FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 30, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOHN G. MUEHLENBECK, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 2002-230-DM Eureka Materials Quarry
v.	:	Mine I.D. 23-01840
CONCRETE AGGREGATES, LLC, Respondent	:	

DECISION

Appearances: Jennifer A. Casey, Esq., and Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Gregory P. White, Esq., Clayton, Missouri, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of John G. Muehlenbeck against Concrete Aggregates, LLC, ("Concrete Aggregates") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). A hearing in this case was held in Clayton, Missouri. The parties presented testimony and documentary evidence and filed post-hearing briefs.

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

Muehlenbeck was hired by Concrete Aggregates in May 1999 to be the superintendent at its Eureka Materials Quarry (the "quarry"). As superintendent, Muehlenbeck was the number two man at the quarry and he reported directly to William ("Willie") Kopp, the managing member of Concrete Aggregates. The quarry is a very small sand and gravel operation on the edge of the St. Louis metropolitan area. Concrete Aggregates dredges material from the bottom of a 35 acre, man-made pond using a barge; it cleans, sizes, and prepares the dredged material, and sells the gravel and sand produced. Muehlenbeck supervised four hourly employees. Because Muehlenbeck had previously been a union carpenter, Concrete Aggregates paid him the prevailing carpenter's wage, making him the highest paid employee at the quarry, even though he was a management employee.

Muehlenbeck was terminated from his employment with Concrete Aggregates on October 1, 2001. Muehlenbeck and the Secretary contend that he was terminated for engaging in protected activities, but Concrete Aggregates argues that he was terminated for leaving the quarry two hours early on Friday, September 28, 2001, without notice or permission.

William Kopp and his brother, Richard Kopp, own a number of related businesses in the area. Richard Kopp is the managing member of Kirkwood Materials ("Kirkwood'), which sells construction and landscaping material. Kopp-Ko is the holding company for both operations. Kirkwood Materials has a sales outlet at the quarry. Although Kirkwood and Concrete Aggregates are two separate corporations, the Kopp brothers coordinate the human resource functions for both companies. Because both operations are small, they used Varsity Group, a payroll provider, to handle payroll and other human resource functions. In May 2001, Gail Holden, a sales representative for Strategic Outsourcing, Incorporated ("SOI"), approached the Kopp brothers about switching payroll providers. (Tr. 380-81). SOI could provide better service for Concrete Aggregates and Kirkwood and also provide more generous benefits to their employees, including workers' compensation benefits and an improved 401(k) plan. (Tr. 378-79). Richard Kopp took the lead in negotiating the terms of service for both Concrete Aggregates and Kirkwood employees.

Scott Frank, an area manager with SOI, testified that when a company uses SOI's services, it acts as a co-employer with the host company. SOI provides employee benefits and manages the payroll while the host company sets the terms and conditions of employment. Concrete Aggregates describes SOI as an "employee leasing company" that enables "smaller companies to come together and pool their resources and create 'buying power' in order to take advantage of greater benefits for employees." (CA Brief 4; Tr. 379-80). On September 19, 2001, William Kopp notified employees that Concrete Aggregates would be changing its payroll and benefit provider to SOI. Employees of Concrete Aggregates were combined with employees of Kirkwood in order to secure one comprehensive benefit package. Concrete Aggregates was the smaller of the two companies. SOI was to begin providing these services in mid-October 2001.

Concrete Aggregates and Kirkwood scheduled a voluntary meeting on the evening of September 20, 2001, at a nearby hotel to inform employees of the change. Representatives of SOI were present to answer questions. No employees of Concrete Aggregates attended this informational meeting. The next day William Kopp gave the employees of Concrete Aggregates the pamphlets and paperwork that had been handed out at the meeting. This packet of material included forms that employees had to sign. Some of the forms were routine forms such as IRS W-2 forms. The form at issue in this case was entitled "Assigned Employee Acknowledgments" ("employee acknowledgment form"). As the employees were looking at this information packet, Jerry Rauscher, the mechanic on Muehlenbeck's crew, showed Muehlenbeck language that concerned him. After they discussed the language, Muehlenbeck became concerned with the form as well. A number of provisions in the employee acknowledgment form concerned Rauscher, Muehlenbeck, and Bill Shumacher,

who operated the plant and ran the loader on Muehlenbeck's crew. The most significant provision that concerned them states, in part, as follows:

