FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 16 2015

PATRICK SHEMWELL,	DISCRIMINATION PROCEEDINGS
Complainant,	Docket No. KENT 2014-258-D MSHA Case No.: MADI-CD-2013-22
	Docket No. KENT 2014-259-D MSHA Case No.: MADI-CD-2013-27
v.	Docket No. KENT 2014-281-D MSHA Case No.: MADI-CD-2014-01
	Docket No. KENT 2014-282-D MSHA Case No.: MADI-CD-2013-25
KENAMERICAN RESOURCES, INC.,	Mine: Paradise # 9
Respondent.	Mine ID: 15-17741

AMENDED DECISION AND ORDER[1]

Appearances: Tony Oppegard, Esq., Attorney at Law, Lexington, KY and Wes Addington, Esq., Appalachian Citizens' Law Center, Inc., Whitesburg, KY, Representing Complainant

Marco Rajkovich, Esq., and Todd C. Myers, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, Representing Respondent

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by Hayward Patrick Shemwell ("Shemwell" or "Complainant"), a miner, against KenAmerican Resources, Inc. ("KenAmerican" or "Respondent").

Shemwell filed four discrimination complaints with the Mine Safety and Health Administration (MSHA) on August 21, 2013, September 11, 2013, September 20, 2013, and October 11, 2013. (RX-9).[2] Shemwell alleged that he was improperly transferred from his position as a prep plant mechanic to a bulldozer operator, threatened with reprisal after a Significant and Substantial (S&S) violation was issued, threatened with reprisal for using his

[1] This Decision was amended to fix an error in the caption, which listed the case as being brought by the Secretary of Labor on behalf of Patrick Shemwell.

[2] Complainant's exhibits will hereinafter be designated CX followed by a number. The Respondent's exhibits will be designated as RX followed by a number.

cellphone camera to document a threat, and ultimately discharged for refusing to operate an unsafe bulldozer. (RX-9).

After conducting an investigation, MSHA declined to file a discrimination complaint with the Federal Mine Safety and Health Review Commission (FMSHRC) for each of these MSHA complaints. Shemwell, through counsel, filed four complaints of discrimination under the Federal Mine Safety and Health Act of 1977 on February 12, 2014, and February 14, 2014. On April 15, 2014, Chief Judge Lesnick assigned these cases to the undersigned judge. On November 28, 2014, this Court consolidated Shemwell's four discrimination claims (KENT 2014-258-D, KENT 2014-259-D, KENT 2014-281-D, and KENT 2014-282-D).

Prehearing statements were timely filed by the parties. On June 3, 2015, KenAmerican Resources filed a Motion in Limine to exclude the expert testimony of Tracey Stumbo, as well as the use of a prior settlement agreement between KenAmerican and Shemwell, which was confidential and placed under seal. Shemwell responded to the Motion in Limine on June 5, 2015. On that date, this Court held a conference call. During the conference call, each side presented arguments concerning the Motion in Limine and the use of an expert witness. At the conclusion of the call, this Court made an oral ruling on the Motion in Limine, which was memorialized in writing. This Court permitted the expert testimony of Tracy Stumbo in relation to the D-6 bulldozer. Further, this Court denied admission of the full prior confidential settlement agreement, but did allow the parties to stipulate that Shemwell had settled six prior discrimination complaints on August 19, 2013, based in part upon his return to work as a prep plant mechanic.

A hearing was held in Evansville, Indiana, from June 9-11, 2015, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post-Hearing and Reply Briefs, which have been fully considered.

STIPULATIONS

1. There was a past confidential agreement on August 19, 2013, in which Mr. Shemwell agreed to settle six prior discrimination complaints in part to return to his job as a prep plant mechanic. (Tr. 8).[3]

2. KenAmerican is subject to the Federal Mine Safety and Health Act of 1977. (Tr. 9).

3. KenAmerican is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judge has the authority to hear this case and issue a decision. (Tr. 9).

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[3] Pages of the official hearing transcript are designated "Tr." followed by the appropriate page references.

SUMMARY OF TESTIMONY

Patrick Shemwell began as a prep plant mechanic for KenAmerican at the Paradise #9 mine in January 2012. (Tr. 55). He worked there until May 17, 2013, when he was discharged. (Tr. 55; CX-2). Shemwell returned to work on August 20, 2013, pursuant to a confidential settlement agreement he made with KenAmerican. (Tr. 55; CX-2). The same month, Shemwell was chosen by his coworkers to be a miners' representative. (Tr. 53-54). In this role, other miners could come to Shemwell with their mine safety complaints; Shemwell's responsibility was to make certain these issues were resolved. (Tr. 53-54).

On August 19, 2013, which was the day before Shemwell returned to work, Shemwell spoke with KenAmerican's vice president Randy Wiles ("Wiles"), who told Shemwell that he could contact him directly if he had safety complaints and was unsuccessful getting help from the foremen. (Tr. 52-53).

The job reassignment from plant mechanic to bulldozer operator

On August 20, 2013, the day Shemwell returned to work as a plant mechanic, Charles Dwight Wilkins ("Wilkins"), who was the shift foreman at the plant during this time, told Shemwell to work on welding. (Tr. 55-56, 59, 473). Wilkins testified that shortly after the assignment was given, Shemwell asked for the Material Safety Data Sheets ("MSDS") for the welding rods. (Tr. 475). Wilkins called James Nichols ("Nichols" a.k.a. "Smoothy"), the safety department director, and Nichols brought the MSDS over to the plant for Shemwell. (Tr. 47-76). Shemwell took the MSDS upstairs to the control room, where he reviewed them for about an hour. (Tr. 476). When Shemwell returned from the control room, he informed Wilkins that he would not continue to weld because the fumes could cause cancer. (Tr. 477).

