

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 13, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-82-D
on behalf of	:	MSHA Case No. MORG CD 96-03
DONALD E. ZECCO,	:	
Complainant	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Mine ID No. 46-01318
Respondent	:	Robinson Run No. 95 Mine

DECISION

Appearances: Gretchen M. McMullen, Esq., Office of the Solicitor,
U.S. Dept. of Labor, Arlington, Virginia, for the Complainant;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor , on behalf of Donald Zecco, under Section 105(c)(2) of the Federal Mine Safety and Health of Act of 1977, 30 U.S.C. ' 801 et seq., the "Act." The Secretary alleges that the Consolidation Coal Company (Consol) violated Section 105(c)(1) of the Act, when it transferred Mr. Zecco, a continuous miner operator, from a production section to a construction project.¹

¹ Section 105(c)(1) of the Act, provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of

himself or others of any statutory right afforded by the Act.

The Secretary maintains that Consol transferred Zecco "in retaliation for making repeated safety complaints about conditions and for running in a safe and cautious manner during adverse conditions on the 6D Section." (Complainant's Brief p.2)². The Secretary seeks a finding that Consol discriminated against Zecco and petitions for a civil penalty of \$8,000.00.³ The significant evidence in this case is largely uncontradicted. It is the inferences to be drawn from that evidence concerning which the parties disagree.

Donald Zecco had worked for Consol at the Robinson Run No. 95 Mine for 23 years and had been classified as a continuous miner operator for 15 years. In October 1995, Zecco was assigned to the 6D Section as a continuous miner operator on the midnight shift. There were adverse mining conditions in the 6D Section faced by all three shifts. There was sulfur in the coal seam, high levels of methane gas, water and bad roof. The sulfur caused sparks to fly off the barrel of the continuous mining machine and caused damage to its bits. At times, these sparks caused a ring of fire at the head of the miner. The methane level, particularly in the No. 3 entry, was purportedly so high that the 1% warning light on Zecco's continuous miner would light every time Zecco started a cut. By law, Zecco was then required to de-energize the miner and check the methane level until the level returned below 1%.

Zecco testified that the combination of sparks flying from the sulfur, float coal dust from mining activity, and methane, caused a serious hazard of an ignition or explosion. In order to correct the conditions and prevent an explosion or ignition, Zecco and his crew took extra safety measures. Zecco testified that he stopped to rock dust every 20 feet, rather than every 40 feet as required by law; he kept the continuous miner washed to suppress the float coal dust; and he checked for methane with a hand held monitor every 10 minutes, rather than every 20 minutes as required by law. Zecco maintains that he also checked the ventilation tubing more often and sometimes hung extra ventilation curtain to improve the air in the face area.

² The implication in the Complaint that Mr. Zecco also suffered retaliation under a "work refusal" theory is deemed to have been withdrawn and abandoned since that theory is neither advanced nor supported by relevant law in the Complainant's post hearing brief.

³ A monetary award was previously made to Mr. Zecco and he was assigned to a production section as a continuous miner operator as a result of his grievance filed under the National Bituminous Coal Wage Agreement of 1993, the "Contract." Accordingly, no issues concerning damages or reinstatement remain for disposition.

Zecco testified that these additional safety precautions, and the maintenance caused by sulfur damage to the bits, caused delays in mining the 6D Section. The monthly production records for October 1995 show that the three shifts on the 6D Section produced 46.3 average feet per shift, while the 7D Section produced 72.4 and the 8D Section produced 69.4 average feet per shift. However, Zecco's crew produced 5-10 feet per shift of coal less than the day and afternoon shifts on the 6D Section. In October 1995, the midnight shift on the 6D Section produced 3.4 average feet per shift less than the day shift, and 10 average feet per shift less than the afternoon shift. (Resp.'s Exh. 4). In November and December 1995, the difference in production between the midnight and day and afternoon shifts on the 6D Section was also approximately 5 to 10 feet. (Resp.'s Exh. 4). Complainant maintains that the day and afternoon shifts, which faced similar conditions on the 6D Section, were able to maintain higher production levels, because lower barometer pressure at night caused more methane to be liberated on their shift.

