FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 24, 2004

JOHN D. TORNBOM, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2004-28-DM
	:	WEST MD 2003-08
v.	:	Mine I.D. 26-00002
	:	Premier Chemicals
PREMIER CHEMICALS, LLC, Respondent	:	

DECISION

Appearances: John D. Tornbom, Hawthorne, Nevada, pro se;
Steven S. Becker, Esq., Premier Chemicals, LLC, King of Prussia, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by John D. Tornbom against Premier Chemicals, LLC, ("Premier"), 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. Tornbom alleges that Premier terminated him from his employment with the company because of protected activities he engaged in while an employee of Premier. An evidentiary hearing was held in Fallon, Nevada.

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

Premier operates a surface mine and plant near Gabbs, Nevada. Material containing magnesite is mined, crushed, milled, and then processed at this facility. The end product has various applications including use in animal feed and water treatment facilities. Mr. Tornbom was hired at the plant on February 25, 2000, and was terminated on May 15, 2003.

Tornbom contends that starting in February 2003, Jim Loeppky, the maintenance superintendent, and other management officials decided to separate him from his employment because he was raising too many safety issues. On February 2, 2003, Larry Ratta injured his eye at the plant. At that time, Tornbom was the fire chief of the Gabbs Volunteer Fire Department. Ratta was brought to him and, after he examined Ratta, Tornbom recommended that he go to the hospital. Tornbom rode along with him in the ambulance to the hospital in Fallon, Nevada. The

following day, Bobby Adamson, Tornbom's supervisor who is a leadman on the maintenance crew,[1] talked to Tornbom in the lunchroom, asked why he had called the Care Flight helicopter, and complained that it cost the company money. Tornbom denied that he called for the helicopter. Tornbom believes that someone at the hospital ordered that the helicopter be standing by in case it was needed. It is about 80 miles to Fallon from Gabbs.

Sometime later in February or March, Tornbom discovered about 85 drums of acidic chemicals at the plant and he reported it to the Nevada fire marshal's office. A few days later, Loeppky called him into his office and asked him why he was "causing all these problems." (Tr. 10). Loeppky accused Tornbom of calling state inspectors on the Larry Ratta injury. Tornbom denied that he did. Loeppky said that his call to the fire marshal's office was causing problems. He also told Tornbom that everyone at the upper shop was having to work harder because of his call and that he was not getting along very well with others at the plant. (Ex. G-1, pp. 2, 11). Apparently, the state fire marshal's office told Premier that it must store these chemicals in accordance with state regulations.

Tornbom testified that on or about April 8, 2003, there was a pine oil spill inside a building at the plant. He stated that this material traveled into the reclaim system for industrial water. The pumps for this reclaim system shut down because some of the spilled material was in clumps. Tornbom found out about the spill when he was asked to go to the HMS (Heavy Media Separation) plant to shut it down. After Tornbom determined that the substance spilled was pine oil, he looked it up in the Department of Transportation's emergency response guide and reported the spill to the Nevada Fire Marshal's office. When advised that this event should be reported to the EPA, Tornbom contacted that agency. Tornbom believes that this spill exposed employees to a hazardous substance.

On or about April 24, 2003, Mr. Loeppky told Tornbom that pine oil is not toxic and that all he was doing was causing problems. Loeppky also told Tornbom that he "had better get all [his] ducks in a row because when this is investigated [he will] look like a fool." (Tr. 14). When Tornbom showed Loeppky the emergency response guide, he replied that it did not apply to the plant.

Loeppky testified that prior to 1988, Premier used pine oil in a flotation process at the plant. That process is no longer used, but some sludgy residue was left in the bottom of a tank. He described pine oil as a soap that is similar to Pine-Sol. (Tr. 70). When this tank was washed out on April 8, a lot of bubbles were created and a Pine-Sol odor was emitted. Fire hoses were used to wash the material down into the tailing system below the plant. This material had been used at the plant for years. Loeppky testified that when the tanks were cleaned in April, nobody knew that there was any pine oil left in them. Premier took measures to force the material down into the tailings ponds with large quantities of water. Much of this material was in chunks.

