FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 27, 2000

SECRETARY OF LABOR, MSHA on behalf of MARK L. POLLOCK, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 99-169-DM
v.	:	
KENNECOTT BARNEY'S CANYON MINING COMPANY, Respondent	:	Barney's Canyon Mine MSHA Id. No. 42-02040
SECRETARY OF LABOR, MSHA on behalf of TONY M. LOPEZ, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 99-170-DM
v.	:	
KENNECOTT BARNEY'S CANYON MINING COMPANY, Respondent	:	Barney's Canyon Mine MSHA Id. No. 42-02040

DECISION

Appearances: Mark W. Nelson, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainants;
Laura E. Beverage, Esq., and Karen L. Johnston, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on complaints of discrimination brought by the Secretary of Labor on behalf of Mark L. Pollock and Tony M. Lopez against Kennecott Barney's Canyon Mining Company ("Kennecott") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). A hearing in the cases was held in Salt Lake City, Utah. The parties presented testimony and documentary evidence and filed post-hearing briefs.

Mr. Pollock filed three complaints of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") and Mr. Lopez filed one complaint. MSHA investigated the complaints, determined that Kennecott violated the provisions of section 105(c)(1) as alleged in each complaint, and filed these discrimination cases.

I. FINDINGS OF FACT

Barney's Canyon Mine is a surface gold mine in Salt Lake County, Utah. Several unions represent the employees at the mine under one collective bargaining agreement. Messrs. Pollock and Lopez acted as miners' representatives under the Mine Act at the Barney's Canyon Mine. Mr. Lopez has been a miners' representative since 1990, but his role as a miners' representative diminished over time. He was chairman of the local steelworkers union and was on the grievance committee. Mr. Pollock began representing miners in about 1995 and he was quite active in that role at the time of the events in this case. Between May 20 and June 14, 1998, five hazard complaints were filed with MSHA by miners at the Barney's Canyon Mine. Mr. Pollock was directly responsible for filing two of the complaints while Mr. Lopez filed one of the complaints.

At all pertinent times, Mr. Pollock was an ore-control technician on the day shift . He was required to perform various duties that sequentially take place at the mine. As an ore-control technician, Pollock marked the exact locations on benches for the drilling crew to drill holes that would subsequently be filled with explosives. This task is referred to as "marking pattern." After the holes are drilled, he tags and collects samples of cuttings that are placed in bags by the drilling crew. He delivers the bags to the assay laboratory at the mine. Next, he "flags the holes," using numbered flags that correspond with the bags of drill cuttings. The assay lab identifies the samples as ore or waste and plots this information on a computer map. The mine's surveyor performs a survey of the area using a GPS pack and the computer map. With the assistance of an ore technician or another person, he marks the areas containing ore with green lath so that the mining crew knows which areas contain gold ore and which areas are waste. Painted stakes and lath are used to mark the outside boundary of the ore-containing material. Because of the nature of his work, Pollock travels around the mine in a company pickup and frequently works independently. At all relevant times, Kennecott was mining in an area of the mine known as the Melco pit, which is about a 20- to 30-minute round trip drive from the assay lab. Mr. Lopez was an ore technician until 1996. In the summer of 1996, he became a driller on the swing shift.

A. Mr. Lopez's Discrimination Complaint

On July 10, 1998, Mr. Lopez was assigned to operate Drill No. 102 (the "drill"). During his preshift inspection, he noted that the side window on the drill was broken. He previously reported that this window was broken during the week of June 29, 1998. Mr. Lopez's supervisor, Gil Valdez, told Lopez that the window would be fixed. When Lopez pointed out the broken window to Valdez on July 10, Valdez told Lopez to get to work. Valdez also told Lopez that he would be sent home if he did not operate the drill. Lopez believed that the condition of the glass was caused by the hydraulic hoses of the drill banging against the window and that he

was worried the he could get glass in his eyes. The window apparently had been replaced the week before but the hydraulic lines broke it again. Mr. Lopez contacted Kennecott safety representatives Brian Regan and Steve Lackey. After examining the window, Mr. Regan concluded that no safety hazard was created by the condition of the glass. Regan noted that the safety glass was cracked, not broken, and asked Lopez if he could finish his shift and the drill would be fixed in accordance with the mine's preventive maintenance program.

Lopez also contacted Ray Gottling, Operations Manager. When Gottling arrived at the drill, he determined that no safety hazard existed. Nevertheless, he shut down the drill because Lopez seemed so upset about it. Mr. Gottling testified that he was not aware that Mr. Lopez was concerned about hydraulic hoses hitting the window. (Tr. 1340). Lopez also complained about hydraulic fluid on the walking surfaces of the truck. After the drill was shut down, Valdez ordered him to clean the walking surfaces of the truck with a steam cleaner. Lopez testified that Valdez told him that he "wasn't through" with him and that he would "get even." (Tr. 392). Mr. Lopez asked another employee to telephone MSHA to complain about the hazardous condition. An MSHA inspector subsequently inspected the drill, but he did not issue any citations. The window had been replaced by the time he arrived.

The next day, Mr. Pollock and Tom Withers, an equipment operator, were doing reclamation work. Mr. Valdez drove up and asked Mr. Pollock why he is always getting him in trouble with Mr. Gottling.[1] (Tr. 69). Pollock testified that he told Valdez that if he did things safely, he would not be in trouble so much. Mr. Withers then asked Valdez how he likes Lopez and Pollock getting him in trouble by going over his head. Valdez responded, "I'll get even." (Tr. 69, 275.) Both Pollock and Withers believed that Valdez's threat was serious.

A few days later, Mr. Lopez went on a previously scheduled vacation. When he returned, Lopez was charged with a failure to meet Kennecott's mandatory drilling quota. Following a disciplinary hearing, a disciplinary letter was placed in his file for this offense. (Ex. R-1). On September 13, 1998, Mr. Lopez filed his discrimination complaint with MSHA. He alleges that this discipline was taken against him in retaliation for his safety complaint.

The disciplinary letter was signed by Valdez and states that Lopez failed to meet the company's drilling standards during March, May, and June 1998. *Id.* It further states that if Lopez failed to meet these standards in any month before March 1999, another disciplinary hearing would be held. Lopez contends that he should not have been disciplined at all or that, at most, he should have received an oral warning. (Tr. 463). He believes that if he had not made the safety complaint described above, he would have received an oral warning. By filing this action, Lopez is seeking to have the letter removed from his personnel file along with records of all other disciplinary actions taken against him by Mr. Valdez.

