

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

January 20, 2010

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of HARRY LEE BECKMAN,	:	
Complainant	:	Docket No. WEVA 2009-1526-D
	:	Case No. MORG-CD-2008-10
v.	:	
	:	
METTIKI COAL (WV), LLC,	:	Mountain View Mine
Respondent	:	Mine ID: 46-09028

**DECISION**

Appearances: Samuel Lord, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant;  
Willia B. Perlmutter, Esq., Crowell & Moring, LLP, Washington, D.C., for the Respondent.

Before: Judge Feldman

This case is before me based on a June 3, 2009, discrimination complaint filed against Mettiki Coal (WV), LLC (“Mettiki”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006) (“the Act”), by the Secretary of Labor (“the Secretary”) on behalf of Harry Lee Beckman. The complaint alleges that Mettiki violated the provisions of section 105(c)(1) of the Act,<sup>1</sup> 30 U.S.C. § 815(c)(1), when it discharged Beckman on September 15, 2008, following a September 9, 2008, diesel locomotive accident.

The hearing was conducted in Oakland, Maryland, from July 21 through July 23, 2010. The parties have filed post-hearing briefs and replies that have been considered in the disposition of this matter.

**I. Statement of the Case**

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<sup>1</sup> Section 105(c)(1), provides, in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

Beckman was the operator of a diesel locomotive when a serious accident occurred on September 9, 2008. The Secretary asserts that Beckman's September 15, 2008, discharge following this accident, was motivated, at least in part, by his protected activity. The protected activity relied upon is Beckman's long term participation in mine inspections as a miners' representative during his 28 years as a Mettiki employee. In addition, the Secretary relies on safety related complaints, principally concerning watery track conditions, communicated to mine management on April 17, 2007, and March 18, 2008.

Mettiki maintains that its sole reason for discharging Beckman was Beckman's loss of control of a multi-ton diesel locomotive that collided with another track vehicle. The accident resulted in injuries to two miners, one of whom required hospital treatment.

Mettiki's claimed justification for terminating Beckman because of his involvement in a serious accident is not implausible. The record fails to reflect that Mettiki harbored resentment or animus towards Beckman's long term participation as a miners' representative, or towards his two safety related complaints that occurred during the 17 month period prior to his discharge. Thus, the Secretary has failed to present adequate evidence that Mettiki's decision to terminate Beckman was motivated, in any part, by his protected activity. Consequently, Beckman's discrimination complaint must be denied.

## **II. Findings of Fact**

### **a. Background**

Mettiki operates the Mountain View Mine ("Mountain View"), an underground coal mine in Tucker County, West Virginia, where Beckman worked until his September 2008, termination. At the time of Beckman's discharge, Mountain View was mining longwall panels as well as continuous mining units. The day and midnight shifts are production shifts, and the afternoon shift is a maintenance shift. (Tr. 926-27).

Mettiki also operates several surface facilities in nearby Maryland. The surface facilities include a strip mine, acid mine drainage facilities, a coal preparation plant, stockpiles, and unloading and loading facilities for both rail and truck. Most of Mettiki's coal goes to the preparation plant, although some raw coal goes to a nearby power station. (Tr. 922-23). In calendar year 2008, the year Beckman was terminated, Mettiki produced over 5 million tons of raw material, and 2.8 million tons of clean coal. (Tr. 924-25).

Beckman is a 53-year-old coal miner who had been employed by Mettiki for over 28 years. (Tr. 985). In 2005, Beckman was transferred to Mountain View where he worked as a general laborer on the afternoon shift until his discharge in September 2008. (Tr. 251, 287, 482). Mettiki has stipulated that, generally speaking, Beckman was a satisfactory employee. Specifically Mettiki stipulated that, with the exception of Beckman's operation of diesel locomotives, "in the past [Beckman] had not been insubordinate and he had performed adequately or more than adequately." (Tr. 985).

b. Beckman's Miners' Representative Activities

In September 2008, there were 19 registered miners' representatives at Mountain View. Beckman was one of the 19 registered miners' representatives, having been for many years a representative at both of Mettiki's mines in Maryland and at Mountain View. (Tr. 86-87; Stip. Nos. 3, 5; Gov. Ex. 3). Mettiki used a rotation system to determine who would accompany an inspector as the miners' representative on a given shift. If the next available miners' representative declined to travel with the inspector, and no other miners' representatives volunteered, the mine inspector traveled alone.

Richard Show, a former colleague of Beckman who testified on his behalf, worked for Mettiki as a miner from 1978 until he began his career as an MSHA inspector on April 1, 2005. (Tr. 53). Show served as a miners' representative during his tenure with Mettiki. (Tr. 89-90, 101). Show's testimony concerning his view of Mettiki's tolerance for the activities of miners' representatives was contradictory. Show initially testified that Mettiki was "open to people traveling with inspectors." (Tr. 85). Show also testified that he did not personally experience any retribution from the company for his activities as a miners' representative. (Tr. 85, 93).

However, Show also attempted to diminish Mettiki's enthusiasm for the role of miners' representatives by opining that Mettiki neither encouraged nor discouraged their participation. (Tr. 85). Coming full circle, Show subsequently implied that Mettiki interfered with the miners' right to participate in inspections because Mettiki did not actively recruit a substitute for a miners' representative who had declined to travel with an inspector. (Tr. 86-87).

Any suggestion by Show that Mettiki interfered with miners accompanying inspectors was undermined by Beckman. Beckman testified, in essence, that Mettiki permitted a registered miners' representative to volunteer as a substitute if the next available miners' representative declined. (Tr. 256). In this regard, Beckman testified that he frequently traveled with MSHA inspectors when other miners' representatives declined. Beckman testified that he also frequently accompanied inspectors from the state of West Virginia. (Tr. 255-56). The Secretary asserts that Beckman's frequent participation as a miners' representative was a motivating factor in his termination. Beckman testified:

Mr. Lord: So let me ask you again, would you say that when an inspector came to the shift, would you typically travel with the inspector?

Beckman: Well, I'd go ask everybody and see who wanted to go. And if nobody wanted to go, then I would go, yeah.

Mr. Lord: When you say you asked everybody, are you talking about other miners on the list?

Beckman: I'd ask all of the miners' reps if any of them wanted to go. And if they didn't want to go, then I'd go.

(Tr. 256).

c. Beckman's April 17, 2007, Safety Complaint

In April 2007, Beckman was assigned to operate a track locomotive hauling setup supplies to a new longwall panel area. (Tr. 268). This required Beckman to travel on a section of track between the No. 2 Butt and the No. 3 Butt. (Gov. Ex. 12). For approximately three days prior to his safety complaint, Beckman observed an area of high water around the track in the vicinity of the No. 3 Butt. (Tr. 268). The locomotive's sanders clogged when Beckman traversed this area. The sanders are used to apply sand to the tracks to increase traction for braking. Beckman decided to inform upper management about this condition because the water had been accumulating for several days. (Tr. 269).

