FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

June 28, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-228-DM
on behalf of	:	SC MD 01-14
TRACY ALLEN SANSOUCIE,	:	
Complainant	:	
	:	
v.	:	
	:	
VESSELL MINERAL PRODUCTS,	:	Mine ID 23-00221
	:	
Respondent	:	Vessell Mineral Products

DECISION

Appearances: John Rainwater, Esq. and Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Bradley S. Hiles, Esq. and Christopher T. Berg, Esq., Blackwell, Sanders, Peper, Martin, LLP., St. Louis, Missouri, for Respondent.

Before: Judge Bulluck

This proceeding is before me on a Complaint of Discrimination filed by the Secretary of Labor ("the Secretary") on behalf of Tracy Allen Sansoucie against Vessell Mineral Products ("Vessell"), under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(2).[1] The complaint alleges that Sansoucie was unlawfully discharged from employment in retaliation for having made safety complaints to the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary seeks reinstatement of Sansoucie to his former position with back pay and interest, employment benefits and seniority, expungement of Sansoucie's employment record of all references to the circumstances surrounding his discharge, and payment of a $5,000.00 civil penalty.

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

A hearing was held in St. Louis, Missouri. The parties presented testimony and documentary evidence, and stipulated that "To the best of the Secretary's knowledge at [that] time, no official or employee of the Mine Safety and Health Administration called Vessell Mineral Products to warn of the Part 50 audit" (Tr. 6). Post-hearing briefs were filed. For the reasons set forth below, I find that Sansoucie failed to prove a violation of section 105(c) of the Act, and dismiss his Complaint of Discrimination.

I. FACTUAL BACKGROUND

Vessell Minerals is a plant that purifies lime for steel factories, employing 50 to 60 workers over three shifts in a 24-hour a day operation at its Bonne Terre, Missouri, quarry and kiln facility (Tr. 12-13). Royce Vessell has owned the corporation since January 1997, Flora Denton is vice-president and handles administrative functions such as personnel, accounting, and safety training, and Brad Bayless is plant superintendent.

Tracy Sansoucie first worked at Vessell in late 1998 in several areas, including special products and kiln, conveyor and elevator maintenance (Tr. 14). Sansoucie, whom Vessell knew to suffer from alcohol abuse resulting in legal problems, had very poor attendance and quit in January 2000, according to Vessell, in lieu of being fired (Tr. 21-27, 145, 476-80, 723; ex. G-2). Shortly thereafter, in mid-February 2000, Sansoucie seeking to be rehired, explained to Vessell that he had recently remarried and needed a job, and represented that he had gotten treatment for his alcoholism (Tr. 146, 181-82). According to Flora Denton, Sansoucie was viewed as a talented worker and, after consulting Royce Vessell and making it "very clear to [Sansoucie] that his past practices would not be tolerated," she rehired him (Tr. 482).

Vessell permitted Sansoucie to work the night shift and plenty of overtime, arranged his work schedule to accommodate incarceration on weekends and other legal obligations, and found his overall performance, including attendance, to be very good (Tr. 482-84). Sometime around June of 2000, Sansoucie became a burn floor supervisor of seven to ten employees, and reported directly to Brad Bayless (Tr. 14-16).[2] The only instance of an attendance infraction noted by

---

[2] The burn floor is the area from which the burn man (burner) controls the kiln. The supervisor checks on operation of the kiln and the back end where rocks are fed into the kiln (Tr. 17). Referring to Sansoucie's diagram at exhibit G-1, lime is processed as follows: starting at the hopper, product travels up the conveyor into a rock box, then falls down a feed tube into the back of the kiln (bigger rocks go to a raw crusher behind the cooler, into a shaker pan, then into an elevator); any spillage goes to a shaker pan and elevator that return it to the system; it takes approximately four hours for product to reach the opposite end of the kiln at the cooler floor (the cooler man empties the hoppers and ensures that product goes the right way to the silos), located beneath the kiln; product is then separated into various hoppers, then run to the silos (Tr. 18-21).

Vessell occurred during the week of November 13, 2000, when Sansoucie failed to report for two shifts without calling in (Vessel considers three consecutive shifts a "voluntary quit"); Sanscoucie provided satisfactory explanation to Denton, however, and was permitted the entire week off to tend to personal, family-related matters (Tr. 483-86; ex. R-16).

