FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 8, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of WYMAN OWENS, Complainant	:	DISCRIMINATION PROCEEDINGS Docket No. SE 2002-134-D BIRM CD 2002-04
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of GARY WATSON, Complainant	:	Docket No. SE 2002-135-D BIRM CD 2002-05
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of HENRY JOHNSON, Complainant	:	Docket No. SE 2002-136-D BIRM CD 2002-07
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine

DECISION

Appearances: MaryBeth Bernui, Esq. and Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary.
Ann C. Robertson, Esq., Gordon, Silberman, Wiggins & Childs, Birmingham, Alabama, for the Complainants.
Daryl H. Dewberry, Esq., United Mine Workers of America, Birmingham, Alabama, and Judith Rivlin, Esq., (on brief), United Mine Workers of America, Fairfax, Virginia, for the Intervenor.
Harry Hopkins, Esq. and Brian Bostick, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, Birmingham, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On August 12, 2002, the Secretary filed before the Commission three Complainants of Discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), alleging respectively, that Wyman Owens who was employed by Drummond as a safety committeeman, Gary Watson who was employed by Drummond as a fireboss and Henry Johnson who was employed by Drummond as a fill-in fireboss, all engaged in protected activities, and were discharged on or about March 20, 2002 in violation of Section 105(c) of the Act, because they had engaged in protected activities.[1] On September 9, 2002, Drummond filed an Answer denying, inter alia, that Owens, Watson and Johnson had engaged in protected activities. The answer also denies any causal connection between the protected activities and the adverse actions, and asserting an affirmative defense that it would have taken adverse action based on unprotected activities alone. Subsequently, Drummond filed a motion for summary decision, which was denied in a decision issued on March 6, 2003. On March 11, 12 and 13, 2003, a hearing was held in Birmingham, Alabama.[2] At the hearing, the United Mine Workers (UMW) appeared as Intervenor, and the individual complainants were represented by private counsel.

Subsequent to the hearing the parties filed the following: proposed findings of fact and

---

[1] Initially, on June 13, 2002, the Secretary filed applications for temporary reinstatement on behalf of Owens, Watson, and Johnson. Subsequent to a hearing on July 26, 2002, a decision was issued granting these applications subject to the parties' agreement regarding economic reinstatement. Drummond filed a petition for review before the Court of Appeals, 11th Circuit. The petition was denied in an unpublished opinion, Drummond v. FMSHRC, Secretary of Labor, and MSHA, sub. nom. Owens, Watson, and Johnson, (No. 02-14394, May 9, 2003).

[2] On March 3, 2003, the Secretary filed a motion in limine seeking to limit the introduction of certain testimony and documentary evidence. The motion was denied in a telephone conference call with all parties on March 3, 2003.

legal argument, replies to other parties' proposed findings of fact. In addition, Respondent filed a response to the Secretary's reply brief.

I. Complainants, Their Protected Activities, and Adverse Actions Taken Against Them.

A. Gloy Wyman Owens

Owens worked for Drummond for over 25 years. He worked at the Shoal Creek Mine from January 1994 through March 22, 2002, when he was terminated. For the last three years until he was terminated, he worked the 3 p.m. to 11 a.m. ("owl shift") Monday through Saturday, and occasionally on Sunday.

Owens served as a full-time Health and Safety Committeeman for the United Mine Workers Union. The committee consisted of three persons including Owens. His duties included checking for safety violations, accompanying MSHA inspectors on their inspections, and discussing conditions in the mine with miners.

Owens indicated that if any problems were reported to him, he then inspected for hazardous conditions. He indicated that if a miner asked him to look at a condition, he would look at it. If he found the condition hazardous, he contacted whoever was in charge to report the condition. Owens indicated that when asked by a supervisor for his recommendation as to what to do to abate or correct the condition, he gave his opinion. Owens testified that if the condition was not abated, he shut the mine down and notified proper management officials in order to explain the condition.

In February 2001, Drummond was engaged in the construction of an overcast. According to Owens, there was not sufficient air in the area. He contacted the immediate foreman, Marty Lewis, and told him to ventilate the area. According to Owens, Lewis said that he could not do it. Owens shut the mine down until the ventilation was approved. Owens then called the mine shift foreman, Doug Altizer, and explained the situation. Altizer told Lewis to get air to the area. The situation was corrected, and the mine was reopened.

According to Owens, in March 2001, he met five or six times with various Drummond officials regarding a petition for modification relating to the use of a 24,000 volt Miner. Among these officials were Ken McCoy, the director of operations, Rich Painter, the mine manager, and Dickie Estep, the director of health and safety. Owens stated that he told them that they had to agree to various stipulations, or the union would oppose the petition for modification. Owens indicated that at these meetings, at times, there were differences of opinion.

