

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2010

THOMAS BEWAK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2008-161-DM
v.	:	
	:	
ALASKA MECHANICAL,	:	Rock Creek Mine
INCORPORATED,	:	Mine ID 50-01850
Respondent	:	

DECISION

Appearances: Melinda D. Miles, Law Office of Melinda D. Miles, Palmer, Alaska, for Complainant; Allen F. Clendaniel, Sedor, Wendlandt, Evans & Filippi, Anchorage, Alaska, for Respondent.

Before: Judge Lesnick

This proceeding is before me on a Complaint of Discrimination filed by Thomas Bewak (“Bewak”) against Alaska Mechanical, Incorporated (“AMI”), under section 105(c) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c). The complaint alleges unlawful discharge from employment in retaliation for having made safety complaints to AMI.

Bewak filed a Discrimination Complaint with the Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on August 8, 2007.¹ Ex. O. In a letter to Bewak dated September 21, 2007, MSHA notified him that, based on its investigation of the allegations contained in the Complaint, it had concluded that a violation of section 105(c) had not occurred. Ex. P. Bewak, initially *pro se*, initiated this instant proceeding before the Commission on November 5, 2007, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).²

¹ Section 105(c)(2) provides, in pertinent part: “Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

² Section 105(c)(3) provides, in pertinent part: “If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall

Before a hearing was held, Bewak obtained counsel. A hearing was subsequently held in Anchorage, Alaska. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that Bewak engaged in activity protected by the Act, and that his protected activity motivated Alaska Mechanical to terminate his employment.

I. Factual Background

The complainant, Bewak, is a welder and welding inspector who lives in Chickaloon, Alaska. His inspector certifications were valid at all times relevant to these proceedings, and authorized him to inspect the quality of welds and welding bolt-ups. Tr. 104-07. In early July 2007, Bewak was hired by AMI to work on a construction project at the Rock Creek Mine near Nome, Alaska, primarily as a pipe welder, and secondarily as a quality control inspector. Tr. 112-13; Ex. B. He worked at the Rock Creek site from on or around July 8, 2007, until he was fired on July 25, 2007. Tr. 113, 165; Ex. D.

During 2007, NovaGold Resources and their subsidiary, Alaska Gold, were developing a gold mine on the Rock Creek site. AMI had been hired as a general contractor to build processing facilities on the site. Tr. 242. At the time Bewak worked at the Rock Creek Mine, Kurt Imig was AMI's principal in charge of the Rock Creek Mine project, and also the company's acting corporate safety officer, chief financial officer, and chief purchasing officer. Tr. 284, 286-87. Imig testified that "[t]here was a big push in '07 to get the work done so that [Alaska Gold] could pour a bar of gold before the new year." Tr. 247.

When Bewak reported for work at the Rock Creek site, he received a 20-30 minute "minimal safety orientation" before being told to "hang out and just watch everybody the way they work and just get used to being [on the site]." Tr. 113-16. During his first day on the job site, Bewak observed several work practices and conditions that he felt were unsafe, including ironworkers working overhead and allowing "more than the usual amount of stuff" to fall from where they were working onto areas frequented by other workers, welding leads running "up over and around the stairways where people could trip over" them, "some people [who] wore their safety equipment for climbing around and other people [who] didn't," and supervisors who were not addressing the safety problems he observed, acting instead as if "as long as they saw the people moving, . . . that was good enough for them." Tr. 116-17, 119.

Bewak's observations were corroborated by Bret Garland, a pipefitter who worked for AMI at the Rock Creek Mine during the same period Bewak did. Tr. 21-23. Garland testified that during the time he worked at Rock Creek, "[t]here just was a constant array of red flags popping up" regarding unsafe working conditions. Tr. 24. When he first reported for work – at which time he did not receive any "orientation or training," the site "looked rough . . . they

have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission"

needed to come in with a little bit more fine fill and level out the place.” Tr. 31-34. Although he brought his concerns to the attention of his supervisor, the conditions causing him concern were never addressed. Tr. 36, 42. According to Garland, “as safety cultures go, this one [at AMI’s Rock Creek Mine project] was deficient.” Tr. 78.

Each workday at the Rock Creek Mine began with a meeting of all AMI employees that John Jackson, AMI’s Mechanical Superintendent, described as consisting of “a group discussion on where the main work activities were going to be located for that day, a general quick summary of the type of activity, whether it was crane work, and – and the corresponding potential hazards. Then that usually lasted not long, perhaps 15, 20 minutes.” Tr. 412. After this all-hands meeting, Jackson testified that “the mechanical guys . . . would always have a safety meeting.” Tr. 413. After these smaller meetings, members of the work crew were required to sign a Task Hazard Assessment (“THA”) highlighting any potential hazards associated with that day’s work. According to Jackson, “[i]t was mandatory that you sign those. . . . And by signing those . . . [y]ou understood what your job was, and you agreed with the potential hazards and what to do to correct them.” Tr. 415.

