

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 15, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 97-257-D
on behalf of RONALD MAXEY,	:	BARB CD 97-07
Complainant	:	
v.	:	
	:	Mine No. 68
LEECO, INCORPORATED,	:	Mine ID No. 15-17497
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, on behalf of Ronald Maxey;
Marco Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of Leeco, Incorporated.

Before: Judge Melick

This case is before me upon the Complaint filed by the Secretary of Labor, pursuant to Section 105(c)(2) of the Federal Mine Safety Health Act of 1997, 30 U.S.C. ' 801 et. seq., the "Act," alleging that Ronald Maxey was discharged by Leeco, Incorporated (Leeco), in violation of Section 105(c)(1) of the Act.¹

¹ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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 because of the exercise by such miner, representative of miners or applicant for employment on behalf of

himself or others of any statutory right afforded by this Act.

In her Complaint, the Secretary alleges as follows:

On or about February 11, 1997, Maxey was discharged by respondent because he had exercised rights under the Act by complaining to representatives of the Mine Safety and Health Administration about unsafe working conditions at the No. 68 mine. These conditions included no brakes or lights on the railrunners and the "white tub" mantrip, railrunners sticking on point, no track communication, sanders not functioning on railrunners due to water on the track, no jacks or bars on the railrunners, overcrowded mantrips, switches installed incorrectly on the track and railrunners colliding with each other because of no lights or brakes.

At hearings on the Secretary's Application for Temporary Reinstatement, held July 2, 1997, Senior Special Investigator for the Mine Safety and Health Administration (MSHA) Ronnie Brock, testified that on February 5, 1997, he talked to Maxey by telephone.² Maxey was then in another MSHA office with Special Investigator Maurice Mullins. Brock testified that Maxey claimed he had been suspended because he made safety complaints to the operator. Brock then explained to Maxey his right to file a "105(c)" complaint. Maxey declined, stating that he would wait. Brock told Maxey that he was nevertheless obligated to send an inspector to the mine based upon Maxey's allegations of safety hazards. Brock documented the conversation and told Mullins to obtain details of the allegations from Maxey.

Don Baker, a regular MSHA inspector at the Leeco No. 68 Mine, who was familiar with Maxey, received a telephone call from Maxey on the evening of February 4. Maxey reported that he was having trouble with the company and needed to talk. Baker met with Maxey the next day at the MSHA office and referred Maxey to Special Investigator Mullins, who was also then present in the office. On February 6, Baker's supervisor gave him a checklist of items to be inspected at the No. 68 Mine (Gov't Exh. 5).

Early in the morning of February 7, Baker and MSHA engineer Scott Whitaker proceeded

² By agreement of the parties, the July 2, 1997, record of the Temporary Reinstatement Proceedings is incorporated herein by reference. The transcript of those proceedings is designated as "Tr. I" and the transcript of proceedings on the merits held September 30, 1997, is designated as "Tr. II." It should be noted that the decision ordering temporary reinstatement dated July 8, 1997, was issued without benefit of the completed record now available. Final credibility determinations have now been made based on this completed record.

to the No. 68 Mine to conduct the inspection. Meeting initially with second shift mine foreman Ricky Campbell, Baker stated that he was continuing his regular inspection and would be looking at, among other things, the escapeway. Baker did not immediately inspect the rail equipment, the subject of Maxey's complaints, but proceeded first to the escapeway. He then proceeded to the track entry to deal with the issues in Maxey's complaint. As a result of his inspection on February 7, Baker issued one citation and four notices-to-provide-safeguards relating to the rail equipment. (Gov't Exh. 6 and 7). Baker had never previously issued this many safeguards at one time and, indeed, had only once before issued a safeguard at the mine. Baker returned to the mine on February 9, and issued two additional citations for violations on the rail equipment. Baker testified that he did not give Leeco the list of safety problems furnished by Maxey nor did he tell anyone that he was present because of Maxey's complaint.

Maxey testified that he had worked for Leeco for sixteen years prior to his suspension and had been a railrunner for the previous ten years. He had been a railrunner at the subject mine for one and one half years. He explained that it is an underground mine with three sections. His job was to haul supplies to the head drives and to the working sections. He worked the 6:00 a.m. to 3:00 p.m. day shift, primarily in the 003 Section. At the time of his discharge, Vic Lewis was his supervisor.