In June 2001, the safety committee presented a petition to McCoy, Painter, and Estep regarding the use of truss-bolts. Owens indicated , in essence, that in discussions with the latter, he presented his position that this equipment would weaken roof support.

In July 2001, a petition was re-submitted by Drummond to modify from a 35 foot cut to a 40 foot cut. According to Owens, at a meeting with Painter and Estep, he, along with two other union members, opposed the petition and said they would not be able to get sufficient air in the face. Subsequently, the petition was granted for a 40 foot cut, but was not implemented.

On September 11, 2001, at a Stakeholder's meeting with MSHA officials, Owens disagreed with McCoy who, in his speech, had advocated more of a role for management. Owens stated that in disagreeing with McCoy, he noted that rates of citations, accidents, and severity of citations had not been decreasing.

In March 2002, Drummond asked for a waiver from the State of Alabama to use a backup fan should another fan not be operative. Owens informed Tom Sheback, the owl shift foreman, that he opposed this request.

After the state granted the waiver, Owens and Safety Committee Chairman Ronnie Griffith, held a meeting with union members. At the meeting, Owens and Griffith passed out flyers with the telephone numbers of Tom Wilson, a member of the international division of the UMWA, and a Mr. Sanders, an employee of the State of Alabama, and McCoy. Owens and Griffith told the union members that the granting of the waiver for the backup fan was "taken out of our hands" and if they opposed it, they should contact the three officials identified in the flyer who were the officials responsible for the waiver (T.R. Vol I. 39-40).[3] All of the owl shift supervisors attended this meeting with approximately 80 or 90 union members. Owens and Griffith also passed out these flyers to the union members who worked on the day and evening shifts.

Owens indicated that he, along with the safety director at the mine, normally met with MSHA inspectors once a month after their inspections, to discuss any violative conditions noted by the inspectors, and citations they issued. According to Owens, in the last six months prior to his termination, the union did not support Drummond's requests to vacate citations it had received. In the last year prior to his termination he agreed with Drummond, on only one occasion, that two citations it had received should be combined .

On March 22, 2002, Owens received a letter from Drummond dated March 20, 2002, which stated that he was suspended with intent to discharge due to "[r]eceiving stolen company property". Seventeen other Drummond bargaining unit employees, three unrepresented miners and four members of management were also terminated based on their allegedly having stolen or received stolen company property, possessed or sold drugs, or consumed alcoholic beverages on

[3]T.R. Vol. I, refers to, the volume and page of the Temporary Reinstatement hearing transcript which, based on the parties agreement is incorporated in the record of the instant proceedings. Tr., refers to the transcript of the instant proceedings.

company property. Owens and <u>six</u> others were not voluntarily reinstated[4] On March 27, 2002, Owens met with management officials regarding this letter. At the meeting, he was told by a Mr. Eller that he had taken a battery or batteries, either automobile or marine. In response, Owens said that he did not receive any such items from Terry Clark, who worked at the warehouse.

B. Gary Lee Watson

Watson worked for Drummond since 1985, and at the Shoal Creek facility since March 1994. He served as a fireboss since 1995. Watson indicated that, as a fireboss, he was responsible for performing a preshift examination which involved walking the belt lines and walkways, and inspecting for dangerous conditions. He indicated there were four separate routes, and the firebosses rotated inspection of these routes on a monthly basis. Any dangerous conditions were noted in the fireboss book which was kept in the foreman's office, and also signed by a foreman. Any hazardous condition so noted was to be addressed immediately. Additionally, he would call a foreman or an assistant foreman. If they were not present, he then would call the communication office. Between June 1, 2001, and December 31, 2001, Watson wrote up at least 42 hazardous conditions in the pre-shift examination book that had to be corrected immediately before the oncoming shift could enter the mine.

On February 18, 2002, Watson found 24 inches of water in a primary roadway, noted it as a hazardous condition in the pre-shift examination book, roped off the area, and reported it to a foreman.

Between January 1, 2002, and March 18, 2002, Watson wrote up at least five hazardous conditions in the pre-shift examination book that had to be corrected before the oncoming shift could enter the mine.

From June 1, 2001, up and until March 18, 2002, Watson noted various and multiple hazardous conditions in his pre-shift reports on at least 47 occasions and noted comments of various violations on over 50 occasions. Between June 13, 2001, and March 2002, Watson conducted 17 weekly examinations where he noted, in the weekly examination books, conditions that needed to be repaired or corrected.

