

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 25, 2008

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of DANIEL R. BRUSCA,	:	Docket No. WEST 2008-1099-D
Applicant	:	MSHA No. DENV 2008-07
	:	
v.	:	Foidel Creek Mine
	:	
TWENTYMILE COAL COMPANY,	:	Mine I.D. 05-03836
Respondent	:	

DECISION AND ORDER DENYING TEMPORARY REINSTATEMENT

Appearances: Lydia Tzagoloff., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Daniel R. Brusca against Twentymile Coal Company (“Twentymile”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the “Mine Act”). The application was filed on or about May 30, 2008 and Twentymile requested a hearing within ten days of receipt of the application. The application alleges that Twentymile discriminated against Brusca when he was terminated from his employment on March 20, 2008. The application states that the Secretary determined that the underlying discrimination complaint filed by Brusca was not frivolously brought. A hearing in this temporary reinstatement proceeding was held on June 17, 2008, in Denver, Colorado. For the reasons set forth below, I find that the applicant did not establish that Brusca’s discrimination complaint was not frivolously brought.

I. SUMMARY OF THE EVIDENCE

Twentymile’s Foidel Creek Mine is a large, underground coal mine in Routt County, Colorado. Daniel Brusca started working at Twentymile in June 1997 as a mechanic on the longwall crew. He eventually became a belt maintenance lead man with the responsibility to supervise a belt maintenance crew. He received work assignments from his supervisor and gave

those assignments to the members of his crew. He also worked with the crew and was responsible for their safety. The belt maintenance crew repaired rollers, maintained motors and performed other tasks. As a lead man, Brusca performed much of the maintenance himself. Brusca's immediate supervisor was Shawn Brown who was responsible for all of the belt maintenance crews. Brown's supervisor was Ed Brady, the conveyance manager.

Brusca testified that in early March 2008, Brown asked him to perform a dangerous task. His crew was asked to change out a 500 horsepower motor for the drive belt. He was told to take a Ford tractor and open the equipment doors in the roadway, put the tractor in between the equipment doors and a stopping, close the doors behind the tractor, and tear out enough of the stopping to pull the motor with the winch on the tractor out of the drive area into the crosscut between the belt line and the roadway. Brusca asked Brown how he was to provide ventilation to operate a piece of diesel equipment in the crosscut with the doors closed behind it and only part of the stopping removed. According to Brusca, Brown replied, "I know what I would do, but I can't tell you." (Tr. 20). Brusca took that to mean that Brown wanted him to "just do whatever he had to, illegal or not, to get this job done." *Id.* Brusca then told Brown that there would be no ventilation in the crosscut with the doors closed behind it, even with the stopping partially removed, because there would not be enough air in the belt line as it passes by the tractor. When he asked Brown how he was supposed to provide ventilation for the tractor, Brown again replied that he knew what he would do. Brusca admitted that he assumed that Brown was implying that he should do something illegal. (Tr. 50).

Because Brusca believed that operating the tractor between the equipment doors and the stopping would fill the air with exhaust fumes, he kept the tractor in the roadway, put the motor on a skid and used cables to pull it out. His crew could not complete the job before the end of the shift. Brusca believes that Brown was "aggravated" by his actions. (Tr. 21). According to Brusca, Brown "acted like, here we go again, here is Brusca refusing to do something again, bringing up safety issues." When Brusca returned to the mine on his next scheduled shift, the motor had been replaced but he believes that someone had operated the tractor between the partial stopping and equipment doors to complete the job.

Brusca also testified that in late February 2008, he was holding a safety meeting with his crew at the beginning of the shift. It was a required meeting under company policy. The meeting was being held in the break room on the second floor of the weld shop. Brusca testified that Brady came into the weld shop and told everyone "to get up from the table and get to work." (Tr. 22). Brusca said that Brady did not come over to see what they were doing, he just told them to get to work. From Brady's position, he would not have been able to tell what they were doing. (Tr. 59). The crew finished the safety meeting before getting up and getting their tools to start their maintenance duties.

Brusca testified that sometime in February 2008 his crew was working in the area of the Two North Main Belt when crew member Nate Weesner got rock dust in his eye. On the way out, Brusca and his crew went to the main surface building at the mine, known as the "operations

center,” so that Weesner could wash out his eye. While he was doing that, Brusca and crew member Rupard Carnahan had a cup of coffee in the operations center. Ed Brady came by and told Brusca to get to work. When Brusca told Brady that they were there because Weesner got rock dust in his eye, Brady “acted like he didn’t believe that, that we were out there goofing off.” (Tr. 24). Brusca said that he waited for Weesner rather than return to the weld shop because it would not take very long for Weesner to wash out his eye. (Tr. 61-62).

