FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

November 5, 2009

PETER J. PHILLIPS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2009-286-DM
	:	RM MD 2008-05
v.	:	
	:	Mine ID 05-04
	:	Portable Crusher #4
A & S CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Peter J. Phillips., Florence, Colorado, *pro se*;
Richard P. Ranson, Esq., and Jason P. Kane, Esq., Ranson & Kane, P.C., Colorado Springs, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Peter J. Phillips against A & S Construction Company ("A & S"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Phillips contends that he was terminated from his employment because he complained about safety issues at the Evans Pit. An evidentiary hearing was held in Cañon City, Colorado. For the reasons set forth below, the discrimination complaint is dismissed.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

At all pertinent times, A & S operated the Evans Pit near Pueblo, Colorado. The pit included a crusher and ancillary equipment used to make aggregate for asphalt and concrete products. In June 2007, the crusher was operating 24 hours a day, seven days a week. On or about February 12, 2008, Mr. Phillips filed a discrimination complaint with the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). On November 3, 2008, the Secretary determined that the facts disclosed during her investigation into the complaint filed by Phillips do not constitute a violation of section 105(c) of the Mine Act.[1]

[1] The parties were previously engaged in litigation concerning these matters. Before the Secretary determined that section 105(c) of the Mine Act had not been violated, she brought a temporary reinstatement case under section 105(c)(2). A & S agreed to an economic reinstatement.

On or about December 12, 2008, Phillips filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. The complaint of discrimination alleges that he was a wash plant foreman for A & S and that on June 26, 2007, he observed the scraper lying on its side. When he went to see what had happened, he saw Kenny McMullen, the scraper operator, shaking his head saying that he could not believe that he did this. When Phillips talked to McMullen, he could smell alcohol on his breath. Harvey Barnhard approached and Phillips told him that McMullen was drunk. Phillips told Barnhard that he wanted McMullen off the property. Barnhard told him to mind his own business. Phillips then called John Paul Ary and was told that McMullen was the only scraper operator and that he would have to stay. Phillips replied that he does not "put up with anyone drinking or doing drugs on the job." (Discrim. Complaint). On or about September 8, 2007, when McMullen came to work drunk, Phillips told him that he was fired. McMullen called Ary who told him that he was not fired. Phillips subsequently told Ary that McMullen could kill someone, to which Ary responded by telling Phillips to mind his own business. On September 13, 2007, A & S fired Phillips for allegedly failing to show up at work without prior approval. In its answer to the complaint, A & S denied these allegations and asserted several affirmative defenses.

A. Phillips' Request for a Second Continuance.

This case was assigned to me on February 20, 2009, and I issued a prehearing order on February 23. I issued a notice of hearing on March 23, 2009, following a conference call with the parties, setting the hearing for May 18. Shortly thereafter, six subpoenas were sent to Phillips at his request. Counsel for A & S took Phillips' deposition on April 8, 2009. As required by my notice of hearing, A & S submitted its witness and exhibit list to me on May 6. On or about May 14, another conference call was held during which Phillips asked that the hearing be canceled because he felt he needed to find counsel to represent him. I orally granted Phillips' request and then issued an order on May 14 canceling the hearing so that he could find an attorney to represent him in the case.

On July 17, 2009, I held another conference call with the parties. During this call, Phillips advised me that he was unable to find an attorney to represent him and that I should set a hearing date. After discussing several possible dates, the parties agreed that the hearing would be held on September 9, 2009. On this basis, I issued a notice of hearing on July 20 setting the case for hearing on September 9.

The parties convened on September 9 in Cañon City and Phillips was ready to proceed with the hearing. Phillips did not raise any objections to the hearing when I asked if there were

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On November 26, 2008, Judge David Barbour dissolved his order of temporary economic reinstatement and dismissed the temporary reinstatement proceeding. 30 FMSHRC 1119 (Nov. 2008). The Commission granted Phillips' petition for review of the judge's dissolution of the order of temporary economic reinstatement. By decision dated September 9, 2009, the Commission, by a two to two vote, affirmed the judge's order. 31 FMSHRC _____ (Sept. 2009).

