

CCASE:

USWA (RONALD SHANE BIRD) V. GENERAL CHEMICAL COMPANY

DDATE:

19931208

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 8, 1993

UNITED STEELWORKERS OF : DISCRIMINATION PROCEEDING
AMERICA on behalf of :
RONALD SHANE BIRD, : Docket No. WEST 92-596-DM
Complainant : RM MD 92-06
:
v. : General Chemical Mine
:
GENERAL CHEMICAL COMPANY, :
Respondent :

DECISION

Appearances: Harry Tuggle, Safety and Health Specialist, United Steelworkers of America, Pittsburgh, Pennsylvania, for Complainant;

Matthew R. McNulty III, Esq., Bradley R. Cahoon, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, Salt Lake City, Utah, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) under Section 105(c)(2) of the Act was dismissed.

Complainant Bird contends that he was the subject of adverse action in the form of reprimands and reassignments to different crews after making a safety complaint on February 17, 1992,(Footnote 1) in the form of a work refusal.

Although Complainant suffered no economic loss (T. 27), Complainant seeks a remedy in the form of expungement of records reflecting reprimands, including records of a "hearing" into the

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Certain exhibits, specifically Exhibits C-1, C-2, and C-3, mistakenly show this date as 2-18-92.

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matter, together with an order requiring the Respondent to cease and desist from reassigning Complainant to different crews and an order returning Complainant to work on a bore miner rather than on a continuous miner (T. 26-29, 31, 32, 34).

Respondent concedes that Complainant made a safety complaint and that such was communicated to management. Respondent denies, however, that the reprimands and reassignments of Complainant were related to his safety complaint, contending that its actions were justified since Complainant refused a direct order from his supervisor, Foreman Danny Williams, and because Complainant Bird is a frequent complainer, has a personality problem with Williams, was accused of racial and sexual harassment by another employee, was a poor bore miner operator, and actually requested one of the reassignments.

After review of the record, exhibits, and arguments and briefs of the parties, the position of Respondent is found meritorious. Accordingly, its proposed findings and conclusions are, as modified, adopted.

FINDINGS

On February 17, 1992, the 31-year old Complainant was operating a bore miner (Footnote 2) at Respondent's underground trona mine located near Green River, Wyoming (T. 34, 37-40; Ct. Ex. 1). A member of United Steelworkers of America, Local 15320, Complainant has been employed at the mine for 14 years (T. 34-36).

On the day in question, Complainant Bird was working with D crew consisting of himself and three other crew members: Corey Loveless, mechanic; Tom Smith, FTC operator; and Doug Williamson, roof-bolter operator (T. 41). His foreman was Daniel R. "Danny" Williams.

Before commencing work, Williams held a safety meeting with his crew concerning barring down and bolting procedures. (T. 107-108, 256). Following the safety meeting, as is required by MSHA regulation, Williams entered the room the crew planned to mine and noted that the right side of the room was cut six to eight inches high. The left side of the room was cut "on seam" (T. 257, 313-314). The bore miner operator working prior to Williams' shift made this uneven cut. He had apparently failed to keep his miner level (T. 257), and the seam was rolling to the right (T. 314). Based on his 21 years of experience in underground mining, more mining experience than any of the other crew members, Williams considered this cut to be safe and was making

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He is also trained to operate a continuous miner (T. 37-38), and was so employed at the time of hearing (T. 34).

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plans to insure the safety of his crew (T. 260, 265). Bird entered the room and drove the miner to the face. Walking on the right side of the room until they reached the face, Smith and Williamson followed the miner (T. 258).

While Williams was setting up the cut at the end of the room, Bird left his machine, and came back to talk to him and brought to Williams' attention that the room was unsafe (T. 41, 53). Bird asked Williams if he had seen the condition of the room. Williams responded he had and that it was "cut a little high." Williams and Bird then went together to look at the high-cut area (T. 258). Contrary to Bird's testimony (T. 52-53, 113-114), the area was 100 feet from the front of the room and 65 feet back from the face (T. 258, 374). As previously noted, the left side of the arch was cut on seam, but the right side of the arch was cut six to eight inches high (T. 259, 374, 311, 329). Williams instructed Bird to bar down a loose area on the right side of the arch (T. 259, 374). Bird barred down a chunk six to eight feet long and two feet square (T. 52, 289). Trona remained in the curl on both sides at the area Bird barred down. Contrary to Mr. Bird's testimony, the cut was not made into the oil shale (T. 329).