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[1] The "leadman" on a crew functions as a foreman at Premier.

The Material Safety Data Sheet ("MSDS") for pine oil lists the hazards associated with pine oil. (Tr. 73; Ex. R-8). The MSDS states that there are hazards associated with contact with the skin and eyes, ingestion, and inhaling the fumes. Loeppky does not believe that the pine oil presented a hazard to Premier's employees because it was released in a ventilated building, it traveled through pipes to the HMS, which is a well-ventilated building, and then it went outside in a ditch to the tailings pond. He testified that pine oil had been released during a cleaning operation a few years earlier without adversely affecting employees. (Tr. 78). Loeppky testified that he told Tornbom that he had better "get his ducks in a row . . . because he was just ranting and raving." *Id.* He further testified that "[t]here's no talking to [Tornbom] when he's in one of his temper tantrums, you can't -- you're not going to reason with him." *Id.* Loeppky also testified that employees working at the plant were familiar with pine oil, but he does not believe that any formal instruction was given on the hazards listed in the MSDS. (Tr. 84). Premier did not report this spill to any governmental agencies because its chemist determined that reporting was not required.

Tornbom testified that on April 9, 2003, Bobby Adamson ordered him to pull the motor at the Sweco screen area in the Magox plant along with Jamie Harris. They used a chain fall to pull the motor and set it on the adjacent deck on the third floor of the building. A chain fall is a winch equipped with chains that is used to raise and lower heavy equipment. (Tr. 33). Adamson wanted them to use a chain fall to bring the motor down to the lower level so that it could be moved out of the building on a cart. Tornbom testified that he does not believe that "hanging a chain fall off either the handrail or the [fixed] ladder . . . was a safe thing." (Tr. 16). He did not believe it was safe because he was not sure if the welds on the handrail would hold and he was concerned about an employee who was cleaning up on the ground level. Tornbom estimates that the motor weighed about 160 pounds. Tornbom testified that when he raised this objection, Adamson said he did not care how the motor was taken down to the ground level, but he wanted it done. Tornbom testified that he felt threatened by Adamson's attitude and that Adamson was abusive toward him. Tornbom eventually carried the motor down the stairs to the ground floor. He was issued a reprimand for not completing the job in the manner in which he was instructed. Tornbom testified that he feels that "carrying it down by hand was still safer than trying to lower [it] down with a chain fall with somebody working down below in case something happened." (Tr. 18).

Adamson testified that Tornbom and Harris had already pulled the motor when he arrived. Adamson stated that, as soon as he arrived, Tornbom "jumped into my face and started getting mad at me." (Tr. 32). He testified that he told Tornbom to lower it down to the next level using a chain fall so it could be carried on a cart to the electric shop. He also testified that he told Tornbom not to try to carry the motor. Soon after he gave that instruction, Adamson went to the electric shop to get the replacement motor so it could be installed at the Sweco screen. Adamson testified that when he returned to Magox, Tornbom yelled at him again about moving the motors. Adamson carried the new motor a few steps into the building from his pickup and Harris then took it up to the Sweco deck.

The next day, Adamson learned that Tornbom had carried the old motor down the stairs rather than using a chain fall or other means to lower it down. Upon hearing this, Adamson talked to Loeppky about the incident and recommended that Tornbom be reprimanded for insubordination because he was "yelling," being "disrespectful," and "making a bad work environment." (Tr. 36). Loeppky issued the reprimand on April 14, 2003, which states:

> You were insubordinate and did not follow directions when told how to remove the motor at Sweco screen area in Magox. Also, you refused to perform a task assigned to you by not using the chain fall to lower a motor to a lower level from where you were working because you said it was unsafe. When another suggestion was made for two people to carry the motor you refused to follow that instruction was well. You displayed anger to your supervisor, which you have been reprimanded for in the past. After the supervisor left the premises you then moved the motor in an unsafe manner causing a supposed injury to yourself.

