FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-96-DM
on behalf of CLAY BAIER	:	
Complainant	:	J & J Pit
	:	
v.	:	Mine I.D. 05-04517
	:	
DURANGO GRAVEL,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Jim Helmericks, owner, Durango Gravel, Durango, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Clay Baier against Durango Gravel under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c) (the "Mine Act"). The complaint alleges that Durango Gravel terminated Mr. Baier from his employment in violation of section 105(c). A hearing in this case was held in Durango, Colorado.

I. FINDINGS OF FACT

Durango Gravel owns and operates a sand and gravel pit in La Plata County, Colorado. Durango Gravel is a sole proprietorship owned by James Helmericks. The mine consists of a pit and a crusher. It is a small operation that generally employs two individuals in addition to Mr. Helmericks. The mine is not very profitable. The crusher is old and breaks down frequently. Mr. Baier testified that the crusher operated only about eight hours per week. (Tr. 69). He stated that the crusher would work for about two hours and then it would break down. *Id.* He also testified that it was broken down about 99 percent of the time. *Id.* Mr. Helmericks testified that the crusher is "old and slow" and cannot crush very much rock in a given month. (Tr. 313-14).

Clay Baier started working for Durango Gravel as a truck driver in April 1996. All employees perform a wide variety of tasks as directed by Mr. Helmericks. Mr. Baier would frequently operate the loader, repair equipment including the crusher, and perform other tasks. Mr. Helmericks terminated Mr. Baier from his employment on August 1, 1996.

On May 20, 1993, MSHA Inspector Dennis Tobin issued an imminent danger order to Durango Gravel because he observed an employee using a loader to dig at the toe of a highwall. The order charged a violation of 30 C.F.R. § 56.3131 because the inspector was concerned that the highwall could fail and injure or kill the equipment operator. (Ex. P-3). In April 1996, MSHA received a complaint from a miner concerning hazardous conditions at the mine. (Ex. P-1). One of the hazards mentioned in the complaint was that the operator was undercutting the wall at the face to remove the gravel. (*Id.* at 2).

In July 1996, MSHA Inspectors Royal Williams and George Renton inspected the mine in response to the complaint. (Tr.212). The inspectors talked to Mr. Helmericks and his employees about mining under the toe of the highwall. Inspector Williams testified that there was an area along the highwall where an overhang existed and that it is his belief that miners were removing material from the toe of the highwall at that location. (Tr. 213). Inspector Williams told Mr. Baier not to dig into the face of the highwall because the highwall could fail and seriously injure or kill him. He advised Mr. Baier that if rock was needed to feed the crusher, material should be pushed down from the top of the highwall and scooped up with the loader. Mr. Baier told the inspector that he had been digging into the toe of the highwall. (Tr. 215). Because neither inspector observed anyone digging into the highwall, no citations were issued.

The facts surrounding Mr. Baier's discharge are seriously disputed by the parties. Mr. Baier testified that he started pushing material down from the top of the highwall with the loader in the weeks that followed the MSHA inspection but that Mr. Helmericks told him not to go on top of the highwall. He further testified that on August 1, 1996, he arrived at work at about 7:00 a.m. He stated that Mr. Helmericks and his son, Jim Helmericks, Jr., ("Jim, Jr.") arrived soon after. Baier stated that Helmericks fired him immediately after he arrived on the property. Baier testified that Helmericks told him that he did not belong at the mine and that he verbally threatened him. Baier testified that he was fired because he insisted on pushing material from the top of the highwall rather than digging at the toe of the highwall. Baier testified that on the Monday before he was terminated, Helmericks observed him pushing material off the top of the highwall and Helmericks "jumped all over me again." (Tr. 33). He stated that Helmericks did not give a reason for his termination and that Durango Gravel did not pay him for his final week and one-half of work.