On several occasions he discussed, with various management officials, hazardous conditions he had noted, and they did not always agree with him. According to Watson, on one occasion in 2001, at a safety meeting at which Dickie Estep, Don Hendrickson, and Leonard Woodby were present, Watson told them that if problems with air changes continue to occur while men are underground, "... we are going to have to address it more severely" (T.R. I, 103). Watson testified that on one occasion in 2002, between January and March, after he had reported

---

[4] On July 26, 2002, subsequent to a hearing, an order was entered granting the Secretary's application for temporary reinstatement of Owens, subject the terms of the parties' agreement regarding his economic reinstatement.

icing on a walkway to his supervisor, Woodby made "... some little snide comments about it was fine when I went down it, or, you know, the men said they could go up and down it" (sic) (T.R., I., 98-99) Watson said that several times over the last eight years management officials told him that what he had termed to be hazardous should have been put in the comment section of the fireboss book. Further, according to Watson, a foreman, John Redmill used to curse him all the time.

On March 21, 2002, Watson was advised by management that he was being suspended for theft of property. He said management told him that he had taken five gallons of gas, a bag of Quickrete cement, cleaning supplies, a pick, an ax, a shovel, a pre-made sandwich, and a soft drink. Drummond did not subsequently voluntarily reinstate him.[5]

C. Henry Johnson

Johnson has been a Drummond employee since 1975 or 1976, and worked at Shoal Creek since June 1995, until he was discharged in March 2002. He worked as an outby utility man, but served as a fireboss four to five days a week during the 11 p.m. to 7 a.m. owl shift. He indicated that if he found a hazardous condition, he would call his immediate supervisor or the assistant, or mine foreman, or the company operator. According to Johnson, in addition, on several occasions in 2001, and 2002, he shut down an area of the mine due to hazardous conditions. According to Johnson, on one occasion when he had to shut down the main belt due to gas and the problems were corrected the next day, he was told by Rich Painter, Mine Manager, in his office, "[d]on't you ever shut my damn belt down again" (T.R. I., 176).

Between June 1, 2001, and December 31, 2001, Johnson wrote up at least six hazardous conditions in the pre-shift examination book that had to be corrected immediately before the oncoming shift could enter the mine. During this same time period, Johnson noted least 65 conditions in the comments section of the pre-shift examination books.

Between June 20, 2001, and March 20, 2002, Johnson conducted 13 weekly examinations, and noted, in the weekly examination book, conditions that needed to be repaired or corrected. Between January 1, 2002, and March 20, 2002, Johnson entered, in the pre-shift examination book, at least four hazardous conditions that had to be corrected immediately before the oncoming shift could enter the mine. Johnson stated that the more conditions he wrote, "the meaner you got looked at" (T.R., Vol. I, 174). On one occasion, after Johnson noted the existence of hazardous conditions, Robert Payne, a foreman, told him that other fire bosses on his shift had not seen these conditions and "... why did you write it up." (T.R., Vol. I, 172).

On March 20, 2002, Johnson was notified by the company that it intended to terminate him. He stated that he was told that on two separate occasions he had purchased one pill for which he paid three dollars. Johnson said that it was a Lortab 5. Johnson was told he also had

[5] See footnote 1, infra.

stolen soap, paper towels, garbage bags, Windex, a car battery, a No. 9 spray, a wire brush, and brought 40 dollars worth of marijuana to Terry Clark. Johnson indicated that none of these allegations are true except for an incident involving the pills. Drummond did not subsequently voluntarily reinstate him.[6]

II. Drummond's Actions

A. Investigation

In November 2001, Drummond was told that Terry Clark, whom it had hired on March 19, 2001, to work in the warehouse, was stealing from the company. Thereafter, Drummond enlisted the services of North American Security, an outside security firm, to perform surveillance at the Shoal Creek warehouse in an effort to determine who might be engaged in this alleged theft. North American conducted its surveillance from mid-November until December 12, 2001, when its surveillance team was discovered by Drummond workers who destroyed some of their surveillance equipment. The video did not show Watson, Owens, or Johnson engaged in any of the acts of wrong doing alleged in their suspension notices.

In December 2001, Drummond received information from a non employee confidential informant that she had some of Drummond's stolen property in her possession. The informant implicated Terry Clark, a supply clerk who worked in the warehouse at the Shoal Creek Mine, as being involved in the theft of Drummond property. On January 7 or 8, 2002, Tim Mosko, Respondent's Director of Security, received a list from the confidential informant identifying 20 employees allegedly engaged in misconduct at the Shoal Creek Mine.

