FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

April 28, 2005

VERNON HOLDEN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 2004-364-DM
	:	WE MD 2004-05
ROSS ISLAND SAND & GRAVEL CO.,	:	
Respondent	:	Avery Point Ramp
	:	Mine ID 35-00540

DECISION

Appearances: James E. Davis, Esq., Talbott, Simpson, Gibson & Davis, Yakima, Washington, for Complainant.
Richard C. Hunt, Esq., Barran and Liebman, Portland, Oregon, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by Vernon Holden pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(3).[1] Holden alleges that Ross Island Sand & Gravel Company, ("Ross Island") discriminated against him in retaliation for his complaints about safety by laying him off for one week in March 2003 and by failing to call him back to work from January 15 to April 5, 2004. A hearing was held in The Dalles, Oregon. Following the hearing, both parties moved to re-open the record to submit additional evidence. Those motions were granted, and the parties subsequently filed briefs.[2] For the reasons set forth below, I find that Respondent has failed to prove that he was discriminated against in violation of the Act.

[1] Pursuant to section 105(c)(2) of the Act, a miner may file a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

[2] *See* Orders dated December 6, 2004, and January 31, 2005, allowing supplementation of the record with Complainant's exhibits 6 and 7, and Respondent's exhibits 22 and 23.

Findings of Fact

Through its wholly owned subsidiary, Pacific Northwest Aggregates, Incorporated ("Pacific"), Ross Island operates the Avery pit, a sand and gravel mine on the banks of the Columbia River in Avery, Washington. Sand and gravel are extracted from the site and transported by barge down-river to Ross Island facilities near Portland, Oregon. A small amount of material is sold to local consumers, which is referred to as "outside sales." The Avery pit is located on land owned by the Yakima Nation. Pacific's Handbook specifies that enrolled members of the Yakima Nation have preference in all aspects of employment, followed by enrolled members of other federally recognized tribes.[3] Ex. C-1 at 7.

The mining operation is seasonal. It typically begins in late March, after the U.S. Army Corps of Engineers completes annual maintenance on navigation locks. Barge traffic on the river must be curtailed during lock maintenance. In 2003, lock maintenance was scheduled from March 8 through March 22. Ex. R- 12. Pacific's employees were called back to work on March 3, before lock maintenance began, because Ross Island was in short supply of a particular product. On March 7, three of the eight men who worked at the Avery pit, including two haul truck drivers, were laid off. Tr. 398. A crew of five men was retained to perform major maintenance projects, taking down a radial stacker and extending a tunnel. Pacific encountered delays in that work, and did not resume full mining operations or call the truck drivers back to work, until March 31, 2003.

Material is extracted from various sites on the Avery pit property by use of front-end loaders, and is dumped into haul trucks. It is transported to a hopper and conveyor belt system, and loaded onto barges. Four barges are used in the operation. Three small barges have a capacity of 2,900 - 3,000 tons each, and can be loaded in approximately two hours. One large barge has a capacity double that of the smaller barges. The barges are loaded in pairs, and about 10 - 15 minutes is required to reposition the barges so that the second one can be loaded. Barge loading is a critical operation, and the loader operator and haul truck drivers attempt to keep a constant flow of trucks to the loading hopper so that the conveyor belts do not "go dry." Barges are loaded three days a week, on Mondays, Wednesdays and Fridays. Tuesdays and Thursdays are less busy "lay down days," when overburden is removed and the wash plant is operated. Tr. 410-14. Employees are encouraged to schedule matters that would prevent them from working, e.g., doctor's visits, on these days. Tr. 410-11.

Complainant, Vernon Holden, became employed at the Avery pit in March 2001, and performed a variety of jobs in 2001 and 2002. He operated equipment, including loaders, trucks, a backhoe, and a grader. He also operated the wash plant, and performed maintenance and other duties. Tr. 26-30; ex. C-3. By 2003, his primary assignment was driving one of the haul trucks.

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[3] Holden testified that he is over 25% Native American. Tr. 91. However, he is not an enrolled member of the Yakima Nation or any other federally recognized tribe. Tr. 115.

