

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JACOB HAMILTON,
Complainant

v.

AMERICAN MINING AND
TUNNELING, LLC
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-326-DM
MSHA No. WE MD 2016-04

Fire Creek Mine

Mine ID 26-02691 A4880

DECISION

Appearances: Jessica M. Flores, Esq., and Joseph Lake, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California, for Complainant; Donna V. Pryor, Esq., and Erik M. Dullea, Esq., Husch Blackwell LLP, Denver, Colorado, for Respondent.¹

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by the Secretary of Labor on behalf of Jacob Hamilton under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the “Mine Act”) and on an amended complaint seeking the assessment of a civil penalty filed by the Secretary against American Mining and Tunneling, LLC (“AMT”) pursuant to sections 105 and 110 of the Mine Act. 30 U.S.C. §§ 815 and 820. A hearing in the case was held in Elko, Nevada. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. STATEMENT OF THE CASE

On January 4, 2016, Hamilton filed a complaint of discrimination under section 105(c) of the Mine Act. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) conducted an investigation and, following that investigation, the Secretary filed a complaint before the Commission on Hamilton’s behalf. This case was assigned to me on March 23, 2016, after AMT filed an answer to the complaint.

On February 5, 2016, the Secretary filed an application for temporary reinstatement on Hamilton’s behalf pursuant to section 105(c)(2) of the Mine Act. On March 1, 2016, I granted the parties’ joint motion to approve the settlement in that case and ordered AMT to provide

¹ At the time of the hearing, Ms. Pryor and Mr. Dullea were with the Denver office of Jackson Lewis P.C.

temporary economic reinstatement in Docket No. WEST 2016-259-DM. As of this date, my order of temporary reinstatement is still in effect.

Hamilton alleges that AMT discriminated against him on November 4, 2015, when he was terminated from his employment at the Fire Creek Mine after he engaged in protected activity by “reporting unsafe conditions at the Mine including missed holes in Spiral #2, attempting to correct unsafe conditions including bolting to secure the roof to safely reignite the missed holes, objecting to supervisor Darrin Quimby’s instruction to work under unsupported roof, and objecting to supervisor Darrin Quimby’s instruction to use a mucker bucket to load explosives.” Discrimination Complaint at 3. AMT denies that Hamilton engaged in protected activity and, in any event, Hamilton’s termination was motivated by his unprotected activity and it would have taken this adverse action for the unprotected activity alone.

For the reasons below, I find that AMT did not discriminate against Hamilton under the section 105(c) of the Mine Act when it terminated his employment and, as a consequence, the discrimination complaint is dismissed.

II. DISCUSSION OF EVIDENCE WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

At the start of the hearing, counsel for Complainant read the following stipulations into the record, which were admitted into evidence.

1. Pursuant to Section 113 of the Mine Safety and Health Act, 30 USC 823, which we will refer to as the Act, the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

2. American Mining & Tunneling, LLC hereinafter Respondent, a Nevada limited liability company, has a place of business located in or near Crescent Valley, Nevada, and has a principal place of business in Spokane, Washington.

3. Respondent at all relevant times had a contract with Klondex Gold and Silver Mining Company, whereby Respondent performed services at Fire Creek Mine, hereinafter the Mine, in Crescent Valley, Nevada.

4. At all relevant times, Respondent had an MSHA contract I.D. number and was an operator at the mine as this term is defined by Section 3(d) of the Act, 30 USC 802(d), because it was an independent contractor performing work or construction at the mine.

5. The products of the Fire Creek Mine enter commerce or the operations or products thereof affect commerce.

6. At all relevant times Respondent has been a covered entity subject to the jurisdiction of the Act.

7. Jacob Hamilton was employed by Respondent as an underground miner. Hamilton was a miner as the term is defined in Section 3 (g) of the Act, 30 USC 802 (g).

8. Hamilton was hired by Respondent on or about April 26, 2015.

9. Hamilton began working for Respondent at Fire Creek Mine on or about October 19, 2015.

10. On or about January 4th, 2016, Hamilton filed a complaint with the Secretary charging discrimination pursuant to Section 105(c) of the Act.

Tr. 8-9.

The Fire Creek Mine is an active, underground gold and silver mine operated by Klondex Gold and Silver Mining Company (“Klondex”) in Lander County, Nevada. AMT was a contractor at the mine and Hamilton’s crew was working in Spiral #2 on November 3, 2015. The miners on Hamilton’s shift were supervised by Darrin Quimby, who was a leadman for AMT.

The mine uses a traditional mining cycle. At the start of each shift, miners muck out rock that was blasted at the end of the previous shift. This rock is either hauled out of the mine or temporarily stored in a muck bay to be transported out later. A mucker (load, haul, dump equipment) is used for this purpose. Next, rock bolts are installed with a plate to place mesh panels on the roof as support. A roof bolting machine is used to install the roof support. Sometimes, miners must scale the roof as they add roof support to remove any loose rock or uneven surfaces.² Next, the crew will drill blast holes into the face using the jumbo drill after the pattern to be used is designated. After the holes have been drilled, they will be loaded with explosives. Typically, “sausage powder” is used along with a blasting cap. Tr. 22. The explosives are detonated at the end of the shift. Frequently, the crew is unable to complete all these steps in a single shift.

Hamilton began his nightshift on November 3, 2015 in Spiral #2. He began mucking out the blasted rock. At some point, he observed three un-shot holes along the rib. Tr. 47. The blast performed at the end of the previous shift did not completely detonate all the explosives. If, while mucking, a miner sees holes that were drilled for purposes of blasting, he should assume that they are misfires and contain undetonated explosives. Tr. 155, 270. Hamilton recognized that he had to do something to remove or detonate any explosives that were present.

