

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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December 27, 2013

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA), on	:	
behalf of CLINTON RAY WARD,	:	Docket No. WEVA 2013-597-D
Complainant,	:	MSHA Case No. PINE-CD-2012-02
	:	
v.	:	
	:	
ARGUS ENERGY WV, LLC,	:	Mine ID: 46-08994
Respondent.	:	Mine: Deep Mine No. 8

DECISION AND ORDER
DENYING DISCRIMINATION COMPLAINT
AND DISSOLVING THE TEMPORARY REINSTATEMENT

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA on behalf of Complainant Clinton Ray Ward

Mark E. Heath, Esq., and Dennise R. Smith, Esq., Spilman, Thomas & Battle, PLLC, Charleston, WV for the Respondent

Before: Judge Steele

This case is before me upon the complaint filed by the Secretary of Labor (“Secretary”), pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45. The Secretary, on behalf of Complainant Clinton Ray Ward (“Ward”), alleges that Argus Energy WV, LLC (“Argus” or “Respondent”), violated Section 105(c)(1) of the Act when it discharged Ward on June 1, 2012.

On June 9, 2012, the Secretary filed an Application for Temporary Reinstatement of Ward to his former position with Argus at its Deep Mine No. 8 (“the Mine”) pending final hearing and disposition of the case.

A hearing was held on his request for temporary reinstatement on July 27, 2012 in Charleston, West Virginia. Under the legal standard of a Temporary Reinstatement hearing, I found that Ward’s complaint was not frivolously brought, and I issued an Order temporarily reinstating him on August 1, 2012. Argus appealed the Order, and the Commission upheld it on August 21, 2012. The Secretary, Ward, and Argus agreed to economic reinstatement in lieu of actual reinstatement.

For the reasons set forth below, I deny the discrimination complaint and dissolve the temporary reinstatement.

CONTENTIONS OF THE PARTIES

The Secretary of Labor contends that Respondent discriminated against Ward, in violation of Section 105(c)(1) of the act, for raising safety concerns at the Mine. Specifically, the Secretary claims that a *prima facie* case exists to show that Ward was discharged for making safety complaints. First, the Secretary asserts that Ward engaged in protected activity within the meaning of the Act. *Secretary of Labor's Post-Hearing Brief* at 31. That protected activity included complaining about the number of workers assigned to electrical tasks and noting water accumulating near the seals. *Id.* at 20, 31. The Secretary further contends that Ward suffered adverse employment action, first when he was required to ride into the mine with his crew, when he was singled out in a safety meeting for calling MSHA, and finally when he was discharged. *Id.* at 34. The Secretary also asserts that Respondent had a discriminatory motive which is shown through circumstantial evidence. *Id.* at 35-36. Specifically, the Secretary asserts that there is circumstantial evidence that Respondent had knowledge of Ward's complaints, that there was previous discriminatory action before the discharge, and that the timing between the protected activity and the discharge were close. *Id.* at 35-39. In a related argument, the Secretary contends that Respondent's claim that Ward was discharged for work performance issues is mere pretext. *Id.* at 40-43. The Secretary notes that the investigation into Ward's alleged work performance was inadequate to support a finding that the discharge was not pretextual. *Id.* at 39-40. Finally, the Secretary contends that Ward is entitled to damages. *Id.* at 44.

Respondent contends that Ward did not engage in protected activity, that it did not have discriminatory animus towards Ward, and that it had a legitimate business reason for discharging Ward. *Respondent's Post-Hearing Brief* at 51-64. Specifically, Respondent asserts that Ward did not engage in protected activity because there is no evidence that Ward ever reported a problem with water at the seals, even though he was tasked with examinations. *Id.* at 51-52. Respondent argues that the only substantiated instance where Ward spoke to management about water was after the condition was already cited and Respondent was actively correcting the problem. *Id.* at 52. Respondent also contends that even if Ward had engaged in protected activity, it did not have unlawful motive in discharging him. *Id.* at 54. Respondent asserts that no *prima facie* case of discriminatory intent can be made because there is no evidence that management had any knowledge of Ward's protected activity. *Id.* at 54-56. Respondent also notes that there was no evidence of animus toward the protected activity; in fact the miner who eventually reported the cited condition in writing, Adkins, faced no repercussions. *Id.* at 56-58. Respondent also asserts there was no disparate treatment of Ward because other supervisors were required to travel with their crews. *Id.* at 59. Finally, the Secretary contends that it had actual cause to discharge Ward. *Id.* at 59. Specifically, Respondent asserts that Ward did not complete his work tasks, failed to properly supervise employees, and stayed on the surface when he should have been working underground. *Id.* at 60-64. He was even given a verbal warning that he would be fired if his performance did not improve and he failed to take corrective action. *Id.* at 61. Respondent asserts that this is more than a mere pretext but, in fact, constitutes good cause for discharge. *Id.* at 64-65.