After Bird barred out the loose material, he walked to the face, and Williams thought he was going to return to work. As Williams walked back to the laser at the end of the room, Bird, without further discussion or permission, began to back the miner out of the room (T. 261). Williams went to the face and asked Williamson what was happening. Williamson said, "I guess we are moving out of here." Williams then walked up to Bird and asked him what he was doing. Bird said, "This is unsafe; we're backing out of here." Williams said, "No, we're not." Bird then said, "I want a safety steward." Without any hesitation or resistance, Williams allowed Bird to leave the area to get a safety steward (T. 262-263, 55). After Bird requested a safety steward, Williams did not order him to mine the face (T. 262).

After Bird left, Williams talked about the condition of the room with the other crew members (T. 263). No other crew member refused to work or asked to leave the room (T. 179). Crew members had in the past raised safety concerns with Williams. He and the crew were always able to work out these problems together and continue mining (T. 260). Williams never required his crews to mine areas that he considered to be unsafe and his crew had "generally" trusted his judgment whether a room was safe to mine (T. 261). This crew had encountered high cuts in the past (T. 259-260, 265) and had also encountered higher cuts than the one present in the room (T. 260). When presented with high cuts before, the crew would bar out the loose roof and then the roof bolter would rebolt the area (T. 260-261). They would use these procedures to make the room safe and then continue mining (T. 260). Based on his 21 years of mining experience and 15 years

After the power went off, Williams proceeded to the lunch room to determine why the power was off. Williams believed or suspected that Bird had turned off the power. He found Bird and asked him whether he (Bird) had turned off the power. Bird confirmed that he had. Williams then told him to turn on the power (T. 266). Bird refused and threatened to put his lock on the transformer (T. 267).

During this exchange, Bird did not claim that Mullins had instructed him to turn off the power or leave everything where it was. Williams then gave Bird a direct order, "Turn the power on; don't put your lock on the miner." Bird again refused. Williams said, "Shane, I'll tell you one more time, go turn the power on and do not put your lockout on the miner or I'll take you out of the mine." Bird again disobeyed Williams' direct order and locked out the miner (T. 267-268).(Footnote 4) Williams then informed Bird he was taking him out of the mine (T. 268). In his 15 years of supervisory experience, Williams had never had a worker disobey a direct order. He had never been in a position where it was necessary to give a direct order to any other employee besides Bird (T. 282). Although he could have, Williams did not attempt to turn the power back on himself because he believed Bird had turned the power off and the situation was "escalating too bad" (T. 266).

Bird admitted upon examination by the Court that Williams "just said turn the power back on, and I told him 'No.'" When asked: "He didn't say go back and operate the machine?" Bird admitted, "No, no." Significantly, Bird later testified that, "Well, he did tell me to turn the power back on and go back to the miner" (T.67, 68). Williams testified, "I told Shane to go up and get his water jug. I was taking him out of the mine" (T. 268).

Mr. Bird alleges that Williams pushed him during their exchange in the lunch room (T. 130-131). Williams, however, testified
training (T. 361). The safety supervisor said there is a new miner training plan in effect at General Chemical that is approved by MSHA (T. 359). The plan has a specific section addressing workers' rights (T. 360). The training related to safety concerns lasts one to two hours (T. 360).

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A lock is a device that all miners carry to place on a transformer to prevent power from energizing a machine. Bird placed his lock on the transformer, which was located away from the mining equipment. Anyone can turn the power on and off at the transformer if it is not locked out. No one besides Bird could remove Bird's lock once he placed in on the transformer (T. 300).

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fied convincingly that he did not touch or push Mr. Bird at any time during the incident (T. 268, 295, 300).

