FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 7, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 97-157-D
on behalf of	:	
WILLIAM KACZMARCZYK,	:	Case No. WILK CD 97-02
Complainant	:	
v.	:	Ellangowan Refuse Bank No. 45
	:	Mine ID No. 36-02234
READING ANTHRACITE	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

This case is before me based on a Complaint filed by the Secretary of Labor ("Secretary"), on behalf of William Kaczmarczyk, alleging that he was discriminated against by Reading Anthracite Company ("Reading") in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). Pursuant to notice, the case was heard in Harrisburg, Pennsylvania, on November 18-19, 1997. On February 5, 1998, Reading filed proposed findings of fact and a brief. On February 9, 1998, the Secretary filed proposed findings of fact and a brief. On February 18, 1998, Reading filed objections to the Secretary's proposed findings, and a reply brief. On February 20, 1998, the Secretary filed a response to Readings proposed findings, and a response brief.

I. Findings of Fact

Based on the Parties' stipulations, Reading's Admissions, and the evidence of record, I find the following:

1. William Kaczmarczyk was employed by Reading Anthracite in December 1976.

2. Kaczmarczyk was classified as an electrician by Reading Anthracite in 1985.

3. In November 1989, Kaczmarczyk was injured while working at Reading. Following that injury, Kaczmarczyk was placed on workers compensation status.

4. Kaczmarczyk remained workers compensation status from the time of his injury through January 1991.

5. From January into February 1991, Kaczmarczyk returned to active duty work at Reading pursuant to its light duty program.

6. In February 1991, Kaczmarczyk left active duty and returned to workers compensation status where he remained until January 1992. During that period of time, Kazmarczyk underwent surgery and rehabilitation for the injury he had incurred in October 1989.

7. Prior to returning to work under the light duty program in January 1992, Kaczmarczyk obtained a release from his physician Dr. Keith Kuhlengel on January 2, 1992, that authorized him to return to work at Reading. Kaczmarczyk presented Dr. Kuhlengel's authorization to Frank Derrick, Reading's General Manager, and requested that he be allowed to return to work. Derrick told Kaczmarczyk that Reading would need a second opinion from another physician, and arranged for an evaluation from Dr. Robert Gunderson, a physician selected by Reading. Dr. Gunderson examined Kaczmarczyk on January 7, 1992, and determined that he was physically capable of returning to work as an electrician. Following the examination, Kaczmarczyk was permitted to return to work at Reading as an electrician.

8. In January 1992, Kaczmarczyk returned to active employment at Reading in a light-duty program. He worked in this capacity until October 15, 1993, when Reading placed him on workers compensation status.

9. On September 12, 1994, pursuant to an Order of Temporary Reinstatement issued by Arthur Judge Amchan[1], Kaczmarczyk was returned to light duty employment at Reading.

10. Kaczmarczyk continued to work in a light duty capacity between September 12, 1994,

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[1]/ Judge Amchan subsequently left the Commission to serve as an Administrative Law Judge with another agency.

and September 23, 1995, when he was again placed on workers compensation status.

11. Between September 12, 1994, and September 23, 1995, David Kerstetter, Kaczmarczyk's immediate supervisor, did not offer Kaczmarczyk the opportunity to work overtime or provide him with specific assignments during the regular work week.

12. In January 1995, Kaczmarczyk requested that he be allowed to drive coal trucks on an overtime basis.

13. On January 24, 1995, Kaczmarczyk's physician, Dr. Kuhlengel, provided a letter stating as follow: "He may function as a truck driver on a temporary basis with a maximum of ten (10) hrs. per week overtime on a trial basis."

14. Kaczmarczyk presented Dr. Kuhlengel's authorization to representatives at Reading who arranged an examination with a second physician, Dr. Michael Dawson.

15. On March 30, 1995, Dr. Dawson examined Kaczmarczyk, and determined that he was physically capable of operating the haul truck on an unlimited and unrestricted basis.

16. Kaczmarczyk presented Dr. Dawson's report to Reading immediately after he received it, but Reading did not permit Kaczmarczyk to drive the truck on an overtime basis or perform any overtime work until June 1995, after Judge Amcham had issued his May 24, 1995, order permanently reinstating Kaczmarczyk to his former position.