any preliminary matters. (Tr. 5). After counsel for A & S finished with his opening statement, Phillips said "I am going to need a lawyer." (Tr. 14). He characterized the company's opening statement as "nothing but lies." *Id.* I advised him that an opening statement is not evidence and that I would not consider it when rendering my decision. (Tr. 15). I reminded Phillips that I postponed the hearing from May until September so that he could find an attorney and that during our July conference call he advised me that he was ready to proceed to hearing. (Tr. 14-15). He replied "[t]hen you will have to decide it and rule for them." (Tr. 15). When Phillips was asked why he did not get a lawyer after the hearing was postponed in May, he replied "I don't have no money [and] I still don't have no money." (Tr. 16). Phillips said that he called four attorneys including Tony Oppegard. The three Denver attorneys wanted a retainer of $2,500 and he said "I don't have that kind of money." *Id.* He indicated that he needed a lawyer after listening to the company's opening statement because it was "all fabricated." *Id.* I did not grant his request for second continuance of the hearing and called Phillips to the stand so that he could present his case.

The Commission has not directly addressed the right to counsel issue. In *Sewell Coal Co.*, the Commission reversed a judge because he set a hearing date that conflicted with a previously scheduled commitment of the company's counsel and then refused to continue the hearing upon the request of the attorney. 2 FMSHRC 2479 (Sept. 1980). The Commission balanced the public interest in the prompt adjudication of cases against the convenience of the judge and the party's right to be represented by counsel, and concluded that the judge abused his discretion in denying the request for a continuance. The Commission stated that "due process has been given . . . when a party has been afforded the opportunity to obtain competent counsel . . . ." *Id.* at 2480. In *Jaxsun v. Asarco, LLC.*, the Commission recognized that, when assessing matters of party representation at a hearing, judges should be guided by the Mine Act, the Commission's Procedural Rules, and the Administrative Procedure Act ("APA"). 29 FMSHRC 616, 620-621 (Aug. 2007). The APA provides that a party may appear at a hearing without representation, although the party is entitled to obtain representation. 5 U.S.C. § 555(b). The Commission's procedural rules allow a party to represent himself or obtain counsel. 29 C.F.R. §§ 2700.3(b)(1), 2700.4(a).

At least one federal court has held that a judge does not abuse his discretion when, in a civil case, he denies a motion to continue a case a second time after the moving party failed to obtain counsel during the first continuance. *Charles v. Rice,* 999 F.2d 1580; 1993 WL 307892 (5th Cir. 1993) (unpublished). The court held that an abuse of discretion will be found only when the denial of continuance " 'severely prejudiced' the party requesting it and where, 'on balance, the interests in favor of a fair trial heavily outweighed the interests in favor of an immediate trial.' " *Id.* at WL p. 3, *citing Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co.*, 423 F.2d 842, 844 (5th Cir. 1970).

In this case, I granted Phillips a continuance of the hearing, over the objection of A & S, so that he could obtain counsel. I set the case for hearing a second time only after Phillips advised me that he was unable to obtain counsel and he was ready to proceed to hearing. I chose

September 9, 2009, for the hearing date after making sure, during a conference call, that Phillips had no objection to that date. The hearing commenced as scheduled and Phillips asked for a continuance only after counsel for the company completed his opening statement.[2] When asked why he had not engaged an attorney during the summer, he replied that he did not have sufficient funds to pay a retainer and that he still did not have such funds. It would have been unfair to A & S to grant a second continuance at the start of the hearing because A & S was prepared for the hearing and the company had four witnesses ready to testify. The Commission had expended resources in preparation of the hearing and had retained a court reporter. The only basis Phillips gave was that the company's opening statement was "nothing but lies." I explained to Phillips that the opening statement was not evidence and that he would be given the opportunity to cross-examine the company's witnesses after they testified. He also knew, well before the hearing, that the company would offer evidence that differed from his own. He had a copy of the company's witness and exhibit lists since May 6, 2009. Phillips had a copy of the company's six page answer which set forth many of the defenses that counsel summarized in his opening statement. Indeed, Phillips sent A & S a response to the answer so it is clear that he had studied it. (Ex. B). Congress provided that discrimination cases shall "be expedited" by the Commission. (§ 105(c)(3) Mine Act). I weighed all of the factors set forth above and determined that Phillip's request for a second continuance should be denied, especially since the request came after the hearing had started and it was unlikely that he would have been more successful in retaining an attorney than he had been during the summer.