Following the incident at the lunch room, Williams called Keith Mullins, his shift supervisor on D crew. Mullins is Williams' immediate supervisor to whom Williams reports on a daily basis. When Mullins arrived, he and Williams went to the room to look at the roof conditions (T. 268-270, 311). Williams explained to Mullins how the crew had backed up to rebolt so they could continue to mine. Consistent with Williams' testimony, Mullins testified that the crew had placed bolts in the barred out area, trona was still in the curl in this area, and there was no sign that the cut had entered oil shale in the area (T. 311, 329). Mullins agreed that Williams "was doing the right thing" by rebolting to continue mining the room (T. 269, 327) and felt that the room did not look "bad" (T. 336).

After Mullins decided to have the crew continue mining, Bird demanded a Union safety steward (T. 312). Contrary to Bird's contention (T. 101), this was the first time he had made this request to Mullins (T. 312). Mullins then left to get Bird a safety steward. Bird admitted that on numerous occasions he had called Mullins to intercede on his behalf because Bird "thought he was fair" (T. 122). After Mullins came down and inspected the area, he decided the crew could go back to work. It was only after Mullins' review of the situation did Bird demand Mullins get a safety steward (T. 123).

RANDY T. PITTS, General Chemical's production superintendent over the bore panels, arrived after Mullins had left (T. 269, 371). Pitts is responsible for safety production costs, and control of the bore areas (T. 372). Pitts and Williams went to the face and discussed the roof conditions (T. 270). Pitts examined the roof conditions.

After Pitts came out of the room, Bird came up to him and claimed Williams had pushed him (T. 375). Pitts asked Williams to follow him out, so they could talk privately (T. 270, 376). Pitts asked Williams if he had pushed Bird (T. 270). Williams told Pitts he did not. Pitts again asked Williams whether he had, "in fact," shoved Bird (T. 376). Again, Williams denied pushing Bird (T. 270, 376). Pitts repeated his question about Bird's allegations and explained to Williams the severity of the allegations. Williams again denied pushing Bird and Pitts took no action against Williams. Pitts confirmed Williams had made the room safe for mining (T. 377).

Pitts then decided to separate Bird's safety concern issue from Bird's insubordination in refusing to obey Williams' direct orders (T. 377). Pitts testified, "Bird can be a very volatile person, and I felt that the situation could very easily escalate to something much more severe" (T. 377). Pitts believed that "by

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removing Mr. Bird from the situation it would diffuse that" (T. 378). Pitts did not want the safety issue confused with the in-subordination issue since those issues were "completely separate" (T. 379). Bird's insubordination was based solely on his refusal to obey Williams' direct orders (T. 271-272).

Pitts instructed the crew to back up the equipment and make a ventilation turn out of the room (T. 271, 377). Removing Bird from the mine and backing the miner up to make a ventilation turn separated Bird's insubordination from Bird's raising a safety concern (T. 271, 379). Pitts also decided to make the ventilation turn because he had already decided to remove Bird from the area and the crew would be short one person without Bird (T. 378). Three persons are needed to efficiently and safely mine straight ahead (T. 378, 397-398). Making the ventilation turn did not require bolting and it could be done with only two crew members (T. 378).

Pitts told Bird that he was taking him out of the mine but before this Pitts let Bird talk to the union safety steward, ROBERT W. TAYLOR, who had been brought to the area by Mullins (T. 210, 212-213, 312, 379-380). Taylor then proceeded to inspect the conditions of the room.

TERRY W. ADCOCK, Respondent's mine safety supervisor, after learning of the incident between Williams and Bird, asked GLEN SIBER, a Union safety steward, to go with him into the bore panel area. They arrived after Bird had been taken out of the mine (T. 355-357). Adcock and Siber discussed what had happened with Williamson and Smith and examined the room together. The crew showed them the area Bird barred out and the bolts that had been installed in that area. Adcock testified that he responded, "Well, that's a standard practice." A "safety issue" was brought up on the room, "but that was taken care of" according to Adcock (T. 367, 368). Adcock then stated that the crew told him that the safety issue was resolved when they placed bolts in the area of concern. Four or five bolts were placed in the area that had been barred out by Bird and they were painted red. Adcock testified that the roof on the left side was "[f]ine" and that it was "in good shape." The curl had not fallen out on the left side.

