FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
May 7, 1996

ROSS S. STEWART, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 95-27-D
v.	:	
	:	
TWENTYMILE COAL COMPANY, Respondent	:	Foidel Creek Mine

DECISION

Appearances: Brian L. Lewis, Esq., Denver, Colorado, for Complainant;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Ross S. Stewart against Twentymile Coal Company ("Twentymile") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1988)("Mine Act"). For the reasons set forth below, I find that Mr. Stewart did not establish that his discharge by Twentymile was motivated by his protected activity. Accordingly, I find that Mr. Stewart was not discriminated against by Twentymile in violation of the Mine Act.

Mr. Stewart filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). MSHA concluded that the facts disclosed during its investigation did not constitute a violation of section 105(c). Mr. Stewart then instituted this proceeding before the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3). A hearing was held in Steamboat Springs, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

FINDINGS OF FACT

Mr. Stewart was employed by Twentymile at the Foidel Creek Mine for about ten years. During that period, he held a number of positions with Twentymile and was a shuttle car operator at

the time of his discharge. The Foidel Creek Mine is an underground coal mine in Routt County, Colorado, and employs about 280 people.

On the day shift of May 16, 1994, Mr. Stewart was operating a shuttle car in a continuous miner section. The section was developing entries in preparation for longwall mining. Two shuttle cars were transporting coal from the continuous mining machine to the belt. The shuttle cars dumped the coal at the feeder breaker for the belt. In a typical shift, Mr. Stewart would make about 50 trips from the continuous miner to the feeder breaker. A shuttle car is a large piece of mobile mining equipment. The operator sits in a small compartment and faces the opposite side of the shuttle car. He can see to the front and back of the shuttle car through openings in the operator's compartment.

Allen Meckley was Mr. Stewart's supervisor from late September 1993 through May 16, 1994. On May 16 Mr. Meckley was in the vicinity of the feeder breaker when he observed Mr. Stewart dump several loads of coal. On one trip Mr. Meckley noticed that the conveyor on the shuttle car continued to operate after all of the coal was dumped. (Tr. 419). Because Mr. Stewart did not back away from the feeder breaker after the coal was dumped, Mr. Meckley was concerned that Mr. Stewart was asleep. (Tr. 431, 499). Meckley approached the shuttle car and stood to the side of the operator's compartment. Mr. Stewart did not react to his presence. (Tr. 500). Mr. Stewart's head was down, his hands were in his lap, and Mr. Meckley believed that his eyes were closed. (Tr. 30, 154-55, 430, 500-01). The conveyor of the shuttle car was still running. (Tr. 27, 154). Meckley tapped Stewart on the shoulder. When Stewart looked up, Meckley said, "Ross, are you sick?" (Tr. 28, 419, 501). Mr. Stewart replied, "No." Id. Meckley told Stewart to park his shuttle car and get his lunch. They then proceeded out of the mine. On the way out Meckley said, "I think you know why we are going outside, I told you the next time I caught you sleeping we were going out." (Tr. 32-33, 157, 435, 501-02). Mr. Stewart replied, "Yeh, I know" or "If that's what you want to call it." (Tr. 33, 435).

At the surface, Mr. Stewart was advised that he was suspended pending an investigation as to the appropriate discipline. Mine management conducted an investigation into the matter, met with Mr. Stewart to obtain his views, and reached the conclusion that he should be terminated for sleeping on the job. In reaching this conclusion, management took into consideration Mr. Meckley's belief that he caught Mr. Stewart sleeping underground in October 1993 and in December 1993. Mr. Stewart admits that he

was drowsy when Mr. Meckley observed him in December 1993, but denies that he was asleep on May 16, 1994. (Tr. 143-44).

Mr. Stewart maintains that he was terminated for engaging in activities that are protected under section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). First, he contends that he complained to management that Mr. Meckley and other members of the crew reported to work with the smell of alcohol on their breath. Second, he argues that he complained about the safety of the wheel rims on his shuttle car. Third, he maintains that he testified at a hearing before former Administrative Law Judge John A. Morris in a discrimination proceeding brought by Fred Peters against Twentymile. Mr. Stewart contends that these activities were protected under the Mine Act and that he was terminated, at least in part, because of these activities.

SUMMARY OF THE LAW

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, tb Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

Because direct evidence of actual discriminatory motive is rare, illegal motive may be established through circumstantial evidence or a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Examples of circumstantial evidence that tend to show discriminatory intent on the part of the mine operator include: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. Chacon, 3 FMSHRC at 2510.