On April 17, 2007, approximately 17 months prior to his termination, Beckman informed Mountain View's Safety Director, Terry Savage, about the water accumulation that was interfering with the operation of track equipment. (Tr. 759-63; Joint Stip. 6; Gov. Ex. 12). Savage testified that he considered Beckman's complaint to be valid. (Tr. 762). Savage testified that it was the company's policy to send e-mails to all concerned members of management summarizing safety complaints so that safety problems could be addressed. (Tr. 760-62).

Consequently on April 17, 2007, Savage e-mailed Al Smith, Frank Sanders, Dave Blythe, Larry Johnson, and Jody Theriot to inform them of Beckman's concern. (Gov. Ex. 12). At that time, Smith was the manager of underground operations; Sanders was a foreman; Blythe was a maintenance superintendent; Johnson was a longwall coordinator; and Theriot was manager of safety and human resources.

Savage's April 17, 2007, e-mail stated:

Harry Beckman stopped in the office today to voice a safety concern. Harry said that the track between 2-Butt and 3-Butt [h]as water accumulations over the rail that is causing the sanders on the locomotives to plug. Harry said the remainder of the rail inby and outby this location is in good shape.

(Gov. Ex. 12).

As previously noted, Beckman worked the 3:00 p.m. to 11:00 p.m. maintenance shift. The condition Beckman complained of was not addressed during the maintenance shift on April 17, 2007. When Beckman reported to work the following day on the April 18, 2007, Perry Mercure, the maintenance shift foreman, assigned Beckman and a contractor employee to remedy the high water condition. (Tr. 285-87). The condition was corrected by jacking up the rail above the water line and placing blocks underneath the tracks for support. (Tr. 270).

Beckman testified that although he sometimes operated a locomotive, he was not classified as a designated motorman. Rather, he was classified as a general laborer. He conceded that track repairs generally are assigned to general laborers. In fact, he admitted that,

in the past, he occasionally had jacked-up rails to alleviate water conditions on the tracks. (Tr. 342).

The Secretary's brief asserts that Savage's e-mail was intended to intimidate and deter Beckman from making further safety complaints. The Secretary also asserts that Beckman's assignment to fix the subject track condition during the next maintenance shift was a further attempt to dissuade Beckman from making future safety related complaints. (Sec'y Br. at 16-17).

d. Beckman's March 18, 2008, Complaint to Kreiser

On February 5, 2008, during an MSHA inspection, Show observed several track hazards including high water along the track at two different locations. Show issued notice of Safeguard No. 7112585 pursuant to section 314(b) of the Act, 30 U.S.C. § 874(b), that included prohibiting water from accumulating above the rails. (Gov. Ex. 5). The safeguard notice noted that the mine had steep grades that contributed to the hazardous conditions.

Approximately one month later, on March 8, 2008, Beckman accompanied Show as a miners' representative during a mine inspection. At that time, Show observed water above the rails for a distance of ten feet, as well as a nearby locomotive with clogged sanders. (Tr. 150). Show issued citations for both conditions. Specifically, Show cited the track water as a non-S&S violation of 30 C.F.R. § 75.1403 because it violated recently issued Safeguard No. 7112585; and an S&S violation of 30 C.F.R. § 75.1725(a) due to the clogged sanders because Mettiki had not maintained mobile equipment in safe operating condition as required by the standard. (Gov. Exs. 7, 8).

One week later, on March 15, 2008, Show returned to Mountain View and observed an additional high water condition on the rails for a distance of twelve feet. Show issued another citation citing a 30 C.F.R. § 75.1403 violation of Safeguard No. 7112585. (Gov. Ex. 6). Similar to the initial safeguard violation, Show also designated this safeguard violation as non-S&S. The Secretary does not allege that Show issued the notice of safeguard or the subsequent violations, including both safeguard violations in March 2008, as a result of complaints by Beckman. (Tr. 152).

On March 15, 2008, during a recess in an annual refresher training session, Beckman spoke to Dwight Kreiser, Vice President for Mettiki's Northern Appalachia Operations. Krieser had previously been General Manager at Mettiki mines, including Mountain View, where Beckman had worked. In his previous capacities, Krieser had addressed non-safety related concerns raised by Beckman.

Having recently accompanied Show on March 8, 2008, when Show issued a safeguard violation for water on the tracks, Beckman complained to Kreiser about muddy and wet track conditions.<sup>2</sup> Beckman also complained about the need for ballast on the No. 5 and No. 6 Butt tracks. Ballast is used to provide a firmer track bed to avoid derailments.

Beckman told Krieser that, in the future, he would not report violations or hazardous conditions because "nothing's being done." (Tr. 222). Kreiser testified that he believed Beckman was complaining about ongoing conditions at the mine. (Tr. 229). Kreiser was also concerned about Beckman's allegation that safety complaints were not being addressed.

In view of Beckman's complaints, Kreiser contacted Savage and Sanders, both of whom are subordinate management officials. (Tr. 234-35; Gov. Ex. 11). Savage told Kreiser that Beckman had complained about water on the track "over a year ago." Savage left Kreiser with the impression that Beckman's complaint was addressed and there was nothing further to be done. Savage did not tell Kreiser that a notice of safeguard and a non-S&S safeguard violation recently had been issued at Mountain View. (Tr. 227; Gov. Ex. 11). Kreiser conveyed Beckman's ballast concerns to Sanders who assured Kreiser that additional ballast was being applied as needed.

On March 19, 2008, Kreiser sent Beckman a memorandum summarizing the results of his inquiry into Beckman's complaints. Kreiser was also concerned about Beckman's expressed reticence to inform management about hazardous conditions. Kreiser's memorandum to Beckman states:

To: Harry Beckman

From: Dwight Kreiser

Subject: Response letter to Mr. Harry Beckman[']s] comments directed to me on

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<sup>2</sup> Beckman was unaware of the second safeguard violation for watery track conditions that Show had issued on the same day Beckman was attending refresher training on March 15, 2008.

Saturday March 15, 2008 at our annual retraining classes.

Mr. Beckman confronted me about the following issues on March 15, 2008 regarding safety concerns at the Mt. View Mine.

- 1) Mr. Beckman said he went to Terry Savage regarding water and mud on the West Mains track, and said Mr. Savage told him to fill out a safety concern sheet.