In early October 1995, Zecco checked the 6D Section auxiliary fan and felt that it was not pulling enough air to the section. The fan had a 40 horsepower motor whereas the other section fans had 50 horsepower motors. Zecco claims that he reported the lower power fan to Maintenance Foreman Mike Preolitti, that Preolitti checked the fan and agreed that it had a 40 horsepower motor. Zecco claims that Preolitti also told him that all the fans in the mine were supposed to have been changed to 50 horsepower motors. Preolitti said he would see about obtaining a 50 horsepower fan motor for the 6D Section. Preolitti did not recall talking to Zecco directly about the 6D Section fan. He learned about the 40 horsepower motor from Consol Safety Inspector Phil Morgan and had Morgan check the ventilation. The ventilation was within legal parameters. Preolitti thought that all the fans had already by then been converted to 50 horsepower motors. According to Preolitti, as soon as a 50 horsepower fan became available it was installed.

Zecco maintains that in mid-October he also spoke several times to Consol Safety Inspector Phil Morgan about the inadequacies of the 6D Section fan. Morgan checked the section ventilation with a pitot tube and found it to be within legal limits. He nevertheless told Zecco he would make arrangements to obtain a 50 horsepower fan. Meanwhile he had Zecco's crew clean the dirt from the fan shroud to improve the existing ventilation.

In mid-November, Zecco spoke to Assistant Mine Superintendent Rodney Poland about the 6D Section fan and about the methane and sulfur problems. Zecco maintains that he also told Poland that he was required to shut down the miner at 1% methane, and that he would not run the miner with the warning light activated. Zecco purportedly also told Poland that in order to improve production on the 6D Section Poland needed to work with the crew and get the methane under control. Zecco also claims that he told Poland that the section ventilation fan was directly related to the methane problem and that a bigger fan would provide more air to the face. Poland recalled that Zecco reported the size of the 6D fan but he could not recall other details of the conversation. He relied on Zecco's recollection.

Zecco also claims that in early November he spoke to Mine Superintendent Walter Scheller about the 6D ventilation fan and the methane and sulfur conditions on the section. Zecco maintains that, in total, he complained to management 10 to 12 times about the section fan and the methane and sulfur conditions. It is undisputed that the fan motor was in fact changed to 50 horsepower in January 1996, after Zecco had been transferred off the section and that 70 horsepower fans were later installed on all the sections.

Zecco testified that in mid-November, Section Foreman Titus held a meeting with the 6D crew concerning production. Titus told the crew that Poland had said that production was down and needed improvement. Titus said he had asked Poland to observe the conditions on the 6D Section for himself but he declined and said he did not want any excuses, he only wanted production to improve. Zecco felt they were trying to get the miners "to do things that we shouldn't be doing." At the same time Zecco acknowledged that he understood they were not being asked to mine unsafely. Titus testified, moreover, that he understood that Poland's criticism related to the fact that the other shifts faced the same conditions as their shift but were producing more coal.

On December 15, 1995, Zecco saw the realignment sheet posted at the mine indicating he would be transferred from the Oakdale Portal to the Robinson Run Portal to work as a continuous miner operator on a construction crew. Zecco also noted that John Belcastro was transferred from the Robinson Run Portal to a miner operator position at the Oakdale Portal. Zecco testified that he was the most senior continuous miner operator on the midnight shift, and that Belcastro was the least senior. Zecco protested his assignment to Assistant Superintendent Poland on the morning of December 16. On December 18, when Zecco learned that he was still assigned to the Robinson Run Portal, he filed a grievance claiming he was improperly realigned and had a seniority right to remain on an active production section. Zecco testified that the seal construction project at the Robinson Run Portal was a special project, and that the past practice at the mine was to "ask the oldest and force the youngest."

Zecco claimed that, according to the Contract, priority for jobs is based on seniority and that the most senior continuous miner operator has a right to work in that position. At the time of the realignment, the three most senior continuous miner operators, Zecco, Garcia, and O'Dell, were working at the Oakdale Portal on active mining sections, and the least senior continuous miner operator, Belcastro, was working on the D-haulway project at the Robinson Run Portal.