The police began an investigation of a theft ring based upon information supplied by the confidential informant, and recovered Drummond property at the residence of the confidential informant. During the course of the police investigation, Terry Clark admitted that he had stolen property from Drummond, and he also identified several other employees as being involved in theft or the sale or use of drugs and alcohol at the mine. Terry Clark was arrested and charged with theft by the Jefferson County Sheriff's Department and the Walker County Sheriff's Department. He was facing potentially 15-20 years in jail. Terry Clark's employment with Drummond was terminated on January 12, 2002.

In late January 2002, Drummond determined that the police were losing interest in the investigation, and requested and received permission to pursue its own investigation into the alleged misconduct. Drummond engaged the services of David P. Frizell, Jr., to conduct an investigation on its behalf. Frizell is an investigator with past work experience for the U.S. Naval Investigative Service, the Central Intelligence Agency, and the U.S. Office of Personnel Management.

---

[6] See footnote 1, infra.

Drummond did not direct that Frizell investigate any particular employee, other than Terry Clark. Drummond gave Frizell a list, compiled by Terry Clark and the confidential informant, of those employees allegedly involved in theft. Frizell began his investigation on or about February 11, 2002, and met with the Jefferson County Sheriff's Department on February 11, 2002, regarding Terry Clark. He then proceeded to interview seventeen employees, including management and labor, and the confidential informant. Frizell took several statements from Terry Clark regarding misconduct by other workers. The investigation provided additional details of the misconduct of Watson, Johnson, Owens, other unrepresented workers, and members of management.

On February 22, 2002, Frizell interviewed the confident informant who identified Terry Clark, Henry Johnson, Gary Watson, Wyman Owens and 17 other employees as involved in theft, drug use, drug sales, and drug purchases. There is no evidence that the confidential informant identified Watson, Johnson, and Owens as being guilty of misconduct because they held jobs that involve safety activities. Further, there is no evidence that she knew that Watson, Johnson, or Owens held such positions.

On March 8, 2002, Terry Clark, his brother, Teddy Clark, another former employee, and Drummond entered into an agreement wherein Terry and Teddy Clark agreed to "[f]ull, honest and complete cooperation and agreement to testify in arbitration or litigation regarding certain matters. ...." (T.R., Resp. Ex. 36). Also, the District Attorney's office in charge of their case proposed to resolve the criminal charges against them.

After Drummond was informed about alleged theft and drug use on its property, Mike Zervos, Drummond's president, formed a security committee consisting of the following employees to address these allegations: Ken McCoy, Mike Zervos, Dean Hubble, Rich Painter, Tim Mosko, Mike Tracy, Ed Sellers, David Muncher, Curt Jones, and for a while, Darryl Riley. The committee commenced to meet daily, and by early February 2002, it decided it believed Terry Clark, and was going to use information he had provided.

Subsequently, Frizell informed the Committee that it was his opinion that Terry Clark was a reliable witness. Frizell told the Committee that he based this opinion on the following: Terry Clark's numerous statements were "highly consistent;" that Clark "made full admission without minimizing or rationalizing his own involvement;" that Clark made admissions against his own interest; that there was "a high percentage of corroboration" between his statements and the statements of others; that Clark was careful to provide appropriate caveats between "facts and his own opinions and beliefs"; and that Clark's statements contained "no major or significant discrepancies and that the evidence that was garnered during the investigation disclosed no fabrication of facts at all in any instance by [him]" (T.R. II, 97). Frizell recommended to Drummond that it not rely on Teddy Clark's testimony unless they had independent verification. Frizell determined Teddy Clark had lied during their interview, and "later admitted so" (T.R. II., 98). Also, Frizell found that Terry Clark had difficulty focusing on the questions asked, and that his responses were "all over the road," (id.) Further, Frizell noted that Teddy Clark was unable

to give explanations as to his involvement in a coherent manner.

The Security committee requested written reports from Frizell as to the involved persons with a summary of the misconduct of which they were accused. On or about March 15, 2002, Frizell provided the committee with a matrix, based on his investigation, setting forth the names of individual employees of Drummond allegedly implicated in wrong-doing, the allegations made against them, the source of the allegations and other evidence implicating them.[7]

The security committee ranked the severity of the misconduct and the evidentiary support for the allegations made against each individual listed on the matrix with a grade of A,[8] A/B,[9] B/A,[10] B, or B/C[11]. Those individuals placed in the A category were considered to have engaged in the most severe misconduct. Terry Clark's statements constituted the "major part" of these decisions. (T.R. II, 65) There is no evidence that the security committee ever discussed or considered any of the claimants' safety related activities in their discussions of the allegations made against them.