The standard work day at the Avery pit ends at 3:00 p.m. By longstanding practice, the men work through their 30 minute lunch period and leave a half hour early, at 2:30 p.m. The company handbook provides that workers are to have a ten-minute rest period in the morning and afternoon, but that the breaks will not be "scheduled since the nature of the work allows employees to take these rest periods on an intermittent basis." Ex. C-1 at 8. The nature of the operation also dictates that breaks not be scheduled. The barge loading system, with its extensive conveyor belts, for example, can not simply be shut down. Holden generally felt that he was unable to take rest periods, and had been concerned about the issue for some time. He brought up the subject of breaks at safety meetings three or four times from 2001 - 2003. Tr. 67; ex. R-14. On one occasion, an instructor associated with MSHA advised that equipment operators should stop and stretch their legs if they felt that they needed a break. Tr. 67.

Holden decided to press the break issue during safety meetings, shortly after he was called back to work in 2003. He thought that the meetings occurred on March 31 and during the first week in April. Tr. 60-61, 62, 67-68.[4] He described a safety meeting that would most likely have occurred on a Tuesday, when such meetings were normally held. Holden noted that there were no scheduled breaks, and proposed that on non-barge days, they get off work 20 minutes early if they had not taken their breaks. Tr. 129, 197, 201-03. His intention was to leave earlier to ease his commute, since he had moved to Toppenish, Washington, some 88 miles away from the pit. Tr. 60-61. Roland Jack Spencer, a fellow haul truck driver, also lived in Toppenish. He and Holden rode to and from work together. Tr. 61.

Holden testified that Richard Aldrich, Pacific's superintendent, reacted with hostility when he made his proposal regarding breaks, but that Aldrich told the miners that they should talk it over and he would do whatever they agreed to. Tr. 60-61. A few days later, there was another meeting. None of the other miners supported Holden, except for Spencer. Tr. 62, 67-68. Holden testified that that afternoon, he was told by Spencer that Aldrich had said that everyone would be working the following week, except for Holden, because Aldrich wanted to punish him for raising the break issue. Tr. 69. Spencer testified similarly, except that he stated that Aldrich did not say why Holden was being punished. Tr. 184. Holden was never told by Aldrich, or anyone associated with Pacific's management, that he had been laid off, and he made no effort to confirm the lay-off. Tr. 69-70. He and Spencer testified that Holden did not go to work the following week, but that Spencer did. Tr. 132, 185, 191, 430. Aldrich testified that Holden was not suspended for a week because he raised the break issue, and denied saying that he intended to punish Holden. Tr. 364.

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[4] His recollection of the timing of events appeared to have been based upon notations that he had made in a journal. Tr. 59; ex. C-5. He obtained the journal in mid-March of 2003, and made daily entries in it. One of the primary reasons that he got the journal was to record events pertinent to perceived discrimination. Tr. 423, 434-36. When he had forgotten the journal, he made notes on papers kept in his truck. Tr. 153-57. One of the first entries in the journal was made on March 20, and was to the effect that Holden was called back to work on March 31, 2003. Ex. C-5.

Holden testified that Aldrich attempted to call in another driver, Ernest Leslie, to replace him during the week's suspension. Tr. 70. Leslie testified that Aldrich called him in April, two days before his April 22 birthday, and asked him to come in to work. Tr. 208. He replied that he had no intention of returning to work until his entitlement to unemployment compensation ended at the end of April. Tr. 208. Leslie's testimony is rebutted by Pacific's payroll records, which show that he worked the entire month of April 2003, 198 hours from April 5 to May 3. Tr. 215; ex. R-15.

Holden returned to work on March 31, 2003, and worked the remainder of the season, except for an approximately 10-week period from June to mid-August, when Pacific's operations were curtailed for economic reasons. In mid-December, an MSHA inspection had raised an issue with respect to the absence of speed limit signs on the pit's roadways. Aldrich ordered signs designating various speed limits by overnight delivery, but received only "15 MPH" signs. Tr. 339. He decided to post the signs, even though trucks could safely travel at higher speeds on portions of some roadways. Holden and Spencer posted the signs.