Zecco testified that even though his assigned job classification at the seal construction project remained as continuous miner operator, when he filed his grievance he did not believe he would be operating a miner at the Robinson Run Portal. Zecco never in fact did run a continuous miner from the time he was transferred on December 16, until he was transferred back to the Oakdale Portal on February 20, 1996. Rather he performed unclassified, general insider laborer duties, including digging ditches, building cribs, walking seals in low top, pumping water from seals, dragging posts in low top and setting posts, carrying old belt structure, shoveling belt spillage, and shoveling snow out of the mine entrance. According to Zecco, this work was more

physically demanding and the conditions were worse than in his prior position. He had to walk long distances bent over due to the low clearances and occasionally had to wear hip waders because of water conditions.

From February 20, 1996, when he returned to the Oakdale Portal, until October 1996, when the grievance was finally settled, Zecco was assigned various duties on the production sections. He substituted for other continuous miner operators, built cribs, helped with a longwall move and operated other mining equipment. Belcastro continued to operate the continuous miner on a permanent section during this period. In October 1996, when Zecco was reassigned to a production section, Belcastro was assigned as floating continuous miner operator.

Zecco testified that at his first grievance meeting, Poland told him that he was transferred because of his low production. According to Zecco, at the next grievance meeting, Human Resource Director Mark Schiffbauer stated that he did not realize Zecco was not running a continuous miner at the Robinson Run Portal. Schiffbauer purportedly said that if Zecco was not running the miner a good part of the time, Zecco should have remained on the miner at the Oakdale Portal because he was most senior. Schiffbauer told Zecco he would speak to Poland. After several more meetings, the grievance was set for arbitration. In October 1996, the parties reached a settlement in which Zecco was assigned to a continuous miner on the 10D Section and was paid for 75 hours of overtime lost as a result of the transfer.

Respondent, Consol, maintains in essence that its transfer of Zecco to the seal construction project was strictly a business decision unrelated in any way to his request for a 50 horsepower fan for the 6D Section or to his other alleged protected activity. According to Consol, the transfer was the result of major restructuring at the mine and evaluation of the relative abilities of the miner operators. There was in fact a work force reduction and realignment at the mine on December 16, 1995. The mine work force was reduced by 75 miners and one-third of the remaining 375 miners were realigned into different job classifications, shifts and portal assignments. Miners were portaled at two locations and many miners who previously reported to the Robinson Run Portal were moved to the Oakdale Portal, while other miners were moved from the Oakdale Portal to the Robinson Run portal.

The work force reduction and realignment resulted from the completion of the D-Haulway in September 1995. This permitted the use of conveyor belt haulage for coal transportation throughout the mine and eliminated the need for rail haulage. The D-Haulway connected with the existing mine conveyor belt system at the 140 Block in September 1995, and the mine-wide conveyor belt system was operational October 1, 1995. For the next two and one-half months, the D-Haulway continuous miner production crews and the mainline motormen, who had been used previously to haul coal by rail, completed the D-Haulway work and started rehabilitation work required to seal part of the mine - - the seal construction project. The work on the seal project during this period involved the use of the D-Haulway continuous miner to cut overcasts, split coal blocks for airways and perform related rehabilitation work. According to Poland, following the work force reduction and realignment, upper mine management, excluding section foremen, pooled their collective knowledge to put together the most productive crews from the

remaining available employees. Poland noted that these assignments were not based on exact science, but involved judgment and some trial and error.

By December 16, 1995, Consol management had decided to operate one longwall, and three continuous miner sections. It had also been decided, based on input from Shift Foreman Harrison, to assign a four-member crew consisting of a continuous miner operator, a shuttle car operator, a roof bolter and mechanic to work on the construction project on each shift. As a result, four continuous miner operator positions were maintained following the work force reduction and realignment on December 16.