Mr. Helmericks testified that on the day that Mr. Baier was terminated the crusher was down for repairs. He stated that upon his arrival at the mine, he assigned his two employees, Mr. Baier and Jim, Jr., the task of repairing the crusher. Mr. Helmericks then left the mine to get parts in Farmington, New Mexico. Helmericks testified that when he returned to the mine later that day, Baier was up on the highwall with a loader pushing material down from the top of the highwall. He stated that he terminated Baier for not doing his assigned task, repairing the

crusher. He testified that he did not want Baier up on the highwall because: (1) the crusher needed to be repaired; (2) the mine had enough loose rock to feed the crusher once it was repaired without pushing any more material down; and (3) he believed that pushing material down with a loader was not safe. Helmericks testified that if the mine needed additional loose material to feed the crusher, he would push material down from the top of the highwall using a track-mounted bulldozer. He stated that he did not want any employee other than himself pushing material over the edge of the highwall and that he did not want loaders used for that purpose. Helmericks stated that he did not terminate Baier because he refused to dig into the toe of the highwall, but because he did not follow his direction to assist Jim, Jr., in the repair of the crusher and to not push material from the top of the highwall.

I find that cutting into the highwall at Durango Gravel with a loader is very hazardous. Such a procedure is likely to decrease the stability of the wall. It is highly likely that material will fall from the highwall and injure or kill the loader operator if such a procedure is used.

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).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was 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). 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. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Clay Baier Engage in Protected Activity?

1. Baier's Discussions with MSHA Inspectors

For the reasons set forth below, I find that Mr. Baier engaged in activity that is protected by section 105(c) of the Mine Act when he spoke with MSHA inspectors during their inspection in July 1996. He asked whether he should cut into the toe of the highwall when getting rock to run through the crusher. The record makes it clear that Mr. Helmericks was upset that the inspectors talked to Mr. Baier. Mr. Helmericks was not at the mine at the time of the inspection and he believed that the inspectors should have obtained any information about mining practices from Jim, Jr., who was "in charge" whenever Helmericks was absent from the mine. As I explained at the hearing, MSHA inspectors are authorized to speak with miners during their inspections without the approval of the mine operator. Indeed, inspectors often spend more time talking with miners than with representatives of the operator. Mr. Baier's conversation with the inspectors about safety issues was protected activity.

2. Baier's Refusal to Dig into the Toe of the Highwall

Section 105(c) also protects "a miner's right to refuse to work under conditions that he reasonably and in good faith believes to be hazardous." *John A. Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir 1989)(citations omitted). The "perception of a hazard must be viewed from the miner's perspective at the time of the work refusal." *Id.* Such a work refusal is protected under section 105(c).

It is clear that after discussing the issue with Inspector Williams, Mr. Baier reasonably and in good faith believed that digging material from the toe of the highwall created a significant risk to his safety. Accordingly, if Mr. Baier were ordered or otherwise required to dig material from the highwall and he refused to do so, his refusal would constitute protected activity. I discuss this issue in considerable detail below because this dispute is central to the case.

Mr. Baier testified that he was told by Mr. Helmericks to dig material from the toe of the highwall on many occasions. (Tr. 15-16). He stated that he did not know that this practice was dangerous until the MSHA inspectors told him in July that he should get "product from the top and push it down." (Tr. 17). Mr. Baier testified that whenever he attempted to follow the procedures recommended by the MSHA inspectors, Mr. Helmericks would become angry and say that the inspectors "don't know what they are talking about." (17-19). Baier also testified that Helmericks told him to tell the inspectors that he was pushing material down from the top rather than digging at the toe of the highwall. *Id.*

Baier testified that on August 1, Helmericks cursed at him, said "you don't belong here," and terminated him. (Tr. 22-23). He stated that Helmericks did not give him a reason for the termination. (Tr. 22-24). Baier stated that Helmericks terminated him in the morning after Baier had started all of the equipment in preparation for operations. He testified that the crusher was not down for repairs that morning. Baier stated that on the Monday before his termination, he

was pushing material off the highwall when Helmericks "jumped all over me again." (Tr. 33). Baier believes that on August 1, Helmericks was still angry at him for his refusal to dig into the highwall on the previous Monday. (Tr. 39). He stated that he does not know why Helmericks terminated him three days after his work refusal rather than at the time of the altercation on Monday.