As a result, Wilkins assigned Shemwell to change the panels on the coal screens.[4] (Tr. 477). Shemwell went to "lock and tag out" the coal screens, but he was unable to find any locks, and the only available tags were old laminate tags.[5] (Tr. 57). Shemwell complained to Wilkins, and Gary Trump, a Paradise #9 manager, about the inadequate tags and lack of locks. (Tr. 59, 61). Wilkins testified that he did not believe the machine needed to be locked and tagged because he was troubleshooting on it. (Tr. 474-75). Wilkins then told Shemwell to return to work. (Tr. 474). A discussion occurred between Shemwell and Wilkins because Shemwell felt that the lack of locks and the old tags were unsafe. (Tr. 62). Ultimately, no new tags or locks were provided

[4] Raw coal from underground comes up the belt where it is washed and separated; then the coal screens separate the big coal from the fine coal. (Tr. 56). The screens have larger coal at the top and fine coal at the bottom. (Tr. 56).

[5] The process of locking and tagging out is used by miners to prevent machines from turning on and harming another individual when there is work being done on the machine. (Tr. 58-59). Each individual working on the machine gets a lock to put on the machine, which prevents its operation. (Tr. 60). A tag with the name of the miner is also used, so that coworkers are aware who is working on the machine. (Tr. 60).

for Shemwell. (Tr. 62). Bobby Jones, another plant mechanic, had already locked the coal screen machine, and Wilkins told Shemwell that one lock was enough. (Tr. 61, 438).

Due to Shemwell's dissatisfaction with Wilkins's response, Shemwell requested to contact Wiles, KenAmerican's vice president, about this safety issue. (Tr. 62). Wilkins then went down to the plant office with Shemwell to call Wiles on the phone. (Tr. 62, 480). Shemwell spoke with Wiles about his safety concerns involving the lack of adequate locks and tags. (Tr. 62-63). Wiles told Shemwell to instruct Wilkins to go to the warehouse and get more locks and tags. (Tr. 63). Shemwell testified that Wilkins was upset about Shemwell calling Wiles because it would get Wilkins in trouble. (Tr. 63).

The following day Shemwell was assigned to operate a bulldozer at the gob pit, which held the refuse piles at the mine. (Tr. 64, 614). Wilkins was the foreman during the shift, and he asked Shemwell to operate one of the bulldozers. (Tr. 64). Shemwell responded that he did not want to work at the gob pit because he had no experience working there. (Tr. 64). Nonetheless, he was assigned to operate one of the bulldozers at the gob pit. (Tr. 65). There is some dispute as to who ordered this assignment. (Tr. 290, 483). The human resources manager for KenAmerican, Ron Winebarger ("Winebarger"), testified that he did not know if Wilkins ultimately made the decision to move Shemwell to the gob pit. (Tr. 290). Wilkins testified that he thought it was Bruce Patton, the plant manager, who made the decision to move Shemwell. (Tr. 483). After being transferred over to work at the gob pit, Shemwell filed a discrimination complaint wherein he alleged that he was reassigned to operate a bulldozer from his position as a prep plant mechanic because of the safety complaints he had made the previous day. (Tr. 68; CX-7).

Alleged threat of reprisal after a S&S violation was issued at the gob pit

On August 21, 2013, Shemwell was task trained on the D-8 and D-5 bulldozers by Wilkins and a bulldozer operator named Archie Shelton ("Shelton"). (Tr. 79, 485-86, 487-88). At the time, Shelton was working on the gob pit bulldozers and had previously worked at Paradise #9 as a diesel mechanic. (Tr. 487). Wilkins testified that he explained to Shemwell that the gob pile must be kept in two-foot lifts. (Tr. 487). Conversely, Shemwell testified that he was not trained on how high the gob pile must be kept. (Tr. 69). Shemwell said he was only told to push the piles over as the gob truck comes in and dumps the refuse.[6] (Tr. 69).

Several days after working at the gob pit, Shemwell testified he found out about a ground control plan. (Tr. 70). The ground at the gob pit was spongy and saturated with water, which made some of the dump trucks sink when bringing over refuse from the plant. (Tr. 70). Shemwell asked John Sparr ("Sparr"), an engineer who managed the gob pit, for the ground control plan. (Tr. 70). Shemwell also testified that Joey Burden ("Burden"), an equipment operator, told Shemwell that the prep plant needed to fix a sweeper on the gob belt to prevent any water from being put into the gob truck. (Tr. 72). Moreover, Shemwell testified that Burden

[6] The gob truck is a large dump truck that brings refuse material to the gob pile. (Tr. 490). The truck holds fifty tons. (Tr. 490).

said the plant let this water problem continue for too long and that a citation could be issued because of the water getting into the gob pit. (Tr. 72-73). Once Shemwell received the ground control plan, he read it, but was unable to understand it. (Tr. 73). Therefore, he called MSHA and asked them to come out to Paradise #9 and do a 103(g) inspection to determine whether the gob pit was being maintained according to the ground control plan. (Tr. 73).

On September 1, 2013, MSHA inspectors came to Paradise #9, and issued two S&S citations. (Tr. 78; CX-3). These citations were issued due to the gob piles impeding drainage, which created soft spots, and insufficient compacting. (CX-3). In reaction to these citations, Sparr came to Shemwell and told him to compact the gob pile. (Tr. 80-82). Shemwell testified that Sparr threatened him with a "write-up" if Shemwell did not compact the gob pile into two-foot piles by the next day.[7] (Tr. 80-82). Shemwell was then task trained on the compactor by Burden. (Tr. 87). However, the compactor that Shemwell was assigned to did not have a CB radio in it for two-way communication.[8] (Tr. 87). During Shemwell's first shift, Sparr did not get him a two-way radio when requested. (Tr. 88). The same day, on the second shift, Gary Hatfield ("Hatfield"), the second shift foreman, did get Shemwell a two-way radio for the compactor. (Tr. 88-89, 109).

Alleged threat of reprisal for using a cellphone to document a threat

While working at the gob pit, Shemwell called the MSHA hotline about some oil on the ground near where he would refuel the bulldozers. (Tr. 83). Shemwell also made a complaint about the fire extinguishers near the fuel tank not being up to date. (Tr. 84). The second night, Shemwell was asked to use the compactor; there was again no CB radio inside, so he refused to use the compactor. (Tr. 89). Accordingly, Shemwell was assigned to use the bulldozer instead. (Tr. 89).