According to Maxey, on February 4, 1997, he arrived at work around 6:00 a.m. and met with Lewis. Maxey acknowledged that on the previous day he was supposed to have taken "eight-by-eight's" to the section to be used for track support. Maxey reportedly told Lewis that he had not done so, claiming he had not had time because he and Lewis had built a cement-block wall the day before. According to Maxey, Lewis then responded, "then you need to go to 004 section . . . so you'll know what coal mining is about" (Tr. I. 76). Maxey refused to go to the section and Lewis then told him to report to mine superintendents Amon Tracey or Everett Kelly. When Tracey later arrived, Maxey reported that Lewis had sent him to meet with him. Tracey conferred with Lewis and returned saying, "it sounds like to me that you quit," and told Maxey to get off mine property (Tr. I. 77).

Maxey denied to Tracey that he quit but, as he was leaving the mine property, he ran into Talmadge Mosley, Leeco's President. Mosley intervened with Tracey and, 20 or 30 minutes later, Maxey was called back and told that, rather than be fired he would only be suspended for five days. According to Maxey, Tracey then told him to return on February 11, to operate the "Lo-Lo," maintaining cables and shoveling loose coal at the belt. Tracey then asked Maxey if he had any written warnings and Maxey purportedly responded that he "didn't think so" (Tr. I. 81).

That same day Maxey called MSHA Inspector Baker and followed up with a visit to the MSHA office the next day. He reportedly told Baker that he was suspended because of complaints he made to mine officials regarding the condition of the hoist and the railrunners. He subsequently met with Special Investigator Mullins and provided him with a checklist of items (Gov't Exh. 5).

Maxey thereafter returned to work on February 11, at about 5:40 a.m. No one from Leeco had contacted him after his February 4 suspension. As he was dressing for work, Lewis

told him to see Tracey. According to Maxey, Tracey told him that, after reviewing his records and, in light of his refusal to work, he had decided to terminate him. Maxey maintains that he was shown three written warnings, one each in 1984, 1985 and 1987, and that he told Tracey that these were ten years old. Tracey purportedly did not respond. Maxey testified that, on February 4th, he did not recall that he had received these earlier warnings, although he did remember when shown them on February 11.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); and *Secretary on behalf of Robinette v. United Coal Co.*, 3 FMSHRC 803, 817-18 (April 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 part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It is undisputed in this case that Maxey engaged in protected activity by reporting safety complaints to MSHA on February 4 and 5, 1997, and that he subsequently suffered adverse action (discharge). As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

Leeco maintains in this case that it had no knowledge of Maxey's protected activity at the time of his discharge and, therefore, it was not, and could not have been, motivated in any part by such protected activity. More specifically, Leeco maintains that Mine Superintendent Amon Tracey made the decision to discharge Maxey on February 6, 1997, when Tracey purportedly confirmed that Maxey had six prior warnings in his personnel file and therefore believed that Maxey had lied to him on February 5 in denying that he had any prior warnings. If Tracey did in fact make the decision to discharge Maxey on February 6, 1997, then it is apparent that the discharge was not motivated by Maxey's protected activity and that the discharge was therefore

not in violation of the Act.³ The Complainant maintains, on the other hand, that Tracey did not in fact decide to discharge him on February 6, but rather made that decision only after the MSHA inspections on February 7 and 9. The Complainant argues that it may reasonably be inferred from the circumstantial evidence that Tracey knew of these inspections, that he believed that Maxey had triggered such inspections and that Tracey did not actually decide to discharge Maxey until sometime after those inspections.

Leeco's case depends on the testimony of its Superintendent, Amon Tracey. Tracey testified that he first learned of a problem with Maxey around 7:30 on the morning of February 4th when he called mine foreman Victor Lewis. Lewis, who was Maxey's supervisor, reported that Maxey had failed to take some "eight by eight's" into the mine and that he was going to send Maxey to the 4 Section in the belief that he needed closer supervision. When Tracey later arrived at the mine around 9 a.m., Maxey reported to him that there had been a mix-up and that he was told by Vic Lewis to see him. Tracey then conferred with Lewis who reported that Maxey had twice refused to go to the 4 Section. Tracey concluded that Maxey had quit by refusing a direct work order. Tracey then asked Maxey if he had any other disciplinary slips and Maxey said, "No." Tracey directed Maxey to leave mine property on the basis of his belief that Maxey had quit or had been fired for disobeying a direct work order.