Mr. Helmericks testified that he had instructed loader operators to dig into the highwall in previous years because he "didn't know any better." (Tr. 266). He stated that once he received the citation in 1993, he stopped that practice. *Id.* Helmericks testified that, since that time, he has instructed employees to obtain easily available material. He explained that the highwall itself is hard near the bottom, but that material naturally falls from the top and is deposited near the base of the highwall. (Tr. 265, 325-27). He testified that these deposits are easy to scoop up and that removing them does not endanger the loader operator. (Tr. 264-66). He also testified that he had stripped off the top 10 feet of the highwall in preceding years with a bulldozer. (Tr. 328-29). He stated that in the weeks before Baier's termination, he instructed him to get this "easy, available material" when he needed feed for the crusher. (Tr. 262). Helmericks stated that these deposits are illustrated in the photographs in Exhibits R-8 and J-1. He testified that although these photographs were taken the week before the trial, the conditions at the mine had not changed because mining had not progressed significantly since August 1, 1996. (Tr. 263; 287). Inspector Williams testified that he observed loose material in front of the highwall at the time of his inspection in July 1996. (Tr. 217-18). He also testified that scooping up material along the outer edge of this loose material would not present a hazard. (Tr. 235).

Mr. Helmericks testified that on August 1 the crusher was down because the tail roller "had a bad bearing and the belt had received some damage." (Tr. 249). He stated that he instructed Baier and Jim, Jr., to start repairing the belt and tail roller. Mr. Helmericks testified that he went to Farmington to get parts needed at the mine. When he returned at about 11:00 that morning, Jim, Jr., was working on the crusher, but Baier was on top of the highwall in a loader pushing material off the edge. (Tr. 250-51). Helmericks testified that he drove to the top of the highwall and asked Baier why he was up on the highwall. He stated that Baier replied that the MSHA inspectors told him to mine from the top of the highwall. (Tr. 251-52). Helmericks told Baier that he had previously warned Baier not to go up on the highwall with the loader anymore. *Id.* Helmericks then told Baier that he was fired. An altercation followed concerning pay that Baier claimed was due him.

Helmericks testified that he fired Mr. Baier because he had been assigned to work on the crusher and he had taken it upon himself to push material off the highwall with the loader. (Tr. 266-67). Helmericks further testified that there was no need for Baier to be up on the highwall at that time because the crusher was down and there was plenty of loose material around the pit to feed the crusher once it was repaired in any event. (Tr. 258-59; 264, 283-85, 313). Helmericks testified that he only wanted himself working on top of the highwall because he preferred to use a bulldozer to push down material. (Tr. 264, 267, 313) He stated that when the scoop of a loader is full of material, the balance point is at the front tires. (Tr. 268-69). He further testified that the top of the highwall is angled towards the edge. (Tr. 268-69, 303-04; Ex. J-1). He believes that

pushing or dumping material off the edge of the highwall with the loader at the J & J Pit is dangerous. *Id.*

Mr. Helmericks denies that he terminated Mr. Baier early in the morning of August 1 after Baier had started all of the equipment, including the crusher. He stated that the crusher was out of order that day and that he terminated Baier around 11:00 a.m. for failing to help his son repair the crusher as directed. Helmericks testified that he did not want Baier pushing material from the top of the highwall and Baier believed that Inspector Williams authorized him to do so. (Tr. 274-76, 331-32). The testimony of Jim, Jr., is consistent with Mr. Helmericks' testimony in this regard. (Tr. 375-82, 394-98).

The Secretary takes the position that Mr. Helmericks continued to require Baier to dig into the toe of the highwall to get material for the crusher and that when Baier attempted to get the material by pushing it down from the top, he was terminated from his employment. Baier testified that the mine had no material for the crusher "unless I was digging under the toe." (Tr. 449). Durango Gravel takes the position that the crusher was not operating on the day of his termination and that the mine had plenty of material to feed the crusher without the necessity of digging into the toe or going on top of the highwall. Helmericks testified that he did not fire Baier for refusing to dig into the toe, but for taking it upon himself to push material off the top of the highwall with a loader despite repeated instructions not to do so.