B. <u>Summary of the testimony.</u>

Phillips testified that he was hired by A & S in August 2006, after he was fired from another job. (Tr. 18). He was hired to operate a loader at the Evans Pit near Pueblo, Colorado. In November of that year he started working as a mechanic at the pit. He had prior experience working as a mechanic on heavy equipment. Phillips testified that Darrell Fisher was his supervisor at the pit and that they got along very well. Fisher was the crusher foreman at the pit and he supervised the pit when Harvey Barnhart was not there. Fisher became the crusher superintendent after Barnhart was reassigned to other pits in July 2007. (Tr. 102, 106-07, 111). John Paul Ary functioned as the chief operating officer of A & S. (Tr. 79-80, 140-42). Phillips was responsible for keeping the wash plant operating. He did not supervise anyone and he could not set his own hours even after he was given the title "foreman" in August 2007. (Tr. 101).

Harvey Barnhart was the crusher superintendent for A & S and, as such, was the supervisor of the Evans Pit. (Tr. 80). He was also the supervisor of three other pits for A & S. He has worked for A & S since 1987 and has operated virtually every piece of equipment that the company owns. In the summer of 2007, the wash plant at the pit was operating seven days a week and 24 hours a day. A & S employed about 100 people in 2007.

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[2] If I had not granted the company's request to make an opening statement, the trial would have proceeded and Phillips would not have asked for the continuance at all or he would have requested a continuance after one or more of the company's witnesses had testified.

Denise Gonzales was the office manager and safety manager for A & S. As safety manager, she monitored safety training to make sure that all employees received required MSHA/OSHA training. (Tr. 121). She also supervised enforcement of the company's alcohol and drug policies. She gave each new employee an employee manual, safety manual, and drug/alcohol policy statement. (Ex. D). She testified that the company conducts drug/alcohol testing when hiring employees, after serious accidents, upon reasonable suspicion, and on a random basis. (Tr. 123).

1. Events of June 26 and 28, 2007

On June 26, 2007, McMullen partially tipped over the scraper he was operating while he was dumping overburden. Phillips testified that he was in the control shack running the wash plant and he could see the scraper from that vantage point. (Tr. 21). Phillips said that he was the first person to arrive at the scene of the accident. Phillips testified that he could smell alcohol on McMullen's breath when he talked to him. Phillips also testified that Fisher arrived at the scene soon thereafter and he told Fisher about the alcohol on McMullen's breath. (Tr. 27). According to Phillips, when he told Fisher that McMullen should be fired, he agreed with him "100 percent." (Tr. 25, 51-52). Phillips also testified that he called Ary to discuss the incident with him using Fisher's cell phone. Phillips testified that Ary replied that because McMullen was the company's only scraper operator, he would not be terminated.

Barnhart testified that when he arrived at the pit on June 26, he noticed that someone was moving the trackhoe toward the area where the overburden was being stacked in berms. (Tr. 93). Phillips was operating the trackhoe. He told Phillips to take the trackhoe back to the pit and to return to the wash plant. Barnhart testified that he did not have any other discussion with Phillips at that time. (Tr. 95). As the scraper dumps more overburden on a berm, a slope will develop. Barnhart testified that McMullen should have used the bulldozer, that was parked in the area, to flatten out the berm when it became too steep. (Tr. 91-95). If he had done that, he would not have tipped the scraper. Barnhart testified that it only took about five minutes to get the scraper going again.

In his complaint of discrimination, Phillips stated that, when Barnhart arrived at the pit that day, Phillips told Barnhart that he wanted McMullen "off the pit today" and that Barnhart told him "to mind my own "f---ing business' " (Ex. A). Phillips testified about these events at the hearing. (Tr. 49-50). Barnhart testified that Phillips did not mention anything about McMullen having alcohol on his breath that day. (Tr. 96, 106). He also testified that Fisher was not at the pit on June 26, 2007, but was out of town on personal business. (Tr. 97). Fisher testified that he was in Silver City, New Mexico, on June 26 visiting his in-laws. (Tr. 109; Ex. N). He did not return to work at the pit until July 2. He could not recall any time when Phillips complained about employees operating equipment with alcohol on their breath. (Tr. 114-15).

