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SOL (MSHA) V. SUNNY MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-365-D
ON BEHALF OF	:	
JOHNNY ROBINSON,	:	PIKE CD 93-22
Complainant	:	
v.	:	No. 12 Surface
	:	
SUNNY RIDGE MINING COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Complainant;
Herman W. Lester, Esq., Pikeville, Kentucky, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). The complaint was filed on behalf of Johnny Robinson, a former employee and drill operator of the respondent who claimed that he was discharged on or about August 16, 1993, because he made a series of health and safety complaints regarding the condition of the drill.

The respondent denied any discrimination, and it contended that Mr. Robinson was discharged for damaging the company drill that he was operating on August 16, 1993, the day that he was discharged.

A hearing was held in Pikeville, Kentucky. The petitioner filed a posthearing brief, but the respondent did not. However, I have considered its oral arguments made at the hearing in the course of my adjudication of this matter.

Issues

The critical issue in this case is whether Mr. Robinson's discharge was prompted in any way by any health or safety complaints that he may have made concerning the drill, or whether it was the result of his damaging the drill as claimed by the respondent. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. et seq.
2. Sections 105(c) (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties agreed to the following (Tr. 9-12).

1. Mr. Robinson was hired by the respondent on April 12, 1993, as a general laborer-drill operator, at a salary rate of \$10 per hour, based on a 40-hour week. He subsequently received a raise to \$11 per hour, and his overtime rate was \$16.50 per hour. His last day of employment was August 16, 1993.
2. The subject mine is a non-union operation, and Mr. Robinson is a "miner" as defined by the Act.
3. The complaint was filed by the Secretary pursuant to section 105(c)(2) of the Act, and the Commission has jurisdiction in this matter.
4. The respondent is a coal mine operator engaged in the business of mining coal in interstate commerce and is subject to the Act.

Complainant's Testimony and Evidence

Johnny M. Robinson, the complainant in this case, testified that he has a tenth grade education and has worked in the mining industry for 9 or 10 years. He worked for the respondent at the No. 12 surface coal mine on the day shift as a drill operator and rock truck driver, as needed. He was hired by Phillip Rife, the mine foreman, and Mr. Rife was his supervisor for the entire time he worked at the mine. He confirmed that his normal work hours were 7:00 a.m. to 5:00 p.m., six days a week and the mine

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operated one shift when he was there. He stated that he received no training or orientation when he was hired and no one explained any company policies or procedures to him. He had never been disciplined prior to his discharge on August 16, 1993 (Tr. 16-19).

Mr. Robinson explained his duties, and he described the drill that he usually operated on a daily basis (Tr. 21-22). He stated that one of the levers on the 35B Gardner Denver drill that he operated was hard to pull and he had to use both hands to pull it. He believed the lever operated the blower. He also stated that the dust collector and air conditioner were not working (Tr. 23). He stated that he mentioned all of these problems to Mr. Rife, to the mine operator Tommy Potter, and to Gary Minix, the mechanic (Tr. 24).

Mr. Robinson stated that he experienced "bad chest pains" and that he "got to smothering a lot" and had to go to the hospital emergency room as a result of the problems with the drill. He stated that he was not admitted but was given an E.K.G. test and x-rays were taken, and he also took a stress test. He informed Mr. Rife about his health problems and explained as follows at (Tr. 27):

A. He said there was nothing wrong with my heart. I said, "I don't think so either, Phillip. If it's anything wrong with me, it's the lever and breathing the dust that I've been breathing." He said, "There ain't nothing wrong with you."

Mr. Robinson stated that Mr. Potter told him that he was trying his best to repair the drill lever and agreed that it was hard to pull (Tr. 25). Mr. Robinson stated further that Mr. Rife responded to his complaints about the drill, and he explained as follows at (Tr. 24-25):

A. He said they was planning on getting them fixed, he said, as soon as they could get somebody up here to work on the air conditioner, the air-conditioning. And he said the dust collector and everything would be fixed, in time.

Q. Was the dust collector ever repaired?

A. Let's see. I was off for two weeks. And when I come back to work, the dust collector was working. And I run it about two or three days after that and I was fired.

Q. What about the air conditioner ?

A. Yes, it was working.

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Q. How long had that been repaired before you were fired?

A. They done all this maintenance in the two weeks I was off.

Q. How about the lever on the drill?

A. It was never repaired.

Mr. Robinson stated that on August 16, 1993, he was operating the drill on the haulage road that is located from the parking lot out to the work area and he was drilling a drainage ditch against the highwall. Mr. Rife assigned him that job and acknowledged that he would be drilling in a "tight area" because of passing coal haulage trucks. Mr. Rife told him to "be careful and take your time" but not to hold up any of the coal trucks (Tr. 28-29).

Mr. Robinson stated that four coal trucks and other vehicular traffic passed by him on the haulage road while he was operating the drill, and when the coal trucks passed he was a foot and a half away and he positioned himself as close as he could to the highwall. He would sometimes back up to a wider part of the road if he were close enough to do so before the coal trucks reached his area (Tr. 30-32).

Mr. Robinson stated that he realized that the drill blower was damaged that same evening after he parked the drill at the parking lot and began to check the oil and water to prepare the machine for work the next day. He explained that he was removing some tree limbs and leaves from the machine and noticed that the blower was bent. He then called Mr. Rife on his truck C.B. and asked him to come to the drill. He and Mr. Rife examined the damage, and Mr. Robinson stated as follows at (Tr. 36):

* * * I said, "Phillip," I said, "I'm sorry for bending the blower on the drill." I said, "I was in a tight spot." He said, "Yeah, I know you was in a pretty rough spot." I said, "Well, I tried my best, you know, to take care of the equipment."

And he said, "Well, I don't know what the owners is going to say about it. I said, "Well, like I said, I'm sorry I bent the blower on the drill." And then he asked me, he said, "Are you working tomorrow?" And I said, "Yeah." He said, "Well, I guess I can put you driving the water truck." I said, "Okay. I'll see you in the morning." That was about -- I guess, about ten minutes till five.

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Mr. Robinson stated that Mr. Rife called him at home on the evening of August 16, at 8:30 or 9:00 p.m. and told him that he no longer needed his services. Mr. Robinson stated that he responded "Ten-Four" and that "it choked me that I got fired". Mr. Robinson then called Mr. Minix, the mechanic, and informed him that he had been fired and Mr. Minix told him that he could not be fired over the phone and that "he has got to fire you to your face" (Tr. 38).