On July 19, 2007, two AMI employees, Craig Bagley, 28, and Tyler Kahle, 19, died as a result of injuries sustained when the manlift they were operating tipped over. Tr. 95-96. Immediately following this accident, AMI’s operations on the site were essentially suspended while inspectors from the Mine Safety and Health Administration (“MSHA”) investigated the accident. Tr. 444. MSHA eventually cited AMI for violating the task training requirements of 30 C.F.R. § 48.27(a), alleging: “The task training did not identify the specific safe operating procedures and limitations of the Load Management System that was critical to safely operate [the] manlift.” Ex. 6. AMI was also cited for unwarrantable failure to comply with 30 C.F.R. § 56.14205 by operating the manlift beyond its design capacity. Ex. 6.³

The day after the accident was a paid day off; over the following four days, July 21-24, Bewak did “[v]ery little,” though on either July 22 or July 23, Jackson asked Bewak to inspect bolts used by AMI in constructing a mill building on the site. Tr. 193, 448. Bewak began inspecting the bolts, but found that, in his opinion, “90 percent of the joints that I looked at had to be reworked, if not all of them.” Tr. 149. He told Jackson “[i]t looks pretty rough,” and declined to finish the inspection because AMI did not have any necessary reference materials on site for Bewak to consult. Tr. 152-53. Jackson testified that Bewak told him “he didn’t feel comfortable in performing that task.” Tr. 424. On July 25, 2007, Bewak attended the all-hands

³ AMI contested both the citations and the penalties arising from the accident. *Alaska Mechanical, Inc.*, Docket Nos. WEST 2008-1582-M, WEST 2008-135-RM, and WEST 2008-153-RM. The Secretary of Labor (“Secretary”) and AMI filed a joint motion to approve settlement in the proceedings, dated March 12, 2010. On June 30, 2010, I concluded that the reduced penalty agreed to by the parties for Citation No. 6398234 lacked the factual basis necessary for me to determine whether the penalty would adequately effectuate the deterrent purpose underlying the Act’s penalty assessment scheme, and denied the motion.

meeting and a fall protection training session in the morning, then was told by his supervisor, Rob Lancaster, that he had work for his crew, whereupon he assigned a welding job to several members of his crew, including Bewak. Tr. 206-07. At approximately 2 o'clock that afternoon, Bewak was fired. Tr. 165-67. Lancaster testified that he fired Bewak because, as he told Jackson that day, "I just can't get Tom to work." Ex. N at 50.⁴

Jackson testified Bewak was fired "[b]ecause he would not follow safety procedures. . . . He wouldn't do his work. He would . . . go out, walking around, talking to other guys that are trying to do their work, thereby impacting my job . . . it was just becoming too much." Tr. 435-36. Jackson explained further:

I mean, the rules were very simple and were explained daily: Sign the THAs. For whatever reason, he wouldn't. Wear your safety vest. . . . Practically every day: Would you get the vest on, please? Stay on task. Do what you're hired to do, which in his case was putting together pipe. Do that. And he would have other people, laborers and whatnot, do his work for him. He would be out and about. I'd show up where he was supposed to be working, and he's not there. . . . And so after a point here, this guy's more problem than he's worth to me. And so that's it. And it was not like it was out of the blue. You know, if you don't start getting back on beam here, I'll lay you off . . . and you can step aside and let a man that's serious about his job come in here and do it. You know, we ramped up here.

Tr. 436-437.

II. Findings of Fact and Conclusions of Law

A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a prima facie case of prohibited discrimination by presenting 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 that activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 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). In determining whether a mine operator's adverse action was motivated by protected activity, the Commission has noted that a judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge*

⁴ Lancaster did not testify at the hearing on this matter. Instead, his testimony was taken in a telephonic deposition on August 6, 2009, the transcript of which was admitted into the record for evidentiary purposes as Exhibit N.

Corp., 709 F.2d 86 (D.C. Cir. 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” 3 FMSHRC at 2510 (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (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 of the complainant. 3 FMSHRC at 2510-12; *see also Sec’y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009) (finding “proximity in time” where the time between the protected activity and adverse action was three weeks); *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 37-38, 43-44 (Jan. 1999) (finding temporal proximity despite 16-month gap between protected activity and adverse action).

A. Protected Activity

Bewak has established that, before AMI terminated his employment, he engaged in protected activity when he brought safety concerns to the attention of his supervisors and an MSHA inspector.⁵ There is no dispute that Bewak resisted signing THAs. *See* Tr. 419-20 (Jackson’s testimony that he “heard through the foremen initially that [Bewak] wasn’t signing the THAs). According to Bewak, he resisted signing THAs because the work crews to which he was assigned “never actually physically went to [a work] area to do a THA ever, not with me . . . [and] you’re supposed to physically go there. And everybody is supposed to point, hey, look, the ground is not right for the manlift or – or this ladder is broken. Numerous things that could be pointed out by everybody looking at the job.” Tr. 496.