At that time Leeco's President, Talmadge Mosley, pulled up and conversed with Maxey. A few minutes later, Mosley asked Tracey about Maxey's status and intervened on his behalf. Mosley indicated that Maxey he had been with the company a long time and suggested that the punishment may have been too harsh. He asked Tracey to reconsider. Tracey then recalled Maxey and gave him a five day suspension. Maxey was to return on February 11th, reporting to the 4 Section as a belt man or scoop man.

According to Tracey, that evening or the following day, February 5, he told mine foremen Everett Kelly and Victor Lewis about Maxey's problem and both reported having issued Maxey prior verbal warnings. Based on this information, Tracey called the company personnel office located in London, Kentucky, to check on Maxey's past discipline. According to Tracey, Maxey's prior warnings were read over the phone by "personnel man" A.B. Foreman. Tracey testified that Fred Shannon, Leeco's safety director, brought the disciplinary slips from the London office on February 6, and after looking them over, commented to Shannon that he was going to fire him because he lied (Tr. I. 22). Tracey maintains that he was then unaware of Maxey's visit to the MSHA offices.

Tracey maintains that he thereafter talked to Talmadge Mosley on the telephone about

³ There is no allegation or evidence that, prior to the February 7, MSHA inspection, any Leeco personnel knew or had reason to know of Maxey's confidential complaints to MSHA on February 4 and 5.

Maxey's prior disciplinary slips and received Mosley's approval to fire Maxey. Tracey maintained that he did not then call Maxey because he did not have his correct telephone number and did not "feel like going up and knocking on the man's door" even though he lived only three quarters of a mile away (Tr. I. 274). When Maxey returned to work on February 11th, Tracey showed him the six disciplinary slips, told him that he had lied and discharged him. These copies had been sent from the London office by facsimile on February 10th. Tracey maintains that he did not complete the discharge notice until February 11th, although he had previously decided to discharge him on February 6th. Tracey testified that he told Vic Lewis, Talmadge Mosley, Fred Shannon and possibly Everett Kelly, prior to February 11th, that he was going to fire Maxey.

Fred Shannon testified that Maxey told him on February 4th that he "messed up bad, thought that he'd fooled around and lost his job" (Tr. I. 304). Maxey admitted to Shannon that he had refused to report to the No. 4 Section as he was told. Shannon claims that he became aware of Maxey's six warning slips on February 5. He purportedly picked up the original warning slips that same evening from the company's London office and delivered them to Tracey the following day, Thursday, February 6. According to Shannon, Tracey looked at the warning slips in his presence and then stated that he had decided to terminate Maxey. Shannon explained that the warning notices he hand-delivered to Tracey on February 6, were returned to Maxey's personnel file and that copies of the notices were subsequently faxed on February 10, upon Tracey's request.

At hearings on the merits, Shannon explained that on February 5th, he overheard the telephone conversation between A.B. Foreman and Tracey. From what he was able to hear, Tracey was discussing the warning slips and said that he needed copies. "A.B." apparently then put them in an envelope for Shannon to pick up, and Shannon did in fact pick them up at the London office that evening. On February 6, the following morning, Shannon brought the envelope to Tracey's office and it was opened in his presence. Tracey said that there were six warning slips and that Maxey had lied to him. Later that day Shannon returned the slips to Maxey's file in the London office.

On Monday, February 10, the next time he talked to Tracey, Tracey purportedly asked to see the Maxey file again. Shannon thought that he had told Tracey the file was back in London, but said that he would have the reports faxed to him. Shannon explained that the disciplinary files for company employees are kept in the personnel files maintained at the London offices. Shannon was present when the warning slips were faxed to Tracey in his office.

Shannon testified that he was not aware on February 7th, that inspector Baker was at the mine. He subsequently learned either on Saturday, February 8th, or the following Monday that Baker had been at the mine. Shannon testified, however, that it did not surprise him that Baker was inspecting on a Friday and Sunday, as this was not unusual. He also observed that during January 1997, the mine had twenty inspection days and had fourteen in February. He also noted that the mine had been inspected on a Friday only the week before the hearings.

