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

January 20, 2006

FLOYD DOWLIN, III, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2004-492-D
	:	DENV-CD 2004-09
v.	:	
	:	Mine I.D. 24-01747
	:	Rosebud #6 Mine
WESTERN ENERGY COMPANY, Respondent	:	

DECISION

Appearances: Amber Haff, Laurel, Montana, for Complainant;
Laura E. Beverage, Esq., Jackson Kelly, Denver, Colorado,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Floyd Dowlin, III, against Western Energy Company ("Western Energy"), 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. Dowlin contends that he was terminated from his employment because he complained about safety issues at the mine. An evidentiary hearing was held in Billings, Montana. I entered a bench decision at the end of the hearing dismissing the complaint of discrimination.

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

Western Energy operates the Rosebud #6 Mine, a large open pit coal mine in Rosebud County, Montana. Mr. Dowlin filed a discrimination complaint with the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary determined that the facts disclosed during her investigation into Dowlin's discrimination complaint do not constitute a violation of section 105(c) of the Mine Act. On September 23, 2004, Dowlin filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. He alleges that he suffered adverse actions because he complained about safety conditions at the mine. He was represented by his daughter, who is not an attorney.

Dowlin worked at the Rosebud #6 Mine for about 15 years. During that period, he operated many different types of mobile equipment but he preferred to operate bulldozers. In late August 2002, Dowlin was operating a water truck when he observed the boom of a dragline

swing over an open mine road. (Tr. 54, 111). He stated that a coal haul truck drove under the boom. He reported this condition to management over the mine radio. According to Dowlin, a representative from the company safety department investigated the condition but he did not take any action. As a consequence, Dowlin called the local MSHA office to complain about the condition he observed. An MSHA inspector investigated Dowlin's complaint and determined that no violation of a safety standard occurred. (Tr. 57). MSHA's lack of enforcement angered Dowlin, so he called MSHA again. Another MSHA inspector visited the site and wrote a non-significant and substantial citation alleging a violation of 30 C.F.R. § 77.1607(c), as follows: "verbal testimony revealed coal haul truck #148 passed under the boom of #124 dragline while the dragline was in operation." (Ex. C-2).

Between October 7, 2002 and December 6, 2002, Dowlin was on medical leave for two months because he had broken his ribs. (Tr. 59, 115). When he returned to work, he operated a water truck and he was scheduled to operate a coal haul truck. (Tr. 61, 116). Dowlin preferred not to operate coal trucks because he considered it to be "boring" and he did not believe that coal truck drivers make as much money even though the rate of pay was the same. (Tr. 61-62, 128, 143-44). Dowlin believed that haul truck drivers were not given as many opportunities to work overtime. He also believed that his assignment to operate a haul truck violated the Family Medical Leave Act. (Tr. 63). He liked operating a reclamation dozer because "you're pretty well left alone" on that job. (Tr. 142). Dowlin likes to work independently in an area with minimal supervision.

Dowlin believes that Jack Rosander, production superintendent, and Glenn Logan, a production supervisor, were instrumental in reassigning him to the coal haul crew and that this reassignment was in retaliation for his safety complaint. Dowlin testified that after he complained to them about the assignment, he was reassigned to operate a dozer. (Tr. 64, 117).

Between December 2002 and March 2004 Dowlin was primarily scheduled to operate a dozer on the reclamation crew. (Tr. 118-19) He operated other equipment during that period as assigned by management. *Id.* On the graveyard shift of March 2, 2004, Dowlin was scheduled to work with Harry Stevenson to help load a train. (Tr. 64). Both men operated dozers to push coal into the feeders. A feeder is an opening in the ground that consists of a square concrete box that is lined with quarter inch flat metal plate. (Tr. 232). There are about 15 feeders in the area. (Ex. R-7). Coal falls through these feeders onto a belt that transports the coal to the top of the tipple. Dowlin was operating a D-10 Caterpillar and Stevenson was operating a larger D-11. Dowlin testified that visibility was very poor that night and that steam was rising from the coal. The feeders were covered with coal and it was impossible to see where they were. (Tr. 65, 122). The metal lining and lips of several feeders were extensively damaged that night. Dowlin and Stevenson were shown the damaged feeders at 8:00 a.m. at the end of their shift. (Tr. 122). Dowlin believes that any number of people could have damaged the feeders before his shift but that he was singled out for punishment. (Tr. 65-66, 123). He also testified that other people have damaged the feeders, but he is the only employee who has been disciplined for damaging the feeders. He stated that management based its conclusion that he was responsible for the damage