When asked whether he told AMI management why he was reluctant to sign the THAs, Bewak said:

I told Lancaster flat out. . . . I said, . . . in order for me to sign this, we got to really do one of these things [i.e., an adequate task hazard assessment]. And he’s like – looks at me like – kind of like a deer in headlights, and just kind of blew it off and would say some unnatural thing like, yeah, okay, we will or something like that. You know, Tom, sign the damn thing so we can get to work.

Tr. 130. Garland also testified that, in his experience, no THAs were ever done to address specific hazards of specific jobs in the areas where the jobs were to be performed. Tr. 50-52.⁶ I

⁵ Section 105(c)(1) of the Act provides, in pertinent part, that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation.”

⁶ In this connection, I would note that it was clearly the opinion of MSHA that AMI’s task training was tragically inadequate on at least one occasion. In its report on the July 19

find that Bewak's concerns regarding the THAs, and his communicating these concerns to AMI management, constituted protected activity.

As detailed above, on either July 22 or 23, Jackson asked Bewak to inspect bolted joints⁷ in the mill building that AMI had under construction on the site. Tr. 193, 448. Bewak testified that he agreed to do so, and found the work performed on the joints to be so inferior that, in his opinion, most of the joints needed to be reworked. Tr. 149. He relayed his concerns to Jackson and declined to finish the inspection. Tr. 152-53. According to Bewak, he told Jackson "you would almost have to start from scratch [on] every joint." Tr. 157. Given Bewak's background as a quality control inspector, I find that his concerns as to the quality of the work done on the bolted joints were based upon a good faith, reasonable belief in a hazardous condition. *Robinette*, 3 FMSHRC at 812 (in the context of protected work refusals, the Commission has held that in order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition"). I also find that when Bewak told Jackson that the bolted joints were "pretty rough" and required extensive reworking, that this constituted protected activity.

After the July 19 double fatality at the Rock Creek Mine, MSHA Inspector Stephen Cain arrived at the site to investigate the accident. Cain testified that Bewak approached him during his investigation with concerns regarding the safety of the bolted joints being used in the construction of the mill building. Tr. 94-98. Bewak testified:

I had been there for over a week, and everything I saw, up [to] and including the deaths . . . just compelled me to [approach Inspector Cain]. . . . I wanted to talk to him. And I – when I first got the opportunity, I took it. He was standing out there pretty much alone, and I was with a group of people. I went right over there and introduced myself and asked him if – if he could do anything about the quality of the work [in the mill building], because after the guys got killed, I was afraid that building was going to fall down on somebody.

Tr. 161. Bewak's contacts with Inspector Cain constituted protected activity.

B. Adverse Action

It is undisputed that on July 25, 2007, AMI terminated Bewak's employment at the Rock Creek Mine, that it was Rob Lancaster who told Bewak he was fired, and that it was John

double fatality, the agency concluded that AMI management "failed to ensure the training [provided to the manlift operators] addressed all safe operating procedures," and this failure was a root cause of the accident that killed the operators of the manlift. Ex. 6.

⁷ In his Complaint filed with the Commission, Bewak stated that he examined "the DTI or direct-tension-indicator bolt-up connections." Ex. O, p.1.

Jackson, AMI's mechanical superintendent, who made the ultimate decision to fire Bewak. Tr. 167, 409, 431, 433; Exs. C, D, & N at 50. I also find that Bewak was fired at around 2 o'clock in the afternoon on July 25, after he had spent the morning in a training session on fall protection. Tr. 165-67, 206-07. When he was fired, Bewak was part of a crew that had been assigned a welding job by Lancaster. AMI does not dispute, and I thus credit Bewak's testimony that "it was a two-man job at best, and he [Lancaster] had five, maybe even more people on that job all wanting to get back to work, because they hadn't been doing anything for two days. That was like the big deal, the first job that came up. Nobody wants to stand around." Tr. 494.

Aside from these bare essentials, I find it necessary to address the testimony of Bewak's supervisors on the events of July 25, 2007. I note in particular that Lancaster's account of what occurred on July 25 differs in many respects from these findings. Ex. N at 36-50. According to Lancaster, on the day he fired Bewak, he "had a project that came in the door, and it was a welding project." *Id.* at 36-37.⁸ He testified that he assigned the project to Bewak, with one other person, Mike Morgan, to act as a "fire watch" for Bewak (i.e., someone "with a fire extinguisher nearby, in case something flared up"). *Id.* at 37. After attending to other tasks, he returned to where he had assigned Bewak to work and discovered that:

Mike Morgan was welding it. So I said, I need Mike to be a fire watch on the job, that's the way we lined it out. I wanted to, you know, get him working. So I told him, I need you to complete the job, so I pulled Mike off of it. . . . I need[ed] a structural welder on it and not a pipefitter welder. Mike wasn't certified as a structural welder and Tom was supposed to be. . . . I didn't reprimand anybody at that point. I asked Tom to complete the job, and I went back to the main office, I believe, and did some paperwork there.