James Everett Kelly is now a mine superintendent at Leeco's No. 68 Mine. He was an assistant to Tracey during relevant times. Vic Lewis told Kelly on February 4th that he wanted to

transfer Maxey to the 4 Section. Kelly agreed. Kelly later learned that Maxey had refused to go to the 4 Section and that disciplinary action had been instituted. Kelly maintains that he told Tracey that he thought Maxey should have been terminated for refusing to work. According to Kelly, one or two days following the February 4th suspension of Maxey, Tracey told him that he was going to terminate Maxey because he had lied about his disciplinary record.

Kelly became aware on February 9th, while working at another mine, that inspector Baker was at the No. 68 Mine. Kelly was not, however, surprised that Baker inspected on a Sunday and did not find it unusual for Baker to be at the mine on a weekend. He was unaware that Maxey had visited the MSHA offices on February 9th. On cross-examination Kelly explained that he had seen the prior warning slips when Tracey showed them to him some two or three days after February 4th, i.e., either on the 6th or 7th. He was certain that it was not after the weekend. At that time Tracey said that he was going to terminate Maxey.

A.B. Foreman is Leeco's worker's compensation coordinator. His office was located in London, Kentucky, where the personnel files are kept. He recalled that Tracey had called and asked if Maxey had any warning slips in his personnel file. According to Foreman, Tracey held on the phone line while he searched for the warning slips and then reported them over the phone to Tracey. Tracey then allegedly told Foreman that he would have Shannon pick them up and Shannon in fact picked them up later that afternoon. Foreman recalled that it was a few days later when Tracey again called and said he needed more copies of the warning slips, and needed them right away. Foreman then faxed those copies to Tracey on February 10th as noted on the top of the warning slips in evidence as Government Exhibit 3.

Talmadge Mosley, Leeco's President, recalled meeting with Maxey on February 4, 1997, right after he had initially been fired. Maxey told Mosley "they fired me and I don't know why" (Tr. II. 201). Mosley then intervened with Tracey on Maxey's behalf arguing that Maxey had been with the mine a long time and that discharging him may have been "a little too harsh" (Tr. II. 203). Maxey purportedly also told Mosley that he had no other disciplinary actions. On Thursday, February 6th, Mosley purportedly talked to Tracey by telephone. Tracey claims that he told Mosley that Maxey had lied to him and that in fact he had six warning slips in his file. According to Mosley, Tracey said that he was therefore going to fire Maxey and he approved (Tr. II. 205).

Evaluation of the Evidence

While the testimony of the operator's witnesses might superficially appear to support its claims that it in fact discharged Complainant on February 6, 1997, prior to the MSHA inspections, upon closer scrutiny and upon evaluation of the documentary evidence (and lack thereof), I find that its claims fail the test of credibility. It is the combination of a number of inconsistencies that leads to this conclusion. In particular the credibility of two key witnesses, general mine superintendent Amon Tracey and safety inspector Fred Shannon, must be viewed in light of inconsistent statements and testimony. For example, at the unemployment insurance hearing held on June 24, 1997, prior to the temporary reinstatement hearing, Tracey testified on three separate occasions that "the engineers" from Leeco's London, Kentucky office, which is located

approximately 70 miles from Tracey's office at Jeff, delivered the written warnings to him on February 6th.

In addition, when asked why copies of the written warnings were faxed from Leeco's London office to Tracey's office on February 10th, the day before Maxey's discharge, Tracey testified that he "couldn't find" the copies that had been personally delivered to him on the 6th, so he called A.B. Foreman at the London office on the 10th and asked Foreman to fax him another set of copies.

Tracey also testified, however, that he subsequently found the copies that had been delivered to him on the 6th and those copies, not the fax copies, were the ones he purportedly showed Maxey when he discharged him on February 11th. More specifically, Tracey testified at the unemployment insurance hearings that "I later recovered my copies. I have them now, the originals, that Ronnie Maxey looked at" (Jt. Exh. 1). In contrast, Tracey testified at the temporary reinstatement hearing that Fred Shannon, who he identified at trial as "our safety man" (and who had been safety director for two years and whose office was located next to Tracey's) and not the engineers from the London office, had hand-delivered the packet of written warnings to him on February 6th (Tr. I. 271, 291). While Respondent notes that Shannon previously worked in the engineering department the record shows that that had been 4 **2** years earlier. Tracey himself never explained this inconsistency.

