FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 27, 2003

ARNOLD J. JISTEL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2002-150-DM
v.	:	SC MD 02-05
	:	
TRINITY MATERIALS, INC.,	:	Trinity Materials
Respondent	:	Mine ID 41-01163

DECISION

Appearances: Jason M. Willett, Esq., Hinds & Willett, Waxahachie, Texas, for Complainant,
David M. Curtis, Esq., Gardere Wynne Sewell LLP, Dallas, Texas, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by Arnold Jistel pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(3).[1] Jistel alleges that Trinity Materials ("Trinity") discriminated against him by terminating his employment on October 25, 2001, as a result of his complaints about safety. A hearing was held in Dallas, Texas. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Respondent did not discriminate against Jistel and dismiss the complaint.

Findings of Fact

Trinity mines and processes sand and gravel at numerous locations in Texas and Louisiana. It owns a plant at Seagoville, Texas, at which it processed sand and gravel mined from adjoining land leased from the Southland Land and Cattle Company. Material had been removed from approximately ten different pit areas on the property since 1980. By late 2001, the marketable sand and gravel at other locations had been exhausted, and only one small pit was being worked.

[1] Pursuant to section 105(c)(2) of the Act, the Secretary of Labor must investigate complaints of discrimination filed by miners and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

Jistel became employed at Trinity's Seagoville facility on December 12, 1997. In 2001, he held the position of plant operator, and also operated equipment when other employees did not report for work. He earned $10.25 an hour and worked an average of 28 hours of overtime per week. Jistel was responsible for general operation of the plant and conducted daily workplace examinations of the facility. His immediate supervisor was Tommy Weatherly, the plant manager. Billy Rogers, was also a plant operator and had been the manager prior to Weatherly. Jistel had known Rogers, who had been his brother-in-law, for twenty years. He continued to view Rogers as a supervisor and was good friends with him. Tr. 216.

When Jistel conducted his daily inspections of the plant, he carried note paper and jotted down items of significance. He used his notes to complete a "Daily Work Place Inspection Checklist." The form had a series of boxes for each area of the plant for each day of the week. In each box he entered either a "✓" indicating that conditions were "OK," or an "✕," indicating a "Discrepancy," which he described in a section of the form entitled "Remarks." A copy of the form was transmitted by facsimile each day to Trinity's main office at Ferris, Texas.

From January to March 2001, Jistel placed "✓'s" in all boxes on the forms, indicating that the areas were "O.K." However, each sheet bore notations, "walkway at doghouse needs welded," and "A.J. is working on guards and walkway." Beginning on March 26, 2001, however, "✕'s" were placed in boxes for "Walkways & Handrails" and "Guards." The remarks sections of the forms generally included comments that the walkway at the doghouse needed welding, the walkway on the rock belt needed to be replaced, the handrail at the log washer needed welding, an electrical box needed to be replaced, and a lock was needed on another box. Ex. C-48, R-G-6.[2]

On May 30 and 31, 2001, MSHA conducted a regular inspection of the pit area of the Seagoville facility. Eight citations were written for various alleged violations. On June 4 and 5, 2001, MSHA returned to the facility to inspect the plant and issued eight additional citations. Of particular note was Citation No. 6207305, alleging a violation of 30 C.F.R. § 56.11001, which requires that a "safe means of access be provided and maintained to all working places." The violation was based upon the poor structural condition of a conveyor tail pulley and attached elevated walkway that was used to service the conveyor. It was alleged to have been attributable to the "High" negligence of the operator, and was issued under section 104(d)(1) of the Act as an unwarrantable failure to comply with a mandatory standard. The basis of the unwarrantable failure allegation was that the condition had been noted by Jistel in his work place examination reports for the prior eight weeks and nothing had been done about it. Ex. C-47, R-G-4. In order to abate the conditions noted in the citations, particularly the structural problem, the plant was shut down for a few days, after which the facility was run under normal conditions.

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[2] Complainant's exhibits are referred to with the prefix "C," and are designated by a number. Respondent's exhibits are referred to with the prefix "R," and are generally designated with both a letter and a number.