(Ex. R-2).

Tornbom testified that Adamson was the individual who started yelling that day. At the hearing, Tornbom asked Adamson why he was reprimanded for carrying the old motor down the stairs while Harris was not reprimanded when he carried the new motor up the stairs. In reply, Adamson testified that Tornbom was reprimanded because he was told not to try to carry the motor while Harris was not. Adamson testified that Tornbom kept yelling at him that he did not want to carry the motor and Adamson did not want Tornbom to lift something that he did not think he could handle. (Tr. 38). Adamson also stated that Harris is strong "like a bull" so he can carry heavier objects than Tornbom can. Adamson weighed the old motor after this incident and determined that it weighed 160 pounds. (Tr. 39). Loeppky testified that because Harris worked for a contractor, Premier could not discipline him directly. Loeppky said that he told Harris that he did not want him to carry heavy equipment around because he did not "want him to be an old man before his time." (Tr. 80). Loeppky also talked to Harris's supervisor about the incident.

James Harris, a contract mill mechanic in the upper shop, testified that after he and Tornbom removed the old motor they removed the counterweights from the motor. When Adamson arrived, Tornbom and Adamson started "going at it" about how the old motor would be lowered to the bottom level and how the new motor would be brought up. (Tr. 46). Harris testified that he and other employees have used chain falls to bring up and lower heavy equipment in the past without any difficulty. (Tr. 45-46). As a consequence, he did not get involved in or understand Tornbom's argument with Adamson. Harris testified that when Adamson arrived with the new motor, he reached down, picked it up, and brought it up to the Sweco deck without any difficulty. On June 19, 2003, Harris signed a written statement about this incident. (Ex. R-3; Tr. 44, 48). In the statement, he said that when Tornbom raised questions about the safety of using a chain fall, Adamson replied that they could weld a "pad eye

(or lifting eye) to the stationary ladder to use the chain fall." *Id.* At that point Tornbom started screaming that Adamson was going to get someone killed. *Id.* Harris confirmed that someone was cleaning in the area below the deck. He also confirmed that Adamson told Tornbom not to try to carry the old motor down the stairs. (Tr. 49). Harris offered to carry the old motor down the stairs, but Tornbom insisted that he carry the motor down. (Tr. 50).

On April 9, 2003, Tornbom reported that he injured his right shoulder while carrying the old motor down the stairs the day before. (Ex. R-4). In his report of injury, Tornbom stated that he carried the motor because he was "told by Bobby Adamson to move the motor in an unsafe way." *Id.*

On May 15, 2003, Tornbom and John Chappalear were repairing the D-119 bucket elevator. Tornbom testified that he noticed that no product was running on a nearby conveyer belt. He testified that they decided to travel to the HMS to find out why no product was on the belt. John Gentry, a mill shift leadman, asked Tornbom what he was doing down at the HMS. Tornbom testified that he responded by saying that the whole plant was his work area and he flipped Gentry off. It was established at the hearing that, at the time these events occurred, it was a common practice of employees to flip each other off as a joke.

John Gentry, a mill shift leadman, testified that Tornbom and Chappalear were assigned work at the D-119 elevator that day. At about 3:30 p.m., he noticed Tornbom's vehicle approaching the HMS. At the end of the shift, Gentry asked him why he left his work area by traveling to the HMS. (Tr. 53). Tornbom replied that the whole plant is his work area. Gentry testified that he pressed the matter because Tornbom was working on a priority project that day. Gentry said that Tornbom replied by flipping him off and saying something like "do what you F'g have to do" before he walked away. *Id.* Although it was a common practice for employees to flip each other off, Gentry "got the feeling that he'd either slapped me or spit in my face." (Tr. 54). He did not think that Tornbom was joking around.