Sansoucie worked without incident until he was injured on the night of December 28, 2000. According to Sansoucie, sometime around 9:30 or 10:00 p.m. when he noticed a hot spot on the kiln, he directed the burners to pull (extinguish) the fire, put the kiln on auxiliary power, then shut off the conveyor, elevator and shaker pan at the control building near the pump house. As he was leaving the area around 10:30 p.m., he slipped on a set of icy steps near the pump house and fell into a concrete ditch (Tr. 30-36; ex. G-1). Sansoucie went to the burn floor and advised maintenance supervisor Ed King of the accident, and called Brad Bayless at home (Tr. 37-40). Because Royce Vessell and Flora Denton were on vacation, Bayless was in charge of the mine. Sansoucie did not report to work the next day and, believing that he was simply sore from bruising, did not seek medical attention until January 2, 2001, from his family physician, Dennis Sumski (Tr. 40-41). Dr. Sumski referred Sansoucie to orthopedic surgeon William Harris, who diagnosed Sansoucie's injury as a first degree separation of his AC joint and a fracture of the distal clavicle, and restricted him from working until January 18, 2001 (Tr. 43-45). Sansoucie elected to have both doctor visits paid by his private insurance carrier, Blue Cross/Blue Shield, rather than worker's compensation (Tr. 41-42, 45-46).

In the meantime, upon return from vacation, Denton arranged for Sansoucie to come to the plant to discuss the accident and his medical status. It is unclear whether the meeting took place on January 4th or 8th ("January meeting"), but the parties agree that Sansoucie, Denton, Bayless and Royce Vessell were present, and that Sansoucie's accident was discussed (Tr. 51-52). According to Denton, she brought to the meeting the forms necessary for reporting the injury to Vessell, worker's compensation and MSHA, but Sansoucie declined to fill them out, explaining that he did not wish to get Vessell in trouble with MSHA (Tr. 55, 100, 419-22). There was some confusion, since Sansoucie claimed that the accident occurred on the job, as to why he had had his medical claims processed through his personal insurance carrier. Denton, angry that Sansoucie had not followed company procedures by filling out Vessell's report of work-related injury and going to the company doctor, told Sansouie that he had given her enough reason to fire him; Sansoucie responded that Denton should "do what [she had] to do" (Tr. 52-54, 423, 426-27). The meeting ended with an agreement that Sansoucie get back to Vessell after he had given the matter further thought, as to how he wanted the claim to be handled (Tr. 53, 103-05, 426).

Instead of getting back to Vessell, however, Sansouie called MSHA's Rolla, Missouri field office on January 9th and spoke with the office secretary, Steven Brill. Sansoucie complained of improperly stored oxygen and acetylene tanks at the plant, and he inquired as to whether he, a supervisor, was obligated to fill out his own accident report (MSHA form 7000-1) (Tr. 60-61, 348). As a result of Sansoucie's call, MSHA Inspector Donald Richards inspected Vessell the same day and found the tanks at various locations properly stored (Tr. 366, 371; ex. G-5). Inspector Richards was unaware of the complainant's identity and at no time mentioned

Sansoucie or any Vessell employee in connection with the hazard complaint (Tr. 367-71, 378, 388). Because the allegation of failure to report the accident did not involve an immediate safety hazard, MSHA assigned Inspector Ed Jewell to conduct a Part 50 audit later in the month (Tr. 350-51).

Sansoucie also called the Missouri Division of Workers' Compensation on January 16th and talked to Art Hinshaw (Tr. 60). Hinshaw called Denton shortly thereafter and told her that Sansoucie had accused Vessell of refusing to report his workers' compensation claim, and advised her, irrespective of any confusion as to where the accident occurred, to file the claim (Tr. 431). Denton and Royce Vessel then met with claims representative Mark Redick of Cincinnati Insurance (Vessell's workers' compensation carrier) and, based on his advice (employee Charles Herbert was also discussed), faxed the workers' compensation claim to the insurance carrier and mailed the Mine Accident, Injury and Illness Report (MSHA Form 7000-1) to MSHA on January 17th (Tr. 436-41; ex. R-3, R-4, G-6).