Shemwell complained on behalf of a coworker named "Big John" that one of the bulldozers had no air conditioning. (Tr. 91, 92). The bulldozer that Big John was using did not have an air conditioner for approximately three weeks. (Tr. 91). Shemwell testified that Big John said he wrote down this problem in the pre-op sheets he had to fill out every day before using the bulldozer.[9] (Tr. 91). Shemwell called the MSHA hotline about this issue and asked MSHA to come out to investigate. (Tr. 91).

Two days after making the complaint to MSHA about Big John's bulldozer, two MSHA inspectors, Inspector Putty and another, came out to the mine with Nichols, the safety department director. (Tr. 92). While Shemwell was clocking in at the bathhouse, the inspectors and Nichols

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[7] A write-up as referred to here is a type of disciplinary action. (*See* Tr. 82).

[8] A CB or two-way radio is necessary if an individual using a compactor is not within hearing distance of another person. (Tr. 88).

[9] A pre-op sheet is used at the start of a shift to check a machine for its safety condition. (Tr. 97). Fluids, oil, coolant levels, lights, warning beacons, and back up lights are some of the things tested during a pre-op check. (Tr. 97).

pulled up in Nichols's truck. (Tr. 92). Nichols came over and said the inspectors wanted to talk to the employees before they started work. (Tr. 93). Inspector Putty said the employees needed to make sure to talk to the foreman and Nichols before calling MSHA with safety complaints. (Tr. 93). In response, Shemwell said he was the individual who made the complaints, and his call was not anonymous. (Tr. 94). Then Shemwell and Inspector Putty argued, followed by Inspector Putty apologizing for his statement. (Tr. 95). They also discussed the lack of a water cooler in the bathhouse and Big John's bulldozer during this meeting. (Tr. 95-96). In addition to the inspectors and Nichols, J.J. Stringer ("Stringer"), the heavy equipment mechanic supervisor, David Darnell ("Darnell"), the prep plant superintendent, Wilkins, and approximately eight to ten crew members were present at this meeting. (Tr. 93-94, 99).

The next day, September 19, Shemwell was operating one of the bulldozers at the gob pit. (Tr. 100). While he was working, Randall Parm ("Parm"), the gob truck driver, drove over to talk with Shemwell. (Tr. 100). Parm told Shemwell that he saw the words "dead man walking" written on the miners' representative sheet with an arrow pointing towards Shemwell's name. (Tr. 100). Shemwell then used Parm's two-way radio to get Darnell to come over to the gob pit. (Tr. 100-01). Darnell drove over to the gob pit with Hatfield. (Tr. 101). They kept asking Shemwell what was going on, but he would not tell them; Shemwell just asked to be taken to the bathhouse. (Tr. 101). They brought him to the bathhouse, where Sparr was waiting. (Tr. 102). Shemwell went over to the bulletin board and took his phone out to photograph the miners' representative sheet. (Tr. 102). Darnell used his own cellphone to take a few photos of Shemwell with his cellphone out and reminded Shemwell that the use of cellphones during working hours was prohibited. (Tr. 102, 534-35). Shemwell was upset and left work because he did not feel safe any longer. (Tr. 102). For about ten days after this event, Shemwell did not return to work. (Tr. 106).

Suspension and discharge for refusal to operate unsafe bulldozers

On October 1, 2013, Shemwell returned to work. (Tr. 107). That day, Shemwell was assigned to operate the D-5 bulldozer. (Tr. 107). The D-5 bulldozer was missing a seal from the doorjamb, which left an inch-wide gap where the exhaust would leak into the bulldozer. (Tr. 108). Shemwell was able to operate the D-5 bulldozer downwind for the rest of his shift, which kept exhaust from blowing inside the bulldozer. (Tr. 108). At the end of his shift, Shemwell told Hatfield about the gap in the bulldozer door, and Hatfield said he would let Darnell know. (Tr. 109).

On the following day, Shemwell was again assigned to operate the D-5 bulldozer, but the door gap was not fixed. (Tr. 110). Darnell brought Shemwell over to the gob pit, and Shemwell told Darnell about the gap leaking exhaust into the bulldozer. (Tr. 110). As a result, Darnell looked at the bulldozer and acknowledged there was a significant space in the door, which needed to be fixed with a gasket. (Tr. 110). Darnell then called Stringer to ask for a gasket, but none was available. (Tr. 110). Darnell suggested fixing the door gap with silicone. (Tr. 111). Shemwell agreed to try and repair the door with silicone, and subsequently filled the gap with silicone. (Tr. 110-11). The fumes from the silicone bothered Shemwell, so he asked to see the MSDS on silicone. (Tr. 111). In reviewing the MSDS, Shemwell read that silicone could affect the nervous system and cause cancer, so a respirator should be worn when in contact with

silicone. (Tr. 112). Shemwell asked to go to the bathhouse to wash his hands and asked for a respirator. (Tr. 112). No respirator was available, so Shemwell refused to operate the D-5 bulldozer. (Tr. 112-13).

Shemwell was then asked to use the D-6 bulldozer. (Tr. 113). Burden task trained Shemwell on the D-6, specifically highlighting that the throttle did not always work properly. (Tr. 114, 356). Shemwell operated the D-6 bulldozer for approximately twenty to thirty minutes on the gob pile. (Tr. 114). Shemwell testified that the gob pile was approximately fifteen to twenty feet high. (Tr. 114). Wilkins conversely testified the gob piles reached seven or eight feet at the tallest; Bobby Jones Jr. ("Jones"), a plant mechanic who had also operated the gob pile bulldozer in the past, testified that the piles reached eight to nine feet at most; and Phillip Burden, a plant mechanic, testified that the piles reached six to seven feet. (Tr. 393, 451, 490). Shemwell testified that he "tee-tottered" over the hill when he tried to push the gob, and the throttle was not working properly to help him reverse. (Tr. 117). Therefore, once he was able to safely exit the bulldozer, he told Darnell he would not use the D-6 again.[10] (Tr. 117). Darnell then asked Shemwell if he wanted to travel with the federal inspector, and Darnell testified he told Shemwell he did not have to operate the bulldozer if it made him feel unsafe. (Tr. 121, 51-72).