Barnhart testified that he has known and worked with McMullen for many years. Barnhart worked close to McMullen on June 26 and he did not smell any alcohol on McMullen's

breath that day or on any other day. (Tr. 103-04). He also stated that he would terminate anyone using drugs or alcohol "in a heartbeat." (Tr. 104). The company has a zero tolerance policy in that regard. Ary also testified that the company has zero tolerance for alcohol and drug abuse. (Tr. 142-3). If there is an accident caused by an employee who is impaired by alcohol, the financial impact would be "devastating" to the company. Ary testified that "[i]nsurance companies are driving our industry" because the risk of liability is so great. (Tr. 144). Based on his experience with Barnhart, Ary said that there is no doubt in his mind that, if Barnhart was made aware that an employee had the smell of alcohol on his breath, he would have called for an immediate test of that employee. Ary testified that he never heard that Phillips had complained about McMullen. Barnhart also testified that, if a scraper operator quit or was terminated, he could find a replacement that same day by moving another employee into that position. (Tr. 85).

On June 28, 2009, Barnhart terminated Phillips from his employment. (Tr. 31). Phillips said that he was let go after he had an argument with Barnhart. Phillips testified that this termination had nothing to do with the events of June 26 involving McMullen. (Tr 52-53). Barnhart testified that he was eating lunch that day when Phillips approached him and said, "I don't like my job anymore." (Tr. 98). When Barnhart said that not everyone likes their job all the time, Phillips said he was not going to repair the wash plant when it breaks down anymore. Barnhart asked Phillips to return to the wash plant. Phillips said that he was taking the rest of the week off and that he would return on Monday. (Tr. 98). At that point, Barnhart terminated his employment with the company.

On June 29, Ary called Phillips and offered him his job back. Ary told Barnhart that he rehired him because the company needed to keep a mechanic/welder on staff and the company was "under the gun" to keep the wash plant operating. (Tr. 99). Ary testified that he wanted to give Phillips a second chance. (Tr. 147, 150). Fisher testified that when he returned from his vacation in New Mexico, after Phillips had been rehired, he noticed a change in Phillips' attitude toward his work. According to Fisher, after he was hired back, "he figured nobody could tell him nothing." (Tr. 112-13). For example, according to Fisher, Phillips took a longer time when changing a screen at the wash plant.

2. <u>Events of September 8, 2007</u>

Phillips also testified that when he came to work on September 8, 2007, he again smelled alcohol on McMullen's breath. (Tr. 43). Phillips testified that he told McMullen that he was fired, but he admitted at the hearing that he did not have the authority to fire anyone. (Tr. 44). Phillips testified that he complained to Fisher about this. (Tr. 23-25, 43-33). Phillips said that he smelled alcohol on McMullen's breath on at least one other occasion while at work. In his complaint of discrimination, Phillips stated that he talked to Ary that day and asked him " 'what if [McMullen] kills someone or himself?' and John Paul Ary told me to mind my own business." (Ex. A). At the hearing, Phillips testified that he did not talk to Ary about this incident. (Tr. 56-57). Fisher testified that Phillips never told him that he smelled alcohol on McMullen's breath.

(Tr. 115). Gonzales testified that, according to the company's payroll records, McMullen was not at work on September 8, 2007. (Tr. 134-36).

3. Events of September 11 - 13, 2007

Phillips testified that during the afternoon of September 11, 2007, he talked to Fisher about going to the company's facility in Cañon City to get a stretcher and other safety supplies to take to the Evans Pit. He also said that he called Fisher on the phone that evening to let Fisher know that he would was definitely getting these supplies the next day rather than going to work at the pit. (Tr. 33-34, 70-71). He also told him that he was going to Ace Hardware to get other supplies for the pit. Phillips said that he put on his work clothes on September 12 and went to the Fremont Paving[3] yard in Cañon City. He talked to a man in the parts area about getting a number of items including a stretcher. He got a purchase order from the parts man and went to Ace Hardware to get additional parts including plywood, a T-Square, and a socket wrench. (Tr. 36-38). He then went home for the day at about 2:00 p.m. (Tr. 39). He normally works a 12 hour shift at the pit, from 6:00 a.m. to 6:00 p.m. Phillips testified that he called Fisher at the pit and Fisher told him that everything was running well. (Tr. 68-69). In his deposition, Phillips testified that he talked to Denise Gonzales at the Fremont Paving office about getting a company truck. (Tr. 63-64; Ex. I). He could not remember this conversation at the hearing. (Tr. 62). In his deposition, he said that he did not talk to Fisher on September 12. (Tr. 69).

Fisher testified that Phillips failed to report to work on September 12. Fisher further testified that Phillips never notified him that he would not be working at the Evans Pit on September 12. (Tr. 117, 119). At about 10:00 a.m. on September 12, Denise Gonzales called Fisher to ask why Phillips was at her office at Fremont Paving in Cañon City instead of at the pit. *Id.* He told her that he had no idea why Phillips was there.