Id. at 38-42. Lancaster said he again returned to Bewak's work area and found that "no one was welding on the plate" and that Bewak did not have on his safety vest. *Id.* at 42. Lancaster went on to testify that "at this point it's already been three-plus hours that this blade should have been worked on and there wasn't any prep work done to it. . . . I said, I need to get it done by noon." *Id.* at 42, 49. He left again "to go check on the rest of the crew," then returned again to Bewak's work area:

And when I came back he was just standing next to the blade. . . . So at that point I just walked right to the office. I told John Jackson, I said, I just can't get Tom to work. And he said, well, you know what to do then . . . we're not paying people to stand there. So I told [Jackson] I was going to let [Bewak] go. So I went back to Tom and I told him.

⁸ Lancaster was not clear as to the nature of this project. First, he said it was a welding job "on a big blade off a piece of equipment," but then said, "I don't remember exactly what it was, but it was a welding project." Ex. N at 36-37. Later, he again said the project involved "some type of bulldozer blade." *Id.* at 43.

Id. at 49-50.

The most significant problem I find with Lancaster's testimony is that it is at odds with record evidence that establishes an entirely different sequence of events. Although Lancaster claims that after "three-plus hours" he told Bewak he needed the welding project "done by noon," during that time period, i.e., the morning of July 25, Bewak was attending fall protection training. *See* Ex. L. Lancaster also contradicts himself when, on the one hand, he says that when he first checked on Bewak, he found Morgan welding, and on the other hand, says that later, "there wasn't any prep work done to it." If he found Morgan welding, there must have been at least *some* prep work done. He was questioned further on this point, and further highlighted the contradictions in his testimony:

Q. Why did you say start on the project if you had already seen him working on the project before?

A. He hadn't worked on the project yet. And it's been over three hours, that's why I got a little upset. I told him I need to get this blade started.

Q. Started. Okay. But this is the blade that Mike was welding on and Tom was watching him?

A. Yes.

Ex. N at 44. As to Lancaster's assertion that Morgan "wasn't certified as a structural welder," Morgan himself testified at the hearing that he was, in fact, certified at the time to do both pipefitting and structural welding. Tr. 70-71. Lancaster's testimony is also at odds with Bewak's, who said Lancaster "had five, maybe even more people on that job all wanting to get back to work." Tr. 494.

Finally, I note that another of Bewak's supervisors, Michael Shawn Engstrom, an AMI general foreman, strangely enough told a story very similar to Lancaster's. Asked to comment generally on Bewak's performance, Engstrom testified:

[O]ne particular day I made sure that there was a weld for Mr. Bewak to do, and he was to weld it. And anyways, I come back out later, and one of the other kids was welding on it. . . . Well, obviously I had confronted him about it. And I can't remember exactly what the exact story was, but I recall that he wanted to let the kid have some more practice and ... get some more welds under him, which, you know, is fine, but I need[ed] to evaluate . . . Mr. Bewak, and I need[ed] him to do the stuff that's assigned to him.

Tr. 330-31. When asked if he was aware that Lancaster told “the same story,” Engstrom was taken aback, responding: “As far as – no, because I don’t know – I’m not exactly sure what you’re getting at.” Tr. 341-42. When counsel clarified the question, Engstrom replied, “If Rob Lancaster is telling that story as well, then that would be on a separate incident.” Tr. 342. When Bewak was asked about the same story being told by Engstrom and Lancaster “about you having another younger welder do a weld that you had been asked to do,” he replied, “They’re confused. It only happened once.” Tr. 494.

I agree with Bewak. I find that Engstrom and Lancaster were, at best, confused, and that this fact casts considerable doubt on their testimony as a whole, as well as even greater doubt on the particular testimony each offered regarding the story about Bewak and the younger welder. I discredit their contradictory testimony. Instead, I find that Lancaster assigned a welding job to a crew that included Bewak on July 25, 2007; that this occurred after Bewak attended the fall protection training session; and that once on the job, Bewak allowed a less experienced, albeit properly certified, welder an opportunity to gain some experience by doing a structural weld. I also find that any welding job AMI undertook at the Rock Creek Mine would have required the company to “pay[] people to stand there,” because as Lancaster stated, when welding was done, “you always had to have a fire watch . . . in case something flared up.” *See* Ex. N at 37, 50.

C. Motivation

I find that the record contains ample reliable evidence to support a conclusion that AMI’s termination of Bewak was motivated by his protected activity. In reaching this conclusion, I have relied primarily upon the following indicia of AMI’s discriminatory intent: (1) the company’s admitted knowledge of Bewak’s protected activity; (2) the animus demonstrated by AMI towards Bewak’s protected activity; and (3) the very close proximity in time between Bewak’s protected activity and AMI’s adverse action.