solely on measurements taken of track marks made by the dozer he was operating. (Tr. 66-67). Dowlin believes that it is more likely that Stevenson damaged the feeders that night. (Tr. 67). Dowlin attended a fact-finding meeting with management on the morning of March 3, 2004. (Tr. 123). He admitted at the meeting that he had run over the lip of one or more feeders that night. Dozer operators are required to keep some coal over the feeder area and are not supposed to scrape down to bare dirt. Dowlin received a verbal warning for the incident. (Tr. 67-68, 124). He admitted telling Terry Sprenger, the human resources manager, after the meeting that he did not disagree with the verbal warning. (Tr. 124-25).

Dowlin was told that he would be assigned to work on the coal haul crew as a result of the feeder incident. (Tr. 69). He discussed the matter with Jack Rosander. According to Dowlin, Rosander told him that he was taken off the dozer because of past incidents including the feeder damage. Rosander also cited the fact that Dowlin had run over a dragline cable a few years earlier. Dowlin responded that another employee had run over a dragline cable three times in less than a year. Dowlin told Rosander that this inconsistent discipline demonstrates that he was discriminated against in violation of the Mine Act. He testified that other employees damaged equipment without receiving any discipline. (Tr. 144-45). Dowlin maintains that he was reassigned to drive coal haul trucks in retaliation for his 2002 safety complaint.

After this meeting with Rosander, Dowlin talked to Terry Sprenger. (Tr. 70). Sprenger apparently told Dowlin that Rosander and Joe Micheletti, a facilities manager, arranged for the change in his work assignment, but Sprenger told Dowlin that he was not discriminated against as a result of his safety complaint. (Tr. 71).

Late in the day on March 3, 2004, Dowlin went to the mine to work the graveyard shift that started at midnight. Dowlin was "severely upset, severely depressed" because of the way the feeder incident had been handled by the company. (Tr. 72). Dowlin testified that because he has a history of "depression and mental problems," he "just wasn't quite [in a] right mind." *Id.* He decided that if the posted schedule showed him working on the coal haul crew the following week, he would turn in a request for medical leave because he "was on the verge of a mental breakdown." (Tr. 72, 129). When Dowlin saw that he was scheduled to drive a haul truck starting the following Monday, he turned in a medical leave request and left the mine. He testified that he would not have turned in the medical leave request if the posted schedule indicated that he would be operating the dozer. (Tr. 129). His regular shift boss was not there, so he wrote a supervisor's name on the envelope and placed the medical leave form where the time cards are kept in the crew shack. (Tr. 131).

Jim Holenbeck, the relief shift boss on the graveyard shift, was an hourly employee and a member of the local Operating Engineers union with Dowlin. Holenbeck told Dowlin what dozer he would be operating that night. (Tr. 74). Dowlin testified that he refused to "acknowledge" Holenbeck because he has "no use for that man." *Id.* Dowlin went to his locker, removed his personal belongings, and put them in his truck. He then told Holenbeck that he would have to find someone to replace him because he was going home. (Tr. 76, 136). Dowlin

did not tell Holenbeck that he had requested medical leave. (Tr. 135-36). When Holenbeck asked why he was leaving, Dowlin testified that he replied "because of brown nosing rotten spanky wanky snitches like you." (Tr. 76-77). Dowlin also remembers that he told Holenbeck that he "might have to tear his head off for snitching"and "whip his ass." (Tr. 77, 132, 138). Dowlin admitted that he threatened Holenbeck. (Tr. 131-32).[1]