Mr. Robinson stated that he went to work the next day, August 17, and was preparing to operate a piece of equipment when Mr. Rife appeared and informed him that he had been fired the previous day. Mr. Rife then told him that "I'll tell it to your face. You're a fired man now" (Tr. 39). Mr. Robinson further explained his encounter with Mr. Rife as follows at (Tr. 39-40):

* * * Anyway, it got into us hollering, cussing. I got mad and started cussing Phillip. Phillip was saying his stuff and he told me to get my blank off the hill. I said, "Well" -- I started cussing him and I turned around and went back to get my lunch bucket and thermos.

I kept noticing Phillip out of the corner of my eye and he came running at me. And when he got about six foot away from me, I wheeled around with my right arm cocked. And I said, "You come on and hit me" and I said "I'll knock your teeth out." Like he was running to hit me. And he said, "Well, get your... blank" lunch bucket and get the . . . blank. . .off the job."

I said, "Okay." I said, "I'm going to." He said, "Get in the truck." He said, "Get in the truck. I'll take you around the hill." I said, "I don't want in the truck. I don't want a ride. I'll walk out of here." And I did.

Mr. Robinson stated that he also spoke with "one of the Darnell brothers" who stopped along the road while he (Robinson) was walking to the parking area after Mr. Rife fired him. Mr. Robinson stated that he told Mr. Darnell that Mr. Rife fired him for bending the drill blower the previous day (Tr. 41).

Mr. Robinson denied that he was ever under the influence of alcohol while working at the mine (Tr. 43). He stated that two other employees damaged equipment at the mine but were not fired and he identified them as Chuck Griffith and Eddie Taylor (Tr. 43-44).

Mr. Robinson stated that after he was fired by the respondent he looked for other work and found a job at Branham and Baker Mining Company at \$12.50 an hour, and worked there from

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October 1993, to March 31, 1994. He has continued to seek further employment with other mine operators since that time (Tr. 45-46).

On cross-examination, Mr. Robinson confirmed that he received a pay raise during his employment with the respondent and that he was off for two weeks because of lack of work before he was fired (Tr. 49). He confirmed that both Mr. Rife and Mr. Potter cautioned him to be careful for his personal safety and not to damage the machine while he was drilling on August 16, and they also instructed him not to hold up the coal trucks and to keep out of their way. He denied that Mr. Rife and Mr. Potter pointed out several wide places in the roadway where he could take the drill when the trucks passed (Tr. 51-52).

Mr. Robinson could not state how many times he may have struck the highwall when he was drilling on August 16, and he stated that "if I hit it, I never felt it. I didn't acknowledge it" (Tr. 54). He confirmed that if he did hit the highwall, the blower part of the machine would have struck it. He acknowledged that the blower was bent but did not remember when it happened (Tr. 55).

Mr. Robinson confirmed that he was warned to keep the drill out of the highwall trees but indicated that this was difficult because the trees stick out over the highwall. He confirmed that the drill was into the trees several times on the day in question and that he knocked down some small limbs and leaves, and on one occasion had to remove "a pretty good size branch" from the drill (Tr. 56-57). Mr. Robinson confirmed that Mr. Manix cautioned him about getting into the trees with the drill (Tr. 58). Mr. Robinson explained his conversation with Mr. Rife when they examined the drill as follows at (Tr. 59-60):

A. I told him, I said, "I guess I've run into the highwall, Philip." That is what I said to him.

JUDGE KOUTRAS: What other explanation would there be? Do you know?

THE WITNESS: Pardon?

JUDGE KOUTRAS: What other explanation is there? I mean, the blower wouldn't have gotten into the trees, would it? It's low.

THE WITNESS: No, it wouldn't have got in the trees. I would have had to hit the highwall. I had to hit the highwall. I'm not saying I didn't hit it.

* * * * *

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Q. You didn't tell Philip you were sorry about damaging the machine, did you, that day?

A. Yes, I did.

Q. You told him, to quote things I've seen throughout this, "Accidents happen."

A. No sir, I did not. I told him I was sorry I bent that blower.

Q. You deny making that statement.

A. I do deny it.

Mr. Robinson was of the opinion that the drill was operable without the blower working the day after it was damaged. Even though the purpose of the blower is to keep the dust away from the drill operator, he would have operated the drill in that condition and stated that "I had done it before" (Tr. 62-63).

Mr. Robinson denied that he had been drinking the evening he was fired, or the next morning, and he denied returning to work after Mr. Rife phoned him and fired him to challenge Mr. Rife's authority or to "get into a cussing match" with him (Tr. 64-65). When asked why he was fired, Mr. Robinson responded as follows at (Tr. 65-66):

Q. What was the reason you were fired, John?

A. I would say for denting the blower on the drill. That is what I was told anyway.

Q. Is that your understanding, too?

A. That is what I was told.

Mr. Robinson stated that Mr. Minix was present during his encounter with Mr. Rife. He confirmed that after inviting Mr. Rife to hit him and telling Mr. Rife that he would knock his teeth out, Mr. Rife walked away from him (Tr. 66-67).

Mr. Robinson identified a copy of an employment application that he signed when he applied for a job with the Branham and Baker Coal Company on September 20, 1993. He admitted that he stated on the application that he was a high school graduate, which was not true, and he explained that "there is not too many people hire you anymore without having a high school education" (Tr. 69). He also admitted that the November 10, 1992, date shown on the application as the date he was hired by the respondent is not correct, and that the statement that he was still working for the respondent on September 20, 1993, was also

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not true. He also admitted that he did not disclose that he was fired by the respondent and simply indicated that he left because he only worked three or four days a week, and he explained that "who is going to hire me if I told them another company fired me?" (Tr. 70). Mr. Robinson admitted that he certified that the answers given by him on the application form were true and correct and knew that the information he gave with respect to his employment with the respondent was not correct (Tr. 71).

Mr. Robinson stated that Branham and Baker Coal Company hired him in October 1993, and terminated him in March 1994 (Tr. 71). He explained that he was fired by the company president and was told that he was not performing his duties as a drill operator (Tr. 73). He confirmed that he filed a discrimination complaint with MSHA against Branham and Baker and suggested that he was fired because of his discrimination complaint against the respondent (Tr. 77, 82). MSHA's counsel confirmed that Mr. Robinson's complaint against Branham and Baker is under investigation (Tr. 78).

Mr. Robinson believed that the drill lever that was hard to pull operated the blower, but he was not sure, and he confirmed that all of the other levers were operational. He also confirmed that Mr. Potter worked on the lever after he complained about it, and that a mechanic also worked on it (Tr. 84-85).