JOINT STIPULATIONS

The parties stipulate to the following:

- 1) Deep Mine No. 8 (the “Mine”) is subject to the jurisdiction of the Health Act of 1977 (the “Act”).
- 2) The Mine is located in Lincoln County, West Virginia.
- 3) The Mine is owned and operated by Respondent, Argus Energy WV, LLC.
- 4) Respondent has an effect on interstate commerce within the meaning of the Act.
- 5) Respondent is subject to the Act.
- 6) The presiding Administrative Law Judge has jurisdiction over the above-captioned proceedings pursuant to § 105 of the Act.
- 7) Respondent is subject to the jurisdiction of the Federal Mine Safety and Health [Review] Commission and stipulates that the Administrative Law Judge has the authority to hear this case and issue a decision.
- 8) The parties stipulate to the authenticity of their exhibits but not to the relevance or truth of the matters asserted therein.
- 9) Payment of the total proposed penalty of \$25,000.00 in this matter will not affect Respondent’s ability to continue in business.
- 10) Complainant, Clinton Ray Ward, was employed by Respondent as the third shift electrician from on or about October 2011 until June 1, 2012.
- 11) While working at the Mine, Complainant was a miner as defined in § 3(g) of the Act, 30 U.S.C. §802(g).
- 12) Complainant has been economically reinstated from August 1, 2012 through the present.

FINDINGS OF FACT

The findings of fact are based on the record as a whole and the undersigned’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the undersigned’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Ward’s Position in the Mine:

Clinton Ray Ward began working at Argus Energy Deep Mine No. 8 in October 2011. Tr. 30. Argus Mine No. 8 had approximately 50-60 employees in March 2012, with approximately 10 of those in maintenance on each shift. Tr. 262. His last day working at the mine was May 31, 2012. Tr. 30. At that time, Ward worked as the third shift chief electrician. Tr. 30.

Prior to working at Argus, Ward had four years of underground experience and three and a half years as an electrician. Tr. 30. He had a year's experience working as a supervisor electrician. Tr. 31. Ward had a West Virginia underground certification and a West Virginia low, medium, and high voltage electrical card. Tr. 31.

As a third shift electrician, Ward's shift was from 11 pm to 7 am, but he tried to get to work at 10 pm. Tr. 31-32. Each shift, Ward would receive his assignments as a work list from the day shift electrician, Jake Bowen.¹ Tr. 33, 309; SX-1. Additionally, the second shift would sometimes tell Ward about work that needed to be done. Tr. 34, 309.

Ward's regular duties included multiple electrical examinations, including checking the permissibility and recording in the books the belt heads and the KVA's (or power centers). Tr. 35. The KVA's had to be examined once a month. Tr. 37. On a weekly basis, Ward had to examine nine belt heads, which meant that he performed approximately three examinations per night. Tr. 37. These examinations took approximately 45 minutes to one hour to perform. Tr. 37. After Ward began working at Argus, Bowen told him that it was a "hands-on underground job." Tr. 311, 475.

Additionally, Ward testified that he was sometimes pulled off his regular duties to do non-maintenance work, including hauling supplies or roof bolting. Tr. 38-39. Ward stated that he and his crew also had to haul materials in during belt moves, which took place every other night on two sections. Tr. 39-40. Ward testified that due to his non-electrical duties he often could not get all of his duties completed. Tr. 40. Ward was told that when his assignments conflicted, he should do superintendent Grover Meade's assignments first.² Tr. 41.

I credit Elza Maynard, the move boss at the time of Ward's employment, who testified that he never requested help with belt moves or repairs, but sometimes Ward or his crew helped

¹ At the time of hearing, Jake Bowen had worked as the chief electrician for Argus No. 8 mine for two years. Tr. 287. He had Kentucky and West Virginia electrical, mine foreman, and EMT certifications. Tr. 288. He was also a hoist engineer and a shot firer, a Kentucky state instructor, a federal instructor, and was certified in dust. Tr. 288. Prior to working at Argus, Bowen worked briefly at Mt. Laurel and then for 11 years at Excel, the last five of which he was a chief electrician. Tr. 288-289. At the time of hearing, Bowen had 27 years of mining experience and 15 years of experience as an electrician. Tr. 288.

