

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 10, 1998

GARY D. MORGAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 98-17-D
v.	:	VINC CD 97-02
	:	
ARCH OF ILLINOIS,	:	Conant Mine
Respondent	:	Mine ID No. 11-02886

DECISION

Appearances: Leonard D. Rice, Esq., Du Quoin, Illinois, for the Complainant;
Frenchette C. Potter, Esq., Arch Mineral Corporation, St. Louis, Missouri, for
the Respondent.

Before: Judge Weisberger

This case is before me based upon a Complaint filed by Gary D. Morgan, (AComplainant@) alleging that he was discriminated against by Arch of Illinois (AArch@), in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (Athe Act@). Pursuant to notice, the case was scheduled and heard in Nashville, Illinois, on March 17-18, 1998. On May 26, 1998, Complainant filed a brief. Respondent's brief was received on May 29, 1998.

I. Complainant's Evidence

Arch operates a number of underground coal mines including the Kathleen Mine and the Conant Mine. Gary Morgan, a miner with more than 25 years experience, worked in various capacities in mines owned by Arch or its predecessor. In October 1989, he was recalled from an economic layoff to work as a utility person at the Kathleen Mine where he continued to work until he was laid off in July 1995, when the mine closed down. When he was called back to work at the Kathleen Mine, he was not required to take any tests. According to Morgan, most of the time at the Kathleen Mine he operated a scoop. He also drove a ram car, and relieved the regular bolter and continuous miner helper at lunch time and during overtime. Morgan estimated that, in total, at Kathleen Mine he operated a bolter for less than a year.

Morgan indicated that for the entire time he worked at the Kathleen Mine he had many confrontations with his immediate foreman, Ben Williams, and the latter cursed him. Morgan indicated that whenever the section was in production the dust was always bad (Tr. 30), and he complained to Williams about the dust. However, according to Morgan, Williams did not listen to him. Morgan indicated that Williams told that he had no time to water the dust as he was

loading coal. Morgan said that he tried to water the roads and scoop the dust out of the way in order to clear the dust.

In 1990, Morgan spoke to the mine manager, Harry Riddle, and told him that there was dust in the air and dust lying around. Riddle said he would try to get something done about it. The following day, there was not much dust, however, dusty conditions reoccurred.

Morgan indicated that on one occasion, in the east side of the mine, there was a very high dust content. In the middle of 1994, Morgan observed that dust pumps worn by miners were being turned off, that the sniffers on some dust pumps were being concealed under the lapels of coats, that curtains were left undone, and that dust pumps were being placed in fresh air. Morgan reported these concerns to Williams who made no effort to rectify them. On two occasions Morgan complained to Jasper Shirley Stirman, the Safety Committeeman regarding dust violations. Stirman reported these conditions to the MSHA Sparta Office, and to Dick Berry, Arch's safety coordinator, but he did not divulge to him the name of the person who had made the complaints.

Subsequently, around August 1994, Riddle met underground with William's crew concerning complaints about dust sampling. Morgan testified that he told Riddle, "I'm the one that turned you in" (Tr. 38), and that he had seen the dust pumps being turned off. Lee Summers, the miner who had been wearing the dust pump then called him a liar, and a confrontation ensued. According to Morgan, all this occurred in the presence of Riddle who then informed the men to take the proper dust samples and go back to work.

According to Stirman, at a monthly meeting to resolve the dust violations, Gene Sharp, the mine superintendent, said that A. . . [d]amn Morgan is the one that's causing the complaint" (Tr 17). Also, on two other occasions, Sharp made derogatory statements about Morgan.