There is evidence in the record to support each party. On the one hand, Baier's testimony is supported by the testimony of William Elvidge. Mr. Elvidge was employed at the J & J Pit for a period of time up to April 1996. (Tr. 164-65). He testified that he was required to dig at the toe of the highwall when he was employed by Durango Gravel because there was not enough material available from the "safe side" to feed the crusher. (Tr. 167). He stated that Mr. Helmericks showed him how to dig at the toe of the highwall. *Id.* Elvidge stated that whenever he asked Mr. Helmericks to push material from the top of the highwall, his response was that he would do it later. (Tr. 168, 181). Mr. Elvidge is the miner who filed the safety complaint with MSHA that prompted the July inspection. (Tr. 169; Ex. P-1).

Baier's testimony is also supported by Mr. Helmericks' attitude towards work refusals related to safety, as exhibited at the hearing. For example, he stated that a miner must always follow the orders of his supervisor and that he "has the opportunity to quit if he feels he has been in danger." (Tr. 79). Although it is well within Mr. Helmericks' right to demand that employees strictly comply with his orders at the pit, he cannot make such demands if a miner raises legitimate safety concerns. While Mr. Helmericks may believe that he should have that right, the Mine Act provides otherwise.

The testimony of Inspector Williams also supports a finding that employees had been required to dig at the toe of the highwall. He stated that, although he did not observe anyone digging at the toe, he believes that miners were cutting into the toe of the highwall at one location. (Tr. 213-14). He reached this conclusion based on the shape of the wall. Mr. Baier told him he had been digging at the toe. (Tr. 215).

On the other hand, Mr. Helmericks' testimony is supported by the testimony of Jim, Jr., and to a lesser extent, the testimony of Inspector Williams and the photographs. Mr. Williams and the photographs indicate that there was a considerable amount of loose, easily available material at the pit. (Tr. 217-18; Exs. J-1, R-8). It is not controverted that the crusher was old and slow and could not process much material at any one time. Thus, this evidence would indicate that it was not necessary for anyone to dig into the toe to get material for the crusher.

Based on my review of the record, I find that miners were cutting into the toe to obtain material for the crusher in the weeks prior to Mr. Baier's termination. I also find that even if Mr. Helmericks did not directly order his employees to obtain material from the toe, he was aware of their actions and did not stop them. The record makes clear that the material at the pit was not all the same and that it was not uncommon to mix loose rock with other material, such as clay-bearing material or sandy material, to obtain feed for the crusher to meet customer specifications. (Tr. 276-78).

With respect to the events that took place on August 1, 1996, I find Mr. Helmericks' testimony to be more credible. After observing Helmericks' conduct during the course of this hearing, I do not believe that he would have fired Mr. Baier in the manner described in Baier's testimony. Instead, Helmericks would have fired Baier at the time he observed Baier using the loader on the highwall. He would not have waited two or three days. Mr. Helmericks is a volatile individual with strong beliefs as to how a pit should be operated. He prides himself on running a tight ship. If he observed Baier using the loader to push material off the highwall, after warning him not to do so, he would not wait three days to take action. Accordingly, I find that it is highly likely that Mr. Baier was using the loader to push material down from the highwall on August 1. The issue of whether Mr. Helmericks had ordered Baier to help Jim, Jr., repair the crusher is discussed in more detail below.

I find that Baier's refusal to dig into the toe of the highwall was protected activity, but that his decision to push material from the top of the highwall was not protected. Baier had the legal right under the Mine Act to refuse to perform an unsafe act, but he did not have the right to take a loader to the top of the highwall to obtain material. A miner cannot refuse to work because of a difference of opinion over the proper way to perform a particular task if the refusal is not safety related. *Sammons v. Mine Service Co.*, 6 FMSHRC 1391, 1398 (June 1984). Mr. Helmericks, as the owner/operator of the J&J Pit, has the right to direct his workforce and decide who is going to do what job. Helmericks decided that he would be the only individual who would push material off the highwall and that he would use a bulldozer. He apparently communicated this information to Baier prior to the incidents that gave rise to this proceeding. Mr. Baier's refusal to follow Helmericks' direction not to go up on the highwall with the loader is not, by itself, protected under the Mine Act.

