

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 22, 2007

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION,	:	Docket No. SE 2006-176-D
on behalf of THOMAS F. WILSON,	:	BIRM CD 2006-03
Complainant	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA,	:	
Intervenor	:	
v.	:	
	:	
OAK GROVE RESOURCES, LLC, and	:	
JAMES E. SIKO,	:	Mine ID 01-00329
Respondent	:	Concord Prep Plant/Oak Grove Mine

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant;
Patrick K. Nakamura, Esq., Nakamura, Quinn & Walls, LLP, Birmingham, Alabama, for Intervenor;
Thomas A. Smock, Esq., and Michael D. Glass, Esq., (on brief), Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, Pennsylvania, for Respondents.

Before: Judge Hodgdon

This case is before me on a Discrimination Complaint brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Thomas F. Wilson, against Oak Grove Resources, LLC, and James E. Siko, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). A trial was held in Birmingham, Alabama. For the reasons set forth below, I find that neither Respondent discriminated against the Complainant.

Background

Oak Grove Resources operates the Oak Grove Mine, an underground coal mine, and the Concord Preparation Plant near Adger, Alabama. The company's corporate headquarters are located at the South Point complex, outside of Canonsburg, Pennsylvania. James E. Siko is Vice President of Operations and the top management official at the Oak Grove Mine and preparation plant.

Oak Grove's miners are represented by the United Mine Workers of America (UMWA). Thomas F. Wilson is employed by the UMWA as an International Health and Safety Representative and is a representative of miners at the Oak Grove Mine and Concord Preparation Plant. His office is in Hueytown, Alabama. He does not work for Oak Grove Resources.

On Saturday, January 14, 2006, Wilson conducted a UMWA safety inspection of the Concord Preparation Plant, under the terms of the collective bargaining agreement. He was accompanied on the inspection by Thomas Henson, an employee of Oak Grove and the president of the local UMWA union, and Gary McGough, an Oak Grove Safety Coordinator. Wilson provided a copy of his inspection report to Oak Grove management on January 15. On Tuesday, January 17, he filed a copy of the report with the MSHA District Office as a hazard complaint under section 103(g) of the Act, 30 U.S.C. § 813(g).¹

In response to Wilson's complaint, MSHA Inspector Jarvis Westery conducted an inspection of the preparation plant that same day. At 10:15 a.m. he issued Order No. 7687445 alleging a violation with regard to the coal thermal dryer facility. This resulted in closing down the facility until the order was terminated at 3:15 p.m., after Oak Grove had abated the cited condition.

Siko was underground in the Oak Grove mine on the morning of January 17 when he was informed of the order shutting down the thermal dryer facility and that a 103(g) complaint had been filed. He left the mine and went to the preparation plant sometime after 1:30 p.m. to oversee the abatement of the order and to discuss it with the inspector.

Sometime on January 18, a second 103(g) complaint, concerning the underground mine, was called into the local MSHA office by an anonymous miner. As a result, MSHA Inspector Russell Weekly conducted an inspection of the mine on the 18th and issued four citations to the company.

¹ Section 103(g) provides that: "Whenever a representative of the miners . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such . . . representative shall have a right to obtain an immediate inspection by giving notice to the Secretary"

Wilson filed his discrimination complaint with MSHA on February 2, 2006, concerning statements alleged to have been made by Siko. One was alleged to have been made to Ralph Erwin, an hourly employee, on the night of January 17. The other was purported to have been made to John Cupps, an hourly employee and chairman of the UMWA Mine Committee at the preparation plant, over the telephone on the afternoon of January 18.

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner, or representative of miners, cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) he “is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) he “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 (4) he has exercised “on behalf of himself or others . . . any statutory right afforded by this Act.”

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner, or representative of miners, must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated in any part by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (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. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In this case, there is no dispute that Wilson engaged in protected activity. It differs from most discrimination cases, however, in that the issue is whether there was any adverse action taken by the Respondents, not whether the adverse action was motivated by the protected activity. The Complainant asserts that Siko made statements to Erwin and Cupps that would have a chilling effect on miners’ willingness to make safety complaints. Siko denies making such statements.