In July 1995, after Morgan was laid off for economic reasons, he placed his name on Arch's panel for recall in September 1996. He was called for an inby position at the Conant Mine, and was given a written test. John Cotter, a shift foreman, told him that he passed the written test and was then to take a "hands-on" test. In order to pass this test he would have to operate three out of four pieces of equipment. Morgan received task training and was then first tested on the ram car, and then on the scoop. Prior to the testing, Cotter allowed him time to familiarize himself with these pieces of equipment. Morgan testified that prior to being tested on the roof bolter, he was not shown where the controls were located, and was not given an opportunity to familiarize himself with this piece of equipment. Cotter told him to back the bolter into position, and install 30-inch bolts. According to Morgan, when he started putting the bolts in the holes that he had drilled, a miner, Kenny Anheuser, made the bolts for him and handed them to him. According to Morgan, Cotter then told Anheuser that he could not continue to help Morgan because he was being tested. Morgan stated that, at the conclusion of the test, he felt confident that he had not done anything wrong. He asked Cotter how he did, and Cotter told him that he does not evaluate the tests, but merely records information ,and that someone else evaluates it.

Cotter then asked Morgan if he wanted to test on the continuous miner, and Morgan told him that he thought he only needed to be tested on three out of four pieces of equipment. Cotter indicated that he thought that he would offer Morgan the opportunity to test on the miner. Morgan testified that no one had introduced him to the controls of the miner, and he was not given any opportunity to "warm up." Morgan testified that, in operating the miner, he let the tail get into the roof which he termed a "bad move" (Tr. 60). Morgan eventually finished the test, and Cotter informed him that he would be notified in a few days.

Approximately 3 days later, Morgan called Bob Blaylock, the supervisor of safety at the Conant Mine, who informed him that he had failed the hands-on test. Blaylock told him that he did not change the bits, that he had bent a roof bolt steel (Tr. 62), and that he took too much time. Morgan testified that he told Blaylock that he did not bend any steel, that he changed bits as necessary, and that he did not know that there was any time limit. Morgan testified that Blaylock told him that if he did not pass the bolter test, he could not be considered for any other position at the mine. Morgan said that Blaylock told him that for an outby position he had to be tested on two out of three pieces of equipment, one of which must be the bolter, and that for an inby position he had to be tested on three out of four pieces of equipment. Blaylock told Morgan that if he would enhance his bolting skills, he could be considered for another job. Subsequently, Terry Morris, who had less seniority than Morgan was awarded an outby job. Morgan had not been notified of this position.

Dennis Dwayne Harrison, who was laid off from the Kathleen Mine late in the spring of 1995, had reported various safety concerns prior to being laid off as a pit committeeman. On August 20, 1996, Harrison was called to take a test for an inby position. He was given the hands-on test by Blaylock. The first piece of equipment that he was tested on was the bolter. He was given 25 minutes of familiarization during which time he put in about fifteen 48-inch bolts. After the test started, he drilled 30-inch holes. He had a helper who made up the bolts, and gave them to him. He did not complete the test because the bolter lost power. Harrison then was tested on the hauler, and the scoop. According to Harrison, Blaylock told him that he did not have any time to further test him on the bolter, but that he had passed the hands-on test, and a physical was scheduled.

Harrison testified that a week after he heard that Morgan was to be tested for recall he mentioned this to Williams. Morgan testified that Williams said A . . I've already told him if he does pass, not to put him in my unit with me (sic) (Tr. 121-122).

Stanley Dennis Warden was a miner operator at the Kathleen Mine. He indicated that Lee Somers worked with him as a miner helper, and that A we had a lot of trouble with him shutting the dust pump off (Tr. 127). Warden indicated that when dust sampling was taking place he had to make sure that curtains were up, and the miner operators stayed behind the intake air curtain. He said that one time he was A . . ordered to stand behind the curtain, and cut a hole in the curtain and look through the curtain to load the buggies (Tr. 128). Warden also indicated that he had helped several individuals who were tested on the bolter.

Lester Furlow, a miner working at the Conant Mine, testified that he was tested on the

bolter by Bill Young and Bob Blaylock in April 1993, for an inby position at the Conant Mine. He stated that he was allowed about 30 to 45 minutes to warm up during which time he drilled between 12 to 15 holes. He said that in the testing on the bolter he broke the steel and a clip that holds the bit onto the steel. A helper showed him how to change the spring and the steel. The helper did not do anything to assist him.

