FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 29, 2003

DALLAS CROASMUN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 2002-162-D
v.	:	PITT CD 2002-02
	:	
CONSOL PENNSYLVANIA COAL CO.,	:	Enlow Fork Mine
Respondent	:	Mine ID 36-07416

DECISION

Appearances: Michael J. Healey, Esq., Healey & Hornack, Pittsburgh, Pennsylvania, and Gregory Hook, Esq., Hook & Hook, Waynesboro, Pennsylvania, on behalf of Complainant;
Carl J. Smith, Jr., Esq., Richman & Smith, Washington, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Dallas Croasmun, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," alleging that he was discharged on March 8, 2002, by the Consol Pennsylvania Coal Company (Consol) in violation of Section 105(c)(1) of the Act.[1] In particular, in his initial complaint to the Department of Labor's Mine Safety and Health Administration (MSHA), Mr. Croasmun alleges that he "became aware that the real reason [for his discharge] was a statement made the week of February 18, 2002, that I would no longer

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[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

continue to send people on an elevator that I did not feel was safe to operate." Croasmun seeks reinstatement and damages including an award for back pay.[2]

Croasmun has worked in the mining industry since 1976 and holds a number of state certifications including those for mine foreman, maintenance foreman and mine superintendent. He has also received specific training in elevator repairs and inspections. During relevant times he was the surface maintenance supervisor at the Enlow Fork Mine. In that capacity he was in charge of authorizing all repairs on the surface and authorizing purchase orders for equipment in amounts up to $5,000.00.

According to Croasmun, a new elevator was being installed at the 3 North Portal beginning in mid 2001. The elevator was tested and inspected by the state and was placed in service on December 15, 2001. At that time 400 miners were using the elevator each day. The elevator holds 35 miners and has a weight load of 9,000 pounds. It transports personnel between the surface and 600 feet underground at a speed of 600 feet per minute. There is no dispute that the elevator continued to have problems with unexpected stoppages. These stoppages, known as "tripping," were caused by over-speeding which triggered the safety devices. According to Croasmun, the elevator was tripping dozens of times per shift and that he had therefore stationed a person at the elevator to override the faults. Croasmun testified that on some occasions he had to adjust or disable safety devices in order to override the tripping mechanism. State and federal inspectors were aware of the problems and, whenever the elevator was down for 30 minutes or more, state officials were contacted pursuant to state requirements. The problems continued into January and, in the latter part of that month, a meeting was held with the various elevator contractors to discuss those problems. The contractors were advised by Croasmun at this meeting that payments under their contracts would be withheld until the problems were corrected. Croasmun maintains that he kept mine superintendent Thomas Coram, apprised of the elevator problems.

The problems continued and a second meeting was held among Consol officials without any contractors present. Croasmun maintains that he told everyone at the meeting that the elevator was unsafe.[3] Others at the meeting, including Lou Barletta, felt that it could never be fixed and should be replaced. According to Croasmun, only Consol electrical engineer John Burr believed the elevator could be operated. Croasmun also maintains that later the same or the next day he told Coram, with no one else present, that he would no longer send people on the elevator and that he did not feel it was safe to operate. Coram purportedly did not respond. Croasmun acknowledged however that he continued to try to repair the elevator and never in fact prevented anyone from using it. He further acknowledged that he never filed a "Section 103(g)"

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[2] These proceedings have been bifurcated so that issues regarding damages have been deferred.

[3] Croasmun also prepared a list of specific problems with the elevator which he maintains was presented at the January and February meetings (See Exh. C-13).

complaint regarding the elevator. At the conclusion of the meeting, Rick Weaver and Tim Shell were to remedy the elevator problems by carrying out the proposal set forth in Exhibit C-14.

Edward Kocerka, an electrical engineer for Integrated Mill Systems Inc., testified that Croasmun complained to him in February 2002, of an unreliable elevator and asked him to check it out. During the six hours Kocerka observed the elevator, it tripped and came to a sudden stop at least three times. Another contractor employee was on-site to return the elevator to service. Following his study, Kocerka presented Croasmun with a repair estimate (Exh. C-1). Consol had not yet responded to his proposal.