For the most serious of the statements, the one supposed to have been made to Cupps, the evidence is in direct conflict and cannot be reconciled. Cupps and Wilson contend that Siko

made threatening statements over the telephone. Siko denied making the statement and denied talking on the telephone to Cupps at all during the time when the statement was supposed to have been made.

Concerning the statement to Erwin, Erwin and Siko were essentially in agreement about what was said. On the other hand, the rest of the witnesses who testified about their understanding of Siko's statement described a different statement than the one related by Erwin and Siko.

Obviously, either the Complainant and his witnesses were not telling the truth, or the company witnesses were not telling the truth. However, for most of the witnesses, it was not obvious from the manner and demeanor of the witness that he was being untruthful. Nor was it obvious from the accounts themselves which was false. Further, this is not a case where one side has an evident motive to lie and the other does not. In the final analysis then, inconsistencies and the fact that the burden is on the Complainant to prove the case have provided the reasons for the decision in this case. A discussion of those reasons is set forth below.

The Complaint

Wilson's complaint, filed on February 2, 2007, stated as follows:

On January 18, 2006 (specifically) and other dates (in general), myself, other miners and miners representatives have heard Oak Grove Resources, Inc. Vice President James E. Siko make threats of discharge against all employees that engage in protected activities under the 1977 Mine Health and Safety Act and/or supported Tom Wilson exercising his protected activities under said Mine Act. This verbal threat specifically spelled out that it was being addressed against all UMWA employees at both the Oak Grove Mine and the Concord Mine.

(Jt. Ex. 6.) When the Discrimination Complaint was filed with the Commission, the allegation was that:

Respondents Oak Grove and James E. Siko discriminated against and interfered with the statutory rights of Thomas Wilson as a "representative of miners" and those miners employed at the Concord Mine, Preparation Plant, and Oak Grove Mine, when Respondent James E. Siko made statements to miners' representatives and miners in which he threatened to retaliate against any miners who made safety complaints to Oak Grove; who filed complaints with MSHA under Section 103(g) of the Mine Act; or who assisted or supported miners and miners'

representatives who made safety complaints or filed complaints under Section 103(g) of the Mine Act.

(Comp. at 3.)

As can be seen, it is only by construing Wilson's "other dates (in general)" remark to include the alleged statement to Erwin and the fact that the Secretary assigned no dates to the allegations in the Complaint, that the statement to Erwin is included in this proceeding at all. Nevertheless, evidence concerning it was produced at the hearing and the parties have discussed it in their briefs, so it is being considered part of the complaint.

The Statement to Erwin

On the afternoon of January 17, Siko made arrangements for miners from the mine to be sent to the preparation plant to assist in abating the violations found by Inspector Westery and the deficiencies set out in Wilson's inspection report. He left the mine in the evening and returned to the preparation plant around 10:30 or 10:45 p.m. He encountered Erwin, a stationary equipment operator, in the lunch room of the preparation plant building. According to Erwin, Siko "shook my hand and asked me how I was doing." (Tr. 97.)

Erwin testified that Siko then said, "that these 103's were going to kill the Company, and that whoever was calling in the 103(g)'s might as well have gone ahead and committed suicide because they were killing their jobs." (Tr. 98.) Erwin stated that he replied that he did not know anything about "the 103's." (Tr. 99.)

Siko's recollection of the conversation was similar. He testified that he said:

Well, I'm not doing very well. The violations and the (g)'s are tearing us apart. The guy who's filing these, that's not the way to get it done, that's more like suicide. We've got to get better, we've got to – jobs are at stake if we don't improve here, and the Government will shut us down, and they've told us this, you know, that unless we improve, that'll happen.

(Tr. 305.)

Erwin related that after talking to Siko, he completed his rounds and then went back up to the control room, located a short way down the hall from the lunch room, to warn Tommy Henson that Siko was "mad" and that "he needed to be careful what he said around Mr. Siko while he was upset." (Tr. 99-101.) Erwin said that he relayed to Henson exactly what Siko had said to him. (Tr. 116.) However, Henson claimed that Erwin told him that Siko "said that he couldn't stand all the 103(g)'s, and if he found out who filed the 103(g)'s, that they might as well put a gun to their head and committed suicide." (Tr. 45-46.)