B. Adverse Actions

1. Discharge of Employees

The committee concluded that the following 18 bargaining unit employees whom it rated A, A/B, B/A, B, or B/C, committed misconduct sufficient to warrant their terminations: Dan Patrick, Ricky Smith, Ray Wallace, Wyman Owens, Henry Johnson, Clarence Gaines, Eddie Tucker, Morris Caffey, Gary Watson, Ralph Harper, Terry Short, Mike Alexander, Johnny Cooley, Rick Marquis, B.G. Evans, Earl Cagle, Marlin Strickland, and Mike Williams. On March 20, 2002, Drummond issued letters to each of these 18 individuals advising them of their suspension with intent to discharge. In addition, four members of management, three unrepresented employees, Terry Clark, Teddy Clark, and John Stewart, were also terminated.

2. Reinstatement of Some Employees

---

[7]In the matrix, the names of the individuals previously considered, but found by investigation not to be implicated, were deleted.

[8]The following employees were placed in the A category: Dan Patrick, Ray Wallace, Ricky Smith, Henry Johnson and Ralph Harper.

[9]The following employees were placed in the A/B category: Gary Watson and Johnny Cooley.

[10]The following five employees were place in the "B/A" category: Wyman Owens, Clarence Gaines, Eddit Tucker, Morris Caffey, and Bob Evans.

[11]The following six employees were placed in the B or B/C category: Terry Short, Mike Alexander, Rick Marquis, Earl Cagle, Mike Williams, and Marlin "Butch" Strickland.

On March 21-22, 2002, and on March 27, 2002, Drummond and the local union held 24-48 hour meetings for each of the accused. The company was represented at these meetings by Dean Hubble, Jay Vilseck, Rich Painter and Ken Eller.

As a result of these meetings, one employee resigned and another was reinstated with one day loss of pay.[12]

The company and local union also scheduled 2nd step meetings for the remaining 16 employees for March 29, 2002. The company informed the union that it "would not move" relating to those nine suspended employees whose cases involved drugs, or those whom "we had on video" (Tr. 408).[13]

On April 3, 2002, pursuant to a settlement with the union, the company reinstated the following seven employees without back pay: Cagle, Williams, Strickland, Marquis, Evans, Cooley and Alexander.[14] The company also, based on an agreement with the union, offered to reinstate the following employees with back pay on the condition that they take and pass a polygraph test: Tucker, Morris, Caffey, Gaines, Owens, and Watson. In addition, Tucker, Gaines, and Caffey would be required to take a drug test. These individuals refused to take a polygraph and/or drug test.

On April 4, 2002, pursuant to a settlement with the union, the company agreed to allow Harper to remain in sickness and absence ("S&A") status until these benefits expire and then be allowed to retire on January 3, 2003. As a result, Harper received additional retirement benefits resulting from the new union contract that took effect on January 1, 2003.

On May 12, 2002, Drummond offered Wallace, who was initially placed on disciplinary suspension from March 20, 2002, through May 12, 2002, a last chance agreement, and he was reinstated without back pay.

VII. Additional Facts and Discussion

---

[12] Dan Patrick, whom Terry Clark had accused of theft of hundreds of dollars of company property, including over 100 welding torches, resigned on March 21, 2002, in exchange for the company's agreement not to prosecute him. Terry Short, who was accused of theft of cable based on video surveillance of him taking cable from a company truck and placing it in his personal vehicle, told Drummond at the 24-48 meeting that he had permission to take the cable. This was confirmed with Short's foreman later that same day, and Short was reinstated on March 21, 2002, with one day loss of pay.

[13] These employees are Wallace, Smith, Johnson, Watson, Owens, Tucker, Caffey, Harper, and Gaines.

[14] None of the discharged management employees or unrepresented employees were offered reinstatement.

A. Case Law

Section 105(c) of the Act prohibits the discharge or discrimination of a miner who made a complaint under or related to the federal mine safety and health act including "... a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this act."

Under established Commission Law, the complainant in a Section 105(c) proceeding, establishes a prima facie case of a violation of Section 105(c), if a preponderance of the evidence proves 1) that he engaged in a protected activity, and 2) that the adverse action was motivated in any part by the protected activity. Pasula v. Consolidation Coal Co. ,2 FMSHRC 2786, 2799-2800 (Nov. 1980), reversed on other grounds, Sub. Nom. Consolidation Coal Co. v. Marshall, 663 F. 2d , 1121 (3rd Cir. 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. Id. If the Operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. Id. at 2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (Apr. 1981).

1. The Prima Facie Case

a. Protected Activities and Adverse Actions

The record clearly establishes that all three claimants, Owens, Watson, and Johnson, engaged in protected activity. Owens, as a safety committeeman, examined the mine on a daily basis for hazardous conditions. Any such conditions were reported by Owens to mine management. Acting within the scope of his authority, Owens shut the mine down on two separate occasions in the twelve months prior to his discharge.

