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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOSEPH A. SMITH, COMPLAINANT	DISCRIMINATION PROCEEDINGS
	Docket No. PENN 92-57-D
	PITT CD 91-04
v.	Docket No. PENN 92-58-D
	PITT CD 91-11
HELEN MINING COMPANY, RESPONDENT	Homer City Mine

Appearances: Gretchen Lucken, Esq., Tana M. Adde, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainant;
J. Michael Klutch, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

The Secretary brings these cases on behalf of Joseph A. Smith and claims that Smith was twice unlawfully discriminated against and discharged (on December 20, 1990 and July 2, 1991) for engaging in protected safety-related activity. Smith filed a union grievance concerning the December 1990 discharge and an arbitrator reduced the discharge to a 60 working day suspension. He was reinstated to his former position on March 11, 1991. As regards the latter discharge on July 2, 1991, the Secretary of Labor applied for and I ordered the temporary reinstatement of Smith to his previous position on November 5, 1991, where he remains pending this decision. Secretary v. Helen Mining Co., 13 FMSHRC 1808 (November 1991) (ALJ ORDER OF TEMPORARY REINSTATEMENT).

Pursuant to notice, hearings were held on the merits of these cases on March 24, 25, 26, and 31, 1992, in Ebensburg, Pennsylvania, and the parties have filed posthearing arguments which I have considered in the course of my adjudication of this matter.

FINDINGS OF FACT

1. At all times relevant to this complaint, Smith was employed by respondent as a shearer operator on the longwall at the Homer City Mine; he has been employed at the Helen Mining Company for approximately 20 years; he is the UMWA Local Safety Committee Chairman; and he is also a certified mine examiner ("fireboss").

2. At all times relevant hereto, Helen Mining Company, a Pennsylvania corporation, was engaged in the production of bituminous coal at its underground mine, known as the Homer City Mine, and is, therefore, an "operator" as defined by section 3(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. 802(d).

3. The Homer City Mine is located in Indiana County, Pennsylvania, and is an underground coal mine, the products of which enter commerce within the meaning of sections 3(b), 3(h), and 4 of the Act, 30 U.S.C. 802(b), 802(h), and 803.

4. On October 25, 1990, some 2 months prior to his December 1990 discharge, Smith filed a section 105(c) Discrimination Complaint against Thomas Hofrichter, the Mine Superintendent, Jack Woody, the President, and Jim Slick, the Mine Foreman, for allegedly denying himself, in his capacity as the UMWA Safety Committee Chairman, access to the mine to investigate a safety complaint that men were working under an unsupported roof. MSHA declined to pursue that case and that was the end of the section 105(c) action. However, Smith also filed a grievance under the UMWA Contract, which was subsequently settled by an agreement stipulating that the Safety Committee has the right to inspect the mine and upon giving advance notice, will not be denied access. Smith and Hofrichter signed this Statement of Settlement on November 16, 1990.

5. On November 17, 1990, Smith confronted Superintendent Hofrichter concerning mine management's ability to require Smith and other UMWA firebosses to perform mine examiner work on an as-needed basis. Smith told Hofrichter that the Pennsylvania Department of Environmental Resources (DER) had advised him that his fireboss certification was his to use as he wished and that he would not have to perform fireboss duties if he did not want to. Smith allegedly challenged Hofrichter to issue a direct order to him to fireboss so that he could refuse and then Hofrichter could discharge him for insubordination. Hofrichter states that he declined Smith's invitation to discharge him inasmuch as Smith's services as a fireboss were not required on that particular shift. Hofrichter memorialized his discussion with Smith in handwritten notes that were made a part of Smith's personnel file. (Respondent's Exhibit No. 8).

6. Although firebossing is generally performed by managerial employees such as foremen, there is an established practice at the Homer City Mine which permits hourly rank and file employees, such as Smith, to perform firebossing work on an as-needed basis.

7. On December 18, 1990, prior to the commencement of his shift, Smith engaged Superintendent Hofrichter in a discussion about two then-pending grievances otherwise unrelated to this case. During this discussion, Superintendent Hofrichter told Smith that he did not intend to pay the grievances. According to Hofrichter, Smith then threatened to shut down the longwall on his shift in reprisal. Smith cited Hofrichter to ongoing problems with shearer water pressure and pull key malfunctions on the longwall as his intended reasons for shutting down the longwall that evening. Smith, on the other hand, characterizes their conversation as making safety complaints to mine management regarding defective emergency pull keys and inadequate water pressure on the longwall shearer. Proving, I suppose, that one man's safety complaints are another man's threat to disrupt production.

8. Pull keys are a series of emergency stop switches which are located along the longwall face. During the 2 weeks prior to December 18, 1990, two of these emergency stop switches were taken out of service, sent away for repair, and then subsequently reinstalled. Despite the repair of the pull keys, they continued to malfunction intermittently. It is also uncontroverted that problems in maintaining adequate water pressure on the longwall shearer persisted. These are legitimate reasons to stop operation of the longwall; at least that is the official position of all concerned. As a matter of practice, however, unless someone complains, the longwall shearer will operate.