I investigated this [accusation] and found out that Mr. Beckman did go to Terry Savage concerning this matter over a year ago. Terry advised me that he did tell Harry to fill out a safety concern and took immediate action to remedy the complaint by bring[ing] it to the attention of the manager underground. Due to the amount [of] time that has elapsed there is no f[u]rther action necessary.

- 2) Complained that 5 Butt and 6 Butt tracks needed more ballast add[ed] to them.

I communicated this with the operation management at the mine and they conveyed to me that ballasting of the 5 Butt track is performed frequently as needed and that the 6 Butt track is ballasted as it is installed. Underground management response reiterates the statements made by a fellow hourly worker conveyed when you brought this to my attention.

- 3) Mr. Beckman made the following statement “I don’t report hazardous condition[s] anymore, because nothing is done about it[.]”

My response to this is [that] safety is [of] the utmost importance to the company. The company relies on the hourly workforce to inform management of these conditions, and [to] correct any violations or practice that exposes our employees. I also take offense to this statement in that **it’s your obligation as an employee and fireboss to report any hazardous conditions that exist.**

(Gov. Ex. 11) (emphasis in original).

There is no evidence that Kreiser’s response to Beckman was disingenuous with respect to Krieser’s belief that Beckman’s high water complaint was more than one year old, and that it had promptly been addressed. There is also no reason to question the sincerity of Kreiser’s admonishment of Beckman in response to Beckman’s statement that he would no longer report hazards to management. Beckman continued to periodically accompany MSHA inspectors as a miners’ representative without incident after his communication with Kreiser. Beckman’s last trip with an inspector prior to his termination occurred on August 5, 2008. (Gov. Ex. 4).

e. The September 9, 2008 Accident

I. Locomotives at Mountain View

At Mountain View, diesel locomotives, or “motors,” are used to haul shields and other equipment during longwall moves, and to haul supplies at other times. (Tr. 490). The locomotives are massive pieces of equipment that run on permanent rails underground. Mettiki uses two different kinds of locomotives: 15-ton Jeffreys and 30-ton Brookvilles. (Tr. 424, 428). A Brookville is one foot wider and ten feet longer than the less powerful Jeffrey. The operator cab of a Brookville is eight to nine inches lower than the operator cab of a Jeffrey locomotive. (Tr. 491-92).

A Jeffrey locomotive has three brakes: a hand brake, that operates on air pressure and is routinely used during normal operation; a wheel brake, used when the motor will be parked for an extended period; and an emergency brake, which automatically engages if air pressure to the brakes drops below 50 pounds per square inch (“psi”). When the Jeffrey is traveling, its operator must maintain at least 50 psi pressure to prevent the emergency brake from engaging. (Tr. 630).

In addition, the Jeffrey and Brookville locomotives are equipped with sanders that rely on air pressure to function. The sanders apply sand on the track to create traction for effective braking, particularly when the multi-ton locomotives are traveling down a grade. (Tr. 149, 304, 633). The operators must “rev” the locomotive engines before moving the locomotive. This ensures that there will be adequate air pressure to operate the hand brake and the sanders, and to prevent the emergency brake from automatically engaging. (Tr. 443, 632).

Locomotives are paired and work in tandem, in a three unit train, to haul longwall shields. Pairing locomotives is necessary because a longwall shield is too heavy to be pulled by a single locomotive. During longwall moves, the shields are carried on a lowboy trailer that is attached as the third unit of the train. (Tr. 65). Thus, a train consists of a Brookville, a Jeffrey and a lowboy, or, two Jeffreys and a lowboy.

The comparative size of each locomotive dictates its particular function. When a Brookville is paired with a Jeffrey, the Brookville is identified as the “lead” or “helper” motor. The Brookville is used to pull the Jeffrey and lowboy when it is the front car, and to push the Jeffrey and lowboy when it is the rear car when the train travels in the opposite direction. (Tr. 422-23). When necessary, the Jeffrey can be throttled to assist the Brookville in pulling or pushing. However, the Jeffrey’s primary function, when the multi-ton train loaded with shields gains momentum traveling down a grade, is to serve as a supplemental brake system that assists the operator of the Brookville in controlling the speed of the train. (Tr. 503-05).

Because of the Brookville’s larger size, its operator controls when and how the motors move. (Tr. 675, 858). The Brookville operator is responsible for making certain that the Jeffrey has built up sufficient air pressure, and that it is ready to move, before engaging the throttle of the Brookville. (Tr. 542-44). As the operator of the lead motor, the operator of the Brookville is responsible for ensuring that the rail ahead of the motors is clear. (Tr. 428-29). To ensure the path is clear, the



Brookville operator relies on the locomotive's headlights that were described as being brighter than the high beams on a car. (Tr. 544-45).

## ii. The Teardown Track

Upon completion of a longwall panel, routine operations cease and all personnel participate in the dismantling and movement of the longwall equipment for development of the next panel. (Tr. 497-98). As noted, the longwall is moved, shield by shield, to the next location via locomotives and lowboys. The two motors and the lowboy, coupled together, transport the shields on the teardown track to the setup location for the next longwall panel. (Tr. 288).

The teardown track is a straightaway, divided by three cross-cuts ("chutes"). The chutes are consecutively numbered from the No. 1 to No. 3 chute. The teardown track has a gradual downhill grade in the direction from the No. 1 to the No. 3 chute. (Tr. 510-11, 606-07; Gov. Ex. 1). Utility equipment called "mules" use the chutes to transport the dismantled shields from the longwall area to the lowboy that is situated at the intersection of the chute and the teardown track. The locomotives pull the lowboys carrying the shields beyond the No. 3 chute where the trains exit to go to the next setup location. (Gov. Ex. 1; Tr. 64-65).

The distance between each of the three chutes where they intersected with the teardown track was approximately 150 feet. (Tr. 866). Fluorescent lights were hung at each chute. (Tr. 545-46, 866). Afternoon shift foreman James Bateman, who participated in the accident investigation, testified that the fluorescent lighting and the headlights from the Brookville enabled a person standing at the No. 1 chute to see clearly to the No. 3 chute. (Tr. 511, 513, 613). Although Beckman disputes that the entire teardown track was visible, he testified that he could at least see the No. 2 chute from his Brookville when it was situated at the No. 1 chute, a distance of approximately 150 feet. (Tr. 435-36).

Locomotive operators must be particularly vigilant of the safety of others during longwall moves because of the speed at which the longwall move progresses. (Tr. 208, 498-99). At such times, all personnel involved in dismantling and moving the longwall shields are exposed to the potential hazard posed by the increased rail traffic of multi-ton locomotives transporting multi-ton shields to the next setup area. (Tr. 498-99, 866).