AMT’s stated reason for terminating Hamilton’s employment is because of the manner in which he attempted to remove undetonated explosives during that shift. Rather than re-shooting the holes to clear out any undetonated explosives, Hamilton chose to use his roof bolting

² Hamilton used the term “moiling” to describe the work that he performed. He defined moiling as “hammering, scaling rock off, any loose rock or uneven corners, edges.” Tr. 19. He used the drill steel on the roof bolter to provide “sheer percussion to hammer it out or ... drilling holes and breaking that rock out.” Tr. 20. He testified that the difference between scaling and moiling is that with moiling “you actually drill, you cut holes this way, cut holes [that] way, cut hole this way, break the rock out.” Tr. 75.

equipment to drill into the rock to dislodge the explosives from the rib. By drilling in and around the un-shot holes, the undetonated explosives were revealed. After the explosive material was clearly visible, Hamilton continued to use drill steel to drill around and very close to these holes in an attempt to remove more rock. Tr. 53-56. Hamilton admitted that he drilled numerous holes in the area. Tr. 79. When he was unable to remove sufficient rock to cause the explosive material to fall out, he began using his roof bolting machine to install additional ground support so he could reshoot the holes. Tr. 251-52. The leadman on the crew, Darrin Quimby, was becoming impatient with Hamilton and ordered him to re-shoot the holes. Tr. 255. Because Hamilton's drill steel broke, he was not able to install additional roof support or blast out the misfires by the end of the shift. Tr. 64-65. His shift ended early because of a planned power outage.

At the end of the shift, Quimby called his supervisor, AMT Superintendent Heinz Woelki, to tell him that Hamilton had used drill steel to drill close to and perhaps into holes that contained undetonated explosives. Tr. 269. Woelki was not at the mine at that time but was on the way to AMT's Nevada office in Winnemucca, Nevada. When he arrived in Winnemucca, Woelki discussed this matter with AMT Operations Manager Mark Carlson. Arrangements were made to have miners on the next shift take photographs around the misfired holes before any work was done. These photos were emailed to Carlson. Upon review of the photos, both Woelki and Carlson agreed that "the incident was a serious safety infraction and violation of MSHA regulations, which posed a grave risk to safety and well-being of the miners." AMT Br. 3-4; Tr. 435-36, 386-87. They concluded that Hamilton should be terminated and they advised Cassandra Elloway, AMT's chief financial officer, who agreed with the decision. Tr. 393. Hamilton was terminated later that day.

The Secretary³ contends that AMT's proffered reason for Hamilton's termination is pretext. The Secretary presented evidence to show that Hamilton engaged in protected activity during this same shift and that his termination was a direct result of the protected activity.⁴

B. Alleged Protected Activity

The Secretary presented evidence of Hamilton's protected activity in the context of what he considered to be AMT's shoddy operations at the Fire Creek Mine. AMT entered into a contract to provide underground development mining services to Klondex at the Fire Creek Mine. On or about October 19, 2015, Hamilton and other miners started working at Fire Creek at the start of this new contract. Woelki was designated as the superintendent at the outset, but it

³ I use the terms "Secretary" and "Complainant" interchangeably in this decision. The Secretary presented evidence at the hearing on behalf of Hamilton, the complainant.

⁴ I have not discussed all the evidence presented by the parties in this decision. Some of this evidence was introduced to raise questions concerning the credibility of opposing witnesses and to show inconsistencies in the case of the opposing side. Nevertheless, I considered the record as a whole in reaching my findings and conclusions. Evidence that is inconsistent with my findings and conclusions is hereby rejected.

is not clear that he would remain in this position beyond the initial startup. Hamilton's crew, included Carl Roeller and Schuyler McCune, was supervised by leadman Quimby.

Hamilton, Roeller, and McCune testified that conditions at the mine were hectic and disorganized. The equipment they had to use was described as "garbage." Tr. 150-51. Hamilton testified that AMT had not yet mobilized the proper "tools, gear, or equipment" at the mine for the crew to efficiently perform their work. Tr. 34. The equipment that was present broke down frequently. Tr. 167-68. As a consequence, the crew often was unable to blast at the end of their shift, which slowed down development of the mine. Hamilton testified that Woelki put pressure on the crew to increase production and he threatened to fire them if production did not pick up. Hamilton testified that Quimby repeatedly directed the crew to take unsafe shortcuts, such as asking them not to bolt the roof to standard, so they could blast a round at the end of the shift. Tr. 35-36, 153. Hamilton testified that during his first week of work, he was setting up ground support when Quimby ordered the crew to stop. Tr. 37. Quimby told the crew that the support they installed was good enough and ordered them to blast. *Id.* Hamilton testified about other unsafe shortcuts he was ordered to take. Tr. 129-30, 179-80.

AMT denies these allegations. It argues that AMT was not behind schedule and did not push miners to prioritize production over safety. Christopher Corley, AMT's operations manager, stated that AMT was not under pressure to push production during the first few weeks of its contract at the mine. He testified that the initial challenges AMT faced at Fire Creek Mine were no different from the challenges it faces during startup at other mines and that Klondex understood these challenges. Tr. 363. Robert Crommelin, Klondex's Senior Safety Coordinator, testified that neither AMT nor its miners were penalized if production goals were not met. Tr. 470. On cross-examination, Hamilton admitted he had never been on a startup job before, AMT had accepted the job at Fire Creek at the last minute, and the project started the same week he began his employment at the mine. Tr. 35, 151. He also admitted that Woelki had been trying to acquire better mining equipment. Tr. 80.