9. Following Smith's aforementioned discussion with Superintendent Hofrichter, prior to his shift on December 18, 1990, Smith entered the mine and immediately complained to his foreman regarding the damaged pull keys and, somewhat later, about low water pressure on the shearer, which complaints together resulted in the idling of his longwall shearer that evening for the entire shift.

10. Respondent characterizes Smith's complaints regarding the defective pull keys and inadequate water pressure as being selfishly motivated by personal gain, but nevertheless has to agree that they were legitimate complaints. I concur that Smith's motives may not have been entirely pure, but I nonetheless find these complaints to be legitimate safety complaints and protected activity within the meaning of the Mine Act.

11. On December 19, 1990, Superintendent Hofrichter had a discussion with David Hallow, the UMWA Grievance Committee Chairman and coincidentally, Smith's friend. Hallow asked Hofrichter if management intended to produce coal during the coming weekend. Hofrichter replied in an angry tone that they would not load coal on the weekend because they could not even load coal during the week. Hofrichter also told Hallow that he was very upset with Smith for following through on his threat to stop longwall production during the preceding evening's shift ostensibly because management refused to pay him for his outstanding grievances. Hofrichter also threatened to fire Smith at this meeting ----"your buddy won't be around much longer."

12. On December 19, 1990, Assistant Shift Foreman Stanley DeWitt met with Smith at approximately 3:50 p.m. and instructed him to perform firebossing duties that evening on the 4:01 p.m. shift. Smith told DeWitt that he did not want the responsibility of performing that work on that particular evening. DeWitt in turn advised Shift Foreman "Butch" Earnest that Smith did not want the responsibility of performing fireboss duties that evening. Earnest told DeWitt to instruct Smith that firebossing was the only work available for him on that shift. DeWitt passed this information along to Smith, who inquired as to whether DeWitt's instruction was a direct work order. DeWitt indicated that it was, and Smith replied, "no problem" and complied with the order.

13. After receiving his firebossing assignment, Smith confronted Superintendent Hofrichter in the hallway outside his office. Smith complained to Hofrichter that by virtue of having been forced to perform mine examiner's work that evening, he would lose the opportunity to receive 2 hours of overtime pay that he would have otherwise earned on the longwall as a shearer operator. Hofrichter assured him that upon completion of his firebossing work, he could rejoin his crew on the longwall and complete his anticipated 10-hour shift. Superintendent Hofrichter then turned and walked away from Smith, at which point Smith followed Hofrichter into his office. Smith told Hofrichter that he would be sorry for making him fireboss that evening. When Hofrichter replied that firebossing was the only work available for Smith on that shift, Smith reiterated that Hofrichter would be sorry since he, Smith, would be looking for imminent dangers in the mine during his firebossing run. To which I would only say, so what; that's what he's supposed to be looking for, amongst other things.

14. After Smith departed, Hofrichter spoke with Shift Foreman Earnest. Hofrichter warned Earnest that Smith was very displeased about having to perform the on-shift fireboss run that evening, and that Earnest should be sure to keep employees available to correct any problems which Smith might report during the shift.

15. Sometime after beginning his mine examination, he called Shift Foreman Earnest from the Number 6 Belt Drive and told him that the Number 6 Belt, where it meets the tailpiece of the Number 5 Belt, was gobbed out and that, as a result an automatic switch had deactivated the Number 6 Belt. Smith also reported that the coal build-up on the Number 6 Belt had covered the tailpiece of the adjacent Number 5 Belt and caused it to surge and lurch. Earnest told Smith to shut down the Number 5 Belt and to attempt to quickly determine what had caused the malfunction of the Number 6 Belt. Smith reported to Earnest that in his judgment the equipment malfunction was triggered by a stray piece of discarded belt that had clogged the dump chute at the juncture of the Number 5 and Number 6 Belts, although the Belt Foreman later reported that he didn't find anything in the chute. Respondent speculates that Smith sabotaged the belt, but there is no evidence of that in this record.

16. After shutting down the Number 5 Belt, Smith, following instructions from Earnest, continued with his fireboss run. At approximately 7:42 p.m., Smith called Earnest from the mine telephone at the Number 1 Main Belt, which is located at the outby terminus of the Northwest Passage. Smith told Earnest that due to the presence of a large amount of coal float dust at the air lock in that location, he would have to shut down the Number 1 Main Belt.

17. This is a drastic remedy because all of the belts in this coal mine operate in sequence. If the Number 1 Main Belt is deactivated, all of the other belts in the coal mine automatically disengage in sequence, including those which service the longwall. Ultimately, deactivation of the Number 1 Main Belt halts coal production in the entire coal mine since the belt system, the sole means of removing coal from the mine, is rendered inoperative.