1. Knowledge

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,” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Chacon*, 3 FMSHRC at 2510. Here, however, I do not need to resort to any circumstantial evidence or inferences to find that AMI knew of Bewak’s protected activity because the company admitted it knew of these activities. John Jackson, who made the ultimate decision to fire Bewak, testified he knew Bewak made safety complaints:

Q. Mr. Bewak complained about safety violations at the Rock Creek Mine project prior to the deaths of Mr. Bagley and Mr. Kahle. Isn’t that correct?

A. The only complaints I was aware of were the ones that were specific,

that he would make specific to what his area of work or what he was involved in.

Q. Right. So he did make complaints about safety, right?

A. Yeah.

Tr. 462; *see also* Tr. 409, 431, 433; Ex. C & D. Jackson also testified that he “heard through the foremen initially that [Bewak] wasn’t signing the THAs, and so I – after a short while of this – and I had a chat with him. Is there a problem here? . . . I can recall him saying he had safety issues.” Tr. 419-20; *see also* Tr. 431, 433, Exs. C & D. Engstrom denied ever hearing Bewak complain about THAs. Tr. 304-05, 356. In light of Jackson’s testimony that he “heard through the foremen initially” that Bewak had objected to signing THAs (Tr. 419-20), I discredit Engstrom’s testimony on this point. To the contrary, I find that Engstrom knew of Bewak’s concerns regarding the THAs.

Lancaster testified that before Bewak was transferred to his crew, he was unaware of Bewak refusing to sign any THAs. Ex. N at 32. Bewak, however, testified that on July 25, in particular, Lancaster confronted him after he had not signed the THA for that day’s work assignment:

[Lancaster] assigned the work, and then he . . . reminded me before he left, kind of away from everybody, [he] said, well, you didn’t sign the [THA] again. And he . . . acted like he was a little more ticked off about it this time than all the other times. So I said, yeah. . . . And when he left, I went and signed it, because I was thinking, well, I really don’t want to lose my job. And so I did. I went and signed it against my better judgment.

Tr. 166. Bewak also stated that he “told Lancaster flat out” why he was reluctant to sign the THAs. Tr. 130. Jackson also testified that he “heard through the foremen” – not a singular “foreman” – about Bewak’s reluctance to sign THAs. Tr. 419. Having already found Lancaster’s testimony generally unreliable, I discredit his testimony here, and find that he knew that Bewak had problems with signing THAs.

Jackson denied that Bewak told him after inspecting the bolts in the mill building that he “would almost have to start from scratch [on] every joint.” Tr. 157, 448. However, I find Jackson’s testimony on this point lacking any credibility. His denial of being told by Bewak that the bolting job was done poorly came only after a series of non-responsive, equivocal answers on cross examination:

Q. Do you recall that when Mr. Bewak told you that he was refusing to inspect the mill building, that the reason he gave you was because it was so poorly done, [you] would need to start from scratch?

A. I would have to think about that for a minute because that’s not – he’s

not in a position to make that decision. He's not qualified.

...

Q. Okay. But whether or not he was qualified to state so, do you agree that when Mr. Bewak refused to inspect the mill building, the reason he gave you was that it was so poorly done, you would need to, quote, start from scratch?

A. I disagree with that statement. He's not qualified to make it.

Q. I'm not asking you, Mr. Jackson, whether you agree or disagree with the statement. I'm asking whether you agree that Mr. Bewak made that statement.

A. No. I don't recall that.

Tr. 446-447. Contrary to this testimony, I find that Jackson was well aware of the concerns Bewak expressed concerning the bolts in the mill building Jackson asked him to inspect. Specifically, I find that Jackson knew that in Bewak's opinion, the quality of work done on the bolts was inferior and needed to be reworked.

Jackson also was aware that Bewak talked to an MSHA inspector after the July 19 fatal accident, and that this was "during the process of him being laid off." Tr. 427. Bewak also testified that when he spoke with Inspector Cain about the bolt-up in the mill building, he did so in plain sight of his supervisor, Rob Lancaster. Tr. 169. Especially in light of Cain's testimony that he spoke to AMI management about Bewak's concerns (Tr. 98), I infer that Jackson knew that the subject of the conversation Bewak had with Cain was the bolt-up.