The following day, on December 19, 2003, Aldrich contacted the drivers by radio and requested their views on whether higher speeds could safely be traveled. Tim Rambler replied that trucks could go faster than 15 mph on the haul road on the west end of the property. Tr. 78. Holden interpreted Aldrich's inquiry as a request to drive faster than the newly posted limit, and declined to respond to it. Instead, he replied by telling Aldrich that if he wanted him to drive faster he was going to have to tell him to, and stated that it was Aldrich's decision. Tr. 79. Aldrich then made the same inquiry to Spencer, who replied as Holden had. Tr. 81, 186. Holden and Spencer testified that Aldrich made a remark to the effect that the slow driving was "sabotaging loading of the barges." Tr. 81, 187. Aldrich denied making the comment. Tr. 341. A note purportedly made by Holden on December 19, relates that Holden asked Aldrich if he thought they were trying to sabotage loading of the barges, to which no response was made. Tr. 153; ex. C-3. Aldrich did not direct the drivers to exceed the posted limit. Tr. 137-38, 340-41.

That same day, December 19, Pacific shut down operations for the winter. Tr. 81-82. There was an ample inventory of material at Ross Island's facility, and no more barges were loaded. Tr. 341. Holden and most of the crew were laid off. Tr. 81. Holden gave conflicting accounts of his expectations regarding the anticipated winter shut-down. He first testified that Aldrich told him in December 2003 that a new barge loading system would be installed during the winter shut-down, and that truck drivers and operators would be needed. Tr. 82-83. However, he later testified that he found out in mid-January that men were installing the loading system, and that Aldrich had told him on December 19 that "nobody was going to be coming back until April." Tr. 94. He alleges that Pacific's failure to call him back to work in January 2004 was in retaliation for his December actions with respect to the speed limit signs.

Although he believed that he had been discriminated against as early as March or April of 2003, Holden did not take any action to assert a complaint of discrimination until approximately November. At that time he spoke to an MSHA inspector, who was conducting an inspection of

his truck, and told him that he wanted to talk to him. The inspector gave him his business card, and Holden later called him to relate his complaint of discrimination. Tr. 96. He was referred to MSHA's Vacaville, California, office, which mailed a discrimination complaint form to him. Holden testified that he filled out the form, signed it and mailed it back to MSHA about one week after receiving it. Tr 169. However, the date entered next to his signature on the complaint form is February 6, 2004, and the form was received by MSHA on February 23 or 25, 2004. Ex. R-14. Holden's complaint alleged that he had been discriminated against when he was laid off during the "first or second week of April 2003." Ex. R-14. It made no mention of the alleged January 2004 discrimination.

Subsequent to filing the MSHA complaint, Holden was called to return to work at the Avery pit. Phone messages were left at his home in late March, informing him that work would begin on April 5, 2004. Tr. 89-90. He decided not to return to work. At the time he made that decision he had not yet secured another job, and it is unclear whether he had applied for one.[5] Holden testified that he made his decision to file a discrimination complaint after learning in January 2004 that "everybody was working but me and Roland Spencer," when he had been told that no one would be coming back until April. Tr. 94-95. He concluded that he did not want to return to Ross Island because of the "hostile working environment" created by Aldrich, who he believed was a racist. Tr. 144.

By letter dated May 13, 2004, MSHA advised Holden that its investigation of his discrimination complaint had been completed and that it had concluded, on behalf of the Secretary, that no discrimination had occurred. Ex. R-14. Holden then filed his complaint of discrimination with the Commission, pursuant to section 105(c)(3) of the Act. The complaint was subsequently amended to include an allegation of discrimination during the period January 15 to April 5, 2004.

Conclusions of Law - Further Findings of Fact

Timeliness of Holden's Complaint of Discrimination

As noted above, Holden did not file a complaint of discrimination with MSHA until February 23 or 25, 2004, many months after the alleged March 2003 lay-off. That lay-off was the only discriminatory action alleged in the complaint. Respondent argues that both claims should be dismissed because the complaint was untimely, and the second allegation of discrimination was not included in the MSHA complaint. Section 105(c)(2) of the Act provides, in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with,

[5] Holden first testified that he had applied for a job by the time he was notified to return to work in April of 2004. Tr. 90. Later, he testified that he had not applied for another job at the time of the notification. Tr. 145.

