FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 3, 2003

PAUL LANDREVILLE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2003-55-DM
v.	:	NC MD 02-07
	:	
NORTHSHORE MINING COMPANY,	:	North Shore Mine
Respondent	:	Mine ID 21-00209

DECISION

Appearances: Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for the Respondent.
Paul Landreville, Virginia, Minnesota, *pro se*.

Before: Judge Schroeder

This case is before me on a Petition under Section 105(c)(3) of the Mine Safety Act by a mine former employee alleging discrimination as a result of his exercise of rights under the Mine Safety Act. A hearing was held in Duluth, Minnesota on June 4-5, and continued on July 14-15, 2003. [1]

INTRODUCTION

While a claim of discrimination under the Mine Safety Act is usually driven by the particular facts of the case, the legal pattern through which those facts are evaluated is important. In a case involving a claim of discrimination under the Mine Safety Act, the complainant bears the initial burden of showing (1) that he was employed as a miner, (2) that he exercised rights protected by the Mine Safety Act, and (3) that he suffered adverse action from his employer in circumstances in which it is reasonable to infer that the exercise of rights under the Mine Safety Act motivated in some substantial part the adverse action. When these three elements have been shown by competent evidence, the burden shifts to the respondent to show (1) that the complainant's evidence is defective, and/or (2) that any adverse action suffered by the complainant could reasonably have been motivated at least in part by reasons unrelated to the exercise of rights under the Mine Safety Act. When these two elements have been shown by

[1]References to the Transcript of the Hearing will be indicated by "Tr" and a page number. References to record exhibits offered by the Complainant will be indicated by "PL" and a page number. References to record exhibits offered by the Respondent will be indicated by "N" and a page number.

competent evidence, the burden shifts back to the complainant to show that the motivation for the adverse action other than the exercise of rights protected by the Mine Safety Act was merely pretext. *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Sorenson v. Intermountain Mine Services,* 17 FMSHRC 145 (Feb. 1995).

In this case, many of the necessary factual elements are not in dispute. What is in dispute is the reason for the adverse action taken against Mr. Landreville by NorthShore Mining; Mr. Landreville contending his termination was triggered by his pattern of complaints on safety issues, while NorthShore contends he committed serious work-rule infractions and generally performed as an inadequate employee. I note at the outset that my consideration of Mr. Landreville's contentions represent the fourth opportunity he has had to argue these points. He has unsuccessfully appealed to an arbitrator under his union contract, to the Minnesota Unemployment Compensation Board, and to the Mine Safety and Health Administration.

Following the hearing, the parties were given an opportunity for oral and written argument. After careful study of the record and consideration of the arguments made concerning that record, I make the following findings and conclusions:

FINDINGS OF FACT

Paul Landreville was employed by Northshore Mining Company for the period June 1998 to June 2002. For much of that period he was an electrician that worked with a crew of electricians to construct and maintain electrical infrastructure to an open pit taconite mine. On June 5, 2002, his employment by Northshore Mining Company was terminated. During the course of his employment as a miner he raised safety issues (involving electrical and other crafts) with his immediate supervisors, with mine management and with personnel at the Mine Safety and Health Administration. He asserts his termination was the result of hostility toward him created by his attempts to raise safety issues.

Mr. Landreville was hired in June 1998 at the Silver Bay Processing Plant as a maintenance technician (Tr. 86; N-12, p.31). He had worked for United States Steel Company at its Minntac facility for two years as a millwright and electrician (Tr. 86: N-12, pp.4, 32). Minntac is a large taconite mine with an associated pellet processing facility similar to Northshore (Tr. 86). While at Minntac, he had experience with high voltage and high voltage switch gear (Tr. 87). While at Silver Bay, Mr. Landreville sought to transfer to the Babbitt facility (Tr. 64, 564). This required an interview with a group of hourly and management employees from Babbitt's electrical group (Tr. 782-3). At that time, the electrical group was supervised by Richard Judnick and the interviewers included hourly electricians Bob Toumela, Scott Eckman and Terry Sunsdahl (Tr. 784). Mr. Landreville did not receive the position at Babbitt because these hourly employees did not feel that Mr. Landreville was qualified to perform the job and had not been truthful in his interview (Tr. 782-3).