The above history is background to the two specific safety complaints Hamilton made during the night shift of November 3, as set forth in the Secretary's discrimination complaint. I find that the first few weeks of AMT's operations at the Fire Creek Mine were a shakedown period for AMT. Everything was not in place for a smooth, efficient operation, which frustrated the miners. I also find that although Hamilton believed he was required to take shortcuts that compromised safety, his belief that he was under a risk of termination and that AMT was favoring production over safety is not correct. For purposes of this decision, however, I will assume that Hamilton complained to Quimby about safety conditions at least once between October 19, 2015 and November 2, 2015. Specific events before November 3, 2015, are not part of this case, however, because they were not included in MSHA's investigation of Hamilton's complaint and are not mentioned in the Secretary's Discrimination Complaint or the First Amended Discrimination Complaint.⁵

⁵ The Secretary, in his brief, relies on several instances of alleged protected activity prior to November 3, 2015. Sec'y Br. 11-12. These instances are not mentioned in the complaint Hamilton filed with the Secretary, in the discrimination complaint the Secretary filed with the Commission, or in the declaration of MSHA Special Investigator Diane Watson dated February

In the discrimination complaint Hamilton filed with MSHA, Hamilton described two events that occurred on the night shift of November 3 that he contends constituted protected activities. Ex. R-2. The specific circumstances surrounding these activities are as follows:

1. When Hamilton arrived at the heading of Spiral #2 on November 3, he found a forklift with a dead battery. He drove a jumbo drill to the surface to find a mechanic who could fix the forklift. A jumbo drill takes 15-20 minutes to drive to the surface while a mucker takes about 5-10 minutes to drive the same distance. Tr. 184-85. When he reached the surface with the jumbo drill, he told Quimby about the forklift and that it was blocking an escapeway. Tr. 41, 250. Quimby wanted Hamilton to park the jumbo drill underground at a muck bay. Hamilton told Quimby that it would not fit there because another piece of equipment was parked there. Hamilton testified that Quimby became irritated and told Hamilton to park the jumbo at a sump underground. Hamilton told Quimby he could not park there because he would not be able to put the boom down. Tr. 42. Hamilton said that Quimby became more irritated and told him to stop talking and do what he was told. *Id.* Woelki had previously instructed the crew to refrain from bringing equipment out from underground because cold temperatures could freeze water lines in the equipment. Tr. 284-85.

This issue must have resolved itself because the jumbo drill was parked somewhere underground and Hamilton did not mention anything about not being able to lower the boom to anyone and did not record it on the equipment card or another document. Tr. 102. The problem with the forklift was corrected and Quimby drove Hamilton back to his work place. Quimby testified that he was not irritated because Hamilton raised a safety issue but because he believed Hamilton was taking too much time to perform preliminary tasks and making excuses. Tr. 251.

2. Upon returning to the heading, Hamilton began examining his workplace. He examined the ground conditions and looked for potential hazards. Tr. 45. He did not find any issues, recorded his inspection on his 5-Point Safety Card, and proceeded to wet down the muck pile so he could muck out the area. Tr. 45-46; Ex. C-1 (Complainant's Exhibit 1). While he was mucking he noticed three drill holes along the spring line.⁶ Tr. 47. He was unable to determine whether there was explosive material in these holes. He began to remove the rock from around these holes by moiling with his bolter. Tr. 50-53. Hamilton testified that, after doing so, he

4, 2016. Ex. R-2 (Watson's declaration was not filed with the Secretary's complaint in this case but was attached as Exhibit B to the Secretary's Application for Temporary Reinstatement in WEST 2016-259-DM). In *Sec'y of Labor on behalf of Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997), the Commission explained that the scope of a discrimination proceeding is determined not by the original complaint filed with MSHA by the alleged discriminatee but, rather, by the subject matter of the investigation conducted by the Secretary in response to the complaint filed by the alleged discriminatee. Watson's Investigation Report, dated February 4, 2016, focuses on the events of November 3-4, 2015. Ex. R-20. There is only one brief reference to Quimby's alleged conduct prior to November 3. *Id.* at 5. Although MSHA's investigation was limited to events of November 3-4, I have considered the evidence about working conditions at the mine prior to November 3 in reaching my conclusions.

⁶ The "spring line" is the area where the back meets the back (top) meets the rib. Tr. 73.

exposed enough rock to see what appeared to be explosives in at least one of the unblasted holes.⁷ Tr. 53-54.

Hamilton testified that he tried to wash out the explosives with the water spray on the bolter. Tr. 54-56. When that failed, Hamilton testified that he began to install ground support and bolt up to the misfire to blast it. *Id.* He further testified that while scaling prior to installing ground support he discovered another misfire. He updated his 5-Point Safety Card to note the misfires. Sec'y Ex 1. Quimby came by at that time so Hamilton brought him up to speed as to what was going on. Hamilton testified that Quimby told him to use the mucker bucket to load the misfires and blast them in that manner. Tr. 60-61. Hamilton objected to loading and blasting under unsupported ground and to using the mucker bucket to load the misfires because the mucker bucket was not designed to hold people and did not have railings or fall protection. Tr. 60-61, 68. Hamilton testified that he had time to install ground support and blast the misfires safely, but while he was in the process of installing additional ground support his drill bit broke. Tr. 64-65. As a result, he was not able to install the ground support or blast the misfires by the end of his shift. *Id.* According to Hamilton, when Quimby found out that he had not blasted out the misfires by the end of the shift, Quimby told Hamilton he was required to do what he is told to do and that he was "writing [him] up for drilling on miss-holes." Tr. 64.