DISCUSSION WITH FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no doubt that Mr. Stewart had a statutory right to voice his concerns about the safety of his workplace without fear of retribution by management. I find that Mr. Stewart's complaints about alcohol use and the safety of the wheel rims of the shuttle car, and his testimony at the Peters hearing were protected under the Mine Act. The issue is whether his discharge was motivated in any part by this protected activity.

1. Testimony at the Peters Hearing

Mr. Stewart was subpoenaed to testify at hearing before former Administrative Law Judge John A. Morris in Fred L. Peters v. Twentymile Coal Company. Mr. Stewart contends that Twentymile's decision to terminate him was motivated, at least in part, by the fact that he testified in this proceeding. The hearing was held on December 8, 1992. The adverse action in that case was a letter of discipline that was placed in Mr. Peters' file. In his decision, Judge Morris dismissed the discrimination complaint because he determined that the adverse action was not motivated in any part by Mr. Peters' protected activity. 15 FMSHRC 704, 734 (April 1993). Stewart believes that his participation in the hearing angered mine management. He points to the fact that other employees were allowed to carry over vacation time from one year to the next and that he lost vacation days because he did not use them by a certain date. (Tr. 60-63). He attributes this disparate treatment to the fact that he testified at the Peters hearing. (Tr. 61).

I find that Mr. Stewart's termination was not motivated in any part by the fact that he testified at the Peters hearing. First, it is worth noting that Mr. Peters, the complainant in

that case, is still employed by Twentymile. It is highly unlikely that Twentymile would be motivated, in whole or in part, to terminate an employee because he testified under subpoena in a Commission proceeding while retaining the employee who brought the case in the first place. Other miners were subpoenaed to testify in that case and did not suffer any adverse consequences. (Tr. 105-07). It does not appear from the judge's decision that Mr. Stewart's testimony was particularly important in that case.

Mr. Stewart lost his vacation days well before the Peters hearing. The record demonstrates that a number of employees including Mr. Stewart were allowed to carry over 1991 vacation leave into early 1992. He lost the vacation days that he carried over because he did not use them by March 31, 1992.[1] The Peters hearing was held on December 8, 1992. Thus, he did not lose vacation days in retaliation for his testimony.

Finally, I credit the testimony of the applicable management witnesses that they did not consider the fact that he testified in the Peters case when they determined that Stewart should be terminated. Mr. Meckley was not involved in the Peters case and was an hourly employee at the time of the hearing. Ronald K. Spangler, Twentymile's manager of human resources, was a key player in the decision to terminate Mr. Stewart. He was not employed by Twentymile at the time of the Peters hearing. Mr. Spangler testified that, during his investigation of the Stewart matter, the Peters hearing was only mentioned once. He was told by Daryl Firestone that Mr. Stewart was under the mistaken belief that Twentymile management was mad at him for testifying at the Peters hearing. (Tr. 298, 350-51). Mr. Firestone was Peters' supervisor who issued the disciplinary letter that was the subject of that case. Mr. Spangler further testified that Firestone told him that Stewart's testimony was "more in favor of the Company." Id. Mr. Firestone testified that he was present when Stewart testified at the Peters hearing and believed that his testimony supported the company. (Tr. 634, 636). I conclude that Mr. Spangler did not consider Stewart's participation at the Peters hearing when he recommended to the general manager that Stewart be terminated. William Ivy, general manager at Twentymile, made the ultimate decision to terminate Mr. Stewart and he testified that Stewart's participation in the

---

[1] Other employees who were allowed to carry over vacation days from 1991 to 1992 did not lose any of this leave because they used it before the deadline of March 31, 1992. Mr. Stewart lost 10 days of vacation because he failed to use them in time, rather than in retaliation for protected activity under the Mine Act.

Peters hearing was not a factor in his decision to terminate Mr. Stewart. (Tr. 595).

2. Split Rim Complaint

In May 1991, Mr. Stewart refused to operate his shuttle car because he believed it to be unsafe. (Tr. 97-98; Ex. R-4). Specifically, he complained about the split rim wheel assembly on the shuttle car. He contends that the rim exploded and a nearby miner could have been injured. (Tr. 54-55). Each wheel rim on his shuttle car consisted of two pieces that were designed to be held together by the air pressure in the tire. Mr. Stewart believed that the rims were faulty and created a safety hazard. There is no question that this complaint was protected under the Mine Act.

I find, however, that Mr. Stewart's termination was not motivated in any part by his complaint. The split rim incident was remote in time from the events in May 1994 that resulted in his termination. Mr. Meckley was not his supervisor in May 1991, but was an hourly employee on his crew. He has no recollection of the complaint. (Tr. 468-69). Mr. Spangler did not work for Twentymile at the time of the split rim complaint and did not learn about it until after Mr. Stewart was terminated. (Tr. 323). Mr. Stewart did not raise this issue with Mr. Spangler during their meeting of June 2, 1994, when he was given the opportunity to present his views. (Ex. R-18). Mr. Ivy, the general manager, testified that he remembers hearing that about problems with the rims but he does not recall any of the details. (Tr. 602).