Gerald Selby, a miner who had worked with Morgan at the Kathleen Mine, was aware that Morgan had reported violations in 1994. He testified that he had seen Somers with a dust sampling machine pinned on, but with his coat placed over it. He stated that one time he saw Somers wearing a pump that had been turned off. According to Selby, at times, a dust pump on the section had been placed on the miner in a position where there was not any exposure to dust. Selby testified that during dust sampling, Athey@cut out of sequence, and kept the miner in the air entries (Tr. 144).

Selby indicated that on one occasion when Williams was hanging curtains, he told Williams that a dust pump had been turned off. Williams stated that he would take care of it, but he continued to hang curtains.

According to Selby, a few days after the meeting with Riddle he asked Riddle if he had straightened Morgan out regarding the dust sampling. According to Selby, Riddle said that AGary Morgan will never work in another Arch minerals mines again@(sic) (Tr. 147). Daniel Helmer who was present corroborated Selby=s testimony.

In essence, Complainant=s witnesses Stirsman, Harrison, and Shelby all expressed concern that they were not comfortable testifying as they feared that Arch would retaliate against them, or prevent them from returning to work.

II. Respondent=s evidence

Williams was the section foreman in the Kathleen Mine between 1989 and 1995. In this capacity, he supervised Morgan. According to Williams, Awe had a little trouble back and forth@ (Tr. 179), and had Asome heated arguments, not just over dust sampling@(Tr. 181). Williams indicated that on one occasion Morgan operated a bolter in relief during dinner and AI didn=t think he did very well on it, so I took him off of it@(Tr. 160). According to Williams, in 1994, Morgan complained that the roads were dusty, and that Somers was shutting off the dust pump. Williams said that other employees had also complained that Somers was shutting off the pump. Williams indicated that Somers customarily wore his coat tail over the dust pump. In response, Williams said he talked to Somers. He indicated that there was a bad feeling between the bolter operators and Somers, in that the former complained that Somers did not clean up properly.

Williams indicated that he found out that Morgan was the one who initially made the dust complaints to MSHA only after the section 105(c) complaint had been filed. According to Williams, when Riddle met with the crew concerning the dust violations, Morgan did not say that he had instigated the MSHA investigation, or had filed a complaint with MSHA. On cross-

examination, he was **Aquestioned@**as follows: **AIn your testimony you're indicating that Mr. Morgan did not step forward or say anything that he was the one responsible for turning these in@**(sic) (Tr. 173). His **Aanswer@**is as follows: **ANo, he did not, not that I remember, no.@** (Tr. 173).

Williams testified that in September 1996, prior to going underground, in the course of a half hour meeting, Morgan's name was brought up as part of a conversation wherein miners on the crew were asking who would be working on the section. According to Williams, some of the men present asked him if he wanted Morgan on the section and he said **A[w]ell, I don't think so@** (Tr. 169). He explained, in essence, that he preferred to have someone else in the section because he'd rather have someone with whom he did not have a lot of trouble. Williams testified that he did not say anything at this meeting about Morgan's complaints about dust, or that he had instigated the MSHA investigation. Williams indicated that Cotter was not present at this meeting.

Williams indicated that he did not talk to Cotter prior to the time that Morgan took the tests to be recalled, and that he did not have anything to do with the tests. Williams stated specifically that he did not tell Cotter to fail Morgan, did not talk to Cotter about Morgan, and did not tell anyone to fail Morgan.

Williams indicated that he might have mentioned Morgan's name to Riddle concerning complaints about dust violations. He stated that he reported to Riddle that Morgan and two other bolters had said that the dust pump was being turned off, and that people in the section were **Abattling back and forth@**over this issue (Tr. 181).

Riddle was the shift manager at the Kathleen Mine between 1991 and 1995. Riddle, who supervised Morgan when the latter worked on an idle day or over a weekend, stated that Morgan was always a good worker and there were no conflicts. However, he was aware that Morgan and Williams had squabbled. He indicated that in operating the scoop, Morgan was **A[a]s good as anybody at the coal mine could@**(sic) (Tr. 206).