Gonzales testified that Phillips spoke to her on the morning of September 12 at the Fremont Paving office. She testified that he was not wearing work clothes and that he told her that he was "running personal errands." (Tr. 132). When he asked for a company truck and cell phone, she replied that only Ary could authorize that. She said that after this conversation she called Fisher to ask why Phillips was at the Cañon City office.

When Phillips went to work on September 13, he started doing some repairs on the jaw crusher. Phillips testified that Fisher then drove up, told him he was fired, and then drove away. (Tr. 40). Fisher testified that he asked Phillips where he had been the day before. Phillips responded that he was in Delta, Colorado, working with Ary and Barnhart at a pit there. (Tr. 117). Fisher testified that he knew Phillips was lying because Gonzales had called and told him he was at her office in Cañon City on September 12. Fisher called Ary to tell him that Phillips is no longer a dependable employee and that he "just can't use him" anymore. (Tr. 117). He also

[3] Fremont Paving & Ready Mix and A & S are affiliated companies. Both A & S and Fremont Paving have offices and other facilities at the same location in Cañon City.

called Gonzales. Phillips left the pit and went to the office at Fremont Paving. On the way there, he talked to Ary and Ary confirmed that he was terminated. (Tr. 149-50).

Phillips testified at the hearing that he does not know why he was fired. (Tr. 72). Phillips believes that the stated reason that the company gave for terminating him was a pretext, but he is not sure why he was actually terminated. (Tr. 77). He said that the "main" reason he filed the complaint is because other people were passing him by and getting various benefits, including a company truck. (Tr. 75-76). He alleged at the hearing that people who have been caught driving under the influence of alcohol ("DUI") have been given access to company trucks. He said that he complained about this to Fisher on a number of occasions. (Tr. 78). Fisher testified that Phillips never complained to him about employees with DUIs in their driving records. (Tr. 114-15).

Fisher testified that he terminated Phillips because he was no longer a dependable employee. (Tr. 118). Phillips did not show up at work on September 12 and he did not call in advance to tell Fisher that he would not be there. Fisher also testified that he never would have authorized Phillips to buy supplies at an Ace Hardware in Cañon City because the company employs a "parts guy" who would have bought the supplies in Pueblo. It is about a two hour round trip drive from the Evans Pit in Pueblo to Cañon City. (Tr. 119).

Phillips admitted that the company performs random drug and alcohol testing and that the night crew was tested for alcohol on June 26, 2007. (Tr. 64). Phillips testified that one individual tested positive as a result of this testing, but he was not fired. (Tr. 64-65). Gonzales, who supervised this test, testified that nobody tested positive for alcohol as a result of this test. (Tr. 129-30). Gonzales also testified that the company obtains a driving record report on every employee when they are hired and annually thereafter. (Tr. 136-38). The company's insurance carrier notifies her if an employee's drivers license has been suspended. This insurance carrier is "very stringent" with respect to DUIs and will exclude from coverage an employee with a recent DUI. (Tr. 137). When an employee receives a DUI, he is usually terminated from employment.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

I have previously held that complaining about alcohol use is protected under section 105(c) of the Mine Act because it directly relates to employee safety. *Fletcher v. Morrill Asphalt Paving*, 24 FMSHRC 232, 239 (Feb. 2002). In the present case, however, I find that it was not established that Phillips engaged in protected activity or that the company terminated him from his employment as a result of any protected activity.

Much of the testimony of Phillips was internally inconsistent and was contrary to the objective facts established at the hearing. For example, in his complaint of discrimination, Phillips said that while he was at the scene of the accident, Fisher "approached" him. (Ex. A). At the hearing, he testified that he had an extended conversation with Fisher about McMullen's alcohol abuse that day and that Fisher agreed with him that McMullen had been drinking and that he should be fired. (Tr. 23-26, 51-52). He also testified that he used Fisher's cell phone to call Ary that day. (Tr. 42-43). Yet, the objective evidence establishes that Fisher was in New Mexico when these events occurred. A & S presented Fisher's credit card statement to show that he charged meals and other items in New Mexico with his Visa card during this period. (Ex. N). Phillips testimony on this issue is not credible.

