burton left the property during that time.

Mr. Johnson stated that his initial conversation with Mr. Burton when he informed him that he would not be allowed to come to work if the left the property was based on his interpretation of the company's leave policy and was in no way intended to discriminate against Mr. Burton. Mr. Johnson stated that he confirmed that interpretation with Mr. McCoy, who then instructed him to tell Mr. Burton that he would not be allowed to work upon his return.

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 ground 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 affirmately defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, _____U.S._____, 76 1.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 another grounds sub nom. Donovan v. Phelps Doge 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 reemphasized 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 discrimiatee, 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. Burton's Protected Activity

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

The Alleged Acts of Discrimination

The SCSR incident of July 5, 1990

Mr. Burton's assertion that he and his crew "were forced" to walk to their working section without their SCSR's suggests that foreman Johnson somehow coerced or intimidated Mr. Burton to do something against his will, thereby exposing him to a hazard, because he informed foreman Johnson about the inoperative sanding devices on the mantrip which the crew was scheduled to use to transport them to the section. However, I am not convinced that this was the case.

I have carefully reviewed Mr. Burton's testimony, and I cannot conclude that he specifically lodged a safety complaint with Mr. Johnson with respect to the inoperable sanding devices. Mr. Burton's testimony reflects that while he was pre-shifting the mantrip in compliance with Company policy he found that the

sanders were clogged and he proceeded to clean them, thus delaying the departure of the mantrip. Mr. Johnson then pointed to two other mantrips and suggested to Mr. Burton that he should use one of those. However, the second mantrip had inoperable brakes and Mr. Johnson agreed that it should not be used. Mr. Burton then discovered that the third mantrip also had some clogged sanders, and while he was in the process of checking it out in preparation of cleaning the devices, Mr. Burton stated "walk in".

Mr. Burton testified that Mr. Johnson was "red faced and mad" when he made the statement "walk in". This suggests that Mr. Johnson was chagrined at Mr. Burton personally and was somehow taking it out on him. However, quite the opposite could also be true. As the shift foreman responsible for getting the crew to work on time, Mr. Johnson may have been frustrated over the lack of any operable mantrips, and reacted out of that frustration. I find no evidence that Mr. Johnson harbored any ill will toward Mr. Burton at the time in question, and Mr. Burton was not the only person who began to walk to the section. The entire crew, including several management employees, began walking. No one, including Mr. Burton, voiced any complaints about walking, and Mr. Burton and the union miners did not invoke their individual safety rights, did not refuse to walk in, and apparently did not protest to Mr. Johnson. I also take note of the fact that Mr. Johnson informed Mr. Burton that the mantrip would pick up the crew after the sanders were repaired, and safety manager Estep testified the men were picked up after they had walked approximately 4,000 feet, which is less than a mile.

With regard to the self rescue devices, I find no evidence to support any reasonable conclusion that Mr. Johnson's refusal to allow Mr. Burton to take one from the mantrip with him when he began to walk was done to punish or harass Mr. Burton. Contrary to Mr. Burton's assertion that he had complained about the unsafe practice of sending the crew into the section without the devices, I find nothing in his testimony to support any such conclusion. The testimony shows that Mr. Burton simply asked Mr. Johnson for a self-rescue device and was refused. Mr. Burton confirmed that Mr. Johnson explained to him that he did not need the device because the mine had a plan that required such devices to be stored at strategic locations along the travelway taken by the crew. The fact that Mr. Johnson was subsequently proved wrong and conceded that he had erred is not relevant to his state of mind on July 5, when he refused Mr. Burton's request. Further, Mr. Burton conceded that he is provided with a personal filter type rescue device at all times while underground and that he is trained in its use. Although Mr. Burton testified that he wanted to take the mantrip device with him because of a prior experience when he was exposed to smoke from a motor fire, there is no evidence that he told Mr. Johnson about this incident, and

Mr. Burton admitted that no one invoked their individual safety rights by refusing to proceed to the section without the SCSR's.