On January 19th, Denton required Sanscoucie to be examined by the company doctor, David Mullen of Bonne Terre Medical Associates, and Dr. Mullen referred him to Dr. Harris, the same specialist to whom Dr. Sumski had referred Sansoucie (Tr. 46-47, 442). Denton was flexible in fashioning a work assignment for Sansoucie that would meet his physical limitations and transportation needs and, although Dr. Harris released him for 'light duty" on January 22nd, Sanscoucie ultimately returned to a desk job in Vessel's office on January 24th (Tr. 56, 95-97, 131, 139, 450-51, 459-60).

Regarding MSHA's Part 50 audit of Vessell's injury reporting and filing over the prior three year period, Inspector Jewell, along with MSHA trainee Steve Thompson, interviewed Sanscoucie at his home on January 22nd, and inspected the plant's paperwork from January 23rd through 25th. In order to keep Vessell from learning that a complaint had been made, Inspector Jewell deliberately misled Denton as to the reason for the audit by telling her that Vessell had been randomly selected (Tr. 496-97; ex. R-27, p. 33-40). Sansoucie's name did not come up during the audit (Tr. 497). Four citations were issued as a result of the audit, one of which involved late reporting of Sansoucie's accident by one day (Ex. G-8; R-27, p. 68, 71-72).

Sansoucie's attendance on light duty during late January was extremely irregular and abbreviated when he did report to work. Denton, having received authorization from Royce Vessell to fire Sansoucie (and Charles Herbert), went to Sansoucie's home accompanied by Curt Nickelson on February 2, 2001, and discharged Sansoucie from employment (Tr. 68; ex. R-25, p. 341).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act,[3] a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.,* 20 FMSHRC 324, 328 (April 1998); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula,* 2 FMSHRC 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively 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. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Sansoucie has established that he engaged in protected activity by complaining to MSHA about storage of oxygen and acetylene tanks, and by reporting his accident of December 28, 2000. He has failed to show, however, that Vessel was motivated in any part by his protected activity.

In determining whether a mine operator's adverse action was 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." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp*., 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *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 towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

---

[3] Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others . . . any statutory rights afforded by this Act."

The Secretary identifies Sansoucie's statement at the January meeting-- that he did not want to get Vessell in trouble with MSHA-- as protected activity (Tr. 55, 422). I do not find that Sansoucie's reference to MSHA constituted activity that is protected by the Act but, in the overall context of the meeting, appears to be an attempt by Sansoucie to deflect attention from his own behavior and diffuse Denton's anger. Denton testified that her anger at Sansoucie for failing to follow well-known company procedures of filling out an internal accident report and seeking medical attention through Bonne Terre Medical Associates precipitated her comment to Sansoucie about firing him (Tr. 420-21, 423). She testified that conflicting versions of his accident by Sansoucie, coupled with his election to use his personal medical insurance rather than Vessel's insurance carrier, made her suspicious that the accident had not occurred at work (Tr. 429). In any case, she testified, she urged Sansoucie to assist in filling out the workers' compensation paperwork and he refused. Sansoucie, on the other hand, testified that he had not felt that his injuries were serious enough to report at the time of the accident (Tr. 98). He asserted that, because Denton had told him that she would like to fire him, he told Vessell that he did not believe that the accident should be treated as a workers' compensation claim (Tr. 99). Sansoucie, himself, puts Denton's comment in the context of frustration, rather than an actual intention to fire him, by testifying that "she was aggravated, yes. Because I had -- didn't follow -- they said I didn't follow procedures. Not filling out an accident report at the time of the accident" (Tr. 52, 180-82; see 710). Sansoucie also confirmed that Denton was angry that he had sought medical attention from his family physician, rather than Dr. Mullen (Tr. 52). I do not find credible any suggestion by Sansoucie that he feared losing his job. Denton's anger, then, was clearly rooted in Sansoucie's failure to follow company procedures, irrespective of any doubt about the circumstances surrounding the accident, and requesting that Sansoucie fill out a workers' compensation claim was entirely reasonable. Sansoucie's explanation for his lack of cooperation, "I had never been through anything like this before. I didn't know if I should do it or shouldn't do it. I don't know if it would hurt the company or it would help the company," puts his motivation in question, rather than Denton's, especially since he was instructed on-the-spot as to the proper procedures for work-related injuries. Sansoucie also stated that he was the first to mention filing of MSHA's mine accident report (Tr. 179, 183-84). His concern for the company at this point, however, is at least suspicious, viewed in the overall context of his refusal to cooperate. It bears noting that Sansoucie's taunting of Denton to "do . . . what she needed to do," in response to mention of firing him, was inappropriate for someone desirous of maintaining employment, and only served to fuel the antagonism between them (Tr. 53). This meeting is a benchmark in determining Denton's motivation for ultimately terminating Sansoucie, in that it is the first indication that Denton was very angry about Sansoucie's handling of his accident, and it establishes the reason for her anger as unrelated to Sansoucie's protected activity, which had not yet occurred.