17. On April 26, 1995, the Secretary filed an Emergency Motion to Enforce the Order of Temporary Reinstatement alleging that Reading had constructively discharged Kaczmarczyk on April 20, 1995. Judge Amchan found that Reading had violated the provisions of the order of temporary restatement, but that the environment was not sufficiently intolerable to constitute "constructive suspension."

18. On May 24, 1995, Kaczmarczyk was permanently reinstated to the light duty program at Reading pursuant to an order of Judge Amcham.

19. From June 1995 through September 23, 1995, Kaczmarczyk drove a haul truck and a water truck on an irregular basis at Reading's Maple Hill Site. His physical restrictions did not interfere with his ability to perform the tasks associated with the operation of these trucks.

20. Kaczmarczyk never refused to perform any of the duties associated with the operation of the haul truck or the water truck because of his physical conditions.

21. In evaluating Kaczmarczyk's physical abilities during the time period June through September 1995 when he drove a water truck and a haul truck, most weight was placed on the determinations of physicians who examined him, rather than the subjective understanding of Kaczmarczyk regarding these restrictions. Dr. Peter A. Feinstein, who examined him on June 10, 1994, indicated that Kaczmarczyk could continuously reach above his right shoulder, lift a maximum of 20 pounds, and frequently bend, squat, and kneel. On January 24, 1995, his treating physician, Dr. Kuhlengel indicated that Kaczmarczyk could function as a truck driver "on a temporary basis with a maximum of ten (10) hours per week of overtime on a trial basis" (Sec. Ex. 26). Dr. Michael Dawson who evaluated him on March 30, 1995, included that he was able to work as a truck driver "on an unlimited and unrestricted basis" (Sec. Ex. 10). Dr. Kuhlengel in a report dated December 20, 1995, indicated that he had examined Kaczmarczyk on that day, and that he should not lift or carry more than 10 pounds, and not do any bending, squatting, twisting, pushing, pulling, climbing, kneeling, or overhead work. Based on an examination on November 13, 1996, Dr. Kuhlengel placed the same restriction on Kaczmarczyk, but indicated that he should be able to perform work as a truck driver "as long as the position is within the stated restrictions" (Sec. Ex. 14).

22. In the time period June 1996 through September 1996, Kaczmarczyk told his immediate supervisor, Dave Kerstetter, that he was interested in driving trucks, and provided Kerstetter with a letter from Dr. Kuhlengel dated September 25, 1996, indicating that he could return to work with restrictions of lifting 10 pounds, and no bending, pushing, pulling, or performing overhead work. Dr. Kuhlengel added as follows: " . . . he is able to drive a truck with an air seat" (Sec. Ex. 13).

23. On October 19, 1996, a temporary truck driver position was posted.

24. The temporary haul truck position required the operation of a haul truck that was used to haul ash from the co-generation plant.

25. The ash from the co-generation plant was loaded onto the haul truck with a hopper, which dropped the fine ash particles from a height of about 5 to 6 feet onto the bed of the haul truck. The fine particles of the ash do not produce significant jarring or vibration that is associated with the loading of large rock and materials onto a haul truck.

26. The haul truck that was used to haul material from the co-generation plant had an automatic transmission. It also was equipped with an air seat, which reduced the effect of road bumps and cushioned the ride for the truck operator, and a steering system similar in function to power steering. In order to reach the cab of the truck that was used to haul material from the co-generation plant, an operator must climb approximately 10 steps. During the course of a workday, a haul truck driver needs to climb the steps onto the truck's cab on only one occasion.

27. Once a "bid" is posted, the job listed in the "bid" is traditionally awarded to the most senior, qualified, Reading employee who bids on the position.

28. Kaczmarczyk was the most senior Reading employee to bid on the position of temporary truck driver.

29. The temporary truck driver position was awarded to Harry Markle because Reading believed that Kaczmarczyk was physically incapable of performing the duties associated with the position, since Dr. Kuhlengel's statement explicitly releasing Kaczmarczyk to drive trucks also contained a restriction relating to bending, squatting, pulling, crawling, climbing, and lifting.