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[1] For example, during the Week of July 7, Pollock reported to Gottling that Valdez's crew was drilling on a catch bench. The catch bench was not supposed to be drilled or blasted. Valdez was the drilling supervisor and he admitted to Gottling that it was a mistake.

B. Mr. Pollock's First Discrimination Complaint

On July 14, 1998, Mr. Pollock filed a safety complaint with MSHA because of his belief that the drill still presented a safety hazard. (Tr. 63; Ex. C-5). He was especially concerned that the Murphy switch on the drill was broken with the result that the drill operator would not know if the compressor engine "was going to explode." (Tr. 64). The Murphy switch apparently indicates the temperature of the compressor oil. The complaint also states that the window was broken again. When MSHA investigated this complaint, it determined that the conditions did not present a hazard. MSHA determined that the defective Murphy switch merely posed a risk to the equipment, but that no miners would be injured if the compressor engine overheated.

On July 15, Gerald Slothower, the engineer and short-range planner, approached Pollock to tell him that "people in admin were a little upset with [Pollock] for calling MSHA." (Tr. 80). Mr. Slothower indicated that he believed that Pollock's concerns were not unreasonable. Slothower was Pollock's supervisor.

Mr. Pollock talked to Laurie Priano, Human Resources Manager, about this alleged harassment, but she did not believe that he was being harassed. Pollock filed his first discrimination complaint with MSHA on August 31, 1998 (MSHA No. RM MD 98-14). The complaint alleges that as a result of the five complaints filed with MSHA, including the complaints about the drill, he was continually harassed by mine management, especially Messrs. Valdez and J. Ed. Switzer, the chief mining engineer.

C. Mr. Pollock's Second Discrimination Complaint

In November 1998, Pollock assisted another Kennecott employee file a complaint with MSHA. (Ex C-14). On Sunday, December 6, 1998, Pollock entered a break room to eat his lunch. The television used for training videos was on and was tuned to an NFL football game. Pollock did not turn off the television and watched the game as he was eating. Mr. Gottling walked through the room when Pollock was present but Gottling did not say anything.

On December 7, 1998, Pollock was called to a disciplinary hearing for violating Kennecott's general code of conduct because he was watching television. At the conclusion of the hearing, Pollock was advised that he would be given a written warning for the misuse of company property. (Ex. C-18).

On December 8, 1998, Mine Superintendent Leonard Wolff told Pollock to report to the administration building. MSHA arrived at the mine to begin a regular inspection and Pollock was one of the miners' representatives. Wolff told Pollock that he was to accompany the inspectors during that portion of the inspection involving the surface mine areas. After the opening conference, Mr. Slothower asked Pollock to come into his office. Slothower handed Pollock the written warning. Pollock asked why he was being disciplined for such a minor offense. Slothower said that he was being issued a written warning because of "his abrasive attitude

toward management personnel." (Tr. 102). Pollock testified that he was amazed by Slothower's statement. He responded by saying: "Well, if I have such an abrasive attitude, it's going to be a tough [MSHA] inspection for me to be around management personnel for the next two or three days." *Id.* Pollock testified that this was meant as a smart aleck comment that he would have a tough time being constantly around management employees during the inspection. Slothower interpreted the conversation differently and believed that Pollock was attempting to intimidate him into reducing the discipline for the television incident.

Mr. Slothower also asked Pollock if he was responsible for the MSHA inspection. Pollock replied that he did not call MSHA and that it was a regular MSHA inspection. Mr. Pollock left the building and while traveling around the mine that afternoon, he advised various people to get the mine in shape for the inspection. For example, Curtis Sanchez was an acting supervisor that week and was worried about the MSHA inspection. (Tr. 289). Pollock told him to make sure that equipment operators do thorough preshift examinations and to check the portable toilets to make sure they are upright and clean. Pollock also examined a highwall with another supervisor.

On December 9, Pollock arrived at the mine to accompany the MSHA inspection team as a walk-around representative. Slothower approached Pollock and told him that he was being suspended for making threats against Kennecott during his conversation with him the previous day. Pollock was escorted from the mine property and was unable to act as a miners' representative during the inspection. Another miners' representative accompanied the inspectors and no citations were issued during the inspection.

One of the reasons that Kennecott's managers decided to suspend Pollock was because they believed that he was going to try to create violative conditions that would be cited by MSHA. They based that belief on Pollock's statement to Slothower that it was going to be a "tough inspection" with him around. Thus, Kennecott believed that he might engage in deliberate sabotage. As discussed above, Pollock did not try to create violations after his conversation with Slothower on December 8 but worked to try to eliminate potential violations.

A disciplinary hearing was held on December 12. Pollock contends that he was not permitted to call all of the witnesses that he wanted to call. A meeting was held on December 13 where Pollock was advised that Kennecott was dropping the charge that he threatened to create violations of safety standards. He was charged with insubordination for making threats to management. His suspension was reduced to one day. (Tr. 115). He was also required to write a letter of apology to Mr. Slothower. (Tr. 118; Ex. C-23). A written warning was placed in Pollock's file describing the reasons for Kennecott's disciplinary action. (Ex. C-25). Pollock filed grievances for the written warnings and his suspension.

On December 21, 1998, Mr. Pollock filed his second discrimination complaint with MSHA (MSHA No. RM MD 99-02). This complaint alleges that the disciplinary actions that were taken against him between December 6 and 13 were a direct result of his protected safety

activities. In the complaint he stated that management "will stop at nothing to harass and discriminate against miners' representatives [whom] they view as a threat." (Ex. C-15).

D. Mr. Pollock's Third Discrimination Complaint

On April 20, 1999, Robert Jones, the surveyor, asked Pollock to help him flag and stake ore in the Melco pit. Pollock told Jones that Jones was required to ask someone from the overtime board to help him. The job of assisting Jones flag and stake ore would have taken about 20-30 minutes. Jones complained to Slothower who then ordered Pollock to report to the pit at 11:00 a.m. Pollock reported to the area but remained in his pickup. April 20 was a rainy day and Pollock passed by the building containing his locker where he stored his rain gear several times that morning. He did not stop to put his rain gear in his truck.

When Jones arrived at the pit, he parked his truck within 150 feet of Pollock's truck. Jones tried to contact Pollock by radio but Pollock did not respond. Jones got out of his truck and began working. He painted the lathing needed to stake ore. Pollock did not attempt to assist him. Cory Withers, the drill and blast supervisor, [2] drove by and asked Jones for his assistance. Jones left for a few minutes to assist Withers. When he returned to the pit, he again radioed Pollock but got no response. Jones then walked over to Pollock's truck and knocked on his window. Jones was wearing his rain gear and had his GPS pack on his back. When Pollock opened his window, Jones told him he was ready. As Jones walked toward the area to be surveyed, he turned back and saw Pollock driving away. Unknown to Jones, Pollock called Slothower to ask if he could get his rain gear. It would have taken Pollock about 30 minutes to get his rain gear and return to the pit.