Fred Shannon's explanation of what happened to the warning slips that he supposedly hand-delivered to Tracey on February 6th also contradicted Tracey's testimony at the unemployment insurance hearing. Shannon testified that on the afternoon of February 6th (after he had delivered the envelope of warning slips to Tracey) Tracey gave the written warnings back to him and told him to keep them for him (Tr. II. 92-93, 103-105). Shannon claimed that he then unwittingly placed the warning notices in Maxey's training file, and took the training file to the London office where he put it in Leeco's "safety department filing cabinet" (Tr. II. 106-109, 93-95).

According to Shannon, four days later, on February 10th, Tracey came to his office and said he needed the warning slips back to show to Maxey the next morning (when he was going to discharge Maxey). At that point, Shannon allegedly remembered that he had accidentally put the warning slips in the training file, and put the training file in the safety department file in London (Tr. II. 95-96, 109-110). Because the warning slips were back in the London office, and Tracey needed them the following morning, Tracey said he would just have A.B. Foreman fax him another set of the notices (Tr. II. 96, 123).

As already noted, however, Tracey testified at the unemployment hearing that on February 11th he had shown Maxey the same written warnings that had been personally delivered to him on February 6th and not the copies that were faxed to him on the 10th. Indeed, if Shannon's version of events was true, Tracey could not have shown Maxey the hand-delivered copies on the 11th because they supposedly were sitting in a file cabinet 70 miles away.

Shannon's testimony about how he came to pick up and personally deliver the warning slips to Tracey on February 6th also contradicts Tracey's testimony at the unemployment

insurance hearing. At the hearing on the merits of this case, Shannon testified that he went into Tracey's office on February 5th and overheard Tracey talking to Foreman on the telephone "about some warning slips, and he needed a copy of them, that he needed to see them" (Tr. II. 90). Shannon said that Tracey "was still on the phone when I told him if he [Foreman] would put it in an envelope . . . I could pick them up for him" (Tr. II. 90-91).⁴

Shannon alleged that when he personally delivered the packet of warning slips to Tracey on February 6th, Tracey opened up the envelope in his presence, looked at the written warnings, and declared that the "was going to fire him [Maxey]" (Tr. II. 91-92 and 123-124, Tr. I. 311). However, at the unemployment hearing, Tracey testified that he did not talk about Maxey on February 6th with anyone other than Talmadge Mosley and Everett Kelly (UI 141, Q42). Indeed, although Shannon purportedly played a prominent role in support of Leeco's cases, Tracey never mentioned Shannon during his testimony in the unemployment hearing (Jt. Exh. 1, pp. 126-185).

In addition to the inconsistencies between the testimony of Tracey and Shannon, it is also noteworthy that in his statement to MSHA, Shannon did not mention supposedly picking up the warning slips and delivering them to Tracey. In fact, on March 12th, the date of Shannon's statement, the extent of his purported knowledge about Maxey's discharge was as follows:

On Thursday, February 6, 1997, Amon Tracey told me that he had followed up on Ronnie Maxey's file & found out that he had been wrote up 6 times. He also said that Everett had verbally warned him [Maxey] & so had Vic. He told me he was going to call Talmadge & tell him that he was going to fire Ronnie Maxey after finding he had lied to him (Gov. Exh. 8, p.3).

As Complainant observes in his brief, it defies common sense that Tracey would have told Shannon that he had checked on Maxey's personnel file and learned about the written warnings if, as Shannon testified, he (Shannon) had personally delivered the warnings to Tracey on February 6th, and watched Tracey read the warning slips in his presence.⁵

⁴ Shannon thereby also contradicted his own testimony at the temporary reinstatement hearing, wherein he stated that he had talked to Tracey about picking up the warning slips sometime after Tracey had talked to Foreman, i.e., he did not claim to have walked in on Tracey's phone conversation with Foreman (Tr. I. 310).

⁵ It should also be noted that Tracey, in his statement to MSHA, likewise did not allege that Shannon had delivered the warning slips to him. See Joint Exhibit 2.

Leeco's claim that the written warnings were personally delivered on February 6th to Tracey, whose office was located 70 miles from the company's London office, rather than simply faxed to him in the first instance, is also suspect. In this regard, it is undisputed that Leeco regularly faxed from the London office to Tracey's office at the No. 68 mine its daily reports regarding MSHA citations issued to the company (Tr. I. 288-290). In light of the contradictory testimony of Tracey and Shannon, and Shannon's inconsistent accounts of how he came to volunteer to pick up the warning slips in the first place, Leeco's assertion that the written warnings were hand-delivered to Tracey on February 6th is indeed not credible.