At a later date, Mr. Landreville was able to transfer to Babbitt as a production truck driver (Tr. 65, 87). In approximately the fall of 2001, Mr. Landreville was able to transfer into a position in the electrical group in the maintenance department (Tr. 65). Initially, he was

supervised by Brad Dahl because Mr. Judnick had been assigned to a special project (Tr. 750; see also Tr. 84). Mr. Judnick returned to his supervisory duties over the electrical group in October and November 2001 (Tr. 690).

In the beginning, Mr. Landreville's duties involved essentially "shadowing" another member of the electrical group (Tr. 248-9, 337). Those miners would perform their day-to-day tasks and show Mr. Landreville the procedures for performing the jobs safely and ask him if he had any questions (Tr. 248-9, 364-5, 477). He was not considered generally receptive to the training and he frequently commented that he had worked on more sophisticated systems at Silver Bay or that he "knew everything about that" (Tr. 184, 293, 334, 364-5, 478, 684; PL-1; N-7A, B, E). He also frequently commented that the procedures at Silver Bay and Minntac were different and better (Tr. 186, 364, 709-10; N–7 A through E).

In early October 2001, there was an incident that resulted in a counseling session for Mr. Landreville with Mr. Dahl (Tr. 683; N-13). Two hourly employees in the crusher brought it to Mr. Dahl's attention that Mr. Landreville had been unable to repair a problem another electrician was able to fix (Tr. 683, 686). During the incident, Mr. Landreville indicated an unwillingness to solve the problem. During the incident he had taken the time to eat his lunch and had, at one point, simply sat down without trying to solve the problem (Tr. 302; PL-1; N-13, pp.1-5). To a supervisor who observed him sitting down, leaning against a piece of equipment, he appeared to be sleeping, although Mr. Olson, who was the electrician involved, thought he was just sitting down (Tr. 302, 344; N-13, pp.1, 3). When Mr. Dahl met with Mr. Landreville, he indicated that he did not need training and said he was training Mr. Olson (Tr. 684: PL-1). Mr. Olson had, in fact, been the one who corrected the problems that Mr. Landreville did not (PL-1; N-13, pp.1-5). Mr. Dahl concluded that Mr. Landreville needed more training and he was assigned again to accompany other electricians for training (Tr. 336, 687; PL-13). He was not disciplined for these actions.

Mr. Landreville was also counseled by Mr. Judnick at various times about his excessive use of the telephone (Tr. 767-8; N-13, p.7). Other mine personnel observed this (Tr. 374; N-7E, p.3), and some complained to Mr. Judnick about Mr. Landreville's use of the telephone (Tr. 768). They also complained about difficulty in reaching him when he was on pit patrol and complained that he was slow in responding (Tr. 768, 827). He was also reported to tend to leave jobs for the next shift of electricians (Tr. 294, 372; N-7 A through E). He was not disciplined for these actions.

A safety work order system has been established by Northshore to permit employees to submit work orders related to safety issues (Tr. 99, 531). Mr. Landreville submitted two such orders between October 2001 and the end of May 2002 (Tr. 735-6; N-30). He was told on a number of occasions to use the system (Tr. 678, 725). Other employees used it far more frequently (Tr. 735-6; –30). The computer system automatically reminds management concerning outstanding safety work orders to ensure the work is done (Tr. 531-2, 690).

The program also involves the use of hourly safety coordinators to make safety inspections and report unsafe conditions to management (Tr. 529-30, 578-9). A portion of the Northshore Employee Handbook requires that "(e)ach employee must report to his/her immediate supervisor any unsafe condition, accident, injury, or property damage prior to the end of their working shift" (N-3A, p.5-1). The safety program also involves regular safety meetings and training (Tr. 528). It is portrayed as intended to instill in the workforce an attitude or culture that unsafe conditions are to be reported and corrected (Tr. 535-6). This goal is set out in its General Safety Rulebook on the first page:

> NO JOB IS SO IMPORTANT OR CRITICAL THAT IT CANNOT BE DONE SAFELY. IF SAFETY WILL BE COMPROMISED, IT IS THE RESPONSIBILITY OF EACH EMPLOYEE TO STOP THE WORK UNTIL THE SITUATION CAN BE REMEDIED, i.e., SAFE PRODUCTION. (N-4B, p.1; see also Tr. 577)

Northshore's approach has achieved substantial results. The Babbitt Mine had not had a lost time injury for almost three years at the time of the hearing (Tr. 573). It had received recognition over the last several years by MSHA for its injury free record (Tr. 573-5).

