

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 27, 2005

ROBERT R. TOLLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2004-165-DM
	:	RM MD 2003-12
	:	
v.	:	Mine I.D. 42-00155
	:	Cane Creek
MOAB SALT, LLC,	:	
Respondent	:	

DECISION

Appearances: Robert R. Tolley, West Valley City, Utah, pro se;
Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver,
Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Robert R. Tolley against Moab Salt, LLC (“Moab Salt”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Mr. Tolley alleges that after he engaged in protected activities at Moab Salt he was subjected to discrimination and harassment. He contends that he was constructively discharged from his employment with the company as a result of this harassment. An evidentiary hearing was held in Moab, Utah.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Moab Salt, now know as Intrepid Potash-Moab, LLC, operates the Cane Creek plant (the “plant”) in Grand County, Utah. Moab Salt engages in a solution process whereby a brine solution of water and salt is pumped underground into a potash deposit. The solution is then pumped to the surface into ponds and a solar process is used to evaporate the liquid leaving salt and potash crystals which are recovered using scrapers. The crystals are processed through flotation cells, separated, packaged and sold. Some of the material is re-used in making brine for injection. Moab Salt sells salt and potash both in bulk and in bags. (Tr. 400). Moab Salt’s current owners started operating the plant in February 2000. The plant has existed since 1962. Mr. Tolley started working for Moab Salt in August 1997. During all relevant times, Tolley worked in “rail loadout.” (Tr. 18). In that position, he operated a front-end loader to load trucks and railcars.

At all relevant times, Moab Salt was in the process of replacing the steel siding and roof panels (the “siding”) on its buildings. It started removing the siding on the conveyor galleries, also known as the inclines, in May 2003. These inclines carried salt and potash from the warehouse to the loadout area. The old siding consisted of large pieces of corrugated steel coated with a tar-based material, known by the trade name “Galbestos.” The old siding was deteriorating in many places. Moab Salt replaced the old siding with plastic siding. Tolley testified that, as part of his job, he had to travel inside the inclines along the belts to remove clogs. These inclines are 30 to 40 feet above the ground. (Tr. 21; Ex. R-6).

Moab Salt employees were removing the siding on the conveyor galleries using a rented manlift. The area below was flagged off and an employee was stationed there to keep workers away from the area. Two employees were in the manlift to remove the screws holding the siding in place. After the screws were removed, each piece of old siding was dropped about 30 to 40 feet to the ground. The siding was then stacked along the exterior fence of the plant in an area known as the “boneyard.” Tolley was not involved in the removal of the old siding or the installation of the new siding, but he helped move some of the old siding to the boneyard.

On June 5, 2003, Harlan Hawks, an hourly employee in the packaging department, told Tolley that the coating on the siding contained asbestos. Mr. Hawks told Tolley that he overheard two supervisors saying that Moab Salt was going to have to figure out a way to dispose of the old siding because landfills will not take anything that contains more than a minimal amount of asbestos. (Tr. 24, 225). Tolley did not know that the old siding contained asbestos.

When the siding was dropped to the ground, flakes of the tar-based coating sometimes separated from the siding and scattered on the ground. Later that day, Mr. Tolley and Hawks took some of the flakes, put them in a plastic bag and went to talk to Plant Manager Rick York. Tolley believed that, when the siding was new, it did not create any health risks, but that when the siding was dropped to the ground and the coating on the siding flaked off, the asbestos in the coating became friable.¹ (Tr. 26). Tolley testified that, when he told York about the asbestos, York replied that he knew that the coating on the siding contained asbestos but that he did not believe it created a health hazard to employees. (Tr. 27). They walked to the boneyard to look at the stacked siding. When they saw some fibers in the siding, Tolley told York that the company was not handling it properly. (Tr. 365). York told Tolley that he would check on it and get back to him. After this meeting, Mr. Tolley sent two samples of the material he collected to an independent laboratory in Salt Lake City for analysis.

On June 6, Tolley talked to Glenn Hunter, the maintenance supervisor, about the asbestos. When Hunter told him that the asbestos was not friable, Tolley replied that because the old siding is deteriorating, asbestos fibers can get into the air as it is removed. (Tr. 33). Hunter replied that he is “asbestos certified” based on past job experiences and again told Tolley not to

¹ A substance is “friable” if it is “easily broken, pulverized, or reduced to powder.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 223 (2d ed. 1997).

worry about it. He also told Tolley that the asbestos content of the coating was about 12 percent. *Id.* Hunter had supervised the removal of Galbestos from an FMC Chemicals plant in Wyoming. (Tr. 338). The siding was removed at Moab Salt using the same technique Hunter used in Wyoming. Hunter testified that the asbestos on the siding was chrysotile asbestos, which he stated is the least hazardous form of asbestos. Hunter admitted that in some areas, the Galbestos siding had deteriorated over the years and chips of the paint flaked off as it was dropped to the ground. (Tr. 352). He also admitted that there was more asbestos in the siding than he had realized. (Tr. 355).

The analysis of the sample that Tolley took from the area under the conveyor galleries showed that the sample contained 15% asbestos (Chrysotile). (Tr. 29-30; Ex. C-1).² Tolley sent the samples to the lab because he was concerned that there was loose material and chips of the coating all over the ground and employees were sweeping it up without taking any extra precautions. Tolley testified that when Robyn Kurz from the lab called him at home with the lab results on or about June 10, she told him that it was “bad stuff” and that he should not “mess with it.” (Tr. 32, 35). Tolley testified that she told him that the asbestos was friable. *Id.* Tolley did not provide Moab Salt with a written copy of the lab results. (Tr. 129).

York contacted an environmental consultant, JBR Environmental Consultants (“JBR Consultants”), on June 10 and asked them to come to the site to evaluate the situation. JBR consultants told York that it would be at the site on June 23, 2003. When York advised Tolley on June 10, Tolley wanted the consultant to come earlier. York called JBR Consultants back and made arrangements for JBR to visit the plant on June 13. (Tr. 367). Tolley told York that he believed that the asbestos was a major problem which should be taken care of immediately.