At this time, the mine was also preparing to set up the next longwall on the 6D Section. It was necessary therefore to maximize mining progress on the 6D Section to have the next longwall panel ready to go on time. Accordingly, the best continuous miner crews were placed in the 6D Section. On the midnight shift, one particular crew, with continuous miner operator Rick Garcia, excelled and were assigned to the 6D Section. At the same time, Poland noted, based in part on a comparison of the nature and extent of production delays reported by each shift, that the midnight shift production on the 6-D Section had been significantly lower than the other two shifts. Poland believed this was the result of poor management by the section foreman and not merely because of the mining conditions.

Consol also notes that the mine was operating two types of continuous mining machines in December 1995, and this affected the assignments to the remaining miner operator positions on the midnight shift. There were 12CM miners located on the 6D Section and the seal project. A 14CM satellite miner was used on the 7D and 8D Sections. The satellite miner was significantly larger and more difficult to operate. In addition, transfer of these machines between sections was difficult and time consuming.

O'Dell, Zecco and Belcastro were the three remaining continuous miner operators. O'Dell was retained in the 7D section because he was considered the best available satellite miner operator and had been operating the 7D satellite miner satisfactorily prior to December 16. Poland wanted to improve productivity by having a better crew mix for the Oakdale Portal sections. He considered the general consensus of mine management that Zecco had struggled with the satellite miner and Belcastro had performed well on the satellite miner. Indeed, even Zecco's own witness, Albert Titus, recognized that Zecco was not as good at running the satellite miner as the other three operators. The decision was made therefore, to assign Belcastro to the remaining satellite miner in the 8D Section and to observe his performance.

The initial assignment of miners to the Robinson Run Portal midnight shift was made by Assistant Superintendent Poland because Midnight Shift Foreman Evans was on vacation when the initial posting required by the Contract was finalized. When Evans returned from vacation on December 17, 1995, he and Poland finalized the midnight shift assignments. Evans decided not to change any of the assignments.

On his first day at work on the seal project, Zecco filed a grievance pursuant under Article 23 (c) of the Contract objecting to his portal change. He alleged that "[m]anagement is in violation of the National Bituminous Coal Wage Agreement by improperly realigning me to the Robinson Run Portal." Consol disagreed with Zecco that his seniority entitled him to chose his portal maintaining that Arbitration Decision 78-19 supported its position.⁴ By the third step of the grievance process, Zecco also claimed that he was not regularly operating a continuous miner. When it was learned that Zecco was not working the same amount of overtime he had previously, arrangements were made to make overtime work available to him and he was compensated for the overtime lost to that point.

On January 11, 1996, Zecco filed the instant discrimination complaint asserting that he was removed from the 6D Section because he made complaints about methane to Mr. Poland. Poland had received reports from management and hourly employees alike regarding the methane and sulfur being encountered on the section. He recalled one occasion when Zecco told him that the 6D ventilation fan was undersized with a 40 horsepower. Poland told Zecco the fan would be checked. Safety Inspector Morgan reported back that the fan did have a 40 horsepower motor, but that it was providing adequate ventilation for mining. Morgan also reported his findings to Zecco and told Zecco that a larger horsepower motor was in the works. Poland heard nothing further from Zecco. Poland knew that all of the section ventilation fans were being upgraded to 50 horsepower, so he informed Maintenance Foreman Preolitti that the 6D fan had a 40 horsepower motor. Preolitti thought they had all been upgraded. Preolitti said he would get another motor.

The crews on the seal project worked from the Robinson Run Portal until late February 1996. The continuous miner that had been used in this area before the realignment was available for use but required some routine maintenance. However, the work being performed at the time did not require a continuous miner. The seal project crews were then told to report to the Oakdale Portal to move the longwall to 6D Section. This move took three to four weeks.

Consol maintains that in April, its management realized that the seal project would not be operating as originally planned and another realignment was proposed to eliminate skilled job classifications. Zecco's grievance was ultimately resolved when the two satellite miners were replaced with 12CM miners in November 1996, and Zecco was assigned to one of the new machines.

