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MSHA (BRYAN PACK) V. MAYNARD BRANCG DREDGING,
AND ROGER KIRK
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 10, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

On behalf of BRYAN PACK Docket No. CENT 86-9-D

v.

MAYNARD BRANCG DREDGING COMPANY
and ROGER KIRK

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Chairman; Doyle and Nelson, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act") Complainant, Bryan Pack alleges a violation by Maynard Branch Dredging Company ("Maynard Branch") and its President, Roger Kirk, of section 105(c) of the Mine Act. Commission Administrative Law Judge William Fauver held that Maynard Branch Dredging Company and its president, Roger Kirk did not violate the Mine Act in discharging Pack. 9 FMSHRC 1474 (August 1987). While the Judge found that Pack had engaged in protected activity by reporting a safety violation to MSHA inspectors, he went on to find that Pack's failure to report the conditions which created the violation to a supervisor or to his co-workers constituted misconduct of sufficient seriousness that Respondents would have discharged him on that ground alone even if he had not complained to the inspectors. 9 FMSHRC at 1476. We granted the Secretary of Labor's petition for discretionary review. For the

reasons set forth below, we affirm the Judge's decision as correct both as a matter of law and as supported by substantial evidence.

At the time of the events giving rise to this proceeding, Maynard Branch operated a coal dredging and preparation facility in Lawrence County Kentucky. The dredging operation extracted coal from a river bottom by means of a suction hose extending from a dredging platform. The platform floated atop an assembly of, empty oil drums. Movement of the platform back and forth across the river was accomplished by means of cables and winches situated on either shore. Material dredged from the river bottom was pumped through a pipeline to a conveyor system that included a series of shaker screens whereby the coal was

separated from silt, sand and other refuse. Tr. 23-28. The dredging and preparation activity employed five to seven miners and produced about 9,000 tons of coal per year. Tr. 24, 9 FMSHRC at 1474.

Complainant Pack was employed by Maynard Branch as a night watchman and fill-in laborer for approximately one and one-half years prior to his discharge. Working alone from 11:00 p.m. to 7:00 a.m., he was responsible for security at the facility. He was also responsible for seeing that the dredging platform remained afloat and for cleaning up spillage around the conveyor and shaker screens. Tr. 20, 21, 45. 47.

On May 15, 1984, prior to the start of his shift, Pack testified that he was asked by his brother, Jeffrey Pack, a former employee of Maynard Branch, whether dynamite was still being stored in the glove compartment of a school bus being used as an office and storage facility at the dredging site. Tr. 32. Upon arriving at the site Pack, who had been unaware of the presence of the dynamite on the bus, examined the glove compartment and discovered dynamite and detonators. 1/ Concerned for his safety, he carefully closed the glove compartment and spent the remainder of the shift in his own truck. 9 FMSHRC at 1475.

During and after his shift he told no supervisor of his discovery even though the company policy required him to notify management of any hazardous conditions discovered at the dredging site. 9 FMSHRC at 1475. 2/ Nor did Pack inform miners coming on shift the morning of May 16, 1984 of his discovery of the dynamite. Id. Instead, he left the site, picked up his father, and drove to a nearby town. Id.

As they drove past a restaurant parking lot, Pack's father recognized a car belonging to an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Pack thereupon located two inspectors and informed them of his discovery of the dynamite. One of the inspectors, Baron Lawson, proceeded to the dredging site where he informed one of the foremen. James Adkins, that he had received a complaint regarding improper storage of explosives. Upon inspection of the glove compartment, Inspector Lawson discovered two and one-half sticks of dynamite and two detonators or blasting caps. Tr. 13. He issued a citation to Maynard Branch charging a violation of 30 C.F.R. 77.1301(a) dealing with the storage of explosives. 3/

1/ The testimony establishes that at least some of the dynamite was left over from a blasting operation performed during the previous

winter when it became necessary to blast river ice away from the dredging platform. Tr. 94. There is no evidence in the record as to how the detonators came to be stored in the glove compartment.