Dowlin then went home to rest. When he woke up he was feeling "depressed and suicidal" so he called to make an appointment with his doctor. (Tr. 77). After meeting with the doctor, he received a referral to a psychiatrist and the doctor wrote a letter recommending that Dowlin be excused from work because of his mental condition. (Tr. 78; Ex. C-3). Dowlin checked into the psychiatric ward of the Deaconess Hospital in Billings. He was in the hospital about four or five days. (Tr. 84). His diagnosis was "major depression, recurrent with mild psychotic features" and "occupation related problems." (Ex. C-5, p. 2). He agreed to see a counselor as a condition of his release. Dowlin had therapy sessions with several counselors. (Tr. 84-5, 88-89, Exs. C-6, C-7).

When Dowlin left the mine just before the start of his shift, Western Energy assumed that he had quit. Mr. Sprenger wrote a letter to Dowlin which stated that the company had been "notified that you tendered your verbal resignation on March 3, 2004, at approximately 11:30 p.m. to Mr. Jim Holenbeck, acting supervisor." (Ex. C-8). Dowlin testified that he did not tell Holenbeck that he was quitting and he left the request for medical leave in the crew shack. (Tr. 94). Dowlin testified that, because he was a faithful 15 year employee at Western Energy, Mr. Sprenger should have called to find out why he left the mine. The fact that he was never called demonstrates that Western Energy was trying to "get rid" of him "due to safety factors." (Tr. 92). He never received a response to the request for medical leave. Dowlin maintains that the company terminated him for raising safety issues.

After he was released from the hospital, Dowlin contacted his union representative to set up a meeting with management. He did not want his job back at that time, but he wanted the company to honor his request for medical leave. (Tr. 97, 126-27). Dowlin testified that the union negotiated a settlement in which he would receive $3,600 and have his medical leave request honored, but he turned the settlement down. (Tr. 97, 127, 143).

On cross-examination, Dowlin admitted that under the collective bargaining agreement a miner does not have the right to operate a particular type of equipment and that management may assign and reassign an employee to operate any other type of equipment for which he has received training. (Tr. 112). He also admitted that Western Energy is not required to make job assignments based on seniority. (Tr. 151). Mr Dowlin was task trained to operate a wide range of equipment at the mine including coal haul trucks, dozers, and scrapers. (Tr. 113; Ex. R-3).

---

[1] In January 2004, Dowlin damaged a metal culvert as he removed it with his dozer. He called Holenbeck a snitch on March 3 because Dowlin believes that Holenbeck told management about the damage. Dowlin was not disciplined for the damage. (Tr. 132-35).

Dowlin admitted that he could have volunteered for overtime while he was a coal haul truck operator, but he was guaranteed work on three weekends as a reclamation dozer operator. (Tr. 149, 152-53).[2]

Jim Holenbeck worked for Western Energy for 25 years before he retired. (Tr. 203). He was a scraper blade operator in March 2004. Because he was a certified mine foreman he filled in as a supervisor on an as-needed basis. He was the acting supervisor on the graveyard shift that started at midnight. He recalls that Mr. Dowlin asked him to meet him outside before the shift started. (Tr. 204). Holenbeck recalls that Dowlin told him that he was quitting. (Tr. 205). As Dowlin walked to his pickup truck, Holenbeck asked Dowlin what was the matter. Dowlin told him that he would not work for anyone who ratted on him. *Id.* Holenbeck testified that when he tried to tell Dowlin that he did not rat on him, Dowlin replied that he should whip his butt and he drove off. At the suggestion of another supervisor, Holenbeck wrote a memo describing what happened and left it on Rosander's desk. (Tr. 205-06). In the memo, he wrote that Dowlin told him he was quitting. (Ex. R-4).

Jack Rosander was the production superintendent in March 2004. (Tr. 214). He testified that under the collective bargaining agreement, employees are assigned to equipment on a weekly basis without regard to employee seniority. (Tr. 216; Ex. R-5, p. 13). He testified that the coal crew made as much if not more money than dozer operators in 2004. He further testified that he prints out the weekly crew schedule on Wednesday of the preceding week. (Tr. 220).