> I agree that any legal complaint or dispute involving SOI, Client, or any employee, officer, or director of SOI or Client (the Arbitrating Parties), under whatever law, regarding my employment, my application for employment, or any termination from employment, will be submitted exclusively to binding arbitration by a panel of either one or three neutral arbitrators, which may be held in Charlotte, North Carolina, or the capitol of the state in which I work, at the option of the party demanding arbitration (or another mutually agreed location). This means that any complaint or dispute will not be heard by a court, a jury, or an administrative agency. I also agree that having an administrative agency proceed purportedly on my behalf would circumvent this agreement, therefore, I assign any relief or recovery an administrative agency obtains purportedly on my behalf from an Arbitrating Party to that Party.

(Exs. C-4, R-3). Concrete Aggregates' employees were concerned about the fact that they could not use the Missouri court system, request a jury trial if they were severely injured, or have Missouri government agencies intercede on their behalf. They were also concerned about the provision requiring arbitration in North Carolina. Muehlenbeck was especially concerned that, by signing the employee acknowledgment form, he would be waiving his rights under the Mine Act and waiving his right to have MSHA or its inspectors offer him any kind of assistance. An MSHA inspector had recently been at the quarry and discussed miners' rights with employees so it was fresh in Muehlenbeck's mind. Muehlenbeck, Rauscher, and Shumacher decided that they would not sign the employee acknowledgment form for the above reasons.[1] (Tr. 85, 133, 213-14, 273). They signed all of the other forms and returned them to William Kopp.

When Kopp discovered the next day that the employee acknowledgment form had not been signed by these employees, he reminded them that the form needed to be signed before SOI could begin providing payroll services. (Tr. 147-48, 213-14). Muehlenbeck advised Kopp that the employee acknowledgment form violated provisions of the Mine Act and the employees would not sign it. (Tr. 148-49, 215). Concrete Aggregates had copies of a booklet at the quarry published by the Department of Labor entitled "A Guide to Miners' Rights and Responsibilities under the Federal Mine Safety and Health Act of 1977" ("miners' rights guide"). (Ex. C-5). When he left work that day, Muehlenbeck took a copy home to review

[1] They had concerns about other provisions in the employee acknowledgment form including a provision that stated that employees would get paid at the minimum wage if Concrete Aggregates fails to pay SOI all moneys due under the contract between them.

and he highlighted those provisions in the booklet that he believed would be invalidated by the employee acknowledgment form. Muehlenbeck presented the highlighted miners' rights guide to William Kopp to show him the conflict between the employee acknowledgment form and the rights afforded miners under the Mine Act. (Tr. 86-87, 216, 295, 440). Kopp subsequently faxed portions of the guide to SOI. (Tr. 295-96, 485).

On Thursday, September 27, 2001, near the end of the shift, Kopp advised Concrete Aggregates' employees that two representatives of SOI were at the quarry to answer any questions they had about SOI and the employee acknowledgment form. Gail Holden and Scott Frank of SOI, William Kopp, Muehlenbeck, Rauscher, and Shumacher attended this meeting. The representatives of SOI downplayed the importance of the employee acknowledgment form but, at the same time, stated that it had to be signed by everyone. Mr. Frank called it a standard form agreement. (Tr. 91, 278). Mr. Frank stated that employees could make changes to the wording, if they felt it was necessary. (Tr. 92-93, 332). Muehlenbeck noted that the employee acknowledgment form includes language stating that no modifications could be made to the agreement "unless signed by an authorized officer of SOI." (Ex. C-4). There is no dispute that neither Mr. Frank nor Ms. Holden were authorized officers of SOI.

The testimony concerning the discussions at this meeting varies significantly. Muehlenbeck testified that the employees were pressured to sign the employee acknowledgment form at the meeting and that when employees raised a question about it, Frank tried to "brush it off" on the basis that the language "didn't mean what it said." (Tr. 91-92). Muehlenbeck believed that Frank wanted to leave the meeting with signatures from all three employees. Muehlenbeck stated that he raised issues about the rights of miners under the Mine Act but that the SOI representatives never responded to these questions. Muehlenbeck testified that the meeting got heated at times because he made clear that he was not going to sign the employee acknowledgment form until all his concerns were addressed. Muehlenbeck also testified that Frank told the employees that if they did not sign the employee acknowledgment form, they might not get paid. (Tr. 95-97, 128). Muehlenbeck understood this to mean that they could be fired for not signing. (Tr. 98). William Kopp did not say much at the meeting. (Tr. 151). Muehlenbeck testified that near the end of the meeting Kopp suggested that Muehlenbeck get an attorney to review the employee acknowledgment form and Kopp offered to pay the fees of this attorney. (Tr. 96, 135-36, 141, 151). Muehlenbeck did not take Kopp up on this offer.