John Chappalear, who was a contract employee in 2003, no longer works at Premier. He testified that he and Tornbom did not particularly like working on the bucket elevator and decided to take a break. (Tr. 60-61). The work they were assigned was to replace the metal sides of the bucket elevator, which is not a pleasant task. (Tr. 63). He testified that when Gentry confronted them, Tornbom flipped Gentry off and may have cursed at him. (Tr. 61, 64-65; Ex. R-7). Chappalear believes that Tornbom had a bad attitude toward management. Chappalear also testified that the story about there being no product on a nearby belt line was just a cover to tell anyone who saw them out of their work area. (Tr. 65). He stated that "our specific task that day was to work on the D-119 elevator not go gallivanting around the plant." (Tr. 67). He testified that he may have told Tornbom the day after this incident that he thought the whole thing was a joke. Tornbom received a written reprimand for this incident, which states:

> You were out of your work area (down by the HMS at 3:30).
> When I advised you of this, you gave me the finger and told me the

> whole plant was your work area. You had a bad attitude and [were] supposed to be working [on the] D-119 elevator.

(Ex. R-5). Tornbom was terminated from his employment following this incident. Tornbom believes that he was terminated for reporting the pine oil spill, refusing to bring down the motor at Sweco screen area in Magox using a chain fall, and reporting the acidic chemicals to the fire marshal.[2]

Jennifer Williamson, human resources and safety coordinator, testified that MSHA Inspector Jerry Killian and his supervisor Tyrone Goodspeed traveled to the mine for a regular inspection and to investigate a section 103(g) complaint MSHA received on April 21, 2003, about the pine oil spill and the Sweco motor incident. The inspectors investigated the complaints and talked to employees about the conditions, including Tornbom. No citations were issued for either condition. (Tr. 90). The inspectors determined that the pine oil was not toxic and that the company's procedure of using a chain fall to move the motors to and from the Sweco deck was safe. (Ex. R-10).

When MSHA investigated Tornbom's discrimination complaint, the investigator asked the company to produce its history of reprimands. These reprimands show that employees have been disciplined for being out of their work area, for being insubordinate, and for failing to follow a leadman's orders. (Ex. R-11). Ms. Williams testified that an employee is terminated on a third notice of reprimand of the same violation. (Tr. 97). As a consequence, an employee can receive three reprimands without being terminated if the reprimands are for different violations of the company's rules.

Tornbom received his first reprimand on July 23, 2002. Adamson testified that following a dispute with Tornbom just before lunch, Tornbom became angry and headed to his pickup truck. Adamson testified that he walked up behind Tornbom toward the truck. When Tornbom got into the truck, he "tore out of there as fast as he could" which caused Adamson to be peppered with rocks from the gravel roadway. (Tr. 29). Adamson testified that he discussed the incident with Tornbom later that day and recommended to Loeppky that Tornbom be reprimanded. Loeppky issued the reprimand later that day, which states:

> You were spinning the tires on the pickup, you were driving in front of the upper shop. Any repetition of the act or any other fit of anger with your supervisor or fellow workers will be cause for your immediate termination.

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[2] Tornbom filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") on or about June 2, 2003. By letter dated August 20, 2003, MSHA notified Tornbom that it determined that the facts disclosed during its investigation of his complaint did not constitute a violation of section 105(c) of the Mine Act. On October 15, 2003, Tornbom filed the complaint in this proceeding.

(Ex. R-1). Tornbom testified that he did not know that Adamson was behind the truck when he spun out and that he apologized after the incident. Premier classified this reprimand as discipline taken for insubordination. (Tr. 105).

Don Pressey, general manager for Premier's Gabbs facility, testified that he determined that Tornbom should be terminated from his employment. (Tr. 99). Gentry came into his office to discuss the incident of May 15 and asked if "he had to stand for this treatment that he got." *Id.* Gentry described the incident to Pressey without mentioning Tornbom's name. (Tr. 99-100). Pressey replied that he did not have to put up with such behavior from an employee. When Pressey found out it was Tornbom, he left a message with him to meet him the following Monday, May 19. Before talking with Tornbom, Pressey discussed Tornbom's conduct with Adamson and Loeppky, after which he decided to terminate Tornbom. Tornbom was notified on May 19, 2003, that he was terminated effective May 15.