As Complainant further notes in his brief, Leeco's version of events requires that one ignore both its contradictory testimony and common sense while the Complainant, on the other hand, has proof that copies of the written warnings were faxed to Tracey on February 10th, one day after MSHA had completed its second inspection at the No. 68 mine, and one day before Maxey was discharged. (Gov't Exh. 3).

The reason advanced by Leeco as to why Tracey purportedly decided to check Maxey's personnel file in the first place, i.e., his suspicion that Maxey had lied about his disciplinary history, is also suspect. Tracey testified that when Vic Lewis and Everett Kelly both told him shortly after he had suspended Maxey on February 4th that they had previously given verbal warnings to Maxey, "that kind of rung a bit of a bell with me" (Tr. I. 269, 294). In light of Tracey's testimony that he asked Maxey on February 4th whether he had ever received any "disciplinary slips" (i.e., written warnings) it strains credulity that thereafter learning about verbal warnings would have prompted Tracey to investigate Maxey's work history. Indeed, in his MSHA statement, Tracey claimed that he had held the opinion that Maxey "was not a very good worker" for 6-12 months before he fired Maxey. If that was true, it is highly unlikely that Tracey would have been surprised to hear that Maxey had previously been given verbal warnings.

Moreover, at the unemployment hearing, Tracey admitted that he had known about Vic Lewis's purported verbal warning to Maxey for several months before the suspension of Maxey. Thus, the only verbal warnings that Tracey could have learned about after suspending Maxey were those purportedly given by Everett Kelly. It is also noted that when he was questioned at his deposition in this proceeding, Kelly did not say that he had told Tracey about verbally warning Maxey (Tr. II. 163-166). Kelly likewise in his statement to MSHA, did not mention any disciplinary problems he had had with Maxey (Tr. II. 166-167). While Kelly could have inadvertently omitted this information in his deposition and statement to MSHA, it is nevertheless another factor to consider in evaluating the credibility of Kelly's trial testimony that he had informed Tracey of having given verbal warnings to Maxey. It is significant moreover, that even if Kelly had told Tracey about alleged verbal warnings he had given Maxey, Kelly himself admitted that such warnings would not have been considered by Leeco in disciplining its miners (Tr. II. 168).

The documentary evidence, and lack thereof, also fails to support Leeco's claims. As previously noted, Leeco has produced no documentary evidence establishing that Tracey's decision to discharge Maxey was made on February 6th. Indeed, the documentary evidence, i.e., the written warnings that were faxed to Tracey on February 10th (Gov't Exh. 3) and the discharge

notice dated February 11th (Gov't Exh. No. 2), suggests otherwise. In addition, the absence of telephone records to corroborate the alleged February 6th telephone conversation between Tracey and Leeco President Talmadge Mosley is significant. Mosley testified that on Thursday, February 6th, while he was in Pennsylvania on company business, he called Tracey. According to Mosley, Tracey told him during that conversation that he was going to fire Maxey because Maxey had lied about his disciplinary history (Tr. II. 204). This testimony mirrored Tracey's testimony at the temporary reinstatement and unemployment insurance hearings (Tr. I. 273).

However, when Mosley gave his statement to MSHA on March 12th, in the presence of Tracey and Marco Rajkovich, Leeco's attorney, he stated that Tracey had called him on the morning of February 6th. This inconsistency is significant in light of the fact that Tracey likewise told MSHA on March 12th, just 5 weeks after the alleged phone conversation of February 6th, that he had called Mosley. Thus, both Tracey and Mosley told MSHA that Tracey had initiated the phone call on February 6th, yet both testified inconsistently at the discrimination and unemployment hearings that Mosley had made the call.

This inconsistency may be significant because if Tracey had initiated the telephone call from Leeco's offices it would be a simple matter to prove such a call by the production of Leeco's own telephone records. It may reasonably be inferred under all the circumstances that after it was realized that such a call could not be corroborated by Leeco's records, since there was in fact no such call, both Mosley and Tracey's testimony was modified to reflect this problem. Thus, their testimony was subsequently changed to suggest that Mosley had initiated the call.