Quimby testified that Hamilton could have reached and re-blasted at least one of the misfires while remaining under pre-existing ground support. Tr. 254. Instead of reshooting the holes, Hamilton chose to use equipment to drill holes into the rock. This drilling on, in, and near the un-shot holes revealed the undetonated explosives, yet Hamilton continued to drill near and perhaps into these holes after the explosive material became visible to him. Tr. 53-56. Quimby testified that when he visited Hamilton during the shift he saw 50-60 drill holes in the vicinity of the undetonated holes. Tr. 270. Hamilton admitted that he drilled "50, 200 [a] lot" around the subject holes. Tr. 79. Quimby told Hamilton to reshoot the holes. Quimby testified that at the end of the shift, he called Woelki to tell him that Hamilton had drilled in and around undetonated blast holes, as discussed above.⁸

C. Analysis of the Issues

Section 105(c) of the Mine Act prohibits discrimination against a miner for exercising a right established under the Mine Act. Pursuant to Commission case law, a *prima facie* case for a

⁷ Holes that were drilled during the previous shift and were filled with explosives that failed to detonate when the face was detonated were referred to as "misfires" or "miss-holes" by the witnesses.

⁸ It is not entirely clear whether Hamilton drilled into the undetonated blast holes or drilled very close to the holes. Woelki and Carlson reviewed the cell phone photographs that were taken during the following shift before the area was blasted to remove the misfires. Ex. R-1. In this exhibit, the explosive material in the photographs is yellow in color and the holes that Hamilton drilled are the black circles. Whether Hamilton actually drilled into a blast hole is not critical because the exhibit clearly shows that he drilled extremely close to the undetonated explosive material in the holes. I credit Woelki's testimony that a miner cannot be very accurate in the placement of holes when using a roof bolter for this purpose. Tr. 440.

violation of section 105(c) is established if the complainant proves by a preponderance of the evidence that (1) he was engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal. Co.*, 2 FMSHRC 2786, 2799 (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, 817-18 (Apr. 1981).

The Commission will consider the following factors in determining whether the complainant has established a causal connection between the protected activity and the adverse action: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

It is rare for a section 105(c) case to be proven solely on direct evidence. Rather, it is more typical for such a case to be made by relying on indirect or circumstantial evidence. Therefore, it is of no surprise that the Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999) (quoting *Chacon*, 3 FMSHRC at 2510).

Once a *prima facie* case is established, the mine operator is given an opportunity to rebut by showing that either there was no protected activity or the adverse action was not motivated in any way by the protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If the operator is unable to successfully rebut, it may still establish an affirmative defense by proving that the adverse action was motivated by unprotected activity, and it would have taken the action based solely on the unprotected activity. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-2800.

Did Hamilton Engage in Protected Activity?

I find that Hamilton engaged in protected activity. First, he raised concerns about the location of the forklift in a designated escapeway and the appropriate place to safely park the jumbo drill. Second, and more importantly, he raised concerns about loading and blasting under unsupported ground and to using the mucker bucket to load the misfires because the bucket was not designed to safely hold people and did not have railings or fall protection.

AMT described the interactions between Hamilton and Quimby on the night shift of November 3 as ordinary differences of opinion on work methods arising during the normal course of work. AMT Br. 5. Quimby testified that he believed the Hamilton was taking too much time to perform preliminary tasks, such as when he took the slowest piece of equipment to the surface to report that the battery was dead on the forklift.⁹ Tr. 251, 184-85. AMT also argues that Hamilton's testimony that he objected to Quimby's suggestion that they use the

⁹ Apparently, there were no two-way radios available at that time.

mucker bucket to reach the misfired holes should not be credited because it contradicts the testimony of McCune. Tr. 183.

I find that AMT's arguments miss the point. These arguments are more generally directed to the question whether he was terminated as a result of these protected activities. I find that Complainant established that he engaged in protected activity.

Was Hamilton's Termination Motivated in any Part by the Protected Activity?

Complainant has the burden of establishing a *prima facie* case on this issue. The Commission has held that to establish a *prima facie* case of discrimination, "the complainant need only 'present[] evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by the activity'" *Jayson Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1065 (May 2011) (emphasis in original) (citation omitted). The Commission made clear that this burden is lower than the ultimate burden of persuasion that the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. *Id.*

A complainant often must rely on indirect or circumstantial evidence to establish a *prima facie* case. As stated above, an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case. *Baier*, 21 FMSHRC at 957. The Commission has stated that "[a]n operator may not escape responsibility by pleading ignorance due the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n. 4 (Feb. 1984). Thus, the fact that Woelki and Carlson were not aware of Hamilton's safety complaints does not necessarily mean that Complainant failed to establish a *prima facie* case of knowledge of the protected activity. If Quimby's made a recommendation that Hamilton should be terminated and if the recommendation influenced Woelki's and Carlson's decision to terminate Hamilton, then Quimby's knowledge and retaliatory animus may be attributed to the decision maker. *Turner*, 33 FMSHRC at 1068.

Evidence and Credibility

A close review of the evidence is critical in resolving the issues in this case. A judge's credibility determinations can be critical in analyzing the evidence in discrimination cases. Witnesses frequently provide different accounts of the same events and their perceptions can differ even if their accounts do not differ in a substantial degree. The Commission has long held that because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). A recent Commission decision illustrates both in the majority decision and in the dissenting opinion, the pivotal role that a judge's credibility determinations often have in discrimination cases. *Sec'y of Labor on behalf of Charles Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC _____, No. VA 2014-343-D (Aug. 23, 2016).