30. According to Frank Derrick, Reading's General Manager, an individual does not have to perform any activities that involve crawling in order to operate the haul truck that is the subject of this case.

31. A miner must bend to perform the preshift inspection and to check fluids on the haul trucks. Derrick indicated on cross-examination that as a result of a grievance, mechanics still service and start the haul trucks. However, Reading has no written rule directing either mechanics or truck drivers exclusively to perform these duties. Kaczmarczyk testified that when he drove the haul truck, he did not check the fluids. Kaczmarczyk testified that the mechanics performed this task ". . . because the practice is --- our Local Union 807, our job site, states that the mechanics check the fuels trucks" (sic) (Tr. 324-325). I find this testimony of one individual who worked on only one shift insufficient to establish that the practice at the site at issue was that only the mechanics were to check the fluids, service the vehicles, and start them.

32. Kaczmarczyk testified that in order to check the fluid levels, oil, and antifreeze on the haul truck, it is not necessary to bend, crawl, twist, push, or pull. He also said that it would take no more than 5 minutes to check the oil, transmission fluid, and antifreeze levels on the haul truck that was used to haul materials from the coal generation plant. Since he did not check these fluids, I do not place much weight on his testimony regarding the activities required to perform these functions. In contrast, Derrick testified that, in essence, the decision not to award the temporary truck driver position to Kaczmarczyk was based upon the conclusion that the latter could not perform the specific duties involved in operating this position such as bending, climbing, and squatting. I accept Derrick's testimony that these duties are required as it is supported by a Job Analysis[2] of the truck driver position prepared for Reading by CRA Managed Care, Inc. ("CRA"), which indicates that these activities are required 10 percent of the time. The analysis also states that the heaviest weight to be lifted one time is 15 pounds, and that lifting it above the shoulder is required.

33. Neither Derrick nor any other Reading agent contacted Dr. Kuhlengel or another physician to determine whether Kaczmarczyk was physically capable of performing the duties

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[2]/ A job analysis is a mechanism that allows Reading to describe in detail all of the duties associated with a particular position at the mine site in order that a physician can review the job analysis and determine whether a particular employee is physically capable of performing the duties associated with the position.

Job analyses are developed at the instruction of Derrick and compiled by Reading managerial employees who are familiar with the duties associated with a particular position or job at the mine

associated with the truck driver position.

34. There is no evidence that Reading was obligated to contact Dr. Kuhlengel or another physician in these circumstances. The Secretary's reliance on Article 3(i)(3) of the Reading Anthracite Company Wage Agreement of 1994 (Sec. Ex. 4) is misplaced. Section 3(i)(3), supra, its applies to a miner who was "refused recall from a panel or from sick or injured status." In contrast, Kaczmarczyk was in workers compensation status, and applied not for recall but for a job as a temporary truck driver. Nor is there evidence that Reading had a practice of contacting treating physicians or making referrals to other physicians in situations similar to that of Kaczmarczyk's.

Jay Berger, a UMW District Board Member, testified that on one occasion an employee who had been off work for 8 years presented Reading with a note from his physician permitting him to return to work. Reading referred this employee to their doctor for evaluation. This instance appears to be within the scope of section 3(i)(3), supra, but insufficient to establish a practice in situations similar to the case at bar.

35. On October 16, 1996, pursuant to the collective bargaining agreement, Kaczmarczyk had a meeting with Kerstetter to appeal Reading's decision to award the temporary truck driver position to Markle. During this meeting, Kerstetter told Kaczmarczyk that he was not awarded the temporary truck driver position because his restrictions prevented him from operating the haul truck. Following the October 16, 1996 meeting, Kaczmarczyk filed grievance No. 97-01 because he believed that Reading had acted improperly in awarding the temporary truck driver position to Markle.

36. Pursuant to the terms of the collective bargaining agreement, a Step 2 grievance meeting was convened on November 6, 1996, to consider Kaczmarczyk's contention that he should have been awarded the temporary truck driver's position. During the Step 2 proceeding, Kaczmarczyk told Reading's representatives that he had a doctor's authorization to work as a truck driver, and requested that he be awarded the position.