> or otherwise discriminated against by any person in violation of this subsection may *within 60 days after such violation occurs*, file a complaint with the Secretary alleging such discrimination. (emphasis supplied.)

The Commission has held that the 60 - day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and excusable neglect. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386-87 (Dec. 1999); *Perry v. Phelps Dodge Morenci*, 18 FMSHRC 1918, 1921-22 (Nov. 1996); *Hollis v. Consolidation Coal Co.,* 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). While the Commission has not ruled directly on the issue, it appears that a miner's reasonable fear of retaliation may be considered in determining whether there are justifiable circumstances for the late filing of a discrimination complaint.[6] *Cf. Olson v. FMSHRC*, 381 F.3d 1007, 1014 (10th Cir. 2004). Even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal. *Perry*, 18 FMSHRC at 1922. The burden of proving justifiable circumstances is on the miner and the burden of demonstrating material legal prejudice is on the mine operator.[7] *See Olson*, 381 F.3d at 1009.

Timeliness – The March 2003 Lay-off

The first discriminatory action argued in Complainant's post-hearing brief is that he was laid off for a week in March 2003, either the week ending March 15, or the week ending March 29.[8] Under section 105(c)(2), Complainant's allegation of discrimination should have been filed with MSHA by May 9 or 23, 2003. The February 25, 2004, filing was over nine months beyond the statutory deadline. Complainant argues that justifiable circumstances for the

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[6] While the Act provides comprehensive remedies for miners injured by discrimination, those remedies would not lessen the potentially substantial economic hardship that a miner might suffer while MSHA investigates a discrimination complaint and moves to secure temporary reinstatement of the miner. Combined with the uncertainty of a favorable outcome of a discrimination action, a miner considering whether to file a discrimination complaint might well reasonably defer such action because of a fear of reprisal. Allowing justifiable circumstances to be established by a reasonable fear of retaliation would be consistent with the intent of Congress that the Act's anti-discrimination provisions be broadly construed. *See Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994).

[7] Respondent does not contend that the delay in filing prejudiced its ability to defend.

[8] As noted in the discussion that follows, there is a great deal of inconsistency in Complainant's allegations regarding when he was discriminated against. That inconsistency has carried over into the post-hearing brief. At one point, it is argued that Complainant was improperly laid off from March 10 to 15, 2003. Compl. Br. At 10-11. Other discussions address improper punishment for the week beginning March 22. Compl. Br. At 2, 19, 20.

untimely filing have been established by "his confusion regarding the proper procedures and his fear that he . . . would be terminated." Compl. Br. at 19.

Holden does not claim that he was unaware of his right under the Act to file a discrimination complaint. He testified that MSHA instructors had discussed a miner's right to file a discrimination complaint at training sessions, although he did not recall being aware of a time frame within which such claims had to be filed. Tr. 98, 168. Holden impressed me as an intelligent person, who understood his Mine Act and other rights, and was fully capable of pursuing remedies under the Act and other statutory provisions. He obtained a journal in March of 2003 for the express purpose of recording events pertinent to perceived discrimination, and made daily entries in it. Tr. 423, 434-36. At times when he had forgotten the diary, he made notes on papers kept in his truck. Tr. 153-57. He appeared to be familiar with terminology associated with other claims of discrimination that he may be pursuing. Tr. 144.

Holden testified that he delayed filing his discrimination complaint because he believed that, if he filed it while he was working, he would be fired. Tr. 92, 97-98. However, the record as a whole establishes that Holden was not intimidated, and that he continued to press issues that had alienated management. He discussed the issue of breaks in safety meetings conducted by MSHA instructors, and at other times over the course of his employment. Tr. 66-67, 140, 182, 190; ex. R-14. He was threatened by management several times. Tr. 97. He did not appear to have been intimidated by such threats. He described confrontations with management following his pressing of the break issue in March 2003, at which attempts were made to intimidate him and threats were made to fire him. Tr. 68, 85-87, 433. He was not intimidated by these actions, and continued to argue his position. Tr. 86-87, 433. Notes in Holden's diary indicate that he discussed safety issues with Aldrich in October 2003. Ex. C-5.

