

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf of	:	Docket No. KENT 2003-313-D
CHARLES SCOTT HOWARD,	:	BARB CD 2003-07
Complainant	:	
v.	:	Cave Spur No. 1
	:	Mine ID 15-18197
CAVE SPUR COAL, LLC, PANTHER	:	
MINING, LLC, and BLACK MOUNTAIN	:	Panther No. 1
RESOURCES, LLC.,	:	Mine ID 15-18198
Respondents	:	

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor; Stephen A. Sanders, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, on behalf of Charles Scott Howard; Stephen M. Hodges, Esq., PennStuart, Abingdon, Virginia, on behalf of the Respondents.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by the Secretary of Labor pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the “Act,” alleging that Charles Scott Howard was discharged by Panther Mining, LLC (Panther Mining) on February 3, 2003, in violation of Section 105(c)(1) of the Act.¹ In particular, the Secretary alleges in her complaint that Howard was discharged from

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 this 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

his employment with Panther Mining because he had engaged in protected activity related to health and safety at the No. 1 Mine of Cave Spur Coal, LLC (Cave Spur). The Secretary further alleges that both Cave Spur and Panther Mining are controlled by, or their operations are directed by, Black Mountain Resources, LLC (Black Mountain).

Cave Spur and Panther Mining are wholly owned subsidiaries of Black Mountain. The individual complainant, Charles Howard, had been a day shift production foreman at Cave Spur for five months until January 28, 2003, when his section was closed and he, along with 34 other miners, was laid off.² All the laid-off miners were advised by Cave Spur Superintendent Larry Mosely that they could apply for jobs at Panther Mining. Howard was among the 28 who applied and among the 20 who were hired by Larry Adams, the superintendent of the Panther Mine. Although preferring to work as a day shift production foreman, Howard was hired as a night or “graveyard” shift maintenance foreman working from 11:00 p.m. to 7:00 a.m. According to Howard, when he met with Adams he told him that they got rid of him at Cave Spur because he would not do “outlaw” work, *i.e.*, in violation of health and safety practices, and that “if they expected that at Panther, [he] wouldn’t do that.” Howard acknowledges that Adams assured him that the Panther Mine did not operate that way.

Howard claims that during his five months at Cave Spur he complained “40 to 50 times,” mostly to Larry Mosely, about the lack of ventilation. According to Howard, Mosely’s only response to these complaints was the word “well” (Tr. I. 26). He also claims that mine foreman Harold Spurrier would occasionally come in and tell him to go ahead and work in spite of the lack of ventilation. Howard also alleges that during his employment at Cave Spur he was twice told to use crib blocks to elevate a roof bolting machine. According to Howard, this practice was unsafe on these two occasions (Tr. I. 29). Howard also claims as a protected activity that on one occasion he and Spurrier came upon a water hole and Spurrier told him “we’ll take care of that later” (Tr. I. 27). Finally, Howard claims that on his last day of work at Cave Spur, January 28, 2003, he complained to Mosely and Spurrier about insufficient air where he was planning to cut coal. According to Howard, even though a Federal inspector was present Mosely told him to mine without sufficient air. Howard claims he refused to comply.³

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 the Act.

² The complaint herein does not allege that this layoff was discriminatory or in violation of the Act even though Howard purportedly made more than 40 to 50 health and safety complaints during his five months at Cave Spur.

³ The Federal inspector who was present at that time, Alice Blanton, of the Department of Labor’s Mine and Safety and Health Administration (MSHA) testified however

Although dissatisfied with the unsafe and unhealthy “outlaw” operations at Cave Spur, Howard nevertheless wanted to return to Cave Spur as a day shift production foreman and felt he had been unfairly treated by being laid-off, while another foreman, who was a friend of Superintendent Mosely’s, was retained. Because of this dissatisfaction, on the morning of January 30, 2003, Howard took the unusual step to see Black Mountain’s vice president of operations, Ross Kegan. Howard complained to Kegan about problems with insufficient air and excess water at Cave Spur and that he had not been treated fairly by being sent from Cave Spur to the Panther Mine. In response Kegan purportedly told Howard that “certain individuals would hang their self [*sic*] if that’s the way their practices were,” and that Howard should “keep a good attitude, do a good job and just keep [his] mind focused on that.” Howard admits that he never did specifically ask to return to his job at Cave Spur.

According to Howard, following his meeting with Kegan, he called a friend at the Kentucky Department of Mines and Minerals (KDMM) alleging ventilation problems at the Cave Spur Mine. Howard also called the “hotline” maintained by MSHA and left an anonymous complaint about ventilation problems at the Cave Spur Mine and allegedly reported that they would have to “blitz” the mine to catch them in violation.

The next day, Friday, January 31, 2003, KDMM Inspector George Johnson went to Cave Spur in response to the anonymous complaint (Tr. I. 42-146). Johnson testified that he did not know who made the complaint. His inspection took four hours. Superintendent Mosely accompanied him. (Tr. I. 169-170). Johnson found some deficiency in airflow, but it was not a violation and the deficiency was corrected during the inspection. By the end of the inspection, Johnson concluded that the mine had adequate ventilation and had no violations. He issued no citations. (Tr. I. 146).