⁴ Administrative notice is taken of Arbitration Decision 78-19 a copy of which is contained in the Exhibit file. The issue of whether management has the right under the Contract to reassign miners within their classification to other locations in the mine regardless of seniority was not resolved by Zecco's grievance nor is it found necessary to resolve in this proceeding.

Evaluation of the Evidence

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The 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. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

There is no dispute in this case that Zecco had reported to Consol management his concerns about the methane and sulfur and about the 40-horsepower fan providing ventilation to the 6D Section in October and November 1995. Although it is undisputed that the ventilation met legal requirements and there is no evidence that any violative conditions existed, because of frequent methane and sulphur problems the 6D crews were facing during that period, it is clear that ventilation in the face area was critical to maintain a safe environment. Accordingly, Zecco's complaints in this regard constituted protected activity.

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the Eastern protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

In this regard, it is undisputed that Zecco had requested, during the period October through November 1995, that the 40-horsepower ventilating fan on the 6D Section be replaced by a 50-horsepower fan. According to the unchallenged testimony of Zecco, these requests were made to maintenance foreman Preolitti, to Consol safety inspector, Phil Morgan and to Rodney Poland among others. There is no disagreement that Zecco also complained to management, and specifically to Poland, about the sulfur and methane on the section and that he affirmed to Poland his practice not to operate the continuous miner when the warning light indicated that he should not operate it. Consol management therefore had knowledge of Zecco's protected activity.

Since Zecco was thereafter transferred in mid-December from a job on a production crew to the seal construction project, there was also a close relationship in time between his protected activity and his claim of adverse action.

I nevertheless do not find that Complainant has sustained his burden of proving that his transfer to the seal construction project was motivated in any part by his protected activity. First, his complaints were not of such a nature as would be expected to engender disapproval let alone hostility and retaliation. Zecco's complaints, while relating to safety, were also clearly consistent with improving mine productivity. The better the ventilation of the 6D Section the less downtime the section would suffer from high levels of methane. It is undisputed, moreover, that Consol management had already planned to replace all of its 40 horsepower fans with 50 horsepower fans. It appears that only the 6D fan had not yet been replaced and, when management was apprised of this by Zecco and his crew, they were apparently surprised. In addition, efforts were immediately made to replace that fan, consistent with pre-existing plans, without any evidence of hostility. Indeed, it may be repeated, no hostility would be expected since improved ventilation with a 50 horsepower fan would reasonably be expected to improve mine productivity and fan replacements had already been planned by Consol management.

In addition, management was well aware of the sulfur and methane problems on the 6D Section causing a recognized slowdown of production. It is also noted that neither Zecco's foremen Albert Titus, who he called as his own witness, nor Zecco himself, ever testified that anyone ever suggested they mine unsafely or with the warning light activated. Indeed, Titus explained that Poland thought the midnight crew could bring its productivity up to the level of the other shifts on the 6D Section by such things as staggering lunch breaks and not permitting the crew to stay in the dinner hole too long. Zecco himself also made clear at hearings that he was not asked to mine unsafely. His witness, mechanic Michael Smith, confirms this and noted that efforts by Zecco's foreman to increase productivity took such forms as prompting the crew to get to the dinner hole earlier.

Second, the 40 horsepower fan was in fact replaced by a 50 horsepower fan in January 1997, after Zecco had already been transferred. If, indeed, management had transferred Zecco out of the 6D Section because of hostility toward his requests for a 50 horsepower fan (because, following the logic of Zecco's argument, Consol was hostile toward him because it did not really want to replace the fan), it is unlikely that Consol would have gone ahead and replaced that fan after he had already been transferred. It is also significant that Consol management, on its own volition, subsequently replaced all the 50 horsepower fans with 70 horsepower fans. It cannot reasonably be inferred within this framework that Consol would have been hostile to Zecco's earlier request for only a 50 horsepower fan. Again, it should be emphasized that improved ventilation provided by these more powerful fans is directly related to improved productivity.

Third, it is undisputed in this case that a number of other miners on all three shifts also complained about the fan in the 6D Section around the same time Zecco made his complaints and there have been neither claims, nor evidence, of retaliation against those persons. Sam Marra, a shuttle car operator on the 6D Section during relevant times, who was also a member of the

UMWA safety committee, testified that he, as well as other safety committeemen, including Bob Nizely, also "complained to the point where they got tired of us complaining about the fan." Marra also personally complained to Preolitti, to Poland, and to Federal mine inspectors. Indeed, Federal inspectors thereafter came to the mine as a result of Marra's complaints and performed an inspection sometime in early November 1995. There is no evidence in this case that Zecco complained to Federal inspectors or complained any more vociferously or frequently than Marra, Nizely or other members of any of the three shifts, yet there is no evidence of any adverse action against Marra, Nizely or any other miners.

Complainant also cites in his brief, as evidence of hostility toward his protected activity, allegations that Foreman Harrison said to him after he filed his grievance over having been denied alleged seniority rights, that he was "lucky to be working." Complainant has not, however, shown that Harrison was then even aware of Zecco's protected activity. It is also noted that there had just recently been a layoff at this mine of 75 miners.

Zecco claims that he also suffered disparate treatment because, as the most senior continuous miner operator at the mine, he was entitled under the Contract to remain as a continuous miner operator at the seals construction project to which he was reassigned.⁵ The credible evidence suggests however, that Consol did in fact intend, at the time of Zecco's transfer, to have him operate a continuous miner on the seals construction project. I find the testimony of midnight shift foreman Tom Harrison particularly credible on this issue. According to Harrison, he was asked at meetings before the realignment to designate the type of work crews he would need on the seal construction project. Harrison specifically requested a number of skill positions including three continuous miner operators, one for each shift. Harrison anticipated needing continuous miner operators to cut overcasts and rock and had two continuous miners at the project needing only permissibility exams to operate. Indeed, if Consol did not intend to use three higher paid skilled crews, including continuous miners operators, on the seals construction project it would no doubt have selected lower paid general inside laborers to do the work. I cannot therefore accept Complainant's argument that he was singled out to work on this project in retaliation and to deprive him of the opportunity to operate a continuous miner. The fact that conditions and needs subsequently changed, resulting in neither Zecco nor the other miner operators operating continuous miners on the project does not support Zecco's claim. Moreover, according to the credible testimony of Harrison, it is permissible under the Contract, and not unusual, to have miners working out of classification for periods of 30 days.

In addition, even assuming, *arguendo*, that Zecco was selected in spite of his seniority to work on the seals construction project, no inference of an improper motive can be drawn because Consol had a rational, objective, non-protected business reason for Zecco's transfer out of

⁵ It appears that the settlement of Zecco's grievance was based not necessarily on the fact of his transfer to the seal project alone but on the fact that it turned out that he was not performing in his classification as a continuous miner operator. Consol continues to maintain that it has the right under the Contract to select where its miners will work, regardless of seniority.

production, i.e., his crew's lowest productivity of the three shifts on the 6-D Section as well as his reported difficulties operating the satellite miner.

Even assuming, *arguendo*, that Zecco's transfer was motivated in part by his protected activity, I find that Consol would nevertheless have successfully defended affirmatively by proving that it would have transferred Zecco in any event, based on his unprotected activity (lower productivity and inadequacy in operating the satellite miner) alone. In this regard, data for October and November, for the 6D Section midnight shift crew, do in fact show lower productivity (Respondent's Exhibits No. 3 & 4). While Complainant maintains that lower productivity on the midnight shift may have been the result of lower barometric pressure there is no evidence that the actual barometric pressures were lower nor of the actual correlation between such pressure and methane emissions on the 6D Section. Poland and Titus agreed moreover, that the lower productivity of Zecco's crew was significant and cost them a lot of money. Consol could reasonably have relied upon the perceived inadequacies of Zecco as a non-protected business justification for his transfer to the seal construction project.

Under all the circumstances, I do not find that Complainant has sustained his burden of proving that his transfer was in violation of Section 105(c) of the Act.

ORDER

Discrimination Complaint Docket No. WEVA 97-82-D, is hereby DISMISSED.

Gary Melick
Administrative Law Judge

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