Although I am not completely discrediting the testimony of any witness, I found that their credibility varied greatly.¹⁰ I especially credit the testimony of Heinz Woelki for a number of reasons. He had a calm bearing and a credible demeanor. Ordinarily, he functions as a master mechanic for AMT but he was given the task of supervising AMT's project at the Fire Creek Mine during the start-up period. He was the superintendent for the project for about two months after which he again became a master mechanic. Tr. 187-88. He has about 46 years of experience in underground metal mining including time on mine rescue teams. Tr. 433, 439-40. He has worked in many positions during his career including ones involving the use of explosives. Tr. 442. His testimony was internally consistent and I found it to be especially trustworthy. He was quite candid in describing the mistakes he made in the manner in which Hamilton was terminated. I find that he honestly testified about the events that occurred and his reasons for terminating Hamilton's employment. I do not believe that he tailored his testimony to reflect what AMT management wanted him to say.

Quimby testified there was a spot underground where the jumbo drill could be safely parked and told Hamilton to park it there. Tr. 250. Woelki had told the crew earlier that the drill could not be brought outside because the water in the spray system would freeze. Tr. 285. Quimby told Hamilton that he was wasting time on this issue. Apparently, the drill was safely parked and the issue was not raised again. I find that this issue was resolved and it played no part in AMT's decision to terminate Hamilton or in Quimby's decision to discuss Hamilton's conduct with Woelki.

After the drill issue was resolved, Quimby dropped Hamilton off at the heading of the Spiral #2 and Quimby returned to his work area.¹¹ Later in the shift, Quimby returned to Hamilton's work area and saw that Hamilton was bolting up roof and rib support. Quimby observed the misfires at that time. Tr. 252. Hamilton gave Quimby his 5-Point Safety Card to sign. Ex. G-1. The card noted the misfires. Quimby told Hamilton to finish installing the roof bolt he was working on and get the misfires blasted. Quimby testified that Hamilton could insert blasting material into the misfires while standing on the muck pile while under supported roof. Tr. 254-55. Because Hamilton was an experienced miner, Quimby did not believe he had to babysit him. Tr. 256-57. I find that the evidence does not support a finding that Quimby required Hamilton to stand in the bucket of the mucker. Rather, because Hamilton was an experienced miner, Quimby expected Hamilton to work safely and efficiently to get the hazardous misfires down.

¹⁰ In assessing the credibility of witnesses, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses. The witnesses were sequestered.

¹¹ Because Quimby was a leadman and not a foreman, he spent most of his time performing hourly production work. In addition, the miners on his crew were experienced, so he did not believe that they should require close supervision. Hamilton had about eight years of experience as an underground metal miner. Tr. 16.

During his visit to Hamilton's work area, Quimby observed 50 or 60 holes drilled around and very close to the misfired holes. Tr. 270. Quimby testified that he was surprised that Hamilton had tried to drill out the misfires. Tr. 255. He said that he had never seen an experienced miner engage in such a negligent act. Tr. 255-56. Such an act is both illegal and very dangerous. Tr. 270. Because Hamilton had stopped trying to drill out the rock surrounding the misfires when Quimby arrived, he did not escort Hamilton out of the mine for his actions. Tr. 256. Quimby testified that he did not immediately remove Hamilton from the mine because Hamilton was pinning the roof and had stopped drilling into the misfires.

Before Hamilton was able to blast out the misfires, the drill steel on his roof bolter broke. As a consequence, he did not complete installing roof support and blasting out the misfires before the end of the shift. He advised Quimby about this on the surface after the end of the shift.¹² Tr. 268. Quimby told the leadman for the oncoming shift about the misfires. Tr. 285. The misfires were shot down after a few more roof bolts were installed during the following shift.

At the end of the shift, after he was on the surface, Quimby called Woelki to tell him that Hamilton had drilled into misfires. Quimby testified that, although he would not have told the oncoming crew about the misfires if Hamilton had shot them down, he would have told Woelki that Hamilton had drilled into the misfires in any event. Tr. 269-70.

Knowledge of Protected Activity

The parties disagree as to whether AMT had knowledge of Hamilton's protected activity. The Secretary asserts that Hamilton raised multiple safety concerns to Quimby with the result that AMT had knowledge of the protected activities. Sec'y Br. 15-16. The Secretary contends that AMT relied exclusively on Quimby's statements in deciding to terminate Hamilton. Further, Quimby was the only individual who gave a statement in AMT's post-termination investigation, was the individual who notified Hamilton of his termination, and filled out part of AMT's Notice of Employee Separation. *Id.* 16; Ex. C-3. Given Quimby's knowledge and the animus he harbored toward Hamilton's safety complaints, the retaliatory motive of Quimby should be imputed to AMT even if the ultimate decision makers did not have knowledge.

AMT argues that the individuals who made the decision to terminate Hamilton, i.e., Woelki, Carlson and Elloway, had no knowledge of Hamilton's alleged protected activity, could not have been motivated by such, and made the decision to terminate Hamilton based only on information that Hamilton had drilled into misfires. AMT Br. 7-10. The decision to terminate was made only after they reviewed the photographs that were taken of the heading the following shift. Ex. R-1. These photographs clearly show that Hamilton had drilled very close to the undetonated explosives. Further, any knowledge Quimby may have had regarding Hamilton's alleged protected activities is not imputable to AMT since Quimby did not participate in any decision making, did not make any disciplinary recommendation, and only reported to Woelki that Hamilton had drilled into un-shot holes. Although AMT acknowledges that Quimby's delivery of the termination decision to Hamilton was a deviation from company procedure,

¹² The shift ended early that day because of a scheduled power shutdown. Tr. 64.