B. <u>Was Clay Baier's Termination Motivated in any Part by the Protected Activity?</u>

In determining whether a mine operator's adverse action was 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." *Secretary 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). Based on the evidence presented at the hearing, I find that Clay Baier's termination was motivated at least in part by his protected activity.

A mine operator's knowledge of the protected activity is one factor to evaluate when determining whether an adverse action was motivated by protected activity. Mr. Helmericks knew that Clay Baier had discussed safety issues with MSHA inspectors and that the inspectors had advised Mr. Baier not to cut into the highwall with the loader. Mr. Helmericks also knew that when Mr. Baier went to the top of the highwall to push material over the edge of the highwall, he did so on the advice of Inspector Williams. Baier put Helmericks on notice that he did not believe that it was safe to dig at the toe of the highwall.

Another factor is the mine operator's hostility towards the protected activity, often referred to as "animus." It is clear that Mr. Helmericks was extremely hostile towards MSHA in general, as well as Mr. Baier's conversation with Inspector Williams about safety issues at the mine. Mr. Helmericks contends that the inspectors should not have talked with Baier but should have talked only with Jim, Jr. Mr. Helmericks considered Mr. Williams' advice to Mr. Baier to be a direct threat to his supervisory authority. Helmericks did not approve of Baier's discussion of safety issues with MSHA. Helmericks also demonstrated animus towards Baier's actions in response to Mr. Williams' advice.

Finally, the termination of Mr. Baier occurred shortly after the July 1996 MSHA inspection. The termination also occurred immediately after Helmericks observed Baier pushing material off the highwall. While this activity was not protected, as discussed above, it was related to the safety concerns Baier raised with Inspector Williams. This proximity in time is another factor that indicates that the termination was motivated in part by the protected activity.

Based on the above, I find that the Secretary established a *prima facie* case that Mr. Baier engaged in protected activity and that his termination from employment was motivated at least in part by that activity.

C. Durango Gravel's Case

As stated above, a mine operator may rebut the Secretary's *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. I find that Durango Gravel did not rebut the Secretary's case in this manner. The preponderance of the evidence presented at the hearing shows that Mr. Baier engaged in protected activity and that his termination was motivated, at least in part, by that activity. I find that Mr. Helmericks decided to terminate Mr. Baier, in part, because Baier had discussed safety issues with Inspector Williams in July 1996. The record shows that Helmericks resented the fact that Baier raised these issues with the inspector.

The evidence concerning Baier's alleged work refusal merits further analysis. When evaluating a miner's allegation that he refused to perform work because he reasonably and good faith believed that the work was not safe, a judge must consider whether the miner communicated his concerns to the mine operator. "When reasonably possible, a miner refusing to work should ordinarily communicate or at least attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). I find that Baier attempted to communicate his concerns about digging into the highwall to Mr. Helmericks. Whether Helmericks fully understood that Baier traveled to the top of the highwall because of his own personal safety concerns is not entirely clear. Nevertheless, I find that Helmericks understood that Baier would not dig into the highwall because of his safety concerns.

Another consideration is whether, after he learned of Baier's concerns, Helmericks took steps to address the perceived danger. A mine operator has an obligation to explain why the work area is safe or explain that any problems have been corrected. To put it another way, a miner's work refusal is not protected if the operator addresses his safety concerns "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441.