2. Animus

I find ample reliable evidence of the animus AMI management held towards Bewak. With regards to THAs, despite concerns Bewak expressed about signing them when no adequate hazard assessment had been done, he was told repeatedly that before he could start working, he had to sign a THA, and that failure to sign one could lead to his being fired. Tr. 125-26. According to Bewak, "we were told flat out we could get fired if we didn't sign it, flat out." Tr. 129. Jackson testified that Bewak was reluctant to sign the THAs, and "had a chat with him," but dismissed Bewak's safety concerns as "just chatter." Tr. 419-420. When told by Bewak of the problems with the bolt-up in the mill building, and that he did not want to proceed with inspecting them, Bewak testified that Jackson was "visibly upset." Tr. 156. When explaining why he changed Bewak's Termination Report from indicating Bewak was laid off, with "Not Qualified" listed as the "Reason for Separation" (Ex. C), to indicating he was "Fired" for "Refusing to Follow Safety Procedures," Jackson testified: "Well, quite honestly, he just pissed me off." Tr. 431, 433. Bewak also testified that when he spoke with Inspector Cain, he did so in plain sight of his supervisor, Rob Lancaster. After Bewak finished, he testified: "When I turned around, [Lancaster] gave me that look, like, oh, that dirty rat." Tr. 169.

In light of this testimony, I find that Bewak worked in an environment in which management was pervasively hostile to his safety complaints.

3. Proximity in Time

Bewak was employed by AMI at the Rock Creek Mine for less than three weeks, from July 8 or 9 until July 25, 2007. Tr. 113, 165; Ex. D. Clearly, the events that are the subject of this proceeding occurred in very close proximity in time. The most relevant sequence of events, however, occurred within a period of three or four days, from July 22 or 23, when Jackson asked Bewak to inspect the bolt-up in the mill building, to July 25, when he was fired.

Jackson testified that he asked Bewak to inspect the bolt-ups on either Sunday, July 22, or Monday, July 23. Tr. 448. I have already found that after examining some bolts, Bewak told Jackson that the quality of work done on the bolts was inferior and needed to be reworked, and I have credited Bewak's testimony that upon hearing this, Jackson was "visibly upset." Tr. 156. Soon after he expressed his concerns to Jackson, Bewak asked MSHA Inspector Cain "if he could do anything about the quality of the work" in the mill building, and told Cain he was "afraid that building was going to fall down on somebody." Tr. 161. Cain, in turn, told AMI management of Bewak's concerns. Tr. 98. I have already drawn the inference that Jackson knew that Bewak spoke to Cain about the bolt-up. On Tuesday, July 24, 2007, Jackson signed a Termination Report on Bewak with "Layoff" checked and "Not Qualified" listed as "Reason for Separation." Tr. 431, Ex. C. By the afternoon of the following day, Wednesday, July 25, Bewak had been fired. Tr. 165-67. Clearly, there is a significant coincidence in time between these various events, and I thus find such a coincidence in time between Bewak's protected activity, specifically his complaints regarding the bolt-up in the mill building, and the adverse action AMI took against him.

D. Prima Facie Case

In light of the findings I have made above, that Bewak engaged in protected activity, that AMI took adverse action against him, and that the adverse action was motivated by Bewak's protected activities, I therefore conclude that Bewak has met his burden of establishing a prima facie case of unlawful discrimination under the Mine Act.

E. AMI's Defenses

An operator may rebut a prima facie case of prohibited discrimination by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern*

Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying Pasula-Robinette test); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The Commission has also noted that judges "may conclude that [such] justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." *Chacon*, 3 FMSHRC at 2516.

AMI argues that Bewak's "[s]afety complaints, if any, had nothing to do with his termination. He was fired because of his poor performance and workplace misconduct." AMI Br. at 3. In finding that AMI was motivated at least in part by Bewak's protected activities, I have rejected this defense. It remains for me to determine whether AMI would have fired Bewak for unprotected activity alone. Before addressing this issue, however, AMI's documentation of Bewak's firing is problematic enough that I need to first address the contradictions and problems arising from these documents and the testimony about them.

The record contains two Termination Reports for Bewak signed and dated by Jackson. Exs. C & D. The first of these reports was signed and dated by Jackson on July 24, 2007, and lists July 24 as an effective date of termination. Under "Type of Separation," "Layoff" is checked, and "Other: Not Qualified" is listed as a "Reason for Separation." The section of the report entitled "Employee Evaluation" shows that Jackson believed Bewak's attendance was "Satisfactory," and that his cooperation, initiative, job knowledge, and quality of work were all "Fair." Under "Recommendation," "Some Reservation" is checked; however, under "Rehire," a line appears midway between "Yes" and "No." Ex. C.

The second report has no effective date of termination, but was signed and dated by Jackson on July 27, 2007. Under "Type of Separation," "Fired" is checked, and "Other: Refusing to Follow Safety Procedures" is listed as a "Reason for Separation." Jackson has changed his evaluation of Bewak's initiative and quality of work from "Fair" to "Unsatisfactory." Under "Recommendation," "Would Not Recommend" is checked, and under "Rehire," "No" is clearly marked. Ex. D. Neither Termination Report was signed or dated by Bewak in the space provided for him to do so.

When asked why he changed the Termination Report to reflect more poorly on Bewak's performance, Jackson said that Bewak's behavior after being fired, but before leaving Nome, led him to make the changes. Tr. 433-35. However, this rationale fails to stand up to any degree of scrutiny.