Johnson worked as a fill-in fire boss two to three days a week, and Watson worked as a fire boss on the owl shift.[15] They conducted pre-shift examinations looking for hazardous conditions, and when found, they notified a mine foreman so that the hazard could be corrected. From June 2001, thru March 20, 2002, they each recorded hazardous conditions in the pre-shift books. On one occasion in February 2002, upon noting water accumulations, Watson roped off the area and recorded the condition to the foreman. Johnson shut the beltline down upon noting rollers turning in coal, and on another occasion shut the mine down and pulled the men out after

[15] I take cognizance of Drummond's argument that actions performed in execution of one's required job duties are not protected activities. This argument was initially made by Drummond in its motion for summary decision. This argument was considered and rejected in the order denying motion for summary decision, issued March 6, 2003, and the rationale for the rejection, is incorporated herein.

he had found an excess of methane.

The record also clearly indicates that Drummond took adverse action against Owens, Watson, and Johnson, when it notified them of their suspension with the intent to discharge and by not voluntarily reinstating them after their discharge.

b. Adverse Action Motivated in any Part by Protected Activities

Commission case law establishes that in evaluating whether the Secretary has proven a causal connection between protected activities and adverse action, the following factors are to be considered: 1) knowledge of the protected activity 2) hostility or animus toward protected activity 3) coincidence in time between protected activity and the adverse action and 4) disparate treatment. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), rev'd on other grounds, 709 F. 2d 86 (D.C. Cir. 1983).

Knowledge of Protected Activity

Owens notified various mine foremen when he found hazardous conditions. Watson and Johnson noted hazardous conditions in examination books that are co-signed by mine foreman. Hence, management had knowledge of their protected activities.

Animus toward protected activity

On one occasion when Johnson shut down the belt due to having observed a hazardous condition, Rich Painter, a mine manager, told him "don't ever shut my damn belt down again" (T.R. I.,176).

According to the uncontradicted testimony of Watson, a management official had cursed him, and on other occasions other management officials told him that conditions that he had reported in examination books as being "hazardous" should, instead, have been listed in the "comments" section. Thus the record contains some evidence of animus towards Johnson and Watson's protected activities engaged in by Johnson and Watson.

Coincidence in time between protected activity and adverse action.

In early March 2002, just weeks before he was discharged, Owens handed out fliers with names and phone numbers of the Drummond officials who had agreed to seeking a waiver of a back-up fan. Watson shut down the smoke walkway in the first week of January 2002, due to excessive icing. Also, he noted high water as a hazardous condition on January 21, February 14, and February 18, 2002, and two days before his discharge. Johnson noted hazardous high water on January 22, 2002, and noted ice on the slope on January 4, January 16, and February 7, 2002. Thus, the record contains some evidence of some protected activities engaged in by all three

complainants, in a period of time in close proximity to the date of their discharge. This provides a basis for a finding of some coincidence in time between protected activities and adverse action.

Disparate treatment

The record does contain some evidence of some disparate treatment. Owens was accused of having received stolen company property and was terminated, and not reinstated. Watson was accused of taking company property and was terminated, and not reinstated. Johnson, who was accused of selling drugs was terminated and not reinstated. On the other hand, the following eight individuals who also had been accused of either theft of company property or selling or giving drugs to others on company property were subsequently reinstated: Wallace, Alexander, Cooley, Marquis, Evans, Strickland, Williams, and Harper.

McCoy indicated that, regarding Owens, he was not reinstated because his theft was premeditated as he had asked Terry Clark to steal a battery on two occasions. In contrast, Alexander, Cagle, Marquis, and Williams, were subsequently reinstated although they had been accused by Clark of asking him for stolen goods on two occasions.

Watson, who was not reinstated, had been accused by Clark of taking various items belonging to the company property including cleaning supplies. In contrast, Cagle, was reinstated although he also had been accused by Terry Clark of taking cleaning supplies and another item of company property.

Johnson, who had been accused by Terry Clark of selling drugs on company property, was not reinstated. However, Cooley and Evans, who had similarly been accused of selling and giving drugs to other employees were reinstated. Additionally, Harper, who had been accused of giving drugs to other employees, was allowed to retire under a new union contract which provided him with additional retirement benefits.

Taking into account all the above factors, in combination, I find that the Secretary has adduced a sufficient quantum of evidence to establish that Drummond's motivation in taking adverse action against claimants was based, in any part, on their protected activity. Thus, I find that Secretary has established a prima facie case.