Based upon the foregoing, I find that Complainant has failed to carry his burden of proving justifiable circumstances for his delay in filing the complaint of discrimination with MSHA, regarding the March 2003 lay-off. I find that, at all pertinent times, Holden was fully aware of his right to file a discrimination complaint, and either knew or should have known of the 60-day time limit for filing. I also find that he has failed to prove that the delay in filing was the result of a genuine fear of retaliation.

Timeliness – The January 2004 Lay-off

The amended complaint filed in this action alleges that Holden was discriminated against during the period January 15 to April 5, 2004, when he was not called back to work. He claims, in essence, that he was laid off during that period. The MSHA discrimination complaint was filed within 60 days of that allegedly discriminatory action. However, there was no mention of the claim in the MSHA complaint. Holden testified that he advised MSHA about the claim during a phone call that appears to have been made shortly after he filed the complaint. Tr. 171. He claims that he was told that he could describe the new claim during MSHA's investigation of

the original complaint.[9] Tr. 95-96, 170-71. He claims to have told an MSHA investigator of the claim in the course of an interview prompted by his original complaint. Tr. 171.

The Commission has held that discriminatory actions not specifically alleged in an MSHA complaint may be pursued in a later action before the Commission, if they were addressed in MSHA's investigation of the complaint. *Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997). There is nothing in the limited MSHA records that were introduced into evidence at the hearing to confirm or rebut Holden's testimony that the claim was reported during the MSHA investigation. Ex. R-14. The letter advising Complainant of MSHA's determination that no discrimination had occurred, does not identify the claim or claims that were considered. Ex. R-14. In the absence of evidence to the contrary, I find that Holden's complaint of discrimination during the period January 15 to April 5, 2004, was brought to MSHA's attention in the course of its investigation and that it can be maintained in this action.

The Discrimination Claims

The determination that Complainant has not established justifiable circumstances for failing to timely file his complaint of discrimination requires dismissal of the claim as to the March 2003 lay-off. However, in the interests of judicial economy, it will be assumed, for purposes of argument, that justifiable circumstances were established, and both claims will be addressed on the merits.

A complainant alleging discrimination under the Act typically establishes a *prima facie* case 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. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 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 way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. 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 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639,

[9] Holden's explanation for failing to include the claim for the January lay-off in his written MSHA complaint is difficult to accept. He acknowledged signing the complaint form on February 6, 2004, well after he was aware of the essential elements of the claim. It seems highly unlikely that MSHA would advise a miner that a discrimination claim need not be reduced to writing, except, possibly, if it was related to a discrimination complaint that had already been filed. See the discussion above. If the phone call, in fact, did not occur until after the complaint had been filed, Holden's explanation fails.

642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

The March 2003 claim

Holden failed to establish a *prima facie* case with respect to his allegation that he was laid off in March of 2003. While it appears that he engaged in protected activity, he failed to prove that he suffered adverse action.

The thrust of his argument is that he was suspended in retaliation for raising a safety complaint, i.e., that he and other workers were not getting rest breaks. He related advice that a trainer associated with MSHA had provided, to the effect that drivers should take a break if they felt that they needed one. In his written MSHA complaint, he described raising the issue that they should get breaks "as a safety precaution." Ex. R-14. Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1).

However, as described in his and other witnesses' testimony at the hearing, his intention was not to get rest breaks, but to get off work 20 minutes earlier to ease his "almost 100 mile" commute. Tr. 129, 197, 201-03. Aldrich's recollection was that Holden was trying to have breaks scheduled, which, as noted in the handbook, is not permitted by the nature of the work. Tr. 351-52. As described at the hearing, the issue does not appear to have been raised as a matter of safety, or perceived as such by Aldrich. Nevertheless, Holden's actions did amount to a protest of what he perceived to be inadequate opportunities to take rest periods.[10] On the facts of this case, I find that Holden's actions constitute protected activity under the Act.