The next morning, Henson called Wilson from his home and “told him exactly what Ralph told me.” (Tr. 48.) Wilson called Henson back and told him that they had a meeting with MSHA Special Investigator Jim Boyle at 3:00 p.m. at Steve’s Grocery. At the meeting, when Boyle learned that the statement had not been made to Henson, but to another miner, it was decided that Wilson would go to the preparation plant and talk to the miner.

Wilson and Erwin met in the bathhouse shortly before the afternoon shift began at 4:00 p.m. Erwin testified he that talked with Wilson for about a minute and a half. He told Wilson what Siko had said to him and when Wilson asked him if he wanted to pursue a 105(c) complaint, he said no. (Tr. 102, 126.)

Wilson testified that when he spoke with Erwin, “[i]t was a very short conversation. Ralph confirmed that Mr. Siko had made statements to him, but he also excused it as Mr. Siko having a bad day.”² (Tr. 223-24.) Wilson maintained that Erwin told him that Siko had said that “whoever was filing 103(g)’s might as well commit suicide. And there was something about, ‘his ass is mine,’ or something to that effect.” (Tr. 224.) He later testified that: “My best recollection of what the man told me, is that whoever’s filed the 103(g) might as well go ahead and commit suicide, pull the trigger, his ass is mine, when I find him.” (Tr. 255.) Wilson also declared that when Erwin related this, he used a gesture of his hand as a gun and put his finger in his mouth. (Tr. 256.)

Cupps testified that when he was leaving work on January 20, Henson asked him to come into the control room and when he arrived, Henson told Erwin to tell him what he had heard. He recounted that “Ralph said, well, I done told you, Mr. Henson, you just tell him, and then if you need it changed, I’ll make it correct. He said, okay. So Tommy told me.” (Tr. 152.) He said that Tommy told him:

Well, he had told me, which I didn’t know anything about it at the time ‘til they told me there in that room. And he said, well, he said that he had talked to Mr. Siko, and said Mr. Siko told him that whoever called that 103(g) in, that might as well put a gun, I thought he said, in the roof of his mouth, and pull the trigger, in other words, just might as well kill yourself. Because if he found out who it was, his you-know-what was his, referring to your backside.

(Tr. 153.) Cupps further stated that when Henson had finished, Erwin “told us everything that he said, it was true, and he was real nervous.” (Tr. 153.)

² Wilson concluded after talking with Erwin that there were “no grounds to pursue a 105(c).” (Tr. 225, 256.)

There is a big difference between what Erwin testified that Siko said to him and what Henson, Wilson and Cupps claimed Erwin told them Siko said to him. In addition, Erwin also testified that Siko never made a hand as a gun gesture and put it in his mouth, or to his head. (Tr. 109, 118.) And he further testified that he did not make such a gesture when he told Henson, Wilson and Cupps what Siko had said. (Tr. 118.) Furthermore, Erwin testified that he told Cupps verbatim what Siko had said to him. (Tr. 103-04.) He did not say anything about letting Henson do his talking for him. Indeed, he did not even mention Henson being present when he talked to Cupps.

Henson testified that when Erwin told him about the conversation, Erwin did not say or demonstrate that Siko had made any hand gestures. (Tr. 65.) Henson also stated that when he related the conversation to Wilson he did not mention that Siko had made any hand gestures. (Tr. 74.) Yet, Wilson maintained that everyone who told him what Siko had said used the hand as gun gesture, testifying that “[m]y memory is that’s the only version I’d ever heard” (Tr. 241.)

I find that the only credible versions of what Siko said to Erwin were offered by Siko and Erwin. The rest were based on second and third hand hearsay. At best, they demonstrate how information becomes garbled as it is passed from person to person. At worst, they evidence deliberate fabrication. It is not necessary to decide which in this instance.