2/ One of the foremen, Rocky Fitzpatrick, lived less than a mile from the dredging operation. Tr. 65. On a previous occasion Pack had gone to Mr. Fitzpatrick's house to notify him of flooding conditions that damaged the pump on the dredging platform. Tr. 142.

3/ Maynard Branch did not contest the citation and paid the penalty assessed by the Secretary. 9 FMSHRC at 1475.

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During the inspection Kirk arrived on the scene and asked the inspector who had complained about the explosives. The inspector indicated that he did not know the complainant by name but gave Kirk a physical description of Pack. Kirk responded that "[w]e know who it is," believing that the inspector had described Pack. Once the inspector left the site, Kirk directed Foreman Fitzpatrick to fire Pack. Fitzpatrick fired Pack that afternoon. 9 FMSHRC 1476.

Thereafter, Pack confronted Inspector Lawson regarding Lawson's description of Pack to Kirk. The inspector denied having described Pack in detail and suggested that Pack file a complaint of discrimination. Tr. 39. Pack's complaint to the Secretary was filed May 29, 1984. After an investigation the Secretary filed her complaint on Pack's behalf with this Commission on October 17, 1987. 4/

In his decision below the judge held that the Secretary had established a prima facie case of discrimination. Pack had engaged in protected activity by reporting the illegally stored explosives to the MSHA inspectors and the respondents were motivated at least in part by that protected activity when they discharged him. 9 FMSHRC at 1476. The judge went on to hold, however, that Maynard Branch and Kirk had rebutted the prima facie case by establishing with "convincing proof" that they were motivated more by what they considered to be the serious misconduct of Pack in neglecting to carry out his duties as a security guard, i.e., in failing to report a dangerous situation to a foreman or to the oncoming crew. Id.

On review the Secretary urges reversal of the judge's decision on the grounds that it is legally erroneous and that certain of its factual conclusions are not supported by substantial evidence. The Secretary argues that the judge's decision, if not reversed, will have a chilling effect on the right of miners to report dangerous conditions or safety and health violations to MSHA. Moreover, the Secretary interprets the judge's decision to require that miners make their complaints first to the operator and only then to the Secretary, thus imperiling the anonymity protections afforded miner informants under section 103(g) of the Mine Act, 30 U.S.C. 813(g). 5/

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) 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 (October 1980),
rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall,
663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v.
United Castle Coal Co.. 3 FMSHRC 803, 817-18 (April 1981).

4/ At the hearing before the judge, respondents moved to dismiss
the complaint as untimely filed, which motion the judge took under
advisement pending post-hearing briefing on the issue. Tr. 91.
Although the question was briefed, the judge's decision contains no
ruling on the matter. In any event, the timeliness issue is not
before us on review.

5/ It should be noted that the confidentiality of miner informants is
also protected by this Commission in its procedural rules. 29 C.F.R.
§ 2700.59.

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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 protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the unprotected activity. *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 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC* 719 F.2d 194, 195-6 (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 a nearly identical test under the National Labor Relations Act).

The affirmative defense referred to above is involved in this case. On that issue the judge held that Maynard Branch and Kirk had rebutted the prima facie case by establishing with "convincing proof" that they were motivated by the serious unprotected misconduct of Pack in neglecting his duties as a security guard, i.e., in failing to report a dangerous situation to a foreman or to the oncoming crew, and would have discharged him on that ground alone. 9 FMSHRC 1476.

At the outset of his opinion the Judge stated that he made his findings of fact based upon his consideration of the hearing evidence and the record as a whole. 9 FMSHRC at 1474. Among those findings was the judge's determination that Pack's failure to report the presence of the dynamite violated company procedure. Although the Secretary argues otherwise, we find sufficient support in the record for the judge's determination that Maynard Branch did have an established policy requiring that safety and health hazards be reported to the operator's supervisors. Jeffrey Kinser, James Atkins and Rocky Fitzpatrick, all foremen while Pack was employed at Maynard Branch, each testified that it was the operator's policy that safety violations and problems were to be reported by an employee to his immediate supervisor. Tr. 98, 99, 117, 143, 144, 152. Kirk, testifying in his capacity as part owner, affirmed that this was company policy. Tr. 178. Fitzpatrick, who was Pack's supervisor, testified that he told Pack "to inform [him] day or night, weekend, whenever [there was a problem]." Tr. 143, 144.