Pollock never helped Jones stake the ore. By the time Pollock got back to the pit with his rain gear, the GPS system was no longer functioning. Slothower ordered Pollock to mark pattern instead. Jones staked the ore himself later that afternoon when the GPS system was working. Pollock was scheduled to be at a grievance hearing at 1 p.m. that afternoon and did not assist Jones. Thus, Pollock sat in his truck at the pit from about 10:55 am to about 11:30 a.m. without providing any assistance to Jones. Soon after Jones knocked on Pollock's truck window, Pollock left the area to get his rain gear. Pollock did not mark any pattern that afternoon until after the hearing.[3]

Kennecott management was upset at Pollock's conduct and conducted an investigation. At about 11:30 a.m. on April 21, a disciplinary hearing was held concerning this matter. Pollock

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[2] Cory Withers, who is not related to Tom Withers, replaced Mr. Valdez in this position. Mr. Valdez died in an auto accident in January 1999.

[3] The testimony of Pollock and Jones differed somewhat concerning the events that morning. I credit the testimony of Jones in all respects. Jones was one of the Secretary's most credible witnesses.

was charged with the failure to perform a reasonable job assignment and with insubordination.[4] At the conclusion of the hearing, Pollock was sent home and paid for the rest of his shift. Pollock wanted to call a number of witnesses to the hearing, but this request was denied. These witnesses were to be called in response to the radio charge which was dropped.

There was a considerable delay before Pollock was notified of the nature of his discipline. Kennecott management received permission for an extension of time from a union representative. Pollock was informed by this representative that the company was thinking about terminating him from his employment.

On May 3, Pollock was presented with a "Last Chance Agreement." Under this agreement, Pollock would remain an employee but he would, in essence, be on probation. (Ex. G-29). He would also be required to withdraw all pending complaints that he filed under section 105(c) of the Mine Act. In exchange for this agreement, Pollock's suspension would be reduced to three days. Pollock refused to sign the agreement and there were extensive negotiations between the company, union officials, and Pollock. (Exs. G-30-31).

When these negotiations broke down, Kennecott reduced Pollock's termination to an eight-day suspension with a final warning that future violations of the mine's general code of conduct will result in termination from employment. (Ex. 32). The warning was issued because of Pollock's "argumentative and combative behavior and failure to complete ... work assignments." *Id.* Pollock was instructed to return to work on May 9. In the meantime, Pollock filed his third complaint of discrimination with MSHA on May 4, 1999 (MSHA No. RM MD 99-09). (Ex. G-26). In the complaint, Pollock alleges that Kennecott terminated him for not signing the last chance agreement. Pollock remains employed by Kennecott.

II. DISCUSSION WITH FINDINGS OF FACT 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).

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[4] Pollock was also charged with failure to respond to radio calls, but that charge was dropped.

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).

There is no dispute that Messrs. Lopez and Pollock engaged in protected activity. The issue is whether the adverse actions taken were motivated by that protected activity. 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). Some of the circumstantial indicia of discriminatory intent include (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action.

A. Mr. Lopez's Discrimination Complaint

Valdez gave Lopez a disciplinary letter for failure to meet Kennecott's mandatory drilling quota during March, May, and June 1998. The Secretary contends that this letter was issued in violation of the company's progressive discipline policy. She argues that, at most, Lopez should have received a verbal warning for this violation. She notes that when other employees failed to meet the performance standards, no discipline was given. The Secretary also points to the threats made by Valdez to establish a discriminatory motive. She argues that when Lopez attempted to discuss Valdez's threats with Ms. Priano, he was rebuffed and, thus, had no choice but to file his discrimination complaint. Lopez was concerned that if he raised other safety issues, he would face even stronger discipline.

Kennecott contends that its managers recognized that Lopez had the right to shut down the drill and, at the conclusion of its investigation, it allowed Lopez to do so despite the fact that no safety hazard was actually present. Lopez contacted MSHA after the drill had been shut down. Kennecott questions the accuracy of Lopez's description of Valdez's comments to him. Lopez did not tell Kennecott managers and safety representatives that he had been threatened by

Valdez. Ms. Priano testified that she did not hear of these alleged threats from Lopez, but learned about them during the course of a grievance hearing involving Mr. Pollock.

Kennecott argues that Lopez did not suffer any adverse action as a result of Valdez's alleged threats. First, the Secretary failed to establish that the threats were actually made or that he reported the threats to anyone in management. In his statement to MSHA, Valdez denied making any threats to Lopez. (Ex. R-23). Valdez also stated that he was joking around when he told Pollock and Withers that he would "get even." *Id.* Even if the threats were made, Kennecott maintains that an unrealized threat cannot constitute adverse action under the Mine Action.

Kennecott contends that the Secretary did not establish a nexus between the protected activity and any adverse action. The company has an excellent record with respect to safety issues and it does not take adverse action against employees who raise safety issues. Lopez's discipline was motivated solely by his failure to meet the company's drilling standards. The standards, which set forth how many holes each driller must complete on a monthly average, were provided to drillers in February 1998. (Ex. R-28). Lopez failed to meet the standard for three out of four months. In essence, Lopez was placed on probation because of his failure to meet the standards.

Kennecott argues that the Secretary also failed to establish disparate treatment. The Secretary did not establish that Lopez was treated more harshly than those similarly situated. Kennecott states that the Secretary did not identify any similarly situated employee who was treated better than Lopez. Lopez was the only employee who missed the standards for three months and, as a consequence, he was issued the warning letter.

I find that the Secretary established that adverse action was taken against Lopez. I credit the testimony of Lopez and Tom Withers that Valdez made threats against Lopez. Although Valdez could not testify to counter Lopez's testimony, I note that Lopez's testimony is consistent with the testimony of Pollock and Tom Withers on this issue. The fact that Lopez did not immediately report these threats is not surprising because Valdez was his immediate supervisor. He wanted the window on the drill fixed. Raising issues about threats would not have helped resolve the safety issue. If Valdez denied making the threats to upper management, it would put Lopez in a very difficult position.

I reject Kennecott's argument that since the threat was never carried out, it cannot constitute adverse action. First, as discussed below, I find that the threat was carried out. In addition, even if it were not, such threats on the part of a front line supervisor would have a chilling effect on the right of miners to raise safety issues. No miner is going to raise a safety issue if his supervisor tells him or other employees that he will "get even."