Because Tolley believed that Moab Salt was not responding to the asbestos problem with the urgency it deserved, Tolley called the Utah Department of Environmental Quality (“DEQ”). Tolley did not divulge his employer or the location of the plant to DEQ representatives. According to Tolley, Mr. Greg Sorenson with the air quality section of DEQ told him that he was “in a bad situation” and that “these people are breaking the law.” (Tr. 38). When Sorenson asked for names, Tolley declined to provide such information because he wanted to continue to work with management. *Id.*

Tolley talked with York over the next several days and York told him that he was looking into the matter. Mr. Sorenson told Tolley during subsequent telephone conversations that the company would look better if management called DEQ rather than having DEQ come in as a result of a call from an employee. (Tr. 39). Tolley testified that York refused to call DEQ. The next time Tolley called Sorenson at the DEQ and told him that management was not going to call him, Sorenson again asked for the location of the plant. This time Tolley provided the requested information to Sorenson. (Tr. 40).

² The other sample was taken from material insulating pipes in a different area of the plant. That sample contained about 75% asbestos (Chrysotile). (Ex. C-2).

Bowen Call, a DEQ inspector, visited the mine on June 10, 2003. In his inspection notice, Mr. Call wrote, "complaint had merit and it appears that asbestos materials have been handled improperly." (Ex. C-3). He ordered that no more clean-up work be conducted until a thorough asbestos survey had been completed. When an employee of JBR Consultants arrived on June 10, he did not believe that the material was friable, but he agreed that the company should follow the DEQ's recommendations.

On June 10, 2003, Tolley placed a phone call to Hugh Harvey, one of the owners of Moab Salt. He is an owner and manager of "The Intrepid Companies" in Denver, Colorado, which owns Moab Salt through Intrepid Mining, LLC. When Tolley told Harvey about the asbestos problem, Harvey replied that he was not aware of the asbestos. Tolley testified that Harvey became angry when he told Harvey that he had samples of the material tested by an independent laboratory. (Tr. 42-43). Harvey testified that when he asked Tolley for details about the samples, Tolley refused to answer his questions. (Tr. 282-83). Harvey then called Robert Jornayvaz, another owner/manager with the Intrepid Companies, to tell him about his phone call with Tolley.

Harvey traveled to Moab on June 11 to look into the matter. When he arrived at the site, a reporter and camera crew from KSL TV Channel 5 (Salt Lake City) was there along with Mr. Call from DEQ. Harvey met with Call, toured the plant, and interviewed a number of hourly employees. At that time the old siding on the conveyor galleries had been removed and replaced with new siding. (Ex. R-6; Tr. 286). Jornayvaz traveled to Moab on or about June 12.

York testified that Moab Salt issued a memo to all employees on June 11, 2003, advising them about the asbestos in the siding that was being removed. (Tr. 379; Ex. R-12). It also told employees that, although the company did not believe that the asbestos created a health hazard, it stopped all work on the removal project until the health risks could be assessed.

On the morning of June 13, 2003, York called Tolley at home and asked to meet with him, Harvey, and Jornayvaz for lunch to discuss the asbestos problem. Tolley declined the invitation. (Tr. 45). He did agree to meet with them at work, but only because York required him to. (Tr. 152). When he arrived at the meeting room, Messrs. Harvey and Jornayvaz were present along with an attorney from Salt Lake City. Tolley testified the he wanted Mr. York at the meeting, but he was told that York had other matters to attend to. York testified that he asked Tolley if he would like him to be present at the meeting, but that Tolley replied that he did not think he would need him. York testified that he did not want to attend this meeting in case Tolley wanted to talk to Jornayvaz about York's actions with respect to Tolley's asbestos concerns. (Tr. 375-76).

The parties' interpretation of what transpired at this meeting on June 13 diverges considerably. Tolley testified that he became uncomfortable at the meeting because he believed that Harvey and Jornayvaz were asking the wrong questions. They were not asking questions designed to help solve the problem, but were asking "what evidence" he had and who did he talk

to. (Tr. 46). When he asked to leave the meeting, they told him to stay. When he tried to change the subject by discussing locations on the property that he believed were contaminated with asbestos, they kept asking him who he talked to about the asbestos. They also wanted to know if he had taken any video tapes of the asbestos removal.

Tolley testified that at one point during the meeting Jornayvaz became very agitated and told Tolley that he had put every penny of his money in “this place” and “you’re not going to take this from me.” (Tr. 48-49). Tolley stated that management never talked about safety issues at this meeting because they were only interested in what evidence he had and who he had talked to. Tolley told Jornayvaz and Harvey during this meeting that he was aware of various hazards at the site and that he had photographs and video tapes of these hazards. (Tr. 148). Tolley admitted that he refused to show them the photographs or tapes. (Tr. 156-57). Hawks was separately interviewed. (Tr. 240).

Jornayvaz testified that he traveled to Moab in June 2003, because Tolley asked Harvey, over the phone, whether he knew that the company “had many and numerous problems, including asbestos” at the plant. (Tr. 246). He stated that he called Tolley and Hawks to the meeting on June 13 to gather information as to the nature and severity of these problems. He testified that he wanted to get any information that he could, including photos and videos, so that any safety problems could be resolved. (Tr. 247). Jornayvaz testified that he did not know that the siding on the conveyor galleries contained asbestos until after he arrived at the site. (Tr. 249). Jornayvaz told Tolley that he had invested a great deal of money into Moab Salt to make it work and he was very much interested in knowing whether there were problems and whether York was adequately addressing these problems. (Tr. 256). Jornayvaz testified that he became frustrated by Tolley’s lack of cooperation at the meeting and he raised his voice. Tolley kept telling him that there were numerous safety problems but he would not tell him what the problems were. Tolley kept saying “it will all come out in time.” (Tr. 256). Tolley also raised his voice at the meeting and frequently interrupted others. (Tr. 261).