Later in February 2008, Brusca was called into Brown’s office for a “pre-evaluation meeting.” Brown told Brusca that the company was thinking of replacing him as the lead man and asked him if he wanted to continue as the lead man. Brusca replied that he did. According to Brusca, Brown told him that he should not be holding safety meetings at the start of the shift because they were a waste of time. He told Brusca that these meetings were “just an opportunity for people to have a snack out of their lunch box, and that also my crew didn’t need to be out in the operations center taking a break.” (Tr. 24). Brusca testified that his safety meetings usually lasted about ten minutes and that Twentymile’s safety director encouraged such meetings. (Tr. 24, 66-67). Some of the men cooked up breakfast during the meeting as well. Brusca believes that other crews do the same thing. (Tr. 69). Ron Spangler, the human resources director at the mine, testified that pre-evaluation meetings are often held when an employee is being asked to improve his performance so that he can try to change his behavior before the actual performance evaluation. (Tr. 94-95).

Brusca told Brown that, according to the poster in the hallway at the operations center, employees are entitled to a ten-minute break between the start of shift and their lunch period and again between the lunch period and the end of the shift. Brown replied that the company does not have such a policy. Brusca assumed that the information on the poster applied to the company’s operations. Spangler stated that the language of the poster in the hallway that relates to mid-morning and mid-afternoon breaks does not apply to mining and the poster specifically lists those industries that it covers. (Tr. 95-96).

Brusca also testified about safety issues that had arisen in prior years. During one incident that occurred about three years earlier, his crew was assigned to fabricate new guards for a conveyor drive. He went into the weld shop and, when he saw that it was unusually messy, assigned his crew to work on getting the shop in better condition. The back door was falling off its hinges and a large, heavy cooling skid was sitting on top of two saw horses. He had his crew work to secure the skid and Brusca was planning to fix the back door. Brady arrived and asked Brusca why the crew was not fabricating new guards for the conveyor, as assigned. (Tr. 28). Brusca responded that he had to get the weld shop in better shape first and that the cooling skid was in such a precarious position that it could fall and injure someone. The shop was about 60 feet wide and 100 feet long. (Tr. 58). Brusca testified that Brady got very angry and accused Brusca of always doing whatever he wanted to do and ignoring job assignments given to his crew. Brusca responded that the crew would work on the guards as soon as they took steps to make the workplace safe. He also told Brady that the crew used wire to hold the existing guards in place so there was no immediate safety hazard. (Tr. 54-56). Brusca attends the foreman’s

meeting every morning and he brought up the unsafe condition of the cooling skid at the meeting the following morning. Several managers went over to the shop to look at the cooling skid after the meeting and “nobody was denying that these were safety issues.” (Tr. 30). Brusca said that he was told that he should not have brought up the issue at the foreman’s meeting. Brusca testified that his relationship with Brady deteriorated after this incident.

About a year later, as Brusca’s crew was finishing up replacing a hydraulic motor, a shift foreman stopped by and asked Brusca to look at a solenoid valve at the Four Main North head roller. Brusca got a replacement solenoid valve and the crew went to that area. Brusca’s message light flashed and, when he returned the call to Brady, Brady became angry because the crew was replacing the solenoid rather than working on the antifreeze system on the top of the coal belt, as assigned. Brusca explained that the antifreeze system could not be worked on while the belts were operating. (Tr. 32). Later, Brady called back and asked why the crew was taking so long to change out the solenoid switch. Brusca explained that it would not be safe to rush the job. Apparently, Brady had been watching the crew from a monitor in the control room. A camera had been installed in the area to monitor the conveyor system. It bothered Brusca that Brady had been watching him to make sure he was not goofing off. It took his crew a few hours to change the solenoid. (Tr. 52). Brusca said that he was trying to finish the job before the crew went to lunch. *Id.* Brusca complained to Mike Ludlow, the mine manager, that it was a dangerous practice for Brady to call people on the mine phone to try to rush them on a job. Although Ludlow said he would look into the matter, Brusca never heard back from Ludlow.

Dean Moore, who was a member of Brusca’s crew, was out on medical leave because of a hernia operation. On the evening of March 13, Moore drove to the mine with his brother, who was not a Twentymile employee. He walked into the weld shop and started talking to Brusca. Brusca testified that he asked Moore if he was working that night and he replied that he was there to get his dirty clothes from the bath house. Brusca also testified that he was about to tell Moore that he could not be in the shop without his personal protective equipment (“PPE”) when Pat Sollars walked in and ordered Moore and his brother to leave the property. Sollars is the maintenance manager for Twentymile. Brusca was not concerned for the immediate safety of Moore and his brother because no work was being performed in the shop, but he was aware that they were not wearing any PPE, including a hard hat. Brusca knew that PPE must be worn in the shop. Moore was wearing his street clothes. Brusca testified that he has seen Brady in the weld shop without a hard hat on several occasions. (Tr. 69).