Exhibit C-4 contains a dispute provision that reads:

In the event that an employee challenges his job assignment in the belief that it is eminently hazardous, the assignment will be investigated by supervision of company safety department representative and union representative. Thereafter, the case will stand on its own merits and in such case no employee will be disciplined until the foregoing procedure has been followed.

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Bird claims that "in his mind" there was no investigation made pursuant to this provision (T. 96). He admitted, however, that an investigation could have been performed after he was taken out of the mine (T. 72). Bird also conceded that the language of the dispute provision did not require that he be present for the investigation (T. 98). He also conceded that nothing in the agreement required the foreman to get him a union steward (T. 101).

Prior to the time Bird was disciplined with a written warning, BOB TAYLOR and GLEN SIBER, both union representatives, investigated the conditions of the room. Also, before Bird was disciplined, Mullins, Pitts, and Adcock, General Chemical's safety department representatives (T. 136), investigated the conditions of the room. Bird testified that when Pitts arrived, he took his lock off because he believed the investigation was beginning (T. 137).

Bird was sent home by Pitts but still received a full day's pay for February 17, 1992 (T. 83, 380). Pitts clarified that the act of removing Bird from "the mine was not disciplinary; it was just to remove him from a volatile situation" (T. 380).

On February 18, 1992, the day after the incident, Respondent held a disciplinary hearing pursuant to Article XIII, Section 2, of the Labor Agreement between Respondent General Chemical and the Union ("Union Agreement") which provides:

The administering of discipline will be done in conformity with established Company policy which shall recognize generally accepted principle of industry, due process, and just cause, and will include the employee's right to a hearing and to Union representation unless the employee is specifically advised otherwise (T. 342, 380).

At the hearing on February 18, Bird was given an opportunity to tell his side of the events that occurred on February 17 (T. 141, 343, 358, 381-382). Bird was represented by Union officials. Bird's fellow crew members also attended the hearing and talked about the incident. Exhibit C-6 makes no reference to moving Bird to another shift (T. 157).

Following the hearing, Respondent issued to Bird a Notice and Record of Disciplinary Action (Ex. C-6), which provides:

On February 17, 1992, Shane Bird was insubordinate wherein he refused to comply with a direct order given him by his supervisor, Danny Williams. Mr. Bird was given specific instructions by Williams to turn the power back on at the transformer and not to lock out the miner. Mr. Bird disregarded the instruction and proceeded to put his lock on the miner despite Wil-

liams' order. Insubordination is a serious violation of the company rules of conduct and would normally result in a lengthy suspension or termination. However, in consideration of mitigating circumstances presented at the hearing, the Company chose to forego these options and issue Mr. Bird a written reprimand for his actions on this day. (T. 381).

Pitts and GERALD A. HASLAM, Respondent's Superintendent of Human Resources, explained the meaning of the term "mitigating circumstances" used in the Notice (T. 337-338, 382). The term referred to the safety concern Bird had raised about the condition of the room. Haslam stated, "Insubordination is a very serious infraction and can result in some very severe discipline" (T. 340). However, because Bird had raised a safety issue, Haslam explained that the company decided to confine that discipline to a written warning" (T. 340). Prior to Bird's insubordination hearing, Respondent had terminated two other employees who had refused direct orders (T. 352). No grievance was filed after Bird received the written warning for insubordination (T. 420).

According to Pitts, the mitigating circumstances referred to the Company's giving Bird the benefit of the doubt about the safety issue he had raised to Williams (T. 382). Respondent, however, did not give Bird the benefit of the doubt about insubordination and Pitts testified that Bird "was clearly insubordinate" in disobeying his foreman's direct orders (T. 382-383).