Siko admitted at the trial that he had forgotten the discussion with Erwin, until Erwin was deposed. (Tr. 374-76, 382.) He further admitted that when he was deposed on July 18, 2006, in response to the question of whether he had “any conversation with a UMWA member who had, and had indicated anything about, talked anything about 103(g) complaints on the 17th [of January],” he answered that he had not. (Tr. 375-76.) He explained that after Erwin was deposed, “I went through my notes, my personal records of production, line people back to the plant, etcetera, etcetera, and realized that I was there and did talk to Ralph that night.” (Tr. 382.)

His lack of memory and denial that he talked with anyone about the 103(g) complaints on January 17 are not significant. The failure to remember an offhand remark made while exchanging pleasantries with a miner some six months prior does not demonstrate duplicity. Nor does answering “no” to an open-ended question as whether he had talked to any miner about the complaints. As Siko testified: “I had no memory of that one event, because I was in, dropped off the letter, the note of what we were going to do, spoke to the foreman, passed Ralph, and out the door I went.” (Tr. 385.) He went on to say: “I move around a lot, and talk to a lot of people, and I got a lot of things going on there.” (Tr. 385.) Consequently, I find that Siko’s credibility is not adversely affected by these apparent inconsistencies.

Moreover, with regard to the statement to Erwin, Siko’s credibility makes little difference since relying solely on what Erwin related that Siko said, there was no violation of the Act. In some circumstances, what Siko said could have a chilling effect on miners; for instance, if he said it to the miner who had made the complaint, or to a group of miners, or to union

representatives. Here, however, the statement was made spontaneously and without apparent forethought in response to Erwin asking him how he was doing. While it expressed his frustration, it was made in the context of venting to one of the miners he thought he knew and was friendly with, not as a threat that it should not happen again.

Certainly, Erwin did not take it as a threat. He testified that he thought Siko was talking about the company as a whole being at risk, rather than about taking actions against individual employees. (Tr. 111.) He further stated that he told Henson what had happened only to warn him that Siko was in a bad mood; he did not say to Henson, or anyone else, that Siko was threatening miners. Thus, while statements can be violations of the Act if they have a chilling effect on miners exercising their rights under the Act, this was not such a statement and did not have such an effect. Accordingly, I conclude that this statement was not a violation of section 105(c).

The Statement to Cupps and Wilson

Cupps, who in January 2006 was Central Control Room Operator working the day shift, testified that Siko routinely called him two or three days a week, or more, to check on how the shift had gone and what the production was. (Tr. 142.) He said that on January 18, at about 3:55 p.m., Siko called him to ask about production. (Tr. 143.) At this point in his testimony, in response to an innocuous question, Cupps gave the following monologue:

Q. Let me stop you. Did you ask him about his day, did he ask about your day, was there any small talk beforehand?

A. Oh, he asked me about the plant, yeah, just small talk, then he went in about this 103(g). I told him – yeah, he asked me how the plant was doing, I told him it was doing good, because we'd had a good run that day. You know, we'd had a good yield, good run and everything. I told [him] it was good.

And he said, well, things ain't going that good with me. And I said, sir? He said, things are not going that good with me. I said, what are you talking about? He said, relating to these 103(g)'s and these Orders I got up there at the plant, he said, I don't think it's going too good at all.

And up until we'd went down with the dryer, you know, we'd done good. And then he just, like he changed into another gear, you want to say, or something. And he started saying these tactics and about Mr. Wilson.

And about that time Mr. Wilson stepped in the door. And I

asked him, I said, well, Mr. Siko, I said you related to Mr. Wilson, do you want to talk to him, he just entered the room. He said, no, I don't want to talk to him, he'd better not be up there.

I said, well, Mr. Siko, I'm going to tell you again, he's here, do you want to talk to him. He said, I done told you, John, I don't want to talk to him and he'd better not be in there.

In the meantime, I'd motioned for Mr. Wilson to come over there. I felt like if the man was going to bring Mr. Wilson's name up, Mr. Wilson needed to hear the conversation. Because he was relating to him in an aggravated voice, and he was raising his voice.