2. Drummond's Affirmative Defense

a. Applicable case law

In Sec. ex. rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F. 2d, 86 (D.C. Cir. 1983) the Commission explained the proper criteria for analyzing an operator's business justifications for an adverse action:

> ... Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained. (Emphasis added).
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.' Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System, Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

In William H. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982), the Commission further explained its holding in Chacon as follows:

> Thus, we first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, we held that once it is determined that a business justification is not pretextual, then the judge should determine whether 'the reason was enough to have legitimately moved the operator' to take adverse action.

In Haro, id., the Commission also elaborated on the scope of the Judge's examination of an operator's business justification response as follows:

> ... we intend that a judge, in carefully analyzing such defenses, should not substitute his business judgement or sense of "industrial justice" for that of the operator. As we recently explained, 'Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.' Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (Jun. 1982) (emphasis added).

b. Discussion

In essence, it appears to be the position of Drummond, that its affirmative defense is predicated upon a business justification for the adverse action taken against complainants, in that they were discharged for theft and other misconduct. In this regard, it asserts that it had a good faith belief that the claimants committed misconduct. In contrast, the Secretary argues, in essence, that Drummond's justification is pretextual, in that its reliance on Terry Clark is not credible, that Clark was motivated to lie, that there were conflicts and inconsistencies in McCoy's testimony, that Drummond failed to investigate beyond the word of Terry Clark, and that the evidence does not support Frizell's testimony regarding Terry Clark's credibility. In addition to these arguments, counsel for the individual claimants asserts that the latter suffered disparate treatment, and accordingly the assertion by Drummond of a business justification for the adverse action taken against them, is only pretextual. For the reasons set forth below, I conclude that Drummond has established by a preponderance of the evidence, the existence of a business justification for the adverse action taken against the individual claimants, that was credible, and that was enough to have legitimately moved it to take the adverse actions (see Haro at 1938).

A preponderance of evidence establishes that, by March 15, 2002, the company had become aware that it had a problem relating to the theft of company property and the selling of drugs on its property. In order to obtain information regarding the individuals involved in these activities the company arranged for video surveillance of its property, and hired an independent private investigator. On March 15, 2002, Drummond was presented with a report by the private investigator based upon the latter's interviews of a former employee, Terry Clark, other employees, and surveillance tapes. Once the company learned that it had a serious theft and drug selling problem on its site, it certainly was credible for it to arrange for surveillance and the services of an investigator. In these regards, there is no evidence that any instructions were given to the investigator or the firm that conducted the surveillance, to single out or focus in on Owens, Johnson, Watson, or other firebosses. It certainly is credible that receipt by Drummond of Frizell's report implicating Owens, Johnson, and Watson, and other employees, in theft and or drug activities, would have legitimately moved it decide to suspend them with intent to terminate. It is not for this body to determine whether the operator should have accepted Frizell's conclusions knowing that, in main part, they were based on information supplied by Terry Clark, who had previously been fired by Drummond for having allegedly stolen property from Drummond, and who had agreed to complete cooperation in exchange for Drummond's agreement to acquiesce in an agreement proposed by the District Attorney's office to resolve the criminal charges against him. Also, it is not proper for this body to question Frizell's reliance on Terry Clark's information provided to him, and Frizell's opinion regarding Clark's credibility. What is relevant is that Drummond was presented with information from various sources implicating Owens, Watson, and Johnson in serious misconduct, which it acted upon in suspending them with the intent to discharge. Within the context of Drummond's concern of widespread theft of its property and use of drugs on its property, it was legitimate for it to arrange for an investigation of these alleged acts, and individuals allegedly implicated. Further, on its

face, the information provided to it by its investigator implicating Owens, Watson, and Johnson was, within the above context, credible and legitimate to move it to terminate these individuals. In this connection, it is significant to note that 15 other Drummond employees who also had been implicated in videotapes and/or the investigator's report as having been involved in theft of company property and/or selling drugs, were, along with Owens, Johnson, and Watson, suspended with intent to terminate on March 21,2002.

It is the contention of Complainants that, subsequent to their being suspended with intent to discharge, additional adverse action was taken against them when they were not provided, by Drummond, with the opportunity to be reinstated. In contrast, seven other individuals, who had been included in the group of eighteen employees who had been suspended with intent to discharge were all reinstated on April 3, 2002, without back pay, pursuant to a settlement with the union. Also, two other individuals who had previously been part of the class of employees who were suspended on March 21, received treatment more favorable than that accorded Complainants. Harper was continued on sick leave status until those benefits expired and then was allowed to work one day in the calendar year 2003 and retire on January 3, 2003. As a result he received additional retirement benefits based on a new union contract that became effective on January 1, 2003. Wallace, after serving a fifty day suspension, was offered a last chance agreement and was reinstated without back pay.