Tracey Stumbo ("Stumbo"), who testified as an expert witness on behalf of the Complainant, testified that a bulldozer throttle works to bring the machine up to full speed, and there is a decelerator pedal to lower the speed of the bulldozer.[11] (Tr. 260). Stumbo further testified after hearing Shemwell's testimony about the bulldozer almost tipping over, that Shemwell did not have control of the steering due to the throttle not working. (Tr. 262). If a throttle kicks out, a bulldozer will only be at idle speed, and it cannot be reversed. (Tr. 263). As a result, Stumbo testified he would have issued a closure order for a bulldozer if the throttle kicked out.[12] (Tr.

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[10] Ronald Winebarger, the human resources manager who ultimately terminated Shemwell, testified that he had no knowledge of Shemwell tipping over in the D-6 bulldozer. (Tr. 625). Shemwell testified he told Darnell about almost tipping over. (Tr. 126). Shemwell also testified he told Winebarger about almost tipping over, but he did not go into detail. (Tr. 195).

[11] Tracy Stumbo was the former chief accident investigator for the Kentucky Office of Mine Safety & Licensing ("OMSL"), which was previously known as the Kentucky Department of Mines & Minerals ("KDMM"). (Tr. 233). After voir dire was conducted, Stumbo was allowed to testify as an expert witness. (Tr. 256). Stumbo worked for KDMM/OMSL for 29 years, including 17 years as the state's chief accident investigator, where he investigated at least 130 fatal mining accidents. (Tr. 233, 239). As an accident investigator, Stumbo spent five years inspecting bulldozers at refuse piles. (Tr. 236). Prior to working for KDMM/OMSL, Stumbo worked for approximately 12 years in the coal mining industry. (Tr. 241). Before testifying, the expert witness listened to Shemwell's testimony about his operation of the D-6 bulldozer. (Tr. 261).

[12] Stumbo did not testify to exactly what a closure order is, but this Court inferred from his testimony that a closure order indicates that a machine is not safe to use and cannot be used until it has been fixed. (*See* Tr. 266).

266). However, Stumbo did acknowledge that Shemwell's testimony about tipping over might be suspicious to an investigator because it never showed up in any of Shemwell's complaints or in any statements made to MSHA. (Tr. 277).

Two days later, October 4, 2013, was Shemwell's last day of work with Paradise #9 before being suspended. (Tr. 125). Wilkins and Darnell brought Shemwell to the gob pit to operate the D-6 bulldozer. (Tr. 125). But Shemwell refused to operate the D-6 bulldozer because of the throttle. (Tr. 125). Shemwell testified that he offered to use the D-5 instead. (Tr. 133). However, there were still silicone fumes inside, so Shemwell refused to operate the D-5 without a respirator. (Tr. 133). Darnell then brought Shemwell to Winebarger, the human resources manager. (Tr. 128). Darnell told Winebarger that Shemwell would not operate the D-6 bulldozer. (Tr. 128-29). Shemwell responded that there were safety issues with the throttle, which is why he would not use the D-6 bulldozer. (Tr. 129). Consequently, Winebarger suspended Shemwell for three days so Winebarger could conduct a safety investigation of the bulldozer. (Tr. 129).

On October 9, 2013, Shemwell returned to work after suspension. (Tr. 129). When he first arrived, he met with Winebarger and Darnell. (Tr. 131). Winebarger told Shemwell that experienced operators checked the D-6 bulldozer and no safety issues were found. (Tr. 132). Jimmy Lee Bryant, who worked with the maintenance surface shop heavy equipment; Bobby Jones, a plant mechanic; and Phillip Burden were all asked to check the D-6 for safety issues, and they all signed statements indicating that they found no safety issues. (Tr. 334, 416, 437; RX-2-4). Bryant said he did not find an issue with the throttle, but would have tagged out the D-6 if he had found a problem. (Tr. 427). Phillip Burden did not find the throttle idling to be a safety issue. (Tr. 398). Winebarger then terminated Shemwell for the stated reason that he had refused to operate the D-6. (Tr. 132, 331).

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. Complainant argues that Respondent discriminated against Complainant on four separate occasions after he engaged in protected activities. First, Complainant contends that Shemwell's move from plant mechanic to bulldozer operator constituted discrimination. (*Complainant's Post-Hearing Brief* at 43-44). Complainant alleges that this move was made in retaliation for complaints that Shemwell had made about insufficient locks and tags, as well as six other pre-settlement complaints to MSHA. (*Id.* at 43-44). Respondent argues that this move was not made in retaliation to any protected activity. (*Respondent's Post-Hearing Brief* at 4-6). Rather, Respondent contends that moving Shemwell to the gob pit was a business decision not involving Shemwell's safety complaints. (*Id.* at 5-6). Respondent argues that all employees operate equipment in addition to their usual jobs. (*Id.* at 6). In response, Complainant counters that the mere moving of a miner from one position to another after making safety complaints constitutes discrimination. (*Complainant's Reply Brief* at 29-30).

Complainant alleges that a second act of discrimination occurred after Shemwell made a complaint to MSHA to come inspect the gob pit. (*Complainant's Post-Hearing Brief* at 44-45). Complainant alleges that Sparr, the gob pit engineer, threatened Shemwell with a write-up after Shemwell's complaint was made and subsequent citations were issued by MSHA. (*Id.*). Conversely, the Respondent contends that no threat was made to Shemwell because Joey Burden, a coworker who was present during Sparr's conversation with Shemwell, said that Sparr only reminded them about the two-foot lift requirement for the gob pit. (*Respondent's Post-Hearing Brief* at 11-12.)

