FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 22, 1996

LANCE A. PAUL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 95-228-DM
	:	MSHA Case No. WE MD 95-04
NEWMONT GOLD COMPANY, Respondent	:	Gold Quarry
	:	Mine ID 26-00500

DECISION

Appearances: Lance A. Paul, *pro se*, Elko, Nevada, for the Complainant;
Charles W. Newcom, Esq., Sherman & Howard L.L.C., Denver, Colorado, for the Respondent.

Before: Judge Feldman

This case was heard on November 28 and 29, 1995, in Elko, Nevada. This matter is before me based upon a discrimination complaint filed on March 1, 1995, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3) by the complainant, Lance A. Paul, against the respondent, Newmont Gold Company (Newmont). Section 105(c) provides, in pertinent part:

> No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... .

Paul alleges his November 10, 1994, discharge for alleged insubordination was motivated by his protected activity associated with his radio transmission to control room management during a November 3, 1994, fire at the respondent's Refractory Ore Treatment Plant (ROTP). The purpose of Paul's radio communication was to express concern for the safety of a fellow employee, who, unlike other employees, had not been sent to the designated evacuation area during the fire emergency.

In response to Paul's complaint, the respondent asserts that Paul, who had been working under a last chance agreement, was discharged because:

> Mr. Paul committed two violations of company policies leading to his termination. The first involved his violation of company lock out procedures by his failure to remove his locks from equipment before he left work. This is a clear violation of written company policy. The second, <u>and far more significant</u>, violation of company policy, which occurred the day after the first violation by Mr. Paul, involved his breaking radio silence, again in violation of company policy, during a mine emergency (Emphasis added). (Respondent's Prehearing Br. at p.2)

Although the prehearing information and the testimony adduced at trial reveals the respondent relied heavily on Paul's November 3, 1994, breaking of radio silence as a basis for his termination, Newmont relies upon an alternative defense. Namely, Newmont argues, even if Paul's November 3, 1994, radio communication was protected, Paul would have been terminated regardless of his use of the radio because of his failure to follow lock out procedures before leaving mine property on November 2, 1994.

For the reasons discussed below, the evidence reflects Paul's November 3, 1994, radio communication was protected activity that significantly and substantially motivated the adverse action complained of. Consequently, Lance Paul's discrimination complaint shall be granted.

<u>Preliminary Findings Of Fact</u>

The respondent, Newmont Gold Company, operates a refractory ore treatment plant located approximately six miles north of Carlin and 25 miles east of Elko, Nevada. (Tr. 130). The plant separates iron from iron ore and produced approximately 1.7 million ounces of gold in 1994. (Tr. 204).

Lance Paul was employed by Newmont as a laborer, utility man and mill operator since 1988 until his discharge on November 10, 1994. From August 1994 until his termination, Paul served as the Chief Union Steward for Operating Engineers Local 3. During his tenure as Chief Steward, Paul was involved in safety-related activities serving on the safety and health, and grievance committees. The company/union contract specifies that safety is everyone's responsibility. (Tr. 308-09).

On October 6, 1992, Paul was disciplined after he was overheard complaining to a fellow employee that there were too

many "scabs" (non-union members) working in the mill department. Paul was suspended without pay for five days as a result of his conduct.

Shortly thereafter, on or about November 15, 1992, Paul was found "loafing" in a janitorial closet during his work shift. Paul alleged he had sat down to rest after he had gone into the closet to get supplies. Newmont alleged Paul was sleeping on the job. Paul admitted on cross-examination that the door of the closet was closed and the lights were out. (Tr. 98-99).

Newmont was contemplating terminating Paul as a result of the October 1992 "scab" and November 1992 "resting" incidents. However, the union intervened on Paul's behalf. The company agreed to place Paul under the terms of a "Last Chance" Agreement on November 25, 1992. Under this agreement, Paul acknowledged that his violation of any Company rules or regulations during the next 24 months "may subject [him] to immediate discharge." (Ex. R-1, p.1).

The Last Chance Agreement remained in effect despite an October 15, 1993, settlement of a union grievance proceeding that resulted in the repayment of Paul's wages for his October 1992 five day suspension and the removal of the "scab" incident disciplinary action from Paul's records. (Ex. R-1, p.2). During the period November 25, 1992, when the Last Chance Agreement was executed, until November 1, 1994, Paul had no intervening disciplinary problems. (Tr. 319).