² Grover Todd Meade began working as the superintendent of Argus No. 8 mine in June 2011. Tr. 472. He had 16 years experience in the coal industry. Tr. 472. Meade was certified as a foreman in West Virginia and Kentucky. Tr. 472.

when they did not have anything to do.³ Tr. 428. This occurred approximately once per week. Tr. 440. Ward never asked Maynard to borrow a member of his crew to help retrieve parts, but Maynard testified that had Ward asked, there would have been crewmembers available to help. Tr. 433-434.

Ward supervised three trainees and a contractor electrician who were divided over two sections. Tr. 42-43. However there was one month when Ward was alone with a trainee. Tr. 42. A trainee is not permitted to perform any electrical work unless he is being closely supervised, and he cannot perform examinations. Tr. 43. Ward testified that he asked for additional workers, and he would occasionally get additional contractors. Tr. 44. However, he testified that the contractors were often late or absent from work, or on drugs. Tr. 44. On cross-examination, Ward conceded that Bowen would help him when he had little help, and his workload was decreased during those periods. Tr. 126-128.

In some instances, Ward had to perform the checks on the KVA's at the D set of seals. Tr. 45. The seals were constructed in September or October 2011. Tr. 241-242. They are 120 PSI seals and are approximately 20-feet wide and 17-feet thick. Tr. 291. The topography of the area was not level, and the floor dipped down as one approached the seals. Tr. 46. The lowest point was No. 1, and it had a water trap to keep the bad air from the sealed area from coming in contact with good air. Tr. 47. The pipe, which Ward estimated was eight inches in diameter, was also supposed to keep water from building up behind the seals. Tr. 48.

Allegations of Water at the Seals

Ward testified that in January 2012, he walked to the double doors, looked over the No. 1 and 2 seals, and saw water in the return. Tr. 51-54. However, he stated that he was not concerned because there was not a lot of water. Tr. 51. He could not recall whether he talked with anyone about the water, but testified that he may have talked with Jake Bowen and Maynard. Tr. 63. Both Bowen and Maynard testified that Ward never discussed any water or safety issues with them. Tr. 333, 436, 437. Ward testified that the water had built up because there had been a roof fall on the track outby in January that knocked out the power to the seals. Tr. 55-56. Therefore, the pumps did not work. Tr. 56.

Ward testified that he traveled to the No. 7 box in January and returned in mid-February at Bowen's direction and found a lot more water at the pumps. Tr. 59, 64, 132. However, Bowen testified that several of the KVA's were not powered from September 2011 through late April 2012, meaning that there was no need to check on them or put them in the book. Tr. 294-302. Furthermore, Harless and Bowen traveled to the D seals at the end of January and did not observe any water present. Tr. 279. In late April, the No. 6 pump was put back in service. Tr.

³ Elza Maynard was employed as a third shift mine foreman for Argus from September 2011 until May 2012. Tr. 424-425. In May, Maynard became the third shift move boss. Tr. 425. He had 15 years of mining experience and had a West Virginia and Kentucky mine foreman's certificates, dust sampling card, and an EMT card in Kentucky. Tr. 425.

299-307. Meade had been at the D seals several times after they were constructed, and he never observed any water there prior to April 23. Tr. 479-480.

Kay Adkins, the day shift mine foreman, testified that he had been to the seals several times prior to April 23, and never observed any water in front of them.⁴ Tr. 387-393. On April 23, Adkins observed water approximately 18-24 inches high. Tr. 392-395. Adkins put this in the books, and was not disciplined in any way for doing so. Tr. 395.

Ward testified that he discussed the water issues with Maynard, Bowen, and Dingess. However, each of these individuals testified that Ward never discussed any such issues with them. Tr. 65, 145, 333, 436-437, 463-464. Based on the credible testimony of these three individuals, I credit their versions of the events.

Ward also did not bring up any safety complaints to any of the state inspectors that accompanied him. Tr. 150-151, 167. Harless testified that Ward never brought any safety complaints to him or reported any water problems to him. Tr. 279-280. Bowen testified that Ward never made any safety complaints to him, and that he was not aware of Ward making any safety complaints to anyone at the mine. Tr. 333. Ward also never discussed the water issues in the mine to Bowen. Tr. 333. Maynard testified that he had been at the D seals one time prior to April 23, and he did not observe any water. Tr. 426.