## iii. The September 9, 2008, Collision

On September 9, 2008, Mettiki was moving the longwall after it had completed the E-3 panel. (Tr. 65; Gov. Ex. 1). Beckman, operating a Brookville, and Mike Harvey, paired with Beckman and operating a Jeffrey, were assigned to operate their locomotives in tandem on the afternoon shift. Their locomotives were to be used to transport shields from the teardown area to the next setup area. (Joint Stip. 7, 8). Beckman had been assigned to operate the heavier, more powerful Brookville because he had more experience as a locomotive operator. (Tr. 423).

Immediately prior to the accident, Beckman was in the operator's compartment of the lead Brookville that was coupled to Harvey's Jeffrey. Attached to the rear of Harvey's Jeffrey was a lowboy carrying a longwall shield that had been loaded at the No. 1 chute. (Tr. 422-23; Joint Stip. 9, 10). Beckman and Harvey were operating the third pair of locomotives on the teardown track. In front of them, in the vicinity of the No. 2 chute, were Russ Knox and Willie Welch, who were both operating Jeffreys that were pulling an empty lowboy. (Tr. 656, 514). In front of Knox and Welch, were the first pair motors, both of which were Jeffreys, located in the vicinity of the No. 3 chute. These Jeffreys, operated by James Beavers and Randy Sisler, were pulling a lowboy loaded with a longwall shield. (Tr. 656).

The plan was for Beavers and Sisler to leave the teardown area to transport their shield to the longwall setup area for the next panel. (Tr. 660, 663). Knox and Welch were to leave the teardown area behind Beavers and Sisler, at which time they would travel a full circuit for return to the teardown area to pick up another shield. (Tr. 660, 663). Beckman and Harvey were to follow Knox and Welch out of the teardown area to take their shield to the mine hoist, where it would be taken to the surface for maintenance. (Tr. 656).

Before the planned movement of the three pairs of locomotives, Harvey exited his Jeffrey, leaving Beckman who remained in the Brookville. Harvey traveled on foot to find a "boomer" to use to secure the longwall shield to the hoist for its transport to the surface. (Tr. 656-58). After Harvey exited the Jeffrey, the Beckman/Harvey train was blocking a mule on the No. 1 chute that was attempting to cross the teardown track. Consequently, Beckman, acting alone, moved the Brookville approximately 15 feet in the direction of the No. 2 chute pulling the Jeffrey and the lowboy so that the lowboy cleared the No. 1 chute allowing the mule to cross. (Tr. 356).

Shortly after Beckman had moved the Brookville forward to clear the No. 1 chute, as Harvey was re-entering the Jeffrey, Anthony Fitzgerald, the teardown supervisor, instructed Beckman and Harvey to exit the teardown track by following the motors in front of them. The usual practice was for a motorman to use hand signals to ensure that his partner was ready to move. However, Beckman throttled the Brookville, starting the train in motion without first obtaining confirmation from Harvey that he was ready. (Tr. 302). Beckman testified that he believed that Harvey was ready because he saw Harvey release the hand brake that frees the Jeffrey's wheels in preparation for forward movement. (Tr. 301-02).

However, Harvey maintains that he did not indicate to Beckman that he was ready. Harvey testified:

Harvey: After I spoke to Anthony, I climbed up the motor, closed the door and went to sit down. Before I could sit down, the motors took off. The motors were moving. I [sat] down quickly, caught neutral, because it has to be in neutral to start. I caught

neutral, started it . . .<sup>3</sup>

Court: So you got in the cab and it started to move?

Harvey: Yes . . . So I put the motor in neutral, and I started it. Once it started, because we were moving, I released my hand brake. That's not normal for me. Normally I don't release the hand brake until I get air pressure. But the motors were already moving.

Ms. Perlmutter: Then why did you release your hand brake?

Harvey: So the wheels wouldn't be sliding. Hopefully they would be turning, you know. If you're sliding, that gives you very little control . . . . And so I released my hand brake, the motor was still in neutral, and I had the throttle, trying to build the air pressure. I don't recall; the air pressure hadn't dropped to zero. It was above 50, but it wasn't at full capacity. But in that scenario, with that many people, you know, the motor's moving, I need air pressure. I'm on a grade. I can't throttle and be in gear. I mean, if I'm throttling it in gear, you know, you're creating speed, and that's the last thing I wanted to do.

Court: Okay. So you wanted to raise the air pressure by keeping it in neutral and racing the engine. Was that, what, for the sanders?

Harvey: That was to raise the rpm so I could safely use the sanders. I don't know how fast it would actually drop the air pressure if I used the sanders without raising the rpms. But I didn't want to take a chance, if I did it and the wheels start sliding, then that creates a whole other problem.

Court: Because if you dropped the air pressure, the automatic brake would engage?

Harvey: If I got to 50 pounds, yes, sir. . . .

Ms. Perlmutter: And you said that would create a whole other problem.

Harvey: When the wheels are sliding, you have no control. I mean, it's hard to stop a sliding motor.

(Tr. 665-69).

In sum, Harvey testified that his goal was to release the hand brake to prevent the Jeffrey's

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<sup>3</sup> The locomotive is left in gear when not in use to prevent free-wheeling. (Tr. 666-67). Thus, when the Jeffrey began to move, Harvey shifted out of gear and into neutral before revving the engine. Harvey testified that the Jeffrey remained in neutral until the collision. (Tr. 682).

wheels from locking so that it could be better controlled. In addition, he proceeded to keep the Jeffrey in neutral in an attempt to raise the psi by revving the engine. This would ensure adequate pressure for the sanders, as well as prevent the emergency brake from automatically engaging if the air pressure fell below 50 psi.

Beckman began moving his Brookville forward without first ensuring that Harvey was ready. Consequently, Beckman did not have the benefit of the braking assistance provided by a Jeffrey that had sufficient psi pressure to utilize sanders and to normally operate the hand brake. While the Brookville train was proceeding down the grade, unbeknownst to Beckman, Beaver and Sisler had stopped in the vicinity of the No. 3 chute, at the bottom of the teardown track, to pick up pneumatic hoses for the longwall shields. (Tr. 679-81). Welch and Knox, who were traveling immediately behind them, stopped safely between the No. 2 and No. 3 chutes. Beckman, however, lost control of the motors, and was unable to stop before crashing into the empty lowboy attached to the Jeffreys of Welch and Knox. Apparently angered because he believed Harvey had not helped him to brake the paired locomotives, Beckman exited his Brookville and yelled to Harvey, “do you think that’s fucking fast enough?”<sup>4</sup> As a result of the collision, Beckman’s Brookville landed on top of the empty lowboy. (Tr. 311).