Superintendent McCoy candidly admitted that Mr. Johnson made a mistake by not allowing Mr. Burton and the crew to take the SCSR devices with them when they were directed to walk to the section, and Mr. McCoy confirmed that Mr. Johnson met with the crew the next day and conceded to the miners that he was in error and had given them some bad information. Further, the July 5, 1990, incident concerning the miners walking without the SCSR's was the subject of a grievance filed by the union, and it resulted in a citation issued by MSHA for a violation of the SCSR storage plan. Although the evidence reflects that Mr. Burton, as well as others, were "witnesses" at the grievance meeting, that particular event took place after July 5, 1909. Under the circumstances, I cannot conclude that Mr. Johnson's actions on July 5, 1990, standing alone, constituted illegal discrimination within the parameters of section 105(c) of the Act. In my view, the union pursued the proper avenue of appeal in that matter when it filed a grievance and requested MSHA to pursue the matter.

The Dental Visit of July 11, 1990.

The evidence establishes that the typewritten complaint letter dated March 21, 1991, containing Mr. Burton's signature, which was filed with the Commission, was in fact drafted and typed by union safety committee chairman Robert Clay, who also addressed the hand-written envelope (Tr. 45). As noted earlier, the letter states in part that "Since my initial charge was filed, Arch of Kentucky management has continued to harrass and discriminate aginst its employees, namely me." I take note of the fact that Mr. Burton's MSHA complaint was filed on July 24, 1990, after his dental visit of July 11, 1990, and I assume that the "initial charge" referred to in the Commission complaint letter is the grievance filed by the union concerning the July 5, 1990, incident. Mr. Burton and three other miners have been characterized as the "grievants" in those proceedings.

Mr. Burton confirmed that an employee is not paid for any absences from work due to doctor or dentist visits regardless of whether the absence is treated as excused or unexcused. However, an accumulation of unexcused absences may adversely impact on his attendance record pursuant to the company absenteeism program. In this case, the parties stipulated that Mr. Burton's absence from work because of the visit to his dentist was initially recorded on his record as unexcused, but was eventually changed to excused (Tr. 27). In the couse of the hearing, Mr. Burton's counsel asserted that Mr. Burton believed that he was treated unfairly with respect to the dental excuse matter and that his treatment by the respondent "was harassing and an attempt to harass him" (Tr. 196). Although not specifically alleged,

counsel suggested that the respondent's follow-up telephone calls to the dentist to verify Mr. Burton's visit was also harassment.

Mr. Burton acknowledged that he was aware of the information required to be included on a doctor's excuse slip to support an excused absence. Although he stated that he had previously turned in slips similar to the one which he initally turned in to his immediate foreman Hubert Boggs (exhibit C-1), he conceded that the slip did not contain all of the required information. Under the circumstances, I conclude and find that Mr. Waldron acted correctly in rejecting the initial slip submitted by Mr. Burton, and I find no credible evidence of any harassment.

With regard to the second dentist slip (exhibit C-2), Mr. Burton testified that he obtained that one after Mr. Waldron instructed him to do so within twenty-four hours of his rejection of the first one. Mr. Burton confirmed that Mr. Waldron rejected the second slip because it was late, but informed him that superintendent Strickle would make a determination as to whether or not it was acceptable. Mr. Strickle did not testifiy, and no testimony was elicited by the parties from Mr. Waldron concerning the dental slips in question.

Superintendent McCoy explained the respondent's policy concerning doctor's excuse slips and follow-up calls by management to doctors to verify an employee's absence. Mr. McCoy confirmed that Mr. Waldron discussed the first slip with him, and that it contained incomplete information. Mr. McCoy testified that he was not familiar with the second slip, and did not recall seeing it, and he did not know why it took so long to ultimately approve it as an excused absence. However, he explained that the updating of the leave cards of 250 employees sometimes lags behind, and that the time clerks ultimately take care of them.

I find no evidence of any involvement by foreman Scott Johnson in the matter concerning Mr. Burton's dental leave slips. As noted earlier, Mr. Burton's second leave slip was apparently accepted and his records were ultimately corrected to reflect an excused absence. I find no evidence of any animus by management towards Mr. Burton, and I find reasonably plausible Mr. McCoy's explanation that with the number of employee records dealt with by his clerks, the updating of individual cards is somewhat lax. Indeed, Mr. Burton's counsel observed during the hearing that the respondent's bookkeeping was "a little shaky", and she candidly discounted any suggestion that management altered Mr. Burton's leave records or that there was any management conspiracy against him (Tr. 188-192). Under all of these circumstances, I cannot conclude that management's handling of Mr. Burton's dental leave slips amounted to discrimination or harrassment because of any protected safety activity on his part.