Ward performed the electrical examinations at the No. 6 and 7 pump stations in March 2012, and indicated that there were no dangerous conditions observed.⁵ Tr. 57-58. If they were de-energized at that time, they would have been marked out of service. Tr. 57-58. Ward testified that the No. 6 pump was back in service in March, but the No. 7 pump was under water. Tr. 59. Ward described the water as being three or four more breaks outby where it had been in February. Tr. 62-63.

Ward's Performance Issues:

Benton Harless, the maintenance superintendent for Argus mines Nos. 7, 8, and 10, and the prep plant, worked closely with Ward, and described him as not having enough hands-on experience for the position he was in.⁶ Tr. 264. Harless reached this conclusion after several

⁴ Kay Adkins was employed at Argus No. 8 since 2003, with the last two years as the day shift mine foreman. Tr. 381. Prior to that position, Adkins was a section boss. Tr. 382. He has worked in the coal industry since 1978, and has a West Virginia mine foreman card, as well as a CPR, EMT, and surface cards. Tr. 382.

⁵ The No. 6 KVA is also referred to as the "mid point box," and the No. 7 KVA is also referred to as the "old 2 head." Tr. 59.

⁶ Benton Harless was a maintenance superintended for Argus Nos. 7, 8, and 10 mines, as well as the prep plant since December 2011. Tr. 258. Prior to that he was the chief electrician at the No. 7 mine for four years. Tr. 258-259. He was certified as an electrician in Kentucky and West

incidents. Tr. 264. The first was Ward's not knowing how to fix the chain on the belt head. Tr. 265-266. In another instance, Bowen wrote Ward up for incorrectly connecting the wrong sized cable to a motor. Tr. 266-267. Additionally, Harless spoke with Ward several times about making sure he went to both sections each night to check on his crew because tasks were not being completed. Tr. 268.

Similarly, after observing Ward's work for some time, Bowen formed the opinion that Ward "had room to grow as a chief electrician. He wasn't real good at prioritizing." Tr. 312. He described Ward as a "good worker," but qualified that "a lot of times we would have to go in and redo something he had done." Tr. 312.

In one instance Ward spent most of his shift trying to connect a P-40 breaker box to a P-70 pump. Tr. 269. Ward testified that he was told by either Meade or Bowen to connect the P-70 pump to the P-40 starter box, however Bowen denied this, testifying that he did not even know at the time that the pump was down. Tr. 108-110, 190-191, 312, 325. Bowen said that connecting a pump to a breaker is not a complicated task and that an experienced electrician should have known not to connect the P-70 pump to the P-40 box. Tr. 312, 325. Connecting the P-70 pump to the P-40 starter box was illegal and it would not work. Tr. 108-109. Ward testified that he stated that it would not work, and was told "hook it up anyway." Tr. 109.

Dingess was able to get the pump working on the next shift within 25 minutes. Tr. 113, 269. When Harless spoke to Ward that morning, Ward simply stated that he could not get the pump going or the breaker to stay in. Tr. 270. Dingess told Harless that the problem was that a P-70 pump is a 45-amp breaker and a P-40 is a 10.25-amp breaker, and that an electrician should know that he cannot connect the two. Tr. 270. He testified that it would have been basic knowledge not to wire the P-70 to the P-40. Tr. 458-459.

Harless also had several discussions with Ward concerning MSHA's inability to run dust on 3 Section on February 16 because the equipment was not maintained properly. Tr. 270-271. On February 16, the dust pumps were run on the day shift on two sections. Tr. 313-314. However, after an hour and a half into the shift, the crew still could not get the 3 Section to run, because they couldn't get their checks done on the miners. Tr. 314-315. As a result, the mine was not able to get enough production that day for dust sampling to count on 3 Section. Tr. 318. This looked bad for the mine and it required the inspector to come spend another full day at the mine. Tr. 407-408. Bowen spoke with Ward about the inability to get the 3 Section running, and Ward stated that in spite of having been instructed to go to the 3 Section, he spent all his time on the 2 Section and had not made it to the 3 Section. Tr. 315-316.

During this period, the tracker was indicating that Ward was staying outside for three hours into his shift before going underground. Tr. 271. Harless testified that only in rare circumstances should a chief electrician remain outside for that long. Tr. 272. Harless stated that

Virginia. Tr. 258-259. Harless had been employed in the coal industry since 1988, and had been a certified electrician since 1993. Tr. 259.

there was no reason that Ward would need to wait outside to talk to the second shift, because he could talk to them once he got to the section. Tr. 278. Bowen talked with Ward about making sure he checked on his crew and made sure they were doing their job. Tr. 313.