37. Pursuant to the terms of the collective bargaining agreement a Step 3 Grievance Meeting was convened on November 14, 1996.

38. During the Step 3 meeting, Kaczmarczyk and Berger informed Lenny Haspe, Reading's representative, that Kaczmarczyk had driven the haul truck in the past "with restrictions . . . at that time also he had" (sic)(Tr. 54). Kaczmarczyk informed Reading that Dr. Kuhlengel had determined that he was physically able to perform the duties of a haul truck driver. He presented Reading with a November 13, 1996, report signed by Dr. Kuhlengel which stated that it was "acceptable" for Kaczmarczyk to drive a truck with certain restrictions.

Kaczmarczyk requested that Reading prepare a job analysis for the truck driver position in order to resolve Reading's concern that Kaczmarczyk's physical restrictions prevented him from working as a haul truck driver.

39. On December 4, 1996, Berger wrote a letter to Derrick stating that Haspe had not answered questions posed during the Step 3 proceeding regarding Reading's rationale for refusing to allow Kaczmarczyk to work as a temporary truck driver. Berger asked Reading to explicitly state its position, and reminded Derrick that Kaczmarczyk had been released by his physician to drive the haul truck, and that he had driven the truck on prior occasions.

40. On January 13, 1997, Kaczmarczyk wrote a letter to Dr. Kuhlengel regarding his ability to drive the haul truck. Dr. Kuhengel responded on January 21, 1997, and stated that Kaczmarczyk could not load or unload a truck but was "able to drive a truck with an air seat." Kaczmarczyk provided Kerstetter with a copy of this letter.

41. On January 31, 1997, Berger sent a letter to Dr. Kuhlengel seeking to obtain information for the pending Step 4 Grievance Hearing concerning Kaczmarczyk's ability to perform certain duties associated with the truck driver position.

42. On February 10, 1997, Dr. Kuhlengel responded to Berger's letter and stated that he did not feel that climbing several steps up to a truck cab "is severely restricted by his condition." He also opined that a total of 15 minutes a day to check fluid levels "is not unreasonable." He also restricted the following activities to less than 15 minutes total in an 8 hour day: bending, squatting, twisting, pushing, pulling, cralwing, climbing, and kneeling.

43. Pursuant to the terms of the collective bargaining agreement, a Step 4 Grievance Hearing was convened on February 11, 1997. An Umpire selected pursuant to the terms of the collective bargaining agreement presided at the proceeding, and heard from both parties regarding Kaczmarczyk's claim that Reading had improperly denied his bid to drive the haul truck.

44. At the Step 4 proceeding, Berger introduced the February 10, 1997, letter from Dr. Kuhengel. According to Berger, Derrick was "hot" (Tr. 98) and said "that Bill would be a downfall of Reading Anthracite Company" (Tr.95), and then "made statements about Bill filing the case with the EEOC and MSHA" (Tr. 95). In essence, Kaczmarczyk corroborated this version.

In contrast, according to Derrick, Kaczmarczyk had had gotten "out of control" (Tr. 229), and, in stating his reasons why the Umpire should continue to hear the case mentioned "that he would see us all in court. He had charges filed" (Tr. 231). According to Derrick, the Umpire became confused, and he (Derrick) told him, to "set the record straight" (Tr. 231), that Kaczmarczyk had filed charges with the Pennsylvania Human Rights Commission and MSHA. Ricardo Muntone, an accountant employed by Reading, who was present at the Step 4 proceeding, testified that after the Umpire questioned whether his decision on the grievance would be binding, and Derrick said that Kaczmarczyk had filed similar actions with other

agencies. Neither Muntone nor Derrick specifically denied that Derrick had said that Kaczmarczyk would be the downfall of Reading. Accordingly, and also based on my observations of the witnesses' demeanor, I accept the version testified to by Berger and Kaczmarczyk.

45. The statements that Derrick made at the Step 4 proceeding that Kaczmarczyk was going to be the downfall of Reading because of the cases he had filed with the Human Rights Commission and MSHA were not part of the res gesta of any offers of settlement made by Derrick.