I find that the Secretary established that Lopez's discipline was motivated, at least in part, by his protected activity. As stated above, direct evidence of motivation is rarely encountered. In this case, however, I find that there is a direct link between the protected activity and the adverse

action. Mr. Valdez expressed his hostility to the protected activity and he is the person who issued the disciplinary letter. He had knowledge of the protected activity; he displayed hostility towards the protected activity; and the adverse action was taken in a matter of days after the protected activity occurred.

Valdez based the discipline on Lopez's failure to meet the production standards for drillers. The letter he issued stated that if Lopez failed to meet any of the required drilling standards for a nine-month period he could be discharged. (Ex. R-1). This was the first time that Lopez failed to meet production standards at the mine. (Tr. 1438). He felt that if he made any mistake, even a minor one, he would face discharge. Although Valdez had warned the drilling crew that some crew members were not meeting the drilling quotas, Mr. Lopez had not received a verbal warning specifically directed at his performance. (Tr. 1444). Mr. Lopez met all of the company's other requirements during these months.

Kennecott articulated a legitimate business justification for disciplining Lopez. He did not drill a sufficient number of holes during three months. The memo from Gil Valdez, dated February 24, 1998, that set forth the new drilling standards, provided that "should a driller fail to make the standard three (3) times in any rolling 12-month period, the driller will be considered for disqualification." (Ex. R-28). The Secretary argues that the discipline was too harsh to be solely motivated by the company's stated justification and that Lopez's protected activity played a part.

I agree with the Secretary that Lopez's protected activities were considered when it was determined that a written warning would be issued. Mixed motive cases are difficult to resolve because "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." *Chacon*, 3 FMSHRC 2516. In this case, the issue is whether Kennecott would have issued the warning letter for his unprotected activities alone. I find that Kennecott would not have issued the letter had Lopez not engaged in protected activity. I reach this conclusion based on Valdez's hostility to the protected activity and the coincidence in time. Although I cannot speculate what discipline he would have received if he had not engaged in protected activity, I find that Mr. Valdez was motivated, in part, by the protected activity when he issued the disciplinary letter. This violation was serious and Kennecott's negligence was moderate. A penalty of $1,000 is appropriate.

B. Mr. Pollock's First Discrimination Complaint

Mr. Pollock engaged in protected activity by filing safety complaints with MSHA. He did not receive any discipline for the protected activity set forth in his first complaint of discrimination. In the Secretary's complaint of discrimination filed with the Commission, the Secretary alleges that Pollock "was and continues to be threatened, harassed, and intimidated" by Kennecott for exercising his rights under the Mine Act. The Secretary seeks an order directing Kennecott to "cease and desist from threatening, harassing, or intimidating Mr. Pollock" for his protected activity.

The alleged threats and intimidation came from Mr. Valdez and Mr. Switzer. Valdez's threats are discussed above in conjunction with Mr. Lopez's discrimination complaint. For the same reasons discussed above, I find that Mr. Valdez made threats against Mr. Pollock as a result of Pollock's protected activity.

The alleged harassment by Mr. Switzer is described by the Secretary as "yelling at Pollock over benign work performance issues." (S. Br. 7). As proof of discriminatory animus, Pollock states that Switzer asked Slothower in July 1998 whether Pollock had enough work "to keep [him] busy to keep him from calling MSHA all the time." (Tr. 81). Pollock believes that Mr. Switzer continually harassed him after he made complaints to MSHA.

One of the incidents relied upon by the Secretary occurred in August 1998, when Switzer was filling in as Pollock's supervisor in place of Slothower. Pollock testified that Switzer wanted Pollock to mark more pattern than Slothower usually required. When Pollock questioned the need to mark more pattern, Switzer yelled at him for arguing with him about it. (Tr. 84-85). Switzer testified that he asked Pollock three times to mark pattern in a certain area and he refused to do it. (Tr. 1010-11). At a subsequent meeting during which the duties of ore technicians were discussed, Switzer explained to Pollock that he needed to mark as much pattern as possible so that Kennecott can get the results back from the assay lab as quickly as possible after the holes are drilled. (Tr. 1015). He explained that marking more holes gives the drilling crew flexibility as to where they can drill on a particular shift. At this meeting, Pollock complained about his job duties, argued with management about these duties, and argued about the need to mark additional pattern. (Tr. 1016).

Another incident relied upon by Pollock concerned overtime pay. Mr. Jones was authorized to work overtime in August 1998 doing some reclamation work. When Pollock found out about this he complained to Switzer about this overtime and asked why he could not work overtime. (Tr. 1021). Switzer responded in a heated manner that he determined who works overtime not Pollock. Switzer canceled Jones's overtime.

I find that the Secretary did not establish any connection between Switzer's alleged "harassment" of Pollock and Pollock's discrimination complaints. First, both Slothower and Switzer denied that Switzer made the statement to keep Pollock busy to keep him from filing complaints. I credit their testimony in this regard. Second, Switzer's relationship with Pollock was always strained especially after Pollock was suspended by Switzer in 1996. Pollock refused to pick up and deliver sample bags to the assay lab in July 1996 because he believed that some of the bags were heavier than normal. (Tr. 1000-02). When Pollock was told that someone else would pick them up, Pollock refused to tag the samples. Switzer met with Pollock later that day to discuss the matter. Pollock came into Switzer's office "very agitated," he was "yelling and screaming," and he was very "irate." Pollock received a three-day suspension which was upheld by the labor arbitrator. (Ex. R-21).

The conflict between these two men in August 1998 also concerned whether Pollock refused to complete a work assignment and this conflict does not demonstrate animus towards protected activity. Switzer was Slothower's supervisor and Switzer believed that the ore technicians were not marking sufficient pattern. He resented Pollock's argumentative attitude about the issue. He believed that Pollock was refusing to carry out a reasonable job assignment.

I find that the evidence of record establishes that Switzer believed that Pollock exhibited disregard for management directives and that he displayed an aggressive attitude when given job assignments that he did not like or disagreed with. I find that any hostility Switzer exhibited towards Pollock was a result of the unprotected activity discussed above and that Pollock's protected activity played no part in Switzer's relationship with or attitude towards Pollock. Even assuming that Switzer was also motivated, in part, by Pollock's protected activity when he allegedly harassed Pollock, I find that Switzer would have treated Pollock in the same manner for the unprotected activity alone.