Both Welch and Knox were injured in the collision. (Tr. 681-82). Knox sustained shoulder injuries, but was not hospitalized. Welch, who was situated in the second Jeffrey closer to the lowboy that was struck, experienced the brunt of the collision. (Tr. 524). Welch was taken to the hospital for treatment, although the record does not reflect that his injuries were serious. (Tr. 516-17).

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<sup>4</sup> Mettiki believes Beckman’s excited utterance evidenced a cavalier attitude towards the accident. Obviously, crashing into the lowboy was neither an intentional act, nor a pleasant experience. A fair reading of this statement is that Beckman was expressing his displeasure with Harvey because of his belief that Harvey failed to assist him in controlling the locomotives. In fact, Mike Burch, Mettiki’s general manager, conceded that Beckman’s utterance was motivated by Beckman’s belief that, “Harvey in the Jeffrey didn’t give him any assistance in slowing down.” (Tr. 951).

#### iv. Mettiki's Investigation

Mine management conducted an investigation to determine the cause of the September 9, 2008, collision. Immediately after the accident James Bateman, the afternoon shift foreman, observed the track conditions in the teardown area. Bateman determined that, with the exception of 15 feet of shiny rail just beyond the No. 1 chute, "there was no wet or muddy conditions. . . . [T]he track was dry and well sanded." (Tr. 517-18). Bateman initially testified that this shiny rail corroborated Harvey's story that Beckman dragged him when the train first started moving until Harvey released his brake. However on cross-examination, Bateman acknowledged that the shiny rail could also have been created when Beckman moved the train forward to let the mule pass through the No. 1 chute. (Tr. 528-29, 561-62).

At the end of the afternoon shift, Bateman began collecting statements from the locomotive operators who had been working at the time of the accident. Bateman interviewed eight of the nine motor operators who were on duty. (Tr. 523). The only motor operator who was unavailable was Welch who was at the hospital. (Tr. 523-24).

Harvey told Bateman that after he had just returned to the Jeffrey, after looking for a boomer to attach to the hoist, the motors started moving before he was positioned in the operator's compartment. As a consequence, Harvey related to Bateman that he immediately had to start the Jeffrey motor in order to release the brake. (Tr. 524). Beckman told Bateman that he thought Harvey "was ready to go" although he now realized that Harvey "was not ready to go." (Tr. 525). Beckman told Bateman that the collision occurred because "they were going too fast," although Beckman did not express an opinion regarding who was at fault. (Tr. 525-26).

Bateman completed his interviews during the early morning hours of September 9, 2008. At trial, Bateman was requested to explain his conclusion regarding the cause of the accident. Bateman testified:

Bateman: My conclusion was that Mr. Beckman did not wait for Mr. Harvey to get in his motor before – or his motor was in motion before Mr. Harvey was ready to go. They dropped down off of the grade and struck the lowboy that was parked between No. 2 and No. 3 chute.

Ms. Perlmutter: Is there anything that Mr. Harvey could have done differently?

Bateman: Been ready to go.

(Tr. 540).

Bateman provided his investigation notes to Frank Sanders, manager of underground operations. Sanders and safety director Terry Savage continued to investigate during the next five days. They reviewed the Brookville's maintenance records and concluded that the accident was not caused by a mechanical malfunction. They also determined that the Jeffrey had no mechanical problems that contributed to the accident. (Tr. 782, 867).

Together Sanders and Savage conducted approximately ten additional interviews, questioning some individuals more than once. (Tr. 771-72, 882-83). The day after the accident, during the afternoon shift on September 10, 2008, Savage and Sanders interviewed numerous miners including Bateman, Fitzgerald, Beckman, Harvey and Knox. (Tr. 771-72). They also interviewed eye witnesses who were near the teardown track who observed the motors moving before Harvey was fully in the operator's deck of the Jeffrey. (Tr. 861). They also learned that some motor operators were uncomfortable working in tandem with Beckman because he did not give them enough time to check their equipment before getting started.

Savage testified that Knox, in particular, expressed his desire not to be paired with Beckman because of his conduct on the rail. (Tr. 772-73). Sanders testified that in addition to Knox, Harvey and Welch also complained about Beckman running at high rates of speed, and Beckman's refusal to stop for sand to refill the sanders. (Tr. 860). As a result of their interviews, consistent with the procedures outlined in Mettiki's Employee Handbook for a major offense,<sup>5</sup> Beckman was suspended pending completion of Mettiki's investigation. (Resp. Ex. 3, p.7).

An investigation committee was created to determine Beckman's fate. (Tr. 957). The committee consisted of Mike Burch, the general manager, Sanders, manager of underground operations, Savage, safety director, and Horace Joseph ("Jody") Theriot, III, manager of safety and human resources. Savage summarized the committee's conclusion with respect to the cause of the accident. Savage testified:

Yeah, late in the investigation. I mean I don't know exactly what day it was out of those five days. It was sometime during that investigation, we determined that what had happened was, Harry was running the lead motor. He was in charge of that trip. He took off before Mr. Harvey was ready. Actually before the Jeffrey locomotive was even started, the engine was started on it, it started to move. The distance it traveled gave very little time for Mr. Harvey to react. By the time Harry figured out what was going on, it was little time for him to stop it. And there was already 11 tons of steel, rolling stock steel, going down the rail that was – couldn't stop.

(Tr. 774).

As noted above, Bateman who performed the preliminary investigation, also concluded the

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<sup>5</sup> "A major offense is a violation of the Rules of Conduct or the law which may directly and seriously affect safety or the operations. . . . A major offense can result in termination even if it is a first offense." Among the examples of a major offense is: "[u]nsafe acts or practices which endanger life or property." (Joint Stip. 10, 11; Resp. Ex. 3, p.6) (emphasis in original).

cause of the accident was Beckman's failure to make certain that Harvey was ready before Beckman moved his Brookville forward. (Tr. 540). Although Bateman stated that "it was not my decision to make," he apparently believed that termination was too harsh of a sanction. (Tr. 568-79). However, Bateman did not believe that Beckman's longstanding participation as a miners' representative, or past safety complaints, influenced the company's conclusion that Beckman's misjudgment was the underlying cause of the accident. (Tr. 548-49).

The investigation committee ultimately recommended the termination of Beckman. Savage summarized the reasons for the committee's recommendation:

It was a very hard recommendation for all of us to make. There was a lot of thought that went into that process. It got down to Harry's conduct at the time of the accident, leading up to the accident, the way he'd acted and interacted with the other motor operators, and his response at the end of the accident, where he jumped off the locomotive and said, is that fast enough? And he didn't take – he acted in disregard of people's safety. He took off before Mr. Harvey was ready. He wasn't remorseful at the end of the accident. Only to say was that fast enough? He didn't take consideration that maybe someone was hurt, and there were two individuals that were injured at that time. Just those facts alone right there, that he was not remorseful for what he'd done, and he never took responsibility during the whole course of the interviews, that he'd done anything wrong. . . . Harry said that he thought he was being pushed. He didn't know why he couldn't stop. He didn't know what Mr. Harvey was doing. But he never checked with Mr. Harvey to see what he was doing, or never asked Mr. Harvey if he was ready to go.