On March 15, Sollars asked Brusca to go to the conference room with him and Brown. Sollars asked Brusca what Moore was doing at the weld shop on the evening of the 13th. Brusca said that he had just started talking to Moore when Sollars came in and ordered Moore to leave. Brusca testified that Sollars acted like he did not believe him and that Brusca knew more than he was telling. (Tr. 39). Sollars became angry and told Brusca that he was not doing an “adequate job and that people don’t like to work around [him] and [his] crew.” *Id.* The conversation continued with Sollars asking more about Moore’s presence at the mine. Brusca told Sollars that Weesner saw Moore soon after he arrived at the mine and told Weesner that Brusca was in the

shop. Sollars then asked Brusca, “has Nate [Weesner] been infected with the cancer yet?” *Id.* Brusca did not like being referred to as a “cancer” and he did not reply. Sollars told Brusca that the company wanted to find another lead man for his crew but that it would not be easy because nobody wanted to work with him.

The following Monday, March 17, Brusca talked to Ludlow about the meeting with Sollars. Ludlow said that he would talk to Sollars when he returned to work. Ludlow then asked Brusca if he had clocked in at the mine when he drove to the town of Craig to attend annual refresher training on March 12. He replied that he did and that he had the right to be compensated for any additional costs he incurred in attending a training session that was not held at the mine. (Tr. 41). Brusca testified that he had clocked in under similar circumstances the previous year and so had Carnahan and Moore. Brusca testified that he did not know how to ask for a mileage allowance for the trip to Craig. Carnahan rode with him to Craig on March 12 and he also clocked in at the mine. Other miners were paid for ten hours of work while attending the training class, but Brusca and Carnahan sought pay for an extra two hours and fifteen minutes that day. A payroll clerk noticed the discrepancy. Brusca’s pay was \$29.50 an hour. He made two dollars an hour more than he otherwise would have because he was a lead man.

Mr. Spangler testified that Sollars told him that he was working late one evening when he saw a personal vehicle traveling at a high rate of speed entering a restricted area of the mine. He looked for another supervisor and went to investigate. Sollars told Spangler that he found Moore in the weld shop talking to Brusca and he saw that neither Moore nor the person with him was wearing PPE. Sollars told both men to immediately leave the mine. Mr. Moore was subsequently terminated from his employment in part because he had been in the weld shop without PPE. (Tr. 85). Spangler also testified that a payroll clerk showed him Brusca’s time records for March 12 because everyone else worked ten hours that day. Brusca and Carnahan had logged two and a quarter more hours than everyone else without authorization. (Tr. 85).

A little later on March 17, Brusca was asked to attend a meeting with Ludlow, Brown, and Spangler. He was told that the company was not pleased with his performance, especially with respect to two recent incidents. In the first incident, the company alleged that, as a supervisor, Brusca should not have allowed two people to enter the weld shop on March 13 without wearing PPE. He replied that he had not yet had the time to address the issue concerning the lack of PPE with Moore. (Tr. 86). Spangler did not believe Brusca on this issue and he felt that Brusca had more than enough time to tell Moore to leave or put on PPE. As the lead man, it was Brusca’s responsibility to make sure that anyone who was obviously not wearing PPE either left the area or went to get PPE. (Tr. 104).

With respect to the incident involving the time card, Brusca told Spangler that he should have been paid mileage for the trip to Craig. Spangler testified that Brusca figured that he would try to get more hours instead “to see if I got caught.” (Tr. 86). Spangler’s impression is that Brusca knew that he was not entitled to the extra hours and he was “trying to slip something through.” *Id.* Brusca would have been reimbursed for mileage if he had asked for it. (Tr. 112).

Over the previous few years a number of people at the mine had told Spangler that Brusca “took advantage of the company” and he was difficult to work with. (Tr. 78-79). Spangler considered Brusca’s actions to be stealing from the company and he testified that he has terminated other people for misrepresenting their hours on their time cards. Spangler checked the payroll records and discovered that Brusca took an extra 45 minutes to attend a meeting in Craig the previous year. Mr. Carnahan, who also claimed over two extra hours for attending the March 12, 2008, meeting, was disciplined for the incident but he was not terminated because he merely followed the lead of Brusca, his supervisor, and he was scheduled to retire in June 2008. (Tr. 89).