As a consequence, only the threats made by Mr. Valdez support Mr. Pollock's first discrimination complaint. I reject the other allegations contained in Pollock's first complaint of discrimination filed with MSHA. This violation was moderately serious and Kennecott's negligence was moderate. A penalty of $500 is appropriate.

C. Mr. Pollock's Second Discrimination Complaint

The Secretary contends that "Kennecott's removal of Pollock from the mine on December 9, 1998, was a direct result of Kennecott's concern about Pollock fulfilling his role as a pro-active miners' representative during the course of the inspection." (S. Br. 11). Kennecott contends that, because Pollock denied watching television during his lunch break on December 6 at the disciplinary hearing on December 7, he was issued a written warning for the offense. Kennecott states that if Pollock had admitted watching television he would have received an oral warning. It maintains that when Pollock was given the written warning on December 8, Pollock was angry and tried to get it reduced. Kennecott contends that when Slothower refused to reduce the offense to an oral warning, "Pollock warned Slothower that the company would pay for the issuance of the discipline in the course of the inspection." (K. Br. 28). Kennecott argues that Slothower reasonably perceived Pollock's statements as a threat against the company, no matter what Pollock's exact words were during this conversation. Kennecott believes that this perceived threat is sufficient to support a charge of insubordination and a two-day suspension. Pollock's "expression of disrespect and disobedience toward authority" supports the charge of insubordination even assuming that Pollock did not intend his statement to Slothower to be a threat. (K. Br. 31).

The first issue is whether Pollock's discipline was motivated in any part by his protected activity. The events at the disciplinary hearing on December 7 are disputed by the parties. Pollock testified that he did not deny watching television on December 6. (Tr. 96). Mr. Jones also testified that Pollock did not deny watching television during the disciplinary hearing. (Tr.

318). Mr. Slothower and Melissa Miller, a human resources employee, testified that Pollock denied watching television on December 6 during the disciplinary hearing. (Tr. 985, 1180-81). Slothower testified that he issued the written warning because Pollock "lied" during the disciplinary hearing when he stated that he was not watching television. (Tr. 1181). Pollock stated that he would have accepted an oral warning. (Tr. 179).

There is no dispute that, during the disciplinary hearing, Pollock argued that watching the company television did not violate the general code of conduct. I find that during the course of this discussion Pollock failed to take responsibility for his actions but that he did not affirmatively deny that the television was on or that he looked at the television. His point may well have been that simply being in a room with a television on does not violate the code of conduct unless the employee turned it on. In his complaint filed with MSHA, Pollock merely mentions the television incident. At the hearing in this case, Pollock testified that he did not know what motivated the company to issue the warning letter. (Tr. 178).

I credit the testimony of Mr. Slothower that he would have given Pollock an oral warning if Pollock had accepted responsibility for his actions. Whether or not Pollock actually lied at the disciplinary hearing, Slothower reasonably believed that Pollock failed to admit that he violated the general code of conduct.[5] I find that Slothower issued the written warning for that reason alone and that he was not motivated, in any part, by Pollock's protected activity.

Pollock's second discrimination complaint principally focuses on the events of December 8-12, 1998. As stated above, the Secretary alleges that Pollock was removed from mine property because Kennecott was concerned that Pollock would exercise his statutory rights during the MSHA inspection. I find that Slothower was intimidated by Pollock's statement to him in his office on December 8. I note that Slothower, who is a geologist, is not a tough manager. He goes out of his way to avoid conflict with the employees he supervises. (Tr. 1174-75). Until December 8, his relationship with Pollock was "amicable." *Id.* Whatever words were actually used, Slothower felt that Pollock was using his position as a miners' representative to intimidate him to reduce his discipline for watching television. (Tr. 1190). Kennecott argues that Pollock's misuse of his position as a miners' representative is not protected under the Mine Act. I agree. If a miner, including a miners' representative, threatens to create a hostile environment during an MSHA inspection in order to reduce the severity of disciplinary action taken against him, such threats are not protected by the Mine Act. In this case, Slothower did not believe that Pollock would create a hazard that would threaten the safety of miners or that he would damage company property, but he feared that Pollock would create a hostile environment that would create friction between the company and MSHA. Slothower believed that Pollock might "go out and try to cause the company to get an undeserved citation." (Tr. 1189-90). This belief was shared by Wolff and Priano. (Tr. 677, 764-65).

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[5] At the hearing in this case, Pollock admitted that watching the company television was a violation of Kennecott's general code of conduct. (Tr. 179).

Pollock had a reputation as a rather hard-nosed advocate for safety at the mine. Kennecott takes mine safety and health issues seriously and Barney's Canyon Mine received MSHA's Sentinels of Safety Award in 1998. MSHA Inspector Okuniewicz testified that this mine has an excellent history of previous violations compared with other mines of its size. (Tr. 529-30). The mine had not interfered with Pollock's right to act as a walk-around representative, but a number of disputes have arisen over the years in which Pollock disagreed with the company on safety issues. It is quite clear that Pollock is an "in-your-face" type of person who does not back down when he believes that a safety hazard is present. He is also a strong advocate for the union. I find that most of the hostility that developed between the company and Pollock is a result of his union activities and the perception that he is frequently disrespectful and disobedient to Kennecott's managers. The record shows that he frequently argues with supervisors about work assignments. Slothower, on the other hand, is a rather quiet and unassuming individual.

Was Slothower's decision to suspend Pollock motivated in any part by his protected activity? The Secretary argues that the "timing of the discipline in relation to Pollock's involvement with MSHA activities at the mine, coupled with Kennecott's knowledge of Pollock's involvement with MSHA, is more than sufficient to establish the requisite motivational nexus between Pollock's protected activity and the adverse action taken against him." (S. Br. 12). Slothower knew that Pollock was an MSHA advocate and that, even if he did not create violations, he would aggressively assist MSHA inspectors in finding violations. His right to do so is protected under the Mine Act. A miners' representative has the right to point out violations to an MSHA inspector.

It is important to recognize that until Pollock made the comment to Slothower that it was going to be a "tough inspection," Pollock was scheduled to be the miners' representative during the inspection. Kennecott had made arrangements for Pollock to attend the opening MSHA conference and to accompany the MSHA inspectors during the inspection. Because of his work schedule that week, Pollock was going to be paid at his overtime rate during the MSHA inspection. Thus, until the "tough inspection" conversation, there was no indication of any animus against Pollock's full participation in the inspection as a walk-around representative, despite his reputation as a strong safety advocate.