On February 24, Croasmun left for a business related conference in Phoenix, Arizona, and for a vacation in Las Vegas. Upon returning to his office on March 5, he noted that his desk had been broken into, his papers were strewn about, a ledger was missing and a note was left on his desk directing him to see Superintendent Coram. Croasmun proceeded to Coram's office and maintains that Coram immediately confronted him about a load of belt that had been removed from the property on February 20th or 21st and said that someone was going to federal prison for what he had done. According to Croasmun, Luke Gianato, Consol's supervisor of human resources then entered the office. Croasmun testified that he told Coram that he had given the belt to a truck driver. Croasmun admitted that this statement was a lie. He did not then tell Coram that he had traded the belt in return for services performed by a Consol contractor nor did he suggest calling the contractor to confirm that the belt was indeed payment for services. Croasmun claimed at hearing that he had arranged with one of Consol's contractors, B&M, to exchange the used belt to pay for services performed by that contractor. Croasmun conceded that this agreement was not in writing and that there were no specific terms for the transaction. He claimed that trading used belt to pay contractors had been done before and that former mine superintendent, Jim McCaffrey, had engaged in similar transactions.[4]

At hearing, Croasmun maintained that on February 21, 2002, he had nine rolls of used belt loaded onto a truck driven by Greg Lemley. Lemley had been hired by Melinda White of B&M. Croasmun admits that he told the guard at the mine gate that he had completed the paperwork and that Lemley was authorized to leave mine property with the belt. At hearing, Croasmun also acknowledged that he knew the belt was going to be sold to Tracy Yarber, and that the proceeds would go to Melinda White. He maintained that he had no idea how much Melinda White was to be paid for the belt but that Consol owed her a little over $10,000.00. According to Croasmun, he expected that White would report to him how much she obtained for the belt and that if it was more than $10,000.00, she would owe Consol additional services to make up the difference.

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[4] McCaffrey testified that as former mine superintendent he once initiated an exchange with the Conveyor Services Company of used conveyor belt for new belt. It was handled however by Consol's purchasing group. According to McCaffrey, Croasmun was not authorized to perform such transactions.

Following the meeting with Coram, Croasmun was told to go home. On March 8, 2002, Croasmun again met with Coram and Gianato, at which time he was told that he was being fired for violating company Rule No. 8, *i.e.,* for theft. Croasmun acknowledges that at no time did he tell Coram that he was actually being fired because of his complaints about the safety of the elevator.

Pennsylvania mine inspector Thomas Schumaker testified that he was the regular inspector of the Enlow Fork Mine. According to Schumaker, state procedures require that when a mine elevator is out of service for 30 minutes, it must be reported to the state. He had received such a report on March 4, 2002. Schumaker noted that since the elevator is the primary route of the escape in the event of an emergency, if it is not functioning it removes a means of escape from the mine. It may reasonably be inferred from this testimony that when the elevator was not functioning miner safety was indeed compromised.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom*. *Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

From the record in this case I conclude that indeed, Croasmun engaged in protected activity by complaining of the unreliability of the north portal elevator. This is credibly established through the testimony of electrical engineer Edward Kocerka and by the clear evidence that the reliability of that elevator was discussed at the February 18, 2002 meeting of Consol officials. The problem with the elevator was, however, common knowledge among Consol personnel and it appears that many Consol employees were complaining about it. It is accordingly highly unlikely that retaliation would only have been against taken maintenance supervisor Croasmun.

Croasmun also alleges however, that he made a specific complaint to mine superintendent Coram, following the February 18th meeting that was of such a provocative nature, i.e., that he would no longer send personnel on the elevator because it was unsafe, as to illicit a retaliatory response. However I do not find Croasmun's representations in this regard to

be credible. First, Coram denied that any such exchange ever occurred. Second, Croasmun admits that he never did prevent anyone from using the elevator nor did he ever shut the elevator down. Third, Croasmun's supervisor, Mike Stewart, testified that he himself had shut down the elevator because of safety concerns and no retaliatory action was taken against him. Finally, the credibility of Croasmun's testimony in this regard is severely impacted by his admissions that he lied to Coram regarding his part in the ostensible theft of Consol property. Within this framework of evidence, I conclude that the discharge was not motivated by protected activity.