As Complainant also observes in his brief, the inference that Leeco's defense was fabricated may also be derived from two other compelling circumstances. First, the evidence suggests that Maxey was indeed not fired for allegedly lying, thereby supporting the conclusion that the decision to fire Maxey was not made on February 6th. In this regard it is undisputed that Tracey made the decision to discharge Maxey, and that he wrote the discharge notice himself on February 11th (Tr. I. 280-281). The notice states as follows:

After numerous times of written warning Ronnie Maxey's work is still unsatisfactory. Also disobeyed a direct order. (Gov't Exh. No. 2).

If, in fact, Tracey had decided on February 6th to discharge Maxey on the grounds that he lied about his disciplinary history, it is inconsistent and therefore suspect that Tracey did not indicate on the discharge notice that lying was in fact the basis for the discharge. Instead, Tracey stated that Maxey's work was unsatisfactory because he had refused a work order (which was the basis for his previous 5 day suspension) after having previously received "numerous" written warnings. Moreover, Tracey did not offer any justification or explanation at either the discrimination or unemployment hearings for his failure to state on the discharge notice that Maxey was being fired for lying or dishonesty.

The second circumstance is based on the actions of Shirley Grant, Leeco's assistant human resources coordinator, in filing Leeco's responses to Maxey's unemployment claim. This evidence also circumstantially leads to the inference that Maxey was not fired for alleged lying. Grant

testified that it was her responsibility to respond to unemployment claims against Leeco (Tr. II. 67). When a worker from the local unemployment office called Grant, sometime after February 20th, to get the company's position as to why Leeco had discharged Maxey, Grant responded that Maxey had been fired for refusing two direct work orders. At trial, Grant attempted to explain this inconsistency by testifying only that the unemployment office "wanted a reply very, very shortly," and she therefore could only talk with Vic Lewis, Maxey's immediate foreman, and not with Tracey, who had discharged Maxey (Tr. II 80-82).

In addition, Leeco's appeal of the initial unemployment insurance determination (in Maxey's favor) further suggests that Leeco's claim that Maxey was fired for lying was pretextual. In this regard, the following colloquy ensued at the unemployment hearings regarding Grant's testimony:

Attorney: And who instructed you to appeal?

Grant: It came from Amon [Tracey], from the job, from the superintendent. I can't remember if it was exactly from Amon to me. It might have went from Amon to my supervisor to me . . .

Q: And who - did someone instruct you to state what your reason was for appealing?

A: Yes, insubordination, yes. I mean, that's what we said all along is that he failed to follow two orders.

Q: Okay, but what I'm asking you is, that's not something that you wrote on your own. You were told that that was the reason; that's what you should put in your appeal notice?

A: Yeah, we discussed that. I mean, that was the reason, misconduct.

Q: Who was "we?"

A: With Amon and - yeah, I can't remember if Everett [Kelly] was there. I don't remember that.

Q: So, as best you remember, Mr. Tracey and perhaps Mr. Kelly told you to appeal, and the basis for appealing was insubordination or the reason for discharge was insubordination.

A: Insubordination, yes (Tr. II. 71-72).

No mention is made that Maxey had been fired for lying or dishonesty. Grant indicated that the company's position "all along" was that Maxey had been discharged for "insubordination" - i.e., for "fail[ing] to follow two orders."

Subsequently however, when Grant testified at the instant discrimination hearing, she initially claimed that Tracey had told her to appeal the unemployment claim because Maxey had been fired for refusing to follow work orders and for lying (Tr. II. 70). She explained, only after she was presented with her prior testimony from the unemployment hearing, that she "should have" mentioned lying as a basis for the discharge during that earlier testimony (Tr. II. 73). This explanation, given all of the other inconsistencies in Leeco's case, does not ring credible.

In sum, all of the documentary evidence in this proceeding (i.e., the written warnings that were faxed to Tracey on February 10th, the discharge notice of February 11th, and Leeco's unemployment appeal notice of March 5th (Gov't Exhibit 11) support the Complainant's contention that the decision to discharge him was made only after Tracey's receipt of the warning slips on February 10th, and that he was not fired for lying as Leeco now claims. At the same time there is no documentary evidence that supports Leeco's claim that Tracey decided to fire Maxey on February 6th for lying.