Harvey testified that Tolley had difficulty articulating his safety concerns at this meeting. He mentioned the asbestos in the siding. He gave Harvey the impression that he was aware of many safety problems at the plant which he was not going to discuss. (Tr. 289). Harvey became frustrated because Tolley was quite adamant that there were numerous safety problems that he had documented with samples, photos, and video tape, but he would not discuss these safety issues with them. (Tr. 289-90). As an example, Harvey noted that Tolley provided the Salt Lake City television station with the written results from the independent lab, but he would not give a copy of the results to Harvey. The personnel policies of Moab Salt require employees to tell their supervisor if they discover any unsafe conditions so that the conditions can be corrected. (Tr. 377-78; Ex. R-11). York testified that Tolley refused to provide him with any information about the alleged unsafe conditions in violation of this policy.

After the June 13 meeting, Jornayvaz wrote a letter to Tolley summarizing the meeting. The letter states in part:

[Y]ou repeatedly stated that you have additional information about asbestos hazards at the facility and about other potential health and safety issues at the facility. In spite of our repeated requests, you refused to share that information with us. All you were willing to say was, "There will be a time for everything to come out."

Other than the asbestos issue that we are currently addressing, we are unaware of any other safety-related issues at the facility. If you do have information about potential health or safety issues at the facility, it is crucial that you provide information to us immediately, so we can take appropriate action. Refusing to provide the information puts your co-workers and others at risk if there are in fact health or safety hazards.

(Ex. R-1; Tr. 257-59). Tolley did not respond to this letter.

Tolley also filed a hazard complaint with MSHA and MSHA inspected the plant on June 13. MSHA Inspectors Okuniewicz and Lee believed that the material was not friable until they learned that the DEQ had determined otherwise. (Tr. 373). MSHA conducted personal and area sampling for asbestos on June 17, 2003. On July 9, 2003, MSHA issued to Moab Salt a section 104(a) citation, a section 104(d)(1) citation, a section 104(g) order, and a section 104(d)(1) order. The Secretary's proposed penalties totaled \$8,460.00.

On July 9, 2003, MSHA issued its report which, with respect to asbestos, had this to say:

During a period of time between May 10, 2003, and June 5, 2003, several employees were assigned to remove and replace siding on three transfer conveyors. The siding that was removed was known to contain asbestos. The employees, and employees in the area of the work, had the potential to be exposed to airborne asbestos fibers. The correct personal protective equipment needed for asbestos exposure was not used.

(Ex. C-8). MSHA tested for airborne asbestos but no violation was detected. (Tr. 208). There have been no excursions above the OSHA PEL for asbestos at the plant. The OSHA PEL is a more rigorous standard than MSHA's TLV for asbestos.

On June 20, 2003, Moab Salt issued a memo to all employees concerning asbestos awareness training. (Ex. R-7). All employees were required to attend the training on June 25, 2003. All Moab Salt employees attended this meeting except Tolley and four others. Hawks attended the meeting and testified that it lasted about two hours. (Tr. 233). Tolley serves as a volunteer rescue diver for the Moab Fire Department. On June 22, a boy fell into the Colorado River near Moab. Tolley was diving on the river for several days looking for the boy. Tolley's

shift at Moab Salt started at 4:00 p.m. that week. The asbestos meeting was at 2:00 p.m. on June 25. On most days that week he arrived at work late because of his diving. Tolley testified that he missed the meeting on June 25 because he was diving and the production manager, Rick Klein, did not remind him of the meeting or direct him to be there. (Tr. 59). Tolley testified that he was aware that he was supposed to attend the asbestos meeting at 2:00 p.m. on June 25. (Tr. 168). After Tolley arrived at work at 6:15 p.m. that day, Klein told him that he should not have missed the asbestos safety meeting. Tolley was given a written warning for not attending that meeting. (Tr. 60; Ex. C-5). Company records show that Tolley was given 2.5 hours of vacation time on June 25 because he was diving. (Tr. 63; Ex. C-6). Klein tried to call Tolley at his home on the morning of June 25 to tell him that his attendance at the meeting was mandatory. Klein told Tolley's wife that he had to attend the meeting. (Tr. 170-71).

Rick Klein testified that, on or about June 20, 2003, a notice concerning mandatory asbestos awareness training was posted at the mine. (Tr. 312; Ex. R-7). This asbestos safety class was scheduled at the suggestion of DEQ. (Tr. 253). The course was taught by Rocky Mountain Occupational Health. This contractor also provided more specific training for any Moab Salt employees who would be involved in asbestos cleanup. Klein testified that, on June 24, Tolley asked him if he could come to work late that day so he could continue diving for the volunteer fire department. Klein told Tolley that he could arrive late that day, but Klein testified that he did not give Tolley permission to be late for several days. When Tolley is late to work because of duties with the fire department, vacation time is assigned to missed time so that he will be paid for the missed time. (Tr. 316). Early in the morning on June 25, Tolley left a message on Klein's answering machine at work asking if he could be late again that day. Klein immediately called Tolley's home to remind him of the asbestos training meeting at 2:00 p.m. that day, but Tolley had already left. Tolley was given a written letter of warning for missing the meeting. (Tr. 321; Ex. C-5). Of the other employees who missed the training, two were on vacation, one was recovering from surgery, and another was scheduled to be off that day to take his father to dialysis out of town. (Tr. 333).

When Tolley and Hawks started raising the asbestos issues, rumors started that the plant was going to be closed because of the high cost of asbestos removal. Employees knew that Tolley and Hawks had raised the asbestos issue. On or about June 19, when Tolley went to his vehicle at work, there was a photo of Mr. Hawks on his windshield with a dot drawn on his forehead to look like a bullet hole. (Tr. 52-53; Ex. R-13). Tolley and Hawks showed York the photo. They told York that they felt threatened by the photo. (Tr. 380). York drove to the Sheriff's Office in Moab, Utah, to initiate an investigation into the matter. The sheriff was unable to determine who placed the photo on the windshield. (Tr. 381; Ex. R-13). In response, York issued an anti-harassment memo to all employees. (Ex. C-4). The memo stated that "verbal or physical conduct that denigrates or shows hostility toward an individual, and that creates an intimidating, hostile, or offensive work environment" is prohibited. *Id.* The memo further stated:

Any employee who believes that he/she is being harassed by a co-worker, manager, supervisor, or other individual in the workplace should immediately report the concerns to a supervisor or manager. A prompt, impartial and thorough investigation will occur. If it is determined that prohibited harassment has occurred, appropriate disciplinary action, up to and including termination, will occur.