Rauscher testified that the meeting became heated when the arbitration provision was discussed. (Tr. 221). The SOI representatives kept asking "who are you going to sue?" (Tr. 221). One of Concrete Aggregates' employees responded "if I can't bring in MSHA, OSHA, or anyone on my behalf, why would I leave an arbitrating party [to] say my arm's worth only $2,000 to you guys, but to a lawyer and jury it could be worth a bunch?" (Tr. 222). Rauscher testified that the SOI representatives seemed to avoid answering any questions about MSHA. He also testified that the SOI people indicated that any employee who did not sign the

employee acknowledgment form could not be guaranteed a paycheck. (Tr. 223-24). William Kopp offered to hire an attorney to answer any questions, but Rauscher did not think an attorney was necessary. Frank told the assembled employees to "scratch out the parts you don't like" in the paragraph, but the employees kept asking who had the authority to approve changes to the form. (Tr. 225). Rauscher testified that he felt pressure to sign the form at the meeting because it was a condition of his employment. (Tr. 227-28).

Shumacher testified that he decided to sign the employee acknowledgment form during the meeting and that after he signed it, he left the meeting. (Tr. 276). He signed the form because Ms. Holden assured him that he had probably signed a similar form with the Varsity Group. Shumacher also had a private conversation with Kopp during the meeting that satisfied him. (Tr. 278-79). He could not specifically remember any discussions about MSHA but he is sure that it came up. *Id.*

Frank testified that he never heard anyone talk about "miners' rights" or "MSHA" at this meeting. (Tr. 330, 339). The issues raised by the employees centered around their concerns that any arbitration would be held in North Carolina. (Tr. 330-31). Frank also testified that, because he had dealt primarily with Kirkwood, he did not know at the time of the meeting that Concrete Aggregates engaged in mining. He stated that SOI does not generally work with companies engaged in mining because of higher workers' compensation costs.[2] (Tr. 335). He admitted that he has no knowledge of the rights of miners under the Mine Act. (Tr. 331). He also testified that he told the assembled employees that they could make changes to the employee acknowledgment form and he would "run them up the flagpole" to the corporate offices in Charlotte. (Tr. 332-33) When Muehlenbeck crossed off the entire arbitration paragraph, quoted above, Frank advised him that such a major change would probably not fly. Frank denied that anyone from SOI threatened to withhold an employee's paycheck if there was a delay in signing the forms or that he pressured anyone to sign the form during the meeting. (Tr. 337, 341).

William Kopp testified that he did not believe that the employee acknowledgment form would infringe on the rights of miners. (Tr. 395-96). He further testified that he would not do anything to go against the Mine Act and that, if SOI attempted to prevent a miner from

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[2] It is clear that SOI was aware that some of the employees at Kirkwood/Concrete Aggregates engaged in mining. Several SOI employees visited the quarry prior to October 1, 2001. Concrete Aggregates faxed several pages of the miners' rights guide to SOI prior to the meeting on September 27. (Tr. 295-96). In addition, SOI's director of loss control visited the facility in January 2002 to perform a safety survey for SOI and his report mentions the quarry and MSHA compliance. (Ex. R-4). In a letter to counsel for the Secretary dated February 15, 2002, the general counsel for SOI stated that SOI never agreed to provide services to those employees at the quarry engaged in mining. (Ex. R-1). Although it appears that SOI does not generally accept business from high risk operations such as mining, SOI knew or should have known that some of the employees at the quarry were miners. (Tr. 383-84).

asserting his rights under the Mine Act, he would cancel the contract with SOI. *Id.* Kopp testified that he did not understand exactly what Muehlenbeck was getting at during this meeting and that Muehlenbeck seemed to be concerned that he wanted to retain his right to a jury trial in St. Louis if he was injured on the job. (Tr. 397-98). He admits that Muehlenbeck raised Mine Act issues at the meeting. (Tr. 485). Kopp stated that, near the end of the meeting, he suggested that anyone who had any concern could hire an attorney to review the employee acknowledgment form at his cost. (Tr. 398-99). He testified that there was some urgency in getting the signed employee acknowledgment forms to SOI but he did not believe that the forms had to be signed the day of the meeting. (Tr. 411).