Finally, the fact that Leeco made no attempt to contact Maxey prior to February 11th, regarding his purported discharge, supports the conclusion that the discharge decision was not made until after the London office faxed the warning slips to Tracey on February 10th. Tracey claims that when he saw a "598" prefix listed for Maxey's phone number, he knew it wasn't the right number. He therefore did not call the number, for example, to try to contact someone who could then get in touch with Maxey - because Maxey "was the man [he] wanted to see" (Tr. I. 285).

It is undisputed that Tracey knew that Maxey lived within a mile of the No. 68 mine (Tr. I. 300) and no doubt also knew that he lived on property owned by Leeco (Tr. II. 124-125). Nonetheless, Tracey admits that during the 5 day period between Tracey's purported decision to fire Maxey and Maxey's return to the mine on February 11th, he made no effort to contact Maxey other than supposedly checking a list of employee telephone numbers on his office wall (Tr. II. 283-286). Specifically, Tracey did not attempt to send Maxey a discharge notice in the mail (Tr. II. 285), did not go to his home, and did not make any effort to determine Maxey's phone number despite his admission that immediately contacting a discharged employee is the proper thing to do. In this regard, the following colloquy occurred at the instant hearings:

Tracey: I was going to call [Maxey] and tell him that he was discharged.

Attorney: Why?

A: Well, you know, I felt like that I should. If indeed he has a five-day suspension and thinks that he's coming back to work . . . only to come back to be discharged, the man might go somewhere else and get him a job and start to work. That would save him being . . . without pay for those few days. I try to be very honest and square with my people.

Q: So, in other words, you thought it was the fair and right thing to do when

you discharged somebody . . . to notify them right away.

A: Yes, sir. I even phone people at home. Even if they quit my job. I call them at home (Tr. I. 283-284).

In conclusion, considering all of the evidence and circumstances, I do not find Leeco's claim that it made the decision to discharge Maxey on February 6, 1997, to be credible. Moreover, I find that the operator's efforts to create a fictional account to support such a claim is, in itself, compelling evidence and, in conjunction with the coincidence in timing, it is clear that the decision to discharge Maxey on February 10th or 11th was motivated by the knowledge or suspicion that Maxey had made safety complaints to MSHA resulting in the inspection of the No. 68 mine on February 7 and 9, and the issuance by MSHA of citations and notices-to-provide-safeguards in that mine. Accordingly, I find that Maxey's discharge was motivated by his protected activity

In its posthearing brief Leeco raised, for the first time, the alternative argument that, "Amon Tracey would have terminated Maxey whether or not he had knowledge of Maxey's complaint to MSHA, due to Maxey's inadequate job performance, failure to follow the direct orders of his supervisor, Vic Lewis, and directly lying to Amon Tracey when confronted with his failure to follow Mr. Lewis's instructions." (Respondent's Brief p.2).

It is not explained and therefore it is not clear what Respondent is referencing in its statement that Maxey was "directly lying to Amon Tracey when confronted with his failure to follow Mr. Lewis's instructions." It presumably is its claim, disputed by Complainant, that Complainant lied about his prior disciplinary record. Considering, however, the damage Leeco has brought upon its credibility in this case I can give but little weight to its version of this disputed event. Accordingly, I reject its apparent affirmative defense that, even if it had knowledge of Maxey's protected activity (which it vehemently denies), it would have discharged him in any event, based on his unprotected activity alone. Under all the circumstances I find that Maxey was discharged in violation of section 105(c)(1) of the Act.

ORDER

Discrimination Complaint Docket No. KENT 97-257-D, **IS GRANTED**. The Secretary is directed to file a brief on or before February 3, 1998, addressing each of the criteria under section 110(i) of the Act, citing supportive evidence in the record and arguing how that evidence supports her proposed penalty in this case. The Respondent may also file a brief on this issue on or before the same date.

The parties are further directed to confer with the objective of reaching agreement on issues relating to costs and damages, and to report the results to the undersigned on or before February 3, 1998. This decision is accordingly not yet final and will not be final until such time as all remaining issues as to costs, damages and a civil penalty are resolved.

Gary Melick
Administrative Law Judge

Distribution:

Mary Beth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project of the ARDF of Kentucky, Inc., 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

Marco M. Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, 1700 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507 (Certified Mail)

\mca