Quimby did so only because Woelki instructed him to do so since Woelki could not get to the mine in time to notify Hamilton of the termination.

The Commission has explained that, if an immediate supervisor's recommendation to terminate an alleged discriminatee is at least partially a result of retaliatory animus and that recommendation influenced management to take the adverse action, then the immediate supervisor's knowledge and retaliatory animus may be attributed to the decision maker. *Turner*, 33 FMSHRC at 1068. The Secretary cites two Commission cases for the proposition that Quimby's knowledge is imputable to AMT, *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F. 3d 1136 (9th Cir. 2001) and the concurring opinion of Chairman Jordan in *Sec'y of Labor on behalf of Andrew Garcia v. Colorado Lava*, 24 FMSHRC 350 (Apr. 2002). In both instances, as well as in *Turner*, the imputation of knowledge of the protected activity hinged on the level of a supervisor's involvement in the decision which resulted in the adverse action. In *Bergene*, while the manager was not ultimately responsible for the decision that resulted in the adverse action, he was found to have played an "influential role" in that decision. Likewise, in *Garcia*, Commissioner Jordan's statement regarding imputation requires the supervisor to have "influenced" or "participated" in the decision that adversely affected the employee.

I find that Quimby's knowledge is not imputable to Woelki and Carlson, who made the decision to terminate Hamilton. I especially credit Woelki's testimony on this issue. Woelki, with the consent of Carlson, made the decision to terminate Hamilton. They had no knowledge of safety complaints. Tr. 436-437. Quimby did not make any recommendation to them about Hamilton's termination. *Id.* Rather, Quimby only told Woelki that Hamilton had drilled into the area of the misfires. Woelki made the decision based in large part on photographs. *See* Tr. 435-437 and Ex. R-1. Without the photographs to corroborate Quimby's statements to him, it is doubtful that Woelki would have determined that Hamilton should be immediately terminated. Woelki explained that Hamilton's act "was extremely dangerous, against our company policy, Klondex company policy and the Code of Federal Regulations[.]" Tr. 436, 440-442. The testimony of Carlson and Elloway support Woelki's decision. Tr. 386, 390, 392-94, 446-47. Leadman Quimby was the only person with some management responsibility who had knowledge of Hamilton's protected activity and he simply advised Woelki that Hamilton had drilled in the vicinity of misfires. The relaying of this information to the ultimate decision maker did not rise to the level of involvement that would trigger imputation of Quimby's knowledge to AMT.¹³ In addition, although Quimby was the person who told Hamilton he had been terminated, the decision had already been made and Woelki was unable to do it because he was not at the mine.

¹³ An argument could be made that, but for Hamilton's protected activity, Quimby would not have called Woelki to tell him that Hamilton drilled into the misfires. Once the misfires were blasted at the beginning of the next shift, any evidence of Hamilton's actions would have been destroyed. The Secretary called Quimby as an adverse witness. Quimby testified that he was surprised that Hamilton moiled (i.e. drilled) near the misfires, he had never observed an experienced miner do that before, and that he considered Hamilton's actions to be hazardous. Tr. 255-56. I credit this portion of Quimby's testimony and find that he would have called Woelki even if Hamilton had not engaged in protected activity.

Hostility or Animus Toward the Protected Activity

The Secretary argues that AMT, through Quimby, demonstrated hostility or animus toward Hamilton's protected activity and safety in general at the mine. Specifically, he argues that AMT was under pressure to produce and AMT management threatened miners with the loss of jobs and bonuses if production goals were not met. Sec'y Br. 14. In addition, the Secretary contends that Quimby accused Hamilton of using safety concerns as an excuse for not producing and told Hamilton to shoot down the misfires whether he was able to get the roof bolted up or not. Sec'y Br. 5; Tr. 61.

AMT argues that production was not the focus at the expense of safety and there was no evidence of any hostility or animus towards protected activity. The mine was in startup phase, which involved normal initial challenges and difficulties and AMT was not under pressure from Klondex to step up production. AMT Br. 11-13. AMT's safety record is evidence that it does not focus on production at the expense of safety.

I find that there is evidence in the record to support a finding that Quimby was tired of Hamilton's delays and that he wanted him to blast down the misfires by the end of the shift. By pressuring Hamilton in such a manner, Quimby, whether intentional or not, displayed hostility toward Hamilton's protected activities. Quimby displayed hostility to any type of delay and his hostility was not specifically directed at safety complaints. Nevertheless, the record supports a finding that Quimby was hostile toward Hamilton's safety complaints. Those in management who made the decision to terminate Hamilton, on the other hand, did not demonstrate hostility or animus toward Hamilton's protected activity or to safety complaints in general at the mine. I do not credit evidence to the contrary.

I have already found that Quimby's knowledge of protected activity should not be imputed to AMT and that Woelki, Carlson and Elloway were unaware of any protected activity. Moreover, I credit the testimonies of both AMT Operations Manager Corley and Klondex Senior Safety Coordinator Crommelin that AMT was not under pressure to push production and that it would not be penalized if production goals were not met. Tr. 363, 470. Roeller testified that miners were getting pushed to shoot rounds, but they often could not blast at the end of their shifts because the equipment provided by AMT was substandard. Tr. 150-51. I do not dispute that everyone was frustrated with the slow pace at the outset of AMT's project at the Fire Creek Mine or that miners were sometimes pushed to do more. AMT was in the midst of an initial shakedown period following the commencement of work and smooth operation had not yet been achieved. Nevertheless, I do not credit testimony that miners were threatened with their jobs as a result of the conditions at the mine and that they had to endure unsafe conditions as a consequence.