On the morning of Friday, September 28, 2001, Muehlenbeck reported to work as usual. During his lunch break, he was sitting near the Concrete Aggregates office at the quarry with other employees when Brandy Lauer, the secretary for Concrete Aggregates, approached the men holding a fax she had received from the main office of Kirkwood. She read the fax out loud to the men. The fax was a reminder that the employee acknowledgment form had to be signed and returned to Kirkwood's main office. The fax stated that employees could put the words "under protest" under their signature. (Tr. 104, 228-29).

Muehlenbeck became distraught and angry that he was again being asked to sign the employee acknowledgment form. (Tr. 105-06, 229-31, 253, 298). Frustrated that his concerns were not being addressed, Muehlenbeck went into the Concrete Aggregates office, put his two-way radio on the desk, and left the quarry to go home. He left at about 1:30 p.m., two hours before his normal quitting time of 3:30 p.m. Lauer saw him leave, but Muehlenbeck did not tell Kopp or anyone else at the quarry that he was leaving. (Tr. 156-58, 427). Shortly thereafter, Rauscher also left the quarry.

The operator of the dredge on September 28, 2001, was Bob White, who had been working at the quarry for six weeks.[3] (Tr. 413). The pond covers about 35 acres as illustrated in exhibit R-10. (Tr. 418). Shortly after Muehlenbeck left the quarry, a hydraulic hose on the dredge ruptured spewing hydraulic oil over the dredge which caused the hose used to vacuum up material from the bottom of the pond to become clogged with material. (Tr. 414-17). Mr. White attempted to get Muehlenbeck on the two-way radio so that he could provide assistance. (Tr. 421). Muehlenbeck did not respond to his call. Muehlenbeck and Rauscher are the only mechanics at the quarry. William Kopp heard the call and he tried to find Muehlenbeck and Rauscher. (Tr. 424). Kopp believes that, by leaving the quarry without permission or notice, Muehlenbeck put White in jeopardy. (Tr. 419, 426).

Although hoses rupture on the dredge with some frequency, Kopp testified that the matter must be attended to quickly, especially when the vacuum line is clogged. (Tr. 422). Kopp stated that he prefers to have two dredge operators and a mechanic at the quarry

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[3] Bob White is the brother of Gregory White, counsel for Concrete Aggregates. Bob White signed the employee acknowledgment form.

whenever the dredge is being operated. (Tr. 418-19, 423). Kopp and other employees worked over the weekend cleaning out all of the product lines and getting the dredge in operating order. (Tr. 425-26). Kopp believes that if Muehlenbeck had not left the property, Muehlenbeck would have been able to tell White via the radio how to get the lines cleared before he lost all of the hydraulics. (Tr. 425-26). Muehlenbeck did not attempt to call or otherwise get hold of Kopp that day or over the weekend.

When Muehlenbeck came to work on Monday, October 1, 2001, William Kopp asked him, "Where did you go Friday?" (Tr. 108). Muehlenbeck did not say where he had gone but told Kopp about the fax that Ms. Lauer read to the employees. Muehlenbeck told Kopp that he "got pissed off and left." *Id.* Muehlenbeck also said, "I'm not going to sign that piece of paper, Willie." *Id.* Kopp responded, "Fine, get your tools, gather your tools, turn in your keys." *Id.* Kopp terminated the employment of Muehlenbeck and Rauscher that morning.[4] Kopp testified that he terminated Muehlenbeck because he left the quarry without permission. (Tr. 376-77; Ex. R-5). He stated that a supervisor walking off the job is a very serious offense. Muehlenbeck and the Secretary believe that Muehlenbeck was terminated for refusing to sign the employee acknowledgment form.

II. DISCUSSION WITH FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*"). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April

[4] The Secretary offered to file a discrimination complaint on behalf of Rauscher but he declined to pursue the case because he had obtained employment elsewhere. Rauscher testified that Kopp told him that he would "eventually" have to sign the employee acknowledgment form. (Tr. 235).