Mr. Landreville has also shown difficulties in following instructions. On May 7, 2002, he asked for overtime and Mr. Judnick specifically assigned him the job of blowing out the control cabinets in the crusher building (Tr. 763-4; N-13, p.11). This was a job that needed to be done for reasons of safety (Tr. 764-5). Instead of performing the job he was assigned, he "air gapped" the 30" motors at the crusher (Tr. 764). He did this job despite the fact that other electricians told him it was unnecessary (Tr. 430-1,459, 764). He was not disciplined for this infraction.

On May 22, 2002, there was an incident that brought issues with respect to Mr. Landreville to a head. In the course of normal mine operations, an explosive blast had occurred that day. The blast damaged some power lines coming out of the west pit feeder in the pit (Tr. 54, 116, 268, 270; N-16). To enable mining operations to continue with powered equipment, it was necessary to reconfigure the power in the pit (Tr. 276-7). Prior to the blast, the power had been supplied from the west pit feeder substation located near the crusher building (Tr. 53-4; N-16).

Once the damage was discovered, Mr. Landreville locked out [2] the substation as part of his pit patrol duties; it had already been deenergized before the blast (Tr. 54, 273). In order to develop a plan of action concerning getting power to the pit equipment, two pit supervisors, Bernie Barich and Byran Rusco, came to the electricians' room to discuss what would be done (Tr. 277, 350-1, 462; PL-1). This kind of informal gathering of co-workers appears to be a

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[2] A "lock out" is a process whereby a switch is rendered inoperable by placing a padlock on the switch arm. This process insures the system segment on the outbound side of the switch is not re-energized without the knowledge of the person placing the lock. It is possible to have multiple "lock outs" on the same switch at the same time.

regular part of how the electricians at Babbit did their work. Mr. Landreville was familiar with the practice.

A number of the electricians, including Mr. Landreville, participated in the discussion (Tr. 278, 350-1, 418). The weight of the evidence is that Mr. Landreville offered a suggestion that would have resulted in power going to one of the pieces of mining equipment that was affected (Tr. 118, 184, 513; N-5). Instead, it was decided to bring the power from the south mine substation so that both a drill and a shovel could be energized (Tr. 280, 350-1, 513-14). This would involve changing jumpers at the location where the lines for the west pit substation and the south mine substation met in order to permit power to flow from the south substation (Tr. 280, 351-2; N-16, pt. C). Mr. Landreville was present in the room as this option was discussed and the decision made (Tr. 277, 353, 390-1,462, 513-15, 517; -5). Mr. Landreville at one point denied being present and at another point contended he had been in and out of the room as the discussion proceeded. It appeared to others that he was present at the critical decision stage of the discussion and that he understood the discussion as it related to his work responsibilities as pit patrol. He had a work responsibility to understand the outcome of the discussion in order to be a safe and responsible member of the electrical team. After the discussion, the electricians left the room at the same time (Tr. 752).

Following the discussions, Todd Pontinen and Scott Eckman performed the pole work to accomplish the power rerouting task (Tr. 354). Two sets of cables ran from a three pole structure midway between the west pit feeder and a switch house for the Number 127 shovel (Tr. 351; N-16) Jumpers were moved, permitting power to flow from the south mine substation line to two taps, including the switch house for the 127 shovel and a second nearby switch house to which a drill cable were connected (Tr. 351,355; N-16). Mr. Pontinen locked out the west pit substation and the south mine substation before the work was performed (Tr. 354-5, 418). When Mr. Pontinen and Mr. Eckman switched the cables, they used a bucket truck to lift Mr. Pontinen up to the power cables (Tr. 354). While they were using it, it was parked jutting out into the mine road (Tr. 357, 419). It was a distinctive orange color and they put cones around it (Tr. 357). While they were performing the work, Mr. Landreville passed them in the pit patrol truck (Tr. 358, 414, 420). He could not help seeing the work in progress and was under a duty to inquire as to the significance of the work if he did not already understand the significance of the work.

Before the lock was taken off the south mine substation, Mr. Eckman contacted the electricians in the pit, including Mr. Landreville, to establish that they were clear of any danger before power was restored (Tr. 358-9, 402, 420-1). Mr. Landreville acknowledged the call and gave a response that he was in the clear (Tr. 359, 420-1, 438, 458). The call, at the very least, should have alerted Mr. Landreville that changes were occurring in the power distribution network. If he did not understand the significance of the changes, he was under some duty to inquire. He made no inquiry following the radio call.