A meeting was held on February 17 with Ward, Meade, Maynard, Bowen and Harless, Meade told Ward that his job as a chief electrician was to go to both sections and make sure everything was ready to run coal for the day shift. Tr. 158, 318-319. Ward was told that he didn't need to sit outside as long as he was doing, and "if they didn't straighten up, that they'd probably end up losing their job." Tr. 318-319. During that meeting, Ward told Meade that he was on 2 Section all night. Tr. 160. Meade responded that Ward was not telling the truth because the tracking system indicated that he was outside until 2:30 a.m. Tr. 160, 182. Ward could not recall why he spent so much time outside on that day. Tr. 160.

Meade testified that unless something was down outside, there was no reason for a chief electrician to stay outside for any extended period of time. Tr. 477. When Ward was hired, Meade explained to him that his duties required him to be underground supervising his crew. Tr. 477-478. When ordering a part, the outside man can radio down to tell underground miners that the part arrived. Tr. 495. When Meade told Ward that there was a problem with how long Ward was staying on the surface Ward did not explain his conduct in response. Tr. 162. Instead Ward simply said "yes" and "no." Tr. 162. Ward stated that his silence was because Meade and him "didn't get along, didn't see eye to eye." Tr. 162.

In that same meeting, Harless spoke with Ward about making sure that the equipment was being maintained. Tr. 272-273. Meade told Ward and Maynard that he thought they had done a poor job. Tr. 495. Meade told Ward that he was supposed to go to both sections and he did not. Tr. 495-496. Ward wanted to suspend two employees, and Meade told him that if anyone should be suspended it should be Ward. Tr. 495-496. Meade told Ward that he could be terminated if the section was not ready again, and was told not to stay outside. Tr. 275, 435.

Ward testified that he "usually, regularly" was underground within an hour and 15 minutes of the start of his shift. Tr. 163-164. However, when asked if the tracking data would confirm those timeframes, Ward conceded that he often went underground later than he had previously testified. Tr. 164. Ward stated that he stayed outside for long periods based on what he was taught at a previous job at Rock Springs. Tr. 164. However, he conceded that Rock Springs staffed their mines differently than Argus, and the third shift electrician did not do electrician work. Tr. 164-165.

On May 31, production could barely be run at the proper levels for dust samples to be run. Tr. 280.

The April 24 Impact Inspection

Kenneth Butcher was one of the inspectors who performed the April 24, 2012 impact inspection at the No. 8 mine.⁷ Tr. 221. Butcher estimated that there were eight inspectors at the mine that day. Tr. 222. Jake Bowen accompanied Butcher on the impact inspection. Tr. 223, 319. Bowen told Butcher that “he knew they were going to get hammered if they were to get a good electrical exam...because he stated he was shorthanded and people were taking shortcuts.” Tr. 225.

Following the inspection, MSHA shut down the mine and required it to remove the water around the D seals. Tr. 68-69. The mine received 97 violations and 10 D-Orders during the impact inspection. Tr. 498. This was the most that Meade had ever received. Tr. 498.

It took approximately three weeks to remove all the water. Tr. 69. This was done by Ward and Maynard taking a “John boat” over the S-trap and opening and shutting the valves to pump out the water. Tr. 69. They did this in order to regulate the water and keep it from overriding the pump and flooding the area further. Tr. 70. Ward and Maynard took the boat there two to three times. Tr. 71.

Butcher returned to the mine to terminate citations on May 17 with Inspector Wolford from the Pineville office, and was accompanied by Meade. Tr. 226. Butcher saw evidence that water had been present at the seals. Tr. 228-230. The water was too high between the 2 and 3 seals for Butcher to inspect the area. Tr. 230-231. Butcher described two possible hazards when there is excessive water at the seals. Tr. 237-239. The first is to the examiner and the second is when the operator must check for methane. Tr. 237-239.

Ward testified that he felt a current under the boat because the seals were leaking. Tr. 70-71. Ward believed that this could have posed a fatal hazard. Tr. 71. He testified that he shared this concern with Maynard. Tr. 71. Ward also testified that he discussed his concerns with Lee Williamson, who became the third shift foreman during that time.⁸ Tr. 71-72. However, this discussion occurred after the impact inspection, when there was an active attempt to pump out the water. Tr. 71-72. Williamson responded that Ward and Maynard should not go to the area alone. Tr. 72.