Id.

On July 8, 2003, Moab Salt posted a notice on various bulletin boards around the plant stating that employees' pay would be increased but that no bonuses would be paid in July. Included in the notice was the following language:

The company has seen increases in the cost of natural gas, petroleum products, bonding/reclamation costs and property insurance. Due to the continued drought, the agricultural potash market has been slower than last year with our prices having dropped from previous years. Further, the company is facing potential fines due to the asbestos concerns raised in June.

(Ex. C-7; Tr. 64). Tolley testified that after this notice was posted, hourly employees started blaming him for the loss of the bonus. Tolley said that a number of employees began harassing him about his asbestos complaint. Louis Lopez would no longer be his partner when he played golf, for example. (Tr. 178). They had a verbal exchange in the change room one day. He also had verbal exchanges with at least two other hourly employees about his asbestos complaint. Tolley testified that York told him that Jornayvaz added the reference to asbestos in the notice. (Tr. 65).

In prior years, memos advising employees about potential bonuses did not set forth any reasons for the company's decision. York testified that Messrs. Harvey and Jornayvaz wanted the reasons that the company was not giving employees a bonus in July 2003 to be included in the memo. (Tr. 382). York testified that when Tolley complained to him that employees were harassing him because of the language about asbestos fines in the July 8 memo, York asked Tolley to tell him which employees were harassing him. York testified that Tolley refused to provide him with that information. (Tr. 383). Tolley testified that York never asked for the names of individuals harassing him but merely stated that there was nothing he could do.

Jornayvaz testified that the language about asbestos was not placed in the memo to discriminate against Tolley or to harass him. Harvey testified that he was involved in the decision to increase wages in July 2003 and he helped draft the notice that was posted at the mine. (Tr. 293). The company had paid a bonus in 2002, so Harvey felt that the employees deserved an explanation as to why no bonus would be paid in July 2003. At the time the notice was written, he did not know how much money it would cost to clean up the asbestos. A bonus

was paid in December 2003 because there had been a turnaround in the potash market and the asbestos cleanup had been completed. (Tr. 294-95). The potash market hit bottom in July 2003.

Tolley also contends that after June 13, 2003, he was no longer given the opportunity to work overtime. (Tr. 68, 85-91; Exs. C-6, C-9). Tolley took vacation the week of June 15 and July 21-23; he also took funeral leave July 1-3. (Tr. 182-83). He testified that he wanted to work more overtime hours, but the company would not give them to him. (Tr. 215).

Klein testified that Moab Salt is a seasonal operation so there is less opportunity for overtime during June, July and August. (Tr. 323). For example, there was no work for the slurry pit operator during those months, so he was available to work in loadout when extra help was needed there. The company tries to assign work to available employees so that it does not have to pay overtime to employees who are already scheduled to work 40 hours during the week. By the end of October 2003, Tolley worked about 325 hours of overtime. (Tr. 327). Klein testified that Tolley turned down overtime one time during the summer and that any lack of overtime hours was totally unrelated to Tolley's complaints about asbestos.

Tolley testified that his shift supervisor, Leroy Snyder, started harassing him after he raised the asbestos issue. Tolley testified that when he needed to travel to other parts of the plant, he usually caught a ride from someone in a company truck. Tolley testified that Snyder became agitated when Mr. Hawks gave him a ride in a company truck. According to Tolley, Snyder told him that because MSHA is being hard on us, "things are going to change with you." *Id.* Tolley was told that he could get rides from other employees, but not from Hawks. Tolley also testified that Snyder told him that he could not leave his work area for any reason and that Hawks was to stay out of his area. (Tr. 76). Hawks also testified that he was told that he could not leave his work area. (Tr. 229). Hawks further stated that his schedule was changed after the asbestos incident so that he was no longer on the same shift as Tolley. (Tr. 229). Hawks also confirmed that after the asbestos incident Snyder became "very rude" in his demeanor. (Tr. 232). Tolley testified that Bill Sanchez, the other employee in loadout, was never told that he could not leave his work area. After Tolley complained to York about Snyder's conduct, Snyder was transferred to another section of the plant where he was no longer Tolley's supervisor. (Tr. 157-62).

Snyder did not testify at the hearing. York testified that he had previously counseled Snyder about his management style. (Tr. 398). He told Snyder that he did not want him cursing at or raising his voice to employees. Hawks was offered a promotion, but he turned it down. (Tr. 399). Klein testified that he changed Hawks' work schedule in late July so that Hawks could work day shift rather than so many swing shifts. He made this change for Mr. Hawks' benefit and Hawks did not complain about this change. (Tr. 332).

Tolley usually brought his lunch to work and put it in the refrigerator in the packaging department, where Hawks worked. Tolley testified that Snyder told Tolley that he could no longer do that. Tolley testified that on July 30, 2003, he put his lunch in the refrigerator in rail

loadout in a Tupperware container that had his name on it. He ate his lunch at about 11:45 a.m. that day. (Tr. 190). That night at home, Tolley became very ill. Tolley testified that he was so sick that he could not walk. (Tr. 80). He refused his wife's offer to drive him to the emergency room. He did not go to work on July 31 and he did not see a physician. (Tr. 190-91). Tolley called "poison control" that day because he believed that he may have been poisoned. Tolley was asked by poison control whether he had been exposed to any chemicals at work. Tolley reported to work the next day, but he still felt sick. He called the county sheriff's office to report that he had been poisoned. Because Tolley's wife had run the Tupperware container through the dishwasher, the sheriff's deputy told Tolley that nothing could be done. Tolley did not tell anyone at work that he believed he had been poisoned. (Tr. 191).