Mr. Helmericks' testimony concerning his prior discussions with Baier about going up on the highwall center around issues of authority. Helmericks testified that Baier told him that he pushed down material from the top of the highwall because Inspector Williams told him to do so to get material for the crusher. (Tr. 274-75). Helmericks testified that Baier was "a little mixed up about who really had authority to give directives at the pit." (Tr. 275). Although Helmericks recognized that Inspector Williams "was responsible for pointing out safety issues," he told Baier that the inspector had no authority to tell Baier to go up on the highwall. *Id.* When Baier repeated what the inspector had told him, Helmericks replied that "you are not going to do it [Inspector Williams' way] because it is unsafe and I told you not to do it." *Id.*

The credible evidence in the record demonstrates that Mr. Helmericks did not attempt to explain that he and Inspector Williams were in agreement that miners should not dig into the toe of the highwall. Helmericks could have easily attempted to allay Baier's fears by explaining that he should not dig into the toe of the highwall and that if more material was needed to feed the crusher he should wait until Helmericks was able to push material down from the highwall using the bulldozer. As stated above, the protected activity was Baier's refusal to dig into the toe of the highwall, not his actions in pushing down material from the top with a loader. Even though there was some loose material around the pit, Baier still reasonably believed that he was required to dig into the highwall to get material.[1] Helmericks did not allay his fears by explaining to Baier that he

[1] It was also reasonable for Baier to be concerned about digging into loose material that was immediately adjacent to the base of the highwall. Removing such material may weaken a highwall, especially if the material has been present for a considerable length of time. In addition, a loader operator could inadvertently cut into the highwall while trying to remove such material.

would no longer be required to do that. Instead, he treated Baier's actions as a threat to his supervisory authority.

Thus, Helmericks was angry that Baier continued to follow the inspector's advice, but Helmericks did not attempt to tell Baier why the hazard did not exist or how it would be eliminated. I find that the evidence demonstrates that the actions Baier took in response to his safety concerns were a factor in Mr. Helmericks decision to terminate Mr. Baier.

If the mine operator cannot directly rebut the Secretary's case, 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. This issue requires further analysis.

The Commission described this defense in *Pasula*, as follows.

> The employer may affirmatively defend ... by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he *would* have taken adverse action against the miner in any event for the unprotected activities alone.... It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event.

2 FMSHRC at 2799-800 (emphasis in original). In *Bradley v. Belva Coal Co.*, the Commission further refined this analysis, as follows:

> Ordinarily, an operator can attempt to demonstrate [that it would have terminated the miner for the unprotected activity alone] by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC 982, 993 (June 1982). *See also Chacon*, 3 FMSHRC at 2516-17.

Durango Gravel bears the burden of proof on this issue. Mr. Helmericks proceeded in this case without the benefit of counsel. Accordingly, I granted Durango Gravel wide latitude in presenting evidence at the hearing and attempted to provide as much guidance to Mr. Helmericks as I reasonably could about the legal issues involved and the evidence he would need to present to defend against a discrimination complaint. For the reasons set forth below, I find that he did not establish that he would have terminated Mr. Baier for his unprotected activities alone.

As stated above, Mr. Baier's actions in taking it upon himself to push material down from the top of the highwall with a loader were not protected. Mr. Helmericks was also motivated to terminate Mr. Baier because of this unprotected activity. I find that Mr. Helmericks did not establish that he would have terminated Baier for these actions alone. For purposes of this discussion, I assume that the events that took place on August 1, 1996, were as Mr. Helmericks described. That is, Helmericks terminated Baier after he returned from Farmington and observed Baier pushing material from the top of the highwall rather than repairing the crusher as he had instructed.

I find that Baier's actions were directly related to his refusal to dig into the highwall. The only reason presented in the record for Baier's decision to push material off the highwall was to avoid having to dig into the highwall. He took these actions because of advice he received from Inspector Williams. Although this "self-help" measure was not protected, it arose out of Baier's safety concerns and, as discussed above, Helmericks did little to attempt to allay Baier's fear that he could be seriously injured while working under the highwall. Thus, if Baier were terminated solely for being up on the highwall, the termination was too closely related to his protected work refusal, given that Mr. Helmericks did not reasonably allay his fears, to conclude that such a termination was for his unprotected activity alone.