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

Tornbom engaged in a number of safety-related activities that are protected by the Mine Act. He complained about the storage of acidic chemicals at the mine, he complained about the release of pine oil at the mine, and he complained about the manner in which his supervisor wanted him to lower the Sweco screen motor to the bottom of plant. Premier does not dispute that Tornbom "believes in his heart" that he raised serious safety issues at the mine. (Tr. 105). As a consequence, I find that Tornbom engaged in protected activity while employed at Premier.

B. Adverse Action

Tornbom suffered an adverse action when he was separated from his employment. The issue is whether Tornbom was terminated from his job as a result of his protected activities. 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.

It is clear that Premier management had knowledge of Tornbom's protected activities. In addition, there is a coincidence in time between the protected activities and the adverse action. The safety complaints that Tornbom relies upon were made in February, March, and April 2003. He was terminated effective May 15, 2003. The key issues are whether management displayed hostility or animus toward the protected activities and whether there was disparate treatment of Tornbom. I discuss each incident individually.

1. <u>The Larry Ratta Injury</u>.

The events surrounding the injury to Larry Ratta do not constitute activities protected by the Mine Act. Adamson apparently confronted Tornbom about the fact that Premier might have to pay for the Care Flight helicopter. Since Tornbom was the local fire chief and he tended to Ratta's injuries at the plant, Adamson assumed that he had called for the helicopter. Tornbom denies that he called Care Flight. Tornbom did not complain about safety or health conditions at the mine, so there were no protected activities associated with this incident. In addition, Tornbom was not disciplined by Premier as a result of this incident.

2. Drums of Acidic Chemicals.

Tornbom reported to the fire marshal that there were drums of acidic chemicals stored at the facility. I find that his complaint was protected under the Mine Act because Tornbom believed that the chemicals posed a health and safety risk to himself and other employees. It appears that Premier had to change the manner in which it stored these chemicals after Tornbom's call to the fire marshal because Loeppky told Tornbom that his complaint was requiring everyone in the upper shop to work harder. I find that Loeppky's response to Tornbom's complaint displayed hostility and animus toward his protected activity, but Tornbom was not disciplined for calling the fire marshal.

3. Pine Oil Incident.

Tornbom complained about the presence of pine oil to the Nevada Fire Marshal's office and the EPA. He also filed a complaint with MSHA. Thus, I find that Tornbom engaged in protected activity. Premier contends that pine oil is not hazardous and that it is similar to Pine-Sol. The primary ingredient in Pine-Sol is pine oil. Pine-Sol also contains surfactants used as cleaning agents. The hazards associated with Pine-Sol are the same as the hazards listed on the MSDS for pine oil. (*See* National Institutes of Health, National Library of Medicine, Specialized Information Services, Household Products Database, *available at* http://householdproducts.nlm.nih.gov/cgi-bin/household/brands?tbl=brands&id=3007020). I find that the release of pine oil at Premier did not pose any health or safety risk to Tornbom or other employees at the facility. The MSHA inspectors who investigated the hazard complaint reached same conclusion. (Ex. R-10). Nevertheless, Tornbom sincerely believed that a safety and health risk was present. I also believe that his concerns were reasonable. I find that his complaints to governmental authorities are protected by section 105(c) of the Mine Act.

I believe that Loeppky's response to Tornbom's complaint was not particularly hostile. Loeppky felt that the release of the pine oil did not pose a safety or health risk to employees. He knew that pine oil had been used in the plant in the past and that it is similar to Pine-Sol. He simply told Tornbom that he better get his ducks in a row before he makes a big issue out of it. I credit Loeppky's testimony that he made this statement to Tornbom because he was "ranting and raving" about it. Nevertheless, I give Tornbom the benefit of the doubt and assume that Loeppky displayed some degree of hostility toward his complaint. He interpreted Loeppky's statements as a threat.