Pollock was suspended in December 1998, because Kennecott perceived that he threatened Slothower. Although Slothower knew of Pollock's past protected activity, there is no evidence that he was hostile to this activity. Indeed, Slothower told Pollock in July that he understood his concerns about the drill. As stated above, Pollock was scheduled to be a walk-around representative during the inspection. Slothower felt that Pollock was attempting to intimidate him to reduce the written warning to an oral warning.

The fact that a miner frequently makes safety complaints does not immunize him from discipline for threatening management. *See e.g. Sapunarich v. Lehigh Portland Cement Co*., 11 FMSHRC 81, 88 (January 1989)(ALJ). In reviewing a claim that a whistle-blower had been discriminated against for raising safety issues at a nuclear power plant, the Seventh Circuit noted

that "an employee's insubordination toward supervisors and coworkers, even when engaged in protected activity, is justification for termination." *Kahn v. U.S. Secretary of Labor*, 64 F. 3d 271, 279 (1995)(citations omitted). The court went on to state that the rights afforded employees under the Energy Reorganization Act "are a shield against employer retaliation not a sword with which one may threaten ... supervisors." *Id.* The Mine Act affords miners broader protection than a whistle-blower statute. In addition, one must take into consideration the fact that, in the mining industry, harsh words are often spoken between supervisors and employees. Although Slothower enjoyed a reasonably good relationship with Pollock, Slothower genuinely felt threatened by Pollock's "tough inspection" statement. Slothower's decision to discipline Pollock was based solely on Pollock's statement to him on December 8.

I also find that Pollock was not provoked into making the statement. The "tough inspection" statement was made in the context of an informal conversation in Slothower's office. Slothower told Pollock that he would get along with managers better if he were less abrasive. (Tr. 1185). At the hearing, Pollock testified that he was "amazed" by Slothower's comment. (Tr. 102). I find this response by Pollock to be rather disingenuous. As stated above, Pollock was known as an in-your-face type of person and he had quite a few disagreements with managers at the mine about work-related issues. Pollock knew about the written warning and he did not raise safety issues at the meeting. Thus, I find that nothing in the informal conversation that occurred that morning reasonably provoked Pollock's response.

The Secretary argues that other evidence demonstrates Kennecott's hostility to Pollock's protected activity. For example, Slothower asked Pollock if a call from him precipitated the MSHA inspection. The Secretary also relies on testimony from Mr. Wolff that, although a miners' representative has the right to act as "a second set of eyes for the inspector," he takes a dim view of it. (Tr. 680-82). I find that Wolff merely stated the obvious. Every mine manager would prefer miners to point out safety violations to management or the company's safety department first rather than to MSHA so that the company can be given the opportunity to correct the problem. Wolff recognized that Pollock had the right to show violations to an inspector. His statement that he prefers to correct safety hazards in house does not indicate specific animus towards Pollock's protected activity. The Secretary also criticizes the fact that there was a delay between the conversation between Pollock and Slothower and the decision to suspend Pollock. Slothower testified that he does not like to discipline employees so he usually thinks about it first and seeks advice from upper management. (Tr. 1188-89). The ultimate decision to discipline Pollock was Slothower's and he based his decision on the factors discussed above. (Tr. 1192).

I find that Kennecott had a legitimate business justification for disciplining Pollock. I do not have the authority to determine whether the terms of his discipline were fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal*

Co., 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). I conclude that Mr. Pollock's suspension in December 1998 was not motivated in any part by his protected activity.

D. Mr. Pollock's Third Discrimination Complaint

When Pollock would not help Jones stake and flag ore on the morning of April 20, 1999, Slothower walked up to Pollock's truck and told Pollock to report to the Melco Pit at 11 a.m. to assist Jones. Pollock told Slothower that Jones should get help from the overtime board. In response, Slothower told Pollock not to dictate policy and that Jones did not need to go to the overtime board. (Tr. 218). Pollock told Slothower that he was going to file a grievance over this issue because Jones was never required to help the ore technicians. (Tr. 219). Pollock construes Slothower's order to help Jones stake the ore to be harassment and favoritism because Jones is never required to help him. *Id.* Pollock admits, however, that assisting the surveyor is part of the job responsibility of an ore technician. (Tr. 221). Such assistance may include staking and flagging ore. (Ex. R-5). Pollock provided such assistance in the past.

Kennecott argues that Pollock's response to Slothower's reasonable job assignment "encapsulates the real issue: Pollock does not want to do anything that he perceives to be more than his fair share, even when it is included in his job responsibilities and is a direct order from his supervisor." (K. Br. 37). Kennecott contends that Pollock's conduct between 11:00 and 1:00 a.m. demonstrates his continuing resistance to carry out this job assignment despite a direct order from Slothower. It maintains that Pollock sat in his truck for about 30 minutes while Jones worked at preparing the stakes without making any effort to assist Jones. When Jones walked over to his truck to specifically request his assistance, Pollock abruptly left the area without notifying Jones. Kennecott argues that Pollock knew that Jones could finish the job in the time it took him to drive to his locker to get his rain gear and return to the pit. It maintains that Pollock deliberately disregarded Slothower's order to assist Jones. If Pollock had helped Jones, the job could have been completed by noon. Kennecott states that it disciplined Pollock for his refusal to complete a reasonable job assignment.

The Secretary argues that "the undisputed facts establish that none of [the] purported reasons for discipline occurred." (S. Br. 15). She points to testimony from Jones that Pollock was not insubordinate to him. (Tr. 323). Jones also testified that this was the first time that Pollock was assigned to assist him and he did not do so. (Tr. 335). She also relies on the testimony of Slothower that, had the GPS system not failed, Jones and Pollock would have had time to finish the survey after Pollock retrieved his rain gear. (Tr. 1289-90). The Secretary argues that the reasons offered by Kennecott for Pollock's discipline are "contrived and inconsistent." (S. Br. 16).

The Secretary submits that Pollock was disciplined because of his protected activities including the fact that he filed two complaints of discrimination with MSHA. She believes that the last chance agreement confirms the relationship between Pollock's protected activities and the adverse action taken against him. She maintains that Pollock was treated far more harshly than

other employees who violated company rules and that the last chance agreement was unlike anything anyone had seen before. She concluded that the discipline given Pollock far exceeds the discipline received by other employees for significantly more serious infractions.