The November 2, 1994 Failure to Remove Locks

On November 1, 1994, at approximately 7:30 p.m., shift foreman Peter Pacini telephoned Paul at home to request that he come to the plant on his day off to clean the nozzle in the preheater vessel on the roaster circuit because the preheater was buried in iron ore. (Tr. 205). Paul arrived at the plant at approximately 9:00 p.m., whereupon Pacini issued Paul six padlocks to lock out breakers and valves to ensure the equipment remained stationary while Paul serviced the roaster.

Paul stated he worked on the equipment from 9:00 p.m. on November 1 until approximately 3:00 a.m. on November 2, 1994. Paul stated he was tired and had not slept all day. Paul testified that he then showered and left the plant at approximately 3:30 a.m., forgetting to remove the locks from the breakers and valves used to access the equipment. (Tr. 50-56).

Pacini admitted Paul told him that he was very tired. However, Pacini estimated that Paul completed his work at

approximately midnight. Pacini testified that he reminded Paul to remove his locks before he left the plant. (Tr. 206). However, Paul did not remember being specifically reminded. (Tr. 107-08). The evidence does not reflect, and Newmont does not allege, that Paul's failure to remove the locks was intentional. In fact, Newmont's Manager of Employee Relations, Cindy Rider, testified she attributed Paul's failure to remove his locks to negligence, rather than an intentional act. (Tr. 316-17). Moreover, it is not uncommon for personnel to forget to remove locks. (Tr. 154-60; Exs. C9-C18). Generally, a verbal warning is the only discipline imposed for failure to remove locks as a first offense. (Tr. 160, 229-30, 334-35).

Later that same morning on November 2, 1994, at approximately 5:30 a.m., Pacini phoned Paul at home. Pacini advised Paul that, although Newmont wanted to energize the roaster, Paul had forgotten to remove his locks. Pacini testified, "I said to him he could come out and remove his locks or seeing as how he was home, we could remove them for him, according to our procedure." (Tr. 207). Paul told Pacini to go ahead and remove the locks. Paul testified that he did not refuse to return to the plant and that he was not ordered by Pacini to return. (Tr. 108-09). Significantly, Pacini was specifically asked to clarify this issue:

> Q. Mr. Pacini, did you ever, during the course of your conversation with Mr. Paul at home, did you order or require him to come back to work to remove the locks?
>
> A. No. I just said that he could come out and remove them or I could remove them.[1] (Tr.209).

The November 3, 1994, Breaking of Radio Silence

Paul had the day off and did not report to work for the evening shift on November 2, 1994. The plant operates on two

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[1] Pacini's demeanor at the time of this testimony was revealing. Based on my observations, Pacini appeared to experience an anxiety attack. His face became flushed, he began coughing uncontrollably, and he had difficulty breathing. As discussed infra, the absence of insubordination in this lockout incident is damaging to the respondent's case. The evidence reflects the "insubordination" referenced as a factor in Paul's termination relates to his breaking of radio silence which was safety related activity protected by section 105(c) of the Mine Act. (See Exs. C-2, R-10).

12 hour shifts from 7:30 a.m until 7:30 p.m., and, from 7:30 p.m. until 7:30 a.m. The day shift foreman on November 3, 1994, was Tony Gunder. Gunder was scheduled to be relieved on that day at 7:30 p.m. by evening shift foreman Ronald D. Wooden (R.D.), at which time Wooden's crew would replace Gunder's crew.

On November 3, 1994, at approximately 6:20 p.m., prior to Wooden's arrival, a fire broke out at the gas cleaning area of the Electostatic Percipitator which is made of plastic, fiberglass and lead. (Tr. 202-03, 253, 242-43, 246). This area contains toxic chemicals, including mercuric chloride and other mercury compounds. (Tr. 209). There was a concern regarding the hazards of smoke inhalation. (Tr. 185-89, 194-95, 209, 228, 297-98, See Ex. C-3). At 6:40 p.m., Gunder sounded the evacuation horn for the purpose of evacuating all contractor personnel not engaged in fighting the fire. (Tr. 253). Gunder ordered his crew to man fire hoses until company fire fighters and fire fighters from outside agencies could arrive. The Nevada Division of Forestry and the Elko and Carlin Fire Departments ultimately were called because the fire was out of control. (Tr. 191, 246).