1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case in this manner by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In her brief, the Secretary states that the "refusal to sign a document that conflicts with statutorily protected rights is not an issue that has been addressed by the Commission." (S. Br. 13). She argues that the facts giving rise to Muehlenbeck's termination and subsequent claim of discrimination "most closely resemble that of a work refusal - an activity protected under section 105(c) of the Mine Act." *Id.* She cites the legislative history of the Mine Act which states that the protections of section 105(c) should be interpreted to include "the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders that are violative of the Act. . . ." ("*Legis. Hist.* at 623"). The Secretary contends that Muehlenbeck's refusal to comply with Concrete Aggregates' order to sign the employee acknowledgment form was protected activity because the terms of the form violated section 105(c) of the Mine Act. She maintains that Complainant established that his termination was the direct result of Muehlenbeck's refusal to sign the form. The Secretary argues that Concrete Aggregates grossly exaggerates the problems created by Muehlenbeck's early departure from the quarry on September 28 and that this justification for terminating him is pretext to mask the unlawful reason for the termination. The Secretary contends that Muehlenbeck's departure from the quarry was "a direct, immediate, and reasonable response to the unlawful demands of his employer." (S. Br. 25). Consequently, Muehlenbeck should be granted "leeway" for his "impulsive behavior" because it was in response to Concrete Aggregates' "wrongful provocation." (S. Br. 26) (citation omitted).

Concrete Aggregates argues that there is no evidence that the arbitration clause in the employee acknowledgment form was enforceable as to the Mine Safety and Health Administration or this Commission. There is no evidence that signing the form would have interfered with or abrogated Muehlenbeck's Mine Act rights. Complainant merely established that Muehlenbeck was bothered by the form, that he had difficulty explaining to William Kopp why this form concerned him, and that he walked off the job as a result of a fax received in the office without discussing his concerns with Kopp. Concrete Aggregates contends that the Secretary failed to establish a *prima facie* case.

A. Protected Activity

I agree with the Complainant that the facts in this case most closely resemble a work refusal. The Commission and the courts have recognized the right of a miner to refuse to work in the face of perceived hazards. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id*. at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *See Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp*., 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

In this case, Muehlenbeck is not required to prove that the employee acknowledgment form would actually interfere with his Mine Act rights; he just has to show a good faith reasonable belief that the arbitration clause on the form would interfere with these rights. I find that Muehlenbeck met his burden of proof on this issue. The language in the arbitration clause is rather broad in its scope. A layman, unfamiliar with the law as it has developed under the Mine Act, could reasonably believe that a miner could no longer seek the protections afforded by the Mine Act. I find that Mr. Muehlenbeck's belief was reasonable and that he held that belief in good faith. He was genuinely concerned that by signing the form he could be waiving his rights under the Mine Act. Consequently, I find that he engaged in protected activity when he raised questions about the effect of the arbitration clause on his rights under the Mine Act.

When "a miner expresses a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger." *Gilbert v. FMSHRC*, 866 F. 2d 1433, 1440 (D.C. Cir 1989). If an operator adequately addresses a miner's concerns so that "his fears reasonably should have been quelled," an otherwise reasonable work refusal can become unreasonable. *Id.* at 1441. The Secretary argues that Concrete Aggregates "wholly failed to address Muehlenbeck's concerns regarding the arbitration" provision. (S. Br. 17). She points to the fact that Kopp failed to sit down with the employees and explain the terms of the provision. When Muehlenbeck gave Kopp a highlighted copy of the miners' rights guide, Kopp failed to respond. Instead, Kopp arranged a meeting with SOI representatives who had no knowledge of an employee's rights and responsibilities under the Mine Act. These representatives were not empowered by SOI to authorize any changes to the employee acknowledgment form. The SOI representatives simply tried to appease Muehlenbeck by saying that it was a "standard form" that he should not be concerned about. Muehlenbeck left the meeting with no greater understanding of the impact of the arbitration language on his Mine Act rights than before. The Secretary contends that Kopp did nothing after the meeting

to allay employee concerns. She characterizes Kopp's offer to pay for an attorney to review the employee acknowledgment form as an effort to shift responsibility to the employees to make sure that the form would not impinge on their rights.