Mr. Robinson stated that other employees also complained about the air conditioning when it stopped operating. He confirmed that Mr. Rife told him that he was trying to get someone to repair the air conditioning, that there was no one on the job who could make the repairs, and that a certified mechanic was required. Mr. Robinson also confirmed that Mr. Rife had a mechanic from another mine site repair the air conditioning as it would go out and that it was working on the day he was fired (Tr. 86-87). He stated that he never made any safety or health complaints to any MSHA or state mine inspectors (Tr. 88).

Mr. Robinson reviewed a copy of his prior deposition of May 10, 1994, in this case, and he confirmed that he testified that his employment problems with the respondent all related to the damage to the drill and had nothing to do with any complaints about safety or health violations. Mr. Robinson confirmed that Mr. Rife informed him that he was fired for damaging the drill and that he (Robinson) understood that this was the reason for his discharge and that it had nothing to do with his health or safety complaints. Mr. Robinson confirmed that he reviewed his deposition and did not change any of his testimony regarding the reasons for his discharge when he signed the deposition after receiving it from the court reporter (Tr. 90-94).

In response to further questions, Mr. Robinson could not explain why he misstated the date of his hiring by the respondent

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on the application he filed with Branham and Baker. He confirmed that he stated that he was still employed by the respondent in order to get the Branham and Baker job and that he needed to work, and he did not disclose his discharge because he believed he would not have been hired. He also acknowledged that he stated he was a high school graduate because it would be easier to get the job (Tr. 97-98).

In further explanation of his prior deposition testimony, Mr. Robinson responded as follows to questions by MSHA's counsel (Tr. 98-99):

Q. Now, I want to talk to you about your deposition, on page forty-seven. Mr. Lester already read into the record his questions and your response to his questions on page forty-seven. I would like to read into the record and show you your response to my questions on page fifty-three, beginning with question one.

Question One -- and this is direct examination by me, page fifty-three. "I just want to clarify a few things now. You were told that you were fired from Sunny Ridge for damaging the drill, correct?."

A. Yes.

Q. Answer, "Yes, I was." Is that your answer?

A. Yes.

Q. Question two, "Do you feel you were fired because you made all those complaints?"

Answer, "It's a possibility. I'm not saying for sure, because I don't now for sure. "Was that your answer?"

A. Yes, it was.

Q. Can you explain that?

A. I was told I was fired for damaging the drill. They never said nothing to me about my complaints or firing me over my complaints or none of the above. So I really didn't know -- I give the most honest answer I could. I didn't know if that was the reason why I got fired.

Q. What do you believe?

A. I believe it was due to all of it; the blower, the dust, the complaints and me damaging the drill. All of it wrapped up in one.

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Everett Potter, employed by the Corbin Coal Company as a night shift supervisor, testified that he was employed by the respondent as an equipment operator for four months during May through August of 1993. He worked the same shift with Mr. Robinson and Philip Rife was the mine foreman and their supervisor. He stated that Mr. Robinson worked regularly and he heard him complain to Mr. Rife about the hot, dry, and dusty conditions because of the lack of air conditioning for the drill that he operated. Mr. Potter characterized Mr. Robinson's complaints as complaints about "normal breakdowns and normal stuff", and he could not recall Mr. Robinson complaining about the drill lever.

Mr. Potter considered Mr. Robinson to be a "fair drill man" and he never observed him drinking alcohol while on the job. Mr. Potter confirmed that he was working the day Mr. Robinson was fired and that Mr. Rife told him about it the next day. Mr. Potter did not believe that Mr. Robinson complained about the lack of air conditioning more than any other employee.

Mr. Potter stated that he quit his job with the respondent for a better job offer and more benefits and money. He stated that he "ruined" a front wheel on an end-loader that he was operating while employed by the respondent and he was not fired. He stated that one month before he quit his job the equipment air conditioning was in working order (Tr. 112-119).

On cross-examination, Mr. Potter confirmed that when he worked at the mine there was no equipment air conditioning, that it was hot, and everyone complained about this. He stated that he observed Mr. Robinson drinking alcohol on mine property "once or twice a week" at the mine parts trailer area after his work shift was over. Mr. Potter confirmed that he was not at the mine when Mr. Robinson was fired, or the next day. He stated that he would "probably" hire Mr. Robinson. He also indicated that the question of whether to fire an employee for damaging equipment would be a judgment call by the foreman or supervisor. He confirmed that the respondent performed maintenance on its equipment.

Mr. Potter stated that the damage to the tire that he ruined was the result of an accident, and that it was not intentional or the result of gross negligence on his part. He confirmed that when he worked at the mine the respondent had someone come from another job to service the equipment air conditioners (Tr. 119-127).

Ruben Hylton, employed by the Sidewinder Mining Company since late August of 1993, as a mechanic, testified that he was employed by the respondent at the No. 12 mine as a greaser maintaining the equipment for approximately one-and-one half to two years. He worked on the same shift with Mr. Robinson and

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confirmed that Mr. Rife was his supervisor and his father-in-law. Mr. Hylton stated that he performed maintenance on the drill operated by Mr. Robinson and that one of the levers was "stiff". He confirmed that he heard Mr. Robinson state that the lever was stiff, but he could not recall who he told about this.

Mr. Hylton knew of no other employee who was ever fired by the respondent for damaging equipment. He stated that he was told that "if you tear up equipment, that's it" and he knew that "if I messed up", he would be subject to discharge (Tr. 128-135).

On cross-examination, Mr. Hylton stated that he left his job with the respondent voluntarily to work with his father. He stated that he has observed Mr. Robinson drinking alcohol at the mine after his work shift. He stated that during the work shift on August 16, 1993, the day Mr. Robinson was fired, he was working with Mr. Minix, the equipment mechanic, and that Mr. Minix warned Mr. Robinson about operating the drill "in the trees" at the highwall and Mr. Hylton observed that a large tree branch had fallen on the drill. When Mr. Minix brought this to Mr. Robinson's attention, Mr. Robinson responded "was I in those trees?" Mr. Hylton stated that Mr. Robinson bent the drill dust blower on the highwall and that he observed several equipment scrapes against the highwall.

In response to further questions, Mr. Hylton stated that he observed Mr. Robinson drinking after his work shift at the parts trailer area where employees parked their vehicles and that on one occasion he smelled alcohol on Mr. Robinson's breath (Tr. 135-148).