And then, I went into attach [*sic*] them, and he told me, said, let me tell you something about that 103(g) and them orders up there at the plant. He said, like a red light/green light issue, John, I'm going to put it to you that way. He said, the people that follows after Mr. Wilson and his tactics, files these 103(g)'s in, and things of that, and causes problems towards this Company, is interfering with the operation on the safety issues, he said, them red light people, they'll no longer be employed here, they'll not work for us. He said only green light people that go through the green light that don't cause no problems, keeps their mouth shut, don't cause no problems with safety, he said, them kind of people will work here.

And it was a real aggravated voice. I mean, he was raising his voice. You could have heard him as far as from here to you, just about, in that room. The room's not that big, but you could have heard it probably that far.

(Tr. 143-46.)

Cupps asserted that the call lasted until 4:10 p.m. or 4:12 p.m. (Tr. 175.) He said that Siko was so loud that Wilson could have heard him over by the door he had come in. (Tr. 186-87.) He further related that when Wilson came over by him, he turned the handset receiver so that Wilson could also listen. (Tr. 186-87.) He was adamant that he did not put the call on the speaker phone. (Tr. 177.) He also testified that his foreman came into the control room during the telephone call to ask for the performance sheet that Cupps' fills out at the end of the shift. (Tr. 148.)

Wilson testified that he went upstairs to the control room at 4:00 p.m. looking for Cupps. (Tr. 225-26.) He said he first stuck his head in the foremen's office and said: "Where's Cupps?" (Tr. 260.) Then, he recounted that he went through an open door into the control room and saw Cupps on the telephone. (Tr. 228.) He said that he heard Cupps refer to him, then Cupps motioned him to come over and as he approached Cupps he could hear someone, whose voice he recognized as Siko's, screaming on the phone. (Tr. 228-29, 267.) At that point, he asserted that the call was put on the speaker phone. (Tr. 229.) He testified that he heard Siko say:

I want to talk to you about these 103(g)'s and safety complaints.

And there's two types of people, red light people are the people that file safety complaints or support Tom Wilson in his filing of complaints, and green light people, which are people that keep their mouths shut. And when all is said and done, only green light people will work for this company.

That went through two rounds of the same thing being said twice.

(Tr. 229-30.) Wilson estimated that the call ended at 4:05 p.m. and that it lasted no longer than four or five minutes. (Tr. 266.)

Siko testified that he did not normally call the control room operator at the end of the shift to get the production report. (Tr. 283.) He said that he called the foremen's office to get that information. (Tr. 283-84.) He stated that if he called the control room operator for such information, it would be in the middle of a shift. (Tr. 284, 361-62.)

Siko denied making a telephone call to Cupps in the control room on January 18. (Tr. 316-17.) He testified that he was in the underground mine with Benjamin Statler, President and CEO of the company, Barry Dangerfield, COO of the company, and Michael McLaughlin, Mine Superintendent for the underground mine, from about 8:00 a.m. until about 5:45 p.m. on that day. (Tr. 313-16, 330-31.) He said that from about 2:00 p.m. the group "spent the rest of our afternoon in that return [11 West Section], trying to get that return rock dusted so we could start that section back up. And that lasted until about 4:30, quarter until 5:00." (Tr. 314.) He estimated that the closest telephone to where they were was "900 to 950 feet away." (Tr. 342.)

Siko's testimony was supported by Dangerfield and McLaughlin. McLaughlin testified that Siko did not mention having to make a telephone call, did not remove himself from the group and did not make a telephone call at 4:00 p.m. on the 18th. (Tr. 456.) Dangerfield testified that the nearest telephone "was almost a thousand feet away, at the top end of that section." (Tr. 487-88.) He said there was no doubt in his mind that Siko did not make a telephone call to the prep plant at 4:00 p.m. because "[t]here's no way Jim could have made a call. There's no phones there. We were in the return." (Tr. 488.)

I credit the testimony of Siko over that of Cupps and Wilson. His testimony is corroborated by witnesses who are not directly involved in the complaint. It is plausible and not inherently incredible. Except for Cupps and Wilson, it is not contradicted by any other witness, either directly or indirectly. In addition, he has been in the mining business for 37 and a half years and is familiar with section 105(c). (Tr. 323-24.) It is difficult to believe that he would commit such an obvious violation of the Act by making overt threats to the chairman of the local union mine committee.