Holden's accounts of when he allegedly suffered adverse action have been highly inconsistent. His original complaint to MSHA alleged that he had been suspended for the "first or second week in April 2003" or the "last week [of March] or first week in April of 2003." Ex. R-14. The amended complaint in this action alleges that he raised the break issue at a safety meeting in March and was suspended during the "first or second week in April, 2003." Am. Compl. at 2.

Holden testified that he was laid off the first or second week in April. Tr. 68-69, 130. However, Respondent introduced time slips prepared by Holden showing that, with the exception

[10] The parties introduced a considerable amount of evidence on the question of whether Holden took, or was able to take, the allotted rest breaks. I find it unnecessary to resolve that question, because I am satisfied that Holden raised the issue of breaks in a manner that qualifies as protected activity under the Act.

of a day or two, he worked from April 1 through 25. Ex. R-20. After Respondent introduced those records, Holden was re-called, and testified that he believed that he had been laid off from April 28 to May 2, and that the safety meeting must have been the Friday before the 28th.[11] Tr. 420-21, 428-29. Because of this significant change to the adverse action allegation, Respondent supplemented the record, post-hearing, introducing additional time slips submitted by Complainant showing that he worked from April 27 to May 10, except for two or three days that he was off participating in a basketball tournament. Ex. R-22, R-23.

Faced with his own time slips showing that he was not laid off for a week during the April to early May period, Complainant now argues in his post-hearing brief that he was laid off in March, although it is unclear when. At pages 10 - 11 of the brief, it is argued that Complainant was improperly laid off from March 10 to 15, 2003. However, discussions at pages 2, 19 and 20, address improper punishment for the week beginning March 22. While Pacific's records confirm that he did not work during those weeks, it is clear that he was not laid off for retaliatory reasons at those times.

One of the few consistencies in Holden's claim is that he was laid off following a week during which he and Spencer worked, at the conclusion of which Spencer advised him of Aldrich's statement that everyone but Holden would be back the following week. Tr. 68-70, 133, 428-30, ex. R-14. Another consistency is that Spencer continued to work, and worked during the week that Holden was laid off. Tr. 132, 185, 191, 430.

It is undisputed that Holden did not work from March 8 through March 30. Ex. R-6, R-17. Spencer, likewise, did not work during that period. Ex. R-6, R-18. Consequently, the alleged retaliatory lay-off could not have occurred during the week beginning on March 22, because neither Holden nor Spencer had worked the previous week, and Spencer did not work that week. In addition, there are no entries in Holden's journal relating to the alleged discriminatory events for that time frame. Ex. C-5. It is inconceivable that events of such importance would not have been contemporaneously recorded in the journal which he obtained

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[11] Holden's allegations, regarding meetings at which the break issue was discussed, show a similar lack of consistency. His MSHA complaint describes a safety meeting that occurred during the last week of March or the first week in April, at which he raised the break issue and was called a troublemaker. Ex. R-14. The complaint also describes a meeting that occurred "the next day," in the lunch room, that lasted over an hour. Ex. R-14. Only Holden, Aldrich and one other person were involved in that meeting, at which Aldrich threatened to fire Holden. At the hearing, Holden testified that he raised the break issue at an informal meeting on March 31. Tr. 61-61. He then described a meeting with the whole crew that occurred two days later, during the first week in April, at which he was called a troublemaker. Tr. 62, 67-68. He later described an hour-long meeting in the lunch room, with Aldrich and one other person, that occurred "after [he was] off the week in April." Tr. 85. When re-called to the stand, he discussed a meeting in the lunch room, at which Aldrich threatened to fire him, that occurred after a safety meeting on March 4, before he was laid off. Tr. 433-35.

for the purpose of recording information pertinent to perceived discrimination.

The week of March 10 through 15, is a more plausible possibility for the alleged retaliatory lay-off; however, only slightly so. Spencer and Holden had worked the previous week, despite Holden's initial testimony to the contrary.[12] There also had been a safety meeting the previous Tuesday, March 4, conducted by Aldrich. Tr. 350-53; ex R-19. Holden apparently did not procure his journal until mid-March, which could at least partially explain the absence of entries for that period.[13] However, Pacific's records clearly establish that Spencer did not work during the week of March 10. Ex. R-6, R-18. It is also undisputed that maintenance on the river locks started that week, which dictated that virtually all mining activity had to be curtailed.