The Chronic Excessive Absenteeism Program and the Counseling Session of August 1, 1990.

As noted earlier, Mr. Burton's discrimination complaints did not specify the particular acts of alleged management harassment. In the course of the hearing however, Mr. Burton implied that his placement in the respondent's chronic excessive absenteeism program and his counseling session of August 1, 1990, resulting from his placement in the program, were acts of harrassment or retaliation because of his safety complaints. In addition, Mr. Burton's counsel questioned "whether certain things occurred because in retaliation for it that series of events that ended up with the citation" (Tr. 204). Counsel expressed confusion "about the handling of the chronic absenteeism policy" and she questioned the fact that Mr. Burton was unaware of certain matters that were placed in his personnel records. Counsel also asserted that "it's a fair inference" that these events occurred because Mr. Burton caused problems for the respondent (Tr. 205-206).

The parties stipulated that the respondent was free to establish an additional chronic excessive absenteeism policy beyond that covered by the Union/Management Agreement of 1988 (Exhibits R-3, R-4; Tr. 57). Mr. Burton testified that in late July, 1990, Mr. Waldron informed him that he was being placed under the respondent's chronic absenteeism program because his vacation time, coupled with his absences of July 11 and July 13, 1990, placed him in a "higher bracket" as compared to other employees. However, Mr. Burton confirmed that he was subsequently removed from the chronic excessive absenteeism list.

The record reflects that Mr. Burton had been previously designated an "irregular worker" on July 15, 1989, because of an accumulation of six days of unexcused absences during May and June, 1989. Mr. Burton's counsel indicated that she would stipulate that the respondent designated Mr. Burton as an irregular worker, but she contended that the designation was improper, that Mr. Burton had no notice that he was so designated, and that several of the recorded absences were the result of a general mine strike during which all union employees were affected (Tr. 172).

Mr. Waldron confirmed that Mr. Burton was placed in the chronic absenteeism program in July, 1990, because of his attendance record during the months of April, May, and June. Mr. Waldron denied that Mr. Burton's July absences were included in the computations which resulted in his being placed in the program (Tr. 174). Mr. Waldron stated that Mr. Burton, as well as several other employees, were considered "pattern missers" or "long weekend syndrome" workers who missed work on Fridays and Mondays, and that this was one of the determining factors for counseling him (Tr. 176-177). Mr. Waldron confirmed that in

addition to Mr. Burton, ten other employees were also counseled in late July and early August, 1990 (Tr. 176; exhibit R-13).

Mr. Waldron confirmed that Mr. Burton was no longer in the chronic absentee program, and he candidly conceded that errors were made in connection with some of the charged absences and that the leave clerks should have checked more closely and not counted Mr. Burton's vacation days or "floating days" against his attendance records for purposes of the counseling program. Mr. Waldron explained the different leave codes used in making entries on an employee's leave cards, and he confirmed that at the time he counseled Mr. Burton he relied on the leave entries made on his records by his clerks. However, when he later determined that Mr. Burton should have been credited with certain excused, rather than unexcused days, the appropriate corrections were made to his records (Tr. 185-188).

As noted earlier, Mr. Burton is no longer under the respondent's chronic excessive absenteeism program, and Mr. Waldron candidly conceded that administrative errors were made in designating some of Mr. Burton's absences as "unexcused", but that corrective action was taken to correct the records. I find no credible evidence to support any reasonable inference that Mr. Burton was placed in that program because of the July 5, 1990, SCSR incident which eventually led to the grievance and a citation being served to the respondent. As noted earlier, I find no evidence of any animus by management against Mr. Burton, and Mr. McCoy agreed that Mr. Burton acted properly in bringing the mantrip sanders condition to Mr. Johnson's attention and that he would have thought less of him if he had not done so. I also find no evidence that Mr. Johnson had anything to do with Mr. Burton's attendance record problems.