In these regards, the record contains some evidence of disparate treatment of Owens, Johnson, and Watson, as discussed above. (VII, (A)(1)(b)). This quantum of evidence was found to have been sufficient, when considered in combination with some evidence of animus, knowledge of protected activities, and coincidence in time, to have been of sufficient probative weight to have met the Secretary's burden of establishing that Drummond's motivation in not reinstating Owens, Johnson, and Watson, was based in any part on their protected activities. (id.) However, the record as a whole does not contain a sufficient quantum of evidence of disparate treatment to establish, as argued by complainants, that Drummond's asserted justification was pretextual. In this connection I find it most significant that Owens, Johnson, and Watson, were initially suspended with intent to discharge along with fifteen other individuals who also had been implicated in theft of company property and/or selling or use of drugs. Also, although the Complainants were not reinstated, they were treated in this regard the same as three other individuals, Tucker, Caffey, and Gaines, who also had been implicated in theft and/or drug selling, and were not reinstated. There is no evidence in the record that the latter three individuals had engaged in protected activities, or that Drummond was motivated in any part in its decision not to reinstate them based upon their protected activities.

The Secretary argues that Drummond's reliance on the uncooberated statements of Terry Clark was not credible because he had only been employed at Drummond for nine months before he had been discharged, was involved in theft of Drummond property, and was not prosecuted for the alleged theft based upon his agreement to cooperate with Drummond. However, while such reliance might not have been the wisest business determination by Drummond, the function of the Commission is not to pass judgement on the wisdom of this determination (See, Bradley v.

Belva Coal Co., 4 FMSHRC 982, 993 (June 1982)). Since Drummond hired an independent investigator to ascertain the facts relating to alleged theft of company property and use of drugs on its property, and since Frizell, the independent investigator provided his opinion to Drummond that Clark's accusatory statements were reliable, it can not be found that Drummond's reliance on Frizell's opinion and conclusions was "plainly incredible or implausible" Haro at 1937. Accordingly I conclude that, given these circumstances, "... a finding of pretext is inappropriate." (id.).

The Secretary, in its brief, refers to various inconsistencies in McCoy's testimony and in his deposition to, in essence, defeat the good faith of Drummond's business justification for suspending with intent to fire the complainants, and subsequently not reinstating them. In essence, the main thrust of the asserted inconsistencies relate to the soundness of Drummond's determinations regarding the classification of the 18 implicated employees by degrees of culpability, and quality of supporting evidence. It is not for this forum to perform a detailed inquiry as to the wisdom of Drummond's determinations. I observed McCoy's demeanor and found him to be a credible witness regarding matters essential to Drummond's affirmative defense, i.e., that in determining not to offer reinstatement relating to the claimants it relied on Frizell's report which set forth, for each of these individuals, specific allegations of unprotected activities, and the supporting witness and additional evidence, if any. On this basis, it appears that the business justification was not plainly incredible or implausible, and thus a finding of pretext is inappropriate. (id.).

Lastly, the fact that Drummond offered the Complainants, along with Tucker, Caffey, and Gaines, the opportunity to take a polygraph test and be reinstated with back pay should they pass such a test, which all these individuals refused to take, is further credible justification for Drummond's action.

Therefore, based upon all the above, it is concluded that although the Secretary has established a prima facie case of discrimination under the Act regarding the three named Claimants, Drummond has prevailed in its affirmative defense. Therefore the Complaints of Discrimination are dismissed.[16]

---

[16] At the hearing Drummond proffered six polygraph reports of tests administered to Terry Clark on April 26, 2002. The Secretary objected, and a decision on the admissibility was reserved. Since the tests were administered to Clark on April 26, 2002, and since the adverse actions taken against Owens, Watson, and Johnson consisting of their firing on or about March 20, 2002, and their not being reinstated on April 3, 2002, the reports themselves are not relevant to Drummond's motivation and justification.

ORDER

It is **ORDERED** that these cases be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

MaryBeth Bernui, Esq., Thomas A Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Harry Hopkins, Esq., Brian R. Bostic, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, 1900 Southtrust Tower, 420 N. 20th Street, Birmingham, Alabama, 35203-3204

Ann C. Robertson, Esq., Temple D. Trueblood, Esq., Gordon, Silberman, Wiggins & Childs, 1400 South Trust Tower, Birmingham, AL 35203

Daryl H. Dewberry, Esq., United Mine Workers of America, District 20, 1200 Fourth Avenue South, Birmingham, AL 35233

Judith Rivlin, Esq., United Mine Workers of America, 8315 Lee Highway, Fairfax, VA 22031

/sc