Rosander testified that he investigated the damage to the feeders and took photographs. (Tr. 228; Ex. R-8). The photographs were taken the morning after Mr. Dowlin's graveyard shift. (Tr.230). Some of the feeders were severely damaged in that the metal lining had been bent back. (Tr. 232). The damage was more extensive than he could ever remember. (Tr. 236, 251-52; Ex. R-8 p. 9). In addition, quite a bit of dirt had been pushed into the feeders which affects coal quality. (Tr. 233). By looking at the dozer tracks and measuring their width, Rosander determined that the damage had been caused by Dowlin's smaller dozer. In addition, Rosander testified that Mr. Stevenson told him that Dowlin had been working around the feeders that were damaged. (Tr. 235). Stevenson told Rosander that he was working up on coal piles at the east end and Dowlin was working on the west end near the damaged feeders. (Tr. 263). Rosander also determined that the previous crew had not damaged the feeders. Rosander testified that

---

[2] Five miners also testified on behalf of Dowlin. Most of the testimony concerned the events of late August 2002 when the boom of a dragline swung over a mine road. Several miners, including a union steward, testified that they were not aware of anyone else being disciplined for damaging feeders. (Tr. 50, 156, 176). There was also testimony that miners had been disciplined for damaging other equipment. (Tr. 50, 188). One miner testified that if an employee does something that management does not agree with, he will likely be assigned to a job that he does not like. (Tr. 174). Another miner testified that an employee is permitted to slow down or shut down his equipment if visibility is too poor to work safely. (Tr. 168). Another miner testified that he preferred to operate coal haul trucks rather than work on a dragline.

when he talked to Dowlin about the damage, Dowlin acknowledged that he damaged the feeders. (Tr. 237).

Following his investigation, Rosander determined that Dowlin should be transferred to another position. (Tr. 238). Damaging the feeders has a negative effect on coal production. He reassigned Dowlin to a coal hauling position. (Tr. 239). He did not expect that this transfer would reduce the amount of money Dowlin would earn. (Tr. 261).

Rosander does not believe that the boom of the dragline extended over the roadway in August 2002. (Tr. 239-43). He bases this conclusion on his understanding of the configuration of the roadway and the position of the dragline on that day. MSHA Inspector Priest did not issue a citation. A few days later, MSHA Inspector Keller issued a citation for the condition. The company paid the $55.00 penalty proposed by the Secretary because it was not worth challenging. (Tr. 244). Rosander denied that Dowlin was transferred to the coal haul trucks in December 2002 and in March 2004 as a result of his complaint about the boom of the dragline in August 2002. (Tr. 245).

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

I find that Mr. Dowlin engaged in protected activity. He testified that he saw the boom of a dragline swing over a roadway and a truck pass under the boom. For purposes of this decision, I credit this testimony and find that it qualifies as protected activity.

B. Adverse Action

1. Verbal Discipline and Reassignment to Coal Haulage Trucks.

Dowlin genuinely believes that the company required him to operate coal haul trucks in December 2002 and March 2004 in retaliation for his August 2002 safety complaint. The company contends that these equipment assignments were made in the ordinary course of business and that they were not "adverse" because his rate of pay did not change. In addition, it maintains that his total wages were not adversely affected by these assignments because he was still eligible for overtime.

It is clear that Dowlin saw these actions as "adverse" to his interests. The company knew that he preferred to operate a reclamation dozer and Dowlin sincerely believes that he was taken off the dozer to punish him. The December 2002 assignment to operate a coal haul truck cannot be construed as adverse because Dowlin was reassigned to the dozer as soon as he requested it.