Pitts telephoned Bird the evening of February 18 and told him he was being moved from D to B crew (T. 402). Pitts testified that he did not move Bird to B crew as a result of Bird's raising the safety issue (T. 402-403). Rather, Pitts testified, "The allegation of the shoving and stuff was the straw that broke the camel's back. ... I could not in good conscience put [Bird and Williams]) back together after that accusation was made (T. 403). Bird confirmed this (T. 142, 157). Bird told Pitts that "there was something that needed to be done about" his pushing allegation (T. 76). Pitts was asked on cross-examination, "To your knowledge, are people usually moved for allegations?" Pitts responded, "They're moved when a whole series of events take place. In any series of events there is a final event. That was the final event. The series of events involving Bird started in the years prior to the February 17 incident" (T. 404).

During his conversation with Pitts on the evening of February 18, Bird asked for a vacation. Respondent accommodated Bird's request for vacation. Bird was allowed to take vacation even though it was to be granted on a first-come, first-serve basis. Bird's response to this treatment was, "I thought it was pretty white of them" (T. 143-145).

Pitts testified that Mr. Bird was a "poor operator" of the borer and this, together with the insubordination and alleged shoving incident, led to Bird's being moved from D crew to B crew. Prior to February 17 Pitts, on a "great many occasions," talked to Bird about the way he operated the bore miner, both directly and through his foreman, Williams. These discussions were about (1) cutting off seam, (2) leaving the miner's top bar too low, and (3) leaving a step in the roof which created very dangerous situations. Bird also had a habit of standing outside the miner while he operated it. Pitts and Williams also talked to Bird about this problem on numerous occasions (T. 383-385). A few days before the February 17 incident, Pitts was walking past the panel and the other crew members saw him coming and flagged Bird so that he could jump back into the cab (T. 383).

During the six weeks prior to February 17, 1992, problems arose with the way Bird operated the bore miner. Bird was aware the panel belt the crew was using was old and worn (T. 272, 384). Supervision talked to Bird and all of the bore miner "operators, telling them that they had to slow down, run continually, but slower, to prevent problems" (T. 109, 384). Bird often ran at a rate that would overload the belt and the system would shut down (T. 272). When the system started back up, the belt would break (T. 110, 272). If the miner is operated too fast, it creates "hard wear and tear on the front end of the miner" (T. 384). Bird conceded that if the miner is operated too fast it adds a lot of weight to the belt causing it to break (T. 178). This increases maintenance costs and significantly slows down production (T. 384). During the six-week period prior to February 17, there were nine belt breakdowns, seven of which were the result of Bird's overloading the belts (T. 275, 384). Although the panel belt was old, it could be operated at reasonable capacity without breaking. Several times Pitts and Williams instructed Bird to slow down the miner (T. 275, 276). After these discussions, there would be "brief improvement for a few days But after a few days, Bird would slip back into the same problems" (T. 276, 385). While Bird holds the record for one day's production on the bore miner (T. 276) during 1991, Bird was in last place for total production for the year (T. 276) and for the year 1992, after Bird left, D crew placed first for production. Williams explained that the discrepancy between the years 1991 and 1992 for total production was because Bird's replacement operates the miner "safely at a good speed, but not overload anything" (T. 277-278). The other operators understood better than Bird how to properly use the bore miner (T. 299). Bird is the only operator that Williams supervised during his 15 years of experience who has continually refused to change the way he operated a miner to prevent breakdowns (T. 283).

Prior to the February 17 incident, Pitts' supervisor, RON HUGHES, General Chemical's mine manager (T. 344), demanded that Pitts "identify and fix operational problems with the bore miner"

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(T. 386). Specifically, Hughes insisted that Pitts correct problems associated with the way Bird was operating the bore miner. These problems were important factors in the decision to move Bird to another crew after his insubordination (T. 387).

Bird had confrontations "a number of times" with the foreman that preceded Williams, DON DARROUGH (T. 386). Pitts testified, "Darrrough continuously had problems with Shane. And we came to the point of having to move Shane or move the foreman. And I told Shane that was the case; and he almost begged to stay on the machine and said that all the problems had to do with the foreman, and if he was given the opportunity to stay on the machine, that he'd do a much better job." Pitts moved Darrrough to a different crew instead of Bird (T. 386).