The third act of discrimination alleged by the Complainant occurred after Shemwell found "dead man walking" written on the miners' representative sheet in the bathhouse. (*Complainant's Post-Hearing Brief* at 45-46). Shemwell contends that Darnell demonstrated animus when he took a photo of Shemwell documenting the comments on the miners' representative sheet. (*Id.* at 46). The Respondent counters that there was a no-cellphone-use policy during working hours, and Shemwell was not singled out by Darnell. (*Respondent's Post-Hearing Brief* at 13). Instead, Darnell consistently attempted to enforce this no-cellphone-use policy while at Paradise #9 mine. (*Id.* at 13). However, Complainant responds that Shemwell's photograph was a protected activity, so any threat of discipline by Darnell was discrimination. (*Complainant's Reply Brief* at 33).

Finally, Complainant contends that his discharge was discriminatory because it occurred as a result of his refusal to operate the D-5 and D-6 bulldozers on October 2, and October 4. (*Complainant's Post-Hearing Brief* at 46). Complainant further contends these work refusals were reasonable because the throttle on the D-6 bulldozer did not work properly, and the D-5 bulldozer was missing a door seal, which resulted in him being overcome with silicone fumes. (*Id.* at 46-47). The Respondent argues that Shemwell was inconsistent when recounting an incident that occurred while using the D-6 bulldozer, and he unreasonably refused to use a bulldozer that was safe. (*Respondent's Post-Hearing Brief* at 16-18). Respondent further contends that three experienced operators—Jimmy Lee Bryant, Bobby Jones, and Phillip Burden—checked out the D-6 bulldozer and did not find any safety issues. (*Id.* at 18-19). Additionally, Respondent argues that Winebarger, the human resources manager, who ultimately discharged Shemwell, was only told by Shemwell that the D-6 bulldozer was old, and that Shemwell did not want to operate it. (*Id.* at 23-24). Consequently, Respondent argues that Shemwell never presented a reasonable safety issue for refusing to operate the D-6 bulldozer, and therefore, the termination was made based on his refusal to work. (*Id.* at 25).

DISCUSSION

This case has been brought based on allegations that the Respondent discriminated against the Complainant under section 105(c) of the Act, which states:

> No person shall...in any manner discriminate against or otherwise interfere with the exercise of the statutory right of any miner...because such miner...has instituted or caused to be instituted any proceeding under or related to this Act...or because of the exercise by such miner...of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1)

The Mine Act is remedial legislation, and it should be liberally construed. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (1980). Recognizing that miner participation was essential to miner's health and safety, the Act was drafted to encourage miners to partake in its enforcement. *Id.* The Senate Report accompanying the Act states:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant 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. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978).

I. Complainant established a *prima facie* case of discrimination

To establish a *prima facie* case of discrimination, the Complainant must show that he (1) engaged in protected activity, and (2) suffered an adverse action that was motivated at least in part by the protected activity. *Sec'y of Labor on behalf of Miller v. Savage Svcs. Corp.*, 37 FMSHRC 936 (2015). The burden of persuasion is on the Complainant. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). An operator can rebut a *prima facie* case by showing that there was no protected activity or that the adverse action was not motivated by the protected activity. *Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-36 (Sept. 1997). The Commission has held "[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... alone." *Sec'y of Labor on behalf of Leonard Bernadyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (March 2000).

A. Complainant engaged in activity protected by the Mine Act

The Respondent concedes that it terminated Shemwell for his refusal to operate the D-6 bulldozer. (Tr. 331). Therefore, this case ultimately turns upon whether Shemwell's work refusals, based upon his safety concerns, constituted protected activity. (Tr. 331).

The Commission has repeatedly held that a work refusal is a form of protected activity. *See e.g. Bryce Dolan v. F& E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000). Although the Mine Act grants miners the right to complain of a safety or health danger or violation, it does not expressly state that miners have the right to refuse to work under such circumstances. 30 U.S.C. § 815 (c)(1). Nevertheless, the Commission and this Court have recognized the right to refuse work in the face of such perceived danger. *See Bryce Dolan*, 22 FMSHRC at 176; *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Estrada v. Runyan Construction INC.*, 36 FMSHRC 3156, 3166 (2014)(ALJ). A protected work refusal "...is an extremely important legal construct, particularly in the mining industry, where hazards often appear instantaneously and a miner's decision to remove him or herself from a dangerous situation

could be the difference between life and death." *Bryce Dolan*, 22 FMSHRC at 179-80. The legislative history confirms the Congressional intent for the Act to cover work refusals:

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include...the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

S. Rep. No. 95-181, at 35.

i. Work refusals must be in good faith to be protected by the Act

For a work refusal to be protected, the miner need not show that a hazard *actually* existed. *Estrada*, 36 FMSHRC at 3166. Rather a miner need only show that he possessed a good faith belief that there was a safety hazard. *Id.* Good faith is required to prevent work refusals involving "frauds or other types of deception." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810 (April 1981); *see also Pasula*, 2 FMSHRC at 2792 (discussing the necessity of good faith in protected work refusals).[13]

The miner retains the burden of demonstrating good faith—but he need *not* prove the absence of bad faith. *Gilbert v. Federal Mine Safety & Health Review Commission*, 866 F.2d 1433 (D.C. Cir. 1989); *Sec'y of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993 (1983). A miner's good faith can be established through his own testimony. *Robinette*, 3 FMSHRC at 810-12. Conversely, an operator can use evidence or cross-examination to demonstrate bad faith. *See id.*

ii. Good faith requires a miner's belief be honest and reasonable

In *Robinette*, the Commission held that in order for work refusals to be protected, the miner's good faith belief must be honest and reasonable. *Id.* at 812. Reasonableness is not an entirely *objective* standard, but rather it requires the ALJ to analyze the perception of the miner at the time the alleged protected activity took place. *Sec'y of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 152, 15349 (1983); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (1982). In *Bryce Dolan*, the Commission held that "the standard under which work refusals are analyzed includes the *subjective* element of a miner's 'honest belief that a hazard exists' as well as the *objective* requirement that the miner's belief be reasonable." *Bryce Dolan*, 22 FMSHRC at 177, n. 7 (citing *Robinette*, 3 FMSHRC at 810).