Darwin Bailey, testified that he was employed by the respondent as a rock truck driver and that Mr. Rife was his supervisor. He worked on the same shift with Mr. Robinson and believed that he was "a pretty good drill men." He stated that on one occasion he heard Mr. Robinson complain about a lever on the drill that he was operating and that it was repaired. He confirmed that Mr. Robinson complained about the lack of air conditioning on his drill and that Mr. Rife responded by stating that the repairman "was on his way". Mr. Bailey stated that he never heard Mr. Robinson complain about dust and he did not know if Mr. Robinson complained more than any other employee. Mr. Bailey believed that the air conditioning was repaired approximately a week after Mr. Robinson was fired.

Mr. Bailey stated that he was working at the mine on the day Mr. Robinson was fired when "he came down and started the trouble". He stated that Mr. Robinson was highly upset and told him that Mr. Rife had fired him. He stated that Mr. Robinson cursed Mr. Rife, and told him he would "see him in court".

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Mr. Bailey could not recall any company discharge policy, or that he was ever informed about any policy stating that an employee would be discharged for damaging equipment. Mr. Bailey stated that dozer operator "Chuck" Griffith had an accident when a truck pulled in front of his dozer, and that he was not fired (Tr. 148-163).

On cross-examination, Mr. Bailey reiterated that he only heard Mr. Robinson complain one time about his drill lever and that it was repaired. He also confirmed that he never heard Mr. Robinson complain about dust, but that he did complain about the lack of air conditioning. He confirmed that everyone had air conditioning after it was repaired.

Mr. Bailey further confirmed that Mr. Robinson was screaming and cursing at Mr. Rife and wanted to fight him after Mr. Rife informed him that he had been fired. Mr. Bailey did not know whether he smelled any alcohol on Mr. Robinson at that time and he characterized Mr. Rife as a "good, fine, boss". Mr. Bailey believed that Mr. Griffith was not fired because his equipment damage was an "accident" (Tr. 163-172).

Charles I. Griffith, employed by Sidney Harwoods as a dozer operator, testified that he was employed by the respondent from approximately April, 1992, to August, 1993, at the No. 12 mine as a dozer and loader operator. He stated that Mr. Rife was the mine foreman and his supervisor, and that Mr. Rife had hired him. Mr. Griffith stated that he worked the same shift with Mr. Robinson and that Mr. Robinson had a "regular attendance" record, and he considered Mr. Robinson to be a "fair and competent" drill operator.

Mr. Griffith stated that Mr. Robinson expressed his concerns about the lack of air conditioning on his drill and "just different things". Mr. Griffith was also aware that Mr. Robinson had complained one time about a drill lever but he could not recall any further details. With regard to any dust problems, Mr. Griffith stated that Mr. Robinson usually complained to Mr. Rife or to "whoever" over the C.B. radio on his equipment. Mr. Griffith "guessed" that Mr. Robinson complained more than the other employees. Mr. Griffith never observed Mr. Robinson drinking on the job, but they would have a few beers off mine property after work.

Mr. Griffith stated that the air conditioning on the equipment that he operated "worked sometimes, and sometimes it didn't". He further stated that none of the equipment air conditioning was operational all of the time but that Mr. Rife tried to get it repaired and that a maintenance crew came to the mine during "the first of July" and made repairs. Mr. Griffith also stated that some of the equipment had open cabs that were not equipped for air conditioning. Mr. Griffith stated that when

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"something went wrong with the equipment", employees would complain and that "it was usually fixed".

Mr. Griffith stated that he observed Mr. Robinson operating the drill the day he was fired and learned the next day that Mr. Rife had fired him. He rode out of the work site with Mr. Rife and saw Mr. Robinson at the parking lot. Mr. Griffith stated that Mr. Rife showed him the damaged drill and told him that Mr. Robinson had "torn it up". Mr. Griffith stated that he observed indentations in the highwall where "the drill got into it" and observed that the drill blower "was bent pretty bad". Mr. Griffith stated that he was shown the company policy about damaging company equipment when he was first hired.

Mr. Griffith stated that a few months before Mr. Robinson was fired he (Griffith) had an accident with his endloader while loading coal. He explained that he struck the hood of a truck that he could not see with his dozer blade raised, but was not fired. He also stated that he knocked an oil tank off when he was close to the highwall. He was also aware that drill operator Eddie Taylor had a hydraulic motor torn off the drill he was operating and was not disciplined at that time.

Mr. Griffith stated that when he had his accident with the truck Mr. Rife cautioned him to be more careful and admonished him for being careless. Mr. Griffith stated that after Mr. Robinson was fired in August, he (Griffith) was pushing shot and spoil with his dozer and knocked a hole in the radiator. He reported this to Mr. Rife and showed him the damage. Mr. Rife then left to summon a mechanic and Mr. Rife discussed the matter further with Mr. Griffith. Mr. Rife informed him that "he had no other choice", and Mr. Griffith stated that "I picked up my bucket and left the mine" (Tr. 172-187).

On cross-examination, Mr. Griffith stated that it "was pretty well known", that on any strip mining job if an employee continuously damaged his equipment his job may be in jeopardy. However, he was not aware of anything in writing. Mr. Griffith stated that he left his job with the respondent after his third incident of damaging equipment (the damaged radiator), and he confirmed that Mr. Rife told him that he took "too many chances" with his equipment. Mr. Griffith admitted that he took chances that he should not have taken, and has since learned to be more cautious about not damaging equipment and "not to rush so much". He stated that the damaged radiator resulted in production down time and it "cost thousands" to repair the damage.

Mr. Griffith stated that at the time Mr. Robinson damaged the drill blower he observed "five or six gouges" in the blower and he was of the opinion that the damage could have been prevented if Mr. Robinson had exercised more reasonable care. He confirmed that he never heard mine management state that they

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would get rid of Mr. Robinson for any safety complaints. Mr. Griffith stated that he has operated equipment with no air conditioning. He also stated that he was sure that Mr. Robinson was fired for damaging the drill (Tr. 187-225).

Respondent's Testimony and Evidence

Gary Minix, mechanic, No. 12 Mine, testified that he was familiar with the Gardner-Denver drill that was operated by Mr. Robinson. He stated that he repaired a number of broken chains and hoses that occurred when Mr. Robinson was operating the machine, but that after he left there was a decrease in the repairs that he had to make to the drill. Mr. Minix stated that on one occasion Mr. Robinson admitted to him that he had intentionally damaged a hose because he was mad at Mr. Rife, but later apologized for doing this.

Mr. Minix stated that the drill lever that controlled the air used to blow out the material from the drilled holes was "harder than usual" to operate and that he obtained new parts to repair the lever. However, after adjusting the lever tension, the repairs were not needed and the lever is still operative and in use. With regard to the equipment air conditioning, Mr. Minix stated that repairs are made by licensed mechanics when they can get to it and he explained that in view of the presence of freon in the air conditioning units licensed contractor mechanics must make the repairs.