(Tr. 775-76).

Consistent with the committee's recommendation, Beckman was terminated on September 15, 2008. The reason given for Beckman's termination was that he committed a major offense under the Code of Conduct. (Joint Stip. Nos. 15, 16). Consistent with Bateman's opinion, both Savage and Sanders testified that neither Beckman's service as a miners' representative nor his safety related complaints were factors in Beckman's discharge. (Tr. 548-49, 774, 777, 867-68).

### **III. Further Findings and Conclusions**

#### **a. Analytical Framework**

Section 105(c) of the Mine Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners “to play an active part in the enforcement of the 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 Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is the intent of Congress that, “[w]henver protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

The Secretary has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, the Secretary must establish that Beckman engaged in protected activity, and that Beckman’s September 15, 2008, discharge was motivated, in some part, by that activity. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 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).

Mettiki may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that Beckman’s termination was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Mettiki may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, *i.e.*, Beckman’s accident, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission’s *Pasula-Robinette* test).

The Secretary contends that Beckman’s protected activities were a motivating factor in Mettiki’s decision to terminate Beckman immediately after his involvement in the September 9, 2008, locomotive accident. The protected activities identified by Beckman that allegedly influenced Mettiki’s decision are: (1) Beckman’s longstanding participation as a miners’ representative; (2) his April 17, 2007, complaint concerning high water encroaching track rail that rendered sanders used for traction and braking inoperative; and, (3) his subsequent March 15, 2008, complaint reiterating his concern for the hazard posed by high water on tracks, as well as the need for additional track ballast.

While Mettiki freely admits that it had knowledge of these protected activities, it contends that they played no role in Beckman’s discharge. Rather, Mettiki asserts that its

accident investigation that revealed Beckman was at fault, and Beckman’s reticence to accept



responsibility, are the sole motivating factors that influenced its decision.

b. Mettiki's Claimed Business Justification

Beckman was terminated immediately following the September 9, 2008, locomotive accident. The Secretary, in essence, contends that Mettiki's claimed rationale for terminating Beckman is an insincere attempt to hide its discriminatory motive. Alternatively, the Secretary argues that, even if Mettiki was motivated by Beckman's role in the accident, Mettiki was also motivated, at least in part, by Beckman's protected activity. Nevertheless, the September 9, 2008, accident was serious in that it resulted in the injury of two miners, one of whom required hospital treatment.

The parameters for analyzing a claimed business justification for disciplining a miner who has brought a discrimination claim before this Commission are well settled. In this regard, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citations omitted).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

*Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission subsequently further explained that, while a proffered business justification must be facially reasonable, it is not the role of the judge to substitute his or her judgement for that of the mine operator. The Commission stated:

[T]he reference in *Chacon* to a “limited” and “restrained” examination of an operator’s business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of “industrial justice” for that of the operator. As we recently explained, “Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed.”

*Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

Mettiki has stipulated that, other than Beckman, no miners have been suspended or terminated for safety violations since the Mountain View Mine opened in July of 2005. (Tr. 907). Thus, the Secretary seeks to rely on Mettiki’s failure to impose disciplinary sanctions for other accidents at Mountain View to demonstrate that Beckman was the victim of disparate treatment as a consequence of his protected activities.

The Secretary relies on two locomotive accidents, both involving similar facts, that occurred before and after Beckman’s discharge. The first accident, involving Beckman, occurred during the afternoon shift on June 6, 2008. (Gov. Ex. 14). On that day, Jason Kelly operating a trailing Brookville, and Beckman operating a paired Jeffrey with two empty ballast cars in tow, were assigned to transport the ballast cars to the surface via the hoist track. At the bottom of the hoist track, Kelly and Beckman decided to decouple the Brookville locomotive. They attempted to push the empty ballast cars with the Jeffrey up to the middle of the hoist track where the hoist coupler was located.

While traveling up the track, the Jeffrey locomotive broke traction and stopped. Kelly exited the Jeffrey to hand sand the outby rail. The Jeffrey again lost traction and traveled back down the hoist track colliding with the Brookville that had been decoupled. The collision resulted in the derailling of both ballast cars and one end of the Jeffrey locomotive. During the June 9, 2008, accident investigation, Beckman stated that he had previously experienced a runaway locomotive when a motor broke traction and traveled to the end of the hoist track. (Gov. Ex. 14). Despite Beckman’s involvement in the accident, and a prior similar incident, he was not disciplined in any way as a result of his runaway Jeffrey. (Tr. 421).

A second similar accident, involving Josh Surguy, occurred subsequent to Beckman’s discharge. On May 7, 2009, Surguy lost control of his locomotive as it broke traction climbing the elevated hoist track. (Tr. 810-11; Gov. Ex. 16). Although both accidents involved collisions, the Beckman and Surguy hoist track accidents did not result in injuries.

Neither Beckman nor Surguy were disciplined because it was determined that it was not uncommon for locomotive operators to attempt to climb the hoist track to reach the coupling device that had failed to descend from the flat area of the track. After the Surguy accident, additional

weight was added to the hoist line to provide inertia that prevents the line from becoming stuck at the flat portion of the elevated hoist track. (Gov. Ex. 15).

The Secretary also relies on an incident involving Doug Lewis. The incident occurred on September 5, 2007, when Doug Lewis was observed by a mine inspector welding pieces of a continuous miner ripper head while he was exposed to the elevated boom. As a result of this incident, Citation No. 6602799 was issued citing a violation of the mandatory safety standard in 30 C.F.R. § 75.1726(b) that prohibits working under machinery that has not been securely blocked. (Gov. Ex. 17). Lewis was not disciplined as a result of this incident.

The Secretary seeks to infer that Beckman's discharge constitutes disparate treatment because no one had been previously discharged as the result of an accident at Mettiki's Mountain View Mine. However, to be successful, a claim of disparate treatment requires a showing that another employee who was guilty of the same or more serious offense escaped the disciplinary fate suffered by the complainant. *See Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n. 14 (Apr. 1998) *citing Schulte v. Lizza Indus., Inc.* 6 FMSHRC 8, 16 (Jan. 1984); *Chacon*, 3 FMSHRC at 2512.