Phillips also testified that he complained about the smell of alcohol on McMullen's breath on or about September 8, 2007. He said that when he complained about this to Fischer, Fisher responded by saying "I don't know what we are going to do with this guy." (Tr. 43-44). Fisher testified that Phillips never said anything to him about McMullen's breath or alcohol use. In his discrimination complaint, Phillips stated that he had a discussion about McMullen with Ary that day and Ary told Phillips to mind his own business. (Ex. A). At the hearing, he admitted that he did not discuss McMullen with Ary. Gonzales testified that she reviewed McMullen's payroll records for September 2007 and that a time card for McMullen could not be located for September 8, 2007. To make sure that his time card for that day had not been misplaced, she checked the payroll records to see how many hours McMullen worked that week.

She discovered that he worked 48.5 hours the week that included September 8 and that this time was fully accounted for by the hours he worked on the other days that week. (Tr. 133-36). Consequently, she testified that McMullen was not paid for any work on September 8. I note that September 8, 2007, was a Saturday and it would appear that McMullen was not at work that day. It is possible that Phillips was mistaken about the exact date, but his account of the events is otherwise inconsistent.

At the hearing, Phillips alleged that A & S allowed employees with suspended drivers licenses to operate company trucks and other mobile equipment. (Tr. 76-78). He said that these licenses were suspended by the State of Colorado due to DUI infractions. This allegation was not contained in his complaint of discrimination. I find that this allegation is not credible and I credit the evidence presented by A & S to rebut this allegation. Gonzales testified that employees who are given DUI tickets are usually terminated because all employees are expected to be able to operate trucks or other mobile equipment. A company the size of A & S would not take such a risk because it is unlikely that its insurance carrier would cover any liability for accidents caused by these employees.

Based on the above, I find that it was not established that Phillips engaged in protected activity. There was no credible proof that McMullen was under the influence of alcohol at the pit. I credit Barnhart's testimony in this regard. I credit the testimony of Ary and Gonzales concerning the company's substance abuse policies. I also credit the testimony of Fisher and Barnhart that Phillips did not communicate any concerns about the use of alcohol to company management. Phillips' testimony with respect to these issues was not credible.

B. Adverse Action

Even if I assume that Phillips engaged in protected activity, I find that it was not established that his termination from employment was motivated in any part by complaints about alcohol use. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the 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 (November 1981), *rev'd on other grounds*, 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." *Id.* (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 toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

All of the company's witnesses denied that Phillips communicated any concern that he could smell alcohol on the breath of McMullen. I credit that testimony as well as the testimony of Barnhart that he would have had McMullen tested if he suspected that McMullen had been drinking. There is no credible evidence that company mangers displayed hostility or animus

toward the protected activity. I credit the evidence presented by A & S that its managers do not tolerate the use of alcohol or drugs and that, if anyone is caught under the influence of these substances while working at the pit, they will be subjected to testing and termination if the test results are positive. There is coincidence in time between the alleged protected activity and his termination. Disparate treatment is not an issue in this case.

I find that the reason A & S gave for Phillips' termination was not a pretext for an unlawful dismissal. A & S terminated Phillips earlier in the summer of 2007. Phillips testified that this termination was not the result of his alleged protected activity. Ary rehired Phillips because he wanted to give him a second chance and the company needed a mechanic for the wash plant. Phillips' description of the events of September 11 through 13 is not very credible. Fisher testified that he never gave Phillips permission to buy supplies for the pit in Cañon City on September 12 rather than work at the wash plant that day. I credit this testimony. The pit and crusher facilities were operating full bore at that time. Because it vibrates, the wash plant is prone to mechanical breakdowns and Phillips was needed to make repairs to keep the plant in operation. (Tr. 87). It is highly unlikely that Fisher would have wanted Phillips to take the day off so he could get a stretcher and miscellaneous supplies in Cañon City. Gonzales testified that Phillips told her he was running personal errands that day. Fisher testified that when he asked Phillips why he was not at work on September 12, Phillips replied that he was working at another pit with Barnhart. I find that the decision of A & S to terminate Phillips was not at all related to complaints about alcohol use.

III. ORDER

For the reasons set forth above the discrimination complaint filed by Peter J. Phillips against A & S Construction Company under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Peter J. Phillips, P.O. Box 41, Florence, CO 81226 (Certified Mail)

Richard Ranson, Esq., Ranson & Kane, PC, 3475 Briargate Blvd, Suite 201, Colorado Springs, CO 80920 (Certified Mail)

RWM