York testified that, on August 6, 2003, Utah poison control called Moab Salt to ask if Tolley was "still alive." (Tr. 384). York immediately called Tolley at home to find out what was going on. Tolley told York that he called poison control the previous week. Tolley told him that after work on July 31 he started feeling bad and he thought he had the flu. (Ex. R-14). When the symptoms did not go away and he developed a rash, he called poison control. Tolley told York that he believed he had suffered from food poisoning. (Tr. 386). York did not understand Tolley to mean that he believed that his food had been deliberately poisoned. York testified that on August 7, Tolley told him that he thought someone had put poison in his food at the plant. (Tr. 386). Tolley asked York if the company could get him a refrigerator that he could control to store his lunch in. York agreed to this request and allowed him to put a lock on it.

Tolley testified that, after this incident, he was afraid to leave his food anywhere. (Tr. 104). Tolley was upset that the company did not investigate this incident. (Tr. 84). York agreed to buy Tolley his own refrigerator for use at work. Tolley testified that it took the company several weeks to provide this refrigerator and that, when he put a lock on it, Snyder told him that he had to pass out keys to his fellow employees. (Tr. 105). When he balked at that, the company agreed that he would not have to share the refrigerator with other employees. York testified that Tolley never told him that Snyder wanted him to give out keys to other people. (Tr. 388-89).

Soon after the DEQ inspected the plant on June 11, JBR Consultants completed their evaluation of what was required to clean up the asbestos. The DEQ required Moab Salt to adopt an operation and maintenance plan ("O&M Plan") to facilitate the removal of any asbestos at the site. (Tr. 347-48). As stated above, the work on the conveyor galleries was completed by early June but siding needed to be removed and replaced in other areas at the plant after that date. Mr. Call of the DEQ required Moab Salt to clean up the asbestos-containing paint chips on the ground in the area of the inclines and to do similar cleaning in other areas of the plant as the old siding was being removed.³ Environmental Abatement, Inc., ("EAI") performed this work for Moab Salt between June 13 and June 25, 2003. This contractor used special precautions when cleaning up the material on the ground under the conveyors. During this cleanup operation,

³ The DEQ also required Moab Salt to perform extensive cleaning in and around the crystallizer building, which contained equipment that had not been used since 1968. (Tr. 372).

employees of the contractor wore Tyvek coveralls and P-100 filters, they wetted the area down to contain any dust, and removed any paint chips. They cleaned the area twice and expanded the area at the request of the DEQ. The cleanup around the galleries was completed by early July. The galleries were shut down during the cleanup operations. Several Moab Salt employees were trained on the proper removal of the siding and cleanup of any chips so that EAI's services would no longer be required.

After the cleanup had been completed in the area around the conveyor galleries, Tolley noticed some flakes on the support structure inside the galleries. During a telephone conversation on the morning of August 7, 2003, Tolley raised this concern with York and Klein. (Tr. 390-91; Ex. R-15). In response, Klein and York traveled through the conveyor galleries and found some chips. York called EAI to clean the galleries more thoroughly on August 8. (Tr. 391). York testified that Tolley seemed satisfied with the company's response. On August 16, Tolley reported additional chips in the galleries. (Tr. 393). York believes that, because the galleries are suspended in the air between buildings, the wind picked up chips hidden in the recesses of the structure. (Tr. 393). Moab Salt told EAI to return and vacuum the beams of the structure so that chips would not reappear.

Tolley asked York whether he could be tested for asbestos exposure under the Utah Workers Compensation Fund ("WCF"). (Tr. 98). York testified that a claim was filed for Tolley with the WCF but that Tolley was not satisfied with the speed at which the process moved. Tolley set up an appointment with a doctor in Salt Lake City on September 9, 2003, and took vacation time to see him. Based on the report of the physician, the WCF entered the following findings:

While squamous cell CA and fibrosis are reported with asbestos exposure, the response dose is related and the current reported exposure is not considered significant for this condition.

The development of mesothelioma is specific to asbestos inhalation and is reported to occur with even brief exposure to asbestos. The incidence would be low, probably under 1% and the time to occur can be 20 years or more.

(Ex. C-12). The WCF agreed to pay for his initial evaluation and for checkups including x-rays every five years for 20 years. After 20 years, the WCF agreed to pay for such checkups every two years "if you feel this is essential for your peace of mind." (Ex. C-12).

In September 2003, Tolley put his house in Moab, Utah, up for sale and started looking for work in the Salt Lake City area. (Tr. 103). He decided that he had to leave his employment with Moab Salt because it was "not willing to do anything about the harassment . . . or to do anything on my behalf." (Tr. 103). He believes that Jornayvaz was angry at him for reporting the asbestos problem and that the company was unwilling to stop the harassment. The

harassment included the food poisoning, the photo of Hawks on his windshield, the memo that essentially blamed Tolley and Hawks for the lack of employee bonuses, and the company's lack of cooperation in getting his concerns addressed. In October 2003, Tolley purchased a house in West Valley City, which is in the Salt Lake City area, and he moved his family there in December 2003. He testified that he sold his Moab house in February 2004 at below market price. (Tr. 106). He obtained employment in the Salt Lake City area in February 2004. (Tr.107).

Tolley called York to resign from Moab Salt on December 23, 2003. York and Tolley agreed to make his resignation effective December 27 so that his son's previously scheduled dental work in Salt Lake City would be covered by the company's health insurance. (Tr. 397; Ex. R-17). York testified that Tolley told him that it was better for him and his family to live in Salt Lake rather than Moab.

Tolley applied for unemployment benefits but Moab Salt challenged his right to these benefits. The administrative law judge who heard the case reviewed the evidence concerning discrimination and harassment. The judge determined that Tolley had been subject to some harassment in June 2003 for his safety activities. He concluded that "[s]ince there were no troubling work related incidents after June 19, 2003, that could be corroborated as something other than the claimant's suspicions, the preponderance of the evidence in this case supports the conclusion that the claimant quit his job in December 2003 to move his family to the Salt Lake City area." (Ex. C-14 p. 4). Tolley was denied unemployment compensation benefits beyond the \$1,865.00 he initially received. Tolley states that the hearing was held over the telephone and that he disagrees with the judge's decision because it is based almost exclusively on the company's account of the events. Tolley appealed the administrative law judge's decision but it was affirmed on appeal. (Tr. 206; Ex. R-4).