In other words, analysis of the claimed justification for disciplinary action against a miner who was involved in an accident, who now is claiming discrimination, must be viewed in the context of the particular circumstances surrounding the accident. Put another way, apples must be compared to apples. Thus, the Secretary's attempt to equate the hoisting accidents, and Lewis' exposure under unblocked equipment, to Beckman's collision on the teardown track is an exercise in futility.<sup>6</sup>

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<sup>6</sup> The Secretary also relies on Show's testimony that there were additional incidents of runaway locomotives that did not result in disciplinary actions. (Tr. 163-64). However, no evidence concerning the details of these accidents was presented. Consequently, these reported incidents do not constitute evidence of disparate treatment.

Beckman's accident resulted in injuries. Although reasonable people may differ as to whether it was Beckman or Harvey who was primarily responsible for the accident, the company asserts that its investigation revealed that Beckman was at fault. The company's conclusion was based on information provided by Beckman and Harvey, as well as the observations of eye witnesses. As previously noted, this Commission does not have the authority to act as an arbitration or grievance board. *Chacon*, 3 FMSHRC at 2516-17. Thus, in the absence of any evidence of bad faith, the conclusions reached by Mettiki as a result of its investigation are not subject to review in this proceeding.

Rather, the narrow focus is on whether the mine operator's claimed justification is credible, and, if so, whether the adverse action would have been taken by the company regardless of whether the complainant had engaged in protected activity. *Id.* Consequently, the only issue for resolution is whether Mettiki's claim that it discharged Beckman because of his role in the September 9, 2008, accident is sincere, rather than an attempt to mask discrimination. The fact that Beckman was the first person to be terminated after an accident at Mountain View, alone, does not provide an adequate basis for concluding that the company's claimed justification is a disingenuous attempt to conceal a retaliatory motive.

c. Hostility Towards Protected Activity

Having concluded that Mettiki's claimed business justification is plausible, the focus shifts to whether Mettiki was also influenced, in any way, by Beckman's protected activity. The Commission recognizes that mine operators sometimes attempt to mask their retaliatory motives by purportedly relying on activity or events unrelated to the Mine Act as the sole justification for the adverse action complained of. *Chacon*, 3 FMSHRC at 2516-17. Direct evidence of a discriminatory motive is rare. Thus, in determining whether Mettiki's decision to terminate Beckman was also based, in any part, on a hostility towards Beckman's protected activities, the Commission looks to indirect or circumstantial evidence of discrimination. In this regard, the Commission has stated:

[D]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'

*Chacon*, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 8<sup>th</sup> Cir. 1965). Some of the more common circumstantial indicia of discriminatory intent are knowledge of the protected activity, coincidence in time between the adverse action and the protected activity, hostility or animus towards the protected activity, and disparate treatment of the complainant. *Id.*

I. Knowledge of Protected Activity  
And Coincidence in Time

In this case, the only material circumstantial indicia clearly demonstrated by the Secretary, which Mettiki admits, is Mettiki's knowledge of both Beckman's participation as a miners' representative, and his April 17, 2007, and March 15, 2008, safety related complaints. With respect to coincidence in time, the lynchpin of many discrimination complaints, there is an insufficient nexus between the relied upon protected activity and the adverse action. The Secretary relies on Beckman's longstanding participation, during his 28 years as a Mettiki employee, as a representative of miners at both of Mettiki's mines, including his accompaniment of mine inspectors in the months prior to his termination. Specifically, the Secretary, in her post-hearing brief, notes that Beckman served as a miners' representative seven times during the period from November 2007 until his last participation on August 5, 2008. (Sec'y Br. at 10).

However, to demonstrate that there is indirect evidence of a discriminatory motive with respect to coincidence in time requires a rational connection between Beckman's participation in inspections and his termination. *See Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (Nov. 1989) *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138 (there must be a rational connection between the evidentiary facts and the adverse action complained of). Frequent participation as a miners' representative, alone, does not give rise to a coincidence in time inference of discrimination when the representative is terminated immediately after engaging in unprotected activity. In such cases, an inference of discrimination requires credible evidence of hostility towards the complainant's role as a miners' representative. Here, there is no credible evidence of hostility towards Beckman's activities as a miners' representative. By his own admission, Beckman had been a miners' representative for many years. Moreover, Mettiki permitted Beckman to substitute as a miners' representative when other miners declined to travel with inspectors.

Nor are Beckman's April 17, 2007, and March 15, 2008, complaints circumstantial evidence of a discriminatory motive with respect to coincidence in time. These complaints, having occurred approximately seventeen months and six months prior to Beckman's termination, without evidence of any material intervening hostility, are too remote in time to reflect a causal connection. *Id.* Consequently, the Secretary has failed to demonstrate a coincidence in time between Beckman's protected activities and his discharge that constitutes indirect evidence of discrimination.

ii. Animus

With regard to Mettiki's alleged animus toward miners' representative participation, the Secretary has presented nothing more than speculation without evidentiary support. For example, in her brief, the Secretary questions the propriety of Mettiki's miners' representative rotation system that consisted of 19 registered miners' representatives. These representatives were supposed to accompany inspectors on a rotating basis. It was not uncommon for these representatives to decline to accompany an inspector. Consequently, the Secretary infers that Mettiki "recruit[ed] miners' representatives who they knew would decline to travel [with inspectors], but whose inclusion on a shift's roster of miners' representatives would reduce the

frequency with which bona fide miners' representatives could travel." (Sec. Br. 13). There is no record evidence to support such speculation.

Richard Show, currently an MSHA inspector, last worked for Mettiki on April 1, 2005. Show's testimony concerning Mettiki's attitude towards miners accompanying inspectors was equivocal. Show testified that Mettiki management was "open to people traveling with inspectors," but he also opined that Mettiki neither encouraged nor discouraged miners' representative participation. (Tr. 85). Show initially testified that other miners' representatives were not asked if they wanted to accompany an inspector when the scheduled representative declined to travel. However, on cross examination, Show testified that the representatives decided among themselves who would travel when an inspector arrived at the mine. (Tr. 87, 169-70).

Moreover, Show's contradictory testimony that substitutes were not encouraged is belied by Beckman's testimony that he frequently accompanied inspectors when others declined. (Tr. 256). In fact, Beckman testified that he traveled with both state and federal inspectors, sometimes as often as three days in a row. (255-56). Thus, there is no evidence that Mettiki had a policy of interfering with the rights of miners to accompany an inspector.

The Secretary also relies on Show's testimony to suggest that Mettiki has a history of discriminating against miners who were representatives. However Show could offer no meaningful evidence of past discrimination. In this regard, Show testified that, in the past, several individuals who were miners' representatives were terminated by Mettiki. However, Show did not provide the names of these individuals. Moreover, Show admitted that their terminations were not necessarily motivated by their activities as miners' representatives. In fact, Show conceded that there were "a lot of circumstances [behind their terminations] that [I didn't] know about." Finally, Show testified that he did not experience any discrimination as a result of his role as a miners' representative while employed by Mettiki. (Tr. 85-93). Significantly, even Beckman conceded that he never experienced any tangible discrimination as a result of his miners' representative activities, alleging "[i]t was just, you know, the expressions they made . . . ." (Tr. 263-64).