In reaching this conclusion I have not disregarded Croasmun's claims that unlawful motivation may be inferred by the relatively close proximity in time between his protected activity, purportedly on February 18, 2002, and his suspension on March 5, 2002, and his discharge on March 8, 2002. However any such inference is completely negated and superceded by the intervening discovery of Croasmun's apparent participation in the theft of Consol property. Moreover, even assuming, *arguendo*, that Consol had been motivated in part by Croasmun's protected activity, Consol presented overwhelming evidence to support the affirmative defense that it was also motivated by Croasmun's unprotected activity (apparent participation in the theft of Consol property) and that it would have taken the adverse action for the unprotected activity alone. *See Pasula,* 2 FMSHRC at 2799-800; *See also Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

In *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982), the Commission discussed several indicia of legitimate non-discriminatory reasons for an employer's adverse action - - including the violation of personnel rules forbidding the conduct in question. The Commission has also stated that an affirmative defense should not be "examined superficially or be approved automatically once offered," *Haro v. Magma Copper Company,* 4 FMSHRC 1935, 1938 (November 1982), and has further enunciated that in reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley,* 4 FMSHRC at 993. Consol in this case has established such an affirmative defense by abundant credible evidence. Clearly it was motivated to discharge Croasmun by evidence of his participation in the theft of Consol property.

In this regard I first note the credible testimony of Consol warehouse supervisor Steven Crouse. Crouse saw the rolls of conveyor belt being loaded onto a trailer on February 21, 2002. A Consol employee also told Crouse that truck driver Lemley later told him that he could not remember where he had taken the nine rolls of belt. Crouse then checked to determine whether the proper paperwork had been filed in the shipping warehouse. According to Crouse, a copy of the form, MM-18, must be filed at his warehouse for anything that leaves mine property. The form must also be signed by the superintendent. There was no such form in the warehouse file. Crouse then reported his suspicions to superintendent Coram.

Coram testified that Crouse reported to him around February 28th that belt had been removed from mine property under suspicious circumstances. Private Investigator Ronald Pearson was then called. Pearson testified that he was asked by Coram on March 4, 2002, to

investigate the disappearance of the belt. After his investigation, Pearson reported back to Coram and Gianato on March 5 and 6. According to Pearson, Croasmun told the mine security guard that the paperwork had been taken care of and that he was to permit the truck to drive onto mine property and remove the belt. An employee of B&M contracting, George Kelly, told Pearson that he and Croasmun put red numbers on the belt to be loaded onto Lemley's truck. Kelly was also told by Croasmun that the paperwork had been taken care of. Truck driver Greg Lemley told Pearson that he picked up the belt as a favor to the mine and that he delivered it to Yarber. Yarber purportedly wrote checks for 5,000.00 and $4,800.00, payable to Melinda White, and gave them to Lemley to return to Pennsylvania. Pearson attempted to obtain relevant records from Melinda White but she refused to produce them.

Luke Gianato, Consol's supervisor of human resources, was present with Coram at the March 5 meeting with Croasmun. According to Gianato, Coram made no threats or statements to the effect that someone would go to jail over the matter. Coram merely stated to Croasmun that the belt had left mine property without authorization and that they were trying to find out what happened. According to Gianato, Croasmun explained that he had given the belt to Lemley to use for horse stalls in his barn because Lemley had done favors for him. At the end of the meeting, Croasmun was told to go home and stay off mine property until contacted. Gianato was also present at the March 8th meeting. Coram asked Croasmun if he had anything else to say and Croasmun responded: "do I have to destroy others to save myself?" Coram then told Croasmun that he was terminated and that he was not to return to Consol property.

Superintendent Coram corroborated Gianato's testimony concerning the March 5 and March 8 meetings. According to Coram, Croasmun never recanted his statement at the March 5 meeting that he gave the belt to Lemley in return for favors and that Lemley purportedly wanted the belt for barn stalls. Coram further testified that Croasmun had no authority to trade the belt. Coram maintains that he in fact did not recommend that Crouse be discharged but merely passed the investigative results on to higher officials. He subsequently learned from Consol's manager of human resources, Mark Hurtkey, that the decision to terminate Croasmun had been made. The March 8th meeting with Croasmun followed, and he then informed Croasmun of the decision to terminate.

Within this framework of evidence it is clear that Consol officials had, at the time of Croasmun's discharge, possession of credible evidence that Croasmun had participated in the theft of Consol property and that he had lied about it. Under these circumstances I have no difficulty concluding that, even had Consol been motivated in part by protected activities, it clearly would have discharged Croasmun for his unprotected activities alone.

Under the circumstances this discrimination case must be dismissed.

ORDER

Discrimination Proceeding Docket No. PENN 2002-162-D, is hereby dismissed.

Gary Melick
Administrative Law Judge

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