Pitts indicated it was not possible to put Bird back as a bore miner operator because Bird is "a poor operator." Pitts denied that Bird was taken off the bore miner because he raised a safety concern. Pitts testified "Like I said, he was a poor operator and it was hurting us" (T. 387).

Mr. Haslam testified that under Article II of the 1990 Labor Agreement between General Chemical and the Union (Ex. R-3) General Chemical retains the authority to assign shifts and tasks to personnel (T. 340). Bird agreed (T. 159). By asking to be put back on D crew, Bird was asking for an exception to the Union Agreement (T. 341).

Haslam had in the past been responsible for management rights under the Labor Agreement. Haslam gave two examples where Respondent moved a worker because of a conflict with his foreman. Respondent also moved a male employee because of a conflict with a female employee. In these instances, the Union filed grievances against the changes (T. 350-351). Bird did not file a grievance with the Union following his shift change from D crew to B crew (T. 340).

MICHAEL BENNETT, Respondent's Production Superintendent over the continuous area, has responsibility for administering the absentee grievance procedure for the underground portion of the mine (T. 407-408). Respondent established business justifications for each shift move of Bird (T. 412). Bird was assigned to a continuous miner on D crew after he bid the move in the spring of 1990. Although Bennett did not attend the February 18 Disciplinary hearing, he was aware of Bird's insubordination and pushing allegations (T. 413). Although Respondent tries to work out disputes between hourly employees and supervision, the problems between Bird and Williams were different (T. 413-414). Bennett testified, "I think that there's a problem waiting to happen there. It's been my experience that once there is a problem like

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that, it's just a matter of time before it redevelops and worsens" (T. 429). Respondent moved Bird out of harm's way to protect both Bird and Williams (T. 429).

Bennett said that a previous bore miner operator, Mike Robertson, requested to get back on a boring machine. Robertson operated a continuous miner on B crew. The "easiest move ... causing the least disruption" was to switch Bird and Robertson (T. 414). So Bird was moved to B crew.

After the decision to move Bird to B crew, Bennett and Haslam attended a meeting requested by Union representative TONY TRUJILLO, which was called because of concerns raised by FRANCES PAGE, a black female employee. On a previous occasion, Ms. Page had accused Bird of sexual and racial harassment. When Page learned that Bird was coming back on B crew, she expressed reservations about it (T. 416). B crew consists of approximately 40 production and 30 maintenance and utility employees (T. 416). Respondent had no intention of putting Bird and Page together in the same panel (T. 417). Trujillo acknowledged that the mine was large and that Bird and Page would only see each other at the start and at the end of the shift and he believed that Bird and Page were adults and could work on the same crew without any problem (T. 417). The union agreed and assented to the move of Bird to B crew (T. 417). (Footnote 5) Bennett told Bird that Page had raised concerns about his sexual and racial harassment of Page while he had previously been on B crew. Bird was told that Respondent expected him to perform his job and to leave Page alone (T. 417-418).

Despite the Union's assurance that Bird and Page were going to act reasonably, in April 1992, Page filed a discrimination complaint alleging that Bird had again sexually and racially harassed her. These allegations were in addition to the allegations Page had made earlier in 1990. Page filed her complaint against Respondent General Chemical because Wyoming law requires General Chemical to provide Page with a workplace free of racial and sexual harassment (T. 151-152, 418-419). As a result of the allegations made by Page in her complaint, Bennett moved Bird from B to C crew. This move was made to avoid potential liability of General Chemical (T. 422-423). In addition, Bird testified that he, the Union, and Page insisted that Bird be moved from B to C crew (T. 85, 146). Bird was told that he would be fired if anything

5 William Korhonen, the union President, testified that neither in his mind nor in the mind of the Union was an agreement reached moving Bird to B crew. However, the union did not object in writing and did not grieve the move (T. 443-444).