Jistel claimed that after the June citations were issued, Rogers and Weatherly "kept picking on" him and "harassing" him. Tr. 151. He claimed that about a month after the citation was written, Rogers hollered at him and told him to stop writing safety problems on the daily reports because Carl Campbell, the general manager, was mad about it and might fire him. Tr. 155, 206-07. Rogers denied the allegation. Tr. 135. Jistel testified that his shift was changed from day to evening and that Rogers told him that the purpose was to keep him from talking to MSHA about safety violations. Tr. 166-67. Weatherly testified that he created an overlapping second shift immediately after the shut down because Trinity needed to make up production. He stated that he asked Jistel if he would take the second shift and that he agreed. Tr. 131. Jistel did not directly contradict that testimony. Rogers confirmed that Trinity began a second shift because they had gotten behind on production. Demand was typically high at that time of year and they had operated a second shift at some point every summer. Tr. 99.

Jistel described other jobs he was directed to do by Weatherly and Rogers. About three to four weeks after the citation was written, he was assigned to disassemble an old flatbed trailer with a cutting torch, and was directed to remove weeds from around the plant. Tr. 153-56. The cutting and weeding tasks lasted about one day each. Tr. 214. He was also assigned to drive a truck down to the pit to change a cable on a dragline whenever the cable broke. Tr. 215. It is not clear whether this was one of his ongoing responsibilities.

Jistel complained about "surveillance" activities, stating that: "[Weatherly] was just standing around watching over me, taking pictures and stuff like that . . . eyeballing me." Tr. 157. He testified that Weatherly and Steve Key, the overall area manager, took pictures of him when he worked at night, and that they would hide the camera when he looked at them. He claimed that this type of activity, by Key and Errol Viator, who replaced Weatherly as plant manager in September 2001,[3] occurred every night after the citations were written until he was laid-off on October 25, 2001. Tr. 158. At one point, they allegedly took pictures of him when he used the restroom and placed a video camera in the control room. Jistel never inquired about the picture taking. Tr. 158.

MSHA initiated a special investigation pursuant to section 110(I) of the Act to determine whether individual managers should be charged in their personal capacities, with respect to the safe access violation cited in June. On September 12, 2001, Jistel signed a written statement of an interview that had been conducted by Michael Franklin, an MSHA special investigator. Ex. R-D-2. Jistel testified that he saw Rogers and Weatherly bring in a video camera that was placed in the control room, where the statement had been given. Tr. 164. In his statement, Jistel described a conveyor that had fallen over and a concrete belt line that had broken in seven places. Following the statement, Trinity allegedly re-erected the fallen conveyor and repaired the concrete belt line. Those actions convinced Jistel that Trinity had used the video camera to

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[3] Weatherly was transferred to a smaller plant around the beginning of September 2001, in part, because of his failure to address the problems noted in the daily inspection reports. Viator was manager of another nearby plant and was also given responsibility for the Seagoville plant for the few months that it was expected to be operational.

record his statement to Franklin, because he believed that the only place Trinity's managers could have gotten that information was from the statement. Tr. 165-66.

Jistel was inconsistent in relating his knowledge about the impending plant closure. He stated that he heard from Trinity's quality control personnel that the plant was about to close about two days prior to being laid-off on October 25, 2001. Tr. 176. However, he also stated that he was told, before the citations were written, i.e., prior to May 30, 2002, that Trinity did not want to spend any money on the plant because it was going to shut down. Tr. 200-01. He was looking for another job because of the impending lay-off, and had talked to a nearby sand and gravel company about a job, but they never got back to him. Tr. 203.

On October 13, 2001, Jistel became involved in a physical altercation with Emillio Padilla, a loader operator. Tr. 209; ex. R-D-3, R-D-7. Trinity's Employee Disciplinary Process cited fighting as a major infraction "which should result in discharge for a first offense." Ex. C-2, R-D-7. Neither Jistel nor Padilla were disciplined for the altercation. Campbell explained that he decided not to discipline the men because of the impending shut down of the Seagoville facility. Tr. 261.

The resources in the last workable pit were finally depleted in late October 2001. Trinity's managers met to determine what to do with the men and equipment. The pit operation was shut down because there was no more sand and gravel to remove from it. The plant was kept in operation on a small scale to process the "surge pile," material that had been stored near the plant so that it could be processed if weather conditions prevented the transport of material from the pit. Trinity also intended to process material that had been deposited around the plant to create a surface for the operation of trucks, loaders and other equipment.