Wooden arrived at the plant at 7:10 p.m., approximately 40 minutes after the fire had begun. Upon arriving, Wooden observed the smoke from the fire. Wooden reported to the control room and then proceeded to locate Gunder. Wooden and Gunder discussed the evening shift relieving the day shift at the fire. (Tr.242).

Wooden gathered his crew in the break room (lunchroom) at approximately 7:15 p.m. With the exception of Lance Paul, who had not yet arrived at work, and Michelle Berry, who was untrained in fighting fires, Wooden instructed the crew to put on Goretex acid suits and to go down to relieve Gunder's crew until help could arrive. (Tr. 274). Wooden told Berry to remain in the break room until he notified her to leave. (Tr. 276-77).

Although most of the evening crew routinely arrived at the plant on a company bus from Elko 15 minutes early at 7:15 p.m., it was Paul's practice to take a later bus which arrived at the plant shortly before 7:30 p.m. (Tr. 57). Paul saw black smoke rising from the fire as he arrived at the plant a few minutes before 7:30 p.m. Paul went to relieve day shift mill operator Joe Best. Best gave Paul his radio. Best informed Paul that he thought everyone was evacuated, but that he could not hear the evacuation horn over the noise from the mill. Paul took some pressure readings at the mill and then proceeded to bring his lunch box to the lunchroom. Berry was the only person in the lunchroom. Berry and Paul spoke briefly and then Paul went up to the control room where Ed Durazo directed Paul to put on his acid

gear and fight the fire. As a mill operator, Paul did not have acid gear. Therefore, Durazo gave Paul keys to lockers containing the Goretex suits.

Shortly before 7:50 p.m., Wooden instructed his crew to go up to the "meeting area" at the west side of the plant because the fire fighters were arriving. (Tr. 279). While Paul was in the locker looking for the appropriate gear, he heard Wooden on the radio attempting to find out if Paul had arrived. Paul responded on the radio that he had arrived. Newmont does not allege that this radio transmission violated company policy. Wooden requested Paul to meet him by the caustic scrubber.

Paul and Wooden met at the scrubber at about 7:50 p.m. (Tr. 282-83). As Paul approached, Wooden instructed him to join the others up on the hill at the evacuation point. Paul testified that he asked Wooden why no one told him they evacuated, to which Wooden replied, "just go." (Tr. 65). Wooden testified that Paul asked him if they had evacuated to which he replied, "no." (Tr. 279). Wooden then hurriedly returned to the gas cleaning area in the vicinity of the fire. (Tr. 243, 283).

Paul reported to the evacuation area. He remembered seeing Berry in the lunchroom and he noticed she was not with the others on the hill. Paul testified:

> As soon as I seen (sic) that she wasn't there, it clicked in my head where she was and what her circumstances were. She didn't know anything. She didn't have a radio. I called the control room. I got on the radio and I called the control room. This was like two or three minutes after I talked to R.D. (Wooden), and he told me to go up there.
>
> I got on the radio and I called the control room, and I said, 'Mickey (Berry) is in the lunchroom, and she doesn't have a radio. Would you please call her (on the telephone) and let her know that we've evacuated.' (Tr.70-71).

Paul testified he communicated with the control room about evacuating Berry rather than Wooden because: the control room had direct contact with Berry via the telephone; it was the quickest method of accomplishing her evacuation without unduly causing radio interference; and Wooden was apparently preoccupied with directing the fire efforts in that he had hurriedly returned to the fire area after their meeting at the caustic scrubber only minutes before. (Tr. 95-96). Paul's testimony is supported by Wooden who stated, he was in a hurry when he left the caustic scrubber "because I was trying to help coordinate the fire fighting efforts." (Tr. 297).

Paul's radio transmission with Ed Durazo in the control room occurred at approximately 7:50 p.m. (Tr. 283). Durazo is a supervisor that reports to Wooden. (Tr. 216, 288-89). Wooden, who overheard Paul's communication, testified that the entire transmission was between five and ten seconds. (Tr. 299). Durazo telephoned Berry in the lunchroom and told her to report to the evacuation area. (Tr. 31-32). Berry arrived at the evacuation point a few minutes later. (Tr. 71).