The Secretary conceded that the record contains statements by members of Maynard Branch's management, including Roger Kirk, that there was a policy requiring employees to report dangerous conditions, but protests that these statements are "unsupported." Sec. Br. at 13.

The judge, in his role as fact finder, determined that a preponderance of the reliable and probative evidence established that there was such a company reporting policy. Statements of management officials that there was such a policy constitute substantial evidence where the judge determines, as he apparently did here, that those statements were reliable.

He also note that it is commonly understood that security guards have the duty to report breaches of security to their employers and that the presence of improperly stored dynamite undeniably constitutes such a report- able breach. Even Pack, while unable to recall whether a reporting policy was in effect (Tr. 52), nevertheless testified that the job of a security guard is to report safety violations. Tr. 68.

In response to the Secretary's arguments that Pack didn't appreciate the inherent hazard of the dynamite's storage in the glove box until after he reported it to MSHA, 6/ that everyone already knew the dynamite was stored there, and that Maynard Branch's failure to discipline an employee who stored part of the dynamite in the glove box demonstrates that Pack was really fired solely for reporting the matter to MSHA, it must simply be said again that the Judge, after reviewing all of the reliable and probative evidence, did not accept those arguments and consequently did not include them among his findings of fact.

The Secretary implicitly raises the issue of whether Pack received disparate treatment in being discharged over the incident since the individual responsible for placing one of the sticks of dynamite in the glove compartment. Fitzpatrick, was not similarly disciplined. 7/ Sec. Br. 13. The Judge, however, credited Kirk's statement that the dynamite incident was the "straw that broke the camel's back" with respect to Pack's work record and that, prior to Pack's failure to report the serious safety and security problem. Kirk had been asked to fire Pack for other incidents. 9 FMSHRC at 1476. The record contains testimony by Kirk and others that Pack's inattention a week or two earlier had resulted in the capsizing of the barge platform and severe damage to the dredging pump. At that time Atkins had urged Kirk to fire Pack. Tr. 116, 129, 143.

The Secretary also argues that when a miner engages in protected activity by reporting a dangerous condition to MSHA, such action by the miner insulates the individual from being discharged for failing to also report that condition to his foreman or co-workers. Consequently, according to the Secretary, operators may not impose a policy which requires a miner who makes a safety complaint to MSHA to also notify the operator of the complaint. Pointing to section 105(c)'s proscription that miners shall not suffer adverse action for making a complaint under the Mine Act, the Secretary asserts that Pack was discharged for doing exactly that. The Secretary believes that, if not reversed, the judge's decision will have a chilling effect on the right of miners to report dangerous conditions or safety and health violations to MSHA. Moreover, the Secretary interprets the judge's decision to require that miners must make their complaints first to the operator and only then to the Secretary, thus imperiling the anonymity protections afforded miner informants under section 103(g) of the Mine Act, 30 U.S.C. 813(g).

It is important to point out what did and did not happen here. Maynard Branch did not have a policy that prohibited miners from

reporting dangerous conditions to MSHA, a policy that would clearly be prohibited by the Mine Act. Nor did Maynard Branch have a policy that required miners to notify the company

6/ Pack's recognition of the danger posed by the improperly stored dynamite and blasting caps is signified by his conduct in carefully closing the glove box and spending the shift away from the bus.
9 FMSHRC 1475, Finding of Fact No. 4.

7/ The record reflects that foremen Fitzpatrick and Atkins and a Mr. Kinser, the blaster who oversaw the ice clearing activity, were orally reprimanded by Kirk. Tr. 90.

prior to contacting MSHA. The company policy only required employees to report dangerous conditions to the company, and contained no instructions or prohibitions as to employees' actions vis-a-vis MSHA. The facts show that, upon finding the dynamite, Pack failed to perform his job responsibility at any time and then, by fortuitous circumstances, reported the condition to MSHA. Pack's failure to perform the essence of his job, that of reporting security breaches, exposed other miners to the risk of injury, and it was that breach that cost him his job. The specter raised by the Secretary of miners being intimidated from exercising their rights under sections 103(g) or 105(c) of the Mine Act simply is not presented by this case.