Hugo Schulz, the mine's most experienced electrician, was also working in the pit that day (Tr. 461). He went to the switch house for the 127 shovel to change the rotation on the motors (Tr. 464). In order to do so, he had to "lock out" the switch house and remove what is

known as a "Kirk key" from the front of the switch house to open the back to check the rotation (Tr. 465). He performed this operation on both the drill and 127 shovel (Tr. 466). He restored the switch houses to the condition he found them, i.e., in a condition to provide power to the drill and shovel (Tr. 466). He then went to the 127 shovel to check the rotation on the electrical motor there once the power was restored (Tr. 466). When he was there, he noticed that the shovel did not appear to be energized, while the drill nearby appeared to be, because its lights were on (Tr. 467). Mr. Schulz inquired of one of the bull gang members who was nearby who told him Mr. Landreville had been working on the shovel (Tr. 468).[3]

Mr. Schulz investigated and discovered the cable for the shovel had been disconnected from the junction box near the shovel (Tr. 468). Mr. Schulz then called Mr. Landreville on the radio and Mr. Landreville apparently told him that he had the Kirk key for the switch house (Tr. 470). Mr. Schulz heard a response that was broken but sounded like "got key" (Tr. 470). At the time of this radio conversation, Mr. Olson, who was working in the crusher that day, observed Mr. Landreville driving near the crusher and saw him turn around and head in the direction of the switch house (Tr. 284-5; see also Tr. 471-2). Mr. Schulz drove from the shovel to the switch house (Tr. 470; N-16). As he passed the crusher, he saw Mr. Landreville come from the direction of the switch house (Tr. 471). Mr. Schulz would have had a longer drive to the switch house than Mr. Landreville (Tr. 470 - 75).[4] When Mr. Schulz got to the switch house, it had been locked out (Tr. 471). This was the condition of the switch house that Mr. Landreville apparently described in the radio call with Mr. Scholtz.

Mr. Scholtz later learned from Mr. Olson about Mr. Landreville's reversal of direction at the time of the radio call and concluded that Mr. Landreville had lied about having the key and also concluded that the cable from the switch house to shovel was energized after it had been disconnected from the junction box (Tr. 472). He further concluded that Mr. Landreville did not tell the truth when he responded on the radio that he had the key (Tr. 473-4). Mr. Scholtz believed that the energized high voltage cable laying on the ground presented a significant safety hazard and was concerned about the nearby presence of the bull gang 100 feet away and the fact that a crew would be moving the shovel (Tr. 472).

It is standard operating procedure before working on a cable to lock power out at the

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[3] In testimony, Mr. Landreville admitted he did not follow standard procedure in working on the shovel in that he did not, according to him, lock out the switch house connection to the shovel until after he had finished his work on the shovel, apparently relying for his own safety on the remote lock out at the crusher placed earlier in connection with the blast damage.

[4] Mr. Landreville spent the vast bulk of his post-hearing memorandum on the issue of time periods necessary for Mr. Scholtz and Mr. Landreville to make their respective trips after the radio call. Data on time and distance for these trips is not sufficiently precise in the record to make the kinds of comparisons attempted by Mr. Landreville. The actual issue is the credibility of the two witnesses. I find Mr. Scholtz to be a more consistent and credible witness.

source closest to it to minimize the risk of the cable being reenergized from any source (Tr. 285-6, 288, 375, 377, 425, 474). It is a procedure that Mr. Landreville had been trained on by the other electricians when he had accompanied them and it was a procedure he had performed (Tr. 288, 377, 425, 475, 502). Mr. Scholtz was concerned about the incident because of the hazard involved and discussed it with Mr. Judnick, his supervisor (Tr. 475). Mr. Judnick discussed the matter with Mr. Landreville that day, along with a number of other issues about Mr. Landreville's work performance (Tr. 756-61). Mr. Landreville admitted that he did not lock out the switch house (Tr. 758). Although Mr. Judnick did not direct Mr. Landreville to report the incident in the log book before he left for the day and did not tell him what to write (Tr. 758), Mr. Landreville made an entry in the logbook (PL-6). Mr. Landreville wrote:

> Hookup to unit (I dropped power @ crusher west feeder put my safety lock on & opened up a box behind shovel with the switch house still in. This was wrong. I should have not relied only on the feeder being locked out but should have opened up switch house too.) The feeder can be energized from other sources by moving jumpers (PL-6).