18. Earnest was leery of doing this. He was mindful of Hofrichter's earlier warning to him that Smith's firebossing activity that evening would bear watching. Earnest disagreed that Smith should shut down the Number 1 Main Belt and told him not to. He told him to leave the belt running and go ahead with his examination. But Smith felt that the condition was too dangerous to leave the area unattended with the belt running. It is generally acknowledged that float coal dust is combustible when it is suspended in air and can contribute to an explosion if combined with an ignition source. Right after Smith hung up the phone with Earnest, he shut down the belt in order to remove the ignition source posed by the electrical components and also because he would be underneath and on the tight side of the belt shoveling the float dust. He then began shoveling and rock dusting to correct the situation which he believed to be a hazardous accumulation of coal float dust.

19. Assuming for the moment that Smith was truly concerned about these accumulations, respondent has raised several very good issues concerning Smith's lack of safe and/or effective technique in pursuing a cleanup of the float dust.

Although the Number 1 Main Belt had been turned off, the circuit breaker, which furnishes power to all electrical components servicing the Number 1 Main Belt, including nonpermissible Jabco systems, belt take-ups, and sequence timers, had not been tripped. Rather, the belt had been stopped merely by use of the "stop" button which controls only the belt itself. Therefore, although the Number 1 Main Belt had been turned off, all of the other electrical components servicing the Number 1 Main Belt, both permissible and nonpermissible, remained energized and constituted potential ignition sources for an explosion.

A rock dusting machine was located near the starter box, together with 25 to 30 bags of rock dust. Smith, an experienced miner who has held virtually every classified position in the coal industry, was certainly capable of operating this rock dusting equipment. A rock dusting machine emits crushed limestone with air pressurized to 40 or 50 psi. A rock duster's effective range is at least 30 feet and, therefore, Smith could have rock dusted the tight side of the Number 1 Main Belt from the walkway on the wide side of the belt had he used the rock duster located at the starter box near the slope bottom.

Furthermore, the primary remedy selected by Smith, i.e., shoveling the coal float dust onto the belt and alternately turning the power off and on to move the belt so as to allow for more room on the belt for additional float dust, in the opinion of many would only serve to exacerbate the coal float dust problem, if it existed, inasmuch as the air velocity in the air lock area is such that the coal float dust, even if it could be shoveled onto the belt (which some witnesses doubt), would be carried several hundred feet inby that location, and the renewed suspension of the coal float dust in the high velocity air, coupled with the sparks potentially created by alternately turning the belt on and off, could recreate and even worsen the hazard which Smith alleges he encountered in the first instance.

These all appear to be valid criticisms that make Smith's reaction to the assumed crisis appear amateurish. But, whether or not Smith took the most effective action to correct what he perceived to be a hazardous condition will not be determinative of whether he engaged in protected activity in this instance.

20. Respondent also raises an issue regarding the very existence of a hazardous accumulation of coal float dust in the first instance. There is certainly a factual conflict in the evidence on this threshold issue. Smith, of course, maintains that there was a hazardous accumulation of deep coal float dust

in the entire area of the air lock. Patrick Shirley, a general inside laborer at the time, who has since been laid off, testified that DeWitt took him to the air lock area to address the problem. When he got there, an hour or so after the belt had been shut off, he observed black float dust and coal spillage accumulated more or less all over the whole air lock area to a depth of 6 or 7 inches. He also observed Smith shoveling on the tight side of the belt at that time. On the other hand, DeWitt, the Assistant Shift Foreman, who arrived at the same time as Shirley, testified that he saw no coal float dust anywhere. He did see coal spillage, however, which measured approximately 3 1/2 inches deep, 2 1/2 to 3 feet wide and about 40 feet long in that area. He also estimated that Smith had already cleaned up about that same amount. He opined that Smith had about half of it cleaned up when he got there with Shirley. Shift Foreman Earnest was also of the opinion that there was no coal float dust found based on his understanding of DeWitt's report to him ---"he [DeWitt] said the area was gray." Yet his own handwritten notes admitted into the record as Respondent's Exhibit No. 1 reflect that DeWitt reported to him that there was float dust in the air lock area when he arrived to relieve Smith. In fact, on cross-examination that point was driven home [Tr. 107 (3/26/92]:

> Q. All right. And so your notes, in fact, say that you talked to Stanley DeWitt and he told you there was float dust; isn't that correct?
>
> A. Yes, ma'am.

An investigative Commission appointed by the State of Pennsylvania Department of Environmental Resources, Bureau of Deep Mine Safety, the certification authority for mine examiners in that state, conducted a special investigation into this incident as well. State Coal Mine Inspector Ellsworth Pauley, a member of the investigative Commission, testified that the Commission specifically addressed the allegation that Smith had lied about the amount of float dust that was present and they found that Smith's report was accurate, as indicated by witness statements they took, including Foreman DeWitt's telephone report confirming float dust in the area, plus the amount of clean-up subsequently required to abate the condition.

Ultimately, the investigative Commission and the Director of the Bureau of Deep Mine Safety concluded that Smith's action in stopping the belt was proper, based on the amount of float dust which he encountered and that he was required by law to take corrective action under those conditions.

In deciding this issue, I find that the preponderance of the admissible evidence is to the effect that Smith did find a substantial and dangerous accumulation of float coal dust as he

reported to his superiors that he had. Respondent's allegation that Smith exaggerated the extent of the float dust accumulation is accordingly rejected.