Tolley admits that he was not terminated by Moab Salt, but he contends that he was forced to leave because of the continuing harassment. (Tr. 112). He testified that he believed that his "life was at stake." (Tr. 115). Tolley testified that whenever he brought harassment issues to the attention of management, he was told that there was nothing that the company could do. Tolley was particularly disturbed by Moab Salt's lack of response to the harassment and also to his initial concerns about asbestos exposure. Tolley believes that he gave the company every opportunity to correct the asbestos disposal problem but that his concerns were ignored. Fellow employees accused Tolley of taking food off their table because they were scared that his complaint about asbestos was going to cause the plant to be closed. (Tr. 116-17). Although York told Tolley that the plant was not going to be closed, Tolley believes that the company did not do enough to calm the fears of his fellow employees. Tolley described the food poisoning as the "turning point" because, after that, his wife wanted to leave Moab. (Tr. 117).

Tolley filed a complaint of discrimination with MSHA on August 2, 2003. By letter dated January 9, 2004, MSHA advised Tolley that it determined that Moab Salt had not violated section 105(c) of the Mine Act. Tolley filed this case with the Commission on his own behalf under section 105(c)(3). Tolley is seeking the following: pay for the overtime hours he was not

assigned in the summer of 2003; reimbursement for the cost of having the asbestos samples analyzed by the laboratory; the difference between the sale price and market price of the house he sold in Moab; reimbursement for the cost of putting his household furnishings into storage; the costs incurred by his wife related to the shutting down of her business in Moab; the costs associated with relocating his family to the Salt Lake City area; reimbursement for all future medical bills if he gets a disease from his asbestos exposure; back pay for the period between December 27, 2003, and the date he obtained employment in Salt Lake City in February 2004; and the removal of the disciplinary letter from his record for not attending the asbestos awareness meeting on June 25.⁴

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] 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, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) (“*Legis. Hist.*”)

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). 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 part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend 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. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

⁴ Tolley also presented evidence that he worked part time performing towing for Charles Harrison, a contract oil pumper for Intrepid Oil, from time to time. (Tr. 120-22). (Tr. 120-22). Tolley contends that he was not given as much towing work after June 2003. Harvey testified that any reduction in towing that Tolley performed for Mr. Harrison was unrelated to the asbestos issues at Moab Salt. (Tr. 296-97). I find this issue to be irrelevant to this case.

There is no dispute that Tolley engaged in protected activity when he complained to management, MSHA, and the DEQ about asbestos at the mine.

B. Adverse Action

Tolley contends that he suffered adverse action as a result of his protected activities while still employed by Moab Salt. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

First, Tolley argues that he was not given as many opportunities as before to work overtime after June 13, 2003, the date of the meeting with Jornayvaz. His proof is almost entirely anecdotal. (Tr. 85-89; Ex. C-9). He cites examples of situations where other employees worked overtime and he did not. *Id.* He testified that he wanted to work more overtime hours, but the company would not give them to him. (Tr. 215). Klein, who was responsible for assigning overtime, credibly testified that there was less overtime available June through August of 2003 because of the seasonal nature of the work. (Tr. 323). He also testified that, because of the lack of work in other areas of the plant during the summer, employees from those areas work in rail loadout as needed, thereby eliminating the need for as many overtime hours. There is no question that Tolley worked overtime hours that summer. I credit Klein's testimony that any reduction in Tolley's overtime hours that summer was totally unrelated to Tolley's complaints about asbestos. As a consequence, I find that Tolley failed to establish that any reduction in his overtime hours after June 13, 2003, was related to his protected activities. Tolley did not establish that he was subject to disparate treatment.

Second, Tolley contends that he was issued the written letter of warning for missing the asbestos awareness meeting because he was the employee who first raised the issue with management. As stated above, the meeting was arranged at the suggestion of the DEQ and was first announced on June 20. I credit the testimony of Klein that the other employees had legitimate reasons for missing the meeting. Two were on vacation, one was recovering from surgery, and another was scheduled to be off that day to take his father to dialysis out of town. (Tr. 333). I find, however, that Tolley likely would have not been disciplined if he had not been one of the employees who raised the asbestos issue. I credit Klein's testimony that when he gave Tolley permission to be late to work on June 24 he did not give him blanket authority to be late other days that week. Tolley knew that he was required to be at the meeting. Nevertheless, given his prior volunteer work with the Moab Fire Department, I find that the company would not have

placed a disciplinary letter in his file if he had not raised the asbestos issue. Thus, I find that this adverse action was taken as a direct result of his protected activity. Consequently, I order that this letter be permanently removed from his record.

C. Constructive Discharge

The remainder of the issues in this case relate to Tolley's contention that he was forced to leave Moab Salt because of the continued harassment he suffered. He agrees that he was not terminated from his employment but argues that he had no choice but to quit. Constructive discharge is established "when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Sec'y on behalf of Nantz v. Nally & Hamilson Enters.*, 16 FMSHRC 2208, 2210 (Nov. 1994) (citation omitted). In essence, "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." *Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir 1988). In determining whether working conditions were so intolerable that a reasonable person would have felt compelled to resign, each incident or working condition should not be viewed discretely, but rather in the context of the cumulative effect it could have on the employee. *Sec'y on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 276 (March 1999) (citation omitted). The incidents or conditions are considered from the perspective of the reasonable employee alleging such conditions. *Id.* Because it is the employer who is ultimately responsible for working conditions, it is the employer's actions that must be closely examined. *Id.* at 280.