Moreover, the Secretary's position fails to take into account an operator's right to require the reporting of dangerous conditions. It is beyond dispute that a mine operator has the right to hire individuals whose job duties include the reporting of dangerous conditions. The Mine Act itself recognizes the importance of such an arrangement. While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA. This is particularly true where the miner's very job responsibilities, by definition, include the duty to report unsafe conditions to the operator. The Secretary's position would create other untenable situations. For example, it would prohibit an operator from disciplining a pre-shift examiner who, rather than reporting dangerous conditions to the operator, chose instead to report to MSHA, while the miners on the incoming shift entered the mine unaware of the dangers. We do not believe this is what anti-discrimination provisions of the Mine Act contemplated.

As the judge found, Pack was a security guard who engaged in serious misconduct by failing to perform an essential duty: reporting to the mine foreman or oncoming crew his discovery of a very dangerous situation which jeopardized their safety. It was for this reason that the judge determined that Maynard Branch and Kirk, while motivated in part to discharge Pack for reporting the dangerous condition to MSHA, were also motivated by Pack's egregious failure to perform his job, and that, whether he reported to MSHA or not, Pack would have been fired for this misconduct.

We find there is substantial evidence in the record of Pack's dereliction of those duties inherent in his position as security

guard. That evidence supports the judge's conclusion that Pack would have been discharged for that misconduct alone. Accordingly, we affirm the judge's decision dismissing Pack's complaint.

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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Commissioner Backley concurring in part and dissenting in part.

The administrative law judge concluded that Bryan Pack engaged in a protected activity by notifying MSHA of a dangerous safety violation, and that Respondent was motivated at least in part by such protected activity in discharging him. I agree. The administrative law judge also found that:

the seriousness of Pack's misconduct as a security guard - in discovering a very dangerous situation and failing to report it to the foreman or oncoming crew - jeopardized their safety . . .

9 FMSHRC 1476

Again, I agree. Moreover I join the majority in finding ... "substantial evidence in the record of Pack's dereliction of those duties inherent in his position as a security guard " Slip op. at 6. Pack's failure to warn oncoming crew members of the danger was especially egregious.

The Secretary however argues otherwise. The Secretary states that "the judge in effect has ruled that an operator may require miners to notify the company of any complaints made to MSHA." The Secretary argues that such a request "would severely chill miners' exercise of their statutory rights" and "vitiates many of the protections of the Mine Act..." Sec. Br. at 6. Elsewhere the Secretary states, "even where a miner believes that an imminent danger exists Section 103(g) does not require the miner to report that condition to the operator..." Sec. Br. at 7.

I find the Secretary's position on this issue to be perverse. The Secretary apparently condones the manner in which Mr. Pack acquitted himself - leaving the mine knowing that a dangerous condition existed, yet failing to warn oncoming fellow workers. In her zeal to find a way to prevail in this case, the Secretary seems to be willing to turn a blind eye toward the fundamental goal of the Act - to ensure that every miner does all that he can to make the work environment safe. In this regard, Pack failed.

To attempt to dignify Pack's conduct by invoking statutory reporting rights is irresponsible. There is no conflict of rights in this case and the judge's ruling on the matter creates no conflict. Mr. Pack had the right to anonymously make a safety complaint to MSHA, and he did so in this case. 1/ However, because of the exigencies of

this particular

1/ His identity may have remained unknown to Respondent Roger Kirk but for the astounding fact that MSHA inspector Bryan Wilson Lawson provided Kirk with a physical identification of Pack. Tr. 15

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situation, Mr. Pack had, in my opinion, a fundamental obligation to first forewarn his fellow workers of the safety hazard before leaving the mine. On this point the Secretary quibbles that no such company policy may have existed and that "the effect of Maynard Branch's reporting requirement is to place an impermissible burden on miners making safety complaints." Sec. Br. at 12. This myopic view of the facts of this case is disturbing. More significantly, the question to be posed is what type of burden was placed upon the safety of the crew who were not properly warned of the hazard known by Mr. Pack?