Wooden was standing with Gunder directing the fire fighting efforts when he overheard Paul's communication at 7:50 p.m. Wooden testified that he immediately "got on the radio and confirmed that we had not evacuated and informed Lance I knew where my people were and to maintain radio silence unless authorized." (Tr. 283). Paul testified, "[a]s soon as I got off the radio, R.D. came on and said he was the boss and there was no evacuation and that -- I don't remember how he said it, but my ears burned a little bit." (Tr. 71, 75-76). Regardless of the exact words used by Wooden, it is undisputed that Wooden was extremely upset. (Tr. 146).

At approximately 9:00 p.m. Wooden confronted Paul over the evacuation of Berry. Paul testified:

> ... he was walking into me and he was shaking his finger on to my chest and in my face. He was shouting at me so that his spittle was on my cheek. He was telling me that I was out of line. He was chewing me again for making the radio call to evacuate Michelle Berry. The first time he did it was on the radio right after I had done it. He was leaning on me so heavy I couldn't even walk, he was edging me over. (Tr. 79).

Paul's account of Wooden's behavior in this incident was corroborated by employees Michelle Berry, Lidia Peasnall and Chad Rooney. (Tr. 23, 143-44, 153; Exs. C-5, C-6, C-7).

With the exception of fire fighters, the entire plant was evacuated from approximately 9:00 p.m. until the fire was brought under control at approximately 10:30 p.m. (Tr. 73-74, 193-95). The fire was controlled with an application of foam by the Elko Fire Department. Everyone returned to the plant at approximately 10:30 p.m. (Tr. 193).

Paul was having lunch in the lunchroom at approximately 4:30 a.m. whereupon he met Wooden, and, another argument over Berry's evacuation ensued. At trial, Newmont stipulated that Wooden was upset over Paul's breaking of radio silence and that Wooden engaged in three heated discussions with Paul in which

Wooden expressed his displeasure. (Tr. 145-51). Wooden testified he believed Paul's communications to the control room constituted insubordination. (Tr. 293-95).

Paul worked until 7:30 a.m. and was scheduled to return to work at 7:30 p.m. on November 4, 1994. At 5:00 p.m., before leaving for work, Paul called Jim Mullins, Newmont's General Superintendent, to allege that he had been assaulted by Wooden over the Berry incident. (Tr. 147, 346).

Upon arriving for work at 7:20 p.m. on November 4, 1994, Paul was informed by Wooden that he had been suspended pending an investigation and that there would be no further discussion. (Tr. 84). Wooden gave Paul a "Notice of Disciplinary Action" reflecting a written warning for Paul's failure to remove locks on November 2, 1994. (Ex. R-2).

A meeting with the union concerning Paul's employment status was conducted on November 10, 1994, at which time Paul was terminated. The meeting was attended by Cindy Rider, Manager of Employee Relations, Trent Temple, Area Operations Superintendent, Union Representative Siemon Ostrander, Wooden and Paul. Paul testified that, "Cindy told me the reason was insubordination for breaking radio silence and directing the work force and that was a violation of my Last Chance Agreement that I had signed almost two years earlier." (Tr. 86). Paul further stated that he was surprised because he thought the subject of the meeting was his failure to remove the locks on November 2, 1994. (Tr. 86). Paul was given a "Personnel Transaction Notice" signed by Wooden and Temple on November 10, 1994, reflecting that Paul's last day of work was November 3, 1994, and that the reason for termination was "Insubordination/Violation of Last Chance Agreement." (Ex. C-2).

Paul's discharge is the subject of a pending grievance proceeding. (Tr. 87). In a letter to union representative Ostrander, dated December 6, 1994, Tom Enos, Newmont's General Superintendent, summarized the company's position:

> After gaining your input, I have taken the time to again review the issues surrounding Mr. Paul's termination and find the following facts:
>
> Mr. Paul was on a Last Chance Agreement, signed by all parties, (himself, the Company and the Union), and this agreement clearly outlines that he may be subject to "immediate" discharge if he "fails to uphold his responsibilities as an employee of Newmont Gold Company or violates any company rules or regulations."
>
> Mr. Paul violated the lockout rule when he did not remove his locks on 11/2/94, a rule which is well known. Failure to remove locks affects production as equipment cannot be put into operation until all locks are removed and accounted for. This violation in itself is a basis to terminate his employment as outlined in the Last Chance Agreement which is why General Foreman Gonzales had him suspended to look into the violation of his Last Chance Agreement.
>
> In the third grievance meeting, Mr. Paul acknowledged that he was aware he should not break radio silence during an emergency and in spite of this, he broke radio silence and attempted to direct the workforce on the night of the fire, 11/3/94. He had just been in the Lunch Room area, which is right below the Control Room, and he knew it was well out of the fire area. There was no reason for him to assume Ms. Berry was in danger or that he should assume the responsibility of directing the work force. Further, he made no attempt to check with his foreman to ascertain any facts or information prior to <u>breaking radio silence</u> and directing the Control Room Operators to remove her from the building. Again, Mr. Paul did not uphold company rules and regulations; in fact, <u>his conduct was insubordinate</u>, <u>and also basis for discharge from employment</u> as outlined in the Last Chance Agreement.
>
> As far as Mr. Paul's allegations of physically abusive treatment by Mr. Wooden, there are obviously two different versions of the incident; however, I do not find that Mr. Paul is more believable than Mr. Wooden. In fact, were he the subject of abusive treatment or "assault," it is incredible that he would not have immediately contacted company management to complain the night of November 3rd.

I find that the termination was proper in light of the circumstances. Accordingly, it is my decision to deny this grievance. (Emphasis added). (Ex. R-10).

Although Cindy Rider attempted to characterize Paul's failure to remove his locks, which Rider admitted was inadvertent, as insubordination, it is clear that the "insubordination" referred to in the November 10, 1994, Personnel Transaction Notice was directed at the November 3, 1994, breaking of radio silence. (Tr. 293-94, 315-16). This notice served as the basis for Paul's November 10, 1994, discharge. (Ex C-2).

Disposition of Issues

Discriminatory Discharge

Paul, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Paul must establish that his expressed concerns about the safety of Ms. Berry constituted protected activity, and, that the adverse action complained of, in this case his November 10, 1994, discharge, was motivated in some part by that protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d. Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

Newmont may rebut a *prima facie* case presented by Paul by demonstrating either that Paul's November 3, 1994, radio transmissions did not constitute protected activity, or that Paul's November 10, 1994, discharge was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. If Newmont fails to rebut, Newmont may also affirmatively defend against Paul's *prima facie* case by establishing that (1) it was also motivated by Paul's unprotected activity (Paul's failure to remove his locks), and (2) that it would have discharged Paul anyway for his unprotected activity alone. See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Newmont bears the burden of proving an affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935, 1937

(November 1982). However, the ultimate burden of proof remains with Paul as the complainant in this proceeding. Robinette, 3 FMSHRC at 817-18.

Protected Activity

It is axiomatic that miners have an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). This statutory right is afforded to miners who bring to the attention of mine management conditions or circumstances that pose hazards to fellow employees as well as to themselves. See Secretary on behalf of Cameron v. Consolidation Coal Company, 7 FMSHRC 319 (March 1985). A miner's right to voice safety related complaints is so fundamental that the Mine Act even protects complaints about conditions that do not pose an immediate hazard as long as the complaint does not involve a work refusal. Secretary o.b.o. Ronny Boswell v. National Cement Company, 16 FMSHRC 1595, 1599 (August 1994).

Communication of potential health or safety hazards, and responses thereto, are the means by which the Act's purposes are achieved. Once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985).

Although an operator is under no obligation to agree with a miner's concerns, an operator must address a miner's concern in a way that reasonably quells the miner's fears. Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989). A miner's willingness to express safety and health related complaints should be encouraged rather than inhibited. Such protected complaints may not be the motivation for adverse action against the complainant by mine management personnel.

In the instant case, Durazo, serving in a supervisory capacity, could have responded to Paul's concerns

in a variety of ways that would not violate the anti-discrimination provisions of the Mine Act. At Paul's suggestion, he could have evacuated Berry from the lunchroom; he could have considered Paul's suggestion and concluded Berry was in no danger; or, he could have consulted with Wooden over the wisdom of Berry remaining alone in the lunchroom. However, it is obvious that, if Paul's termination was influenced by his safety related communication with Durazo, his discharge cannot be sanctioned by the Mine Act.