When Mr. Stewart complained about the safety of the wheel rims, his supervisor, Mr. Firestone, looked into the matter. (Tr. 637-38). Mr. Stewart's complaint was that the locking ring tab was not connected on the wheel rim. (Tr. 88, 539, 637-38, 656). Mr. Firestone discussed the matter with the shift foreman. Id. Joseph F. Hampton, a maintenance supervisor, and William G. Kendall, the manager of maintenance for Twentymile, called the company that supplied tires and rims for the mine. (Tr. 540, 656-57). The supplier replied that the locking tabs are necessary only when the tire is being inflated and that they were not necessary after that. (Tr. 540, 659-62). Mr. Kendall met with a representative of the rim supplier to discuss the split rim issue. He circulated a memorandum on May 24, 1991, explaining why the locking tabs are not necessary after the tire is inflated. (Tr. 658-59; Ex. R-4). Mr. Hampton also discussed the matter with Stewart. (Tr. 541-42).

Mr. Stewart relies heavily on the fact that Twentymile had to scrap the wheel rims on his shuttle car as a result of his complaint, at a cost of up to $24,000.00,[2] and that the shuttle car was shut down for several hours. The record reveals that the rims had to be replaced because Frank Pavlisick, a maintenance foreman, welded the two parts of the wheel rims together without consulting his supervisors. (Tr. 662-63). The welding was unsafe and damaged the wheel rims. Id. It is apparent that mine management was concerned about the welding rather than Mr. Stewart's safety complaint. (Tr. 663). There is no credible evidence that the company held Mr. Stewart accountable for this matter. In addition, I cannot draw a reasonable inference of discriminatory intent. Management handled his complaint with the same degree of concern that it does all safety complaints. The record makes it clear that employees frequently shut down equipment for safety reasons and that employees are not disciplined for such conduct. Mr. Stewart did not have a history of shutting down equipment for safety reasons. (Tr. 98). He was not disciplined at the time of these events and I find that his termination was not motivated, directly or indirectly, by this safety complaint.

3. Alcohol Use Complaints

Mr. Stewart complained to management that miners were coming to work with the smell of alcohol on their breath. His concern was that the miners' judgment could be impaired and that mine safety was affected. Mr. Stewart testified that about four or five miners would come to work with the smell of alcohol on their breath. (Tr. 42-43). One of these miners was Allen Meckley, who was a bolter on his crew at the time. Stewart contends that when Meckley became his supervisor in September 1993, Meckley set out to get him fired in retaliation for his protected activity. He believes that Meckley harbored a grudge against him because of these complaints.

All of the evidence relied upon by Mr. Stewart is circumstantial. Mr. Stewart maintains that Mr. Meckley was overtly hostile from the moment he became his supervisor. He argues that the issue of whether Twentymile had cause to discharge him "boils down to a `swearing contest' between Mr. Stewart and Mr. Meckley." (Br. at 5). Stewart contends that because Meckley had an ulterior motive for alleging that he was sleeping, Meckley's testimony should not be credited. Mr. Stewart points to the fact

[2] It is not clear from the record how many of the rims had to be replaced. For the purposes of Mr. Stewart's argument, I assume that all four were replaced.

that Meckley admitted that Stewart did not get along well with his fellow crew members. (Br. 7; Tr. 475). Stewart contends that the crew had a grudge against him because he was a "snitch". He points to the testimony of Charles L. Moss to support his position. Moss testified that when he was the crew's foreman, one of the crew members complained to him that Stewart was a snitch. (Tr. 180). In addition, Stewart testified that Hansel Burum, a former member of the crew, told him that he was a snitch. (Tr. 66). Finally, Stewart heard rumors in Craig, Colorado, where he lived, that "Allen [Meckley] finally got me." (Tr. 73).

Mr. Stewart discussed his concern about alcohol use with several of the mine's supervisors. When Mr. Moss was his supervisor, he complained that members of the crew had alcohol on their breath. (Tr. 182-83). On at least one occasion, Mr. Moss checked it out and could not detect any alcohol on the individual's breath. (Tr. 190-91). Around February 1993, Stewart complained to Mr. Ivy about alcohol abuse at the mine. (Tr. 47-49, 112, 389, 595-99). He did not name any particular individuals. Mr. Ivy discussed the issue in a general manner at a crew meeting. Apparently several members of the crew made snide comments to Stewart about this. Mr. Meckley, who was a bolter at the time, did not make any comments. (Tr. 118). Stewart also testified that he complained to Meckley, when Meckley was his supervisor. (Tr. 42-47). Stewart said that Meckley did not have any particular response. Meckley could not recall any such discussion. (Tr. 469).