At some point around the time Bewak was fired, AMI provided him a ticket to fly from Nome to Anchorage, Alaska, aboard Alaska Airlines Flight 153. Ex. H (Travel Request dated July 25, 2007, but signed and dated by Jackson on July 24). On the evening of July 25, 2007, the day Bewak was fired, an incident involving Bewak occurred at the Nome Airport. Tr. 177-79. A police report on the incident notes that Bewak "was told that he could not fly [that night] because of intoxication and to reschedule for tomorrow [July 26]." Ex. K. Bewak testified that he "went

back to [his] hotel room and waited till the next day and flew out.” Tr. 178.

Jackson, on the other hand, testified that after Bewak was fired, “[h]e pulled a disappearing act and was gone for three days. And we didn’t know where he was.” Tr. 433. In other words, according to Jackson, Bewak was fired on July 25, disappeared for three days, during which AMI personnel “were cruising around town” but “couldn’t find Bewak,” then re-appeared on July 28 and “pops up at the airline . . . and starts giving a bunch of grief to the gal there.” Tr. 433-34. Jackson went on to say:

I mean, right, wrong or otherwise, if you’re working for me, as far as I’m concerned, you have to maintain . . . a professional bearing, you know. . . . And there was no need for that.

I mean, what was – give me a reason why you’d want to do that. And that made me angry, because, to me, it was an insult. And so I changed the paper. I mean, this is – if that’s the kind of guy he is, that’s the kind of guy that we don’t want working for our company. And so I changed his papers, and I put in “Fired.” And basically, as far as I’m concerned, that meant he’s not eligible for rehire, and so be it.

Tr. 434-35. Jackson fails to explain in his testimony the discrepancy between his story and the police report of the airport incident dated July 25, which corroborated Bewak’s testimony that he attempted to leave Nome that evening, but was forced to wait until the next day, July 26, to leave. Nor did Jackson mention the airport incident in his July 27 termination report, nor the three day “disappearing act.” In fact, all he mentioned was Bewak’s purported “Refus[al] to Follow Safety Procedures” – which clearly has nothing whatever to do with Bewak’s conduct *after* being fired.

Jackson’s testimony contradicts the documentary evidence. I find it singularly unreliable. Furthermore, I find the second Termination Report to be a post hoc rationalization of AMI’s firing of Bewak for making safety complaints to MSHA. Moreover, I find Bewak’s conduct after being fired irrelevant to these proceedings, and reject as absurd AMI’s insinuation that it was justified in firing Bewak for something he did *after* he was fired. The July 27 Termination Report is a cynical attempt to turn the tables on Bewak, to make him out to be an unsafe worker, and shift the focus away from the company’s all too tragic failure to maintain a safe working environment on the Rock Creek Mine site.

In its posthearing brief, AMI points to an incident during which Engstrom told Bewak that he had been seen “stealing tools out of . . . somebody’s toolbox.” AMI Br. at 3 (quoting Tr. 136-37). When Engstrom told Bewak who purportedly had made this accusation, Bewak went to confront his purported accusers, ignoring Engstrom’s order not to do so. When Bewak confronted the workers, they insisted that they never made any such accusation. Bewak then returned to his job, where Engstrom “didn’t say another word to me ever after that.” Tr. 135-37. According to

Engstrom, the incident “was blown out of proportion,” and that “it wasn’t like anybody was calling [Bewak] a thief.” Tr. 332-33. AMI now argues that the incident justified Bewak’s termination because “he disobeyed a supervisor’s direct order [and] angrily confronted other employees.” AMI Br. at 4 (citing Tr. 136-37).⁹

As to whether AMI would have fired Bewak for this conduct alone, the fact is that they did not do so, nor does the company’s contemporaneous documentation of his firing mention that he was insubordinate or confrontational with other employees. *See* Exs. C & D. Nor did Jackson ever offer this incident as among the reasons Bewak was fired. *See* Tr. 436-437. Moreover, the record reflects that at the AMI Rock Creek site, misconduct was not tolerated, and that failure to follow the company’s rules could lead to one being summarily fired. Calling the all-hands meeting “the daily threat,” Bewak testified that “when everyone left the meeting . . . They would talk – you know, they were angry. They were nervous. They were upset. These guys have families to feed, and children and bills, and they’re all walking away every day thinking that if they do . . . just some normal thing that may not suit [project manager Frank] Torres’ idea of a normal thing, they would be on the next plane out of here.” Tr. 120-21. Garland corroborated Bewak’s testimony, saying of the all-hands meetings: “What sticks out in my mind is the emphatic demands that you don’t stand around. . . . Every morning my job felt threatened by Frank Torres.” Tr. 43, 45. Had Bewak’s behavior upon being accused of stealing tools been so egregious, I find it likelier than not that he would have been fired at that time rather than after making safety complaints to management and an MSHA inspector. I find AMI’s argument unconvincing, and thus reject it.