On the morning of May 23, Mr. Dahl was contacted by several of the electricians who requested a meeting to discuss their concern with regard to the incident (Tr. 290, 360-1, 424-5, 672). Mr. Dahl contacted Carl Kerschen, Senior Area Manger for Human Resources, at his office in Silver Bay (Tr. 155, 673). Mr. Kerschen met with the electricians on the afternoon on May 23. Mr. Landreville was not working that day and did not attend the meeting (Tr. 159). He was not scheduled to return to work until May 28 (Tr. 159). In Mr. Kerschen's years of experience in human relations, for employees to request such a meeting was highly unusual (Tr. 157).

When Mr. Kerschen met with the electricians and heard their concerns for their safety and experiences with Mr. Landreville's work performance, he decided to have a complete investigation of the incident done by Kimball Alvey, Northshore's Area Manager for Safety and Loss Control (Tr. 158). Mr. Alvey had many years of experience working with MSHA and had been a special investigator for MSHA for several years and had conducted accident, Section 105(c), and Section 110©) investigations (Tr. 158, 561). As part of the investigation, Mr. Alvey interviewed the electricians and Mr. Landreville. In addition, Mr. Kerschen reviewed Mr. Landreville's personnel file, which contained references to some of the previous incidents such as the one in the crusher in October 2001 (Tr. 162; N-12, p.166). He also asked for any other notes that Mr. Dahl and Mr. Judnick might have so he could get an accurate picture of Mr. Landreville as an employee (Tr. 168-9). Among other things, this indicated that on at least five separate occasions, going back to when Mr. Landreville was at Silver Bay, he had been counseled about his work performance (N-1; N-12, pp.14, 15, 23, 24, 25; N-13, p.7; PL-1).

Mr. Kerschen asked Mr. Judnick to contact Mr. Landreville to schedule a meeting on Tuesday, May 28, the day Mr. Landreville was scheduled to return to work in order to hear his side of the story (Tr. 159). Mr. Judnick advised him that he was suspended from work pending

completion of Northshore's investigation (Tr. 160). Mr. Landreville had two telephone conversations with Mr. Judnick before and after his meeting with Mr. Kerschen (Tr. 775-6; N-8). Mr. Judnick regarded some of Mr. Landreville's comments in their conversations as threats because Mr. Landreville said if he was fired he would not be the only one (Tr. 777). Mr. Judnick construed this as a threat because he thought Mr. Landreville might fabricate accusations against himself and others (Tr. 777). Mr. Judnick reported the conversations to Mr. Kerschen and to Mike Johnson, Mine Manager of Babbitt Mine (Tr. 161).

During various meetings during this time, with Mr. Judnick and Mr. Kerschen, Mr. Landreville raised safety concerns (Tr. 161). Although they were unrelated to the incident on May 22, Northshore tried to ascertain the nature of his concerns and correct them (Tr. 161). To that end, they met with him on June 3 and developed a list of safety issues in discussion with Mr. Landreville (Tr. 161, 568, 603, 606,675). They included the following:

1. Overfusing on a heater.
2. Wiring on a crane in the crusher.
3. Practice of holding the undervoltage relay in on the shovels and drills when they were started using a portable power unit.
4. A light switch in the women's dry.
5. Sodium lights on the shovels.
6. Panels for heaters in the truck shop with wrong color wire.
7. Jib crane at top of loading bins-wiring too small.

(Tr. 675; N-26, 27)

This list was given to Bryan Baird, Northshore's safety representative, and an electrician, Mr. Toumela, to investigate (Tr. 192-3, 568, 675). There had to be follow-up on the item related to the shovels (Tr. 569; PL-5). Two items did not need corrections; the others were determined to not be problems or could be remedied by simple corrective measures which could have been taken by Mr. Landreville in the course of his work, such as by the addition of a piece of colored tape (Tr. 194-5; PL-5).

After the meeting to gather information on the safety issues, there was a second meeting with Mr. Johnson, the Mine Manager (Tr. 221). Mr. Landreville's suspension was continued at that time to investigate the telephone conversations and to complete Mr. Alvey's investigation (Tr. 221-2).