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crew to operate the miner. Bird was told that when the A crew operator returned from medical leave, Bird would have the opportunity to choose either to return to C crew or stay with A Crew. So as a result of Bird's grievance, he moved to A crew until the operator returned from medical leave (T. 425). After the operator returned from medical leave, Bird came to the Company "and said, 'Yes, I want to go back to C crew'." As a result of Bird's own request, in November 1992, the Company moved Bird back to C crew. Bird could have chosen to stay on A crew, but he chose C crew (T. 425).

Approximately five or six weeks prior to the hearing in this matter, Bird came to management and said, "Look, I'm not running the machine all the time on C crew. I would like to be on a miner full time" (T. 426). He was advised that there was a miner open on A crew. Bird said that if he could work with a certain foreman, he would go to A crew. Respondent agreed to his request and made this change for Bird (T. 426). Bird is presently operating a continuous miner on A crew (T. 91).

BOB TAYLOR, the union safety steward, claimed he had never heard of Respondent's moving around the 24 miner operators, "unless they go in and request it" (T. 216). Taylor admitted that none of the 23 miners had disobeyed direct orders like Bird had (T. 218). None of the other 23 miner operators have a history of problems like Bird. None of the other 23 have been accused of sexual and racial harassment like Bird. None of the other 23 operators are as controversial as Bird (T. 427).

In summary, Bird was on D crew because he bid on it originally; Bird moved from D to B crew because of his unsatisfactory job performance over a period of time and because of the alleged shoving incident with Williams; Bird moved from B to C crew because he was accused of sexually and racially harassing a black female employee; Bird then moved from C to A crew because the Union filed a grievance on Bird's behalf requesting that "he be assigned a full time miner"; Bird moved from A to C crew because he requested it (T. 427-428); and finally, Bird moved from C back to A crew at his own request (T. 428). Presently, Bird operates a continuous miner at the same rate of pay he was receiving as a bore miner operator on D crew (T. 428). He has received the same rate of pay since the February 17, 1992, incident (T. 105).

DISCUSSION AND CONCLUSIONS

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the 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

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complained of was motivated in any part by that activity. Secretary on behalf of *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (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 may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-959 (D.C. Cir. 1984) (specifically approving the 'Commission's Pasula-Robinette test'); and *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986).

The record is clear that Complainant Bird initially engaged in an activity protected under the Act--complaining to his foreman Danny Williams that conditions in a room he was working in were unsafe and initially refusing to work. (Footnote 7) Complainant concedes that Williams advised him that he had previously seen the area complained of and considered it safe (T. 54) and that Williams directed him and the crew to continue the work (T. 55; Complainant's Post-Hearing Brief, p. 3).

It is concluded on the circumstances of this case that Mr. Bird's act of turning off the power to the miner when he did not know the circumstances, and then later refusing a direct order to turn the power back on was unreasonable and was not a protected activity under the Act.

It was established that Respondent took adverse action in the form of a written warning to Mr. Bird for failing to comply

7 For a work refusal to come within the protection of the Mine Act, the miner must have a good faith, reasonable belief that the work in question is hazardous. *Robinette*, supra, 3 FMSHRC 801-812. If such belief is reasonable, the mine operator has an obligation to address the danger perceived by the miner. *River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529 (September 1983); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226 (February 1984), aff'd sub nom *Brock v. Metric*, 766 F.2d 469 (11th Cir. 1985). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged condition. See *Ronny Boswell v. National Cement Company* 14 FMSHRC 253 (February 1992).

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address the perceived danger." Respondent did so here. After Bird left the room and after talking to the crew, Williams had the crew back up and rebolt the area. They could have completed this task had Bird not shut down and locked out the equipment. Safety supervisor TERRY ADCOCK, a federal and state certified miner investigator, testified that Mr. Williams' attempted resolution was an accepted safety practice for dealing with high cuts. Further, Mullins, who Bird himself admitted was "fair," concluded Williams made or was attempting to make the room safe to mine. In addition, Bird's fears, if any, were completely satisfied when the decision was made to pull back and make a ventilation turn. These actions fully demonstrate a good faith and reasonable response to Bird's concern.