4. Sweco Screen Motor Incident.

Tornbom complained about the manner in which Adamson wanted him to lower the Sweco screen motor to the floor of the plant. He also refused to comply with Adamson's order to use the chain fall. As a consequence, this incident can more accurately be described as a work refusal.

The Commission and the courts have recognized the right of a miner to refuse to work in the face of perceived hazards. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id*. at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *See Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

I find that Tornbom was proceeding in good faith when he refused to use a chain fall to lower the motor. Whether he was acting reasonably is a closer issue. Harris credibly testified that chain falls are used to raise and lower heavy equipment at the Magox plant. The company proposed to use a handrail or fixed metal ladder to support the motor. The motor only weighed 160 pounds, which is not particularly heavy, but the weight of the chain fall is not in evidence. The MSHA inspectors who investigated the section 103(g) complaint entered the following findings and conclusions in their report:

> Bobby Adamson had employee hang a 160 lb motor from a ladder. He refused to do as instructed, for he thought that MSHA has a rule against this. He was told to do it anyway. . . . MSHA has no rule to that effect as long as they do it as safe as possible. Looked the area in question over. Could see nothing wrong with their procedure. The ladder was substantially constructed. Issued negative findings.

(Ex. R-10). Handrails and fixed metal ladders are designed to take weight. Although Tornbom was concerned about an employee cleaning up in an area below, that problem could have been solved by removing the employee once the chain fall operation was started. There is no evidence that Adamson would have allowed employees to continue working under the area where the motor was to be lowered. Nevertheless, for purposes of my analysis, I will assume that Tornbom had a reasonable basis for his concern. He believed that the motor could accidently fall and hit an employee under the chain fall. On that basis, I find that Adamson displayed some animus toward Tornbom's safety complaint, although Adamson was mostly concerned with Tornbom's belligerent attitude.

5. Incident of May 15, 2003

The event that led to Tornbom's termination occurred on May 15, 2003, when Gentry confronted Tornbom about his presence at the HMS plant. The events that transpired that day do not involve protected activity. Gentry believed that Tornbom displayed a lack of respect for

management and that he was insubordinate. It is this incident that precipitated Tornbom's termination. Tornbom believes that his termination following this incident was pretext to cover up the real reason for his termination, his protected activities. He claims that employees frequently flip each other off without being disciplined or terminated.

C. Sufficiency of Tornbom's Case

Because Tornbom engaged in protected activities and Premier was hostile to at least some of his safety concerns, I find that Tornbom established a *prima facie* case. He was terminated for insubordination shortly after he made these complaints.

D. Analysis of Premier's Defense

As stated above, an operator can rebut a *prima facie* case by presenting evidence that either no protected activity occurred, no adverse actions were taken, or that the actions taken with respect to the employee were in no part motivated by the protected activity. An operator can also rebut the *prima facie* case by presenting evidence that the actions it took with respect to the employee were also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

I hold that Premier successfully rebutted Tornbom's case. I find that Premier did not terminate Tornbom for his protected activities. I also find that, even if Premier took some of these activities into consideration when it terminated Tornbom, it would have terminated Tornbom for his unprotected conduct alone.

Tornbom was terminated following three reprimands for insubordination. The final reprimand was for being out of his work area and showing disrespect to his supervisor. I find that this reprimand and the resulting discharge was not a pretext to cover an unlawful motive for the termination. Tornbom had no reason for being at the HMS plant at that time. When Gentry questioned him about it, Tornbom responded in a belligerent and antagonistic manner. Chappalear testified that there was no reason for them to be at the HMS plant and confirmed Tornbom's display of belligerence. There was absolutely no safety component to this incident. In addition, Tornbom's aggressive attitude toward Gentry was not provoked by Premier. A Commission judge must "determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity. . . ." *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 992 (Sept. 2001). Mr. Gentry had not been involved in Tornbom's previous discipline. Moreover, Gentry's questioning of Tornbom was legitimate and totally unrelated to Tornbom's protected activities. I credit Gentry's testimony on this issue. I also credit the testimony of Pressey that he decided that the employee Gentry complained about on May 15 should be reprimanded before he learned that Tornbom was the employee involved. (Tr. 98-99).