21. The preponderance of the evidence also establishes that it was a common practice for mine examiners to stop belts and that no other mine examiner has been disciplined for such conduct. Smith testified that he regularly stopped belts during mine examinations over the past 15 years, when he felt it was necessary to correct a hazardous condition, and had never before been disciplined for stopping a belt. Another certified mine examiner, Edward Williams, testified that he regularly stopped belts during mine examinations if he believed corrective action was required. Williams also testified that there was no policy requiring permission to stop a belt, and he knew of no other mine examiner who had been disciplined for stopping a belt. State Inspector Pauley also concurred that a mine examiner may stop a belt line, without permission and even has a responsibility to do so if a hazardous situation exists.

22. The Pennsylvania DER Bureau of Deep Mine Safety Report (Complainant's Exhibit No. 4) stated that the mine examiner has an obligation to report dangerous conditions and take appropriate action to correct them. They found that Smith had acted appropriately in shutting down the belt in order to begin correcting a dangerous accumulation of float coal dust. Furthermore, the State investigative Commission found that Shift Foreman Earnest had interfered with Smith's performance of his mine examiner duties in violation of state law, by attempting to overrule Smith's decision to shut down the belt without first verifying the mine conditions reported to him. The investigative Commission opined that since Earnest had not seen the conditions, he could not have made a sound judgment as to severity. The Bureau further expressed concern about Earnest making such a decision without having first verified the presence or absence of the reported conditions.

23. On or about December 20, 1990, Helen Mining Company management discharged Smith for insubordination, to wit; disobeying or refusing a direct order from Foreman Earnest to leave the No. 1 Belt running. But this is problematical for the company because Foreman Earnest admits that he never gave Smith a direct order. He merely "told" him to leave the belt running and begin abating the condition. And there is a plethora of evidence in this record that in the union-management environment that exists in this mine, there is a very real distinction between a discussion over the proper course of action to take to abate a hazardous condition which results in an instruction to "leave the belt running and begin abating the condition" and a direct work order which utilizes those magic words. When the terminology

"this is a direct order" is used, an antenna goes up, the listener becomes focused and presumably obeys or not at his peril.

In any event, Smith filed a grievance concerning this discharge. The arbitrator on February 28, 1991, decided that the company had shown just cause for disciplining Smith, but believed discharge to be too harsh a penalty and ordered Helen Mining Company to reduce the penalty to a 60 working day suspension. Therefore, Smith returned to work on March 11, 1991, having served out the time.

Not wanting to put all his eggs in one basket, Smith also filed a parallel action, a section 105(c) complaint with MSHA, now docketed at PENN 92-57-D. He seeks an order directing back pay, interest and expungement of this adverse action from his personnel records. The Secretary asks for the imposition of a civil penalty.

24. Subsequent to his return to work in March of 1991, Smith had occasion to file another section 105(c) complaint with MSHA on May 7, 1991. This one was based on an incident in which Smith was reassigned from his job as a shearer operator on the longwall, allegedly for making safety complaints about defective equipment on the longwall. Smith alleged that he was assigned to work as a mechanic for several weeks and placed at the bottom of the shaft to wait for assignments. Smith testified that he sat there idle, with no mechanic work assigned, for several weeks. MSHA declined to pursue this case because he suffered no loss in pay, and that is all that was ever done with it. No findings were ever made regarding this situation and I don't intend to make any herein. As far as I am concerned, the only relevance this complaint has to the case at bar is by the very fact that a section 105(c) complaint was filed, Smith ipso facto engaged in protected activity.

25. In late June 1991, Smith filed three section 103(g) requests with MSHA for hazardous condition inspections.

On June 18, 1991, David Hallow, Chairman of the UMWA Mine Committee and Smith filed the first of the aforementioned three section 103(g) complaints or requests for inspection with MSHA at the local MSHA field office. It stated as follows:

> A 103(g) special investigation is requested this day 6-18-91. Circumstances surrounding this issue are that one J. C. Miller was instructed by maintenance foreman and belt foreman to hold line starters in with a cap piece and/or screwdriver (to keep belt operable). He followed instructions, burst belt in half thus

> filling longwall section with smoke. Men evacuated with SCSRs. J. C. Miller was then off job 6-17-91. His training on keeping belt running is a dangerous situation.

MSHA Coal Mine Inspector William Sparvieri conducted an inspection in response to this request on June 19, 1991, and as a result issued the company six section 104(a) citations. Interestingly, Inspector Sparvieri testified that when he presented this complaint to mine management, Safety Director Lynn Harding stated to him that he (Harding) knew that Smith had filed the complaint, apparently from Smith himself.

On June 25, 1991, Smith filed the second of the three 103(g) requests.