Complainant supplemented the record, post-hearing, with records from the Washington State Employment Security Department, purporting to show that Holden received unemployment compensation benefits for the week ending March 15, but that Spencer did not. He argues that those records establish that Spencer worked that week, and that Holden did not. However, the unemployment records do not explain why Spencer did not receive benefits. He may have failed to apply for them, or he may have been working somewhere other than at Pacific. What is clear, is that he did not work at Pacific that week. Ex. R-6, R-18. Consequently, the alleged retaliatory lay-off, as Holden and Spencer described it, could not have occurred during the week of March 10.

I find that Complainant has failed to establish that he suffered adverse action.[14] He and Spencer were laid off starting the week of March 10 solely because of the curtailment of mining operations, necessitated by the closure of navigation locks on the river.

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[12] Holden testified that he did not work or attend a safety meeting at the beginning of March. Tr. 59-60, 131, 151. However, Respondent introduced into evidence time slips submitted by Complainant, himself, showing that he worked a total of 48 hours from March 3 through 7, 2003. Ex. R- 17.

[13] Of course, the placement of the entry in the notes section at the end of April remains puzzling.

[14] Complainant apparently claims to have suffered other adverse action, i.e., the denial of rest breaks during his entire period of employment with Pacific, beginning in 2001. Compl. Br. at 1-2, 20-21. However, he makes no plausible argument that he was denied breaks from 2001 to 2003, in retaliation for engaging in activity protected under the Act, i.e., his raising and pressing the issue as a safety concern in March of 2003. Complainant cannot assert his claim to wrongfully denied wages under Washington State law in this proceeding. Nor can he litigate here the allegation included in his amended complaint, that he was discriminated against because of his status as an American Indian.

Discrimination from January 15 to April 5, 2004

Complainant claims that Aldrich's questioning of the truck drivers about whether it would be safe to drive faster than 15 mph was "an effort to coerce the drivers into violating the posted speed limit." Compl. Br. at 14. He further contends that his and Spencer's resistence to the inquiry, and their continued adherence to the 15 mph speed limit, led to adverse consequences, i.e., that Rambler "ended up taking Complainant's (and Spencer's) truck driving job commencing in January 2004."[15] *Id.*

This claim has deficiencies similar to those of the first claim on the issues of protected activity and adverse action. There had been no speed limit signs in the area in question, and drivers had traveled faster than 15 mph because the haul road was well-maintained and it was safe to do so. Tr. 193, 267, 313. Even Spencer stated that he safely drove faster than 15 mph before the signs were posted, and that 25 mph would have been a safe speed.[16] Tr. 187-89, 193. Aldrich had the signs posted because an MSHA inspector had suggested it and they were the only ones available, which he and Rambler characterized as a misunderstanding. Tr. 313-14, 399-400. The inspector had advised that the speed limit could be adjusted, and Aldrich reasonably sought the drivers' input on whether a speed higher than 15 mph would be appropriate.[17] Tr. 377-78. He most likely was not satisfied that trucks were traveling at 15 mph on a haul road that could safely be driven at the faster speeds that the trucks had traveled prior to installation of the signs. As Dave Clark, the loader operator and lead man for the crew, stated, the signs slowed loading of the barges. Tr. 262. While Aldrich's inquiries may reasonably have been interpreted as a preference that the trucks be driven faster than 15 mph, he did not direct that the trucks operate faster than the posted limit. Tr. 137-38, 340-41. Nor did he attempt to pressure the drivers into operating the trucks at a speed that would have been inappropriate for the conditions. I also find that Aldrich did not make a remark to the effect that Holden and Spencer were "sabotaging" loading of the barges. A note that Holden claims to have made that day, apparently a day that he had forgotten his journal, describes only Holden's use of the word

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[15] Aside from the conceptual difficulty of one individual taking the jobs of two drivers, Spencer did not share this view. He testified that the work being done over the winter shut-down was not the type of work he would normally do, and that he suffered no adverse consequences because of his responses to Aldrich's inquires. Tr. 187, 189.