Campbell met with Key, Viator, and Arturo Munoz, Trinity's human resources and safety manager, to determine what positions they needed to keep filled, in order to operate the plant for the limited purpose of processing the surge pile and other material. They reviewed the personnel files of the men then working and, for each such position, retained the individual with the most seniority with Trinity and the most experience at his position. Of the two operators, Rogers had more seniority and experience than Jistel. Since only one plant operator was needed, Jistel was laid-off. A dragline operator, trackhoe operator, and water truck driver were laid-off because they worked at the pit and it was closed. William Sanders, an oiler with twenty-nine years of seniority, was also laid-off. He took a vacation and returned to Trinity asking for any available work, and was hired for a few days to take down a fence on the leased property. A recently hired laborer was also let go. Emilio Padilla, a loader operator, was retained because a loader was needed to process the surge pile and other material.

On Thursday, October 25, 2001, Jistel and five other employees were notified that they were being laid-off, effective that day. Ex. C-1. Jistel does not believe that the other employees laid-off were discriminated against. Tr. 221-23. The limited operations at the plant continued for a few months. The Seagoville facility was closed permanently in January 2002. Jistel registered for unemployment compensation, which he received for approximately thirteen months. He lives on a farm with his mother and, with assistance from other family members,

operates the farm. He has not been re-employed, despite numerous attempts to find work.

Jistel was involved in some controversy following his departure. On Saturday, October 27, 2001, he was observed in the plant's office. The plant was not operating and the only other employee on site was performing other tasks. The following Monday, Trinity noted that many of the daily inspection reports had been altered. Tr. 93-94. Many "✓'s" had been changed to "✗'s" and numerous problems had been added to the remarks section. Of particular significance was the report for August 30, 2001. Three versions of that report were produced at the hearing. Ex. R-C-9, C-10, C-11. The third version lists twelve electrical, guarding and structural problems that were not included on the original form. MSHA returned to the facility that Monday and conducted a further inspection, specifically requesting to examine the daily inspection report for August 30, 2001. Jistel was suspected of changing the reports, although the newly added material was not in his handwriting. Jistel testified that he typically made additions to reports as the day went by, but agreed that there should have been only one version of the report. Tr. 230-33. Trinity reported the alterations to MSHA and was told that it was a matter that should be handled as a criminal investigation, which Trinity chose not to pursue.

Jistel also testified that the surveillance harassment continued after he was laid-off. He stated that different cars with people operating video cameras drove by his house and he speculated that Trinity may have hired a private investigator to monitor his searching for work. Tr. 217-18. He stated that he told MSHA special investigator Ron Mesa about it. However, there is no mention of that claimed activity in the statement he gave to Mesa on December 5, 2001. Ex. R-D-3.

On November 29, 2001, Jistel filed a complaint of discrimination with MSHA, alleging that he had been laid-off because he participated in the MSHA inspection and in the subsequent investigation to determine whether charges would be filed against individual managers at Trinity. Ex. R-C-5. He identified Campbell, Munoz, Key, Richard Forth, another area manager, Viator and Weatherly as persons responsible for the discriminatory action. By letter dated February 27, 2002, MSHA advised that its investigation had been completed and that it had concluded, on behalf of the Secretary, that Jistel had not been discriminated against. Jistel then filed a complaint of discrimination with the Commission, pursuant to section 105(c)(3) of the Act.

Conclusions of Law - Further Findings of Fact

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner, it 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 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

Prima Facie Case

Jistel reported safety hazards on the daily inspection sheets and provided information to MSHA during its investigation of alleged violations of mandatory safety standards. A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). I find that Jistel's activities were protected under the Act. Jistel clearly suffered adverse action. He was laid-off on October 25, 2001.

The principle issue as to Jistel's *prima facie* case is whether the adverse action was motivated in any part by his protected activity. In *Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999), the Commission acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint.

> "Direct evidence of [unlawful] 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.'" [citing *Chacon*]. In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id*. We also have held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case" and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Id*.

As explained below, I find that Trinity made the decision to discharge Jistel solely as a consequence of economic pressures that required closing of the Seagoville plant.