Here, Shemwell refused to operate a D-5 bulldozer on October 1, 2013, due to a gap in the doorjamb, which allowed exhaust to enter into the cab. (Tr. 107-08). Shemwell complained twice to his supervisors Hatfield and Darnell. (Tr. 108-10). Darnell thereupon gave Shemwell

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[13] In reaching his within findings as to the good faith nature of Complainant's work refusal(s), the ALJ found Complainant's Counsel's arguments persuasive regarding Shemwell's willingness to operate the D-5 bulldozer on October 1, 2013. (*See Complainant's Post-Hearing Brief* at 15).

silicone to repair the door, but this resulted in silicone fumes filling the bulldozer. (Tr. 110-11). After reviewing the MSDS, Shemwell became aware that silicone fumes could affect the nervous system and cause cancer, so he refused to operate the D-5 without a respirator. (Tr.112-13).

On October 2, 2013, Shemwell was moved to the D-6 bulldozer. (Tr. 113). When he was task trained on the D-6 bulldozer, Shemwell was told by Burden, an equipment operator, that the throttle did not always work properly. (Tr. 114). Shemwell testified that the throttle stopped working on the D-6 bulldozer while he was on the edge of a refuse pile, which led to the bulldozer almost falling over. (Tr. 117). As a result, Shemwell also refused to operate the D-6 bulldozer after telling his supervisor Darnell about this safety issue with the D-6 throttle. (Tr. 117).

Respondent has questioned whether the D-6 bulldozer tipping incident—as described by Shemwell—had actually taken place or was essentially a fabrication. (*Respondent's Post-Hearing Br. at* 38-39).

However, in order to establish a viable claim of discrimination, Shemwell need not prove that the D-6 bulldozer had nearly tipped over. The Complainant need only show that he had experienced untoward difficulties with the bulldozer such that he reasonably and in good faith felt unsafe in operating it. This Court specifically finds that Shemwell was credible in describing his perceived loss of control of the bulldozer while running it on the gob pile.

In analyzing the *subjective* element of whether Shemwell had an honest belief that the bulldozer's continued operation presented a hazard, this Court has also considered that Shemwell had very limited training and experience in the operation of bulldozers. In experiencing a throttle malfunction while on the gob pile, Shemwell may well have honestly believed himself to be in greater danger than he actually was.

The miners who testified on behalf of the Respondent that they had felt safe in operating the bulldozer may well have been also truthful in their expressed opinions.[14] (RX-2-4). However, the question is not whether these miners subjectively felt themselves at risk in operating the bulldozer—or indeed whether the bulldozer was in fact hazardous to operate—*but whether Shemwell in good faith perceived himself to be in danger.*

As to *Bryce Dolan's* requirement that the miner's belief be objectively reasonable, this Court notes the testimony of the Complainant's expert witness, Tracey Stumbo. Stumbo opined that he would have issued a closure order if the D-6 bulldozer had been used on top of a refuse pile and the throttle kicked out. (Tr. 266). Shemwell's coworkers, Bryant, Phillip Burden and

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[14] This Court is not altogether certain whether the miners were being completely honest in expressing their full confidence in the safety of the bulldozer or merely giving testimony to garner the mine operator's favor. The memorable scene in *Jaws* is called to mind in which Amity Council members, egged on by the mayor, reluctantly go treading into the water to prove to beach-goers there was no risk from sharks. JAWS (Universal Pictures 1975).

Joey Burden also testified that they knew that the D-6 bulldozer's throttle had not been working properly. (Tr. 404, 421-22).[15]

Given the total circumstances, a prudent miner who experienced problems controlling a bulldozer on top of a gob pile could reasonably believe that its continued operation posed a hazard. Therefore, this Court finds that Shemwell's work refusal constituted a form of protected activity under the Act.

B. Complainant's discharge was an adverse action that was motivated at least in part by his work refusal

Given this Court's finding that Shemwell's refusal to operate the D-6 bulldozer was protected activity, this Court will address (1) whether there was an adverse action, and (2) if there is a nexus between the miner's protected activity and the adverse action. *See Kenneth L. Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998)(addressing separately if there is an adverse action, then whether there is a nexus between the adverse action and protected activity).

i. Complainant suffered an adverse employment action

Under the Act, an adverse action is broadly defined. *See Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012). The legislative history of the Mine Act demonstrates this expansive intent when it stated:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses, and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.

S. Rep. 95-181 at 36 (1977).

Here, there was clearly an adverse action because Shemwell was discharged after he refused to operate the D-6 bulldozer. (Tr. 132). On October 4, 2013, Darnell, the prep plant superintendent, and Wilkins, the shift foreman, brought Shemwell to the gob pit and assigned Shemwell to the D-6 bulldozer. (Tr. 125). Shemwell refused to operate the D-6 bulldozer because he said the throttle was a safety hazard. (Tr. 125). Shemwell testified that he offered to use the D-5 bulldozer, but that it still had unsafe silicone fumes in it from a previous day. (Tr. 133). After refusing to use these two bulldozers, Darnell brought Shemwell to Winebarger, the human resources manager, and Darnell told Winebarger about Shemwell refusing to operate the D-6. (Tr. 128-29). In response, Shemwell said that there were safety issues with the bulldozer. (Tr. 129). Shemwell was then suspended for three days so that Winebarger could conduct an

[15] In reaching his within findings that Complainant had reasonably refused to operate machinery that he believed to be unsafe, the ALJ found persuasive Complainant's argument that Shemwell had never refused to operate the D-8 bulldozer, which was the primary bulldozer on the gob pile. (*See Complainant's Post-Hearing Brief* at 3-4).

investigation. (Tr. 625-626). Upon returning from suspension on October 9, 2013, Shemwell was fired for refusing to comply with a work request to use the D-6 bulldozer. (Tr. 133).

ii. There was a nexus between the protected activity and adverse action

Because Shemwell's termination was clearly an adverse action, it must next be determined whether there was a nexus between the protected activity and adverse action. The Respondent essentially concedes that Shemwell was terminated for refusing to operate the D-6 bulldozer. (Tr. 331). Given Respondent's concession that Shemwell was terminated due to his refusal to operate the D-6 bulldozer and this Court's finding that the work refusal in question was protected activity, in-depth nexus analysis is not necessary.