Mr. Minix stated that on August 16, 1993, the day Mr. Robinson was fired, he observed him operating his drill at approximately 8:30 or 9:30 A.M., and found that a tree limb had fallen into the drill mast. Mr. Minix stated that he removed the limb and informed Mr. Robinson about several other trees "around the hill". Mr. Minix returned an hour or so later and observed that the drill dust collector was bent, and Mr. Robinson informed him that he couldn't help it. Mr. Minix stated that he warned Mr. Robinson again to stay out of the trees and he heard the sound of another tree that had fallen near the drill but it did not land on the machine. Mr. Minix then left the area.

Mr. Minix stated that he later observed Mr. Rife and Mr. Robinson discussing the damaged drill dust collector and heard Mr. Robinson comment "shit happens" as he proceeded to retrieve a beer from a cooler and leave the area. Mr. Minix stated that Mr. Robinson called him later that evening and informed him that Mr. Rife had fired him. Mr. Minix stated that he told Mr. Robinson that he could not be fired by telephone, and he believed that Mr. Robinson was fired because of attitude problems and damaging the drill. He stated that he and Mr. Robinson were friends and that he often gave Mr. Robinson rides to work.

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Mr. Minix stated that he was present when Mr. Robinson came to the mine the next morning after he was fired and that he smelled alcohol on Mr. Robinson's breath. Mr. Minix stated that he observed and heard Mr. Robinson cursing Mr. Rife in a loud voice, calling him "bad names", and attempting to get Mr. Rife to fight him. Mr. Minix estimated that it would take several hours, and cost several thousand dollars to replace the damaged dust collector. He stated that the drill was repaired, but a new dust collector was not installed (Tr. 225-252).

On cross-examination, Mr. Minix stated that the damaged drill was out of operation for approximately five to nine hours. He believed that the damage could have been avoided if Mr. Robinson had exercised reasonable care (Tr. 252-257).

Philip Rife, Mine Foreman, No. 12 mine, testified that he has served as foreman for two years and that the day shift has 16 employees. He stated that he hired Mr. Robinson as a drill operator on April 12, 1993, and was his supervisor until August 16, 1993. He had no complaints about Mr. Robinson's work and stated that he came to work every day and did an acceptable and suitable job.

Mr. Rife stated that two or three weeks before he fired Mr. Robinson there was a change in his attitude. Mr. Rife stated that he received a telephone call from someone from the child welfare office in Prestonsburg inquiring about Mr. Robinson's wages. Mr. Robinson informed him that his ex-wife was after him for child support and had him jailed. Mr. Rife stated that Mr. Robinson told him he would force him to fire him because he did not want to pay his ex-wife any child support.

Mr. Rife confirmed that Mr. Robinson complained to him about the lack of air conditioning on his drill, and that others had also complained. Mr. Rife explained that it was difficult to maintain the air conditioning because certified mechanics had to perform the work because of the presence of freon. He stated that the drills had recently been inspected by MSHA and OSM and were in good order. He also confirmed that Mr. Robinson had complained about a drill lever used to blow dust out of the drilled holes, but that the mechanic had sprayed it with WD-40, and this took care of the problem and no further complaints were made.

Mr. Rife stated that he fired Mr. Robinson for damaging the drill on August 16, 1993. Mr. Rife stated that he personally observed and counted 21 places and paint marks on the highwall where Mr. Robinson had struck it with the drill while he was operating it that day. The damage rendered the drill inoperable, and when he discussed the matter with Mr. Robinson, he (Robinson) commented that "shit happens" and never indicated that he was sorry or that it was an accident. Mr. Robinson did not inform

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him that he had struck any trees with the drill, but Mr. Minix informed him that Mr. Robinson had in fact "been in the trees" with the drill.

Mr. Rife confirmed that other employees had damaged mine equipment but were not fired. He explained that the incident involving Mr. Griffith was an accident and that Mr. Griffith apologized. He stated that Mr. Robinson had a bad attitude and he believed that he intentionally damaged the drill for not doing what was asked of him to stay out of the trees. Since the drill hit the highwall 21 times, Mr. Rife concluded that Mr. Robinson knew what he was doing. Mr. Rife stated that pursuant to company policy, intentionally damaging equipment is a discharge offense.

Mr. Rife believed that he got along well with all of his employees and he denied that he harbored any ill will against Mr. Robinson or that the "had it in" for him for complaining about the drill air conditioning. Mr. Rife stated that he would not have fired Mr. Robinson, if he did not have "an attitude problem" and had not damaged the drill (Tr. 258-278).

On cross-examination, Mr. Rife further explained his deposition testimony concerning Mr. Robinson's child support problems (Tr. 278-280). He confirmed that he previously stated that Mr. Griffith was not fired and quit his job on his own accord and that he told MSHA's special investigator Hamilton that Mr. Griffith was fired for damaging equipment after he had been warned two or three times, and that he had been fired a few days after Mr. Robinson. He also confirmed that he told Mr. Hamilton that Mr. Robinson had complained two or three times about the drill blower lever being hard to pull and that he gave him some WD-40 oil to free the lever and that it was harder than normal to operate (Tr. 282-283).

Mr. Rife stated that a former employee, Fred Bailey, quit his job at the mine and told him that he was leaving because of the dust and heat and because the air conditioning not working. He confirmed that Mr. Bailey had complained to him about these matters, but denied that he quit because his complaints were not taken care of (Tr. 285-286).

Mr. Rife testified about his encounter with Mr. Robinson on the morning after he fired him by telephone as follows at (Tr. 286-288):

A. I had come in the job and there he was with Gary Minix, the mechanic. I said "Johnny, what are you doing out here?" He said, "If you have anything to say to me, you say it in front of tater," which is Gary Minix.

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I said, "Well, Okay, You're fired. Come on, I'll take you on out of here." And when I said that, he went to cussing and calling me every kind of a name there was.

Q. Did you cuss him back?

A. No, sir. No, I didn't cuss him back.

Q. Did you get close to him or he get close to you?

A. He run right in my nose. He got right in my face.

Q. Do you recognize the smell or alcohol on someone's breath?

A. Yes.

Q. Did you recognize it on his?

A. Yes.

Q. All right. What happened after that?

A. Well, I went on back out to the other end to pick up the men and bring them out. And I tried to get him to come on and get in the truck and let me bring him out. He walked from one end of the job, out to the other parking lot.

And when he got out to the other parking lot, he went to cussing and kicking and swooping. When he pulled out, he went up the hill and across the county road, toward the Virginia line, cussing me, spinning, throwing gravels.