During the inspection, Cave Spur superintendent Mosely mentioned to Johnson that Cave Spur had just laid off a lot of people, and that he was not surprised that someone had called in a complaint. (Tr. I. 146). According to Johnson, when there is a lay off at a mine, laid off miners are likely to make complaints. (Tr. I.151). Mosely testified that he never suspected Howard to be the person who called in the anonymous complaint. “I had no reason to suspect that Scott Howard was the one that called it in. There were 35 people that were laid off, not all of them were happy.” (Tr. I.168). Several of the laid-off miners either did not apply for employment at Panther, or applied and were rejected.

Sometime later, probably on the same day, Mosely called Kegan and reported that there had been an anonymous complaint, that a state inspector had been at the mine and that

that she was at Howard’s section sometime before 8:50 a.m., and was present for up to four hours. She found 26,100 cubic feet of air (cfm) where only 9,000 cfm was required, *i.e.*, at the last open crosscut. Blanton further testified that she found no air deficiencies in Howard’s section. She also talked to Howard who apparently registered no complaints (Tr. II. 152-155).

“everything checked out okay” (Tr. I.160). Mosely testified that he did not know who made the complaint when he spoke with Kegan and did not mention Howard (Tr. I.168).

Also, on Friday, January 31, 2003, Kegan called Adams to inform him that Howard had visited him the day before. (Tr. I.175). According to Kegan this call was made before Kegan knew of the state inspection at Cave Spur (Tr. II. 22-23). Kegan testified that he called Adams because he thought Howard’s supervisor should know that his subordinate, Howard, had “gone around” him. (Tr. II.22). Kegan told Adams that Howard was unhappy at being a night shift “move” foreman and that he had made some complaints about issues at Cave Spur. (Tr. II. 21). Kegan testified that he could not recall telling Adams of any of Howard’s specific complaints about safety issues at Cave Spur. (Tr. II. 21).

Both Kegan and Adams maintain that, in their phone conversation, Kegan never directed Adams to fire Howard, never suggested that Adams consider firing Howard, and never suggested that Adams take any action against Howard. (Tr. II. 23, 194,196). According to their testimony, Kegan simply informed Adams that his subordinate, Howard, had approached Kegan outside the normal chain of command and that he, Kegan, had advised him to do a good job at Panther and that he would be treated fairly there. (Tr. I.175-177; Tr. II. 21, 196).

Howard began working at Panther on January 29, 2003. One of his responsibilities as foreman of the third shift crew was to move the belt forward so that the next shift production crew could begin production upon their arrival. Howard acknowledges that on this first shift he was unable to complete the belt move. Howard next returned to work on Sunday night February 2, 2003. After the shift, which ended on the morning of February 3rd, he met with superintendent Adams. It was at this meeting that Howard was fired. Howard described the meeting in the following colloquy at hearing:

Q. [By Mr. Giannikas] Okay. Now what happened after that shift? The morning of Monday, February 3, 2003?

A. I came outside and Larry come out, Larry Adams and said I need to talk to you before you leave. So, I finished filling out my on-shift and my time and went to the office to see what he wanted.

Q. What happened next?

A. He was sitting there and he said - - the first thing he asked me was that Cecil Seals.

Q. And who is Cecil Seals?

A. Cecil Seals was one of the bull crew workers on my crew.

Q. And what is bull crew?

A. Bull crew is like just call them just manual labor. It is different jobs. They do more than one job.

Q. To make it clear cut, is a bull crew the same thing as maintenance crew pretty much?

A. Yeah, it's considered maintenance, the main hand.

Q. Okay. You were saying Mr. Cecil Seals; is that his name?

A. Yes. He hadn't showed up Sunday night to work at 9:00 when we began. Somebody said he had called in, he had got to the mines - - somebody said he had called in and Tim Hughes had answered the phone on their section. They said Cecil Seals wanted a ride and Tim Hughes - - Cecil Seals wanted a ride and Tim Hughes told him if he wasn't driving, he would have to walk. Evidently he had come inside.

Q. What did you tell Mr. Adams with respect to Mr. Seals?

A. I told him that I was told that he had quit. I hadn't talked to him. I couldn't say for sure.

Q. What else did Mr. Adams speak to you about?

A. He asked me who told me that I needed to come in early Sunday night.

Q. What was your response?

A. I told him some other fellows said it would be all right.

...

JUDGE MELICK: You said you told him Tim Hughes told you you could go in early?

THE WITNESS: I was told Tim Hughes was the other section foreman on the third shift. Now I had had some problems, or some questions I could ask him and he knowed basically, but I also discussed it when I said fellows, the electrician. They said they didn't see no problem coming in early. When they worked at Cave Spur and they had a lot of work to do, they come in early.

JUDGE MELICK: So, you talked to your electrician also?

THE WITNESS: Yes, but it was more than one person originally. I told Tim Hughes was just the first mine foreman I had.

BY MR. GIANNIKAS:

Q. How many active sections did Panther run?

A. Then I went there they had three sections.

Q. So, Tim Hughes was the other maintenance foreman?

A. He was the foreman on the section.

Q. He had your job on another section?

A. Yes.

Q. So, in any event, you told Mr. Adams these things; correct?

A. I told him Tim Hughes told me that, yes.

Q. So, tell me what Mr. Adams said?

A. I don't know the exact words, but we talking about the time when we went in early and I told him if he didn't want us to come in early that we wouldn't come in early no more.