According to Riddle, prior to the MSHA investigation concerning dust violations, he had heard rumors concerning dust sampling complaints. He indicated that he went underground to meet with Williams=crew to air the problems. Riddle said that at the meeting there was a lot of bickering, and that the miner operator was having problems with the rest of the crew regarding the dust pump. According to Riddle, Morgan did not state that he was the one who had made complaints to MSHA. He also indicated he did not recall Morgan admitting that he went to MSHA. He was asked whether he had told Helmer or Selby that Morgan would not work again at another Arch mine and he stated, "[N]o absolutely not. I did not say that" (Tr. 194). He indicated that he had become aware that Morgan had made the dust sampling complaint to MSHA only after Morgan had filed the discrimination complaint at issue.

Riddle indicated that he did not speak to anyone about Morgan testing for a job at the Conant Mine, and that he was not involved in the testing procedures. According to Riddle, he did not tell Cotter that Morgan had filed dust complaints with MSHA, and did not ask or tell Cotter to fail Morgan. Nor did he tell anyone else to fail Morgan.

Blaylock explained that pursuant to the National Bituminous Coal Wage Agreement of 1993, (AAgreement@) as amended by a Memorandum of Understanding, when a job vacancy occurs, the job is posted and if it is not filled, the company then goes to a panel to select the senior person who is given a written test. The candidate is then provided with hazard and task training, and after a warm-up period, is tested on a piece of equipment. Candidates must pass a test operating three out of the four pieces of equipment in order to pass the hands-on test. He indicated that 100 percent of the candidates are tested on the coal hauler and the scoop, both of which require only minimal skill. Approximately 75 to 80 percent of the candidates are tested on the bolter which requires a high level of skill, and only 20 percent of the applicants are tested on the miner which would requires the highest level of skill.

Blaylock indicated that, in administering the testing, it was standard procedure for him to time how long it took the candidate to load coal with the miner, and to drill holes and bolt with the bolter. He also timed the operation of the scoop. Blaylock indicated that there was no standardized time for the drilling of the holes, and the bolting due to varying roof conditions. According to Blaylock, the standard for the miner to load the coal hauler was 20 to 30 seconds. Blaylock stated that the only exception to the standard procedures occurred on one occasion when a candidate, Terry Morris, was testing on the roof bolter.¹ The tester, who was new in this task, had to interrupt this test to perform some other duties. Morris failed the test, but upon appeal by the union was retested, and he subsequently passed.

Blaylock testified that he found out that Morgan had made complaints to MSHA, and had also complained to Arch about dust problems, only after the discrimination complaint at issue had been filed. He stated that he was not told by anyone to fail Morgan in testing him for the inby position.

Cotter testified that subsequent to 1996, either he or another shift foreman conducted the candidate recall testing. He indicated that, as his standard procedure, once he takes the candidate

^{1/} On cross- examination, Blaylock indicated that when he tested another candidate, Dennis Harrison, the former did not fully complete the test by drilling 5-foot or 6-foot holes because the bolter broke. However, in spite of this, Blaylock passed Harrison because he had observed him in practice bolting four rows of bolts, and he was able to evaluate his work and found him to be skilled.

underground the latter is provided with task training. The candidate then is shown the controls on the equipment he is to be tested on, and he is allowed to warm up. According to Cotter, when the candidate indicates that he is comfortable running the machine, he commences testing. He indicated that it is not possible to warm up the continuous miner which is usually positioned at a point where the candidate can commence cutting. He allows a helper to assemble the bolts. Cotter indicated that in evaluating the candidate's operation of the bolter, he observes how smooth the latter operates the controls, how he inserts the steel, how deep he drills the hole, and if the hole is appropriate size for the pin. He also observes how the bolter changes the bit, how he swings the boom, and how he places the mast up to the roof.

Cotter indicated that in testing Morgan he did not treat him differently than other candidates. According to Cotter's testimony, Morgan did not pass the bolter test as he was not smooth. The time that it took Moran to perform the bolter test was not a factor that Cotter took into account in making this decision. In Morgan's hands-on test, Cotter indicated that Morgan did not display knowledge of the proper use of drill steels and wrenches, did not display the ability to recognize and correct problems which arise during roof bolt installation, and was not safe and efficient during the test. His comments are as follows: "He had knowledge of what cons are supposed to do, but had problems hitting the wrigh control. Bent 6' steel. [D]id not change bits when necessary. Very slow in operating the bolter. In my opinion he would not do well in a production mode@ (sic) (Petitioner's Ex. G p. 7).²