⁷ Kenneth Butcher was employed by MSHA for four and a half years, and served as a supervisor of Work Group II at the Logan Field Office since February 2013. Tr. 219. Prior to this position, Butcher held positions as electrical specialist at the Logan Field Office and CMI. Tr. 219. He had a BA in civil engineering and was a certified mine foreman, certified electrician, certified diesel instructor, and an MSHA accident investigator. Tr. 220. Prior to working for MSHA, Butcher worked as an underground coal miner for 28 years where he held a variety of positions, including foreman, chief electrician, laborer, and equipment operator. Tr. 220.

⁸ Norman Lee Williamson had been employed at Argus Mine No. 8 since February 2012. Tr. 403-404. He began as a boss on the 3 Section day shift crew and in May 2012 became a miner operator. Tr. 404. He had worked in the coal industry for 21 years. Tr. 405.

On cross-examination, Ward testified that the reason he was told not to go alone may not have concerned safety, but rather efficiency. Tr. 172. Ward testified that he also spoke about his concerns with William Robert Sloan, the safety director at several of Argus's mines.⁹ Tr. 72-73. However, Sloan testified that although he spoke to Ward three to four times per week, Ward never made any safety complaints to Sloan, including any pump or seal issues. Tr. 446. I credit Sloane's testimony that Ward never complained to him.

After the impact inspection, Ward had a meeting with Meade and Maynard where Maynard was demoted to section boss and Ward was told to ride in and out with the crew. Tr. 73. Ward took this change as a demotion, but admitted that section bosses and foremen often ride in with their crews. Tr. 184. He also continued to get the same rate of pay, had the same responsibilities, and was still the chief electrician. Tr. 188. Meade did not provide them any reasons for the changes. Tr. 75. Meade testified that he told Ward to ride in with the crew so that Ward could get more done underground. Tr. 509-510.

After the impact inspection, Ward was responsible for two sections, which constituted one supersection. Tr. 85-86. On those sections was the following equipment: two miners, four buggies, and two roof bolters. Tr. 86.

At a meeting following the impact inspection, Meade discussed the MSHA inspection. Tr. 75. Ward brought up the subject of who may have called MSHA. Tr. 178. Ward asked "was it Whalen?" referring to a third shift electrician. Tr. 76. Meade responded, "No, I know who called," while looking at Ward and shaking his head. Tr. 76. Ward understood this to constitute a threat. Tr. 76. Meade testified that he did not believe that Ward called MSHA. Tr. 507-508. He believed that a contractor who was denied unemployment compensation called MSHA. Tr. 508.

Ward testified that Williamson said that Meade never like Ward and was going to get rid of Ward as soon as he could. Tr. 76-77. Ward testified that Meade's disdain for him traced back to when Ward first began working at Argus in October 2011. Tr. 123. However, Meade denied having any problems getting along with Ward. Tr. 475.

Ward's Termination:

On his last shift, Ward arrived to work at 10 pm on May 30, 2012 and worked until 8 am on May 31. Tr. 77. Ward testified that on that shift, Billy Justice, a state electrical inspector accompanied Ward until approximately 5 am. Tr. 77-78. Ward testified that Justice kept him from being able to work on the planetary on the miner as his work order directed.¹⁰ Tr. 78-79;

⁹ At the time of hearing, Willard Robert Sloan had worked as the safety director at Argus Nos. 7, 8, and 11 mines for two years. Tr. 444. Prior to working at Argus, Sloan worked examining airways and belt lines at Booth Energy for 20 years. Tr. 445. He had Kentucky and West Virginia mine foreman, surface, unlimited instructor, and EMT cards. Tr. 445.

¹⁰ The planetary is the drive that turns the Caterpillar track and propels the miner. Tr. 79.

SX-1. Ward testified that working on the planetary usually takes three to four people three to four hours. Tr. 82. Additionally, he was directing the trainees on a belt and power move. Tr. 83.

Justice wrote up the miner because the methane monitor would not calibrate properly. Tr. 115. Specifically, the miner would not calibrate past .8, meaning that the miner would not shut down even under dangerous amounts of methane. Tr. 326-327. The citation that Justice wrote indicated that he was at the mine from the night of May 29 through the morning of May 30, which is one day before Ward testified that he was there. Tr. 118-120; RX-A. Ward testified that the inconsistency must have been due to a typo on Justice's part. Tr. 119-120. I credit the date on the exhibit over Ward's memory, as Ward consistently could not remember important details of his employment. See e.g. Tr. 168, 180.