Spangler testified that following the meeting on March 17, he determined that Brusca should be terminated from his employment. Before Spangler told his boss of this decision, he talked to other supervisors and managers to gather their thoughts as to Brusca’s overall job performance so he could develop a “balanced view” of Brusca. (Tr. 91). Brady was not available because he was on vacation.

He also reviewed Brusca’s personnel files. There had been an incident a few years earlier in which people were placing derogatory and obscene graffiti on equipment at the mine. Tom Bulger’s belt crew was attacked in this graffiti. Bulger told Spangler that he was convinced that Brusca and his crew were the culprits. (Tr. 77). Although Spangler could never establish that Brusca was directly involved, Brusca was counseled about the matter and the graffiti stopped. (Tr. 78-81, 105-06). Spangler believed that Brusca misrepresented what had happened. (Tr. 107-08). During the investigation of this incident, two miners told him that they were available to work overtime unless they had to work with Brusca. (Tr. 79).

Spangler testified that he made the ultimate decision to terminate Mr. Brusca based on the two incidents, discussed above. (Tr. 92). Brusca failed to address the obvious PPE issue in the weld shop and he falsified his time sheet. Spangler also considered the “marginal performance over time that Mr. Brusca had demonstrated.” (Tr. 93). Spangler testified that he did not know that Brusca had complained about safety or that a supervisor told Brusca that morning safety talks are a waste of time. In addition, Spangler did not know about the incidents involving the tractor in the airway or the repair of the solenoid on a head roller. He was also not aware of the incident in which Brady came into the weld shop while the crew was having a safety meeting and told everyone to get to work. (Tr. 97-98). Finally, Spangler testified that he knew nothing about the earlier incident in which Brusca delayed fabricating new guards for the conveyor system until he took steps to make the weld shop safer to work in. (Tr. 98). “There was never an issue brought to my attention as to any of the safety elements that have been talked about today [at the hearing]. . . .” (Tr. 94, 100). Spangler was only told that Brusca was taking advantage of the company and that he was difficult to work with. (Tr. 93-94, 101-02).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) 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.*”).

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the “scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner’s complaint was frivolously brought.”

“The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Courts and the Commission have equated the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act with the “reasonable cause to believe standard” at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with “not insubstantial.” *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” (*Legis. Hist.* at 624-25).

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).

It is rare to find that the link between an adverse action and the protected activity can be established exclusively by direct evidence. Usually the administrative law judge must look for

circumstantial evidence to draw an inference regarding the operator's motivation for the adverse action. The Commission has set out some guidelines for determining motivation.

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "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.

Sec'y of Labor on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

Applicant provided many examples of what he considered to be protected activity. About three years ago, Brusca and his crew attempted to make the weld shop safer before fabricating new guards for a conveyor drive. Although Brady became angry when he entered the shop because the crew had not started working on the new guards, there was no adverse action taken against Brusca. Although comments were made by management, he suffered no disciplinary actions. In addition, there was no coincidence in time between the alleged protected activity and Brusca's termination from employment.

About two years ago, Brusca and his crew were working to replace a solenoid valve on a head roller. When Brady found out that Brusca was taking what he considered to be a long time on this work, he became angry and he apparently kept an eye on Brusca with the camera that had been installed in the area. Again there was no adverse action taken and there was no coincidence in time. Moreover, it does not appear that protected activity was involved in this incident.

As described above, Brusca was holding a safety meeting at the beginning of the shift sometime in February 2008, when Brady came into the weld shop and told everyone to get to work. There is no direct evidence that Brady knew that the crew was discussing safety issues. He just saw that the crew was sitting around a table. It can be inferred that Brady knew that Brusca often talked about safety at the beginning of the shift. Brady exhibited some animus toward this protected activity, but it appears that Brady believed that the crew was goofing off rather than discussing safety issues. Brusca completed the safety meeting before the crew started their assigned tasks. The training materials that Brusca used during the meeting were provided by Twentymile's safety director. (Tr.24, 66-67).

The incident involving Brusca and Carnahan getting a cup of coffee in the operations center sometime in February 2008 while Mr. Weesner washed his eye out does not involve protected activity. Brady apparently believed that the entire crew did not have to follow Weesner around while he took care of his eye.