Mr. Rife denied that he informed anyone at Branham and Baker Coal Company that he had fired Mr. Robinson, or that he tried to get Mr. Robinson fired from his job at that company (Tr. 288-289).

Mr. Robinson was called in rebuttal and he denied that he ever told Mr. Rife that he would fire him so that he would not have to pay child support (Tr. 295). He produced paycheck stubs from his employment with Branham & Baker, and confirmed that part of his pay was garnished in order to make child support payments (Tr. 296-297).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he

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engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3 Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, U.S. , 67 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the 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.

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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.

Protected Activity

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

Mr. Robinson's Communication of his Safety Complaint to Mine Management

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate complaints to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (4th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

Although Mr. Robinson's protected activity concerned safety complaints rather than work refusals, I conclude and find that the same principles apply and that the Secretary has the burden of establishing that Mr. Robinson made and communicated his safety complaints to mine management and that management retaliated against him by discharging him for complaining. In short, in order to prevail in this case, the Secretary must establish a nexus between Mr. Robinson's complaints and any adverse discriminatory actions (the discharge) which followed. See: Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Mining Company, Inc.,

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9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Company, 11 FMSHRC 1948 (October 1989).

Mr. Robinson testified about certain "problems" that he experienced with the drill, and he identified these as a lever which was difficult to pull, and a dust collector and air conditioning unit that were inoperative (Tr. 23). The dust collector was the same one that he subsequently damaged (Tr. 85). He stated that he mentioned these matters to the mine operator Tommy Potter, mine foreman Phillip Rife, his immediate supervisor, and mine mechanic Gary Minix (Tr. 24). Mr. Potter was not called as a witness in this case.

In addition to his complaints about the drill, Mr. Robinson also mentioned a visit to a hospital emergency room after he "got to smothering a lot" and experienced "bad chest pains". Mr. Robinson attributed this visit to the problems that he experienced with the drill, and he testified that he informed Mr. Rife about these health problems (Tr. 27).

Former Shift Supervisor Everett Potter testified that he heard Mr. Robinson complain to Mr. Rife about his drill and the lack of air conditioning (Tr. 116). Former maintenance greaser Ruben Hylton testified that he heard Mr. Robinson complain about the "stiff" drill lever, but he could not recall who he complained to (Tr. 133). Rock truck driver Darwin Bailey testified that Mr. Robinson complained to Mr. Rife and Mr. Minix about the drill lever and the air conditioning, but never heard him complain about any dust (Tr. 152-153). Former dozer operator Charles Griffith testified that Mr. Robinson complained one time about the lever and that he complained to Mr. Rife about the dust over his C.B. radio (Tr. 176-177). Mr. Rife acknowledged that Mr. Robinson complained to him about the drill lever and lack of air conditioning (Tr. 264-265; 268).

Based on the foregoing testimony, I conclude and find that Mr. Robinson made safety complaints concerning his drill and timely communicated them to mine foreman Rife. I further conclude and find that Mr. Robinson's safety communications met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982), Secretary on behalf of John Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (March 1984); and Gilbert v. Sandy Fork Mining Company, supra.

The Respondent's Responses to Mr. Robinson's Complaints

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated this to mine management, management has a duty and obligation to address the

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perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

There is no evidence in this case that Mr. Robinson ever refused to operate the drill because of any perceived safety hazards. Indeed, he acknowledged that he often operated the drill when the dust collector was not functioning properly.

Mr. Robinson acknowledged that Mr. Rife responded to his drill complaints and informed him that he would summon someone to the mine to make the repairs. Mr. Robinson confirmed that during the two-weeks prior to his discharge when he was off for a lack of work, the drill dust collector and the air conditioning were repaired and were functioning properly when he returned to work (Tr. 24-25). Mr. Robinson further testified that Mr. Rife explained to him that a certified mechanic was required to make the air conditioning repairs and that Mr. Rife would bring a mechanic from another mine site to repair the air conditioning whenever it malfunctioned and that the air conditioning was working on the day he was fired (Tr. 86-88).

Former equipment operator Charles Griffith, called as a witness for Mr. Robinson, testified that Mr. Rife attempted to have the air conditioning repaired when it malfunctioned, or when the employees complained about it. He characterized the complaints as "gripes", and he stated that Mr. Rife usually kept the equipment in repair and that he had a maintenance crew make repairs during July, 1993, (Tr. 176, 194-195).

Former equipment operator Everett Potter, who was also called as a witness for Mr. Robinson, characterized the drill complaints as complaints resulting from "normal equipment wear and breakdowns" (Tr. 115-116, 119). He confirmed that his end-loader air conditioning was operational for a month or a month and-a-half when he left the mine in September, 1993 (Tr. 118). He also confirmed that someone would come to the mine to check and service the equipment air conditioning (Tr. 125-126).

With respect to the drill lever that Mr. Robinson claimed was difficult to pull, he confirmed that Mr. Potter worked on the lever after he complained about it, and that a mechanic also worked on it (Tr. 84-85). Rock truck driver Darwin Bailey, also a witness for Mr. Robinson, testified that the lever was repaired by the mechanic, Gary Minix, the day after Mr. Robinson complained about it (Tr. 151-152). Although Mr. Bailey "believed" that the air conditioning was repaired approximately a week after Mr. Robinson was discharged, I conclude that he was

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mistaken. Mr. Robinson himself confirmed that the air conditioning was repaired while he was off before his discharge and that it was operating properly when he returned to work.

Mine Mechanic Minix acknowledged that the drill lever in question was "harder than usual" to operate. He testified that new parts were obtained to repair the lever, but that the new parts were not used because the lever was restored to normal after the tension was adjusted and that it is still functioning properly with no further complaints from anyone (Tr. 231-232). He also confirmed that the air conditioning was repaired when qualified technicians licensed to make the repairs were available to do the work (Tr. 233-235).

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the respondent took reasonable and appropriate measures to correct the drill conditions that Mr. Robinson complained about. Indeed, Mr. Robinson himself acknowledged that repairs were made to the dust collector and air conditioning during the two-week period before he was discharged and that this equipment was operating properly the day he was fired. With respect to the drill lever, I conclude and find that it too was repaired in response to Mr. Robinson's complaint. Further, after viewing all of the witnesses in the course of the trial, I am persuaded by the credible testimony of the former employees of the respondent who testified that foreman Rife reacted affirmatively in making equipment repairs, or arranging for the repairs to be made, when breakdowns occurred, or when complaints were made, particularly during the hot and dry summer period when the surface working conditions may have been less than ideal.