This Court will review however some of the case law applicable to direct and indirect evidence in the context of the termination and protected work refusal in this case.

In cases where direct evidence of discrimination is unavailable, there are several indicia of discriminatory intent the court will consider, including: "(1) knowledge of the protected activity; (2) hostility towards to protected activity; (3) coincidence in time between the protected activity and adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)). "Furthermore, inferences drawn by judges are 'permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.'" *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)). Accordingly, all reasonable inferences may be drawn from the facts. *Id.*

a. Respondent had knowledge of the protected activity

Knowledge of protected activity is one of the most important factors in a circumstantial case for discrimination. *Sec'y of Labor on behalf of Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730, 736 (March 2014)(ALJ). The Commission has specifically held "an operator may not escape responsibility by pleading ignorance due to the division of company personnel functions," and a supervisor's knowledge can be imputed to a management decision-maker when the supervisor influences management's determination decisions. *Metric Constructors,* 6 FMSHRC 226 (Feb. 1984); *Turner v. National Cement,* 33 FMSHRC 1059 (May 2011). Moreover, when an agent of an operator has knowledge or should have knowledge of a safety hazard, such knowledge is imputed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977) *aff'd* 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (holding acts or knowledge of an agent are attributable to a principal). An agent is someone with duties normally delegated to management personnel and has responsibilities fundamental to the mine's operations. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000).

Winebarger stated he does not remember if he knew about Shemwell's throttle complaint at the time of Shemwell's suspension or at the termination meeting on October 9, 2013. (Tr. 625).

However, Winebarger's testimony that he did not know about the throttle complaint at the time of the October 4, 2013, suspension meeting is not credible because he began a safety investigation directly in response to this meeting. (Tr. 625-26). Moreover, Bryant, one of the three individuals who was asked to investigate the D-6 bulldozer, stated that he had been specifically instructed to test the D-6 throttle. (Tr. 419). Therefore, this Court finds that Winebarger knew or should have known of the complaints that Shemwell had made and of Shemwell's work refusal based on the D-6 throttle not working. Given that Winebarger was the operator's human resources manager, he was an agent of KenAmerican. KenAmerican cannot therefore deny actual or constructive knowledge of Shemwell's protected activity.

b. There was hostility towards Complainant's protected activity

The next consideration is whether the mine operator demonstrated hostility or animus towards the protected activity. *See Chacon,* 3 FMSHRC at 2511. The Commission has held that animus should be weighed more heavily the more specifically-directed it is to the complainant's protected activity. *Id.*

There was clear animus in this case. On October 4, 2013, the prep plant superintendent Darnell brought Shemwell to the human resources manager in response to Shemwell's complaints and refusals to operate the D-6 and D-5 bulldozers. (Tr. 578-79). Shemwell was suspended that same day, and when he returned after suspension, Shemwell was discharged for refusing to operate a bulldozer (the D-6) he felt was unsafe. (Tr. 133, 331). This suspension and discharge are both acts of hostility taken by KenAmerican after Shemwell made safety complaints and safety related work refusals. As a result, this animus weighs more heavily because it was directed specifically at Shemwell's refusals to operate bulldozers he believed to be unsafe.

c. There was a coincidence in time between the protected activity and the adverse action

Here, there was also clear coincidence in time between the protected activity and the adverse action at issue. On October 4, 2013, Shemwell refused to use the D-5 and D-6 bulldozers because he believed them to be unsafe. (Tr. 125-26). That same day, he was taken by Darnell, the prep plant superintendent, to Winebarger who suspended Shemwell for three days to allow for a safety investigation. (Tr. 128-29, 578-79). On October 9, 2013, when Shemwell returned to work, he was discharged for failing to operate the D-6 bulldozer. (Tr. 331). The termination meeting occurred immediately upon Shemwell's return to work on Wednesday October 9, which was less than a week after his suspension. This Court therefore finds that this factor is satisfied and weighs heavily in the Complainant's favor.

d. There is no clear evidence of disparate treatment

The final consideration is whether the Complainant experienced disparate treatment. *Chacon*, 3 FMSHRC at 2510. Disparate treatment occurs when employees who perform the same action or offense are treated differently by management. *Id.* at 2512. However, disparate

treatment is not necessary to prove a *prima facie* discrimination claim when other indicia of discriminatory intent are present. *Id.* at 2510-13.

It is unclear whether the Complainant experienced disparate treatment involving his suspension and termination. Shemwell was suspended and discharged for complaining and refusing to use the D-5 and D-6 bulldozers for safety reasons. (Tr. 131-33). No evidence has been brought by the Complainant demonstrating that any other miner who refused to use these bulldozers was treated differently. As a result, this consideration does not favor the Complainant.

In light of the above indicia, there is evidence establishing a nexus between the protected activity and the adverse action. There was a coincidence in time; the Respondent had knowledge of the protected activity; and there was hostility towards Shemwell's protected activity. Consequently, the Complainant has demonstrated a *prima facie* case of discrimination for his termination.

II. Respondent failed to rebut Complainant's *prima facie* case

A *prima facie* case of discrimination can be rebutted by an operator showing that there was no protected activity or by showing the adverse action taken was not related to the protected activity. *Pasula*, 2 FMSHRC at 2799-2800. Given the foregoing findings, the operator has failed to show there was no protected activity and/or that Shemwell's termination was not directly related his protected activity. (Tr. 331). This Court recognizes the legitimate concern on the part of mine operators, including the Respondent, that some miners in an effort to shield themselves from punishment due to poor job performance or misconduct, may make frivolous or unwarranted safety complaints. Further, this Court recognizes that a returning discriminatee, such as Complainant, who has returned to work after a successful discrimination settlement, may also be tempted to insulate himself against future adverse actions by lodging preemptive safety complaints. There are always "outliers," both mine operators and miners, who attempt to "game the system."