Finally, it is noteworthy that Beckman's previous hoist track accident occurred on June 6, 2008, after Beckman's safety complaints to Savage and Krieser. Beckman was not disciplined as a result of this accident. Mettiki's failure to discipline Beckman, when it had the opportunity, seriously undermines the Secretary's assertion that Mettiki harbored animosity towards Beckman because of his role as a miners' representative or his history of safety complaints.

In fact, the Secretary's counsel concedes that there is no significant evidence of animus in this case:

I'll just come right out and say, there's not a lot of evidence of animus in the case. There is some evidence of animus in this case. Evidence of animus is not required. In fact, the direct evidence of animus is expressly recognized as very rarely encountered in retaliation cases. What we're looking at is the totality of the circumstances here, whether or not – and I'm sure we'll have an argument in a little bit about whether or not we've made our prima facie case. And I can reserve all of this until then.

(Tr. 280; Sec'y Br. at 42).

The Secretary's reliance on inference is misplaced. In effect, the Secretary attempts to infer animus in response to protected activity, rather than demonstrating evidence of animus to support an inference of discrimination. Thus, the Secretary has impermissibly bootstrapped an unsubstantiated inference of animus to infer Beckman was the victim of discrimination.

The Secretary seeks to assume a company animus towards Beckman because he engaged in protected activity. The Secretary further seeks to use this unsubstantiated inference of animus to arrive at an inference of a discriminatory motive. The Secretary's approach begs the issue. Contrary to the Secretary's assertion, evidence of animus is required. As the proponent bearing the burden of proof, the Secretary must establish the presence of animus by material evidence before animus can serve as indirect evidence of discrimination. The Secretary has failed to do so as an unsupported inference of animus will not suffice.<sup>7</sup>

### iii. Disparate Treatment

The Secretary asserts that Mettiki's responses to Beckman's safety related complaints evidence disparate treatment because they were "punitive" in nature and "revealed [a] disdain for safety related complaints." (Sec'y Br. at 43). To support this assertion the Secretary relies on the following: (1) Savage's April 17, 2007, e-mail to mine management identifying Beckman as the source of a track water complaint; (2) the assignment of Beckman, with the assistance of a contract employee, to remove the subject water hazard during the next maintenance shift on April 18, 2007; and (3) Krieser's March 19, 2008, written response to Beckman's track water and ballast complaints.

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<sup>7</sup> The Secretary's reliance in her brief on *Sec'y o/b/o Garcia v. Colorado Lava*, 24 FMSHRC 350, 354 (Apr. 2002) for the proposition that it is permissible to infer an operator's animus because of protected activity is misplaced. (Sec'y Br. at 42). The Commission, in *Colorado Lava*, merely reiterated its longstanding view, articulated in *Chacon*, that discrimination can be shown through indirect evidence such as disparate treatment, animus and coincidence in time, all of which are lacking in this case. *Id.* at 354. Thus, indirect evidence of discrimination must be shown and may not be presumed.

It is not uncommon for mine operators to keep written safety related records that identify potential hazardous conditions that require remedial action. These records, such as pre-shift inspections of equipment, and pre-shift and on-shift examination reports of underground conditions, routinely contain the names of the individuals who seek corrective measures. Savage testified, without contradiction, that it was company policy to provide written notification to all concerned members of management summarizing safety complaints and their origin to ensure that all complaints were adequately addressed. (Tr. 760-62). Such written notification to management containing the nature and source of safety complaints, alone, is not facially discriminatory.

As a general proposition, assigning the miner who identified a hazardous condition to remedy the condition does not constitute disparate treatment provided that the assignment is consistent with that miner's routine job duties and the work assignment is not part of an ongoing pattern of retaliation. Here, Beckman has conceded that track maintenance was within the scope of his job duties in that he had remedied track conditions in the past. (Tr. 342). There is no evidence of a continuing pattern of undesirable job assignments or other facts that would suggest that Beckman was the victim of retaliatory disparate treatment. Consequently, the timely assignment on the next maintenance shift of Beckman, a maintenance worker, to remedy the water conditions that were the subject of his complaint, without more, is not indirect evidence of a retaliatory motive.

Nor is Kreiser's March 19, 2008, written response to the safety issues raised by Beckman, concerning track water and ballast, evidence of disparate treatment. Rather, Kreiser's response demonstrated that Beckman's complaints were taken seriously, and, Krieser encouraged Beckman to inform management of any future safety related conditions that may concern him.

Significantly, Bateman testified that neither Beckman's longstanding participation as a miners' representative, nor his past safety complaints, influenced Mettiki's accident investigation that determined that Beckman's misjudgment was the underlying cause of the accident. (Tr. 548-49). Bateman's opinion is entitled to great weight in that he is, in essence, a friendly witness who apparently believed that Beckman's termination was too harsh of a sanction. (Tr. 568-79).

Mettiki has stipulated that, with the exception of Beckman's negligent operation of locomotives, it considered Beckman's work performance to have been more than adequate. (Tr. 985). While Beckman's discharge after 28 years of Mettiki employment may be unfortunate, the scope of this discrimination proceeding is narrow. As previously noted, the issue is not whether Mettiki's disciplinary action was just or wise. *Chacon*, 3 FMSHRC at 2516-17. Rather, the only issue is whether Mettiki's asserted motivation for discharging Beckman, for unprotected conduct alone, is as claimed.

In the final analysis, to prevail, the Secretary must present adequate evidence demonstrating that Mettiki harbored resentment towards Beckman's safety related activities that influenced, at least in part, Mettiki's decision to discharge Beckman. However, there is an absence of meaningful evidence that Beckman was the victim of disparate or hostile treatment during his long term participation as a miners' representative, or, during the approximate 17 month period between his initial April 2007 complaint and his September 2008 discharge.



Consequently, the Secretary has failed to demonstrate that Mettiki's decision to terminate Beckman immediately following his September 9, 2008, locomotive accident was motivated, in any part, by Beckman's protected activities.

**ORDER**

\_\_\_\_\_ In view of the above, **IT IS ORDERED** that the discrimination complaint filed by the Secretary of Labor on behalf of Harry Lee Beckman **IS DENIED**. Accordingly, **IT IS FURTHER ORDERED** that Docket No. WEVA 2009-1526-D **IS DISMISSED**.

Jerold Feldman  
Administrative Law Judge

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