With respect to his March 2004 assignment to a coal haul truck, Dowlin believes that he was treated differently from other employees who had damaged equipment. He pointed to a number of employees who he believed had caused significant damage to equipment. He also contends that the company had insufficient cause to blame him for the damage, which shows that management had a discriminatory motive. The company maintains that damage to the feeders was quite substantial and that it had more than enough evidence to determine that Dowlin caused the damage. It relies on the fact that Dowlin admitted that he damaged one or more feeders that evening. Western Energy contends that it was within its rights under the collective bargaining agreement to give Dowlin a verbal warning and to reassign him to a haul truck following the feeder incident. Rosander did not believe that this reassignment would reduce his pay and I credit his testimony on that issue. Thus, I find that Dowlin did not suffer an adverse action when he was assigned to operate a coal haul truck the following week. Nevertheless, I give Dowlin the benefit of the doubt and, for purposes of this decision, I will assume that his verbal warning and reassignment to operate coal haul trucks in March 2004 was an adverse action.

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.

Western Energy had knowledge of the protected activity. Although there was some hostility to Dowlin calling MSHA twice in August 2002, there is no evidence that this hostility continued into 2004. In addition, there is no evidence that the company was hostile to employees raising safety issues. One of Dowlin's witnesses testified that a miner is not required to operate equipment when visibility is too poor to work safely. (Tr. 168). There was no coincidence in time between the protected activity and the adverse action. Although Dowlin made claims of disparate treatment, I credit the testimony of Rosander that the damage to the feeders was more extensive than he had ever seen. He determined that Dowlin should be reassigned based on the damage caused, the dozer track marks, Stevenson's statements, and Dowlin's admission that he damaged at least one feeder. Rosander did not believe that his wages would be adversely affected. Although Dowlin believes that he was the only employee who was transferred to another piece of equipment for damaging the feeders, he admitted that other employees have been transferred for causing other equipment damage. (Tr. 137). He also testified that several employees who were not transferred caused more equipment damage than he did. (Tr. 144). All of his evidence on this issue is quite anecdotal and does not establish disparate treatment.

In a discrimination case, a judge may conclude that the justification offered by the employer for taking an adverse action "is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516. The Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the

> reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted).

I find that Western Energy's alleged business justification for reassigning Dowlin to operate a haul truck is credible. The reasons set forth by Western Energy for disciplining and reassigning Dowlin were "enough to have legitimately moved the operator to have" taken those actions. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). I conclude that the evidence establishes that the verbal warning and reassignment to operate haulage trucks was not motivated by Dowlin's protected activity

2. Separation from Employment.

Dowlin argues that he was terminated from his employment in March 2004 when he refused to operate coal haul trucks and requested medical leave for his mental condition brought on by the company's discriminatory actions. He contends that he did not tell Holenbeck that he was quitting and that he left his request for medical leave in the crew shack for the supervisor on the day shift. Given his 15 years of employment with the company, Mr. Sprenger should have inquired as to his intentions rather than assuming that he quit. He believes that he was fired by the company when it chose to ignore his request for medical leave. Dowlin also points to the intake notes of the physicians and counselors who treated him following his termination from employment which state that his mental condition was the result of his discriminatory treatment by his employer.

At the close of Dowlin's case, Western Energy moved for summary decision and asked that this case be dismissed. (Tr. 188). I took the motion under advisement. (Tr. 201). After the testimony of Holenbeck and Rosander, Western Energy renewed its motion. (Tr. 266). Following oral argument, I granted Western Energy's motion to dismiss. (Tr. 267-71).

Western Energy argues that Dowlin quit his job when he left the property just before midnight on March 3, 2004. (Exs. C-8, R-4). Holenbeck, the relief shift boss, believed that Dowlin had quit and he wrote a memo to his supervisor setting forth his conversation with Dowlin. In addition, the intake notes of the physician in Billings who saw Dowlin in March 2004 indicated that Dowlin told him that he had quit his job. (Tr. 107; Ex. C-4, R-2). Dowlin stormed off the mine in anger and failed to return. At the hearing, during oral argument, Dowlin stated that he "walked off the job." (Tr. 191). As a consequence, the company argues that there was no adverse action.

Assuming that there was an adverse action, Western Energy argues that Dowlin's alleged termination is too remote in time to relate back to his complaint to MSHA in August 2002. There is no connection between Dowlin's safety complaint and the company's treatment of him in March 2004. Finally, Western Energy argues that no relief can be given in any event because

the Social Security Administration subsequently determined that Dowlin was eligible for disability benefits retroactive to March 4, 2004. Thus, the Federal government has already determined that Dowlin is not capable of working or earning a living. The Commission cannot grant Dowlin back pay or reinstate him in the face of this determination by the Social Security Administration.