On the other hand, there are inconsistencies in the testimony of Wilson and Cupps. Further, portions of their testimony are contradicted by other witnesses and documentary evidence. Finally, Cupps' manner and demeanor while testifying, specifically, his verbosity, his admitted embellishments and exaggerations, his false modesty and his propensity for answering questions not asked, further diminish his credibility.

Wilson's and Cupps' testimony had some obvious incompatibilities. Cupps said he let Wilson listen in on the handset, Wilson said the call was on the speaker phone. Wilson said the call only lasted about five minutes, Cupps claimed it lasted 15 to 17 minutes. These are not matters on which disagreement would normally be expected.

Furthermore, not only was the testimony of Wilson and Cupps inconsistent, but Henson, the control room operator who followed Cupps on the afternoon shift, testified that he arrived in the control room at 4:00 p.m. on January 18 and that Cupps was not there. (Tr. 78-80.) This testimony is substantiated by Oak Grove's timekeeping system. A printout of the Kronos Timekeeping System shows that Cupps clocked out at 3:57 p.m. and Henson clocked in at 3:47 p.m.³ (Tr. 530, Resp. Ex. 1.)

On cross-examination during the Complainant's case-in-chief, Cupps testified that he usually clocks out at 4:00, that he could not remember whether he had already clocked out before receiving Siko's call, but that normally, once he clocks out he leaves. (Tr. 176.) However, after the timekeeping evidence was introduced, Cupps was recalled in rebuttal. He first testified that there was a variance between the time clock and the clocks on the computers in the control room, with the clocks in the control room being "behind, and either when you first started out it would be fifteen minutes faster or slower, and it just varies both ways, really." (Tr. 573.) Later, he was asked if he had any recollection of clocking out and then returning to the control room and he

³ The Secretary objected to the timekeeping evidence on the grounds of surprise in that the Respondent had not furnished a copy of it prior to trial. The objection was overruled. (Tr. 534.) The Secretary objects to it again in her brief. (Sec. Br. at 30.) This is the only completely objective evidence in the trial. If counsel for the Respondent was aware of it prior to the trial, he should have furnished it to the Secretary. Nevertheless, the possibility of such evidence should have been obvious to the Secretary, and could have been requested prior to trial. There is no indication that the exhibit was either not authentic or fabricated. Consequently, the objection is again overruled.

answered: “Probably did. I probably went down the hall and clocked out and made a phone – or something – went back up there and answered the phone. You know it could have very well happened that a way.” (Tr. 579.) This testimony, to the extent it makes any sense at all, is not credible.

Additionally, Michael Blevins, Oak Grove Resources Safety Director, testified that he was on the second floor of the preparation plant sometime between 3:45 p.m. to 3:55 p.m. and stopped in the control room. He said that Henson was in the control room, but Cupps was not. (Tr. 411.) He further testified that he was on the second floor until 4:15 p.m. or 4:30 p.m. and he never saw Wilson. (Tr. 411-12.)

Lastly, Kenneth Young, the maintenance foreman, testified that he was in the foremen’s office at 4:00 p.m. on January 18 and did not see Wilson in the area. (Tr. 515-16.) Young also testified that Siko called the foremen for production information and only called the control room “at times.” (Tr. 521.) Another foreman, Dave Walters, testified that he was filling in for the superintendent and was working between the superintendent’s office, which is also on the second floor a short distance from the foremen’s office, and the foremen’s office at 4:00 on January 18. He said that he did not see Wilson on the second floor at all that day. (Tr. 557.) He further testified that he did not go into the control room to get the performance report from Cupps. (Tr. 561.) Finally, both Young and Walters testified that they did not hear any “screaming” coming from the speaker phone in the control room. (Tr. 520, 569.)

In weighing this evidence, I find that a preponderance of the credible evidence supports the Respondent’s case, rather than the Complainant’s. Accordingly, I conclude that Siko did not call Cupps (and Wilson) as alleged and that there was no violation of section 105(c) of the Act.