Cotter indicated that it is his decision to pass or fail a candidate, and that his decision has always been final. Cotter maintained that he was not told by anyone to fail Morgan, that no one suggested that he fail Morgan, and that no one told him to test Morgan any differently than other candidates. Specifically, he said that at the time of the test, he did not know that Morgan had made complaints to MSHA, and did not know that Morgan had complained to management about dust. He indicated that 6 months prior to instant hearing was the first time that he found out that Morgan had made complaints to MSHA, and had made complaints to the company about dust.

Peter Wyckoff, has been the mine manager at the Conant Mine since March 1996. In this capacity, he oversees the hands-on testing. He said that in September 1996, he heard Williams say that he did not want Morgan on his crew. According to Wyckoff, Williams did not say anything about Morgan having complained to Kathleen Mine management or MSHA about dust sampling. Wyckoff did not tell Cotter what Williams said about Morgan, and did not repeat it "At the test time@ (Tr. 297).

Wyckoff stated that during the investigation following the filing of the discrimination complaint by Morgan, he learned for the first time that Morgan had complained to the company, and MSHA about dust sampling. He stated that he did not tell or suggest to anyone to fail

^{2/} Pursuant to the parties' agreement, Petitioner's Exhibits F and G are admitted into evidence post-hearing.

Morgan on the inby testing. Nor did he tell anyone to tell Cotter that Williams did not want Morgan on his shift.

III. Analysis.

The Commission, in *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving 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, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); *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 protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corporation, v. United Castle Coal Co.*, 813 F.2d 639, 642 (4th Cir. 1987).

Based on Morgan's testimony, that was not contradicted or impeached by Arch's witnesses, I find that Morgan engaged in protected activities in reporting dusty conditions to Williams, Riddle, and Stirman. Further, there is no dispute in the record that Cotter determined that Morgan did not pass the hands on test regarding the operation of the bolter, and that Morgan was not recalled by Arch for an inby position in October 1996. I thus find that Arch did take adverse action against Morgan. Thus, the pivotal issue for resolution is whether the adverse action taken by Arch was motivated in any part by Morgan's protected activities.

In general, the commission in *Hicks v. Cobra Mining, Inc.*, et al., 13 FMSHRC 523 (1991) discussed the principles to be applied in evaluating motivational nexus as follows (13 FMSHRC, supra, at 530):

The Commission in previous rulings has acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. **A**Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . **I**ntent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. *Secretary o.b.o. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983 quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965).

In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC 2510.

In essence, Morgan testified that Williams, to whom he complained about dust violations, had cursed him, and that he had many confrontations with Williams. More importantly, according to Harrison, when he mentioned to Williams that Morgan in 1996, was going to be tested for recall, Williams said that he did not want to have Morgan in his unit. Williams knowledged that he did not want Morgan in his section, because he had had a lot of trouble with him. He knowledged that they had had some heated arguments, not just over dust sampling (Tr. 182). I find that Williams did have some animus toward Morgan, in part due to Morgan's complaints about dust violations. However, Williams was not involved in any decisions relating to an evaluation of Morgan's hands on testing, or the decision whether to recall him. There is no evidence that he communicated his animus to either Cotter or Blaylock who made these decisions. Specifically, I accept Williams's testimony, as it was not contradicted or impeached, that he did not tell Cotter to fail Morgan, and did not even talk to Cotter prior to the time Morgan took the hands on test. For the same reasons, I also accept his testimony that he did not tell anyone to fail Morgan on the hands on testing.

According to Morgan, in 1990 he had complained to Riddle about dust violations, and that, in a meeting with the crew in August 1994, he told Riddle regarding dust violations, " . . . that I'm the one that turned you in . . ." (Tr. 38). This version was corroborated by another miner Jerold Selby, who was present at this meeting.