The issues surrounding this discrimination complaint are factual in nature. The Secretary relies heavily on a disparate treatment theory. The other ore control technician, Carl Bluth, had a significant absentee problem and he frequently failed to fill out laboratory sample sheets as required. The Secretary points to the fact that Bluth only received oral warnings for failing to perform this important part of his job duties. In addition, Bluth was put on probation in December 1998 for excessive absences, yet when he violated the terms of his probation in August he was given a second chance. Kennecott contends that both Pollock and Bluth have failed to fill out laboratory sample sheets and that Pollock was treated no more harshly than Bluth. Moreover, Slothower testified that Bluth's alleged infraction was never brought to his attention. (Tr. 1268, 1477). In addition, Kennecott argues that this issue is not relevant because the incidents upon which the Secretary relies occurred after Pollock returned from his April 1999 suspension. (Ex. G-45).

Except as discussed below, I find that Kennecott rebutted the Secretary's *prima facie* case by showing that the adverse action was not motivated in any part by Pollock's protected activity. The dispute between Slothower and Pollock concerned his work assignment on April 20, 1999. I credit Slothower's testimony and find that he reasonably believed that Pollock was deliberately refusing to carry out a work assignment. Pollock refused to help Jones until he was directly ordered to do so by Slothower. He argued with Slothower about the job assignment. When Pollock went to the pit, he sat in his truck while Jones began working. Pollock drove away in his truck shortly after Jones knocked on Pollock's truck window. Thus, it was reasonable for Slothower to conclude that Pollock was deliberately defying his order to help Jones. The fact that Jones did not regard this as "insubordination" or that Pollock helped Jones in the past is irrelevant. Pollock did not want to help Jones; he argued with Slothower about it; and he managed to avoid helping him. The entire project could have been completed in less than 45 minutes. No protected activity was involved. Nothing in the record indicates that any part of Slothower's decision to discipline Pollock was based on his prior protected activity.

Pollock had a history of arguing about job assignments with supervisors. As discussed earlier in this decision, he argued with Switzer about how much pattern should be marked, and he refused to tag and deliver sample bags to the lab if they were not filled correctly. The record documents other incidents in which Pollock argued with managers about overtime, working hours, and work assignments. It is significant that Pollock regarded Slothower's order that he help Jones as harassment and favoritism because Jones was never required to help him. The Mine Act does not protect an hourly employee who continually questions or argues with supervisors about job assignments, working hours, and the manner in which the mine is being managed. Such disputes are not protected under the Mine Act unless they involve safety issues.

The Secretary's reliance on disparate treatment is misplaced. There are no other employees whose conduct is comparable to Pollock's. None of the other employees that the Secretary points to for comparison had a history of arguing with managers about job assignments. Mr. Bluth, for example, had an absentee problem. He was placed on probation and then given a second chance. Pollock, on the other hand, was given an award by Kennecott in July 1999 for seven years of perfect attendance. (Ex. G-28). Both Bluth and Pollock failed to completely fill out the laboratory sample sheets some of the time, but there is no showing that Pollock was treated more harshly. The Secretary argues that Bluth was not as good an ore technician as Pollock. Even if I assume that to be true, I do not have jurisdiction to be Solomon in this case to determine who deserves to be disciplined and what discipline should be meted out.

The Secretary also relies on the terms of the last chance agreement to establish her case. (Ex. G-29). I agree that the last chance agreement is the most troubling aspect of this case. I credit the testimony of the Secretary's witnesses, including union officials, that this agreement was unlike anything they had seen at the Barney's Canyon Mine. Paragraph D of that agreement is of particular concern in the context of this Mine Act proceeding. In that paragraph, Pollock was required, as a condition of keeping his job, to admit that the discrimination complaints he filed with MSHA were "without foundation or merit and were filed only in an attempt to shield myself from discipline for my misconduct." *Id.* As stated above, Pollock refused to sign the agreement. He was allowed to return to work, was given an eight-day suspension, and was told that future violations of the mine's general code of conduct would result in his termination.

I find that the last chance agreement violated section 105(c) of the Mine Act. An operator cannot demand that a miner waive his Mine Act rights as a precondition to continued employment. Such a provision puts a miner in an untenable position at odds with the protections set forth in the Mine Act. He must either face termination or give up his rights. The agreement was not reached following negotiations between the parties but was compelled by Kennecott. A mine operator cannot include in its disciplinary program a provision that a miner must waive his section 105(c) rights as a precondition to employment or reduced discipline. Requiring Pollock to sign Paragraph D was an obvious and egregious violation of section 105(c). Even though Pollock did not sign the last chance agreement, other miners at Barney's Canyon may well be reluctant to raise safety issues or file safety complaints with MSHA. It had a chilling effect on miners' rights.

The discipline that Pollock was ultimately given did not include any references to his Mine Act rights. Because I find that Slothower did not discipline Pollock for his protected activity, the issue is whether the last chance agreement is evidence of a discriminatory motive. Slothower wanted to terminate Pollock but was not involved in drafting the last-chance agreement. (Tr. 1224). Mr. Pollock was under probation as a result of his previous discipline for insubordination in December 1998. After negotiations between Kennecott and the union broke down over the last-chance agreement, Kennecott gave Pollock a final warning and suspended him for nine days. I find that Kennecott's attempt to impose Paragraph D of the last-chance agreement does not

indicate that Slothower or Kennecott was motivated by his protected activity when it was decided that he should be disciplined for insubordination.

I disagree with the Secretary's characterization of Kennecott's rationale for disciplining Pollock as contrived and inconsistent. Slothower was responsible for supervising Pollock. He believed that Pollock was becoming increasingly defiant of management direction. He knew of many instances where Pollock refused to follow his orders and company policy. It was this history that lead Slothower to conclude that discipline was necessary following the events of April 20, 1999. I find that Kennecott established that this discipline was not motivated by his protected activity.

Kennecott violated section 105(c) when it required Pollock to sign the last-chance agreement. This violation was very serious and Kennecott's negligence was high. A penalty of $10,000 for this violation is appropriate.

E. Consideration of Mr. Pollock's Cases as a Whole

Because Mr. Pollock engaged in protected activity over an extended period of time as a miners' representative, it is important to look at his case as a whole and not simply analyze each complaint of discrimination in isolation. The Secretary is alleging that Kennecott engaged in a course of conduct to discourage Pollock from being a zealous safety advocate. She contends that Kennecott's discipline of Pollock would tend to have a chilling effect on other miners' expressing safety concerns. Some of the evidence of record supports the Secretary's position. Mr. Jones, for example, testified that any individual who raises safety concerns "will have a difficult relationship with this particular administration." (Tr. 335). He also stated that "if you're as involved as [Pollock] is in safety issues out there, that you're going to have a hard time with the Company." (Tr. 325). I credit Mr. Jones's testimony in this regard and find that the company was becoming increasingly impatient with Pollock's aggressive safety advocacy.