46. On February 24, 1997, Reading sent a job analysis for the haul truck driver position to Dr. Kuhlengel. On March 7, 1997, Reading received the completed job analysis from Dr. Kuhlengel in which he stated that Kaczmarczyk's physical restrictions did not prevent him from working as haul truck driver.

47. On March 7, 1997, Reading sent Kaczmarczyk a letter informing him that Dr. Kuhlengel had determined that he was capable of performing the job of a coal truck driver, and instructed Kaczmarczyk to make arrangements to return to work.

48. On March 10, 1997, Muntone telephoned Kaczmarczyk, and informed Kaczmarczyk's wife that he should make arrangements to return to work at Reading.

49. When Kaczmarzyk reported to work at Reading on March 10, 1997, Kerstetter informed him that there was no work available as a haul truck driver, since Schuylkill Energy Resources (SER) had completed the construction of a conveyor belt system on March 2, 1997, which moved ash from the coal generation plant without the use of haul trucks.

50. As early as August 1994, Reading had become aware that SER would be constructing a conveyor to replace the coal haulage trucks.

51. Derrick thought SER would complete construction of the conveyor belt system in February or March 1997.

52. In March 1997, Kaczmarczyk felt that he was physically able to preform the duties associated with the position of a water truck driver. Between March and April 1997, Kaczmarczyk requested that a job analysis be made of the water truck position. Muntone notified Derrick that Kaczmarczyk had requested a job analysis for the water truck position.

53. Derrick instructed Muntone to prepare a job analysis for the water truck position on March 12, 1997.

54. The water truck was a haul truck modified to allow it to carry water. Operating the water truck requires climbing approximately eight times a shift, standing a total of an hour, and walking a total of an hour. Operating the haul truck requires only occasional climbing, and no standing and walking. All other physical demands of these job are the same.

55. Derrick ordered the preparation of a job analysis for the water truck position because he considered the physical demands associated with the operation of the water truck to be more significant than those associated with the haul truck, since the water truck driver needed to climb into the water truck's cab more frequently during the shift, and needed to turn a crank in order to open a value to fill the water truck with water.[3]

56. Reading completed the job analysis for the water truck position on March 13, 1997, and sent the analysis to CRA who forwarded it Dr. Khulengel on April 9, 1997.

57. On May 16, 1997, Reading received a job analysis for the water truck position from Dr. Kuhlengel. Dr. Kuhlengel concluded that Kaczmarczyk's physical restrictions did not prevent him from work as water truck driver.

58. On May 19, 1997, Kaczmarczyk returned to work at Reading as a water truck driver.

II. Analysis

A. Case Law

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

[3]/ In 1995, when Kaczmarczyk operated a water truck, he was able to climb into the cab of the water trunk, and he did not have any difficultly turning the value used to fill it. However, he had subsequently reinjured his back in September 1995.

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).

B. The Secretary's Prima Facie Case

1. Protected Activities

The parties have stipulated that the following sets forth the scope of the protected activities engaged in by Kaczmarczyk:

> On October 19, 1993, Mr. Kaczmarczyk filed a complaint with the Mine Safety and Health Administration alleging that the Respondent had unlawfully placed him on "worker's compensation" status because he had earlier engaged in a series of protected activities. The nature of these protected activities, and the details associated with his involvement in such activities, were the subject of extensive litigation[4] involving the Respondent, about which the Respondent is aware. Both the activities alleged in the discrimination complaint and the subsequent litigation, much of which occurred after September 1994, constitute protected activities under the Mine Act.
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> On or about July 16, 1995, Mr. Kaczmarczyk reported that the No. 609 truck that he had been assigned to drive was unsafe for him to operate due to the fact that the truck had a defective air seat and a significant crack in the window on the passenger side of the vehicle. On the same date, Mr. Kaczmarczyk reported that the No. 556 truck that he had been assigned to drive was unsafe to operate due to the fact that the truck had: inadequate service brakes that would not hold the truck on the hills over which the truck traveled, a defective back-up alarm, and an inoperable latch on the driver's side door, which prevented the door from effectively remaining closed while the truck was operated. Mr. Kaczmarczyk reported these conditions to David Kerstetter in the area of the Maple Hill Garage.