The work order for the May 30 shift included work on the planetary and making sure the new car was running, however Joe Flemming, an electrician on the second shift, also told Ward that there was a problem with the roof bolter that he needed to attend to. Tr. 80. The way Ward prioritized his work was to put the inspector first and then proceed to help in moving the miner. Tr. 81. Ward placed three of his men to help with the move. Tr. 81.

After Ward was finished with Justice, he went to the 2 Section and found that nothing had been done. Tr. 87. By 7 a.m., Ward's crew had one miner working, which Justice had shut down due to problems with the methane monitor. He also may have had one bolter working. Tr. 88-89. Ward's crew never got started on the planetary. Tr. 89-90.

Bowen took the MSHA inspector, Roger Workman, to the section on the morning of May 31 to run dust, and the miner would not start. Tr. 327-328. This problem was not in any way related to the cited problem with the miner the day before. Tr. 328. They found that both miners and both bolters were down. Tr. 329. Ward had told Bowen that one of the miners was down due to planetary repairs, however he did not report the other equipment problems, even though it was his responsibility to report them. Tr. 329. One of the bolters was tagged out and Bowen had to take the other out of service because it didn't have enough suction. Tr. 329-330. This problem should have been discovered by Ward when he ran dust parameters in his shift, and the problem should have been reported. Tr. 330.

Some time after this shift, Bowen spoke to Ward and said that the section "looked like a bomb went off."¹¹ Tr. 91. Ward responded that there was a belt move during the previous shift, and he had Inspector Justice with him. Tr. 91-92. Then Meade called Ward and Bowen into his office and fired Ward. Tr. 92-93. Meade testified that there were consistently problems with Ward's performance. Tr. 486-489. Harless and Meade decided to fire Ward because of job performance, management skills, and for being responsible for MSHA's inability to run dust on two occasions. Tr. 280-281. There was no requirement at Argus for an employee to be written up before being fired. Tr. 478.

¹¹ Ward could not recall if it was on May 31 or June 1. Tr. 90-92.

Ward stated that Meade did not make any mention of the planetary and did not give Ward a reason for his termination. Tr. 93-94. However, Ward also testified that Meade told him that it was the second time that the section was not ready to run. Tr. 196. Meade testified that he fired Ward because things kept getting worse. Tr. 517-518. Furthermore, Bowen and Meade each stated that Meade told Ward about his performance issues as an electrician. Tr. 32. Ward was provided an opportunity to explain, but said nothing. Tr. 332. Ward testified that he did not mention to Meade that he had a state inspector because he “figured there was no need for it.” Tr. 196.

On the termination slip that Ward received, the reason provided was “not doing his job.” Tr. 95-96; SX-4. Ward never received written warnings prior to his termination. Tr. 96. Ward testified that he believed that he was fired because Meade thought Ward had called MSHA resulting in the impact inspection. Tr. 101.

ANALYSIS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Section 105(c)(1) of the Act states in relevant part:

No person shall discharge or in any manner discriminate against [...] or otherwise interfere with the exercise of the statutory right of any miner [...] in any coal or any other mine subject this chapter because such miner [...] has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent [...] of an alleged danger or safety or health violation in a coal or other mine.

30 C.F.R. § 815(c)(1).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (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.” *MSHA on behalf of Leonard Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (March 2000). The Commission has further held that even “[i]f the operator cannot rebut the *prima facie* case in this manner, it

nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone.” *Id.*

I find that the Secretary has both failed to meet his *prima facie* case by failing to present credible evidence that Ward engaged in protected activity or that the termination was motivated by such activity. Furthermore, even if the Secretary had met his burden here, Respondent has shown that it would have terminated Ward’s employment for legitimate non-discriminatory reasons related to his poor work performance.

Ward did not engage in protected activity and there was no animus toward such alleged activities

Both the Secretary and Respondent spent an inordinate amount of resources in the hearing and in their post-hearing briefs dedicated to the issue of whether there was water at the D seals prior to April 23, 2012. However, for purposes of this discrimination proceeding, the relevant issue is not whether water was present during this timeframe, but whether Ward made any health or safety complaints related to the water.

Though Ward testified that he discussed the water at the seals with several individuals, his testimony on the matter was vague and incredible. Ward stated that he *may* have spoken with Bowen and Maynard about the water, but Bowen and Maynard each testified unequivocally that Ward never discussed the issue with them. Tr. 51, 63, 333, 436, 437. Similarly, Ward did not mention the issue to any of the state inspectors that accompanied him or with Harless. Tr. 150-151, 167, 279-280. Aside from Ward’s often inconsistent testimony, there is nothing in the record to indicate that Ward made any health or safety complaints.