Mr. Alvey reported his conclusions to Mr. Kerschen following his investigation of the May 22 incident by memorandum dated June 5, 2002 (Tr. 565; N-2). Mr. Alvey concluded that failing to lock out the switch house "is a serious safety infraction not only of company rule and procedures, which cannot be tolerated" (Tr. 568; N-2). Mr. Alvey also reported his conclusions

verbally to Mr. Kerschen before the report was finalized (Tr. 565).

The decision was made to terminate Mr. Landreville's employment (Tr. 162). Mr. Landreville was advised of this on June 5, 2002, by Mr. Kerschen (Tr. 164). The decision to discharge Mr. Landreville was based upon a review of Mr. Alvey's investigation, Mr. Landreville's personnel file, the documentation of Mr. Dahl, the notes concerning the incidents in the fall of 2001, the statements of the electricians, and the notes of Mr. Judnick concerning his conversations with Mr. Landreville (Tr. 164-79).

Mr. Kerschen based the decision to discharge Mr. Landreville on the seriousness of the incident on May 22, upon input from his co-workers relative to his work performance, the fact that Mr. Landreville had falsely told his supervisors that he had not been trained on the switch house lock-out procedure, that he had harassed his supervisor creating a hostile workplace in violation of Company policy, that he had been counseled several times since October 2001, and had not improved his work performance, and that he had failed to correct unsafe work conditions (Tr. 180-90; N-1). Mr. Kerschen felt Mr. Landreville was going to continue to be a safety risk (Tr. 180).

The NorthShore Employee Handbook includes a number of grounds for immediate termination including violation of commonly accepted safe working practices, falsifying testimony in an investigation, and sleeping on the job (N-3, p.3-4). A violation of a known safety practice is sufficient, in and of itself, for termination (Tr. 182). Such misconduct has resulted in discharges of other employees (Tr. 199). In addition, there was a pattern with Mr. Landreville of ongoing problems with no improvement (Tr. 188-9).

The Employee Handbook provides a number of remedies for employees when they are disciplined or terminated (N-3A, pp 2-8 to 2-12,3-3). Mr. Landreville had three options: he could appeal to the General Manager, to a Peer Review panel or to an arbitrator (N-3A, pp.2-10, 3-3). He selected arbitration (Tr. 128).

The arbitration was conducted under the national rules of the American Arbitration Association for the resolution of employment disputes (Tr. 200; N-19). An experienced arbitrator conducted the arbitration hearing, which lasted three days (Tr. 204; N-17, p.1; N-24). During the arbitration, Mr. Landreville was entitled to counsel, which Northshore should have partially paid for (Tr. 128: N-3A, p.3-3). He did not retain counsel (Tr. 128).

The arbitrator's decision was issued on April 4, 2003 (N-17). The arbitrator upheld the discharge and found there was just cause to terminate Mr. Landreville's employment (N-17, p.7). The arbitrator further held that there was "no basis to conclude that Respondent's action represented retaliation for Mr. Landreville's reporting of safety concerns at the mine or for any other reason" (N-17, p.7). The arbitrator found that Mr. Landreville testified inconsistently and attempted to divert attention from the facts of the case by raising other issues (N-17, p.8). She also held that he had lied (N-17, p.8). She held that work in the mine required a high level of

trust and good communication and that the absence of such trust and communication created a "clear and present danger of future safety concerns." (N-17, p.8). Finally she held that the incident which supported termination reflects Mr. Landreville's "blatant disregard for standard operating procedures which, clear to even a novice, could result in a fatality." (N-17, p.8).

By letter dated June 7, 2002, Mr. Landreville made a complaint to MSHA. That letter raised the following issues:

1. Practice of holding the undervoltage relay in when starting the shovel from a portable power unit
2. Cable splicing and the splice kit used for cable splices
3. An insulator on the cable testing machine. (PL-3).

Most of the issues were different from what was raised on June 3 by Mr. Landreville (PL-3: N-26, 27). An investigation was conducted by MSHA and included personnel from its technical support group as well as an electrical inspector (Tr. 568-71; PL-2). No citations were issued although a recommendation, which Northshore followed, was made concerning the undervoltage relay (Tr. 572; PL-2). In addition, the cable tester which is referenced in the complaint had been voluntarily red-tagged and taken out of service pending completion of repairs (Tr. 572; PL-2).