More importantly, I believe that the evidence establishes that Helmericks' animosity towards MSHA played a significant role in his decision. If Baier had not raised safety issues with MSHA during their July inspection and Williams had not provided guidance to Baier concerning how to safely mine the highwall, it is unlikely that Helmericks would have terminated Baier for being up on the highwall on August 1. It is more likely that Helmericks would simply have chewed him out. As stated above, Helmericks saw Baier's actions in conjunction with Inspector Williams' July inspection as a direct threat to his supervisory authority. Durango Gravel did not establish that it would have terminated Baier for being on top of the highwall on August 1 if his activities did not spring from his safety complaints to MSHA.

At the hearing, Durango Gravel presented evidence that it terminated Mr. Baier for a number of other reasons related to his work performance. For example, Mr. Helmericks testified that Baier was an unsafe equipment operator. Helmericks pointed to the fact that Baier damaged a loader when he backed into the stacker. (Tr. 27, 267). This accident occurred about 10 days prior to his termination. (Tr. 312). There is conflicting testimony as to whether Helmericks was concerned about the accident at the time. The evidence establishes that there was no left side mirror on the loader at the time of the accident. (Tr.28). Mr. Helmericks also stated that Baier

damaged his welding trailer with the loader on another occasion. Mr. Helmericks did not terminate Baier at the time of either of these accidents.

Mr. Helmericks also testified that Baier did not respect his authority or his property at the pit. Helmericks referred to a number of instances in which Baier was openly disrespectful towards him and caused damage to his property. For example, on one occasion Baier taunted Helmericks in front of Sharon Helmericks, his wife, by stating that she was cute and would leave him someday. (Tr. 160-62, 246-47). Helmericks referred to a number of instances where Baier caused damage to property, such as when his dog wrecked a welder while chasing a chipmunk. (Tr. 134-35). Helmericks testified that he had previously warned Baier not to bring his dog to the pit. Until Baier raised safety concerns following MSHA's inspection, however, none of the alleged insubordinate and disrespectful actions Helmericks refers to caused him to terminate Baier's employment with Durango Gravel.

Durango Gravel spent a significant time at the hearing attempting to discredit the testimony of Mr. Baier and his witnesses. Much of this effort was devoted to calling Baier and his witnesses liars and criminals. Name-calling does not establish the truth of the allegation. Throughout this proceeding, Mr. Helmericks sought to introduce evidence of Baier's alleged criminal activity. In evaluating this issue, I relied upon Rule 609 of the Federal Rules of Evidence. That rule provides that evidence that a witness was convicted of a crime shall be admitted if the crime was punishable by imprisonment in excess of one year, if the crime involved dishonesty or false statement, or if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Baier admitted that he was convicted of a misdemeanor charge in Arizona in 1986 or 1987. (Tr. 454). He paid a monetary penalty but was not incarcerated. I find that this conviction does not relate to Baier's veracity at the hearing.[2]

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[2] At the hearing and in its brief, Durango Gravel raised issues as to the honesty and integrity of Kristi Floyd, counsel for the Secretary. Mr. Helmericks believes that Ms. Floyd participated in a conspiracy to withhold information about Mr. Baier's criminal activity and dishonest actions. (Tr. 350-52, 453-54). He stated that he intends to take steps to have her disbarred. In his brief, Mr. Helmericks referred to Ms. Floyd as a "bully." (D.Gr. Br. 6). During discovery, Mr. Helmericks sought information from the Secretary about Baier's criminal record and employment history. After reviewing the record, I find that there is no evidence that Ms. Floyd engaged in any unethical conduct in this case or that she attempted to withhold evidence or information from Mr. Helmericks.

As to the criminal record, Ms. Floyd represented in answers to discovery that Baier did not have a felony conviction. In a supplemental response, Ms. Floyd stated that Baier had never been in prison and did not have a criminal record. At the hearing, Ms. Floyd represented that she had no knowledge of the misdemeanor conviction until the day before the hearing. Once she learned about it, she provided such information to the judge. When Mr. Helmericks continued to raise questions about it, she voluntarily revealed it in open court. I determined that information about this conviction would not be admissible under Rule 609.