Brusca alleges that during his pre-evaluation meeting with Brown sometime in late February 2008, Brown criticized him for holding safety meetings at the start of his shift because they were a waste of time. Brown characterized these meetings as an opportunity for the crew to take a break. Holding legitimate safety meetings at the start of a shift can be characterized as protected activity. If the meetings are in reality a sham then they would not be protected. For purposes of this temporary reinstatement case, I assume that the meetings were legitimate and were protected under the Mine Act. Brown displayed hostility or animus toward these meetings during Brusca's pre-evaluation. There was also a coincidence in time between the pre-evaluation meeting and Brusca's termination.

The final incident that the Applicant relies upon to make a case arose in early March 2008 when Brusca was told to change out a motor for a drive belt. He removed the motor in a manner that was different from what Brown had instructed. He removed the motor in a manner that did not expose the crew to diesel exhaust. Brusca testified that he believed that Brown was angry that he did not follow his explicit instructions when he removed the motor. For the purposes of this temporary reinstatement proceeding, I assume that Brusca was concerned with the health of his crew when he removed the motor using cables rather than placing the tractor between the equipment doors and the stopping. Such activity would arguably be protected under the Mine Act. I also accept Brusca's testimony that Brown displayed some hostility toward his actions. There was a coincidence in time between this event and his discharge from employment.

The record makes clear that the company's human resources director made the decision to terminate Brusca. Spangler based his decision on three factors. First, he accepted the chronology of events that Sollars described to him for the incident that occurred in the weld shop. Sollars advised Spangler that Brusca had allowed Moore and Moore's brother to remain in the weld shop without any PPE, including a hard hat. Sollars believed that Moore and his brother had been in the shop for some length of time before he arrived. Spangler did not believe Brusca's rendition of the events because it was inconsistent with what Sollars had told him. As a lead man, Brusca was a supervisor and he should not have been holding a conversation in the weld shop with people who were not wearing any PPE.

The second factor Spangler relied upon was Brusca's misrepresentation on his time sheet that he worked more than twelve hours on March 12, the date of the annual refresher training in Craig, Colorado. Spangler believed that Brusca's attitude showed that he had tried to slip the extra time through without getting caught. This misrepresentation was consistent with the information Spangler had previously received that Brusca was often not totally honest. Brusca never asked if he could add the extra time to attend the training and he did not ask how he could be reimbursed for the mileage to Craig. Craig is about 40 miles from the mine. The Secretary's

training regulations require mine operators to pay for miscellaneous expenses, including mileage, when training is held away from the mine. 30 C.F.R. §48.10(b). Spangler determined that Brusca had deliberately falsified his time sheet and this action amounted to a theft of company property. Other miners have been terminated for similar actions.

Finally, as discussed above, Spangler took into consideration Brusca's perceived reputation for being difficult to work with and for not being forthright. Spangler remembered the problems with graffiti at the mine and thought that Brusca had been directly involved. Spangler concluded that Brusca's behavior with respect to the two incidents that led to his dismissal was consistent with his past behavior at the mine.

The evidence presented at the hearing clearly demonstrates that Twentymile's stated reasons for terminating Brusca were not pretextual. Spangler considered Brusca's falsifying of his time sheet to be a very serious matter. Spangler also credited the statements of Sollars that Brusca allowed Moore and his brother to remain in the weld shop while wearing street clothes without any PPE. Spangler explicitly denied that he had any knowledge of the safety issues raised by Brusca that were described in this temporary reinstatement case. Spangler's testimony was entirely credible. It is important to note that Carnahan was also disciplined for the time sheet incident and Moore was discharged in part for being in the weld shop without PPE.

As stated above, Brusca testified that Brown and Brady displayed hostility toward the safety meetings, but the evidence shows that this hostility arose out of their frustration that he was slow to get his assigned work completed rather than hostility toward legitimate safety meetings. There is no evidence that Twentymile discourages safety discussions. Indeed, the evidence shows that safety meetings are encouraged. More importantly, Spangler testified that he had no knowledge of these events when he made the decision to terminate Brusca from his employment at Twentymile. I recognize that a mine operator may try to deliberately insulate the person making the decision to terminate an employee in order to mask the true, discriminatory reason for the discharge, but I can draw no inference from the evidence, including circumstantial evidence, that there was a hidden motive in this case or that Brusca was terminated for activities protected under the Mine Act.

Based on the above, I find that the Secretary did not meet her burden to establish that there is reasonable cause to believe that Brusca was terminated for protected activities. This case does not appear to have merit and was therefore "frivolously brought."

III. ORDER

The Secretary of Labor's application for the temporary reinstatement of Daniel R. Brusca is **DENIED** and this temporary reinstatement proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Lydia Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Fax 303-844-1753 and Certified Mail)

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222 (Fax 412-434-8062 and Certified Mail).

RWM