Accordingly, I concur with the majority regarding Pack's duty and his failure to fulfill that duty. I would also affirm the administrative law judge's conclusion that the Secretary made a prima facie case of discrimination. 9 FMSHRC 1476

The administrative law judge concluded that:

Respondents rebutted the prima facie case by convincing proof that Respondents were motivated by serious unprotected misconduct of the employee and would have discharged him on that ground alone even if he had not complained to the inspectors.

9 FMSHRC 1476

The majority has affirmed this conclusion. I cannot agree.

A review of the record, which of course includes the written decision, does not persuade me that Respondents' motivation went beyond pure retaliation for Pack's reporting of the dangerous condition to MSHA. The record contains evidence confirming the retaliatory motivation, including damaging admissions by Roger Kirk, President and part owner, (Tr. 178) and foreman Rocky Fitzpatrick. Tr. 158, 164. That evidence, however, is not the basis of my dissent.

Elsewhere in the record we learn that Fitzpatrick admitted placing a stick of dynamite in the subject bus (Tr. 140) and further that he informed no one of that dangerous condition. Tr. 141, 156-157. The record also discloses that Kirk responded to Fitzpatrick's conduct by merely advising him "not to let it happen again." Tr. 190.

While I understand that legitimate reasons may exist within this record which might reconcile the disparate treatment accorded

Pack and Fitzpatrick, I am not inclined, as is the majority, to naively conclude that unarticulated findings of fact equate to rejection of arguments. Slip op. at 5. Our Rule 65(a), 29 C.F.R. 2700.65(a) and the APA, 5 U.S.C. Sec. 557(c) both require that all material issues of fact, law, or discretion be specifically addressed in the decision. Unfortunately the decision in this case contains no reference to the above-noted evidence.

In this case, the entire decision turns on whether respondents would have discharged Pack for his unprotected activity alone. In attempting to resolve that issue, nothing could be more material than record evidence which establishes that a contemporaneous violation of the very same company policy by another, who did not call MSHA, resulted in no discipline. Rarely in discrimination cases do we have the opportunity to so clearly measure potential disparate treatment. Ironically the decision in this case contains no such analysis.

The absence of such an analysis is particularly significant because Fitzpatrick's conduct was, by any measure, far more egregious than Pack's. Fitzpatrick created a dangerous safety hazard; Fitzpatrick failed to warn the crew of the danger for an extended period of time; and Fitzpatrick, as foreman, had a high degree of duty and responsibility for the safety of the entire crew....a duty which was at least as high as the duty to which Pack was charged as a security guard.

Consequently, in the absence of any findings or analysis, Respondents' disparate reaction to Fitzpatrick's breach of duty severely undercuts the administrative law judge's conclusion that Pack would have been discharged solely for his unprotected activity.

Accordingly, I would remand, and direct the administrative law judge to consider and discuss the above-referenced evidence regarding disparate treatment, and to determine, in light thereof, whether Pack's unprotected activity alone was the motivation for discharge.

RICHARD V. BACKLEY, Commissioner

Commissioner Lastowka. dissenting:

Section 103(g) of the Mine Act provides to miners the right to report to the Secretary of Labor the existence of hazardous conditions at a mine. 30 U.S.C. 813(g). The Secretary is required to respond to such reports by conducting a special inspection "as soon as possible" to determine if a danger exists. In order to encourage miners to report dangerous conditions, thereby enlisting their aid in the attempt to make mining a less hazardous occupation, miners are granted anonymity in filing a safety complaint. *Id.* Section 105(c) of the Mine Act further encourages and protects the reporting of violations by prohibiting a mine operator from retaliating against a miner "because such miner ... has filed or made a complaint under or related to this Act...." 30 U.S.C. 815(c)(1).