(continued...)

Mr. Helmericks also maintains that Baier stole tools owned by him. The record reveals that the tools were in the trunk of Baier's car on the day he was terminated. They had been put in his car by Jim, Jr., because he often car pooled to work with Baier. Jim, Jr., forgot that they were in the car on the day of Baier's termination. Baier sought to keep the tools until Helmericks paid him the wages he believed he was owed for his last week and one-half of work. I find that Baier did not steal Helmericks' tools and his action in using the tools as leverage to get his final pay check does not show that his testimony is not credible.

Helmericks also attempted to show that Baier's testimony was not credible because of discrepancies in his time cards. Each employee was responsible for reporting the number of hours he worked every day to Mr. Helmericks. After Baier was terminated, Helmericks discovered that Baier reported more hours worked than Jim, Jr., on days that they car pooled to work. It must be noted that Helmericks did not discover this fact until after Baier was terminated and it could not have been a reason for his termination. Such false reporting of time can be the basis for the termination of an employee and does bear on a witness's credibility. I have taken Mr. Helmericks' testimony into consideration in assessing credibility in this case.

Finally, Mr. Helmericks also contends that the testimony of Baier and his witnesses contained numerous conflicts and contradictions. I have reviewed their testimony and cannot find any significant contradictions. Mr. Baier's testimony is also reasonably consistent with his interview with the MSHA special investigator taken on August 26, 1996. More importantly, for purposes of analyzing whether Durango Gravel would have terminated Baier for his unprotected conduct alone, I accepted Mr. Helmericks description of the essential facts that transpired in the week before Baier's termination.

In conclusion, I find that the Secretary established a *prima facie* case of discrimination and Durango Gravel did not rebut the Secretary's case by showing that it did not fire Baier for his protected activity or showing that it would have terminated for his unprotected activity alone. The Secretary seeks the following remedy: (1) Mr. Baier's pay for the week and three days that he worked for Durango Gravel but was not paid, that is, any time he worked July 21 through July 31, 1996; (2) two weeks of back pay; and (3) a civil penalty of $2,500. Durango Gravel contends that it does not owe Mr. Baier any back pay because he caused extensive damage to equipment at the pit. It seeks to offset any back pay award with the cost of repairing damaged equipment. As stated above, Durango Gravel did not establish that it would have terminated Baier for damaging equipment at the mine. The evidence shows that Baier damaged the door of the loader when he

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[2](...continued)

The record reveals that Baier was employed by a large number of companies prior to his employment by Durango Gravel. Baier worked for some of these employers for only a few weeks. In her response to interrogatories and her supplemental response, Ms. Floyd provided a list of his prior employers. At the hearing, Baier revealed that he worked for a few employers that were not provided on Ms. Floyd's lists. He stated that he had forgotten about them. I credit his testimony in this regard.

struck the stacker, but that it was accidental. Mr. Helmericks did not require Baier to pay for the damage at the time of the accident. Durango Gravel did not repair the damage until the week before the trial in this case. Accordingly, I hold that Durango Gravel is not entitled to withhold the cost of repairing equipment from any back pay award under the Mine Act.

III. ORDER

Counsel for the Secretary is ordered to file a brief, on or before, February 16, 1998, setting forth the amount of back pay she contends Durango Gravel owes Mr. Baier. The brief shall include any supporting documentation. The brief shall show the calculations the Secretary used to arrive at a the proposed back pay award. For the period prior to Baier's termination, the brief shall show the hours of work on a daily basis. The Secretary's brief shall also address each of the criteria under section 110(i) of the Mine Act and cite evidence in the record to support her proposed penalty in this case.

Durango Gravel shall have ten days after it receives the Secretary's brief to file a response. In the response, Durango Gravel shall cite evidence to refute the Secretary's calculation of back pay and civil penalty. This decision is not final until I enter a final order awarding a specific amount of back pay and assess an appropriate civil penalty.

Richard W. Manning
Administrative Law Judge

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RWM