Paul's *Prima Facie* Case

At the outset, I wish to dispose of the issues of whether Berry was in actual jeopardy, and the nature of the plant conditions during the fire. First, Berry testified that, although she did not know what was happening outside, she did not feel she was in any jeopardy during the period she was in the lunchroom. (Tr. 33). Wooden also testified he believed Berry was in no danger. (Tr. 280). Consequently, the record reflects Berry was in no immediate danger prior to her 7:50 p.m. departure from the lunchroom. However, as noted above, the relevant question is not whether Berry was actually in danger, but, rather, whether Paul had a reasonable, good faith belief that Berry's continued presence in the lunchroom was hazardous.

With respect to the fire, it is clear that the November 3, 1994, ROTP fire was a major event. It was a chemical fire that took approximately four hours to bring under control. There were significant smoke inhalation dangers created by the fire. Even Wooden admitted the fire was of significant magnitude and that the fire conditions were getting progressively worse. (Tr. 295-96).

The fire was the subject of a November 4, 1994, Freepress newspaper article that reported there were three injuries to fire fighters and that seven Newmont employees were checked for smoke inhalation. (Ex. C-3). I reject Newmont's characterization of this newspaper account as "sensationalism," and the testimony provides no basis for trivializing this event. (Tr. 133).

In addition to the gravity of the fire, the evidence reflects the events of November 3, 1994, were chaotic. In this regard, truck mechanic Paul McKenzie testified concerning wind changes increasing the smoke inhalation hazards, a shortage of foam to fight the fire, and general evacuation orders. (Tr. 184-95). Gunder's sounding of the evacuation horn at 6:50 p.m., which was only intended for contractors, but which signaled a general evacuation, was also confusing. Finally, Wooden's

directions that his crew go to the "meeting area," which is also the evacuation point, provided mixed signals, particularly in view of Gunder's earlier evacuation horn signal. (Tr. 279). It is in this setting that the reasonableness of Paul's concerns for the safety of Berry must be evaluated.

In addressing the reasonableness of Paul's concerns for Berry's well-being, I find myself in the uncomfortable position of explaining the obvious. Ms. Berry was isolated in a room during a fire, while her fellow employees were ordered to stay out of harm's way outside at the evacuation point. The lunchroom is located in the middle of the plant, approximately 100 yards away from the location of the fire at the east end of the plant. (Tr. 363). The evacuation point was located at the farthest west end of the plant, a distance of approximately 220 yards from the fire. (Tr. 365; See photograph of plant in Ex. R-11). Thus, the "meeting area" employees were outside at a designated evacuation point, in the company of each other, and twice as far away from the fire as Berry.

In addition, Berry did not have a radio to monitor what was happening. Her only contact with the outside was via a telephone to the control room which would be of little use if she were overcome by smoke. Moreover, if conditions deteriorated and control tower personnel suddenly evacuated, it is conceivable that they might forget to evacuate Berry, the only member of Wooden's crew that had not been evacuated.

Simply put, when Wooden decided to remove his crew from the vicinity of the fire, he did not elect to send them back to the lunchroom for safety. On the contrary, he sent them to the evacuation point. I see nothing unreasonable about Paul's desire for Berry to join her peers. Likewise, General Foreman Gonzales and Foreman Gunder also testified they believed Paul's concerns about Berry were reasonable. (Tr. 233-36, 255). In fact, Paul's concern was commendable and, not surprisingly, greatly appreciated by Berry. (Tr. 33-34). Thus, Mr. Paul's expression of concern for Ms. Berry was indeed protected activity. It follows that Paul has made a *prime facie* showing that his discharge for "insubordination" was motivated, at least in part, by his protected activity.

Newmont's Defense

a. No Protected Activity Occurred

As noted above, Newmont may rebut Paul's case by showing that no protected activity occurred. In this regard, Newmont

argues that Paul's radio communication was not protected because it violated the company's policy against breaking radio silence in an emergency. As a threshold matter, application of a company policy that prohibits protected activity is preempted by the Mine Act and does not provide a defense to discriminatory conduct.

Furthermore, although this Commission's function is not to pass on the wisdom or fairness of an asserted justification for a particular business decision, the Commission must determine if such justifications are credible. Bradley v. Belva, 4 FMSHRC 982, 993 (June 1982). Here, it is obvious that Newmont's claim that Paul violated its emergency radio use policy is a pretense. The purpose of the policy is to prevent unnecessary communications and radio interference during an emergency so that lines of communication remain open. With respect to the need to maintain a clear channel, Wooden admitted Paul's communication was less than ten seconds in duration. (Tr. 299). Although Newmont would not tolerate Paul's brief radio use, Wooden demonstrated no reluctance to clutter the frequency when he admonished Paul over the radio.