[16] The 15 mph signs on the haul road were later replaced with 25 mph signs. Tr. 191-92, 339; ex. R-3.

[17] The Secretary's regulations provide that "Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used." 30 C.F.R. § 56.9101.

"sabotage" in an inquiry to which Aldrich did not respond.[18] Ex. C-3.

It is difficult to characterize Holden's actions as protected activity. His refusal to respond to Aldrich's inquiry, as well as his insistence on driving no faster than the newly posted speed limit, were not motivated by safety concerns. At no time did Holden assert that driving 20 or 25 mph on the haul road would have been unsafe. From the testimony of Spencer and others, it is apparent that haul truck drivers, including Holden, drove at the higher speed before the signs were posted, and that it was not unsafe to do so. Holden's chief concern appears to have been his personal responsibility in the event of a collision or accident. Tr. 79. While driving at a slower speed will almost always be safer, on this record, I find that Holden's actions did not constitute protected activity.

I also find that Complainant did not suffer adverse action as a result of any activity that he engaged in with respect to the speed limit issue. He had been specifically advised that major maintenance projects were going to be performed over the winter shut-down. Tr. 82-83. He and Spencer were production haul truck drivers, and there was no such work during the shut-down. Spencer testified that the work was not the type of work that he would normally have done, and that nothing happened to him as a result of his replies to Aldrich's inquiries. Tr. 187, 189. Aldrich selected the members of the work crew based upon the type of work that needed to be done. Tr. 359-60, 401-03. Some of the work, e.g., excavation, was performed by a contractor. Tr. 359. There was very little need for trucks. Tr. 264, 268-70. Rambler was part of the work detail and had experience as a haul truck driver. Tr. 309-10. He had provided relief to haul truck drivers so that they could take breaks, and he operated a truck, when needed, during the project. Tr. 204, 270-71, 311. Rambler was also an enrolled member of the Apache tribe, and was entitled to hiring preference at Pacific's Avery pit site. Tr. 309; ex. R-1. Charpentier, who had been originally hired as a maintenance worker, also worked on the project from time to time. Tr. 359.

I find that Holden would not have been scheduled to work on the construction project during the winter shut-down, whether or not he engaged in protected activity, with respect to the speed limit or any other safety issue. Aldrich's selection of men to work on the maintenance projects was based entirely upon *bona fide* business considerations.[19] Complainant has not established that he suffered adverse action as a result of his claimed protected activity with

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[18] There are only two entries in Holden's journal relating to speed for the week of December 15, 2003. The first, at the top of the page, reads "Tim [not Aldrich] tried to get me + Jack to drive faster after MSHA [?]. . . ." The second, in the space allocated to Wednesday, December 17, reads: "Tim driving over speed limit." Ex. C-5.

[19] There was a considerable amount of evidence introduced by both parties on Holden's skills, attitude and general value as an employee and co-worker. That evidence has not been discussed, because Respondent made clear that Holden's work schedule was not established based upon any perceived shortcomings he might have had as an employee.

respect to the speed limit issue.

ORDER

For the reasons stated above, I find that Complainant has failed to carry his burden of establishing that justifiable circumstances existed for failing to timely file his complaint of discrimination with MSHA, with respect to the alleged March 2003 lay-off. In addition, I find that Complainant has failed to establish a *prima facie* case of discrimination as to either his March 2003, or January 15 to April 5, 2004, claim. Alternatively, I find that Ross Island has established that its determinations not to call Complainant to work during March 8 to 31, 2003, and January 15 to April 5, 2004, were the result of *bona fide* business reasons, and that it would have made the same decisions, regardless of any protected activity that Complainant might have engaged in.[20]

Ross Island did not discriminate against Complainant in violation of the Act. Accordingly, the Discrimination Complaint, as amended, is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

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[20] Had Complainant established a *prima facie* case, Respondent would have established its affirmative defense to the claims. *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983); *Haro v. Magma Copper Co*, 4 FMSHRC 1935, 1938 (Nov. 1982).