In the present case, Bryan Pack discovered dynamite and blasting caps stored in the glove compartment of a school bus used as an office at a surface mine site operated by Maynard Branch Dredging Company. Pack reported this condition to a Mine Safety and Health Administration (MSHA) inspector. The inspector promptly proceeded to the mine where he informed the foreman of the complaint. Upon opening the glove compartment, the improperly stored blasting materials were observed and removed. The mine operator was charged with a violation of 30 C.F.R. 77.1301(a), a mandatory safety standard prohibiting improper storage of explosives. Maynard Branch did not contest the violation and paid a civil penalty.

Up to this point, the statutory scheme for encouraging and protecting miner reports of unsafe conditions would appear to be running its intended course. A series of errors by the MSHA inspector, the administrative law judge and now a majority of this Commission, however, have served to vitiate the very protection that Congress intended to provide to miners like Pack who take the initiative to report safety and health hazards. As a direct consequence of his report to the MSHA inspector concerning the improperly stored explosives, Pack was fired. In my opinion, the majority's upholding of this result on a substantial evidence basis is erroneous and far afield from a proper implementation of section 105(c). Accordingly, I must dissent.

The error by the MSHA inspector may not be of controlling importance at this stage of this proceeding, but nonetheless is deserving of comment if only to underscore its gravity and dissuade its repetition. In this regard, the inspector's mistake and its consequences are succinctly set forth in the judge's findings of fact:

9. Respondent Roger Kirk is the president of the company, and owns one-third interest in the business. He personally supervised the dredging facility. Kirk asked the inspector for the name of the person who had made the complaint about the dynamite. The inspector told him he did not get his name, but described him. Kirk recognized the description very well and stated, "We know who it is." Kirk believed that the complainant was Bryan Pack.

10. After the inspector left the dredge, Kirk told the foreman, Rooky Fitzpatrick, to fire Bryan Pack.

9 FMSHRC at 1175-76.

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The inspector's transgression is apparent. The Secretary concedes this and represents that the inspector has been reprimanded for identifying Pack to the company. Sec. Br. at 6 n.1. Perhaps as to this inspector a reprimand is sufficient. Given the fundamental nature and longstanding history of the miners' right that was compromised, however, this discipline could be viewed as being charitable. In light of this incident and the serious adverse impact on the miners who must bear the brunt of such mistakes, it may behoove the Secretary to consider the need for a general reinstruction of her inspectorate concerning the importance of strict adherence to the guarantee of anonymity Congress gave to miners who report safety violations to the government.

Of greater moment are the factual and legal errors committed by the administrative law judge and the majority that control the outcome of this proceeding. As discussed below, I believe that under a correct reading of the record and a proper application of the law, Pack established a violation of section 105(c) and the Judge's contrary conclusion must be reversed.

The administrative law judge found that Pack had engaged in protected activity by reporting the improperly stored dynamite to the Secretary. He further found that Maynard Branch was motivated in part by such activity in discharging Pack. Thus, the judge concluded that a prima facie case of discrimination had been established. Nevertheless, the Judge dismissed the complaint based on his further finding that the company had presented "convincing proof" that it was "motivated by serious unprotected misconduct of [Pack] and would have discharged him on that ground alone even if he had not complained to the inspectors." 9 FMSHRC at 1476. The Secretary challenges this finding of the judge as lacking substantial evidentiary support. I must agree.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion". Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. Universal Camera Corp. v. NLRH, 310 U.S. 171, 188 (1951). Measured against this standard, the Judge's finding that Maynard Branch's firing of Pack was motivated by serious, unprotected misconduct fails. In fact, to the extent that there is testimony in the record in support of the judge's conclusion, I believe that the totality of the record nevertheless reveals that the misconduct-based rationale for Pack's firing constitutes nothing

more than a plain and simple pretext.

The "serious unprotected misconduct" found to justify Pack's firing is the fact that he did not tell anyone at the work site about his discovery prior to his reporting it to the MSHA inspector. The rationale for labelling Pack's failure to communicate his discovery to the operator as misconduct appears to be twofold. First, because Pack was a security guard proper performance of his job required that he immediately tell his superiors what he had found. Second, given the hazard posed by the condition that he had observed, his failure to notify the operator prolonged the hazard to his co-workers thereby justifying removal of his report to MSHA from the cloak of protected activity. These theories of misconduct raise an interesting question concerning whether a miner's right to report hazards to the Secretary should be weighed against the hazard posed to co-workers by any delay in the

reporting of the hazard to the mine operator. Whatever merit these theories may have in the abstract, however, measured against the facts of record in the present case their appeal proves purely superficial.