On or before June 24, 1991, Smith had received complaints from miners that the longwall track entry which is an escapeway and a walkway, was unsafe due to obstructions blocking the shelter holes and water accumulations in the entry. Smith informed Assistant Safety Director David Turner of the hazardous condition while traveling in the area with Turner. The following day, June 25, 1991, Smith inquired of mine management whether action had been taken to correct the condition. When he learned that no action had been taken, Smith wrote a 103(g) complaint and served it to Inspector Sparvieri, who was present at the mine. A preinspection meeting was held in which mine management asked Smith why he filed the 103(g) complaint without first notifying them of the condition, and Smith responded that he had informed Turner the previous day. This inspection resulted in two section 104(a) citations being issued to the company.

The circumstances surrounding Smith's filing of the second 103(g) complaint on June 25, 1991, and mine management's statements during the preinspection meeting demonstrate that management was aware that Smith filed the complaint. Once Smith reported the condition to Assistant Safety Director David Turner, and then inquired about the condition just prior to filing the 103(g) complaint, it was obvious that Smith was the author of the complaint. In addition, Inspector Sparvieri testified that prior to going underground to inspect the area, he met with Smith and mine management. In the meeting, mine management asked Smith why he filed the complaint and there was discussion regarding Smith's having reported the condition to Turner the previous day. Accordingly, I find that the evidence clearly shows that mine management was aware that Smith filed the second 103(g) complaint.

On June 27, 1991, Smith and Hallow received safety complaints from miners who had worked the previous shift in an abandoned longwall section removing old longwall equipment. The miners indicated that they were working under unsupported roof

and were afraid of being seriously injured. The miners also indicated that they were reluctant to address their complaints directly to management for fear of retaliation. Smith and Hallow proceeded to discuss the miners' complaints with Safety Director Lynn Harding and Superintendent Thomas Hofrichter in the hallway outside the mine offices. Smith and Hallow informed Harding and Hofrichter of the serious nature of the complaints and requested permission to inspect the old longwall section to verify the conditions. Hofrichter denied the request. After Hofrichter denied the request, Smith stated that he would write a section 103(g) complaint to get the area inspected by MSHA if necessary, due to the serious nature of the complaints. Smith proceeded to write the 103(g) complaint while sitting on the stairs in the hallway in front of Harding and Hofrichter, and served it to MSHA inspectors who were at the mine to conduct a regular inspection.

The contents of that request, signed by Joseph A. Smith, were as follows:

> 103(g) request for special investigation on the old longwall set up. Men going under chocks that are not pressurized for 2 or 3 weeks, chocks not against roof, one shield pulled out at headgate without pressure, bad roof at headgate and down line, men working on face side of panline without additional roof support. And the approved roof control plan is not being complied with.

MSHA inspector Sparvieri closed the area based just on the contents of the 103(g) complaint, subsequently investigated the 103(g) complaint, and issued a section 107(a) Imminent Danger Withdrawal Order and several more citations due to unsupported roof in the old longwall section, including a section 104(d)(1) citation. The section 107(a) Withdrawal Order had the effect of stopping recovery operations in the old longwall area. To say the least, management strongly disagreed with MSHA's conclusions about the alleged danger posed by the recovery operation, and was particularly angry with the wording contained in the body of the withdrawal order.

26. I find that mine management was aware that Smith filed the three section 103(g) complaints, based on the surrounding circumstances and statements made to Smith and to MSHA Inspector William Sparvieri. Smith reported the hazardous conditions to mine management just prior to filing two of the three complaints, and he also told mine management that he had filed the three 103(g) complaints.

With regard to the 103(g) complaint filed by Smith on June 25, 1991, MSHA Inspector Sparvieri testified that during the preinspection meeting regarding obstructions in the longwall

track entry, someone in mine management, Joe Dunn, asked Smith why he wanted the longwall shut down. Inspector Sparvieri testified that Smith responded that he didn't, he just wanted the mine to be safe.

Superintendent Hofrichter and President Jack Woody both made statements during and after the 103(g) inspection on June 27, 1991, indicating that they were angry with Smith for filing the 103(g) complaints.

Smith and Hallow both testified that during this last 103(g) inspection Hofrichter stated in an angry tone that he was "sick and tired" of Smith filing 103(g) requests. At this time he was described as being red in the face and yelling. On June 28, 1991, the day after the third 103(g) inspection, President Jack Woody made a statement to Hallow threatening to discharge Smith. Hallow testified that Woody stated in a hostile manner that Smith was "wrapped up, packaged, and ready for delivery, and I am just the guy to push the button," after previously indicating during the meeting that he was furious with Smith for filing the last 103(g) complaint.

The testimony of both Hofrichter and Woody to the effect that they denied prior knowledge that Smith was responsible for filing the three section 103(g) complaints, that is, prior to his July 1991 discharge, is rejected as patently incredible. Rather, I find as a fact that mine management in the persons of Hofrichter and Woody, among others, were most definitely aware that Smith filed all three of these 103(g) requests, prior to his discharge.