I believe that Mr. Kopp simply wanted this dispute to go away. I credit his testimony that he would not let SOI trample the rights of miners. I conclude that, because SOI would not have a continuing presence at the mine, Kopp believed that once the forms were signed, with or without changes in the language, SOI would not have any dealings with MSHA and would not be in a position to quash the rights of miners.[5] Nevertheless, Kopp never sat down with Muehlenbeck and the other employees to tell them that Concrete Aggregates would continue to allow them to exercise their rights under the Mine Act as before. Instead, he relied on SOI to address the concerns. When it appeared during the meeting that SOI was not being successful, he suggested that they find an attorney who could provide legal advice and he agreed to pay the costs for the attorney. It is quite obvious that this gesture did not allay the concerns of Muehlenbeck or Rauscher. I find that Concrete Aggregates did not adequately address Muehlenbeck's concerns so that they "reasonably should have been quelled."

B. <u>Adverse Action</u>

The primary issue to be resolved is whether Muehlenbeck was terminated, at least in part, because he engaged in this protected activity. If his termination was motivated in any part by his protected activities, then Concrete Aggregates must show its termination of Muehlenbeck was also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

I find that the preponderance of the evidence demonstrates that Concrete Aggregates terminated Muehlenbeck because he left the quarry on September 28 without permission or telling Kopp that he was doing so. I reach this conclusion for the reasons discussed below.

Mr. White operates a rotating cutting head at the end of a long boom on the dredge that extends under the water to the bottom of the pond. (Ex. R-8). The cutting head breaks up the rock on the bottom and this broken material is vacuumed up through the boom. The material is transported across the surface of the pond to the plant through piping that extends along floating buoys. (Ex. R-10). The dredge was the sole means of production at the quarry at the time of this incident. If the cutting head remains under water for a long time without rotating

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[5] In a letter to counsel for the Secretary, the General Counsel of SOI stated that the service agreement between SOI and its clients makes clear that the agreement does not relieve the client "of its duties and legal obligations with respect to worksite safety and compliance with legal obligations regulating worksite safety and labor." (Ex. R-1, p.2). The agreement further provides that the "client will comply with all federal, state, and local laws and regulations applicable to its operations." *Id.*

it can become stuck in the material at the bottom of the pond. (Tr. 422-23). Thus, repairing hydraulic lines on the dredge must be attended to quickly.

I credit Kopp's testimony that he tries to have two dredge operators present at the quarry whenever it is operating. (Tr. 418-19, 423, 480). In September 2001, Bob White was still an inexperienced dredge operator and Muehlenbeck was the only experienced dredge operator. Whenever White had a problem, Muehlenbeck would provide assistance over the two-way radio or by going on board the dredge. Kopp testified that if a dredge operator called in sick, he usually did not operate the dredge that day. (Tr. 481-82). Muehlenbeck and Rauscher were the only two mechanics qualified to repair equipment at the quarry.

After Muehlenbeck and Rauscher left the quarry, the dredge broke down. Kopp discovered that his superintendent, who is also his experienced dredge operator and a qualified mechanic, had walked off the job without notice and that the other mechanic had also left without notice. An inexperienced operator was on the dredge asking for help. The actions of Muehlenbeck and Rauscher placed Kopp in a difficult position and could have endangered Mr. White.

When Muehlenbeck returned to work on Monday, Kopp asked, "Where did you go Friday?" Muehlenbeck did not provide a rational explanation but simply mentioned the fax and said that he was "pissed off" about it. (Tr. 108). Kopp could not fathom why Muehlenbeck would leave his post two hours early without permission because of the dispute over the form. He was "shocked" that Muehlenbeck left the property without permission. (Tr. 429). Muehlenbeck was in a trusted and vital position at the quarry and Kopp depended on him to oversee operations at the quarry. (Tr. 427-29). Concrete Aggregates only employed Muehlenbeck, Rauscher, Shumacher, White, and Brandy Lauer. By leaving the quarry, Muehlenbeck and Rauscher created a significant problem for Kopp. Muehlenbeck's departure was particularly troublesome for Kopp because he supervised the operations at the quarry.