I find that the Kennecott's relationship with Pollock was influenced at least in part by Pollock's safety advocacy. It is difficult to separate Kennecott's animosity towards his unprotected activities from its dislike of his zeal for safety issues. It is particularly difficult to analyze this issue because, in each instance, Kennecott had reasons for disciplining Pollock.

As a consequence, I will assume that the Secretary established that the decision to discipline Pollock in December 1998 and April/May 1999 was motivated in some part by his protected activities. The issue is whether Kennecott affirmatively proved that it considered Pollock's unprotected activity when disciplining him and would have disciplined him for that conduct alone. In *Bradley v. Belva Coal Co.*, the Commission set out the framework for analyzing this affirmative defense, as follows:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an

> operator can attempt to demonstrate this 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).

As stated above, there are no other employees at the Barney's Canyon Mine who can be compared with Pollock. As stated by Kennecott, "insubordination is not a common problem and discharge and suspensions for such behavior are limited." (K. Br. 49). The employees that the Secretary offers for comparison were not charged with failure to follow the orders of a supervisor or insubordination. Pollock has been involved in a number of such disputes, as discussed in this decision. Pollock is a careful and diligent ore technician. He has been granted a great deal of independence by Kennecott in the performance of his job duties. Kennecott's complaint is that when he is directed to perform any task that is outside his daily routine he argues with his supervisors about it. Pollock was given a number of warnings about his combative attitude and refusal to perform work assignments. Both Switzer and Slothower expressed concern about it to Pollock. Finally, Kennecott's General Code of Conduct requires employees to perform work assignments and comply with instructions from supervisors.

Based on the record, I find that Kennecott established that it would have disciplined Pollock for his unprotected activity alone and that the reasons given by Kennecott were not pretext. Based on credible evidence that Kennecott is not always receptive to safety complaints from miners, I include an order that Kennecott cease and desist from taking any adverse action against miners who exercise their rights under section 105(c) of the Mine Act. This order is entered as part of the remediation for the Lopez's complaint and Pollock's first and third complaints.

The Commission's recent decision in *Secretary of Labor o/b/o Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC _____, (March 16, 2000), discusses issues that are relevant here. In that case, a miner raised safety issues and, in the process, used profanity and made what might be construed as threats. The Commission held that a miner should be given leeway for impulsive behavior when raising safety issues or refusing to perform a task that he believes is unsafe. As the Commission stated, "[w]hether an employee's indiscrete reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case." *Id.* at Slip. Op. 9. Subject to limits, I believe that if a miner is engaged in protective activity, he

should not be stripped of his rights under the Mine Act simply because, in raising the safety issues, he spontaneously and impulsively says impertinent things to his supervisor.[6]

Pollock was often emotional when he raised safety issues. He states that he became agitated only if he felt that supervisors were not responding in an appropriate fashion. Thus, from his point of view, he became aggressive when he was provoked by management. The events giving rise to his December and April/May discipline, however, did not involve safety disputes. In each instance, the dispute concerned work rules and job assignments. Although aggressive behavior while discussing safety disputes may be protected by the Mine Act, such behavior is not protected if the discussions concern activities that are not protected. Otherwise, a mine operator would have a difficult time disciplining a miner who is actively involved in safety issues for insubordination or other unprotected conduct. I find that the conduct that gave rise to Pollock's discipline was not protected in this manner.

The record in this case consists of about 1,480 transcript pages and over 75 exhibits. As a consequence, I could not discuss all of the evidence in this decision. Any evidence that is inconsistent with my findings and conclusions is hereby rejected.

III. CIVIL PENALTY CRITERIA

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The Barney's Canyon Mine is a relatively large operation with 388,262 man hours worked during 1998. The total number of man hours worked at all operations is 5,594,546 in 1998. In the two years prior to May 1, 1999, the mine was issued 24 citations and orders and paid $1,634 in civil penalties. The penalties assessed in this decision will not have an adverse effect on Kennecott's ability to continue in business. It has not been shown that Kennecott failed to demonstrate good faith with respect to the charges brought by the Secretary in these cases. Based on this criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

For the reasons set forth above, I hold that Kennecott discriminated against Tony Lopez when he was issued a disciplinary letter on July 23, 1998, by Gill Valdez. Kennecott is **ORDERED** to remove the letter from his personnel file and this letter shall not be considered as part of his disciplinary history by Kennecott. All other allegations contained in this complaint and any other relief requested by the Secretary and Mr. Lopez are **DENIED**. Kennecott is

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[6] As the dissent states in *Bernardyn*: "A miner must feel free to communicate about [safety] issues — with a management safety director, a foreman, or a union official — without undue concern about whether the complaint is couched in an acceptable format, and thus should not be fired for the manner in which he states them except in extreme circumstances." Slip. Op 12-13.

ORDERED TO PAY the Secretary of Labor a civil penalty in the amount of $1,000 for this violation of section 105(c) within 40 days of the date of this decision.

For the reasons set forth above, I hold that Kennecott discriminated against Mark Pollock when Mr. Valdez made threats against him in July 1998. Kennecott is **ORDERED** to cease and desist from making threats against Mr. Pollock or otherwise discriminating against Mr. Pollock for activities that are protected under section 105(c) of the Mine Act, including telephoning MSHA with safety complaints. All other allegations related to Mr. Pollock's first complaint of discrimination (No. RM MD 98-14) and any other relief requested by the Secretary and Mr. Pollock are **DENIED**. Kennecott is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of $500 for this violation of section 105(c) within 40 days of the date of this decision.

For the reasons ser forth above, I hold that Kennecott did not discriminate against Mark Pollock when it disciplined him in December 1999. Accordingly, the Secretary's complaint of discrimination filed with respect to this discipline (RM MD 99-02) is **DISMISSED**.

For the reasons set forth above, I hold that Kennecott discriminated against Mark Pollock when it required him to sign the last chance agreement as a result of events that took place on April 20, 1999, because Paragraph D of that agreement violated the Mine Act. Kennecott is **ORDERED** to cease and desist from including such language in any future last chance agreements it may execute with respect to any employee at its mine. All other allegations related to Mr. Pollock's third complaint of discrimination (RM MD 99-09) and any other relief requested by the Secretary and Mr. Pollock are **DENIED**. Kennecott is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of $10,000 for this violation of section 105(c) within 40 days of the date of this decision.

For the reasons set forth above, Kennecott is **ORDERED** to cease and desist from taking adverse actions against any miner who exercises his or her rights under section 105(c) of the Mine Act. This decision is my final decision and order in these cases.

Richard W. Manning
Administrative Law Judge

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