While it is undisputed that Sansoucie's call to Steve Brill on January 9th is protected activity, there is no evidence that Royce Vessell or Flora Denton knew that the call had been made or what had been discussed. The Secretary contends that Don Richard's hazard inspection of the oxygen and acetylene tanks so closely followed the January meeting as to make Vessell suspicious that it was precipitated by Sansoucie. The proximity in time standing alone, however,

does not establish Vessell's knowledge. To the contrary, the evidence indicates that no one from MSHA disclosed Sansoucie's identity to anyone at Vessell, and that Denton's guesses to Inspector Richards as to the complainant's identity did not include mention of Sansoucie (Tr. 367-71, 378-81, 491-93, 694-95). Indeed, Sansoucie conceded that he did not believe that Vessel had knowledge of that complaint or that it played any role whatsoever in his discharge (Tr. 110-11).

The Secretary also attempts to establish Vessell's knowledge of Sansoucie's protected activity through testimony of Charles Herbert, that he observed Denton being "tipped off" about the impending Part 50 audit. Herbert was formerly a laborer at Vessell from September 2000 until he was terminated on February 2, 2001, the same day as Sansoucie, also for unexcused absences (Tr. 198-99). Herbert had been injured on the job on December 11, 2000, treated by Dr. Mullen, and assigned to full-time light duty in the main office, Mondays through Fridays, 6:00 a.m. to 2:00 p.m. (Tr. 189-94). At hearing, Herbert testified that Vessell's main office is small, containing three desks pushed next to each other (Tr. 194-95). According to Herbert, one morning when office worker Robin Parker and Flora Denton were also on duty, he overheard a telephone conversation during which Denton "said something about an MSHA audit and then she decided to put the--whoever she was talking to on hold and go back into the conference room and pick the phone up . . . . She met Royce in the hallway and told him that she had somebody on line about an MSHA audit and that they needed to do something about Tracy Sansoucie, that he had been becoming a nuisance and things were getting out of hand around there" (Tr. 195-96, 208). Herbert could not specify the date of the alleged conversation, the time it occurred, or the identity of the caller, although on cross-examination he narrowed down the date to January 22nd, sometime after 10:00 a.m. (Tr. 199-200, 203, 211-27). On cross, his testimony was shown to conflict with his statement to MSHA Investigator Ron Mesa, that Denton told Royce Vessell that "Tracy and his injury and myself and another guy, Mike Pierce I think his name was, had gotten injured, and it was just everything was getting out of hand, too many people getting hurt" (Tr. 228-31). Finally, Herbert claimed that he told Sansoucie about the telephone call at Sansoucie's house, before he was fired (Tr. 232). Lack of specificity in Herbert's rendition of events and gross inconsistencies in his testimony cast a broad shadow over his credibiliy, and it is abundantly clear that he has an axe to grind with Vessell for firing him (Tr. 233-36). Flora Denton testified that she had conducted eight hours of safety training for newly hired employees on January 22nd, and denied that the incident ever took place (Tr. 499-507; ex. R-7). Furthermore, Robin Parker testified credibly that she worked alone on January 22nd -- neither Denton nor Herbert reported to the office that day -- and that the telephone conversation alleged by Herbert never happened (Tr. 611-14; ex. R-9, R-22). Consequently, based on the parties' stipulation that no one from MSHA is known to have alerted Vessell to the impending audit, and substantial lack of credibility on the part of Charles Herbert, it is my finding that the incident never occurred. I further find that the inspectors were careful to characterize the surprise inspection as a "random audit" to protect the identity of the complainant, that they never identified Sansoucie, and that no one at Vessell behaved as if they suspected Sansoucie's involvement (Tr. 691, 695).