Coincidence in Time

The Secretary asserts that the temporal proximity between Hamilton's protected activities and his termination by AMT, without an investigation, "strongly indicates" AMT's discriminatory motive. Sec'y Br. 14. AMT argues that, given the short period of time Hamilton had worked at the Fire Creek Mine, no reasonable inference can be drawn from the timing of

events. However, if any inference can be drawn, it is one in favor of AMT since it terminated Hamilton for his unprotected act the same day it was reported to management. AMT Br. 16.

It is self-evident that Hamilton's termination occurred very soon after his protected activity. I find that, while the temporal proximity of Hamilton's protected activity the night of November 3rd to his termination the following day would normally be indicia of discriminatory intent, here, the issue is not so clear. Even where a coincidence in time exists, "[s]urrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Turner*, 33 FMSHRC at 1070 (citations omitted). The timing of Hamilton's termination, while close in time to his protected activity, was just as close in time to his unprotected hazardous activity. Consequently, although there can be no dispute regarding the temporal proximity of the protected activity and adverse action, I find that not much weight should be given to this issue.

Disparate Treatment

The Secretary argues that Hamilton was the subject of disparate treatment given that he violated no clear company policy and, unlike miner Richard Dahl, who was terminated for throwing an explosive down a drift, was not afforded an opportunity to explain himself or be suspended pending an investigation. Sec'y Br. 17-18. AMT argues that its treatment of Hamilton following his unprotected act was consistent with its company policy as well as its record of terminating employees for violations of company safety policies. AMT Br. 14. AMT has terminated multiple employees for violations of company safety policies. Although AMT may not have interviewed Hamilton before terminating him, as it did when it terminated Dahl under different circumstances involving explosives, there was photographic evidence of Hamilton's misconduct, a different superintendent made this decision, and Dahl was terminated after Hamilton. AMT Br. 14 n. 2.

There is no question that the manner in which AMT terminated Hamilton suffered from a number of irregularities. Some of these irregularities were due to the fact that Woelki was not normally the superintendent of a mine. He did not follow the typical protocol for terminating an employee because it was not something that was a normal part of his job duties. In addition, he was on the way to Winnemucca when Quimby called him.

Normally, when an employer seeks to terminate an employee for an infraction of rules or safety procedures, the employee would be suspended with pay pending an investigation. That is what AMT did when it terminated Dahl. Tr. 370-75. He was suspended with pay while AMT conducted an investigation. During this investigation, AMT interviewed Dahl and other employees with knowledge of the facts. At the conclusion of the investigation, AMT terminated Dahl. In the present case, on the other hand, Hamilton was terminated soon after Woelki and Carlson reviewed the photographs of the heading where Hamilton had been drilling. AMT conducted the investigation of the events after Hamilton was terminated. Ex. C-15.

I find that, although Hamilton's termination differed from AMT's normal procedure, AMT provided adequate reasons for the difference. It should be self-evident to any experienced miner that Hamilton's actions were extremely dangerous and would be prohibited by any mine operator. Hamilton's actions were so inherently hazardous and unusual that one cannot compare

it to other disciplinary actions taken at the mine. I agree with AMT that the circumstances of Dahl's termination are not sufficiently analogous Hamilton's situation. The drill holes created by Hamilton's actions were observed first hand by Quimby and documented in photographs that were reviewed by Woelki and Carlson. Tr. 270; Ex. R-1. The Secretary did not seriously dispute the authenticity or accuracy of the photos. I find that these photographs accurately depict the holes Hamilton drilled near the explosives. Dahl was terminated for throwing an explosive down a drift. Tr. 374. Although Dahl's conduct was certainly dangerous, it does not appear that such clear and convincing evidence of his conduct existed in the immediate aftermath so a pre-termination investigation was necessary. Here, the evidence of dangerous conduct was overwhelming. As noted by AMT, its employee handbook states that it retains discretion to terminate an employee immediately. Tr. 342; Ex. R-10.

Another anomaly in this case arises from the fact that Quimby filled out part of Hamilton's "Notice of Separation." Ex. C-3. It was highly unusual for a leadman to fill out or sign this form. Under the section of the form where management sets forth the reason for the termination, Woelki wrote "[d]rilling marks around the miss hole indicate the bolter operator was trying to use the bolter steel to remove powder." *Id.* Quimby wrote: "No communication. Was told to shoot miss hole. Did not shoot." *Id.* Although the reasons set forth by Woelki and Quimby are not entirely consistent, they both center on Hamilton's conduct with respect to the misfires. I credit AMT's argument that Quimby did not have the authority to terminate Hamilton. Quimby filled out part of the form because (1) Woelki was not at the mine at the time and he wanted the termination to be effective immediately and (2) Woelki was an inexperienced mine superintendent and was not aware that Quimby did not have authority to fill out or sign the separation notice.

Establishment of a Prima Facie Case and its Rebuttal

As stated above, I find that Hamilton engaged in protected activity. Hamilton's termination was the adverse action. The next issue is whether Complainant established a *prima facie* case by presenting evidence sufficient to support a conclusion that his termination was motivated *in any part* by his protected activity. This burden is lower than the ultimate burden of persuasion that Complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. As discussed above, although Woelki did not have knowledge of the protected activity, Quimby certainly did. Quimby displayed some degree of animus or hostility toward the protected activity, as discussed above, but Woelki did not. Quimby was impatient with Hamilton's desire to completely support the roof but it is noteworthy that on the following shift the miners were permitted to complete the task of supporting the roof before the misfires were shot. There was a coincidence in time between the adverse action and the protected activity but also between the adverse action and the unprotected activity. Finally, although other miners have been terminated for serious safety infractions, the procedure used in the present case was not the norm. I find that Complainant established a *prima facie* case.