With regard to Mr. Burton's designation as an "irregular worker" in July, 1989, that event preceded the July 5, 1990, SCSR incident and I find no evidence that his designation was motivated by an protected activity on his part. As for the counseling session of August 1, 1990, the respondent's evidence, which I find credible, establishes that ten other employees were also counseled at approximately the same time as Mr. Burton, and none of those employees were involved in the July 5, 1990, incident. Further, Mr. McCoy's credible and unrebutted testimony establishes that he had previously disciplined another miner by suspending him with intent to discharge for violating the respondent's tardiness policy (Tr. 144). Under the circumstances I cannot conclude that Mr. Burton was "singled out" for any "special treatment" because of his involvement in the July 5, 1990, SCSR incident, or because he saw fit to exercise his right to file a discrimination complaint with MSHA. In short, I find no credible evidence to support any reasonable finding of disparate treatment of Mr. Burton by management because of any protected activity on his part. What the evidence does suggest

is a rather inept and disjointed system of recordkeeping by the respondent with respect to employee attendance records, and a rather lax and untimely method of correcting records when errors are discovered.

The tardiness incident of July 13, 1990.

According to the testimony of the various witnesses, the grievance meeting ended sometime between 2:25 p.m. and 2:42 p.m. Mr. Johnson stated that he observed Mr. Burton leave the mine to go home at 2:42 p.m., and that he returned at 3:50 p.m. Mr. Waldron, who also observed Mr. Burton at the parking lot after the meeting ended, also placed his return at 3:50 p.m. Mr. Burton testified that he returned at 3:37 p.m. All of the witnesses agreed that the normal starting time for the shift was 2:15 p.m. In any event, regardless of the slight time discrepancies, I find that Mr. Burton went home after the grievance meeting ended and returned to the mine with the intention of going to work, albeit after the normal shift starting time.

The most significant part of Mr. Burton's complaint is his contention that Mr. Johnson sent him home and would not allow him to work because he (Burton) had previously complained about the defective mantrip sanders and Mr. Johnson's sending employees underground without SCSR's. In support of this conclusion, Mr. Burton maintains that Mr. Johnson allowed other employees to go home after the grievance meeting was over and to return to work late, and that they were not sent home without pay. In short, Mr. Burton relies on this alleged disparate treatment by Mr. Johnson to support a conclusion that Mr. Johnson retaliated and discriminated against him because of their prior encounter of July 5, 1990, concerning the mantrip sanders and SCSR's.

There are two critical issues presented here. The first is whether or not Mr. Burton had foreman Johnson's permission to go home and return to work late after the conclusion of the grievance meeting, and the second is whether or not Mr. Johnson gave other employees permission to go home at the conclusion of the grievance meeting and allowed them to work late upon their return to the mine. If Mr. Burton had permission to go home and return to work late, then his unexcused absence would not stand scrutiny under the respondent's tardiness program. If foreman Johnson did in fact give other employees permission to go home and return to work late, but denied the same privilege to Mr. Burton, one could reasonably conclude that this disparate treatment was the result of animus by Mr. Johnson towards Mr. Burton and would support a reasonable inference that Mr. Johnson retaliated against Mr. Burton because of the July 5, 1990, incident which prompted the union to file a grievance and which resulted in the issuance of a citation to the respondent.

Mr. Burton testified on direct examination that when he realized he would not have time to go home before his work shift was scheduled to begin, he talked to foreman Johnson during the grievance meeting and told him that he had not eaten and did not have his work clothes or mining hat with him. Mr. Johnson did not reply, said nothing, and "never said no or yes" (Tr. 31-32). Mr. Burton repeated this testimony during cross-examination, and he conceded that no one in mine management gave him permission to go home (Tr. 73-74). In response to several bench questions, he admitted that he did not specifically ask Mr. Johnson for permission to go home and that he simply casually mentioned to him that he had a need to go home (Tr. 75). Mr. Burton also confirmed that he had no knowledge that Mr. Johnson was asked if he wanted the men to go to work even though they would be late (Tr. 80). Mr. Burton also indicated that he again told Mr. Johnson at the end of the meeting of his need to go home and that Mr. Johnson did not reply (Tr. 83).