Then he started telling me that when I got in the office, before my job through and he looked and his door to his office was open. He got up and walked by me and he's done these action while he was going to the door, oh, no - - my job was done and basically said - -

JUDGE MELICK: I'm sorry. I didn't [hear] the rest of that response.

THE WITNESS: When he was talking to me?

JUDGE MELICK: Yes.

THE WITNESS: He went to shut the door and come back where I was at and was standing where his where I was at.

JUDGE MELICK: And he told you to come out the mine early that shift?

THE WITNESS: We had come out early, yes.

JUDGE MELICK: Did he ask you to come out early?

THE WITNESS: No. He said not to come out out of the mine early until our job was done or to - -

BY MR. GIANNIKAS:

Q. So this is in respect to your activities that day, do not come out of the mine until told - -

A. That's the way I took it.

JUDGE MELICK: I'm sorry. I'm from Maryland and I'm having a little bit of difficulty with your accent. Could you [re]state what you just said?

THE WITNESS: If you want to know what - -

JUDGE MELICK: No. Please restate your answer.

THE WITNESS: About coming out early?

JUDGE MELICK: Yes.

THE WITNESS: I hadn't come out early I thought that he was - -

JUDGE MELICK: Didn't you tell me that you had come out early?

THE WITNESS: I figured he knowed.

JUDGE MELICK: You didn't actually tell me that?

THE WITNESS: No.

JUDGE MELICK: So, you thought this was in reference to your future?

THE WITNESS: Yes.

BY MR. GIANNIKAS:

Q. What happened next?

A. Well, he started - - he didn't said nothing out of the way.

Q. Who is this?

A. He was starting to question me and don't do this and don't do this. He kept saying about the job I had done and he started with his hands up in my face - -

Q. Hold on. Hold on. You said he was talking to you about this and talking about that. What exactly was he talking about?

A. Just like he was asking me if I had any questions about what Cecil Seals. He asked questions about the time and he was asking about a tie off.

Q. What is a tie off?

A. The tie off he was talking about on shuttle car which is a restraining cable, the pulley supports the cable on the power center.

Q. Okay. And what did he say about the tie off?

A. He said I hadn't moved them. I told him I didn't move nothing I wasn't supposed to.

Q. And - -

A. This was on Thursday.

Q. So, he was referring to Thursday?

A. No, it was a Sunday night. We moved on a Sunday night.

Q. Listen to my question. So this is the Thursday nigh shift you were referring to about the tie off?

A. That's what I believed.

Q. And what was your response?

A. I told him we hadn't moved - -

Q. And how much truth was there to this accusation about a tie off?

A. I hadn't done it so if he was saying to me I did, then he was lying. I didn't move them. I did what I was told to do. I didn't have time to move anything on that shift.

Q. And this was the shift that began on the 30th, correct?

A. Yes.

Q. So, you were describing, when I interrupted you, you were describing Mr. Adams' demeanor toward you. Could you continue, sir?

A. And he was talking and got a little louder, louder and his face was getting red and he stuck his hand in my face and he was getting mad. I told him, yeah, you know, I'm a grown man and that's not the way I want to be talked to. I don't want to be talked to like a dog.

Q. How far away was his hand from your face, sir?

A. It was as close approximately as from here to that podium, the wood podium up there.

Q. Which podium is that, sir?

A. That's about how far.

JUDGE MELICK: Do you want to state for the record how far you think that is?

THE WITNESS: About three foot, I would say approximately three foot.

MR. GIANNIKAS: Three feet. Three feet away.

BY MR. GIANNIKAS:

Q. You say he stuck his hand in your face, how far away was his hand from your face?

A. About when he raised his hand. You know, if he raised his hand up, I just seen his left hand come up. I raised my hand up like this.

JUDGE MELICK: For the record, when you say I raised my hand like this, you mean you raised your hand to kind of stop his hand?

THE WITNESS: Shake his, no.

JUDGE MELICK: Why did you do that?

THE WITNESS: Because I didn't want to get mad.

JUDGE MELICK: So, he was getting mad at you?

THE WITNESS: Yeah.

JUDGE MELICK: What did you [say] to him?

THE WITNESS: I told him that I was a grown man and that's the way I was supposed to be talked to, I didn't want to be talked to like a dog.

JUDGE MELICK: What was his response to you?

THE WITNESS: He said he didn't have any respect for me; to get off the property.

JUDGE MELICK: What happened then?

THE WITNESS: I said what do you mean. He said you to turn your stuff in and get off the property.

THE WITNESS: I said what do you mean for to turn my stuff in. What do you mean.

He said you need to turn your stuff in. I said are you firing me and he said, yes, you're fired. I said you are firing me because I was putting safety first. He said, no, I'm firing you because of your work performance and your attitude.

JUDGE MELICK: Well, while this was going [on] how was he acting?

THE WITNESS: Not a lot. He started getting mad and he fired me.

JUDGE MELICK: You said he started getting mad?

THE WITNESS: I mean I don't know what happened. I just knew he was starting to get angry and I didn't want the situation to go there, but I did it did. It went too far.

JUDGE MELICK: So, once you understood he was firing you, what did you say to him?

THE WITNESS: I believe the first word out of his mouth he let me know he was firing me, and I look at him and I said, piss on you, and I called him a prick. (Tr. I. 64-75).

Howard's description of the meeting was somewhat clarified on cross-examination in the following colloquy at hearings:

BY MR. HODGES:

Q. Now let's talk about the events of February 3rd. I believe you testified that there were at least three different topics that were discussed that morning; is that correct?

A. Yes.

Q. One was the walk out of a certain member of your crew named Cecil?

A. Yes.

Q. And you and Mr. Adams talked about that and that did not generate any controversy or shouting friction between you?

A. No.

Q. What was the second issue that you talked about?

A. The second issue they brought up was who told me I could come out early because we had come out early.

Q. Who had told you to come out early?

A. Yes.

Q. And then you - - was that a legitimate thing for him to ask you about; why your crew went in early; you didn't object to that did you?

A. No, he could ask anything about the job.

Q. He's your boss isn't he?

A. Yes.

Q. All right. Did you and Mr. Adams talk about that?

A. A little bit, yeah.

Q. And you told him that and that was resolved was it not?

A. I was hoping it was.

Q. And there wasn't any trouble that came up until the third issue came up and that is why certain things hadn't been done on your shift that ended prior to that?

A. When he started talking about that, he didn't seem upset.

Q. But he eventually when you were talking on that subject is where the trouble came up; is that right?

A. Toward the end of the entire conversation that's the time - -

Q. The entire conversation lasted then minutes [or] so?

A. Yeah, 10, not long. Maybe 15 at the most.

Q. Now when the thing accelerated into I'll call it an argument, did you begin to shout?

A. No, it never got to an argument. Never.

Q. Whether it was an argument or not, did you shout?

A. Before I was fired?

Q. No, at any time during the time that you were meeting with Mr. Adams in the setting in which you got fired, did you shout?

A. Before I left his office, yes.

Q. Did you scream?

A. It's according to what you call scream.

Q. You called him a prick more than once didn't you?

A. Yes.

Q. And you said, piss on you; right, when you told him that?

A. Yes.

Q. Did you use the term "friggin" in talking with him?

A. No.

JUDGE MELICK: I'm sorry. What was that word?

MR. HODGES: Friggin, F-R-I-G-G-I-N.

JUDGE MELICK: And you say you did not use that word?

THE WITNESS: No.

BY MR. HODGES:

Q. You never used that word?

A. No.

Q. And there were several other people in the building if I recall the previous testimony but not in the room?

A. In the office, outside of the office and on back in the building.

Q. I just asked you if there were several?

JUDGE MELICK: I'm sorry I couldn't hear both the question and the answer. I'm going to have to ask [you to] please wait for the question before you answer so the reporter can write it down simultaneously to talking.

BY MR. HODGES:

Q. I'm only asking you if there were several other people in the building?

A. I believe there were.

Q. When Mr. Adams told you to get your things and turn in your equipment, you asked him if you were being fired; is that your testimony?

A. Yes.

Q. And he said yes?

A. Yes.

Q. And he said yes?

A. Yes.

Q. And you said you were being fired because of something at Cave Spur?

A. Yes.

Q. And he said, no, you are being fired for insubordination and not getting the work done?

A. He said my attitude, not insubordination.

Q. Attitude and what else?

A. My work.

(Tr. I. 122-126).

Panther Superintendent Larry Adams described the events leading up to the meeting with Howard and the meeting itself in the following colloquy at hearing:

Q. [BY MR. HODGES:] Did you at some time become aware that Mr. Howard's crew had not completed assigned work on a certain shift?

A. Yes, sir.

Q. Do you remember when that was?

A. It was on Friday morning probably about 7:45 a.m.

Q. And how did you become aware of that?

A. The day shift section foreman David Fugate told us about it and told me that he hadn't finished the work before he ever started drilling coal.

Q. At that time you found out about it was Mr. Howard still around the mine area?

A. No, he'd already left.

Q. This was Friday?

A. Yes.

Q. And did you work Saturdays?

A. No, sir.

Q. So, the next time that you would have seen Mr. Howard was Monday morning?

A. Yes, sir.

Q. Did you attempt to investigate and correct this problem that had occurred with Mr. Howard?

A. Yes, sir.

Q. About what time?

A. He got outside at 7:00. That was his normal time to get out and I think he was out about that time that morning. So, it was a little after 7:00.

Q. And how did you go about discussing this with him?

A. I told Scott to come into my office. I needed to talk to him before he left.

Q. Do you have any practice as to where and when to talk with foreman about job related issues?

A. Yes, sir.

Q. And what was that?

A. I normally take them into the office unless it's just general conversation. If it has something to do with their work or whatever, I take them into the office.

Q. And why is that, sir?

A. Well, coming down through the ranks I never did like to have a superior on me to talk to me in front of the other employees. I had rather do it man one on one. And that's what I do, one on one with employees.

Q. After you got him into the office, what do you recall about the conversation?

A. I told Scott, I said there's some things that he hadn't finished up there on the move on Friday morning. He told he, he said I'm a production foreman and not a move foreman.

And as he was saying this, he was getting louder. I asked Scott, I said, Scott, you are production foreman and I sent you up there to run production, would you know what to do to correct these problems or would I have to send somebody up there to do it for you?

And he said, no, I know what to do. I said, well, if you know what to do, why didn't you do it. He just kept getting louder and louder with me and every word he spoke. That's why I told him, I said, Scott, don't take this attitude with me because I don't tolerate this from employees.

He looked at me and he said, if anybody's got a frigging attitude it's you.

Q. Now the term "frigging" is that a term you use in your conversation?

A. No.

Q. All right. Were you offended by that term?

A. Yes, I was.

Q. Were you offended?

A. Yes, sir.

Q. Did you do anything to attempt to, perhaps, have civil language around your work environment?

A. Yes, sir, I try to.

Q. Once he made the comment about you are one with the frigging attitude, what did you do?

A. I told him to go get his stuff and turn it in. I wouldn't tolerate that. He said are you firing me. I said, yes, I'm firing you for insubordination.

(Tr. II. 197-201).

Panther day shift production foreman David Fugate (the foreman who worked the shift following Howard's) confirmed at hearing that he had informed Adams on January 31, 2003, that Howard's maintenance crew had not completed its assigned work that morning. Howard had already left for the day and, because Adams did not work the following day, a Saturday, Adams was unable to discuss Howard's failure to complete his work until Monday morning February 3, 2003.

Motion to Dismiss

The Respondents first allege that the Secretary's complaint herein was untimely filed. They note that Howard's charge of discrimination was filed on February 6, 2003, and that the Secretary did not file her complaint herein until June 10, 2003 - - beyond the 120-day legal time limit. Citing relevant provisions of Section 105 (c) of the Act this Commission in *Secretary, ex rel. Donald R. Hale v. 4-A Coal Company*, 8 FMSHRC 905 at 908 (June 1986) stated as follows:

. . . we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter - - *i.e.*, within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. *Cf. David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 23-25 (January 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984) (table); *Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8, 12-14 (January 1984).

Thus, even assuming that the Secretary filed her complaint beyond the statutory time limits, without a showing that the delay prejudiced the Respondents, dismissal is not warranted. The Respondents in this case failed to present any evidence of prejudice and indeed, affirmatively declined to "undertake to show prejudice." Under the circumstances the Respondents' Motion to Dismiss on these grounds must be denied.

The Respondents also appear to suggest that this case should be dismissed because the Secretary disobeyed an "order" in the related temporary reinstatement proceeding for the Secretary to file her complaint on the merits by May [21], 2003. The fact is, however, that no

such “order” was ever issued. This judge, in the settlement decision in that case, merely restated the terms of the settlement agreement between the parties which included an agreement by the Secretary to file her complaint by May 21, 2003. See *Secretary o/b/o Charles Scott Howard v. Panther Mining, LLC, et al.*, 25 FMSHRC 216 (June 2003). Accordingly, the Respondents’ remedy, if any, is for breach of the contract set forth in the settlement agreement. Under the circumstances the Motion to Dismiss must be, and is, denied.

The Merits

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 Castle 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 194, 195-196 (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.)

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 noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), rev’d on other grounds *sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), “[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.”

The Secretary alleges three categories or incidents of protected activity for which she argues Howard was terminated: (1) “Howard’s history of safety complaints and refusals to comply with unsafe directives throughout his employment with Cave Spur,” (2) “Howard’s January 31, 2003, safety complaints during his meeting with Kegan in which he told Kegan about ventilation and other problems at the Cave Spur mine” and (3) “Howard’s January 30, 2003, anonymous complaint to KDMM.” The first alleged protected activity apparently relates to Howard’s purported 40 to 50 complaints about the lack of ventilation as well as additional complaints about the use of crib blocks to elevate a roof bolting machine and certain water

problems. In addition, on the last day of his employment at Cave Spur, Howard purportedly refused to mine coal with insufficient air in the face of specific instructions from Mosely and Spurrier to do so and in the presence of an MSHA inspector.

With respect to this alleged “work refusal” the Secretary has failed to support her allegations under the appropriate legal framework, *i.e.*, that Howard entertained a reasonable, good faith belief that to continue working would have been hazardous. *Dykhoff v. Borax Incorporated*, 22 FMSHRC 1194, 1198-1199 (October 2000), *accord*; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). Moreover, not only is there no claim in this complaint of immediate adverse action, but Howard was hired later the same day by Panther Mining, another Black Mountain subsidiary. In any event, I do not find Howard’s allegations in this regard to be credible. The MSHA inspector who was present at that time, Alice Blanton, testified that, indeed, she was at Howard’s section sometime before 8:50 a.m., and found 26,100 cfm where only 9,000 cfm was required, *i.e.*, at the last open crosscut. Blanton further testified that she found no air deficiencies in Howard’s section. While Howard maintains that Blanton took her air readings 40 minutes before the deficiency occurred, I note that she was still present and that Howard nevertheless failed to mention the alleged inadequate ventilation to her. In addition, both Mosely and Spurrier denied Howard’s allegations.

I further find that Howard’s alleged 40 to 50 other complaints about ventilation as well as the work refusal itself are also suspect because none of the daily reports Howard completed while at Cave Spur indicated any inadequate ventilation (Tr. II. 27-32). The preshift and on-shift reports (Resp’s Exh. No. 6 and 8) show air flow readings. Of the 210 reports, none showed air flow under 9,000 cfm. Under Cave Spur’s MSHA - approved ventilation plan, 9,000 cfm air flow was required except under certain circumstances, in which case 15,000 cfm air flow was required (Tr. II. 30). While 5 of the 210 reports showed between 9,000 and 15,000 cfm, there is no evidence that the circumstances requiring 15,000 cfm existed at the time of any of these five readings. I find that this evidence largely discredits Howard’s claims that there was a lack of ventilation some 40 to 50 times about which he complained to management during his 5-month tenure at Cave Spur.

However, even assuming, *arguendo*, that Howard did make safety complaints during his 5-month tenure at Cave Spur regarding inadequate ventilation, excess water and the use of timbers to elevate a roof bolter, I do not find that his termination from Panther on February 3, 2003, was motivated in any part by any such complaints made, or work refusal exercised, during this tenure. I first note that the Secretary does not allege in her complaint herein that Howard’s layoff from Cave Spur (along with 34 other miners) on February 28, 2003, was an adverse action attributable to the above alleged protected activities. I also note that Howard was among those laid-off miners who were immediately rehired at Panther, another subsidiary of Black Mountain, in spite of his alleged protected activities at Cave Spur and in spite of his reporting to the hiring official at Panther Mining, Superintendent Adams, about the alleged unlawful and unsafe practices at Cave Spur and of his purported statement to Adams that he would refuse to perform such “outlaw” practices at Panther Mining.

I next consider Howard's third alleged protected activity, *i.e.*, "Howard's January 30, 2003, anonymous complaint to KDMM." There is no dispute that at no time before his discharge was Howard's identity as the anonymous complaine to the Kentucky mine officials disclosed. What is known is that Kentucky Inspector George Johnson, went to Cave Spur on January 31, and told Cave Spur officials only that he was there on an anonymous complaint. It is also noted that after his inspection Johnson concluded that the mine had adequate ventilation and that there were no violations.

I find Superintendent Mosely's testimony credible that he did not in fact suspect that Howard was the person who called in the anonymous complaint because, as he explained, 35 people were laid-off and "not all of them were happy." Indeed, several of those laid-off miners either did not apply for employment at Panther Mining or applied and were rejected. I therefore also find Mosely's testimony credible, that he in fact did not know who made the anonymous complaint when he spoke to Kegan later that same day. However, even if Mosely and Kegan had suspicions that Howard had made the anonymous complaint both Kegan and Adams denied that any such suspicions were communicated to Adams before Adams discharged Howard. In light of Kegan's and Adams' credible denials I cannot infer that Kegan indeed suspected that Howard was the anonymous complainant or that Kegan relayed any such suspicions to Adams. Under these circumstances I do not find that Adams' discharge of Howard was motivated by any suspicion that Howard was the anonymous complaine to the Kentucky mine officials about the Cave Spur mine.

The Secretary's second alleged protected activity, *i.e.*, "Howard's January [30], 2003, safety complaints during his meeting with Kegan in which he told Kegan about ventilation and other problems at the Cave Spur mine," appears to be undisputed. As previously noted, Ross Kegan was vice president of operations for parent company Black Mountain. Kegan's and Howard's versions of the meeting differ to some extent. However, in critical respects, it is clear that, during the meeting, Howard raised the subject of ventilation problems and the use of crib blocks to elevate the roof bolter at Cave Spur (Tr. II. 14). Howard testified that he also raised questions about water conditions at Cave Spur (Tr. I. 36-48). The fact that Howard was no longer working at Cave Spur where the alleged unsafe conditions had previously existed and in the overall context of Howard's dissatisfaction with being transferred from a day production shift to a night maintenance shift and his belief that Cave Spur management had showed favoritism toward another foreman who had been retained at Cave Spur, I find Kegan's version of the meeting to be the more credible. Howard's testimony is also considered in light of the credibility issues previously noted. Kegan described the meeting in the following colloquy at hearing:

Q. [BY MR. HODGES] Now did Mr. Scott Howard come to visit you on January 30 of 2003?

A. Yes, he did.

Q. Was that the first and only time you had ever met with him?

A. Yes, it was.

Q. Is it usual or unusual for a foreman to visit with you about job related issues?

A. It would be unusual, if I recall I think it was through the three years and nine months I've been in my position at Black Mountain he was the first foreman that ever come in my office to visit.

Q. And within the operations of the companies who would the foreman go to if he did have problems?

A. The superintendent of his mine.

Q. When he came to visit you that day, just describe what happened. First, did he have an appointment?

A. No.

Q. All right. Then what happened?

A. He came to the office and notified my receptionist that Scott Howard was there and I considered it unusual and I didn't have any other appointments scheduled at that time, so it was no problem to get to see him.

I was seated at my desk; he sat across the desk from me and began describing several issues that he seemed somewhat agitated about. Among them were complaints he made about Cave Spur. He had in this area, especially overriding of employment, that was that he considered himself a better foreman than the numbers had shown, and production had shown on his section at Cave Spur.

He didn't feel like he had gotten a fair shake at Cave Spur. He described some issues at the Cave Spur. He described some issues at the Cave Spur that he felt contributed to his performance at Cave Spur, among them were ventilation problems. He did say that he had problems getting air on the section.

He said that it was common for the superintendent Larry Mosely to pull people off his section and take to the other section which had him operating short-handed.

He mentioned that he had been asked, if I recall correctly, to run roof bolter up on crib blocks so the ATRS would reach the top. And that's the gist of what he complained about at Cave Spur.

He did say that he felt the section foreman on 001 section on the day shift Jimmy Thomas was a favorite of Superintendent Larry Mosely. He felt that Larry Mosely tried to favor Jimmy Thomas so that Jimmy Thomas' production numbers looked better than his. And that was the motivation of the superintendent, he wanted Jimmy Thomas and didn't want anybody to run more coal.

Scott specifically said that the mine management didn't want him to run coal.

Q. Cave Spur mine management didn't want him to run coal?

A. Yes.

Q. What did you say to that?

A. I said that didn't make sense to me. Why would anybody not want you to run coal. He reiterated it was the desire to make Jimmy Thomas look good and have better production numbers than Scott's section?

Q. Now did Mr. Howard ask anything specific of you during that meeting?

A. No.

Q. Did he tell you about making complaints to management of Cave Spur?

A. I don't recall him saying that.

Q. Did he tell you that he intended to make safety complaints to both officials?

A. No.

Q. And did you make some response to Mr. Howard?

A. Well, he, as I stated, he was a little bit agitated and I'm not sure if he was aware of it or not, but the loudness of his voice had become somewhat elevated while we were discussing and so much so that after he left our office

manager wanted to know what he was so upset about, she made a specific comment about that.

My response to Scott, one, kind of calm him down a little bit and I told him my advice to him and I considered it good advice was that he focus on his new job at Panther and he needed to have good positive work attitude. He needed to work hard.

The superintendent there, Larry Adams, was a gentleman that I had known and worked around many years. I told him a lot of people like to work with Larry. And people that had worked for Larry for any length of time had developed a lot of loyalty to him and wanted to stay in his employ because of the way he operated his mines.

And that if Scott would focus on his job and work hard, that he would get along with Larry Adams just fine because Larry Adams did things by the book and he would have a long career, that Panther was a good mine, had a lot reserve and a long life there and he would have a good career in front him.

(Tr. II. 13-18).

Thus, while Howard clearly made what may be considered to be protected safety complaints during his meeting with Kegan, it is apparent that the thrust of the meeting was Howard's unhappiness with being transferred from day shift production foreman to night shift maintenance foreman. Indeed, at the end of the meeting it is apparent that Kegan assured Howard that if he focused on his job, and worked hard, he would have a good career in front of him, and could move up with more favorable job shifts and pay. Within this framework it would not be reasonable to infer that Kegan would have harbored ill-will toward Howard, such as would motivate him to seek his discharge.

It is uncontradicted, however, that following this meeting between Howard and Kegan, Kegan called Panther Mine superintendent Adams, and discussed with Adams the meeting he had with Howard. As previously noted, there is no sound evidentiary basis on which I can discredit Kegan's and Adams' testimony that Kegan did not tell Adams of any suspicions that Howard was the anonymous complainant giving rise to the KDMM inspection at Cave Spur. In regard to the telephone call with Kegan, Adams testified that "[he] told me that Scott had been to see him and he talked a little bit about Cave Spur, but he said he hadn't had any problems with Panther Mine." (Tr. II. 196).

This statement strongly suggests, and it may reasonably be inferred, that Kegan did however in fact relate to Adams some, if not all, of Howard's complaints about the Cave Spur operation, including complaints about the ventilation problems, water problems and/or using timbers to elevate a roof bolter. I therefore conclude, that as of the afternoon of January 31, 2003, Adams was aware by way of Kegan's call, of Howard's protected activities. I note

however that both Kegan and Adams, denied that Kegan directed Adams to fire Howard or suggested that Adams consider firing Howard, or suggested that Adams take action against Howard. I have no reason to discredit this testimony. Thus, it is clear that when Adams terminated Howard on February 3, 2003, he was aware of Howard's protected activity by way of two sources, *i.e.*, Howard's own statement to him at the time he hired Howard on January 28, 2003, and Kegan's telephone call on January 31, 2003.

There is also a coincidence of timing (six days and three days respectively) between Adams' obtaining knowledge of Howard's protected activity and the adverse action. Ordinarily, this evidence might suggest that Howard's termination may have been motivated by his protected activity. That evidence is negated however by the absence of evidence of hostility by Adams (or even Kegan) toward the protected activity. Indeed, Adams hired Howard with full knowledge of Howard's safety complaints about Cave Spur and only after Howard told him that he would refuse to perform the illegal "outlaw" work he claims he had performed at Cave Spur. According to Adams, Kegan also told him that Howard had not any problems with Adams' mine, *i.e.*, the Panther Mine. The only safety problems raised by Howard were allegedly at Cave Spur over which Adams had no responsibility, or particular interest. Thus, Howard's complaints, limited to prior conditions at another mine and his apparent satisfaction with the conditions at Adams' mine, suggest that Adams would have had little reason to be hostile toward Howard.

Finally, any finding that Adams would have been motivated to discharge Howard by Howard's protected activity concerning Cave Spur is further negated by the actual circumstances of his discharge. In this regard, I give the greater weight to Adams' description of the events leading up to that discharge. Howard's version of events that are in conflict with Adams' must be viewed in light of not only his own self interest but also because of his vague and confused description of that meeting. Howard's testimony, with this exception, was generally articulate. This suggests to me that, at best, Howard had a poor recollection of that meeting. Adam's version is also consistent with Howard's lingering dissatisfaction over what he felt was favoritism and unfair treatment at Cave Spur and his new job as a maintenance foreman on the "graveyard" shift. Howard's general credibility is also damaged for the reasons previously stated.

Adams credibly testified with respect to this meeting that he called Howard into his office on February 3, 2003, to discuss Howard's failure to complete his work the previous Friday. As previously noted, this was the first opportunity Adams had to meet with Howard following that Friday. Adams had been informed by the production foreman, David Fugate, that Howard had not completed the "moveup" on his Friday shift, causing a delay in production. (Tr. II. 205-206). Adams testified that when he called Adams into his office to discuss this issue, Howard lost his temper. According to Adams, Howard got louder and louder and told him that he was a production foreman and not a move foreman. At hearing, Adams further described Howard's actions in the following colloquy:

And as he was saying this, he was getting louder. I asked Scott, I said, Scott, [if] you are [a] production foreman and I sent you up there to run production, would you know what to do to correct these problems or would I have to send somebody up there to do it for you?" And he said, "No, I know what to do." I said, "Well, if you know what to, why didn't you do it." He just kept getting louder and louder with me in every word he spoke. That's why I told him, I said, "Scott, don't take this attitude with me because I don't tolerate this from employees." He looked at me and he said, "If anybody's got a friggin attitude it's you." (Tr. II. 199).

In response to Howard, Adams "told him to go get his stuff and turn it in [and said] I wouldn't tolerate that. He said, are you firing me. I said, yes, I'm firing you for insubordination." (Tr. II. 200). As previously noted, I find Adams' version of events to be the most credible and I find that this evidence further negates any inference that Adams' knowledge of Howard's protected activities provided any basis for his discharge of him.

In any event, even assuming, *arguendo*, that Howard engaged in all the alleged protected activities and that Respondents were motivated in part by such activities, I find that Respondents would have taken the adverse action in any event for his unprotected activities alone, *i.e.*, Howard's insubordinate behavior. In *Chacon*, 3 FMSHRC at 2510, the Commission also explained the proper criteria for analyzing an operator's non-protected business justification for an adverse action:

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

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. *Cf. Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." *Cf. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or sense of fairness or enlightened business practice. Rather, the narrow statutory

question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. *Cf. R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating and analogous standard).

The Secretary appears to argue in this regard, that the reasons stated by Adams for his termination of Howard were merely pretextual and speculates that the decision was no doubt influenced by instructions from Kegan. This argument is premised however, on a rejection of the testimony of Kegan and Adams which I have found credible. In addition, to accept the Secretary's argument would require acceptance of a scheme so complex as to stretch credulity beyond rational limits. First, Adams would have had to wait until Howard committed an obvious failure of his duties, then Adams would have had to trigger Howard's temper by bringing such failure to his attention and then hope that Howard would react in a disrespectful, offensive and insubordinate manner, thereby presenting the alleged pretextual grounds for Howard's discharge.⁴

The Secretary also argues that Kegan admitted that, to his recollection, no one had ever previously been terminated for insubordination and that accordingly Howard's termination on such grounds was evidence of disparate treatment and was therefore discriminatory. There is no evidence however that any other employee had ever acted in a manner such as Howard acted. Without such evidence a discriminatory or pretextual inference can not properly be made. Under the circumstances I find that Adams' stated reasons for discharging Howard, were credible, not pretextual and provided a reasonable and rationale basis to have legitimately moved Adams to discharge Howard.

Under all the circumstances, I do not find that the Secretary has sustained her burden of proving that Howard was discharged in violation of Section 105(c) of the Act.

⁴ While Adams testified that Howard used the term "frigging" while acting insubordinately, and while such term may be considered by some to be a profanity, insubordination and not merely the use of profanity was the stated basis for Howard's termination. Accordingly the "profanity analysis" set forth in *Secretary o/b/o Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (March 1984) is inapposite.

ORDER

Discrimination Proceeding Docket No. KENT 2003-313-D, is hereby dismissed. The order for economic reinstatement issued May 13, 2003, in the related Temporary Reinstatement Proceeding, *Secretary o/b/o Charles Scott Howard v. Panther Mining, LLC., et al.*, 25 FMSHRC 216 (June 2003) is hereby terminated 30 days from the date of this decision, unless a petition for review with this Commission is filed within that time. Commission Rule 70, 29 C.F.R. § 2700.70. *Secretary, o/b/o Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (September 1999).

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Stephen A. Sanders, Esq., Appalachian Citizens Law Center, Inc., 207 W. Court St., Suite 202, Prestonsburg, KY 41653-7725

Stephen M. Hodges, Esq., 208 Main Street, Abingdon, VA 24210-2904

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