I find that AMT rebutted Complainant's case by establishing that the adverse action was not motivated in any way by the protected activity. As stated above, I found the testimony of Heinz Woelki to be especially credible. Although he did not handle the situation in the manner that a human resources professional would have recommended, his motivation was pure. He did

not want Hamilton returning to the mine because he considered his actions to be extremely hazardous to himself and the other miners. AMT could not afford to take the risk that Hamilton would take such actions in the future. Moreover, as discussed below, even if I assume that Hamilton's protected activity played a part in the decision to terminate him, AMT established that it would have taken that action based solely on the unprotected activity.

AMT's Affirmative Defenses

AMT alleges, as an affirmative defense, that it would have terminated Hamilton for his unprotected activity alone. AMT Br. 26. It maintains that the uncontroverted testimony shows that the impetus for Hamilton's termination was his "gross safety violation." *Id.* AMT management considered Hamilton's actions to be unnecessarily hazardous because the misfires could have been removed in a safe manner. In addition, Klondex Safety Coordinator Crommelin testified that Hamilton's actions were an "unacceptable practice" that was unsafe and in violation of Klondex's policies and MSHA regulations. Tr. 463-64; Ex. R-22. As a result of his actions, Klondex prohibited Hamilton from working at any of its mines in the future.

I find that even if I assume that part of the reason Hamilton was terminated was because of his protected activities, AMT would have terminated him for his unprotected act of drilling close to the misfires alone. As discussed above, Woelki believed that Hamilton was trying to drill the misfires out to save time, but such conduct was "extremely hazardous." Tr. 190. I credit Woelki's statement that "when someone attempts to remove explosives with a drill steel by moiling[,] there is a high chance of setting off the explosive and [these actions could] result in injury or death." Tr. 438. The "main hazard is the percussion; the impact on the explosive will set it off." Tr. 441. The same is true with respect to the blasting cap and the shock cord; an impact can set them off. *Id.* Woelki decided to terminate Hamilton only after he saw the photographs demonstrating that Hamilton had drilled many holes very close to the blasting material. Tr. 191. Woelki reviewed the photographs after he arrived in the Winnemucca office later on November 4. Tr. 436. I credit Woelki's testimony that he was unaware of any safety complaints made by Hamilton and that Quimby did not recommend to Woelki that Hamilton be terminated. Tr. 436-37.

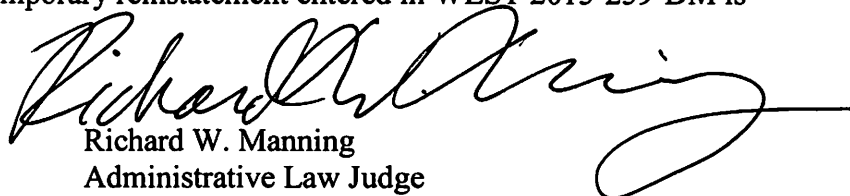
I find that AMT's stated reason for terminating Hamilton was not pretext to cover up the real discriminatory reason. In reviewing an operator's affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has explained that "pretext may be found, for example, where the asserted justification 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). On the other hand, the Commission also held that "judges should not substitute for the operator's business judgment [their] views of 'good' business practice[.]" *Chacon*, 3 FMSHRC at 2516-17. "[O]nce it is determined that a business justification is not pretextual, then the judge should determine whether 'the reason was enough to have legitimately moved the operator' to take adverse action." *William H. Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982) (citation omitted).

The Secretary argues that AMT's characterization of Hamilton's conduct should not be credited. He maintains that the actions that AMT accuses Hamilton of committing "is the sort of unbelievable conduct that when alleged by an employer, indicates pretext." Sec'y Br. 19 (citation omitted). Although a mine operator's accusations concerning unsafe conduct must be closely examined for the reasons suggested by the Secretary, Hamilton readily admitted that he drilled many holes around the explosive materials using the roof bolting machine. He was not simply using the bolter to scale down loose rock; he admits to drilling "plenty" of holes, "50, 200. A lot." Tr. 79. Hamilton's own testimony supports the "unbelievable conduct" that AMT accuses Hamilton of committing.

I find that the business justification offered by AMT was not pretextual. It was not "weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534. I credit the testimony of Woelki that AMT terminated Hamilton solely for drilling in and around the misfires. The Secretary argues that AMT did not have a specific rule prohibiting a miner from using a drill in such a manner, which helps demonstrate that the company failed to follow its own procedures when terminating Hamilton. AMT did not need to have a rule telling experienced miners not to drill into or near undetonated explosives; such an obligation is self-evident. Experienced miners do not usually take such hazardous steps to remove undetonated explosives. Tr. 439. Hamilton's conduct in drilling close to explosive material was reason enough for a mine operator to terminate his employment. As Woelki stated, when a miner is using a machine to drill from ten feet away, he cannot be very accurate with the placement or direction of the drill. Tr. 440. Using drill steel to try to dislodge explosive material from the host rock was extremely dangerous and foolhardy. Woelki testified that when he was on mine rescue teams he retrieved the bodies of several miners who did something similar. Tr. 439-40. Hamilton is lucky to be alive.

III. ORDER

For the reasons set forth above, the complaint of discrimination brought by the Secretary of Labor on behalf of Jacob Hamilton is **DENIED** and this proceeding is **DISMISSED**. By order also issued today, my order of temporary reinstatement entered in WEST 2015-259-DM is dissolved.


Richard W. Manning
Administrative Law Judge

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