There is no direct evidence linking Mr. Stewart's termination with his complaints about alcohol use. Mr. Stewart maintains that there is "ample circumstantial indicia of discriminatory intent ... ." (Reply Br. at 4). I used a two-step process to analyze this issue. First, I considered the guidelines set forth by the Commission in Chacon, 3 FMSHRC at 2510, to determine whether I could draw a reasonable inference of discriminatory intent. Second, I examined the facts surrounding Mr. Stewart's termination to determine whether his termination appeared to be internally consistent with Twentymile's position.

The first factor set forth in Chacon is whether the company had knowledge of the protected activity. I find that there is sufficient circumstantial evidence to establish that Meckley had knowledge of Mr. Stewart's complaints about alcohol use, despite the fact that he could not recall such complaints at the hearing. Mr. Spangler testified that he did not know that Mr. Stewart had

complained about alcohol use at the time he recommended that Mr. Stewart be terminated for sleeping on the job. (Tr. 323). He was not employed at Twentymile at the time of the complaints. Mr. Hampton could not recall that Mr. Stewart complained about alcohol use. (Tr. 554). Mr. Ivy remembers meeting with Stewart at the end of a shift in February 1993, but could not recall the contents of the discussion. (Tr. 595-96). Mr. Ivy stated that they may have discussed alcohol and he may have raised it at a crew meeting. (Tr. 596-97). Accordingly, I find that mine management had knowledge of the protected activity.

The next factor is whether there was hostility or animus towards the protected activity. I find that circumstantial evidence does not establish such hostility or animus. Management witnesses testified that they would not tolerate miners coming to work under the influence of alcohol or drugs. (Tr. 182, 595-96). I credit this testimony. There is no evidence, other than the testimony of Mr. Stewart, that anyone came to work with alcohol on his breath or was under the influence of alcohol at the mine.[3] Mr. Meckley denied that he ever came to work with alcohol on his breath and does not remember the issue being raised. (Tr. 469-70). Mr. Moss testified that when he was the crew's supervisor, Meckley never came to work with alcohol on his breath. (Tr. 182). Some of Stewart's fellow crew members mocked him about his complaints in 1993 but I cannot draw an inference that this was a factor in his termination. Mr. Stewart relies on the fact that he did not get along with the other members of the crew to establish that there was hostility towards his protected activity. I find that the animus directed towards Mr. Stewart by the crew and his immediate supervisors was the result of the fact that they believed that he did not pull his weight on the crew. (Tr. 179-181, 183-84, 187-89, 193, 195-6, 207-08, 211-12, 322-23, 465, 475-76, 488-89, 544-46, 554, 641, 647). I cannot ascertain whether or not Mr. Stewart was a hard worker, but the evidence shows that he was perceived as someone who was reluctant to help others on the crew and the crew sometimes gave him a hard time as a result. Id.

The third Chacon factor is the coincidence in time between the protected activity and the adverse action. Mr. Stewart's complaints about alcohol use occurred well before his termination. He was very vague about when he made these complaints, but it is clear that the complaint to the general manager was made

[3] Mr. Peters, however, had been in alcohol abuse counseling and Mr. Firestone smelled alcohol on his breath on one occasion. (Tr. 639-40; 15 FMSHRC at 721).

around February 1993, about 15 months before his discharge. Mr. Meckley was his supervisor for about eight of these months. While it is certainly possible for a supervisor to hold a grudge for 15 months and take action in retaliation in the manner described by Mr. Stewart, I cannot make such an inference in this case. The linkage is simply too tenuous to reach such a conclusion.

The final factor is whether there was disparate treatment of the complainant. This factor is difficult to analyze because there is no evidence that other employees complained that miners were coming to work with the smell of alcohol on their breath. As stated above, however, I credit the testimony of management witnesses that the company would not tolerate employees coming to work under the influence of alcohol. In addition, other employees who were caught sleeping at work were terminated unless management determined that there were mitigating circumstances. One employee was discharged for sleeping underground. (Tr. 395-96). Two other employees were caught sleeping in a truck on the surface and were given a two-week suspension, lost all bonus pay, and were placed on probation for a year. (Tr. 224, 393). Mr. Spangler determined that they should not be terminated because it was a first offense, they were not operating equipment at the time, their supervisor was against termination, and they cooperated during Twentymile's investigation of the incident. (Tr. 391-94). I credit Mr. Spangler's testimony describing the reasons why Mr. Stewart was terminated and these other two miners were not. I find that Mr. Stewart failed to establish disparate treatment. I cannot draw a reasonable inference that he was treated differently because of his safety complaints. [4]