The Secretary presented the testimony of Jason Cowsert to establish Denton's knowledge. Cowsert, a Vessell employee since July 1999, was a burn man, working the same shift as

Sansoucie at the time of Sansoucie's accident (Tr. 253). Cowsert testified that, around the end of January 2001, he talked to Denton about moving him off the burn floor to maintenance. They discussed cooler man Darren Hooss replacing Cowsert, and Denton estimated that it would take her two weeks to arrange for Hooss to get up to the burn floor (Tr. 255-56, 283). Cowsert testified that he explained to Denton that he wanted a transfer because "just Royce was up there, and he's, you know, I can't stand working with him all the time, and then plus, it just [sic] I was tired of the 12-hour shifts, you know. I wanted something with 8-hour shift, and plus sometimes that shift will swing, and I didn't want to go on swing shift. I wanted to stay on a steady shift" (Tr. 257-58). Cowsert asserted that rumors had circulated around the plant that Sansoucie had been hurt and was going to sue the company, and that Denton stated during this meeting that "Tracy's [f_cking] us right now, but he's going to be the one getting [f_cked] in the long run" (Tr. 259, 261, 263-64, 328-29). According to Cowsert, he told Sansoucie about Denton's comment at some point when Sansoucie was on light duty in the office (Tr. 260). Cowsert reasoned that the discussion with Denton would have had to have occurred in late January because, according to burn log entries, he trained Hooss to burn on February 7th and 19th -- two weeks later, as Denton had promised (Tr. 285, 294, 305; ex. 13). On cross-examination, Cowsert acknowledged that Denton had been referring to "Tracy's lawsuit" when she talked about Tracy "f_cking" Vessell (Tr. 271-74). Denton acknowledged the conversation with Cowsert and readily admitted having made the statement, but attested to a completely different context and time frame. She testified that the discussion took place on March 13th, the day after Inspector Mesa had hand-delivered to her Tracy Sansoucie's discrimination complaint, and because, in her mind, this was tantamount to being sued, she ranted to Cowsert about "Tracy's lawsuit" the following day (Tr. 508-12). She testified that the week before, Inspector Mesa had delivered Charles's Herbert's discrimination complaint to her, and she was very angry when presented with Sansoucie's, especially upon reading the false allegations (Tr. 509). Viewing all the evidence, the only reasonable context in which Denton could have referenced "Tracy's lawsuit" was Sansoucie's discrimination complaint. The burn log does not support Cowsert's recollection that the discussion took place in January and Hooss was trained on two dates in early February, because it is highly implausible that a burner could have been trained over two partial workdays. Cowsert, by his own testimony that "everybody" assumed that Sansoucie had made the complaint that prompted the Part 50 audit "just because he had got hurt, and he had been fired " places the rumors in the post-discharge time frame. The record indicates that, in mid-February, well after Sansoucie's discharge, Royce Vessell replaced Brad Bayless by assuming total supervision of the burn plant and retraining the burners, in response to losing a major customer and product quality issues (Tr. 514-18, 664-70, 698; ex. R-14, R-15). Vessell witnesses Ed King, Brett Gobble, Randy Nickelson and Royce Vessell all testified that, after taking over control of the burn plant, Royce Vessell trained all burners, including Hooss (Tr. 623-26, 642-44, 699-704). The burn log establishes that Hooss became "Burnmaster" on April 11th and, therefore supports Vessel's position that he was trained between March 19th and mid-April (Tr. 519-21, 638-39, 669). I credit Denton's rendition of events, especially because, in his March 11th interview with Ron Mesa, Sansoucie never mentioned Denton's comment to Cowsert. Sansoucie claims that "he had forgot about having that conversation with Jason, and it really didn't mean nothing" (Tr. 168-70; ex. R-19). A more plausible explanation for Sansoucie's memory lapse is that the MSHA

interview preceded the Denton-Cowsert conversation. Therefore, I find that Flora Denton's declaration of war on Sansoucie occurred in March, on the heels of notice of Sansoucie's discrimination complaint, clearly after Sansoucie had been discharged.