Mr. Clay testified on direct examination that after realizing that the grievance meeting would likely extend beyond the normal start of the working shift at 2:15 p.m., he mentioned this to Mr. Johnson and Mr. Johnson indicated that he expected and wanted the men to go to work after the meeting was over, regardless of the time (Tr. 103-105). Mr. Clay stated that during a break in the grievance meeting, he told Mr. Johnson that several of the men had to go home after the meeting and that Mr. Johnson indicated that he had "no problem" with this and that he needed everyone to work regardless if they first had to go home (Tr. 106-107). Mr. Clay further testified that he specifically identified Mr. Adams, Mr. Rogers, and Mr. Burton to Mr. Johnson as the individuals who needed to go home at the conclusion of the grievance meeting and that Mr. Johnson stated that it was "o.k." for them to do so and to return to work regardless of the time they returned (Tr. 108).

On cross-examination, and when pressed to explain his testimony that Mr. Johnson said that he had "no problem" with Mr. Burton, Mr. Adams, and Mr. Rogers going home, Mr. Clay stated that Mr. Johnson indicated "Yes. We need all the people we can get" (Tr. 118). In response to several repeated questions seeking a direct answer to the question of whether or not Mr. Johnson specifically gave his permission for the three named individuals in question to leave the mine after the grievance meeting and to then return to work, Mr. Clay stated that he construed Mr. Johnson's statement "we need all the people that we can get" as permission for the three individuals to go home (Tr. 119).

After viewing Mr. Clay during the course of the hearing, and upon careful examination of his testimony, I find him to be less than a credible witness. I do not believe his direct testimony, which was given in response to my bench questions, and I have

given it little weight in support of any conclusion that Mr. Johnson gave his permission for Mr. Burton, Mr. Rogers, and Mr. Adams to go home after the grievance meeting and to then return late to work. Indeed, Mr. Burton conceded that no one from mine management, including Mr. Johnson, gave him permission to go home after the grievance meeting and I take note of the fact that Mr. Burton identified only Mr. Rogers as someone who had gone home, and said nothing about Mr. Adams.

In their identical affidavits, Mr. Adams and Mr. Rogers stated that they went home after the grievance meeting, and as a result of going home, they were late for their work shift. They do not state that Mr. Johnson gave them permission to go home after the meeting or that Mr. Johnson knew that they were going home. Although they both asserted that Mr. Johnson was aware that they would be late and approved of it, I construe this to mean that Mr. Johnson had no objection to their going to work late after the grievance meeting ended. However, I reject their assertions as credible evidence that Mr. Johnson gave them permission to go home, or that he even knew that they had gone home.

In his affidavit Mr. Johnson stated that since the grievance meeting had extended beyond the normal start of the work shift and the four grievants (Burton, Adams, Rogers, and Fox) missed the scheduled mantrip, he arranged for another mantrip to transport these individuals underground. While in the process of making these arrangements, Mr. Johnson observed Mr. Burton leave the mine at approximately 2:42 p.m., and Mr. Adams and Mr. Rogers left in the mantrip to go to work at 2:50 p.m. At no time did Mr. Johnson see anyone other than Mr. Burton leave the property, and to the best of his knowledge Mr. Adams and Mr. Rogers did not leave the mine. Mr. Johnson denied that he had given any of these individuals, including Mr. Burton, permission to leave the property, and he denied that he ever stated that he had "no problem" with their leaving.

Safety Committee Chairman Clay initially testified that miners are aware of the respondent's tardiness and excused absence policy and that it is posted on the bulletin board (Tr. 110). He later stated that he could not remember whether the policy was posted at the time Mr. Burton was sent home, but he confirmed that there was an "oral policy" which vested discretion in the work supervisor to send someone home if he reported late for work (Tr. 112-113)). He further confirmed that the policy has been upheld through the union grievance procedures (Tr. 114).

Mr. Burton was rather equivocal about his knowledge of the mine tardiness policy. He initially testified that he was aware of the policy but could not recall seeing it posted. He "guessed" that he knew if he were late for work he would be

considered tardy and charged with an unexcused absence. He also indicated that he knew there was "some kind" of a tardiness program, but denied any knowledge as to how it worked. Finally, he admitted that he knew that if he were sent home after reporting to work late his absence would be considered unexcused, and he acknowledged that he would not be paid for such an absence.