Tornbom's complaint about the presence of pine oil at the plant was at least initially reasonable. Loeppky was primarily hostile to Tornbom's agitated state over the issue. Loeppky knew that pine oil was not toxic and that the health hazards presented were not significant because employees were simply diluting the material with water and letting it run into the tailings pond. Loeppky did not do a particularly good job of addressing Tornbom's concerns, however. When "a miner expresses a reasonable, good faith fear [of] a hazard, the operator has a corresponding obligation to address the perceived danger." *Gilbert v. FMSHRC*, 866 F.2d 1433, 1440 (D.C. Cir 1989). If an operator adequately addresses a miner's concerns so that "his fears reasonably should have been quelled," an otherwise reasonable work refusal can become unreasonable. *Id.* at 1441. Loeppky did not quell Tornbom's fears by stating that he had better get his ducks in a row. Tornbom took that statement as a threat rather than a caution that his concerns were not reasonable. Nevertheless, Tornbom was not disciplined for raising concerns about the release of pine oil. In addition, I find that the concern Tornbom raised about the release of pine oil did not contribute to his termination from employment on May 15.

Tornbom was disciplined for the events surrounding his refusal to use a chain fall to move the old motor from the Sweco deck to the lower level. Tornbom seemed to be concerned that the welds on the frame of the permanent ladder on the Sweco deck could not hold the weight of the motor and chain fall. He was also concerned that someone could be cleaning in the area below. I did not personally visit the Sweco deck but, based on my knowledge of industrial installations, Tornbom's concerns seem rather far fetched. The motor only weighed 160 pounds and chain falls had been used in the past. The MSHA inspectors who investigated the section 103(g) safety complaint determined that there was "nothing wrong with [Premier's] procedure." (Ex. R-10). I find that Tornbom was disciplined for the angry manner in which he discussed the issue with Adamson and the fact that he carried the 160 pound motor down the stairs by himself, thereby injuring his shoulder. I credit the testimony of Harris and Adamson on the belligerent attitude displayed by Tornbom. I find that his belligerent attitude was not provoked by management because Tornbom became hostile the moment Adamson arrived at the deck. Adamson attempted to quell Tornbom's fears by explaining how a chain fall could be used safely, but Tornbom simply kept on yelling at him. (*See* Exs. R-2 & R-3). I find that, even if his protected activity played a part in this reprimand for this work refusal, he would have been reprimanded in any event for his unprotected activities alone.

Loeppky made disparaging remarks about Tornbom's complaints concerning the storage of drums of acidic chemicals at the plant. Tornbom was not disciplined for his complaint and, based on evidence presented by Premier, I find that these complaints did not contribute to the two subsequent reprimands that he received for insubordination. Tornbom did not allege that the reprimand he received in 2002 for spinning his tires in front of the upper shop was a result of any protected activity.

Finally, Tornbom alleges that he was treated differently from other similarly situated employees. He points to the fact that many employees who have received three reprimands are

still working for Premier. He also argues that employees often flipped each other off as a joke. I credit the testimony of Williamson that Tornbom was terminated because he had received three reprimands for the same offense. She testified that if an employee is remanded for three unrelated offenses, such as tardiness, leaving a work area, and failing to wear an hard hat, he will usually not be terminated. (Tr. 92, 97). She believes that this rule is set forth in the collective bargaining agreement. I credit the testimony of Gentry that Tornbom was not joking when he told Gentry that the whole plant was his work area and flipped him off.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by John D. Tornbom against Premier Chemicals, LLC, under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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