On the other hand, Riddle maintained that Morgan did not state that he was the one who made the complaints to MSHA, and that he did not recall Morgan admitting that he went to MSHA. Similarly, Williams in testifying regarding this meeting, stated that Morgan did not say that he had instigated the MSHA investigation, or had filed complaints with MSHA. However, on cross-examination, the certainty of his testimony on direct examination was diluted by the following statement concerning his earlier testimony that Morgan did not say that he was the one responsible for turning in the violations "[n]o, he did not, not that I remember, no" (Tr. 173). Also, I take cognizance of Williams's testimony that he had reported to Riddle that two other bolters and Morgan had alleged that a dust pump had been turned off. I accept the version testified to by Morgan inasmuch as I observed his demeanor and found his testimony credible on this point. Also his testimony was corroborated by Selby. I find that Riddle was aware of Morgan's complaints about dust violations and that he had admitted to filing a complaint with MSHA.

According to Selby, a few day after the meeting with Riddle, he asked him if he had straightened Morgan out regarding the dust sampling, and that Riddle replied "Gary Morgan will never work in an other Arch Minerals mines again" (sic) (Tr. 147). Another miner, Daniel

Helmer, who was present, corroborated Selby's testimony. On the other hand, when Riddle was asked whether he made this statement, he responded as follows: "[n]o, absolutely not. I did not say that" (Tr. 194).

Although the version testified to by Morgan and Selby establishes animus on the part of Riddle, who had knowledge of Morgan's safety complaints, there is no evidence that this animus formed the basis, in any part, for the adverse actions taken against Morgan. I observed Riddle's demeanor, and find his testimony credible that he was not involved in the testing procedures, and did not ask or tell Cotter or anyone else to fail Morgan. For the same reason, I accept his testimony that he did not tell Cotter that Morgan had filed dust complaints with MSHA. I also note that there is no direct evidence contradicting or impeaching this testimony.

In essence, according to Morgan, Cotter, contrary to established procedure, did not allow him time to warm up on the bolter before he has tested, and did not allow another miner to continue to help him by assembling the bolts. Morgan also alleges that he was discriminated against in that Harrison was passed for recall by Blaylock even though he did not fully complete the hands-on test on the bolter. Morgan also alleged that contrary to Cotter's expressed rationale for failing him on the test, he did not bend any steel. He maintained that he changed the bits as necessary, and had not been aware that there was any time limit on performing the various bolter tasks.

The decision to fail Morgan on the bolter test was made by Cotter. I observed Cotter's demeanor and found his testimony credible. Also, I note that the record does not contain any direct evidence impeaching or contradicting his testimony that he was not told by anyone to fail Morgan, that no one suggested that he fail Morgan, that no one had told him to test Morgan any differently than any other candidate, and that at the time of the test he did not know that Morgan had made complaints to MSHA and Arch. I thus accept his testimony. I find that the record fails to establish that there was any animus on the part of Cotter towards Morgan that related to Morgan's protected activities. I find that it has not been established that Cotter's decision to fail Morgan on the hands-on bolter test, and his actions toward Morgan on the date of the testing were motivated on any part by Morgan's protected activities.

Morgan had been informed by Blaylock that he did not pass the bolter test and that he would not be considered on any other job. Blaylock's testimony, which was not impeached or contradicted by any direct evidence, was that he first found out that Morgan had made complaints to MSHA and to Arch about dust problems only after the discrimination complainant at issue had been filed, and that he was not told by anyone to fail Morgan. I observed Blaylock's demeanor and found his testimony credible on this point. I thus accept his testimony. I find that it has not been established that Blaylock's actions were motivated by any animus toward Morgan regarding safety complaints, as he did not have any knowledge of these complaints.

Hence, for all the above reasons, I conclude that it has not been established that Cotter, the only agent of Arch to have taken adverse action against Morgan, had any animus toward Morgan relating to his protected activities, or even knew of Morgan's protected activity on or before October 1996, when the adverse actions were taken. (See *Hicks, supra*, at 530). I thus conclude that it has not been established that the adverse actions taken by Arch, acting through Cotter, were in any part motivated by Morgan's protected activities. Thus, I find that it has not been established that Morgan was discriminated against in violation of section 105(c) of the Act.

ORDER

It is **ORDERED** that Morgan's Complainant be **DISMISSED**, and that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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