In determining whether a mine operator's adverse action is motivated in any part 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*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

In this case, I find that Kopp had knowledge of Muehlenbeck's protected activity. Kopp was somewhat confused as to why Muehlenbeck was so concerned because Kopp did

not intend to reduce the rights of miners at the quarry after the SOI contract was put into place. Nevertheless, Muehlenbeck gave Kopp a copy of the miners' rights guide so he knew or should have known that Muehlenbeck was concerned that the employee acknowledgment form would indeed infringe upon his rights as a miner. There is also a very close coincidence in time between the protected activity and the adverse action. Kopp did little to address Muehlenbeck's concerns.

Whether Concrete Aggregates demonstrated animus or hostility toward the protected activity is a closer issue. On one hand, Kopp believed that the employee acknowledgment form would not change anything with respect to miners' rights. There is absolutely no proof that Kopp is hostile toward the rights of miners or that he would become hostile under the SOI agreement. In addition, Kopp offered to pay for an attorney to look into the matter for Muehlenbeck. On the other hand, it is evident that Kopp was perplexed and troubled by Muehlenbeck's refusal to sign the employee acknowledgment form. I agree with Concrete Aggregates that Kopp did not try to force Muehlenbeck to sign the form right away. Kopp knew that, if Muehlenbeck retained an attorney to review the form, there would be a considerable delay before the matter was resolved. Kopp never told Muehlenbeck that if he did not sign by a particular date he would be terminated, he would not be paid, or he would be disciplined. (Tr. 409-10). Nevertheless, there was some urgency inasmuch as the services of the Varsity Group were set to expire in mid-October and the contract with SOI was set to take effect that date. Concrete Aggregates and SOI put pressure on the employees to sign the employee acknowledgment form. Workers compensation coverage is mandatory in Missouri and the SOI service agreement would not become effective until all of the paper work was completed. The fax set to the quarry by the office manager for Kirkwood suggested that the employees sign the form "under protest." Although there is no evidence in the record as to who made that suggestion, it must have been made by Richard Kopp, perhaps after consultation with William Kopp. I find that there was some hostility toward Muehlenbeck's continuing objection to signing the employee acknowledgment form.

Disparate treatment does not really come into play because this case presents a unique set of circumstances. The fact that Muehlenbeck had not been disciplined before and that he had a good record of performance reviews is irrelevant. The only person in similar circumstances was Rauscher who was terminated along with Muehlenbeck.

Resentment had been building at the quarry as a result of the dispute over the employee acknowledgment form. For the reasons set forth above and because Muehlenbeck discussed the fax with Kopp just before he was terminated, I find that Muehlenbeck's continuing refusal to sign the form may have played some part in Kopp's decision to terminate him. Because of the nature of the conversation on the morning of October 1, the record in this case makes it impossible to conclude that Muehlenbeck's refusal to sign the employee acknowledgment form was not considered by Kopp. Consequently, I find that Concrete Aggregates did not establish that the termination of Muehlenbeck was in no part motivated by the protected activity. As a result, I must analyze the case as a "mixed-motive" case.

As the Secretary states, in a mixed-motive case:

> It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in unprotected activity and that he would have disciplined him in any event.

Robinette, 3 FMSHRC at 819-19. An operator can try to establish this defense "by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

I find that Muehlenbeck's termination was precipitated by the fact that he left without notice or permission coupled with the fact that he could not explain his absence. If Muehlenbeck had provided Kopp with an explanation on the morning of October 1, he would not have been terminated. If, for example, Muehlenbeck had to rush to the hospital because a relative had been in a serious auto accident, Kopp would not have fired him. If there had been no dispute over the employee acknowledgment form and Muehlenbeck left the quarry two hours early because, for example, he was angry that Kopp would not let him take a vacation day on the following Friday, Kopp most certainly would have terminated Muehlenbeck. There is no evidence, or even a suggestion in the record, that Muehlenbeck would have been fired for refusing to sign the employee acknowledgment form if he had remained at work on September 28. The evidence makes clear that Kopp decided to terminate Muehlenbeck because he left the quarry in anger without explanation or permission.

There is no evidence of past discipline "consistent with that meted out" to Muehlenbeck because no employee had ever left the quarry two hours early in a fit of anger before. The Secretary contends that Muehlenbeck frequently left early to buy parts needed at the quarry. Such conduct does not help support the Secretary's argument. When Muehlenbeck left early to get parts, he was performing work for his employer, he generally used his radio to notify others that he was going and to ask if anyone needed anything, and he did not leave two hours early. Muehlenbeck simply left early enough to run by a parts store on the way home to buy supplies or parts he would need the next day. That Kopp permitted Muehlenbeck to buy supplies in that manner is not inconsistent with his termination on October 1.