The record clearly indicates that Flora Denton is assertive, outspoken and, by her own admission, uses profanity. In retrospect, she would have been well-advised not to have spoken candidly to Cowsert about Sansoucie's lawsuit, but considering the magnitude of her outrage at that juncture, it is hard to conceive of her not speaking her mind if she thought that Sansoucie had called MSHA. The Secretary points to Denton's animus toward MSHA as evidence of her knowledge of Sansoucie's protected activity. All accounts of Denton's contempt for MSHA, however, involved general agitation at being "picked on" by the inspectors, without any specific link to Sansoucie or any other miner.

Finally, the Secretary's reliance on Vessell's toleration of Sansoucie's prior attendance deficiencies, as indication that its legitimate reason for firing Sansoucie is pretextual, is misplaced. While Vessell admits to poor attendance on the part of Sansoucie during his first year of employment, the company contends that Sansoucie would have been fired had he not quit in January 2000, and that when he was rehired that February, Vessell made it clear that regular attendance was expected of him. Vessell considered Sansoucie's work and attendance to be satisfactory until his December 2000 accident. Vessell distinguishes between Sansoucie's prior attendance record and the period that he was assigned light duty. Flora Denton described Vessel's light duty/return to work program as a win-win situation that redefines job duties to fit injured workers' medical restrictions, employing them full-time at 100% of their regular pay (workers' compensation pays 66%), while the company benefits by keeping down its insurance premiums and lost time days (Tr. 424-26). Likewise, Royce Vessell testified that the light duty program returns the employee to his permanent job as quickly as possible and helps the workers' compensation rate for the company (Tr. 692-94). He explained that, by blatantly missing time without doctor's excuses, and making statements like "fire me," Sansoucie and Herbert had set a bad example for other workers and undermined the light duty program (Tr. 696-97). Moreover, he testified that, because of the program's importance to the company, he would have fired Sansoucie even if he had known that Sansoucie had complained to MSHA (Tr. 697).

It is clear that Flora Denton was furious with Sansoucie, as early as the January meeting when she told him that she would like to fire him for failure to follow Vessell's work-related injury procedures (Tr. 177). It is also evident that Denton's anger and frustration escalated when she learned that Sansoucie had contacted the Missouri Department of Workers' Compensation himself, and accused Vessell of refusing to report his claim. Despite the difficulties in dealing with Sansoucie, however, Denton afforded him the utmost flexibility in selecting his light duty assignment. There is no dispute that Sansoucie's attendance while on light duty was poor--characterized by failures to report to duty, work full days, call-in absences, obtain medical excuses, and notify Denton of early departures. Moreover, Denton's claim that Sansoucie invited her to fire him on three occasions between the January meeting and February 1st, the day before his discharge, was essentially unchallenged (Tr. 426, 461-62, 466). Denton testified credibly that

on the second occasion she had cautioned Sansoucie that his job was in jeopardy and that if he continued to tell her that, she was "going to go through with it," and the third time, she knew that she needed to talk to Royce Vessell because the company had a serious problem (Tr. 466-67, 470-71). When it became clear to Denton and Royce Vessell that Sancoucie had no intention of cooperating with the light duty program, Denton fired him (471-72). There is no indication from the record that Denton or Royce Vessel knew of Sansoucie's protected activity. They treated him the same as similarly situated employee Charles Herbert, also a flagrant violator of the light duty program, but not a participant in protected activity. Furthermore, despite Sansoucie's testimony that Denton fired him without an explanation, I am persuaded that she told Sansoucie that he had been missing too many days on light duty (Tr. 474-75; 153-56; ex. R-18).

Based on the record in its entirety, I conclude that Sansoucie has failed to establish a *prima facie* case. Assuming, *arguendo*, that Vessel knew of Sansoucie's complaints to MSHA, Vessell has proven that, based on Sansoucie's flagrant lack of compliance with its light duty program, it would have terminated him for his unprotected activity alone.

ORDER

Accordingly, inasmuch as the Secretary has failed to establish, by a preponderance of the evidence, that Sansoucie was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Tracy Allen Sansoucie against Vessell Mineral Products, under section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

John Rainwater, Esq. and Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, P.O. Box 46550, Denver, CO 80201-6550

Christopher T. Berg, Esq. and Bradley S. Hiles, Esq., Blackwell, Sanders, Peper, Martin, LLP, 720 Olive Street, Suite 2400, St. Louis, MO 63101

yi