Tolley emphasized two concerns at the hearing. First, he believes that Moab Salt did not react quickly enough when he raised concerns about asbestos at the plant. Tolley contends that management was hostile to his protected activities. Second, Tolley contends that Moab Salt failed to take sufficient steps to end the harassment by his fellow employees. I find that the evidence shows that when Tolley raised the asbestos issue, York took his concerns seriously. Moab Salt knew that Galbestos contained asbestos because Hawks overheard Hunter talking about it. York did not believe that the Galbestos created a health hazard, but he accompanied Tolley to the boneyard to look at the stacked siding. When York could see fibers in the coating on the siding, he told Tolley that he would look into the matter. Given that Moab Salt was in the process of removing the old siding, York needed to act quickly to address any problems. On June 10, York contacted JBR Consultants to have them come to the plant to evaluate the situation, which was five days after Tolley first raised his concerns with York. Given the health hazards that asbestos can create, York should have responded more quickly to Tolley's concerns. At Tolley's request, however, York asked that JBR Consultants visit the plant on June 13 rather than the originally scheduled date of June 23.

As stated above, JBR Consultants did not believe that the asbestos-containing coating on the old siding created a health hazard because it was not friable. The DEQ, however, required Moab Salt to adopt an O&M Plan that required the company to treat the asbestos-coated siding as a potential health hazard. If Tolley had not called the DEQ, it is doubtful that JBR Consultants

or Moab Salt would have adopted such a rigorous plan. Tolley's primary concern was to make sure that the project was stopped until a thorough evaluation could be completed. (Tr. 140-41). Tolley's concern was entirely reasonable. It is not clear whether Moab Salt would have stopped the siding replacement project on its own without the intervention of the DEQ. Thus, Tolley's actions helped ensure the safety of Moab Salt's employees. His actions also increased the cost of the siding replacement project. Once the DEQ determined that the company needed to take greater precautions when handling the old siding, Moab Salt acted reasonably and promptly. It stopped all work on the project and, with the assistance of JBR Consultants, developed a plan that satisfied the DEQ's requirements. The evidence establishes that after June 10, 2003, Moab Salt did everything required to make sure that the health of its employees was protected when removing and disposing of the old siding. Indeed, when Tolley discovered additional pieces of the coating in the conveyor galleries in August, the entire area was cleaned thoroughly again to make sure it had all been removed.

Harvey and Jornayvaz traveled to Moab to investigate Tolley's complaints. Tolley did not want to meet with them. It was only after York ordered Tolley to meet with them that Tolley relented. Tolley's reluctance is puzzling because he is the person who called Harvey about the asbestos situation. Tolley told them that he had photos, video tapes, and other evidence of conditions that endangered the health and safety of Moab Salt's employees. Both Harvey and Jornayvaz believed that Tolley was concerned with other hazards as well as the asbestos hazard. Tolley refused to provide any details about his safety and health concerns. Tolley testified that he wanted to leave the meeting because Harvey and Jornayvaz were asking the wrong questions.

Based on my observation of his testimony at the hearing, I find that Tolley is a very difficult person to talk to. When being questioned by me and opposing counsel, he frequently interrupted before he fully understood the question. Tolley interrupted the person questioning him at the hearing more frequently than most other witnesses who have appeared before me. He jumped from subject to subject making his train of thought very difficult to follow. I credit the testimony of Harvey and Jornayvaz that they became frustrated at this June 13 meeting because Tolley did not want to provide much information about the alleged safety and health hazards. I especially credit the testimony of Harvey concerning the events at the meeting with Tolley on June 13, as summarized above. Harvey was a very believable witness. I find that Tolley was not harassed by Harvey and Jornayvaz during this meeting. Taking into consideration the words and actions at this meeting, I find that it was not a coercive interrogation that violated Tolley's section 105(c) rights. *See Moses v. Whitely Development Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985). After the meeting, Jornayvaz wrote a letter to Tolley asking for any information he had regarding safety related issues. (Ex. R-1). Tolley did not respond to this letter.

The first instance of harassment occurred when Tolley found a photograph of Hawks on his windshield. When York was shown the photo, he immediately drove to Moab so that an official investigation could be started. He also issued an anti-harassment memo. The Sheriff's Department was unable to determine who placed the photo on the windshield. Although Moab

Salt could have conducted its own internal investigation into this incident, I find that Moab Salt did not condone this harassment and took steps to try to prevent further harassment.

The memo of July 8, 2003, set forth the concerns raised about asbestos as one of the reasons that a bonus was not being paid to employees. (Ex. C-7). This memo had the effect of causing Tolley to be subject to a significant amount of harassment from fellow employees. Although Moab Salt management stated that it was not their intent to single out Tolley for harassment, that fact is largely irrelevant for two reasons. First, it was readily foreseeable that Tolley would be subject to ridicule and scorn once employees read the memo. The memo made clear that one of the reasons employees were not getting a bonus was the fact that asbestos concerns were raised in June. In addition, when looking at the statement contained in the memo, I must consider all of the circumstances that existed at the time. *See Sec'y of Labor on behalf of Grey v. North Star Mining, Inc.*, 27 FMSHRC _____, slip op. at 9, KENT 2001-23-D (Jan. 12, 2005). The employer's motivation in making the statement is not nearly as relevant as whether the statement would tend to intimidate a reasonable miner or cause him to be subjected to harassment. I find that the July memorandum had the effect of intimidating Tolley because it subjected him to harassment from his fellow employees.

I find that Tolley was also intimidated and harassed by his shift supervisor, Leroy Snyder. I credit the testimony of Tolley that Snyder treated him differently after he complained about the asbestos. Snyder changed the terms and conditions of his employment by prohibiting Tolley from leaving his workplace, prohibiting Tolley from fraternizing with Hawks, and ordering Tolley to provide other employees with keys to the refrigerator that York ordered for him. Hawks's testimony corroborates the testimony of Tolley on this issue. Tolley admitted that Snyder was transferred to another part of the plant after he complained to York, with the result that Snyder was no longer Tolley's supervisor. Although it appears that this transfer was made for other reasons, it had the effect of immediately remedying the situation.