CONCLUSIONS

A complainant in a discrimination case has the burden of showing two essential facts; (1) that the complainant engaged in activity protected under the Mine Safety Act, and (2) that an adverse action against the complainant was motivated in some part by the protected activity. The showing of motivation can be inferential or circumstantial. There is no requirement for a showing of a "smoking gun." *Secretary on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803 (April 1981). Once the miner has made an initial showing of the elements of a claim of discrimination, the respondent mine operator has the burden of showing either (1) that no actual protected activity occurred, or (2) that the protected activity did no in any way motivate the adverse action taken, or (3) that some unprotected action by the complainant was sufficient to justify the adverse action taken. *Haro v. Magma Copper Co.* 4 FMSHRC 1935 (November 1982). Unprotected activities which can be used as a defense to a claim of discrimination are activities such as insubordination, dishonesty, absenteeism, poor or unsafe work performance, and similar offenses. It is well settled that if an operator's business justification is reasonable it will be sufficient to sustain the defense. It is not my responsibility to determine whether I would have reached a different conclusion than that reached by the mine operator under the same circumstances. Unless the complainant is able to show that the mine operator's purported reasons are mere pretext, the merits, fairness, or wisdom of the adverse action taken is beyond my authority. To show that the mine operator's reasons are pretextual, a complainant must demonstrate that the reasons are implausible or incredible. *Secretary on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2516 (November 1981). The mine

operator is not required to be **right** but only to have been **reasonable** on the record before me. One of the primary indications that the mine operator acted appropriately under the circumstances is a properly documented investigation into the facts prior to taking the contested adverse action.

In this case, the complainant was successful in presenting a *prima facie* case. It was not seriously disputed that Mr. Landreville engaged in activity arguably protected under the Mine Safety Act. Over an extended period, and with greater frequency near the time of his employment termination, Mr. Landreville pointed out to his supervisors and to his coworkers what he believed were safety concerns in the work place. He took advantage of the computerized safety work order system used by Northshore. He pointed out safety concerns, not only in areas in which he had work responsibilities, but also on other subjects he happened upon in the course of his work.

Further, the closeness in time between his increased number of safety complaints and his termination is a reasonable basis upon which it can be inferred that the complaints were related in some degree to his termination. He did not present anything remotely resembling a "smoking gun" on improper motivation of Northshore management in taking action against Mr. Landreville. But for the limited purpose of finding a *prima facie* case to shift the burden of proof to the mine operator, the time element would be sufficient. I should note here that the Northshore management officials that testified were completely credible in both style and content of their testimony.

The Respondent submitted evidence on the reasons given for the termination of Mr. Landreville. Northshore contended the termination was based on the following grounds that are not protected activity under the Mine Safety Act:

1. He committed a serious safety infraction on May 22, 2002, by failing to lock out power to the 127 shovel at the nearest power source, the switch house;
2. He engaged in a pattern of behavior in conflict with his employment responsibilities that he failed to correct even though counseled repeatedly;
3. He lost the trust of his fellow employees in the electrical team in circumstances in which trust is vital to the safe and effective completion of the work;
4. He lied about his training and experience;
5. He made hostile and threatening telephone calls about his immediate supervisor.

For two basic reasons, I conclude that Northshore has met its burden of showing that the termination of Mr. Landreville was not motivated by activity protected under the Mine Safety Act; first, because of process of termination used by Northshore included a fair and reasonable investigation of the facts relied upon by Northshore, including an opportunity for Mr. Landreville to present evidence and question the evidence presented against him, and second, the record created in this case indicates to me that it is more probable than not that Mr. Landreville committed a serious safety infraction on May 22, 2002, that would by itself be sufficient to

justify the termination of Mr. Landreville. Each of these reasons needs to be explained in some greater detail.