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[4]/ On September 12, 1994, following an evidentiary hearing, Reading was ordered to temporarily reinstate Kaczmarczyk (16 FMSHRC 1941) A hearing on the merits of Kaczmarczyk's complaint of discrimination was held on March 14, 1995. On May 24, 1995, a decision was issued holding that Reading discriminated against Kaczmarczyk because, but for his participation in MSHA inspections, he would not have been placed on workers compensation.

On or about July 27, 1995, Mr. Kaczmarczyk notified David Kerstetter that the pump at the pumphouse was not working and unclean water was thus flowing from the pumphouse into a near-by creek. Mr. Kaczmarczyk notified Mr. Kerstetter that this condition presented a danger to the health and safety of individuals working in, and around, the pumphouse and that the condition may also constitute a violation of state, and or federal, environmental regulations.

On or about July 30, 1995, Mr. Kaczmarczyk reported that the No. 660 ash truck that he had been assigned to drive was unsafe for him to operate due to the fact that the truck had a significant crack in the window on the driver's side of the vehicle. Mr. Kaczmarczyk reported the condition to David Kerstetter in the area of the Maple Hill Garage.

On or about August 2, 1995, Mr. Kaczmarczyk refused to operate a truck that he had been assigned by David Kerstetter to drive because the truck had a defective air-seat and operating the vehicle in this condition posed a hazard to Mr. Kaczmarczyk.

On or about August 3, 1995, Mr. Kaczmarczyk complained to David Kerstetter and a UMWA representative that dust from the hoppers at the co-generation plant was seeping into the cabs of the trucks that were being loaded with material at the hopper location and creating an unhealthy condition for himself and other truck drivers.

On or about September 13, 1995, Mr. Kaczmarczyk refused to perform a portion of job he had been assigned by Frank Derrick because he believed that performing the task as assigned would have placed him in a situation that may result in an injury. Specifically, Mr Derrick ordered Mr. Kaczmarczyk to pick up garbage in an area in which there existed a steep, 20-foot incline protected by a berm approximately 5 feet in height. While Mr. Kaczmarczyk did pick up garbage in the area, he refused to pick up garbage on the incline and the berm, since he believed that it would be dangerous for him to work in this area, given the equipment that was available to perform the task and the nature of the work site.

It also was stipulated that in the time period from September 13, 1995, to October 8, 1996, when Kaczmarczyk bid on the temporary truck job, he did not engage in any safety related or protected activities.

2. Adverse Actions

The Secretary alleges that the following constitute Reading's adverse actions: 1. On or about October 16, 1996, Reading awarded Markle the position of temporary haul truck driver, and 2. Reading denied Kaczmarczyk the opportunity to drive a water truck from March to May 1997. In essence, Reading did not dispute that it took these actions.

3. Motivation

Inasmuch as there is no dispute in the record that Kaczmarczyk engaged in protected activities, and that Reading took adverse actions, the only issue to be resolved is whether there was a nexus between the protected activities and the adverse actions. In other words in order to prevail, the Secretary must establish that the adverse action taken by Reading was motivated "in any part by that activity." (*Pasula*, supra at 2799) The prima facie case may be rebutted by Reading by showing that the adverse action was in no part motivated by protected activity.[5] If Reading cannot establish this, it may defend affirmatively by proving that it also was motivated by Kaczmarczyk's unprotected activity and would have taken the adverse action in any event based upon the unprotected activity alone. (*Tri-Star*, supra, at 2463-2464.)

Essentially it is Secretary's position that discriminatory motivation on Reading's part in taking the specific adverse actions against Kaczmarczyk, is established by evidence tending to show that Reading's rationale for these actions was merely pretextual. Reading argues that a nexus has not been established due to the long time span between protected activities and the adverse actions. In this connection it refers to the last protected activity which occurred on or about September 13, 1995, and the earliest adverse action which was taken on or about October 16, 1996, when Reading awarded another miner the position of temporary haul truck driver.

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.