27. Smith called off sick for the 12:01 a.m. shift on July 1, 1991, with the "flu." He was next scheduled to work the 12:01 a.m. shift on July 2, 1991. That day he claims to have been still feeling puny but decided to go to work anyway, believing that he could handle his regular job as a shearer operator. But, meanwhile back at the mine, Shift Foreman John Burda and Assistant Foreman David Hildebrand were engaged in scheduling work assignments for various UMWA employees for the shift that was scheduled to begin at 12:01 a.m., on July 2, 1991. Burda's shift was to be short three regularly scheduled foremen that evening due to vacations and illnesses. One of the foremen who was going to be off that evening was Gary Fertal, who regularly performs on-shift firebossing on Burda's shift.

So Burda, knowing that Smith was an experienced fireboss, told Assistant Foreman Hildebrand to instruct Smith to assume Fertal's firebossing duties that evening. At approximately 11:20 p.m., Hildebrand spoke with Smith, who was in the bathhouse dressing for work. Hildebrand told Smith that he was to fireboss that evening. Smith stated that he would rather not and was told to speak to Shift Foreman John Burda regarding his assignment.

Smith went to the foremen's office and spoke with Burda. He told Burda he didn't want to fireboss and asked if there was any other work available for him. Burda advised him that the only work available for him that night was to fireboss and that if Smith did not want the assignment to go home. Burda also told Smith that if he was still at the mine at 12:01 a.m., when the shift started, that the firebossing assignment would become a direct work order. Smith then in rapid succession stated to Burda that: (1) he was going home sick or taking a sick day; (2) he would fireboss if Burda would write out the assignment and finally (3) he would take an "illegal day," intending to get a medical excuse the next day, thus converting the unexcused absence to an unpaid sick day.

It should be noted that in requesting the sick day, Smith never did tell Burda that he was, in fact, sick.

A sick day is common mine parlance for a "sick/personal day" which is provided for by the National Bituminous Coal Wage Agreement. A sick/personal day is a contractual day off that can be taken for any reason which may, but does not necessarily, include sickness. Well-established practice at the Homer City Mine requires that management be informed that an employee wishes to take a sick day before the scheduled commencement of a shift. Requests for sick days are not granted to employees after the shift begins. Shift Foreman Burda, after Smith asked for a "sick Day," looked at the clock on the wall in his office, noted that the time was 11:49 p.m. (which was prior to the scheduled commencement of the midnight shift), and indicated that since the shift had not yet begun, he could and would grant Smith's request for a sick day and thus, if he did not wish to fireboss, he could go home. But, other than agreeing to grant Smith's request for a sick day, Burda never gave Smith permission to leave the mine.

The next question is was it necessary for Smith to have permission to leave the mine before the shift starts. I don't think so.

The National Bituminous Coal Wage Agreement requires that employees regularly attend work and that all of their absences be accounted for. "Illegal days" off, as the term itself suggests, are absences that occur without management's permission or authorization and do not stand on the same footing as contractually-authorized holidays, such as graduated and floating vacation days and sick days. Because illegal absences are not authorized or sanctioned by the collective bargaining agreement, employees can, and are, disciplined by Helen for being away from work for a period of two or more (2á) consecutive days without authorization, unless the absences are subsequently proven to be related to illness. This is exactly what Smith had in mind, and what he in fact did the following day.

The next day, Smith did in fact go to the hospital emergency room and was diagnosed as having "gastroenteritis" and advised to take a couple of days off by the treating physician. However, Smith was overtaken by events in this regard in that Superintendent Hofrichter called him at home on July 2, 1991, to advise that he was suspended with intent to discharge for insubordination because he refused the firebossing assignment.

Smith then filed yet another Complaint of Discrimination under section 105(c) of the Act which is now docketed at PENN 92-58-D as well as a grievance under the contract.

28. That grievance concerning Helen Mining Company's suspension of Smith subject to discharge resulted in an arbitration hearing conducted by Arbitrator Jack I. Lenavitt on July 11, 1991. Arbitrator Lenavitt, in a July 16, 1991 decision sustained Helen's discharge of Smith for insubordination and interference with the operation and management of the Homer City Mine, premised upon his refusal upon direction by his foreman to fireboss.

29. There is an established practice that miners at the Homer City Mine can and do decline assignments and go home so long as they leave the mine prior to the start of the shift. Several miner witnesses testified to that effect and that seems to be the consensus of the evidence. Foreman Burda likewise stated that if Smith had asked for a sick or personal day and left the premises prior to the start of the shift there would have been no "insubordination" and therefore no problem. No other miner, besides Smith, has been disciplined as a result of this practice.

FURTHER FINDINGS WITH CONCLUSIONS

The general principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also

Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

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 Eighth 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. Chacon, supra at 2510.

There can be no doubt that Smith engaged in a plethora of protected activity just prior to both discharges at issue in these cases. See Findings of Fact Nos. 4, 7, 9, 10, 16, 18, 24, and 25.

In addition to these specific instances wherein Smith engaged in protected activity under the Act, Smith also served as the UMWA Safety Committee Chairman in this mine throughout the period we are looking at. In this position, Smith was the primary safety advocate for the miners at the Homer City Mine. Smith persistently addressed safety complaints to management on behalf of the miners regarding conditions and equipment in the mine, and he served as the miners' representative during state and federal mine inspections, traveling with inspectors on a regular basis. Smith also regularly attended safety meetings

with mine management to address ongoing safety issues at the mine. Within just days prior to both discharges, Smith made safety complaints to management and MSHA regarding equipment and conditions at the mine based on complaints he received from other miners.