Although there is a suggestion to the contrary, Jistel does not contest the fact that the Seagoville facility was shut down because of the exhaustion of sand and gravel reserves.[4] He contends that, but for his protected activity, he would not have been laid-off on October 25, 2001, and would have eventually been transferred to another Trinity's facility. Tr. 281-83; Compl's. brief, part H. The problem with this theory is that Trinity's asserted reasons for the lay-off are un-rebutted. Complainant points to no evidence challenging Trinity's contentions that only one plant operator was needed after the pit was closed, and that Rogers had more seniority than Jistel and was retained for that reason. Complainant offered no proof that Trinity's explanation of the reasons for and procedures followed with respect to the lay-offs were not accurate descriptions of bona-fide business practices. While Trinity operated other similar facilities, there is no evidence that a plant operator position was available at the time of his lay-off.[5]

Jistel's credibility is suspect in many areas. His concerns about "surveillance" activities, especially that pictures were taken of him every day for months, strikes me as incredible. His conclusion that Trinity used a video camera to record his statement to Franklin is also highly questionable. Jistel described attempts by Trinity to find out what MSHA had asked him and what he had said in his statement. He was asked to write a letter relating what he had told Franklin and he was called to a meeting and asked what he had told MSHA, actions that Trinity acknowledged. Tr. 169-73; ex. R-G-8. Jistel offered no explanation as to why Trinity would ask him what he said in his statement, if it already had a recording of it. Moreover, his belief that his statement was the only place Trinity could have gotten information regarding the fallen conveyor and the broken concrete belt is difficult to accept. Jistel's statement contains one small paragraph about those problems, which appear to be descriptions of past events. The conveyor was said to have fallen over two months before the June inspections, i.e., about the beginning of April, 2001, and the report about the structure for the sand belt appears to refer to past repairs. Jistel, himself, had reported problems with the structure of conveyors in his daily inspection reports and claimed to have continued to do so, despite efforts by Trinity's managers to get him to stop. The fact that a conveyor had fallen more than five months before Jistel gave the statement could not possibly be information that only he knew.

The shift change and other "harassment" claims are also unconvincing. Trinity advanced a bona-fide business reason for the shift change. I find that Jistel agreed to the shift change, as Weatherly testified. The change created only overlapping shifts. Instead of working from 6:30

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[4] Jistel testified that he was told that Trinity was "re-digging" the material that was allegedly exhausted at Seagoville and processing it at another plant, Scurry-Rosser. Tr. 190. However, Campbell testified that Trinity has never had a plant at that location. Tr. 268. Trinity also established that no further material was removed from the Seagoville site. Tr. 295-96; ex. R-E.

[5] Jistel also claimed that he was qualified for other jobs, e.g., equipment operator. However, men laid-off at the same time had more seniority, and at least one was also qualified for such jobs.

a.m. to 6:30 p.m., Jistel worked from 9:30 a.m. to 9:30 p.m. Ex. R-D-3. Those work hours would not have kept him away from MSHA inspectors, which he claimed he was told was the reason for the change. The "other work" assignments were few in number and of very short duration. I find that none of the actions Jistel complained of were taken in retaliation for his protected activities. Rogers may well have told Jistel that Campbell was upset about the citations. However, Jistel's claims of abusive treatment by Rogers are difficult to square with the fact that Jistel felt that he was good friends with Rogers and Rogers, similarly, felt that he was always on good terms with Jistel. Tr. 80.

If Trinity had wanted to retaliate against Jistel because of the June 4, 2001, citation, or his subsequent participation in the investigation, it seems that it would have done so before October 25, 2001. The lapse of more than four months between the event that allegedly provided the primary motivation for retaliation and the adverse action substantially weakens any inference of unlawful motivation. Jistel's involvement in the fight with Padilla presented an opportunity for Trinity to discharge Jistel consistent with its established disciplinary process. Yet, Jistel was not disciplined. It strains credulity to suggest that Trinity, supposedly eager to retaliate against Jistel, would have passed up the opportunity to discharge him for fighting and waited to use the curtailment of activities at the Seagoville facility as a "pretext" to lay him off.

On consideration of all the evidence, I find that Complainant has failed to carry his burden of proof, and that his lay-off was not motivated in any part by his protected activity.

ORDER

For the reasons stated above, I find that Trinity's decision to discharge Jistel was not motivated in any part by Jistel's protected activity. Rather, it was based solely upon legitimate business considerations. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

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