Respondent thus discharged its duty to respond to Bird's reasonable belief that the work in question was hazardous. Williams never ordered Bird to go back to the room and operate the miner. Williams ordered him to perform solely unprotected activities (turn on the power and not to lock out). In the circumstances here Williams was not required to explain to Bird that the crew was making the room safe to mine. It is immaterial that Williams never communicated to Bird that the crew was rebolting when Bird turned the power off on them. As Respondent contends, Mr. Bird confuses his role in the mine with that of management's.

Bird has failed to establish discriminatory motivation by a preponderance of the evidence. There is no convincing evidence that the adverse action of Respondent was motivated in any part by Bird's limited protected activity.

Discriminatory intent may be proved by circumstantial indicia including: knowledge of protected activity; hostility towards protected activity; coincidence in time between the protected activity and the adverse actions; and disparate treatment of the miner. Respondent responded to Bird's safety concerns and even gave him the benefit of the doubt when it chose not to discipline him more severely when he was insubordinate. Bird has not established by a preponderance of the evidence any of the circumstantial indicia of discriminatory intent.

There is no persuasive evidence that Respondent displayed a specific hostility toward Bird's protected activity. Respondent established convincing evidence to the contrary. Williams and the other supervisors recognized Bird's safety concern and, contrary to Bird's assertion, did not attack or threaten him for raising such concern. Without hesitation or resistance, Williams allowed Bird to leave the room to find a safety steward. Respondent respected Bird's concern enough to pull back the miner and make a ventilation turn. Respondent removed Bird from the mine to protect him from further altercations, paid him for the full day, and bypassed Company policy to grant him vacation so he could make a reasonable transition to his new crew. Respondent

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has in the past discharged miners for less insubordination, but chose to discipline Bird with a written warning because he had raised a safety concern. He received a hearing concerning his insubordination. His shift changes did not reflect hostility to protected activity. On the contrary, each move was to protect Bird from harm or to grant his personal request for reassignment. Respondent abolished an operator position to accommodate Bird's request for a move and, as a further accommodation, assigned Bird to work with the foreman with whom Bird requested to work.

Complainant Bird presented no evidence that Respondent had been, in general, hostile to his or others' protected activities.

Although Respondent bears the burden of establishing its affirmative defense, "the ultimate burden of persuasion does not shift from" Mr. Bird. *Sammons v. Mine Services Co.*, 6 FMSHRC 1391 (June 1984).

Legitimate business justifications existed for removing Bird from the mine apart from his protected activities. Respondent established that it removed Bird to protect him, not to discipline him. Respondent moved Bird because he refused Williams' direct orders and alleged Williams pushed him. Because Bird had a volatile reputation, Respondent believed in its business judgment that Bird should be removed to protect him from any further altercations and to diffuse the situation. The situation could have escalated to something more severe. Under the restrained inquiry required by the Commission in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), these justifications for removing Bird from the mine are neither incredible nor implausible.

Likewise, legitimate business justification existed for issuing a written warning to Bird for his insubordination. A business justification for issuing Bird a written warning was for his turning off power to, and locking out, machinery and refusing his foreman's direct orders. Bird's insubordination clearly established Respondent's affirmative defense for issuing this written warning.

As the Commission stated in *Bradley v. Belva Coal Company*, 4 FMSHRC 981, 991 (June 1982): "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."

The record in this matter is convincing that Respondent was motivated for the reasons and justifications it claims. Complainant's evidence was not found to be persuasive that his discipline was due to any alleged expression of safety concerns. *Consolidation Coal Co. v. Marshall*, supra.

CONCLUSIONS

Respondent's motivation in reprimanding and reassigning Complainant was for his unprotected activities and the decision to take such adverse action was justified. This adverse action was not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo that it was established by a preponderance of the reliable, probative evidence that the adverse actions were motivated in part by protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by Complainant's unprotected activities and that it would have taken the adverse actions in any event for such. *Gravelly v. Ranger Fuel Corp.*, 6 FMSHRC 729 (1984).

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

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