Business Justification

In asserting the affirmative defense of independent justification (i.e., showing business reasons independent of actions protected by the Mine Safety Act) the employer has the burden of demonstrating that its actions were motivated by information and analysis of facts which establish independent grounds for the action taken. A reasoned and documented business judgment, which is beyond the power of this Commission to second guess, forms the basis for a conclusion that the reasons for the adverse action were beyond the protection of the Mine Safety Act. [5]

In this case, the process of making a reasoned and documented business judgment began with the conversations of Mr. Landreville's coworkers, Hugo Scholtz and Carl Olson, concerning the cable Mr. Scholtz found on the ground. Rather than take those preliminary conclusions to immediate action against Mr. Landreville, the coworkers began taking with others about those conclusions. They accumulated evidence and issues to present to Human Resources. From Human Resources the conversation went to a trained investigator, Mr. Alvey, who gathered more information and opinions. This level of information was delivered to management, who went on to afford Mr. Landreville an opportunity to respond. Actions against Mr. Landreville were measured and proportionate to the seriousness of the charges. Written statements were taken within a short time after the events of concern and were preserved for future review. Even after a termination decision was made, well-established procedures afforded Mr. Landreville further opportunities for review.

In this instance, the arbitration decision is entitled to significant weight. First, the arbitration was conducted under the national rules of the American Arbitration Association resolution for employment disputes (Tr. 200, 219). The arbitrator was an experienced employment arbitrator. Mr. Landreville was entitled to counsel but did not exercise that right (Tr. 128). The hearing lasted three days and Mr. Landreville called a number of witnesses and was able to cross examine Northshore's witnesses (Tr. 217). The testimony was under oath (Tr. 205). The factual issues were very much the same (–17). Mr. Landreville has not presented any evidence to suggest the arbitration proceeding was anything but a fair and honest review of the facts of his case.

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[5] A careful reading of the decision in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation,* 3 FMSHRC 2508, 2517 (November 1981) supports this position. The Commission in *Chacon* reverses on a substantial evidence basis the trial judges rejection of an affirmative defense by Phelps Dodge built on a careful documentation of a business case for termination.

Substantial Evidence

The evidentiary burden that rests on Mr. Landreville for him to succeed in this case is for him to show it is more probable than not that Northshore terminated his employment in substantial part because of his efforts to invoke his health and safety efforts protected by the Mine Safety Act. Rather than attempt to show that motivation directly from Northshore witnesses, Mr. Landreville attempted to show that the motivations articulated by Northshore in its termination action were incorrect and hence a pretext. I should note at this point that I do not consider it my responsibility or even within my jurisdiction to determine to a legal certainty whether Mr. Landreville either did or did not commit the work rule violations that he was accused of in the termination proceedings. My responsibility is to use the evidence concerning those alleged work rule violations to determine whether the respective burdens of proof have been met in this case, i.e., whether Mr. Landreville has shown by substantial evidence that Northshore was actually motivated to terminate him by reasons prohibited by the Mine Safety Act.

The Commission decision in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation,* 3 FMSHRC 2508, 2517 (November 1981) makes it clear that the burden Mr. Landreville faces is a heavy one. In interpreting a prior Commission decision, the Commission in *Chacon,* supra, said the following:

> 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." [Citations omitted] 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 and meets the first part of the Pasula affirmative defense test, 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 practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.
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> 3 FMSHRC 2516

Accepting Mr. Landreville's testimony at face value, he makes at most a plausible argument for error by Northshore management in evaluating the statements by co-workers on the hazards he created. I do not find in his allegations of error any evidence to support a conclusion that Northshore asserted the reasons for Mr. Landreville's discharge as a pretext for taking action against him that would otherwise be prohibited under the Mine Safety Act. However, there are a number of reasons to not accept Mr. Landreville's testimony at face value. Significant conflicts and contradictions are found on important points.

A typical example of this problem is the testimony concerning the delivery of a Northshore safety handbook to Mr. Landreville early in his employment. He first denied ever receiving a copy of the handbook. When confronted with a copy bearing his signature he was reluctant to agree that he had in fact received the document (Tr 106 - 111). Further, Mr. Landreville often claimed to be a very safe worker but admitted that on May 22, 2002, he violated a fundamental safety rule that required disconnection of electrical equipment at the disconnect point closest to the equipment. He admitted the violation but attempted to justify the lapse by other steps he had taken. Finally, he claimed to be not aware of the power rerouting plan developed at the electricians meeting on May 22, 2002. He conceded, however, that he was aware of the purpose of the meeting and that he planned to do other electrical work the rest of the day. Any safety conscious employee, particularly one with the assignment of "pit boss" would make it his business to learn the outcome of the meeting. Mr. Landreville's disclaimers of knowledge of the meeting and the outcome simply do not ring true.

ORDER

For all of the foregoing reason, the Petition filed by Mr. Landreville is DISMISSED.

Irwin Schroeder
Administrative Law Judge

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