Although some of Shemwell's actions upon his return to work could understandably be viewed by Respondent as having been motivated by an improper *mens rea*[16], this Court has found that Complainant's refusal to operate the D-6 bulldozer was a legitimate work refusal and thus constituted protected work activity. As the adverse action, Complainant's discharge, was clearly related to Complainant's work refusal, Respondent has failed to mount a successful rebuttal.

[16] This Court notes Respondent's "Central Argument" that Shemwell had lodged bad faith safety complaints to avoid undesirable work tasks. (*See inter alia Respondent's Post-Hearing Brief* at 1-2). However, for the reasons discussed herein, this Court finds that Complainant's legitimate concerns about the safety of the D-6 bulldozer transcended a mere desire to avoid gob pile work.

III. The operator has failed to establish a viable affirmative defense

If the operator cannot rebut the Complainant's *prima facie* case, it can still affirmatively defend by demonstrating the miner was disciplined for an unprotected activity alone. *Id.* at 2800. Specifically, an affirmative defense can be proven by the operator demonstrating "past discipline consistent with warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*. 4 FMSHRC 982, 993 (June 1982). However, a defense may be found pretextual when it is "...weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521,1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982).

Given the instant factual circumstances, the operator cannot prove by a preponderance of the evidence that Shemwell's discharge would still have occurred absent the protected activity. Indeed Respondent has essentially argued that it was Shemwell's protected activity—his work refusal based upon safety concerns—that led to his discharge. (*See Respondent's Post-Hearing Brief* at 41).[17]

As noted *supra*, Complainant need not prove the absence of bad faith during the time period from his return to work until his discharge. Complainant need only show he had a good faith and reasonable belief that operation of the bulldozer with a malfunctioning throttle on the gob pile presented a hazard.

The Respondent attempts to argue that the suspension and termination of Shemwell was a business decision. (*Respondent's Post-Hearing Br.* at 40). The Respondent argues that Shemwell had refused reasonable work requests, and that one of the company policies allowed employee discharge for unreasonable work refusals. (*Id.* at 41). However, a company policy that prohibits a miner from refusing to perform work he believes is unsafe would not be enforceable under the Mine Act, and therefore cannot form the basis of a business justification. The Respondent's affirmative defense is not viable because the Complainant's protected work refusal was the critical reason for the disciplinary action taken against Shemwell. (*See* Tr. 331). Thus, Respondent's arguments to the contrary must be rejected.

IV. Three other alleged acts of discrimination

Shemwell also argues three additional previous acts of discrimination were committed against him: (1) Shemwell's transfer from prep plant mechanic to bulldozer operator; (2) an alleged threat of reprisal for calling MSHA to inspect the gob pit, which resulted in two S&S citations; and, (3) an alleged threat of reprisal for using his cellphone to document a perceived written threat on the miners' representative sheet. (CX-1).

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[17] Moreover, Winebarger admits that his decision to discharge Shemwell was based *solely* upon Shemwell's refusal to operate the D-6 bulldozer that Shemwell found had a throttle problem. (Tr. 331).

Given this Court's above findings that the Complainant suffered a discriminatory discharge based upon his protected work refusal and considering that the dispositions of these other alleged acts of discrimination will not affect Shemwell's ultimate remedies, this Court will only address these allegations in brief.

There is some question as to whether there was a discriminatory animus on the part of the Respondent in its initial transfer of Complainant from his usual prep plant mechanic work to bulldozer work at the gob pile.[18] Respondent contends that a bulldozer operator was needed for the gob pile and all miners were expected to operate machinery when the need arose.

Although harboring some suspicion as to whether this transfer was purely due to work exigency as alleged by Respondent, this Court finds that the Respondent has by a preponderance of the evidence raised a meritorious affirmative defense of a business justification. *See also Chacon*, 3 FMSHRC at 2510 wherein the Commission held, in analyzing a business justification as an affirmative defense for an adverse action, that—"[t]he proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities...[T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner (Citations omitted)."

As to the threat of reprisal for Shemwell's calls to MSHA regarding the gob pile, this Court remains uncertain as to whether such threat of reprisal had been actually made and accordingly finds that Complainant has not carried his burden of proof.

Finally, the threat of reprisal involving Shemwell using his cellphone to document a perceived written threat has been considered by this Court. Darnell admitted to documenting Shemwell's cellphone use, and warning Shemwell that cellphones are prohibited. (Tr. 534-35). Still it is unclear what reprisal was threatened here, and this Court finds there is no relationship between this incident and Shemwell's ultimate discharge.

CONCLUSION & ORDER

Based on the foregoing, I find that the Respondent violated §105(c) of the Act by discriminating against Shemwell for engaging in protected activity.

KenAmerican is consequently **ORDERED** to cease and desist from discriminating against its employees because of their exercise of rights protected by the Mine Act, including the right to make complaints to mine management, and the right to refuse to perform unsafe work. Moreover, it is **ORDERED** that all management officials employed by KenAmerican be required to undergo comprehensive specialized training by MSHA personnel in the safety rights

[18] This Court notes the suspicious nature of a miner—with significant welding experience—refusing to weld due to health risks involved upon his first day returning to work. (*See* RX-10). This refusal occurred while Shemwell was still working as a prep plant mechanic before his transfer to the gob pile. (*See* Tr. 477, 488).

of miners under §105(c) of the Mine Act. Additionally, Respondent is **ORDERED** to remove any and all negative references to this matter in Shemwell's personnel records.

It is also **ORDERED** that KenAmerican must post this decision in Paradise #9 mine, and the prep plant, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 consecutive days.

It is further **ORDERED** that Shemwell be immediately reinstated to his position as prep plant mechanic with backpay, benefits, and interest to October 9, 2013.[19] This reinstatement should be at the same rate of pay, on the same shift, and with the same status and classification that Shemwell would now hold had he not been unlawfully discharged. Respondent is also **ORDERED** to reimburse Shemwell for all reasonable expenses incurred in the institution and litigation of this case, including attorney fees and expenses.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Paradise #9 Mine is located so that the Secretary may file a petition for assessment of civil penalty within 45 days of receipt of this Decision.

John Kent Lewis
Administrative Law Judge

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[19] The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method, which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), *as modified by Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).