Additionally, the totality of the evidence indicates that there was no animus toward any alleged protected activities. First off, it should be noted that Adkins, who reported the water in April, testified that he suffered no repercussions. Tr. 395. Ward testified that at a meeting to discuss the impact inspection, Meade gave Ward a threatening look when Ward asked if it was another electrician that called MSHA. Tr. 76, 178. If anyone engaged in problematic conduct at this meeting, it was Ward—a supervisor—who attempted to implicate another electrician for making an anonymous complaint to MSHA—a form of conduct that the Mine Act encourages. Furthermore, Meade’s looking at Ward as he responded, saying, “No, I know who called,” cannot be taken as a threat without more. Tr. 76. It is not uncommon for individuals to look at each other when talking. Though Ward may have sincerely believed Meade’s look to be threatening, there is nothing in the record to substantiate this subjective feeling.

Similarly, other alleged forms of animus described here do not create the inference of discrimination. Despite testifying that it felt like a demotion, Ward’s being told to ride in with his crew carried no reductions in pay or title. Tr. 188. Ward conceded that section bosses and foremen often ride in with their crews, and Meade testified that he told Ward to do so in order to ensure that he spent more time underground. Tr. 184, 509-510. Without being able to show through credible evidence that Ward engaged in protected activity, and that he suffered an adverse employment action as a result, the Secretary has not made a *prima facie* case.

Argus Energy had a legitimate non-discriminatory reason for terminating Ward's employment

Even if the Secretary had met its burden of making a *prima facie* case of discrimination, Argus had a legitimate non-discriminatory reason for terminating Ward's employment. During Ward's short tenure at the mine, he had numerous performance issues, several of which he was warned about. Ward spent an excessive amount of time on the surface, at the expense of going underground and supervising his crew. Tr. 271. Ward was told that his job required him to be "hands on" and be underground, yet he repeatedly stayed above ground for up to 3 hours of an 8 hour shift. Tr. 311, 475. As a result of Ward not spending his shift underground, he often left tasks unfinished or finished incorrectly. Tr. 266-268.

Ward also made significant mistakes that an experienced electrician should not have made. This included spending the majority of a shift wiring a P-40 breaker box to a P-70 pump. Tr. 269. The P-70 pump is a 45-amp breaker and the P-40 box is a 10.25-amp breaker, meaning that the two pieces of equipment are incompatible. Tr. 270. Ward testified that he was ordered to connect them, and he just did as he was told. Tr. 108-110. Bowen denied that anyone told Ward to connect the two pieces of equipment. Tr. 190-191. Dingess, who fixed the pump in the next shift, was able to do so in 25 minutes. Tr. 113. I find Bowen's testimony more credible, and find that it defies logic that Ward explained to his supervisors the impossibility of this task and they told him to waste his shift trying. Furthermore, if he was so directed, it should not have taken his entire shift to connect the equipment.

Ward was also in large part responsible for MSHA's inability to run dust samples on two separate occasions. MSHA tried to run dust samples on February 16, but was unable to do so because the equipment was not maintained properly. Tr. 270-271. Such maintenance was one of Ward's primary responsibilities. Tr. 35-37. After this incident, Ward was warned about staying above ground at the expense of doing his work underground. Tr. 158, 318-319. He was also told that if it occurred again, he may lose his job. Tr. 318-319.

On May 31, MSHA returned to run dust samples, and this time was barely able to run the samples due to problems with the equipment. Tr. 280. The next day Ward was terminated for performance issues. Tr. 486-489. I find that these performance issues, as well as others described at hearing, constitute legitimate non-discriminatory reasons for Ward's termination.

CONCLUSION

I have reviewed the entire record in this case and have carefully considered the contentions of the parties. I conclude that Argus Energy did not discriminate against Clinton Ray Ward. Accordingly, the discrimination complaint is denied and the August 1, 2012 Temporary Reinstatement Order is dissolved.¹²

¹² Respondent's Motion to Dissolve Temporary Reinstatement while this decision is pending has been made moot. Furthermore, it should go without saying that any money paid to Complainant during the period of temporary reinstatement is not recoverable.

ORDER

Based on the foregoing, the Secretary's discrimination complaint is hereby **DENIED**, and Complainant's Temporary Reinstatement is **DISSOLVED**.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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