AMI reiterates its argument that Bewak was fired for “misconduct (including safety violations), and personality conflicts,” and adds “poor performance” to its reasons. AMI Br. at 5. The only “safety violation” the company points to is that Bewak repeatedly failed to wear his safety vest. In fact, Bewak admitted that he failed to wear his safety vest on at least two occasions, one of which was on July 25, the day he was fired. Tr. 493. On July 25, Bewak was dressed in protective welding leathers: “when a welder welds, he’s got to cover his arms. Some leathers are only covering one arm. Some leathers cover from the chest and both arms, and some are a full leather jacket. . . . I have all three. On that particular day [I was fired], I was wearing the full jacket.” Tr. 500-01. In fact, had he not been wearing leathers, he would have been in violation of AMI’s work rules. Tr. 500. Notably, Bewak wore his leathers over the safety vest provided by AMI because sparks would melt the vest. Tr. 171-72, 417-18, 493. Garland also testified: “I’m not used to ever seeing welders wearing a safety vest.” Tr. 57-58. Bewak had good reason to shield his safety vest from sparks generated as he welded. To fault him for doing so, AMI placed Bewak between a rock and a hard place – requiring him to wear protective leathers on the one hand, and on the other hand, to wear a safety vest that was “probably more

⁹ The company also highlights Bewak’s statement that after he returned to his job, when Engstrom “didn’t say another word to me,” he “would have smacked [Engstrom] if he did.” Tr. 137. At the time of the incident, however, Bewak neither voiced nor acted upon any such intention. I reject AMI’s attempt to use his statement, made at trial over two years after the incident, to show that Bewak intended to strike Engstrom. *See* AMI Br. at 3.

dangerous, really, because it [would] melt to you.” Tr. 172. I conclude that this particular justification “is so weak, so implausible, [and] so out of line with normal practice that it [is] a mere pretext seized upon to cloak discriminatory motive.” See *Chacon*, 3 FMSHRC at 2516.

AMI’s other grievances against Bewak lack credibility. The company argues that Bewak was confrontational towards “Engstrom and other members of the crew.” AMI Br. at 5 (citing Tr. 335). But Engstrom, over whose credibility I have already raised doubts, testified “he was confrontational with *some other people*.” Tr. 335 (emphasis added). Such a vague, unsubstantiated statement is the very epitome of pretext. The company argues that Bewak “was too social, which caused him to not do his work, but also to distract other employees from doing their work.” AMI Br. at 5. On the one hand, Engstrom testified that Bewak “[stood] around talking a lot” (Tr. 331), while on the other hand Lancaster said that “Tom never spoke much. I don’t know if he ever really talked to me at all . . . he was pretty quiet.” Ex. N at 30. Given the overall lack of credibility I found in the testimony of these two witnesses, I conclude that Engstrom’s accusation is yet further pretext. AMI’s assertion that Bewak “did not do welds that he was assigned and would give them to others to do” (AMI Br. at 5), refers to Engstrom’s version of the story involving the welder Mike Morgan, which I explicitly discredited above. I also discredited Lancaster’s version of this story, which AMI also attempts to offer as justification for Bewak’s termination. AMI Br. at 6.

F. Conclusion

I find no merit in AMI’s attempts to resuscitate their case against Bewak by falling back on unreliable, contradictory record evidence. Having thus found that the proffered rationale for Bewak’s discharge is not credible and was merely a pretext for terminating him because of his protected safety complaints, I find that the Complainant herein has sustained his burden of proving that his firing on July 25, 2007, was in violation of section 105(c)(1) of the Mine Act.

ORDER

Accordingly, inasmuch as Bewak has established, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Thomas Bewak against Alaska Mechanical, Incorporated, under section 105(c) of the Act, is **GRANTED**.

Within ten days of the date of this decision counsel for the parties **ARE ORDERED** to confer to determine the appropriate back pay and interest to be awarded Bewak for the days he missed work as a result of his illegal termination, and any other relief required to make Bewak whole.¹⁰ Within 15 days of the date of this decision, counsel shall report the results of their

¹⁰ Section 105(c)(3) of the Act provides, in pertinent part: “The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order . . . dismissing or sustaining the complainant’s charges and, if the charges are sustained, granting such relief as it deems

discussions to me jointly in writing, and I will issue a decision and order ruling on the agreed-upon relief. If counsel are unable to agree, they shall jointly advise me in writing within 15 days of the date of this decision, and I will issue an order regarding the issue of relief.

Also within 15 days of the date of this decision, counsel for the parties **ARE ORDERED** to separately address the civil penalty criteria set forth in section 110(i) of the Act.¹¹ Based on these submissions, I shall enter findings on each criterion and will assess Alaska Mechanical, Incorporated, a civil penalty for its violation of section 105(c).

Robert J. Lesnick
Chief Administrative Law Judge

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appropriate . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

¹¹ Section 110(i) of the Act provides, in pertinent part: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."