Maynard Branch is not a large operation with a sophisticated operating structure; it employed only 5 to 7 workers at its river dredging site. Pack worked as a night watchman at the dredge and also occasionally filled in as a laborer removing rock and debris from the coal and cleaning up around the conveyor. On May 15, 1981, Pack was to report to the mine at 11:00 p.m. That same night his brother, a former Maynard Branch employee, had asked him if there were still explosives in the glove compartment of the school bus used as the office. Tr. 32. According to his brother, the dynamite had been placed in the glove compartment by Rocky Fitzpatrick, the foreman, after a winter blasting operation. Tr. 67. Pack knew nothing about this, but upon arrival at the site he immediately checked the glove compartment and observed "two things that looked like road flares". Tr. 53. He then "closed the glove box back real carefully and left the bus very carefully and sat in my truck the rest of the night." Tr. 33.

Pack was the only person at the site during the night shift. Id. Pack left work at the end of his shift without mentioning what he had observed to the others arriving for work because "[f]rom what I had been told, everyone knew it was there except me. They all knew it was there". Tr. 54, See also Tr. 55-66 6T. While driving home, he saw an MSHA vehicle in a restaurant parking lot and stopped to report to the MSHA inspectors what he had found and to inquire as to the safety and legality thereof. Tr. 33-3\$. The consequences of Pack's doing so have already been detailed.

The linchpin of the judge's conclusion that Pack's conduct is not protected under the Mine Act, and the majority's affirmation of that result, is their finding that Pack's failure to inform the other workers of the presence of the dynamite in the bus constitutes "serious misconduct." In so finding they necessarily refuse to accept Pack's consistent testimony that he did not do so because he believed that everyone else had long been aware of what he had only just found out. Pack's testimony in this respect cannot be discredited or ignored, however, because it is directly corroborated by the testimony of respondent's own witness, foreman Rocky Fitzpatrick.

Fitzpatrick testified that in January 1981 the river had frozen and dynamite was used to blast the ice and free the dredge.

Tr. 138-39. He explained that after discovering that he had accidentally left a stick of dynamite on the dredge, "I removed it from the dredge and I took it to the bus that we used as storage and office space, and I put it in the glove compartment of the bus".

Tr. 140. As late as one week before Pack's discovery, Fitzpatrick knowingly continued to allow this dangerous and improper storage. He testified:

It was on a Tuesday or Wednesday night, Delbert [Fitzpatrick] was helping me watch the cables and the water and stuff, and I was trying to get some sleep. It was 2 or 3:00 in the morning. I had instructed him to keep an eye on the dredge and things, I was going to try to get some sleep. This bus was in two sections. There was like a plastic partition that separated the office space from the storage space. The office end of it had a recliner chair

and a table and some other objects in that end, and the other end was storage space. I sat down in the recliner chair, and I told Delbert, I said, I am going to try to get a couple of hours sleep. You can keep an eye on things. He said, well I'll go up here where I can keep an eye on things. He went up and sat down in the driver's seat of the bus. The driver's seat was still in the bus, and the rest of the seats were taken out for storage space. He walked up there and sat down, and he lit a cigarette. I said, I don't know why, but it just come to me that that stick of explosives was in the glove compartment. I said, you better watch smoking cigarettes, more or less joking, you better watch smoking cigarettes up there, there is a stick of dynamite in that glove compartment. He said, really, or you're kidding, or something like that. I said no. I walked up and opened the glove compartment, and the one stick was there.

Tr. 119-50. See also Tr. 82 {testimony of MSHA special investigator that Fitzpatrick told him he had placed dynamite in glove compartment).

Fitzpatrick's candid admission concerning his culpability in placing the dynamite in the bus corroborates Pack's testimony concerning his brother's revelation to him of the dynamite's presence, Fitzpatrick's role in placing it there and the knowledge of others about its presence. In these circumstances, it can only be concluded that Pack's belief in the futility of communicating to Fitzpatrick and the others what he had belatedly learned was held reasonably and in good faith. *Simpson v. FMSHRC*, 812 F. 2d 15J (D.C. Cir. 1988).