The Statement to Henson

The Secretary argues that Siko also made a statement to Henson that was a violation of section 105(c). Little attention was paid to the alleged statement by the parties at the trial or in their briefs. Indeed, it is questionable whether it was part of the complaint. Nonetheless, since it was mentioned, it is discussed below.

Henson testified that on either the 18th or the 19th, he was not sure which, Siko called him at the first part of the shift to ask “how much raw, how much clean, we’d run.” (Tr. 51-52.) He then averred that Siko said that “we couldn’t live with all the federal violations and 103(g)’s that was being called, and that he [*sic*] was either going to have to be with the [*sic*], for the Company or against the company. And the ones that was going to be against the Company wasn’t going to stay there.” (Tr. 52.)

Siko testified that he did not make such statements to Henson at any time during the week of January 15. (Tr. 319.) He said: “I don’t remember having any [conversation with Henson], because it was a very outstanding or marked week at the preparation plant with the series of

events that transpired over there.” (Tr. 320.) Although this statement is confusing, or it was not transcribed accurately, the inference drawn from it is that Siko remembered that he did not make such a statement because the week stood out in his mind.

I find that the Complainant has not proved that Siko made the alleged statement. Henson was the local union president. He was closely involved with Wilson in the safety inspection, in investigating the situation involving Erwin, and in filing the 105(c) complaint. Yet this allegation was not included in the complaint. It could be argued that the incident with Erwin was only alluded to in the complaint because Erwin did not want to be involved, but no such reason exists for the omission of the Henson allegation. Unless it did not occur.

Contrary to Henson’s and Cupps’ testimony, it does not appear that Siko routinely and frequently called them for production information and that, therefore, his calling them was not out of the ordinary.⁴ More credible is the testimony of Siko and his foremen that he only called the control room at unusual times, such as the middle of the shift, or on his way to work in the early morning, or when he could not reach any one else.

This purported statement appears to have been an afterthought at the trial and in the Complainant’s proposed findings. In a 39 page brief, the Complainant spent fewer than four paragraphs discussing it. Even more significantly, it is not mentioned in the Intervenor’s brief at all.

Consequently, for all of these reasons, I conclude that Siko did not make the alleged threatening statement to Henson.

Conclusion

As mentioned at the beginning, there is no way to reconcile the testimony of Wilson, Cupps and Henson with that of Siko and the other management witnesses. One side or the other was not telling the truth, but, for the most part, neither side’s presentation was implausible or incredible. Furthermore, both parties had reason to fabricate. It will serve no purpose to speculate on the motive for such untruths. It was apparent from the trial, however, that management and the union seem to have a very adversarial relationship at this operation. Consequently, in arriving at a decision in this matter, I have relied on the inconsistencies in the testimony and the fact that the Complainant has the burden of proving its case by a preponderance of the evidence. Applying those factors, I conclude that the Complainant has failed to prove that the company violated section 105(c) of the Act in any of these instances.

⁴ Incredibly, if the call to Henson was made on the 18th, the testimony of Henson and Cupps is conflicting, unless one believes that Siko called Cupps at the end of his shift, and then called Henson at the beginning of his following shift, to ask for the same information which he had supposedly already gotten from Cupps.

Order

The Complainant, Thomas F. Wilson, has not established that James E. Siko made statements which constituted adverse action under the Act. Accordingly, his Discrimination Complaint filed against Oak Grove Resources, LLC, and James E. Siko, under section 105(c) of the Act is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Thomas A. Smock, Esq., Michael D. Glass, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Four Gateway Center, Suite 400, 444 Liberty Avenue, Pittsburgh, PA 15222

Patrick K. Nakamura, Esq., Nakamura, Quinn & Walls, LLP, Lakeshore Park Plaza, Suite 130, 2204 Lakeshore Drive, Birmingham, Alabama 35209-6701

Mr. Thomas F. Wilson, Miner's Representative, United Mine Workers of America, 9326 Keenes Mill Road, Cottdale, AL 35453

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