As discussed above, "unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question" is not relevant under the facts

of this case. Muehlenbeck was not terminated for a poor work record or infractions that would be subject to past discipline. He was terminated because he left work two hours early without notice or permission in a fit of anger. His behavior displayed a serious lack of judgment for a quarry superintendent. Based on the record in the case, I hold that Concrete Aggregates' termination of Mr. Muehlenbeck was primarily motivated by his unprotected activity and that it would have terminated him for the unprotected activity alone.

C. Provocation

The Secretary contends that Muehlenbeck's "impulsive behavior" in leaving the quarry should be overlooked because he was wrongfully provoked by Concrete Aggregates. The Commission has "recognized the inequity of permitting an employer to discipline an employee for actions which the employer provoked." *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.,* 23 FMSHRC 981, 992 (Sept. 2001). A Commission judge is "obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity. . . ." *Id.* "An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment." *NLRB v. M & B Headwear Co*., 349 F.2d 170, 174 (4th Cir. 1965). "The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." *Id.*

"Whether an employee's indiscreet reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case." *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 306 (March 2000). Thus, I must determine whether the facts in this case, when viewed in their totality, place Muehlenbeck's conduct within the scope of the "leeway" the courts grant employees whose "behavior takes place in response to an employer's wrongful provocation." *Id.* at 307-08 (citation omitted). I find that Muehlenbeck should not be granted leeway in this instance. The incident that allegedly provoked Muehlenbeck was the reading of a fax by Ms. Lauer that had been sent by the office manager at Kirkwood. The fax reminded Muehlenbeck and Rauscher that they needed to get the form signed. (Tr. 293). The employees were told that they could sign the employee acknowledgment form "under protest." At this point, Muehlenbeck became enraged, threw the company radio on the desk, and left the mine. Muehlenbeck testified that he was "real upset." (Tr. 106). He did not attempt to find Kopp to discuss the matter, he just left the property in anger and disgust.

Although the employee acknowledgment form was a point of contention between Muehlenbeck and Concrete Aggregates, the reading of a fax about the form by the company secretary was not the kind of provocation that would justify Muehlenbeck abandoning his job for the day. Indeed, because the fax suggested that he sign the form "under protest," it is apparent that the company was still trying to reach an accommodation with him over the issue. There had been no indication made to Muehlenbeck from Kopp or anyone else at Concrete

Aggregates or Kirkwood that his job was on the line or that his rights as a miner would be curtailed upon the signing of the form. Complainant has not established that Muehlenbeck's "sense of indignation" was justified or that the "excessive expression" of his anger had been reasonably provoked.

The facts in this case can be contrasted with the facts in *Bernardyn*. In that case, Mr. Bernardyn had refused to drive a truck on a muddy and slippery road at a speed that he considered to be unsafe. When his supervisor ordered him to drive faster, Bernardyn radioed the union safety committeeman and, during this radio conversation, cussed out his supervisor. Bernardyn was fired for using profanity and threatening his supervisor over the radio. The Commission remanded the case to the administrative law judge to make findings on the provocation issue. 22 FMSHRC at 307. The Commission noted that "[h]ad Bernardyn complied with [his supervisor's] instruction to drive faster, it would have put him in harm's way." *Id.* In the present case, Muehlenbeck was not being asked to perform a task that was unsafe. There was no immediacy in the situation from Muehlenbeck's perspective. Muehlenbeck knew or should have known that the issue surrounding the employee acknowledgment form had not been resolved at the meeting on September 27 and that his employer would be bringing it up again. There is nothing to indicate that the suggestion contained in the fax that Muehlenbeck sign the employee acknowledgment form "under protest" was anything but a good faith response from the company to Muehlenbeck's concerns. The fax was not hostile or threatening. Simply put, the fax and the company's attempts to resolve the issues surrounding the employee acknowledgment form were not "wrongful provocations" and Muehlenbeck's response, abandoning his position at the quarry, was excessive and unreasonable.

III. ORDER

For the reasons set forth above, the complaint of discrimination filed by the Secretary of Labor on behalf of John G. Muehlenbeck against Concrete Aggregates, LLC, under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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