Twentymile's stated reason for terminating Mr. Stewart is consistent with the evidence. The testimony about the events of May 16, 1994, differ in some of the details. Stewart testified that Meckley approached him from the left and tapped him on his left shoulder, while Meckley testified that he observed Stewart from the right side and tapped his right shoulder. (Tr. 423-26, 693). Stewart testified that Meckley could not have determined

---

[4] Mr. Stewart also contends that there were other instances where he was mistreated because of his safety complaints. He states that he was temporarily transferred to another crew, temporarily removed from his position as shuttle car operator, and lost some vacation leave because of his protected activity. He did not lose any pay or benefits because of these transfers. Based on the record, I find that the temporary reassignments and loss of vacation time were unrelated to any of his protected activities.

that his eyes were closed or that he was sleeping because of the design of the cab on the shuttle car. (Tr. 22) He further stated that Meckley's testimony that he tapped Stewart on the right shoulder is not credible because the right side of the shuttle car was against the coal feeder. (Tr. 693-94). Meckley testified that there was enough space for him to stand to the right of the cab. (Tr. 422-24; Ex. R-39). Stewart testified that his eyes were open and that he kept the conveyor on his shuttle car running to make sure that all of the coal was discharged onto the feeder breaker. (Tr. 29-31). He testified that he had on his ear plugs and did not see or hear Meckley until he tapped him on his shoulder. Id. He stated that he immediately turned to Meckley and asked him what he wanted. Id.

These discrepancies are not as significant as Mr. Stewart believes and do not provide a basis for discrediting Meckley's testimony. I find that Mr. Meckley had an honest, good faith belief that Mr. Stewart was asleep on May 16, 1996. I also find that Meckley believed that Stewart was asleep in his shuttle car at the feeder in October 1993. (Tr. 445-47). Meckley verbally warned him not to sleep underground. Id. Meckley also believed that Stewart was asleep on December 21, 1993. In that incident, the operator of the continuous miner and Meckley signaled Stewart to tram his shuttle car forward to be loaded with coal. (Tr. 448-49). Stewart did not respond to the signal. Meckley approached Stewart and said, "Ross, Ross, you need to get a load." (Tr. 449).

Mr. Spangler had worked at Twentymile for about six weeks when Stewart was suspended on May 16. As the human resources manager, he was responsible for investigating the incident. He performed a thorough, independent and professional investigation into the matter. I find his testimony to be particularly persuasive and credible. He made several attempts to get Stewart's position on the incident. Mr. Spangler believes that Stewart was uncooperative and evasive during the investigation. As discussed above, Spangler knew very little about any of Stewart's protected activities and knew nothing about his complaints concerning the smell of alcohol. I credit his testimony that Stewart's protected activities were not a factor he considered in recommending that he be terminated. I believe that if Meckley had set Stewart up in retaliation for his safety complaints, it is likely that Spangler would have uncovered it.

Mr. Stewart contends that Twentymile's hostility toward him can be inferred because of its "irregular handling of [his] termination." (Br. at 9). He bases this argument on the fact that Mr. Meckley's notes regarding the sleeping incidents were not

kept in Stewart's personnel file and the company failed to follow its own internal disciplinary procedures. Twentymile's disciplinary system is rather informal and subjective. It has a set of procedures known as the Green Answer Book, that it follows when dealing with personnel issues. (Ex. R-28). I find that Twentymile generally followed its procedures and Mr. Spangler gave Mr. Stewart an opportunity to present any mitigating factors. The Mine Act does not mandate any particular type of disciplinary system. I do not have the authority to determine whether Mr. Stewart's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

I conclude that Mr. Stewart's discharge did not violate section 105(c) of the Mine Act. I find that Mr. Stewart engaged in protected activity but that his termination was not motivated in any part by his protected activity. I also find that, even if his protected activity were a factor, he would have been terminated in any event for his unprotected activity alone.

ORDER

Accordingly, the complaint filed by Ross S. Stewart against Twentymile Coal Company under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Brian L. Lewis, Esq., 10200 E. Girard Avenue, No. B-233, Denver, Colorado 80231-5508 (Certified Mail)

R. Henry Moore, Esq., BUCHANAN INGERSOLL, One Oxford Tower, 20th Floor, 301 Grant Street, Pittsburgh, PA 15219-1410 (Certified Mail)

RWM