With respect to Mr. Robinson's assertions and suggestions that the problems associated with the drill he was operating were responsible for his chest pains which prompted his visit to a hospital emergency room, I find absolutely no credible or probative evidence to support these conclusions and they are rejected as less than credible and totally lacking any medical support. Indeed, when questioned from the bench concerning any evidentiary support for Mr. Robinson's conclusions that his fears of a "heart attack", which according to his unsworn statement of September 9, 1993, to the MSHA special investigation (Exhibit C-6), occurred on a Sunday, July 24, 1993, the Secretary's counsel asserted that she had certain hospital records verifying that Mr. Robinson visited the hospital, but could not read them or "understand a word it says" (Tr. 105).

Alleged Disparate Treatment

Mr. Robinson asserted that two other employees damaged equipment but were not discharged, and he identified them as "Chuck" Griffith and Eddie Taylor (Tr. 43-44). Mr. Griffith

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testified in this case, but Mr. Taylor was not called. However, Everett Potter, a former employee not mentioned by Mr. Robinson, but called as one of his witnesses, testified that he "ruined" a front wheel on an end-loader while employed by the respondent, and he was not fired. Mr. Potter explained that the damage to the tire was the result of an accident, rather than gross negligence, the lack of care, or an intentional act on his part. As a foreman himself, he believed that judgments and distinctions must be made with respect to an employee accidentally damaging a piece of equipment, and an intentional or negligent act resulting from a lack of care (Tr. 124-125).

Mr. Griffith confirmed that he dislodged an oil tank from an end-loader when he got too close to the highwall, and that he also damaged the hood of a truck when his vision was obscured by the raised loader blade. He explained that this was an accident and that Mr. Rife admonished and cautioned him to be more careful, but did not fire him.

Mr. Griffith further confirmed that he subsequently damaged the radiator of a dozer "three days prior to his dismissal", and that after viewing the damage, Mr. Rife informed him that he had "no other choice," and Mr. Griffith interpreted this as a discharge and he left the mine and sought employment elsewhere (Tr. 186-187).

Mr. Rife acknowledged that other employees had damaged equipment but were not fired. However, he explained that "accidents happen", but "if you tear a piece of equipment up intentionally, you're discharged" (Tr. 273). Mr. Rife confirmed that he told the MSHA special investigator on October 7, 1993, that Mr. Griffith was fired after he had been warned three times about damaging equipment (Tr. 282; Exhibit C-4). I take note of the fact that in his pre-trial deposition of May 10, 1994, Mr. Rife stated that Mr. Griffith was not fired and quit and left on his own accord (Exhibit C-3; pg. 30). Although these statements are inconsistent, I still find Mr. Rife to be a credible witness.

Although Mr. Rife's earlier statement that Mr. Griffith was fired is in conflict with his later deposition statement that Mr. Griffith left on his own accord, it is not in conflict with Mr. Griffith's testimony explaining the incident. Mr. Griffith confirmed that while Mr. Rife did not make a direct statement that he was fired for damaging equipment after receiving prior warnings, Mr. Griffith understood that this was the case when Mr. Rife told that "he had no other choice." Mr. Griffith confirmed that he "picked up his bucket and left the mine" and explained that "I wanted to just get up and say, well, I'll quit real fast, so I wouldn't have a discharge on my employment record. But I jsut saved him the agony of telling me, I guess, exactly, your fired" (Tr. 208).

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Mr. Rife acknowledged that he previously told the MSHA special investigator that there was no written or verbal company policy concerning the discharge of employees for damaging equipment but that mine operators Tommy and Mitch Potter instructed him not to let anyone damage equipment (Tr. 281-282). At his deposition, Mr. Rife confirmed that there was no written policy, but stated that "if you tear it up your fired" and that this was a verbal policy that he informed Mr. Robinson of on more than one occasion (Exhibit C-3; pgs. 31-32).

As noted earlier, former equipment operator Potter, who is now employed as a foreman for another mine operator, believed that discharging someone for damaging equipment is a judgment call, and he distinguished equipment damage resulting from an accident, and damage resulting from an intentional act or gross negligence.

Former mechanic Hylton testified that when he worked for the respondent he was told that "if you tear up equipment, that's it", and he knew that he was subject to discharge if he "messed up". He believed that if he or anyone else deliberately or carelessly damaged a piece of equipment, he would expect to be fired or would have left expecting to be fired (Tr. 134-136).

Rock truck driver Bailey, who could not recall any company policy regarding discharges for damaging equipment, and who was called as a witness for Mr. Robinson, was of the opinion that his presence at the hearing was "a waste of time", and he explained as follows at (Tr. 157-158):

THE WITNESS: The man messed up, tore the drill up, okay? It's Mr. Potter's job. It's his money that has to pay for fixing it, okay? He has got the right to decide what needs to be what. If he don't want the man, fire him because he tore up equipment it's his right, or Philip Rife's right to fire the man, you see?

Mr. Griffith, who acknowledged that he knew "that was it" after his third incident of damaging equipment, and who confirmed that no one spoke to him about any company discharge policy when he was first hired, nonetheless testified that while he was not specifically told about being fired for damaging company equipment, he was aware that this was the case (Tr. 183, 188). He stated that "that is something that, if you work on a strip job, you pretty well know -- or any job, for that matter. If you continually tear up equipment, you know, you're losing the company money" (Tr. 188-189). He also believed that anyone on any job would know that he was jeopardizing his employment for damaging equipment (Tr. 191).

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There is no evidence to support any conclusion that Mr. Rife, or mine management, harbored any ill-will towards Mr. Robinson or that anyone connected with management ever harassed, intimidated, threatened, or otherwise displayed any displeasure with Mr. Robinson because of any safety or health complaints. There is also no evidence that Mr. Robinson ever complained to any MSHA or state mine inspectors about any mine safety or health conditions that he considered hazardous.

I find no credible or probative evidence to establish or suggest that Mr. Robinson was singled out for discharge or that he was treated differently from other employees because of his complaints. I find credible Mr. Rife's testimony that he informed Mr. Robinson on more than one occasion that damaging company equipment would be cause for discharge, and as noted earlier, several of Mr. Robinson's witnesses confirmed and acknowledged that it was a known fact that carelessly damaging equipment could result in a discharge. I take note of the fact that Mr. Robinson has worked in the mining industry for nine or ten years, and while there is no evidence that the respondent had any written company policy, I find Mr. Rife's testimony to be credible and I believe that he had spoken to Mr. Robinson about the consequences of damaging equipment, and I find Mr. Robinson's testimony to the contrary to be less than credible.