In a case under the 1969 Coal Act, the Commission recognized the special status of a union safety committee member in bringing safety complaints to the Secretary. Local 1110 UMWA and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979).

If anything, the 1977 Mine Act was intended to broaden and strengthen the protection against discrimination afforded miners and their representatives. See S. Rep. No. 95-181, 95th Cong., 1st Sess. 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 (1978).

The members of the mine safety committee are given a special status and added responsibilities under the Union Contract (Article III(d)) and under the Act. They are the spokesmen for the miners in safety matters and are responsible for bringing safety concerns to management and to MSHA. Subject to the requirements that their actions be taken in good faith and be reasonable, I conclude that the actions of safety committeemen such as Smith in bringing safety complaints to MSHA or to the mine operator, are protected activity as well.

There also can be no doubt that mine management was well aware of Smith's safety activity in the mine generally and the aforementioned particular instances of protected activity specifically. See Findings of Fact Nos. 1, 4, 7, 9, 16, 18, 24, 25, and 26.

In addition to evidence of knowledge, the Commission's analysis in Chacon provides that evidence of management hostility toward the protected safety activity is further proof of discriminatory intent. With regard to both discharges, mine management made statements demonstrating open hostility toward Smith's safety complaints and threatened to fire him. See Findings of Fact Nos. 11 and 26.

The Chacon analysis also provides that a coincidence in time between the protected activity and the adverse action is further circumstantial evidence of discriminatory intent. There is a close coincidence in time with regard to both discharges of Smith. With regard to the December 1990 discharge, Smith made safety complaints about the longwall equipment on December 18, 2 days prior to his discharge on December 20. Additionally, Smith reported the hazardous accumulation of float dust and shut down the beltline on December 19, one day prior to his discharge.

With regard to the July 1991 discharge, Smith made the last of three 103(g) complaints on June 27, just 6 days prior to his discharge on July 2. Accordingly, the clear coincidence in time between Smith's safety complaints and his discharge on both occasions strongly suggests that the discharges were motivated by his protected activity.

Finally, the Chacon analysis also provides that evidence of disparate treatment is indicative of discriminatory intent. The evidence persuades me that Smith was subjected to disparate treatment for conduct which was otherwise somewhat routine at the Homer City Mine. See Findings of Fact Nos. 21, 22, and 29.

I therefore find that the respondent was motivated by Smith's protected activity in discharging him on both occasions at bar. Accordingly, it follows that I also find that the respondent has failed to rebut the government's prima facie case.

Respondent has also failed to prove as an affirmative defense that Smith would have been discharged in any event for unprotected conduct alone. In both of these cases, respondent has alleged that Smith was insubordinate and would have been discharged for that unprotected activity alone.

But with regard to the December 1990 discharge, the evidence does not support the allegation that Smith was insubordinate by disobeying a direct order to leave the belt running, because the person who allegedly gave that order admitted that no such order was issued. Rather, the evidence more reasonably establishes that Smith was discharged after he took what appears to me to be appropriate corrective action to abate a hazardous condition, consistent with the common practice of mine examiners at this mine.

Moreover, even if Earnest had issued a direct order to leave the No. 1 belt running, in spite of Smith's report of a dangerous accumulation of float coal dust, the State investigative Commission found that that would constitute illegal interference with the duties of a mine examiner, and refusal to obey such an order which potentially jeopardized the safety of himself and miners working inby the No. 1 airlock area would not justify Smith's discharge on the basis of insubordination. In fact, according to the investigators, Smith was required by law to take immediate corrective action, in light of the serious hazard of an explosion posed by the float coal dust, which included deenergizing the belt to remove the ignition source.

Furthermore, if respondent truly believed that Smith had made a false report of float coal dust conditions during the mine examination, Superintendent Hofrichter could and should have discharged Smith for that reason, rather than fabricating this insubordination offense out of whole cloth. Of course, there was

a small problem with that; Earnest's own notes reflected that a float dust accumulation in fact existed in the No. 1 airlock area as Foreman DeWitt reported, and the State investigative Commission found that Smith's report accurately described the conditions.

Respondent also failed to prove that Smith would have been disciplined for unprotected conduct alone with regard to the July 1991 discharge. Respondent alleged that Smith was discharged for refusing a direct order to serve as a substitute mine examiner for that shift. But, the evidence does not support respondent's claim that Smith disobeyed a direct work order to serve as a fireboss. To the contrary, Shift Foreman Burda admitted during cross-examination that he never stated to Smith that he was issuing a direct order, and his own notes reflect that he told Smith to leave prior to the start of the shift or his instructions to fireboss would become a direct work order.

The evidence shows that Smith was given an assignment that he felt he couldn't perform due to illness, or perhaps just an assignment he didn't want that night as respondent would have it. He then discussed the assignment with Burda, his foreman, declined it, and subsequently took the night off as an unexcused absence. He thereupon left the mine site prior to the start of the shift.