The majority's emphasis of the fact that Pack was a night watchman whose duties apparently also included reporting safety hazards he discovered (Tr. 68) ignores the crucial fact that Pack's good faith belief in the futility of doing so in this instance excuses his failure to communicate with the operator. *Simpson, supra*. Further, their emphasis of Pack's "egregious" misconduct in failing to protect his fellow workers from the hazard he had just discovered not only ignores his belief in the futility of telling them what they already knew, but also grossly distorts the consequences of Pack's actions. Rather than callously causing others to be exposed to a continued hazard pack acted responsibly and, as a result, the danger that Maynard Branch's foreman knowingly had allowed to exist for several months was swiftly and effectively abated. In these circumstances, the majority's casting of Pack as an irresponsible employee undeserving of the Act's protection is incomprehensible.

Compare *Miller v. FMSHRC*, 687 F.2d 191, 196 (7th Cir. 1982).

Other evidence in the record also detracts from the substantiality of the evidence supporting the judge's conclusion that Pack was fired for misconduct rather than for reporting the illegality stored dynamite to MSHA. Most telling is the evidence illustrating Maynard Branch's disparate treatment of Pack as compared to its other employees who actually were involved in the improper use and storage of dynamite. Roger Kirk, owner of Maynard Branch, testified at a state administrative proceeding that "there wasn't suppose[d] to be any powder on the premises at all.... We had no permit to have powder on the...premises at all." Exh. C-6 at 5-6. Despite this, foreman Fitzpatrick testified that he used dynamite to blast ice from the river, that he left a stick of dynamite on

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the dredge by accident, that he placed the dynamite in the glove compartment, and that he observed the dynamite as late as one week before the inspector's arrival at the site. Tr. 138-141, 119-150, 155-58. In addition, Jeff Kinser, a fill-in foreman, testified as to his involvement in the blasting operation and that afterwards he had given some dynamite to Pack's brother, then an employee, for personal use even though he did not know whether he was licensed or certified. Tr. 96. Foreman James Atkins also testified as to his involvement in the blasting. Tr.114-15.

Despite this demonstrated widespread nonchalance towards the handling and use of explosives at Maynard Branch, Pack, who was not at all involved, was the only employee disciplined as a result of the inspector's discovery. Fitzpatrick, Kinser and Atkins were merely "talked to about it and told not to let it happen again. Tr. 190.

The operator's self-serving assertion that Pack's "misconduct" concerning the dynamite was only one in a series of incidents leading to his firing also fails. To survive a disparate treatment analysis, in this regard, the majority draws comfort from the operator's argument that shortly before the incident at issue "Pack's inattention ... had resulted in the capsizing of the barge platform and severe damage to the dredging pump." Slip op. at 5. Assuming this to be true, two points must be noted. First, this incident did not trigger any action against Pack until after his report to MSHA. Second, James Atkins testified that he and the rest of the day shift had been involved in a pump tipping incident just two or three weeks before the pump incident that ostensibly influenced Pack's firing, and that he had been neither disciplined nor criticized. Tr. 122-27.

Finally, I find troubling the majority's attempt to draw support for their result from section 2(e) of the Act, 30 U.S.C. 801(e). Slip op. at 6. It seems strange to me that section 2(e)'s statement of a congressional finding that miners must assist operators in the prevention of hazards can be relied on as justification for disciplining a miner whose good faith report to MSHA of a known hazard caused the prompt abatement of the hazard.

In sum, upon consideration of the record as a whole, I conclude that the administrative law judge's finding that Bryan Pack was fired for serious misconduct apart from his protected activity is not supported by substantial evidence and is contrary to law. I further conclude that the non-protected reasons advanced in support of Pack's firing constitute nothing more than a pretext. Pack was fired for making a report to MSHA and his firing therefore violated section

105(c) of the Mine Act.

Accordingly, I dissent.

James A. Lastowka, Commissioner

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