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FREDERICK G. BRADLEY V. BELVA COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 4, 1982
FREDERICK G. BRADLEY

v. Docket No. WEVA 80-708-D

BELVA COAL COMPANY

DECISION

This discrimination case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979). We are asked to decide whether a decision by a state agency denying a miner's claim of discrimination under a state mine safety law precludes litigation of his discrimination claim under the Mine Act, or of issues arising under the Mine Act claim. On the basis of the record in this case, we affirm the judge's determination that the state action did not preclude the miner's separate action under the Mine Act. We also affirm the judge's conclusion that the miner had been discriminatorily discharged in violation of the Mine Act, but remand for recomputation of the back pay award.

I.

Frederick Bradley was employed as a section foreman at Belva Coal Company's No. 5-B underground coal mine in Logan County, West Virginia. His duties included coal production and supervising the abatement of safety violations. He had a reputation for being a productive and safety-conscious miner. On a number of occasions prior to his discharge in June 1980, he complained about safety hazards in his section. Bradley made some of his complaints to his immediate supervisor, Mine Foreman Larry Davis.

On June 10, 1980, an MSHA inspector inspecting the 5-B mine issued three withdrawal orders and nine or ten citations for violations of mandatory safety standards. The cited conditions included excessive accumulations of combustible materials in the haulageways, inadequate short-circuit protection, incorrectly hung curtains, and damage to a trailing cable that had been driven over by mobile equipment. Bradley's crew spent a portion of its shift correcting the violations. The withdrawal orders were terminated the same day and most of the violations were abated.

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On June 11, 1980, the following day, the same inspector returned

to the mine and observed conditions similar to those that had led to the citations and orders on June 10. He issued more citations and three more withdrawal order , one of which covered a continuous miner trailing cable that had been run over and damaged by mobile equipment. The cable was not energized at the time the order was issued, but was still connected to the continuous miner and to a power source. The inspector agreed that the damaged part of the cable could be replaced by a permanent splice. The cable was "red tagged" to indicate that it was not to be used, but was not "locked out"--that is, locks were not applied to the electrical equipment to prevent energization.

The miners immediately began abatement work. Mine Foreman Davis instructed Bradley to have cribs brought up for roof support in the face area, where the inspector had found inadequate support. Bradley directed Thomas Minton, the scoop operator, to take the scoop and get a load of cribs. Bradley and another miner began hanging the continuous miner's damaged trailing cable so that the scoop could pass. Foreman Davis told Bradley not to bother hanging the cable and directed him to let the scoop run over it. Davis testified that he perceived no danger in having the scoop run over the cable because the cable was not energized and its damaged section was to be cut away and replaced. Bradley refused to comply with Davis' order, and hung the cable while Minton drove by in the scoop. Bradley and Davis exchanged some words during this incident.

Shortly after the cable incident, Davis told Bradley to bring a tape measure up to the face where the cribs were being installed. Davis needed to measure a place in the work area that the inspector had indicated was too wide. Bradley was engaged in other compliance work and either directly or indirectly refused, complaining about being asked to do a number of tasks at the same time. In the words of the judge (3 FMSHRC at 437), "heated words were exchanged" between the two, and Davis informed Bradley that he was fired. Bradley testified that Davis told him the firing was for Bradley's "attitude." Tr. 35-6. Bradley left the mine, and later Davis filled out a personnel form indicating that he had fired Bradley for "unsatisfactory work," "disobedience," and "insubordination." 1/

On June 27, 1980, Bradley filed a complaint of unlawful discrimination with the West Virginia Coal Mine Safety Board of Appeals and alleged a

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1/ At one point on June 11 after Bradley had arrived on the surface Davis telephoned from below and offered to let Bradley return to work. Bradley responded that he had been fired, and would discuss the matter with Belva management. Tr. 39-40, 175. (Davis testified that he offered the job back solely out of sympathetic concern over the economic effects on Bradley of a termination. Tr. 175.) Bradley

discussed his situation with Belva management officials, Conally Carlton and James Miller. Miller told Bradley to "leave the mountain." Tr. 40. Miller had been below with Davis earlier, and had apparently overheard the last argument between Davis and Bradley. Tr. 39. Neither Carlton nor Miller testified at the hearing.
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violation of that State's Coal Mine Safety Law (W. Va. Code $ 22-1-21). 2/ The state action was heard by a three-member Board on August 26, 1980. At the state hearing, Bradley was represented by counsel and had the opportunity to present witnesses and evidence and to cross-examine Belva's witnesses. A transcript of the testimony was prepared by a court reporter. On December 12, 1980, the State Board issued the following decision:

2/ W. Va. Code $ 22-1-21 provides:
(a) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that he believes or knows that such miner or representative (1) has notified the director, his authorized representative, or an operator, directly or indirectly, of any alleged violation or danger, (2) has filed, instituted or caused to be filed or instituted any proceeding under this law, (3) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this law. No miner or representative shall be discharged or in any other way discriminated against or caused to be discriminated against because a miner or representative has done (1), (2) or (3) above.
(b) Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against, or any miner who has not been compensated by an operator for lost time due to the posting of a withdrawal order, may, within thirty days after such violation occurs, apply to the appeals board for a review of such alleged discharge, discrimination, or failure to compensate. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the appeals board shall cause such investigation to be made as it deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Mailing of the notice of hearing to the charged party at his last address of record as reflected in the records of the

department of mines shall be deemed adequate notice to the charged party. Such notice shall be by certified mail, return receipt requested. Any such hearing shall be of record. Upon receiving the report of such investigation, the board shall make findings of fact. If it finds that such violation did occur, it shall issue a decision within forty-five days, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the board deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay, and also compensation for the idle time as a result of a withdrawal order. If it finds that there was no such violation, it shall issue an order denying the application. Such order shall incorporate the board's findings therein. If the proceedings under this section relative to discharge are not completed within forty-five days of the date of discharge due to delay caused by the operator, the
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A majority of the Board finds that the dispute between Mr. Bradley and his superior did not involve safety matters and at no time did the matter of the individual safety of the miner arise. In the opinion of a majority of the Board, Mr. Bradley was terminated for insubordination The complaint of Frederick G. Bradley is, therefore, dismissed.
Pursuant to state law, Bradley filed an appeal of the Board's decision in the Circuit Court of Kanawha County, West Virginia, on January 15, 1981. The record does not reflect that a judicial decision has yet issued.
While the state action was pending before the State Board, Bradley filed a complaint of unlawful discrimination with the Commission on September 23, 1980. 3/ Shortly after issuance of the State Board decision, Belva file' with the Commission a "Motion to Dismiss or in the Alternative ... to Defer Proceedings." Belva contended that the State Board decision precluded litigation of Bradley's federal claim pursuant to section 105(c) of the Mine Act under the "doctrine of res judicata and collateral estoppel." Belva also argued that "principles of comity" required dismissal of the federal proceeding. In the alternative, Belva sought deferral of the federal proceedings until Bradley had exhausted state appeal procedures. In an unpublished order dated January 12, 1981 ("Unpub. Order"), the Commission's administrative law judge denied Belva's motion. The administrative law judge held the hearing January 28, 1981, and issued a decision on February 11, 1981, concluding that Bradley had suffered

unlawful discrimination and ordering Belva to reinstate him with back pay. 3 FMSHRC 433 (1981). In a supplemental decision on April 10, 1981, the judge refined his initial analysis to reflect the Commission's discrimination tests in Pasula v. Consolidated Coal Co., 2 FMSHRC 2786 (1980), rev'd on evidentiary grounds, 663 F.2d 1211 (3d Cir. 1981), and in Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981), and awarded Bradley back pay. 3 FMSHRC 921 (1981).

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footnote 2/ cont'd.

miner shall be automatically reinstated until the final determination. If such proceedings are not completed within forty-five days of the date of discharge due to delay caused by the board, then the board may, at its option, reinstate the miner until the final determination. If such proceedings are not completed within forty-five days of the date of discharge due to delay caused by the miner the board shall not reinstate the miner until the final determination.

(c) Whenever an order is issued under this section, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses including the attorney's fees as determined by the board to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

3/ Bradley brought his discrimination complaint pursuant to section 105(c)(3) of the Mine Act because the Secretary had determined after investigation that a violation of section 105(c) had not occurred.

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II.

We analyze first the question of whether the West Virginia Board decision precludes litigation of Bradley's Mine Act discrimination claim or of issues arising under that claim. Preclusion is an affirmative defense, and the party asserting it must prove all the elements necessary to establish it. For the reasons explained below, we conclude that preclusion is inapplicable because Belva has not shown the necessary identity either of claims or of issues.

As a general proposition, we recognize that preclusive effect as to either claims or issues may attach in appropriate cases to the decision of an administrative agency acting in a judicial capacity. See United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966). There are exceptions to the applicability of preclusion, as, for example, where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Montana v. United States, 440 U.S. 147, 164 n. 11 (1979). Additionally, in cases of overlapping federal and state

regulation, federal supremacy may, in effect, bar proceedings under a state law that conflicts with a federal statute. See, for example, Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978). As relevant here, however, unless the party asserting a preclusion defense can satisfy the "technical" requirements for raising it, we need not resolve such questions as the quality or fairness of procedures followed in the state litigation or whether the state law conflicts with the Mine Act. 4/ Belva has not made the necessary "technical" showing with regard to either type of preclusion. We turn initially to res judicata, or claim preclusion.

Res Judicata

We agree with the judge (Unpub. Order at 3) that since this case arises under a federal statute, the federal law of preclusion, rather than state law, must provide the criteria for analysis. See Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). Under the federal doctrine of res judicata, a judgment by a court of competent jurisdiction on the merits in a prior

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4/ The Mine Act does not totally pre-empt state regulation of mine safety and health, but does "supersede" any conflicting state law. Thus, section 506(a) of the Mine Act provides:

No State law in effect on the date of enactment of this Act or which may become effective thereafter shall be superseded by any provision of this Act or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this Act or with any order issued or any mandatory health or safety standard.

Without reaching the possible conflict issue, we note in passing that the provisions of West Virginia Code $ 22-1-21 are not identical to the discrimination provisions of section 105(c) of the Mine Act (n. 6 below). We also note that Bradley argues that the West Virginia proceedings were unfair, a contention not necessary to resolve in view of our disposition of this case.

suit bars a second suit involving the same parties or their privies based on the same claim. Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). Res judicata also forecloses litigation in a second action of grounds for, or defenses to, the first claim that were legally available to the parties, even if they were not actually litigated in the first action. Brown v. Felsen, 442 U.S. 127, 131 (1978). As indicated above, res judicata may be applied to the decisions of administrative agencies acting in a judicial capacity. In this case, the crucial res judicata question is whether Bradley's state and

federal claims action are identical; of course, if they are not, res judicata is inapplicable. See Newport News Shipbuilding & Dry Dock v. Director, 583 F.2d 1273, 1278 (4th Cir. 1978), cert denied, 440 U.S. 915 (1979). 5/

The judge did not make an unequivocal finding on whether Bradley's state and federal claims are identical. He defined claim as the "operative facts out of which a grievance [arises]" (Unpub. Order at 2), and concluded that "the set of facts" in Bradley's complaint "amount[s] to a cause of action" under both West Virginia law and the Mine Act. Id. at 3. On the other hand, he also emphasized that "Bradley never had an opportunity to have his $ 105(c) [Mine Act] claim litigated expressly" before the West Virginia Board. Id. In any event, the judge rejected Belva's preclusion defense largely on the statutory grounds that the Mine Act creates a wholly independent federal claim in discrimination cases. On appeal, Belva focuses on this latter aspect of the judge's decision; however, it must still demonstrate that it meets the technical requirements for asserting res judicata. In attempting to do that, Belva contends that Bradley's state and federal claims are the same. Petition for Discretionary Review at 9.

We first define a claim. The term has been variously described in the res judicata context, and the judge's focus on a common nucleus of operative fact is a formulation that has received judicial approval. We are not inclined, however, to examine claims in a legal vacuum. A suit is founded on a source of law protecting against a wrong, as well as on the events complained of. Distinct sources of law may create different rights, impose different duties, and interdict different wrongs, yet may all apply to the same set of facts. See, for example, Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 126-130 (6th Cir. 1971)(an administrative decision resolving a complaint arising under the National Labor

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5/ While this decision was being prepared, the Supreme Court held in Kremer v. Chemical Constr. Corp.,____ U.S._____, No. 80-6045, May 17, 1982, that a federal district court handling a plaintiff's employment discrimination claim under Title VII of the Civil Rights Act of 1964 must give.preclusive effect to a prior state court decision upholding a state's administrative agency's rejection of the plaintiff's same state employment discrimination claim. The Court overturned a line of cases which had held that preclusion did not apply on the theory that Title VII provided for an independent and cumulative federal remedy regardless of state proceedings. Without engaging in detailed analysis, the Court concluded in Kremer that the plaintiff's state and federal claims, or at least the key issues common to both suits, were identical. The Court did not modify the settled requirement that

there must be an identity of claims or issues in order for preclusion to apply. Our decision in the present case rests on the conclusion that Belva has failed to show the kind of identity of claims or issues which the Court found present in Kremer.

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Relations Act does not necessarily preclude a suit arising under Title VII even though the same basic facts were involved in both actions). Therefore, we favor and adopt the approach to defining claim for res judicata purposes that looks not only to the operative facts, but also to "'the primary right and duty, and the delict or wrong ... in each action.'" Maher v. City of New Orleans, 516 F.2d at 1057, quoting Seaboard Coast Line R. Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969). See also Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). This test is well suited to employment discrimination cases, which typically involve a complex mix of fact and law. In short, when comparing a discrimination action brought under another statute to one arising under the Mine Act, we will examine both the facts and the substantive legal protection afforded the miner under both statutes.

Applying the foregoing analysis, we conclude that the gravamen of Bradley's federal Mine Act claim is that he was discriminated against for engaging in a protected work refusal--namely, for refusing to obey an order that he reasonably believed would have created a safety hazard if obeyed. From all that appears on the record, the gravamen of his state claim is that he was discriminated against for making safety complaints. Furthermore, his federal claim necessarily includes the burdens of proof and discrimination analysis we announced in Pasula, 2 FMSHRC at 2796-2800, and Robinette, 3 FMSHRC at 817-18 & n. 20. There is nothing in the record showing any corresponding elements under West Virginia law. While Bradley's two claims are similar, we cannot conclude on this record either that they are the same or that Bradley could have brought an action under West Virginia law that would have been identical to his federal claim.

Turning to Bradley's federal claim, we have previously concluded that section 105(c)(1) of the Mine Act 6/ grants miners the general right to refuse work if the refusal is based on a good faith, reasonable belief that a hazardous condition exists. Pasula, 2 FMSHRC at 2789-94; Robinette, 3 FMSHRC at 807-17. Although section 105(c) does not expressly

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6/ Section 105(c)(1) provides:

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 miner 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 this Act.

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provide for the right to refuse work, the legislative history unambiguously shows that Congress intended section 105 to embrace this right. See Pasula, 2 FMSHRC at 2791-93. The judge's decision--when read in light of our views on the meaning of a claim--makes clear that the essence of Bradley's federal claim is that he was fired for refusing the order to allow the scoop to run over the damaged trailing cable. 3 FMSHRC at 922. The judge also analyzed Bradley's claim solely under the Pasula-Robinette tests for examining an alleged discriminatory action. Id.

In contrast, section 22-1-21(a) of the West Virginia Code (n. 2 above), under which Bradley brought his state action, provides in relevant part that "No person shall discharge ... any miner ... by reason of the fact that he believes or knows that such miner ... has notified ... an operator, directly or indirectly, of any alleged violations or danger ...." It is not clear from the face of this provision whether the state law would treat Bradley's refusal to obey an order as a protected "notification to an operator of a danger." Belva has not demonstrated in any event that West Virginia law confers a general right to refuse work. (Belva has presented us with no other substantive provisions of the state law.) Other than the West Virginia decision in issue, Belva has presented no West Virginia Board decisions (which, from all that appears, are not officially published) nor any other court decision interpreting the West Virginia act. Nor has Belva presented any legislative history to explain the meaning of section 22-1-21(a). Similarly, Belva has not shown that West Virginia law affords a miner in a discrimination case the burden of proof structure and analytical framework used to resolve a Mine Act

discrimination case.
Nor does the State Board decision in Bradley's case shed any light on the foregoing matters. The decision is extremely brief and conclusory. The decision contains no findings of fact, credibility resolutions, or explanations for the conclusions reached. No mention is made that the matter of a right to refuse work was litigated or considered by the Board, or that such a right in general exists under state law. 7/ The decision is also silent on the burdens of proof and discrimination analysis employed to reach the result obtained.
7/ At the West Virginia state hearing, Bradley's counsel seem to have argued that Bradley was fired because of prior safety complaints or because he was being held responsible for the mine section being shut down by the MSHA inspector. Transcript of West Virginia hearing, at 83, 87. We note in passing that the transcript of the state proceeding is frequently garbled and does not provide significant assistance in determining the basis of Bradley's state claim.
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While we agree with the judge that the facts involved in Bradley's two actions are substantially the same, we cannot find on this record that the two claims are identical. Of course, we are not attempting to essay any kind of a conclusive construction on the meaning of West Virginia law. We have addressed only the facial, apparent meaning of section 22-1-21(a), and we have a record virtually devoid of proof on identity of claims. Our holding therefore means only that Belva has failed to show that Bradley's state "safety complaint" claim involved, or could have involved, the same kind of work refusal claim litigated before us. Cf. Tipler v. E.I. duPont deNemours & Co., 443 F.2d at 126-130. 8/ We would, of course, take steps to prevent any duplicating recoveries under state law and this Act, and, as we hold below, we will also allow the decisions of state tribunals to be admitted into evidence in our proceedings. This latter device may supply in appropriate cases approximately the same relief the preclusion doctrines are designed to afford.
Collateral Estoppel
Our conclusion on res judicata does not dictate a particular conclusion with regard to collateral estoppel, or issue preclusion. Unlike res judicata, the doctrine of collateral estoppel applies where the second suit is based upon a different claim. Under collateral estoppel, the judgment in the earlier suit precludes re-litigation of issues actually litigated and necessary to the outcome of the earlier suit. See, for example, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 & n. 5 (1979). We need not decide whether collateral estoppel applies to our proceedings because Belva has not satisfied the requirements for raising this defense.
Indeed, Belva has not advanced any separate collateral estoppel

arguments, but instead has vaguely lumped this doctrine with its discussion of res judicata. The basic premise for applying collateral estoppel is a showing that the precise issues involved in the second action were actually and necessarily decided in the first. Belva has not made this showing. The West Virginia Board decision is so brief and conclusory that we can not use it as a basis for collateral estoppel. In the third section of this decision, we discuss the issues relevant to this federal action, and nothing in this very limited record persuades us that they were considered or decided in the West Virginia proceeding.

8/ At oral argument before us, reference was made to section 22-2-26(g) of the West Virginia Act, which provides for a limited right to refuse work under unsupported roof, and we agree with the position taken by Belva's counsel that that section appears to have no relevance to the facts of this case.

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In addition to its preclusion arguments, Belva also raises a comity argument, which appears to be based on the Supreme Court's discussion of "Our Federalism" in Younger v. Harris, 401 U.S. 37 (1971). The analogy to Younger is strained. In that case, the only issue was the proper policy to be followed by a federal court when requested to enjoin on constitutional grounds a criminal prosecution pending in a state court. Even if this comity notion possessed some analogous appeal, which we do not decide, it should not apply where, as here, a miner is pursuing different claims.

We conclude our preclusion discussion by addressing the judge's admission into evidence of the state decision, a procedural action to which Belva does not object. Allowing the introduction of such decisions may satisfy many of the goals that the preclusion and comity doctrines were created to serve: lessening the burdens of multiple litigation, fostering harmonious federal-state development of similar bodies of law, and avoiding unnecessary relitigation of points already thoroughly tried and analyzed by a competent body. We approve the introduction of such decisions into evidence, but also agree with the judge that no weight should have been accorded to this particular decision. 3 FMSHRC at 921. As we have already indicated, the state opinion is on its face devoid of any meaningful analysis. We therefore concur with the judge that "[w]ithout knowing how the Board evaluated the testimony or applied the law, ... any deference to its opinion would be unjustifiable." Id.

We now turn to the discrimination issues.

III.

We first analyze whether Bradley established a prima facie case under our Pasula/Robinette tests, and then examine the question of

whether Belva nevertheless successfully defended against it.
The standards by which we analyze a section 105 prima facie case were set out in Pasula and Robinette. In Pasula, we developed a two-part test:

> ... the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion.

Pasula, 2 FMSHRC at 2799. As we have already indicated, these two decisions also recognize a right to refuse work so long as the refusal is predicated on a good faith, reasonable belief in a hazardous condition.
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The judge appropriately applied the Robinette test to Bradley's refusal to let the scoop run over the cable (see discussion of facts above). Although Belva disagrees with the specific manner in which the Robinette test was applied to the facts in this case, it does not argue that the wrong test was applied. Belva contends that Bradley did not have a reasonable belief that the cable was hazardous. Belva relies on "objective" evidence and points to testimony that the cable was severed and de-energized.
In Robinette, however, we adopted a test less rigid than "objective proof":

> Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger. For all these reasons, a "reasonable belief" rule is preferable to an "objective proof" approach under the Act.

Robinette, 3 FMSHRC at 812. Here, the judge had before him ample evidence that Bradley may have had a reasonable fear of shock or electrocution. The miners in Bradley's crew testified that they did not know the cable had been de-energized--the cable was still hooked up to the continuous miner, it had not been locked out, and the opposite end of the cable was located three breaks away. Tr. 89. Moreover, Bradley testified that only a week before the argument he had been badly shocked by a cable under similar conditions. Tr. 235. Belva also points to testimony that electricians had already cut the cable for splicing. Tr. 221-22. However, this testimony does not make clear whether the cutting occurred before or after the scoop incident, and there is no evidence Bradley knew or was told of the cutting when he refused to let the scoop run over the damaged cable. Under these circumstances, we affirm the judge's conclusion that Bradley's

refusal to allow the scoop to drive over the cable was a protected refusal to perform work that the miner reasonably regarded as dangerous. The next question is whether Bradley's discharge was motivated "in any part" by this protected work refusal.

The judge inferred improper motivation largely because of the operator's knowledge of Bradley's protected activity and the timing of the protected activity and the sanction. In Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), pet. for rev. filed, No. 81-2300, D.C. Cir., December 11, 1981, the majority and the dissent agreed that circumstantial evidence of this type and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination. 3 FMSHRC at 2510-12.

It is undisputed that Bradley had made a number of safety complaints to the operator, and had made some to his supervisor, Mine Foreman Davis. Davis was the supervisor who fired Bradley and whose order Bradley refused to obey. Thus, Davis was well aware of Bradley's protected activity in general and his work refusal in particular. With respect to coincidental timing, the judge found that "[s]ince the discharge followed so closely on [Bradley's] refusal to allow the scoop to run over the cable, such refusal unquestionably figured in the decision to discharge." 3 FMSHRC at 922. We agree.

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The evidence of knowledge and timing present in this case constitutes substantial evidence that Bradley's discharge was at least partially motivated b his protected refusal to work. The more difficult issue is whether Belva successfully defended against Bradley's prima facie case. In Pasula, we spelled out the availability of defense to a successfully established prima facie case:

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

2 FMSHRC at 2799-800. (Emphasis in original.)

Belva's final defense is that, even assuming a prima facie case was established, Bradley was also fired for his insubordinate refusal to get a tape measure (see discussion of facts above) and that he would have been fired anyway for that act alone.

Since it was the refusal to get the tape measure that immediately preceded Davis' decision to fire, we agree with the judge's apparent finding that this act also figured into the discharge.

3 FMSHRC at 922. Thus, this is a "mixed motivation" discrimination case and the ultimate issue is whether Belva would have fired Bradley for the tape incident alone. The judge found that Belva would not have discharged him over that matter and, while Belva poses some reasonable arguments, the judge's rejection of them is supported by substantial evidence. We do not, however, approve of some of his reasoning.

As we emphasized in Pasula, and recently re-emphasized in Chacon, the 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. ~994

Here, Belva points only to Davis' testimony that the tape line argument was the "only reason" for Bradley's discharge. Tr. 173-4. Belva did not attempt to show that Bradley was an unsatisfactory miner or had engaged in insubordinate acts previously. Neither did Belva attempt to show that it had rules or practices dealing with this kind of problem, or had previously fired anyone for similar incidents. We also note that Davis' testimony appears somewhat less than forthright. He did not initially mention the cable incident, and conceded that he had argued with Bradley over that point only upon questioning by the judge. Tr. 189.

Under the foregoing circumstances, we agree with the judge that Belva's defense is not persuasive. Since the incidents involving the cable and tape line happened virtually on top of one another, the judge's inference that Bradley would not have been discharged over the tape measure dispute alone is supportable. At the same time, we are troubled by some of the language used by the judge. He suggests, for example, that discharge over such an incident would be a "totally disproportionate sanction." 3 FMSHRC at 922. Such

personal views are irrelevant; the proper point is that Belva failed to show that it would have fired him over that incident alone. In a different case, an operator might be able to show that such an incident alone supported termination and a judge's and our views on the wisdom or justice of such an action would be beside the point.

In sum, we affirm the judge's discrimination findings on the bases discussed above.

IV.

In his supplemental decision, the judge awarded Bradley $22,249.76 in back pay with interest, as well as costs and attorney's fees. 3 FMSHRC at 923. 9/ Because it appears that the judge erred in computing the back pay due, we remand this aspect of the judge's decision for expeditious recomputation of back pay.

In Northern Coal Co., 4 FMSHRC 126, 144 (1982), we followed precedent established under the National Labor Relations Act and defined back pay as the sum equal to the gross pay the miner would have earned but for the discrimination, less his "actual net interim earnings." "Net interim earnings" is an accepted term of art which does not refer to net earnings in the usual sense (gross pay minus various withholdings). Rather, the term describes the employee's gross interim earnings less those expenses, if any, incurred in seeking and holding the interim employment--expenses that the employee would not have incurred had he not suffered the discrimination. 10/ To remove any possible confusion, we will henceforth

9/ While this case was pending before us, Belva agreed to pay the sums owed into an escrow account.

10/ Under the National Labor Relations Act, such deductible expenses include transportation costs incurred in finding and maintaining interim employment; employment agency fees; room and board where the employee works away from home; moving expenses, etc.

refer to the term as "actual interim earnings." See OCAW v. NLRB, 547 F.2d 598, 602 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977).

The judge subtracted Bradley's net earnings (that is, take home pay) from the gross pay he would have earned from Belva. We remand so that the judge can deduct the actual interim earnings as described above. We note that in the proceedings before the judge, Bradley asserted he had not actually received a portion of the sum owed him by one interim employer. The judge should ascertain on remand whether any more of this sum has been recovered by Bradley since the judge's initial decision. The judge may take such

additional evidence and argument as necessary. 11/
For the foregoing reasons, we remand for expeditious recalculation of back pay, and affirm the rest of the judge's decision on the bases discussed above.
A. E. Lawson,
Commissioner
11/ We also affirm the judge's handling of Belva's allegations of unemployment compensation "fraud" by Bradley. Whatever the truth may be regarding these allegations, the matter is before the state, not the Commission.
~996
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