Article XXII of the National Bituminous Coal Wage Agreement of 1988, in effect at respondent's mine during the time relevant to this case, provides in part that if an employee accumulates 6 single days of unexcused absence in a 180-day period or 3 single days of absence in a 30-day period, he shall be designated an "irregular worker" and will be subject to discipline; or when an employee absents himself from work for 2 consecutive days without the consent of the employer, other than because of proven sickness, he may be discharged. Smith fits neither of these categories by taking a single unexcused day off. In fact, Smith and several other witnesses all testified that miners regularly arrived at the mine, declined an assignment for whatever reason, and left the mine prior to the start of the shift. These miners each testified that this is common practice at the mine, that they had declined assignments and left the mine prior to the start of the shift, and that they knew of no other miner, besides Smith, who had been disciplined as a result of doing so. It certainly seems clear that the union contract permits this rather strange practice, so long as a miner does not utilize two consecutive days of unauthorized absences.

Smith also testified that he believed that he could properly utilize an unexcused absence which management would later designate as excused, if and when he presented medical documentation upon his return to work. A memorandum (Complainant's Exhibit No. 11) issued by respondent to all employees regarding proper

documentation of medical absences also clearly states that absences due to illness can be later excused by bringing in a medical release. I find that Smith's decision to take an unexcused absence and return when he was no longer sick with a medical release was reasonably consistent with this company policy.

In summary, respondent has failed to prove that Smith would have been discharged in any event for his unprotected activity alone. Accordingly, the evidence supports a finding with regard to both discharges that respondent, Helen Mining Company, discharged Smith in retaliation for engaging in protected safety-related activity in violation of section 105(c) of the Mine Act.

Respondent attempts to characterize Smith as a selfish, greedy, vindictive and manipulative employee. I have no doubt that Smith regularly and often antagonizes the company with what might be characterized as "sharp practice," by which I mean using the union contract to his personal advantage whenever and wherever he gets a chance. But that is not sufficient grounds for the company to discriminate against Smith in violation of federal law.

Lastly, I am mindful that I have not discussed every episodic development that is contained in the lengthy record of trial of these cases, but I have considered everything that is in the record and discussed those portions which I felt were necessary to my determination. To a large extent, these cases turned on credibility choices. The major credibility choice was of course between Smith and Hofrichter. As between the two, Smith's version of events was clearly the better corroborated and also better fit the physical facts contained in the record.

Before I close this decision, a word on the weight or lack thereof I gave to the two arbitration decisions which were both very favorable to the respondent.

Congress created a unique statutory scheme under section 105(c) of the Mine Act to preserve a miner's right not to be discriminated against for engaging in protected activity. The issues and standards of proofs presented in arbitration proceedings pursuant to collective bargaining agreements are not the same as those presented in discrimination cases adjudicated pursuant to the Mine Act. An employee's rights pursuant to a collective bargaining agreement are different from the statutorily protected safety rights of miners. Accordingly, the weight to be accorded arbitrator's decisions is within the sound discretion of the Commission's trial judge, on a case-by-case basis. In these cases, I obviously made vastly different credibility findings than either of the two arbitrators who ruled

on Smith's grievances previously. Under these circumstances, therefore, I have given no weight to the arbitration decisions at issue herein.

CIVIL PENALTY

Because of the egregious discriminatory conduct committed in these cases, I find that Superintendent Hofrichter knew or should have known that he was violating section 105(c) of the Act when he discharged Smith on both occasions complained of herein.

Since Superintendent Hofrichter was an agent of the respondent, the violation was the result of operator negligence.

I find that the violation was also serious in that it could be expected to have had a chilling effect upon persons willing to act as union safety committeemen and mine examiners, thereby seriously diminishing the effectiveness of those personnel and regulatory enforcement under the Act in general. In assessing a penalty herein I have also considered that the mine operator is large in size and has a moderate history of violations. No evidence has been presented to indicate that Helen Mining Company has violated section 105(c) within the previous 2 year period under facts similar to those herein. The violative condition has not yet been abated since Mr. Smith has obviously not yet been paid for his lost wages. Under all the circumstances herein I find a penalty of $10,000 to be appropriate for the two violations found herein, $5,000 to be allocated to each.

ORDER

Respondent is ORDERED:

1. To pay Joseph A. Smith back pay which was stipulated to in the amount of $45,450.37, within 30 days of the date of this order.

2. To pay Joseph A. Smith interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990).

3. To reinstate complainant to the same position, pay, assignment, and with all other conditions and benefits of employment that he would have had if he had not been discharged from his previous position on July 2, 1991, with no break in service concerning any employment benefit or purpose.

4. To completely expunge the personnel records maintained on Joseph A. Smith of all information relating to the December 1990 and July 1991 discharges.

5. To pay to the Department of Labor a civil penalty of $10,000 within 30 days of the date of this decision.

This Decision constitutes my final disposition of this proceeding.

Roy J. Maurer
Administrative Law Judge