After careful consideration of all of the testimony and evidence, I conclude and find that Mr. Burton was well aware of the respondent's tardiness policy and that he knew if he were sent home after reporting late for his work shift he would not be paid. After viewing Mr. Burton during the hearing, and taking into consideration the fact that he has worked for the respondent for some 14 years, I remain unconvinced that he was ignorant of his rights and responsibilities with respect to timely reporting for work, and I am not persuaded that he did not know about the policy and rules in this regard.

The credible and unrebutted testimony of Mr. McCoy establishes it was he, and not Mr. Johnson, who made the decision to send Mr. Burton home and not allow him to work upon his late return to the mine after going home at the conclusion of the grievance meeting. I conclude and find that Mr. McCoy's decision in this regard was based on Mr. Johnson's statement to him that he had not given Mr. Burton permission to go home, and the respondent's policy of treating tardy work starts where an employee does not have permission to go to work late as unexcused absences. I further conclude and find that Mr. Johnson was simply carrying out Mr. McCoy's instructions when he informed Mr. Burton that he would not be allowed to go to work and sent him home.

Mr. Burton conceded that some of the miners who were at the grievance meeting came to work that day with their work clothes and other equipment prepared go to work after the meeting ended (Tr. 72-73). Mr. Burton explained that he did not bring his work clothes and equipment with him because he was late leaving his home, had his wife's car, and was late for the meeting (Tr. 81-82). These are matters within Mr. Burton's control, and in hindsight, better planning on his part may have prevented the situation which resulted in his arriving late for work after going home and missing the mantrip which Mr. Johnson had arranged for the other miners who were also late after the grievance meeting. Under the circumstances, Mr. Burton has no one to blame but himself for being sent home and not allowed to work that day.

I find that Mr. Burton made a unilateral decision to leave the mine at the conclusion of the grievance meeting of July 13, 1990. I further find that Mr. Burton did not have the permission of foreman Johnson or any other management official to leave the

mine to go home and to return later to go to work. Mr. Burton's contention that Mr. Johnson sent him home and would not allow him to work because of the prior SCSR incident of July 5, 1990, is rejected. As noted earlier, the decision to send Mr. Burton home was made by Mr. McCoy, and it was carried out by Mr. Johnson. Further, the decision not to allow Mr. Burton to work was based on his leaving the mine without permission rather than reporting to work immediately after the grievance meeting ended. By taking it upon himself to leave without permission, Mr. Burton arrived back at the mine later than the other miners who had also attended the meeting but who were on their way to their working section by the time Mr. Burton returned and got dressed and presented himself to Mr. Johnson for further instructions.

I find no reasonably supportable credible evidence, either direct, or circumstantial, to support any conclusion that Mr. Johnson or Mr. McCoy, individually or collectively, were motivated by a desire to retaliate against Mr. Burton, or to harass him for any protected activity on his part when they would not allow him to go to work when he reported back to the mine after leaving without permission. To the contrary, I conclude and find that management's decision to send Mr. Burton home pursuant to company policy when he left the mine without permission and returned later to report for work was a reasonable and plausible management decision incident to its right to control the work force. As previously noted by the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982), citing its Pasula and Chacon decisions, etc., "Our function is not to pass on the wisdom or fairness or 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".

I further find no credible evidence of any disparate treatment of Mr. Burton by mine management with respect to its refusal to allow him to return to work and sending him home when he arrived back at the mine after leaving without permission. The available credible evidence establishes to my satisfaction that Mr. Burton was the only individual known to Mr. McCoy and Mr. Johnson who left the mine without permission to go home after the grievance meeting ended, and their motivation in sending Mr. Burton home was based on what I believe was a reasonable belief that this was the case. Even if I were to accept as true the fact that Mr. Adams and Mr. Rogers also went home after the grievance meeting, I find no credible evidence to support any reasonable conclusion that Mr. McCoy and Mr. Johnson knew that they had gone home, or that Mr. Johnson had given them permission to leave. Further, as noted earlier, both of these individuals were ready to return to work timely following the grievance meeting when Mr. Johnson made arrangements for a special mantrip to take them to their work places, but Mr. Burton was not.

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 Mr. Burton has failed to establish a violation of section 105(c) of the Act. Accordingly, his complain IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge