

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

August 7, 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
ON BEHALF OF JAMES RIEKE, : Docket No. LAKE 95-201-DM  
Petitioner : NC-DC 94-10  
:  
v. : Cleveland Mine  
: Mine ID 33-06994  
AKZO SALT COMPANY, :  
Respondent :

**DECISION**

Appearances: Lisa A. Gray, Esq., Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois  
for Complainant;  
William Michael Hanna, Esq., Squire, Sanders and  
Dempsey, Cleveland, Ohio for Respondent

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of James Rieke pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, *et seq.*, the "Mine Act", alleging that the Akzo Salt Company (Akzo) transferred Mr. Rieke in violation of Section 105(c)(1) of the Act.<sup>1</sup>

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<sup>1</sup> Section 105(c)(1) 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

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other mine, or because such miner, representative of miners  
or applicant for employment is the subject of medical  
Footnote 1 continued

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.

More particularly, Mr. Rieke states in his complaint filed with the Mine Safety and Health Administration (MSHA) as follows:

I think Jim Bannerman is harassing me is [sic] because of the safety report I wrote on him. He received a D-1 from that. This took place on the 10th of February 1994. He has threatened me on my job and talks to me very loud and abusive. Now on 3-31-94 Jim Bannerman gives me a paper that states that I am disqualified on powder and on Eimco which reads - Mr. Rieke over the past few months your attitude as a powderman and its related work has reach [sic] the point that it can no longer be tolerated you are being disqualified as a powderman and Eimco operator as of March 31st, 1994.

In his complaint before this Commission the Secretary states in part as follows:

The Complainant was removed from his job as blaster on March 31, 1994. The mine operator's stated reason for the removal of the complainant from the blasting position was the Complainant's attitude.

The Complainant filed his complaint of discrimination on May 2, 1994. In that complaint, Rieke alleged that Jim Bannerman, the complainant's foreman, was harassing him because of a safety report that the Complainant filed against Bannerman on February 10, 1994.

The Complainant was witness to Bannerman removing a safety tag from a piece of equipment before Bannerman ascertained that the equipment had been repaired, and told Rieke and another miner to use the equipment, on February 10, 1994. The Complainant reported the incident to his safety committeeman, the safety committeeman reported the incident to MSHA. MSHA inspected Cleveland Mine and, after an

investigation of the alleged violation, the inspector issued Citation No. 4308683 on February 16, 1994, naming Bannerman as the company agent who committed the violation.

The Complainant suffered adverse action in that he was demoted to a laborer, with a reduction in his hourly wage because of his exercise of rights under Section 105 of the Mine Act.

## Factual Background

Complainant James Rieke testified that he is presently a haul truck driver for Akzo and has been since he lost his job as a powderman (blaster). He became a powderman in 1990. In that capacity he was responsible for scaling the faces loading the "ANFO" explosive and shooting the faces. Powdermen were also expected to fill-in for the Eimco front-end-loader drivers on their breaks. This procedure is known as "breaking out the Eimcos."

According to Rieke, on March 31, 1994, he was breaking-in a trainee as a new powderman and had five places to blast. In the first location they were scaling the face when Production Foreman Jim Bannerman approached and asked if he knew they had five places to finish that day. He told Rieke that if they were not completed before the end of the day "I will have something for you". They reached the second place to be blasted around 10:30 that morning and found that this face also needed scaling. Rieke called Maintenance Foreman Mike Decapite to obtain the mechanical scaler but it was not available. Around that time Mine Superintendent Matt Kajfez, Foreman Bannerman and miner's representative, Dan Bierschwal appeared and asked what the problem was. Rieke reported that the face needed scaling. Kajfez told Bannerman to "handle it the way he saw fit". The record does not show how many faces Rieke had actually powdered that day.

At the end of the shift Bannerman asked Rieke for his keys to the powder truck and told him that he was being disqualified as a powderman. Bannerman offered no explanation for the disqualification.

Rieke subsequently received a letter of disqualification signed by Bannerman and stating as follows:

Over the last few months your attitude as a powderman and its related work has reach [sic] the point that it can no longer be tolerated. You are being disqualified as a powderman and Eimco operator as of March 31, 1994.  
(Respondent's Exhibit No. 1)

The Secretary maintains that Bannerman's action on March 31, in removing Rieke from the powderman job, was motivated by, and was in retaliation for, Rieke's safety complaint on February 10, 1994, to his union safety committeeman and MSHA which resulted in the issuance by the Secretary of a "Section 104(d)(1)" citation

to Akzo and naming Bannerman as the responsible agent.<sup>2</sup>

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<sup>2</sup> Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection(c) to be withdrawn from, and be prohibited from entering, such area until an authorized representative of the Secretary determines that such

According to Rieke, on February 10, 1994, his co-worker, Paul White, observed a "down tag" on the powder rig. In spite of that, Foreman Bannerman purportedly directed them to operate the rig without determining whether repairs had been completed. According to Rieke, Bannerman removed the "down tag", stating that "we know the problem". Mine Superintendent Kajfez also came by at that time and although apprised of the circumstances also told Rieke and White to operate the rig. Both White and Rieke continued to believe that it was unsafe to operate the rig with the unrepaired hydraulic leak so Rieke reported this to his union safety committeeman. According to Rieke when Bannerman learned that he had called the committeeman he yelled at him saying "why would you guys run it yesterday and not today?" Rieke responded that it was because there was no "down tag" on it the day before. The union representative subsequently re-tagged the equipment, again taking it out of service and an inspector for the Mine

Safety and Health Administration (MSHA) subsequently appeared and, based in part on the report by Rieke, issued Citation

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violation has been abated.

No. 4308683 naming Rieke on its face.<sup>3</sup>

Shortly after this incident Rieke was transferred to work under Foreman Herb Kanzeg in a different section of the mine. Rieke thought the transfer was the result of "communications problems" with Bannerman. Rieke maintains that driving the Eimco's was not part of his job even though his job description required him to perform "other work as assigned". Rieke maintains, however, that such "other work as assigned" was to be performed only when he had nothing else to do. Rieke testified that he did not mind breaking out the Eimcos as long as he had nothing else to do. However, if he was in the midst of powdering he did not believe it was appropriate for the company to tell him to do something else. He asserts that they have the right to assign other duties only if someone is ill or off work. Rieke concedes that he did not like being pulled off his job as powderman to break out the Eimcos.

Paul White testified that he was working with Rieke as a

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<sup>3</sup> The citation issued on February 16, 1994, states as follows:

"On the day shift 2-10-94, according to two blasters, the foreman, Jim Bannerman, was observed removing an out-of-order tag from the No. 602 powder rig and instructed employees Jim Rieke and Paul White to operate this machine without checking to see if repairs had been completed. This piece of equipment had been removed from service because of a crack in the work platform lifting cylinder. The two employees used this elevated work platform to load explosives at working faces in height ranging from floor level to approximately 12 to 13 feet high. A fall from this height could cause broken bones or dislocations. The No. 602 powder rig has since been repaired. This is an unwarrantable failure."

powderman on February 10, 1994. On that date he and Rieke arrived at the face and found a tag on the powder rig. They called Foreman Bannerman who observed the tag and told White to nevertheless start the equipment. According to White, Bannerman apparently did not see the hydraulic leak causing the problem and told them to operate the rig. Rieke later reported this incident to the union safety committeeman and was told to "down it" if it was unsafe. They thereafter "downed it" and reported this to Bannerman. According to White, Bannerman was "upset" that they were not going to run it and raised his voice "quite a bit" at Rieke. He finally just "gave up" and told White to take the rig to the shop. White observed that there was a "personality conflict" between Bannerman and Rieke and noted that Rieke did not like to relieve the Eimco drivers. White also agreed that Rieke was "just looking for trouble concerning Bannerman" but at the same time Bannerman was "harder" on Rieke than on other employees. Former powderman Steven Dean confirmed that Bannerman was "harder" on Rieke than anyone else.

Union steward and an 18-year employee for Akzo, Don Bierschwal, attended Rieke's first step grievance proceeding in March 1994. According to Bierschwal, the only reason Bannerman gave for the disqualification was Rieke's "attitude". No one explained what was meant by the term and Bierschwal was unaware of any previous disqualification for "attitude". In the past, disqualification from a job had usually been based on something like tearing up equipment and even then only after several written reprimands. Rieke's purported refusal to break out the Eimco's was not raised during the processing of the grievance as a basis for the disqualification. Bierschwal was also present underground when Bannerman asked Rieke why he was taking so long to scale the face. According to Bierschwal, Rieke responded that it was because he was hand scaling. Bierschwal noted that Bannerman appeared surprised by Rieke's explanation and admitted that he would not have called out mine superintendent Kajfez, Baker and Bierschwal if he had known the reason for Rieke's difficulties. Bannerman had apparently failed to inquire.

Gregory Ruble, an Akzo electrician and former union steward, also testified that he had never seen anyone at Akzo disqualified because of "attitude". Ruble also observed that Akzo's normal disciplinary procedures were not followed in Rieke's case. It had been the long standing practice to first provide counseling, followed by a verbal warning and two written notices.

Ruble also attended the first step grievance proceedings following Rieke's disqualification and heard the mine

superintendent state that Rieke's problem was that he was always writing safety reports and requesting safety men and shop stewards. According to Ruble, management representatives also stated at the grievance proceeding that Rieke's problem was that he "didn't want to work under certain conditions that he felt was unsafe". Ruble also testified that Rieke's purported refusal to break out the Eimco's was not brought up at the grievance as a basis for his disqualification.

Production Foreman James Bannerman testified that his problems began with Rieke on September 20, 1993, in regard to breaking out the Eimcos. He directed Rieke to break out an Eimco but later saw it parked. Rieke purportedly stated that he thought it was broken down. On September 22 Rieke again purportedly failed to break out the Eimco's. Bannerman told Rieke that he wanted him to break out the Eimcos in the future without being told.

On March 31, 1994, Bannerman was acting as Rieke's foreman when he observed that Rieke had by 10:00 a.m. powdered only one place. He asked Rieke what the problem was since they had five places to powder that day. Rieke purportedly responded that "we will do what we can." Bannerman maintains that he told Rieke that he expected him to complete all five places or he would have "something" for him. Bannerman testified that a powderman should be able to powder an average of five rooms a day but admitted that on some days they were able to powder only two rooms.

Around noon Bannerman noted that Rieke and his partner were still working at only the second place to be powdered so Bannerman called Mine Superintendent Kajfez, Bill Baker and Shop Steward Bierschwal to talk with Rieke. According to Bannerman he asked "why are we having a problem with you" and Rieke responded because the rest of the guys are "suck asses". Bannerman maintains that he then walked away. He claims that he never heard Rieke say that the delay was caused by having to hand scale the faces. Moreover, Bannerman testified that in any event in his opinion the rooms did not need further scaling. Bannerman testified that he decided to disqualify Rieke because of his previous problems breaking down the Eimcos, for what he believed was Rieke's work slowdown on March 31 and for his "attitude" in referring to other employees as "suck asses". Bannerman maintains that when he disqualified Rieke on March 31 he had no knowledge that Rieke had made a safety complaint giving rise to the MSHA citation naming Bannerman as a mine official responsible for illegally removing an out-of-order tag on February 10, 1994.

Akzo's Human Resources Manager, Russell Ryon, also attended Rieke's second step grievance proceeding. Rieke stated at that

proceeding that it was necessary to make the places safe by hand scaling and this was one reason why he could not complete his work that day. Ryon recalled that Bannerman disagreed with Rieke, maintaining that the places did not need scaling. Ryon also noted that if Bannerman was named in the citation he would have known that the February 10, 1994, citation had, in fact, been issued. Plant Manager Bruce Higgins confirmed that, in fact, as soon as they received the "(d)(1)" citation they began an investigation in which he personally interviewed Bannerman. The interview took place within a few days of the issuance of the citation on February 10, 1994.<sup>4</sup>

### Analysis

The Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Mine 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 (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 (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

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<sup>4</sup> Subsequent to Rieke's disqualification as a powderman a letter was placed in Bannerman's personnel file for his connection with the violation charged in Citation No. 4308683. He was also subsequently charged by the Secretary under Section 110(c) of the Act for a "knowing" violation.

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).

Within this legal framework and the undisputed evidence, it is clear that Complainant Rieke engaged in protected activity on February 10, 1994, as alleged when he filed a safety complaint to Akzo management through his union safety committeemen concerning the purported illegal and unsafe activities of his foreman, Jim Bannerman, in removing a danger tag from the powder rig, and, subsequently, by reporting the incident to an MSHA inspector who subsequently issued a citation to Akzo for the violation.

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 (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 found that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case".

In this case it is clear that Akzo management and, in particular, Rieke's foreman, Jim Bannerman, knew of Rieke's protected activity. Indeed, Rieke was named on the face of the citation issued to Akzo on February 16, 1994. In addition, Akzo plant manager, Bruce Higgins, testified that he conducted an investigation within a few days of the issuance of the citation which included an interview about the citation with Bannerman. Human Resources Manager Russell Lyon, who testified that if Bannerman had been named in the citation as he was, he would have known of it fairly soon after it was issued. Finally, since both Rieke and his co-worker were the miners Bannerman directed to remove the "out-of-order" tag from the powder rig, were the employees directed to operate the powder rig, and were named on the face of the citation it would have been obvious that they were the source of information leading to the issuance of the subject citation.

Significantly, Bannerman's denial at hearing that he knew of

the citation prior to his disqualification of Rieke is directly contradicted by Akzo's own witnesses, Plant Manager Higgins and Human Resources Manager Russell Ryon. I conclude from this evidence that not only did Bannerman have prior knowledge that Rieke had been the source of information leading to the issuance of the subject citation naming him (Bannerman) as a culpable management official, but also that Bannerman tried to conceal in his testimony the fact that he had such knowledge. This not only demonstrates a lack of credibility in itself but also may be construed as evidence of a guilty mind - - a further indicia of discriminatory motive.

The credible evidence suggesting that Bannerman became angry and yelled at Rieke after he learned that Rieke had reported the unsafe powder rig to the safety committeeman demonstrates animus and is another circumstantial factor pointing to discriminatory motive. In addition, according to Gregory Ruble, the former union steward who attended Rieke's first step grievance proceeding, the mine superintendent stated at that proceeding that one of Rieke's problems was that he was always filing safety reports and safety requests and asking for the shop steward. Such evidence of hostility towards Rieke's protected activities, which may reasonably be inferred to include his safety complaint on February 10, 1994, was not merely a circumstantial factor but a direct factor pointing to discriminatory motivation.

As the Commission also noted in *Chacon*, coincidental timing is another indication of illegal motive. Rieke's initial safety complaint in this case occurred on February 10, 1994, and his complaint to the MSHA inspector preceded the citation issued on February 16, 1994. The disqualification of Rieke by Bannerman took place on March 31, 1994 -- within six weeks or less of the protected activity.

Finally, there is credible evidence of disparate treatment. According to Gregory Ruble, the former union steward at Akzo, he had never previously seen anyone at Akzo disqualified for the reason Akzo asserted in Rieke's case, i.e. "attitude". Moreover, Ruble observed that the normal disciplinary procedures were not followed in Rieke's case. According to Ruble, it had been the long standing practice to first provide counseling to an employee presumably before taking action such as the job disqualification here taken against Rieke. In addition, Rieke's testimony is undisputed that the procedures for disciplinary action first provided for counseling, then a verbal warning, two written reprimands and then a final notice. Bierschwal also corroborates this testimony.

Within the above framework of credible evidence, I therefore conclude that the adverse action against Rieke was, indeed, motivated at least in part by discriminatory reasons. Akzo maintains however that it would have taken the adverse action against Rieke in any event on the basis of his unprotected activity alone, i.e. his refusal to break out the Eimcos, his purported work slowdown on March 31, 1994, and for his "attitude" in purportedly referring to other employees as "suck asses". These, of course, were the reasons cited by Bannerman at trial as the underlying basis for his disqualification of Rieke. This argument relates to an affirmative defense under the *Pasula* analysis.

In *Chacon* the Commission explained the proper criteria for analyzing an operator's business justifications 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 conclude that the justification is so 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, (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 our sense of fairness or enlightened business

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

In this case I reject Akzo's purported business reasons for Rieke's disqualification as pretextual. First, none of the reasons advanced by Bannerman can be believed because of his established lack of credibility in denying knowledge of the issuance of Citation NO. 4308683 prior to his disqualification of Rieke. Second, the only reason initially given for Rieke's disqualification was his "attitude". Even at Rieke's grievance proceeding it appears that no explanation for this grounds was furnished and "attitude" had never before in the memory of former union steward Gregory Ruble been cited as a grounds for disqualification. While there is some evidence that Rieke's purported work slowdown may have been raised at one of the grievance proceedings as a reason for the disqualification that in itself may very well have been a protected activity in that the delay in powdering faces appears to have been due to the safety need for hand scaling. Significantly, according to former shop steward Ruble these reasons were also not cited at the grievance proceeding. It is also noteworthy that two of the reasons Bannerman cited at trial - refusing to break out the Eimco's and calling other employees "suck-asses" were also not, according to the evidence, ever raised at the grievance proceedings as a basis for disqualification.

Under all the circumstances I conclude that, indeed, Rieke suffered discrimination in violation of the Act for his disqualification from the job of powderman on March 31, 1994. Accordingly, Complainant James Rieke must be returned to his position as a powderman/blaster.

### **Civil Penalty**

Considering the criteria under Section 110(i) of the Act, I also find that a civil penalty of \$2,000 is appropriate. Rieke's disqualification was serious in its potential impact on the

exercise of miner's rights under the Act. Moreover this action was obviously based on his protected activities and therefore may be deemed to be the result of high negligence.

### **ORDER**

Akzo Salt Company, Inc. is directed to immediately reinstate James Rieke to his position as powderman/blaster. The parties are further ordered to confer regarding any claimed damages and to report by telephone to the office of undersigned on or before August 25, 1995, as to whether such damages can be stipulated. If such damages cannot be stipulated by that date, hearings limited to the issue of damages will be held on August 31, 1995, at 9:00 a.m. in Medina, Ohio. Inasmuch as issues regarding damages have not been resolved, a final order regarding payment of civil penalties will be deferred. This decision is accordingly not a final decision. *Boone v. Rebel Coal*, 3 FMSHRC 1900 (1981).

Gary Melick  
Administrative Law Judge  
703-756-6261

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