I find credible Mr. Rife's testimony that accidental equipment damage that does not involve intentional or careless conduct by an employee would not be a dischargeable offense. I also find his explanations as to why certain other employees may not have been discharged after damaging equipment, to be credible, reasonable, and plausible. I further find that equipment damage was the reason that Mr. Griffith left his employment with the respondent and the evidence adduced in this case supports a reasonable conclusion that Mr. Griffith was constructively discharged because of this.

Management's motivation for Mr. Robinson's Discharge

The evidence establishes that Mr. Robinson was discharged by foreman Rife. Mine operator Tommy Potter was not called to testify in this case, but Mr. Rife's deposition testimony suggests that Mr. Rife may have called Mr. Potter and had his approval for the discharge.

During his deposition of May 10, 1994, Mr. Robinson testified as follows (Exhibit R-2; pg. 47):

Q. The problem concerning your employment with Sunny Ridge all related around the damage to that drill?

A. Exactly.

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Q. And really to cut through the chase and everything, it had nothing to do with any complaints of safety or health violations?

A. Not as I know of.

Mr. Robinson clarified this testimony as follows at (Depo. Tr. pg. 53):

Q. I just want to clarify a few things now. You were told that you were fired from Sunny Ridge for damaging the drill, correct?

A. Yes, I was.

Q. Do you feel you were fired because you made all those complaints?

A. It's a possibility. I'm not saying for sure because I don't know for sure.

In the course of the hearing, and in further explanation of his prior statements, Mr. Robinson reiterated that he was told that he was fired for damaging the drill, and he believed that his discharge "was due to all of it; the blower, the dust, the complaints and me damaging the drill. All of it wrapped up in one" (Tr. 66, 98-99).

Mr. Rife believed that Mr. Robinson did an acceptable job and came to work every day, and he stated that he would not have fired him if he did not have "an attitude problem" and had not intentionally damaged the drill (Tr. 277). Mr. Rife explained that Mr. Robinson's work attitude changed two or three weeks before he fired him, and he suggested that he was having problems with his ex-wife over child support (Tr. 280). Mr. Rife stated that "there was nothing I could do to satisfy him whatsoever. Whatever I asked him to do, he didn't want to do it" (Tr. 275).

Mr. Rife believed that Mr. Robinson deliberately damaged the drill by running it into the highwall. In support of this conclusion, Mr. Rife stated that he counted 21 places on the highwall where the drill struck the highwall while it was operated by Mr. Robinson the day he was fired, and Mr. Rife believed that Mr. Robinson intentionally caused the damage by not heeding Mr. Minix's warnings to stay clear of the highwall trees. Mr. Rife considered the fact that Mr. Robinson did not apologize for damaging the drill, did not inform him that he had been in the trees, and simply commented "shit happens" when asked about the incident. Mr. Minix testified credibly that he heard

Mr. Robinson make this comment as he retrieved a beer from a cooler and left the area after his discussion with Mr. Rife.

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Mr. Minix also indicated that he had warned Mr. Robinson about staying out of the highwall trees early in his shift before he damaged the drill blower.

Mr. Griffith, who viewed the damaged drill on the day Mr. Robinson was discharged, testified that he noticed at least five or six indentations in the highwall as he passed it, and he believed from experience that they were caused by the drill blower striking the highwall with enough force to leave the impressions in the highwall. He was of the opinion that the drill damage could have been prevented if Mr. Robinson had exercised reasonable care (Tr. 192-193). Truck driver Bailey believed that Mr. Rife had a right to fire Mr. Robinson for damaging the drill.

Mr. Robinson testified that he was unaware that he had struck the highwall while operating the drill until after he noticed the damaged blower at the end of the shift. He also claimed that he apologized for the damage, and he denied making the remark attributed to him by Mr. Rife, and overheard by Mr. Minix. I take note of the fact that Mr. Minix testified that he and Mr. Robinson were friends, that he often gave Mr. Robinson a ride to work, and that he advised Mr. Robinson that Mr. Rife could not fire him over the telephone. Under the circumstances, I see no reason why Mr. Minix would not be truthful, and his testimony that Mr. Robinson had on a previous occasion intentionally damaged a drill hose because he was mad at Mr. Rife stands unrebutted.

With regard to Mr. Robinson's encounter and confrontation with Mr. Rife when he returned to the mine the day after Mr. Rife fired him over the telephone, and then fired him again in person, I conclude and find that Mr. Robinson was the aggressor and that he cursed Mr. Rife, threatened him with bodily harm, and in effect invited him to fight. Although this incident occurred after his discharge, I believe it is indicative of Mr. Robinson's temperament and supports Mr. Rife's belief that he had an "attitude" problem. Having viewed Mr. Robinson's demeanor during his testimony concerning the confrontation with Mr. Rife, Mr. Robinson appeared antagonistic, hostile, and somewhat combative with respect to Mr. Rife.

Mr. Robinson acknowledged that he was not truthful when he filed his application for employment after his discharge by the respondent, and that he lied about his discharge, the duration of his employment with the respondent, and his prior educational level. Although Mr. Robinson admitted that he lied because he feared he would not get the job and needed the work, the fact remains that he was not truthful when he filed his job application. Under the circumstances, I believe he would color his testimony in this case to his advantage and I have serious doubts about his credibility.

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I find Mr. Rife's explanation as to why he discharged Mr. Robinson to be credible and plausible. Having viewed both Mr. Rife and Mr. Robinson in the course of the hearing, I find Mr. Rife to be more credible.

I find Mr. Rife's testimony that he observed at least 21 locations at the highwall where the drill made contact with the highwall to be credible, and it reasonably supports Mr. Rife's belief that Mr. Robinson knowingly or intentionally operated the drill in such a manner as to continuously cause it to collide with the highwall during the shift and without regard to the instructions given him to avoid the trees and the highwall. Mr. Rife's conclusion is supported in part by Mr. Griffith who believed that the drill collided with the highwall with such force as to leave impressions at five or six locations, and that Mr. Robinson exercised less than reasonable care in operating the drill. I reject as less than credible Mr. Robinson's claim that he was unaware that he was colliding with the highwall.

I conclude and find that Mr. Rife was justified in discharging Mr. Robinson for damaging the drill, and I find no persuasive evidence, direct or circumstantial, from which to draw any reasonably supportable inference of discriminatory intent on motivation on the part of Mr. Rife with respect to his discharge of Mr. Robinson. I further find no credible or probative evidence from which I can reasonably conclude that Mr. Robinson's discharge was in any way related to any of his drill complaints.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

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