> 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. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . 'Intent is subjective and in may 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 F2.d 693, 698 (8th Cir. 1965).
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> In *Chacon*, the Commission listed some of the more common

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[5]/ Reading argues that the Umpire's decision in the Grievance Procedure (RAC Exs 2 and 6) finding that (1) Kazmarczyk was not entitled to the truck driver position prior to the step 4 proceeding when he submitted the letter from Dr. Kuhlengel dated February 10, 1997, and (2) that six allegations of discrimination, which form part of the basis for the case at bar, were not discriminatory, should be dispositive of the instant proceeding. There is no indication that the parties to the grievance proceeding were provided an opportunity to fully develop the record, conduct cross-examination, or present witnesses on their behalf. More importantly, the grievance proceeding involved adjudicating rights under a union contract. It did not and can not adjudicate rights under section 105(c) of the Act, which is the exclusive jurisdiction of the Commission. Accordingly, I do not assign much weight to the decision of the Umpire.

> 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.

Hence, as set forth by the Commission in *Hicks*, supra, coincidence in time between the protected activity and the adverse action is only one indicia of discriminatory intent, and not dispositive of that issue. Further, as noted by the Secretary, Kaczmarczyk was on workers compensation status between the date of the last protected activity alleged, and October 16, 1996, the date of the first adverse action, when he attempted to return to active duty as a temporary truck driver and the position was awarded instead to Markle. Hence, Reading did not have any opportunity to take any adverse action against Kaczmarczyk during the period when he was on workers compensation status. Accordingly, the lapse of time between the protected activity and the adverse action does not, by itself, prove disprove a nexus between the protected activities and the adverse action.

On the other hand, I accord most weight in evaluating Reading's motivation a statement made by Derrick at the Step 4 Grievance proceeding. According to Berger, after he offered a letter from Dr. Kuhlengel dated February 10, 1997, Derrick said that Kaczmarczyk "would be a downfall of Reading Anthracite Company" (Tr. 95) because of the cases that he had filed with the EEOC and with MSHA. Berger's version was in essence corroborated by Kaczmarczyk. Respondent's witnesses Derrick and Muntone presented a different version which Reading characterizes as no more than heated comments made during an attempt to resolve a contentious matter. Reading asserts that the majority of comments were no more than accurate statements of facts given to the Umpire as an explanation of the procedural posture of the matter. However, it is significant that neither Derrick nor Muntone explicitly denied the specific statement by Derrick as testified to by Berger. I therefore accept the version as testified to by Berger and Kaczmarczyk. I conclude, primarily based on this statement which evidences Derrick's state of mind and attitude towards Kaczmarczyk's protected activities, that there existed animus toward the protected activities.[6] For all these reasons I find that the Secretary has established evidence

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[6]/ I have considered Reading's argument that the claim that Derrick made discriminatory comments toward Kaczmarczyk is without merit because the Umpire who rendered the October 19-29 Grievance decision stated that he could not remember such statements being made, that because hearings are informal many irrelevant statements are made, and that the alleged statements in the context of the hearing do not show discrimination. However, I place more weight, in deciding whether the statements were made, upon live testimony of witnesses whose demeanor I was able to observe and whose testimony was subject to cross-examination. I also do not place any weight upon the conclusion of the Umpire, as the issue before him was not whether an act of discrimination occurred under section 105(c) of the Act.

of some discriminatory intent on the part of Reading when it took the adverse actions complained of. Thus I find that the Secretary has established a prima facie case (*Secretary on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

C. Respondent's Affirmative Defense

Reading argues that based upon the treating physician's restrictions it was reasonable for it to have concluded that Kaczmarczyk was not qualified to perform the jobs for which he applied based on the job analyses of these positions until it obtained express approval from the treating physician based on a job analysis. Reading argued further as follows: (1) once the company obtained a verification from the treating physician, the positions were awarded to Kaczmarczyk; (2) any delays in obtaining reports were not attributable to the company in verifying Kaczmarczyk's fitness; and (3) Kaczmarczyk was compensated for lost wages due to any delay. The Secretary argues in his reply brief that Reading's arguments are pretextual in that it did not contact Dr. Kuhlengel, the treating physician, until February 18, 1997, 4 months after Kaczmarczyk and Berger had requested it to contact Dr. Kuhlengel, that the only motive was one of retaliation as set forth in pages 9-25 of its brief, and that Reading had abundant information available that indicated that Kaczmarczyk was capable of perform the duties involved in operating a truck. It was also argued that the back payments it made came only after it was clear that the company would be obligated to make such payment pursuant to the collective bargaining agreement, and after Kaczmarczyk had filed his present claim.