I find that Dowlin did not establish that he was involuntarily terminated from his employment. I find that Western Energy, in good faith, believed that Dowlin had quit. Dowlin did not advise Holenbeck that he was requesting medical leave. Rather, he left a form for such a request in the crew shack. I credit the testimony of Holenbeck that he believed Dowlin had quit. There is no evidence that Western Energy intended to terminate Dowlin as a result of his actions.

A mine operator is not permitted to provoke a miner who has engaged in protected activity so that he quits or takes actions that subject him to discipline. In such a case a miner's "impulsive behavior" may be overlooked if he was wrongfully provoked by the mine operator. The Commission has "recognized the inequity of permitting an employer to discipline an employee for actions which the employer provoked." *Sec'y of Labor on behalf of McGill v. U.S. Steel mining Co.* , 23 FMSHRC 981, 992 (Sept. 2001). Although Dowlin did not raise this argument, a Commission judge is "obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity. . . ." *Id.* In this case, Dowlin was not disciplined for his impulsive behavior but his behavior led the company to believe that he had quit. "Whether an employee's indiscrete reaction to being provoked is excusable is a question that depends on the particular facts and circumstances of each case." *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 306 (March 2000). I must determine whether Dowlin's conduct is within the scope of the "leeway" courts grant employees whose "behavior takes place in response to an employer's wrongful provocation." *Id.* at 307-08.

I find that Dowlin should not be granted leeway in this case. I recognize that Dowlin has a history of mental illness. Apparently he attempted suicide in the early 1990s. (Exs. C-6, C-7). Nevertheless, the incident that provoked Dowlin was simply the reassignment to drive a haul truck the following week. He did not want to drive a haul truck because he felt it was a "boring" job and he would be subject to greater supervision by management. In response, Dowlin threatened Holenbeck and stormed off the property. There was no immediate threat to Dowlin's safety or health and he was fully trained and qualified to operate a coal haul truck. He simply preferred to operate a reclamation dozer. I find that management's reassignment of Dowlin to another piece of mobile equipment did not constitute a wrongful provocation under the Mine Act.

I also find that constructive discharge does not apply to this situation. A miner can claim that he was constructively discharged if the mine operator "created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994)

(citation omitted); *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265 (March 1999).[3] In this instance, there is no showing that Dowlin's safety was at risk at the time he left the mine or that, by driving coal haul trucks, he would be placed in an unsafe situation. He had driven coal haul trucks in the past and there was no evidence that these trucks were unsafe. In addition, Dowlin was assigned to operate a dozer on that shift. A reasonable miner would not have felt compelled to quit. Dowlin's decision to leave the mine was related to his idiosyncratic mental impairment rather than a reasonable fear that he would be asked to perform an unsafe task.

Dowlin contends that mine management, including Rosander, harassed him for years and that the events of early 2004 were the final straw. He feels that Western Energy treated him unfairly and that the company is partially responsible for his mental problems. Dowlin introduced evidence to show that Rosander and other managers had been treating him unfairly well before he made his safety complaint in August 2002. (Tr. 38-39, 49-50, 137-38, 145-46, 158). Although such disparate treatment may have been unfair, assuming Dowlin's allegation is correct, the Commission "does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment practices except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Deliso v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990). As stated above, I find that Western Energy's actions did not violate the anti-discrimination provisions of section 105(c).

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Floyd Dowlin, III, against Western Energy Company under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

---

[3] Constructive discharge is typically upheld in situations were 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 v. FMSHRC*, 842 F. 2d 453, 463 (D.C. Cir. 1988) (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).

Distribution:

Amber M. Haff, 6680 Duck Creek Road, Laurel, MT 59044 (Certified Mail)

Floyd Dowlin, III, 1113 W. Armells Road, Forsyth, MT 59327-9469 (Certified Mail)

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

RWM