Tolley's actions with respect to the alleged poisoning of his lunch on July 30 are contradictory. He testified that the pains in his stomach were so severe he could not walk, yet he refused to go to the emergency room. Indeed, he never saw a physician as a result of this illness. He called poison control about his stomach illness, rather than a doctor or nurse-practitioner. When poison control asked whether he worked around chemicals, he jumped to the conclusion that he must have been deliberately poisoned. He did not call or tell anyone at Moab Salt about his concern that he had been poisoned, yet he faults the company for failing to conduct a thorough investigation of the alleged poisoning. Tolley had already called the Sheriff's Department by the time he finally advised York on August 7 that he believed he had been poisoned. I find that Tolley did not produce any reliable evidence that he was deliberately poisoned by another employee at Moab Salt. His belief is based on conjecture and speculation. Consequently, because Tolley did not establish that he was poisoned at work, I find that this event did not constitute harassment or intimidation for which Moab Salt can be held responsible. York agreed to purchase a refrigerator for Tolley which he could lock to protect his food.

When Tolley told York in August that he wanted a physician to evaluate his health risk from asbestos exposure, York agreed to file a workers' compensation claim on his behalf. Although York did not respond as quickly as Tolley would have liked, such an examination took place in early September and it was covered by the WCF. As reported by the WCF, Tolley's risk of developing a disease from his exposure to asbestos is quite low. WCF agreed to pay for periodic examinations to monitor his condition. I find that Moab Salt did all that it could to address Tolley's health concerns.

Tolley quit his job at Moab Salt in late December 2003. There is no evidence that Tolley suffered additional harassment at his job after the summer of 2003, except occasional comments from other hourly workers. All employees, including Tolley, received bonus pay on December 13, 2003.

I find that Tolley failed to establish that he was constructively discharged from his job at Moab Salt. The requirement that conditions be "intolerable" to support constructive discharge is not easy to establish.⁵ *Simpson*, 842 F.2d at 463. In December 2003, a reasonable miner would not have felt compelled to resign because of unsafe, unhealthy, or hostile working conditions created or maintained by Moab Salt. Although Moab Salt management and hourly employees displayed some hostility toward Tolley's protected activity in June and early July, the entire matter had been resolved well before he quit in December 2003. York continued to take Tolley's health concerns seriously. For example, he traveled with Klein through the conveyor galleries in August to look for chips from the siding and he had EAI return several times to perform additional cleaning, including hand vacuuming the metal structure inside the galleries. York's conduct, as summarized in the decision, demonstrates that Moab Salt was not hostile to Tolley's health and safety concerns.

The memo of July 8 concerning employee bonuses was unfortunate because it had the effect of subjecting Tolley and Hawks to harassment. When Tolley raised concerns about this harassment he did not provide York with the names of people who were harassing him. As a consequence, it was difficult for Moab Salt to address the harassment issue. Moab Salt cannot be expected to control the actions of its hourly employees after working hours. Tolley testified that many of the negative comments he received from fellow employees were made in Moab when they would cross paths while shopping. Moab Salt cannot force a particular employee to be Tolley's golfing partner. Moab Salt may have been able to do more to control the harassment at

⁵ Constructive discharge is typically upheld in situations where the employer's conduct is egregious. *See, e.g., Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150, 152-53 (10th Cir. 1991) (court agreed that welder with diagnosed respiratory condition was justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson*, 842 F.2d at 463 (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred); *Nantz*, 16 FMSHRC at 2210-13 (bulldozer operator's decision to quit justified in light of operator's failure to protect him from dust which caused breathing and visibility problems).

work, but by December 2003 conditions had improved considerably. All health hazards had been eliminated, the old siding had been replaced, it was obvious that the plant was not going to shut down, and employees received bonus pay.

The doctrine of constructive discharge extends liability to mine operators who indirectly effect a discharge that would have been illegal if done directly. Although the operator's motivation is only one factor to evaluate, I find that Moab Salt management was not attempting to force Tolley to quit. Indeed, it is highly likely that if Tolley had not quit he would still be employed by Moab Salt. Although Hawks was not as vocal about the asbestos issue as Tolley, he was subject to harassment, as demonstrated by his photograph placed on Tolley's vehicle. Hawks is still employed by Moab Salt and he was offered a management position in 2004, which he apparently turned down.

I appreciate Tolley's fears in the summer of 2003. His fellow employees were blaming him for their not getting bonuses. Nevertheless, Moab Salt's management properly addressed the asbestos issue and took steps to quell his concerns about asbestos exposure. It was also reasonable for Tolley to be concerned about the bonus memo of July 8. Although the company's response to Tolley's health concerns and to the harassment was not perfect, when considering the cumulative effect of all of the incidents, I find that Moab Salt did not create or maintain conditions so intolerable that a reasonable person would have felt compelled to resign. In addition, some of the hostility between Tolley and management was created or exacerbated by Tolley's own conduct in refusing to describe his safety and health concerns, as described above.

III. ORDER

For the reasons set forth above, that part of the discrimination complaint filed by Robert R. Tolley concerning the written warning, dated June 25, 2003, which was placed in his file is **AFFIRMED**. Moab Salt is **ORDERED** to remove that written warning from his file. That part of Mr. Tolley's discrimination complaint which seeks reimbursement for overtime that he alleges was denied him is **DENIED**. Finally, that part of Mr. Tolley's discrimination complaint that alleges constructive discharge is **DENIED**. For the reasons set forth above, upon removal of the written warning, this case is **DISMISSED**.⁶

Richard W. Manning
Administrative Law Judge

Distribution:

Mr. Robert R. Tolley, 3838 South 4220 West, West Valley City, UT 84120-4043 (Certified Mail)

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

RWM

⁶ The Commission's procedural rule at 29 C.F.R. § 2700.44(b) provides that, if a judge sustains a discrimination complaint brought under section 105(c)(3) of the Mine Act, he should notify the Secretary of that fact so that the Secretary can file a petition for assessment of civil penalty. In this case, I denied most of the relief that Tolley was seeking and sustained a very small portion of the discrimination complaint. As a consequence, I find that a civil penalty is not appropriate in this case.