I have considered all of these arguments, as well as the balance of the Secretary's arguments as set forth in the post hearing brief. For the reasons that follows, I conclude that Reading has established its affirmative defense, and I reject the Secretary's arguments.

In light of Kaczmarczyk's prior history of medically documented back problems which restricted him from performing various duties in the past and placed him in a workers compensation status, I find that it was a legitimate business concern of Reading, acting through its agent Derrick, that Kaczmarczyk be physically capable of operating a haul truck, the position for which he bid in October 1996. The record establishes that a haul truck operator, hauling material from the co-generation plant, would be required to climb approximately ten steps up to the truck's cab only once a shift. In addition the weight of the evidence establishes that bending, climbing, and squatting are required 10 percent of the time. In addition the operator of the haul truck is required to lift up to 15 pound at one time, and to lift 15 pound above the shoulder level. The medical reports from physicians evaluating Kaczmarczyk's functional capabilities in the 12 month period immediately prior to Kaczmarczyk's bid on the haul truck position, provide a basis for a finding that it was not unreasonable for Derrick to conclude that Kaczmarczyk was restricted from performing the duties required in operating the haul truck. Dr. Kuhengel examined Kaczmarczyk on December 20, 1995. In a report dated December 20, 1995, Dr. Kuhlengel indicated that Kaczmarczyk should not lift or carry more than 10 pounds, and not do any bending, climbing and squatting. On June 5, 1996, Dr. Kuhlengel examined Kaczmarczyk. He indicated in a report dated June 5, 1996, that he gave Kaczmarczyk ". . . recommendations to return to work with restrictions of 10 pounds lifting and no overhead working, no bending, pushing or pulling." Most significantly, when Kaczmarczyk expressed to Kerstetter his interest in

driving a haul truck, he provided Kerstetter with a letter from Dr. Kuhengel dated September 25, 1996, stating that ". . . he is able to drive a truck with an air seat," but setting forth the same restrictions as he had set forth in his report of June 5, 1996, i.e., no lifting more than 10 pounds, and no bending, climbing, or squatting all of which are required to operate the haul truck. Hence, when Kaczmarczyk bid on the truck driver job in October 1996, it was not unreasonable for Derrick to have reached a conclusion in that the latter was medically restricted from performing all the duties of a truck driver.

Similarly, the decision by Derrick on March 12, 1997, to have a job analysis prepared for the water truck position for which Kaczymarczyk subsequently applied, which resulted in Kaczymarczyk's being denied the opportunity to drive a water truck from that date to May 1997, an adverse action, does not appear to have been an unreasonable business judgment. Although Kaczymarczyk had previously been able to perform all of the duties involved in operating a water truck in 1995, he subsequently reinjured his back in September 1995. Hence, there was legitimate concern whether he would be capable to perform the duties required in March 1997. Although the water truck was a haul truck modified to allow it to carry water, its operation required climbing eight times a shift, standing a total of 1 hour, and walking a total of an hour. In contrast, operating a haul truck required only climbing once a shift, and no standing or walking. All other physical demands of these job were the same. Thus, I find that the ordering of a job analysis, which delayed the offering of the job to Kaczymarczyk, was not such an unreasonable business decision, as to raise an inference that it was motivated by discriminatory intent.

Within the context of the above referred to evidence, I find that although the Secretary established a prima facie case, Reading has established that the adverse actions complained of would have been taken in either event based solely upon business decisions that were not unreasonable. I thus conclude that it not been established that Kaczymarczyk was discriminated against by Reading in violation of section 105(c) of the Act. Hence, the Complaint should be dismissed.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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