With respect to permissible radio use, even Cindy Rider and Wooden admitted employees are authorized to use the radio to assist others who are in danger in an emergency. (Tr. 300, 320-22). In short, Paul's transmission was brief and it was necessary. Newmont has no good faith basis for asserting Paul's action violated company policy.

Newmont also argues Paul's communication to the control room was not protected because Paul was not authorized to direct the evacuation of company personnel. Newmont's argument misses the point. Paul did not evacuate Berry. Even Wooden admitted it was supervisor Durazo, not Paul, who directed Berry out of the lunchroom. (Tr. 288-90). Moreover, General Foreman Gonzales conceded it was the decision of Durazo, rather than Paul, to remove Berry. (Tr. 235). Cognizant of the significance of management's role in evacuating Berry, Newmont, in its Post Hearing Brief, in a notable understatement, characterizes Durazo's "management" role in these circumstances as "problematic." (Resp. Br. at p.9). I view Durazo's management role as dispositive.

While Wooden adamantly maintains that Paul should have first called him on the radio,[2] I credit Paul's testimony that calling

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[2] To highlight the absurdity of Newmont's position, perhaps Newmont would argue that Paul should have repeatedly traversed the plant in search of Wooden, thus avoiding "breaking radio silence,"

the control room was the most efficient and quickest means of expressing his concerns for Berry. (Tr. 95-96). After all, only the control room had direct contact with Berry via telephone.[3] Moreover, Wooden testified that he was in a hurry after leaving Paul moments before at the caustic scrubber, "because I was trying to help coordinate the fire fighting efforts." (Tr. 297).

Finally, Newmont maintains that Paul's action placed Wooden in danger in the event he searched for Berry without the benefit of knowing she had been evacuated. This circumstance could have been easily remedied if supervisor Durazo, who was a subordinate of Wooden's, notified Wooden that Berry had been evacuated. (Tr. 289, 319-20). Thus, Newmont has failed to demonstrate that no protected activity occurred, or that Paul committed an egregious violation of company policy that should overshadow Paul's protected activity.

b. <u>Paul's Discharge Was Not Motivated In Any Part By Protected Activity</u>

Newmont asserts that even if Paul's November 3, 1994, radio communication was protected, his discharge was motivated solely by his November 2, 1994, failure to remove his locks. However, this assertion ignores Newmont's own behavior, personnel actions and representations made during this proceeding.

For example, Wooden was more than a little upset at Paul's suggestion that the control room should evacuate Berry. Wooden characterized Paul's action as insubordination. (Tr. 293-94). As noted above, insubordination was the reason given for Paul's discharge in the November 10, 1994, Personnel Transaction Notice discharging Paul. This insubordination was also given as a "basis for discharge from employment" in Superintendent Enos' December 6, 1994, letter to the union.

Finally, as previously noted, in preparation for this proceeding, Newmont has maintained the breaking of radio silence was a "far more significant violation of company policy" than Paul's inadvertent failure to remove his locks. Thus, the evidence reflects Paul's discharge was motivated in substantial part by his November 3, 1994, protected activity.

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while Berry all the while remained in the lunchroom.

[3] Radio use during this emergency would be greater if Paul first called Wooden, as Wooden had no direct means of contact with Berry. Thus, Wooden would have had to use the radio to contact the control room.

c. Paul Would Have Been Discharged Regardless of his Protected Activity

We now arrive at Newmont's last hope. Even if Paul's discharge was, in part, motivated by protected activity, Newmont can affirmatively defend by maintaining Paul would have been fired solely for his November 2, 1994, failure to remove locks without regard to his protected activity. In this regard, Newmont states that Paul's failure to remove locks occurred three weeks prior to the 24 month expiration of his Last Chance Agreement and violated that agreement.

As a preliminary matter, Newmont's actions are inconsistent with its position in this matter. Although Paul's November 2, 1994, failure to remove locks was given as the reason for his suspension on November 4, 1994, he was permitted to work on November 3, 1994, without being informed of any disciplinary action. It was only after he engaged in protected activity on November 3, 1994, that he was advised of his suspension. It was also only after his intervening protected activity that he was advised of his termination.

Significantly, the November 4, Notice of Disciplinary Action referencing his failure to remove locks was only designated as a written warning. (Ex. R-2). While General Foreman Richard Gonzales testified that Paul was not timely notified of his termination after the November 2, 1994, lock removal incident because of the fire the following day, the fact remains that Paul was not discharged until after he engaged in protected activity. Newmont has the burden of proving its affirmative defense that Paul would have been discharged for his unprotected activity alone despite his protected activity. Newmont's failure to discharge Paul immediately after this unprotected activity, and prior to his protected activity which Newmont admittedly believed warranted Paul's discharge, is fatal to its affirmative defense.

Reasonable inferences of discriminatory motivation may be drawn when an operator claims to have relied solely on unprotected activity, rather than protected activity, as a basis for discharge. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981) rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983). The progressive disciplinary stages at Newmont are: (1) a verbal warning; (2) a verbal warning reported in the employee's personnel file; (3) a written warning; (4) suspension; and (5) termination. (Tr 310-11). Paul had no intervening disciplinary problems between the November 25, 1992, execution of his Last Chance Agreement and his November 2, 1994, failure to remove his locks. (Tr. 319). Both Cindy Rider and Richard Gonzales testified that Paul would have received

only a verbal warning if his failure to remove his locks had occurred three weeks later, after the November 25, 1994, expiration of his Last Chance Agreement. (Tr. 229-30, 334-35).

Newmont's alleged literal application of the agreement to provide Newmont a "last chance" to terminate Paul after Paul had reported to work on his day off and worked through the early morning hours on November 2, 1994, is pretextual in nature and was not the principal motivation for Paul's discharge. Rather, the record demonstrates Paul's November 3, 1994, protected activity was an essential motivating factor in his November 10, 1994, termination of employment. Consequently, Newmont has failed to rebut or affirmatively defend Paul's *prima facie* case that he was the victim of a discriminatory discharge.

I wish to note that I am mindful of the potential influence Newmont's interest in defending Wooden against Paul's assault accusations had on Newmont's decision to discharge Paul. (Tr. 147; See Ex. R-10). However, the altercation between Wooden and Paul cannot be disassociated from Paul's protected activity and there is no evidence that Paul was the aggressor. The record reflects both Wooden's response to Paul on the day of the fire, as well as Paul's allegations of assault, were overreactions. Unfortunately, these overreactions apparently interfered with Newmont's ability to resolve this personnel matter without violating the protections afforded miners under section 105(c) of the Mine Act.

ORDER

Accordingly, Newmont Gold Company's November 10, 1994, discharge of Lance A. Paul was discriminatorily motivated and in violation of Section 105(c) of the Mine Act.[4] Consequently, **IT IS ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

   (a) stipulating to the position and salary to which Paul should be reinstated at Newmont's refractory ore treatment plant, or, in the alternative, agreeing on economic reinstatement terms (i.e. a lump sum agreed upon payment in lieu of reinstatement);

   (b) stipulating to the amount of back pay and interest computed from November 4, 1994, to the present, less deductions for unemployment benefits and earnings from other employment;

   (c) stipulating to any other reasonable and related economic losses or litigation costs incurred as a result of Paul's November 10, 1994, discharge.

2. If the parties are able to stipulate to the appropriate relief in this matter, they shall file with the judge, within 30 days of the date of this decision, a Proposed Order for Relief. Newmont's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of this decision on liability or relief.

3. If the parties are unable to stipulate to the relief, Paul shall file with the judge, and serve on opposing counsel, within 30 days of the date of this decision, a Proposed Order for Relief. Paul's proposed order must be supported by documentation, such as check stubs from his prior and current employment, notices of pertinent unemployment awards, and bills and receipts to support any other losses or expenses claimed.

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[4] Pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary is urged to file with this Commission, within 45 days, an appropriate petition for assessment of civil penalty for Newmont Gold Company's violation of section 105(c) of the Mine Act.

4. If Paul files a Proposed Order for Relief, the respondent shall have 14 days to reply. If issues on relief are raised, a separate hearing on relief will be scheduled.

5. This decision shall not constitute the judge's final decision in this matter until a final Order for Relief is entered.

Jerold Feldman
Administrative Law Judge

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